April 26, 2010

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

**Re: Comments on Federal Housing Finance Agency - Proposed Rule: RIN 2590-AA28**

Dear Mr. Pollard:

The Federal Home Loan Bank of Boston ("FHLBB") appreciates this opportunity to comment on the Federal Housing Finance Agency ("FHFA") proposed rule on minority and women inclusion, published in the January 22, 2010 Federal Register, Volume 75, Number 6. The FHFA's Notice of Proposed Rulemaking ("NPRM") proposes regulations to implement Section 1116 of the Housing and Economic Recovery Act of 2008 ("HERA"). The NPRM has invited comments on all aspects of the proposed regulations by April 26, 2010; therefore, the FHLBB respectfully submits the following comments for your consideration.

As discussed more fully below, the FHLBB's comments address six primary areas of concern:

1. The scope of contracts covered by the proposed regulations and the material clause;
2. The application of the regulations to protected classes not included in the legislation;
3. Clarification of "to the maximum extent possible;"
4. Preferential treatment and potential quota issues raised by the proposed regulations;
5. Administrative reporting and publication requirements; and
6. The scope of the alternative dispute resolution requirement.

## 1. SCOPE OF CONTRACTS COVERED AND THE MATERIAL CLAUSE REQUIREMENT

Several sections of the proposed regulations expand the scope of covered contracts beyond the plain language of HERA. HERA applies "to all contracts of a regulated entity *for services* of any kind...." 12 U.S.C. § 4520(c)(emphasis added). By contrast, proposed Section 1201.1 defines "business and activities" to include "all types of contracts;" Section 1207.21(b) requires inclusion efforts to cover "all types of contracts;" Section 1207.21(b)(6) requires a material nondiscrimination clause in "each contract" a regulated entity enters into; Section 1207.21(c)(1) requires outreach efforts for "all contracts entered by the regulated entity;" and Section 1207.23(b)(11) requires regulated entities to report "the number of contracts" entered with diverse businesses and individuals. By exceeding the scope of HERA's language and encompassing contracts other than those for services, the proposed regulations impose unduly burdensome obligations with which regulated entities cannot reasonably or practically comply.

As explained more fully below, FHLBB is party to a wide range of contracts that are not considered contracting opportunities under traditional understanding. Those contracts include, but are not limited to, the following:

- 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)
- Contracts evidencing debt or equity issued by a regulated entity to its investors
- Indemnification agreements in favor of employees, officers, and directors
- Information sharing agreements between FHLBB and state or federal banking regulators

These are not the types of contracts to which inclusion efforts can properly or practically be directed.

### a. Section 1201.1 - Business and Activities

FHLBB believes the definition of "business and activities" is too broad and improperly expands the obligations of regulated entities beyond those mandated by HERA. Specifically, the definition 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." This language, which is not included in HERA, encompasses virtually everything a regulated entity does.[1] HERA does not require regulated entities to engage in minority and women

[1] The express language of 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

inclusion efforts with respect to every single activity or endeavor in which it engages. That language should be deleted from the definition in Section 1207.1 of the proposed regulations.

b. Section 1207.21(b)(6) – material clause

The obligation to include "a material clause committing a contractor to practice principles of equal opportunity and non-discrimination in all its business activities ..." in *each contract* it enters is of significant concern for a number of reasons. First, the scope of contracts for which a material clause will be required is overly broad, and regulated entities simply do not have the leverage to comply. Second, regulated entities will have no way to monitor compliance by a contractor and should not be held accountable for conduct over which they have no control. Third, FHFA lacks authority to regulate the conduct of contractors by requiring a material clause. Fourth, if included, the proposed regulations should expressly limit the material clause requirement prospectively, which is not clear from the current language of the proposed regulation.

i. Lack of bargaining power over "each contract" entered. Regulated entities do not have sufficient bargaining leverage to require the material clause in every contract for numerous reasons. For example, regulated entities will not have leverage to negotiate that clause with large computer hardware and software vendors; financial counterparties, including the largest banks and brokerage houses; insurance companies; and many other providers. Regulated entities will not be able to negotiate a material clause into form agreements required by many other types of service providers, such as utility providers Those entities likely will choose not to provide services to regulated entities if a material clause is required, which may prevent the regulated entity from carrying out its primary functions and in ensuring safety and soundness.

