



July 15, 2013

VIA EMAIL

Alfred M. Pollard, Esq.
Federal Housing Finance Agency
Eighth Floor
400 Seventh Street, S.W.
Washington, D.C. 20024
RegComments@fhfa.gov

**Re: Proposed Rule on Golden Parachute and Indemnification Payments,
RIN 2590-AA08**

Dear Mr. Pollard:

The 12 Federal Home Loan Banks (“FHLBanks”) and the FHLBanks Office of Finance appreciate the opportunity to comment on the Federal Housing Finance Agency’s (“FHFA”) re-proposed rule on Golden Parachute and Indemnification Payments (“Re-proposal”), which was published on May 14, 2013.¹ We recognize the FHFA’s consideration of the FHLBanks’ and Office of Finance’s comments on the FHFA’s prior proposed rule on golden parachutes (“Proposal”)² and appreciate the changes and clarifications that the FHFA made in the Re-proposal in response to those comments.³

¹ 78 Fed. Reg. 28542 (May 14, 2013).

² Golden Parachute and Indemnification Payments, 74 Fed. Reg. 30975 (June 29, 2009).

³ The Office of Finance joins this letter but reaffirms its views to the effect that any final rule should not apply to the Office of Finance and its views relating to the definition of “entity-affiliated party” as expressed in its July 27, 2009 comment letter on the Proposal. In the event that the FHFA nevertheless seeks to apply its final rule to the Office of Finance and parties associated with the Office of Finance, and without waiving any rights to challenge such action, the Office of Finance supports the comments in this letter as they pertain, expressly or implicitly, to the Office of Finance and parties associated with the Office of Finance.

1. Guidance and Clarification on Certain Timing Issues

1.1. The Importance of Allowing FHLBanks to Attract and Retain Qualified Executives

The Re-proposal indicates that the FHFA intends to require a “double approval.” In circumstances where the FHFA had previously approved a golden parachute agreement involving an FHLBank, a second FHFA approval would be required if the FHLBank were subject to a triggering event at the time the payment were to be made.

We are concerned that the FHLBanks’ ability to attract and retain qualified executives will be adversely impacted by an approach that puts compensation arrangements negotiated and executed in good faith in constant jeopardy. As you can appreciate, uncertainty as to an executive’s rights in the event of a future separation from employment can be a major impediment to attracting an executive in the first place. Thus, the balancing that should be done is an evaluation of the likelihood of triggering events occurring in the future, and how that may turn based on the quality of management that an FHLBank may attract and retain.

Under the approach described by the FHFA, an FHLBank cannot lessen this uncertainty when hiring a new executive by obtaining FHFA approval to enter into an agreement because that executive will understand that a separate, independent second review and approval may be required before any payments may actually be made under the agreement, if the FHLBank is then subject to a triggering event. The FHFA itself recognizes this problem when it states that a benefit of seeking a first approval of an agreement is that “executives will not be relying on an agreement under which they will not, in the event, be able to receive payments.”⁴ This is particularly an issue when a potential executive can obtain the same compensation arrangement without such regulatory review from another employer.

The FHLBanks suggest that there is no record of abuse of golden parachute payments among the FHLBanks that has ever posed a significant supervisory issue requiring the resources and intervention of the FHFA. Indeed, to the extent that the FHFA has concerns about the conduct or performance of an executive, it has a wide range of continuing tools to address them apart from mandating a double approval. We suggest that in the absence of laying out such a record and the corresponding benefits of a “double approval” so that the public and the FHLBanks can comment fully and fairly, whatever benefits are perceived are outweighed by the adverse consequences to the FHLBanks. Thus, we believe that a balancing of the interests in this area will suggest that the FHFA amend its final rule to make clear that in the case of an agreement that has been previously approved by the FHFA Director (“Director”) under section 1231.3(b)(1)(i), an FHLBank may make golden parachute payments under that section and pursuant to the agreement without further approval by the FHFA Director.

⁴ 78 Fed. Reg. 28452, 28454.

