FHLBANKS
OFFICE OF FINANCE

July 27, 2009

VIA EMAIL TO REGCOMMENTS@FHFA.GOV AND BY HAND

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Fourth Floor
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Attention: Comments/RIN 2590-AA08

Re: Proposed Rule on Golden Parachute and Indemnification Payments

Dear Mr. Pollard:

The Office of Finance of the Federal Home Loan Bank System ("OF") is writing to comment on the Federal Housing Finance Agency's ("FHFA") proposed rule on Golden Parachute and Indemnification Payments published on June 29, 2009 (the "Proposal"). The FHFA indicates that the Proposal is intended to implement provisions of section 1114 of the Housing and Economic Recovery Act of 2008 ("HERA"), which are to be codified at 12 U.S.C. § 4518(e), with respect to the OF.[1] The OF welcomes this opportunity to comment on the Proposal.

I. We Respectfully Submit that the Final Rule Should Not Apply to the OF; Congress Clearly Intended for Section 1318(e) of Federal Housing Enterprises Financial Safety and Soundness Act of 1992 to Apply Only to a "Regulated Entity" and Not to the "Office of Finance"

HERA amended a series of provisions of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (as amended by HERA, the "1992 Act")[2] to effectuate the combined responsibilities of the FHFA over Freddie Mac and Fannie Mae, as well as the Federal Home Loan Banks ("FHLBanks"). Section 1114 of HERA added section 1318(e) of the 1992 Act (12 U.S.C. § 4518(e)), which provides the FHFA with additional authorities in addressing golden parachute and indemnification payments made by the regulated entities. Section 1318(e) defines the term "golden parachute payment" for the purposes of the 1992 Act as "any payment (or any agreement to make any

1 74 Fed. Reg. 30975 (to be codified at 12 C.F.R. pt. 1231).

2 12 U.S.C §§4501-4642.

payment) in the nature of compensation by any *regulated entity* ... (emphasis added)."[3] Similarly, section 1318(e) defines the term "indemnification payment" for the purposes of the 1992 Act as "any payment (or any agreement to make any payment) by any *regulated entity* ... (emphasis added)."[4] HERA also amended the 1992 Act to include a specific definition of "regulated entity." The term "regulated entity" for purposes of the 1992 Act (including section 1318(e) of the 1992 Act) is defined to mean the "(A) Federal National Mortgage Association and any affiliate thereof; (B) the Federal Home Loan Mortgage Corporation and any affiliate thereof; and (C) any Federal Home Loan Bank."[5] The term "regulated entity" as defined in the 1992 Act does not include the OF.[6]

We respectfully submit that had Congress intended the golden parachute and indemnification provisions in 12 U.S.C. § 4518(e) to apply not only to the "regulated entities" (*i.e.*, Fannie Mae and Freddie Mac (and their respective affiliates), and the FHLBanks) but also to the OF, Congress could have easily effectuated such an intent by including a specific reference to the OF in 12 U.S.C. § 4518(e). Congress, however, chose not to do so.

In making its determination only to refer to "regulated entity" in 12 U.S.C. § 4518(e) and not to refer to the OF, we respectfully submit that Congress evinced a clear and unambiguous intention that the golden parachute and indemnification provisions in 12 U.S.C. § 4518(e) were to be applied *only* to Fannie Mae and Freddie Mac (and their affiliates) and the FHLBanks, and *not* to the OF. We believe this position is strongly supported by the fact that Congress also amended the 1992 Act to expressly refer to *both* the regulated entities *and* the OF when it intended to do so.[7]

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3 12 U.S.C. § 4518(e)(4)(A). The Proposal further recognizes that the OF is not a "regulated entity" by providing in the definition of entity-affiliated party in proposed section 1231.2 of the Proposal that the OF is itself an entity-affiliated party. *See also* 12 U.S.C. § 4502(11).

4 12 U.S.C. § 4502(e)(5)(A).

5 12 U.S.C. § 4502(20). Similarly, in proposed section 1230.2 of the Proposal, the FHFA defines the term "regulated entity" to mean "the Federal National Mortgage Association and any affiliate thereof; the Federal Home Loan Mortgage Corporation and any affiliate thereof; or any Federal Home Loan Bank; the term "regulated entities" means, collectively, the Federal National Mortgage Association and any affiliate thereof; the Federal Home Loan Mortgage Corporation and any affiliate thereof; and any Federal Home Loan Bank."

6 12 U.S.C. § 4502(19) defines the term "Office of Finance" as the "Office of Finance of the Federal Home Loan Bank System (or any successor thereto)."

7 For example, section 1101 of HERA amended 12 U.S.C. § 4511 to specifically refer to the Director as having general regulatory authority over each "regulated entity *and the Office of Finance*" (emphasis added). 12 U.S.C. § 4511(b)(2). Similarly, section 1153 of HERA amended 12 U.S.C. § 4631(a)(1) to provide that any person subject to a removal or prohibition order under that section shall not participate in any manner in the conduct of the affairs of any "regulated entity *or the Office of Finance*" (emphasis added), and also amended 12 U.S.C. § 4631(d)(4) to provide that any such person shall not vote for a director, or serve or act as an entity-affiliated party of "a regulated entity or as an officer or director of the *Office of Finance*" (emphasis added).

While acknowledging "the Office of Finance is not directly covered by section 1318(e),"[8] the FHFA nonetheless seeks to apply such provisions to the OF on the basis that the OF "is subject to the Director's "general regulatory authority" under section 1311(b)(2) of the [1992 Act], as amended by HERA."[9] We respectfully submit that the FHFA's position in this regard is contrary to the plain language of 12 U.S.C. § 4518(e), the will of Congress, and established law.[10] By purposely omitting the OF from the ambit of 12 U.S.C. § 4518(e), we believe that Congress has clearly and unambiguously expressed its intent to exclude the OF from the reach of these provisions.[11] Furthermore, under well established principles of administrative law, the FHFA cannot rely on its general rulemaking authority to expand the reach of the golden parachute and indemnification provisions and effectively rewrite the statute.[12]

See also 12 U.S.C. § 4637(e) which contains several references to a "regulated entity *or the Office of Finance*" (emphasis added).

8 74 Fed. Reg. at 30967.