Similarly, under some circumstances, regulated entities are required to use specific contractors. For example, regulated entities that lease their business property often are required by building management to engage the services of certain contractors or vendors such as cleaning crews. In those situations, regulated entities will lack any leverage to negotiate a material clause, leaving the regulated entity with the choice of noncompliance with the regulation or going without necessary services.

ii. Inability to enforce material clause. The material clause should be omitted because regulated entities will not be able to monitor compliance by contractors, rendering the clause unenforceable. Moreover, the regulated entities are not in the business of enforcing equal opportunity obligations. Rather, they provide reliable wholesale funding and liquidity to member financial institutions and deliver competitively priced financial products and service and supporting housing finance and community economic growth. Expending resources on attempting to monitor contractor compliance would be inconsistent with this mandate. Further, regulated entities should not be held accountable to FHFA for contractor conduct they cannot and should not monitor or enforce.

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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).

Moreover, the final regulations should not require contractors to pass the material clause through to their subcontractors. Regulated entities have even less control to monitor or enforce material clauses in contractor-subcontractor agreements to which regulated entities are not parties.

iii. Exceeding scope of regulatory authority. HERA vests FHFA with the authority and responsibility to define, monitor and enforce the inclusion efforts of regulated entities. Neither HERA nor any other federal statute vests FHFA with authority to regulate the conduct of contractors. To the extent the material clause requirement is an attempt to regulate the conduct or activities of contractors and vendors, it exceeds the scope of FHFA's regulatory authority. If an equal employment and non-discrimination clause is required in contracts, it should not be a material clause.

iv. Possibility of retroactive application. Proposed Section 1207.21(b))(6) does not address whether the material clause requirement will be applied retroactively to existing contracts with regulated entities. Certainly, it would be extremely difficult, if not impossible, for regulated entities to renegotiate the terms of every contract to retroactively include the material clause. The final regulations should clarify that the material clause will be required only on a prospective basis.

In sum, the final regulations should omit the material clause requirement altogether. If the final regulations require regulated entities to include an equal employment clause in contracts, the clause should not be a material one. Instead, the clause should advise contractors of the regulated entity's commitment to equal opportunity and nondiscrimination, while encouraging contractors to practice equal employment opportunity and nondiscrimination. Finally, if a clause is required, whether material or not, the final regulations should clarify that the clause need only be included prospectively and not retroactively.

c. Section 1207.21(c)(1).

Proposed section 1207.21(c)(1) should be modified to clarify that regulated entities' outreach efforts to include minorities and women in contracting opportunities apply to contracts for goods and services as written in 12 C.F.R. §361.6, implemented by the Federal Deposit Insurance Company ("FDIC"), rather than "all contracts entered by the regulated entity." Outreach will be impossible or impracticable with respect to non-goods and services contracts (e.g., membership agreements).

d. Section 1207.23(b)(11).

Similarly, the final regulations should limit the scope of contracts included in the annual report to contracts for goods and services, as those are the contracts to which outreach efforts are appropriately directed.

## 2. PROVISIONS APPLICABLE TO INDIVIDUALS WITH DISABILITIES AND DISABLED-OWNED BUSINESSES.

The final regulations should not include any references to persons with disabilities or disabled-owned businesses, and all sections applicable only to those individuals or business should be omitted. Under the express statutory language, HERA's inclusion and diversity requirements are limited to women and minorities and women and minority-owned businesses. 46 U.S.C. § 4520(b). HERA does not extend those requirements to persons with disabilities or disabled-owned businesses, who are protected under other federal laws such as the Americans with Disabilities Act and Section 503 of the Rehabilitation Act, enforced by the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs ("OFCCP"), respectively. As such, FHFA lacks authority to define or regulate inclusion efforts with respect to persons with disabilities and disabled-owned businesses.

