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

Re: Proposed Rule: RIN 2590-AA28 (Minority and Women Inclusion)

Dear Mr. Pollard:

Freddie Mac is pleased to submit these comments concerning the proposed minority and women inclusion rule published by the Federal Housing Finance Agency ("FHFA") on January 11, 2010.[1] The proposed rule is designed to implement section 1116 of the Housing and Economic Recovery Act of 2008 ("HERA"). In general, the proposed rule requires Freddie Mac, Fannie Mae, and the Federal Home Loan Banks (the "Regulated Entities") to: (1) establish an office of minority and women inclusion; (2) institute policies and procedures regarding equal opportunity in employment and contracting; and (3) report certain employment and contracting information.

Freddie Mac embraces inclusion of minorities and women and the intent behind FHFA's proposed rule. We also share FHFA's goal of promoting diversity and we commend FHFA for its leadership in proposing this rulemaking. Freddie Mac has been recognized as a leader in its commitment to diversity and has received numerous honors and awards for its efforts. Most recently, in the April 2010 issue of Hispanic Business, Freddie Mac was ranked #19 in the Hispanic Business Diversity Stock Index, which is comprised of companies that appear on the Diversity Elite ranking of best companies for Hispanics in the September 2009 issue of Hispanic Business. In addition, in 2009, Freddie Mac was recognized by Black Enterprise, Working Mother Magazine, Latina Style, Black EOE Journal, and Professional Woman's Magazine. Moreover, Freddie Mac's Legal Division received the Minority Corporate Counsel Association's Employer of Choice Award in 2008.

After reviewing the proposal, we agree that most requirements are desirable and consistent with our existing efforts. We have identified a few provisions that may not further the minority and women inclusion goals of HERA and that may also prove unduly burdensome. As described below, Freddie Mac respectfully suggests that FHFA:

(1) clarify the categories of "disabled" and "disabled-owned business" due to practical and legal barriers in identifying disability status;

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[1] 75 Fed. Reg. 1289. By notice published March 8, 2010, FHFA extended the comment period to April 26, 2010. 75 Fed. Reg. 10446.

(2) remove the provisions that would require establishment of a contract bid protest process, to avoid creating new substantive rights for vendors to protest contract awards by the Regulated Entities, and to reduce the burden and cost associated with creating such a process;

(3) remove the establishment of mandatory employee alternative dispute resolution procedures, inasmuch as we have an existing complaint resolution process; and

(4) combine the annual submission of information into one report, with the submission deadline extended to March 31 of each year, in order to allow sufficient time to collect data and to avoid duplication of resources.

1. Disability Status

In addition to minorities and women, and businesses owned by them, the proposed rule addresses employment and contracting requirements with respect to disabled individuals and disabled-owned businesses. We applaud FHFA's efforts to include disabled populations within the scope of the proposed rule. We note that there are practical and legal reasons that counsel against the mandatory identification of the disability status of employees, applicants for employment, and contractors. We therefore recommend that FHFA specifically state that the Regulated Entities would be required to use voluntary, commercially reasonable efforts to identify the "disabled" and "disabled-owned business" populations under the proposed rule, in recognition of the subjective nature of the terms and legal barriers to requiring individuals to identify their disabilities.

Freddie Mac does not currently track the disability status of its applicants for employment, employees or contractors. In the event FHFA adopts the proposal, significant time would be required to implement appropriate tracking systems. We suggest that FHFA postpone the reporting requirements for disability-related categories until 2012, to allow sufficient time to establish new tracking systems.

a. Employment Issues

The proposed rule includes requirements for the annual reporting of certain data to FHFA related to employees' disability status.[2] Proposed § 1207.23. The contents of the annual report include such data as "disability classification" for individuals: (1) applying for employment; (2) hired for employment; (3) separated from employment; (4) applying for promotion; and (5) promoted. Proposed § 1207.23(b)(3), (4), (5), (7), and (8).