9 *Id.* Section 1311(b)(2) of the 1992 Act (as amended by section 1101 of HERA) (12 U.S.C. § 4511(b)(2)) provides as follows: "The Director shall have general regulatory authority over each regulated entity and the Office of Finance, and shall exercise such general regulatory authority, including such duties and authorities set forth under section 1313, to ensure that the purposes of this Act, the authorizing statutes, and any other applicable law are carried out."

10 It is well settled that when the intent of Congress is clear, an agency must give effect to the expressed intent of Congress. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

11 We respectfully submit that to conclude otherwise would violate the canon of statutory construction, *expressio unius est exclusio alterius*, which states that "the mention of some implies the exclusion of others not mentioned." *United Dominion Indus. v. United States*, 532 U.S. 822, 836 (2001); *see also*, e.g., *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (stating that "when the items [listed in a statute] are members of an associated group or series," courts will infer "that items not mentioned were excluded by deliberate choice, not inadvertence."); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying the canon of expressio unius est exclusio alterius); *Pac. Nw. Generating Coop. v. DOE*, 550 F.3d 846 (9th Cir. 2008) (holding that mandatory language in a statute did not apply to a certain class of utility customers, because that class was not included on the list of customers to whom the mandatory language applied).

12 An agency's rulemaking power "is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute." *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (U.S. 1986); *see also*, e.g., *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 493 (D.C. Cir. 2007) (holding that the Securities and Exchange Commission ("SEC") could not invoke its general rulemaking authority to broaden the class of broker-dealers exempt under the Investment Advisers Act where Congress unambiguously defined which broker-dealers were exempt under the Act); *American Bankers Ass'n v. SEC*, 804 F.2d 739, 755 (D.C. Cir. 1986) (holding that the SEC could not use its rulemaking powers to expand the definition of "bank" and increase its regulatory jurisdiction when Congress included a clear and unambiguous definition of "bank" in the statute).

For the reasons discussed above, we respectfully submit that no basis exists in law for the FHFA to apply its final rule on golden parachute and indemnification provisions to the OF. We respectfully submit that to do so would expressly contradict the clear and unambiguous intent of Congress in enacting section 1114 of HERA that the golden parachute and indemnification provisions in 12 U.S.C. § 4518(e) only apply to "regulated entities" and *not* to the OF. We respectfully request that the final rule be modified to make it clear that it does not apply to the OF or any parties associated with it.

II. We Respectfully Submit that Congress Clearly Defined the Term "Entity-Affiliated Party" For Purposes of the 1992 Act In a Manner that Does Not Specify Any Entity-Affiliated Parties of the OF, and that the FHFA Cannot Create a Different Definition for the Purposes of the Final Rule

The Proposal seeks to place certain limitations on the OF in regard to its ability to make golden parachute payments and indemnification payments to "entity-affiliated parties" of the OF. As a matter of law, we respectfully submit that these limitations are not applicable to the OF.

Section 1303 of the 1992 Act establishes the following definition of "entity-affiliated party":

> The term "entity-affiliated party" means—
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> (A) any director, officer, employee, or controlling stockholder of, or agent for, a regulated entity;
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> (B) any shareholder, affiliate, consultant, or joint venture partner of a regulated entity, and any other person, as determined by the Director (by regulation or on a case-by-case basis) that participates in the conduct of the affairs of a regulated entity, provided that a member of a Federal Home Loan Bank shall not be deemed to have participated in the affairs of that Bank solely by virtue of being a shareholder of, and obtaining advances from, that Bank;
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> (C) any independent contractor for a regulated entity (including any attorney, appraiser, or accountant), if—
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> (i) the independent contractor knowingly or recklessly participates in—
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> (I) any violation of any law or regulation;
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> (II) any breach of fiduciary duty; or
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> (III) any unsafe or unsound practice; and
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> (ii) such violation, breach, or practice caused, or is likely to cause, more than a minimal financial loss

> to, or a significant adverse effect on, the regulated entity;
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> (D) any not-for-profit corporation that receives its principal funding, on an ongoing basis, from any regulated entity; and
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> (E) the Office of Finance.[13]

None of paragraphs (A) through (D) of section 1303 quoted above define any person or entity to be an "entity-affiliated party" of the OF. Instead, those paragraphs define certain persons or entities to be entity-affiliated parties of a "regulated entity" – a term that, as discussed above, clearly does *not* include the OF. In fact, the only reference to the OF in section 1303 is in paragraph (E), which establishes the OF itself as an entity-affiliated party, but which does not establish any person or entity as an entity-affiliated party of the OF. In this regard, it is notable that in providing for removal and prohibition authority to the FHFA, Congress structured such authority to apply to (i) an entity affiliated party and (ii) "any officer, director or management of the Office of Finance".[14] In taking this approach, we respectfully submit that Congress made it clear that the term "entity-affiliated party" would be limited to parties associated with the regulated entities and that parties associated with the OF were only covered by virtue of a separate and additional reference to "any officer, director or management of the Office of Finance". Such a reference does not appear in section 1318 of the 1992 Act.

Despite the clear statutory definition of "entity-affiliated party" in section 1303 of the 1992 Act, the FHFA seeks to include in proposed section 1231.2 of the Proposal a different definition of "entity-affiliated party" that seeks to establish entity-affiliated parties of the OF. The proposed definition states:

> *Entity-affiliated party* means:
> (1) With respect to the Office of Finance, any director, officer, or management of the Office of Finance;

As discussed above, we believe that the 1992 Act provides no statutory basis for this proposed definition. We respectfully submit that the FHFA is not free to disregard the clear language of Congress in this respect and to simply create a new definition for a Congressionally established and defined term.[15] In this respect, we note that in its

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13 12 U.S.C. § 4502(11) (emphasis added).

14 12 U.S.C. § 4636a(a)(1)-(2).

15 In order to be valid, regulations "must be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 873 (1977); where Congress provides a clear and unambiguous statutory definition for a term, an agency cannot redefine that term through regulation. *See Shays v. FEC*, 414 F.3d 76, 107-09 (D.C. Cir. 2005) (invalidating an Federal Election Commission regulation on the grounds that the agency's regulatory definition of

proposed rule on Executive Compensation published on June 5, 2009 (the "Executive Compensation Proposal"),[16] which also is intended to implement the provisions of section 1318 of the 1992 Act, the FHFA defined the term "entity-affiliated party" exactly in accord with the statutory definition contained in section 1303 of the 1992 Act, and without seeking to establish any person or entity as an entity-affiliated party of the OF.[17] We note that the FHFA has now created two different definitions of the term "entity-affiliated party" for the purposes of section 1318 of the 1992 Act, only one of which is consistent with statutorily defined term in section 1303 of the 1992 Act. We respectfully request therefore that the Proposal be modified to define the term "entity affiliated party" for the purposes of the Proposal in implementing section 1318(e) of the 1992 Act to be consistent both with the statutory definition of that term contained in section 1303 of the 1992 Act and with the FHFA's definition of that term in its Executive Compensation Proposal for purposes of sections 1318(a)-(d) of the 1992 Act.

