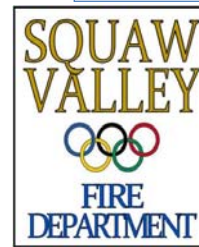




SQUAW VALLEY PUBLIC SERVICE DISTRICT



Palisades at Squaw Valley Project Amendment #1 to Water and Sewer Service Agreement

DATE: December 19, 2017

TO: District Board Members

FROM: Mike Geary, General Manager

SUBJECT: *Palisades at Squaw Valley* Project Water and Sewer Service Agreement
Amendment – withdraw provisions requiring Community Benefit Fees be paid
upon Transfers of Ownership of Lots.

BACKGROUND: The Board approved Resolution 2017-07 authorizing execution of the Water and Sewer Service Agreement for the *Palisades at Squaw Valley* Project on May 30, 2017. Section 3.4 of the Agreement requires the developer record covenants that impose a fee equal to 0.5% of the cost of the property for the purposes of funding Community Benefits that could include improving the environment, cultural, educational and recreational benefits in Olympic Valley. It reads:

3.4 Community Benefit Fee. Developer covenants and agrees that it shall record a Community Benefit Fee in favor of the Truckee Tahoe Community Foundation or other local nonprofit entity. The Community Benefit Fee covenant shall impose a one half percent (0.5%) fee on the gross sales price of a home located on lots one through eight (1-8) and thirty nine through sixty three (39-63) that is sold or transferred in the Project including upon subsequent transfers, sales, or exchanges thereof, and excluding initial transfers, sales, or exchanges in perpetuity. The Community Benefit Fee shall be in compliance with applicable state and federal law, including 12 Code of Federal Regulations §1228 et seq, as now in effect or hereafter modified or amended and shall provide that the funds generated shall be used for the purpose of improving the environment, cultural, educational and recreational benefits in Olympic Valley. The Community Benefit Fee will provide that the funds may be used for restoration of Squaw Creek, maintenance and enhancement of the Squaw Valley Aquifer and Watershed, including for District's ongoing Aquifer Monitoring Program or related activities in support of the

measurement, management and preservation of the Squaw Valley Aquifer which serves the Project or studies related thereto. Said environmental, recreational, cultural, or educational benefits shall be determined at the discretion of the Recipient of the Benefit Fee.

See the attached Board Report for additional information on the project and the Water and Sewer Service Agreement approved in May 2017.

DISCUSSION: Following are excerpts of an explanation of the challenges associated with recording covenants on the parcels in the *Palisades at Squaw* Project which were provided by the developer's attorney, experienced in this specialty of law:

Federal Regulations require a demonstrable direct benefit to the payer of the fee. Here is how the final Federal Regulations define "direct benefit":

Direct benefit means that the proceeds of a private transfer fee are used exclusively to support maintenance and improvements to encumbered properties, and acquisition, improvement, administration, and maintenance of property owned by the covered association of which the owners of the burdened property are members and used primarily for their benefit.

Direct benefit also includes cultural, educational, charitable, recreational, environmental, conservation or other similar activities that—

(1) Are conducted in or protect the burdened community or adjacent or contiguous property, or

*(2) Are conducted **on other property that is used primarily by residents of the burdened community.***

Also attached is the entire Final Decision document which is printed at the end of the rather lengthy explanation. The explanation is helpful because the regulators go to great pains to show that they considered all the comments that they received during the regulatory process.

From my perspective, as legal counsel to a developer, it is irresponsible to become the facilitator for drafting and recording a binding covenant, obligating future lot and home buyers, to pay fees that may not be legal just because well-intentioned nonprofit groups in and around Squaw Valley want another source of revenue for their projects and charitable endeavors. The folks who desire Palisades to record a covenant should find a lawyer who is willing to issue a legal opinion to the effect that the

covenant is a valid and a binding legal obligation, enforceable in accordance with its terms.

If the covenant is challenged, it may not be enforceable and that leaves the developer open to litigation with future owners who challenge the covenant. In discussions regarding Community Benefit Fees in Squaw Valley, there is a lot of dancing around about having a very general and non-specific fee recorded in the chain of title and letting all the difficult problems sift themselves out later.

California is stuck between a rock and a hard place because the California laws (Civil Code sections 4575 through 4580) prohibit property owner associations from being the recipients of transfer fees and yet the Federal rules are exactly the opposite --- wanting the community that is paying the fee to have the direct benefit from those payments.

As noted above, there may also be risk for the recipient of the funds associated with the approach of “letting all the difficult problems sift themselves out later”.

There has been some discussion about the Squaw Valley PSD being the recipient of the funds. The collection, administration, and disbursement of Community Benefit Fees as intended and envisioned may be outside of the statutory authorities provided to the District; formed as a County Water District under Sections 30322 and 30323 of the California Water Code.

ALTERNATIVES: 1. Approve, and authorize the Board President to execute, Amendment #1 to Water and Sewer Service Agreement for the Palisades at Squaw Valley Project, removing Section 3.4, deleting the requirement to impose Community Benefit Fees be paid upon transfer of ownership of parcels within the new subdivision, and including any modifications to the attached draft version that are approved by District counsel.

2. Do not amend the Agreement.

FISCAL/RESOURCE IMPACTS: There are no fiscal impacts to the District. The District could potentially have been a recipient of funds from the Community Benefit Fees for a myriad of projects and programs, such as aquifer / groundwater management. The intent of this development agreement provision is well-intended. It is unfortunate that for this project it is unfeasible within the parameters of federal guidelines.

RECOMMENDATION: Alternative #1 above.

- ATTACHMENTS:**
- DRAFT Version of the First Amendment to the Water and Sewer Service Agreement for *The Palisades at Squaw*.
 - Board Report dated May 30, 2017 – *The Palisades at Squaw – Water and Sewer Service Agreement*.
 - Federal Housing Financing Agency - Federal Register Document Describing the New Real Estate Transfer Fee Rules - Private Transfer Fees - A Rule by the Federal Housing Finance Agency on 03/16/2012

DATE PREPARED: December 18, 2017.

**FIRST AMENDMENT TO THE
WATER AND SEWER SERVICE AGREEMENT**

The Palisades Development, LLC, a California limited liability company and Squaw Valley Public Service District, a public entity (collectively, the “Parties”) executed the Water and Sewer Service Agreement dated May 31, 2017 (“Agreement”).

WHEREAS, the Parties did reserve the right to amend from time to time such Agreement in whole or in part.

WHEREAS, the Parties wish to amend Section 3.4 Community Benefit Fee.

NOW THEREFORE, pursuant to the provisions of Section 18.8 Amendment of the Agreement and by signature below, the Parties do hereby amend the Agreement as follows:

1. Section 3.4 Community Benefit Fee of the Agreement is deleted in its entirety.
2. Miscellaneous. This First Amendment to the Agreement modifies the Agreement and shall control in the event of any inconsistencies. In all other respects, the Agreement shall remain in full force and effect and shall be incorporated herein by reference. All terms not defined herein shall have the definitions set forth in the Agreement. This First Amendment may be executed in counterparts, which taken together, shall constitute one amendment. Each person executing this First Amendment warrants that he/she has the authority to execute this First Amendment from the party on whose behalf said person is purporting to execute it.

IN WITNESS WHEREOF, the Parties executed this First Amendment on the date referenced below and by their signatures, understand and agree to be bound by any and all terms within the Agreement.

