# Proposed Rules

Federal Register
Vol. 76, No. 26
Tuesday, February 8, 2011

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

### 9 CFR Parts 103, 112, and 114

**[Docket No. APHIS–2008–0008]**

**RIN 0579–AD19**

### Viruses, Serums, Toxins, and Analogous Products; Packaging and Labeling

*Correction*

In proposed rule document 2011–648 beginning on page 2268 in the issue of Thursday, January 13, 2011, make the following correction:

On page 2269, in the third column, in first full paragraph, 20 lines from the bottom, "8 EC" should read "8 °C".

[FR Doc. C1–2011–648 Filed 2–7–11; 8:45 am]

**BILLING CODE 1505–01–D**

## FEDERAL HOUSING FINANCE AGENCY

### 12 CFR Part 1228

**RIN 2590–AA41**

### Private Transfer Fees

**AGENCY:** Federal Housing Finance Agency.

**ACTION:** Notice of proposed rulemaking; request for comment.

**SUMMARY:** This proposed rule would restrict the regulated entities—the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, the "Enterprises"), and the Federal Home Loan Banks ("Banks")—from dealing in mortgages on properties encumbered by certain types of private transfer fee covenants and in certain related securities. Such covenants are adverse to the liquidity and stability of the housing finance market, and to financial safety and soundness. This proposed rule would except private transfer fees paid to homeowner associations, condominiums, cooperatives, and certain tax-exempt organizations that use the private transfer fees to provide a direct benefit to the owners of the encumbered real property. With limited exceptions, the rule would apply only prospectively to private transfer fee covenants created on or after the date of publication of the proposed rule.

**DATES:** Written comments must be received on or before April 11, 2011.

**ADDRESSES:** You may submit your comments, identified by regulatory identification number (RIN) 2590–AA41, by any of the following methods:

- *E-mail:* Comments to Alfred M. Pollard, General Counsel, may be sent by e-mail to *RegComments@fhfa.gov.* Please include "RIN 2590–AA41" in the subject line of the message.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by e-mail to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by FHFA. Please include "RIN 2590–AA41" in the subject line of the message.
- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA41, Federal Housing Finance Agency, 1700 G Street, NW., Washington, DC 20552.
- *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA41, Federal Housing Finance Agency, 1700 G Street, NW., Washington, DC 20552. The package should be logged at the Guard's Desk, First Floor, on business days between 9 a.m. to 5 p.m.

**FOR FURTHER INFORMATION CONTACT:** For issues regarding this proposed rule, contact Christopher T. Curtis, Senior Deputy General Counsel, (202) 414–8947, *christopher.curtis@fhfa.gov;* David Pearl, Executive Advisor, Office of the Deputy Director for Enterprise Regulation, (202–414–3821), *david.pearl@fhfa.gov;* Christina Muradian, Senior Financial Analyst, Office of Examinations Policy and Strategic Planning, (202–408–2584), *christina.muradian@fhfa.gov;* or Prasant Sar, Policy Analyst, Office of Policy Analysis & Research, (202–343–1327), *prasant.sar@fhfa.gov.* (None of these telephone numbers is a toll-free number); Federal Housing Finance Agency, 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

FHFA invites comment on all aspects of the proposed rule and will take all comments into consideration before issuing a final rule. Copies of all comments will be posted without change, including any personal information you provide, such as your name and address, on the FHFA Internet Web site at *http://www.fhfa.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, 1700 G Street, NW., Washington, DC 20552. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 414–6924.

## II. Background

*Establishment of FHFA*

FHFA is an independent agency of the Federal government and was established by the Housing and Economic Recovery Act of 2008 ("HERA"), Public Law 110–289, 122 Stat. 2654, to regulate and oversee the regulated entities.[1] HERA amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 *et seq.*) ("Safety and Soundness Act") and the Federal Home Loan Bank Act (12 U.S.C. 1421 through 1449) ("Bank Act") to enhance the authorities and responsibilities of the new agency. FHFA's regulatory mission is to ensure, among other things, that each of the regulated entities "operates in a safe and sound manner" and that their "operations and activities * * * foster liquid, efficient, competitive, and resilient national housing finance markets." (12 U.S.C. 4513(a)(1)(B))

## III. Discussion of the Federal Housing Finance Agency's Proposed Guidance

FHFA issued a proposed guidance on private transfer fees for comment on

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

August 16, 2010 (75 FR 49932) and requested public comments during a 60-day public comment period that ended on October 15, 2010. FHFA received several thousand comments on the proposed guidance and has decided to address the subject by regulation rather than through guidance.

