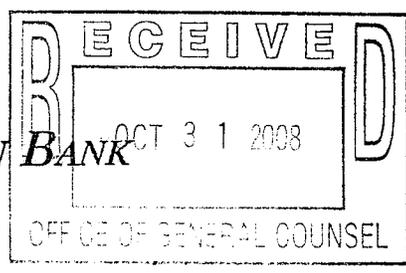


COMMUNICATIONS SECTION
FEDERAL HOME LOAN BANK
OF CINCINNATI
1700 G STREET, N.W.
WASHINGTON, D.C. 20552
TELEPHONE: (513) 521-2000
FAX: (513) 521-2001
WWW.FHFBANK.COM

**FEDERAL HOME LOAN BANK
OF CINCINNATI**



*David H. Hehman
President*

PRIVILEGED AND CONFIDENTIAL

October 31, 2008

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

Gentlemen:

The Federal Housing Finance Agency (the 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 Cincinnati (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 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 the 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 the 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 both industry and other financial institutions of similar size and complexity; and that reasonable and customary compensation, both current and deferred, and separation benefits are important and appropriate components 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 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 the FHFA should look to the corresponding FDIC regulations¹ on golden parachute payments promulgated pursuant to the Federal Deposit Insurance Act (the FDI Act)² for guidance as it considers changes to the Interim Final Rule, for the following two reasons:
 - the FDIC regulations clearly distinguish 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 the Housing and Economic Recovery Act of 2008 (HERA)³ indicates that the former were indeed the model for the latter.

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

- Define “Bona Fide Deferred Compensation Plans or Arrangements” Based on the FDIC Regulations. The FDIC regulations provide an exclusion from the definition of “golden parachute payments” for “bona fide deferred compensation plans or arrangements”. The FDIC recognized that such supplemental retirement plans have always been and are now very common and remain an essential recruiting and retention tool. Thus, it provided an appropriate exception with specific requirements intended to ensure that only actual and reasonable deferred compensation qualifies.⁴

The Bank maintains such a supplemental retirement plans, referred to as the Benefit Equalization Plan (BEP), in which certain executives participate in order to supplement the retirement benefits provided under the Bank's qualified retirement plans (both defined benefit pension and 401(k) thrift savings plans). We believe that most of the FHLBanks have similar plans because of their historical participation in the Financial Institutions Retirement Fund (now Pentegra). The Bank's BEP, which dates back to 1986, only provides benefits in excess of Internal Revenue Service limits (and recognizes non-qualified elective deferrals as pensionable earnings). Funds for the Bank's BEP are set aside in a “rabbi” trust. This program has been a key element of the Bank's compensation structure given the inability to include equity based compensation offered by publicly traded institutions with whom we compete for talent. The BEP has provided a means of partially making up these differences by allowing participants to accumulate savings over their years of employment that they can realize when they retire. As such,

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

² See 12 U.S.C. 1828(k).

³ We have attached as Exhibit A a marked comparison of the HERA provisions showing changes from the corresponding FDI Act provisions.

⁴ See 12 C.F.R. § 359.1(d).

and as pointed out above, the BEP has served as an essential recruiting and retention tool in a competitive market which might otherwise tempt valued employees to seek higher paying jobs with more immediately realizable rewards. The Bank believes that these arrangements would be excluded from the definition of “golden parachute” under the FDIC regulations as plans “primarily for the purpose of providing supplemental retirement benefits or other deferred compensation for a select group of directors, management or highly compensated employees” in effect at least one year prior to a specified event.⁵

The Bank urges the incorporation of the FDIC regulations in this regard in order to permit this common practice to continue. We note, however, that the FDIC regulations do not exclude changes to such plans occurring within one year prior to the institution’s entering a “troubled condition”, if the effect of the changes is to increase benefits payable.⁶ Although we recognize that this is an appropriate presumption, we suggest the Final Rule allow for the case-by-case review by the FHFA of such changes rather than a per se rule.⁷ A hard and fast rule appropriate for the large number of banks the FDIC regulates is unnecessary given the small number of FHFA regulated entities.

- Permit Ordinary, Nondiscriminatory Severance Payments. The Final Rule should exclude from the definition of “golden parachute payments” severance paid pursuant to an FHLBank’s severance policy to the extent it is payable under a nondiscriminatory plan that otherwise meets the requirements set forth in the FDIC regulations and the preamble to the final rule.⁸ Although the FDIC regulations provide for a cap on severance pay equal to the aggregate amount of an employee’s base salary during the twelve months immediately preceding termination,⁹ we again suggest the Final Rule provide for the case-by-case review by the FHFA of payments in excess of twelve month’s base salary to an employee rather than a per se cap.

⁵ See 12 CFR Section 359.1(d)(2)(ii).

⁶ Id.