Dated: December 19, 2017

Squaw Valley Public Service District, a public
entity

By: _____

Dated: December 19, 2017

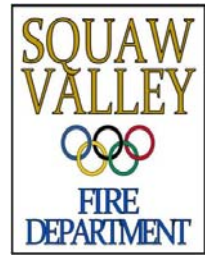
The Palisades Development, LLC, a California
limited liability company

By: _____



SQUAW VALLEY PUBLIC SERVICE DISTRICT

EXHIBIT # F-10
35 pages



The Palisades at Squaw – Water and Sewer Service Agreement

DATE: May 30, 2017
TO: District Board Members
FROM: Dave Hunt, District Engineer
SUBJECT: The Palisades at Squaw - Approval of Resolution 2017-07 authorizing execution of Water and Sewer Service Agreement

BACKGROUND: The Palisades at Squaw (Palisades) consists of a 19.9 acre residential development that includes 63 residential units, lots for open space, parkland and a recreational trail system, and associated roadways and infrastructure. The residential lots will consist of 33 single family residential lots and 30 lots for duplex units. The project is located off of Creeks End Court and Squaw Valley Road.

Placer County adopted a Final Environmental Impact Report on March 21, 2017, and issued a Conditional Use Permit (PLN15-00143). The developer has received Vesting Tentative Map approval from the County for the development.

The developer submitted Improvement Plans prepared by Auerbach Engineering Corporation for water and sewer system improvements, and the District has subsequently reviewed and approved these plans. Construction of the improvements is scheduled to begin in June 2017 and be completed by November 2017.

DISCUSSION: The District has negotiated a Water and Sewer Service Agreement (Agreement) with the developer pursuant to Chapter 1, Division V of the District Water Code and Chapter 4 of the Administrative Code. The Agreement sets forth various rights and responsibilities of both the District and developer related to the District's provision of water and sewer service to the project. Specific conditions of the Agreement include, but are not limited to:

- Community Benefit Fee – Developer has agreed to impose a Community Benefit Fee of one half percent (0.5%) on the gross sales price of a home on all single family residential lots (Lots 1-8 and 39-63) upon transfers, sales, exchanges, excluding initial transfers, sales, or exchanges in perpetuity. The Community Benefit Fee will generate funds that may be used for restoration of Squaw Creek, maintenance and enhancement of the Olympic Valley Aquifer and Watershed, including for the District's ongoing Aquifer Monitoring Program or related activities in support of the measurement,

management and preservation of the Olympic Valley Aquifer, which serves the development.

- Developer has prepared, and the District has reviewed and approved, plans and specifications for the construction of on-site and off-site water and sewer improvements necessary to serve the project. The District will provide construction observation of all water and sewer installations during construction and the developer will reimburse the District for the costs associated with construction management and inspection.
- Developer has agreed to pay the sum of \$50,000 to the District for the purpose of District's installation of a pressure reducing station as contribution to the District's Pressure Zone 1A Improvement Project. The developers' contribution will be paid in three equal installments beginning on June 30, 2018.
- Developer has agreed to grade and improve the existing 30-foot wide emergency vehicle access (EVA) roadway within an existing easement near its intersection with Creeks End Court to Highway 89 in order to provide a secondary means of fire and EMS access for the project. This also includes installation of a new gate at the Highway 89 entrance.
- Upon completion of the improvements, the developer will execute and deliver to the District dedications transferring the improvements and all easements necessary for the construction, maintenance, repair, and replacement of the dedicated water and sewer improvements. The dedication will include a 2-year warranty on the improvements in the form of a Performance, Payment and Maintenance Surety Bond.

ALTERNATIVES: 1. Approve Resolution 2017-07 authorizing execution of the Water and Sewer Service Agreement for The Palisades at Squaw development.
2. Do not approve Resolution 2017-07.

FISCAL/RESOURCE IMPACTS: There are no costs to the District for approving Resolution 2017-07 and executing the Water and Sewer Service Agreement. Expenses are reimbursed by the developer pursuant to the Water and Sewer Service Agreement.

RECOMMENDATIONS: Staff recommends approval of Resolution 2017-07 authorizing execution of the Water and Sewer Service Agreement for The Palisades at Squaw development.

ATTACHMENTS:

- Water and Sewer Service Agreement
- Resolution 2017-07
- Memorandum of Agreement

DATE PREPARED: May 22, 2017

FEDERAL HOUSING FINANCING AGENCY
FEDERAL REGISTER DOCUMENT DESCRIBING THE NEW REAL
ESTATE

TRANSFER FEE RULES

Private Transfer Fees

A Rule by the Federal Housing Finance Agency on 03/16/2012

Publication Date:

03/16/2012

Agency:

Federal Housing Finance Agency

Dates:

This final rule is effective July 16, 2012.

Effective Date:

07/16/2012

Document Type:

Rule

Document Citation:

77 FR 15566; PAGE 15566-15575 (10 pages)

CFR:

12 CFR 1228

RIN:

2590-AA41

Document Number:

Enhanced Content - Table of Contents

This tables of contents is a navigational tool, processed from the headings within the legal text of Federal Register documents. This repetition of headings to form internal navigation links has no substantive legal effect.

ACTION:

Final rule.

SUMMARY:

The Federal Housing Finance Agency (FHFA) is issuing a final rule to 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. This final rule is intended to protect the regulated entities from exposure to mortgages with certain features that may impair their value and increase risk to the financial safety and soundness of the entities. FHFA intends that the regulated entities develop reasonable means and appropriate methods to implement the rule in consultation with FHFA.

DATES:

This final rule is effective July 16, 2012.

FOR FURTHER INFORMATION CONTACT:

Mark D. Laponsky, Deputy General Counsel, (202) 649-3054 or Christopher T. Curtis, Senior Deputy General Counsel, (202) 649-3051 (not toll-free numbers), Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. 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)). HERA authorizes FHFA to “issue any regulations * * * necessary to carry out” that mission and “to ensure that the purposes

of this chapter and the authorizing statutes are accomplished.” (12 U.S.C. 4526(a)). This same grant of rulemaking authority also enables FHFA to draw on its cease-and-desist powers (12 U.S.C. 4631) to prohibit by general rule the same types of unsafe and unsound practices it would be empowered to address through case-by-case adjudications.[2]

Private Transfer Fee Covenants and FHFA's Proposed Guidance

On August 16, 2010, FHFA published for comment a notice of proposed guidance that would have 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. (75 FR 49932).

As described in the proposed 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 99 years.

Many states have enacted legislation to address private transfer fee covenants. State legislative solutions are diverse and include permitting the covenants subject to recordation and disclosure requirements [3] and prohibiting them when fees are paid to private third parties, with exceptions for homeowners' associations, condominiums, cooperatives, and similar organizations that use the fees to directly benefit the properties encumbered by the covenants.[4]

In the proposed guidance and the proposed rule that followed, 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, may not benefit homeowners or the properties involved, and, therefore, could impair the safety and soundness of the regulated entities that invest in or purchase mortgages secured by such properties as collateral. Another concern expressed about private transfer fees is the adequacy of disclosure of these covenants which, in turn, may impede the marketability and valuation 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.

HISTORY OF THE RULE

FHFA's proposed rule grew out of its consideration of over 4,200 comments received on the proposed guidance. Commenters included the Community Associations Institute (CAI), American Land Title Association (ALTA), National Association of Realtors (NAR), Freehold Capital Partners (Freehold), 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 Federal Home Loan 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. After receiving and reviewing the comments, FHFA determined to address the subject through regulation rather than through guidance.

