



850 Freeport Parkway South  
Irving, Texas  
75063-2547

P.O. Box 619026  
Dallas, Texas  
75261-9026

214-441-8500  
fax 214-441-8552  
www.fhfb.com

October 31, 2008

BY E-MAIL

Alfred M. Pollard, General Counsel (OFHEO) and  
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 Regulation with Request for Comments: Golden Parachute Payments; RIN 2590-AA08

Gentlemen:

The Federal Home Loan Bank of Dallas (the "Bank") appreciates the opportunity to comment on the interim final rule on golden parachute payments issued by the Federal Housing Finance Agency (the "FHFA") and published in the Federal Register on September 16, 2008 (as amended in the Federal Register on September 19, 2008 and September 23, 2008, the "Interim Final Rule"). We thank you for the opportunity to be heard on this matter.

The Bank shares the widespread public concern over excessively large golden parachute payments paid by failed or failing companies and applauds the 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 the FHFA recognizes, that the fulfillment of our housing and liquidity mission (consistent with safe and sound operation) 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. It is in light of the above -- what we believe to be our shared policy goals -- that we offer the following comments, suggestions, and requests for clarification in respect of the Interim Final Rule.

**Definition of Golden Parachute Payments**

The Bank believes that the FHFA intended in the Interim Final Rule to prohibit the Federal Home Loan Banks ("FHLBanks") from making true golden parachute payments in certain circumstances, but did not intend to prohibit the FHLBanks from paying normal compensation to officers and employees. Accordingly, the Bank suggests that the FHFA modify the definition of "golden parachute payment" to provide greater clarity as to the types of payments that are prohibited and the types of payments that would be considered normal compensation, and therefore not prohibited.

In general, the Bank requests that normal and customary benefits, as well as payments that are made under nondiscriminatory severance plans or that are required to be paid under applicable law, be expressly excluded from the definition of “golden parachute payment”. The Bank believes that without adding additional carve-outs to the definition of “golden parachute payment”, the definition could be interpreted broadly to apply to a wide range of normal and customary benefits available to current and former employees, including retiree health and life insurance coverage. Additionally, the Bank notes that excluding these items from the definition of “golden parachute payment” is consistent with the definition of “golden parachute payment” in Section 114(e)(4)(C)(i) of the Housing and Economic Recovery Act of 2008 (“HERA”), which specifically excludes from the definition “any payment made pursuant to a ... nondiscriminatory benefit plan.” Also, the Bank believes that nondiscriminatory severance plans should be excluded from the definition of golden parachute payment because severance paid to rank-and-file employees under a nondiscriminatory plan provide the Bank with flexibility in achieving both cost savings and a workforce of optimum size.

Specifically, the Bank requests that the FHFA revise the definition of golden parachute payment to add new clauses (iv), (v), and (iv) to Section 1231.2(f)(2) as follows:

- (iv) Any payment made pursuant to a (A) state statute or foreign law which is applicable to all employees within the appropriate jurisdiction and (B) nondiscriminatory severance pay plan or arrangement which provides for payment of severance benefits to all eligible employees upon involuntary termination other than voluntary resignation or early retirement; *provided, however,* that no employee shall receive any such payment which exceeds the base compensation paid to such employee during the twelve months (or such longer period or greater benefit as the Director shall consent to) immediately preceding termination of employment, resignation or early retirement, and such severance pay plan or arrangement shall not have been adopted or modified to increase the amount or scope of severance benefits at a time when the regulated entity was in a condition specified in paragraph (f)(1)(ii) of this section or in contemplation of such a condition without the prior written consent of the Director;
- (v) Any payment made pursuant to a benefit plan as that term is defined in paragraph (\_\_\_\_) of this Section; or
- (vi) Any payment made pursuant to a nondiscriminatory plan or arrangement which provides for the payment of accrued and unused annual, sick or flex leave in connection with the termination of employment.

