

**FEDERAL HOUSING FINANCE AGENCY**

**12 CFR Part 1207**

**RIN 2590-AA67**

**Minority and Women Inclusion Amendments**

**AGENCY:** Federal Housing Finance Agency.

**ACTION:** Final Rule.

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**SUMMARY:** The Federal Housing Finance Agency (FHFA) is adopting a final rule to amend its regulation on minority and women inclusion by requiring the Federal Home Loan Banks (Banks) and the Office of Finance to include in the contents of their annual reports certain demographic information related to their boards of directors as well as a description of their related outreach activities during the reporting year.

**DATES:** This rule is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Sharron P. A. Levine, Director, Office of Minority and Women Inclusion, [Sharron.Levine@fhfa.gov](mailto:Sharron.Levine@fhfa.gov), (202) 649-3496; or Eric Howard, Deputy Director, Office of Minority and Women Inclusion, [Eric.Howard@fhfa.gov](mailto:Eric.Howard@fhfa.gov), (202) 649-3009; or Karen Lambert, Associate General Counsel, [Karen.Lambert@fhfa.gov](mailto:Karen.Lambert@fhfa.gov), (202) 649-3094 (not toll-free numbers), Federal Housing Finance Agency, 400 Seventh Street, S.W., Washington, DC 20024. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877-8339.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

#### **A. General**

Effective July 30, 2008, the Housing and Economic Recovery Act of 2008 (HERA), Public Law 110-289, 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. HERA transferred the supervisory and oversight responsibilities of the Office of Federal Housing Enterprise Oversight over the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, Enterprises), and of the Federal Housing Finance Board over the Banks and the Bank System's Office of Finance to FHFA. The Enterprises and the Banks are collectively referred to as the regulated entities.

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 with ensuring 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 the respective authorizing statutes of the regulated entities; carry out their missions through activities authorized and consistent with the

Safety and Soundness Act and their authorizing statutes; and engage in activities and operations that are consistent with the public interest.<sup>1</sup>

## B. Office of Minority and Women Inclusion

### i. Statutory Requirements

Section 1116 of HERA amended section 1319A of the Safety and Soundness Act, 12 U.S.C. 4520, to require, in part, that the regulated entities establish an Office of Minority and Women Inclusion (OMWI) or designate an office responsible for carrying out the responsibilities of OMWI. That office is responsible for: all matters relating to diversity in the entity's management, employment, and business activities; the development and implementation of standards and procedures to promote diversity in all business and activities of the regulated entity; and the submission of an annual report to FHFA detailing the actions taken to promote diversity and inclusion. Furthermore, 12 U.S.C. 1833e, and Executive Order 11478, require FHFA and the regulated entities to promote equal opportunity in employment and contracting.

### ii. FHFA's Regulations

FHFA adopted regulations to implement section 1116 of HERA, 12 U.S.C. 1833e and Executive Order 11478, and to set forth the minimum requirements for the regulated entities' diversity programs and reporting requirements. Those regulations, located at 12 CFR part 1207, require each regulated entity and the Office of Finance to establish an OMWI, or designate another office that would be responsible for fulfilling the entity's OMWI responsibilities. Each of these entities must implement policies and procedures to ensure, to the maximum extent possible, in balance with financially safe and sound

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<sup>1</sup> Section 1102 of HERA, 122 Stat. 2663 and 2664.

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.<sup>2</sup> The policies also must encourage the consideration of diversity in the nomination or solicitation of nominees for positions on boards of directors as well as engagement in recruiting and outreach directed at encouraging minorities, women and individuals with disabilities to seek or apply for employment with the regulated entity or the Office of Finance.<sup>3</sup>

Part 1207 also requires each regulated entity and the Office of Finance to submit to the FHFA Director, on or before March 1 of each year, a detailed annual report summarizing its activities during the reporting year (January 1 through December 31 of the preceding year) to comply with the OMWI regulatory requirements.<sup>4</sup> To that end, each regulated entity and the Office of Finance is required to submit as part of its annual report 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 to collect certain demographic information) or a similar report.<sup>5</sup> The Form EEO-1 pertains only to broad occupational categories of employees such as executives/senior level officials, first/mid-level officials and managers, professionals,

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<sup>2</sup> 12 CFR 1207.21(b).

<sup>3</sup> 12 CFR 1207.21(b)(5).

<sup>4</sup> 12 CFR 1207.22(c) and 1207.23.