1.2. Agreements Entered Into By FHLBanks Subject To A Triggering Event Or Seeking to Avoid A Triggering Event

Section 1231.3(b)(1)(ii) provides that if the Director consents in writing to the amount and terms of such golden parachute payment, an FHLBank may enter into a golden parachute agreement in order to hire a person when either (i) the FHLBank satisfies one of the triggering events for a golden parachute payment, or (ii) is seeking to avoid imminently satisfying one of those triggering events. The double approval approach under these circumstances poses an even higher recruitment barrier. An executive who is being asked to play a key role in the turnaround of a troubled FHLBank will naturally be concerned as to both the financial and career risks associated with accepting such position. Such an executive will want to have some protection in the event that future developments lead to a separation from an FHLBank that is subject to a triggering event. Under these circumstances, we believe it is appropriate and preferable for the initial approval by the Director that is mandated under this provision eliminate any requirement for a second FHFA approval for a payment under an FHFA approved agreement.

1.3. Agreements With A Change In Control Provision

Section 1231.3(b)(1)(iii) is directed at providing financial protection for an executive in a circumstance where a regulated entity is subject to a change in control and the executive is separated from service. This provision, as it should, is aimed at focusing an executive on fostering the best interests of the regulated entity and its constituents, rather than on being concerned about the executive's personal financial concerns. It is widely recognized with regard to changes of control that may impact an executive's career, that an institution is best served when the executive is in a neutral position with regard to a potential change of control of his or her institution. Great harm to the institution's interests and that of its constituents may arise when an executive is more concerned over the loss of employment than the loss of the opportunity before the institution. This provision's requirement for another approval by the Director of a change in control severance payment to an executive could likely have the opposite effect than is intended by creating uncertainty regarding the payment and negating the neutralizing benefit that the agreement should have. Here again, we request that the FHFA amend this provision to permit an upfront approval of such a change in control provision with no need under it for an approval at the time of payment. Again, this would not prevent the FHFA from exercising other regulatory authority were it to conclude that for reasons unrelated to the nature of the contract, a payment to the executive should be at issue.⁵

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The Office of Finance notes that section 1231.3(b)(1)(iii) refers to "regulated entity" but does not refer to the Office of Finance, although the Proposal otherwise attempts to subject the Office of Finance and parties associated with the Office of Finance to this rule. If this rule were to apply to the Office of Finance, then the rationale set forth in this paragraph also applies to the Office of Finance.

1.4. Modification For Previously Approved Agreements

To the extent that the FHFA accepts any of our foregoing requests, the language contained in section 1231.3(b)(iv) requiring Director approval of a golden parachute payment should be modified to make clear this requirement does not apply in a situation where an approval of the Director to enter into an agreement was previously obtained.

1.5. Request For Clarification

We note that the Re-proposal deleted paragraph (2)(vii) of the exceptions to the definition of the term “golden parachute,” which provided an exception for “[a]ny other payment which the director determined to be permissible in accordance with section 1231.3(b).” The same exception from the term “golden parachute” is contained in the FDIC’s golden parachute rule.⁶

The FHFA did not explain the reason for this deletion. We would appreciate the FHFA considering the impact of this change and ensuring that it does not have any adverse implications on the treatment of agreements or payments that have been previously approved by the Director.

2. Nondiscriminatory Severance Pay Plan or Arrangement

For reasons set forth in our previous comment, the FHLBanks requested that the FHFA modify the exception from the definition of golden parachute payment for nondiscriminatory severance pay plans or arrangements. The Proposal permitted a variance in benefits on a proportionate basis to groups of employees consisting of not less than the lesser of 33% of employees, or 1,000 employees. The FHLBanks requested that these levels be reduced to the lesser of 20% of employees, or 50 employees given that FHLBanks’ staffs are comprised of less than 400 employees.

The FHFA declined to change these thresholds noting that they were contained in the FDIC’s golden parachute rule and stating that the FDIC rule applies to many small- and mid-sized institutions that also have small numbers of employees. While we appreciate the reference to FDIC practice, we would hope that it would be viewed within the context of the FHLBanks and tailored accordingly.

The FHFA has proposed changing this provision so that the exception does not apply to employees whose salary exceeds \$300,000. The use of salary caps is inconsistent with the approach taken by the FDIC. The FDIC’s golden parachute rule, which provides an exception for a nondiscriminatory severance pay plan, does not contain any provision that denies the availability of the exception based on the compensation level of an employee.⁷ Under the

⁶ 12 C.F.R. § 359.1(f)(2)(vii).

