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FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1207

RIN 2590-AA78

Minority and Women Inclusion Amendments

AGENCY: Federal Housing Finance Agency.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Housing Finance Agency (FHFA or Agency) is issuing notice and providing an opportunity for the public to comment on proposed amendments to its regulations on minority and women inclusion. Those regulations, require the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac) (together, Enterprises), and the Federal Home Loan Banks (Banks or Bank System) (collectively, the regulated entities) and the Bank System's Office of Finance to promote diversity and ensure the inclusion and utilization of minorities, women, and individuals with disabilities and minority-, women-, and disabled-owned businesses in all business and activities at all levels, including management, employment, and contracting. The proposed amendments would clarify the scope of the regulated entities' obligation to promote diversity and ensure the inclusion and utilization of minorities, women, and individuals with disabilities in all business and activities; require each regulated entity to develop and adopt strategies for promoting diversity and ensuring the inclusion of minorities, women, and individuals with

disabilities; and improve the usefulness and comparability of the information the regulated entities report to FHFA about their efforts to advance diversity and inclusion.

DATES: Written comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit your comments, identified by Regulatory Information Number (RIN) 2590–AA78, by any of the following methods:

- Agency Web site: www.fhfa.gov/open-for-comment-or-input.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by email to FHFA at RegComments@fhfa.gov to ensure timely receipt by the Agency. Please include Comments/RIN 2590–AA78 in the subject line of the message.
- Courier/Hand Delivery: The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA78, Federal Housing Finance Agency, 400 Seventh Street SW., Eighth Floor, Washington, DC 20219. Deliver the package to the Seventh Street entrance Guard Desk, First Floor, on business days between 9 a.m. to 5 p.m.
- U.S. Mail, United Parcel Service, Federal Express or Other Mail Service: The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA78, Federal Housing Finance Agency, 400 Seventh Street SW., Eighth Floor, Washington, DC 20219.

FOR FURTHER INFORMATION CONTACT: Sharron P. A. Levine, Director, Office of Minority and Women Inclusion, Sharron.Levine@fhfa.gov, (202) 649-3496;

Eric Howard, Deputy Director, Office of Minority and Women Inclusion, Eric.Howard@fhfa.gov, (202) 649-3009; or James Jordan, Assistant General Counsel, James.Jordan@fhfa.gov, (202) 649-3075 (not toll-free numbers), Federal Housing Finance Agency, 400 Seventh Street, SW., Washington, DC 20219. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA invites comments on all aspects of the proposed amendments and will take all comments into consideration before issuing a final rule. Copies of all comments received will be posted without change on the FHFA Web site at <http://www.fhfa.gov> and will include any personal information you provide, such as your name, address, email address, and telephone number. Copies of all comments received will be made available for examination by the public on business days between the hours of 10 a.m. and 3 p.m., at the Federal Housing Finance Agency, 400 Seventh Street, SW., Eighth Floor, Washington, DC 20219. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 649-3804.

II. Objectives

The objectives of the proposed amendments are to:

- Ensure that the regulated entities¹ fulfill the letter and spirit of their legal obligation to promote diversity and ensure the inclusion and utilization of

¹ For readability, where the preamble refers to a “regulated entity” or the “regulated entities” the provisions apply equally to the Office of Finance, unless such application would conflict with a statute or regulation that specifically distinguishes the treatment of the Office of Finance from the regulated entities.

minorities, women, and individuals with disabilities as well as minority-, women-, and disabled-owned businesses, in all their business and activities;

- Clarify that the requirement to promote diversity and inclusion applies to all the regulated entities' operational, commercial and economic endeavors, including management, employment, contracting, capital market transactions, and affordable housing and community investment programs;
- Require the regulated entities to develop a stand-alone diversity and inclusion strategic plan or incorporate diversity and inclusion into its existing strategic planning process and adopt strategies for promoting diversity and ensuring the inclusion of minorities, women, and individuals with disabilities as well as minority-, women-, and disabled-owned businesses;
- Require the regulated entities to amend their policies on equal opportunity in employment and contracting to include sexual orientation, gender identity, and status as a parent to the list of protected classifications;
- Encourage the regulated entities to expand contracting opportunities for minorities, women, and individuals with disabilities by working with prime contractors (tier 1) to provide subcontracting (tier 2) opportunities to minority-, women-, and disabled-owned businesses;
- Affirm that the regulated entities are authorized to expand the scope of their outreach and inclusion programs beyond the requirements of the Rule, which focuses on minorities, women, and individuals with disabilities; and
- Improve the usefulness and comparability of the annual reports to FHFA by requiring that the regulated entities provide information about their efforts to

advance diversity and inclusion through capital market transactions, affordable housing and community investment programs, initiatives to improve access to mortgage credit, and strategies for promoting the diversity of supervisors and managers.

III. Background

Section 1116 of the Housing and Economic Recovery Act of 2008 (HERA) amended section 1319A of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act), (12 U.S.C. 4520), to require, in part, that the regulated entities establish or designate an office to carry out the requirements of an Office of Minority and Women Inclusion (OMWI). That office is responsible for: fulfilling the requirements of section 1116 of HERA that include all matters relating to diversity in the entity's management, employment, and business activities; developing and implementing standards and procedures to promote diversity in all business and activities of the regulated entity; and submitting an annual report to FHFA detailing the actions taken to promote diversity and inclusion. Furthermore, 12 U.S.C. 1833e,¹ and Executive Order 11478,² which is made applicable to FHFA and its regulated entities by 12 U.S.C. 1833e, generally require FHFA and the regulated entities to promote equal opportunity in employment.

