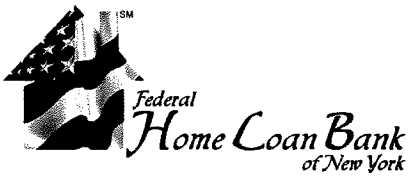

VIA EMAIL (REGCOMMENTS@FHFA.GOV) AND FEDERAL EXPRESS

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 New York ("FHLBank") appreciates this opportunity to comment on the Federal Housing Finance Agency ("FHFA" or "Finance Agency") proposed rule on minority and women inclusion. The FHLBank 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 FHLBank is committed to taking meaningful action to fulfill the mandates of Section 1116. Achievement of this goal will present us with certain challenges, which we are determined to meet. In this regard, the FHLBank urges the Finance Agency to make certain changes to the proposed rule that will facilitate the FHLBank's fulfillment of the objectives of Section 1116. To that end, we respectfully submit the following comments for the Finance Agency's consideration.

I. General Comments

Refining the Legal Standard in HERA "To the Maximum Extent Possible"

Sections 1207.2(b) and 1207.21(b) of the proposed rule 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. We acknowledge that there are opportunities to provide minority-, women-, and disabled-owned businesses with increased access to income arising from support of the FHLBanks' debt issuance, investment, and procurement activities as well as the FHLBanks' legal services, accounting, and other service requirements. However, if not clarified in the final rule as described below, we believe this legal standard may be difficult for the Bank and its examiners to apply, thereby hindering achievement of the rule's intended purpose.

a. *Clarifying that safety and soundness are factors in identifying "the maximum extent possible"*: The final rule should expressly provide that safety and soundness and the best

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interests of the FHLBanks are factors in determining what constitutes "the maximum extent possible." Alternatively, the Finance Agency may wish to provide consistency throughout the rule by using the standard set forth in proposed Section 1207.11 (stating that the "FHFA is committed to ensuring that minorities, women, individuals with disabilities, and minority-, women-, and disabled-owned businesses have the maximum *practicable* opportunity to participate in all contracts awarded by the FHFA") (emphasis added).

b. *Conflicts with other Federal law*: Either in the preamble or in the text of the final regulation, the final rule should specify that the phrase "to the maximum extent possible" is not intended to supplant other federal law. For example, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act ("ADA") (42 U.S.C. 1981 et seq.), other federal anti-discrimination laws, and federal case law, prohibit the Bank from engaging in certain practices. We assume that the final rule is not intended to override these and other well-established federal laws. As such, we believe the Finance Agency could avoid ambiguity in this area by adding the phrase "consistent with applicable law," after the phrase "to the maximum extent possible."

Impermissibility of Application of Government Contracting Standards

The FHLBank notes that neither HERA nor the proposed regulation requires the FHLBank to meet any express or implied federal government contracting standards or other predetermined employment allocations. The FHLBank agrees that this is appropriate under applicable U.S. Supreme Court decisions, including Adarand Constructors, Inc. v. Pena and Rothe Development Corp. v. Dept. of Defense; Title VII of the Civil Rights Act of 1964, which requires equal employment opportunities for all genders and racial groups; and the Department of Labor's Office of Federal Contract Compliance Programs at 41 C.F.R. § 60-2.16(e)(1).

Scope of Contracts Subject to Inclusion

The FHLBank fully supports the goal of enhancing its consideration of minority-, women-, and disabled-owned businesses in its services contracts with respect to all of the FHLBank's business and activities. In this regard, we note that HERA Section 1116 is expressly limited in scope "to all contracts of a regulated entity *for services* of any kind." *See* HERA Section 1116(c)(emphasis added). The proposed rule states that the purpose of the rule is to promote diversity "in all contracts for services of any kind." *See* proposed Section 1207.2(b) (emphasis added). To conform to the express scope limitations of the statute and the stated purpose of the rule, we believe the scope section of the final rule (Section 1207.2(c)) should be revised to clarify that the final rule applies to services contracts. Conforming changes should be made to other sections of the rule. [1]

[1] Each of the following sections should be amended to clarify that the rule is limited in scope to services contracts: 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).

