

April 11, 2011

By e-mail to RegComments@FHFA.gov

Alfred M. Pollard, Esq.
General Counsel
Federal Housing Finance Agency
1700 G. Street, NW.
Washington, DC 20552

Attention: Comments/RIN 2590-AA41

Re: Notice of Proposed Rulemaking on Private Transfer Fees

Dear Mr. Pollard:

The Federal Home Loan Bank of Topeka (“FHLBank Topeka”) appreciates the opportunity to comment on the Federal Housing Finance Agency’s (“FHFA”) Notice of Proposed Rulemaking on Private Transfer Fees (“Proposed Rule”) published in the *Federal Register* on February 8, 2011. FHLBank Topeka respectfully submits the following comments for your consideration.

Effective Date of Final Rulemaking

Section 1228.3 of the Proposed Rule titled *Prospective application and effective date* states that “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....” The FHFA noted in the Supplementary Information to the Proposed Rule that “FHFA proposes to make the rule prospective in effect....” 76 F.R. 6702, 6705 (February 8, 2011). The FHFA agreed with comments on the proposed guidance that the rule should only apply prospectively in order to avoid market uncertainties. Despite the expressed intent of the FHFA to make the rule effective only prospectively, the final rule will actually be effective retroactively if finalized as proposed since the final regulation will be published well after February 8, 2011. Since this rule is only proposed, market participants may not have taken any steps to comply with the Proposed Rule since it is subject to change pending public comment.

FHLBank Topeka commends the FHFA for proposing a 120 day period for the Regulated Entities to comply with the regulation (the Effective Date). However, as proposed, there is a discrepancy between the Effective Date and the provision which states the regulation applies to mortgages on properties encumbered by private transfer fee covenants created on or after February 8, 2011. Because of the delay between February 8, 2011 and the Effective Date, FHLBank Topeka would be prohibited from purchasing Enterprise mortgage-backed securities (MBS) or accepting Enterprise MBS as collateral if the MBS was issued between February 8, 2011 and the Effective Date unless FHLBank can ensure the Enterprise MBS is not backed by a mortgage on a property encumbered by

a private transfer fee covenant. In order to alleviate any additional burdens on members or FHLBank Topeka that provides minimal benefit, and to ensure there continues to be a market for Enterprise MBS issued between February 8, 2011 and the Effective Date, FHLBank Topeka requests that the regulation be revised to state “This part shall apply only to mortgages on properties encumbered by private transfer fee covenants created on or after [the Effective Date],....” FHLBank Topeka’s request would also ensure the rule is effective prospectively consistent with the intent of the FHFA.

FHLBank Topeka also requests clarification on the applicability of the effective date. As noted previously, the regulation applies to “mortgages on properties encumbered by private transfer fee covenants *created on or after* February 8, 2011.” It is unclear if the statement “created on or after” refers to the creation of the mortgage or the creation of the private transfer fee covenant. The Supplementary Information to the Proposed Rule notes that the FHFA’s intent is to make the rule apply “to private transfer fee covenants created after February 8, 2011”, and not to make the rule apply to mortgages created after that date. 76 F.R. at 6705. FHLBank Topeka requests that the FHFA clarify in the final regulation that the statement “created on or after” refers to the creation of the private transfer fee covenant.

Applicability to Securities

FHLBank Topeka supports the FHFA’s goal of limiting the use of private transfer fee covenants. However, the Regulated Entities do not constitute the entire mortgage market in the United States and private transfer fees may continue to be created, albeit likely to a more limited extent given the FHFA’s recent actions. As currently drafted, the Proposed Rule would severely restrict the market for private-label MBS (PLMBS) unless the issuers of those securities can represent and warrant that there is *not a single mortgage* backing the security which is encumbered by a private transfer fee covenant created on or after a certain date. Such representations and warranties may be difficult to receive from issuers of PLMBS, even after conducting substantial due diligence, given the absolute requirement that no mortgage underlying the security can be encumbered by a private transfer fee.

If issuers of PLMBS are unable or unwilling to make such representations, FHLBank Topeka would no longer be able to accept new PLMBS as collateral from its members. FHLBank Topeka does not have the means to evaluate whether any single mortgage underlying a PLMBS is encumbered by a private transfer fee covenant and will need to rely on representations and warranties when it is determining whether a PLMBS is eligible collateral. The FHFA found persuasive the Banks’ comments regarding the challenges in identifying mortgages on properties with private transfer fee covenants. 76 F.R. 6707. The FHFA also noted in its proposed guidance that private transfer fees “often are not disclosed by sellers and are difficult to discover through customary title searches, particularly by successive purchasers.” 75 F.R. 49932, 49933 (August 16, 2010). Issuers of PLMBS face the same difficulty in determining whether a private transfer fee covenant exists on a property and therefore may be unwilling to represent and warrant that there is not a single mortgage backing the security which is encumbered by a private transfer fee covenant. The inability to receive the appropriate representations and warranties from PLMBS issuers, and therefore the inability of FHLBank Topeka members to pledge new PLMBS, could have a significant impact on the eligible

collateral held by members in the future and therefore limit the ability of members to access FHLBank Topeka advances.

Accordingly, FHLBank Topeka requests that the FHFA establish a *de minimis* standard which would permit PLMBS issuers to represent and warrant that all mortgages except those constituting a *de minimis* proportion of the aggregate principal amount of the PLMBS are not encumbered by private transfer fee covenants. Such a *de minimis* standard would encourage more PLMBS issuers to make such representations and warranties since the requirement is not absolute, and therefore ensure FHLBank Topeka members can continue to pledge new PLMBS as collateral, while still achieving the goal of the FHFA to limit the use of private transfer fee covenants.

On behalf of FHLBank Topeka, we thank the FHFA for its consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "David S. Fisher". The signature is fluid and cursive, with the first name "David" being the most prominent.

David S. Fisher
SEVP and COO