FannieMae

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April 26, 2010

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

RE: Proposed Rule on Minority and Women Inclusion: RIN 2590-AA28

Dear Mr. Pollard:

Fannie Mae appreciates the opportunity to submit comments in response to the Notice of Proposed Rulemaking published on January 11, 2010 (the "Proposed Rule"),[1] addressing the requirements of Section 1116 of the Housing and Economic Recovery Act of 2008 ("HERA"),[2] to promote diversity and the inclusion of women and minorities in activities of Fannie Mae, Freddie Mac, and the Federal Home Loan Banks (the "GSEs").

Fannie Mae supports the objectives of Section 1116 of HERA to ensure that women and minorities and women- and minority-owned businesses are included in employment and contracting opportunities. Consistent with HERA and the Proposed Rule, Fannie Mae has implemented organizational changes to ensure that compliance with HERA's diversity requirements is overseen at the highest levels of the company, but since long before HERA, Fannie Mae has been committed to diversity and inclusion in the workplace. For example, Fannie Mae's ACCESS program, which has been in place since 1992, is a mechanism to expand the company's business with securities dealers who are minorities, women, and disabled veterans. Fannie Mae has received numerous awards recognizing the company's commitment to diversity, including Hispanic Corporate 100, America's Top 50 Corporations for Multicultural Business Opportunities, 40 Best Companies for Diversity, and many others. As these awards show, Fannie Mae values a diverse workforce. The company's commitment to diversity and inclusion is an aspect of working at Fannie Mae that enhances the lives of the company's employees so that the company can continue to meet its mission to support the secondary housing market.

While Fannie Mae agrees with FHFA on the importance of the national policy and purposes of Section 1116, certain features of the Proposed Rule appear to raise serious legal and operational issues for the company that would make compliance problematic. In particular, the company is concerned about the following:

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[1] 75 Fed. Reg. 1,289 (Jan. 11, 2010).
[2] 12 U.S.C. § 4520.

- The extension of HERA's requirements to disabled individuals and disabled-owned businesses using the very broad definition of "disabled" set forth in the Americans with Disabilities Act of 1990, as amended (the "ADA").[3]

- The extension of HERA's requirements beyond service contracts to all contracts, including vendor contracts, as well as the addition of public procurement-type requirements that are uncommon outside of the government procurement process.

- The timing and contents of the annual report.

This letter discusses each of these issues in greater detail below.

I. Extension of HERA Requirements to Disabled Individuals and Disabled-Owned Businesses

Under Section 1116(b) of HERA, the GSEs are required to have standards and procedures to ensure, to the maximum extent possible,[4] the inclusion and utilization of minorities and women, and minority- and women-owned businesses in all their business and activities. The Proposed Rule extends this requirement to cover disabled individuals and disabled-owned businesses, using the definition of "disability" set forth in the ADA and the ADA implementing regulations.

The ADA's definition of disability means, with respect to an individual: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[5] The 2008 amendments to the ADA vastly expanded the ADA's definition of "major life activities" to include eating, sleeping, lifting, bending, reading, concentrating, thinking and communicating.[6] A physical or mental impairment is also broadly defined under the ADA to include virtually any impairment, regardless of whether it impacts a person's ability to work, and without consideration of mitigating measures such as medications, medical and mobility devices, hearing aids, and assistive technology.[7] For example, conditions such as depression, migraines, and asthma, even if under control using medication, would qualify as a disability under the ADA and thus under the Proposed Rule As another example, a person who is engaged in or has successfully completed a drug rehabilitation program would also be covered.[8]

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[3] 42 U.S.C. § 12101 *et seq.*

[4] Although the Proposed Rule does not address this, Fannie Mae presumes that HERA's use of the phrase "to the maximum extent possible" in its inclusion mandate does not require Fannie Mae to act in any way that would violate or compromise its obligations to (a) comply with other federal and state civil rights laws and regulations; (b) maintain its safety and soundness; or (c) comply with various agreements it has with the federal government.

[5] 42 U.S.C. § 12102(1).

[6] *Id.* § 12102(2)(A).

[7] *Id.* § 12102(4)(E)(i); see also 29 C.F.R. § 1630.2(h).

