FEDERAL HOME LOAN BANK OF DALLAS

8500 Freeport Parkway South
Suite 100
Irving, Texas
75063-2547

P.O. Box 619026
Dallas, Texas
75261-9026

214.441.8500
fax 214.441.8552
www.fhlb.com

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By email to: RegComments@fhfa.gov

Alfred M. Pollard, Esq.
General Counsel
Federal Housing Finance Agency
Fourth Floor
1700 G Street, N.W.
Washington, D.C. 20552

Attention: Federal Housing Finance Agency—Proposed Rule: RIN 2590—AA28

Re: Proposed Rulemaking on Minority and Women Inclusion

Dear Mr. Pollard:

The Federal Home Loan Bank of Dallas ("Dallas Bank") appreciates the opportunity to provide its comments to the Federal Housing Finance Agency ("FHFA") regarding the FHFA's proposed regulation ("Proposed Regulation") requiring each Federal Home Loan Bank ("FHLBank") to establish an office of minority and women inclusion in order to implement programs to increase outreach for the employment of women and minorities and for the use of women- and minority-owned firms as contractors. The Proposed Regulation is intended to implement the provisions of section 1116 of the Housing and Economic Recovery Act of 2008 ("HERA"). We believe that the following comments will assist the FHFA in crafting a final regulation that would faithfully and most effectively implement the provisions of HERA.
We have divided our comments into two categories. The comments in the first category address the scope of the Proposed Regulation. Comments in the second category address specific sections or aspects of the Proposed Regulation.

I. Scope of the Proposed Regulation

Section 1116(4) of HERA amended § 1319A of the Housing and Community Development Act of 1992, which as amended provides:

> "Each regulated entity shall develop and implement standards and procedures to ensure, to the maximum extent possible, the inclusion and utilization of minorities . . . and women, and minority- and women-owned businesses . . . in all business and activities of the regulated entity at all levels, including in procurement, insurance, and all types of contracts . . ."

12 U.S.C. § 4520(b).

Disability is beyond the scope of HERA

As the quoted section set forth above demonstrates, HERA specifically limits its inclusion and diversity requirements to women and minorities, and specifically defines those terms. It does not cover individuals with disabilities or businesses owned by individuals with disabilities. Thus, the Proposed Regulation exceeds the regulatory authority conferred by the statute to the extent that it includes individuals with disabilities or businesses owned by individuals with disabilities. It is the role of Congress to create law and public policy on this point, and Congress has established protections for individuals with disabilities under other federal laws, including the Americans with Disabilities Act ("ADA") that already apply to the regulated entities. Therefore, the Dallas Bank requests that the FHFA remove references in the final regulation to disabilities.

Should the FHFA retain references to disability in the final regulation, the final regulation should modify the definition of disability and eliminate potential conflicts with other laws and regulations. For example, the proposed definition of disability is problematic because it defines disability to have the same meaning as that provided by 29 C.F.R. §§1630.2(g) and 1630.3, regulations interpreting the ADA.[1] That definition includes individuals "regarded as" having an impairment that substantially limits a major life activity. It is not clear, in the context of the Proposed Regulation, how someone would be "regarded as," having an impairment and this has been a subject of great confusion in the case law. Indeed, under the pre-2009 version of the ADA, several courts of appeals held that an employer had an obligation to accommodate individuals regarded as having disabilities. The revision to the ADA has eliminated that issue, but we expect continuing litigation over an employer's obligations with respect to those "regarded as" having a disability.

The definition of a business owned by an individual with a disability is problematic, in part, because it includes businesses more than 50 percent owned or controlled by a person with a disability, and businesses for which more than 50 percent of the net profit or loss accrues to one or more persons with a disability.

One practical issue is that this information is not readily available to the public.

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[1] Under 29 C.F.R. § 1630.2(g), "Disability" means, with respect to an individual, (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such impairment; (3) or being regarded as having such an impairment. Note that the regulations under the ADA are in the process of revision and have not yet been finalized.

