April 23, 2010

Alfred M. Pollard, General Counsel
Federal Housing Finance Agency, Fourth Floor
1700 G Street, NW
Washington, DC 20552

Re: Comments on Proposed Rulemaking Regarding Minority and Women Inclusion; RIN 2590-AA28

Dear Mr. Pollard:

The Federal Home Loan Bank of Atlanta (the Bank) appreciates this opportunity to comment on the Federal Housing Finance Agency (FHFA) proposed rule on minority and women inclusion. The Bank recognizes the proposed rule as an important step toward achieving the goals of section 1116 of the Housing and Economic Recovery Act of 2008 (HERA).

The Bank has a strong culture of supporting diversity, inclusion, and non-discrimination through its practices and core principles, and the Bank fully supports the intent of the proposed rule. We are proud of our diverse workforce, and we are continually seeking means to enhance the Bank's diversity and outreach efforts. Section 1116 and the proposed rule have presented the Bank with new ideas for achieving a more expansive standard of inclusion.

The Bank is committed to taking meaningful action to fulfill the mandates of section 1116, as implemented by the FHFA. Achievement of this goal presents us with challenges -- challenges we are determined to meet. The Bank urges the FHFA to make certain changes in the final rule that will facilitate the Bank's fulfillment of the objectives of section 1116 and the proposed rule. To that end, we respectfully submit the following comments for the agency's consideration.

Defining "to the maximum extent possible"

Proposed sections 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. This "to the maximum extent possible" language also appears in 12 U.S.C. 4520(b).

In our view, the regulation would be strengthened if the FHFA were to add an appropriate definition of "to the maximum extent possible", to resolve certain ambiguities in a regulated entity's

compliance obligations. It is our view that 12 U.S.C. 4520(b) does not grant to the FHLBanks a license to pursue inclusion efforts in any way that is inconsistent with either (i) their obligations to comply with other federal laws and regulations,[1] (ii) their obligations to maintain their safety and soundness, or (iii) their obligations to fulfill their statutory missions to promote affordable housing and community development and to provide liquidity to members.[2] Please provide a definition of "to the maximum extent possible" that makes clear that the FHLBanks may seek inclusiveness only in ways that are consistent with these fundamental duties. If these ambiguities are not resolved in the final rule, we believe that the legal standard will be difficult for the Bank and its examiners to apply, hindering achievement of the rule's intended purpose.

Impermissibility of Formal or Informal Quotas

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 their employment and contracting processes. This is appropriate since these kinds of approaches could be unlawful under applicable U.S. 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."[3]

A quota system becomes no more permissible if it is informal and enforced only through the FHFA examination process. In reviewing a regulated entity's 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 the final regulation that the FHFA will not expect the regulated entities to use quotas and numbers-based models in their inclusion efforts and will not permit agency personnel to promote the use of such an approach through the examination process.

Scope of Contracts Subject to Inclusion Requirements

Proposed sections 1207.2(b) and 1207.22(a) provide that they apply to "all contracts *for services*", while proposed section 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).

---

[1] 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.

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

[3] 41 C.F.R. § 60-2.16(e)(1).

However, other sections of the proposed regulation purport to apply to all contracts of a regulated entity, and not just contracts for services.[4] This is inappropriate and unworkable.

The regulated entities, like most companies, are party to a wide range of contracts that are not contracting opportunities under any traditional understanding. 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 with principals in financial transactions (including contracts with swap counterparties and agreements with issuers and trustees evidencing MBS and other investments by a regulated entity);[5] contracts evidencing debt or equity issued by a regulated entity to its investors[6]; indemnification agreements in favor of employees, officers, and directors; 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.[7] Therefore, we request that you limit the scope of the regulation's contractor outreach provisions only to all contracts for services provided to a regulated entity, as 12 U.S.C. 4520(c) contemplates.

