FHLBI

FEDERAL HOME LOAN BANK OF INDIANAPOLIS

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April 26, 2010

via Federal eRulemaking Portal and electronic mail to: RegComments@fhfa.gov

Alfred M. Pollard, General Counsel
Attention: Comments/RIN 2590-AA28
Federal Housing Finance Agency
Fourth Floor
1700 G Street, NW
Washington, DC 20552

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

Dear Mr. Pollard:

The Federal Home Loan Bank of Indianapolis (the "Bank") appreciates this opportunity to comment on the Federal Housing Finance Agency ("FHFA") proposed rule on minority and women inclusion ("Proposed Rule"), which would apply to Fannie Mae, Freddie Mac, and the Federal Home Loan Banks ("FHLBanks)" and, together with Fannie Mae and Freddie Mac, the "Regulated Entities"[1]. 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 Bank is committed to taking meaningful action to fulfill the mandates of Section 1116. Achievement of this goal presents us with challenges, which we are determined to meet. The Bank urges the Finance Agency to make certain changes to the final rule that will facilitate the Bank's fulfillment of the objectives of Section 1116 and the final rule. To that end, we respectfully submit the following comments for the Finance Agency's consideration.

I. General Comments

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

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. There are various opportunities throughout the Bank to provide minority-, women-, and disabled-owned businesses with increased access to business relationships. If not

[1] 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.

clarified in the final rule, however, we believe the legal standard will be difficult for the Bank and its examiners to apply, hindering achievement of the rule's intended purpose.

The language "to the maximum extent possible" is derived from HERA and is found in 12 U.S.C. §4520(b). We strongly believe that 12 U.S.C. §4520(b) does not grant the Bank a license to pursue inclusion efforts in any way that is inconsistent with either (i) our obligations to comply with other federal laws and regulations,[2] (ii) our obligations to maintain safety and soundness, or (iii) our obligations to fulfill our statutory missions to promote affordable housing and community development and to provide liquidity to members.[3] The final rule should expressly provide that safety and soundness and the best interests of the FHLBanks are factors in determining what constitutes "the maximum extent possible."

Recognition of Demographic Differences

The Bank asks that the FHFA consider that each FHLBank has differing demographics from the other Regulated Entities based on its location and even within its own district. As a result, FHFA expectations regarding compliance and outreach should be tailored and evaluated based upon the regional demographics.

Impermissibility of Formal or Informal Quotas

It is noteworthy that neither 12 U.S.C. §4520 nor the Proposed Regulation permits or requires a Regulated Entity to create minimum quotas or apply other numbers-based models in promoting diversity in their employment and contracting processes. This is appropriate since these kinds of approaches could be unlawful under applicable U.S. Supreme Court decisions and Title VII of the Civil Rights Act of 1964, which requires equal employment opportunities for all genders and racial groups. We also note that regulations of the Department of Labor's Office of Federal Contract Compliance Programs provide that "[q]uotas are expressly forbidden."[4]

A quota system becomes no more permissible if it is informal and enforced only through the FHFA examination process. In reviewing the Regulated Entities' compliance with Section 1207, FHFA examiners should focus on the robustness of the entity's inclusion processes, not the end results of those processes. Note that a de facto quota can be created simply through having and communicating to the Regulated Entities a regulatory expectation that the number of diverse employees hired and promoted and the number of diverse contractors engaged must increase from year to year (or through simply inferring from the reported numbers that the Regulated Entity's inclusion processes are

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[2] For example, to the extent Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, 42 U.S.C. 1981, and other federal antidiscrimination laws prohibit an FHLBank from engaging in certain practices, all of these prohibitions would remain in effect and undisturbed by 12 U.S.C. 4520 and the proposed regulation.

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

[4] 41 C.F.R. § 60-2.16(e)(1).

deficient). The final regulation should clarify that the FHFA will not expect the Regulated Entities to use quotas and numbers-based models in their inclusion efforts and will not permit FHFA personnel to promote the use of such an approach through the examination process.

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 Rule purport to apply to all contracts of a Regulated Entity, not just contracts for services.[5] To conform to the express scope limitations of the statute and the stated purpose of the rule, we believe the scope section of the final rule (Section 1207.2(c)) should be revised to specify that the final rule applies to services contracts. Conforming changes should be made to other sections of the rule.[6]

The Regulated Entities are party to a wide range of contracts that are not typical "service" contracting opportunities, yet they would be considered services contracts within the scope of the Proposed Rule. The beginning of a partial list of such contracts for an FHLBank would include: standby letters of credit; lien release and inter-creditor 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);[7] 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. Thus, if the final rule were to apply to all contracts entered into by an FHLBank, it would potentially apply to FHLBank transaction agreements with its members and counterparties. Such an expansion in scope would affect the FHLBanks' fulfillment of their statutory mission of providing credit and liquidity to members.