Identifying those businesses would require individuals to self-identify as having disabilities. As a result, businesses with individuals willing to self-identify would receive the benefits of the regulations while individuals not willing to self-identify would not. This approach does not seem reasonably calculated to include all disabled individuals or disabled owners of businesses in contracting opportunities.

Moreover, because the definition of disability includes individuals regarded as having a qualifying impairment, the definition of disabled-owned business includes businesses where individuals "regarded as" having a disability own or control more than 50 percent of the business or are responsible for more than 50 percent of the net profit or loss. The "regarded as" prong of the ADA definition of disability does not make sense in this context. For all these reasons, if disability is retained in the final regulation, the Dallas Bank believes the definition of disability incorporated in the Proposed Regulation, should be modified to eliminate the ambiguity the proposed definition presents.

In addition, the Dallas Bank is concerned that the Proposed Regulation may conflict with the ADA, which bars companies from asking applicants for employment about disabled status unless doing so is necessary under federal law to identify applicants or clients with disabilities in order to provide them with required special services, as opposed to data collection and reporting purposes. The ADA may also limit a company from making a similar inquiry of individuals who are being considered as potential contractors. To the extent this is true, a regulated entity will not, as a practical matter, be able to consider the disabled status of such individuals as a component when the regulated entity reviews and evaluates offers from individual contractors. Please clarify that a regulated entity's duty to comply with such a prohibition under the ADA would partially supersede its obligations under § 1207.21(c)(3) of the Proposed Regulation.

HERA addresses Inclusion of Women and Minorities Only and not other groups

The prescribed equal opportunity notice set forth in § 1207.21(a) of the Proposed Regulation exceeds the scope of FHFA's regulatory authority. It includes "race, color, national origin, sex, religion, age, disability status, or genetic information." HERA limits inclusion and diversity requirements to women and racial minorities.

Contracts Subject to Inclusion should be consistent with the statute

Proposed §§ 1207.2(b) and 1207.22(a) provide that they apply to "all contracts *for services*," while proposed § 1207.23(b)(10) references soliciting contractors "to provide *service*" to the regulated entity. (emphasis added) These provisions are consistent with 12 U.S.C. § 4520(c), which provides that "this section shall apply to all contracts of a regulated entity *for services* of any kind...." (emphasis added)

Other sections of the Proposed Regulation, however, appear to apply to all contracts of a regulated entity, and not just contracts for services.[2] This interpretation

[2] *See* proposed § 1207.1 (definition of "business and activities" includes "all types of contracts"), § 1207.21(b) (inclusion efforts to cover "all types of contracts"), § 1207.21(b)(6) (nondiscrimination clause

causes confusion and may make compliance difficult. Consistent with the statute, the Dallas Bank believes the final regulation should clarify that its provisions apply only to contracts with vendors of goods and services.

The regulated entities, like most companies, are party to a wide range of contracts that are not contracting opportunities under any traditional understanding. The beginning of a partial list of such contracts for an FHLBank would include: standby letters of credit; lien release and intercreditor agreements with competing secured creditors to ensure the priority of a security interest in collateral; customer contracts (including advances agreements and other contracts with members and contracts with recipients and beneficiaries of AHP grants and loans); contracts evidencing debt or equity issued by a regulated entity to its investors; indemnification agreements in favor of an FHLBank or its employees, officers, and directors; confidentiality and non-disclosure agreements with potential vendors and others; and information sharing agreements between an FHLBank and state or federal banking regulators. Imposing procurement outreach obligations on contracts having nothing to do with procurement will make compliance impossible and detract from the effectiveness of our inclusion efforts on actual contracting opportunities.[3]

Therefore, we request that you first resolve the discrepancies as to which contracts are within the purview of the Proposed Regulation, including clarifying the sections that discuss "contracts for services," soliciting contractors "to provide service," contracts "for services of any kind," and "all types of contracts." In addition, we request that the FHFA specifically exclude certain types of contracts (including contracts with members and other examples cited in the foregoing paragraph) from the provisions of this regulation.

