

Section 4. (a) Subject to the limitations in 12 CFR 701.33(c)(5) through (c)(7) of the NCUA regulations, the corporate credit union may elect to indemnify to the extent authorized by (check one) ( ) law of the State of \_\_\_\_\_ or ( ) Model Business Corporation Act the following individuals from any liability asserted against them and expenses reasonably incurred by them in connection with judicial or administrative proceedings to which they are or may become parties by reason of the performance of their official duties: (Check as appropriate) ( ) current officials, ( ) former officials, ( ) current employees, ( ) former employees.

(b) The corporate credit union may purchase and maintain insurance on behalf of the individuals indicated in (a) above against any liability asserted against them and expenses reasonably incurred by them in their official capacities and arising out of the performance of their official duties to the extent such insurance is permitted by the applicable State law or the Model Business Corporation Act.

(c) The term "official" in this bylaw means a person who is a member of the board of directors, supervisory committee, other volunteer committee (including elected or appointed loan officers or membership officers), established by the board of directors.

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## FEDERAL HOUSING FINANCE BOARD

### 12 CFR Part 906

### FEDERAL HOUSING FINANCE AGENCY

### 12 CFR Part 1207

RIN 2590-AA28

### Minority and Women Inclusion

**AGENCIES:** Federal Housing Finance Board; Federal Housing Finance Agency.

**ACTION:** Final rule.

**SUMMARY:** The Federal Housing Finance Agency (FHFA or agency) is adopting a final rule to implement section 1116 of the Housing and Economic Recovery Act of 2008 (HERA). Section 1116 of HERA requires FHFA, the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Federal Home Loan Banks (Banks) to promote diversity and the inclusion of

women and minorities in all activities. The final rule implements the provisions of section 1116 of HERA that apply to Fannie Mae, Freddie Mac, and the Banks.

**DATES:** This rule is effective January 27, 2011.

**FOR FURTHER INFORMATION CONTACT:** Eric Howard, Equal Employment Opportunity and Diversity Director, [Eric.Howard@fhfa.gov](mailto:Eric.Howard@fhfa.gov), (202) 408-2502, 1625 Eye Street NW., Washington, DC 20006; or Mark Laponsky, Deputy General Counsel, [Mark.Laponsky@fhfa.gov](mailto:Mark.Laponsky@fhfa.gov), (202) 414-3832 (not toll-free numbers), Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877-8339.

### SUPPLEMENTARY INFORMATION:

#### I. Background

Effective July 30, 2008, HERA, Public Law 110-289, 122 Stat. 2654, amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 *et seq.*) (Safety and Soundness Act) to establish FHFA as an independent agency of the Federal government.<sup>1</sup> HERA transferred the supervisory and oversight responsibilities of the Office of Federal Housing Enterprise Oversight (OFHEO) over Fannie Mae and Freddie Mac (collectively, Enterprises), and of the Federal Housing Finance Board (FHFB) over the Banks (collectively, regulated entities) and the Bank System's Office of Finance to FHFA.

The Safety and Soundness Act provides that FHFA is headed by a Director with general supervisory and regulatory authority over the regulated entities. FHFA is charged, among other things, with overseeing the prudential operations of the regulated entities. FHFA is also charged to ensure that the regulated entities: Operate in a safe and sound manner including maintenance of adequate capital and internal controls; foster liquid, efficient, competitive, and resilient national housing finance markets; comply with the Safety and Soundness Act and rules, regulations, guidelines and orders issued under the Safety and Soundness Act, and the respective authorizing statutes of the regulated entities; carry out the respective missions through activities authorized and consistent with the Safety and Soundness Act and the authorizing statutes; and, engage in

activities and operations that are consistent with the public interest.

Section 1116 of HERA amended section 1319A of the Safety and Soundness Act (12 U.S.C. 4520) to require FHFA to engage in certain activities to promote a diverse workforce. It also requires each regulated entity to establish an Office of Minority and Women Inclusion, or designate an office, responsible for carrying out the requirements of the section and such requirements and standards established by the Director. Section 1319A of the Safety and Soundness Act requires the regulated entities to promote diversity in all activities and at every level of the organization, including management, employment and contracting. Furthermore, 12 U.S.C. 1833e, as amended, and Executive Order 11478 require FHFA and the regulated entities to promote equal opportunity in employment and contracting.

On January 11, 2010, FHFA published a proposed rule on Minority and Women Inclusion to implement section 1116 of HERA, 12 U.S.C. 4520. The proposal set forth minimum requirements for regulated entity diversity programs as well as requirements for reporting on these programs. The proposal also set forth the minimum requirements for the agency's own diversity program.

The proposed rule consisted of the following subparts: Subpart A addressed matters of general application; subpart B applied only to FHFA's internal operational requirements under section 1116 of HERA; and subpart C implemented the requirements under section 1116 of HERA for the regulated entities. FHFA initially established a 60-day comment period but, at the request of the public, extended that period another forty-five (45) days.<sup>2</sup> The extended comment period closed on April 26, 2010.

FHFA received 23 comment letters to the proposed rule from individuals and entities. Three letters came from private citizens. Fannie Mae, Freddie Mac, and eleven of the Banks submitted comment letters. The Banks of Atlanta, Boston, Chicago, Dallas, Indianapolis, New York, San Francisco, Seattle, Topeka, Des Moines and Pittsburgh sent comments that were generally similar. The Bank System's fiscal agent, the Office of Finance, also submitted a comment. The following trade associations or potential vendors to the regulated entities submitted comment letters: The National Association of Hispanic Real Estate Professionals

<sup>1</sup> See Division A, titled the "Federal Housing Finance Regulatory Reform Act of 2008," Title I, section 1101 of HERA.

<sup>2</sup> See 75 FR 10446, March 8, 2010.

(NAHRE); the New America Alliance (NAA); FinaCorp Securities; Trade Street Advisors (TSA); the Asian Real Estate Association of America (AREAA); and the National Association of Securities Professionals (NASP). The comments were extensive, thoughtful and significant. All comments were considered. None of the comments addressed the provisions of subpart B with respect to the requirements for FHFA's internal diversity management program. A discussion of significant comments as they relate to the provisions of the final rule follows.

## II. Reservation of Subpart B

This regulation finalizes subpart A, addressing matters of general applicability, and subpart C, addressing regulation of diversity at the regulated entities and the Bank System's Office of Finance. FHFA has decided to reserve subpart B of the proposed rule. After the comment period for the proposed rule closed, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 (Dodd-Frank) was enacted. Section 342 of Dodd-Frank expands on the requirements of HERA. Unlike HERA, Dodd-Frank requires the agency to establish and staff a separate Office of Minority and Women Inclusion responsible for carrying out operational diversity requirements. The requirements of Dodd-Frank are similar, but not identical to HERA and apply to several other financial regulatory agencies. FHFA plans to finalize subpart B once it has reconciled the requirements of HERA section 1116, the reserved subpart B to this rule, and section 342 of Dodd-Frank. FHFA wants to ensure that any proposed requirements under subpart B of the rule will facilitate the appropriate alignment of the agency's diversity and inclusion program with the programs the other agencies subject to section 342 of Dodd-Frank will be implementing.

## III. Final Rule—Subparts A and C

FHFA responds to specific concerns below as it explains aspects of the rule commented upon. After considering the comments received in response to the proposed rule, FHFA is adopting a final rule implementing the provisions of section 1116 of HERA that apply to Fannie Mae, Freddie Mac, and the Banks.