FHFA's proposed guidance stated that the Enterprises should not purchase or invest in mortgages on properties encumbered by private transfer fee covenants or securities backed by such mortgages, as such investments would be unsafe and unsound and contrary to the public missions of the Enterprises and the Banks. Likewise, the proposed guidance stated that the Banks should not purchase or invest in such mortgages or securities or hold them as collateral for advances.

As described in the guidance, private transfer fee covenants may be attached to real property by the owner or another private party—frequently, the property developer—and provide for a transfer fee to be paid to an identified third party—such as the developer or its trustee—upon each resale of the property. The fee typically is stated as a fixed amount or as a percentage, such as one percent of the property's sales price, and often exists for a period of ninety-nine (99) years.

The proposed guidance noted that a number of States have either enacted, or are in the process of enacting, legislation to regulate private transfer fee covenants. In California, private transfer fee covenants are permitted, provided that they are properly recorded and contain certain disclosures.[2] Other States, such as Minnesota,[3] Delaware,[4] North Carolina[5] and Hawaii,[6] prohibit private transfer fee covenants that require payment to private third parties (*e.g.,* for-profit companies), but permit these covenants when the fees are paid to homeowners' associations, condominiums, cooperatives, and similar organizations that use the fees to directly benefit the properties encumbered by the covenants.

Legislation was introduced in the 111th U.S. Congress—H.R. 6260, "Homeowner Equity Protection Act of 2010" and H.R. 6332, "Homebuyer Enhanced Fee Disclosure Act of 2010"—to address the issue of private transfer fee covenants.

H.R. 6260 would have banned private transfer fees, with exceptions such as those payable to homeowners' associations. H.R. 6332 would have permitted them, subject to notice and recordation requirements.

In response to questions at congressional hearings, FHFA expressed concerns that private transfer fees may be used to fund purely private continuous streams of income for select market participants either directly or through securitized investment vehicles, and may not benefit homeowners or the properties involved.

FHFA also expressed concerns about the adequacy of disclosure of these private transfer fee covenants which, in turn, may impede the transferability of property and affect its overall marketability. This can impact the valuation and marketability of the encumbered property. Consumers may also be unaware that a fee applies even if the resale price of their home drops below the original purchase price.

## IV. Public Comments on the Proposed Guidance

### *A. Overview of Public Comments*

FHFA received over 4,210 comment letters from a broad spectrum of individuals and organizations, including the Community Associations Institute; American Land Title Association ("ALTA"); National Association of Realtors; Freehold Capital; American College of Real Estate Lawyers; Institute of Real Estate Management; Coalition to Stop Wall Street Home Resale Fees; Sierra Club; numerous State and regional real estate agent associations; real estate companies; numerous homeowners', cooperative, and condominium associations, and individuals living within such associations; community associations and other nonprofit organizations; conservation funds and land trusts and foundations; housing and conservation boards; State housing and community development agencies; State natural resources agencies; developers; builders; appraisers; accountants; title companies; several Banks; members of the U.S. House of Representatives; State Governors; law firms (writing on their own behalf and on behalf of their clients); and other individuals and organizations who wrote to express a wide range of views on private transfer fee covenants.

Comments generally fell into five categories: (1) Commenters advocating a complete ban on private transfer fees; (2) commenters advocating for private transfer fees for condominiums, cooperatives, and homeowners associations; (3) commenters advocating for private transfer fees for section 501(c)(3) or (c)(4) nonprofit associations that provide activities that directly benefit the encumbered property; (4) commenters advocating for private transfer fees for general welfare purposes, even if they do not directly benefit the encumbered property; and (5) commenters who supported the payment of such fees to for-profit entities and also supported the securitization and sale of transfer-fee income streams to investors.

### *B. Discussion of Public Comments*

#### 1. Private Transfer Fees Are Adverse to the Market and Homeowners

Commenters supporting a complete ban on private transfer fee covenants included many local real estate agent associations and private citizens. The real estate agent associations generally argued that the fees increase the cost of homeownership, generating revenue for developers or investors while providing no benefits to homebuyers over time.

Further, these commenters stated that there are few binding requirements for fee disclosures to homebuyers and to homeowners and that disclosure of fees at the time of closing adds undesirable complexity to real estate transactions. The commenters argued that the fees do not correlate with any tangible benefit received by the homebuyer and place an inappropriate burden on the transfer of property.

