FHLBANKS
OFFICE OF FINANCE

CONFIDENTIAL

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

By electronic mail: RegComments@FHFA.gov

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

Dear Mr. Pollard:

The Office of Finance of the Federal Home Loan Bank System ("OF") appreciates this opportunity to comment on the Federal Housing Finance Agency ("FHFA") proposed rule on minority and women inclusion (75 Fed. Reg. 1289 ("Proposed Rule"), which would apply also to Fannie Mae, Freddie Mac, and the Federal Home Loan Banks ("FHLBanks," and together with Fannie Mae and Freddie Mac the "Regulated Entities"). 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 "Section 1116").

The OF has a strong culture of supporting diversity, inclusion, and non-discrimination through its policies, practices, and core principles, and the OF fully supports the intent of the Proposed Rule. We are proud of our diverse workforce. We have made considerable effort to expand contracting opportunities for minority- and women- owned businesses. As of December 31, 2009, there were 17 minority, women or veteran owned businesses authorized to underwrite FHLBank debt, which represented nearly 25 percent of the 80 total authorized underwriters. These 17 firms together distributed over $68 billion in FHLBank debt securities during the second half of 2009. We are continually seeking means for enhancing the OFs diversity and outreach efforts. Section 1116 and the Proposed Rule have presented the OF with new ideas for achieving a more expansive standard of inclusion.

The OF is committed to taking meaningful action to fulfill Section 1116's mandate. Achievement of this goal presents us with some challenges which we are determined to meet. The OF urges the FHFA to make certain changes to the final rule that will help facilitate the OF's fulfillment of the objectives of Section 1116 and the final rule. To that end, we respectfully submit the following comments for the FHFA's consideration.

A. Clarify the Legal Standard: "To the Maximum Extent Possible"

Sections 1207.2(b) and 1207.21(b) of the Proposed Rule requires the OF to maintain standards and procedures to ensure, "to the maximum extent possible," the inclusion and utilization of diverse individuals and companies. We see that there are opportunities to provide minority- and women-owned businesses with increased access to income arising

from support of the OF's debt issuance, investment, and procurement activities. If not clarified in the final rule, however, we believe the legal standard will be difficult for the OF and its examiners to apply, hindering achievement of the rule's intended purpose.

1. 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 interests of the OF are factors in determining what constitutes "the maximum extent possible." Alternatively, the FHFA may wish to provide consistency throughout the rule by using the standard set forth in proposed Section 1207.11 (stating "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).

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

B. Clarify the Scope of Contracts Subject to Inclusion

The OF fully supports the final rule's goal of expanding its consideration of minority-, women-, and disabled-owned businesses in its services contracts with respect to all of the OF's products and services. 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 its purpose is to promote diversity "in all contracts *for services* of any kind." *See* Proposed Rule 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 final rule (Section 1207.2(c)) should be revised to specify that the final rule applies to services contracts. Conforming changes should be made to other sections of the rule.[1]

We understand that services contracts covered within the scope of the rule include brokerage, investment advisory, underwriting, and other services that support the OF

[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 "apply 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).

transaction execution. However, were the final rule to apply to all contracts entered into by the OF, it would potentially apply to the OF's agreements with the Federal Reserve Banks, rating agencies, and the CUSIP bureau, as well as agreements in connection with the listing of consolidated obligations on securities exchanges. Such an expansion in scope would be a dramatic policy change affecting the OF's statutory mission of issuing and servicing the debt for the FHLBanks.

C. Compliance with Other Applicable Law

1. ADA prohibitions on disabled status inquiries: Proposed Section 1207.21(c)(3) requires each Regulated Entity and the OF to "... establish a program for outreach designed to ensure to the maximum extent 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 Americans with Disabilities Act ("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. The OF likely may not, as a practical matter, be able to discern the disabled status of such individuals when the OF reviews and evaluates offers from individual contractors. The final rule should take into consideration these and other requirements of the ADA be made consistent with those requirements.

Proposed Section 1207.23(b)(3) would require that the OF annually report to the FHFA the number of persons with disabilities applying for employment with the OF. 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: Pre-employment 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 requirement or otherwise make it consistent with the requirements of the ADA.

2. Requests for reasonable accommodation: The legal requirements for review of requests for reasonable accommodation are governed by the ADA's body of law, and 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 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.

3. Potential for disclosure of personal confidential information: Proposed Section 1207.23(b)(5) requires that each Regulated Entity and the OF report the number of separations from employment by minority, gender and disability classification. Because the OF has a small number of employees with few separations, the proposed requirement for the OF 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, 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 classifications, should be eliminated.

D. Material Clauses in Contracts

Proposed Section 1207.21(b)(6) would require Regulated Entities and the OF to include in each services contract they enter into "a material clause committing a contractor to practice 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 OF services contract may be impossible from a practical standpoint, as not every contract the OF enters into is negotiable or negotiated, and negotiability often depends on the size, scope, and nature of the services obtained and the competing alternatives for those services. For these reasons, we believe this requirement should be replaced with one that gives the OF more flexibility in this area. This could be accomplished, for example, by establishing materiality thresholds for the requirement based on the contract's dollar size (we recommend contracts larger than $100,000 in value), type or other similar triggering thresholds.

E. Annual Reporting Cycle

Proposed section 1207.22(c) establishes a calendar year reporting period and requires each Regulated Entity and the OF to submit its annual report by February 1 of each year (i.e., one month after the end of the reporting period). We suggest the FHFA revise the section to provide for a minimum of 120 days between the end of the reporting period and the due

date for the annual report. The OF will need time to analyze the diverse contractor payments numbers received, identify successes and trends in its contracting inclusions efforts, determine a plan for the following year, and circulate the draft for review and approval, before submitting to the FHFA.

Alternatively, we suggest the FHFA change the reporting requirement to be consistent with the annual EEO-1 employer information, which is based on a September 30 reporting year.

F. Cumulative Data Based on Contract Numbers

Proposed section 1207.23(b)(11) requires that cumulative data be provided that show the number of contracts entered into with minority or minority-owned businesses, women or women-owned businesses, and disabled or disabled-owned businesses during the reporting year. Due to the nature of some contractual activity, such as underwriting activity, the numerical presentation of contracts will not provide an appropriate assessment of participation by the designated groups. The OF would address these situations on a programmatic basis and respectfully requests that any final rule based on the Proposal provide for FHFA flexibility in monitoring results in these situations.

Thank you for your consideration of these comments.

Sincerely,

John Fisk