In addition, we note how critical it will be that each Regulated Entity ensures that its accounting systems for tracking spending match with the FHFA's ultimate definition of which contracts are subject to Sections 1207.23(b)(11) through (13) reporting requirements. Specifically, with respect to

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[5] 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).

[6] Each of the following sections should be amended to clarify that the rule is limited in scope to services contracts: Sections 1207.1 (definition of "business and activities" includes "all types of contracts"); 1207.21(b) (inclusion efforts to cover "all types of contracts"); 1207.21(b)(6) (nondiscrimination clause to be inserted in "each contract [a regulated entity] enters"); 1207.21(c)(1) (contracting outreach efforts "(a)pply to all contracts entered by the regulated entity"), and 1207.23(b)(11) (obligation to report "the number of contracts" entered with diverse businesses and individuals).

[7] 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.

companies providing goods and services paid for by FHLBank employees or directors who are then reimbursed by the FHLBank, we do not maintain the same level of detailed information regarding these companies as we would for vendors receiving payment directly from the FHLBank.[8] We expect this is true of the accounting systems for other Regulated Entities as well. Therefore, we request that, for purposes of reporting to the FHFA on contracting inclusion efforts, a Regulated Entity be permitted to exclude payments not made directly by a Regulated Entity to a vendor (e.g., employee or director reimbursement payments).

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

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

In addition, the Bank is concerned that the Proposed Rule 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 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 permitted to consider the disabled status of such individuals as a component when the Regulated Entity reviews and evaluates offers from individual contractors. The final rule should take into consideration these and other requirements of the ADA and be made consistent with those requirements.

The final rule should also clarify that Section 1207.23(a), officer certification as to the accuracy of the data in the annual report, may be made subject to the above caveats and other reasonable limitations on the accuracy of a Regulated Entity's diversity reporting, to the extent such limitations are clearly identified in the annual report.

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[8] For example, the Bank would not necessarily have a legal name or address for a taxi cab company providing services to a Bank employee traveling on business, much less any information about the possible diverse status of the owners of the taxi cab company.

II. Comments on Specific Sections of the Proposed Rule

1207.1 Definitions

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 may 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 in which 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. It is not clear in the context of the Proposed Rule how someone would be "regarded as" having a disability.

1207.20 Structure of a Regulated Entity's Designated Office of Minority and Women Inclusion

Proposed Section 1207.20 requires each Regulated Entity to establish and maintain an office of minority and women inclusion (or designate and maintain an existing office) to perform the responsibilities under the Proposed Rule, "under the direction of an officer of the regulated entity or the Office of Finance who reports directly to either the Chief Executive Officer or the Chief Operating Officer, or the equivalent."

The final rule should clarify that Regulated Entity employees responsible for a portion of its compliance processes need not formally report to the officer directing the entity's inclusion efforts and that the officer's role under Section 1207.20(a) is to coordinate the Regulated Entity's inclusion efforts. For example, a Regulated Entity may designate its head of Human Resources as its Section 1207.20(a) responsible officer, but then rely on a separate Accounting department to track diverse contractor spend amounts to meet the various contracting requirements. Thus, the final rule should clarify that some of the Section 1207 responsibilities may be performed by employees not within the Regulated Entity's Office of Minority and Women Inclusion.

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 to comply with. These requirements assume that each FHLBank would update its EEO notice, policies and procedures, and job postings on an ongoing basis to be both Braille and audio accessible, regardless of whether the FHLBank has employees or applicants who are vision or hearing impaired. The FHLBank is cognizant of the ADA and, where employees or applicants request accommodations, the FHLBank will comply with all its legal obligations.

1207.21(b)(6) Material Clauses in Contracts

Section 1207.21(b)(6) of the Proposed Rule would require a Regulated Entity to include in each contract it enters into with a contractor "a material clause committing a contractor to practice principles of equal opportunity and non-discrimination in all its business activities …." While we support the intent of the Proposed Rule, requiring such a clause in every FHLBank services contract will be impossible from a practical standpoint; not every contract the Bank 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. In addition, this Section also calls for a Regulated Entity to require "each such contractor to include the clause in each subcontract it enters for services or goods provided to the regulated entity…" The Bank does not have the ability to monitor contractors or force subcontractors to enter into the above clause. For these reasons, the final rule should allow the FHLBanks more flexibility relating to such contracts.