The Bank believes that the exclusions outlined above will allow the FHLBanks to better distinguish between payments that are prohibited by the rule and those that are permitted. In addition to the changes suggested above, the Bank suggests, in response to the FHFA’s request for comment on what payments made pursuant to a bona fide deferred compensation plan or arrangement should be determined to be permissible golden parachute payments, that Section 1231.2(f)(2)(ii) be revised to read as follows:

- (ii) Any payment made pursuant to a bona fide deferred compensation plan or arrangement as defined in paragraph (\_\_\_\_) of this section;

The Bank believes that bona fide deferred compensation plans are very common and an essential recruiting and retention tool, and that modifying paragraph (f)(2)(ii) as set forth above, along with adding a detailed definition of “Bona fide deferred compensation plan or arrangement” will provide clarity to the Bank on the standards that the FHFA will employ in addressing golden parachute payments.<sup>1</sup>

Additionally, the Bank requests that the definition of “golden parachute payment” in the Interim Final Rule be modified to exclude any payments or agreements approved in advance by the Director of the FHFA. This would be particularly useful in the event an FHLBank experiencing economic difficulties needs to hire persons with particular turnaround expertise to help improve its condition. Such an exception would allow the troubled FHLBank to attract new management that enjoys the confidence of the FHFA. The Bank believes, however, that individuals who possess the experience and expertise that qualify them for such a position are highly sought after business persons who, in many circumstances, already have established successful careers with other financial institutions, and that in order to induce such an individual to leave an established, stable career for a job in a troubled institution, an FHLBank likely would have to agree to pay that individual some sort of severance payment in the event that the individual’s efforts for the institution are not successful. The Bank notes that this reasoning comports with the Federal Deposit Insurance Corporation’s (“FDIC”) stated explanation for providing a similar exception in its golden parachute payment regulation.<sup>2</sup> The Bank also requests that the FHFA provide guidance on the process for obtaining advance approvals for such payments and agreements.

### **Definitions Related to Golden Parachute Payments**

In conjunction with the suggested revisions to the definition of “golden parachute payment” described above, the Bank requests that the FHFA add the following four definitions to Section 1231.2 of the Interim Final Rule to provide definitions for terms used in the suggested exclusions outlined above:

*Benefit plan* means any plan, contract, agreement or other arrangement which is an ‘employee welfare benefit plan’ as that term is defined in section 3(1) of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1002(1)), or other usual and customary plans such as dependent care, tuition reimbursement, group legal services or cafeteria plans; provided however, that such term shall not include any plan intended to be subject to paragraphs (f)(2)(ii) and (iv) of this section.

*Bona fide deferred compensation plan or arrangement* means any plan, contract, agreement or other arrangement whereby:

---

<sup>1</sup> The Bank has included below a suggested definition of “bona fide compensation plan or arrangement”.

<sup>2</sup> The FDIC explained the rationale as follows:

“The purpose of this exception is to permit a troubled institution or depository institution holding company to attempt to reverse its slide toward economic failure by attracting competent, new management which enjoys the confidence of that institution’s primary federal regulator and the FDIC. However, the FDIC is aware that individuals who possess the experience and expertise which qualify them for such a position are highly sought after business persons who, in most circumstances, already have established successful careers with other financial institutions. In order to induce such an individual to leave an established, stable career for a job in a troubled institution which may not survive regardless of that individual’s efforts, it is generally necessary to agree to pay that individual some sort of severance payment in the event that the efforts of the individual for the institution are not successful.” 56 Fed. Reg. 50529, 50531 (1991).

