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**COMMENTS BY THE CENTER FOR REGULATORY EFFECTIVENESS ON  
FHFA'S PROPOSED GUIDANCE FOR TRANSFER FEES**

**I. Introduction**

A private transfer fee covenant is attached to real property by a developer and requires that a fee be paid to a third party or trustee each time the land is sold. If the fee is not paid when the property is sold, then a lien is placed on the property. Traditionally, private transfer fees were used to fund community benefits. For example, private transfer fees have been widely used by homeowner associations, co-op buildings, and charitable organizations to fund environmental restoration projects and affordable housing developments.

However, recently the use of private transfer fees has transformed from a financing tool to fund community projects, to a purely private for-profit income stream for developers and real estate financing firms to provide for a temporal distribution of development costs.<sup>1</sup> Under this for-profit system, developers create private transfer fee covenants on newly developed properties. The covenant requires that each time the property is sold, the seller is required to pay a percentage (typically 1%) of the final sale price to the developer, and most times a licensing

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<sup>1</sup> For purposes of this paper, traditional private transfer fees used to benefit communities and charitable organizations will be referred to as “community transfer fees.” Private transfer fees that benefit third party investors and developers will be referred to as “for-profit private transfer fees.”

company. The developer can then sell the long-term revenue stream in exchange for immediate upfront capital. Moreover, in a developing scheme, private transfer fees will be bundled into securities and sold to investors.<sup>2</sup> Under this system, the investors receive the income stream of 1% of the sale price each time the encumbered property is sold. Because a home is estimated to sell eight to ten times in 99 years, it is estimated by one licensing company that the fee recovered over the life of the covenant will amount to eight to ten percent of the value of the home.<sup>3</sup>

Recognizing that the expanded use of private transfer fee covenants pose “serious risks to the stability and liquidity of the housing markets,” the Federal Housing Finance Agency (FHFA) proposed “Guidance on Private Transfer Fee Covenants” (FHFA’s Proposed Guidance).<sup>4</sup> FHFA’s Proposed Guidance would prohibit the entities it regulates—Fannie Mae, Freddie Mac, and the Federal Home Loan Banks (FHLBanks)—from dealing in mortgages on properties encumbered by private transfer fee covenants.<sup>5</sup> Although FHFA recognizes the distinction between community transfer fees and for-profit private transfer fees, the proposed guidance treats both equally by prohibiting all private transfer fee covenants.<sup>6</sup>

FHFA received 2,639 comments on its proposed guidance for private transfer fee covenants. The purpose of the paper is to analyze two comments that present the core arguments

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<sup>2</sup> Freehold Capital Partners, *Freehold Brochure*, page 12 available at [http://freeholdcapitalpartners.com/forms/freehold\\_brochure.pdf](http://freeholdcapitalpartners.com/forms/freehold_brochure.pdf).

<sup>3</sup> Patton Boggs, *Freehold Capital Partners comment on FHFA proposed guidance concerning Private Transfer Fee Covenants*, page 3, October 15, 2010, available at [http://www.fhfa.gov/webfiles/19294/2521\\_Patton\\_Boggs\\_LLC\\_on\\_behalf\\_of\\_Freehold\\_Capital\\_Partners.pdf](http://www.fhfa.gov/webfiles/19294/2521_Patton_Boggs_LLC_on_behalf_of_Freehold_Capital_Partners.pdf) [hereinafter *Freehold Capital Partners Comment I*].

<sup>4</sup> 75 Fed. Reg. 499832, August 16, 2010 (“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. The Banks should not purchase or invest in such mortgages or securities or hold them as collateral for advances”).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 499833 (“To the extent that private transfer fee covenants benefit unrelated third parties, one cannot claim that a service or value is rendered to the relevant property owner or community. Even where such fees are payable to a homeowners association, unlike more typical annual assessments they are likely to be unrelated to the value rendered”).

surrounding the policy implications of private transfer fees. Section II analyzes the two comments submitted by Freehold Capital Partners. Freehold Capital Partners has been a leader in promoting for-profit private transfer fees. Freehold Capital Partners argues that private transfer fees are a beneficial financial tool to provide capital to developers. Moreover, Freehold contend that private transfer fees benefit consumers, because the fees reduce the cost of homes. Freehold Capital Partners is opposed to FHFA's Proposed Guidance in its entirety, and instead recommends a tailored disclosure regime of private transfer fees. Section III discusses the comment submitted by the Federal Home Loan Bank of New York (FHLBNY). FHLBNY is one of the entities regulated by FHFA that will be directly affected by the ban on private transfer fees. FHLBNY believes that FHFA should restrict the practice of for-profit private transfer fees, but should not prohibit transfer fees used by co-ops and homeowner associations. Finally, section IV concludes the paper with recommendations by the Center for Regulatory Effectiveness (CRE).

