Fannie Mae

December 22, 2016

Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
400 Seventh Street SW
Washington, DC 20219
By submission at *www.fhfa.gov/open-for-comment-or-input.*

RE: Proposed Amendments to Regulations on Minority and Women Inclusion, RIN 2590–AA78

Dear Mr. Pollard:

Fannie Mae appreciates the opportunity to submit comments in response to the Notice of Proposed Rulemaking published on October 27, 2016,[1] proposing amendments to the Federal Housing Finance Agency ("FHFA") regulations on minority and women inclusion (the "Proposed Amendments").[2] These regulations implement Section 1116 of the Housing and Recovery Act of 2008 ("HERA"),[3] promoting diversity and inclusion in the management, employment, and business activities of Fannie Mae, Freddie Mac, and the Federal Home Loan Banks (collectively the "regulated entities").

Fannie Mae believes that providing opportunities for individual minorities, women, and persons with disabilities and for the businesses they own, consistent with financially safe and sound business practices, is an important component of our commitment to be America's most valued housing partner. The housing market and the nation are well served when all Americans have a chance to provide their very best and Fannie Mae stands ready to assist in making those opportunities available.

Our approach to embedding diversity and inclusion into all business activities is designed around four strategic pillars:

- ***Workforce*** – incorporating diversity and inclusion recruitment best practices to attract a diverse pool of candidates to Fannie Mae and focusing on inclusive practices in retaining and developing our employees at all organizational levels
- ***Workplace*** – creating an inclusive environment through engagement
- ***Marketplace*** – using Fannie Mae's industry influence to advance opportunities such as expanding access to credit
- ***Supplier Diversity*** – creating an environment where diverse suppliers have contracting opportunities

That we are successful in building upon these pillars is reflected, among other things, in the awards that we have received. This includes, most recently, Black Enterprise's award for *Best Companies for Diversity*, the

[1] 81 Fed. Reg. 74730 (Oct. 27, 2016).
[2] 12 C.F.R. Part 1207
[3] 12 U.S.C. § 4520

Human Rights Campaign's award for *Best Places to Work: Corporate Equality Index*, and the US Business Leadership Network's award for *National Disabled-Owned Business Advocate of the Year.*

Coming from this perspective, Fannie Mae supports the efforts of FHFA to ensure the inclusion of individual minorities, women, and persons with disabilities and for the businesses they own as reflected in the Proposed Amendments. However, we believe that certain changes to the Proposed Amendments would facilitate their application and the ability of the regulated entities to comply with their requirements. These proposed changes are discussed below.

1. Definitions.

   a. Applicant.

The Proposed Amendments add a new definition for the term "applicant."[4] We believe that subparagraph (3) of this proposed definition is problematic in that it requires the regulated entity to determine whether the individual's "expression of interest" indicates that the individual "possesses the basic qualifications for the position."

Our standard process for employment includes an electronic application. As part of this process, applicants indicate interest in a particular position(s). Those applying for specified positions may or may not include information with their electronic applications supporting all the basic qualifications for the position. Moreover, given the hundreds of submissions we regularly receive for a position, we do not make an assessment regarding qualifications for all applications either. We do not believe this should exclude such individuals as "applicants."

We also find subparagraph (4) of the proposed definition problematic. Our applications are received and stored electronically: there is no process for applicants to subsequently remove themselves from consideration. Moreover, it would be difficult to track a post application expression of disinterest delivered to a recruiter, interviewer, or even a decision-maker.

Accordingly, we suggest that subparagraph three be simplified and that subparagraph four be deleted and the proposed definition of "applicant" be revised to read as follows (changes are in bold):

> *Applicant* means an individual who submits an expression of interest in employment in conjunction with all of the following:
>
> (1) The regulated entity acted to fill a particular position;
>
> (2) The individual followed the regulated entity's standard process for submitting an application; ***and***
>
> (3) ~~**The individual's expression of interest indicates that the individual possesses the basic qualifications for the position.**~~ **The individual *expressed an interest in the particular position.***

[4] Section 1207.1, Proposed Amendments at 81 Fed. Reg. 74736.

(4) ~~The individual has not removed him or herself from consideration or otherwise indicated that he or she is no longer interested in the position.~~

b. Promotion.

The Proposed Amendments add a new definition for the term "promotion."[5] We believe it is too narrow in that it implies promotions are always for good performance and does not recognize that sometimes employees are promoted to reflect the fact that their performance and responsibilities exceed their current job description. Accordingly, we recommend the language be revised as follows (changes are in bold):

> *Promotion* means the advancement of an employee within a regulated entity and may be the result of an employee's proactive pursuit of a higher job ranking or ***a recognition the employee's current job responsibilities have exceeded the current role and there is a need for an in place promotion.*** ~~or a reward for good performance.~~ A promotion is typically associated with an increase in an employee's pay due to additional or enhanced job responsibilities.

c. Disabled-owned business, Minority-owned business, and Women-owned business.