In addition, we note how critical it will be that each regulated entity ensures that its accounting systems for tracking vendor spend match up with the FHFA's ultimate definition of which contracts are subject to the section 1207.23(b)(11) through (13) reporting requirements. In this regard, we note two issues. First, our Bank's accounts payable system includes amounts paid both to vendors selling services to the Bank and vendors selling goods to the Bank.[8] Second, with respect to companies providing goods and services paid for by Bank employees or directors who are then reimbursed by the Bank, we do not maintain the same level of detailed information regarding these

---

[4] See proposed sections 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 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).

[5] Of course, to the extent that a regulated entity pays an institution to broker a financial transaction, contracts for such brokerage services (e.g., insurance brokerage and brokered overnight Fed Funds transactions) are properly considered within the scope of Part 1207.

[6] We recognize that investment advisory and underwriting services are within the proper scope of a regulated entity's contractor inclusion efforts.

[7] 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.

[8] It does not distinguish between the two. And obviously there are vendors who sell both goods and services to the Bank simultaneously (e.g., building contractors who supply both parts and labor).

companies as we would for vendors receiving payment directly from the Bank.[9] We expect this is true of the accounting systems for other regulated entities as well. Therefore, we also request that, for purposes of reporting to the FHFA on contractor inclusion efforts, a regulated entity be permitted to (i) include contracts for goods purchased by the regulated entity and (ii) exclude payments not made directly by a regulated entity to a vendor (e.g., employee or director reimbursement payments).

Reliance on Voluntary Self-Identification by Employees, Directors, and Individual Contractors

For individuals who are employees, directors or contractors, a regulated entity will need to rely (for both practical and legal reasons) on voluntary self-identification to determine whether such individuals are minorities, women, or persons with disabilities. Based on our experience, many such individuals will refuse to self identify. It is also possible that some such individuals may self identify inaccurately. These two factors necessarily limit the accuracy of certain data and information required to be presented in the Section 1207.23 annual report.

Please clarify that the section 1207.23(a) officer certification as to the accuracy of the data in the annual report may be made subject to the above caveats and other reasonable limitations on the accuracy of a regulated entity's diversity reporting, to the extent such limitations are clearly identified in the annual report.

Structure of a Regulated Entity's Designated Office of Minority and Women Inclusion

Proposed section 1207.20 requires each regulated entity to establish and maintain an office of minority and women inclusion (or designate and maintain an existing office) to perform the responsibilities under the proposed regulation, under the direction of an officer of the regulated entity who reports directly to either the Chief Executive Officer or the Chief Operating Officer or the equivalent.

Please clarify that regulated entity employees responsible for a portion of the regulated entity's compliance processes need not formally report to the officer directing the entity's inclusion efforts and that the officer's role under section 1207.20(a) is to coordinate the regulated entity's inclusion efforts. For example, a regulated entity may designate its head of human resources as its section 1207.20(a) responsible officer, but then rely on a separate accounting department to track diverse contractor spend amounts or on a separate procurement department to meet certain of the contracting requirements. In other words, please clarify that some of the Part 1207 responsibilities may be performed by employees not within the regulated entity's office of minority and women inclusion.

[9] 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.

Equal Opportunity Notice

Proposed section 1207.21(a) would require each regulated entity to approve and publish a commitment to equal opportunity "in employment and in contracting, regardless of race, color, national origin, sex, religion, age, disability status, or genetic information." In the employment context, this is merely a restatement of existing federal antidiscrimination law.

However, with respect to contracting, this provision imposes new obligations on the regulated entities. For example, the Age Discrimination in Employment Act (ADEA) does not apply to contracting decisions regarding an independent contractor.[10] It is our view that expanding federal anti-discrimination obligations in contracting beyond discrimination on the basis of race, color, national origin, sex, and disability status is tangential to the primary inclusion goals of the proposed regulation and section 1116 of HERA, and may subject the regulated entities to unnecessary litigation risk. We respectfully request that section 1207.21(a) be modified to remove the references to age, religion, and genetic information as they pertain to contracting by the regulated entities.