### A. Comments on FHFA's Authority

All eleven of the Banks that submitted comments and the Office of Finance commented that the proposed rule exceeds FHFA's authority under HERA in several respects, but most notably by including any coverage of disabilities in

the rule. The comments suggest that coverage of the rule must be strictly limited to HERA's identification of minorities and women.

FHFA disagrees. HERA contains more than sufficient authority for the Director to expand the coverage of the rule. Several provisions of HERA make clear that the provisions of section 1116 are minimum standards on which the Director may expand as he determines appropriate. Section 1116, in explaining the responsibilities of a regulated entity's Office of Minority and Women Inclusion, requires the office to "carry out this section *and all matters of the entity relating to diversity* \* \* \* in accordance with such standards and requirements as the Director shall establish." 12 U.S.C. 4520(a) (emphasis added). The reference to "this section and all matters of the entity relating to diversity" signals that Congress did not intend the terms of the section to limit the Director's authority. They indicate an understanding that "all matters of the entity relating to diversity" is not limited to matters relating to minorities and women. That understanding is buttressed by the unqualified authority for the Director to establish "such standards and requirements" as he determines appropriate.

The Director's authority does not stop at the language of section 1116. The Director has broad general regulatory authority (12 U.S.C. 4511(b)(2)) which is required to include a principal duty of "oversee[ing] the prudential operations of each regulated entity." 12 U.S.C. 4513(a)(1)(A). Moreover, the scope of the Director's authority includes "exercis[ing] such incidental powers as may be necessary or appropriate to fulfill the duties and responsibilities of the Director in the supervision and regulation of each regulated entity." 12 U.S.C. 4513(a)(2)(B).

The Director believes that the anti-discrimination provisions in the Rehabilitation Act of 1973 (29 U.S.C. 791, 793, 794, and 794a) and the congressional findings concerning extensive discrimination and barriers to economic participation faced by individuals with disabilities underlying the Americans with Disabilities Act (42 U.S.C. 12101) (ADA) constitute sufficient reason to include individuals with disabilities and disabled-owned businesses within the scope of this final rule. The final rule includes requirements for inclusion and diversity with respect to individuals with disabilities.

### B. Disabilities Terminology

In several instances, the proposed rule used the term "disabled" to refer to the

community of individuals with disabilities. The final rule changes that terminology to "individuals with disabilities" or "persons with disabilities," where appropriate. Consistent with current convention and usage in the ADA, the final rule no longer refers to individuals with disabilities as "disabled" and the definition of "disabled" has been removed. The term "disabled-owned business" is separately defined and is retained for ease of use.

### C. Disabilities Data Reporting

Several commenters requested removal of data reporting requirements with respect to disabilities. FHFA found their comments compelling to the extent that some elements of the proposed rule create unnecessary tension with medical privacy and anti-discrimination statutes. Therefore, data reporting with respect to disabilities is significantly reduced in the final rule, as discussed below. However, the rule retains some data reporting requirements and continues to require outreach to the individuals with disabilities.

### D. Scope of Contracts Included Under the Rule

A significant number of commenters requested that the agency clarify the scope of the contracts subject to the requirements of the rule. Several commenters proposed that the agency limit the rule to contracts for services. Several others proposed that the final rule apply to contracts for goods and services, but as described by the Federal Deposit Insurance Corporation's own outreach regulation.<sup>3</sup> Some commenters raised serious concerns about applying the rule to loans, advances and other contracts that are for neither goods nor services.

Section 1116(c) of HERA, entitled "Applicability," provides: "This section shall apply to all contracts of a regulated entity for services of any kind, including services of investment banking, asset management entities, broker-dealers, financial services entities, underwriters, accountants, investment consultants, and providers of legal services." This makes clear that the section covers all contracts for services. However, the section does not limit the scope to just contracts for services as a number of commenters asserted. On the contrary, section 1116(b) seeks inclusion and diversity "in all business and activities of the regulated entity at all levels, including in procurement, insurance

<sup>3</sup> See Federal Deposit Insurance Corporation regulation 12 CFR Part 361 Minority and Women Outreach Program Contracting.

and all types of contracts (including contracts for the issuance or guarantee of any debt, equity, or mortgage-related securities, the management of its mortgage and securities portfolios, the making of its equity investments, the purchase, sale, and servicing of single- and multi-family mortgage loans, and the implementation of its affordable housing program and initiatives).” An interpretation that limits coverage to contracts for services makes section 1116(b) a nullity. Even restricting coverage to contracts for goods and services severely limits section 1116(b) beyond the plain language of the statute.

However, FHFA understands the practical difficulties in applying a rule to cover contracts for services, contracts for goods, and contracts for all other subjects, such as financial contracts, loans, financial transactions, financial instruments, realty, deeds, mortgages, letters of credit, confidentiality and non-disclosure agreements, software and other licenses, corporate operating agreements and similar arrangements, and the Banks’ advances. HERA, by requiring every contract for services to be covered but not using the same inclusive language for all contracts, allows for reasonable distinctions. FHFA believes that contracts for goods that are for more than minimal amounts, as well as contracts for services, present great opportunities for the regulated entities and the Office of Finance to advance the interests of diversity. The final rule requires demographic data reporting and all other relevant elements in the regulation for every contract for services and every contract for goods that equals or exceeds \$10,000 in annual value (whether as a single contract or as a series of contracts or renewals with a single vendor). The final rule exempts from the material clause and demographic data reporting requirements of §§ 1207.21(b)(6), 1207.22 and 1207.23(b)(11) through 1207.23(b)(13) all other contracts. The regulated entities’ diversity outreach efforts in contracting under § 1207.21(c), however, should seek to include every type of contract. Paragraph (b) has been added to § 1207.3, “Limitations,” to reflect these distinctions. To further ensure the reasonable implementation of this limitation, section 1207.21(b) is expanded to require that each regulated entity and the Office of Finance identify the types of contracts it considers exempt under § 1207.3(b).

#### *E. Business Certifications*

A few commenters asked for guidance with respect to what certifications FHFA would accept for minority-, women-, and disabled-owned

businesses. Other commenters requested clarity with respect to identifying qualified businesses. The proposed rule noted that the definition of “disabled-owned businesses” is satisfied by a business that qualifies with the U.S. Small Business Administration (SBA) as a Service-Disabled Veteran-Owned Small Business Concern. Other methods of certification exist through State government entities, trade associations and specialty organizations, and chambers of commerce, such as the US Business Leadership Network, a national disability organization of businesses, or the National Association of Minority and Women Owned Law Firms.

Despite inherent shortcomings in self-certification, FHFA believes that the regulated entities and the Office of Finance should be allowed to rely on a self-certification from a business so long as both the certification and the reliance are in good faith. Nonetheless, FHFA prefers that the regulated entities rely on certifications from qualified independent third parties.

#### *F. Quotas and Demographic Benchmarks*

Several commenters urged FHFA to disclaim the use of demographic quotas, while other commenters urged the agency to establish numerical targets and goals. Nothing in the proposed rule, or in the final rule, envisions or suggests the use of quotas. Additionally, a generally applicable regulation is not the vehicle through which to prescribe remedial targets for specific circumstances at particular entities. FHFA will not forego the use of any legally permissible standards, methods, tools and techniques that it determines appropriate to analyze data reported and to measure progress or adherence to standards. Diversity at each regulated entity and the Office of Finance needs to be evaluated separately. FHFA is not willing to impose an artificial standard on all entities. Deficiencies at a regulated entity or the Office of Finance will be addressed as they arise on a case-by-case and issue-by-issue basis. The use of remedies to address the deficiencies will be tailored to fit the circumstances at hand.