Several individuals submitted comment letters indicating private transfer fees were a "scam" against homeowners, robbing them of their equity. Many asserted that the U.S. Department of Housing and Urban Development's ("HUD's") General Counsel had opined that private transfer fees violate HUD's regulations that prohibit legal restrictions on conveyance and require lenders to convey clear and marketable title.[7]

The American Land Title Association (ALTA) raised concerns about private transfer fees, commenting that there is little uniform regulation over their use, with some States prohibiting their use, while others allow such fees with adequate notice and disclosure. ALTA also noted that courts and State legislatures generally do not favor restrictions on the ability of owners to

[2] Cal. Civ. Code §§ 1098 and 1098.5 (2010).

[3] Minn. Stat. §§ 513.73 to 513.76 (2010).

[4] Del. Code Ann. Tit. 25, § 319 (2010).

[5] N.C. Gen. Stat. §§ 39A–1 to 39A–3 (2010).

[6] H.B. 2288, 25th Leg., 1st Sess. (Haw. 2010).

[7] *See* Letter from Margaret E. Burns, Director, Office of Single Family Program Development, to Vicki Cox Golder, President, National Association of Realtors, April 14, 2010: "HUD agrees that this fee unnecessarily increases the cost of homeownership, and in most cases the homebuyer is unaware of its existence. Our General Counsel has confirmed that private transfer fees would clearly violate HUD's regulations at 24 CFR 203.41, which prohibit 'legal restrictions on conveyance,' defined to include limits on the amount of sales proceeds retainable by the seller."

sell real property. The association stated that private transfer fees could be viewed by courts and State legislatures as impairing the marketability and transferability of real property, and as an unreasonable restraint on alienation of property—regardless of the duration of the covenants or the amount of the transfer fees.

2. Private Transfer Fees for Homeowners' Associations, Condominiums, Cooperatives and Similar Associations Should Be Permitted

Many homeowners' associations, condominiums, and cooperatives with properties subject to private transfer fee covenants commented that the final guidance should be crafted to allow private transfer fees to these associations.

These commenters maintained that private transfer fees fund the capital reserves of their buildings or communities and help to fund critical and necessary capital improvements, upgrades and major repairs. They noted that these improvements increase property values, result in lower regular association dues and create more desirable communities. The commenters asserted that restrictions on these private transfer fees would affect the overall affordability of units by causing owners to raise building reserves through special assessments, through higher monthly fees or by a reduction in services, or by a combination of the alternatives.

Several of the Federal Home Loan Banks commenting agreed that private transfer fee covenants can serve a beneficial purpose when those fees are used for capital improvements and repairs. Several of these commenters stated that buildings that have incorporated a private transfer fee will benefit significantly over those that rely on maintenance from tenant shareholders or rental from commercial units. They also asserted that private transfer fees provide a stable reserve fund by insulating owners from large and immediate costs associated with longer term repair projects.

Other commenters argued that homeowner association private transfer fees are fully disclosed and are at most two or three months of dues or a flat fee from as low as $500.

3. Private Transfer Fees for Section 501(c)(3) and (c)(4) Nonprofits Should Be Permitted

Many commenters proposed that FHFA except from the final guidance transfer fees paid to nonprofit corporations with tax-exempt status under Internal Revenue Code ("Code") sections 501(c)(3), 501(c)(4) or 528 where the fees are targeted to social welfare purposes, environmental purposes, civic betterment and social improvements or to "sustain the real estate infrastructure."[8] These commenters asserted that certain not-for-profit organizations play important roles by supporting the creation and maintenance of community enhancements such as open space, environmental conservation and preservation, affordable housing and transit improvements. Several individuals, associations and nonprofit organizations described their own experiences with private transfer fees and how these fees have provided them with both direct and indirect benefits by improving their communities and their quality-of-life.

For example, one nonprofit organization stated that the private transfer fees it collects are disclosed on the good-faith estimate and argued that the fees support "land preservation, agriculture, energy efficiency, green building, walkability, high density building, arts and culture, and community living" for the residents of the community with which the organization is associated.

A number of commenters urged FHFA to except from the final guidance government agencies and other government entities that partner with nonprofits and collect private transfer fees to grow and maintain the affordable housing stock. Other commenters not only shared these views, but also supported the use of private transfer fees in city and State redevelopment efforts, arguing that these efforts were adversely affected by the economic downturn and the resulting reductions in Federal, State and municipal funding.

Some commenters argued that private transfer fees should be allowed for 501(c)(3) nonprofits that collect the fees and then acquire open-space land in the immediate area of a project. Other commenters extended this argument to environmental mitigation, the preservation of sustainable building programs, the protection of wildlife habitats, and the funding for workforce housing programs. These commenters uniformly argued that private transfer fees in this context were a community benefit.[9]

Some commenters supported uses for private transfer fees that fund community organizations such as cultural centers or parks and community centers. These commenters argued that private transfer fee arrangements are sometimes created when developers build community centers and then transfer ownership of the center to a 501(c)(3) organization that uses the private transfer fees to fund its mission by providing and maintaining community services to the homeowner and community. They maintained that these practices make the homeowner's home more valuable because of the services.

