John R. Price
President,
Chief Executive Officer

April 26, 2010

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

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

Dear Mr. Pollard:

The Federal Home Loan Bank of Pittsburgh ("Bank") appreciates this opportunity to comment on the Federal Housing Finance Agency ("Finance Agency") proposed rule on Minority and Women Inclusion ("MWI"). The Finance Agency's proposed regulations seek to implement Section 1116 of the Housing and Economic Recovery Act of 2008 ("HERA"). The Bank supports Congress's attempt to encourage diversity of both our employees and our vendors, when possible. The Bank believes that a diverse team can provide additional viewpoints, skill sets, and experiences, which, in turn, can lead to higher productivity, creative solutions to challenges, and an improved ability to communicate with and understand our members.

The Finance Agency has invited comments on all aspects of the proposed regulations; therefore, the Bank respectfully submits the following comments for your consideration.

I. General Comments

Refining the Legal Standard in HERA "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. The language "to the maximum extent possible" derives from HERA and is found in 12 U.S.C. §4520(b).

The Finance Agency 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 Bank's obligations listed above, and common business issues such as cost and reliability. For example, the Office of the Comptroller of the Currency 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. Part 4.63.

The Bank requests that "to the maximum extent possible" be prefaced with the phrase "ensure MWOBs and IDOBs have the opportunity to participate" in order to apply consistency as written in 12 C.F.R. §4.63. Further, the Bank requests "all types of contracts" be clarified to mean contracts for goods and services as written in 12 C.F.R. §361.6. Applying these standards to membership agreements does not appear consistent with the intention of this proposed rule.

Impermissibility of Application of Government Contracting Standards

The Bank notes that neither HERA nor the proposed regulation requires the Bank to meet any express or implied federal government contracting standards or other predetermined employment allocations. The Bank believes that this is the appropriate interpretation under applicable United States ("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). Also, the Bank asks that the Finance Agency perform an Adarand analysis similar to the one completed by the Federal Deposit Insurance Company ("FDIC") with regards to their Minority and Women Outreach Program[1] in order to tailor the MWI regulations as permissible. Finally, the Bank asks that the Finance Agency provide a statement in the preamble to the final regulation with respect to the Finance Agency's recognition of the differing demographics of our district when compared to the districts of the other Federal Home Loan Banks ("FHLBank(s)") or the U.S. as a whole, and how that may affect outreach efforts as well as results.

Scope of Contracts Subject to Inclusion

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)

However, other sections of the proposed regulation purport to apply to all contracts of a regulated entity, and not just contracts for services.[2] Such a rigid interpretation can be problematic for both the Bank and our members.

The regulated entities, like most companies, are party to a wide range of contracts that are not typical contracting opportunities. A few examples of these unique contracts would

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[1] See 64 Fed. Reg. 42862 (1999).

[2] 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).

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 Affordable Housing Program ("AHP") grants and loans); contracts with principals in financial transactions (including contracts with swap counterparties and agreements with issuers and trustees evidencing mortgage-backed securities and other investments by a regulated entity);[3] contracts evidencing debt or equity issued by a regulated entity to its investors; indemnification agreements in favor of employees, officers, and directors; and information sharing agreements between an FHLBank and state or federal banking regulators. Procurement outreach efforts should be limited to procurement contracts, and the Finance Agency should permit the FHLBanks to use their judgment in determining what outreach efforts are appropriate. Therefore, we request that the Finance Agency first clarify any inconsistencies 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 Finance Agency specifically exclude certain types of contracts (including contracts with members and other examples cited in the foregoing paragraph) from the provisions of this regulation. We believe the Finance Agency may do so because 12 U.S.C. §4520(b) requires inclusion "to the maximum extent possible." Additionally, the Bank requests that the final regulation permit the FHLBanks to use their reasonable discretion as to when they may apply the requirements of this regulation, as each FHLBank deems it possible.[4] Finally, reporting on all types of contracts, whether or not it is possible to control outreach efforts or the inclusion of minorities, women, or individuals with disabilities in those particular contracts, may significantly distort the results of an FHLBank's outreach efforts since an FHLBank could not conduct outreach efforts for a significant portion of its contracts.

We also note how critical it will be that each regulated entity ensures that its accounting systems for tracking spending match up with the Finance Agency's ultimate definition of which contracts are subject to Sections 1207.23(b)(11) through (13) reporting requirements. Specifically, 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 companies as we would for vendors receiving payment directly from the Bank.[5] 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 Finance Agency 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).

