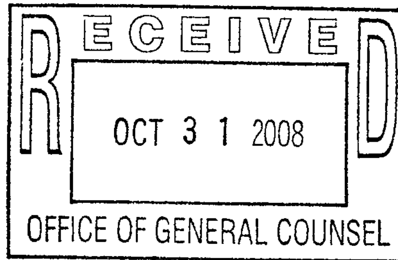
RIN 2590-AA08-#19



By E-mail

October 31, 2008

Alfred M. Pollard, General Counsel (OFHEO)
Christopher Curtis, General Counsel (FHFB)
Federal Housing Finance Agency, Fourth Floor
1700 G Street, NW
Washington, DC 20552

Re: Golden Parachute Payments: RIN 2590-AA08

Dear Messrs. Pollard and Curtis:

Fannie Mae welcomes this opportunity to comment on the Interim Final Regulation on golden parachute payments, released on September 12, 2008 by the Federal Housing Finance Agency ("FHFA") and published in the Federal Register on September 16, 2008, with subsequent amendments published in the Federal Register on September 18, 2008 and September 23, 2008. The Interim Final Regulation implements section 1114 of the Housing and Economic Recovery Act of 2008 ("HERA"). Specifically, it sets forth FHFA's interpretation of key terms in the legislation and identifies factors that FHFA will consider in exercising its authority to prohibit or limit golden parachute payments.

Section 1114 of the HERA was modeled on, and is substantially similar to, section 18(k) of the Federal Deposit Insurance Act,[1] which authorizes the Federal Deposit Insurance Corporation ("FDIC") to prohibit or limit golden parachute payments relating to insured depository institutions and their affiliates. The FDIC implemented section 18(k) in 1996, after an extensive public notice and comment process lasting nearly five years. In 2006, the Farm Credit System Insurance Corporation ("FCSIC") adopted the FDIC's approach in implementing similar legislative language relating to Farm Credit System institutions.[2] Both the FDIC regulations[3] and the FCSIC regulations[4] address most common payments made in connection with the termination of employment.

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[1] 12 U.S.C. 1828(k).

[2] 12 U.S.C. 2277a-10b. The Farm Credit System is a Government-Sponsored Enterprise that operates a nationwide network of borrower-owned financial institutions.

[3] 12 C.F.R. part 359.

[4] 12 C.F.R. part 1412.

In the comments below, we suggest that FHFA revise its Interim Final Regulation to more closely follow the FDIC and FCSIC regulations. Congress modeled section 1114 of the HERA on existing legislation, and was familiar with how that legislation had been interpreted. We believe Congress would have intended substantially similar legislative language to be interpreted in a consistent manner absent a specific, compelling reason to do otherwise. Uniformity in regulation also serves to both foster the public perception of fairness and enable regulated financial institutions to compete on a level regulatory playing field for executive talent. Moreover, conforming the Interim Final Regulation to the FDIC and FCSIC regulations would reduce the administrative burden for both FHFA and the regulated entities because there would be guidance and precedent for dealing with the most common types of payments that are made in connection with a termination of employment.

1. Add the FDIC/FCSIC Definition of Bona Fide Deferred Compensation Plan or Arrangement.

Section 1231.2(f)(2)(ii) of the Interim Final Regulation provides that the term "golden parachute payment" shall not include: "Any payment made pursuant to a bona fide deferred compensation plan or arrangement which the Director determines, by regulation or order, to be permissible." Unlike the FDIC and FCSIC regulations, the Interim Final Regulation does not contain a definition of "bona fide deferred compensation plan or arrangement." We believe it is important that the Director provide a definition so that the regulated entities and their employees have certainty as to which plans and arrangements are excluded from the definition of golden parachute payments. Thus, we recommend that the Director adopt the definition used in the FDIC and FCSIC regulations. See Exhibit 1 (proposed definition of "bona fide deferred compensation plan or arrangement"). This definition would provide certainty that the common types of deferred compensation plans – voluntary deferred compensation plans, excess benefit plans that provide retirement benefits in excess of the statutory limits imposed by the Internal Revenue Code of 1986, and supplemental retirement plans that provide deferred compensation for a select group of management or other highly compensated employees are not prohibited golden parachute payments.

2. Add the FDIC/FCSIC Exclusions from the Definition of the Term Golden Parachute Payment.

Section 1231.2(f)(2) of the Interim Final Regulation exempts from the definition of golden parachute payment three general categories of payments that are contingent upon, or are by their terms payable on or after, termination of employment. The three general categories are:

- Payments under tax-qualified pension or retirement plans.
- Payments made pursuant to a bona fide deferred compensation plan or arrangement; and

- Payments made by reason of death or by reason of termination caused by the disability of an entity-affiliated party.

There are three other general categories of payments that might be contingent upon, or are by their terms payable on or after, termination of employment that are excluded from the definition of golden parachute payment under the FDIC and FCSIC golden parachute regulations because the payments do not circumvent the regulations' primary purpose, *i.e.*, the prohibition of golden parachute payments. These three exclusions consist of payments under welfare benefit and similar plans, payments under nondiscriminatory severance pay plans, and severance payments required by law.

(i) Exclude Payments Under Common Welfare Benefit and Similar Plans.

