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July 29, 2009

Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
Fourth Floor
1700 G Street, NW
Washington, DC 20552

Re: Golden Parachute and Indemnification Payments - Proposed Rule
RIN 2590-AA08, 74 Fed. Reg. 30975 (June 29, 2009)

Dear Mr. Pollard:

Freddie Mac is pleased to submit these comments concerning the golden parachute and indemnification payments amendments proposed by the Federal Housing Finance Agency ("FHFA") on June 29, 2009. The proposed amendments (the "Proposed Amendments") would amend FHFA's Golden Parachute Payments and Indemnification Payments regulation that was published in the Federal Register on January 29, 2009 pursuant to FHFA's authority under Section 1318(e) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended by the Housing and Economic Recovery Act of 2008.

The golden parachute and indemnification standards in the Proposed Amendments are similar to the standards adopted by the Federal Deposit Insurance Corporation ("FDIC") for FDIC-insured institutions.¹ These FDIC golden parachute and indemnification standards apply to many other financial institutions, and Freddie Mac supports FHFA's decision to leverage these well-understood standards in the Proposed Amendments.

We have specific comments, below, as to certain aspects of the Proposed Amendments that we believe could be usefully clarified, either by modifying the text of the Proposed Amendments or through explanatory statements made in connection with FHFA's adoption of a final rule.

1. Impact of Regulations on Conduct Occurring Prior to Effective Date²

In the preamble to the Proposed Amendments, FHFA indicates that the indemnification restrictions in the Proposed Amendments would apply to *agreements* entered into on or after the

¹ 12 C.F.R. Part 359.

² This comment is similar to a comment that we included in our December 29, 2008 letter concerning the golden parachute and indemnification payments amendments proposed by FHFA on November 14, 2008.

effective date.³ However, the preamble and regulation are silent as to whether these new indemnification standards are intended to apply with respect to administrative proceedings or civil actions arising from *conduct* that occurred prior to the effective date of the Proposed Amendments. We recommend that FHFA clarify the application of the Proposed Amendments to conduct occurring before its effective date.

Our understanding is that the Proposed Amendments are intended to apply prospectively only, consistent with the well-established presumption against retroactive application of regulations promulgated to implement new statutory restrictions.⁴ Clarification of that intention would provide helpful certainty to entity-affiliated parties that pre-existing indemnification rights⁵ would continue to be generally applicable with respect to conduct that occurred prior to the Proposed Amendments' effective date, without regard for whether or not an administrative proceeding or civil action related to such conduct commenced after the effective date.

2. Commencement of Administrative Proceedings or Civil Action

When FHFA originally published in November 2008 the indemnification restrictions that were re-proposed in the Proposed Amendments, Section 1231.4(a) stated: "This section applies only after an administrative proceeding or civil action has been instituted by FHFA through issuance of a notice of charges under regulations issued by the Director."⁶ In the Proposed Amendments, this provision now specifies: "This section applies only after an administrative proceeding or civil action has been instituted by FHFA,"⁷ omitting the final clause relating to a notice of charges.

We believe the now-omitted language would provide a useful bright line to the Regulated Entities and to potential indemnitees as to when an FHFA proceeding has been instituted for purposes of this regulation. Notably, commenters had raised this issue when FDIC adopted its golden parachute and indemnification payments regulations in 1996. Consistent with the language in FHFA's November 2008 proposal, the FDIC responded by indicating in the preamble to its final regulations that an action commences upon the issuance of a notice of charges.⁸ We suggest that FHFA similarly clarify the point at which a proceeding commences either by re-inserting the omitted language in Section 1231.4(a) or providing an explanatory statement in the preamble to the final regulation.

3. Reasonableness of Entity-Affiliated Party's Belief

Section 1231.4(c)(1) of the Proposed Amendments specifies certain conditions under which an

³ 74 Fed. Reg. 30975, 30976 (June 29, 2009).

⁴ See *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988).

⁵ Indemnification rights for most entities affiliated with Freddie Mac are based in the corporation's bylaws.

⁶ 73 Fed. Reg. 67424, 67426 (Nov. 14, 2008).

⁷ 74 Fed. Reg. 30975, 30980 (June 29, 2009).

⁸ 61 Fed. Reg. 5926, 5930 (Feb. 15, 1996).

indemnification payment may be made to an entity-affiliated party, which include a good faith board determination "that the entity-affiliated party acted in good faith and in a manner that he or she reasonably believed to be in the best interests of the regulated entity."⁹ This provision is substantively identical to Section 359.5(a)(1) of FDIC's golden parachute and indemnification regulations, except that the FDIC regulations do not include the additional restriction that the affiliated party's belief was reasonable.¹⁰

The additional term in the Proposed Amendments requires that the board of directors assess the reasonableness of an entity-affiliated party's belief at the time that he or she acted. Such an assessment could prove difficult for the board to make, especially in situations when all of the facts leading to an administrative proceeding or civil action are not yet fully known. Accordingly, we believe that FHFA should consider deleting the word "reasonably" from the Proposed Amendments so that FHFA's indemnification standards will more closely track FDIC's well-understood standards.

4. Purchase of Insurance During Conservatorship

The definition of "prohibited indemnification payment" in Section 1231.1 of the Proposed Amendments indicates that indemnification payments by a regulated entity for first or second tier civil money penalties are not prohibited while the regulated entity is in conservatorship.¹¹ However, the same definition does not indicate that payments to purchase any commercial insurance policy or fidelity bond that would provide reimbursement with respect to first or second tier civil money penalties also are not prohibited while the regulated entity is in conservatorship.¹² We believe that permitting a regulated entity to purchase such an insurance policy or fidelity bond while the regulated entity is in conservatorship would be in the interests of both the regulated entity and the conservator. Accordingly, we believe that FHFA should clarify that the purchase of such insurance or bond is not prohibited, either by modifying the definition of "prohibited indemnification payment" in Section 1231.1 or by providing an explanatory statement in the preamble to the final regulation.

5. Status of Existing Orders

During its conservatorship of Freddie Mac and Fannie Mae, FHFA has issued various orders relating to indemnification practices during conservatorship. We believe that it would be useful for

⁹ Proposed 12 C.F.R. § 1231.4(c)(1)(i), 74 Fed. Reg. 30980 (emphasis added).

¹⁰ 12 C.F.R. § 359.5(a)(1).

¹¹ Proposed 12 C.F.R. § 1231.1, 74 Fed. Reg. 30979. (See paragraph (2)(iii) under the definition of "prohibited indemnification payment.")

¹² See *id.* (Paragraph (2)(i) under the definition of "prohibited indemnification payment" includes an exception related to the purchase of a commercial insurance policy or fidelity bond but does not address a regulated entity in conservatorship.)

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FHFA, in its final regulation or through an explanatory statement in the preamble to the regulation, to clarify that, unless expressly so stated, the final regulation does not affect the validity of any of FHFA's prior orders relating to indemnification practices during conservatorship. As FHFA appreciates, this is a sensitive area, and providing as much clarity as possible is important to the stable, efficient operation of Freddie Mac and Fannie Mae.

* * *

Thank you for providing us with the opportunity to comment on the Proposed Amendments. Please do not hesitate to contact me if you have any questions or would like any further information.

Sincerely,



Robert E. Bostrom