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October 12, 2018

By email to: RegComments@fhfa.gov

Mr. Alfred Pollard
General Counsel
Attention: Comments/RIN 2590-AA72
Federal Housing Finance Agency
Constitution Center
Eighth Floor (OGC)
400 7th Street, SW
Washington, DC 20219

Re: Golden Parachute Proposed Rulemaking
Comments/RIN 2590-AA72

Dear Mr. Pollard:

Freddie Mac is pleased to comment on the proposed amendments (the "Proposal"), published by the Federal Housing Finance Agency ("FHFA") on August 28, 2018.[1] The Proposal would modify provisions of 12 CFR Part 1231 related to FHFA's authority to prohibit or limit golden parachute payments by the regulated entities. FHFA indicates that the Proposal would "better align the rule with areas of FHFA's supervisory concern and reduce administrative and compliance burdens."[2] Freddie Mac supports FHFA's efforts in this regard, and we have two suggested revisions to the Proposal that we describe below.

De Minimis Standard

Consistent with the objective of focusing on the types of payments "that are of greater supervisory concern to FHFA,"[3] the Proposal includes a *de minimis* standard that would permit a troubled institution to enter into golden parachute agreements and to make golden parachute payments to affiliated parties (other than executive officers) of $2,500 or less without FHFA review.[4] In order to further FHFA's goal of reducing administrative and compliance burdens, we suggest including an additional exemption for a category of employees with whom the troubled institution could enter into agreements to make payments and to whom the institution could make payments without FHFA review. As FHFA notes in the preamble to the Proposal, the broad scope of the current rule results in FHFA having to review agreements and payments where there is little likelihood that the employee receiving the payment could have engaged in

[1] 83 Fed. Reg. 43801 (Aug. 28, 2018).
[2] *Id.*
[3] *Id.*
[4] Proposed 12 CFR §§ 1231.3(c)(2)(ii), 1231.3(d)(3)(ii).

the type of wrongdoing that would be the basis for prohibiting or limiting a payment or agreement.[5] At Freddie Mac, we believe that employees below the "Director" employee level (*i.e.*, "Manager" level employees and below) would be an appropriate threshold to exempt, although we recognize that each regulated entity has its own employee structure and that it may be necessary for FHFA to designate an appropriate threshold for each regulated entity at the point at which that entity becomes a troubled institution. Payments to employees at such a level and below are considerably less likely to present the risks the Golden Parachute Rule intends to address. By permitting a regulated entity to use its business discretion in making such golden parachute decisions, FHFA would reduce burdens on its own staff as well as on the regulated entities.

Accordingly, we recommend amending Section 1231.3(c) of the Proposal as follows:

> A troubled institution may enter into the following agreements to make a golden parachute payment without the Director's consent: . . .
>
> (2) With an affiliated party who is not an executive officer where the agreement:
>
> (i) Is an individually negotiated settlement agreement, and the conditions of paragraph (e)(2) of this section are met; or (ii) Provides for a golden parachute payment that, when aggregated with all other golden parachute payments to the affiliated party, does not exceed $2,500 (subject to any adjustment for inflation pursuant to paragraph (g) of this section)*; or (iii) Provides for a golden parachute payment to an affiliated party who, based upon guidance provided by FHFA, holds a position in the troubled institution that is unlikely to provide opportunity to materially affect the financial condition of the company or to engage in the types of wrongdoing as set forth in (e)(2) of this section.*

In addition, we recommend amending Section 1231.3(d) of the Proposal as follows:

> A troubled institution may make the following golden parachute payments without the Director's consent: . . .
>
> (3) Other payments to an affiliated party who is not an executive officer. A troubled institution may make a golden parachute payment to an affiliated party who is not an executive officer without the Director's consent in accordance with this part, where: (i) The payment is made in accordance with a permitted agreement and the conditions of paragraph (e)(2) of this section are met; or (ii) The payment when aggregated with all other golden parachute payments to the affiliated party, does not exceed $2,500 (subject to any adjustment for inflation pursuant to paragraph (g) of this section)*; or (iii) The payment is to an affiliated party who, based upon guidance provided by FHFA, holds a position in the troubled institution that is unlikely to provide opportunity to materially affect the financial condition of the company or engage in the types of wrongdoing as set forth in (e)(2) of this section.*

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[5] 83 Fed. Reg. 43802-03.

Alternatively, if FHFA elects not to adopt our recommendation to add a position-based exemption to the Proposal, we would request that FHFA consider increasing the proposed $2,500 cap to $5,000 for a golden parachute payment that a troubled institution could agree to make—and could make--without FHFA review and consent. Such an increase would further reduce the number of termination-related payments that FHFA must review, while not affecting FHFA's abilities to monitor and restrict programmatic golden parachute payments or golden parachute payments to executive officers.

Qualified Pension or Retirement Plans

As in the existing regulation, the Proposal would exempt from the definition of a golden parachute "any pension or retirement plan that is qualified (or is intended within a reasonable period of time to be qualified) under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401)."[6] With respect to the qualification requirement, Freddie Mac notes that the Internal Revenue Service (IRS) has, as of 2017, significantly curtailed its issuance of determinations of qualification for retirement plans.[7] As a result, individually designed retirement plans frequently used by large employers, such as Freddie Mac, will not be able to obtain determinations of qualification from the IRS as frequently as was the case in the past. Whereas those employers previously submitted plans to the IRS for new qualification letters on a regular five-year cycle, as of 2017 the IRS only accepts applications for qualification letters in very limited circumstances (essentially when a plan is adopted or terminated). In practice, this change in the IRS' process will result in large employer retirement plans operating with determinations of qualification that may not reflect current plan design because the plans are not eligible to seek updated determinations of qualification under the IRS' new process. Accordingly, we recommend that FHFA clarify that, in such instances, such a retirement plan would remain exempt from the definition of a "golden parachute." FHFA could provide this clarification either through guidance in the preamble of a final rule, or by amending the text of the Section 1231.3(b)(1) of the Proposal as follows:

> Any pension or retirement plan that is *intended to be* qualified (or is intended within a reasonable period of time to be qualified) under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401).

Freddie Mac appreciates the opportunity to provide our views in response to the Proposal. Please contact me if you have questions or require further information.

Sincerely,

Wendell J. Chambliss
Vice President and Deputy General Counsel
Mission, Legislative & Regulatory Affairs
Legal Division

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[6] Proposed 12 CFR 1231.3(b)(1).

[7] *See* IRS Rev. Proc. 2016-37.