## II. Freehold Capital Partners Comment

Freehold Capital Partners, a real estate financing firm and licensing company, has been an industry leader in promoting for-profit private transfer fees. According to Freehold Capital Partners' chief operating officer, the firm has signed up more than 5,000 developers who are adding private transfer fee covenants to developments worth over \$600 Billion dollars.<sup>7</sup> Freehold recently submitted two comments to the Federal Housing Finance Agency (FHFA) detailing their objections to FHFA's proposed guidance on private transfer fees.<sup>8</sup> Freehold

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<sup>7</sup> *Id.* at 4; Janet Morrissey, *Resale Fees that Only Developers Could Love*, The New York Times, Sept. 11, 2010, at BU1, available at <http://www.nytimes.com/2010/09/12/business/12fees.html>.

<sup>8</sup> Freehold Capital Partners two comments are available at [http://www.fhfa.gov/webfiles/19294/2521\\_Patton\\_Boggs\\_LLC\\_on\\_behalf\\_of\\_Freehold\\_Capital\\_Partners.pdf](http://www.fhfa.gov/webfiles/19294/2521_Patton_Boggs_LLC_on_behalf_of_Freehold_Capital_Partners.pdf) and [http://www.fhfa.gov/webfiles/19319/2546\\_Freehold\\_Capital\\_Partners.pdf](http://www.fhfa.gov/webfiles/19319/2546_Freehold_Capital_Partners.pdf).

Capital Partners argue that private transfer fees benefit homeowners, because the fees provide a capital infusion for developers to finance their projects. The fees enable developers to spread infrastructure costs across the life of the property, thereby lowering the costs of the homes for property owners. The following discussion outlines Freehold Capital Partners comments submitted to FHFA in response proposed ban on private transfer fees.

**a. Do For-Profit Private Transfer Fees Benefit the Property?**

Freehold Capital Partners argue that for-profit private transfer fees benefit the relevant property owner by lowering the cost of the home by spreading development costs across the life of the property. Here the private transfer fee covenant does not benefit the homeowner or the property aside from reducing the cost of the property. Although the transfer fee may decrease the cost of the property the benefit of the fee does not go back into improving the relevant property or community, but rather to third party developers and investors. Moreover, even where the for-profit private transfer fee is used in the initial development of community infrastructure (e.g. a road), future property owners will not benefit from the infrastructure after it deteriorates, but will still be required to pay the private transfer fee to third party investors.

On the contrary, community transfer fees directly benefit the properties they are attached to. In the case of homeowner associations, community transfer fees fund improvements on the property itself and also on the community property. A study by the CATO Institute concluded homeowner associations “increase value by at least 5–6 percent.”<sup>9</sup>

**b. For-Profit Private Transfer Fees and the Impact on the Cost of Homeownership**

Freehold Capital Partners claim that Private Transfer Fees result in savings for homebuyers, because the fee “lowers the price of the home below that of a comparable home

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<sup>9</sup> Amanda Agan and Alexander Tabarrok, *Do Homeowner Associations Raise Property Values? What Are Private Governments Worth?* Regulation, Fall 2005, p. 17 available at <http://www.cato.org/pubs/regulation/regv28n3/v28n3-2.pdf>.

unencumbered by the fee.”<sup>10</sup> Freehold Capital Partners is correct that the private transfer fee does lower the price of the encumbered property relative to unencumbered properties. However, the initial depreciated cost of the home results in much greater costs for the homeowner when he/she sells the encumbered property, because of the cost of the private transfer fees and lost appreciation value of the home.<sup>11</sup>

Figure 1 below, illustrates the lost value of a home encumbered by a private transfer fee. The figures below assume a 2% annual appreciation rate, a 1% private transfer fee, and a 5% reduction in the initial of the home reflecting the price transfer fee.<sup>12</sup> As shown in figure 1, the first four owners of the property encumbered by the private transfer fee will lose a \$10,034.14 in value and a combined \$10,456.49 in private transfer fees paid to the developer and investors.