<sup>5</sup> 12 CFR 1207.23(b)(1).

technicians, and other employee job categories, and those employees' gender, race, and ethnicity classifications.<sup>6</sup>

In addition, part 1207 provides that the FHFA Director has broad enforcement authority in that he or she 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.<sup>7</sup> To that end, the FHFA Director may conduct examinations of the activities of a regulated entity or the Office of Finance under and in compliance with this part 1207 pursuant to 12 U.S.C. 4517.<sup>8</sup>

### C. The Bank System

The Bank System (System) was created by the Federal Home Loan Bank Act of 1932 (Bank Act) to support mortgage lending and related community investment. It is currently composed of 12 Banks, Bank member financial institutions, and the System's fiscal agent, the Office of Finance. The Banks fulfill their statutory mission primarily through providing secured loans (advances) to their members.

The Office of Finance is a joint office of the Banks, the primary responsibility of which is to act as their agent in offering, issuing, and servicing the consolidated obligations that are issued to fund the operations of the Banks.<sup>9</sup> The Office of Finance also prepares the combined financial reports for the System, functions as its fiscal agent,

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<sup>6</sup> The race and ethnicity categories used on the Form EEO-1 are: Hispanic or Latino; White (Not Hispanic or Latino); Black or African American (Not Hispanic or Latino); Native Hawaiian or Other Pacific Islander (Not Hispanic or Latino); Asian (Not Hispanic or Latino); American Indian or Alaska Native (Not Hispanic or Latino); Two or More Races (Not Hispanic or Latino).

<sup>7</sup> 12 CFR 1207.24.

<sup>8</sup> Id.

<sup>9</sup> 12 CFR 1273.3(a).

and performs certain duties relating to the Financing Corporation and Resolution Funding Corporation, respectively.<sup>10</sup>

The board of directors of the Office of Finance consists of 17 members; these include the 12 Bank presidents who serve ex officio and five independent directors.<sup>11</sup> The independent directors must be United States citizens and not have any material relationship with a Bank or the Office of Finance. As a group, the independent directors must have substantial experience in financial and accounting matters. The Office of Finance's independent directors were initially appointed by FHFA. Once the terms of the independent directors expire or the positions otherwise become vacant, the succeeding independent directors will be elected by majority vote of the Office of Finance's board of directors subject to FHFA's review of, and non-objection to, each independent director.<sup>12</sup>

Section 1202 of HERA altered the composition of the Banks' boards of directors by amending section 7 of the Bank Act (12 U.S.C. 1427) to require the management of each Bank to be vested in a board of 13 directors, or such other number as the Director determines appropriate. In addition, each board must comprise both a majority of member directors and at least 40 percent of independent directors.<sup>13</sup> Both member and independent directors are elected by a plurality vote of the members. All board members are required to be U.S. citizens.

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<sup>10</sup> 12 CFR 1273.3(b) – (d).

<sup>11</sup> 12 CFR 1273.7(a).

<sup>12</sup> 12 CFR 1273.7(d); See 75 FR 23163 (May 3, 2010).

<sup>13</sup> Previously, section 7 of the Bank Act required each Bank's board of directors to be comprised of 14 directors, 8 of whom were elected by members and 6 of whom were appointed by the former Federal Housing Finance Board.

Each member director nominee is required to execute a director eligibility certification form prescribed by FHFA.<sup>14</sup> A member director is a member of the board of directors of a Bank, who is a director or officer of a member institution located in the district in which the Bank is located.<sup>15</sup>

Each independent director nominee is required to execute an independent director application form prescribed by FHFA that demonstrates the individual is eligible and has the qualifications to be an independent director.<sup>16</sup> An independent director is a member of the board of directors of a Bank who is a bona fide resident of the district in which the Bank is located.<sup>17</sup> Each independent director who is not a public interest director is required to have demonstrated knowledge of, or experience in, financial management, auditing and accounting, risk management practices, derivatives, project development, organizational management, or such other expertise as the Director may prescribe by regulation.<sup>18</sup> FHFA regulations include the law as one of the areas in which an independent director may have knowledge of, or experience in, to qualify as an independent director.<sup>19</sup> Before nominating any individual to be an independent director, each Bank is required to determine that such knowledge or experience of the nominee is commensurate with that needed to oversee a financial institution with a size and complexity that is comparable to that of the Bank.<sup>20</sup> At least two of the independent directors are required to be public interest directors who shall have more than four years

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<sup>14</sup> 12 CFR 1261.7(c).

<sup>15</sup> 12 U.S.C. 1427(a)(4)(B).

<sup>16</sup> 12 CFR 1261.7(d).

<sup>17</sup> 12 U.S.C. 1427(a)(4)(A).

