

**Dennis S. Marlo**  
Chairman of the Board

October 28, 2008

**BY FEDERAL EXPRESS AND E-MAIL**

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 Rule with Request for  
Comments: Golden Parachute Payments; RIN 2590-AA08.**

Gentlemen:

The Federal Housing Finance Agency ("FHFA") has promulgated an interim final rule (as amended September 19, 2008 and September 23, 2008, the "Interim Final Rule") effective September 16, 2008 with respect to golden parachute payments. This letter sets forth the comments of the Federal Home Loan Bank of Pittsburgh (the "Bank") with respect to the Interim Final Rule and is based on analysis and discussions among the Federal Home Loan Banks (the "FHLBanks"). We applaud you for your prompt action on this rule and thank you for the opportunity to be heard on this important matter.

The FHLBanks are large, complex financial institutions requiring highly talented and skilled management and staff. They compete for talented employees with other financial institutions of similar size and complexity. Designing and offering reasonable compensation plans, including appropriate separation benefits consistent with industry standards, ensures our ability to attract and retain the necessary talent for the management and operation of the Bank.

The inclusion of limits on golden parachute payments by Congress in the Housing and Economic Recovery Act of 2008 ("HERA") is consistent with existing industry standards including those defined by the Federal Deposit Insurance Corporation ("FDIC"). The FDIC standards represent an accepted regulatory definition of the types of separation payments considered golden parachute payments and prohibited as a matter of safety and soundness. At the same time, the exclusions from the golden parachute definition set forth in the FDIC standards are recognized by the banking industry as protecting reasonable separation compensation and benefits which permits banking institutions to compete for skilled staff. This widely recognized and successfully enforced rule on appropriate separation benefits

ensures that banking professionals and benefit managers have a clear understanding of the marketplace when considering retention, promotion and recruitment of qualified employees.

It is in light of the above – and what we believe to be our shared policy goals -- we offer the following comments, suggestions, and requests for clarification for the FHFA's final rule on golden parachute payments (the "Final Rule").

- Consider the FDIC Golden Parachute Payments Regulations for Guidance for the Final Rule. We believe FHFA should look to the correlative FDIC regulations<sup>1</sup> on golden parachute payments promulgated pursuant to the Federal Deposit Insurance Act (the "FDI Act")<sup>2</sup> for guidance as it considers changes to the Interim Final Rule, for two reasons:
  - The FDIC regulations distinguishing clearly between prohibited golden parachute payments and permissible ordinary compensation; and
  - A comparison of the relevant golden parachute payment provisions of the FDI Act and those of HERA indicates that the former were the model for the latter.

Many of the comments that follow suggest specific aspects of the FDIC regulations which we believe should be incorporated into the Final Rule.

- Define "Bona Fide Deferred Compensation Plans or Arrangements" Based on the FDIC Regulations. The Final Rule should define "bona fide deferred compensation plan or arrangement" in a way that is substantively similar to that contained in the FDIC regulations.<sup>3</sup> The FDIC 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<sup>4</sup>. 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. The Final Rule should exclude from the definition of "golden parachute payments"

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<sup>1</sup> See 61 Fed. Reg. 5926 (1996) and 12 C.F.R. Part 359, et. seq.

<sup>2</sup> See 12 U.S.C. 1828(k).

<sup>3</sup> See 12 C.F.R. §359.1(d).

<sup>4</sup> See 12 C.F.R. §359.1(f)(2)(v).

severance paid pursuant to an FHLBank's severance policy 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.<sup>5</sup> This exclusion protects base level severance payments for FHLBank employees<sup>6</sup> consistent with the FDIC regulations.

- Exclude Retiree Health and Life Insurance Benefits. The Interim Rule expansively defines "golden parachute payments" and 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,<sup>7</sup> and we recommend providing a similar exclusion in the Final Rule.

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<sup>5</sup> "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 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 (1996).

<sup>6</sup> With respect to FHLBank executive officers, subject to the prohibition and withholding of compensation requirements under Sections 1113 and 1114 of HERA, while "executive officer" has not yet been defined for the FHLBanks, it would be reasonable considering the size of the FHLBanks' workforces and scope of operations to define "executive officer" for an FHLBank to be that FHLBank's "named executive officers," as such term is defined by Regulation S-K, 17 C.F.R. §229.402(a)(3), and identified by that FHLBank as such in its most recent Annual Report on Form 10-K. For reference, at December 31, 2007, the FHLBanks workforce sizes ranged from 172 to 342 employees. Note further, that such a definition of "executive officer" would be consistent with Section 111(b)(3) of the Emergency Economic Stabilization Act of 2008, which defines that term for purposes of its limitations on executive compensation. The FHLBanks recognize for executive officers subject to the provisions of Sections 1113 and 1114 of HERA that any severance payments as termination compensation may be subject to review by the FHFA.

<sup>7</sup> "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

- Clarify That Unused Leave is Not a "Golden Parachute Payment". The Bank requests clarification that customary payment of unused annual leave and unused sick days in connection with the termination of employment does not constitute a "golden parachute payment."
- Exclude Payments Approved in Advance by the Director of the FHFA (the "Director"). The Final Rule should exclude from the definition of "golden parachute payment" any payments or agreements approved in advance by the Director. An example when this exclusion would be helpful would be if an FHLBank in a troubled condition needed to hire persons of particular turn-around expertise.<sup>8</sup>
- 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 regulations. In that regard the Bank requests the following guidance and clarification in the Final Rule:
  - 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 Events"), need not obtain the Director's approval<sup>9</sup> to enter into an agreement that could

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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).

<sup>8</sup> 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 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).

<sup>9</sup> 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.

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;<sup>10</sup>
  - 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;<sup>11</sup> and
  - 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.<sup>12</sup>
- Provide Certain Exclusions from the Definition of "Entity-Affiliated Party". The Bank requests that the definition of "entity-affiliated party" be modified in the Final Rule to exclude both (i) shareholders of an FHLBank and (ii) participants in an FHLBank's Affordable Housing Program ("AHP"). 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

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<sup>10</sup> 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 Final Rule include a similar clarification.

<sup>11</sup> The language in the FDIC regulations 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).

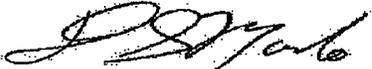
<sup>12</sup> The FDIC, in its rulemaking process, made clear that pre-existing agreements entered into prior to the effective date of the golden parachute provisions of the FDI Act were grandfathered and not subject to retroactive application. 60 Fed. Reg. 16069, 16074 (1995).

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.<sup>13</sup>

- Define "Compensation". The Interim Final Rule does not define the term "compensation." The Bank requests confirmation in the Final Rule that, therefore, the definition of "compensation" set forth in the Federal Housing Enterprises Financial Safety and Soundness Act of 1992<sup>14</sup> 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.
- Provide Certain Exclusions from the Definition of "Troubled Condition". The Bank requests that the definition of "troubled condition" in the Final Rule exclude FHLBanks which (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 in Determining Whether to Prohibit or Limit Golden Parachute Payments. The Bank requests that Section 1231.5(f) of the Interim Final Rule be modified in the Final Rule 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, such person's length of time worked for the FHLBank, history of beneficial contributions to the FHLBank and cooperation with the FHFA's relevant remediation efforts.

The Bank believes that the comments included in this letter are consistent with the FHFA's intent in promulgating the Interim Final Regulation, while protecting the interests of the Bank in hiring and compensating employees. Thank you for your consideration of our comments.

Sincerely,



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<sup>13</sup> Compare HERA § 1002 with HERA § 1114.

<sup>14</sup> "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).