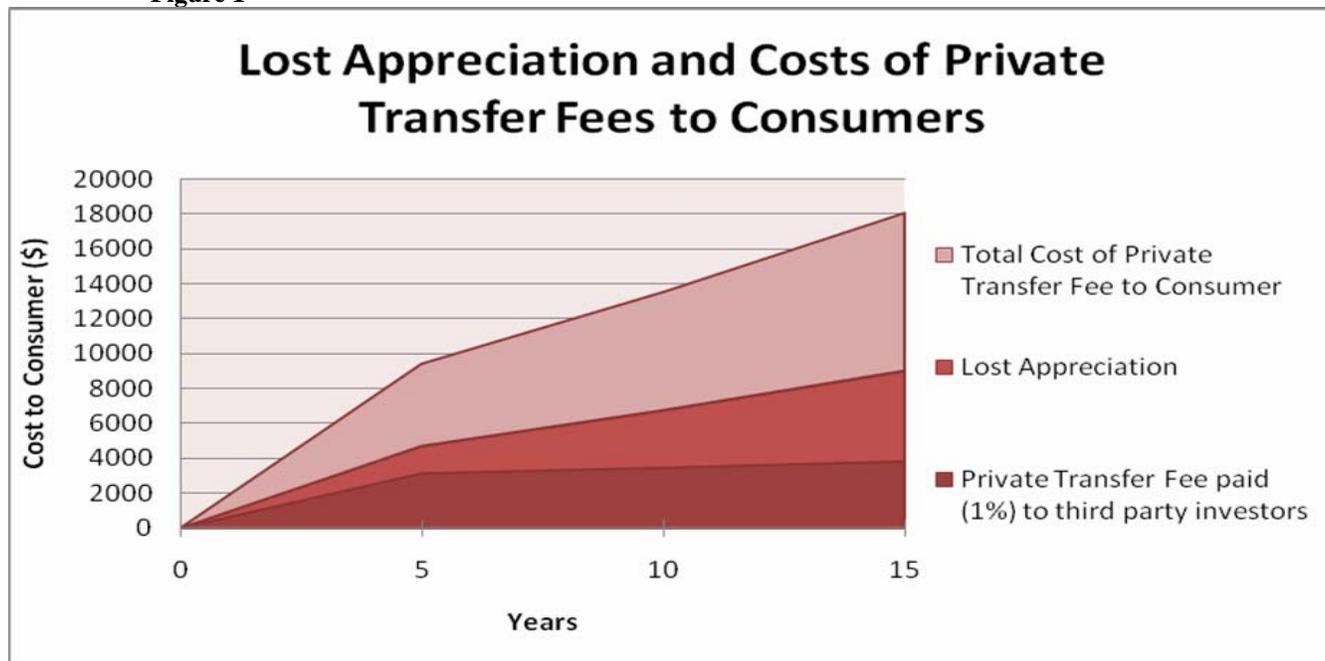
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<sup>10</sup> Patton Boggs, *Freehold Capital Partners comment on FHFA proposed guidance concerning Private Transfer Fee Covenants*, page 5, October 15, 2010, available at [http://www.fhfa.gov/webfiles/19294/2521\\_Patton\\_Boggs\\_LLC\\_on\\_behalf\\_of\\_Freehold\\_Capital\\_Partners.pdf](http://www.fhfa.gov/webfiles/19294/2521_Patton_Boggs_LLC_on_behalf_of_Freehold_Capital_Partners.pdf) [hereinafter *Freehold Capital Partners Comment 1*].

<sup>11</sup> Freehold Capital Partners, *comment on FHFA proposed guidance concerning Private Transfer Fee Covenants*, page 4, October 13, 2010, available at [http://www.fhfa.gov/webfiles/19319/2546\\_Freehold\\_Capital\\_Partners.pdf](http://www.fhfa.gov/webfiles/19319/2546_Freehold_Capital_Partners.pdf) [hereinafter *Freehold Capital Partners Comment 2*].

<sup>12</sup> *Freehold Capital Partners Comment 1*, at page 5 (“homebuyer receives a four to five percent reduction in the initial purchase price”).