- (1) An entity-affiliated party voluntarily elects to defer all or a portion of the reasonable compensation, wages or fees paid for services rendered which otherwise would have been paid to such party at the time the services were rendered (including a plan that provides for the crediting of a reasonable investment return on such elective deferrals) and the regulated entity either:
  - (i) Recognizes compensation expense and accrues a liability for the benefit payments according to generally accepted accounting principles (GAAP); or
  - (ii) Segregates or otherwise sets aside assets in a trust which may only be used to pay plan and other benefits, except that the assets of such trust may be available to satisfy claims of the regulated entity's creditors in the case of insolvency; or
- (2) A regulated entity establishes a nonqualified deferred compensation plan or supplemental retirement plan, other than an elective deferral plan described in paragraph (\_\_\_)(1) of this section:
  - (i) Primarily for the purpose of providing benefits for certain entity-affiliated parties in excess of the limitations on contributions and benefits imposed by sections 415, 401(a)(17), 402(g) or any other applicable provision of the Internal Revenue Code (26 U.S.C. 415, 401(a)(17), 402(g)); or
  - (ii) Primarily for the purpose of providing supplemental retirement benefits or other deferred compensation for a select group of directors, management or highly compensated employees (excluding payments described in paragraph (f)(2)(iv) of this section); and
- (3) In the case of any nonqualified deferred compensation or supplemental retirement plans as described in paragraphs (\_\_\_) (1) and (2) of this section, the following requirements shall apply:
  - (i) The plan was in effect at least one year prior to any of the events described in paragraph (f)(1)(ii) of this section;
  - (ii) Any payment made pursuant to such plan is made in accordance with the terms of the plan as in effect no later than one year prior to any of the events described in paragraph (f)(1)(ii) of this section and in accordance with any amendments to such plan during such one year period that do not increase the benefits payable thereunder;
  - (iii) The entity-affiliated party has a vested right, as defined under the applicable plan document, at the time of termination of employment to payments under such plan;
  - (iv) Benefits under such plan are accrued each period only for current or prior service rendered to the employer (except that an allowance may be made for service with a predecessor employer);
  - (v) Any payment made pursuant to such plan is not based on any discretionary acceleration of vesting or accrual of benefits which occurs at any time later than one year prior to any of the events described in paragraph (f)(1)(ii) of this section;

- (vi) The regulated entity has previously recognized compensation expense and accrued a liability for the benefit payments according to GAAP or segregated or otherwise set aside assets in a trust which may only be used to pay plan benefits, except that the assets of such trust may be available to satisfy claims of the regulated entity's creditors in the case of insolvency; and
- (vii) Payments pursuant to such plans shall not be in excess of the accrued liability computed in accordance with GAAP.

*Compensation* means any payment of money or the provision of any other thing of current or potential value in connection with employment.<sup>3</sup>

*Nondiscriminatory* means that the plan, contract or arrangement in question applies to all employees of a regulated entity who meet reasonable and customary eligibility requirements applicable to all employees, such as minimum length of service requirements. A nondiscriminatory plan, contract or arrangement may provide different benefits based only on objective criteria such as salary, total compensation, length of service, job grade or classification, which are applied on a proportionate basis (with a variance in severance benefits relating to any criterion of plus or minus ten percent) to groups of employees consisting of not less than the lesser of 33 percent of employees or 1,000 employees.

The four definitions provided above will add greater clarity to the payments that are excluded from the definition of "golden parachute payment".

Furthermore, the Bank suggests that the FHFA revise certain definitions set forth in Section 1231.2 of the Interim Final Rule so that payments to affiliated parties unique to the FHLBanks are not prohibited by the rule. Specifically, the Bank requests that the definition of "entity-affiliated party" for purposes of the Interim Final Rule be modified to exclude (i) shareholders of an FHLBank, (ii) participants in an FHLBank's Affordable Housing Program and other community investment programs, and (iii) the Office of Finance. The Bank believes that these exclusions are necessary to recognize the distinctiveness of the FHLBanks (including their cooperative ownership structure and affordable housing and community development mission) consistent with Section 1201 of HERA. Unlike shareholders in other business corporations, shareholders of an FHLBank are not entitled to vote on any matters other than the election of directors, and statutory caps on shares entitled to be voted effectively bar any single shareholder from controlling the selection of board members. Similarly, neither AHP participants nor the Office of Finance controls the affairs of an FHLBank.

The Bank also requests that the definition of "troubled condition" exclude FHLBanks which (i) are considered "adequately capitalized" for purposes of the new capital classifications to be issued by the FHFA and (ii) are not subject to a cease-and-desist order, written agreement, or proceeding described in Section 1231.2(k)(1) of the Interim Final Rule.