In addition, we note how critical it will be that each regulated entity ensures that its accounting systems for tracking spending match up with the FHFA's ultimate definition of which contracts are subject to §§ 1207.23(b)(11) through (13) reporting requirements. Specifically, with respect to companies providing goods and services paid for by FHLBank employees or directors, who are then reimbursed by the FHLBank, we do not maintain the same level of detailed information regarding these companies as we would for vendors receiving payment directly from the FHLBank.[4] Therefore, we

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to be inserted in "each contract [a regulated entity] enters"), § 1207.21(c)(1) (contracting outreach efforts "(a)pply to all contracts entered by the regulated entity"), and §1207.23(b)(11) (obligation to report "the number of contracts" entered with diverse businesses and individuals).

[3] For example, how would a regulated entity comply with the requirement to consider diversity as a component when it sells debt or equity to investors? When it purchases investments for its own portfolio? When it operates its core business of providing funding to its customers? Moreover, given the dollar amounts involved, these activities -- if subject to the contractor reporting rules -- would overwhelm and distort the reporting related to actual diverse vendor purchases by a regulated entity.

[4] For example, the Bank would not necessarily have a legal name or address for a taxi cab company providing services to a Bank employee traveling on business, much less any information about the possible diverse status of the owners of the taxi cab company.

request that, for purposes of reporting to the FHFA on contracting inclusion efforts, a regulated entity be permitted to exclude payments not made directly by a regulated entity to a vendor (e.g., employee or director reimbursement payments).

Annual Reports: Outreach Activities

The Dallas Bank respectfully requests that the FHFA remove the provisions in proposed §1207.23(b)(10) requiring reporting on outreach activities to low-income and inner-city populations and on efforts to provide technical assistance in the contracting process. These requirements apply to the FHFA. *See* 12 U.S.C. § 4520(f) and 12 C.F.R. § 1207.11(b)(2). The regulated entities, however, are appropriately excluded from such requirements because they are not US government agencies and such assistance is outside the scope of 12 U.S.C. § 4520 as it relates to them. Therefore, the regulated entities should not be required to report outreach to low-income and inner-city populations or on technical assistance activities.

II. Comments on Specific Sections or Aspects of the Proposed Regulation

Some of the following comments are offered in the alternative in the event that the FHFA does not accept our recommendations above regarding limiting the scope of the Proposed Regulation.

General Comment

As a threshold matter, we note that the Proposed Regulation is designed to influence a regulated entity's actions but not to ensure predetermined outcomes. It is noteworthy that neither 12 U.S.C. § 4520 nor the Proposed Regulation permits or requires a regulated entity to create minimum quotas or apply other numbers-based models in promoting diversity in its employment and contracting processes. This is appropriate since these kinds of approaches could be unlawful under applicable US Supreme Court decisions and Title VII of the Civil Rights Act of 1964, which requires equal employment opportunities for all genders and racial groups. We also note that regulations of the Department of Labor's Office of Federal Contract Compliance Programs provide that "[q]uotas are expressly forbidden."[5]

We also believe that an informal quota system enforced only through the FHFA examination process is no more permissible than a formal quota system embodied in a regulation. In reviewing the regulated entities' compliance with Part 1207, FHFA examiners should focus on the robustness of the entity's inclusion processes, not the end results of those processes. Note that a *de facto* quota can be created simply through having and communicating to the regulated entities a regulatory expectation that the number of diverse employees hired and promoted and the number of diverse contractors engaged must increase from year to year (or through just inferring from the reported numbers that the regulated entity's inclusion processes are deficient). Please clarify in

[5] 41 C.F.R. § 60-2.16(e)(1).

the final regulation that the FHFA will not expect the regulated entities to use quotas and numbers-based models with respect to predetermined outcomes in their inclusion efforts and will not permit agency personnel to promote the use of such an approach through the examination process.