Accordingly, since all of the golden parachute and indemnification provisions in the Proposal are specifically tied to payments made to an "entity-affiliated party" – a statutorily defined term that does not includes persons or entities affiliated with the OF – we respectfully submit that all of the golden parachute and indemnification provisions are inapplicable to the OF. We respectfully request that the final rule be modified to make it clear that it does not apply to the OF or any parties associated with it.

III. Golden Parachute Provisions

As discussed in sections I and II, above, we respectfully submit that in accordance with section 1318(e) of the 1992 Act none of the golden parachute provisions proposed in the Proposal are applicable to the OF or parties associated with the OF. Accordingly, any golden parachute provisions contained in the final rule should not be applied to the OF or parties associated with the OF. In the event that FHFA nevertheless seeks to apply the final rule on golden parachute payments to the OF, and without waiving any rights to challenge such an action, we offer the following comments for the FHFA's consideration on the golden parachute portion of the Proposal.

"electioneering communication" required that the communication be "for a fee," a requirement not found in the statutory definition); *Sundance Assocs. v. Reno*, 139 F.3d 804, 808 (10th Cir. Colo. 1998) (nullifying a Department of Justice regulation because its definition of "producer" differed from the clear and unambiguous definition in the statute); *B & D Land & Livestock Co. v. Schafer*, 584 F. Supp. 2d 1182, 1197 (N.D. Iowa 2008) (holding that USDA's regulatory definition of "wetland" was invalid because it differed from the statutory definition, which listed three unambiguous requirements for defining a "wetland").

16 74 Fed. Reg. 26989 (to be codified at 12 C.F.R. pt. 1230).

17 Proposed section 1230.2 of the Executive Compensation Proposal.

A. Provide Guidance and Clarification on Certain Timing Issues

We respectfully submit that the Proposal does not clearly address a number of important issues that may confront the OF. In this regard, we request that the final rule address the following matters:

- that if the OF is not subject to any of the triggering events listed in paragraph (1)(ii) of the definition of "golden parachute payment" in proposed section 1231.2 ("Triggering Event") (including if it had previously been subject to a Triggering Event, but is no longer subject to a Triggering Event), it need not obtain the approval of the FHFA Director ("Director") to enter into an agreement that could potentially result in a "golden parachute payment" in the event that a Triggering Event later occurs;[18]

- that if an individual begins to receive golden parachute payments under an agreement prior to the occurrence of a Triggering Event, the subsequent occurrence of a Triggering Event would not have any effect on the continuation of such payments, and the OF would not be required to seek approval of the Director to continue the payments;[19] and

- that if an individual's employment terminates after a Triggering Event that is then resolved so that when the employment ends no Triggering Event is in effect, the approval of the Director is not required to make payments to that individual.

B. Clarify that the Director May Approve an Agreement that Provides for a "Golden Parachute Payment" with a Current Employee of the OF that is Subject to a Triggering Event

Proposed section 1231.3(b)(1)(ii) expressly refers to the possibility that if the OF is subject to a Triggering Event, or is seeking to avoid being imminently subject to a Triggering Event, it may obtain approval from the Director to enter into an agreement with a new hire that provides for a golden parachute payment. We request clarification that the Director under the authority of proposed section 1231.3(b)(i) may likewise

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[18] As we understand the proposed rule, if an individual entered into an agreement that was not subject to the Director's approval because no Triggering Event had occurred and then terminated his or her employment after a Triggering Event occurred, the OF can seek the Director's approval to make such golden parachute payments to the individual by making the filing described in proposed section 1231.6, and the Director may grant such approval under proposed section 1231.3(b)(i).

[19] The FDIC clarified this point in its golden parachute regulation by providing that a condition for a payment being treated as a golden parachute payment is that it is an amount that becomes payable to an employee whose employment is terminated at a time when a triggering event under the FDIC golden parachute rule is in effect. 12 C.F.R. § 359.1(f)(iii)(A).

approve an agreement with a current employee of the OF that is subject to a Triggering Event that provides for a golden parachute payment.

We request that the final rule should clarify that, in any circumstances in which an agreement that provides for a golden parachute payment has been approved by the Director, no further approval by the Director under proposed section 1231.3(b) or otherwise will be required to make a golden parachute payment under the agreement.[20]

C. Confirm the Meaning of the Term "Compensation" for Purposes of the Golden Parachute Payments Rule

We note that the Proposal does not define the term "compensation." We request that the final rule should be modified to expressly include the definition of "compensation" that is set forth in 12 U.S.C. § 4502(6):

> The term "compensation" means any payment of money or the provision of any thing of current or potential value in connection with employment (emphasis added).[21]

Since the term "golden parachute payment" is defined in 12 U.S.C. § 4518(e)(4) as a "payment (or any agreement to make any payment) in the nature of compensation" (emphasis added), the express inclusion of a specific definition of compensation in the final rule will ensure that the term "golden parachute payment" will only apply in the circumstances that Congress intended.

This confirmation would make it clear that the final rule covers only payments "in the nature of compensation" and does not apply under any circumstances to other non-employment payments. Such non-employment payments could include payments to members of the board of directors of the OF who may be considered to be an "entity-affiliated party" as that term is defined in proposed section 1231.2, but the payments to whom are not connected with an employee relationship with the OF.

D. Modify the Definition of Nondiscriminatory Severance Pay Plan or Arrangement

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[20] Proposed section 1231.3(b)(1)(iii) provides that a regulated entity or the OF may agree to make a golden parachute payment under an agreement, which provides for severance payment not to exceed 12 months salary, in the event of a change of control, provided that the regulated entity of the OF shall obtain consent of the Director prior to making such a payment. This provision should be modified to expressly provide that approval for a payment under such an agreement could also be sought from the Director prior to the OF entering into such an agreement.

[21] The FHFA used the same sentence from the definition of compensation in the 1992 Act in its proposed definition of "compensation" in its recently proposed regulation on executive compensation. 74 Fed. Reg. 26989 (to be codified at 12 C.F.R. § 1230.2) (June 5, 2009).