As explained below, the definition of "disabled," under the proposed rule, leaves significant room for judgment (and, therefore, time and resource intensive potential disputes), based on each individual's circumstances. Under the proposed rule, "disabled" is defined as "a person with a disability." Proposed § 1207.1. "Disability," in turn, is defined by reference

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[2] The proposed rule also addresses internal policies and procedures. Proposed §§ 1207.21(a) (publication of equal opportunity notice) and 1207.21(b) (policies and procedures). However, by their nature, these non-discrimination and outreach provisions do not raise the same definitional and counting concerns that are raised by the reporting requirements.

to the rules and interpretive guidance under the Americans with Disabilities Act (ADA).[3] These ADA rules define "disability," in general, as a "physical or mental impairment that substantially limits one or more of the major life activities" of an individual.[4] Moreover, "physical or mental impairment" means: (1) "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of" certain body systems; and (2) "[a]ny mental or psychological disorder."[5]

The ADA rules provide further definitions for the terms "major life activities" and "substantially limits." 29 CFR 1630.2(i) and (j). In addition, the interpretive guidance to the ADA provides extensive explanations of the components of the definition of "disability." 29 CFR Part 1630 Appendix – Interpretive Guidance on Title I of the Americans with Disabilities Act ("Guidance"). Moreover, a particular "impairment" may be a disability for one person, but not for another. As the Guidance notes, the ADA and the implementing rules:

> do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of the impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

Guidance at Section 1630.2(j). In summary, the definition of "disabled" leaves significant room for judgment, because a "disability" for one person may not be a "disability" for another.

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[3] Specifically, "*Disability* has the same meaning as defined in 29 CFR 1630.2(g) and 1630.3 and Appendix to Part 1630 – Interpretive Guidance on Title I of the Americans With Disabilities Act ['Guidance']" Proposed § 1207.1. In the context of the ADA, the definitions and interpretations of "disability" do not present the same challenges as discussed herein with respect to the proposed rule for *reporting* disability status of employees and contractors. As explained by the EEOC, which enforces Title 1 of the ADA, the "ADA is intended to enable disabled persons to compete in the workplace based on the same performance standards and requirements that employers expect of persons who are not disabled...[and] the determination of whether an individual is qualified for a particular position must necessarily be based on a case-by-case basis." See Guidance.

[4] Disability means, with respect to an individual –
(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(2) A record of such an impairment; or
(3) being regarded as having such an impairment. 29 CFR 1630.2(g).

[5] Physical or mental impairment means:
(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or
(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 CFR 1630.2(h).

Even if the definitional challenges could be resolved, Freddie Mac would face obstacles, as a practical matter, in determining which employees, or applicants for employment, are "disabled." As noted above, a "disability" is not necessarily readily apparent, thus making difficult a "disability" determination based on sight. This is especially true for "mental impairments" that may render one "disabled" under the proposed rule.

In order to report accurately under the proposed rule, Freddie Mac would need to ask employees, and applicants for employment, about their disability status. However, such an approach would present significant legal problems in complying with the limitations on such inquiries under the rules implementing the ADA.[6] In addition, the self-reporting of disability status could understandably conflict with the interests of those employees who may wish to maintain the confidentiality of such information.

Moreover, the legal constraints about identifying "disabled" populations are recognized by the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"), which monitors the compliance of federal contractors with Section 503 of the Rehabilitation Act of 1973. The OFCCP only requires federal contractors to solicit information about disabled or veteran's status after an offer of employment has been extended (as opposed to soliciting such information from job applicants). Moreover, the solicitation of such information is entirely voluntary on the part of the employees; they must be specifically informed that providing the information is voluntary and that refusing to provide the information will not result in any adverse employment action. We believe these are sensible restrictions that would work well if incorporated by FHFA into the requirements of the proposed rule.

b. Contracting Issues

The proposed rule also addresses contracting requirements with respect to disabled individuals and disabled-owned businesses. For the reasons explained above, regarding the definition and accurate counting of "disability" status, Freddie Mac currently does not identify, or maintain records of, the disability status of the entities with which it contracts or their employees.