4. All Private Transfer Fees, Including the Securitization of the Transfer Fees, Should Be Permitted

A number of commenters, including some developers and builders, opposed FHFA's proposed guidance on private transfer fee covenants. These commenters contended that private transfer fees confer the same benefits, and raise the same objections, whether viewed in the context of homeowner associations, apartment cooperatives, nonprofit entities or private for-profit groups.

In addition, these commenters advocated for private transfer fees benefitting developers and related parties. One promoter referred to this type of private transfer fee as "capital recovery fees," implying that the fees recover part of the developer's investment in a given project—an amount in addition to the sales price of the houses in the development.

Proponents of developer transfer fees argued that they lower the cost of construction and development. Under this model, a security would be created, backed by the future stream of transfer-fee payments by future buyers of a house. The value of the security, which would only be realized by the developer at the time of its original investment if the security were sold, is argued to offset up-front infrastructure costs, which would otherwise be captured in initial house sale prices.

In this manner, proponents claim private transfer fees spread development costs over all those who benefit; that is, for the next 99 years, subsequent purchasers of the developers' homes

[8] Section 501(c)(3) of the Code provides tax exemption for charitable organizations. Section 501(c)(4) of the Code provides tax exemption for civic leagues, social welfare organizations, and homeowners' associations, among others. Section 528 of the Code provides tax exemption for certain homeowner associations.

[9] Several commenters said that private transfer fees improve the lifestyle of residents, and the surrounding community, by funding yard sales, potluck dinners, concerts, baseball games located at a stadium five miles away from the development and by promoting land conservation and wildlife habitats.

would absorb these costs by paying transfer fees to the developer or any other holder of the related security. On the premise that the present value of the transfer-fee revenue stream supplements the sale price of the developer's new houses, proponents claim that private transfer fees can reduce the developer's negative equity in some developments which have suffered declines in value, thereby assisting in restarting failed development projects and creating jobs.

In response to FHFA's expressed concerns about lack of transparency of private transfer fee covenants, transfer-fee advocates indicate that they support State legislative and regulatory efforts, and private initiatives, to ensure disclosure that is meaningful to future home buyers.

5. Level of Fees

In the proposed guidance, FHFA expressed concern that the typical private transfer fee of one percent was neither minimal nor reasonable, and that the fees were likely not related to the value rendered by the property owner or community. Further, there is an issue of whether the fees are limited to one percent or may be raised by individual developers or securitization firms. In response to this concern, FHFA received a few comments stating that the marketplace does not consider the proportion of the fee relative to the purpose for which it is collected and, therefore, FHFA should not consider the level of the fee. Some commenters also argued that asking the regulated entities to ensure fees were proportional with rendered value would increase costs, including accounting and legal costs.

6. Compliance

Each of the nine Banks that submitted comment letters expressed concern about their ability to comply with the final guidance, which would ask them to ensure that mortgage loans on properties with private transfer fees, and securities backed by such mortgage loans, are not purchased or accepted as collateral. The Banks expressed concerns about their ability to access underlying loan documentation, especially in cases in which they take a blanket lien on member assets, and about the availability of information on the presence of private transfer fee covenants.

Some of the Banks suggested that they could inform their members that such loans may not be pledged as collateral, require enhanced member certifications, and conduct reasonable assessments of loans during on-site reviews.

7. Prospective Application

Several commenters raised concerns about retroactively applying the final guidance to previously originated loans because, they argued, attempts to discover the presence of private transfer fee covenants would pose significant operational challenges. These commenters argued that compliance under most circumstances would be, at best, difficult and, at worst, impossible, because of the added operational complexity it would require on real estate title searches.

Some commenters objected that a retroactive application of the final guidance would effectively render current loans with private transfer fees unmarketable, which would affect both current owners and prospective homebuyers. These commenters argued that retroactivity of the final guidance would impose economic hardship to consumers who should not be subject to rules of which they were unaware at the time of their original purchase.

Similarly, another commenter argued that the final guidance would effectively prohibit sellers from selling their homes, because lending institutions would not finance such purchases for fear these loans would be ineligible for secondary market execution.

Other commenters recommended that the final guidance be applied prospectively, with an effective date of 120 days from the date of issuance. They argued that market participants would require some time to make any necessary operational changes. One Bank requested that members be allowed to pledge loans as collateral if those loans were already acquired by its members prior to the issuance of the final guidance. Another Bank proposed that member institutions be allowed to provide an indemnification to the Bank for a breach, thus avoiding a put-back of the asset.