Paragraph (2)(v) of the definition of "golden parachute payment" in proposed section 1231.2 excludes from that definition a severance payment made pursuant to a nondiscriminatory severance pay plan or arrangement that generally does not exceed base compensation paid to the employee during the 12 months preceding termination of employment. The definition of the term "nondiscriminatory" in proposed section 1231.2 provides that a nondiscriminatory plan or arrangement may provide different benefits based only on objective criteria that are applied on a proportionate basis (with a variance in severance benefits relating to any criterion of plus or minus 10%) to groups of employees consisting of not less than the lesser of 33% of employees or 1,000 employees. The reference to 1,000 employees was taken from the definition of nondiscriminatory in the Federal Deposit Insurance Corporation's rule on golden parachute and indemnification payments ("FDIC Rule").[22] The FDIC Rule applies to depository institutions and holding companies – many of which have tens of thousands of employees. In contrast, the staff at the OF is currently comprised of less than 90 employees. In recognition of the difference in employee size, the 1,000 employee threshold in the Proposal should be changed to a 15 employee threshold for the OF. The FHFA should expressly clarify that the objective criteria can include pay levels or responsibility levels as well as service including service for other employers in similar businesses.

E. We Request that the Final Rule Provide for Exclusion of Certain Payments in Connection With Negotiated Terminations of Employment

As noted above, payments under certain qualified nondiscriminatory severance pay plans or arrangements are not considered to be golden parachute payments. It is possible that depending on particular circumstances, including the circumstances involving a particular employee, the OF may wish to enter into a negotiated termination of an employee's employment with the OF, pursuant to which the employee would receive a payment that does not fall within the terms of a nondiscriminatory severance pay plan or arrangement as described in the Proposal.

We request that the final rule make it clear that an OF agreement to make a payment not exceeding base compensation paid to the employee during the 12 months preceding a negotiated termination of his or her employment, or pursuant to a severance pay plan which does not meet the requirements of paragraph 2(v) of the definition of "golden parachute payment" in proposed section 1231.2 of the Proposal, is excluded from the definition of a golden parachute payment and thus would not require FHFA approval if a Triggering Event were in effect with regard to the OF. Such an exclusion would ensure that the OF retains the flexibility to conduct its ordinary course personnel operations without the need for FHFA approval of customary limited payments in connection with negotiated terminations.

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[22] 12 C.F.R. § 359.1(j).

F. Clarify that Unused Leave is Not a "Golden Parachute Payment"

The final rule should clarify that the customary payment of unused annual leave in connection with the termination of employment does not constitute a "golden parachute payment." We believe that this could be appropriately addressed through an additional exclusion to the term golden parachute payment in paragraph (2) of the definition of that term in proposed section 1231.2.

G. Qualification of Certain Plans Under the Definition of Bona Fide Deferred Compensation Plan or Arrangement

The definition of "bona fide deferred compensation plan or arrangement" should be amended to take into account the differences between generally accepted accounting principles ("GAAP") and the actual payments to participants under these plans and ordinary plan expenses where assets are segregated in trust.

The definition currently permits payments from plans that segregate or otherwise set aside "assets in a trust which may only be used to pay plan and other benefits." Paragraphs (1)(ii) and 3(vi) of the definition of "bona fide deferred compensation plan or arrangement" in proposed section 1231.2 should be amended to include "and related expenses" after "benefits." This accounts for the fact that rabbi trusts often pay certain expenses.

In addition, GAAP treatment normally trails actual benefit accrual. Benefit accrual under Supplemental Executive Retirement Plans ("SERPs") and other deferred compensation plans is usually determined once a year, well after the end of the year, when a company prepares the annual actuarial valuation for the related qualified plan. The employer will adjust the GAAP expense at that time and adjust trust assets at the same time. In order that payments are not reduced due to timing differences, the following language should be added to paragraphs 3(vi) and 1(i) of the definition of "bona fide deferred compensation plan or arrangement" in proposed section 1231.2 after "GAAP": "plus any additional benefit amounts accrued in the normal course under the terms of the plan as in effect no later than one year prior to any events since the most recent GAAP valuation."

Paragraph (3)(vii) of the definition of "bona fide deferred compensation plan or arrangement" in proposed section 1231.2 does not take into account that payments do differ from the accrued liability for GAAP purposes for the timing issues noted as well as for method of payment and discount rates. Particularly for SERPS, the language does not take into account that benefits may differ from GAAP because (a) lump sums under the SERP may differ in value from the FAS valuation amount (and if the qualified plan rates are used to compute the SERP lump sum, this will always be the case), and (b) discount rates under the SERP may be tied to an index that is different from the financial assumptions or may change at a different time from the financial assumptions. Thus, we respectfully request that the following language be added to the end of paragraph 3(vii) of

the definition of "bona fide deferred compensation plan or arrangement" in proposed section 1231.2: "plus any additional benefit amounts accrued in the normal course under the terms of the plan as in effect no later than one year prior to any events since the most recent GAAP valuation and except for variations attributable to the calculation of benefits in the case of a SERP using actuarial assumptions and interest rates used for purposes of the associated qualified defined benefit plan."

Based on our reading of the Proposal, we understand that our Supplemental Retirement Plan and Supplemental Thrift Plan (collectively, the "Plans") with the adjustments described above each qualify as a "bona fide deferred compensation plan" as defined in the Proposal, and thus are excluded from the term "golden parachute payment" under paragraph 2(iii) of the definition of golden parachute payment in proposed section 1231.2.

Our Supplemental Thrift Plan is an elective deferral plan that recognizes compensation expense and accrues a liability for the benefit payments according to GAAP with no more than a one-year trail or segregates or otherwise sets aside assets in a trust which may only be used to pay plan and other benefits and plan expenses, except that the assets of such trust may be available to satisfy claims of creditors in the case of insolvency. Accordingly, it qualifies under paragraph 1 with the adjustments described above of the deferred compensation plan definition.

Our Supplemental Retirement Plan is a supplemental retirement plan, established primarily for the purpose of providing supplemental retirement benefits for a select group of highly compensated employees or for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by the Internal Revenue Code of 1986, as amended. Accordingly, the Supplemental Retirement Plan qualifies under paragraph 2 with the adjustments described above of the deferred compensation plan definition.