In addition, we ask that you please clarify in the preamble to the final regulation that a regulated entity, in publishing its commitment to equal opportunity in contracting, is permitted to include language affirming that, consistent with proposed section 1207.3, the regulated entity's statement of commitment to equal opportunity in contracting does not, and is not intended to, and should not be construed to create any enforceable right or benefit by, any party against the regulated entity or its officers, employees or agents.

Use of Alternative Dispute Resolution Techniques to Resolve Complaints of Discrimination

Please clarify that under proposed section 12071.21(b)(3), each regulated entity remains free to determine when alternative dispute resolution (ADR) should be offered to particular claimants of discrimination, on a case-by-case basis "when appropriate." A different interpretation which requires mandatory ADR to resolve complaints would stand 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, the final version of the FY 2010 Defense Appropriations Bill, which President Obama has signed into law, 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. See Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, Section 8116. We believe it would be unwise to move towards mandatory ADR when its efficacy as public policy is being called into question on many fronts.

---

[10] See, e.g., Robinson v. Overseas Military Sales Corporation, 21 F.3d 502, 509 (2nd Cir. 1994) ("The ADEA prohibits *employers* from discriminating on the basis of age against their *employees*....The ADEA does not cover independent contractors").

Requests for Reasonable Accommodation

Please clarify that proposed section 1207.21(b)(4) is intended to confirm each regulated entity's obligations to comply with the Americans with Disabilities Act (ADA) in regard to requests for reasonable accommodations of disabilities, and is not intended to expand those obligations.

Inclusion of Nondiscrimination Clauses in Vendor Contracts

Proposed 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 ...." This is unworkable as drafted. While in some cases an FHLBank will have leverage to impose particular contract terms on a vendor, there are many critical vendors (including vendors vital to risk management) as to whom the FHLBanks will have no or little power to force inclusion of this contract clause. Depending on the type of vendor, we believe it could raise potential safety and soundness concerns if proposed section 1207.21(b)(6) forced an FHLBank to refuse to do business with a vendor because of a failure to include this clause in its contract.[11] We believe this provision should be removed from the final regulation, or in the alternative modified to require only that a regulated entity use reasonable efforts to include this clause in future contracts.

Contracting Opportunity Publication Requirements

Please confirm that in establishing standards and procedures for publication of contracting opportunities under proposed section 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., for a law firm to conduct a sensitive investigation at a regulated entity).

Annual Reporting Cycle

Proposed section 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).

Please 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 of the FHLBanks (including ours) have already engaged a minority-owned firm to review their vendor databases and confirm which vendors are certified diverse contractors. However, our understanding is that such reviews can often take up to 10 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

[11] For example, what if a vendor critical to determining other-than-temporary-impairment in the FHLBanks' private label securities portfolios refused to agree to this contract term? Would the FHLBanks be prohibited from doing business with the vendor in that event?

are certified diverse can easily last until mid-March. Then, each regulated entity will need time to analyze the diverse contractor spend numbers received, identify failures and successes in its contracting inclusion efforts, determine a plan for improving its contracting inclusion efforts for the following reporting year, draft the annual report, circulate the draft report for internal review and approval (and review, no doubt, by outside discrimination law counsel), and submit 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 section 1207.22(c) and then retain the existing February 1 due date for annual report submission.[12]

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 with the diversity regulation will of necessity begin only after a final regulation is issued, since 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 even 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.[13]

---

[12] 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 section 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 section 1207.23.

[13] For example, under this approach, if the final regulation becomes effective on September 15, 2010, the agency adopts an October 1 to September 30 reporting period as requested above, and the annual report remains due on February 1 for the preceding reporting period, then (a) the preliminary status report would be due December 15, 2010 and (b) the initial annual report would be due February 1, 2012 covering the October 1, 2010 to September 30, 2011 reporting period.

Asking Employee Applicants About Disability Status

Proposed 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.

However, the Equal Employment Opportunity Commission (EEOC) advises employers against making disability-related inquiries prior to making an offer of employment, and therefore, 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 may 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, section 1207.23(b)(3) should be modified to remove this requirement.