⁷ 12 C.F.R. § 359.1(j).

structure of the FHFA’s proposed exception, the level of severance pay that can be provided to the most highly paid employees is strictly constrained by the structure of the rule, which limits any variance in severance pay based on objective criteria groups to plus or minus ten percent. In these circumstances there is no basis for concern that inappropriately large amounts would be paid to executives, particularly where the plan may not provide for payments in regard to terminations for cause, voluntary resignation or early retirement. Accordingly, we request that the FHFA delete the cap from any final rule.

We request that the FHFA expressly clarify that the objective criteria that may be used in a nondiscriminatory severance pay plan can include service at other FHLBanks. We believe that this type of provision is a reasonable element of a corporate severance pay plan that should be available to FHLBanks and their employees.

3. Meaning of the Term “Compensation”

The FHLBanks previously requested that the FHFA provide an express definition of “compensation” in the final rule which would make it clear that the term “golden parachute payment” did not apply to non-employment payments. We continue to believe that such an addition to the rule would be appropriate. We note that the FHFA did address these points in the preamble. We appreciate the FHFA’s statement that it understands the term “compensation” to be “payment for employment or services rendered by individuals,” and the examples it provided to illustrate payments that do not constitute compensation.⁸

4. Treatment of Unused Leave As Not Being A “Golden Parachute Payment”

We requested that any final rule clarify that the customary payment of unused annual leave in connection with the termination of employment does not constitute a “golden parachute payment.” The Re-proposal did not amend the rule to address this point. The preamble did note that the FDIC in regard to its golden parachute rule took the position that it did not intend to restrict institutions, even those that are troubled, from paying terminating employees accrued but unused benefits, such as vacation. We request that the FHFA in any final rule or preamble thereto confirm that it will follow the same approach as the FDIC with respect to accrued but unused benefits, including annual leave.

5. Grandfathering of Current FHLBanks Retirement-Related Plan

The Re-proposal indicates that the FHFA has determined to grandfather all retirement plans and deferred compensation plans in place as of the Re-proposal’s publication date.⁹ Based on this and other statements in the preamble regarding retirement plans, we understand that all

⁸ 78 Fed. Reg. at 28455.

⁹ *Id.* at 28453.

FHLBank retirement-related plans, including defined-contribution, defined-benefit and deferred compensation plans, in place as of the publication of the Re-proposal, are grandfathered and therefore not subject to the terms of the Rules, without regard to whether they meet the requirements to be treated as a “bona fide deferred compensation plan or arrangement” under section 1231.1.¹⁰

6. Bona Fide Deferred Compensation Plans

With respect to plans that are not grandfathered, such as plans that may be adopted after the grandfather date, we recommend certain clarifications. We note that GAAP treatment normally trails actual benefit accrual. Benefit accrual under SERPs and other deferred compensation plans is usually after the end of the year, when a company prepares the annual GAAP statements. In order to address this point, paragraph (3)(vi) of the definition of “bona fide deferred compensation plan or arrangement” in section 1231.2 should be revised to add “(or concurrently or subsequently recognizes)” between “previously recognized” and “compensation expense” and paragraph 3(vii) should be revised to add “as ultimately” between “accrued liability” and “computed”.

7. Mitigating Factors in Determination Regarding Approval of Golden Parachute Payments

We again request that section 1231.3(b)(2) be modified to expressly provide that the Director will consider certain mitigating factors in determining whether to permit a golden parachute payment to be made. Such mitigating factors may include, among others, the individual’s history of beneficial contribution to the FHLBank, and cooperation with FHFA’s relevant remediation efforts. This change would help ensure that a proper balance of all relevant factors, both positive and negative, will be considered by the Director in deciding whether to allow a golden parachute payment.

8. Grandfathering Considerations

In the preamble to the Proposal, the FHFA stated that “it intends that the proposed amendment would apply to agreements entered into by a regulated entity . . . with an entity-affiliated party on or after the date the regulation is effective.”¹¹

In the Re-proposal, the FHFA changed its position and limited grandfathering to retirement plans and deferred compensation plans in place as of the date the Re-proposal. The FHFA indicated that grandfathering would not, however, apply to existing severance plans, change-of-control agreements and ad hoc payments.