FHFA has adopted regulations to implement section 1116 of HERA, 12 U.S.C. 1833e, and in conformance with Executive Order 11478, as amended, to set forth the minimum requirements for the affirmative program for equal opportunity and reporting

¹ See Pub. L. 101–73, title XII, sec. 1216, Aug. 9, 1989, 103 Stat. 529; Pub. L. 102–233, title III, sec. 302(a), Dec. 12, 1991; Pub. L. 110–289, div. A, title II, sec. 1216(g), July 30, 2008, 122 Stat. 2793; Pub. L. 111–203, title III, sec. 367(9), July 21, 2010, 124 Stat. 1557.

² Executive Order 11478 – Equal Employment Opportunity in the Federal Government, August 8, 1969, as amended.

requirements for the regulated entities.³ Those regulations, located at 12 CFR part 1207, require each regulated entity to establish an OMWI office, or to designate another office, that would be responsible for fulfilling the entity's OMWI responsibilities under the statute and the Rule. Each of these entities must implement policies and procedures to ensure, to the maximum extent possible consistent 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, including in management, employment, procurement, insurance, and all types of contracts.⁴ Part 1207 also requires each regulated entity to submit to the FHFA Director, on or before March 1 of each year, a detailed annual report summarizing their activities during the reporting year (January 1 through December 31 of the preceding year) to comply with the OMWI regulatory requirements.⁵

In addition, part 1207 provides that the FHFA Director has broad enforcement authority in that he or she may enforce this Rule 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 4514.⁶ To that end, the FHFA Director may conduct examinations of a regulated entity's activities under, and in compliance with, this part pursuant to 12 U.S.C. 4517.⁷

³ See 75 FR 1289 (January 11, 2010), 75 FR 81395 (December 28, 2010), 79 FR 35960 (June 25, 2014), and 80 FR 25209 (May 4, 2015).

⁴ 12 CFR 1207.21(b).

⁵ 12 CFR 1207.23.

⁶ 12 CFR 1207.24.

⁷ Id.

IV. Existing Examination Guidance and Regulatory Requirements for Strategic Planning

Strategic planning is critical to the success of any organization, including the regulated entities. As noted in FHFA’s Examination Manual (EM) module entitled, Strategic Planning, “in its most fundamental form, strategic planning is the process of evaluating where the institution is, determining where the board would like the institution to go and which risks it is willing to accept, and developing a plan to get there.”⁸ The EM also notes that, “strategic planning is the process of establishing goals and developing a roadmap for achieving those goals.”⁹ A strategic plan serves as the primary means to communicate the board of directors’ long-term vision for the organization and establish measurable goals and objectives for achieving this vision. The EM also identifies the following as components of an effective strategic planning process:

- An analysis of the regulated entity’s financial and operational condition;
- An assessment of internal and external risks to the regulated entity;
- An evaluation of the regulated entity’s strengths and weaknesses;
- An evaluation of opportunities or potential threats facing the regulated entity;
- The financial and operational goals and realistic projections that serve as benchmarks for achieving desired results within a defined time frame;
- The process by which the regulated entity plans to reach its financial and operational goals;
- The identification of those responsible for achieving the goals; and

⁸ FHFA Examination Manual, Strategic Planning Module, March 2013, http://www.fhfa.gov/SupervisionRegulation/Documents/Strategic_Planning_Module_Final_Version_1.0-508.pdf.

⁹ Id.

- A means to monitor the results on an ongoing basis.

The regulated entities are also subject to the Agency's Prudential Management and Operations Standards (PMOS) found in part 1236 of FHFA's regulations. Pursuant to the PMOS guidelines, the board of directors of each regulated entity is responsible for adopting appropriate business strategies, policies, and procedures. The PMOS guidelines also establish standards by which the board of directors is to review and approve all major strategies and policies at least annually, and make any necessary revisions to ensure consistency with the overall business plan.

FHFA regulations at 12 CFR 1239.31 provide detailed information on the strategic planning requirements for each Bank including a requirement that their board of directors have a strategic business plan in effect at all times. FHFA regulation 12 CFR 1239.31(b) requires the board of directors to (1) review the strategic business plan at least annually; (2) amend the plan as appropriate; (3) re-adopt the plan at least every three years; and (4) establish management reporting requirements and monitor implementation of the strategic business plan and the operating goals and objectives contained in it.

V. Importance of Diversity and Inclusion Strategic Planning

A significant and growing body of research provides evidence that having a diverse and inclusive workforce and leadership team benefits an organization by increasing its ability to be creative, innovative, and solutions-oriented.¹⁰ Many organizations, however, fail to recognize that diversity and inclusion are vital

¹⁰ Page, Scott E., The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies, Princeton; Princeton UP, 2007. Print. https://books.google.com/books?id=FAFVHnJ7uK0C&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false; Global Diversity and Inclusion Fostering Innovation Through a Diverse Workforce, Forbes, July 2011, http://www.forbes.com/forbesinsights/innovation_diversity/index.html; and Barta, T., Kleiner, M., and Neumann, T., McKinsey Quarterly, Is There a payoff from top-team diversity?, April 2012, <http://www.mckinsey.com/business-functions/organization/our-insights/is-there-a-payoff-from-top-team-diversity>.

components of long-term business viability and success and, as a result, have strictly limited them solely to the human resource function. Organizations that effectively manage diversity and inclusion have integrated the practice into all of their processes by developing and implementing comprehensive diversity and inclusion strategies. Their path to success starts with senior leadership's commitment to integrate diversity and inclusion into the business, at all levels, and to manage it in the same way as any other business strategy.

