

October 15, 2010

Alfred M. Pollard, General Counsel
Federal Housing Finance Agency, Fourth Floor
1700 G Street, NW
Washington, D.C. 20552

Re: Comments on Private Transfer Fee Covenants Proposed Guidance; No. 2010-N-11

Dear Mr. Pollard:

The Federal Home Loan Bank of Topeka ("Bank") appreciates the opportunity to comment on the Federal Housing Finance Agency ("Finance Agency") notice of proposed guidance on Private Transfer Fee Covenants ("Proposed Guidance"). This letter sets forth the comments of the Bank with respect to the Proposed Guidance.

I. Investments Impact

The Bank supports the Finance Agency's intent and goals as identified in the Proposed Guidance, but the Supplementary Information to the Proposed Guidance differs from the text of the Proposed Guidance in one subtle, but important, respect. The Bank respectfully asks the Finance Agency to amend the text of the Proposed Guidance to mirror the Finance Agency's intent as expressed in the Supplementary Information.

The Finance Agency's Proposed Guidance notes that the "draft Guidance is based on the view that investments in mortgages on properties with private transfer fee covenants *and securities designed to generate income from the fees* are not acceptable for the regulated entities." [emphasis added] 75 F.R. 49932 (August 16, 2010). In describing the Proposed Guidance, the Finance Agency states the Proposed Guidance directs the regulated entities not to purchase or invest in "*securities backed by private transfer fee revenue.*" [emphasis added] *Id.* at 49933. However, the text of the Proposed Guidance itself not only prohibits the purchase of, and investment in, securities backed by private transfer fee revenue, but expands the prohibition to *all securities* backed by a mortgage encumbered by a private transfer fee covenant.

The text of the Proposed Guidance states that Fannie Mae and Freddie Mac "should not purchase or invest in any mortgages encumbered by private transfer fee covenants *or securities backed by such mortgages.*" [emphasis added] *Id.* at 49934. The provision is expanded to Federal Home Loan Banks ("FHLBanks") by stating "The Banks should not purchase or invest in such mortgages or securities or hold them as collateral for advances." *Id.* The text of the Proposed Guidance prohibits the purchase or investment in securities backed by "such mortgages," presumably referring to the immediately preceding phrase which prohibits the purchase or investment in "any mortgages encumbered by private transfer fee covenants." Thus, the text of the Proposed Guidance greatly expands the coverage of the Proposed Guidance as expressed by the Finance Agency in the Supplementary Information and is unnecessary to achieve the Finance Agency's goals.

The Bank supports the Finance Agency's prohibition on purchasing or investing in securities *designed to generate income* from private transfer fees as expressed in the Supplementary Information, and the prohibition of the acceptance of such securities as collateral. However, the Bank has significant concerns with

the difficulty of determining whether a security is backed by a mortgage that may be subject to a private transfer fee covenant and does not believe that such a prohibition is necessary to achieve the Finance Agency's objectives.

II. Monitoring

We respectfully request that the Finance Agency not require "testing" of securities (purchased as investments or pledged as collateral) that were issued prior to the effective date of the final guidance. As a general rule, testing underlying mortgages of mortgage-backed securities presents significant challenges, and if ultimately required should be limited to securities issued after the effective date of the final guidance.

The text of the Proposed Guidance would require the FHLBanks to examine the mortgages backing every security, prior to purchasing or investing in that security or accepting such security as collateral, to determine whether any of the mortgages backing that security are encumbered by a private transfer fee covenant. In the event the FHLBank discovered a private transfer fee covenant on *one* mortgage backing the security, the Proposed Guidance would prohibit the FHLBank from purchasing or investing in that security or accepting that security as collateral. The Finance Agency recognizes that private transfer fee covenants "often are not disclosed by sellers and are difficult to discover through customary title searches." *Id.* at 49933. The difficulty in discovering private transfer fee covenants is exacerbated in the purchase of or investment in securities or acceptance of such securities as collateral, which may require the review of hundreds or thousands of mortgages to ensure they are not encumbered by private transfer fee covenants.

III. Collateral

Monitoring for the presence of private transfer fee covenants will be no less challenging for mortgage loans pledged as collateral because, as the Finance Agency has acknowledged, private transfer fee covenants "are difficult to discover through customary title searches." In the event a loan is impaired by a private transfer fee covenant ("Impaired Loan"), the Bank believes that the risk of loss from such collateral can be managed by increasing the "hair cut" or reducing the lending value attributable to such Impaired Loan. This would avoid penalizing members that made loans in good faith to borrowers who themselves can be considered victims of private transfer fee covenants. The Bank believes that adjusting the lending value of Impaired Loans is the best way to discourage the proliferation of private transfer fee covenants without doing further harm to homeowners who may otherwise find themselves owning un-financeable real estate. Even if the Finance Agency determines that Impaired Loans made after the date that final guidance is issued may not be accepted as collateral, the Bank believes that members that acquired Impaired Loans prior to final guidance should be allowed to pledge them as collateral subject to an appropriate diminution in lending value.

IV. Acquired Member Assets Impact

It would be extremely difficult and burdensome to determine in advance whether every whole loan acquired by the Bank is an Impaired Loan. However, the Bank agrees that a blanket rule making Impaired Loans ineligible for purchase, and compliance with such a rule being subject to the Bank's standard quality control process, should be an adequate procedure for minimizing the Bank's exposure to acquiring any Impaired Loans. The Bank agrees that Impaired Loans which have been acquired prior to the issuance of final guidance may not meet the purchase eligibility standards of the MPF[®] Program. Should such Impaired Loans be discovered in the quality control process, a participating financial institution ("PFI") member should be permitted to provide an indemnification to the Bank with respect to such Impaired Loans, which

indemnifications the Bank accepts from time to time for similar types of minor breaches of representations and warranties, without any additional penalty being placed on the PFI.

On behalf of the Federal Home Loan Bank of Topeka, we thank the Finance Agency for its consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "David S. Fisher". The signature is written in a cursive style with a large initial "D".

David S. Fisher
SEVP and COO