Sections 1207.2(b) and 1207.21(b) Refining the Legal Standard in HERA "To the Maximum Extent Possible"

Proposed §§ 1207.2(b) and 1207.21(b) require the regulated entities to maintain standards and procedures to ensure, "to the maximum extent possible," the inclusion and utilization of diverse individuals and companies. The language "to the maximum extent possible" derives from HERA and is found in US Code 12 U.S.C. § 4520(b).

In our view, the regulation would be much improved if the FHFA were to clarify the meaning of "to the maximum extent possible," to resolve certain ambiguities in a regulated entity's compliance obligations. We strongly believe that "to the maximum extent possible" should not be read literally and must take into account other rules and practical limitations on the extent to which an FHLBank must go in promoting diversity in employment and contracting. For example, 12 U.S.C. § 4520(b) does not grant to an FHLBank a license to pursue inclusion efforts in any way that is inconsistent with either (i) its obligations to comply with other federal laws and regulations,[6] (ii) its obligations to maintain its safety and soundness, or (iii) its obligations to fulfill its statutory missions to promote affordable housing and community development and to provide liquidity to members.[7] The final rule should expressly provide that safety and soundness and the best interests of the FHLBanks are factors in determining what constitutes "the maximum extent possible." To clarify that the final rule is not intended to override other well established federal laws, the FHFA could avoid ambiguity in this area by adding the phrase, "consistent with applicable law," after the phrase, "to the maximum extent possible."

The FHFA may want to review similar diversity regulations issued by other Federal Banking Regulators in order to provide guidance relating to the proper weighing of competing issues of outreach efforts, the FHLBank's obligations listed above, and common business issues such as cost and reliability. For example, the Office of the Comptroller of the Currency ("OCC") states that "The OCC awards contracts consistent with the principles of full and open competition and best value acquisition and with the concept of contracting for agency needs at the lowest practical cost." See 12 C.F.R. § 4.63.

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[6] For example, to the extent Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, 42 U.S.C. § 1981, and other federal antidiscrimination laws prohibit an FHLBank from engaging in certain practices, all of these prohibitions would remain in effect and undisturbed by 12 U.S.C. § 4520 and the Proposed Regulation.

[7] *See, e.g.*, 12 U.S.C. § 4513(f)(1)(B) and (C).

Section 1207.21(b)(3) Internal Procedures to Resolve Complaints in Discrimination in Employment and Contracting Which Shall Include Mandatory Alternative Dispute Resolution Techniques

The Dallas Bank asks that the FHFA remove this section from the final regulation. The provisions of this section relating to resolving disputes in contracting run afoul of the contracting rights of the FHLBank as set forth by the Federal Home Loan Bank Act ("FHLB Act") at 12 U.S.C. § 1432, the contracting rights of the vendor, and § 1207.3 of the Proposed Regulation.

First, the Proposed Regulation interferes with the FHLBanks' power "to make contracts," which is an explicit right granted to the FHLBanks in the FHLB Act. *See* 12 U.S.C. § 1432(a). In order for an FHLBank to use an alternative dispute resolution with its vendors, such language must be included in the contract. Proposed §1207.21(b)(3) represents a restriction on the FHLBank's right to make contracts inasmuch as it would require each FHLBank to enter into only those contracts that include ADR provisions. This narrows the FHLBank's statutory rights under the FHLB Act, which only Congress may do.