Effective strategic business planning, executive sponsorship, communication, change management, project management, day-to-day execution, and measurement are all regarded as business fundamentals for most functional areas in an organization. The research supports the premise that the ability to assess the current state and measure the progress of its diversity and inclusion efforts is also a fundamental and prudent business practice.

VI. Ongoing Efforts by the Regulated Entities to Advance Diversity and Ensure Inclusion

The Rule became effective on January 27, 2011, and set forth the minimum requirements for the regulated entities' diversity and inclusion programs and reporting requirements. They responded to the new regulatory requirements by establishing an OMWI office or designating another office responsible for fulfilling the entity's OMWI responsibilities. They implemented policies, procedures, and programs to improve human resource processes for recruiting, hiring, and promoting minorities, women, and individuals with disabilities. They also focused attention on identifying diverse suppliers and improving outreach efforts to increase participation opportunities for diverse

businesses. These efforts have resulted in improvements in workforce diversity and the utilization of diverse vendors. In order to advance and promote diversity and inclusion, the regulated entities currently engage in one or more of the following activities and initiatives:

- Conducting diversity and inclusion education and training sessions for their directors, managers, and employees;
- Establishing mentoring programs for employees, particularly minorities and women;
- Partnering with minority youth development organizations;
- Sponsoring internship programs for high school and college students;
- Sponsoring and/or supporting community events and celebrations;
- Establishing diversity and inclusion councils;
- Establishing and/or sponsoring employee resource or affinity groups;
- Expanding the scope of outreach activities and initiatives to target and recruit minorities, women, and individuals with disabilities for employment;
- Expanding the scope of outreach activities and initiatives to target minority-, women-, and disabled-owned businesses for contracting opportunities; and
- Marketing to diverse communities.

Many of these efforts and initiatives have enabled or enhanced the ability of the regulated entities to promote opportunities for minorities, women, and individuals with disabilities. While each has worked to build and improve the foundation for advancing diversity and inclusion within its organization, more can be done to expand the breadth, scope, and impact of its existing program. Gaps remain in the regulated entities'

processes and approaches for assessing, planning, and executing diversity and inclusion programs that fulfill the letter and spirit of section 1116 of HERA.

VII. The Proposed Amendments

The proposed amendments would revise the Rule to require each regulated entity to engage in diversity and inclusion strategic planning. They would either develop a stand-alone diversity and inclusion strategic plan or incorporate diversity and inclusion into their existing strategic planning process. Under the proposal, their board of directors must establish an organizational tone for enhanced focus on, and commitment to, diversity and inclusion. The board of director's ongoing oversight assists in creating the conditions for success by ensuring alignment with the overall strategic and operational direction of the regulated entity. Senior management teams also play an important role in the development and execution of the diversity and inclusion strategic plan.

The regulated entities have mainly focused on workforce and supplier diversity to date, largely as a result of the Rule's primary focus on requirements for establishing an OMWI, ensuring equal opportunity in employment and contracting, and developing and submitting reports on the efforts taken to promote diversity and ensure inclusion in employment and contracting. The proposed amendments emphasize the need to expand the scope of diversity and inclusion considerations to their other business and operational areas. The proposed revision would require the regulated entities to broaden the focus of their existing diversity and inclusion goals and strategies to address **all** aspects of their business and operations beyond workforce and supplier diversity only, consistent with section 1116 of HERA.

The proposed amendments would encourage the regulated entities to develop and implement procurement programs and initiatives that expand contracting opportunities for minorities, women, and individuals with disabilities and minority-, women-, and disabled-owned businesses beyond contracting with prime contractors (tier 1) by using subcontracting arrangements (tier 2). This could entail negotiating subcontracting opportunities for minorities, women, and individuals with disabilities in contracts between a regulated entity and prime contractors. This could also involve entering into contracts with majority-owned businesses that advance opportunities for minorities, women, and individuals with disabilities. A new annual reporting requirement would include additional information about the number of contracts and the amounts paid to prime contractors (tier 1) for subcontracts (tier 2) with minorities or minority-owned businesses, women or women-owned businesses, and individuals with disabilities or disabled-owned businesses during the reporting year and the diverse spend with non-diverse-owned businesses.

The Rule implements 12 U.S.C. 1833e and conforms with Executive Order 11478, as amended, to require the regulated entities to commit to the principles of equal opportunity in employment and prohibit discrimination on the basis of race, color, national origin, sex, religion, age, disability status, or genetic information. Executive Orders 13087 and 13152 amended Executive Order 11478 to add sexual orientation and status as a parent to the list of protected bases.¹¹ Executive Order 13672, signed on July 21, 2014, amended Executive Orders 11478 and 11246 to extend protection against

¹¹ Executive Order 13087 – Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, May 28, 1998, <https://www.gpo.gov/fdsys/pkg/FR-1998-06-02/pdf/98-14689.pdf> and Executive Order 13152; Executive Order 13152 – Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, May 2, 2000, <https://www.gpo.gov/fdsys/pkg/WCPD-2000-05-08/pdf/WCPD-2000-05-08-Pg977.pdf>.

discrimination in hiring and employment in the civilian federal workforce on the basis of gender identity and in hiring by federal contractors on the basis of both sexual orientation and gender identity.¹² The proposed amendments would require the regulated entities to amend their policies on equal opportunity in employment and contracting to prohibit discrimination on the basis of sexual orientation, gender identity, and status as a parent.