The proposed rule that relates to contracting includes requirements for the annual reporting of certain data related to disability status to FHFA. Proposed § 1207.23. The contents of these reports include such data as number of contracts entered with, and payments made to, "disabled or disabled-owned businesses." Proposed § 1207.23(b)(11). Under the proposed rule, "disabled" is defined as discussed above. "Disabled-owned business" is defined as one of two categories: (1) a business qualified as a "Service-Disabled Veteran-Owned Small Business Concern" ("Disabled Veteran Business") under the Small Business Administration rules[7]; or (2) a business where more than 50% of the ownership or control is held by one or more persons with a disability, and more than 50%

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[6] *See* 29 CFR 1630.13 and 1630.14 (prohibitions on inquiries of applicants and employees regarding disability status, except under limited circumstances).

[7] 13 CFR 125.8 through 125.13.

of the net profit or loss of the business accrues to one or more persons with a disability. Proposed § 1207.1.

Just as in the employment context, the definition of "disability" and the determination of businesses that are defined in terms of "disability" present certain obstacles to accurate reporting. The definitions make it difficult, as a practical matter, to determine which contractors would fall within such definitions to verify any claims. Although some contractors may self-identify upon request, there is no assurance that reporting on the basis of self-identification would result in statistics that are sufficiently accurate to be meaningful. We make this observation mindful that the statute does not authorize affirmative action in favor of those entities. These concerns do not extend, however, to the outreach efforts, contained in the proposed rule, which we believe would be beneficial.

c. Conclusion

For the reasons stated above, we suggest that FHFA specifically state that the Regulated Entities would only be required to use commercially reasonable efforts to identify "disabled" and "disabled-owned business" populations under the rule based on voluntary self-reporting by the individuals or businesses involved. With respect to "disabled-owned businesses," we recommend that this definition be restricted to those businesses that self-report as either a Disabled Veteran Business or as a business that is certified as a disabled-owned business by a nonprofit organization, such as the U.S. Business Leadership Network. Such an alternative would mitigate to some degree the definitional problems, as it would recognize the subjective nature of these provisions.

2. Protesting Contract Awards

The proposed rule includes reporting requirements that presume the existence of company policies and procedures for unsuccessful bidders to challenge a contract award, similar to those in place at government entities under the Federal Acquisition Regulation (FAR). For example, the proposed rule requires reporting on:

> [T]he number of equal opportunity complaints ... against [Freddie Mac] that ... (ii) [c]laim discrimination in any aspect of the contracting process ... and (iii) were resolved through the regulated entity's ... dispute resolution procedure.[8]

Freddie Mac is not subject to the FAR and is not required to justify its awards to disappointed bidders. As a result, Freddie Mac does not have a system for accepting challenges to its contracting processes. And putting such a system into place would be both costly and resource intensive. In the absence of any statutory intent to create new substantive rights on the part of disappointed bidders (and, in fact, an express regulatory intent not to do so, see Proposed § 1207.3), these additional costs and delays appear difficult to justify. Therefore, we suggest that FHFA modify the proposed rule, as described below, to remove these bid-protesting processes.

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[8] Proposed §1207.23(b)(15). The proposed rule also requires reporting on "amounts paid to claimants by the regulated entity ... for settlements or judgments on discrimination complaints ... [i]n any aspect of the contracting process or in the administration of contracts....." Proposed § 1207.23(b)(16).

Another provision of the proposed rule would require the Regulated Entities to establish procedures to "receive and attempt to resolve complaints of discrimination in employment and in contracting, which shall include an opportunity to use alternative dispute resolution techniques, where appropriate." Proposed § 1207.21(b)(3). This provision does not create substantive rights that could be enforced against Freddie Mac, raising uncertainty regarding the purposes of these required procedures and the resulting costs and delays.