For each of the Plans, (i) the OF either recognizes compensation expense and accrues liability for the benefit payments according to GAAP with no more than a one-year trail or assets are set aside in trusts that may only be used to pay plan and other benefits and plan expenses, which are increased each year for additional accruals; (ii) benefits accrue each period only for current or prior service with the OF; and (iii) payments pursuant to each Plan are not in excess of accrued liability in accordance with GAAP with no more than a one-year trail and taking into account variations attributable to the calculation of benefits in the case of a SERP using actuarial assumptions and interest rates used for purposes of the associated qualified defined benefit plan. Accordingly, each of the Plans meets the additional requirements set forth in paragraphs (3)(iv), (vi), and (vii) of the deferred compensation plan definition.

H. Treatment of Nonqualified Deferred Compensation Plans and Supplemental Retirement Plans

Under paragraph 3(i) of the definition of "bona fide deferred compensation plan or arrangement" in proposed section 1231.2, a plan or arrangement that would otherwise qualify for an exclusion from treatment as a "golden parachute payment" would not qualify for such treatment, if the plan or arrangement were not in effect at least one year prior to the occurrence of a Triggering Event. Furthermore, under paragraph (3)(ii) of definition of "bona fide deferred compensation plan or arrangement" in proposed section 1231, an increase in benefits payable under a qualifying plan or arrangement pursuant to an amendment made during the one-year period prior to the occurrence of a Triggering Event, would appear not to be excluded from the definition of a golden parachute payment.

We submit that paragraphs (3)(i) and (ii) of the definition of "bona fide deferred compensation plan or arrangement" in proposed section 1231.2 should be modified to provide that these one-year rules be subject to waiver by the Director on a case-by-case basis. In any event, we believe that the OF could apply for approval to make a payment with respect to the plan or increased benefits under proposed sections 1231.3(b)(1)(i) and 1231.6. Further, we request that the final rule should include an exception for amendments that have been made to comply with applicable law. In that respect, we suggest adding the following language to the end of paragraph 3(ii) of definition of "bona fide deferred compensation plan or arrangement" in proposed section 1231: "provided further that changes for statutory compliance, such as Code Section 409A, should be disregarded in determining whether a plan provision has been in effect for one year."

I. Modify the Circumstances that Constitute a Triggering Event

We request that the portion of proposed paragraph (1)(ii)(D) of the definition of "golden parachute payment" in proposed section 1231.2, which provides that "or the Office of Finance is assigned a composite rating of 3 or 4 by FHFA," should be revised to delete "3 or". We note that the Federal Housing Finance Board ("FHFB") Office of Supervision Examination Manual ("Manual") draws a sharp distinction between a Composite 3 and a Composite 4 rating.[23] The Manual provides that the general policy in regard to a Composite 3 rated organization is that supervisory action will be taken to address identified deficiencies or weaknesses. In contrast, the Manual provides that the general policy in regard to a Composite 4 rated organization is that a formal enforcement action will be taken to address identified deficiencies or weaknesses. The restrictions of the golden parachute rule should not be triggered in circumstances that are not viewed as being serious enough to require formal enforcement action. We respectfully requested that proposed paragraph (1)(ii)(D) of the definition of "golden parachute payment" in proposed section 1231.2 should also be amended to clarify that it is triggered by the assignment in "writing" of the specified composite rating.

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[23] Manual April 2007 at 5ROE.1.15.

J. Consider Mitigating Factors in Determinations Regarding Approval of Golden Parachute Payments

We request that proposed section 1231.3(b)(2) be modified to expressly provide that the Director will consider certain mitigating factors in determining whether to allow the OF to make a "golden parachute payment." Such mitigating factors may include, among others, the individual's history of beneficial contribution to the OF, and cooperation with FHFA's relevant remediation efforts.

K. Grandfathering Considerations

In the preamble to the Proposal, the FHFA stated that it recognizes that prior to the enactment of HERA, the regulated entities or the OF "may have entered into agreements that provide for golden parachute payments beyond that which is proposed to be permissible under section 1318(e) of the Safety and Soundness Act (12 U.S.C. § 4518(e)), and the proposed amendment (emphasis added)."[24] The FHFA further stated that it "intends that the proposed amendment would apply to agreements entered into by a regulated entity or the Office of Finance with an entity-affiliated party on or after the date the regulation is effective (emphasis added)."[25]

Under the FHFA's preamble statements, restrictions on golden parachute payments under a new final rule adopted by the FHFA as a result of the Proposal will not apply to any agreement that provides for a golden parachute payment that is entered into prior to the effective date of a new final rule ("Grandfathered Agreement"). We note that the Proposal does not discuss how the grandfathering provision would operate.

A Grandfathered Agreement should include any existing compensation plan or arrangement which applies to one or more OF personnel. A Grandfathered Agreement should continue to be grandfathered for purposes of any final rule unless and until there is a material amendment to the Grandfathered Agreement. A material amendment for this purpose would include an extension of the term of the Grandfathered Agreement or an increase in the golden parachute benefits under the Grandfathered Agreement.

IV. Indemnification Provisions

The Proposal includes proposed provisions regarding certain limitations on indemnification by regulated entities and the OF. The Proposal states that these indemnification provisions are substantially similar to the proposed indemnification provisions published on November 14, 2008 ("November Indemnification Proposal").[26]

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24 74 Fed. Reg. at 30976.

25 *Id.*

26 73 Fed. Reg. 67426.

The Proposal indicates that the FHFA will consider comments received in response to the November Indemnification Proposal. The OF submitted a comment letter dated December 22, 2008 to the FHFA on the November Indemnification Proposal.

As discussed in sections I and II, above, we respectfully submit that in accordance with section 1318(e) of the 1992 Act none of the indemnification provisions proposed in the Proposal are applicable to the OF or parties associated with the OF. Accordingly, any indemnification provisions contained in the final rule should not be applied to the OF or parties associated with the OF. In the event that FHFA nevertheless seeks to apply the final rule on indemnification payments to the OF, and without waiving any rights to challenge such an action, we offer the following comments for the FHFA's consideration on the indemnification portion of the Proposal.

A. The Final Rule Should Expand Indemnification Authority for First and Second Tier Civil Money Penalties to the OF

The Proposal would grant Fannie Mae and Freddie Mac ("Enterprises"), the only two regulated entities in conservatorship, the discretion to indemnify their entity-affiliated parties against first and second tier civil money penalties.[27] We respectfully submit that this should be expanded to include all parties covered by the final rule that are not in receivership.