In addition, Federal Banking Regulators have been cautious of the use of ADR processes with regards to certain contracts, e.g., external audit engagement letters. The Interagency Advisory on the Unsafe and Unsound Use of Limitation of Liability Provisions in External Audit Engagement Letters ("the Advisory") were concerned that mandatory ADR provisions could limit the liability of the auditor. The Advisory noted that "By agreeing in advance to submit disputes to mandatory ADR, financial institutions may waive the right to full discovery, limit appellate review, or limit or waive other rights and protections available in ordinary litigation proceedings." Although the Advisory did not find ADR provisions to be unsafe and unsound on their face, they stated that federal banking agencies have provided guidance to their institutions to "carefully review mandatory ADR and jury trial provisions in engagement letters, as well as any agreements regarding rules of procedure, and to fully comprehend the ramifications of any agreement to waive any available remedies."

Second, this section of the Proposed Regulation interferes with the vendors' contracting rights. Many contractors disfavor ADR clauses for a myriad of reasons, including potentially high costs and perceived biases against full recoveries that may otherwise be available in a court of law. The proposed requirement in this section also ignores the fact that in many cases the vendor, not the FHLBank, holds the bargaining power.

Finally, and with regard to vendors who were not awarded contracts by the FHLBank, this section runs counter to the proposed § 1207.3, which states that "the regulations in this part do not...create any right or benefit...by any party against...a regulated entity or the Office of Finance, their officers, employees or agents, or any other person." Granting vendors who are unsuccessful bidders the opportunity to use ADR

processes would be granting a right and a benefit, and is in contravention of the protections of § 1207.3.

The provisions of proposed 12 C.F.R. § 1207.21(3) relating to complaints of discrimination in employment should also be removed from the final regulation. This section stands in opposition to recent legislative initiatives to preclude mandatory arbitration of employment-related claims. For example, the American Recovery and Reinvestment Act of 2009 ("ARRA") precludes predispute arbitration agreements for claims under the ARRA employee whistleblower provision, except for certain disputes arising under a collective bargaining agreement. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, Section 1553(d)(1)-(3). Similarly, § 8116 of the Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118 prohibits federal contractors on certain defense projects from requiring employees and independent contractors to agree to arbitrate certain employment discrimination and harassment claims as a condition of employment. In short, the proposed section stands against the current movement away from mandatory arbitration procedures and would oppose recent legislative efforts to preserve for claimants all means available to resolve complaints of discrimination.

Section 1207.21(b)(4) Requests for Reasonable Accommodations

The reasonable accommodation provision in § 1207.21(b)(4) falls outside the scope of HERA. Moreover, this provision, as applied, would create substantive rights not otherwise available under applicable law, which is inconsistent with §1207.3.[8] For example, the language anticipates accommodation of all individuals with disabilities for all purposes, not, for example, reasonable accommodation for qualified individuals with disabilities that do not impose an undue hardship under the ADA. Regulated entities are not required to accommodate all disabilities under current, applicable law.

The FHLBank also asks that the FHFA clarify the term "effective procedures."

Section 1207.21(b)(6) Material Clauses in Contracts

Section 1207.21(b)(6) of the proposed rule would require a regulated entity to include in each contract it enters into with a contractor "a material clause committing a contractor to practice principles of equal opportunity and non-discrimination in all its business activities ...." The FHLBanks simply do not have the contracting power of the federal government. An FHLBank will have no leverage with many critical vendors where the FHLBank is too small a customer to be able to negotiate such a contractual provision. Examples of such vendors include computer hardware and software vendors such as Microsoft, Dell, and Sun Microsystems; financial counterparties, including the largest banks and brokerage houses; as well as insurance companies (especially with respect to directors and officers liability insurance), to name a few.

[8] Section 1207.3 provides that the regulations are not intended to create any right or benefit, substantive or procedural, enforceable at law, in equity, or through administrative proceeding ....

The Dallas Bank does not believe the above section can be effectively enforced or monitored. Therefore, the Dallas Bank requests that this section be removed from the Proposed Regulation as overly burdensome. In the alternative, we request that the section be replaced with language to the following effect: "Formally request that each contractor practice, and request each of its subcontractors to practice, the principles of equal employment opportunity and non-discrimination in all its business activities for services or goods provided to the regulated entity or the Office of Finance."

