Comment # 1

FHLBank ATLANTA
A FEDERAL HOME LOAN BANK

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BY FEDERAL EXPRESS AND EMAIL

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

RE: Federal Housing Finance Agency Proposed Amendment to Interim Final Regulation: Golden Parachute and Indemnification Payments

Gentlemen:

On November 14, 2008, the Federal Housing Finance Agency (FHFA) issued a proposed amendment (the Proposed Amendment) to its interim final regulation with respect to golden parachute and indemnification payments. This letter sets forth the comments of the Federal Home Loan Bank of Atlanta (the Bank) with respect to the Proposed Amendment. We thank you for the opportunity to be heard on this important matter.

We offer the following comments, suggestions, and requests for clarification in respect of the Proposed Amendment:

- Expand Indemnification Authority for First and Second Tier Civil Money Penalties to Federal Home Loan Banks (FHL Banks). The Proposed Amendment would grant Fannie Mae and Freddie Mac, the only two regulated entities in conservatorship, the discretion to indemnify their entity-affiliated parties (EAPs) against first and second tier civil money penalties.[1] We believe this should be expanded to include all regulated entities that are not in receivership. We agree with FHFA's suggestion in the preamble to the Proposed Amendment that it is in the best interest of regulated entities in conservatorship to be permitted to indemnify EAPs for the kinds of unknowing, inadvertent regulatory violations which form the basis for first and second tier civil money penalty liability. But we think this logic applies doubly for solvent regulated entities that have avoided conservatorship. In addition, we believe that 12 U.S.C. §

[1] See section (2)(iii) of the definition of "prohibited indemnification payment" under Section 1231.2 of the Proposed Amendment.

4636(g) (as amended by the Housing and Economic Recovery Act of 2008) implies that all regulated entities are permitted to offer indemnification for first and second tier civil money penalties. Finally, the exemption for indemnifying EAPs against first and second tier civil money penalties should also include legal or professional expenses attributable to the charges resulting in those penalties.

- Clarify Partial Indemnification Provision. The Proposed Amendment permits partial indemnification when there has been a final adjudication, settlement or finding favorable to the EAP on some, but not all, charges, unless the proceeding or action resulted "in a final prohibition order" against the EAP. A "final prohibition order" is not defined, and we request clarification.

- Clarify Scope of Section 1231.4. Please clarify that the Proposed Amendment requires a regulated entity to go through the Section 1231.4(c) process (which among other things requires specific findings by the regulated entity's board of directors) as a precondition to advancement of legal or professional expenses *by the regulated entity* to an EAP, but not in connection with the advancement of such expenses *by a third party insurer* under insurance or bonds purchased by the regulated entity pursuant to Section 1231.2(l)(2)(i).

- Indicate That a Regulated Entity 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[2] and the sections on advancement of legal fees contained in the Department of Justice's McNulty Memorandum,[3] we believe it would be helpful and appropriate for FHFA to clarify that it will not treat a regulated entity (i) more favorably for having denied an EAP advancement of legal fees or (ii) less favorably for having approved advancement of legal fees to an EAP. A determination by a board of directors of a regulated entity under proposed Section 1231.4(c)(1) should be made objectively and based solely on the merits of the EAP's claim for indemnification.

- Remove or Modify Provision Regarding Treatment of Employee Welfare Benefit Claims in Receivership. In the Proposed Amendment, FHFA, without discussion in the preamble, proposed to add a new Section 1231.6 to the existing regulation, which among other things includes the following sentence (the Receivership Provision):

> "Claims for employee benefits or other benefits which are contingent, even if otherwise vested, when a receiver is appointed for any regulated entity, including any contingency for termination of employment, are not provable claims or actual, direct compensatory damage claims against such receiver."

The Bank believes that the Receivership Provision should be removed, as it provides perverse incentives to the employees of a struggling regulated entity. Any such employee

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

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

who has significant accrued benefits only payable after termination of employment will be forced to abandon the regulated entity prior to the date of a receivership, or risk a loss of 100% of those benefits. Retaining employees during financial difficulties is a challenge for any company, and the Receivership Provision would only exacerbate the problem for affected regulated entities. Note that the Receivership Provision by its terms would apply to all employees, and not just executive officers of a regulated entity.

In addition, there appears to be some tension between the approach reflected in the Receivership Provision and case law interpreting what constitutes a valid receivership claim under the Federal Deposit Insurance Act (FDIA), which was the model for the FHFA receivership provisions contained in Section 1145 of the Housing and Economic Recovery Act of 2008 (HERA). For example, in *McMillian v. FDIC*, the 11th Circuit Court of Appeals held that neither the common law doctrine of provability nor the limitations imposed by the "actual direct compensatory damages" language in Section 11(e)(3) of FDIA (which language is identical to that contained in Section 1145 of HERA) permitted FDIC as receiver to avoid a claim for employee severance arising under a pre-receivership contract that, on the receivership date, remained contingent upon the termination of the employee's employment.[4] *McMillian* remains binding precedent in the Bank's district. If as seems likely courts look to the FDIA case law to help interpret the similar receivership provisions of HERA, the validity of the Receivership Provision may be in doubt, at least in the 11th Circuit.[5]

In the event that FHFA declines to remove the Receivership Provision, we recommend the following changes to it:

- The final amendment should add a definition of "claims for employee benefits or other benefits which are contingent" and that definition should include only golden parachute payments prohibited by the Director and prohibited indemnification payments as defined in the Proposed Amendment. Claims specifically excluded from the definition of "golden parachute payment" in the final version of the regulation should also be excluded from this definition. Employees of regulated entities should be provided comfort that the Receivership Provision will not apply to their claims for earned benefits under 401k plans, defined benefit pension plans, retiree life and medical plans, death and disability benefits, unused leave, and deferred compensation plans.

- The final amendment should indicate that the Receivership Provision does not apply to benefits that have vested prior to the effective date of the amendment.

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[4] See McMillian v. FDIC, 81 F.3d 1041 (1996).

[5] In this regard, if FHFA intends to retain the Receivership Provision, the Bank respectfully requests that FHFA comment on the source of its authority to issue that portion of the rule, given that neither the common law nor the "actual direct compensatory damages" provision of HERA would appear to support that authority.

- The final amendment should state that no similar principle applies to claims for employee benefits against a conservator of a regulated entity.

Thank you for your consideration of our comments.

Sincerely,

Jill Spencer
Executive Vice President, General Counsel,
and Chief Strategy Officer