On February 8, 2011, FHFA published a Notice of Proposed Rulemaking (76 FR 6702) inviting comments on a proposal that incorporated a number of changes to the substance of the former proposed guidance. The proposed rule reflected a narrower focus than the guidance and limited the private transfer fees to which it would be applicable. Among other things, the proposed rule sought comment on an approach to refine the definition of transfer fees eligible for regulated entity investment to include those that provided a direct benefit to the property of the homeowner through maintenance or enhancement of common areas or the structures of multifamily units or the property of the homeowner through support, for instance, of homeowners' or community associations. FHFA also proposed to make the rule prospective in effect, and apply it only to private transfer fee covenants created after the publication date of the proposed rule (February 8, 2011). FHFA proposed further to allow an implementation period of 120 days for the regulated entities within which they might use reasonable means to achieve compliance. FHFA received over one thousand comments on the proposed rule, discussed in more detail below.

In developing the final rule, FHFA reviewed the comments received on the proposed rule as well as, again, the comments received on the previously proposed guidance. In addition to making the intuitive objection that it is wrong to impose a fee on homeowners for exercising the right to sell their own homes, commenters criticized private transfer fees for many reasons in both rounds of comment:

- (1) That the impact of transfer fees on property values is uncertain and potentially adverse because of uncertainty over how often the property will be sold during the duration of the covenant; and that, for that reason as well as because property values go up and down, and therefore the fee as well (in the majority of cases in which it is a percentage of property value), the fees paid are likely to not be aligned with the value received in return, if any.
- (2) That there is no price transparency because buyers are not offered a choice between a property encumbered by the transfer fee covenant and the same property at a different price without the covenant, or between comparable properties with and without the covenant.
- (3) That in many cases the transfer fee is not assessed on the first buyer, making the covenant less likely to be reflected in the initial sale price but more likely to be a surprise upon attempted resale. Similarly, that it is difficult for a buyer to predict the effect of the covenant on the property's value upon resale to subsequent buyers.
- (4) That private transfer fees exploit the lack of transparency of complex real estate transactions; further, that they are not normally discoverable until well after the sale contract is executed, when a title search is performed prior to closing, with unpredictable effects on whether the sale will close or whether the price will be renegotiated.

(5) That private transfer fee covenants present questions of legal enforceability, especially if they are not associated with provision of a direct benefit to the burdened property.

These criticisms contribute to FHFA's concerns about the reliability with which properties subject to such encumbrances may be valued, posing safety and soundness risk to FHFA's regulated entities. Many of these concerns are lessened when the fees provide a direct benefit to the burdened properties, and, as described in more detail below, the final rule follows the approach of the proposed rule in excepting defined classes of fee covenants that are associated with a direct benefit.

This rule does not prohibit any private transfer fees. Rather, pursuant to FHFA's safety and soundness authorities under the Safety and Soundness Act and the Bank Act, as augmented with respect to the Enterprises by its additional plenary powers as Conservator, it prospectively instructs the regulated entities that participating in any market for mortgages on property encumbered by certain private transfer fees is an unsafe and unsound practice in which they shall not engage. The rule also identifies the types of private transfer fee covenants that will not disqualify a mortgage for investment.

II. Public Comments on the Proposed Rule

The public comment period on the proposed rule closed on April 11, 2011. FHFA received over 1,000 comments on all aspects of the proposed rule. Many of the organizations and constituencies that commented on the proposed guidance also commented on the proposed rule. However, the comments differed from those received on the proposed guidance. A very small minority of commenters preferred the more restrictive approach in the proposed guidance. The majority of comments supported the proposed rule because, unlike the guidance, it would not apply to existing transfer fees and because those fees that directly benefit the property on which they are assessed would not disqualify a mortgage for regulated entity investment.

Most comments centered on refinements to the proposed rule to assure it would not inadvertently disqualify certain fee arrangements through omission from the definitions in the proposed rule; on changes to expand parties and activities covered by the "direct benefit" test; and on objections to the proposed rule either because it deviated from the original proposal to disqualify mortgages on property encumbered by any private transfer fee covenant or because it continued to make ineligible for investment mortgages encumbered by fees affecting certain interest groups or business entities.

The comments can be generally characterized as falling into four categories: (1) Comments endorsing the proposed rule; (2) comments generally supporting the proposal, but suggesting specific changes; (3) comments opposed to core elements of the proposed rule; and, (4) comments asserting that the rule lacks prerequisites to proper promulgation. FHFA has accepted suggestions from a number of commenters and made adjustments to the rule to address these comments.

III. Discussion of Public Comments

Supporting the Rule as Proposed

Commenters such as ALTA, the Coalition to Stop Wall Street Home Resale Fees, and the Conference of State Bank Supervisors (CSBS) endorsed the proposed rule's ban on investing in mortgages encumbered with private transfer fee covenants and FHFA's adoption of a "direct benefit" test for permissible covenants. ALTA did note that how the regulated entities would enforce the rule would be of interest, as the title search and examination process would occur late in the home-buying process and that transfer fees often are difficult to detect, if not recorded.

With respect to implementation, ALTA's concern was echoed by other commenters, including the Federal Home Loan Banks as regulated entities. FHFA intends that the regulated entities develop reasonable means for implementation of the regulation in consultation with FHFA. Possible methods include incorporating appropriate restrictions in the seller-servicer guides of the Enterprises; using representations and warranties; or, in the case of the Federal Home Loan Banks, perhaps requiring mortgages to conform to Enterprise purchase standards. The regulated entities have a great deal of experience in developing methods of segregating mortgages in which investment is permissible and those in which investment is not.

The CSBS supported the proposed rule as establishing a "regulatory floor" for the regulated entities. CSBS stated that this "floor" will ensure that the states can continue to enact practical regulations affecting private transfer fees; and that state level supervision of these fees ensures that the regulators are accessible to those they regulate, understand the applicable state laws and are in tune with the local economy. The Joint Editorial Board for Uniform Real Property Acts (JEBURPA) and CSBS were among the commenters urging FHFA to respect state law and avoid preemption of state laws regulating these fees. FHFA believes that § 1228.4 of the final rule adequately addresses this issue.

Support With Modifications

Many commenters expressed support for the proposed rule, but requested modifications primarily to definitions that would clarify its application.

One Thousand Yards

Hyatt & Stubblefield (H&S) and Sproul Trost (Sproul), two real estate law firms, along with CAI, the National Association of Homebuilders (NAHB), the Mortgage Bankers' Association (MBA), JEBURPA, and others criticized the proposal's "adjacent or contiguous property" requirement as ambiguous when considered with other definitions, unworkable, and too restrictive, particularly the requirement that property be located within 1,000 yards of the burdened community in order to be considered "adjacent or contiguous." As described below, FHFA has decided to delete the 1,000-yard limitation. The rule does address the issue of properties that may not be adjacent or contiguous, but with a test of direct benefit rather than location.

Breadth of "Direct Benefit," "Private Transfer Fees," and Exceptions

A significant number of commenters, including NAHB, echoed the CAI comment to broaden the definition of “direct benefit” to embrace all duties and responsibilities that residents ordinarily expect, or choose to require, community or homeowner associations to fulfill. FHFA intends to encompass routine functions of property management and ordinary obligations of governing associations. However, to automatically include any activity that such associations may engage in as a “direct benefit” may not meet the prudential need that the financial burden of such fees be balanced by value actually added to the encumbered property.