In addition, the Dallas Bank requests that the FHFA clarify that this section will apply to contracts only prospectively and that an FHLBank will not be required to renegotiate or amend any existing contract. Requiring an FHLBank to renegotiate an existing contract could put the FHLBank in a position of being forced to grant some other concession to a vendor that knows the FHLBank is legally required to obtain an amendment of a contract. Such a provision would work at cross-purposes to the safety and soundness of an FHLBank.

Section 1207.21(c) Outreach for Contracting

The Dallas Bank requests "all contracts" as referenced in §1207.21(c)(1) be clarified to mean contracts for goods and services as written in 12 C.F.R. §361.6 and implemented by the Federal Deposit Insurance Company ("FDIC"). Applying these standards to membership agreements and other non-goods and services contracts does not appear consistent with the intention of this Proposed Regulation.

Sections 1207.21(c)(2) and 1207.23(b)(10) Outreach for Contracting/Annual Reports

The Dallas Bank respectfully requests that the FHFA clarify the requirement in proposed §1207.21(c)(2) requiring publication of contracting opportunities designed to encourage contractors that are minorities, women, individuals with disabilities, and minority-, women-, and disabled-owned businesses to submit offers or bids for the award of such contracts. The Dallas Bank believes that it is extremely useful to include these individuals and businesses wherever applicable in the RFP process for specific bids which require an RFP be issued based on each FHLBank's policies. However, each FHLBank's ability to publish RFPs to such businesses depends upon multiple factors, including, but not limited to, the presence of contractors that are minorities, women, individuals with disabilities, and minority-, women-, and disabled-owned businesses that provide such goods and services in a specific geographic area, and successful identification of such businesses. The term publication can be misleading as each geographic area does not necessarily offer trade publications that target minorities, women, individuals with disabilities, and minority-, women-, and disabled-owned businesses in every possible field of business.

Please confirm that in establishing standards and procedures for publication of contracting opportunities under proposed § 1207.21(c)(2) each regulated entity retains the discretion to create reasonable exceptions from a general rule of publication. For

example, a regulated entity could carve out and not require publication of contracts below a certain dollar threshold, contracts for time sensitive engagements, and contracts for confidential engagements (e.g., to engage a law firm).

The Dallas Bank also requests that the FHFA clarify similar verbiage in proposed §1207.23(b)(10) which requires a description of activities with respect to which a regulated entity will solicit or advertise for contractors to provide service to the regulated entity. In this case, the term "advertise" can be misleading for the same reasons as the term "publication" referenced above.

Section 1207.22(a)(1) Reports

Under the Proposed Regulation, the FHFA requires each regulated entity, within 90 days after the effective date, to submit a preliminary status report describing the actions taken thus far in establishing Office of Minority and Women Inclusion and the plans for and progress toward implementation. The final regulation should enumerate the expected deliverables to be provided in the preliminary status report. In addition, the FHFA should provide templates for the regulated entities to complete contemporaneously with the publication of the final rule to ensure that each regulated entity is providing the exact information required.

Section 1207.22(a)(1) Timing for the Initial Reports

The Proposed Regulation would require both a preliminary status report within 90 days after a final regulation becomes effective and the initial annual report to be submitted by February 1, 2011.

Most of the FHLBanks' efforts to comply fully with the diversity regulation will of necessity begin only after a final regulation is issued, because it is impossible to know in advance what changes the FHFA may effect in the final regulation in response to comments received. Given this fact, it would be unfair and counterproductive to ask the FHLBanks to report on their compliance efforts for periods preceding the effective date of the final regulation (i.e., before the 12 U.S.C. § 4520(a) "standards and requirements" are established by the Director).

