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BY FEDERAL EXPRESS AND EMAIL

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**

Gentlemen:

The Federal Housing Finance Agency (FHFA) has issued an interim final rule (the Interim Final Rule) with respect to golden parachute payments. This letter sets forth the comments of the Federal Home Loan Bank of Atlanta (the Bank) with respect to the Interim Final Rule and is based on analysis and discussion among the Federal Home Loan Banks (FHLBanks). We thank you for the opportunity to be heard on this important matter.

The Bank shares the widespread public concern over excessive golden parachute payments paid by failed or failing companies and applauds 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 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:

- Consider the FDIC Golden Parachute Payments Regulation. We request that FHFA look for guidance to the FDIC regulations on golden parachute payments¹

¹ See 61 Fed. Reg. 5926 (1996) and 12 C.F.R. Part 359.

promulgated pursuant to the Federal Deposit Insurance Act (the FDI Act)² as it considers potential changes to the Interim Final Rule, for two reasons:

- The FDIC regulations do an excellent job of distinguishing between real golden parachutes (which are prohibited) and normal compensation (which is permitted).
- A side-by-side comparison of the relevant golden parachute payment provisions of the FDI Act and those of the Housing and Economic Recovery Act of 2008 (HERA) indicates that the former were the model for the latter. Congress would have been well aware of how FDIC, in its regulations, exercised its substantively identical statutory authority and presumably intended FHFA to pursue a similar course.

Many of the comments that follow suggest specific aspects of the FDIC regulations that we believe should be incorporated into the final FHFA rule.

- Define “Bona Fide Deferred Compensation Plans or Arrangements.” The Interim Final Rule should be modified to provide a definition of “bona fide deferred compensation plan or arrangement” substantively identical to that contained in the FDIC regulations.³ That definition contains several requirements intended to ensure that only actual and reasonable deferred compensation qualifies and that changes to such plans occurring within one year prior to the institution’s entering a “troubled condition” are ignored, if the effect of the changes is to increase benefits payable.⁴ All plans or arrangements meeting those requirements should then be excluded from the definition of “golden parachute payments,” consistent with the approach set forth in the FDIC regulations.
- Permit Ordinary, Nondiscriminatory Severance Payments for Rank-and-File. The Interim Final Rule should be modified to exclude from the definition of “golden parachute payments” severance paid to rank-and-file employees,⁵ to the extent it is payable under a nondiscriminatory plan and otherwise meets the requirements set forth in the FDIC regulations and the preamble to the final rule.⁶

² See 12 U.S.C. 1828(k).

³ See 12 C.F.R. § 359.1(d).

⁴ See 12 C.F.R. § 359.1(f)(2)(v).

⁵ That is, all employees who are not “executive officers” subject to FHFA compensation review under Section 1318 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (as amended by HERA). The Bank requests that FHFA also define “executive officers” for purposes of Section 1318 to include only an FHLBank’s “named executive officers,” as that term is defined in SEC Regulation S-K. Such a definition of “executive officer” would be consistent with the approach recently taken by the Department of the Treasury in promulgating executive compensation regulations under the Emergency Economic Stabilization Act of 2008.

⁶ “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

- Exclude Retiree Health and Life Insurance Benefits. Because of the breadth of the definition of “golden parachute payment,” it could be interpreted to apply to a wide range of normal and customary benefits available to former employees, such as retiree health and life insurance coverage. To remedy this, FDIC excluded from its definition of “golden parachute payment” payments under any “benefit plan” as defined in FDIC regulations,⁷ and we recommend providing a similar exclusion in the Interim Final Rule.
- Clarify that Unused Leave is not a “Golden Parachute Payment.” The Bank requests clarification that customary payment of unused annual leave in connection with the termination of employment does not constitute a “golden parachute payment.”
- Exclude Payments Approved in Advance by the Director. The definition of “golden parachute payment” in the Interim Final Rule should be modified to exclude any payments or agreements approved in advance by the Director of the FHFA (the Director).⁸ This would be particularly useful in the event a Federal Home Loan Bank needs to hire a turnaround expert to help improve the health of a struggling institution.⁹

which exceeds the base compensation paid to such employee during the twelve months (or such longer period or greater benefit as the Corporation 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 insured depository institution or depository institution holding company 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 appropriate federal banking agency.” 12 C.F.R. § 359.1(f)(2)(v). In addition, in the preamble to the final regulation, the FDIC extended the carve-out to involuntary terminations not associated with reductions in force, including, presumably, terminations for cause. 61 Fed. Reg. 5926, 5927 (1996).