If FHFA retains references to disability and disabled-owned businesses in the final regulations, several sections of the proposed regulations require modification.

a. Section 1207.1.

The definition of disability in §1207.1 should exclude the "regarded as" prong of the definition set forth in 29 C.F.R. § 1630.2(g) and 1630.3, regulations interpreting the ADA.[2] In the context of FHFA's proposed regulations, it is not clear how someone could be "regarded as" having a disability. To the extent HERA's inclusion requirements are applied to persons with disabilities, it certainly was not the intent of Congress to protect those individuals whom a regulated entity regards as having a disability. Rather, protection would be intended for otherwise qualified individuals with actual physical or mental impairments or businesses owned by such individuals.[3]

b. Section 1207.23(b)(3).

The final regulations should not require regulated entities to submit annual reports to the FHFA identifying the number of persons with disabilities who applied for employment. Employers are absolutely precluded from making disability related inquiries of applicants in the pre-offer stage. *See* 41 C.F.R. § 60-741.42 (requiring federal contractors to invite disabled individuals and disabled veterans to self-identify, but only after an offer of employment has been extended); 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

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[2] These regulations currently are in the process of revision and have not been finalized.

[3] The "regarded as" prong of the disability definition has no logical application in the context of determining whether a business is a disabled-owned business under § 1207.1.

www.eeoc.gov/policy/docs/guidance-inquiries.html. Because regulated entitles are unable to ask applicant about disabilities, they will be unable to report on the number of persons with disabilities who apply for jobs.

c. Section 1207.21(b)(4).

The reasonable accommodation provision in § 1207.21(b)(4) would create substantive rights not otherwise available under applicable law. The proposed regulations require accommodation of *all* individuals with disabilities. Unlike the Americans with Disabilities Act and other existing federal law, the accommodation obligation in the proposed regulation is not limited to *otherwise qualified individuals* with disabilities, and the proposed regulations do not create an exception for accommodations that impose an undue hardship or raise a direct threat to health or safety. FHFA recognizes in § 1207.3 of the proposed regulations that it may not create new substantive rights. As such, the reasonable accommodation provision should be omitted as unnecessary, because other applicable law governs accommodations. Alternatively, this section of the regulations should be modified to conform with existing law.

d. Section 1207.23(b)(5).

The requirement that regulated entities report the number of employee separations by disability classification also should be eliminated. Many Federal Home Loan Banks employ a relatively small number of employees and experience very few terminations of employment in any given year. Reporting employee separations by disability classification may effectively identify a specific individual and his or her medical condition. In such circumstances, the sharing of this information may conflict with the goals under the ADA and Health Insurance Portability and Accountability Act ("HIPAA") to keep such information confidential, as well as § 1207.22 of the proposed rule, which provides that the "FHFA is not requiring, and does not desire, that reports under this part contain personally identifiable information."

## 3. CLARIFICATION OF "TO THE MAXIMUM EXTENT POSSIBLE"

Sections 1207.2(b), 1207.21(b), and 1207.21(c) of the proposed regulations 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 final regulations should clarify that when determining whether a regulated entity has met its obligations "to the maximum extent possible," FHFA will consider all relevant facts and circumstances for the particular situation and the particular regulated entity. Such facts and circumstances should include, but not be limited to, the size, location and demographics.

Additionally, the final regulations should clarify that compliance "to the maximum extent possible" will never require a regulated entity to act inconsistently with, or contrary to, (i) other applicable federal laws and regulations (such as Title VII of the Civil Rights Act of 1964, as amended, or the Americans with Disabilities Act, as amended); (ii) the fundamental obligation to maintain the financial safety and soundness of the banks or (iii) the obligation to fulfill the

statutory missions to promote affordable housing and community development and to provide liquidity to members. *See, e.g.,* 12 U.S.C. § 4513(f)(1)(B) and (C).