We agree with the FHFA's suggestion in the preamble to the Proposal that it is in the best interest of regulated entities in conservatorship to be permitted to indemnify entity-affiliated parties for the kinds of matters which form the basis for first and second tier civil money penalty liability. But we think this logic applies doubly for entities that have avoided conservatorship. In addition, 12 U.S.C. § 4636(g) (as amended by HERA) implies that all regulated entities are permitted to offer indemnification for first and second tier civil money penalties. We respectfully submit that the exemption for indemnifying entity-affiliated parties against first and second tier civil money penalties should also include legal or professional expenses attributable to the charges resulting in those penalties.

B. We Respectfully Submit that the Final Rule Allow for Indemnification Granted in Judicial Proceedings

Under the Proposal, the board of directors of the OF must specifically authorize indemnification payments made to an indemnitee. Corporate law in some jurisdictions recognizes another way in which a person may obtain permissible indemnification, specifically by obtaining a ruling from the judge before whom the underlying case was

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[27] This provision is contained in paragraph (2)(iii) of the definition of "prohibited indemnification payment" in proposed section 1231.2.

heard. We respectfully submit that the final rule should allow this alternative route to indemnification as well.

C. Partial Indemnification in Relation to Settlements and Formal Adjudications and Findings

Under the Proposal, the term "prohibited indemnification payment" shall not include "any reasonable payment by a regulated entity or the OF that represents partial indemnification for legal or professional expenses specifically attributable to particular charges for which there has been a formal and final adjudication or *finding in connection with a settlement that the entity-affiliated party has not violated certain laws or regulations or has not engaged in certain unsafe or unsound practices or breaches of fiduciary duty*, unless the administrative proceeding or civil action has resulted in a final prohibition order against the entity-affiliated party under section 1377 of the Safety and Soundness Act (emphasis added)."[28]

The definition of the term "prohibited indemnification payment" should not unduly restrict the potential to negotiate and consummate settlements with an entity-affiliated party. To the extent an entity-affiliated party is unable to obtain partial indemnification for legal and professional expenses which are not specifically or directly related to the remedy provided in a settlement agreement, the entity-affiliated party's willingness to settle other charges with the FHFA may be adversely impacted. This may lead to unnecessary and wasteful litigation.

In this regard, settlements with federal financial regulatory agencies do not typically contain findings by the charging agency, which exculpate the party settling the charges from wrongdoing with respect to some or all of the charges. They almost always contain statements to the effect that the person settling the charges "neither admits nor denies" the agency's allegations. As a result, the availability of partial indemnification in the Proposal may prove to be illusory.

In the case of either a settlement or a formal and final adjudication, the Proposal only allows indemnification for expenses specifically attributable to particular charges as to which the entity-affiliated party has been successful. As a practical matter, it will often be difficult, if not impossible, to precisely allocate expenses related, for example, to the review of documents, or the preparation for a deposition to a particular individual charge.[29] The principle sought to be addressed by this aspect of the Proposal would be better and more fairly effectuated by providing that legal and professional fees incurred

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28 See paragraph (2)(ii) of the definition of "prohibited indemnification payment" in proposed section 1231.2.

29 In the FDIC Final Rule, the FDIC acknowledged the difficulty in allocating expenses between different charges: "The FDIC recognizes that in many cases the appropriate amount of any partial indemnification will be difficult to ascertain with certainty." 61 Fed. Reg. 5926, 5929 (1996).

may be reimbursed in proportion to the percentage of charges as to which the entity-affiliated party is entitled to reimbursement under the terms of the Proposal.

In light of the foregoing, we respectfully submit that the FHFA should revise the applicable exception to the definition of the term "prohibited indemnification payment" in section 1231.2 as follows:

> The term *prohibited indemnification payment* shall not include any reasonable payment by a regulated entity or the Office of Finance that represents partial indemnification for legal or professional expenses **[Delete the following bracketed text]** [specifically] attributable to particular charges for which there has been a formal and final adjudication **[Insert the following bracketed text]** [that the entity-affiliated party has not violated certain laws or regulations or has not engaged in certain unsafe or unsound practices or breaches of fiduciary duty], or **[Insert the following bracketed text]** [any matters which were the subject of a notice of charges which do not form the basis for any remedies imposed on the entity-affiliated party under the terms of a settlement with the entity-affiliated party,] **[Delete the following bracketed text]** [finding in connection with a settlement that the entity-affiliated party has not violated certain laws or regulations or has not engaged in certain unsafe or unsound practices or breaches of fiduciary duty] unless the administrative proceeding or civil action has resulted in a final prohibition order against the entity-affiliated party under section 1377 of the Safety and Soundness Act (12 U.S.C. 4636a) **[Delete the following bracketed text]** [.] **[Insert the following text]** [; provided that the amount of such permissible partial indemnification shall be determined by the ratio that is (a) the charges as to which the entity-affiliated party is deemed to be permitted to receive indemnification under this paragraph, to (b) the total number of charges.]

As discussed above, the Proposal permits partial indemnification when there has been a final adjudication, settlement or finding favorable to the entity-affiliated party on some, but not all, charges, unless the proceeding or action resulted "in a final prohibition order" against the entity-affiliated party.[30] A "final prohibition order" is not defined, and we request clarification.

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30 This provision is contained in paragraph (2)(ii) of the definition of "prohibited indemnification payment" in proposed section 1231.2.

D. The Final Rule Should Indicate that the OF Will Not be Rewarded for Denying Advancement of Legal Expenses or Penalized for Approving Them

In light of the policy concerns and constitutional principles animating both Judge Kaplan's decisions in the KPMG litigation[31] and the sections on advancement of legal fees contained in the Department of Justice's McNulty Memorandum,[32] we respectfully submit that the FHFA should clarify that it would not treat the OF (i) more favorably for having denied an entity-affiliated party advancement of legal fees, or (ii) less favorably for having approved advancement of legal fees to an entity-affiliated party. A determination by the board of directors of the OF under proposed section 1231.4(c)(1) should be made objectively and based solely on the merits of the entity-affiliated party's claim for indemnification.

E. Comments Regarding the Operation of the Proposal

We respectfully submit that the final rule (or its preamble) should describe in detail how the indemnification provisions would operate in practice. In that regard, we have set forth below a brief description of the issues that would likely need to be addressed by the board of directors of the OF ("OF Board") following a request by an entity-affiliated party ("Individual") for indemnification (including an advancement of expenses).