The Proposed Amendments add new definitions for "Disabled-owned business, Minority-owned business", and "Women-owned business."[6] In each instance, the definition incorporates the notion that, in order to qualify as the designated diverse business, the respective disabled, minority, or women owners must have more than a 50 percent ownership interest in the entity and more than 50 percent of the profits or losses of the business must accrue to, respectively, disabled individuals, minorities, or women.

We recommend a change to the percentage of qualifying ownership from "more than fifty percent (50%)" to "fifty-one percent (51%) or more." This requested change is to bring the percentage of ownership in line with those applied elsewhere in the industry, including those used by the Federal Deposit Insurance Corporation,[7] the Small Business Administration,[8] and even within the definition of "Minority-serving financial institution" as contained in the Proposed Amendments.[9]

In addition, contractors which seek to work with Fannie Mae as a disabled-, minority-, or women-owned business must have that status certified by an independent third party that confirms there is a 51 percent or more level of ownership by the diverse party. For example, the National Minority Supplier Development Council certifies minority ownership at the 51 percent or more level http://www.nmsdc.org/mbes/mbe-certification/, the Women's Business Enterprise National Council certifies women ownership at the 51 percent or more level http://www.wbenc.org/certification/, and the US Business Leadership Network certifies ownership by disabled individuals at the 51 percent or more level http://www.usbln.org/what-we-do/supplier-diversity/. Therefore, this is the ownership level at which we are qualifying and reporting these entities.

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[5] Id.
[6] Id.
[7] See discussion of FDIC Minority and Women Outreach Program appearing at https://www.fdic.gov/about/diversity/mwop.
[8] See e.g., 13 C.F.R. § §127.102 and 125.8(g).
[9] 81 Fed. Reg. 74736.

Making the requested change in the level of ownership would assure consistency between the reporting requirements and the practice in the industry.

2. Report on Spend with Non-Diverse Owned Businesses

The Proposed Amendments add a number of new reporting requirements to the regulated entities' annual reports. Included among these are that the regulated entities must provide:

> (18) Cumulative data separately showing the total diversity spend with non-diverse-businesses during the reporting year.[10]

For purposes of meeting this reporting requirement, the Proposed Amendments add a new definition:

> *Diversity spend with non-diverse-owned businesses* means the dollar amount(s) paid by a regulated entity to a prime contractor that is not a minority-, women-, or disabled-owned business for professional services (*i.e.,* the amount paid for work performed, as may be adjusted, in connection with providing legal, accounting, or other professional or consulting services) provided by or allocated to a partner, member or other equity owner who is a minority, woman, or an individual with a disability.[11]

We believe that this reporting requirement recognizes that payments to businesses that are not minority-, women-, or disabled-owned can nonetheless promote diversity and inclusion where the services provided are by minority, women, or disabled individuals. We agree. However, we have several concerns with this provision we recommend be addressed.

First, we strongly believe the regulated entities are not going to be able to secure information relating to allocations of payments to a partner, member, or other equity owner. Allocations are an important component of a contractor's internal compensation framework and are extremely confidential. Even within the contractor itself, this information is often not made available except to a limited group.

Second, we believe that prime contractors may not have reliable information relating to the disability of an individual working on a contract. It is our experience in our own operations that few people choose to identify as a person with a disability and only a small fraction of impairments are visually obvious. For example, an employee experiencing a central nervous system disorder who requests a first floor office as an accommodation is unlikely to self-identify as disabled, visually may not appear to be disabled, but may qualify as disabled. Under these circumstances, it should be recognized that the contractor's reporting regarding such an individual is likely to be inaccurate, but the regulated entities can only report the information that they

[10] Section 1207.23, Proposed Amendments at 81 Fed. Reg. 74738.
[11] Section 1207.1, Proposed Amendments at 81 Fed. Reg. 74736.

have received. Moreover, while the minority status of employees is more easily ascertained visually by a contractor, it too may be incorrect, also resulting in inaccurate reporting.

Finally, professional services are increasingly billed on a fixed fee or project milestone basis. In these situations, in the absence of allocation information, the contract cannot be evaluated to determine that portion of work attributable to minorities, women, or disabled individuals.