[8] 29 C.F.R. § 1630.3(b).

Because the definition of disability is so broad under the ADA, using it to extend the Section 1116 requirements to employment and procurement practices creates problems in both areas, as discussed below. Accordingly, Fannie Mae requests that the focus of the Proposed Rule remain on minorities and women, as set forth in HERA. Alternatively, Fannie Mae proposes that any expansion of the Section 1116 requirements in contracting matters be limited to Service-Disabled Veterans[9] and Service-Disabled Veteran-Owned Small Business Concerns.[10] Service-Disabled Veterans and Service-Disabled Veteran-Owned Small Business Concerns are certified as such by the Department of Veterans Affairs and other unrelated third parties, which would provide an objective source for a determination of whether an entity or business qualifies under the Proposed Rule.

A. Proposed Requirements Related to Employment Matters

The Proposed Rule would require the GSEs to: (1) develop policies and procedures that ensure the inclusion of disabled individuals in management and employment; (2) request medical information from employees and applicants; and (3) report on the medical information received from employees and applicants.[11] This language appears to require the GSEs to take actions that are not allowed under the ADA, and raises other privacy and compliance concerns.

Policies and Procedures Must Comply with the ADA. The Proposed Rule appears to require Fannie Mae to develop policies and procedures that would make disability a criterion upon which the company makes employment decisions. Currently, consistent with the ADA, Fannie Mae's equal employment opportunity policy provides for the company to make reasonable accommodation for qualified individuals with disabilities. However, because the ADA prohibits an employer from making employment decisions based on a disability, Fannie Mae does not have, and may not develop, policies and procedures that base hiring or promotion decisions on an individual's disability.

Requests for Medical Information Must be Limited. The Proposed Rule would require Fannie Mae to solicit medical information from employees and applicants for the purpose of tracking and reporting on hiring, promotion, and separation decisions. Generally, it would be a violation of the ADA for Fannie Mae to inquire about an employee's or applicant's medical condition or disability for any reason other than to determine the ability of the individual to perform the essential functions of his or her job.[12] Under

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[9] A Service-Disabled Veteran is defined as a veteran with a service-connected disability that has been determined by the Veteran's Administration, for purposes of receiving disability compensation or a disability pension, to have a permanent and total service-connected disability. 13 C.F.R. § 125.8.

[10] A Service-Disabled Veteran-Owned Small Business Concern is, generally, a business that is at least 51% owned and managed by one or more Service-Disabled Veterans and meets relevant size standards. *Id.*

[11] The Proposed Rule also requires that the GSEs adopt an equal opportunity notice that states the company's commitment to the principles of equal opportunity regardless of "disability status." However, neither the ADA nor the Proposed Rule defines the term "disability status," and the meaning is unclear. If references to disability are included in the final rule, Fannie Mae requests that the final rule also include a definition of "disability status."

[12] 29 C.F.R. § 1630.13.

Fannie Mae's policy, employees who need a reasonable accommodation must self-identify only when making a request for reasonable accommodation based on a disability. Proactively, Fannie Mae asks employees to self-identify as disabled if they will need assistance/accommodation during an evacuation or to shelter in place.[13] The exact nature of the disability is not required; only the assistance that might be required.

If an employee or applicant chooses not to self-identify, Fannie Mae could not reliably make a determination as to the existence of a disability. Unlike race and sex, which employers are required to list on EEO-1 reports using self-identification or the employer's visual identification, numerous mental and physical impairments are not apparent from a visual inspection, and it is Fannie Mae's experience that individuals with disabilities tend not to identify themselves as disabled if they have non-visible disabilities and do not require an accommodation. Accordingly, where a disability is not visible and self-identification is not necessary because an accommodation has not been requested, and Fannie Mae is not taking some action that actually benefits the individuals with disabilities, Fannie Mae would be unable to collect or report the information.[14]

Moreover, Fannie Mae could only provide accurate data for formal ADA accommodation requests made through the Human Resources department. Given the ADA's broad definition of disability, a manager may grant or deny an informal request that does not, on its face, appear to be related to the ADA, either because of the nature of the request or because the employee chooses not to reveal the impairment. For example, a manager may grant a request for an employee to come in early and leave early one day per week not knowing that the employee will use the time to attend a medical appointment or counseling session.