Several commenters requested that FHFA use regional demographic data when analyzing workforce diversity and the progress of each regulated entity. FHFA responds by noting that it will use the data it considers appropriate in the context of what it is evaluating. Regional demographic data are appropriate for some purposes, but not for all. By way of example only, it would be appropriate to apply national

data when recruiting for employees or soliciting for contractors on a national basis. Under no circumstance will FHFA accept regional demographic data as a means of justifying the failure to make efforts to advance diversity.

#### *G. Comments Disputing the Public Policy Reflected in Section 1116 and the Proposed Rule*

One private citizen commented that any approach to inclusion and diversity that recognizes characteristics like gender and race are misguided and counterproductive. Another private citizen commented that FHFA should not require the creation of Offices of Minority and Women Inclusion and should let existing agencies, such as the Equal Employment Opportunity Commission (EEOC), regulate diversity at the regulated entities.

Both of these comments are mistaken and take issue with the public policy expressed by Congress in section 1116 of HERA. Congress directed each regulated entity to establish an Office of Minority and Women Inclusion, or designate an office to perform the functions required by the statute of such an office. Congress also required that the regulated entities pay attention to and report on gender and racial diversity in their activities including in employment and contracting. FHFA does not have the discretion to ignore the statute. Moreover, HERA gives certain regulatory oversight and enforcement authority to FHFA to broadly encourage diversity in employment, contracting, and all business and activities at the regulated entities which are not otherwise subject to such regulation.

Existing agencies do not, as one private citizen suggested, regulate diversity in employment or contracting at the regulated entities. The EEOC is an enforcement agency to which certain demographic data is reported. It files lawsuits and investigates and processes charges of discrimination in employment against businesses for violations of anti-discrimination laws. It publishes reports about employment discrimination as well as diversity trends and progress throughout the country and in specific segments of the economy. The EEOC’s regulations provide guidelines for addressing and avoiding employment discrimination and it issues recommended best practices and legal policy announcements. It does not exercise regulatory oversight of diversity. Furthermore, its authority is limited to discrimination in employment. The EEOC has no authority with respect to contracting in any industry. Similarly, unlike Federally insured depository

institutions, FHFA's regulated entities are not considered government contractors subject to Executive Order 11246, under which the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) exercises mainly enforcement authority with respect to discrimination on specific bases at many financial institutions and other companies. In short, the responsibilities given to FHFA are not—as the commenter suggested—duplicative of existing regulatory regimes.

#### Section 1207.1 Definitions

In several instances, the proposed rule used the term “disabled” to refer to the community of individuals with disabilities. The final rule uses the term “individuals with disabilities” or “persons with disabilities” instead of “disabled” where appropriate. This change is made consistent with current convention and usage in the ADA. The final rule no longer refers to individuals with disabilities as “disabled” and the definition of “disabled” has been removed. The term “disabled-owned business” is separately defined and is retained for ease of use.

Seven Banks commented that the proposed definition of “business and activities” is too broad, exceeds the scope of HERA, and makes compliance with some sections of the proposed rule impossible.

FHFA disagrees. The definition is intentionally broad and all-inclusive because the statute's description of covered activities is broad and all-inclusive. Section 1116 of HERA applies the diversity and inclusion requirements to “all matters of the entity relating to diversity in management, employment and business activities \* \* \*” 12 U.S.C. 4520(a). It extends to “all business and activities \* \* \* at all levels, including in procurement, insurance and all types of contracts (including contracts for the issuance of debt, equity or mortgage-related securities, the management of its mortgage and securities portfolios, the making of its equity investments, the purchase, sale and servicing of single- and multi-family mortgage loans, and the implementation of its affordable housing program and initiatives).” 12 U.S.C. 4520(b). The breadth of the definition is necessary to ensure that “all types of contracts,” management activities, employment, procurement and “all contracts \* \* \* for services of any kind” (12 U.S.C. 4520(c)) in fact are captured by the regulation. The final rule retains the proposed definition.

Seven Banks identified as problematic the definition of “disabled-owned

business” because it relies on inherently unreliable self-identifications. Another regulated entity suggested expressly permitting the use of voluntary commercially reasonable efforts to identify qualified populations. Self-identifications, while not ideal, are commonly relied upon, including in the decennial censuses. With respect to disabilities, certain inquiries cannot be made and some disabilities are not observable. Self-identification actually is a preferred method for classification. FHFA does not believe that further clarification is needed, having addressed the issues of business certifications above. The final rule retains the proposed definition.

Five regulated entities commented that the proposed definition of “minority” is inconsistent with HERA, which cross-references section 1204 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989. The commenters are correct. Although under the Director's authority, FHFA can require reporting with respect to classifications that are beyond those included in the mandatory definition of “minority,” the final rule conforms the definition of “minority” to that referenced in HERA.

One Bank requested that FHFA limit the definition of “disability” by disregarding the so-called “regarded as” alternative contained in both the Rehabilitation Act of 1973<sup>4</sup> and the ADA.<sup>5</sup> FHFA declines to adopt the suggestion. The definition incorporates standards developed by authorities responsible for enforcing the ADA and FHFA finds no reason to create a narrower definition than that which Federal law has recognized for more than thirty (30) years.

#### Section 1207.2 Policy, Purpose and Scope

Nine Banks and the Office of Finance requested that FHFA limit the phrase “to the maximum extent possible” to actions that are consistent with other laws and accounting for safety and soundness concerns. FHFA believes that compliance with other applicable laws is an inherent qualification on any action and need not be expressed in the final rule. With respect to safety and soundness considerations, the final rule reflects that safety and soundness are concerns that should be balanced when implementing the phrase “to the maximum extent possible.” However, the goals of inclusion and diversity are

<sup>4</sup> See *School Board of Nassau County v. Arline*, 480 U.S. 273, 279 (1987) (quoting the Rehabilitation Act definition of “handicapped individual” as amended in 1974).

<sup>5</sup> 42 U.S.C. 12102(2).

not inconsistent with safety and soundness. Therefore, safety and soundness should not be used, and FHFA will not accept it, as a justification for the regulated entities and the Office of Finance failing to make efforts to advance inclusion and diversity.

The proposed rule did not include individuals with disabilities in describing FHFA's policy to promote nondiscrimination, diversity, and inclusion. The final rule corrects that omission, consistent with the rest of the rule. Additionally, the final rule clarifies that the described policy is a minimum standard. The final rule also removes references to any standards pertaining to FHFA in § 1207.2(b) and (c) since subpart B in which the standards were addressed has been reserved.

#### Section 1207.20 Office of Minority and Women Inclusion

Six Banks requested clarification that an entity would be in compliance with paragraph (a) of this section if some of the responsibilities of § 1207.20 were performed by employees outside of the designated Office of Minority and Women Inclusion. The final rule retains the language from the proposed rule. However, FHFA does not believe it necessary for an Office of Minority and Women Inclusion to operate in isolation from other parts of the entity. As long as the Office of Minority and Women Inclusion, or other designated office, remains responsible and accountable for directing and implementing the entity's diversity and inclusion program, other units of the entity may assist as required. FHFA encourages efforts to integrate respect for and attention to diversity and inclusion throughout each regulated entity.

Five Banks objected to the use of the phrase “standards and guidance” in § 1207.20(c). The final rule uses the phrase “standards and requirements” to conform to the language in 12 U.S.C. 4520(a). Nonetheless, FHFA intends to use various tools to implement this regulation and guidances may be among them, when appropriate.