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[3] 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.

[4] For example, it would be impossible for an FHLBank to comply with §1207.21(c) if that section applies to contracts with members, indemnification agreements with employees, and AHP grants.

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

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. Please clarify that the Bank is under no obligation to take any additional step to attempt to categorize individuals or contractors other than to request such information on a voluntary basis. Of course, the Bank 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 said disclosure.

Regarding the officer certification, please clarify that Section 1207.23(a) may be made subject to the above caveats and other reasonable limitations regarding the accuracy of the data due to the limitations explained above.

II. Comments on Specific Sections of the Proposed Rule

1207.1 Definitions

Business and Activities
The Bank requests that the Finance Agency narrow the definition of "Business and Activities." This definition is very broad and makes compliance with various sections of the regulations virtually impossible, as described throughout this comment letter.

HERA anticipates broad coverage, but not as broad as the definition set forth in the proposed regulations. 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 the section is consistent with the regulations, the "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.

Disability
The Bank requests that the Finance Agency remove references to disability throughout the proposed regulation for several reasons.

First, HERA specifically limits its inclusion and diversity requirements to women and minorities, and specifically defines those terms. 46 U.S.C. §4520(b). Congress did not include either "disability" or "disabled-owned businesses" as additional categories under the law. HERA is neither ambiguous as to whether Congress intended to include disability as a category, nor is it reasonable to conclude that a gap exists in including disability as a category that Congress intended to fill. Thus, the regulations run contrary to the statute, and as required under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[6] said the inclusion of these categories is not reasonable. Protections for individuals with disabilities are provided under other federal laws, including the Americans with Disabilities Act ("ADA"). While the Bank applauds the efforts and well-meaning intentions of the Finance Agency to help other potentially disadvantaged groups, the Finance Agency must defer to Congress to create law and public policy on this point.

Second, the 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. In the event the Finance Agency does not remove references to "disability" and "disabled-owned business," in the alternative, we ask that the Finance Agency clarify in its final regulation that, with regard to a regulated entity's compliance obligations under the Section 1207.21(c)(3), such compliance obligations do not displace the regulated entity's other legal obligations, including, without limitation, applicable prohibitions and limitations under the ADA.

Should the Finance Agency retain references to disability in the final regulation, the Bank believes that the 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.[7] 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 regulations, how someone would be "regarded as disabled," for purposes of contracting and employment outreach.[8] 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 a company's obligations with respect to those "regarded as" having a disability.

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[6] 467 U.S. 837 (1984)

[7] Under 29 C.F.R. Part 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.

[8] In fact, the definition of "regarded as" for purposes of the ADA has been the subject of confusion in the ADA case law.

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. As discussed above, 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 the ADA definition of disability does not appear suited to this context. Therefore, the Bank asks the Finance Agency to either remove or revise this definition as necessary.

Minority
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 regulations define minority as Black or African American, American Indian or Alaska Native, Hispanic or Latino American, and Native Hawaiian or Other Pacific Islander. The Bank asks that the Finance Agency 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[9] 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

[9] For convenience, each reference to "regulated entity" in this comment letter should be read to include the Office of Finance unless the context clearly indicates otherwise.

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.

Regarding the requirement to notify the Director within 30 days of a change in the designation of the office performing the responsibilities of this part, the Bank requests that the Finance Agency remove this requirement. The Bank's Board of Directors established the Office of Minority and Women Inclusion, and a record was made within the minutes which are provided to the Finance Agency. Any such changes to the Office of Minority and Women Inclusion will be made by the Board and subsequently reported in the minutes, which will also be distributed to the Finance Agency.

1207.20(b) Adequate Resources

The Bank believes that it is unnecessary for the Finance Agency 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 Finance Agency regulations do not contain similar provisions as it is expected that an FHLBank will provide adequate resources to meet its regulatory compliance obligations. Therefore, the Bank requests that this section be removed.

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

Requirements in 1207.21(a) and (b) that relate to the publication of the policies and procedures that require media (Braille & audio) would be burdensome compliance requirements. These requirements assume that each FHLBank would update its Equal Employment Opportunity ("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 Bank is cognizant of the ADA and where employees or applicants request accommodations, the Bank will comply with all its legal obligations. Therefore, the Bank requests that this section be removed.