⁷ Such an approach would provide the FHFA with flexibility to approve such changes when warranted. One example when such flexibility would be desirable would be in the case of a scrivener’s error in the reduction of any such plans or arrangements to writing.

⁸ “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. 61 Fed. Reg. 5926 (1996).

⁹ See id.

- Exclude Welfare and Other Usual and Customary Benefits. The Interim Rule expansively defines “golden parachute payments” and could be interpreted to apply to a wide range of welfare and other usual 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,¹⁰ and we recommend providing a similar exclusion in the Final Rule.
- 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”.
- Define “Executive Officers” to be “Named Executive Officers”. With respect to FHLBank executive officers subject to the prohibition and withholding of compensation requirements under Sections 1113 and 1114 of HERA, it would be reasonable considering the size of the FHLBanks' workforces and scope of their 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, we believe that the FHLBanks workforce sizes ranged from 151 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 own limitations on executive compensation.
- Exclude Payments and Agreements Approved in Advance by the Director of the FHFA (the Director) and Provide Guidance for the Process on Obtaining Such Approvals. 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.¹¹ The Final Rule should also provide

¹⁰ “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).

¹¹ 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

guidance on the process on obtaining such advance approvals for such payments and agreements.

- 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), may, but is not required to, obtain the Director's approval¹² 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 automatic requirement that a Bank cease payments of amounts that fall within the definition of a golden parachute payment upon the occurrence of a Triggering Event -- and provide for any specific events that could trigger such a requirement, for example, an event of insolvency, written notice of the Director requiring cessation of payments, or actual knowledge that the payee has acted with malfeasance;
 - 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 such payments;¹³
 - 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;¹⁴ and

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).

¹² 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.

¹³ 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.

¹⁴ 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).

- 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.¹⁵ For the second bullet and this final bullet, such guidance is necessary to avoid a situation where an FHLBank may be subject to litigation by a payee where payments are due under the terms of such an agreement on the one hand, but potential adverse action by the Director where such payments are made, on the other. Obviously, future such agreements will be specifically subject to HERA and FHFA regulation.

- 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) member 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. Likewise, 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.¹⁶

- 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 1992¹⁷ 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 member 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

¹⁵ 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).

¹⁶ Compare HERA § 1002 with HERA § 1114.

¹⁷ “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).

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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 working 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 shared by most if not all of the FHLBanks and are consistent with the FHFA's intent in promulgating the Interim Final Regulation, while protecting the interests of the Bank in hiring, compensating and retaining qualified employees. Thank you for your consideration of our comments.

Sincerely,



David H. Hehman
President

Exhibit A

Comparison of HERA to FDI Act Golden Parachute Payments Provisions

For the following comparison, deleted text shows text that occurred in the FDI Act that did not occur in HERA, added text shows text that occurred in HERA but not in the FDI Act and normal text shows text that is the same in both the FDI Act and HERA.

(1) Golden parachutes and indemnification payments

The ~~Corporation~~Director may prohibit or limit, by regulation or order, any golden parachute payment or indemnification payment.

(2) Factors to be taken into account

The ~~Corporation~~Director shall prescribe, by regulation, the factors to be considered by the ~~Corporation~~Director in taking any action pursuant to paragraph (1), which may include such factors as ~~the following:~~—

(A) ~~Whether~~whether there is a reasonable basis to believe that the ~~institution~~-affiliated party has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the ~~depository institution or covered company~~regulated entity that has had a material ~~effect~~effect on the financial condition of the ~~institution~~regulated entity;

(B) ~~Whether~~whether there is a reasonable basis to believe that the ~~institution~~-affiliated party is substantially responsible for—~~(i) the insolvency of the depository institution or covered company;~~~~(ii) regulated entity,~~ the appointment of a conservator or receiver for the ~~depository institution;~~regulated entity, or~~(iii) the troubled condition of the depository institution regulated entity~~ (as defined in ~~the regulations prescribed pursuant to section 1831i(f) of this title~~);by the Director;

(C) ~~Whether~~whether there is a reasonable basis to believe that the ~~institution~~-affiliated party has materially violated any applicable provision of Federal or State ~~banking~~ law or regulation that has had a material ~~effect~~effect on the financial condition of the ~~institution~~regulated entity;

(D) ~~Whether there is a reasonable basis to believe that the institution~~whether the affiliated party ~~has violated or conspired to violate—~~

~~(i) section 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344 of Title 18; or~~

~~(ii) section 1341 or 1343 of such title affecting a federally insured financial institution.~~~~(E) Whether the institution-affiliated party was in a position of managerial or fiduciary responsibility; and~~

~~(F) The~~(E) the length of time that the party was affiliated with the ~~insured depository institution or covered company~~regulated entity, and the degree to which--

(i) the payment reasonably reflects compensation earned over the period of employment; and

(ii) the compensation involved represents a reasonable payment for services rendered.