Following the receipt of a notice of charges from the FHFA, and before any final order or settlement, the Individual may request that the OF Board agree to advance expenses under proposed section 1231.4(c) to cover any reasonable legal costs and other expenses to be incurred by the Individual in defending himself or herself against such charges. The OF Board may (but would not be required) to advance the reasonable expenses incurred by the Individual in defense of such charges. Before advancing any such payment, however, the OF Board would need to make a good-faith determination in writing after "due investigation" and consideration that (a) the Individual acted in good-faith and in a manner that the Individual reasonably believed to be in the best interests of the regulated entity,[33] and (b) making such payments would not materially adversely affect the safety and soundness of the regulated entity.[34] The Individual would be prohibited from participating in any way in the OF Board's discussion and approval of such payments, except that the Individual may present his or her request to the OF Board

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31 See *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

32 Memorandum from Deputy Attorney General Paul McNulty, Principles of Federal Prosecution of Business Organizations (2006).

33 Proposed section 1231.4(c)(1)(i).

34 Proposed section 1231.4(c)(1)(ii).

and respond to any inquiries from the OF Board concerning his or her involvement in the circumstances giving rise to the administrative proceeding or civil action.[35]

It is important to note that in making this good-faith/best interests determination, in the normal course, the OF Board will not have access to significant portions of the FHFA's investigative record that led to the filing of charges. Further, the OF Board's ability to conduct a "due investigation" into the conduct alleged in the notice of charges will necessarily be limited by the difference in its status, as compared to the status of the FHFA. For example, the OF Board would not have the power to compel third parties to testify, or to produce documents for its examination, as the FHFA does. In light of these considerations, our understanding is that the FHFA is not expecting that the OF Board conduct an investigation comparable to the FHFA's own investigation before agreeing to make an advancement of expenses to the Individual. Rather, the OF Board would be required to make a good-faith inquiry based on the information reasonably available to it to reach its determination that the Individual acted in good faith and in a way that he or she reasonably believed to be in the best interests of the regulated entity.

In the event that the OF Board advanced expenses to the Individual, the Individual would be required to agree in writing to reimburse the regulated entity, only to the extent that amounts are not covered by insurance or fidelity bonds, for the portion of any advanced indemnification payments made by the regulated entity that subsequently become prohibited indemnification payments pursuant to the application of paragraph (1) and (2) of the definition of prohibited indemnification payment in proposed section 1231.2.[36]

If an administrative proceeding or civil action instituted by the FHFA results in a final order or settlement that contains certain provisions specified in paragraph (1)(i)-(iii) of the term "prohibited indemnification payment" in proposed section 1231.2, the regulated entity would be prohibited from paying or reimbursing the Individual for the cost of any assessed amount or any other liability or legal expense with respect to the administrative or civil action, except to the extent that partial indemnification is permitted. The regulated entity would also be prohibited from maintaining insurance or a fidelity bond to pay or reimburse the Individual for the cost of any civil money penalty or judgment resulting from any administrative or civil action instituted by the FHFA under paragraph (2)(i) of the definition of prohibited indemnification payment in proposed section 1231.2.[37] Under paragraph (2)(i) of the proposed definition of prohibited indemnification payment, the regulated entity would not be prohibited, however, from maintaining insurance or a fidelity bond to pay or reimburse the Individual for the cost of

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35 Proposed section 1231.4(c)(2).

36 Such an obligation should not arise until any applicable opportunity to appeal the findings in any administrative proceeding or civil action has expired and the findings have become final.

37 We note that the definition of prohibited indemnification payments does not cover actions by any party (whether governmental or private) other than those instituted by the FHFA.

any legal or professional expenses incurred in connection with such proceeding or action or the amount of any restitution to the regulated entity or receiver.

F. Commencement of an Administrative Action

We note that the proposed section 1231.4(a) of the November Indemnification Proposal provided that the indemnification provisions in proposed section 1231.4 would only apply after an administrative proceeding or civil action has been instituted by the FHFA "through issuance of a notice of charges under regulations issued by the Director."[38] Similarly, in promulgating the FDIC Rule, the FDIC stated that it considers a formal administrative action to be commenced by the issuance of a "Notice of Charges."[39]

Proposed section 1231.4(a) of the Proposal, however, now omits the words "through the issuance of a notice of charges under regulations issued by the Director" and instead provides that the section applies "only after an administrative proceeding or civil action has been instituted by the FHFA." We respectfully submit that the FHFA should confirm that for purposes of an administrative action the issuance of a notice of charges would continue to be the point at which the indemnification provisions of proposed section 1231.4 would be triggered, and that the filing of a complaint in a civil action would be the point at which the indemnification provisions of proposed section 1231.4 would be triggered.[40]

G. Grandfathering Considerations

In the preamble to the Proposal, the FHFA stated that it recognizes that prior to the enactment of HERA, the regulated entities or the OF "may have entered into indemnification agreements that provide for indemnification beyond that which is proposed to be permissible under section 1318(e) of the Safety and Soundness Act (12 USC 4518(e)), and the proposed amendment (emphasis added)."[41] The FHFA further stated that it "intends that the proposed amendment would apply to agreements entered into by a regulated entity or the Office of Finance with an entity-affiliated party on or after the date the regulation is effective (emphasis added)."[42]

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38 73 Fed. Reg. at 67426.

39 61 Fed. Reg. at 5930.

40 As we understand the Proposal, any legal or other expenses incurred prior to the institution of an administrative proceeding or civil action would under no circumstances be deemed to be prohibited indemnification payments.

41 74 Fed. Reg. at 30976.

42 *Id.*

Under the FHFA's preamble statements, restrictions on indemnification in certain circumstances under a new final rule adopted by the FHFA as a result of the Proposal will not apply to any agreement that provides for indemnification that is entered into prior to the effective date of a new final rule. We note that the Proposal does not define what constitutes an "agreement" for purposes of this grandfathering treatment.