Another Bank commented that, since the Enterprises could be expected to comply with the final guidance prospectively, Enterprise mortgage-backed securities ("MBS") should be exempt from any investment or collateral prohibitions contained in the final guidance.

*C. FHFA Response to Public Comments in the Proposed Rule*

After reviewing comments on the proposed guidance, FHFA has decided to publish a proposed rule for comment, with a number of changes to the substance of the former proposed guidance. While FHFA's proposed guidance advised the Enterprises and the Banks not to purchase, or accept as collateral for advances mortgages on property subject to *any* private transfer fee covenants, FHFA has determined to propose a rule with a narrower focus. FHFA's responses to the comments it received, and the changes included in this proposed rule, are described below. In summary, the principal differences between the proposed guidance and the proposed rule are:

- FHFA proposes to except from the rule private transfer fees that are paid to homeowners' associations and similar associations, and to tax-exempt non-profit organizations, where the fees are used for the direct benefit of the encumbered properties.
- FHFA proposes to make the rule prospective in effect, so that it applies to private transfer fee covenants created after the publication date of this proposed rule.
- FHFA allows an implementation period of 120 days for the regulated entities. The regulated entities may use reasonable means to achieve compliance with this rule.

1. Definitions

FHFA is including a number of definitions in the proposed rule to clarify terms, and to identify the scope of the proposed rule's coverage. These definitions include, among others: "adjacent or contiguous property"; "covered association"; "direct benefit"; and "private transfer fee covenant." FHFA requests comment on the content of these definitions, because of the role they play in establishing the scope of the rule's restrictions. For example, the rule would permit the regulated entities to do business in encumbered mortgages when the private transfer fees are paid to a "covered association" and provide a "direct benefit" to the encumbered properties; definitions, therefore, are of significance to market participants. In sum, "covered associations" are defined as homeowners' and similar associations, and tax-exempt non-profit organizations; "direct benefit" is generally defined to include maintenance, improvements, and amenities benefiting the encumbered properties or adjacent properties.

2. Private Transfer Fees Generally

In considering the scope of this proposed rule, FHFA took into account the many public comments received on the August 16, 2010 proposed guidance. One set of commenters stated: "Consumers are essentially forced to pay for the right to sell their property." If the fee is not paid, it results in a lien on the property impairing its marketability. This implicates the public policy against restraints on alienation as well

as the mission of government-sponsored enterprises to foster "liquid, efficient, competitive, and resilient national housing markets." [10]

Because it is difficult to value the burden of a private transfer fee, it is also difficult to value the property that it encumbers and hence the value of that property as collateral for the mortgage loans that the Banks accept as collateral, and that the regulated entities buy, or that back the mortgage-backed securities that the Enterprises guarantee. This is a safety and soundness concern, and is a substantial motivation for FHFA to take action in the form of this rulemaking. In FHFA's view, the purposes for which private transfer fees are imposed are unrelated to the transfer of the property. The transfer is simply an opportunity for the beneficiary of the fee to collect it, imposing a "toll gate" that must be passed before the transfer may occur. While the purposes asserted for these fees—construction of community improvements, upkeep of community amenities, *etc.*—are more logically built into the purchase price of the house (in the case of initial construction) or regularly recurring fees (in the case of upkeep) and using the property transfer as the vehicle for collecting the fee may constitute a restraint on alienation, nevertheless, FHFA believes that certain fees may benefit properties. Fees enhancing the value of collateral backing loans would not be inconsistent with safety and soundness goals.

3. Transfer Fees Paid to Homeowners' Associations and Similar Organizations

FHFA proposes to exclude homeowners' and other similar organizations from the proposed rule in certain instances. First, FHFA acknowledges comments received on the proposed guidance from homeowner associations and their members, as well as from residents of New York co-operatives who feared that the "flip taxes" on their stock interests—analogous to transfer fees on typical real-estate transactions—would be adversely affected. These comments, mostly favorable though not unanimously so, and the longstanding existence and ubiquity of the transfer fees described, suggest that these fees are expected by and are familiar to many homeowner association members and are well understood in banking and mortgage markets.

Private transfer fees assessed by homeowners' and other covered organizations may be viewed as a means by which members of the organizations avoid paying the costs of their amenities out of current income, instead paying those costs out of the equity in their houses when they sell. While owners will then have less sales proceeds with which to buy their next house or to use for other purposes, this has been an accepted means of paying for the maintenance, infrastructure and amenities at these associations.