#### Section 1207.21 Equal Opportunity in Employment and Contracting

Eight Banks commented that paragraph (a) of this section should not be broadened beyond the demographic classifications of “minority” and gender, noted in HERA. Section 1207.21(a) requires an equal opportunity notice and FHFA declines to narrow the identification of so-called “protected classes” recognized in an equal opportunity notice. FHFA notes that the

exact language of the notice is not prescribed, but making this notice exclusive, rather than inclusive, of classifications is inconsistent with encouraging diversity. If anything, the proposed rule's requirement is under-inclusive, as it only addresses protected classifications recognized in Federal employment discrimination laws. Many businesses, perhaps some regulated entities, already have policies that recognize equal opportunity for other classifications, such as marital or parental status, sexual orientation or political affiliation. The final rule clarifies that the status classifications required in the notice establishes a minimal level of inclusiveness and additional coverage is voluntary to the entity. The notice should be supplemented and amended from time-to-time as additional protected classifications are identified in Federal anti-discrimination laws. For additional clarity, the final rule also requires the entity to confirm its commitment against retaliation, a fundamental principle for realizing the objective of equal opportunity.

Eight regulated entities objected to the "alternative media" publication requirements in paragraphs (a) and (b) of this section as overly burdensome.

FHFA disagrees. The proposed rule language required the regulated entities and the Office of Finance to make certain notices, policies and procedures readily accessible to the public "(including through alternative media—e.g., Braille, audio—as necessary)." The language with respect to Braille and audio formats is illustrative of accessibility and not prescriptive. The proposed rule was clear that if alternative media formats were "necessary," they should be used. FHFA has decided to use the phrase "alternative media formats, as necessary," to make it very clear that the language does not limit the types of alternative formats a regulated entity or the Office of Finance should use when necessary to make notices, policies and procedures accessible.

One regulated entity commented that FHFA should modify paragraphs (b) and (c) of this section to clarify that demographic preferences in hiring and contracting are not required. FHFA declines to make the requested modification because it is unnecessary. Nothing in the proposal or the final rule requires preferences. However, the comment alerted FHFA to the fact that recruiting and outreach to sources for applicants for employment who are minorities, women or individuals with disabilities had been omitted from the proposal. To correct this oversight, the

final rule adds a clause to paragraph (b)(5) of this section requiring the regulated entities and the Office of Finance to encourage and engage in recruiting and outreach for applicants for employment from minorities, women and individuals with disabilities.

Twelve of the regulated entities submitted comments objecting to paragraph (b)(3) of this section requiring alternative dispute resolution mechanisms for complaints of discrimination. The requirement is procedural. It does not create a substantive right, but provides a process that is known for both the regulated entity and claimants to resolve disputes early. However, FHFA does not intend to micro-manage the affairs of the regulated entities and the Office of Finance. If, in the exercise of management judgment, a regulated entity or the Office of Finance determines that an alternative dispute resolution mechanism is advisable, FHFA encourages it to make the process transparent and known through the entity's policies. The final rule requires internal procedures for accepting and resolving complaints of discrimination, but does not require any particular design or the use of alternative dispute resolution options.

Ten Banks contended that the reasonable accommodation procedure requirement of paragraph (b)(4) of this section exceeds HERA's scope and creates substantive rights for individuals with disabilities.

FHFA disagrees. The substantive and enforceable right is created by the American with Disabilities Act.<sup>6</sup> The final rule requires the regulated entities and the Office of Finance to establish transparent procedures for fulfilling their legal obligations under the ADA to provide reasonable accommodations to employees and applicants for employment. The final rule retains the language of the proposal.

Eleven Banks and the Office of Finance objected to the proposed paragraph (b)(6) of this section requiring that all contracts contain a material clause committing the contractor to the principles of non-discrimination and diversity and that all contractors require such clauses in subcontracts for goods and services provided to the regulated entities. The Banks believe that requiring such clauses places them at a competitive disadvantage in contracting; that such clauses are unenforceable; and that the requirement interferes with a Bank's and a contractor's right to contract. The final rule retains the

requirement. As a matter of public policy FHFA believes that any regulated entity or the Office of Finance, as a Federal government sponsored enterprise, should decline to enter into business with contractors who find such clauses objectionable. Similar clauses have been required in government contracts under Executive Order 11246 for more than (forty) 40 years. Unlike the requirements for government contracts, FHFA has not prescribed specific language to be included. Each entity is free to develop the specific language of its own required clause. In developing the clause, each entity can address the difficulties it believes exist for enforcement. These clauses create contractual conditions that a contractor or subcontractor can accept or reject. FHFA does not believe that such provisions pose any greater enforcement difficulty than any other contractual condition. Nevertheless, FHFA recognizes that in some contexts and for limited types of contracts these clauses may not be commercially reasonable to obtain. Therefore, § 1207.3(b) establishes certain limitations on the material clause requirement.

Nine regulated entities asked FHFA to confirm that the required standards and procedures for publication of contracting opportunities under paragraph (c)(2) of this section may include reasonable exceptions identified by the regulated entity or the Office of Finance. The commenters were concerned that the expansive scope of the proposed regulation could hinder their ability to engage in certain business transactions. Although the commenters did not provide options for addressing or implementing their suggestions, FHFA recognizes that the requirements under paragraph (c)(2) of this section could result in unintended hardships for the regulated entities and the Office of Finance.

FHFA finds that the publication, solicitation and competitive bidding processes are critical to ensuring broad and fair participation of potential vendors, thereby enhancing the opportunities for a more diverse pool of contractors. The final rule retains the publication and bidding process requirements. However, each regulated entity and the Office of Finance may exercise reasonable discretion to develop thresholds, exceptions, or limitations for implementing paragraph (c)(2) of this section. A new § 1207.21(b)(7) requires the regulated entities and the Office of Finance to develop policies and procedures that address the rationale, necessity, and parameters for employing any thresholds, exceptions, or limitations

<sup>6</sup> 42 U.S.C. 12112(b)(5).

with respect to implementing paragraph (c)(2) of this section. The thresholds, exceptions, or limitations for implementing § 1207.21(c)(2) must be commercially reasonable and consistent with the intent of HERA. Under the express terms of HERA, procedures to “review and evaluat[e] \* \* \* contract proposals and to hire service providers shall include a component that gives consideration to the diversity of the applicant.” 12 U.S.C. 4520(b). The final rule retains, in § 1207.21(c)(3), the requirement for considering diversity.

#### Section 1207.22 Regulated Entity and Office of Finance Reports

Seven Banks asked that the final rule enumerate the expected deliverables necessary for the preliminary status report, as required by paragraph (a)(1) of this section.

FHFA declines to expand on the requirement as requested, because the expansion is unnecessary. Paragraph (a)(1) of this section, as proposed, required the preliminary report to describe “actions taken, plans for and progress toward implementing the provisions of 12 U.S.C. 4520 and this part; and including to the extent available the data and information required by this part to be included in an annual report.” The proposed rule provides sufficient information for the regulated entities and the Office of Finance to understand what is required to be included in the preliminary reports.

Nine regulated entities and the Office of Finance commented on the timing of reports. Some requested that the annual report required by paragraph (c) of this section not be required until at least 120 days after the end of a reporting period. Others requested that the due date for submission be April 1 of each year rather than February 1 and beginning in 2012 rather than 2011. Others requested that the first annual reporting period begin on the date that the final rule is effective while others suggested an October 1 to September 30 reporting period. The comments are far from uniform, but they illustrate that the regulated entities are likely to require significantly different lengths of time to place in operation an infrastructure capable of providing the information required by the rule. Therefore, FHFA has determined that the transition period before the filing of preliminary reports should be lengthened from 90 to 180 days after the effective date of the final rule.