The scope of the diversity and inclusion obligations to be satisfied by the regulated entities varies depending on the source of the authority. As previously noted, FHFA's Rule implements 12 U.S.C. 1833e, which applies the requirements of sections 1 and 2 of Executive Order 11478 to the regulated entities. Section 1 requires the regulated entities to provide equal employment opportunity for all persons, prohibit employment discrimination, and promote equal employment opportunity through a continuing affirmative program. Section 2 describes the elements of an affirmative program of equal employment opportunity, which include providing sufficient resources for administering the program in a positive and effective manner; engaging in recruitment activities that reach all sources of job candidates; fully utilizing the skills of all employees; providing employees opportunities to enhance their skills so they may perform at their fullest potential and advance in accordance with their abilities; providing training and advice to managers and supervisors to assure their understanding and implementation of the program; assuring participation at the local level with other employers, schools, and public and private groups in cooperative efforts to improve community conditions that affect employability; and providing for periodic evaluations of the effectiveness of the program.

¹² Executive Order 13672 – Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, July 21, 2014, <https://www.gpo.gov/fdsys/pkg/CFR-2015-title3-vol1/pdf/CFR-2015-title3-vol1-eo13672.pdf>.

FHFA acknowledges that diversity encompasses the broad range of demographic characteristics identified in Executive Order 11478. However, section 1116 of HERA only focuses on the responsibility of the regulated entities to promote diversity and ensure the inclusion of minorities and women. Therefore, in accordance with the statutory requirements, the primary focus of the regulatory text amendments is on advancing and promoting opportunities for minorities, women, and individuals with disabilities as well as minority-, women-, and disabled-owned businesses. Nonetheless, FHFA affirms that each regulated entity is authorized to expand the scope of its diversity program beyond the requirements of Executive Order 11478, section 1116 of HERA, and the regulations at 12 CFR part 1207. As a result, each regulated entity is encouraged to incorporate other aspects of diversity and inclusion (e.g., Lesbian, Gay, Bisexual, and Transgender (LGBT)-owned and veteran-owned businesses) into their respective OMWI outreach and inclusion programs, and in turn, their strategic planning processes as long as the broader focus does not detract from or diminish efforts to promote opportunities for minorities, women, and individuals with disabilities and minority-, women-, and disabled-owned businesses.

Section 1207.1 Definitions.

FHFA proposes to add, revise, or remove several definitions in § 1207.1 to clarify the existing and new regulatory requirements under part 1207. Where FHFA proposes to add or revise terms, FHFA has reviewed several external sources in search of industry standard definitions. FHFA has determined that there is no uniformly accepted term of art or single source for the newly proposed terms, so FHFA has adapted the substance

found in multiple external definitions¹³ to account for the nature and needs of FHFA’s regulated entities.

FHFA proposes to add definitions for “Applicant” and “Promotion” to clarify the scope of the information the regulated entities are required to report to FHFA under existing § 1207.23(b)(3) and § 1207.23(b)(7). FHFA is proposing a new definition of “Diversity and inclusion strategic planning” that would describe the process the regulated entities must engage in to develop strategies for promoting diversity and ensuring the inclusion of minorities, women, and individuals with disabilities.

FHFA proposes to add definitions for “Prime contractor (tier 1)” and “Subcontractor (tier 2)” to identify two types of contracting arrangements available to the regulated entities to promote diversity and the inclusion of minorities, women, and individuals with disabilities and minority-, women-, and disabled-owned businesses. FHFA also proposes to add a definition for “Diversity spend with non-diverse-owned businesses” to describe the dollar amount a regulated entity pays to a firm that is not owned by a minority, woman, or individual with a disability, for professional services provided by a partner, member, or other equity owner who is a minority, woman, or individual with a disability. This type of arrangement can occur when an organization bases its decision to engage a majority-owned law practice or consulting firm based upon its interactions with a specific partner(s) or non-controlling owner(s) who is also a minority, woman, or individual with a disability.

¹³ For example, the proposed definition of “Subcontractor (Tier II)” was adapted from definitions found in regulations implementing the Small Business Act, Title 41 of the CFR addressing Public Contracts and Property Management, and the Federal Acquisition Regulations as well as definitions implemented by the National Association of Women in Construction and financial institutions such as Citi and KeyBank.

FHFA proposes to add a definition for “Minority-serving financial institution” that would be used by the regulated entities in their efforts to promote access to single- and multi-family mortgage credit, including an assessment of the challenges and impediments financial institutions that primarily serve minorities face in their efforts to access the secondary mortgage market. The proposed definition closely follows the Federal Deposit Insurance Corporation’s (FDIC) Policy Statement Regarding Minority Depository Institutions¹⁴ and encompasses depository and non-depository financial institutions.