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We understand that services contracts covered within the scope of the rule will include brokerage, investment advisory, underwriting, and other services that support FHLBank transaction execution. However, we believe that individual transactions with the FHLBank's members and counterparties themselves do not constitute, and should not constitute, services contracts within the scope of the rule, and the final rule should make this clear. We also believe that the rule should exclude service contracts with FHLBank members from its scope. To do otherwise would represent a dramatic policy change that could potentially affect the FHLBanks' fulfillment of their statutory mission of providing credit and liquidity to members.[2]

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 the reporting requirements of Sections 1207.23(b)(11) through (13). Specifically, with respect to companies providing 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.[3] We expect this is true of the accounting systems for other regulated entities as well. Therefore, we 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).

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. As such, please clarify that the FHLBank is under no obligation to take any additional steps to attempt to categorize individuals or contractors other than to request such information on a voluntary basis. Of course, the FHLBank can only report the information that is collected at the time, which is subject to the willingness of the individual or contractor to make such a disclosure, and the accuracy of such disclosure.

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[2] We note that proposed Section 1207.1, in its definition of *Business and activities*, tracks HERA Section 1116(b) by stating the rule applies to the implementation of the FHLBanks' affordable housing program and initiatives. We interpret this language to mean that service contracts related to implementation of the FHLBanks' affordable housing programs ("AHP") and initiatives are governed by the rule and not that the rule would apply to the FHLBanks' AHP and other community investment program contracts with members and nonprofit sponsors.

[3] A simple example would be the local pizza restaurant or the taxi cab company providing services to a Bank employee traveling on business.

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II. Comments on Specific Sections of the Proposed Rule

1207.1 Definitions

Business and Activities

The FHLBank requests that the FHFA narrow the definition of "Business and Activities". This definition is very broad and, if adopted, may make compliance with various sections of the regulations extremely difficult.

HERA anticipates broad coverage, but not as broad as the definition set forth in the proposed regulations. Specifically, HERA refers to "all business and activities of the regulated entity at all levels, including in procurement, insurance, and all types of contracts (including contracts for the issuance or guarantee of any debt, equity, or mortgage-related securities, the management of its mortgage and securities portfolios, the making of its equity investments, the purchase, sale and servicing of single- and multi-family mortgage loans, and the implementation of its affordable housing program and initiatives.)" 12 U.S.C. §4520(b).

By contrast, the definition in §1207.1 includes "operational, commercial, and economic endeavors of any kind, whether for profit or not for profit and whether regularly or irregularly engaged in by a regulated entity...." While the list of examples in this section is consistent with HERA, the aforementioned "operational, commercial, and economic endeavors..." language encompasses anything a regulated entity does. This seems to exceed the scope of the rules requiring inclusion in employment and contracting.

Disabled-owned business

The definition of disabled-owned business 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. Identifying those businesses would require individuals to self-identify as having disabilities. As a result, businesses with individuals willing to self-identify will 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 of disabled-owned 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

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the ADA definition of disability does not appear suited to this context. Therefore, the FHLBank asks the FHFA to either remove or revise this definition as necessary.

Minority

We note that the definition of minority is inconsistent with the statutory language, which incorporates the definition of minorities in Section 1204(c) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989. That section defines the term minority as "any Black American, Native American, Hispanic American, or Asian American." By contrast, the proposed regulations define minority as Black or African American, American Indian or Alaska Native, Hispanic or Latino American, and Native Hawaiian or Other Pacific Islander. Therefore, the FHLBank asks that the FHFA change the definition to correspond with the statutory language.

1207.20 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.

We request that the FHFA 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 the Accounting Department to track diverse contractor spend amounts or on a separate procurement department to meet certain of the contracting requirements. Thus, we request clarification in the final regulation that some of the Part 1207 responsibilities may be performed by employees not within the regulated entity's office of minority and women inclusion.

1207.20(b) Adequate Resources

The FHLBank believes that it is unnecessary for the FHFA to adopt language in the regulation that requires each FHLBank to provide sufficient resources to fulfill the duties prescribed by the regulation. The text of HERA does not require this language, and current FHFA regulations do not contain similar provisions as it is expected that an FHLBank will provide adequate resources in order to meet its regulatory compliance obligations. Therefore, the FHLBank requests that this section be removed.