<sup>18</sup> 12 U.S.C. 1427(a)(3)(B)(i).

<sup>19</sup> 12 CFR 1261.7(e)(1).

<sup>20</sup> 12 CFR 1261.7(e)(1).

of experience in representing consumer or community interests on banking services, credit needs, housing, or consumer financial protection.<sup>21</sup>

FHFA's regulations include specific actions the Banks may take when nominating and electing directors as well as limitations on the Banks' actions.<sup>22</sup> For example, each Bank may conduct an annual assessment of the skills and experience of the members of its board of directors and may determine whether the capabilities of the board would be enhanced by the addition of individuals with particular qualifications, such as auditing and accounting, derivatives, financial management, organizational management, project development, risk management practices, or the law.<sup>23</sup> If the Bank identifies such particular qualifications, it will inform the members as part of its announcement of elections.<sup>24</sup>

FHFA's regulations also set out the circumstances under which support may be provided for the nomination or election of an individual to a member or independent directorship.

**Member Directors:** A Bank director, officer, attorney, employee, or agent acting in his or her personal capacity, may support the nomination or election of any individual for a member directorship, provided no such individual shall purport to represent the views of the Bank in doing so.<sup>25</sup>

**Independent Directors:** A Bank director, officer, attorney, employee, or agent and the board of directors and Advisory Council (and members of the Advisory Council)

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<sup>21</sup> 12 U.S.C. 1427(a)(3)(B)(ii); 12 CFR 1261.7(e)(2).

<sup>22</sup> 12 CFR 1261.9.

<sup>23</sup> 12 CFR 1261.9(a).

<sup>24</sup> 12 CFR 1261.9(a).

<sup>25</sup> 12 CFR 1261.9(b)(1).

may support the candidacy of any individual nominated by the board of directors for election to an independent directorship.<sup>26</sup>

Beyond these specific allowances for support, a Bank director, officer, attorney, employee, or agent is otherwise prohibited, directly or indirectly, from supporting or opposing the nomination or election of a particular individual for a member or independent director vacancy, or from taking any other action to influence the voting with respect to any particular individual.<sup>27</sup>

#### D. Proposed Minority and Women Inclusion Amendments

On June 25, 2014, FHFA published a proposed rule to amend its regulation on Minority and Women Inclusion to revise the existing reporting requirements.<sup>28</sup> Proposed § 1207.23(b)(9)(i) would require each Bank and the Office of Finance to include in the contents of its annual report data showing for the reporting year by minority and gender classification, the number of individuals on the board of directors of each Bank and the Office of Finance.<sup>29</sup> Proposed § 1207.23(b)(9)(i)(A) would require the Banks and the Office of Finance to use data collected through an information collection requesting each director's voluntary self-identification of his or her minority and gender classification without personally identifiable information.<sup>30</sup> Proposed § 1207.23(b)(9)(i)(B) would require that the Banks and the Office of Finance use the same demographic classifications as those on the Form EEO-1.<sup>31</sup> FHFA noted in the **Federal Register** explanation of the proposed rule that the aggregate board diversity data reported to FHFA

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<sup>26</sup> 12 CFR 1261.9(b)(2).

<sup>27</sup> 12 CFR 1261.9(c).

<sup>28</sup> 79 FR 35960 - 35963 (June 25, 2014).

<sup>29</sup> See 79 FR 35963 (June 25, 2014).

<sup>30</sup> Id.

<sup>31</sup> Id.

would establish a baseline to analyze future trends, and could be used to assess the effectiveness of the strategies developed by the Banks and the Office of Finance related to promoting board diversity.<sup>32</sup>

The proposed rule would also add § 1207.23(b)(9)(ii), which would require the Banks and the Office of Finance to include a description of their outreach activities and strategies related to promoting diversity in nominating or soliciting nominees for positions on boards of directors.<sup>33</sup> Finally, proposed § 1207.23(b)(10) would require a year-over-year comparison of the data reported in § 1207.23(b)(9) by the Banks and the Office of Finance.<sup>34</sup>

The proposed amendment to § 1207.22(c) would require the Banks and the Office of Finance to include the board demographic data and a description of related outreach activities and strategies in the contents of the annual report submitted to FHFA beginning with the report required on or before March 1, 2015.<sup>35</sup>

The 60-day comment period closed on August 25, 2014. FHFA received three comment letters in response to the proposed rule. Nine Banks (Atlanta, Boston, Chicago, Cincinnati, Des Moines, New York, Pittsburgh, Topeka, and Seattle) and the Office of Finance submitted consolidated comments in one letter. The Greenlining Institute, a non-profit organization, and a private citizen also submitted comment letters. The comments were thoughtful and discussed matters that were carefully considered by FHFA.

