

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1231

RIN 2590-AA08

Golden Parachute Payments and Indemnification Payments

AGENCY: Federal Housing Finance Agency.

ACTION: Interim Final Regulation with Request for Comments.

SUMMARY: The Federal Housing Finance Agency (FHFA) is issuing an interim final regulation, with a request for comments, setting forth factors to be considered by the Director of FHFA in acting upon the Director's authority to limit golden parachute payments to entity-affiliated parties in connection with the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal Home Loan Banks.

DATES: *Effective date:* [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comment date: Comments on the Interim Final Regulation must be received on or before [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER]. For additional information, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: You may submit your comments on the interim final regulation, identified by regulatory information number "RIN 2590-AA08," by any of the following methods:

- U.S. Mail, United Parcel Post, Federal Express, or Other Mail Service: The mailing address for comments is: Alfred M. Pollard, General Counsel (Office of Federal Housing Enterprise Oversight (OFHEO)) and Christopher Curtis, General Counsel (Federal Housing Finance Board (FHFB)), Attention: Comments/RIN 2590-AA08, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552.
- Hand Delivered/Courier: The hand delivery address is: Alfred M. Pollard, General Counsel (OFHEO) and Christopher Curtis, General Counsel (FHFB), Attention: Comments/RIN 2590-AA08, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The package should be logged at the Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.
- E-mail: Comments to Alfred M. Pollard, General Counsel (OFHEO) and Christopher Curtis, General Counsel (FHFB), may be sent by e-mail at RegComments@FHFA.gov. Please include “RIN 2590-AA08” in the subject line of the message.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Alfred M. Pollard, General Counsel (OFHEO), telephone (202) 414-3788 or Christopher Curtis, General Counsel (FHFB), telephone (202) 408-2802 (not toll-free numbers), Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Deaf is (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Comments

The Federal Housing Finance Agency (FHFA) invites comments on all aspects of the interim final regulation, and will take all comments into consideration before issuing the final regulation. FHFA requests that comments submitted in hard copy also be accompanied by the electronic version in Microsoft® Word or in portable document format (PDF) on 3.5” disk or CD-ROM.

Copies of all comments will be posted on the internet web site at www.OFHEO.gov. In addition, copies of all comments received will be available for examination by the public on business days between the hours of 10 a.m. and 3 p.m., at the Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. To make an appointment to inspect comments, please call the Office of General Counsel (OFHEO) at (202) 414-3751.

II. Background

The Housing and Economic Recovery Act of 2008 (HERA), Public Law No. 110-289, 122 Stat. 2654, amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 et seq.) (Act) to establish FHFA as an independent agency of the Federal Government.¹ FHFA was established to oversee the prudential operations of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation (collectively, Enterprises), and the Federal Home Loan Banks (Banks) (collectively, regulated entities) and to ensure that they operate in a safe and sound manner including being capitalized adequately; foster liquid, efficient,

¹ See Division A, titled the “Federal Housing Finance Regulatory Reform Act of 2008,” TITLE I, Section 1101 of HERA.

competitive and resilient national housing finance markets; comply with the Act and rules, regulation, guidelines and orders issued under the Act, and the respective authorizing statutes of the regulated entities; and carry out their missions through activities authorized and consistent with the Act and their authorizing statutes; and, that the activities and operations of the regulated entities are consistent with the public interest.

The Office of Federal Housing Enterprise Oversight (OFHEO) and the Federal Housing Finance Board (FHFB) will be abolished one year after enactment of the HERA. However, the regulated entities continue to operate under regulations promulgated by OFHEO and FHFB until such regulations are supplanted by regulations promulgated by the FHFA.

II. Interim Final Regulation and Request for Comments

Section 1114 of HERA amended 12 U.S.C. § 4518 to provide additional authorities for FHFA in addressing certain compensation and benefits, specifically golden parachute payments and indemnification payments. HERA added a new paragraph (e) to section 4518 addressing regulation and prohibition of these benefits. While paragraphs (e)(1) and (e)(3)-(6) are self executing, Congress provided that for paragraph (e)(2) addressing factors to be taken into account when acting regarding golden parachutes and indemnification, FHFA prescribe, by regulation, factors to be considered. The factors set forth in (e)(2) are explicit and provide strong guidance to the Director in taking an action under the statute. Therefore, FHFA is promulgating an interim final rule and requesting comment on paragraph (2) of section 4518(e). FHFA will consider other comments regarding section 4518(e) as part of the public notice and comment period.