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1207.21(a) Equal Opportunity Notice - Notices Provided in Alternative Media

We are of the view that the requirements in 1207.21(a) and (b) that relate to the publication of the policies and procedures that require media (Braille & audio) would be unduly burdensome. These requirements assume that each FHLBank would update its EEO notice, policies and procedures, and job postings on an ongoing basis to be both Braille and audio accessible, regardless of whether the FHLBank has employees or applicants who are vision or hearing impaired. The FHLBank is cognizant of the ADA and, where employees or applicants request accommodations, the FHLBank will comply with all its legal obligations. Therefore, the FHLBank requests that this section be removed.

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

The FHLBank asks that the FHFA remove this section from the final regulation. This is because the provisions of this section relating to resolving disputes in contracting appear to run contrary to 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.

We first note that the proposed regulation interferes with the FHLBank's power "to make contracts," which is an explicit right granted to the FHLBank in the FHLBank Act. See 12 U.S.C. 1432(a). The proposed regulation would require that the FHLBank give vendors the "opportunity to use alternative dispute resolution ("ADR") techniques." ADR clauses are commonly found within contracts; however, the FHLBank normally attempts to remove such clauses. The FHLBank is concerned that the inclusion of the language as written would effectively modify our power "to make contracts" into a power "to make contracts as long as they provide for the use of ADR." The FHLBank believes that the decision to include ADR clauses in contracts is a decision best made by each entity.[4]

In addition, Federal banking regulators have been cautious of the use of ADR processes with regard 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") reflected a concern 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 should provide guidance to their institutions to "carefully review mandatory ADR and jury trial provisions in engagement letters, as well as

[4] The FHLBank notes that the proposed regulation does not require the agency to utilize ADR in the contracting context.

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any agreements regarding rules of procedure, and to fully comprehend the ramifications of any agreement to waive any available remedies."

Next, this section interferes with the vendors' contracting rights. Some 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. To the extent that the proposed regulation requires the FHLBanks to attempt to resolve complaints through an ADR process, which could necessitate a renegotiation of existing contracts to add ADR language, the vendor could claim interference with its contracting rights.

Finally, with regard to vendors who were not awarded contracts by the FHLBank, this section runs counter to the proposed text of 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 non-selected vendors the opportunity to use ADR processes would potentially be granting a right and a benefit, and would be a contravention of the protections of 1207.3.

The provisions of 12 C.F.R. §1207.21(c)(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, the FY 2010 Defense Appropriations Act, which President Obama signed into law on December 19, 2010, 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 H.R. 3326, 111th Cong. (2009). In short, the proposed section stands against the current movement away from mandatory arbitration procedures and would act to oppose recent legislative efforts to preserve all means available to resolve complaints of discrimination.

1207.21(b)(4) Requests for Reasonable Accommodations

The legal requirements for review of requests for reasonable accommodation are governed by the ADA's body of laws. In this regard, we note that proposed section 1207.21(b)(4) may conflict with certain aspects of these laws. Moreover, by not tracking the language of the ADA, the text of proposed section 1207.21(b)(4), could be interpreted to create substantive rights not otherwise available under applicable law. The ADA requires provision of reasonable accommodation for qualified individuals with disabilities that does not impose an undue hardship, whereas the text of proposed section 1207.21(b)(4), suggests the proposed rule may be intended to reach a broader class of individuals. This possibility would be inconsistent with proposed Section 1207.3, which provides that the rule is not intended to create any right or benefit, substantive or

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procedural, enforceable at law, in equity, or through administrative proceeding. Because of its potential to conflict with existing law and because it falls outside the scope of what is authorized by HERA Section 1116, proposed section 1207.21(b)(4) should be removed.