Similarly, JEBURPA, noting that the proposed definition of “private transfer fee” contains only four exclusions (fees imposed by court decree; fees payable to the Federal government or a State or local government; fees arising out of a mechanic's lien; and fees arising from an option to purchase land), suggested that the definition should be expanded to exclude loan assumption fees; loan prepayment fees; and deferred purchase price payments or appreciation sharing contracts. Other comments also sought various expansions to the definition, and FHFA has reviewed these comments and state laws with diverse exceptions. CAI recommended using the term “community transfer fee covenant” rather than “excepted transfer fee covenant.” CAI stated that this would more clearly define the fees that FHFA seeks to disqualify by specifically outlining fees FHFA does not seek to restrict.

Patton Boggs, a law firm writing on behalf of its client, Associations, Inc. (Associa), explained that Associa's members support property owners by providing various services, including closing services, to homeowners' associations. While Associa believed these services fall outside the scope of the proposed rule, Patton Boggs suggested adding a fifth exclusion to the private transfer fee definition to codify its understanding. The H&S law firm stated its general support for the proposed rule as an improvement over the proposed guidance, but also objected to the definition of “direct benefit.” H&S argued alternatively that the definition should be expanded to include a number of additional qualifying uses or deleted in favor of revising the definition of “excepted transfer fee covenant” to be more inclusive.

FHFA has made changes in the proposed rule, described below, in response to these comments.

Internal Revenue Code and Sections 501(c)(3) and 501(c)(4) Charitable Status

Among others, the Natural Resources Defense Council (NRDC), Coalition to Save Community Benefits (CSCB), the Sierra Club, H&S, Sproul, Endangered Habitats League (EHL), and Shute, Mihaly & Weinberger, LLP, a law firm writing on behalf of several environmental groups, objected to the requirement for covenants to directly and exclusively benefit encumbered property, and the reference to usage fee charges in the event of general public use, as well as the limited definition of “covered association.” The principal theme common to these objections is an assertion that the definitions taken together, and particularly in view of requirements for exclusivity of benefits and possible charges for public use, are too restrictive to benefit charitable organizations. These commenters urge a broader exception for not-for-profit organizations that allows their covenants special treatment, asserting that FHFA's proposal is inconsistent with charitable purposes, which require non-exclusivity of benefits in order to meet the public purposes requirement for tax exempt status under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code (IRC).

The California Building Industry Association (CBIA) proposed a revision that embraced the concept of a “community benefits covenant” approach to accommodate nonprofit organizations that administer transfer fees. According to CBIA, this approach would allow non-profits to meet the Internal Revenue Service requirements for nonprofit organizations to engage in charitable and public purposes.

In response to the comments questioning the consistency between the direct benefit requirement and requirements for certain types of tax-exempt status under the IRC, FHFA has made certain changes to the section of the rule on direct benefit that may address some concerns expressed in the comments. FHFA takes no position, however, with respect to potential tax consequences for a nonprofit organization that may result from the administration of transfer fees or that otherwise may be associated with the encumbrance of a property with a private transfer fee covenant.

Recording, Disclosures, and Implementation

Recording and pre-purchase and pre-foreclosure disclosure requirements were among significant suggestions offered by many commenters including MBA, EHL, CSCB, and the Consumer Mortgage Coalition. Commenters recommended recording and disclosure of private transfer fee covenants as additional measures to protect homebuyers and consumers; as ameliorating implementation difficulties for the regulated entities; and a complete alternative to the rule's method of identifying fees that disqualify mortgages for investment. FHFA views recording and disclosure as valuable adjuncts to consumer and lender awareness of fees and perhaps a “best practice” that might be considered by appropriate state or federal authorities. However, adopting such requirements for real estate transactions potentially injects FHFA into issues of state policy and matters of consumer protection. FHFA's core role is as prudential and mission supervisor of its regulated entities, not as a general regulator of real estate markets and practices. The provisions of the rule focus on those aspects of private transfer fee practice that may affect the value of property underlying mortgages held by the regulated entities. FHFA recognizes that future action might be required to revise the rule. FHFA will assess the effectiveness of this rule, deferring consideration of specific transaction requirements to allow state or other federal policymakers to address these issues in the first instance.

With respect to implementation, although recording and disclosure may make it easier for the regulated entities, FHFA does not intend to establish by rule detailed instructions for how regulated entities will implement the rule. However, all regulated entities have experience in establishing controls to segregate mortgages in which they can invest from those which are disqualified. As stated by FHFA when publishing the proposed rule, acceptable compliance with the final rule may be achieved through a Federal Home Loan Bank's 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 Federal Home Loan Banks must use such compliance tools with respect to Enterprise securities, because Enterprise securities issued prospectively should comply with the provisions of the final rule. FHFA will work with the regulated entities to develop appropriate methods to implement the rule.

The suggestion offered by some commenters that recording and disclosure are an alternative to the rule's description of covenants that qualify for investment is misplaced. The rule is not directed at controlling private transfer fee covenants. It is instead directed at limiting the risk to regulated entities when investing in property with values that may be compromised by such covenants. Recording and disclosure requirements do not distinguish among levels of risk, but only make identification of an existing covenant easier. Those details, as noted above, are matters best left to state law or other appropriate federal consumer-focused regulation.

Prospective Application

A variety of commenters, including Federal Home Loan Banks, law firms, and non-profit organizations, expressed concerns over the date on which the rule would apply. The proposed rule provided that regulated entity compliance was not required until after publication of the final rule. To comply with the rule, regulated entities cannot trade in disqualified “mortgages on properties encumbered by private transfer fee covenants created on or after” February 8, 2011. The obligation on the regulated entities is unequivocally prospective—“The regulated entities shall comply with this part not later than 120 days” after publication of the final rule. The date—February 8, 2011—identifies the private transfer fee covenants to which the regulated entities are to apply the rule's qualification and disqualification tests.

The structure of the proposed rule is clear that the language “created on or after” refers to the date on which the covenant that encumbers the land was created. Covenants that encumbered land before February 8, 2011 do not disqualify mortgages. It is FHFA's intention that the date of creation is the date on which the covenant became legally enforceable with respect to the specific encumbered property that is the subject of a mortgage, whether under state law that is the date of recording or some other date.

The only obligations that the proposed rule would impose are forward looking, and they apply only to the regulated entities. The rule regulates neither private transfer fee covenants nor market participants who create or use them.

National Cable & Telecommunications Association v. Federal Communications Commission, 567 F.3d 659 (D.C. Cir. 2009), is instructive with respect to applying retroactivity principles to this rule. In that case, the Federal Communications Commission (FCC) promulgated a rule that prohibited the enforcement of pre-existing exclusivity contracts between cable operators and multi-unit developments, like apartment buildings. The court upheld the rule and determined that it was not an impermissibly retroactive regulation. *Id.* at 671-72.

In *National Cable*, the petitioners asserted that applying the rule to existing contracts violated the presumption against retroactivity contained in the Administrative Procedure Act's “future effect” requirement and was impermissible because of the rule's so-called “secondary retroactivity”; that is, secondary effects of the rule that the FCC failed to consider. The court first emphasized that “[w]e have thus repeatedly made clear that an agency order that only ‘upsets expectations based on prior law is not retroactive,’ *Mobile Relay Associates v. FCC*, 457 F.3d [1, 11 (D.C. Cir. 2006)].” 567 F.3d at 670.