## 4. AVOIDANCE OF UNLAWFUL OR IMPROPER PREFERENTIAL TREATMENT

The final regulations should clarify that regulated entities are expected to engage in good faith outreach efforts to promote diversity and inclusion of women and minorities, and that these efforts should be ongoing. Each regulated entity should be evaluated, to the extent it is evaluated, on the basis of its own efforts and taking all relevant circumstances into account. Regulated entities should not be judged on the basis of results; numbers of women or minorities hired, promoted or contracted with; or dollars spent on inclusion efforts. Such measurements run the risk of violating other federal laws, which prohibit regulated entities, as employers and contracting parties, from making decisions on the basis of race or gender. Selecting female or minority applicants or contractors simply because they are female or minorities would constitute discrimination against male and non-minority individuals or businesses.

Several sections of the proposed regulations should be modified to clarify that neither HERA nor FHFA's regulations require regulated entities to give preferential treatment to any individual or business because of race or gender (or disability, if included in the final regulations), and to clarify that nothing in the regulations is intended to create a *de facto* quota system.[4] Current federal laws prohibit race or gender-based preferential treatment in both employment and contracting and also prohibit quotas based on race or gender or other protected status.

The final regulations should clarify that efforts to ensure inclusion and utilization of minorities and women "to the maximum extent possible" does not require preferential treatment of minorities, women or businesses owned by minorities or women. Rather, the regulations should clarify that efforts should be directed to good faith efforts to promote diversity and inclusion of women and minorities in employment and contracting opportunities. Through good faith efforts to develop a pool of job applicants or potential contractors that includes protected individuals and businesses, regulated entities will increase the likelihood that they will be offered employment or contracting opportunities. However, employees and contractors should always be selected based on qualifications and other legitimate, business-related factors, including cost, not on the basis of gender or race. This modification should be made to Sections 1207.2, 1207.21(b), and 1207.21(c).

Similarly, the final regulations should eliminate the requirement in Section 1207.21(c)(3) that regulated entities "ensure the consideration of the diversity of a contractor" when reviewing and evaluating offers, and the requirement in Section 1207.21(b)(5) requiring regulated entities to "encourage the consideration of diversity" in nominating or soliciting nominees for positions

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[4] Quotas based on sex, race or other protected categories are generally unlawful under applicable United States Supreme Court decisions and Title VII of the Civil Rights Act of 1964. Further, the regulations of the Department of Labor's OFCCP provide that "[q]uotas are expressly forbidden." 41 C.F.R. § 60-2.16(e)(1).

on boards of directors. Neither race nor gender can lawfully be a consideration in making selection decisions. In summary, to be lawful, the regulations should focus on a regulated entity's good faith outreach efforts to develop a pool of diverse job applicants, potential contractors or board members, not on the end results.

The final regulations also should clarify that regulated entities will not be judged based on the number of minorities or women included in the workforce, the number of contracts entered with minority and women-owned businesses and dollars spent, or any other data regulated entities must include in reports to FHFA under Sections 1207.22 or 1207.23. The regulations should recognize that diversity is an on-going process. The final regulations also should clarify that the regulated entities will not be judged against one another in terms of these factors. That type of comparison would create *de facto* quotas for regulated entities to meet based on the workforce composition or number of minority and female contracts entered by other regulated entities.

## 5. ADMINISTRATIVE, REPORTING AND PUBLICATION REQUIREMENTS.

a. Section 1207.20.