(3) Certain payments prohibited

No ~~insured depository institution or covered company~~regulated entity may prepay the salary or any liability or legal expense of any ~~institution~~-affiliated party if such payment is made--

(A) in contemplation of the insolvency of such ~~institution or covered company~~regulated entity, or after the commission of an act of insolvency; and

(B) with a view to, or ~~has~~having the result of--

(i) preventing the proper application of the assets of the ~~institution~~regulated entity to creditors; or

(ii) preferring one creditor over another.

(4) "Golden parachute payment"²² defined

~~For purposes of this subsection--~~

(A) In general

~~The~~For purposes of this subsection, the term "golden parachute payment" means any payment (or any agreement to make any payment) in the nature of compensation by any ~~insured depository institution or covered company~~regulated entity for the benefit of any ~~institution~~-affiliated party pursuant to an obligation of such ~~institution or covered company~~regulated entity that--

(i) is contingent on the termination of such party's affiliation with the ~~institution or covered company~~regulated entity; and--

(ii) is received on or after the date on which--

~~(I) the insured depository institution or covered company, or any insured depository institution subsidiary of such covered company, is insolvent;~~

~~(I) the regulated entity became insolvent;~~

(II) any conservator or receiver is appointed for such ~~institution~~regulated entity; or

(III) the ~~institution's appropriate Federal banking agency~~Director determines that the ~~insured depository institution~~regulated entity is in a troubled condition (as defined in the regulations ~~prescribed pursuant to section 1831i(f) of this title~~);

~~(IV) the insured depository institution has been assigned a composite rating by the appropriate Federal banking agency or the Corporation of 4 or 5 under the Uniform~~

~~Financial Institutions Rating System; or (V) the insured depository institution is subject to a proceeding initiated by the Corporation to terminate or suspend deposit insurance for such institution of the Director).~~

(B) Certain payments in contemplation of an event

Any payment which would be a golden parachute payment but for the fact that such payment was made before the date referred to in subparagraph (A)(ii) shall be treated as a golden parachute payment if the payment was made in contemplation of the occurrence of an event described in any subclause of such subparagraph.

(C) Certain payments not included

~~The~~For purposes of this subsection, the term “golden parachute payment” shall not include--

(i) any payment made pursuant to a retirement plan which is qualified (or is intended to be qualified) under section 401 of Title 2626, or other nondiscriminatory benefit plan;

(ii) any payment made pursuant to a bona fide deferred compensation plan or arrangement which the ~~Board~~Director determines, by regulation or order, to be permissible; or

(iii) any payment made by reason of the death or disability of an ~~institution~~-affiliated party.

(5) Other definitions

For purposes of this subsection-- the following definitions shall apply:

(A) Indemnification payment

Subject to paragraph (6), the term “indemnification payment” means any payment (or any agreement to make any payment) by any ~~insured depository institution or covered company~~regulated entity for the benefit of any person who is or was an ~~institution~~-affiliated party, to pay or reimburse such person for any liability or legal expense with regard to any administrative proceeding or civil action instituted by the ~~appropriate Federal banking agency~~Agency which results in a final order under which such person--

(i) is assessed a civil money penalty;

(ii) is removed or prohibited from participating in conduct of the affairs of the ~~insured depository institution~~regulated entity; or

(iii) is required to take any affirmative action ~~described in section 1818(b)(6) of this title with respect to such institution~~to correct certain conditions resulting from violations or practices, by order of the Director.

(B) Liability or legal expense

The term “liability or legal expense” means--

(i) any legal or other professional expense incurred in connection with any claim, proceeding, or action;

(ii) the amount of, and any cost incurred in connection with, any settlement of any claim, proceeding, or action; and

(iii) the amount of, and any cost incurred in connection with, any judgment or penalty imposed with respect to any claim, proceeding, or action.

(C) Payment

The term "payment" includes--

(i) any direct or indirect transfer of any funds or any asset; and

(ii) any segregation of any funds or assets for the purpose of making, or pursuant to an agreement to make, any payment after the date on which such funds or assets are segregated, without regard to whether the obligation to make such payment is contingent on--

(I) the determination, after such date, of the liability for the payment of such amount; or

(II) the liquidation, after such date, of the amount of such payment.

~~(D) Covered company~~

~~The term "covered company" means any depository institution holding company (including any company required to file a report under section 1843(f)(6) of this title), or any other company that controls an insured depository institution.~~

(6) Certain commercial insurance coverage not treated as covered benefit payment

No provision of this subsection shall be construed as prohibiting any ~~insured depository institution or covered company~~, regulated entity from purchasing any commercial insurance policy or fidelity bond, except that, subject to any requirement described in paragraph (5)(A)(iii), such insurance policy or bond shall not cover any legal or liability expense of the ~~institution or covered company~~ regulated entity which is described in paragraph