Even if the proposed rule affects the value of private transfer fee covenants entered between February 8, 2011 and the date of the regulation, it has “not rendered [those covenants] illegal or otherwise sanctionable. ‘It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes.’ Chemical Waste Management, Inc. v. U.S. Environmental Protection Agency (EPA), 869 F.2d 1526, 1536 (D.C. Cir. 1989). Such expectations, however legitimate, cannot furnish a sufficient basis for identifying impermissibly retroactive rules.” 567 F.3d at 670. See also, Landgraf v. USI Film Products, 511 U.S. 244, 269 (1994); Arkema, Inc. v. EPA, 618 F.3d 1, 7 (D.C. Cir. 2010) (“A rule operates retroactively if it takes away or impairs vested rights.”). A retroactive rule “alter[s] the past legal consequences of past actions.” Bowen v. Georgetown University Hospital, 488 U.S. 204, 219 (Scalia, J., concurring) (emphasis in original). If a vested right is not impaired, the rule is not retroactive. See Arkema, 518 F.3d at 7.

This rule might frustrate an assumption that an encumbered mortgage would be eligible for purchase by a regulated entity, but it does not extinguish any third-party right to have a regulated entity trade in that mortgage, because there is no such right. At any time in the past, regulated entities could refuse to make such purchases; no one possessed a right to require them to be purchased and no regulated entity had any obligation to purchase, invest or otherwise trade in them. Since the rule does not impair a vested right, the rule is not retroactive.

“Secondary retroactivity” exists where a rule “affects a regulated entity’s investment made in reliance on the regulatory status quo before the rule’s promulgation.” Mobile Relay, 457 F.3d at 11. It invalidates a rule only if the rule is arbitrary or capricious. See Bowen, 488 U.S. at 219 (Scalia, J. concurring); Mobile Relay, 457 F.3d at 11. An assessment and balancing of benefits and burdens is required if a rule creates such secondary effects. National Cable, 567 F.3d at 671-72.

Through this rule, FHFA is protecting regulated entities from investments with certain features that impair their value and pose unacceptable levels of risk to the financial safety and soundness of the entities. The regulation is supported by the proliferating use of private transfer fees for purposes unrelated to the encumbered property and proposals to securitize streams of income from them that will never be returned to the property or property owner. By strengthening the safety and soundness of the regulated entities, the rule furthers the central mission of FHFA. It is abundantly clear that FHFA has considered secondary effects. Despite the fact that the rule does not prohibit covenants, it contains a grandfathering provision to allow the regulated entities to trade in mortgages encumbered by otherwise disqualifying covenants if the covenants were created before a date certain. The date certain of February 8, 2011, is the date on which the rule was proposed. It was chosen as a rational date at which markets and market participants could adjust their behavior in case a rule unfavorable to them was eventually adopted and as a means to avoid market disruption that would occur if developers and others attempted to anticipate the forthcoming rule by placing disqualifying covenants on large numbers of previously unencumbered properties during the time that a final rule was being considered. This is an acceptable practice among regulatory agencies.

In National Cable the court upheld the rule despite the fact that “by significantly altering the bargained-for benefits of now unenforceable exclusivity agreements, the Commission has undoubtedly created the

kinds of secondary retroactive effects that require agency attention and balancing” because the FCC in fact conducted the balancing analysis and concluded that “banning enforcement of existing contracts was essential.” 567 F.3d at 671. Like FHFA, the FCC concluded that the public interest required it to “prevent the harms from existing contracts ‘to continue for years,’ or ‘to continue indefinitely in the cases of exclusivity clauses that last in perpetuity.’” Id. The court noted that, as FHFA has done here, the FCC considered legitimate expectations and felt they were relatively undisturbed because states and the FCC had been scrutinizing the prohibited arrangements for some time. Id.

FHFA has fully considered the benefits and burdens and primary and secondary effects of the rule. FHFA concludes that this rule is not impermissibly retroactive and that this conclusion is supported by applicable precedent.

Opposition to Core Elements of the Rule

Some comments opposed elements so fundamental to the proposed rule that changing or eliminating them as requested would vitiate the purpose of the regulation itself. FHFA considered all comments and assessed whether to issue this rule as a regulation, guidance, or not at all. FHFA determined that the concerns, risks, and issues leading it to propose guidance in the first place have not abated and the comments to the proposed rule reinforce that the housing finance system and its participants are better served by the certainty of a rule on this subject. Consequently, FHFA has not accepted suggestions that would serve to make the rule ineffective and undermine its core principles.

One of the principal objectors to the fundamental underpinnings of the proposed rule is Freehold, joined by law firms, developers, and some builders. These commenters claim that private, profit-motivated entities can use private transfer fees (characterized by them as “capital recovery fees,” although the fees are not tied to any particular capital investment) to provide financial benefits to homeowners and communities by distributing development and infrastructure costs to “future” homeowners, rather than embedding all of these costs in the sales price to the initial homebuyer. They generally liken these benefits to those provided by homeowner associations and similar entities that provide ongoing support to encumbered properties. This view is far from universal, as many builders and the NAHB oppose private transfer fee covenants of this sort.

Freehold and other proponents of private transfer fees contend that creating a right for the developer to receive a future stream of transfer fee payments from successive homebuyers allows the developer to recover investment costs more quickly, enabling more capital investment in new development. This is to be accomplished by securitizing that revenue stream, and selling the security to investors who have no connection to the encumbered property. The developer receives the sale proceeds of the security irrespective of the subsequent market value of the developed property. If the stream of income is not securitized and sold to investors, or otherwise assigned, the developer receives it over the life of the covenant, usually 99 years. Advocates for this model argue that the fees allow developers to pursue or complete projects not otherwise viable due to a housing market downturn. As new developments are completed, they assert, jobs are created and the economy in general benefits. Additionally, proponents claim that by spreading costs into the future, each homebuyer benefits from a price that is lower than if

the full costs of the development were recovered from the initial purchaser. However, another commenter, the Center for Regulatory Effectiveness (CRE), challenged Freehold's analysis, finding that private transfer fees paid to developers or to unrelated third parties (as opposed to those directly benefiting owners of burdened property) produce negligible benefits for homeowners, while imposing additional costs and burdens, such as increased difficulty of selling a home encumbered by a private transfer fee. FHFA has carefully considered both analyses and finds CRE's comments more persuasive.

Freehold argues that the purpose of the private transfer fee revenue stream is to fund infrastructure investments. However, FHFA has determined that these arrangements do not require that the revenue stream be spent on infrastructure improvements. To the contrary, Freehold's marketing literature to developers, available on its Web site and cited in CRE's comment on the proposed rule, describes private transfer fees as a means to "extract more value from your real estate projects." See http://freeholdcapitalpartners.com/forms/freehold_brochure.pdf. That "value" is not used to fund any part of the development, precisely because it is a future revenue stream and not cash in hand to the developer. To FHFA's knowledge, no securities based on these revenue streams have ever been sold, so the asserted benefits of this arrangement to developers as a means of funding projects are speculative.

Even as a matter of principle, the arrangement that Freehold markets to developers cannot work to the benefit of both developers and homebuyers as Freehold argues. In a fully informed, freely functioning marketplace, the initial sale price of a property subject to the covenants should be reduced by the present value of the expected future stream of transfer fee payments with which the property is burdened. The price of the security that the developer sells should also reflect the present value of the expected future stream of transfer fee payments, so there is no net creation of value to the developer. In fact, because the financial intermediaries who would manage the transaction would extract a fee, and because Freehold also would extract a fee, the amount received by the developer would actually be less than the amount the developer loses because of the reduction in the sale price of the burdened properties. The developer gains a benefit only if the home buyers do not reduce the price they are willing to pay by the present value of the future transfer fee burden or even close to it.^[5] The arrangement does not work to the benefit of both developers and homebuyers.