It is worth noting that, although government contractors are subject to affirmative action requirements in employment, they are not subject to a requirement that they accept and report on challenges to their contracting practices. The affirmative action regulations that require government contractors to have an internal audit and reporting system to measure the effectiveness of their affirmative action program do not include dispute resolution requirements. 41 CFR § 60-2.17(d). Instead, the OFCCP receives complaints and resolves related disputes with respect to covered government contracts.

3. Employee Alternative Dispute Resolution

The proposed rule would require the establishment of an alternative dispute resolution (ADR) procedure outside of Freddie Mac's normal process of resolving employment discrimination complaints. Such a procedure would consume resources where Freddie Mac already has an existing process for resolving employment discrimination complaints, and when ADR programs are available – and have been used – without formal regulatory requirements.[9] We therefore suggest removing this provision.

The proposed rule would require the Regulated Entities to establish "internal procedures to receive and attempt to resolve complaints of discrimination in employment and in contracting, which shall include an opportunity to use alternative dispute resolution techniques, where appropriate." Proposed § 1207.21(b)(3). The proposed rule also requires reporting on "the number of equal opportunity complaints ... against [Freddie Mac] that ... were resolved through the regulated entity's ... dispute resolution procedure."[10] Proposed § 1207.23(b)(15)(iii).

We believe that these specific procedures would prove costly and unnecessary. Freddie Mac's procedures for resolving employment discrimination complaints have proved successful over the years. Any requirements to follow prescribed ADR procedures would, in all likelihood, add costs and delays to these current procedures. Moreover, programs already exist at the federal and local level to provide employment discrimination complainants with access to ADR. At times, Freddie Mac has participated in such ADR programs in the past. Accordingly, we suggest that these ADR provisions of the proposed rule be removed.

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[9] The notice of proposed rulemaking also does not identify any problems with the other Regulated Entities that would substantiate the ADR requirement. Nor does the authorizing provision of HERA address the issue of ADR. 12 USC 4520.

[10] Proposed § 1207.23(b)(15). The proposed rule also requires reporting on "amounts paid to claimants by the regulated entity ... for settlements or judgments on discrimination complaints ... [i]n any aspect of the contracting process or in the administration of contracts....." 1207.23(b)(16).

4. Extension of Deadline for, and Merger of, Annual Report

The proposed rule calls for two types of annual submissions to FHFA regarding minority and women inclusion: (1) an "annual report," due February 1 of each year, reporting on the activity of the previous year with respect to numerous specific categories of data;[11] and (2) an "annual summary" of this activity, to be included in the "annual report to the Director ... pursuant to 12 USC [1456(c)]."[12] Under proposed § 1207.23(b), the "annual report" would be required to include the information in the "annual summary," in addition to other specified information. In order to avoid duplication, and to provide Freddie Mac with sufficient time to gather the relevant information, we recommend that FHFA consolidate these two submissions under a requirement for a single "annual report," and that the filing date for this single annual report be moved to March 31.

a. Extension of Annual Report Deadline

The proposed rule designates 19 different categories of data to be included in the annual report. Proposed § 1207.23(b). These categories include data related to employment and contracting, and narratives concerning the company's activities – all of which must be submitted with a certification by the officer responsible for the report.

Given the breadth of the information required, and the requirement of a certification, we believe that the company will require more time than is provided by the proposed rule's deadline of February 1. We recommend extending the time within which to submit the annual report to March 31.

This extension is particularly necessary during the first year of reporting. The proposed rule applies to all contracts, not just procurement contracts. Similarly, as noted above, the proposed rule applies to disabled and disabled-owned businesses – which are categories for which the company does not currently track information. If these provisions remain in the final rule, then Freddie Mac would need to design and implement new tracking systems for this information, which would require time to process and evaluate before reporting.

b. Merging the "Annual Report" and "Annual Summary"

In addition to the "annual report," the proposed rule requires Freddie Mac to submit an "annual summary" of its activities related to minority and women inclusion. This annual summary is to be included within the company's "annual report to the Director ... pursuant to 12 U.S.C. [1456(c)]."[13] As explained below, we recommend that this "annual summary"

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[11] Proposed §§ 1207.22(c) and 1207.23.