---

<sup>3</sup> The Interim Final Rule does not define the term "compensation." The Bank requests confirmation that, therefore, the definition of "compensation" set forth in the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 controls for purposes of the regulation. This confirmation would help ensure that the rule covers only money transfers "in the nature of compensation," and does not interfere with other payments, including debt service payments from an FHLBank to the Office of Finance and payments of advance proceeds, dividends, deposit account withdrawals, and AHP funds from an FHLBank to a shareholder. As explained below, the Bank believes that these payments should be excluded from the definition of "golden parachute payment".

## Application of Rule

The Interim Final Rule raises several issues with respect to the timing of its application. In that regard, the Bank requests guidance and clarification on certain matters. First, the Bank requests that the Interim Final Rule be revised to provide that a healthy FHLBank -- i.e., one that is not subject to any of the triggering events listed in paragraphs (f)(1)(ii) or (f)(3) of Section 1231.2 of the Interim Final Rule (“Triggering Event”) – may, but is not required to, obtain the Director’s approval to enter into an agreement that could potentially result in a “golden parachute payment” in the event a Triggering Event later occurs, to the extent that such agreement would not be subject to review by the Director pursuant to Section 1318 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 USC 4518) (as amended by HERA which also amended Section 7 of the FHLB Act (12 USC 1427)).<sup>4</sup>

Second, the Bank asks for clarification that there is no automatic requirement that an FHLBank cease payments of amounts that fall within the definition of golden parachute payment upon the occurrence of a Triggering Event. The Bank also asks that the FHFA provide for any specific events that may trigger such a requirement, including, for example, an event of insolvency, written notice from the Director requiring an FHLBank to cease payments, or the FHLBank’s actual knowledge that the payee has acted with malfeasance.

Third, the Bank requests that the FHFA modify the rule to clarify that, if Section 1231.2(f)(3) does not apply and an individual begins to receive payments under an agreement or plan 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 FHLBank would not be required to seek the approval of the Director to continue the payments. Such a provision would allow individuals who retire from an FHLBank at a time when the FHLBank is healthy, and who were not employed during a troubled condition, to collect periodic retirement payments without worrying the rule could prevent them from collecting payments in the event of any later decline in the FHLBank’s financial condition.

Fourth, the Bank requests that the FHFA clarify that, if an individual’s employment ceases after a Triggering Event which is then resolved so that when employment ceases no Triggering Event is in effect, the approval of the Director is not required to make payments to that individual. In such a case, a payment that might have been considered a prohibited golden parachute payment during the FHLBank’s troubled condition could then be paid to that individual after the FHLBank recovers.

Fifth, the Bank requests that, in light of the fact that it may be difficult for an FHLBank to persuade an individual who entered into an agreement prior to the effective date of HERA to amend the existing agreement, the FHFA modify the Interim Final Rule to provide that those pre-existing agreements are not subject to retroactive application of the rule. With respect to this request and the Bank’s second request set forth above, the Bank believes that these requests are necessary to avoid a situation where an FHLBank may be subject to litigation by a payee where payments are due under the terms of an agreement with the payee, on the one hand, but where making such payments could cause potential adverse action to the FHLBank from the Director, on the other hand.

---

<sup>4</sup> We recognize that with respect to “executive officers” subject to FHFA compensation review under Section 1318 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 USC 4518) (as amended by HERA which also amended Section 7 of the FHLB Act (12 USC 1427)), approval may be required under that separate authority. The comment seeks confirmation that a healthy bank may, without the Director’s approval, change or enter into agreements or arrangements with respect to employees who are not executive officers.

Finally, the Bank requests that Section 1231.5(f) of the Interim Final Rule be modified to expressly indicate that the Director will consider mitigating factors (and not just aggravating factors) in making a determination regarding whether to permit a golden parachute payment to be made. For example, the rule could provide that the Director will consider factors such as the length of an individual's service to the FHLBank, an individual's history of beneficial contributions to the FHLBank, and the FHLBank's cooperation with the FHFA's remediation efforts.

The Bank believes that 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 and compensating employees. Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Terry Smith", written in a cursive style.

Terry Smith  
President and CEO