Welfare benefit and similar plans provide benefits to all or most levels of employees and are generally non-discriminatory in nature. In addition, these plans are customary across many employers and industries. Examples of these types of plans include health care plans for retirees, cafeteria ("flexible spending") plans, tuition reimbursement plans and vacation pay plans. All of these payments are expressly exempt from the FDIC and FCSIC regulations. We recommend that the Director amend section 1231.2(f)(2) of the Interim Final Regulation to exclude payments under welfare benefit and similar plans from the definition of golden parachute payments using the definition found in the FDIC and FCSIC regulations. The change to the Interim Final Regulation to implement this exclusion is shown below:

> [Add at the appropriate place in section 1231.2]
>
> (---) "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 bona fide deferred compensation plan or arrangement or any payment made pursuant to a nondiscriminatory severance pay plan or arrangement.
>
> [Add at the end of section 1231.2(f)(2)]
>
> (iv) Any payment made pursuant to a benefit plan as that term is defined in paragraph (---) of this section.

(ii) Exclude Payments Under Nondiscriminatory Severance Pay Plans.

As is the case with the FDIC and FCSIC golden parachute regulations, FHFA's Interim Final Regulation should also provide a limited exception to the definition of golden parachute payment for nondiscriminatory severance pay plans. These types of plans are extremely common and help attract and retain employees. The exception for non-discriminatory severance pay plans included in the FDIC and FCSIC regulations is drafted in such a way that the requirements for the plan offer ample protection that the exception will not be used to circumvent the Interim Final Regulation's primary purpose of prohibiting golden parachute payments.

We recommend that the Interim Final Regulation be modified to exclude nondiscriminatory severance pay plans using language modeled on the FDIC regulation.[5] The proposed language for this amendment is shown below:

> [Add at the appropriate place in section 1231.2]
>
> (---) "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.
>
> [Add at the end of section 1231.2(f)(2), as previously amended]
>
> (v) Any payment made pursuant to a nondiscriminatory severance pay plan or arrangement which provides for payment of severance benefits to all eligible employees upon involuntary termination other than for cause, 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

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[5] On this matter, the FCSIC regulation is identical to the FDIC regulation with one technical exception (in the definition of "nondiscriminatory").

> 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.

(iii) Exclude Severance Payments Required by Law.

We also recommend that, as is the case with the FDIC and FCSIC regulations, the Interim Final Regulation exclude from the definition of golden parachute payments any severance or similar payment which is required to be made pursuant to a state statute or foreign law which is applicable to all employers within the appropriate jurisdiction (with the exception of employers that may be exempt due to their small number of employees or other similar criteria). This exclusion would permit the regulated entities to make the types of payments required in the case of work force reductions by statutes such as the Worker Adjustment and Retraining Notification (WARN) Act without requesting approval from the Director. The proposed language for this change is shown below:

> [Add at the end of section 1231.2(f)(2), as previously amended]
>
> (vi) Any severance or similar payment which is required to be made pursuant to a state statute or foreign law which is applicable to all employers within the appropriate jurisdiction (with the exception of employers that may be exempt due to their small number of employees or other similar criteria).

3. Factors the Director should consider in determining whether golden parachute payments should be limited or prohibited.

Section 1231.5(a) through (e) of the Interim Final Regulation recite the factors Congress identified in section 1114 of the HERA as factors that FHFA may consider in taking any action to prohibit or limit golden parachute payments. Paragraph (f) provides that the following should be considered:

> Any other factor the Director determines relevant to the facts and circumstances surrounding the golden parachute payment, including but not limited to negligence, gross negligence, neglect, willful misconduct, breach of fiduciary duty, and malfeasance on the part of an entity-affiliated party.

As we have already discussed, there are substantial benefits to regulatory uniformity in terms of predictability and fairness, and there is no apparent difference in congressional intent or in the policy implications of golden parachute restrictions that would call for a different standard in the present context. Therefore, we recommend that section 1231.5(f) be amended to mirror the "catchall" factor adopted by the FDIC and the FCSIC. We believe that this approach, focusing on the intent of the statute, would permit the Director to consider all appropriate factors in determining whether to deny or limit proposed golden parachutes payments.

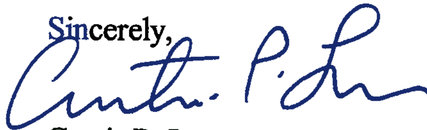
[Amend section 1231.5(f) to read as follows]

(f) Any other factors or circumstances which would indicate that the proposed payment would be contrary to the intent of section 1318(e) of the Act or this part.

* * *

Again, Fannie Mae appreciates this opportunity to comment on the Interim Final Regulation. We are more than willing to provide additional information should you find it helpful. Please feel free to contact me at (202) 752-4850, or contact Judith Dunn, Vice President & Deputy General Counsel, at (202) 752-1648 at your convenience.

Sincerely,



Curtis P. Lu
Senior Vice President & Interim General Counsel

EXHIBIT 1: PROPOSED DEFINITION OF BONA FIDE DEFERRED COMPENSATION PLAN OR ARRANGEMENT

[Add at the appropriate place in section 1231.2]

(---) "Bona fide deferred compensation plan or arrangement means" any plan, contract, agreement or other arrangement whereby:

(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 or supplemental retirement plan, other than an elective deferral plan described in subparagraph (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 of 1986 (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 severance payments described in paragraph (f)(2)(v) of this section); and

(3) In the case of any nonqualified deferred compensation or supplemental retirement plans as described in subparagraphs (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 that may only be used to pay plan benefits, except that the assets of such trust may be available to satisfy claims of the 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.