The FHFA is issuing this regulation as an interim final rule in order to provide clarity on the standards it will employ in addressing golden parachutes and indemnification payments as provided in statute. Additionally, with payments at issue for separating employees, an interim final rule provides clarity for the standards the agency will employ in exercising its authority; at the same time, comments are to be taken regarding the rule. For these reasons, FHFA finds that there is good cause, and that it is in the public interest, to make the rule effective immediately upon publication in the Federal Register and allow for public comment after publication. See 5 U.S.C. 553(b) and (d). The language of the rule reflects congressional intent embodied in the statute.

The interim final rule provides parties an opportunity to comment on all aspects of the regulation and for future revision, if necessary or appropriate, by the FHFA. Comments are specifically requested with respect to the definition of the term “troubled condition,” with respect to other factors the Director should consider in determining whether golden parachute payments should be limited or prohibited, and what payments made pursuant to a bona fide deferred compensation plan or arrangement should be determined to be permissible golden parachute payments.

Section 1313(f) of the Act, as amended by section 1201 of HERA, requires the Director, when promulgating regulations relating to the Banks, to consider the differences between the Banks and the Enterprises with respect to the Banks’ cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; and joint and several liability. The Director may also consider any other differences that are deemed appropriate. In preparing the interim final rule, the Director considered the differences between the Banks and the Enterprises

as they relate to the above factors. The Director requests comments from the public about whether differences related to these factors should result in a revision to the interim final rule as they relate to the Banks.

Regulatory Impacts

Paperwork Reduction Act

The interim final regulation does not contain any information collection requirement that requires the approval of OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et. seq.*).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the interim final regulation under the Regulatory Flexibility Act. FHFA certifies that the interim final regulation is not likely to have a significant economic impact on a substantial number of small business entities because the regulation is applicable only to the regulated entities, which are not small entities for the purposes of the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 1231

Golden Parachutes, Government-Sponsored Enterprises, Indemnification.

Accordingly, for the reasons stated in the preamble, FHFA establishes a new 12 CFR Chapter XII, consisting of part 1231, to read as follows:

PART 1231 – Golden Parachute Payments and Indemnification Payments

Sec.

1231.1 Purpose.

1231.2 Definitions.

1231.3 Golden parachute payments.

1231.4 Indemnification payments.

1231.5 Factors to be taken into account.

Authority: 12 U.S.C. 4518(e).

§ 1231.1 Purpose.

The purpose of this part is to implement section 1318(e) of the Act by setting forth the standards which the Director will take into consideration in determining whether to limit or prohibit golden parachute payments or indemnification payments to entity-affiliated parties.

§ 1231.2 Definitions.

The following definitions apply to the terms used in this part:

(a) Act means the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 et seq.), as amended by the Federal Housing Finance Regulatory Reform Act of 2008, enacted under Division A of the HERA.

(b) Director means the Director of FHFA or his or her designee.

(c) Enterprise means the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation (collectively, Enterprises) and, except as provided by the Director, any affiliate thereof.

(d) Entity-affiliated party means—

(1) Any director, officer, employee, or controlling stockholder of, or agent for, a regulated entity;

(2) Any shareholder, affiliate, consultant, or joint venture partner of a regulated entity, and any other person, as determined by the Director (by regulation or on a case-by-case basis) that participates in the conduct of the affairs of a regulated entity, provided that a member of a Bank shall not be deemed to have participated in the affairs of that Bank solely by virtue of being a shareholder of, and obtaining advances from, that Bank;

(3) Any independent contractor for a regulated entity (including any attorney, appraiser, or accountant), if—

(i) The independent contractor knowingly or recklessly participates in—

(A) Any violation of any law or regulation;

(B) Any breach of fiduciary duty; or

(C) Any unsafe or unsound practice; and

(ii) Such violation, breach, or practice caused, or is likely to cause, more than a minimal financial loss to, or a significant adverse effect on, the regulated entity;

(4) Any not-for-profit corporation that receives its principal funding, on an ongoing basis, from any regulated entity; and

(5) The Office of Finance.

