James A. Kraft
Senior Vice President, General Counsel & Secretary

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April 11, 2011

Email RegComments@fhfa.gov and U.S. Mail

The Honorable Alfred M. Pollard
General Counsel
Attention: Comments/RIN 2590-AA41
Federal Housing Finance Agency
Fourth Floor
1700 G Street, NW
Washington, DC 20552

Re: RIN 2590-AA41

Dear Mr. Pollard:

Plum Creek Timber Company, Inc. (Plum Creek or the Company) owns approximately seven million acres spanning seventeen states. It is the largest and most geographically diverse private landowner in the nation. I am writing to express Plum Creek's concerns about the proposed Federal Housing Finance Agency (FHFA) rule published in the Federal Register on February 8, 2011 (RIN 2590-AA41) (the Proposed Rule).

Despite Plum Creek's broad national land ownership, the Company has imposed only a single transfer fee covenant. Notably, the transfer fee covenant was created to satisfy a permit condition imposed by the State of Maine Land Use Regulation Commission (LURC).[1] This transfer fee covenant affects certain land owned by the Company in Piscataquis and Somerset Counties located in northern Maine. The transfer fee will be used locally to fund construction and maintenance of community hiking trails, address significant local affordable housing needs, and assist with local programs for the protection of wildlife and endangered species.

[1] The approval from LURC involves nearly 400,000 acres, but the transfer fee covenant was imposed on only about 4% of the permitted area. LURC approval was granted on October 8, 2009. The approval is the subject on ongoing multi-party litigation. The transfer fee covenant has not been raised as an issue in the litigation. The transfer fee covenant was executed on February 4, 2011 and was recorded on February 8, 2011.

Although the transfer fee covenant provides direct community benefits[2] and generally appears consistent with the spirit of the types of fees supported by the FHFA, the transfer fee covenant may be in legal jeopardy unless FHFA takes steps to amend and clarify parts of the Proposed Rule. In jeopardizing the transfer fee covenant, FHFA would necessarily be jeopardizing other community benefits that would accompany the development of approximately 900 homes and two resorts in an economically struggling area of rural Maine.

We urge FHFA to amend the Proposed Rule to more fully recognize that state and local governmental authorities, like LURC, have a long history of issuing decisions, permits, and approvals that require private landowners to impose transfer fee covenants because those state and local agencies have determined that the required transfer fees serve legitimate, beneficial community purposes and are in the best interest of the community. In the case of the approval issued by LURC to Plum Creek in 2009, LURC's decision to require the transfer fee covenant followed a public, multi-year approval process. The Concept Plan is specific about how the transfer fee will be computed, how much the fee will be, how the fee will be used, how the fee will be collected, how the fee will be noticed on title, even who would serve on a non-profit board to distribute the funds. In deference to the powers of State and local government to make land use decisions to serve the health, safety, morals and general welfare of citizens, we urge FHFA to exempt from the reach of the Proposed Rule all private transfer fee covenants imposed to satisfy a condition or requirement of a government body. This change could be accommodated by amending Section 1228.1 item (2) in the definition of private transfer fee as follows, "Imposed by, **or imposed to satisfy a conditional approval or requirement** of, or ~~are~~ payable to, the Federal government or a State or local governmental **body**;"[3]

Section 1228.3 of the Proposed Rule provides, *inter alia,* "This part shall apply only to mortgages on properties encumbered by private transfer fee covenants ***created on*** or after

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[2] Plum Creek's letter to FHFA dated October, 2010 more fully describes the transfer fee covenant.

[3] With this change, the definition of *Private Transfer Fee* in Section 1228.1 would read, it its entirety, "*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 imposed to satisfy a conditional approval or requirement of, or payable to, the Federal government or a State or local governmental body; (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."

February *8, 2011…" (Emphasis added).* This excerpted language creates two significant concerns. First, the term "created" is not defined, and can, and likely will, be argued to mean different things, resulting in market uncertainty. In the case of the community benefit covenant imposed by Plum Creek, the LURC approval which requires Plum Creek to impose the transfer fee was granted on October 8, 2009. Plum Creek immediately commenced compliance with this LURC approval, incrementally implementing obligations which govern approximately 400,000 acres. The transfer fee covenant mandated by LURC was signed on February 4, 2011 and was recorded on February 8, 2011. The Proposed Rule creates ambiguity about which of these three dates (October 8, 2009, February 4, 2011 or February 8, 2011) constitutes the date creation. Depending on one's interest, stakeholders may argue a broad range of what "created" means. Some will argue the covenant is created the date the government approval mandating the covenant was issued, some will argue it is the date the document imposing the transfer fee is signed, others will argue it is the date that document is recorded, still others will argue that amending an agreement containing a transfer fee covenant will alter the creation date, while others will argue that the covenant is created anew each time the land subject to a transfer fee covenant is sold. This broad range of interpretations will create significant uncertainty for landowners, homeowners, banks, buyers and other market participants. We encourage FHFA to eliminate this uncertainty. In deciding how to eliminate this ambiguity, FHFA should consider that due to local budget constraints and recording backlogs, in many recording jurisdictions it is not unusual for recording to follow document signing and submittal by days, weeks or even a month. This delay is beyond the control of landowners and suggests that act of signing the covenant, rather than the act of recording the covenant, is the preferred bright line rule definition of what constitutes "creation" of the covenant. We acknowledge that this bright line would not eliminate the risk of a bad actor fraudulently backdating their signature on a transfer fee covenant. This risk could be mitigated by requiring recording not more than thirty days following signing. If recording follows signing by more than thirty days, the date of recording could be deemed the date of creation for purposes of the rule.