Accordingly, we recommend the elimination of the reference to allocations, the application of the provision to hourly fee arrangements only, and recognition of our reliance on information given to us by our prime contractors in meeting our reporting requirements. These recommendations may be incorporated by revising the definition of "Diversity spend with non-diverse owned businesses" to read as follows (changes are in bold):

> *Diversity spend with non-diverse-owned businesses* means the dollar amount(s) paid by a regulated entity to a prime contractor that is not a minority-, women-, or disabled-owned business for professional services (i.e., the amount paid for work performed, as may be adjusted, ***when billed on an hourly basis*** in connection with providing legal, accounting, or other professional or consulting services) provided ~~**by or allocated to a partner, member or other equity owner who is**~~ a minority, woman, or an individual with a disability ***as identified and reported by the prime contractor.***

We recommend that conforming revisions be made to the reporting requirement (changes are in bold):

> (18) Cumulative data separately showing the total diversity spend with non-diverse-businesses during the reporting year~~.~~***, based on information provided by the prime contractors.***

3. Limitations

Section 1207.3 of the Proposed Amendments provide that reporting requirements and the inclusion of clauses committing the contractor to practice the principles of equal employment opportunity and non-discrimination in all its business practices do not apply to contracts for goods with an annual value of less than $25,000.[12]

We recommend that this exclusion be expanded to include all contracts for goods and services where the agreements are off the shelf standard pre-printed contracts supplied by the contractor which are typically non-negotiable. Examples of such agreements include data subscription agreements (e.g., feeds of economic and market information) and off-the-shelf software licenses (e.g., computer click-through agreements). Otherwise the regulated entities will be put in the position of using limited resources to unsuccessfully try to change

[12] 81 Fed. Reg. 74736-74737.

agreements. This exception could be created by revising the regulatory language to read as follows (changes are in bold).

> (b) The contract clause required by § 1207.21(b)(6) and the itemized data reporting on numbers of contracts and amounts involved required under §§ 1207.22 and 1207.23(b)(13) through (22), apply only to contracts for services in any amount and to contracts for goods that equal or exceed $25,000 in annual value whether in a single contract, multiple contracts, a series of contracts or renewals of contracts, with a single vendor, ***except for contracts for services and goods on contractor pre-printed agreements which are non-negotiable.***

4. Board of Directors

a. Adequate Resources.

The Proposed Amendments revise the existing Section 1207.20 (b) to provide that the Boards of the regulated entities, rather than the management of the regulated entity, will ensure that the regulated entity's Office of Minority and Women Inclusion has sufficient resources to carry out its regulatory responsibilities.[13] We agree that appropriate resources are essential to the success of the Office.

However, we believe that the duty for assuring that they are provided does not lie with the Boards. Rather, it is properly vested in the management of the regulated entity which is responsible for its day-to-day operations. This is in contrast to the responsibility of the Boards which require that the directors obtain and inform themselves regarding available material information prior to making a decision, but which does not require them to be day-to-day business and operational experts. Moreover, the management of the regulated entity is better equipped to make a well-considered determination as to what resources are required for its Office of Minority and Women Inclusion and assure that they are made available. Accordingly, we recommend that this proposed section eliminate the reference to the board of directors by being revised to read, in pertinent part, as follows (changes are in bold):

> *Adequate resources.* ~~The board of directors of e~~***E***ach regulated entity will ensure that the Office of Minority and Women Inclusion, or office designated to lead the regulated entity in performing the responsibilities of this part, is provided relevant resources, including, but not limited to, human, technological, and financial resources sufficient to fulfill the requirements of this part.

b. Diversity and Inclusion Strategic Planning.

The proposed Amendments also charge the Board with undertaking certain strategic planning activities and approving the diversity and inclusion strategic plan.[14]

In accordance with Section 1710(b) of the FHFA's regulations on corporate governance,[15] Fannie Mae has elected to follow Delaware law for corporate governance, to the extent it is not inconsistent with Fannie Mae's

[13] 81 Fed. Reg. 74737.
[14] Section 1207.21 (d), Proposed Amendments at 81 Fed. Reg. 74737.
[15] 12 C.F.R. §1710 *et seq.*

Charter Act and other applicable Federal laws. Under Delaware law, a corporation may establish various committees and then delegate what might otherwise be responsibilities of the Board itself to those committees.[16]

Accordingly, when read together with our selected governing law we believe this provision allows us to delegate the referenced oversight to a properly authorized committee of the Board. This may or may not be the case for the other regulated entities which may have different applicable governing laws. To eliminate any doubt, and because such a practice actually facilitates and strengthens Board oversight, we recommend that the authority to delegate the referenced oversight to a committee be specifically incorporated into the Proposed Amendments, by revising this section to, in pertinent part, read as follows (changes are in bold):

> *Diversity and inclusion strategic planning.* No later than 45 days after the commencement of each calendar year, the board of directors, ***or a board committee delegated to act on its*** **behalf,** of each regulated entity shall adopt strategies for promoting diversity and inclusion of minorities, women, and individuals with disabilities, and minority-, women-, and disabled-owned businesses for at least the succeeding three years (i.e., a diversity and inclusion strategic plan). The board of directors of each regulated entity, ***or a board committee delegated to act on its*** **behalf,** shall review and annually affirm that the diversity and inclusion strategic plan remains applicable and appropriate during the two- year period that follows the adoption of the plan.