We believe the best approach would be (i) retaining the requirement to provide a preliminary status report within 90 days after final regulation effective date while (ii) modifying the initial annual reporting obligation such that the first annual report would cover the first full 12-month reporting period occurring after the effective date of the final regulation.

For example, under this approach, if the final regulation becomes effective on September 1, 2010, the agency adopts an October 1 to September 30 reporting period as requested below, and the annual report remains due on February 1 for the preceding reporting period, then, (a) the preliminary status report would be due December 1, 2010

and (b) the initial annual report would be due February 1, 2012 covering the October 1, 2010 to September 30, 2011 reporting period.

Section 1207.22(c) Annual Reporting Cycle

Proposed § 1207.22(c) establishes a calendar year reporting period and requires each regulated entity to submit its annual report by February 1 of each year (i.e., one month after the end of the reporting period).

The Dallas Bank requests that the FHFA revise this section to provide for a minimum of 120 days between the end of the reporting period and the due date for the annual report. Certain FHLBanks (including the Dallas Bank) have already engaged a minority-owned firm to review their vendor databases and confirm which vendors are certified diverse contractors. Our understanding, however, is that such reviews can often take up to nine or ten weeks to complete, since they also involve outreach to specific vendors to confirm their diversity status. Since a regulated entity will not know the entire universe of its vendors for a certain calendar year until after December 31 of that year, the process of confirming which of its vendors are certified as "diverse" can theoretically last until mid-March. Then, each regulated entity will need time to analyze the amount it spent with diverse contractors, identify successes and trends in its contracting inclusion efforts, determine a plan for improving its contracting inclusion efforts for the following reporting year, draft the annual report, and circulate the draft report for internal review and approval before submitting the report to the FHFA. This process simply cannot be completed in any honest and robust manner within one month following the end of the reporting period.

If the FHFA is concerned from a timing perspective that a May 1 annual reporting deadline does not permit the agency to incorporate aspects of the regulated entities' annual diversity reports in the agency's annual report to Congress, then we ask that the Proposed Regulation be modified to accommodate both this issue and the goal of providing the regulated entities sufficient time to prepare accurate reports. We suggest in that case that the FHFA adopt an October 1 to September 30 reporting period under § 1207.22(c) and then retain the existing February 1 due date for annual report submission.[9]

Section 1207.22(d) Annual Summary

The Dallas Bank requests clarification as to the difference between "third-party contractors" and "contractors that are minorities...." We ask that either the FHFA clarify what is meant by "third-party contractor" in the final regulation or provide guidance in the preamble.

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[9] We note in this regard that 12 U.S.C. § 4520(d) does not mandate a calendar year reporting period, as it only requires a regulated entity to report on its inclusion activities in the period since its last report.

We also question what is meant by a Federal Home Loan Bank's "annual report to the Director" under proposed § 1207.22(d). If the Director is not currently requiring receipt of such an annual report, then we would suggest deleting this reference in the final regulation, and simply requiring the diversity annual report in the format set forth in § 1207.23.

Section 1207.23(b)(3) Reports Showing Disability Classifications

Section 1207.23(b)(3) would require, among other things, that a regulated entity annually report to the FHFA the number of persons with disabilities applying for employment with the regulated entity.

The Equal Employment Opportunity Commission ("EEOC"), however, advises employers against making disability-related inquiries prior to making an offer of employment, and therefore, under the EEOC's advice the regulated entity will not be able to provide data showing the disability classification of individuals who apply for but are not offered employment as requested by this section. In fact, asking for this data would violate the ADA. *See e.g.*, EEOC Notice No. 915.002, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (October 10, 1995), available at www.eeoc.gov/policy/docs/preemp.html; *Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA)*, available at www.eeoc.gov/policy/docs/qanda-inquiries.html; *EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act ("ADA")*, available at www.eeoc.gov/policy/docs/guidance-inquiries.html.

As such, § 1207.23(b)(3) should be modified to remove this requirement.