Reporting on Disabilities Creates Privacy Concerns. The Proposed Rule would require the GSEs to report on reasonable accommodations requested and granted. Depending on whether and how the information in the annual report is disclosed by FHFA,[15] the annual report could make public the number of requests received, the number of requests granted, disabilities accommodated, and the types of accommodation granted. However,

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[13] *See* Equal Employment Opportunity Commission, *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA),* No. 915.002 (July 27, 2000), stating: "In order to invite self-identification for purposes of an affirmative action program that is voluntarily undertaken or undertaken pursuant to a law that encourages (rather than requires) affirmative action, an employer must be taking some action that actually benefits individuals with disabilities. The invitation to self-identify also must be *necessary* in order to provide the benefit." (Emphasis in original).

[14] For example, a person with a colostomy (a condition caused by an underlying impairment that is likely not visible to others in the workplace) may not want to self-identify unless he or she needed an accommodation based on the disability. Conversely, a person with vitiligo (a visible autoimmune disorder), which has manifested on his/her legs, may technically meet the definition of "disabled" but may never need to request accommodation. In both cases, the disability would not be reported to or tracked by the company unless the employee requested an accommodation.

[15] Under Proposed Rule §1207.22(b), FHFA may issue information submitted with the annual report "to the public as it deems necessary."

as discussed in Part III below, the Equal Employment Opportunity Commission requires that employers maintain the confidentiality of disability-related information.

In addition, Fannie Mae has confidentiality concerns with collecting and reporting this information because of the obligation to maintain employees' privacy with regard to health issues. Even by just disclosing the type of accommodation provided in connection with the disability involved, the employer may be disclosing to the public - in violation of the ADA - the identity of the individual and his or her disability, particularly if the employee is the only one or only one of a few employees for which the disability is visibly apparent to others (*e.g.*, wheelchair, hearing loss, blindness). For example, a company might make special accommodations for an employee on long distance business travel because the employee is confined to a wheelchair as a result of a certain condition. If only one employee in the company who uses a wheel chair has the need to take long distance business trips, disclosing the information required under the Proposed Rule relating to the accommodation would indirectly disclose who the employee is and the nature of his or her medical condition.

Even supervisors are provided only the information they need to know to implement any accommodations being provided under the ADA.[16] More often than not, the information they need to know does not include the nature of the disability for which the accommodation is being provided. For example, a company might inform a manager that her employee will be taking breaks as needed during the day. Under the Proposed Rule, the manager could learn from the HERA report that the breaks were provided to give rest periods to an HIV-positive employee.

B. Proposed Requirements Related to Contracting and Procurement

The Proposed Rule would require the GSEs to (1) develop policies and procedures that ensure the inclusion of disabled individuals and disabled-owned businesses in contracting; and (2) report on the number of contracts with disabled and disabled-owned businesses, the amount paid to contractors that are disabled and disabled-owned businesses, and the percentage of the total amount spent on contractors that was spent on disabled individuals and disabled-owned businesses. Because of the breadth of the ADA definition applicable to these requirements, the Proposed Rule is likely to dilute the effectiveness of Fannie Mae's current program, and reporting would be unverifiable and unreliable.

As Proposed, the Definition of Disabled is too Broad. Fannie Mae has historically focused on encouraging diverse suppliers, including service-disabled veteran-owned businesses, to bid for business through Fannie Mae's Supplier Diversity Program. Under Fannie Mae's current procurement policy, a disabled business enterprise is at least 51%

[16] 29 C.F.R. § 1630.14 (stating that supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; other information is to be kept confidential).

owned, operated and controlled by one or more veterans with a permanent mental or physical impairment that substantially limits one or more major life activities and which has a significant negative impact upon the company's ability to successfully compete. The definition in the Proposed Rule, because it adopts the ADA's definition of disability, applies to a substantially broader population of individuals.