The final regulations should clarify that employees who are responsible for compliance efforts need not report directly to the officer directing the regulated entity's inclusion efforts. Section 1207.20 of the proposed regulations requires each regulated entity to establish and maintain an office of minority and women inclusion (or designate an existing office) to perform the responsibilities under the proposed regulation, under the direction of an officer who reports directly to either the Chief Executive Officer or the Chief Operating Officer or the equivalent. While the officer is responsible for coordinating and overseeing inclusion efforts, many other employees who are not direct reports of that officer will be involved in those efforts. For example, a regulated entity may designate its head of human resources as the responsible officer, but may rely on accounting department employees to track diverse contractor spend amounts or procurement department employees to meet certain contracting requirements. Accordingly, we request that FHFA 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.

b. Section 1207.21(a), (b)(4) and (b)(7).

The final regulations should not require regulated entities to post "through alternative means" statements affirming the commitment to equal opportunity and contracting, policies and procedures implement to ensure inclusion of minorities and women, or effective procedures for reviewing and granting requests for reasonable accommodation. This type of accommodation for individuals with disabilities exceeds the scope of FHFA's regulatory authority. Moreover, regulated entities already are required to accommodate qualified individuals with disabilities in appropriate situations under other federal laws such as the ADA.

Should FHFA retain the "alternative means" posting requirement, the final regulations should clarify when it is "necessary" for regulated entities to post the § 1207.21(a) EEO statement in that manner. Requiring posting through alternative means, including Braille and

audio, in all instances would be burdensome and costly, and unnecessary, unless it is reasonable to expect blind or deaf individuals to review the posting.

c. Section 1207.21(c)(2).

The final regulations should clarify that, when 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 or consultant to conduct a sensitive investigation at a regulated entity).

d. Section 1207.22(a)(1).

The final regulations should enumerate the expected deliverables to be included in the preliminary status report due 90 days after the regulations become effective, which is referenced in Section 1207.22(a)(1). FHFA should provide templates for the preliminary status report contemporaneously with the publication of the final regulations to ensure that each regulated entity understands what information is required.

e. Section 1207.22(b)

FHLBB is extremely concerned about disclosure to the public of the large amounts of otherwise confidential information required in the annual reports. In the final regulations, Section 1207.22(b) should provide that the information provided in reports will not be disclosed to the public. The data and information required to be included in annual reports by Section 1207.23 is extremely broad, includes information that is otherwise confidential (such as, without limitation, nonpublic claims of discrimination, settlement amounts, requests for reasonable accommodation, and types of disabilities accommodated) and could be misused or misconstrued by the public.

Moreover, Section 1207.23 also should be revised to exclude any information not otherwise available to the public from its gamut because FHFA could be required to disclose it pursuant to a Freedom of Information Act request. To the extent FHFA requires information from regulated entities for enforcement or monitoring purposes, it could require production of that information upon request. That approach would balance the agency's need to monitor with the regulated entities' privacy concerns.

f. Section 1207.22(c).

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 calendar reporting period provides regulated entities with only one month to prepare the substantial reports required under the proposed regulations. In order to provide regulated entities with sufficient time to accurate prepare the annual reports by

February 1, the reporting period should begin on October 1 and end on September 30 of the following year. This reporting period also coincides with that of the annual Standard Form 100 (EEO-1) many regulated entities are required to submit to the EEOC.

g. Section 1207.23(b)(10) Annual Reports – Outreach Activities.

The final regulations should omit the requirements in § 1207.23(b) that regulated entities report their outreach activities directed toward low-income and inner-city populations. These outreach efforts are not required by HERA, which mandates outreach to include and utilize minorities and women. 12 U.S.C. § 4520.

Similarly, the final regulations should omit the requirement that regulated entities report on their activities to provide financial literacy education. While 12 U.S.C. § 4520(f) requires HERA to provide financial literacy education, that requirement does not extend to regulated entities. This exceeds the scope of FHFA's authority over regulated entities' outreach efforts toward women and minorities.