The commenters also presented various and not always consistent alternative reporting periods and dates for their annual accomplishment

reports. FHFA understands the challenges the regulated entities and the Office of Finance may encounter when submitting their annual accomplishment reports. As a result, the first annual report under the rule will be required on March 1, 2012, and will report on the period of January 1 through December 31, 2011. The March 1 date for annual reports provides a minimal amount of time for the agency to analyze information and include elements in its own report to Congress. The January 1 through December 31 reporting period maintains consistency with the periods covered in its annual reports to Congress.

One regulated entity suggested that the rule consolidate the annual summary required by § 1207.22(d) and the annual report under § 1207.22(c). Another requested that the annual report coincide with the due date for an annual financial report.

FHFA declines to adopt either suggestion. The annual report and the annual summary serve different purposes. The summary is the minimum information that HERA requires to be reported along with each entity’s annual report to the Director. The annual report is more detailed and provides greater specificity to aid the agency in fulfilling its regulatory responsibilities.

One regulated entity requested modification to paragraph (b) of this section to provide that the information in annual reports will not be disclosed to the public. Other commenters requested that all information gathered from the regulated entities and the Office of Finance be publicly available. Another regulated entity argued that FHFA should acknowledge that it is bound by other statutes to maintain the confidentiality of some of the information reported, such as reports filed with the EEOC. The applicability of this provision to FHFA is not clear, but FHFA does not intend to publicly release the subject information and data.

FHFA considers the reports and data to be related to examinations and examination, operation, or condition reports. In general, FHFA will consider all the information and data attributed to a particular regulated entity to be non-public, subject to Freedom of Information Act Exemption (b)(8) and to the examination privilege. The agency does not intend to make attributed information public. However, FHFA intends to use the information and data arrayed or aggregated in a variety of ways, without attribution to specific institutions, in order to identify trends, success or lack of success, or best practices each regulated entity can use to assess or improve its own programs.

Additionally, FHFA may use such unattributed information in various formats to inform the public on such trends, success, lack of success and best practices among the regulated entities. As a result, FHFA does not believe that any change to the rule is required in this respect.

Two regulated entities asked for clarification of the term “third-party contractor” as used in paragraph (d) of this section. “Third-party contractor” is an undefined term used in 12 U.S.C. 4520(d). In the context of this part, FHFA considers the term to be co-extensive with the term “contractor” and deletes “third-party” from the final rule. The intent is to capture the various types of contracts entered into between a regulated entity and another person or entity independent of the regulated entity, as limited by § 1207.3(b) of the final rule.

One commenter recommended that the final rule should establish a threshold amount and require large contractors to report on any subcontracting activities. FHFA believes the purpose of the suggestion is an effort to ensure that businesses owned by minorities, women and individuals with disabilities are not used as fronts to steer a majority of the “real” work and business under a contract to other businesses. However, FHFA does not believe that the final rule should establish such detailed requirements. The good faith requirements described above with respect to business certifications are in part intended to address the concern. Moreover, FHFA expects the regulated entities and Office of Finance to develop their contracting policies to ensure that methods are present for verifying that the performing contractor is in fact the qualified minority-, women- or disabled-owned business.

#### Section 1207.23 Annual Reports—Format and Contents

Eleven regulated entities and the Office of Finance, to differing degrees, objected to voluntary self-identification by employees, directors, and contractors. The commenters objected to the use of voluntary self-identification because it could yield unreliable data for the annual reports. Self-identification is an accepted means of gathering demographic data. The decennial censuses rely on self-identification. The EEOC and the OFCCP also recognize that self-identification, as well as visual observation identification, are among acceptable means of gathering demographic data. This issue also is addressed above with respect to the

definition of “disabled-owned business” and business certifications. The final rule is not changed to address this objection.

Twelve regulated entities requested removal of § 1207.23 (b)(3) because the regulated entity will not be able to provide the disability classification for individuals who applied for, but were not offered, employment. The comments raise a significant issue in that anti-discrimination laws severely restrict pre-employment inquiries about disabilities. Consequently, the final rule deletes from paragraphs (b)(3) and (4) of this section references to reporting by disability classification.

Nine Banks requested clarification of paragraphs (b)(3), (7) and (8), of this section allowing regulated entities to use minimum job qualifications as a threshold for reporting the number of individuals applying for employment or promotion. This issue relates to the identification of who is an applicant under anti-discrimination in employment laws. FHFA believes that the regulated entities should follow the guidance provided by the EEOC and the OFCCP in determining what constitutes an applicant requiring reporting. It is not FHFA’s charge or intent to interpret the statutes enforced by other agencies.

Eleven regulated entities commented that requiring data on employment terminations under § 1207.23(b)(5) is inconsistent with the proposed rule’s statement that personally identifiable information is not required.

FHFA disagrees. The provision requires that the entities present a simple numerical tally of employment terminations, whether voluntary or involuntary. It does not require the entities to submit any identifiable information. While it is theoretically possible that someone with access to attributed data from a sufficiently small population of terminations and with pre-existing knowledge of personally identifiable information on an entity’s workforce could deduce the identity of a terminated employee, the prospect is remote and too attenuated to require any adjustment to the rule. The provision does not require personally identifiable information and the entities should not report personally identifiable information.

Eleven regulated entities requested removal of the requirements in § 1207.23(b)(10) with respect to outreach to low-income and inner-city populations, activities to provide financial literacy education and efforts to provide contracting technical assistance. These activities are not required of the regulated entities by HERA and are removed from paragraph

(b)(10) of this section. However, if a regulated entity engages in such activities, FHFA encourages the entity to report on them.

One Bank requested modification to §§ 1207.23 (b)(15) and (16) to remove the requirement to report information about complaints and claims of discrimination, the outcomes of those complaints and claims, and the amounts paid in settlements and judgments. FHFA believes that this data is important for identifying trends and the costs of discrimination claims at each regulated entity separately and in aggregate. The final rule retains the proposed provision.

Nine regulated entities requested removal of §§ 1207.23(b)(18) and (19) as beyond the scope of the reporting requirements of 12 U.S.C. 4520(d). The final rule retains both provisions which require narrative self-analyses of the entity’s progress, successes, needs for improvement and plans for fulfilling the policy and purpose of the regulation. Neither provision is precluded by HERA; both are consistent with FHFA’s regulatory responsibilities.

#### Section 1207.24 Enforcement

After review of all comments, FHFA concluded that no change to this section is needed.

#### Differences Between the Banks and the Enterprises

Section 1313(f) of the Safety and Soundness Act, as amended by section 1201 of HERA, requires the Director, when promulgating regulations relating to the Banks, to consider the differences between the Banks and the Enterprises with respect to the Banks’ cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; and joint and several liability. The Director may also consider any other differences that are deemed appropriate. In preparing the rule, the Director considered the differences between the Banks and the Enterprises as they relate to the above factors. Comments were solicited on these differences in relation to the proposed rule.

A significant difference exists in the nature of advances and other financial contracts that the entities may enter. Specifically, the Banks’ advances are contracts that are entered between a Bank and its members only, limiting the universe of potential counterparties. Because advances are neither contracts for goods nor contracts for services, they are carved out of reporting requirements under the rule. The final rule also provides the entities latitude to exclude

contracts from solicitation and bidding requirements on commercially reasonable bases, so long as those exclusions are identified. The unique character of advances and the restricted market for them provide some reasons that a Bank might exclude them from outreach, solicitation and bidding requirements. However, the demographic profile of the restricted market should not be an excuse to forego diversity efforts. Outreach and recruiting to banks that are owned by diverse individuals is encouraged, which in turn diversifies the market for advances. The final rule reflects the flexibility needed to address these differences.