1207.21(b)(6) Material Clauses in Contracts

Proposed Section 1207.21(b)(6) would require a regulated entity to include in each services contract it enters into "a material clause committing the contractor to practice the principles of equal opportunity and non-discrimination in all its business activities… ." While we support the intent of the proposed provision, requiring such a clause in every FHLBank services contract may not be possible from a practical standpoint, as not every contract the Bank enters into is negotiable or negotiated (and in this regard, we note that negotiability often depends on the size, scope, and nature of the services obtained and the competing alternatives for those services). In addition, the FHLBank does not believe the above-referenced section can be effectively enforced or monitored with respect to vendors and subcontractors.

Therefore, the FHLBank requests that this section be replaced with a provision that, instead of requiring the inclusion of the proposed clause in contracts, requires the regulated entities to "Formally request that each contractor and subcontractor 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".

1207.21(c)(3) Outreach to Those With Disabilities

Proposed Section 1207.21(c)(3) requires each regulated entity to "… establish a program for outreach designed to ensure to the maximum extent possible the inclusion in contracting opportunities of minorities, women, individuals with disabilities…" that shall, at a minimum "ensure the consideration of the diversity of a contractor when the regulated entity … reviews and evaluates offers from contractors." With regard to the determination of disability classification, we are 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 reasonable accommodations, 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. A regulated entity likely may not, as a practical matter, be able to discern the disabled status of such individuals when the regulated entity reviews and evaluates offers from individual contractors. The final rule should take into consideration these and other requirements of the ADA and be made consistent with those requirements.

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1207.22(c) 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).

In order to ensure timely compliance with the February 1st compliance date described in 1207.22(c), the FHLBank requests that the proposed rule be clarified to establish that the data submission requirements coincide with that of the annual EEO-1 employer information report such that the reporting year would end on September 30th of each year, starting on September 30, 2011.

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 with the diversity regulation will of necessity begin only after a final regulation is issued, since it is not possible to know in advance what changes the FHFA may effect in the final regulation in response to comments regarding the proposed rule that may be received. Given this fact, it would be 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 therefore believe the best approach would involve (i) retaining the requirement to provide a preliminary status report within 90 days after the effective date of the final regulation while (ii) modifying the initial annual reporting obligation such that the first annual report would align with the next annual EEO-1 reporting period.

1207.21(c)(2) Contracting Opportunity Publication Requirements

We request that the FHFA confirm that in establishing standards and procedures for publication of contracting opportunities under proposed Section 1207.21(c)(2), each regulated entity can retain the discretion to create reasonable exceptions from a general rule of publication. For example, a FHLBank should be permitted to 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).

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1207.22(d) Annual Summary

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

1207.23(b)(3) Reports Showing Disability Classifications

Proposed Section 1207.23(b)(3) would require that a regulated entity annually report to the Finance Agency 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. 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 (available at www.eeoc.gov/policy/docs/guidance-inquiries.html) (citing that pre-employment inquiries regarding disabilities would violate the ADA). Proposed Section 1207.23(b)(3) should be modified to remove this reporting requirement or otherwise make it consistent with the requirements of the ADA.

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

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 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.

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Therefore, we request that the FHFA in 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).

Another issue exists in that each FHLBank defines "applicants" differently, which, therefore, could potentially affect the FHFA's report when such information is combined. For example, some FHLBanks consider applicants to be individuals who have applied for a position ***and*** completed an office interview. Other FHLBanks consider 'applicants' to be any individual who has applied for a position and is qualified, regardless of whether the individual is interviewed. In order to maintain consistency, we request that "applicants" for purposes of the regulation be defined at a minimum as those individuals that have both applied for a position ***and*** completed an office interview.

1207.23(b)(5) Collections of Data Regarding Terminations

Proposed Section 1207.23(b)(5) requires that each regulated entity report the number of separations from employment by minority, gender and disability classification. Because many FHLBanks have a small number of employees with few separations, the proposed 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 could conflict with the goals under the ADA and the Health Insurance Portability and Accountability Act to keep such information confidential, 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." For these reasons, the reporting requirement in proposed Section 1207.23(b)(5), with respect to separations by disability classification, should be eliminated.

Thank you for your consideration of these comments.

Sincerely,

G. Robert Fusco
SVP, Head of Enterprise Services

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