Figure 1



	Initial value	Value after <sup>13</sup> sale 1 (5yrs)	Value after sale 2 (10yrs)	Value after sale 3 (15yrs)	Total
Property without Private Transfer Fee	\$300,000	\$331,224.24	\$365,698.33	\$403,760.50	
Property Encumbered by a Private Transfer Fee	\$285,000 (5% discount)	\$314,663.03	\$347,413.41	\$383,572.48	
(lost appreciation)		(\$1,561)	(\$3,284.92)	(\$5,188.01)	(\$10,0314.14)
1% Private Transfer Fee paid by Homebuyer		(\$3,146.63)	(\$3,474.13)	(\$3,835.72)	(\$10,456.49)
Value received after sale with private transfer fee		\$311,516.40	\$343,939.28	\$379,736.76	
Difference in value of property with transfer fee and property without transfer fee		\$19,707.84	\$21,759.05	\$24,023.74	
Total cost of transfer fee after 5% savings (\$15,000)		\$4,707.84	\$6,759.05	\$9,023.74	

In the scenario in figure 1, when the home is first purchased from the developer, the homebuyer experiences a discount of \$15,000 in the purchase price to reflect the diminished value of the home carrying the private transfer fee. Although the discount reduces the purchase price of the home by \$15,000, it also decreases the appreciation of the value of the home. Thus, in addition to the private transfer fee paid to the developer of \$10,456.49, the homeowner also suffers economic losses of \$10,034.14 in lost appreciation. Moreover, although the buyer

<sup>13</sup> Assumes an appreciation of 2% compounded annually.

benefits from a 5% discount in the price of the home when buying the property, in this instance the lost appreciation and cost of the fee when selling the property far exceed the benefits. These losses are represented in the bottom line of the table in figure 1. Therefore, although Freehold Capital Partner's state that for-profit private transfer fees reduce the costs of homes, private transfer fees could clearly increase the cost of homeownership depending on the magnitude of the evaluation parameters.

In contrast, community transfer fees fund community projects which directly increase the value of the relevant property. As discussed above, membership to a homeowner association can increase the value of the property by at least 5 to 6%.<sup>14</sup>

**c. For-Profit Private Transfer Fees Impact on Homeowners' Equity and Home Improvement Investments**

Freehold Capital Partners state that Private Transfer Fees reduce the costs of homeownership, arguing that "when you spread infrastructure costs across the life of the property, there is an immediate and continuing savings for homebuyers, because the price of the home is lower than it otherwise would be without the fee."<sup>15</sup> However, Freehold Capital Partners' also state that although the buyer may acquire the property at a depreciated value, they must also sell the home at a depressed value that reflects the private transfer fee that is attached to the land.<sup>16</sup>

In addition, homeowners of property encumbered by a private transfer fee may not in most instances realize the full return on their capital improvements to their property. The

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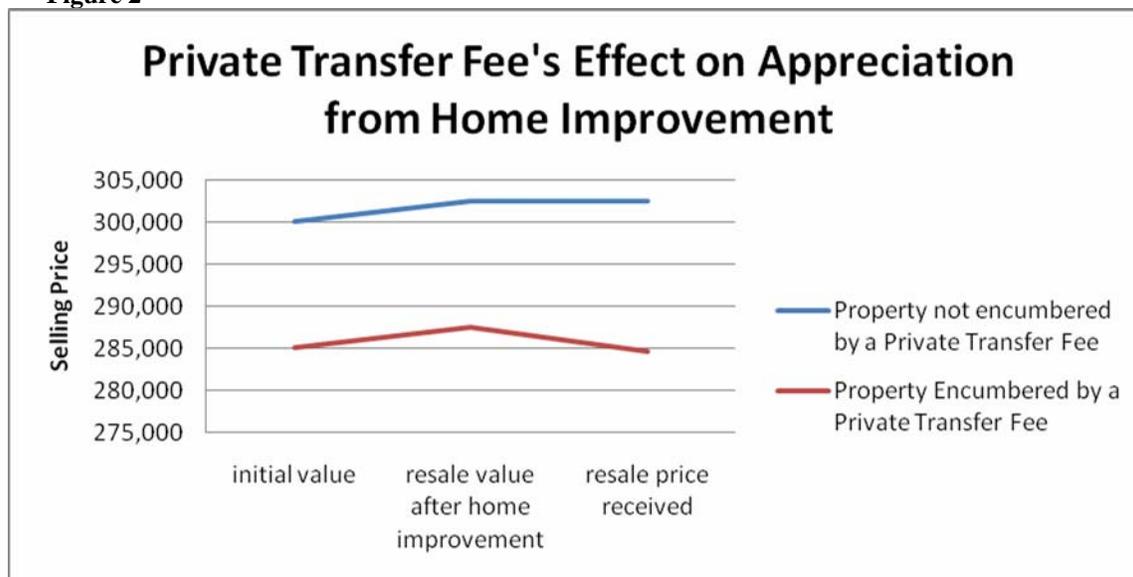
<sup>14</sup> Amanda Agan and Alexander Tabarrok, *Do Homeowner Associations Raise Property Values? What Are Private Governments Worth?* Regulation, Fall 2005, p. 17 available at <http://www.cato.org/pubs/regulation/regv28n3/v28n3-2.pdf>.