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<sup>32</sup> See 79 FR 35961 - 35962 (June 25, 2014).

<sup>33</sup> See 79 FR 35963 (June 25, 2014).

<sup>34</sup> Id.

<sup>35</sup> Id.

## II. Final Rule

FHFA responds to specific concerns below as it explains aspects of the rule to which the comments pertain. After considering the comments received in response to the proposed rule, FHFA is adopting a final rule amending its minority and women inclusion regulations, which applies to the Banks and the Office of Finance.

### A. Applicability of Amendments

A private citizen commented that the amendments should apply to the Enterprises as well as to the Banks and the Office of Finance. FHFA does not include the Enterprises in the final rule. As noted in the **Federal Register** explanation of the proposed rule, FHFA, in its role as conservator of Fannie Mae and Freddie Mac, is involved in the selection of their board members.<sup>36</sup> Therefore, FHFA maintains that under current circumstances, it is not necessary to consider promulgating regulations pertaining to the Enterprises with respect to the requirements of the final rule.

### B. Data Collection

#### i. Method of Collection

The nine Banks and the Office of Finance commented that FHFA should include the voluntary self-identification request for board diversity demographic data in the Independent Director Annual Certification Form and the annual Member Director Eligibility Certification Form, which they believe would provide a “simple method” of collecting this information.

FHFA does not adopt this proposal in the final rule. These forms are used solely to collect information to determine whether each director meets the statutory and

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<sup>36</sup> See 79 FR 35961 (June 25, 2014).

regulatory eligibility requirements.<sup>37</sup> The demographic status of a director or candidate for director is not a requirement for eligibility. In addition, completion of the annual director certification forms is mandatory, whereas submission of minority and gender classification data is voluntary. The final rule adopts the proposed requirement that the Banks and the Office of Finance collect board demographic information by requesting each incumbent director to voluntarily self-identify his or her minority and gender classification, without personally identifiable information. The inclusion of the request for board diversity demographic data in the annual certification forms could imply that the information is mandatory and not voluntary. The inclusion of the request for board diversity demographic data in the annual director certification forms could also raise privacy concerns.

The Greenlining Institute proposed mandating the use of the Form EEO-1 itself to collect the board member demographic information to standardize reporting metrics. FHFA does not adopt this proposal in the final rule. The Form EEO-1 is a compliance survey tool required to be completed by certain employers who are subject to title VII of the Civil Rights Act of 1964, as amended, in accordance with the EEOC's implementing regulations.<sup>38</sup> The Form EEO-1 categorizes a company's employment data by race and ethnicity, gender and job category. Part 1207 requires that the Banks and the Office of Finance report employment demographic information to FHFA using the Form EEO-1 or similar report. The Form EEO-1 does not include a job category for board members since they are not employees. Therefore, the final rule continues to leave to the

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<sup>37</sup> The Independent Director Annual Certification Form applies to each incumbent Bank director, and the Member Director Eligibility Certification Form applies to both candidates for and incumbents of member directorships.

<sup>38</sup> See 29 CFR 1602.7.

discretion of the Banks and the Office of Finance the particular method of collection of the data as long as the Form EEO-1 diversity categories are used.

The nine Banks and the Office of Finance also commented that it is not “necessary or appropriate” to follow the instructions of the Form EEO-1 with respect to the collection of the board demographic information, which allow employers to report observed diversity.<sup>39</sup> The commenters requested that FHFA clarify that there is no requirement to report observed diversity in addition to the board members’ voluntary demographic self-identification. FHFA agrees with this comment and reiterates that the Banks and the Office of Finance are expected to report aggregate data based only on the board members’ voluntary demographic self-identification.

#### ii. Diversity Categories

The proposed rule requires the Banks and the Office of Finance to use the “same classifications as those on Form EEO-1,” referred to here as “diversity categories,” for the purpose of reporting minority and gender classifications of individuals on the boards of directors of the Banks and the Office of Finance. The nine Banks and the Office of Finance commented that following the diversity categories of the Form EEO-1 for boards of directors is “neither necessary nor appropriate” and requested that the minority categories as defined in part 1207 be used. The commenters propose that the Form EEO-1 diversity categories be replaced with the diversity categories found in § 1207.1, which defines “minority” as “any Black (or African) American, Native American (or American Indian), Hispanic (or Latino) American, or Asian American.” The commenters note that although it is reasonable for FHFA to require the Banks and the Office of Finance to

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<sup>39</sup> See EEO-1 Instruction Booklet, Appendix, paragraph 4.

report employee demographic information using the Form EEO-1 diversity categories to avoid duplicating reporting burdens and to ensure that the data reported is consistent with similar information reported to any other agency or regulator, they do not believe these categories are necessary or appropriate for board member demographic information. The commenters provide that there is no legal requirement to report board member demographics, and further note that the “[t]he small size of the reporting pool and greater visibility of each respondent necessitates heightened sensitivity.”