¹⁰ The FHFA also stated that it is “providing a blanket grandfathered status to all deferred compensation plans in place as of the Re-proposal’s publication date.” *Id.* at 28455.

¹¹ 74 Fed. Reg. at 30976.

The FHFA provides no reason why it is proposing to retroactively revoke its specific assurance to the FHLBanks that agreements entered into at any time prior to the effective date of the final rule will be grandfathered. The FHLBanks and potentially impacted employees were entitled to believe that the FHFA acted in good faith when it made an unqualified statement that agreements entered into before the effective date of the final rule would be grandfathered and to rely on the FHFA's statement. An unexplained change in the FHFA's position regarding grandfathering may form the basis for future confusion that may lead to a range of costly litigation challenges by employees and others.

We note that the FDIC in its first golden parachute rule proposal in October 1991, took the position that its rule would apply to existing agreements to pay golden parachute payments.¹² The FDIC received comments asserting that the regulation could not lawfully affect such agreements on constitutional grounds. In its second proposal in March 1995, the FDIC reversed its position. It indicated that while it remained convinced that ample precedent existed to support its initial position, there was no compelling need to apply the regulation in that manner.¹³ As a result, the FDIC decided to treat agreements that were entered into prior to the second proposal as grandfathered.¹⁴

In view of the foregoing, we respectfully request that at a minimum, the FHFA conclude that all agreements that could be treated as resulting in golden parachute payments (whether or not they are retirement or deferred compensation plans), in effect as of the publication of the Re-proposal, will be grandfathered from the application of any final FHFA golden parachute rule. Such a grandfathering should continue to be applicable for purposes of any final rule, unless and until there is a material amendment to a grandfathered agreement. A material amendment for this purpose would include an extension of the term of the grandfathered agreement or an increase in benefits under the grandfathered agreement.

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¹² 56 Fed. Reg. 50529, 50533 (Oct. 7, 1991).

¹³ 60 Fed. Reg. 16074 (Mar. 29, 1995).

¹⁴ The FDIC stated that it would look unfavorably on any golden parachute agreement which is entered into after the date of the second proposal but before the effective date of the final regulation as an attempt to circumvent the regulation.

We appreciate your consideration of these comments.

Sincerely,

Federal Home Loan Bank of Atlanta



Gary F. Garczynski
Chairman, Governance and Compensation
Committee of the Board of Directors

Federal Home Loan Bank of Boston



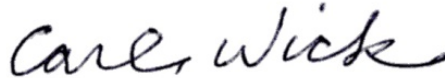
Mark E. Macomber
Chairman, Personnel Committee of the Board
of Directors

Federal Home Loan Bank of Chicago



Steven F. Rosenbaum
Chairman, Human Resources and
Compensation Committee of the Board of
Directors

Federal Home Loan Bank of Cincinnati



Carl F. Wick
Chairman of the Board of Directors
Chairman, Personnel and Compensation
Committee of the Board of Directors

Federal Home Loan Bank of Dallas



Patricia P. Brister
Chair, Compensation and Human Resources
Committee of the Board of Directors

Federal Home Loan Bank of Des Moines



John H. Robinson
Chairman, Human Resources and
Compensation Committee of the Board of
Directors

Federal Home Loan Bank of Indianapolis



Paul Clabuesch
Chairman of the Board of Directors



Christine Coady Narayanan
Chair, Human Resources Committee of the
Board of Directors

Federal Home Loan Bank of Pittsburgh



Patrick A. Bond
Chairman, Human Resources Committee of the
Board of Directors

Federal Home Loan Bank of San Francisco



John F. Luikart
Chairman of the Board of Directors

**Federal Home Loan Banks Office of
Finance**



W. Wesley McMullan
Chairman, Human Resources and
Compensation Committee of the Board of
Directors

Federal Home Loan Bank of New York



C. Cathleen Raffaelli
Chair, Compensation & Human Resources
Committee of the Board of Directors

Federal Home Loan Bank of Seattle



William V. Humphreys
Chairman of the Board of Directors

Federal Home Loan Bank of Topeka



Richard S. Masinton
Chairman, Compensation Committee of the
Board of Directors