1207.21(a) Equal Opportunity Notice – Classifications

The prescribed equal opportunity notice set forth in §1207.21(a) exceeds the scope of the Finance Agency'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. Therefore, the Bank requests that this section be revised to conform with HERA.

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

The Bank asks that the Finance Agency remove this section from the final regulation. The provisions of this section relating to resolving disputes in contracting infringe on the contracting rights of the Bank as set forth by the Federal Home Loan Bank Act ("FHLBank Act") at 12 U.S.C. 1432, the contracting rights of the vendor, and 1207.3 of this proposed regulation.

First, the proposed regulation interferes with the Bank's power "to make contracts," which is an explicit right granted to the Bank in the FHLBank Act. See 12 U.S.C. 1432(a). The proposed regulation would require that the Bank give vendors the "opportunity to use alternative dispute resolution ("ADR") techniques." ADR clauses are commonly found within contracts; however, the Bank normally removes such clauses. The Bank is concerned that the inclusion of the language as written would effectively modify our power "to make contracts" into "to make contracts so long as they provide for the use of ADR." The Bank believes that the decision to include ADR clauses in contracts is a decision best made by each entity.[10]

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") expressed 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 its face, they stated that federal banking agencies provide 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 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. 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, and with regard to vendors who were not awarded contracts by the Bank, 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

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

Office of Finance, their officers, employees or agents, or any other person." Granting non-selected vendors the opportunity to use ADR processes would be inconsistent with Section1207.3.

Regarding complaints of discrimination in employment, the provisions of 12 C.F.R. §1207.21(b)(3) 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, 2009, 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 oppose recent legislative efforts to preserve all means available to resolve complaints of discrimination.

<u>1207.21(b)(4) Requests for Reasonable Accommodations</u>

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.[11] 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 does not impose an undue hardship as set forth in the ADA. Regulated entities are not required to accommodate all disabilities under current, applicable law.

The Bank asks that the Finance Agency clarify the term "effective procedures."

<u>1207.21(b)(5) Diversity in Nominating or Soliciting: Board of Directors</u>

The Bank believes that the proposed regulation would permit the Bank to include a diversity statement in its director nominating materials. The Bank suggests that the Finance Agency provide guidance in the preamble to the final regulation on any alternative ways in which an FHLBank may communicate its diversity statement in connection with the director election process. In addition, the Bank asks that the Finance Agency exclude this section from the skills and experience criteria set forth in the FHLBank Directors regulation, including 12 C.F.R. 1261.7(b).

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[11] 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 ....

1207.21(b)(6) Material Clauses in Contracts

As written, the rule is vague as to whether this contractual requirement will be applied retroactively to all existing contracts with contractors. In this regard, the Finance Agency should clarify that Section 1207.21(b)(6), as written, will apply on a prospective basis, thus effecting only contracts that will be entered into with contractors after the implementation date of any final rule relating to MWI. The Bank does not believe the above section can be effectively enforced or monitored. Therefore, the Bank requests that this section be replaced with the following: "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) Outreach for Contracting

The 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 FDIC. Applying these standards to membership agreements and other non-goods and services contracts does not appear consistent with the intention of this proposed rule.

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

The Bank respectfully requests that the Finance Agency 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 bid for the award of such contracts. The Bank believes that it is extremely useful to include these individuals and businesses wherever applicable in the Request for Proposal ("RFP") process for specific bids which require an RFP 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.

The Bank also requests that the Finance Agency clarify similar language in proposed §1207.23(b)(10), which requires a description of activities to 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.

1207.22(1)(a) Reports

Under the proposed rule, the Finance Agency requires each regulated entity to, within 90 days after the effective date, submit a preliminary status report describing the actions taken thus far in establishing this office and the plans for and progress toward implementation. The final regulation should enumerate the expected deliverables to be provided in the preliminary status report. Since this is a preliminary report, compliance deadlines should be enumerated outside of this status reporting process. Specific guidance to assist a regulated entity in meeting its compliance objectives should be communicated out to all regulated entities so everyone understands the compliance expectations. In addition, the Finance Agency should provide templates for the regulated entities to complete contemporaneously with the publication of the final rule to ensure each regulated entity is providing the exact information required.

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).