Finally, the final regulations should omit the requirement that the regulated entities report on efforts to provide technical assistance for participation in the contracting process. Although the FHFA set forth an affirmative duty requiring the FHFA to offer technical assistance in proposed §1207.11(b)(2), the regulated entities are appropriately excluded from such requirement because they are not federal government agencies with a duty to provide technical assistance to the public. Because the regulated entities are not required to provide technical assistance, and because 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.

h. Section 1207.23(b)(15) and (16)

The final regulations should not require regulated entities to report information about complaints or claims of discrimination, outcomes, and amounts paid in settlements or judgments, which is required by Section 1207.23(b)(15) and (16). Regulated entities should not be judged on the basis of unproved allegations made against them. Any employee, applicant, or other individual can file a claim or complaint, and such claims or complaints may be entirely lacking merit. Moreover, regulated entities may seek to settle claims for business reasons separate and apart from any admission of liability. Requiring regulated entities to report settlement amounts may discourage them from engaging in settlement discussions, requiring them to expend unavailable time and money in administrative processes or litigation.

## 6. MANDATORY ALTERNATIVE DISPUTE RESOLUTION.

Section 1207.21(b)(3), which requires that internal procedures for resolving complaints of discrimination include alternative dispute resolution ("ADR"), should be omitted from the final regulations. First, the ADR requirement imposes significant financial costs and requires significant resources while creating greater legal risk for the regulated entities. Second, the requirement is inconsistent with the pre-litigation procedural requirements for complaints of employment discrimination under federal law. Third, the ADR requirement is inconsistent with

current trends in the law. Finally, the requirement that ADR be used "where appropriate" is vague and provides little guidance to regulated entities about their obligations.

a. Financial Cost and Depletion of Resources.

Various forms of ADR, such as arbitration or mediation, can be extraordinarily expensive for the parties. Mandatory fees to the arbitration forum, the arbitrator or the mediator easily reach tens of thousands of dollars and sometimes significantly more. Additionally, the regulated entities would incur legal fees associated with these types of ADR to protect themselves and their legal positions. Finally, the personnel resources required to participate in arbitration or mediation also will impose significant burdens on regulated entities.

Regulated entities should not be required to bear these costs and burdens any time an employee or contractor makes an internal complaint. Such complaints may be unfounded, based on a misunderstanding, or otherwise not worthy of the expense of formal ADR.

b. Current Exhaustion of Administrative Remedies.

The requirement of ADR in resolving internal disputes is inconsistent with the requirements in many federal employment discrimination statutes that employees file administrative charges with a federal or state agency before litigating or arbitrating employment discrimination disputes. Those administrative schemes often provide the opportunity for voluntary (and free) mediation (one form of ADR) at the outset, or provide the parties with the choice of engaging in litigation or arbitration (another form of ADR) later. Requiring ADR of an internal complaint before a charge of discrimination has been filed circumvents these other statutory schemes.

Moreover, the requirement potentially places regulated entities at a disadvantage. Through mandatory, pre-charge ADR, the regulated entities will be required to set forth their legal arguments and understanding of the facts before the employee is required to file an administrative charge. Employees would know the regulated entities' defenses before even crafting their administrative charges of discrimination.

c. Current Legal Trends.

The ADR requirement is inconsistent with recent legislative initiatives to preclude mandatory arbitration of employment-related claims. For example, the American Recovery and Reinvestment Act of 2009 ("ARRA") prohibits 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 is expected to sign 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 H.R. 3326, 111th Cong. (2009). In short, the proposed section stands against

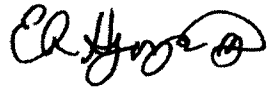
the current movement away from mandatory arbitration procedures and would be contrary to recent legislative efforts to preserve all means available to resolve complaints of discrimination.

d. Use of ADR "When Appropriate."

At the least, the final regulations should clarify when ADR is considered appropriate and what type or types of ADR are required. ADR cannot be appropriate where an employee or contractor refuse to agree to arbitration or other forms of ADR. Regulated entities do not have the power to compel an adverse party to arbitration and as noted above, agreements containing ADR clauses are not always enforceable.

The Federal Home Loan Bank of Boston appreciates the FHFA's consideration of these comments.

Sincerely,



Edward A. Hjerpe, III
President and Chief Executive Officer