FHFA does not adopt the request to require the use of the minority categories as defined in part 1207. The definition of “minority” in part 1207 is consistent with that in section 1204(c) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, which is referenced by section 1319A of the Safety and Soundness Act, as amended by HERA.<sup>40</sup> The Form EEO-1 includes six diversity categories (i.e., Hispanic or Latino; Black or African American (not Hispanic or Latino); Native Hawaiian or Other Pacific Islander (not Hispanic or Latino); Asian (not Hispanic or Latino); American Indian or Alaska Native (not Hispanic or Latino); or Two or More Races (not Hispanic or Latino)). Part 1207 requires that the regulated entities use the Form EEO-1 to report their demographic workforce data. Use of the same minority categories to collect board diversity data will provide consistency of reporting and enhance the comparability of the Banks’ and the Office of Finance’s board composition to that of their workforces. In addition, use of the Form EEO-1’s broader diversity categories will provide a board member with more choices should he or she choose to self-identify.

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<sup>40</sup> 12 U.S.C. 4520(b).

### iii. Collection of Additional Data

The nine Banks and the Office of Finance proposed that FHFA include a category for individuals with disabilities in the board demographic self-reporting request. FHFA does not adopt this proposal in the final rule. The requirement for the regulated entities to report data related to persons with disabilities is limited in part 1207 due to medical privacy concerns.<sup>41</sup> In addition, disability status is not included as a category on the Form EEO-1, and therefore, is not reported as part of the workforce demographic data. For privacy reasons and for comparability of reporting, FHFA does not include a category for individuals with disabilities in the final rule requirements related to board diversity reporting.

The commenters noted that some Banks have Equal Employment Opportunity statements that include diversity categories beyond the required protected classes. The commenters also highlighted their efforts to recruit, hire, and retain employees within the additional diversity categories. To that end, FHFA affirms that the Banks and the Office of Finance have the flexibility to collect demographic status information beyond the gender and minority categories on the Form EEO-1, but FHFA does not require the Banks and the Office of Finance to collect or report information beyond the requirements of the final rule.

The Greenlining Institute proposed that FHFA collect additional information about the board members, including their professional backgrounds, ages, and board turnover data (including time served on the board). The commenter believes that the additional information will better inform FHFA about the composition of the Banks' and

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<sup>41</sup> See 75 FR 81396 (December 28, 2010).

the Office of Finance's respective boards. FHFA does not adopt this proposal in the final rule. Board members are required to meet specific statutory and regulatory eligibility requirements, and information related to these requirements is collected on the pertinent director certification forms. The Banks already report information about their board members' professional backgrounds, time served on the board, and ages in their annual Form 10-K reports filed with the U.S. Securities and Exchange Commission pursuant to section 13 or 15(d) of the Securities and Exchange Act of 1934, which are publicly available. The Office of Finance provides similar information about its directors in the annual Federal Home Loan Bank Combined Financial Report, which also is publicly available. As a result, it is not necessary to include in the final rule a reporting requirement for these types of data.

The Greenlining Institute also proposed that FHFA collect additional data by use of qualitative inquiries on recruitment activities and other information related to board members and applicants. FHFA does not adopt this proposal in the final rule. The final rule requires the Banks and the Office of Finance to include a description of their outreach activities and strategies executed during the preceding year to promote diversity in nominating or soliciting nominees for positions on their respective boards of directors. Such descriptions could include recruiting events. The additional data collection could lead to the attribution of personally identifiable information due to the small number of board member positions.

## C. Outreach Activities

### i. Broad View of Diversity

The nine Banks and the Office of Finance requested that FHFA take a broad view of diversity for the purpose of proposed § 1207.23(b)(9)(ii), which would require reporting “the outreach activities and strategies executed during the preceding year to promote diversity in nominating or soliciting nominees for positions on boards of directors of the Banks and the Office of Finance.” The commenters proposed that the minority and women inclusion amendments allow a regulated entity to define diversity for the purpose of describing their outreach activities and strategies. The commenters noted FHFA’s **Federal Register** explanation of the final rule on the Bank boards of directors eligibility and elections, which states that “diversity among the members of each board of directors of the Banks would be beneficial to the Banks, and thus [FHFA] encourages the Banks to consider the diversity of their boards ...as it requests nominees for member directorships from its members and as it goes through the process of nominating candidates for independent directorships.”<sup>42</sup> However, the eligibility and elections final rule pertaining to the Banks’ boards of directors does not include any provisions that address diversity.