⁷ “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,” other than bona fide deferred compensation plans and nondiscriminatory severance plans addressed elsewhere in the FDIC regulations. 12 C.F.R. § 359.1(c).

⁸ The FDIC regulations permit the appropriate banking agency, with the concurrence of the FDIC, to approve payments and agreements as permissible in advance. See 12 C.F.R. § 359.4(a)(1). As a practical matter this would appear to authorize the agencies to approve (i) a payment on a pre-triggering event agreement for employment that ceases following a triggering event, (ii) a particular golden parachute agreement to be entered into by an institution that is subject to a triggering event, and (iii) a payment to an individual who ceases employment while a triggering event is in effect under an agreement approved under clause (ii).

⁹ The FDIC explained the rationale for this in its rulemaking:

“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

- Provide Guidance and Clarification on Certain Timing Issues. The Interim Final Rule raises several issues with respect to the timing of the regulation's application, many of which were addressed in the FDIC rulemaking process. In that regard the Bank requests the following guidance and clarification:
 - 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") -- need not obtain the Director's approval under the Interim Final Rule¹⁰ to enter into an agreement that could potentially result in a "golden parachute payment" in the event a Triggering Event later occurs;
 - that there is no presumption that the Director will prohibit a golden parachute payment to an individual whose employment ceases after a Triggering Event under an agreement that was entered into prior to a Triggering Event;
 - that if an individual begins to receive payments under an agreement 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;¹¹
 - 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;¹² and

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).

¹⁰ 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 (as amended by HERA), 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.

¹¹ FDIC clarified that this is how its regulation works by adding language to its definition of "golden parachute payment" requiring that the amount become payable to an employee whose employment is terminated at a time when a triggering event is in effect. 12 C.F.R. § 359.1(f)(iii)(A). We request that the Interim Final Rule be modified to include a similar clarification.

¹² The language added by FDIC and referenced in the immediately preceding footnote also serves to clarify this point in the FDIC regulations. See 12 C.F.R. § 359.1(f)(iii)(A).

- whether, in light of contractual and constitutional concerns, agreements entered into prior to the effective date of HERA are subject to the golden parachute payment requirements.¹³
- Provide Certain Exclusions from the Definition of “Entity-Affiliated Party.” The Bank requests that the definition of “entity-affiliated party” for purposes of the Interim Final Rule be modified to exclude both (i) shareholders of an FHLBank and (ii) participants in an FHLBank’s Affordable Housing Program. We believe that this change is 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. FHLBank shareholders 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. AHP participants do not in any meaningful way control the affairs of an FHLBank. We note that the statutory language in the HERA golden parachute payments provision only requires application to “affiliated parties,” not to “entity-affiliated parties” under Section 1002 of HERA.¹⁴
- Confirm Definition of “Compensation.” 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 1992¹⁵ controls for purposes of the regulation. This confirmation would help ensure that the Interim Final Rule covers only money transfers “in the nature of compensation,” as Congress intended, 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.
- Modify Definition of “Troubled Condition.” The Bank requests that the definition of “troubled condition” exclude FHLBanks that (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.
- Consider Mitigating Factors. 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. Such mitigating factors may include, among others, the recipient’s length of service within

¹³ The FDIC, in its rulemaking process, made clear that pre-existing agreements entered into prior to the effective date of the golden parachute provisions of the FDI Act were grandfathered and not subject to retroactive application. 60 Fed. Reg. 16069, 16074 (1995).

¹⁴ Compare HERA § 1002 with HERA § 1114.

¹⁵ “The term ‘compensation’ means any payment of money or the provision of any other thing of current or potential value in connection with employment.” 12 U.S.C. § 4502(6).

the FHLBank system, history of beneficial contribution to the FHLBank, and cooperation with FHFA's relevant remediation efforts.

Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Harvard", with a large, stylized flourish at the end.

Scott C. Harvard
Chairman of the Board
Federal Home Loan Bank of Atlanta