FHFA is proposing to revise the definition of “Women-owned business” by removing one of the standards used to determine whether a business qualifies as a women-owned business. The existing definitions for minority-, women-, and disabled-owned businesses include criteria for determining the diverse status of a business based on who owns or controls the business as well as who accrues the profits or losses generated by the business. The existing definition of “Women-owned business” also includes a criterion based on the percentage of senior management positions held by one or more women. FHFA believes this criterion is unnecessary due to the emphasis the existing definition places on ownership and control. The proposed removal of this criterion for women-owned businesses would bring consistency to the Rule’s standards for determining ownership and control of minority- and disabled-owned businesses. FHFA is also proposing to revise the definitions of “Disabled-owned business,” “Minority-owned business,” and “Women-owned business” by clarifying that ownership can be direct or indirect. By revising the definition, FHFA wishes to encourage each

¹⁴ FDIC Policy Statement Regarding Minority Depository Institutions, April 9, 2002, <https://www.fdic.gov/regulations/resources/minority/policy.html>.

regulated entity to develop and implement procurement programs and initiatives without regard to the distinction between businesses owned by individuals/natural persons and legal persons, such as corporations, as long as the ultimate ownership benefits are held by predominantly disabled, minority, or women owners.

Finally, FHFA is proposing to remove the definitions for “Director,” “FHFA,” “Office of Finance,” and “regulated entity” because they are now defined in 12 CFR part 1201, which defines terms that apply to all FHFA regulations.

Section 1207.2 Policy, purpose, and scope.

FHFA proposes to revise § 1207.2(c) to address the scope of each regulated entity’s responsibility to promote diversity and ensure the inclusion and utilization of minorities, women, and individuals with disabilities and minority-, women-, and disabled-owned businesses. The proposed regulatory language would place emphasis on the requirement to promote diversity and ensure inclusion when awarding contracts for goods and services.

Section 1207.3 Limitations.

FHFA is proposing to revise existing § 1207.3(b), which currently requires each regulated entity’s contracts for goods over \$10,000 to include a material clause that commits the contractor to practice the principles of equal employment opportunity and nondiscrimination and to submit demographic data reports with respect to their workforce. FHFA proposes to increase the material clause threshold to \$25,000 to alleviate administrative burdens the regulated entities encounter when routinely purchasing lower-value goods such as materials and supplies necessary for day-to-day operations. However, FHFA welcomes comments on the potential impact the proposed

threshold change could have on small businesses and, specifically, on the dollar amount of the threshold.

FHFA is also proposing to add paragraphs (c) and (d) to existing § 1207.3. Proposed § 1207.3(c) would require each regulated entity to submit to FHFA within 90 days after the effective date of the amended Rule, a list of the types of contracts it considers exempt under § 1207.3(b) and any thresholds, exceptions, and limitations it establishes for implementing § 1207.21(c)(2). Proposed § 1207.3(d) would then require each regulated entity to notify FHFA within 30 days after any additional changes to the list.

Section 1207.20 Office of Minority and Women Inclusion.

FHFA is proposing to revise paragraphs (b) and (c) of § 1207.20 to clarify that a regulated entity's board of directors has ultimate responsibility for achieving the requirements of part 1207 – not the regulated entity's OMWI (or office designated to perform the responsibilities of part 1207). The proposed revision would clarify that the OMWI is responsible for leading the regulated entity's efforts to promote diversity and inclusion, and that any officer(s) designated to direct and oversee the diversity and inclusion programs has/have the necessary qualifications to effectively administer the requirements of part 1207.

Section 1207.21 Promoting diversity and ensuring inclusion in all business and activities.

FHFA is proposing to revise the title of existing § 1207.21 from “Equal opportunity in employment and contracting” to “Promoting diversity and ensuring inclusion in all business and activities” to accurately reflect the scope of requirements for

advancing diversity and ensuring inclusion in all activities and at every level of the regulated entity, including management, employment and contracting.

FHFA is proposing to amend § 1207.21(a) to add sexual orientation, gender identity, and status as a parent to the list of bases covered under each regulated entity's equal opportunity statement as required by 12 U.S.C. 1833e, and in conformance with Executive Order 11478.

FHFA is proposing to add a new paragraph to § 1207.21(b)(3) to address the statutory requirement in section 1116 (b) of HERA that the regulated entities establish processes that give consideration to the diversity of an applicant when reviewing and evaluating contract proposals and hiring service providers. The proposed rule would require them to develop procedures it would implement for giving consideration to diversity when reviewing and considering contract proposals and hiring service providers.

Proposed § 1207.21(b)(7) would require each regulated entity to establish effective procedures for engaging in diversity and inclusion strategic planning. FHFA is also proposing to revise its allowance that the regulated entities may establish, where commercially reasonable, thresholds, exceptions, and limitations for implementing § 1207.21(b)(7) (proposed § 1207.21(b)(9)). Under § 1207.3(b), the regulated entities would consider any negative or adverse effects the thresholds, exceptions, and limitations would likely have on contracting opportunities for minorities, women, and individuals with disabilities and minority-, women-, and disabled-owned businesses. The proposal would also ensure that the rationale used to support the thresholds, exceptions, and

limitations would not be used to frustrate the intent of the statutory or regulatory requirements to promote diversity and inclusion.

Proposed § 1207.21(d) would require each regulated entity to develop and implement strategies for promoting diversity and ensuring the inclusion of minorities, women, and individuals with disabilities and minority-, women-, and disabled-owned businesses. The board-approved strategies would cover three years and be reviewed and affirmed by the board of directors annually.