FHFA does not include a definition of “diversity” in this final rule and maintains that the Banks and the Office of Finance have the flexibility to conduct their outreach activities and strategies to promote board diversity beyond that contemplated by the rule. However, FHFA expects the Banks and the Office of Finance to report on their outreach activities and strategies that promote minority and women inclusion for the purpose of

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<sup>42</sup> 74 FR 51453 (October 7, 2009).

satisfying the reporting requirements of § 1207.23(b)(9)(ii). FHFA intends to develop guidance that will further elaborate on the agency's expectations related to outreach activities and strategies for the Banks' and the Office of Finance's boards of directors.

ii. Interplay with Director Nomination and Election Process

Also related to the outreach reporting requirement, the nine Banks and the Office of Finance commented that the rule should acknowledge aspects of the director nomination and election process, including the geographic limitations, eligibility requirements and nomination procedures, and that a Bank director, officer, attorney, employee, or agent is restricted by 12 CFR 1261.9 from taking certain actions to influence director nominations and elections.

The nine Banks and the Office of Finance noted that the election regulations at § 1261.9(c) prohibit a Bank director, officer, attorney, employee or agent from communicating in any manner that he or she directly or indirectly supports or opposes the nomination or election of a particular individual for a directorship or from taking any other action to influence the voting with respect to any particular individual. The commenters also noted that the election regulations provide exceptions to the prohibitions when the actions taken meet the following criteria:

- The actions are part of a skills and experience assessment and statement, as permitted by § 1261.9(a);
- The actions taken are in his or her personal capacity, to support the nomination or election of any individual for a member directorship, provided that he or she does not purport to represent the views of the Bank or its board of directors in doing so, as permitted by § 1261.9(b)(1); or

The actions support the candidacy of any individual nominated by the board of directors for election to an independent directorship, as permitted by § 1261.9(b)(2).

The commenters expressed concern that the regulatory restrictions on communication could limit a Bank's ability to address gender or minority identification in the election process, particularly with respect to member directorships. The commenters provided several examples of general outreach and education efforts to promote diversity on their respective boards of directors that they believe are consistent with the terms of § 1261.9. The examples included the following actions for promoting board diversity:

- engaging in general outreach to encourage a diverse pool of nominations for member directorships and applications for independent directorships;
- including a statement about EEO in member director nomination, independent director application, and election materials;
- encouraging trade associations to consider diverse candidates for member director nominations, or encouraging a Bank's Advisory Council to encourage applications from diverse candidates for an independent directorship; and
- providing information about Bank directorships and the election process through general outreach to professional affinity groups to which officers and directors of member institutions may belong.

FHFA agrees that the scenarios provided by the Banks are permissible under, and consistent with, the existing election regulations at 12 C.F.R. § 1261.9.

In addition, the commenters requested clarification on whether more direct actions would be permissible, such as a Bank identifying specific individuals as potential nominees and encouraging the nomination of an individual for a member directorship.

**Member Directors:** With respect to identifying and supporting specific individuals for nomination or election, the regulations permit a Bank director, officer, attorney, employee or agent, acting in his or her personal capacity, to support the nomination or election of any individual for a member directorship. The term “‘personal capacity’ is intended to preclude the use of a director’s official title, position, or authority associated with the position of Bank director, such as through use of Bank stationery, to endorse a candidate.”<sup>43</sup> While the regulations allow such support, they provide that no Bank director, officer, attorney, employee or agent may purport to represent the views of the Bank or its board of directors.<sup>44</sup> Thus, support for the nomination or election of individual member directors, including considerations of diversity, may be made by Bank directors, officers, attorneys, employees or agents acting only in a personal capacity.

**Independent Directors:** Although not addressed by the commenters, FHFA notes that nothing in the existing nomination and election regulations prohibits board members and others from discussing the importance of diversity when nominating, or considering the nomination of, individuals for independent directorships. For example, Board members may introduce the topic and discuss the role diversity plays in the solicitation and nomination processes for independent directorships.

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<sup>43</sup> When proposing the predecessor regulation, the Federal Housing Finance Board explained the term “personal capacity” as quoted above. See 63 FR 26536 (May 13, 1998).

<sup>44</sup> 12 CFR 1261.9(b)(1).