Further, transfer fees paid to associations contribute to the value of the burdened property through the amenities and maintenance that they fund, and hence do not pose the same valuation risk as do fees that fund other activities that do not provide a direct benefit to the burdened property.

Also FHFA is excepting from the proposed rule private transfer fees that are paid to nonprofit organizations that are tax-exempt under section 501(c)(3) or (c)(4) of the Code and provide direct benefits to the encumbered property. Private transfer fees paid to such nonprofits are comparable to those paid to a homeowners' association and should be similarly excepted from the proposed rule.

Accordingly, FHFA is excepting from the restrictions of the proposed rule private transfer fees paid to homeowners', condominium, cooperative and similar associations, and to certain tax-exempt organizations under section 501(c)(3) or (c)(4).

4. Private Transfer Fees Paid to Non-profit Organizations That Do Not Provide a Direct Benefit to the Encumbered Property

Some commenters described payments to non-profit organizations whose relation to the burdened properties was difficult to characterize, *e.g.,* to grow and maintain the affordable housing stock, to support city and State redevelopment efforts or for environmental preservation.

These private transfer fees do not appear to provide exclusive support of cultural, educational, recreational, maintenance or environmental activities providing a "direct benefit" for the encumbered real property. Although the activities themselves may be meritorious, it appears that these private transfer fees provide a benefit to the general community rather than specifically to the community that is burdened by the private transfer fee covenants, and hence are not dedicated to enhancing the value of the residential housing collateral that is central to the underwriting of mortgage loans purchased and accepted by the regulated entities. Because these fees pose the valuation and other issues related to private transfer fees, without providing benefits that are directly focused on the burdened properties, FHFA declines to except them from the restrictions of the proposed rule.

Traditional real-estate law requires that, to be binding, a covenant running with the land must benefit the land that it burdens. Whether these more general charitable uses meet that test is an open question, which casts doubt on the validity of the covenants and hence creates a possible source of challenge in sales transactions. This is only one reason FHFA regards such private transfer fees, as well as those paid to developers and to unrelated parties, discussed below, as creating a safety and soundness risk for FHFA-regulated entities.[11]

5. Developers, Builders, and Related Parties

Private transfer fees paid to developers or other third parties also would be subject to the restrictions described in this proposed rule. Though asserted to be collected for the purpose of funding infrastructure investments, there is no assurance that they actually are. They are simply another source of return to the developer: a way for a developer to extract additional value from its real estate portfolio. There is no relationship between the transfer fee and the actual costs of the developer.

Proponents of private transfer fees payable to developers and their related parties commented that the fees would enable developers to proceed with developments that would otherwise be uneconomical. No evidence has been presented that this would be the case. The argument appears to depend on the proposition that the future income stream from the fee covenants could be securitized and the securities sold to realize immediate revenue for the developer. To FHFA's knowledge, no such securities have ever been issued, so FHFA regards the argument as speculative.

Further, the argument appears to be based on the assumption that the sales

[10] Safety and Soundness Act section 1313(a)(1)(B)(ii).

[11] Several States have passed laws to restrict the use of private transfer fees, often permitting the use of such fees only where they are used for the benefit of the encumbered property. *See* Ariz. Rev. Stat. § 33–442 (Arizona); Cal. Civ. Code § 1098.5 (California); Del. Code tit. 25, § 319 (Delaware); Fla. Stat. Ann. § 689.28 (Florida); Haw. Rev. Stat. § 501(Hawaii); 765 I.L.C.S. 155/10 (Illinois); Iowa Code § 558.48 (Iowa); Kan. Stat. Ann. § 58–3822 (Kansas); La. Rev. Stat. Ann. § 9:3131 to 3136 (Louisiana)); Md. Code, Real Prop. Law § 10–708 (Maryland); Minn. Stat. § 513.73 (Minnesota); Gen. Laws Miss. 2010 Ch. 348 (Mississippi); Mo. Rev. Stat. § 442.558 (Missouri); N.J. Stat. Ann. 46:3–28 to 46:3–33 (New Jersey); N.C. Gen. Stat. § 39A (North Carolina); Ohio Rev. Code Ann. § 5301.057 (Ohio); 2009 Oregon Laws Ch. 298 (Oregon), Texas Prop. Code Ann. § 5.017(b) (Texas); Utah Code § 57–1–46 (Utah).

prices of the encumbered properties, when sold by the developer, would be discounted by less than the value of the transfer-fee-backed securities that would be sold. No evidence has been presented that this would be the case. There has been no demonstration of how purchasers should calculate the discount from the purchase price that would be necessary to offset the effect of the covenant, or that if the purchasers did make such a calculation accurately that there would be any remaining benefit to the developer from this scheme.