As discussed above, the ADA definition of disability applies to a broad spectrum of medical issues, many of which have no impact on an individual's ability to perform his or her job. Policies to promote inclusion of disabled individuals and businesses using this definition would expand opportunities to populations not covered by HERA, and would reduce the number of opportunities for women and minorities. Such policies would also reduce the effectiveness of Fannie Mae's current program, which is designed to assist those disabled individuals and disabled-owned businesses that have historically been unable to complete effectively.

Because the focus of the ADA is to prevent discrimination, broad applicability of the law serves an important purpose. However, where the purpose of a law, such as HERA, is to create opportunities for populations for whom those opportunities were previously limited or unavailable, broad applicability may undercut the effectiveness of the law.

Reporting will be Unreliable. While third party certification is available for Service-Disabled Veterans, certification of other disabled populations is not widely available. To implement the reporting requirements as proposed, Fannie Mae would need to rely on self-certification for most disabled contractors. Given the difficulties of verifying the status of a contractor as disabled, the reporting is unlikely to provide the type of useful information that the Proposed Rule seeks.

C. Recommendation

Fannie Mae recognizes the importance of including historically-disadvantaged individuals and businesses in employment and contracting opportunities, and has policies in place to ensure compliance with the ADA and federal, state and local non-discrimination laws. Fannie Mae is concerned, however, that the Proposed Rule, by adopting such a broad focus, will diminish opportunities for those populations that HERA was intended to reach. Moreover, the requirements and limitations set forth in the ADA would hinder Fannie Mae's ability to comply with the Proposed Rule. Accordingly, Fannie Mae recommends that the Proposed Rule be clarified to avoid conflict with the requirements and restrictions set forth in the ADA, and that it be aligned more closely with the language and intent of HERA. The latter could be accomplished either by retaining the focus of the rule on minorities and women as individuals and as business owners or by limiting any expansion of HERA's contracting requirements to Service-Disabled Veterans and Service-Disabled Veteran-Owned Small Business Concerns.

II. Broad Applicability of the Proposed Rule

Section 1116(b) of HERA requires that the GSEs establish processes for reviewing and evaluating contract proposals that give consideration to the diversity of the applicant. This section is limited by Section 1116(c) to "contracts of a regulated entity for services of any kind . . . ."[17]

The Proposed Rule is similar to Section 1116 in that minorities and women as individuals and as business owners must be included, to the maximum extent possible, in all business and activities of the GSEs, including procurement and all types of contracts. The Proposed Rule does not, however, consistently limit the HERA requirements to "contracts for ... services."[18] As a result, it would appear that all of the requirements of the Proposed Rule would be applicable to all types of contracts entered into by the GSEs, imposing public procurement-type requirements (*e.g.*, publication of and open bidding on contracting opportunities; opportunities for unsuccessful bidders to protest the award of contracts) that are not appropriate for contracts between private entities.

As discussed below, Fannie Mae believes that the final rule should reflect the purpose and scope of the legislative language and retain the statute's focus on service contracts. Retaining this focus would preserve the ability of the GSEs to develop policies and procedures that comply with the statute but also allow the company to compete effectively in the private sector. In addition, Fannie Mae asks that the final rule specify minimum standards for contracts subject to the Section 1116 requirements that exclude contracts for which applying the requirements would be inappropriate, such as small contracts and government-mandated agreements.

The Proposed Rule Should Apply to Service Contracts. In 2009, Fannie Mae published a policy implementing Section 1116. Under this policy, all Fannie Mae business units must follow the processes established by the Procurement Office for the evaluation of proposals for services and to hire service providers. The policy requires business units to track the amounts spent on service providers generally and amounts spent on women, minorities, and women- and minority-owned businesses. The policy also requires the

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[17] 12 U.S.C. § 4520(c) (emphasis added). The legislative history of Section 1116 illustrates that the purpose of the section is to increase diversity in the financial services industry. In the House Financial Services Committee hearing on H.R. 1427, Representative Maxine Waters, who proposed the amendment adding Section 1116 to HERA, stated that "the internal pipeline of minority and women for management-level positions is not being fully leveraged by the private sector or, for that matter, our GSEs. GSE reforms must address the issues of both business diversity and management diversity to be successful." She went on to explain that the reporting requirements would compel the GSEs to disclose whether the financial services firms hired by the GSEs were minority- or women-owned. Together with the plain language of subsection (c), this emphasis on the diversity of participants in the financial services industry, including the statute's multiple references to investment banking firms, underwriters, broker-dealers, and other types of services firms, evidence Congress's intent to limit Section 1116 to contracts for services.