FHFA has also addressed the commenters' concerns in the final rule. FHFA acknowledges this "interplay" between the outreach requirements in the minority and women inclusion regulations and the Bank board of directors nomination and election regulations and further clarifies it by adding a reference to § 1261.9 in § 1207.23(b)(9)(ii) in the final rule to require that the Banks conduct their outreach activities and strategies consistent with the restrictions in the director nomination and election regulations. Since these restrictions apply only to the Banks, FHFA included the phrase "consistent with 12 CFR 1261.9" as a parenthetical after "Banks" in § 1207.23(b)(9)(ii), and not at the end of that section as proposed by the commenters.

#### D. Reports

##### i. Due Date for Initial Data Submission

FHFA did not receive any comments regarding the proposed rule's requirement to submit the demographic board data concurrent with the March 1, 2015, minority and women inclusion report. Since publication of the final rule follows that date, FHFA has extended the timeframe for initially submitting the board diversity data and outreach activities and strategies executed in order to afford the Banks and the Office of Finance a reasonable opportunity from the effective date of the final rule to collect and submit this data. Therefore, the final rule amends § 1207.22(c) to require the first submission of board demographic data and outreach activities and strategies to FHFA no later than September 30, 2015, and thereafter with the annual report.

##### ii. Timeline for Reporting Comparative Data

The nine Banks and the Office of Finance requested that the comparison of board diversity data be voluntary for the first annual report following the effective date of the

regulation. The commenters requested that the first mandatory year-over-year comparison be required in the 2015 annual report, which will be filed in March 2016. FHFA agrees with these requests and does not expect the Banks and the Office of Finance to submit a comparative report until March 2016.

The **Federal Register** explanation of the proposed rule stated that the initial aggregate demographic data reported would provide a baseline to analyze future trends.<sup>45</sup> The Banks and the Office of Finance will be able to use the baseline data submitted by September 30, 2015, to compare with the data submitted in the March 1, 2016 report. Although not required, a Bank or the Office of Finance may voluntarily submit and compare any historical board demographic data it has to date collected and submitted in the report due by September 30, 2015. FHFA determined that this clarification did not require a change to the final rule.

### iii. Use of Data

The Greenlining Institute recommended that FHFA make the annual minority and women inclusion reports of the Banks and the Office of Finance available to the public. The commenter believes that the public's confidence in the progress of the respective OMWIs of the Banks and the Office of Finance in advancing diversity will be limited until the annual reports are made public.

FHFA does not adopt this recommendation in the final rule. FHFA reiterates its position as stated in the **Federal Register** explanation of the final part 1207 regulations:

FHFA considers the reports and data to be related to examinations and examination, operation, or conditions reports. In general, FHFA will consider all

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<sup>45</sup> See 79 FR 35961 - 35962 (June 25, 2014).

the information and the data attributed to a particular regulated entity to be non-public, subject to the 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.<sup>46</sup>

The commenter also noted that it is standard practice for FHFA, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Consumer Financial Protection Bureau, the U.S. Securities and Exchange Commission, the Federal Reserve Board of Governors, and the U.S. Department of the Treasury to make reports on their respective minority and women inclusion activities available to the public. The commenter appears to be referring to the agency statutory reporting requirements under section 342(e) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), which apply to most federal financial regulatory agencies.<sup>47</sup> Such reports are required to be submitted to Congress and include certain information related to the agencies' minority and women inclusion programs.<sup>48</sup> FHFA also makes public its agency annual minority and women

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<sup>46</sup> 75 FR 81400 (December 28, 2010).

<sup>47</sup> Section 342(e) of Public Law 111-203, July 21, 2010, 12 U.S.C. 5452(e).

<sup>48</sup> Id.

inclusion report. However, the statutory reporting requirements under section 1319A of the Safety and Soundness Act apply only to entities regulated by FHFA.<sup>49</sup> Since there are no comparable reporting requirements for the regulated entities of the other financial regulatory agencies, those agencies do not receive minority and women inclusion reports from their regulated entities. FHFA will consider including aggregated data related to its regulated entities in the annual minority and women inclusion report it prepares in accordance with section 342(e) of Dodd-Frank.

### **III. 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 final 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 rule would not adversely affect any of the above factors.

### **IV. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (PRA) requires that FHFA consider the impact of paperwork and other information collection burdens imposed on the public.<sup>50</sup> Under the PRA and the implementing regulations of the Office of Management and Budget (OMB), an agency may not collect or sponsor the collection of information, or

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<sup>49</sup> 12 U.S.C. 4520(d).