FHFA invites comment on these issues.

6. Compliance

FHFA found persuasive the Banks' comments regarding the challenges in identifying mortgages on properties with private transfer fee covenants and securities backed by such mortgage loans. The issues of inconsistent disclosure, and access to loan files for individual loans covered by a blanket lien or for loans underlying securities, have merit.

Acceptable compliance with the final rule may be achieved through the Banks' quality control review process or through the Banks' collateral review process, coupled with appropriate direction to their members, as well as robust representations, warranties, or certifications. The Enterprises would be expected to use similar compliance tools such as appropriate provisions in seller-servicer guides, representations and warranties, and quality-control processes.

FHFA does not expect that the Banks must use such compliance tools with respect to Enterprise securities. Enterprise securities issued prospectively—should comply with the provisions of the final rule.

7. Prospective Application

To avoid market uncertainties such as those suggested in the comment letters, the final rule will apply only to transfer fees created after the date of publication of the proposed rule, and to securities issued after that date backed by revenue from private transfer fees regardless of when the covenants were created. Regulated entities are required to comply with the final rule within 120 days after its publication.

8. Level of Fees

While FHFA expressed concern in the proposed guidance regarding the level of private transfer fees, no specific request to consider or evaluate the proportion of the private transfer fee relative to its purpose was included in the proposed guidance. This proposed rule remains consistent with the proposed guidance on that point. FHFA is not requesting that the regulated entities consider or evaluate the level of private transfer fees. Comments received on this issue during the public comment period reinforced FHFA's concern about the relation between the fees and the value provided to the homeowners. This, in turn, reinforced FHFA's decision to issue the proposed rule to cover all private transfer fees other than those paid to homeowners' and similar associations, and to tax-exempt nonprofits under sections 501(c)(3) or (c)(4) of the Code, that provide a direct benefit to the encumbered property. Comments on the appropriate level of fees are welcome, but FHFA has not addressed that subject at this time.

9. State Laws

As noted above, a number of States have enacted legislation restricting or otherwise regulating private transfer fees. FHFA has included a section in the proposed rule to clarify that the rule does not affect such legislation.

## V. Paperwork Reduction Act

The proposed rule does not contain any collections of information pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Therefore, FHFA has not submitted any information to the Office of Management and Budget for review.

## VI. Regulatory Flexibility Act

The proposed rule applies only to the regulated entities, which do not come within the meaning of small entities as defined in the Regulatory Flexibility Act (*See* 5 U.S.C. 601(6)). Therefore, in accordance with section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 605(b)), FHFA certifies that this proposed rule, if promulgated as a final rule, will not have a significant economic impact on a substantial number of small entities.

## List of Subjects in 12 CFR Part 1228

Asset-backed securities, Builders, Condominium associations, Cooperative associations, Developers, Federal Home Loan Banks, Government-sponsored enterprises, Homeowners' associations, Housing, Mortgages, Mortgage-backed securities, Nonprofit organizations, Private transfer fees.

## Authority and Issuance

For the reasons stated in the preamble, and under the authority of 12 U.S.C. 4526, the Federal Housing Finance Agency proposes to amend Chapter XII of Title 12 of the Code of Federal Regulations by adding a new part 1228 to subchapter B to read as follows:

# PART 1228—RESTRICTIONS ON THE ACQUISITION OF, OR TAKING SECURITY INTERESTS IN, MORTGAGES ON PROPERTIES ENCUMBERED BY CERTAIN PRIVATE TRANSFER FEE COVENANTS AND RELATED SECURITIES

Sec.
1228.1 Definitions.
1228.2 Restrictions.
1228.3 Prospective application and effective date.
1228.4 State restrictions unaffected.

**Authority:** 12 U.S.C. 4513(a)(1)(B) and 12 U.S.C. 4526(a).

### § 1228.1 Definitions.

As used in this part,

*Adjacent or contiguous property* means property that borders or lies in close proximity to the property that is encumbered by a private transfer fee covenant or to other similarly encumbered properties located in the same community and owned by members of the same covered association, *provided* that in no event shall a property greater than one thousand (1000) yards from the encumbered property be considered adjacent or contiguous.

*Covered association* means a nonprofit, mandatory membership organization comprising owners of homes, condominiums, cooperatives, manufactured homes or any interest in real property, created pursuant to a declaration, covenant or other applicable law, or an organization described in section 501(c)(3) or (c)(4) of the Internal Revenue Code.