The Director has considered the above factors and comments and concluded that none of the unique factors relating to the Banks warrants establishing different treatment under this final regulation.

## IV. Regulatory Impact

### *Paperwork Reduction Act*

The final regulation does not contain any information collection requirement that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations shall include an initial regulatory flexibility analysis describing the regulation’s impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the final regulation under the Regulatory Flexibility Act. FHFA certifies that the final regulation is not likely to have a significant economic impact on a substantial number of small business entities because the regulation is applicable only to the regulated entities and the Office of Finance, which are not small entities for purposes of the Regulatory Flexibility Act.

### **List of Subjects**

#### *12 CFR Part 906*

Government contracts, Minority businesses.

## 12 CFR Part 1207

Disability, Discrimination, Equal employment opportunity, Government contracts, Minority businesses, Office of Finance, Outreach, Regulated entities.

**Authority and Issuance**

■ Accordingly, for the reasons stated in the preamble, under the authority of 12 U.S.C. 4526, the Federal Housing Finance Agency amends chapters IX and XII of Title 12, Code of Federal Regulations, as follows:

**CHAPTER IX—FEDERAL HOUSING FINANCE BOARD****PART 906—OPERATIONS**

■ 1. The authority citation for part 906 continues to read as follows:

*Authority:* 12 U.S.C. 4516.

**Subpart C—[Removed and Reserved]**

■ 2. Remove and reserve subpart C, consisting of §§ 906.10 through 906.13.

**CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY****Subchapter A—Organization and Operations**

■ 3. Add part 1207 to subchapter A to read as follows:

**PART 1207—MINORITY AND WOMEN INCLUSION****Subpart A—General**

Sec.

1207.1 Definitions.

1207.2 Policy, purpose, and scope.

1207.3 Limitations.

1207.4–1207.9 [Reserved].

**Subpart B—Minority and Women Inclusion and Diversity at the Federal Housing Finance Agency**

1207.10–1207.19 [Reserved].

**Subpart C—Minority and Women Inclusion and Diversity at Regulated Entities and the Office of Finance**

1207.20 Office of Minority and Women Inclusion.

1207.21 Equal opportunity in employment and contracting.

1207.22 Regulated entity and Office of Finance Reports.

1207.23 Annual reports—format and contents.

1207.24 Enforcement.

*Authority:* 12 U.S.C. 4520 and 4526; 12 U.S.C. 1833e; E.O. 11478.

**Subpart A—General****§ 1207.1 Definitions.**

The following definitions apply to the terms used in this part:

*Business and activities* means operational, commercial, and economic endeavors of any kind, whether for

profit or not for profit and whether regularly or irregularly engaged in by a regulated entity or the Office of Finance, and includes, but is not limited to, management of the regulated entity or the Office of Finance, employment, procurement, insurance, and all types of contracts, including contracts for the issuance or guarantee of any debt, equity, or mortgage-related securities, the management of mortgage and securities portfolios, the making of equity investments, the purchase, sale and servicing of single- and multi-family mortgage loans, and the implementation of affordable housing or community investment programs and initiatives.

*Director* means the Director of FHFA or his or her designee.

*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.

*Disabled-owned business* means a business, and includes financial institutions, mortgage banking firms, investment banking firms, investment consultants or advisors, financial services entities, asset management entities, underwriters, accountants, brokers, brokers-dealers, and providers of legal services—

(1) Qualified as a Service-Disabled Veteran-Owned Small Business Concern as defined in 13 CFR 125.8 through 125.13; or

(2) More than fifty percent (50%) of the ownership or control of which is held by one or more persons with a disability; and

(3) More than fifty percent (50%) of the net profit or loss of which accrues to one or more persons with a disability.

*FHFA* means the Federal Housing Finance Agency.

*Minority* means any Black (or African) American, Native American (or American Indian), Hispanic (or Latino) American, or Asian American.

*Minority-owned business* means a business, and includes financial institutions, mortgage banking firms, investment banking firms, investment consultants or advisors, financial services entities, asset management entities, underwriters, accountants, brokers, brokers-dealers and providers of legal services—

(1) More than fifty percent (50%) of the ownership or control of which is held by one or more minority individuals; and

(2) More than fifty percent (50%) of the net profit or loss of which accrues to one or more minority individuals.

*Office of Finance* means the Office of Finance of the Federal Home Loan Bank System.

*Reasonable accommodation* has the same meaning as defined in 29 CFR 1630.2(o) and Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act.

*Regulated entity* means the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, any Federal Home Loan Bank and/or any affiliate thereof that is subject to the regulatory authority of FHFA. The term “*regulated entities*” means (collectively) the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, and/or any affiliate Federal Home Loan Bank and/or any affiliate thereof that is subject to the regulatory authority of FHFA.

*Women-owned business* means a business, and includes financial institutions, mortgage banking firms, investment banking firms, investment consultants or advisors, financial services entities, asset management entities, underwriters, accountants, brokers, brokers-dealers and providers of legal services—

(1) More than fifty percent (50%) of the ownership or control of which is held by one or more women;

(2) More than fifty percent (50%) of the net profit or loss of which accrues to one or more women; and

(3) A significant percentage of senior management positions of which are held by women.

**§ 1207.2 Policy, purpose, and scope.**

(a) *General policy.* FHFA’s policy is to promote non-discrimination, diversity and, at a minimum, the inclusion of women, minorities, and individuals with disabilities in its own activities and in the business and activities of the regulated entities and the Office of Finance.

(b) *Purpose.* This part establishes minimum standards and requirements for the regulated entities and the Office of Finance to promote diversity and ensure, to the maximum extent possible in balance with financially safe and sound business practices, the inclusion and utilization of minorities, women, individuals with disabilities, and minority-, women-, and disabled-owned businesses at all levels, in management and employment, in all business and activities, and in all contracts for services of any kind, including services that require the services of investment banking, asset management entities, broker-dealers, financial services entities, underwriters, accountants,



investment consultants, and providers of legal services.

(c) *Scope.* This part applies to each regulated entity's and the Office of Finance's implementation of and adherence to diversity, inclusion and non-discrimination policies, practices and principles.

#### § 1207.3 Limitations.

(a) Except as expressly provided herein for enforcement by FHFA, the regulations in this part do not, are not intended to, and should not be construed to create any right or benefit, substantive or procedural, enforceable at law, in equity, or through administrative proceeding, by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, a regulated entity or the Office of Finance, their officers, employees or agents, or any other person.

(b) The contract clause required by section 1207.21(b)(6) and the itemized data reporting on numbers of contracts and amounts involved required under §§ 1207.22 and 1207.23(b)(11) through § 1207.23(b)(13) apply only to contracts for services in any amount and to contracts for goods that equal or exceed \$10,000 in annual value, whether in a single contract, multiple contracts, a series of contracts or renewals of contracts, with a single vendor.

