RIN 2590-AA08 - #16

FEDERAL HOME LOAN BANK OF INDIANAPOLIS

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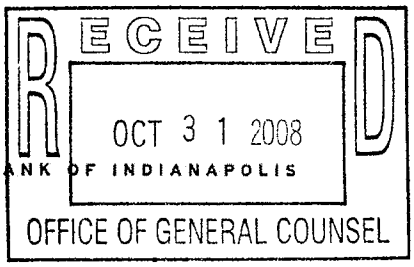

Milton J. Miller
CEO-President

October 30, 2008

via Federal Express and electronic mail

Alfred M. Pollard, General Counsel (OFHEO)
Christopher Curtis, General Counsel (FHFB)
Federal Housing Finance Agency
1700 G Street, N.W.
Washington, DC 20552
Attention: Comments / RIN 2590-AA08

Re: Federal Housing Finance Agency Interim Final Rule with Request for Comments: Golden Parachute Payments; RIN 2590-AA08

Gentlemen:

The Federal Housing Finance Agency (FHFA) has promulgated an interim final rule (as amended September 19, 2008 and September 23, 2008, the "Interim Final Rule") effective September 16, 2008 with respect to golden parachute payments. We understand that most, if not all, Federal Home Loan Banks (the "FHLBanks") are providing comments with respect to the Interim Final Rule. This letter sets forth the comments of the Federal Home Loan Bank of Indianapolis (the "Bank" or "Indianapolis Bank") on this important matter. We thank you for the opportunity to provide comment.

The Indianapolis Bank shares the widespread public concern over excessive golden parachute payments paid by failed companies and applauds FHFA's prompt action to issue a regulation implementing its new statutory authority to prohibit such payments. At the same time, we recognize, and believe FHFA understands that the fulfillment of our housing and liquidity mission (consistent with safe and sound operations) demands a high-caliber workforce; that we compete for talented employees with other financial institutions of similar size and complexity; and that reasonable and customary separation benefits are an important and appropriate component of the Bank's retention, hiring and workforce management efforts. In light of the above—what we believe to be our shared policy goals—we offer the following suggestions and requests for clarification for the FHFA's final rule on golden parachute payments (the "Final Rule").

The Bank supports the comments and suggestions provided to FHFA by the other FHLBanks, particularly those of the FHLBank of Boston. Their comments include thorough, detailed analyses of the Interim Final Rule and applicable law, along with many important suggestions for the Final Rule. To supplement Boston's comments, the Indianapolis Bank offers the following:

1. Section 1114 of the Housing and Economic Recovery Act of 2008 ("HERA") (12 U.S.C. 4518(e)(4)(A)) defines a "golden parachute payment" as

> "any payment (or any agreement to make any payment) in the nature of compensation by any regulated entity for the benefit of any affiliated party pursuant to an obligation of such regulated entity that—
> (i) is contingent on the termination of such party's affiliation with the regulated entity; and
> (ii) is received on or after the date on which—
> (I) the regulated entity became insolvent;
> (II) any conservator or receiver is appointed for such regulated entity; or
> (III) the Director determines that the regulated entity is in a troubled condition (as defined in the regulations of the Director)."

In the absence of clarification in the Final Rule, this definition clearly implies that a regulated entity that is neither insolvent nor the subject of a conservator/receiver appointment could, with little or no notice, be prohibited—based on a "troubled condition" determination—from making a compensation payment which the entity would otherwise be legally obligated to make. Under Indiana law (by which our Bank generally is bound, absent federal pre-emption), the failure to make this otherwise appropriate payment could subject the Bank to a claim for unpaid compensation, including penalties and attorney fees.[1]

We recommend that the Final Rule contain express assurance that the Director (or his duly authorized designee) will provide advance written notice to the affected entity of the Director's decision under HERA Section 1114 to limit or prohibit compensation payments by the entity, and the bases of that decision. Such notice, if timely and adequately documented, should provide protection to the regulated entity in the event of a wage claim, and should reduce the risk that the entity subsequently will be found to have paid compensation in error.

2. Section 1114 of HERA (12 U.S.C. 4518(e)(4)(C)) excludes from the definition of "golden parachute payment," among other things, "any payment made pursuant to a bona fide deferred compensation plan or arrangement which the Director determines, by regulation or order, to be permissible." This exclusion is similarly found in the Interim Final Rule. Thus, it is clear from the statute and the Interim Final Rule that the Director has the authority—and contemplates the use of such authority—to identify and carve out certain kinds of compensation plans or arrangements which the Director deems to be permissible. Consistent with that authority, the Bank suggests that the Final Rule include express approval of, at a minimum, the following kinds of bona fide deferred compensation plans or arrangements:

- Director deferred compensation plans.