[18] For example, Proposed Rule § 1207.2(b), which states FHFA's policy and purpose, and Proposed Rule § 1207.22(a) which requires annual reports, refer to "contracts *for services*" (emphasis added); by contrast, Proposed Rule § 1207.1, which defines "business and activities", and Proposed Rule § 1207.21(b), which prescribes certain minimum standards, refer to "*all types* of contracts" (emphasis added).

business units to reach out to women, minorities, and women- and minority-owned businesses and attempt to solicit multiple bids where possible. Fannie Mae developed this policy after meeting with FHFA and presenting the company's proposals for compliance, which clearly stated their applicability only to service contracts.

Applying the Proposed Rule to contracts for goods would add substantial complexity to compliance while not advancing the purpose of Section 1116. By dollar value, approximately 90% of the money Fannie Mae spends on goods is for technology and office furniture. There are only a few large companies that produce these goods, and they do not meet the Proposed Rule's definitions for diverse companies. Moreover, Fannie Mae's relationships with these companies are small as compared with the total business done by these companies, so Fannie Mae has little or no ability to influence hiring and promotion.

Public Procurement-Type Processes are not Appropriate for Private Entities. Section 1116 requires the GSEs to develop standards and procedures for the inclusion of minorities and women in business activities, and specifies that diversity must be a component of the review and evaluation of contract proposals and proposed service providers. The Proposed Rule, more specifically, requires the GSEs to adopt processes, including the publication of contracting opportunities and opportunities for open bidding on contracts and opportunities to contest the award of contracts, that are not required by HERA. These requirements of the Proposed Rule replicate a public procurement process that is appropriately not present in the private sector.

Government entities use the Federal Register and state and local newspapers to advertise contracting opportunities. Any interested party may submit a bid, and, if not chosen, may delay the contracting process by contesting the contract award. This process can delay a government contract for months or years.

Fannie Mae has processes in place to competitively bid large contracts of over $500,000. Fannie Mae conducts research to identify those companies that have the necessary qualifications and experience to perform the contract, and invites those parties to bid. Companies that wish to be considered for contracting opportunities may register with Fannie Mae, and Fannie Mae may also use unrelated third parties to provide information on qualified candidates. While it may take up to several months to award a contract, this process is shorter and more efficient than an open bidding process, and is considered a commercial "best practice."

Fannie Mae also uses a "private sector process" to address unsuccessful bidders. Such bidders are generally told why they were not awarded the contract and provided with an opportunity to participate in future bids. Commercial law principles do not allow such bidders to bring an action based on discrimination, and neither HERA nor the Proposed Rule would change this essential fact. Indeed, the Proposed Rule specifically states that it does not "create any right or benefit, substantive or procedural, enforceable at law, in equity, or through administrative proceeding, by any party against . . . a regulated

entity."[19] At the same time, however, the Proposed Rule would require the GSEs to make alternative dispute resolution available to unsuccessful bidders.[20] This requirement would create new rights for commercial enterprises that could seriously impair the ability of the GSEs to compete in the private sector.

The Proposed Rule Should Incorporate Minimum Standards. Under the Proposed Rule, Fannie Mae must include non-discrimination language in contracts and track amounts spent on diverse contractors. Applying these requirements to every contract would significantly hinder Fannie Mae's ability to conduct business. Fannie Mae enters into many small contracts and discrete transactions. More specifically, Fannie Mae has contracts with over 15,000 vendors and service providers, but 80% of the dollars spent go to only 500-700 of them. By including in the Proposed Rule a minimum dollar value of $100,000, Fannie Mae could focus on those counterparties that receive the majority of the dollars spent. Fannie Mae also requests an exception for government-mandated transactions, where Fannie Mae may not have a role in choosing the counterparties, and other types of transactions where compliance would be impracticable.