<sup>15</sup> *Freehold Capital Partners Comment 2*, at 6.

<sup>16</sup> Freehold Capital Partners, *Freehold Brochure*, page 15 ("A buyer who buys for less can also sell for less") available at [http://freeholdcapitalpartners.com/forms/freehold\\_brochure.pdf](http://freeholdcapitalpartners.com/forms/freehold_brochure.pdf).

scenario in Figure 3 below illustrates the effect of private transfer fees can have on home investments made exclusively by homeowners.

Figure 2



	initial value	Value of home improvement	resale value	1% private transfer fee	resale price received	Gain/Loss on Resale
<b>Property not encumbered by a Private Transfer Fee</b>	300,000	2,500	302,500	n/a	302,500	<b>\$2,500 gain</b>
<b>Property Encumbered by a Private Transfer Fee</b>	285,000	2,500	287,500	2,875.00	284,625	<b>\$375 loss</b>

Figure 2 depicts a situation where a homeowner makes improvements to their home, yet still loses money on the resale of their home, because of the 1% private transfer fee. Notably, in the case where the transfer fee has been securitized, the homeowner will have to share the return on their home improvement with third party investors who did not contribute at all to the home improvement. The declining red line represents the transfer fee paid to third party investors.

Vanderbilt Law School Professor Kelly Lise Murray states there is a systemic unfairness associated with private transfer fees arguing, “Say the new owner gives a big boost to the value

of a home by upgrading the bathrooms and doing a big addition. They'd be obliged to share that appreciation, via the reconveyance, with people who didn't contribute at all.”<sup>17</sup>

#### **d. Private Transfer Fees Currently Lack Transparency**

Commendably, Freehold Capital Partners does support implementation of nationwide disclosure requirements.<sup>18</sup> Freehold Capital Partners claim that all that of its private transfer fees are guaranteed disclosure because the encumbrance is recorded in public records, which provides sufficient notice to homebuyers.<sup>19</sup>

However, often recordation of the covenant does not provide sufficient notice to homebuyers. Freehold Capital Partners argues that its private transfer fee covenants are easily identified, because the instrument contains a “prominently styled ‘NOTICE’ in bold 14-point font at the top of the first page.”<sup>20</sup> Though it is a large and bold effort, such disclosure does not provide actual notice to buyers. “Often, the fee is within dozens or hundreds of pages of documents, and for some buyers....it may be in a separate document that does not require a signature.”<sup>21</sup> Moreover, the first sale of the property is typically exempted from paying the private transfer fee.<sup>22</sup> The effect of this first sale exemption has been criticized because its existence of the covenant on the land is not transparent to the initial buyer until he or she attempts to sell the property.

Figure 4 below is the first page of an actual private transfer fee covenant used by Freehold Capital Partners. Although the title, “NOTICE TO CLOSING, AGENT, SELLER AND

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<sup>17</sup> Stephanie Fitch, *Proponent of New Real Estate Fee Exempts His Own House*, Forbes, (Aug. 24, 2010) available at <http://www.forbes.com/2010/08/24/new-real-estate-fees-personal-finance-reconveyance-fees.html>.

<sup>18</sup> *Freehold Capital Partners Comment 1*, at 2.

<sup>19</sup> *Freehold Capital Partners Comment 1*, at 10.

<sup>20</sup> *Freehold Capital Partners Comment 1*, at 9.

<sup>21</sup> <http://www.nytimes.com/2010/09/12/business/12fees.html>

<sup>22</sup> *Freehold Capital Partners Comment 1*, at 11-12.