FHFA has carefully reviewed and considered Freehold's analysis and has concluded that Freehold's assertion that private transfer fees are economically beneficial to homebuyers and to the economy is based on assumptions that are not verifiable and lack empirical data. In particular, Freehold's present value assertions rest on assumptions about cash flow streams and appropriate discount rates that are unidentified, unexplained, and lack validation.

FHFA does not agree that private transfer fees appropriately and equitably spread initial developer costs across future homeowners. Development costs ostensibly recovered by these fees do not have a value that extends to the typical 99-year life of the covenant. Initial improvements by a developer depreciate in value over a much shorter period of time. In a traditional development, the initial home price captures the value of the developer's investment. Resale prices capture remaining value of the improvement. This method of capital recovery is more equitable and less disruptive to home resale markets than charging future generations of homeowners for capital investments and residual values of the improvements

funded by those investments. Instead, FHFA finds that the core purpose behind the Freehold model is reflected in Freehold's own marketing material heralding the returns to developers and remote investors from generations-long extraction of value from land at the expense of successive homebuyers. Nothing in the Freehold model demonstrates that any benefit is ever returned to the property burdened by private transfer fee covenants in exchange for repeated and potentially escalating charges.

A variety of non-profit environmental groups asserted that private transfer fee covenants can be used to promote environmental protections and resource conservation, which they claim inures to the benefit of encumbered property and to society at large. The benefits are argued to transcend the property and property owners and therefore, the commenters assert, the covenants have indirect and non-exclusive benefits that should not cause a mortgage to be ineligible for investment. Commenters opposed to such use of private transfer fees argue that developers are willing to impose private transfer fee covenants on properties in settlement of environmental and similar litigation, because the resulting fees are not paid by the developer but shifted to the homeowners; a phenomenon exacerbated by the fact that the initial sale from developer to first buyer is typically exempt from the fee.

FHFA does not take a position on the merits of the environmental, conservation, or similar projects that are funded by private transfer fees. Instead, in its capacity as the safety and soundness regulator of Fannie Mae, Freddie Mac, and the Federal Home Loan Banks and as the Conservator of the Enterprises, FHFA addresses the subject from the perspective of the valuation issues that such use of private transfer fees may cause for the reasons enumerated above: Unpredictability of future sales and, therefore, the magnitude of the financial burden on the encumbered properties; [6] lack of transparency to sellers and purchasers; and the practice of shifting the payment obligation to future buyers who are not privy to the settlement with environmental groups or to the initial transaction with the developer.[7] As a result, FHFA declines to recognize such private transfer fee covenants as excepted from disqualification unless the activities they fund provide a direct benefit to the burdened properties, as defined in the rule and discussed further below. The environmental commenters' reliance on the National Environmental Policy Act of 1969, as amended (NEPA), (42 U.S.C. 4321 et seq.), is also discussed below.

Regulatory Prerequisites

A number of commenters asserted that FHFA failed to satisfy prerequisites for rulemaking. Through counsel, a variety of environmental groups, including the NRDC, claimed that FHFA is required to prepare either an Environmental Impact Statement (EIS) or an Environmental Assessment (EA) under NEPA before proceeding with the rule. Freehold contended that FHFA is not complying with the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 through 612, because the regulation impacts small business entities and the RFA requires FHFA to undertake a detailed analysis and to adopt the least restrictive means for accomplishing the agency's objectives while minimizing the economic impact on small entities.

For reasons explained below, FHFA disagrees with both of these comments. Neither an EIS nor an EA is required for this rule. The RFA was satisfied by the certification contained in the proposed rule and repeated in this final rule.

National Environmental Policy Act

Before addressing the commenters' legal arguments, it is useful to review the background in which their private transfer fee practices have arisen. As described above, certain private transfer fees have been put in place to resolve claims of adverse environmental or other impacts that are asserted to result from proposed real estate developments—claims that would otherwise be resolved in court, or before government permitting bodies. Specifically, particular arrangements that commenters have held up as examples of how they would like to continue using private transfer fees have resulted from settlement of litigation or as a negotiated means to obtain government approval.[8] In response to those environmental and other concerns, various possible tools and outcomes are possible in such cases: a development may be blocked; restricted in other ways; or mitigating measures may be funded using means other than private transfer fees, such as by regular assessments that are more transparent and more readily translatable into property valuation than private transfer fees,[9] or by a lump sum from sale of part of the subject property. Other tools may be available as well and, in some cases, the deciding authority would conclude that the development does not pose the concerns that are claimed and can proceed without restriction. Not one of the letters FHFA received raising environmental concerns about the proposed rule has explained why, or even asserted that, private transfer fees are the only or even a specially valuable tool for dealing with the concerns that have been asserted in comparison with other tools, or why they are the tool of preference, if they are.[10] In each case, the environmental and other impacts that are asserted do not result from FHFA's proposed rule on private transfer fees, but from the real estate development to which the commenters object. That federal regulations may make one or another financing tool that the commenters might wish to use less attractive does not mean that those regulations cause environmental impacts.

Even focusing only on private transfer fees, contrary to a commenter's assertion that FHFA “proposed [the] elimination of private transfer fees,” the rule does not restrict or ban them, but restricts its regulated entities from buying mortgages backed by real estate subject to certain types of covenants. Mortgages held in portfolio or securitized in private secondary markets are not affected by the rule.

For these reasons, for purposes of the NEPA, FHFA's rule is financial and economic; it is not “a major Federal action[] significantly affecting the quality of the human environment.” 42 U.S.C. 4332. NEPA does not require the analysis commenters assert without an “injury to the environment; an economic injury will not suffice.” *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America, ICA v. United States Department of Agriculture*, 415 F.3d 1078, 1103 (9th Cir. 2005) (emphasis added). There must be some causal connection between the rule and the environmental injury. The environmental injury the commenters appear to assert is not caused by FHFA's rule; at best it has a tenuous and speculative nexus to the rule.

The commenters assume that without unrestricted access to a federally supported secondary mortgage market for private transfer fee encumbered mortgages, their environmental protection activities will not just be inconvenienced, but subverted and permanently stopped. The agency recognized that some private transfer fees are used to fund desirable ends, some of which are environmental, social, or cultural. They still can be used for those purposes, but mortgages on property encumbered by them may not qualify for the federally supported secondary mortgage market unless they contain the features required by the rule. Considering all private transfer fee covenants, the rule allows regulated entity investment

when property is encumbered by a grandfathered covenant, and also when the covenant creates a direct benefit to the encumbered property. In these circumstances, the regulated entities may invest in encumbered property. That leaves, as the asserted environmental injury, the inability to trade in the secondary mortgage market mortgages on property encumbered by those private transfer fees that do not return a benefit to the encumbered property, and that are not grandfathered as related to a pre-existing litigation settlement or government-approved agreement. No explanation has been offered why regulation of the mortgage market will result in developments with detrimental environmental impacts or that cannot be remedied by other means that do not pose risks to the safety and soundness of the regulated entities.