Limitations on Considering Disability Status of Individual Contractors

In addition to barring companies from asking applicants for employment about disabled status, 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 proposed section 1207.21(c)(3), as it applies to potential contractors who are individuals.

What Constitutes an Applicant for Employment or Promotion

The data required by sections 1207.23(b)(3), (7) and (8) appears 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 individual 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 whereby 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 sections 1207.23(b)(3), (7) and (8). A regulated entity should also have discretion to determine at what point in the application process the regulated entity will make its determination as to whether an applicant has met those minimum job qualifications. For example, some regulated entities may deem all persons invited to participate in a telephone interview as qualified applicants for a position, while other regulated entities may only include persons who have completed an office interview.

Collection of Data Regarding Terminations

Because many FHLBanks have a small number of employees with few separations, the proposed rule'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 privacy goals of the ADA, the Health Insurance Portability and Accountability Act, and proposed section 1207.22, which provides that the "FHFA is not requiring, and does not desire, that reports under this part contain personally identifiable information."

Narratives for Annual Reports

Proposed sections 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 section 1207.3, we are concerned that providing such a narrative may have unintended consequences that could lead to litigation[14] despite good faith efforts by the regulated entities to comply with the regulation.

We believe that the information requested by proposed sections 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 a regulated entity'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 that is unnecessary and potentially harmful to the reputation and safety and soundness of the regulated entities and, indeed, to the success of the regulated entities' inclusion efforts.

The Bank accordingly requests that the FHFA remove proposed sections 1207.23(b)(18) and (19). In the alternative, if the FHFA believes the information is necessary for a complete report, we

[14] Given the other substantive requirements of the proposed regulation, such potential litigation could include nontraditional discrimination (i.e., "reverse discrimination") claims.

respectfully request that the final regulation specify that the information received pursuant to the reporting requirements in proposed sections 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.

Legal Status of FHFA Guidance

Proposed section 1207.20(c) provides that each regulated entity's diversity office "is responsible for fulfilling the requirements of this part, 12 U.S.C. 1833e(b) and 4520, and *such standards and guidance as the Director may issue hereunder*" (emphasis added). We are concerned that this language may be construed as an attempt to elevate the legal status of FHFA guidance beyond what is permitted by the agency's governing statute and beyond FHFA's historical practice.

While compliance with FHFA regulations and orders and written agreements with the FHFA is mandatory and subject to enforcement action by the FHFA, "guidelines" issued by the FHFA under its 12 U.S.C. 4526 authority do not constitute the basis for an FHFA enforcement action. Presumably to honor this statutory limit,[15] the agency's practice in issuing advisory bulletins has been to include a disclaimer clarifying that they do not have the force of a regulation or order. For example, the most recent advisory bulletin issued by the agency[16] contains the following legend:

> An Advisory Bulletin is a Division of Federal Home Loan Bank Regulation staff document that provides guidance to the Federal Home Loan Banks and the Office of Finance regarding particular supervisory issues. Although an Advisory Bulletin does not have the force of a regulation or an order, it does reflect the position of the Division of Federal Home Loan Bank Regulation on the particular issue, and will be followed by examination staff.

We believe this legend accurately states the legal status of FHFA guidance. Proposed section 1207.20(c), on the other hand, appears by its terms to attempt to incorporate future FHFA guidance by reference into the regulation itself, and in this way convert any noncompliance with that guidance into a violation of the regulation. For these reasons, we respectfully request that the agency modify proposed section 1207.20(c) to remove the references to "standards and guidance" in the final regulation.

Thank you for your consideration of these comments.

Sincerely,

Jill Spencer
Interim President and
Chief Executive Officer

---

[15] And likely also the Administrative Procedures Act, since historically most FHFA guidance has not been subject to a public notice and comment period.

[16] http://www.fhfa.gov/webfiles/15604/2010-AB-01_QandA_on_2008-AB-02.pdf