III. Reporting

The Proposed Rule includes certain requirements that are inconsistent with HERA and the ADA and therefore raise compliance concerns:

- HERA requires the GSEs to report on compliance with Section 1116 in the companies' annual financial reports. The Proposed Rule requires that the Section 1116 report be filed earlier, on February 1.

- The Proposed Rule requires reporting on, and certification of, subjective information and matters of opinion.

- The Proposed Rule states that the annual report may be made public, creating the risk of disclosure of information that must be kept confidential under the ADA.

- The Proposed Rule requires reporting on outreach to populations that are not addressed in Section 1116 or in the substantive provisions of the Proposed Rule.

The Due Date for the Annual Report Should be Consistent with HERA. The Proposed Rule sets February 1 as the due date for annual reports to the Director on compliance with Section 1116. Section 1116 of HERA requires that information on compliance be included with the annual financial report submitted in compliance with Section 309(k) of the Charter Act.[21] The Section 309(k) requirement is satisfied by providing Fannie Mae's annual report on Form 10-K to the Director. The Form 10-K is due 60 days after the end of the fiscal year covered by the report, so Fannie Mae's next Form 10-K will be due on

[19] Proposed Rule § 1207.3.
[20] Proposed Rule § 1207.21(b)(2).
[21] 12 U.S.C. § 4520(d).

March 1, 2011. Because the annual financial report will not be complete by February 1, it will not be possible for Fannie Mae to ensure that the Section 1116 report is reconciled with the company's financial records, which will compromise the ability of the company to certify the report. Fannie Mae requests that the Proposed Rule establish the due date for the Section 1116 reports as the due date for the annual financial report required by Section 309(k) of the Charter Act.

The Contents of the Annual Report Should Consist of Verifiable Data. Fannie Mae recommends that the annual report be limited to data that can be objectively tracked and compared with other institutions and with Fannie Mae's results over time. The Proposed Rule requires that the annual report include such information as an analysis of activities that were successful and unsuccessful, an analysis of areas in which the company needs to improve, and plans and expected results for the next year. This analysis must be certified and may be made public. Whether an activity was successful or unsuccessful is a subjective determination and subject to differing opinions. Plans and expected results are inherently subject to change. Accordingly, Fannie Mae believes that these matters are not appropriate for certification or for public disclosure and therefore should be excluded from the annual report.

The EEO-1 and Certain Other Documents Filed in Connection with the ADA must be Kept Confidential. Fannie Mae submits an EEO-1 Employer Information Report to the Equal Employment Opportunity Commission. The Proposed Rule requires that the EEO-1, as well as information on claims of employment discrimination, be included with the annual report, which may be released to the public.

The Equal Employment Opportunity Commission has designated the EEO-1 as confidential:

> "Sections 706(b) and 709(e) of Title VII and Section 107 of the ADA specifically prohibit disclosure of Title VII and ADA charge files to third parties prior to the institution of a proceeding under Title VII or the ADA involving such information. Section 709(e) also specifically prohibits disclosure of EEO survey reports prior to the institution of a proceeding under Title VII. Commission employees who do so are subject to fine and/or imprisonment."[22]

Fannie Mae requests that FHFA clarify that no information will be released to the public that must be kept confidential under any other law.

Reporting on Outreach. The Proposed Rule states that the annual report must describe outreach activities, including outreach to low-income and inner city populations. Fannie Mae has a longstanding commitment to recruiting a diverse workforce, and has a number of relationships in place to reach minorities and women. Targeting recruiting programs to low-income populations or inner city populations would not advance the objectives of

[22] Equal Employment Opportunity Commission, FOIA Handbook (http://archive.eeoc.gov/foia/hb-11.html).

Section 1116 of HERA because they would not necessarily extend to qualified minority and women employment applicants or minority and women-owned businesses. Fannie Mae recommends that the reporting requirements in the final rule related to outreach activities, consistent with Section 1116, specifically reference women, minorities, and women- and minority-owned businesses.

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Thank you for allowing us to present these views. If you have questions regarding the matters addressed herein, please feel free to contact the undersigned at 202/752-7144.

Sincerely,

for

Timothy J. Mayopoulos
Executive Vice President,
General Counsel and Corporate Secretary