FHLBank
San Francisco

Dean Schultz
President and
Chief Executive Officer

April 26, 2010

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

VIA FEDERAL EXPRESS
AND EMAIL

Re: Comments on Proposed Rulemaking Regarding Minority and Women Inclusion

Dear Mr. Pollard:

The Federal Home Loan Bank of San Francisco (the "Bank") appreciates this opportunity to comment on the Federal Housing Finance Agency ("Finance Agency") proposed rule on minority and women inclusion (75 Fed. Reg. 1289 ("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"). 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 has a strong culture of supporting diversity, inclusion, and non-discrimination through its policies, practices, and core principles, and the Bank fully supports the intent of the Proposed Rule. We are proud of our diverse workforce. We have made considerable efforts to expand contracting opportunities for minority- and women-owned businesses with the Bank, and we are continually seeking means for enhancing the Bank's diversity and outreach efforts. Section 1116 and the Proposed Rule have presented the Bank with new ideas for achieving a more expansive standard of inclusion.

The Federal Home Loan Bank of San Francisco 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.

A. Clarify the Legal Standard: "To the Maximum Extent Possible"

Sections 1207.2(b) and 1207.21(b) of the Proposed Rule 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. We see that there are opportunities to provide minority-, women-, and disabled-owned businesses with increased access to income arising from support of the FHLBanks' debt issuance, investment, and procurement activities as well as the FHLBanks' legal services, accounting, and other service

requirements. If not 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.

1. Clarifying that safety and soundness are factors in identifying "the maximum extent possible:" 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." Alternatively, the Finance Agency may wish to provide consistency throughout the rule by using the standard set forth in proposed Section 1207.11 (stating "FHFA is committed to ensuring that minorities, women, individuals with disabilities, and minority-, women-, and disabled-owned businesses have the maximum *practicable* opportunity to participate in all contracts awarded by the FHFA") (emphasis added).

2. Conflicts with other Federal law: Either in the preamble or in the text of the final regulation, the final rule should specify that "to the maximum extent possible" is not intended to supplant other federal law. For example, as discussed in detail below, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (42 U.S.C. 1981 *et seq.*), other federal anti-discrimination laws, and federal case law prohibit the Bank from engaging in certain practices. We expect that the final rule is not intended to override other well-established federal laws and believe the Finance Agency could avoid ambiguity in this area by adding the phrase, "consistent with applicable law," after the phrase "to the maximum extent possible."

B. Clarify the Scope of Contracts Subject to Inclusion

The Bank fully supports the final rule's goal of expanding its consideration of minority-, women-, and disabled-owned businesses in its services contracts with respect to all of the Bank's business and activities. HERA Section 1116 is expressly limited in scope "to all contracts of a regulated entity *for services* of any kind." *See* HERA Section 1116(c)(emphasis added). The Proposed Rule states that its purpose is to promote diversity "in all contracts *for services* of any kind." *See* Proposed Rule Section 1207.2(b) (emphasis added). 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.[1]

[1] 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).

We understand that services contracts covered within the scope of the rule include brokerage, investment advisory, underwriting, and other services that support FHLBank transaction execution. However, we believe that (i) individual transactions with the Bank's members and counterparties do not constitute services agreements within the intended scope of the rule, and (ii) contracts for services the Bank provides its members (*e.g.*, securities safekeeping services) were also intended to be excluded from the scope of the rule. To expand the scope of the rule to include these types of agreements would represent a dramatic policy change affecting the FHLBanks' fulfillment of their statutory mission of providing credit and liquidity to members.[2] We think the final rule should more clearly exclude these types of agreements from its scope.

C. Compliance with Other Applicable Laws

1. ADA prohibitions on disabled status inquiries: Proposed Section 1207.21(c)(3) requires each Regulated Entity to "… establish a program for outreach designed to ensure to the maximum extent possible the inclusion in contracting opportunities of minorities, women, individuals with disabilities…" that shall, at a minimum "ensure the consideration of the diversity of a contractor when the regulated entity … reviews and evaluates offers from contractors." With regard to the determination of disability classification, we are concerned that the proposed regulation 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 reasonable accommodations, 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. A Regulated Entity likely may not, as a practical matter, be able to discern the disabled status of such individuals 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.

Proposed Section 1207.23(b)(3) would require that a Regulated Entity annually report to the Finance Agency the number of persons with disabilities applying for employment with the Regulated Entity. The Equal Employment Opportunity Commission ("EEOC") advises employers against making disability-related inquiries prior to making an offer of employment. *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-

[2] We note that proposed Section 1207.1, in its definition of *Business and activities*, tracks HERA Section 1116(b) by stating the rule applies to the implementation of the FHLBanks' affordable housing program and initiatives. We interpret this language to mean that service contracts related to implementation of the FHLBanks' affordable housing programs ("AHP") and initiatives are governed by the rule and not that the rule would apply to the FHLBanks' AHP and other community investment program contracts with members and nonprofit sponsors.

inquiries.html); EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (available at www.eeoc.gov/policy/docs/guidance-inquiries.html) (citing that pre-employment inquiries regarding disabilities would violate the ADA). Proposed Section 1207.23(b)(3) should be modified to remove this reporting requirement or otherwise make it consistent with the requirements of the ADA.

2. Requests for reasonable accommodation: The legal requirements for review of requests for reasonable accommodation are governed by the ADA's body of laws, and proposed section 1207.21(b)(4) may conflict with certain aspects of these laws. Moreover, by not tracking the language of the ADA, the text of proposed section 1207.21(b)(4), could be interpreted to create substantive rights not otherwise available under applicable law. The ADA requires provision of reasonable accommodation for qualified individuals with disabilities that does not impose an undue hardship, whereas the text of proposed section 1207.21(b)(4), suggests the Proposed Rule may be intended to reach a broader class of individuals. This possibility would be inconsistent with proposed Section 1207.3, which provides that the rule is not intended to create any right or benefit, substantive or procedural, enforceable at law, in equity, or through administrative proceeding. Because of its potential to conflict with existing law and because it falls outside the scope of what is authorized by HERA Section 1116, proposed section 1207.21(b)(4) should be removed.

3. Potential for disclosure of personal confidential information: Proposed Section 1207.23(b)(5) requires that each Regulated Entity report the number of separations from employment by minority, gender and disability classification. Because many FHLBanks have a small number of employees with few separations, the proposed requirement for Regulated Entities to report employee separations by disability classification may make the identity of a separated employee and his or her disability easily ascertainable. In such circumstances, the sharing of this information would conflict with the goals under the ADA and Health Insurance Portability and Accountability Act (HIPAA) to keep such information confidential, and proposed section 1207.22, which provides that the "FHFA is not requiring, and does not desire, that reports under this part contain personally identifiable information." For these reasons, the reporting requirement in proposed Section 1207.23(b)(5), with respect to separations by disability classification, should be eliminated.

D. Material Clauses in Contracts

Proposed Section 1207.21(b)(6) would require a Regulated Entity to include in each services contract it enters into "a material clause committing the contractor to practice the principles of equal opportunity and non-discrimination in all its business activities… ." While we support the intent of the proposed provision, requiring such a clause in every FHLBank services contracts may be impossible from a practical standpoint, as 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. For these reasons, we believe this requirement should be replaced with one that gives the

FHLBanks more flexibility in this area. This could be accomplished, for example, by establishing materiality thresholds for the requirement based on the contract's dollar size (we recommend contracts larger than $100,000 in value), type, or other similar triggering thresholds.

Thank you for your consideration of these comments.

Very truly yours,

Dean Schultz
President and Chief Executive Officer