

Rules and Regulations

Federal Register

Vol. 74, No. 18

Thursday, January 29, 2009

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FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1231

RIN 2590-AA08

Golden Parachute Payments

AGENCY: Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is issuing a final regulation that sets 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:* January 29, 2009.

FOR FURTHER INFORMATION CONTACT: Alfred M. Pollard, General Counsel, (202) 414-3788 (not a toll-free number), 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. Background

General Background

The Housing and Economic Recovery Act of 2008 (HERA), Public Law 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

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

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, 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 superseded by regulations promulgated by the FHFA.

Background on Golden Parachute Payments

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 paragraph (e)(2) are explicit and provide guidance to the Director in taking an action under the statute.

FHFA published an Interim Final Rule that was effective on September 16, 2008, the date of publication in the **Federal Register**. The rule, which was corrected on September 19 and September 23, 2008, addresses only

golden parachute payments.² During the public notice and comment period, which closed on October 31, 2008, FHFA requested comment on paragraph (2) of section 4518(e), *i.e.*, factors to be taken into account by FHFA when acting regarding golden parachutes. The Interim Final Rule also provided that FHFA would consider other comments on other aspects of the regulation for future revision, if necessary or appropriate.

II. Comment on the Interim Final Rule

General Comment

FHFA received comments from individuals in the general public, nine Federal Home Loan Banks, and Fannie Mae. In general, the public commented that severance should not be paid to departing executives of the Enterprises, particularly the Chief Executive Officers. The consensus among these individuals was that any such payment would be excessive, irresponsible, and grossly unfair to taxpayers.

The Banks commented that they shared widespread public concern over excessive golden parachute payments paid by failed or failing companies. The Banks noted that fulfillment of their housing and liquidity mission, consistent with safe and sound operation, demands a high caliber workforce, and that reasonable and customary separation benefits are an important and appropriate component of the Banks' retention, hiring, and workforce management efforts. To that end, the Banks requested that FHFA consider standards set forth in the Federal Deposit Insurance Corporation (FDIC) regulations on golden parachute payments, which were promulgated pursuant to the Federal Deposit Insurance Act (FDI Act), for guidance as FHFA considers changes to the Interim Final Rule.³ The Banks requested consideration of the FDIC regulations, as the legislative provisions on which they

² 73 FR 53356 (September 16, 2008), with Correcting Amendments at 73 FR 54309 (September 19, 2008) and at 73 FR 54673 (September 23, 2008), to be codified at 12 CFR 1231. The portion of the Interim Final Rule published on September 16, 2008, which relates to indemnification payments, is being promulgated by separate rulemaking that is subject to public comment. See Proposed Amendment for Golden Parachute and Indemnification Payments, 73 FR 67424 (November 14, 2008).

³ See 61 FR 5926 (February 15, 1996) and 12 CFR part 359.

are based are similar to the HERA and represent industry practice. For these reasons, many of the Banks' comments suggest specific aspects of the FDIC regulations that the Banks believe should be incorporated into the Final Rule.

Similarly, Fannie Mae suggested that FHFA revise the Interim Final Rule to more closely follow the FDIC regulations, and also the Farm Credit System Insurance Corporation (FCSIC) regulations, which adopted the FDIC's approach.⁴ Fannie Mae commented that the FDIC and FCSIC regulations implement legislation similar to the HERA so conformance with regulations would foster uniformity in regulation, public perception of fairness, and competition on a level regulatory playing field for executive talent. Fannie Mae also stated such conformance would reduce administrative burden because of existing guidance and precedent.

FHFA gave careful consideration to the comments of the Banks and Fannie Mae requesting conformance of the provisions of the Interim Final Rule with the provisions of FDIC and FCSIC regulations relating to golden parachutes. In publishing the Interim Final Rule, FHFA primarily sought comment on factors the Director would consider in acting on golden parachute payments. The comments received to the Interim Final Rule address other elements of a golden parachute regulation. For this reason, FHFA has determined that it will consider adding provisions similar to those of the FDIC golden parachute regulation in a subsequent rulemaking. The FDIC regulation describes more specifically benefits included or excluded from the term "golden parachute payment." It should be noted that, consistent with the FDIC regulation, benefits provided under qualified and nonqualified deferred compensation plans are excluded from the term "golden parachute payment" under the Interim Final Rule and under this final regulation.

Specific Comment

For purposes of this regulation, FHFA considered a comment by Fannie Mae that addressed one of the factors to be taken into account by the Director when acting regarding golden parachutes, *i.e.*, paragraph (f) of § 1231.5. The paragraph provides that in determining whether to prohibit or limit any golden parachute payment, among the factors, the Director shall consider—

(f) Any other factor the Director determines relevant to the facts and circumstances surrounding the golden parachute 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.

Fannie Mae requested that paragraph (f) of § 1231.5 be amended to mirror the "catchall" factor adopted by the FDIC and the FCSIC in their regulations, whereby the Director would consider: "Any other factors or circumstances which would indicate that the proposed payment would be contrary to the intent of section 1318(e) of the Act or this part." In commenting on the requested amendment, Fannie Mae stated that there are substantial benefits to regulatory uniformity in terms of predictability and fairness, and there is no apparent difference in congressional intent or in the policy implications of golden parachute restrictions that would call for a different standard in the present context. By mirroring the "catchall" factor adopted by the FDIC and the FCSIC, Fannie Mae claimed focus would be on the intent of the statute, and would permit the Director to consider all appropriate factors in determining whether to deny or limit proposed golden parachute payments.

After consideration of Fannie Mae's comment, FHFA determined to amend paragraph (f) of § 1231.5 to follow more closely the statutory language in section 1318 of the Act that the Director may consider in the oversight of compensation of an executive officer. To that end, as relevant facts and circumstances for the Director to consider with respect to golden parachute payments, FHFA has deleted the following language: "but not limited to negligence, gross negligence, neglect" and has substituted in lieu thereof the following language: "any fraudulent act or omission, breach of fiduciary duty, violation of law, rule, regulation, order, or written agreement, and the level of".

Regulatory Impacts

Paperwork Reduction Act

The Final Rule 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 Final Rule under the Regulatory Flexibility Act. FHFA certifies that the Final Rule 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.

Accordingly, the Interim Final Rule at part 1231 of Title 12 CFR Chapter XII, published at 73 FR 53356 on September 16, 2008, and corrected at 73 FR 54309 on September 19, 2008, and at 73 FR 54673 on September 23, 2008, is adopted as a final rule with the following changes:

Subchapter B—Entity Regulations

- 1. The heading for subchapter B of Chapter XII is revised to read as set forth above.
- 2. The title of part 1231 is revised to read as set forth below.

PART 1231—GOLDEN PARACHUTE PAYMENTS

- 3. The authority citation for part 1231 continues to read as follows:

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

- 4. Amend § 1231.5 by revising paragraph (f) to read as follows:

§ 1231.5 Factors to be taken into account.

* * * * *

(f) Any other factor the Director determines relevant to the facts and circumstances surrounding the golden parachute payment, including any fraudulent act or omission, breach of fiduciary duty, violation of law, rule, regulation, order, or written agreement, and the level of willful misconduct, breach of fiduciary duty, and malfeasance on the part of an entity-affiliated party.

Dated: January 15, 2009.

James B. Lockhart III,

Director, Federal Housing Finance Agency.
[FR Doc. E9–1517 Filed 1–28–09; 8:45 am]

BILLING CODE 8070-01-P

⁴ 12 CFR part 1412.