Sections 1207.23(b)(3), (7), and (8) Collection of Data Related to Job Applicants and Employee Promotions

The data required by §§ 1207.23(b)(3), (7) and (8) appear to encompass all job applicants and employees regardless of whether the individual is qualified for the specific job position sought. Specifically, these sections seek data regarding the number of individuals who apply for employment with the regulated entity by minority, gender, and disability classification, as compared to the number of individuals hired for employment by minority, gender, and disability classification, without regard to whether the applicant meets the minimum qualifications required for the job position at issue. The same problem exists with regard to promotions.

By comparison, the EEOC and the Department of Labor's Office of Federal Contract Compliance Programs have focused on comparative analysis by utilizing a concept where the employer can apply minimum job qualifications to eliminate unqualified persons, thus making the comparison between qualified applicants and those chosen for the position more reflective of real-life determinations. Otherwise, an "apples versus oranges" problem arises and comparisons between those who apply and those who are chosen mean very little.

Therefore, we request that the final regulation clarify that a regulated entity may apply minimum job qualifications to eliminate unqualified persons, for purposes of

reporting the number of individuals applying for employment or promotion under §§ 1207.23(b)(3), (7) and (8).

Section 1207.23(b)(18) and (19) Annual Reports

Proposed §§1207.23(b)(18) and (19) require the regulated entities to provide narratives in the annual report identifying and analyzing successful and unsuccessful activities, describing the progress made from the previous year, discussing areas where improvement is necessary, and describing anticipated efforts and results expected in the succeeding year. Despite proposed §1207.3, the Dallas Bank is concerned that providing such a narrative may have unintended consequences that could lead to litigation despite a good faith effort by the regulated entity to comply with the regulation.

The Dallas Bank believes that the information requested by proposed §§1207.23(b)(18) and (19) is beyond the scope of 12 U.S.C. § 4520(d) and is not necessary to achieve its purposes. Information concerning an FHLBank's success or lack of success in achieving the purpose of regulations, and areas in which efforts need to improve, should be addressed in the confidential examination process rather than a report that might be subject to public disclosure under the Freedom of Information Act. In such case, such disclosures could create an increased threat of litigation, or at a minimum increased scrutiny, that is unnecessary and potentially harmful to the reputation and safety and soundness of the regulated entities.

The Dallas Bank accordingly requests that the FHFA remove proposed §§1207.23(b)(18) and (19). In the alternative, if the FHFA believes the information is necessary for a complete report, the Dallas Bank respectfully requests that the final regulation specify that the information received pursuant to the reporting requirements in proposed §§1207.23(b)(18) and (19) shall be considered "Unpublished Information" as defined in 12 C.F.R. § 911.1 and shall be protected as described in 12 C.F.R Part 911.

Another issue exists in that each FHLBank defines "applicants" differently which will affect the FHFA's report when such information is combined. For example, many FHLBanks consider applicants to be individuals who have applied for a position *and* completed an office interview. Other FHLBanks consider applicants any individual who has applied for a position and is qualified, regardless of whether the individual is interviewed. The FHFA should consider defining an "applicant" for the purposes of the reporting requirements discussed above.

Section 1207.23(b)(5) Collection of Data Regarding Terminations

Because many FHLBanks have a small number of employees with few separations, the Dallas Bank is concerned that the Proposed Regulation's requirement for regulated entities to report employee separations by disability classification may make the identity of a separated employee and his or her disability easily ascertainable. In such circumstances, the sharing of this information would conflict with the goals under the ADA and Health Insurance Portability and Accountability Act ("HIPAA") to keep such

information confidential, on the one hand, and §1207.22 of the Proposed Regulation, on the other hand, which provides that the "FHFA is not requiring, and does not desire, that reports under this part contain personally identifiable information."

The Dallas Bank thanks the FHFA for its consideration of these comments

Respectfully submitted,

Terry Smith
President & CEO