FHFA is fundamentally responsible for the safety and soundness of the regulated entities. Its statutory command is to ensure their financial safety and soundness. FHFA cannot allow speculative considerations such as those offered by the commenters to interrupt or subordinate its statutory obligation to prohibit the regulated entities from engaging in unsafe and unsound practices. Congress did not condition FHFA's safety and soundness determinations on assessments of their environmental impact. Like the Federal Energy Regulatory Commission in *Grand Council of the Crees v. Federal Energy Regulatory Commission* (FERC), even if the proposed rule had an environmental impact, when acting to fulfill its independent statutory command to ensure safety and soundness, FHFA would not be required to conduct an EIS or an EA. 198 F.3d 950, 953-54, 956 (D.C. Cir. 2000) (when setting “just and reasonable rates” as commanded by statute, FERC was not required to conduct an EIS or EA, despite the environmental consequences of the action).

Regulatory Flexibility Act

Both the proposed rule and this final rule comply with the RFA, 5 U.S.C. 601 through 612, because they contain FHFA's certification that the rule will not have a significant economic impact on a substantial number of small entities. This certification obviates the need for the detailed analysis commenters seek. See 5 U.S.C. 605(b).

The only impacts that require an RFA analysis are the direct impacts of the rule on small entities that are subject to the rule. See, e.g., *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) (citing cases “consistently reject[ing] the contention that the [RFA] applies to small businesses indirectly affected by the regulation of other entities”); *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 343 (D.C. Cir. 1985) (where rule directly regulated utilities, agency did not have to analyze economic impact on wholesale customers of utilities); *National Women, Infants, and Children Grocers Association v. Food and Nutrition Service*, 416 F. Supp. 2d 92, 108-10 (D.D.C. 2006) (where rule regulated state agencies, agency did not have to analyze impact on vendors that did business with state agencies). The only entities subject to this rule, and the only entities on which the rule will have direct impact, are the FHFA regulated entities—Fannie Mae, Freddie Mac, and the Federal Home Loan Banks—none of which is small. Therefore, an analysis under the RFA is not required. FHFA's certification is sufficient.

IV. FHFA Response to Public Comments in the Proposed Rule

FHFA has decided to adopt the rule largely as proposed. However, in response to comments received, FHFA is making a number of changes to the text of the regulation.

Section 1228.2 is changed to ensure no doubt that any activity dealing in mortgages on property encumbered by private transfer fee covenants, including guaranteeing them as well as purchasing or investing in them, is restricted. The new language broadens the proposed phrase “purchase or invest in” to “purchase invest, or otherwise deal in.” The remainder of that section remains unchanged.

A number of commenters criticized the definition of “adjacent or contiguous property,” and particularly the requirement that it be located within 1,000 yards of the burdened community, arguing that some commonly held facilities, such as marinas, beach access, or golf courses, often cannot feasibly be located within that distance, but yet are for the common benefit of the members of the community and contribute to the value of their property to the same extent as if they were closer. In response to that concern, FHFA has removed the proposed 1,000-yard requirement from the regulation.

At the same time, some commenters pointed out that the restrictions on public access that the proposed regulation contemplated as part of the definition of “direct benefit” would be problematic in situations where the covered association uses transfer fees to fund parks or trails that interconnect with a larger municipal park or trail system which is open to the public. In that situation, although the covered association makes the adjacent property open to the public, the community members (and hence their property) receive fair value in exchange, in the form of convenient access to the larger trail or park system. To address this situation, as well as that described above of common facilities located some distance from the burdened community, FHFA is adopting a two-part approach to the use of transfer fees to fund activities or property outside the burdened community. First, the fees may fund property that is open to the public that is actually adjacent, meaning that it borders the burdened community.^[11] Second, transfer fees may fund amenities that are more distant, if the amenities are primarily for the benefit of the covered association's members. In light of these revisions, FHFA has deleted the proposed provisions regarding public access for a fee or de minimis use, as adding unnecessary complexity.

Several commenters noted that some planned communities include both master associations and sub-associations, such that all residents are members of both a master association and a sub-association, but not of the same sub-association. The final regulation specifically recognizes that possibility.

Some commenters observed that some payments or charges are secured by a covenant to pay upon the next transfer, but do not impose a continuing obligation to pay whenever the property is transferred. FHFA does not regard such obligations as posing the same valuation problem as continuing transfer fee covenants, and has clarified the regulation to define a private transfer fee as one that is payable on a continuing basis whenever the property is transferred. This clarification makes it unnecessary to except from the definition of “private transfer fee” payments arising from an option to purchase or waiver of the right to purchase the encumbered real property (an exception in the proposed definition which FHFA has removed from the final rule) and other exception items suggested by commenters, such as deferred purchase price payments. Other suggested exceptions are unnecessary; for example, loan prepayment fees need not be excepted because they are not paid “in connection with or as a result of transfer of title

to real estate,” but rather because of prepayment of the loan and, therefore, are not covered by the definition of “private transfer fee” as proposed.

In response to some comments and a review of state private transfer fee legislation, FHFA has added to the final rule an exception to the definition of “private transfer fee” for fees and payments that defray actual costs of the transfer, such as new keys, mailboxes, and other features that benefit the new owner.

Some commenters urged that private transfer fees should be used to support local services such as schools, libraries, and fire departments. FHFA has not added an exception for such uses, which normally would fall within the proposed exception for fees paid to government entities. FHFA retains that exception in the final rule. If a particular use of transfer fee covenants would not fall within that exception, FHFA is reluctant to specifically sanction it in the final rule, because such a rule is likely to raise the concern about property valuation in the absence of a direct benefit, which motivates the rule as a whole.

The proposed rule's definition of “private transfer fee” included an exception for fees that are imposed by court judgment, order, or decree. FHFA removes that exception in the final rule. A survey of existing state laws on private transfer fees reveals that most do not contain that exception. Further, review of the many comments discussing the use of private transfer fees to fund preservation or environmental projects that, though they may be meritorious from the perspective of society as a whole, do not contribute directly to the value of the burdened property, raising the valuation concerns that underlie this regulation when funded by private transfer fees, shows that such arrangements often result from settlement of litigation or threatened litigation, and therefore could be structured to escape the effect of this rule by moving to have them embodied in a court decree.

A review of those state statutes on private transfer fees also shows that most of them do not contain the proposed rule's exception for mechanic's liens, plausibly because those liens do not secure an obligation to pay specifically upon transfer (though as a practical matter that obligation, and any other secured obligation, may have to be satisfied in order to clear the title and make the transfer) and are not private transfer fee covenants to begin with. Therefore, FHFA has removed that exception.

Many commenters reacted favorably to FHFA's proposal that the regulation have prospective effect and not apply to private transfer fee covenants created before a date certain. A number of commenters, however, described projects currently underway that are funded by private transfer fees, which could be disrupted to the extent that covenants have not yet been attached to particular parcels that are part of the overall plan. FHFA has clarified the prospective scope of the rule, so that it will not apply to private transfer fee covenants if they are imposed pursuant to a litigation settlement agreement or an agreement approved by a government body before the date certain specified in the rule, February 8, 2011.

Some commenters suggested that the proposed § 1228.4, “State restrictions unaffected,” be revised to state that such state restrictions might include restrictions on validity and enforceability as well as with respect to disclosures or duration, the two examples given in the proposed rule. In cases where a state law restricts the validity or enforceability of private transfer fees, it was not the intention of FHFA to override those restrictions, but rather to provide a framework to protect the regulated entities in the event that private transfer fees could be imposed consistently with state law. For example, one

commenter stated that California law does not permit community associations to fund themselves using private transfer fees. That result is not affected by FHFA's rule permitting the regulated entities to buy mortgages that are secured by properties encumbered by such association transfer fees.