Proposed § 1207.21(e)(1) through (e)(3) would establish the minimum requirements for developing a diversity and inclusion strategic plan. The requirements would complement the guidance that has been provided in FHFA’s EM, Strategic Planning, as well as regulatory requirements and the PMOS guidelines. The proposed amendments would require the regulated entities to include the following components in their diversity and inclusion strategic plans:

- A vision and/or mission statement for fulfilling § 1207.2;
- Measurable goals and objectives for achieving the vision and/or mission statement; and
- A requirement that senior management develop and implement action plans for monitoring and achieving the measurable goals and objectives.

Section 1207.23 Annual reports—format and contents.

FHFA is proposing to revise § 1207.23(b)(3) and (b)(7) to substitute the word “applicants” as defined in § 1207.1 for the words “individuals applying” to clarify the scope of information the regulated entities are required to report to FHFA.

Proposed § 1207.23(b)(9) through (b)(23) revises and/or supplements the minimum requirements for the annual report submitted by each regulated entity. Proposed § 1207.23(b)(9) would require them to report on the diversity of their supervisors and managers as well as provide a description of the strategies and activities it implemented to promote diverse individuals to supervisory or managerial roles. Proposed § 1207.23(b)(12) would require each regulated entity to provide a description of the strategies, initiatives, and activities it implemented to advance diversity and inclusion in conjunction with capital market or financial transactions, efforts to promote access to credit, and affordable housing and community investment programs. Proposed § 1207.23(b)(16) and § 1207.23(b)(17) would require each regulated entity to report the number and dollar amounts of contracts entered into during the preceding year that it considered exempt under § 1207.3(b). The proposed amendments would also require reporting on the number and dollar amounts of prime contracts and subcontracts that prime contractors had with minorities, women, and individuals with disabilities and minority-, women-, and disabled-owned businesses. Proposed § 1207.23(b)(18) would require that the regulated entity report on diversity spend with non-diverse-owned businesses. Proposed § 1207.23(b)(19) would require the regulated entity to provide the total amounts paid to prime contractors and subcontractors and the percentage that was paid to diverse vendors.

Finally, the proposed amendments would remove most references to the “Office of Finance” found in the existing regulation. The proposed change would neither alter nor reduce the Office of Finance’s responsibility to promote diversity and inclusion and would serve to streamline the text of the regulatory requirements. Therefore, FHFA is

proposing to add § 1207.25 to explain that any reference to the regulated entities in part 1207 also applies to the Office of Finance, unless the Office of Finance is otherwise specifically addressed or excluded.

VIII. Consideration of 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 this proposed rule, the Director has considered the differences between the Banks and the Enterprises as they relate to the above factors and has determined that the proposed rule would not adversely affect the Banks taking into account all of the above factors.

IX. Regulatory Impacts

Paperwork Reduction Act

The proposed 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 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 proposed amendments under the Regulatory Flexibility Act and certifies that the proposed amendments, if adopted, are not likely to have a significant economic impact on a substantial number of small business entities because the regulation is only applicable to FHFA and the regulated entities, which are not small entities for purposes of the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 1207

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

Authority and Issuance

For the reasons stated in the preamble, under the authority of 12 U.S.C. 4526, FHFA proposes to amend part 1207 of title 12 of the Code of Federal Regulations as follows:

Part 1207—MINORITY AND WOMEN INCLUSION

1. The authority citation for part 1207 continues to read as follows:

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

§ 1207.1 [Amended]

2. Amend § 1207.1 by:
 - a. Adding a definition for “Applicant” in alphabetical order;
 - b. Removing the definition of “Director”;
 - c. Revising the definition of “Disabled-owned business”;
 - d. Adding definitions for “Diversity and inclusion strategic planning” and “Diversity spend with non-diverse-owned businesses” in alphabetical order;
 - e. Removing the definition of “FHFA”;
 - f. Revising the definition of “Minority-owned business”;
 - g. Adding a definition for “Minority-serving financial institution” in alphabetical order;
 - h. Removing the definition of “Office of Finance”;
 - i. Adding a definition for “Prime contractor (tier 1)” and “Promotion” in alphabetical order;
 - j. Removing the definition of “Regulated entity”;
 - k. Adding a definition for “Subcontractor (tier 2)” in alphabetical order; and
 - l. Revising the definition of “Women-owned business”.

The revisions and additions read as follows:

§ 1207.1 Definitions.

* * * * *

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;

(3) The individual's expression of interest indicates that the individual possesses the basic qualifications for the position; and

(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.

* * * * *

Disabled-owned business means a business, and includes, but is not limited to, 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, directly or indirectly 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.

Diversity and inclusion strategic planning is the process of analyzing the business and activities of a regulated entity to develop strategies for promoting diversity and ensuring the inclusion of minorities, women, and individuals with disabilities in all activities and at every level of the organization, including management, employment, and contracting. A diversity and inclusion strategic plan serves as the primary means to communicate the board of director's long-term diversity and inclusion vision for the

organization, to establish measurable goals and objectives for achieving the vision, and to ensure accountability for achieving the goals and objectives.

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.

* * * * *

Minority-owned business means a business, and includes, but is not limited to, financial institutions, mortgage banking firms, investment banking firms, investment consultants or advisors, financial services entities, asset management entities, underwriters, accountants, brokers, broker-dealers and providers of legal services—

(1) More than fifty percent (50%) of the ownership or control of which is held, directly or indirectly, 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.