[12] Proposed § 1207.22(d).

[13] Proposed § 1207.22(d). Under this provision, the "annual summary" must include a summary of the regulated entity's:

> activities under this part during the previous year, including at a minimum, detailed information describing the actions taken by the regulated entity ... pursuant to 12 U.S.C.

be merged with the "annual report," so that the Regulated Entities would make a single annual submission to FHFA regarding minority and women inclusion.

The proposed rule requires that the "annual report" contain, among other things, the "information provided in the regulated entity's ... *annual summary*." Proposed § 1207.23(b) (emphasis added). Rather than provide the same information in two different submissions, we recommend consolidating these two submissions under a requirement for a single "annual report."

HERA and proposed § 1207.22(d) provide for Freddie Mac to submit detailed information describing actions taken in support of minority and women inclusion within the "annual report ... to the Director" submitted pursuant to 12 USC 1456(c).[14] As discussed below, we recommend that FHFA make clear that the proposed rule is not intended to impose requirements regarding the contents of annual reports on Form 10-K that we are required to file with the Securities and Exchange Commission ("SEC").

Currently, the rules at 12 CFR Part 1730 specify FHFA's requirements for periodic disclosures relating to Freddie Mac's financial condition, results of operation, business developments, and management's expectations, which we satisfy in accordance with 12 CFR § 1730(b) by filing with the SEC periodic reports and other documents we are required to file as an SEC reporting company – including an annual report on Form 10-K. In its publication of the rules at 12 CFR Part 1730, OFHEO, as predecessor to FHFA, referred to its "explicit and implied authorities" under several statutory provisions – including 12 USC 1456(c) – to address Freddie Mac's "disclosure practices." 68 Fed. Reg. 16716. However, 12 CFR Part 1730 does not include 12 USC 1456(c) in its "authority" section and does not identify any of the required periodic disclosures as constituting the "annual report" to the Director of FHFA under 12 USC 1456(c).

We do not believe FHFA should adopt a rule that would require us to include the detailed information required by proposed § 1207.22(d) in the annual report on Form 10-K that we file with the SEC, which is a public document, particularly in light of the limitations on public disclosure described in proposed § 1207.22(b). This provision states that FHFA may issue "aggregate reports and data summaries ... to the public." We therefore recommend that FHFA make clear that any annual reporting requirement established under the proposed rule is separate and distinct from our periodic reporting obligations under the SEC's rules and 12 CFR Part 1730.

> 4520 and a statement of the total amounts paid by the regulated entity ... to third-party contractors during the previous year and the percentage of such amounts paid to contractors that are minorities or minority-owned businesses, women or women-owned businesses, and individuals with disabilities or disabled-owned businesses, respectively.

[14] The statute provides, in relevant part, as follows:

> Each regulated entity shall include, in the annual report submitted by the entity to the Director pursuant to ... section 307(c) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1456(c)) ... detailed information describing the actions taken by the entity pursuant to this section, which shall include a statement of the total amounts paid by the entity to third party contracts since the last such report and the percentage of such amounts paid to businesses described in subsection (b) of this section. 12 U.S.C. 4520(d).

FHFA has broad authority to establish reporting requirements, including under 12 USC 1456(c), 4513 and 4514. We therefore recommend that FHFA revise the proposed rule to require a single annual submission regarding minority and women inclusion as described above and determine that this single "annual report," under Proposed § 1207.23, falls within the "annual report to the Director," provided for under 12 USC 1456(c), but does not affect our reporting obligations under SEC rules and 12 CFR Part 1730.

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We appreciate the opportunity to comment on the proposed rule. We believe our suggestions for revisions would promote the goal of helping ensure inclusion of minorities and women in employment and contracting activities of the Regulated Entities. Please contact me if you have any questions or would like further information.

Sincerely,

Robert E. Bostrom