Second, while the Proposed Rule provides lenders a grace period of 120 days to prepare for compliance, landowners have none. If a transfer fee covenant was signed or perhaps even just recorded on February 8, 2011, the very day the draft rule was published in the Federal Register, arguably the rule applies to that covenant. Without explicitly saying so, the effect of the Proposed Rule as drafted is to require **immediate** compliance from property owners beginning on date the date the **Proposed** Rule is first published for comment. It is not

reasonable or equitable, especially in this extremely fragile real estate climate, to make the effective date applicable to landowners the very day the Proposed Rule is first published in the Federal Register.[4] It would be preferable for the rule to apply only to covenants executed after the effective date of the final rule. That change would afford landowners a reasonable opportunity to learn about the rule and an opportunity to weigh the potentially dramatic impacts of recording a transfer fee covenant which does not fit within its narrowly tailored exemptions.

There are several methods FHFA could use to clarify the Proposed Rule in a way that creates a small grace period for property owners to sign and record transfer fee covenants which are required by outstanding government permits and approvals and to help create market certainty for Plum Creek and similarly situated landowners who are required to impose transfer fee covenants as a condition of prior government action. Plum Creek requests that the FHFA replace the first sentence of Section 1228.3 with two sentences as follows, "Prospective Application and Effective Date"[5], "**This part shall have no effect on mortgages secured by properties which are encumbered by a private transfer fee covenant if such private transfer fee covenant was recorded on or before [insert the effective date of the final rule] in the public records established under the applicable state statute for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge.** This part shall apply only to mortgages on properties encumbered by private transfer fee covenants which covenants were **signed or recorded after [insert the effective date of the final rule],** 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." This change is simple, equitable, and consistent with the prospective intent of the Proposed Rule.

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[4] It is difficult to estimate how many property owners or parcels will be affected by these ambiguities, but the consequences for anything short of total and immediate compliance are very high—no funds from Regulated Entities can be used to fund the purchase of those properties.

[5] Section 1228.3 currently reads, "**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.**"

Prospective application, rather than immediate or retroactive application, is endorsed in FHFA's prefatory comments[6], serves the interest of fairness and due process, and will help to avoid unnecessarily creating market uncertainties for property owners, lenders, buyers and the title insurance industry.

Conclusion:

- Plum Creek urges FHFA to amend the Proposed Rule to more fully recognize that state and local governmental authorities, like LURC, have a long history of issuing decisions, permits, and approvals that require private landowners to impose transfer fee covenants because those state and local agencies have determined that the required transfer fees serve legitimate, beneficial community purposes and are in the best interest of the public. Given the heightened public process and governmental scrutiny of transfer fee covenants imposed to satisfy a governmental condition or approval, Plum Creek requests that FHFA amend Section 1228.1 item (2) in the definition of private transfer fee as follows, "Imposed by, **or imposed to satisfy a conditional approval or requirement of**, or ~~are~~ payable to, the Federal government or a State or local governmental **body**;"

- Section 1228.3 of the Proposed Rule provides, *inter alia, "*This part shall apply only to mortgages on properties encumbered by private transfer fee covenants ***created on*** or after February *8, 2011..." (Emphasis added)*. The term "created" is not defined, and can, and likely will, be argued to mean different things, resulting in market uncertainty. FHFA should define creation as the act of signing the transfer fee covenant. We acknowledge that this bright line would not eliminate the risk of a bad actor fraudulently backdating their signature on a transfer fee covenant. If FHFA wishes to use this Proposed Rule to mitigate the risk of fraudulent backdating, this risk could be mitigated by requiring recording not more than thirty days following signing. If recording follows signing by more than thirty days, the date of recording could be deemed the date of creation for purposes of the rule.

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[6] Section IV(B)(7), page 6707 of the Proposed Rule provides, "To avoid market uncertainties such as those suggested by comment letters, the final rule will apply only to transfer fees ***created after*** the date of publication of the proposed rule..."

- Without explicitly saying so, the effect of the Proposed Rule as drafted is to require **immediate** compliance from property owners beginning on date the date the **Proposed** Rule is first published for comment. Plum Creek requests that FHFA revise the Proposed Rule to apply only to covenants executed after the effective date of the **final** rule. This change would provide landowners a reasonable opportunity to learn about the rule and an opportunity to weigh the potentially dramatic impacts of recording a transfer fee covenant which does not fit within its narrowly tailored exemptions.

- Plum Creek requests that the FHFA replace the first sentence of Section 1228.3 with two sentences as follows, "Prospective Application and Effective Date", "**This part shall have no effect on mortgages secured by properties which are encumbered by a private transfer fee covenant if such private transfer fee covenant was signed on or before [insert the effective date of the final rule] in the public records established under the applicable state statute for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge.** This part shall apply only to mortgages on properties encumbered by private transfer fee covenants which covenants were **signed or recorded after [insert the effective date of the final rule],** 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."

Plum Creek is also a member of the Coalition to Save Community Benefits (the "Community Benefits Coalition" or "Coalition"). The foregoing comments are intended to supplement comments from the Coalition.

Thank you for your consideration.

Sincerely,

James A. Kraft
Senior Vice President, General Counsel and Secretary