Minority-serving financial institution means a financial institution that serves minority populations primarily, including depository and nondepository institutions where fifty-one percent (51%) or more of the stock is owned by one or more minority individuals or where a majority of the members of the board of directors are minority.

Prime contractor (tier 1) means a supplier that enters into a contract with a regulated entity to provide goods and/or services directly to that regulated entity.

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 reward for good performance. A promotion is typically associated with an increase in an employee's pay due to additional or enhanced job responsibilities.

* * * * *

Subcontractor (tier 2) means a supplier that enters into a contract with a prime contractor (tier 1) of a regulated entity to provide goods and/or services to that prime contractor (tier 1) for the benefit of the regulated entity.

Women-owned business means a business and includes, but is not limited to, financial institutions, mortgage banking firms, investment banking firms, investment consultants or advisors, financial services entities, asset management entities, underwriters, accountants, brokers, broker-dealers and providers of legal services—

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

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

§ 1207.2 [Amended]

3. Amend § 1207.2 by:

- a. Removing from paragraphs (a) and (b) the phrase “and the Office of Finance”;
- b. Adding in paragraph (b) a comma immediately following the phrase “to the maximum extent possible”; and
- c. Revising paragraph (c).

The revision reads as follows:

§ 1207.2 Policy, purpose, and scope.

* * * * *

(c) Scope. This part applies to each regulated entity's development, implementation, and adherence to diversity, inclusion, and non-discrimination policies, practices, and principles, including opportunities to award contracts for goods and/or services.

§ 1207.3 [Amended]

4. Amend § 1207.3 by:

- a. In paragraph (a), removing the phrase "or the Office of Finance"; and
- b. Revising paragraph (b) and adding paragraphs (c) and (d) to read as follows:

§ 1207.3 Limitations.

* * * * *

(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.

(c) Within ninety (90) days after the effective date of this regulation each regulated entity shall submit to FHFA a list of the types of contracts it considers exempt under § 1207.3(b) and any thresholds, exceptions, and limitations the regulated entity establishes for the implementation of § 1207.21(c)(2). The submission shall address the criteria identified in § 1207.21(b)(9).

(d) Each regulated entity shall notify FHFA within thirty (30) days after any change in the types of contracts it considers exempt under § 1207.3(b) or any change in the thresholds, exceptions, and limitations the regulated entity establishes for the implementation of § 1207.21(c)(2).

Subpart C—[Amended]

5. Amend the heading of subpart C by removing “and the Office of Finance”.

§ 1207.20 [Amended]

6. Amend § 1207.20 by:

a. Removing the phrases “and the Office of Finance” and “or the Office of Finance” wherever they appear in paragraph (a); and

b. Revising paragraphs (b) and (c) to read as follows:

§ 1207.20 Office of Minority and Women Inclusion.

* * * * *

(b) Adequate resources. The board of directors of each 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. The regulated entity will also ensure that any officer(s) designated to direct and oversee its diversity and inclusion programs has the necessary knowledge, skills, competencies, and abilities to effectively implement the minimum standards and requirements found in 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 leading the

regulated entity's board-approved strategies, 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.

6. Amend § 1207.21 by:

a. Revising the section heading;

b. Removing the phrases "and the Office of Finance", "and Office of Finance", "or the Office of Finance" and "and the Office of Finance's" wherever they appear;

c. Revising the first sentence of paragraph (a);

d. Revising the last sentence of paragraph (b) introductory text;

e. Revising paragraph (b)(2);

f. Redesignating paragraphs (b)(6) through (9) as paragraphs (b)(8) through (11), respectively;

g. Redesignating paragraphs (b)(3) through (5) as paragraphs (b)(4) through (6), respectively;

h. Adding new paragraphs (b)(3) and (7);

i. Revising newly redesignated paragraphs (b)(4), (5), (9), and (10); and

j. Adding paragraphs (d) and (e).

The revisions and additions read as follows:

§ 1207.21 Promoting diversity and ensuring inclusion in all business and activities.

(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 race, color, religion, sex,

national origin, disability status, genetic information, age, sexual orientation, gender identity, or status as a parent. * * *

(b) * * * The policies and procedures of each regulated entity, at a minimum, shall:

* * * * *

(2) Describe its practices and principles for prohibiting discrimination in employment and contracting;

(3) Give consideration to minority-, women-, and disabled-owned businesses when reviewing and evaluating contract proposals as required under § 1207.2(c);

(4) 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 Web site;

(5) Accept, review, and grant or deny requests for reasonable accommodations of disabilities from employees or applicants for employment;

* * * * *

(7) Develop a stand-alone diversity and inclusion strategic plan or incorporate into its existing strategic plan a diversity and inclusion plan that proactively focuses on promoting the advancement of diversity and inclusion. The stand-alone diversity and inclusion strategic plan and the incorporated diversity and inclusion plan are hereinafter referred to as the diversity and inclusion strategic plan;

* * * * *

(9) Identify the types of contracts the regulated entity considers exempt under § 1207.3(b) and any thresholds, exceptions, and limitations the regulated entity establishes for the implementation of § 1207.21(c)(2). The policies and procedures must describe the following:

- (i) The rationale and need for the thresholds, exceptions, or limitations;
- (ii) The criteria used to implement the thresholds, exceptions, or limitations; and
- (iii) Any negative or adverse impact the implementation of the thresholds, exceptions, or limitations would likely have on contracting opportunities for minorities, women, and individuals with disabilities, and minority-, women-, and disabled-owned businesses.