The OF has not entered into separate indemnification agreements with its directors, officers or employees. Currently, indemnification by the OF is governed by its Indemnification Policy ("OF Indemnification Policy"). The OF Indemnification Policy provides that indemnitees have a contractual right to indemnification, reimbursement and advancement of expenses in accordance with the terms of the OF Indemnification Policy, and such persons may bring suit to enforce such a right as if such provisions were set forth in a separate written contract between the OF and such persons. In this regard, we note that certain of the FHLBanks, and as is widespread among corporations in general, operate under an indemnification bylaw.[43] It is well recognized that persons who are covered by contractual indemnification bylaws have legally enforceable rights to indemnification and advancement that arise directly from those bylaws.[44] An indemnification bylaw may provides, among other things, that the right to be indemnified or advanced expenses under the bylaw is a contract right based upon good and valuable consideration, pursuant to which the person entitled thereto may bring suit as if the provisions thereof were set forth in a separate written contract between the person and the company or institution providing the indemnification.[45] As a functional matter, the contractual right in the OF Indemnification Policy, provides the same contractual protection to OF personnel as is provided to FHLBank personnel by a contractual indemnification bylaw.

The FHFA should clarify the final rule so that the contractual right in the OF Indemnification Policy and any separate indemnification agreement will be treated equally as an "agreement" for grandfathering purposes. If notwithstanding the foregoing,

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43 "Probably the most common type of provision found in charter and bylaw documents is one which converts the permissive provisions of a state statute into a mandatory right which is automatically available to corporate officers, directors . . . " Berger and Kaufman, Director and Officer Liability, § 9.6.

44 *See e.g., Underbrink v. Warrior Energy Services Corp.*, Civ. Action No. 2982-VCP, 2008 Del. Ch. LEXIS 65 (Del. Ch. May 30, 2008) (holding that two former directors of a company were entitled to advancement of expenses under the terms of the company's bylaws); *Sassano v. CIBC World Markets Corp.*, 948 A.2d 453 (Del. Ch. 2008) (granting a former employee's claims for indemnification and advancement pursuant to the company's bylaws).

45 *See Advanced Mining Systems, Inc.* v *Lutin*, 623 A.2d 82, 83 (Del. Ch. 1992) (While permissive authority to indemnify may be exercised by a corporation's board of directors on a case-by-case basis, in fact most corporations and virtually all public corporations have by bylaw exercised the authority recognized by section 145 of the Delaware General Corporation Law in their bylaws so as to mandate the extension of indemnification rights in circumstances in which such indemnification would be permissible under Section 145).

the FHFA determines that the contractual right in the OF Indemnification Policy does not constitute an "agreement" for the purposes of grandfathering treatment, the OF requests that the final rule contain a 60-day delay of the effective date so that the OF will have a reasonable opportunity to execute separate indemnification agreements that will be treated as grandfathered agreements.

In addition, the final rule should also confirm that any person who is covered (either by virtue of current or past service to the OF) by the OF Indemnification Policy or an existing separate indemnification agreement, will not be subject to any new restrictions on indemnification payments contained in the final rule that did not exist prior to the effective date of the final rule.[46]

In this regard, modifications to the OF Indemnification Policy or an indemnification agreement should not effect the availability of grandfathering treatment. The OF has been engaged in discussions with the FHFA regarding potential amendments to the OF Indemnification Policy, including revisions to clarify applicable law. We assume that the grandfathering treatment that would be accorded to OF personnel under the current OF Indemnification Policy would be unaffected by any future change to the OF Indemnification Policy, which might not occur until on or after the date the final rule is effective.

In contrast, an individual whose coverage under the OF Indemnification Policy or an indemnification agreement begins on or after the effective date of the final rule will be subject to any new limitations imposed under the final rule.

H. We Request the FHFA Promulgate A Regulation Regarding Law Applicable to Corporate Governance and Indemnification

In connection with the FHFA's consideration of certain indemnification limitations on regulated entities under section 1114 of HERA, we note that currently there is a divergence between the regulations governing indemnification by the Enterprises, as compared to the FHLBanks and the Office of Finance. In 2002, the Office of Federal Housing Enterprise Oversight ("OFHEO") issued a rule addressing the corporate governance of the Enterprises ("Enterprises Corporate Governance Rule").

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[46] We note that 12 C.F.R. § 908.6(i) currently provides that an FHLBank shall not reimburse, indemnify or otherwise compensate directly or indirectly any executive officer or director for a third-tier civil money penalty imposed under the pre-HERA version of 12 U.S.C. § 4636. Neither the civil money penalty provisions of 12 C.F.R. § 908.6 or the specific indemnification provision of 12 C.F.R. § 908.6(i) contain any references to the OF. To the extent that the FHFA had statutory authority to initiate a particular administrative proceeding or civil action, an individual subject to a grandfathered OF Indemnification Policy or a separate indemnification agreement would be permitted to receive indemnification of a first, second or third tier civil money penalty under 12 U.S.C. § 4636(b)(1)-(3), and would not be subject to any limitation on advancement of ultimate indemnification of legal or other expenses or judgments incurred in connection with an administrative proceeding or civil action brought by the FHFA.

This rule required each Enterprise to designate a body of law that it would use for corporate governance practices and procedures: (i) the law of the jurisdiction in which the principal office of the Enterprise is located, (ii) the Delaware General Corporation Law, or (iii) the Revised Model Business Corporation Act ("RMBCA").[47] OFHEO stated that the Enterprises were authorized to operate under the indemnification requirements set forth by the elected body of state law or the RMBCA.[48]

The regulations issued by the FHFB do not contain any provision addressing the law applicable to the corporate governance procedures or indemnification for the FHLBanks or the OF. Accordingly, we respectfully request that the FHFA promulgate a regulation that would allow the OF to select an applicable body of law for purposes of corporate governance practices and procedures, and indemnification consistent with the Enterprises Corporate Governance Rule.

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If you have questions or need clarification with respect to these comments, please feel free to contact John Fisk at (703)467-3640 or fisk@fhlb-of.com.

On behalf of the OF, we appreciate your consideration of these comments.

Sincerely,

Terry Smith
Acting Chairman
OF Board of Directors

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47 12 C.F.R. § 1710.10. A similar rule has been adopted by the Office of the Comptroller of the Currency with respect to national banks and by the Office of Thrift Supervision with respect to federal savings institutions. 12 C.F.R. § 7.200 (OCC); 12 C.F.R. § 552.5(b)(3) (OTS). The Enterprises Corporate Governance Rule provides that the corporate governance practices and procedures of each Enterprise shall comply with applicable federal law and regulations and shall be consistent with safe and sound operations. The Enterprises Corporate Governance Rule further provides that to the extent not inconsistent with the preceding sentence, each Enterprise is to select the practices and procedures of one of the three identified bodies of law.

48 67 Fed. Reg. 38361, 38369 (2002).