#### §§ 1207.4 through 1207.9 [Reserved].

#### Subpart B—Minority and Women Inclusion and Diversity at the Federal Housing Finance Agency

#### § 1207.10 through 1207.19 [Reserved]

#### Subpart C—Minority and Women Inclusion and Diversity at Regulated Entities and the Office of Finance

#### § 1207.20 Office of Minority and Women Inclusion.

(a) *Establishment.* Each regulated entity and the Office of Finance shall establish and maintain an Office of Minority and Women Inclusion, or designate and maintain an office to perform the responsibilities of this part, under the direction of an officer of the regulated entity or the Office of Finance who reports directly to either the Chief Executive Officer or the Chief Operating Officer, or the equivalent. Each regulated entity and the Office of Finance shall notify the Director within thirty (30) days after any change in the designation of the office performing the responsibilities of this part.

(b) *Adequate resources.* Each regulated entity and the Office of Finance will ensure that its Office of Minority and Women Inclusion, or the

office designated to perform the responsibilities of this part, is provided human, technological, and financial resources sufficient to fulfill the requirements of this part.

(c) *Responsibilities.* Each Office of Minority and Women Inclusion, or the office designated to perform the responsibilities of this part, is responsible for fulfilling the requirements of this part, 12 U.S.C. 1833e(b) and 4520, and such standards and requirements as the Director may issue hereunder.

#### § 1207.21 Equal opportunity in employment and contracting.

(a) *Equal opportunity notice.* Each regulated entity and the Office of Finance shall publish a statement, endorsed by its Chief Executive Officer and approved by its Board of Directors, confirming its commitment to the principles of equal opportunity in employment and in contracting, at a minimum regardless of color, national origin, sex, religion, age, disability status, or genetic information. The notice also shall confirm commitment against retaliation or reprisal. Publication shall include, at a minimum, conspicuous posting in all regulated entity and Office of Finance physical facilities, including through alternative media formats, as necessary, and accessible posting on the regulated entity's and the Office of Finance's Web site. The notice shall be updated and re-published, re-endorsed by the Chief Executive Officer and re-approved by the Board of Directors annually.

(b) *Policies and procedures.* Each regulated entity and the Office of Finance shall develop, implement, and maintain policies and procedures to ensure, to the maximum extent possible in balance with financially safe and sound business practices, the inclusion and utilization of minorities, women, individuals with disabilities, and minority-, women-, and disabled-owned businesses in all business and activities and at all levels of the regulated entity and the Office of Finance, including in management, employment, procurement, insurance, and all types of contracts. The policies and procedures of each regulated entity and the Office of Finance at a minimum shall:

(1) Confirm its adherence to the principles of equal opportunity and non-discrimination in employment and in contracting;

(2) Describe its policy against discrimination in employment and contracting;

(3) Establish internal procedures to receive and attempt to resolve complaints of discrimination in

employment and in contracting. Publication will include at a minimum making the procedure conspicuously accessible to employees and applicants through print, electronic, or alternative media formats, as necessary, and through the regulated entity's or the Office of Finance's Web site;

(4) Establish an effective procedure for accepting, reviewing and granting or denying requests for reasonable accommodations of disabilities from employees or applicants for employment;

(5) Encourage the consideration of diversity in nominating or soliciting nominees for positions on boards of directors and engage in recruiting and outreach directed at encouraging individuals who are minorities, women and individuals with disabilities to seek or apply for employment with the regulated entity or the Office of Finance;

(6) Except as limited by § 1207.3(b), require that each contract it enters contains a material clause committing the contractor to practice the principles of equal employment opportunity and non-discrimination in all its business activities and requiring each such contractor to include the clause in each subcontract it enters for services or goods provided to the regulated entity or the Office of Finance;

(7) Identify the types of contracts the regulated entity considers exempt under § 1207.3(b) and any commercially reasonable thresholds, exceptions, and limitations the regulated entity establishes for the implementation of § 1207.21(c)(2). The policies and procedures must address the rationale and need for implementing the thresholds, exceptions, or limitations;

(8) Be published and accessible to employees, applicants for employment, contractors, potential contractors, and members of the public through print, electronic, or alternative media formats, as necessary, and through the regulated entity's or the Office of Finance's Web site; and

(9) Be reviewed at the direction of the officer immediately responsible for directing the Office of Minority and Women Inclusion, or other office designated to perform the responsibilities of this part, at least annually to assess their effectiveness and to incorporate appropriate changes.

(c) *Outreach for contracting.* Each regulated entity and the Office of Finance shall establish a program for outreach designed to ensure to the maximum extent possible the inclusion in contracting opportunities of minorities, women, individuals with disabilities, and minority-, women-, and

disabled-owned businesses. The program at a minimum shall:

(1) Apply to all contracts entered into by the regulated entity or the Office of Finance, including contracts with financial institutions, investment banking firms, investment consultants or advisors, financial services entities, mortgage banking firms, asset management entities, underwriters, accountants, brokers, brokers-dealers, and providers of legal services;

(2) Establish policies, procedures and standards requiring the publication of contracting opportunities designed to encourage contractors that are minorities, women, individuals with disabilities, and minority-, women-, and disabled-owned businesses to submit offers or bid for the award of such contracts; and

(3) Ensure the consideration of the diversity of a contractor when the regulated entity or the Office of Finance reviews and evaluates offers from contractors.

**§ 1207.22 Regulated entity and Office of Finance reports.**

(a) *General.* Each regulated entity and the Office of Finance, through its Office of Minority and Women Inclusion, or other office designated to perform the responsibilities of this part, shall report in writing, in such format as the Director may require, to the Director describing its efforts to promote diversity and ensure the inclusion and utilization of minorities, women, individuals with disabilities, and minority-, women-, and disabled-owned businesses at all levels, in management and employment, in all business and activities, and in all contracts for services and the results of such efforts.

(1) Within 180 days after the effective date of this regulation each regulated entity and the Office of Finance shall submit to the Director or his or her designee a preliminary status report describing actions taken, plans for and progress toward implementing the provisions of 12 U.S.C. 4520 and this part; and including to the extent available the data and information required by this part to be included in an annual report.

(2) FHFA intends to use the preliminary status report solely for the purpose of examining the submitting regulated entity or the Office of Finance and reporting to the institution on its operations and the condition of its program.

(b) *FHFA use of reports.* The data and information reported to FHFA under this part (except for the initial report under paragraph (a)(1) of this section) are intended to be used for any

permissible supervisory and regulatory purpose, including examinations, enforcement actions, identification of matters requiring attention, and production of FHFA examination, operating and condition reports related to one or more of the regulated entities and the Office of Finance. FHFA may use the information and data submitted to issue aggregate reports and data summaries that each regulated entity and the Office of Finance may use to assess its own progress and accomplishments, or to the public as it deems necessary. FHFA is not requiring, and does not desire, that reports under this part contain personally identifiable information.

(c) *Frequency of reports.* Each regulated entity and the Office of Finance shall submit an annual report on or before March 1 of each year, beginning in 2012, reporting on the period of January 1 through December 31 of the preceding year, and such other reports as the Director may require. If the date for submission falls on a Saturday, Sunday, or Federal holiday, the report is due no later than the next day that is not a Saturday, Sunday, or Federal holiday.

(d) *Annual summary.* Each regulated entity and the Office of Finance shall include in its annual report to the Director (pursuant to 12 U.S.C. 1723a(k), 1456(c), or 1440, with respect to the regulated entities) a summary of its activities under this part during the previous year, including at a minimum, detailed information describing the actions taken by the regulated entity or the Office of Finance pursuant to 12 U.S.C. 4520 and a statement of the total amounts paid by the regulated entity or the Office of Finance to 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 and disabled-owned businesses respectively, as limited by § 1207.3(b).