*Direct benefit* means that the proceeds of a private transfer fee are used exclusively to support maintenance and improvements to encumbered properties as well as cultural, educational, charitable, recreational, environmental, conservation or other similar activities that benefit exclusively the real property encumbered by the private transfer fee covenants. Such benefit must flow to the encumbered property or the community comprising the encumbered properties and their common areas or to adjacent or contiguous property. A private transfer fee covenant will be deemed to provide a *direct benefit* when members of the general public may use the facilities funded by the transfer fees in the burdened community and adjacent or contiguous property only upon payment of a fee, except that *de minimis* usage may be provided free of charge for use by a charitable or other not-for-profit group.

*Enterprises* means, collectively, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation.

*Excepted transfer fee covenant* means a covenant to pay a private transfer fee to a covered association that is used exclusively for the direct benefit of the real property encumbered by the private transfer fee covenants.

*Federal Home Loan Banks* or *Banks* mean the Federal Home Loan Banks established under section 12 of the Federal Home Loan Bank Act (12 U.S.C. 1432).

*Private transfer fee* means a transfer fee, including a charge or payment, imposed by a covenant, restriction or other similar document and required to be paid in connection with or as a result of a transfer of title to real estate. A private transfer fee excludes fees, charges, or payments, or other obligations—

(1) Imposed by a court judgment, order or decree;

(2) Imposed by or are payable to the Federal government or a State or local government;

(3) Arising out of a mechanic's lien; or

(4) Arising from an option to purchase or for waiver of the right to purchase the encumbered real property.

*Private transfer fee covenant* means a covenant that—

(1) Purports to run with the land or to bind current owners of, and successors in title to, such real property; and

(2) Obligates a transferee or transferor of all or part of the property to pay a private transfer fee upon transfer of an interest in all or part of the property, or in consideration for permitting such transfer.

*Regulated entities* means the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal Home Loan Banks.

*Transfer* means with respect to real property, the sale, gift, grant, conveyance, assignment, inheritance or other transfer of an interest in the real property.

**§ 1228.2 Restrictions.**

The regulated entities shall not purchase or invest in any mortgages on properties encumbered by private transfer fee covenants, securities backed by such mortgages or securities backed by the income stream from such covenants, unless such covenants are excepted transfer fee covenants. The Banks shall not accept such mortgages or securities as collateral, unless such covenants are excepted transfer fee covenants.

**§ 1228.3 Prospective application and effective date.**

This part shall apply only to mortgages on properties encumbered by private transfer fee covenants created on or after *February 8, 2011,* and to securities backed by such mortgages, and to securities issued after that date backed by revenue from private transfer fees regardless of when the covenants were created. The regulated entities shall comply with this part not later than 120 days following the date of publication of the final rule in the **Federal Register**.

**§ 1228.4 State restrictions unaffected.**

This part does not affect State restrictions or requirements with respect to private transfer fee covenants, such as with respect to disclosures or duration.

Dated: January 28, 2011.

**Edward J. DeMarco,**

*Acting Director, Federal Housing Finance Agency.*

[FR Doc. 2011–2565 Filed 2–7–11; 8:45 am]

BILLING CODE 8070–01–P

## COMMODITY FUTURES TRADING COMMISSION

## 17 CFR Part 23

**RIN 3038–AC96**

## Orderly Liquidation Termination Provision in Swap Trading Relationship Documentation for Swap Dealers and Major Swap Participants

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (Commission or CFTC) is proposing regulations to implement new statutory provisions established under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Section 731 of the Dodd-Frank Act added a new section 4s(i) to the Commodity Exchange Act (CEA), which requires the Commission to prescribe standards for swap dealers and major swap participants related to the timely and accurate confirmation, processing, netting, documentation, and valuation of swaps. The proposed rule would set forth parameters for the inclusion of an orderly liquidation termination provision in the swap trading relationship documentation for swap dealers and major swap participants.

**DATES:** Submit comments on or before April 11, 2011.

**ADDRESSES:** You may submit comments, identified by RIN number 3038–AC96 and Orderly Liquidation Termination Provision in Swap Trading Relationship Documentation for Swap Dealers and Major Swap Participants, by any of the following methods:

- Agency Web site, via its Comments Online process at *http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established procedures in § 145.9 of the Commission's regulations, 17 CFR 145.9.

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

**FOR FURTHER INFORMATION CONTACT:** Sarah E. Josephson, Associate Director, 202–418–5684, *sjosephson@cftc.gov;* Frank N. Fisanich, Special Counsel, 202–418–5949, *ffisanich@cftc.gov;* or Jocelyn Partridge, Special Counsel, 202–418–5926, *jpartridge@cftc.gov;* Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

**SUPPLEMENTARY INFORMATION:**