And finally, various commenters suggested technical revisions to the proposed regulation in the interest of clarity, and FHFA adopts a number of those suggestions in the final rule.

V. Paperwork Reduction Act

The 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 rule applies only to the regulated entities, which do not come within the meaning of small entities as defined in section 601(6) of the RFA. In accordance with section 605(b) of the RFA, FHFA certifies that this rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 12 CFR Part 1228

For the reasons stated in the Supplementary Information, and under the authority of 12 U.S.C. 4526, the Federal Housing Finance Agency amends **Chapter XII of Title 12 of the Code of Federal Regulations by adding 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

1228.1

Definitions.

1228.2

Restrictions.

1228.3

Prospective application and effective date.

1228.4

State restrictions unaffected.

Authority: 12 U.S.C. 4511, 4513, 4526, 4616, 4617, 4631.

§ 1228.1

Definitions.

For the purposes of this part, the following definitions apply:

Adjacent or contiguous property means property that borders the burdened community, provided that such adjacent or contiguous property may be separated from the burdened community by public right of way.

Burdened community means a community comprising all of the parcels or interests in real property encumbered by a single private transfer fee covenant or a series of separate private transfer fee covenants that require payment of private transfer fees to the same entity to be used for the same purposes.

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 section 501(c)(4) of the Internal Revenue Code. A covered association may include master and sub-associations, each of which is also a covered association.

Direct benefit means that the proceeds of a private transfer fee are used exclusively to support maintenance and improvements to encumbered properties, and acquisition, improvement, administration, and maintenance of property owned by the covered association of which the owners of the burdened property are members and used primarily for their benefit. Direct benefit also includes cultural, educational, charitable, recreational, environmental, conservation or other similar activities that—

(1) Are conducted in or protect the burdened community or adjacent or contiguous property, or

(2) Are conducted on other property that is used primarily by residents of the burdened community.

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

Excepted transfer fee covenant means a private transfer fee covenant that requires payment of a private transfer fee to a covered association and limits the use of such transfer fees exclusively to purposes which provide a direct benefit to 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, and payable on a continuing basis each time a property is transferred (except for transfers specifically excepted) for a period of time or indefinitely. A private transfer fee does not include fees, charges, payments, or other obligations—

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

(2) That defray actual costs of the transfer of the property, including transfer of membership in the relevant covered association.

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, invest or otherwise deal 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 Federal Home Loan 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 if those covenants are created on or after February 8, 2011. This part shall not apply to mortgages on properties encumbered by private transfer fee covenants if those covenants are created pursuant to an agreement entered into before February 8, 2011, applicable to land that is identified in the agreement, and the agreement was in settlement of litigation or approved by a government agency or body. This part also applies to securities backed by mortgages to which this part applies, and to securities issued after February 8, 2011, backed by revenue from private transfer fees regardless of when the covenants were created. The regulated entities shall comply with this part not later July 16, 2012.

§ 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 validity, enforceability, disclosures, or duration.

Dated: March 12, 2012.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

Footnotes

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

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2. See *Lincoln Savings & Loan Ass'n v. Federal Home Loan Bank Board*, 856 F.2d 1558, 1562-63 (D.C. Cir. 1988) (upholding FHLBB regulation prohibiting certain unsafe and unsound practices based on cease-and-desist powers); *Independent Bankers Ass'n of America v. Heimann*, 613 F.2d 1164, 1168-69 (D.C. Cir. 1980) (upholding OCC regulation prohibiting certain unsafe and unsound practices based on cease-and-desist powers). As further discussed below, FHFA has found that it constitutes an unsafe and unsound practice to participate in any market for mortgages on property encumbered by certain private transfer fees. To allow full public participation and for the sake of efficiency, FHFA has elected to require the regulated entities to cease and desist from these practices by issuing a rule of general applicability rather than by instituting individual proceedings.

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3. E.g., Cal. Civ. Code §§ 1098 and 1098.5 (2010).

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4. E.g., Del. Code Ann. Tit. 25, § 319 (2010); Minn. Stat. §§ 513.73 to 513.76 (2010); N.C. Gen. Stat. §§ 39A-1 to 39A-3 (2010).

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5. Why might developers and Freehold expect this to be the case? There are at least two possible explanations. First, behavioral economists argue that consumers discount future negative outcomes at excessively high rates, a phenomenon that they call “hyperbolic discounting.” See Bar-Gill, *Seduction by Plastic*, 98 Nw. U. L. Rev. 1373, 1396-99 (2004); Heidhues & Koszegi, “Exploiting Naïvete About Self-Control in the Credit Market” (Institute for Behavioral Economics, Sept. 2009). Second, a substantial number of commenters argue that transfer fees are inadequately disclosed, both as a matter of clarity and as a matter of timing in the real estate purchase transaction, and urge FHFA to establish disclosure standards. This phenomenon could be reinforced by the fact that Freehold's fees—as well as most of those supporting environmental and conservation projects, discussed below—are not charged to the initial buyer of the burdened property, but only to subsequent buyers. That is, the arrangement is structured to ensure that the fees are paid only by parties who are remote from the creation of the covenants and least likely to be aware of them or appreciative of their impact. As explained above, FHFA does not believe that it is its role to fashion or to mandate appropriate disclosures, nor does FHFA take a position on behavioral economics or any of its theories. It is enough for FHFA to recognize that the effect of transfer fee covenants on property values is uncertain, and that the Freehold arrangement extracts value from property that is not returned to it.

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6. “If the fee has a 20-year term, for example, one house may be sold three times and assessed three fees while another house is not sold and, consequently, has no fee.” “Using Real Estate Transfer Fees to Deliver Community Projects,” in *Conservation Frontiers: Reports from the California Council of Land Trusts* (Feb. 2008), p. 3, at <http://www.calandtrusts.org/download.cfm?ID=24427>.

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7. “[T]he original sale of a house has not been assessed in most cases, but the fee does apply to all subsequent sales.” *Id.*

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8. See “Using Real Estate Transfer Fees to Deliver Community Projects,” in *Conservation Frontiers: Reports from the California Council of Land Trusts* (Feb. 2008), describing the litigation origin of the Roseville and Martis Valley private transfer fee arrangements in Placer County, California. Both of those arrangements are discussed in the comment letters FHFA has received. One comment letter described the Plum Creek development in Maine, in which private transfer fees feature prominently in an arrangement arrived at after five years of negotiations and hearings and approved by Maine's Land Use Regulation Commission. That arrangement, however, appears to be currently on hold as a result of subsequent litigation by a subset of the environmental groups, see “Plum Creek's Maine Development Set Aside by Judge” (Associated Press, April 7, 2011).

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9. See Quang Do & Sirmans, “Residential Property Tax Capitalization: Discount Rate Evidence from California,” 47 *Nat'l Tax J.* 341 (1994) (analyzing a data-set from a tax district in San Diego to argue that homebuyers capitalize real property taxes into purchase prices, discounting the future tax payments at a rate of about 4 percent).

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10. Perhaps developers show less resistance to private transfer fees than to other types of restrictions or funding mechanisms. See *supra* n. 5. That certainly is the perspective of the commenters who are adverse to this use of private transfer fees.

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11. The rule allows the properties to be separated by a public right of way, because a public right of way is not inconsistent with public access across the properties.

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