

Federal Housing Finance Agency

§ 1231.2

(d) *Exception to prior approval.* An employment agreement or contract subject to prior approval of the Director under this section may be entered into prior to that approval, provided that such agreement or contract specifically provides notice that termination benefits under the agreement or contract shall not be effective and no payments shall be made under such agreement or contract unless and until approved by the Director. Such notice should make clear that alteration of benefit plans subsequent to FHFA approval under this section, which affect final termination benefits of an executive officer, requires review at the time of the individual's termination from the Enterprise and prior to the payment of any benefits.

(e) *Effect of prior approval of an agreement or contract.* The Director's approval of an executive officer's termination of employment benefits shall not preclude the Director from making any subsequent determination under this section to prohibit and withhold executive compensation.

(f) *Form of approval.* The Director's approval pursuant to this section may occur in such form and manner as the Director shall provide through written notice to the regulated entities or the Office of Finance.

§ 1230.5 Submission of supporting information.

In support of the reviews and decisions provided for in this part, the Director may issue guidance, orders, or notices on the subject of information submissions by the regulated entities and the Office of Finance.

PART 1231—GOLDEN PARACHUTE PAYMENTS

Sec.

1231.1 Purpose.

1231.2 Definitions.

1231.3–1231.4 [Reserved]

1231.5 Factors to be taken into account.

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

SOURCE: 73 FR 53357, Sept. 16, 2008, unless otherwise noted.

§ 1231.1 Purpose.

The purpose of this part is to implement section 1318(e) of the Safety and

Soundness Act by setting forth the standards that the Director will take into consideration in determining whether to limit or prohibit golden parachute payments to entity-affiliated parties.

[73 FR 54673, Sept. 23, 2008, as amended at 78 FR 2323, Jan. 11, 2013]

§ 1231.2 Definitions.

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

(a)–(c) [Reserved]

(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) [Reserved]

(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

§ 1231.3–1231.4

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)–(j) [Reserved]

(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 enti-

12 CFR Ch. XII (1–1–14 Edition)

ty’s most recent report of examination or other information available to the FHFA.

(1)–(n) [Reserved]

[73 FR 53357, Sept. 16, 2008, as amended at 78 FR 2323, Jan. 11, 2013]

§ 1231.3–1231.4 [Reserved]

§ 1231.5 Factors to be taken into account.

In determining whether to prohibit or limit any golden parachute 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 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

Federal Housing Finance Agency

§ 1233.3

malfeasance on the part of an entity-affiliated party.

[73 FR 53357, Sept. 16, 2008, as amended at 73 FR 54673, Sept. 23, 2008; 74 FR 5102, Jan. 29, 2009]

PART 1233—REPORTING OF FRAUDULENT FINANCIAL INSTRUMENTS

Sec.

1233.1 Purpose.

1233.2 Definitions.

1233.3 Reporting.

1233.4 Internal controls, policies, procedures, and training.

1233.5 Protection from liability for reports.

1233.6 Supervisory action.

AUTHORITY: 12 U.S.C. 4511, 4513, 4514, 4526, 4642.

SOURCE: 75 FR 4258, Jan. 27, 2010, unless otherwise noted.

§ 1233.1 Purpose.

The purpose of this part is to implement the Safety and Soundness Act by requiring each regulated entity to report to FHFA upon discovery that it has purchased or sold a fraudulent loan or financial instrument, or suspects a possible fraud relating to the purchase or sale of any loan or financial instrument. In addition, each regulated entity must establish and maintain internal controls, policies, procedures, and operational training to discover such transactions.

§ 1233.2 Definitions.

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

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 Federal Home Loan Bank shall not be deemed to have participated in the affairs of that Federal Home Loan Bank solely by virtue of being a shareholder of, and obtaining advances from, that Federal Home Loan Bank;

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

(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.

Financial instrument means any legally enforceable agreement, certificate, or other writing, in hardcopy or electronic form, having monetary value including, but not limited to, any agreement, certificate, or other writing evidencing an asset pledged as collateral to a Bank by a member to secure an advance by the Bank to that member.

Fraud means a misstatement, misrepresentation, or omission that cannot be corrected and that was relied upon by a regulated entity to purchase or sell a loan or financial instrument.

Possible fraud means that a regulated entity has a reasonable belief, based upon a review of information available to the regulated entity, that fraud may be occurring or has occurred.

Purchased or sold or relating to the purchase or sale means any transaction involving a financial instrument including, but not limited to, any purchase, sale, other acquisition, or creation of a financial instrument by the member of a Bank to be pledged as collateral to the Bank to secure an advance by the Bank to that member, the pledging by a member to a Bank of such financial instrument to secure such an advance, the making of a grant by a Bank under its affordable housing program or community investment program, and the effecting of a wire transfer or other form of electronic payments transaction by the Bank.

[75 FR 4258, Jan. 27, 2010, as amended at 78 FR 2323, Jan. 11, 2013]

§ 1233.3 Reporting.

(a) *Timeframe for reporting.* (1) A regulated entity shall submit to the Director a timely written report upon discovery by the regulated entity that it has purchased or sold a fraudulent loan or financial instrument, or suspects a possible fraud relating to the purchase or sale of any loan or financial instrument.