The Bank requests the annual report be submitted on or before April 1, of each year (and annually on this date thereafter) to allow for the effective compilation and reporting of the previous year's data. The Bank believes that the one-month period referenced in the proposed rule does not provide adequate time for the compilation of requested information. Further, the Bank believes the annual reporting should begin April 1, 2012, not 2011 as prescribed in the proposed rule. Reporting on a significant period of time prior to the effective date of this rule appears superfluous.

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 impossible to know in advance what changes the Finance Agency may effect in the final regulation in response to comments received. Consequently, 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 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 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 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.

1207.21(c)(2) 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 certain confidential engagements (e.g., for a law firm to conduct a sensitive investigation at a regulated entity).

1207.22(d) Annual Summary

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

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 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, 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 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, Section 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 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 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 Sections 1207.23(b)(3), (7), and (8).

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

Because many FHLBanks have a small number of employees with few separations, the Bank is concerned that 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 goals under the ADA and Health Insurance Portability and Accountability Act to keep such information confidential and §1207.22 of the proposed rule, which provides that the "Finance Agency is not requiring, and does not desire, that reports under this part contain personally identifiable information." As requested above, the inclusion of disability within this regulation is problematic; therefore, we again ask the Finance Agency to remove all references to disability in the final regulation.

1207.23(b)(10) Annual Reports – Outreach Activities

The Bank respectfully requests that the Finance Agency remove the provisions in proposed §1207.23(b)(10) requiring reporting on outreach activities to low-income and inner-city

populations. The provisions of 12 U.S.C. §4520 that apply to the regulated entities focus on the inclusion and utilization of minorities and women, but do not require outreach to low-income or inner-city populations. Although an FHLBank might find such outreach useful at times as part of its program to include and utilize minorities and women, such a program would not necessarily need to include outreach to low-income and inner-city populations and, alternatively, outreach to low-income and inner-city populations would not necessarily achieve the purposes of 12 U.S.C. §4520 as it applies to the regulated entities. The Finance Agency appropriately included expanded workforce diversity requirements for the Finance Agency as mandated by 12 U.S.C. §4520(f), which requires the Finance Agency to sponsor and recruit at job fairs in urban communities. The Finance Agency did not impose such requirements on the FHLBanks because Congress specifically limited such requirements to the Finance Agency. Similarly, the Finance Agency should exclude the regulated entities from reporting on inner-city outreach activities since the provisions requiring recruitment in urban communities apply only to the Finance Agency.

The Bank also requests that the Finance Agency remove the provision requiring the regulated entities to report on activities to provide financial literacy education. Such duties are only required for the Finance Agency as provided in 12 U.S.C. §4520(f), and the regulated entities should not be required to provide financial literacy education since Congress specifically limited the requirement to provide financial literacy education to the Finance Agency. Proposed §1207.10(c)(4) requires the Finance Agency to, where feasible, partner "with inner-city high schools, girl's [sic] schools, and high schools with majority minority populations to establish or enhance financial literacy programs and provide mentoring." Financial literacy education is substantially beyond the scope of 12 U.S.C. §4520 as it applies to the regulated entities, and accordingly, the regulated entities should not be required to engage in, nor report on, financial literacy education activities since the provisions on financial literacy education apply only to the Finance Agency.

Finally, the Bank requests that the Finance Agency remove, or in the alternative clarify, the requirement that the regulated entities report on efforts to provide technical assistance for participation in the contracting process. Although the Finance Agency set forth an affirmative duty requiring the Finance Agency to offer technical assistance in proposed §1207.11(b)(2), the regulated entities are appropriately excluded from such requirement since they are not U.S. government agencies with a duty to provide technical assistance to the public. Since the regulated entities are not required to provide technical assistance, and since such assistance is outside the scope of 12 U.S.C. §4520, the regulated entities should not be required to report on technical assistance activities. Alternatively, if the Finance Agency determines that such reporting is necessary, the Bank respectfully requests the Finance Agency to clarify which types of activities constitute technical assistance.

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 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 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 Bank accordingly requests that the Finance Agency remove proposed §1207.23(b)(18) and (19). In the alternative, if the Finance Agency believes the information is necessary for a complete report, the Bank respectfully requests the regulation to 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.

The Bank thanks the Finance Agency for its consideration of these comments and reiterates its support for Congress's actions to promote diversity within our organization.

Sincerely,