(e) Federal Home Loan Bank means a bank established under the Federal Home Loan Act; the term “Federal Home Loan Banks” means, collectively, all the Federal Home Loan Banks.

(f)(1) Golden parachute payment means any payment (or any agreement to make any payment) in the nature of compensation by any regulated entity for the benefit of any current entity-affiliated party pursuant to an obligation of such regulated entity that—

(i) Is contingent on, or by its terms is payable on or after, the termination of such party’s primary employment or affiliation with the regulated entity; and

(ii) Is received on or after the date on which—

(A) The regulated entity became insolvent;

(B) Any conservator or receiver is appointed for such regulated entity; or

(C) The Director determines that the regulated entity is in a troubled condition.

(2) The term “golden parachute payment” shall not include:

(i) Any payment made pursuant to a pension or retirement plan which 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) or pursuant to a pension or other retirement plan which is governed by the laws of any foreign country;

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

(iii) Any payment made by reason of death or by reason of termination caused by the disability of an entity-affiliated party.

(3) Any payment which would be a golden parachute payment but for the fact that such payment was made before the date referred to in paragraph (f)(1)(ii) shall be treated

as a golden parachute payment if the payment was made in contemplation of the occurrence of an event described that paragraph.

(g) FHFA means the Federal Housing Finance Agency.

(h) HERA means the Housing and Economic Recovery Act of 2008, Public Law No. 110-289, 122 Stat. 2654 (July 30, 2008).

(i) Office of Finance means the Office of Finance of the Federal Home Loan Bank System (or any successor thereto).

(j) Regulated entity means the Federal National Mortgage Association and any affiliate thereof; the Federal Home Loan Mortgage Corporation and any affiliate thereof; or any Federal Home Loan Bank; the term “regulated entities” means, collectively, the Federal National Mortgage Association and any affiliate thereof; the Federal Home Loan Mortgage Corporation and any affiliate thereof; and any Federal Home Loan Bank.

(k) Troubled condition means a regulated entity that—

(1) Is subject to a cease-and-desist order or written agreement issued by the FHFA that requires action to improve the financial condition of the regulated entity or is subject to a proceeding initiated by the Director, which contemplates the issuance of an order that requires action to improve the financial condition of the regulated entity, unless otherwise informed in writing by the FHFA; or

(2) Is informed in writing by the Director that it is in a troubled condition for purposes of the requirements of this part on the basis of the regulated entity’s most recent report of examination or other information available to the FHFA.

(l) – (n) [Reserved]

§ 1231.3 Golden parachute payments.

No regulated entity shall make or agree to make any golden parachute payment except with the concurrence of the Director.

§ 1231.4 Indemnification payments.

No regulated entity shall make or agree to make any indemnification payment except with the concurrence of the Director.

§ 1231.5 Factors to be taken into account.

In determining whether to prohibit or limit any golden parachute payment or indemnification payment, the Director shall consider the following factors—

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

(b) Whether there is a reasonable basis to believe that the entity-affiliated party is substantially responsible for the insolvency of the regulated entity, the appointment of a conservator or receiver for the regulated entity, or the troubled condition of the regulated entity (as defined in regulations prescribed by the Director);

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

(d) Whether the entity-affiliated party was in a position of managerial or fiduciary responsibility;

(e) The length of time that the party was affiliated with the regulated entity, and the degree to which the payment reasonably reflects compensation earned over the period

of employment and the compensation involved represents a reasonable payment for services rendered; and

(f) Any other factor the Director determines relevant to the facts and circumstances surrounding the golden parachute or indemnification payment, including but not limited to negligence, gross negligence, neglect, willful misconduct, breach of fiduciary duty, and malfeasance on the part of an entity-affiliated party.

Signature

Date

James B. Lockhart III
Director, Federal Housing Finance Agency.

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