1207.21(c) Outreach for Contracting

The FHLBank 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 Federal Deposit Insurance Company ("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.

1207.22(a)(1) Reports

Under the Proposed Rule, the FHFA requires each Regulated Entity to, within 90 days after the effective date of the regulation, submit a preliminary status report describing the actions taken, plans for and progress toward implementing this office. 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 to all Regulated Entities so all interested parties understand the compliance expectations.

1207.22(a)(1) Timing for the Initial Reports

The Proposed Rule would require both a preliminary status report within 90 days after a final regulation becomes effective and the initial annual report to be submitted by February 1, 2011.

Most of the FHLBanks' efforts to comply with the diversity regulation will of necessity begin only after a final regulation is issued, since it is impossible to know in advance what changes the FHFA may effect in the final regulation in response to comments received. Given this fact, it would be unfair and counterproductive to ask the FHLBanks to report on their compliance efforts for periods preceding the effective date of the final regulation (i.e., before the 12 U.S.C. §4520(a) "standards and requirements" are 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 the effective date of the final regulation 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 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 previous 12-month reporting period (as determined by FHFA in the final regulation).

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 FHFA the number of persons with disabilities applying for employment with the Regulated Entity.

However, the Equal Employment Opportunity Commission (EEOC) advises employers against making disability-related inquiries prior to making an offer of employment and, therefore, the Regulated Entity will not be able to provide data showing the disability classification of individuals who apply for, but are not offered, employment as requested by this section. In fact, asking for this data 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 particular 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 (OFCCP) have focused on comparative analysis by utilizing a concept whereby the employer can apply minimum job qualifications to eliminate unqualified persons, thus making the comparison between qualified applicants and those chosen for the position more reflective of real-life determinations. Otherwise, an "apples versus oranges" problem arises and comparisons between those who apply and those who are chosen mean very little. Therefore, we request that the final regulation clarify that a Regulated Entity may apply minimum job qualifications to eliminate unqualified persons for purposes of reporting the number of individuals applying for employment or promotion under Sections 1207.23(b)(3), (7) and (8).

Another issue is that each FHLBank defines "applicants" differently, which, therefore, will affect the FHFA's report when such information is combined. For example, many FHLBanks consider applicants to be individuals who have applied for a position *and* completed an office interview. Other FHLBanks consider applicants any individual who has applied for a position and is qualified, regardless of whether the individual is interviewed.

The OFCCP defines an internet applicant as: i) an individual submits an expression of interest in employment through the Internet or related electronic data technologies; ii) the contractor considers the individual for employment in a particular position; iii) the individual's expression of interest indicates the individual possesses the basic qualifications for the position; and, iv) the individual at no point in the contractor's selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.[9] The FHFA may consider a similar definition for "applicants" as it relates to the Regulated Entities.

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

Because many FHLBanks have a small number of employees with few separations, the Bank is very 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

[9] 41 CFR Part 60-1.3

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 §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."

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

We request that the FHFA remove the provision requiring the Regulated Entities to report on activities to provide financial literacy education. Since this will be an additional cost on our financial institution members and is not otherwise required by statute per 12 U.S.C. §4520, we do not believe financial literacy education, although a very important matter, should be imposed on the Regulated Entities by regulation.

1207.23(b)(18) and (19) Annual Reports

Proposed Sections §1207.23(b)(18) and (19) require the regulated entities to provide narratives in the annual report identifying and analyzing successful and unsuccessful activities, describing the progress made from the previous year, discussing areas where improvement is necessary, and describing anticipated efforts and results expected in the succeeding year. Despite proposed §1207.3 limitations, the FHLBank 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.

We believe 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 the 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. We request that the FHFA remove proposed §1207.23(b)(18) and (19).

In the alternative, if the FHFA believes the information is necessary for a complete report, we respectfully request the regulation 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 § 911.

We thank you for this opportunity and for your consideration of our comments on this Proposed Rule. If you have any questions or need clarification with respect to these comments, please contact the undersigned.

Sincerely,

FEDERAL HOME LOAN BANK OF INDIANAPOLIS

Milton J. Miller
President & Chief Executive Officer