5. Strategic Plan

Sections 1207.21(d) and (e) of the Proposed Amendments provide for the Board's development of a diversity and inclusion strategic plan.[17] We agree that this is a very important undertaking and have already adopted such a plan. Section 1207.21(b)(7) of the Proposed Amendments provides that the policies and procedures of the organization shall also provide for the development of a stand-alone diversity and inclusion strategic plan. We believe this is confusing and redundant and recommend that §1207.21(b)(7) be deleted.

6. Annual reports – formats and contents.

Section 1207.23(b)(12) provides that the regulated entities' annual report shall include, among other things, a description of a variety of activities designed to advance diversity in mortgage credit, capital market transactions, and in affordable housing and community investment programs. The obligation to report on these matters carries with it the implication that a regulated entity will engage in the activities described.

However, we believe this section could be enhanced if the nature of the activities was not prescribed and the language was clarified to break out those activities which FHFA has identified. This would enable the regulated entities to undertake and report on activities that serve diversity purposes, but also would allow them more flexibility in designing and implementing their efforts within their respective business models.

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[16] Section 141 of Delaware's General Corporation Law provides, in pertinent part, that: "The board of directors may, by resolution passed by a majority of the whole board, designate 1 or more committees . . . Any such committee, to the extent provided in the resolution of the board of directors, or in the bylaws of the corporation, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation . . ." (DEL. CODE. ANN. TIT. 8 § 141)(1953).

[17] 81 Fed. Reg. 74737.

Accordingly, we suggest this provision be revised to read as follows (changes are in bold):

> . . . 12) A description of strategies, initiatives, and activities the regulated entity implemented to advance diversity and inclusion in conjunction with its efforts to –
>
> (i) Promote access to single- and multi-family mortgage credit ~~by –,~~ **which may include:**
>
> (A) Assessing challenges and impediments minority-serving financial institutions face in accessing the secondary mortgage market;
>
> (B) ***Assessing challenges and impediments minority-serving financial institutions face*** ~~and/or~~ in providing access to single- and multi-family mortgage credit for creditworthy borrowers; ***and***
>
> ***(C)*** Supporting lenders who serve minority communities;
>
> (ii) Promote diversity in capital market transactions ~~by –,~~ ***which may include:***
>
> (A) Assessing challenges and impediments minority-, women-, and disabled-owned businesses face providing capital market or financial transaction services including, but not limited to, those identified in § 1201.1; and
>
> (B) Identifying, considering, and selecting minority-, women-, and disabled-owned businesses to participate in capital market or financial transactions;
>
> (iii) Promote diversity and inclusion in affordable housing and community investment programs; . . .

7. Effective Date

We would like to propose a transition period before two reporting requirements become effective: (a) the new annual reporting requirements with respect to subcontractors referred to in Section 1207.23(b)(16)(iii) and (17)(iii) and (ii) of the Proposed Amendments[18] and (2) diversity spend with "non-diverse-owned businesses" referenced in Section 1207.23(b)(18)[19] of the Proposed Amendments, if these requirements are retained in the final rule.

Our recommendation is based on the fact that we are not currently collecting the pertinent data responsive to these reporting requirements and it will take us some time to do so. These activities also will require technological changes to our existing systems which handle thousands of contracts. Such changes are fairly time consuming to design, develop, test, and implement. In addition, the new requirements for subcontracting and diverse spend with "non-diverse-owned businesses" will necessarily require us to review existing

[18] 81 Fed. Reg. 74738.
[19] Id.

contracts for appropriate subcontracting opportunities and reporting requirements and approach the prime contractors to negotiate relevant changes or develop another approach to this challenge altogether.

Delay in the effective date of the Proposed Amendments for these provisions will allow us to undertake these matters in a thoughtful and complete manner. Thus, we recommend that these annual reporting requirements only become effective for the first full reporting year at least six months following their adoption. For instance, if the final rule is issued in June 2017, we request that the reporting requirements apply only to reporting years for 2018 and beyond.

8. Technical Change

We believe the reference in the first line of § 1207.3(b) to "section 1207.21(b)(6)" should be a reference to "section 1207.21(b)(8)".

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We appreciate having the opportunity to present our views. If you have any questions regarding the matters addressed in this letter, please feel free to contact the undersigned at (202)752-3426.

Sincerely,

Brian P. McQuaid
Senior Vice President and Chief Human Resources Officer