<sup>50</sup> See 44 U.S.C. 3507(a) and (d).

impose an information collection requirement, unless it displays a currently valid control number assigned by OMB.<sup>51</sup> This final rule contains a new information collection requirement, which is described below.

As required by the PRA, FHFA requested comments on the new collection of information in the proposed rule.<sup>52</sup> The agency received no comments on that issue. As is also required by the PRA, FHFA submitted an analysis of the new collection of information to OMB for review in conjunction with the publication of the proposed rule.<sup>53</sup> OMB assigned to this collection of information control number 2590-0014, but has not yet approved the collection; however, FHFA expects OMB will do so by the effective date of the final rule.

Summary: Under § 1207.23(b)(9)(i), each Bank and the Office of Finance are required to request annually that each member of its board of directors provide, on a voluntary basis, self-identification of his or her demographic classification (using the same minority and gender classifications as those used on the Form EEO-1), without including personally identifiable information. Sections 1207.23(b)(9) and 1207.22(c) require that each Bank and the Office of Finance submit the baseline board demographic information collected to FHFA no later than September 30, 2015, and thereafter the information be included as part of the annual reports they are already required to submit under existing part 1207.

Use: FHFA will use the information collected under § 1207.23(b)(9)(i) to assess the effectiveness of the policies and procedures that each of the Banks and the Office of

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<sup>51</sup> See 44 U.S.C. 3512(a); 5 CFR 1320.8(b)(3)(vi).

<sup>52</sup> See 44 U.S.C. 3507(a)(1)(D); 5 CFR 1320.11(a).

<sup>53</sup> See 44 U.S.C. 3507(d)(1)(A); 5 CFR 1320.11(b).

Finance is required to implement to promote diversity in all of its business and activities “at all levels” and, specifically, to encourage diversity in the nomination and solicitation of nominees for members of its boards of directors. FHFA will also use the information to establish a baseline to analyze future trends relating to the diversity of the boards of directors of the Banks and the Office of Finance.

Respondents: Respondents will be the approximately 210 individuals serving on the boards of directors of the Banks and the Office of Finance in any given year.

Frequency: The information will be collected annually.

Annual Burden Estimate: FHFA estimates the total annualized hour burden for all respondents to the proposed information collection to be 21 hours. FHFA estimates that an average of 210 board directors will provide information annually and that each response will take approximately 0.1 hours on average (210 respondents x 0.1 hours per response = 21 hours). There will be no annualized cost to the Federal government.

## **V. 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 final rule under the Regulatory Flexibility Act.

The General Counsel of FHFA certifies that the final rule is not likely to have a significant economic impact on a substantial number of small entities because the

regulation is applicable only to the Banks and the Office of Finance, which are not small entities for purposes of the Regulatory Flexibility Act.

**List of Subjects in 12 CFR Part 1207**

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

**Authority and Issuance**

For the reasons stated in the SUPPLEMENTARY INFORMATION, and under the authority of 12 U.S.C. 4526, FHFA amends Subpart C of 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.

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

2. Amend § 1207.22 by adding a new sentence at the end of paragraph (c) to read as follows:

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

\* \* \* \* \*

(c) \* \* \* The data required to be reported by § 1207.23(b)(9) herein shall be submitted no later than September 30, 2015, and thereafter included in each annual report.

\* \* \* \* \*

3. Amend § 1207.23 as follows:

a. Redesignate paragraphs (b)(9) through (19) as paragraphs (b)(10) through (20);

and

b. Add new paragraph (b)(9) and amend newly redesignated paragraph (b)(10) to read as follows:

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

\* \* \* \* \*

(b) \* \* \*

(9)(i) Data showing for the reporting year by minority and gender classification, the number of individuals on the board of directors of each Bank and the Office of Finance—

(A) Using data collected by each Bank and the Office of Finance through an information collection requesting each director's voluntary self-identification of his or her minority and gender classification without personally identifiable information;

(B) Using the same classifications as those on the Form EEO-1; and

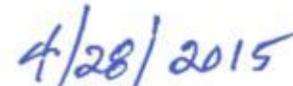
(ii) A description of the outreach activities and strategies executed during the preceding year to promote diversity in nominating or soliciting nominees for positions on boards of directors of the Banks (consistent with 12 CFR 1261.9) and the Office of Finance;

(10) A comparison of the data reported by Fannie Mae and Freddie Mac under paragraphs (b)(1) through (8) of this section, and by the Banks and the Office of Finance under paragraphs (b)(1) through (9) of this section, to such data as reported in the previous year together with a narrative analysis;

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



Date