(10) Be published and made 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 Web site; and

* * * * *

(d) Diversity and inclusion strategic planning. No later than 45 days after the commencement of each calendar year, the board of directors 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 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.

(e) Contents of the diversity and inclusion strategic plan. The diversity and inclusion strategic plan shall include the following:

(1) A vision and/or mission statement that address the importance of promoting diversity and ensuring the inclusion of minorities, women, and individuals with disabilities in order to fulfill § 1207.2;

(2) Measurable strategic goals and objectives for accomplishing the agreed-upon priorities and intended outcomes developed to advance diversity and ensure the inclusion of minorities, women, and individuals with disabilities at the regulated entity in accordance with § 1207.2; and

(3) A requirement to create and implement action plans to achieve the strategic goals and objectives and management reporting requirements for monitoring the implementation of those goals and objectives.

§ 1207.22 [Amended]

7. Amend § 1207.22 by removing the phrases “and Office of Finance”, “and the Office of Finance”, “or the Office of Finance”, and “the Office of Finance’s” from the section heading and from wherever else they appear.

§ 1207.23 [Amended]

8. Amend § 1207.23 by:

a. Removing the phrases “and the Office of Finance”, “or the Office of Finance”, and “or the Office of Finance’s” from all paragraphs;

b. In paragraphs (b)(3) and (7), removing the phrase “individuals applying” and adding in its place “applicants”;

c. Adding “and the Office of Finance” after “each Bank” in paragraph (b)(9)(i); adding “and the Office of Finance” after “each Bank” in paragraph (b)(9)(i)(A); adding “and the Office of Finance” to the end of the sentence in paragraph (b)(9)(B)(ii); adding “and the Office of Finance” after “by the Banks” in paragraph (b)(10);

d. Redesignating paragraphs (b)(14) through (20) as paragraphs (b)(19) through (25), respectively;

e. Redesignating paragraphs (b)(11) through (13) as paragraphs (b)(13) through (15), respectively;

f. Redesignating paragraphs (b)(9) and (10) as paragraphs (b)(10) and (11), respectively;

g. Adding new paragraphs (b)(9) and (12);

h. Revising newly redesignated paragraphs (b)(14) and (15);

i. Adding new paragraphs (b)(16), (17), and (18); and

j. Revising newly redesignated paragraphs (b)(19) and (23).

The revisions and additions read as follows:

§ 1207.23 Annual reports—format and content.

* * * * *

(b) * * *

(9) Data showing for the reporting year by minority, gender, and disability classification –

(i) The number of individuals responsible for supervising employees and/or managing the functions or departments of the regulated entity; and

(ii) A description of the strategies, initiatives, and activities executed during the preceding year to promote diverse individuals to supervisory and management roles;

* * * * *

(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 –

(A) Assessing challenges and impediments minority-serving financial institutions face in accessing the secondary mortgage market and/or providing access to single- and multi-family mortgage credit for creditworthy borrowers; and

(B) Supporting lenders who serve minority communities;

(ii) Promote diversity in capital market transactions by –

(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;

* * * * *

(14) Cumulative data separately showing the total number of contracts in place at the beginning of the reporting year as well as those entered into during the reporting year;

(15) Cumulative data separately showing the total amount paid for contracts in place at the beginning of the reporting year as well as those entered into during the reporting year;

(16) Cumulative data separately showing the total number of contracts entered into during the reporting year that were—

(i) Considered exempt under § 1207.3(b);

(ii) Prime contracts (tier 1) entered into with minorities or minority-owned businesses, women or women-owned businesses, and individuals with disabilities or disabled-owned businesses;

(iii) Subcontractor (tier 2) contracts that prime contractors (tier 1) entered into with minorities or minority-owned businesses, women or women-owned businesses, and individuals with disabilities or disabled-owned businesses;

(17) Cumulative data separately showing the total amount paid for contracts entered into during the reporting year that were—

(i) Considered exempt under § 1207.3(b);

(ii) To prime contractors (tier 1) that are minorities or minority-owned businesses, women or women-owned businesses, and individuals with disabilities or disabled-owned businesses in place at the beginning of the reporting year as well as those entered into during the reporting year;

(iii) To subcontractors (tier 2) that are minorities or minority-owned businesses, women or women-owned businesses, and individuals with disabilities or disabled-owned businesses in place at the beginning of the reporting year;

(18) Cumulative data separately showing the total diversity spend with non-diverse-owned businesses during the reporting year;

(19) The annual total of amounts paid to prime contractors (tier 1) and subcontractors (tier 2) and the percentage of which was paid separately through prime contracts and subcontracts to minorities or minority-owned businesses, women or women-owned businesses, and individuals with disabilities or disabled-owned businesses during the reporting year;

* * * * *

(23) A comparison of the data reported under paragraphs (b)(13) through (19) of this section with the same information reported for the previous year;

§ 1207.24 [Amended]

9. Amend § 1207.24 by removing the phrase “or the Office of Finance’s”.

10. Add § 1207.25 to read as follows:

§ 1207.25 Office of Finance.

All parts of this regulation and the standards issued under it shall apply to the Office of Finance, as defined in § 1201.1, in the same manner in which it applies to the regulated entities, unless the Office of Finance is otherwise specifically addressed or excluded.

Melvin L. Watt,
Director, Federal Housing Finance Agency.

October 18, 2016
Dated

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