[1] Indiana Code § 22-2-5-1 *et seq.*

- Supplemental executive retirement plans (SERPs) (non-qualified) – restoration plans which do not contain benefits which are otherwise broadly available and do not provide special bonuses.
- Supplemental executive thrift plans (SETPs) – continuation savings plans which do not vote special bonuses. [2]
- Change-in-control agreements.[3]
- Long-standing, broad-based, non-contractual severance policies.[4]
- Officer or employee separation/release contracts with salary/benefits provided for one year or less.[5]

In the Final Rule, the FHFA should expressly permit these and similar compensation arrangements unless, in the exercise of his statutory authority, the Director has expressly found a specific plan or arrangement to be impermissible. In this regard, it will be important to distinguish "restorative" or "continuation" plans under which the employee may defer his or her earned compensation, from plans under which the board of directors or management, in their discretion, has awarded (in effect) a bonus in the form of a cash grant to plan participants. Also, if an officer has worked for a lengthy period of time in reliance on the plan or contract, that factor, too, should support enforceability, and should be expressly recognized as such in the Final Rule.

This approach will provide much-needed clarity and certainty to the FHLBanks as they implement the many significant statutory and regulatory changes brought about by ongoing challenges and uncertainties of the current mortgage / liquidity markets.[6] Similarly, a default approach that expressly approves certain kinds of deferred compensation arrangements will enable the FHLBanks, in the event a plan or arrangement is deemed by the Director to be impermissible, to re-visit their compensation approaches in a comprehensive and timely fashion. Further, this approach will give the FHLBanks (and their affected directors, officers

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[2] SERPs and SETPs are widely adopted and implemented in the FHLBanks and financial institutions of similar size and complexity, and are typically offered to all senior officers of the organization. Such plans generally are used simply to restore benefits that would otherwise be reduced by operation of the Internal Revenue Code.

[3] These contracts, which provide three years of salary and benefits (in excess of the IRS golden parachute limits with a gross-up for tax penalties) to certain of the Bank's senior officers in the event the Bank merges and the officer is not offered an equivalent job at the successor entity, have been in place at the Bank since 2000. As a safety-soundness matter, the Board of Directors determined these contracts are advisable to ensure a core management team stays in place during merger discussions. Outside salary and benefits consultants retained at the time also advised the Board that market data supported the offering of these contracts.

[4] The Federal Home Loan Bank of Indianapolis has had these kinds of plans and/or arrangements in place since the late 1980s.

[5] These separation/release contracts are offered on a very limited case-by-case basis to ensure that an officer or employee does not compete with the employer, or are offered as a risk mitigation tool to resolve employment law litigation.

[6] While we recognize that, by definition, limitations on or prohibitions of "golden parachute payments" would only apply to a failed or failing institution, the clarity and certainty we seek in the Final Rule is at least as important to healthy institutions which do not believe they are at risk of one of the triggering events listed in Section 1231.2(f)(1)(ii) or (f)(3) of the Interim Final Rule.

and employees) greater certainty that their widely-used, generally-accepted compensation programs will not be subject to abrupt, unexpected prohibitions or limitations imposed after-the-fact by the FHFA.[7] In turn, the FHLBanks will be better able to remain competitive in the hiring, compensation and retention of high-caliber employees.[8] Director recruitment will also be facilitated.

The Bank believes the comments included in this letter are consistent with the FHFA's intent in promulgating the Interim Final Rule, while protecting the interests of the Bank in hiring, retaining and appropriately compensating employees. If you have questions or need clarification with respect to these comments, please feel free to contact Dan Lane, Vice President and Associate General Counsel, at 317-465-0513. Again, thank you for your consideration of our comments.

Sincerely,

FEDERAL HOME LOAN BANK OF INDIANAPOLIS

By: _____
Milton J. Miller
President and Chief Executive Officer

[7] *See, e.g.*, the FDIC's position that pre-existing agreements entered into prior to the effective date of the golden parachute provisions of the FDI Act were grandfathered and not subject to retroactive application of the FDIC regulation. 60 Fed. Reg. 16069, 16074 (1995).

[8] One alternative to the suggested default approach would involve identification by the Director of the kinds of deferred compensation arrangements that would be *dis*favored under the statute and the Final Rule.