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# The FDIC's Expanding View of Golden Parachute Payments

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In the immediate aftermath of the financial collapse in 2008, the phrase "golden parachute" was repeatedly printed in headlines when referring to large bonuses executives were receiving after leaving their companies and the world economy in ruins.

As the Treasury tried to stem the tide of bank failures through recapitalization efforts such as TARP, it prohibited certain incentive compensation practices for institutions who received funds through such programs. Under the TARP regulations, any company receiving TARP funds could not give "golden parachute payments" to senior executive officers for any reason, except for payments for services performed, until such funds were repaid to the Treasury. Many forget, however, that the FDIC restricted golden parachute payments for troubled banks long before the Great Recession. Recently the 8th Circuit Court of Appeals (which includes Arkansas in its territory) upheld the FDIC's view that payments which may arise due to a breach of an employment agreement may be considered golden parachute payments.

## Golden Parachute Payment

The FDIC has the power to prohibit any golden parachute payment. A "golden parachute payment" is any payment in the nature of compensation by a bank or holding company for the benefit of an institution-affiliated party or "IAP" (which includes directors, officers, employees and controlling stockholders) that is (1) contingent on, or by its terms payable on or after, the termination of such IAP's primary employment or affiliation with the bank or company and (2) is received on or after or is made in contemplation of (a) insolvency, (b) appointment of a conservator or receiver, (c) a determination that the bank or holding company is in a "troubled condition", (d) the bank or holding company being assigned a composite rating of 4 or 5, or (e) the bank being subject to a proceeding to terminate or suspend deposit insurance.

Golden parachute payments do not include payments made for (1) a qualified pension or retirement plan, (2) an employee welfare benefit plan (such as medical, dental and vision plans, disability plans, dependent care, etc.), (3) death or termination caused by disability, (4) a nondiscriminatory severance pay plan which applies to all employees and is not made when the institution is in or contemplating being in a troubled condition, (5) any severance or other payments required by state statute, or (6) any other payment which the FDIC determines to be permissible.

## Von Rohr v. Reliance Bank

Jerry Von Rohr worked at Reliance Bank, a Missouri state bank, for over thirteen years. In 1998 Von Rohr and Reliance Bankshares, Inc. executed an employment agreement for his service as the chairman, president and CEO of Reliance Bank. The employment agreement was extended several times, but in 2011, Von Rohr was terminated with a year remaining in the term of his agreement. Von Rohr sued Reliance Bank for breach of the agreement and claimed he was entitled to compensation for one year's salary. The FDIC stated that the requested payment constituted a prohibited golden parachute since Reliance Bank was in a troubled condition and the compensation was for services he did not render.

## • ABOUT THE AUTHOR •



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## *It's safe to say that unless an officer's employment compensation falls under one of the FDIC exceptions there is no guarantee that the officer will receive post-employment compensation...*

At the lower court level, Von Rohr argued that compensation could not be denied because it was not subject to TARP, which the court correctly dismissed since TARP had nothing to do with the FDIC's prohibition on golden parachute payments. He further argued that the compensation requested was not money owed in contemplation of his departure from the bank, the typical understanding of a "golden parachute", but compensation he would have received if the bank had not breached the agreement. The FDIC asserted it was irrelevant that the compensation did not arise from an agreement contemplating his departure, the fact that he would be receiving money after his departure made the damages requested a golden parachute payment. The 8th Circuit Court of Appeals agreed with the FDIC.

### **Application to the FDIC**

It's safe to say that unless an officer's employment compensation falls under one of the FDIC exceptions there is no guarantee that the officer will receive post-employment compensation from a troubled institution, even if that institution breached its contractual obligations. In the event an officer believes she is entitled to post-employment compensation which does not fall under an FDIC exception, an application for approval of the compensation may be submitted to the FDIC and the applicable regulator. The applicant will need to demonstrate that it is not aware of any information where it is reasonable to believe that, at the time of such payment, the officer committed the following acts which had a material adverse effect on the institution: (1) fraud or breach of duty to the institution, (2) act responsible for the troubled condition of the bank, (3) acts that materially violated any state or federal banking law, or (4) various other types of fraud, theft or embezzlement against the institution. In weighing its decision, the FDIC may consider the officer's managerial or fiduciary responsibility to the institution, the length of time the officer was with the institution, and the degree to which the proposed compensation would be contrary to the restriction on golden parachute payments.

### **Conclusion**

Golden parachute payments are not necessarily scandalous bonuses an executive at investment firms receive before her company crashes. They can be ordinary contractual payments due to officers at a bank whose ratings have declined. While it's impossible to predict the future health of a bank when negotiating terms of employment, knowing that future compensation owed under your employment agreement may be denied if the bank stumbles will allow an officer to analyze how compensation should be structured to reduce the risk of non-payment.

1. 12 U.S.C. § 5221.
2. 12 U.S.C. § 1828(k)(1).
3. 12 C.F.R. § 303.101(c) ("troubled condition" includes any institution subject to a cease-and-desist order or written agreement which requires action to improve the financial condition of the bank or is subject to a proceeding which

contemplates the issuance of an order that requires action to improve the financial condition of the bank).

4. 12 C.F.R. § 359.1(f).
5. 12 C.F.R. § 359.1(f)(2).
6. *Von Rohr v. Reliance Bank*, No. 15-2392, 2016 WL 3407710, \*1 (8th Cir. June 21, 2016).
7. *Von Rohr v. Reliance Bank*, 2014 WL 2110031, \*2 (E.D. Mo. May 20, 2014).
8. Golden parachute restrictions may not apply if the termination is based on discrimination or other statutory claims. *Von Rohr v. Reliance Bank*, \*3 (8th Cir. June 21, 2016) (citing *Sterling Savings Bank v. Stanley*, 2012 WL 3643679 (E.D. Wa. Aug. 23, 2012)).
9. 12 C.F.R. § 303.244.
10. 12 C.F.R. § 359.4.
11. *Id.*



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