**§ 1207.23 Annual reports—format and contents.**

(a) *Format.* Each annual report shall consist of a detailed summary of the regulated entity's or the Office of Finance's activities during the reporting year to carry out the requirements of this part, which report may also be made a part of the regulated entity's or the Office of Finance's annual report to the Director. The report shall contain a table of contents and conclude with a certification by the regulated entity's or the Office of Finance's officer responsible for the annual report that

the data and information presented in the report are accurate, and are approved for submission.

(b) *Contents.* The annual report shall contain the information provided in the regulated entity's or the Office of Finance's annual summary pursuant to § 1207.22(d) and, in addition to any other information or data the Director may require, shall include:

(1) The EEO-1 Employer Information Report (Form EEO-1 used by the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) to collect certain demographic information) or similar reports filed by the regulated entity or the Office of Finance during the reporting year. If the regulated entity or the Office of Finance does not file Form EEO-1 or similar reports, the regulated entity or the Office of Finance shall submit to FHFA a completed Form EEO-1;

(2) All other reports or plans the regulated entity or the Office of Finance submitted to the EEOC, the Department of Labor, OFCCP or Congress ("reports or plans" is not intended to include separate complaints or charges of discrimination or responses thereto) during the reporting year;

(3) Data showing by minority and gender the number of individuals applying for employment with the regulated entity or the Office of Finance in each occupational or job category identified on the Form EEO-1 during the reporting year;

(4) Data showing by minority and gender the number of individuals hired for employment with the regulated entity or the Office of Finance in each occupational or job category identified on the Form EEO-1 during the reporting year;

(5) Data showing by minority, gender and disability classification, and categorized as voluntary or involuntary, the number of separations from employment with the regulated entity or the Office of Finance in each occupational or job category identified on the Form EEO-1 during the reporting year;

(6) Data showing the number of requests for reasonable accommodation received from employees and applicants for employment, the number of requests granted, and the disabilities accommodated and the types of accommodation granted during the reporting year;

(7) Data showing for the reporting year by minority, gender, and disability classification the number of individuals applying for promotion at the regulated entity or the Office of Finance—

(i) Within each occupational or job category identified on the Form EEO-1; and

(ii) From one such occupational or job category to another;

(8) Data showing by minority, gender, and disability classification the number of individuals—

(i) Promoted at the regulated entity or the Office of Finance within each occupational or job category identified on the Form EEO-1, after applying for such a promotion;

(ii) Promoted at the regulated entity or the Office of Finance within each occupational or job category identified on the Form EEO-1, without applying for such a promotion; and

(iii) Promoted at the regulated entity or the Office of Finance from one occupational or job category identified on the Form EEO-1 to another such category, after applying for such a promotion;

(9) A comparison of the data reported under paragraphs (b)(1) through (b)(8) of this section to such data as reported in the previous year together with a narrative analysis;

(10) Descriptions of all regulated entity or Office of Finance outreach activity during the reporting year to recruit individuals who are minorities, women, or persons with disabilities for employment, to solicit or advertise for minority or minority-owned, women or women-owned, and disabled-owned contractors or contractors who are individuals with disabilities to offer proposals or bids to enter into business with the regulated entity or Office of Finance, or to inform such contractors of the regulated entity's or Office of Finance's contracting process, including the identification of any partners, organizations, or government offices with which the regulated entity or the Office of Finance participated in such outreach activity;

(11) Cumulative data separately showing the number of contracts entered with minorities or minority-owned businesses, women or women-owned businesses and individuals with disabilities or disabled-owned businesses during the reporting year;

(12) Cumulative data separately showing for the reporting year the total amount the regulated entity or the Office of Finance paid to contractors that are minorities or minority-owned businesses, women or women-owned and individuals with disabilities or disabled-owned businesses;

(13) The annual total of amounts paid to contractors and the percentage of which was paid separately to minorities or minority-owned businesses, women or women-owned businesses and

individuals with disabilities or disabled-owned businesses during the reporting year;

(14) Certification of compliance with §§ 1207.20 and 1207.21, together with sufficient documentation to verify compliance;

(15) Data for the reporting year showing, separately, the number of equal opportunity complaints (including administrative agency charges or complaints, arbitral or judicial claims) against the regulated entity or the Office of Finance that—

(i) Claim employment discrimination, by basis or kind of the alleged discrimination (race, sex, disability, *etc.*) and by result (settlement, favorable, or unfavorable outcome);

(ii) Claim discrimination in any aspect of the contracting process or administration of contracts, by basis of the alleged discrimination and by result; and

(iii) Were resolved through the regulated entity's or the Office of Finance's internal processes;

(16) Data showing for the reporting year amounts paid to claimants by the regulated entity or the Office of Finance for settlements or judgments on discrimination complaints—

(i) In employment, by basis of the alleged discrimination; and

(ii) In any aspect of the contracting process or in the administration of contracts, by basis of the alleged discrimination;

(17) A comparison of the data reported under paragraphs (b)(12) and (b)(13) of this section with the same information reported for the previous year;

(18) A narrative identification and analysis of the reporting year's activities the regulated entity or the Office of Finance considers successful and unsuccessful in achieving the purpose and policy of regulations in this part and a description of progress made from the previous year; and

(19) A narrative identification and analysis of business activities, levels, and areas in which the regulated entity's or the Office of Finance's efforts need to improve with respect to achieving the purpose and policy of regulations in this part, together with a description of anticipated efforts and results the regulated entity or the Office of Finance expects in the succeeding year.

#### **§ 1207.24 Enforcement.**

The Director may enforce this regulation and standards issued under it in any manner and through any means within his or her authority, including through identifying matters requiring attention, corrective action orders,

directives, or enforcement actions under 12 U.S.C. 4513b and 4514. The Director may conduct examinations of a regulated entity's or the Office of Finance's activities under and in compliance with this part pursuant to 12 U.S.C. 4517.

Dated: December 20, 2010.

**Edward J. DeMarco,**

*Acting Director, Federal Housing Finance Agency.*

[FR Doc. 2010-32541 Filed 12-27-10; 8:45 am]

**BILLING CODE 8070-01-P**

## **FEDERAL HOUSING FINANCE AGENCY**

### **12 CFR Part 1252**

**RIN 2590-AA22**

#### **Portfolio Holdings**

**AGENCY:** Federal Housing Finance Agency.

**ACTION:** Final rule; response to comments on the interim final rule.

**SUMMARY:** The Federal Housing Finance Agency (FHFA) is issuing a final regulation that will govern the portfolio holdings of Fannie Mae and Freddie Mac (collectively, the Enterprises) during the pendency of the conservatorships. The final regulation adopts FHFA's interim final rule on portfolio holdings, without change. See 74 FR 5609, January 30, 2009. That interim rule adopted the portfolio limits specified in each Enterprise's Senior Preferred Stock Purchase Agreement (PSPA) with the Department of the Treasury (Treasury) as the regulation limits. Specifically, it provides that each Enterprise comply with the portfolio limits contained in the respective PSPAs, as they may be amended from time to time. The interim regulation also stipulated that the regulation is to be in effect until amended or the Enterprises are no longer subject to the PSPAs.

**DATES:** Effective December 28, 2010, the interim final rule published on January 30, 2009 (74 FR 5609), which was effective January 30, 2009, is confirmed as final.

**FOR FURTHER INFORMATION CONTACT:** Ming-Yuen Meyer-Fong, Office of the General Counsel, (202) 414-3798, or Valerie Smith, Office of Policy Analysis and Research, (202) 414-3770, Federal Housing Finance Agency, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Deaf is (800) 877-8339. For more information on this Final Regulation, see the