PURCHASER” is bold and in capital letters, the presence of a private transfer fee is not explicitly clear. The notice directs the closing agent to the public records and to six separate paragraphs in the 13-page document to determine if there is a private transfer fee on the land.

**Figure 3**

**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS**

**NOTICE TO CLOSING AGENT, SELLER AND PURCHASER**

THIS INSTRUMENT MAY REQUIRE COLLECTION OF A FEE,  
CHARGE OR ASSESSMENT IN CONNECTION WITH CONVEYANCE OF TITLE.

**Instructions to Closing Agent:** Check the official public records for subsequent amendments to this instrument. Check paragraph 6 of this instrument for exempt sales. For non-exempt sales made before expiration of this instrument (see paragraph 2), collect one percent (1%) of the Gross Sales Price from the Seller (see paragraph 5), retain Closing Agent fee (see ¶13e) and remit balance to Trustee (see paragraphs 9, 14). Contact Trustee with inquiries related to this instrument and for assistance with closing. See also ¶13.

KNOW-ALL MEN BY THESE PRESENTS THAT this Declaration is made by S. L. 6, LLC., A UTAH LIMITED LIABILITY COMPANY, whose mailing address is 1099 W. South Jordan Parkway, South Jordan, UT 84095 (hereinafter "Declarant") together with all of Declarant's heirs, successors and assigns and is as follows:

WITNESSETH:

WHEREAS, Declarant is the present owner of that certain real property ("Property") located in Utah County, State of Utah, described as follows:

Assessor Parcel #(s): 58-040-0006; 58-040-0005; 58-040-0114; 58-040-0113; 58-040-0226; 58-040-0315; 58-040-0316; 58-040-0347; 58-040-0348; 58-040-0349; 66-065-0102; 66-066-0061; 66-084-0182; 66-084-0205; 66-194-0603 through 66-194-0612; 66-194-0614; 66-194-0618 through 66-194-0624; 66-217-0001 through 66-217-0086; 66-217-0007

The real property located in Utah County, Utah, as more particularly described in Exhibit "A" attached hereto and incorporated herein for all purposes.

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS that Declarant hereby declares that the Property shall be held, sold, subjected to and conveyed subject to the following

Source: Janet Morrissey, *Resale Fees that Only Developers Could Love*, The New York Times, Sept. 11, 2010, at BU1, available at <http://graphics8.nytimes.com/packages/pdf/business/20100912fees.pdf>. Note, image has been reduced from its original size.

In this particular case, the private transfer fee covenant was contained in a separate 13-page document that was not included in the closing papers and did not require a signature by the buyer.<sup>23</sup> The buyer, closing agent, and homebuilder were all unaware of the private transfer at the time of the purchase.<sup>24</sup>

<sup>23</sup> Janet Morrissey, *Resale Fees that Only Developers Could Love*, The New York Times, Sept. 11, 2010, at BU1, available at <http://www.nytimes.com/2010/09/12/business/12fees.html>.

<sup>24</sup> *Id.*

**e. Consumers' Choice to Purchase a Home with a Private Transfer Fee**

Finally, Freehold Capital Partners argue that individuals have a choice when purchasing a home; homebuyers who purchase a home with a private transfer fee covenant choose to do so because the fee lowers the price of a comparable home unencumbered by the fee. The idea is that buyers are aware of the fees and negotiate the purchase of their home to reflect the encumbrance attached to the land. In reality though, the housing market does not provide consumers with such perfect information and the market does not provide the range of choices among comparable properties to determine if a private transfer fee is beneficial. Without the choice of purchasing an identical home that does not have a private transfer fee, homebuyers are unable to determine if the sale price of the home is actually being discounted.

Private transfer fees are a complex mechanism for homebuyers to understand. Transfer fees require a high degree of sophistication about housing markets to determine if purchasing a property burdened with a transfer fee is a rational and economically beneficial decision. If there is implementation of a national disclosure regime, the requirements must exceed the current standards set forth by Freehold Capital Partners. While Freehold Capital Partners are correct in that private transfer fees may operate to the benefit of the consumer by allowing the consumer to negotiate down the buying price to reflect the encumbrance on the land, this cannot occur on the current operation of transfer fees where consumers are acting without actual notice and knowledge of the fees. The efficacy of for-profit-transfer fees is determined in large part by the effectiveness of national disclosure program.

**III. Federal Home Loan Bank of New York**

The FHLBNY is one of the entities directly regulated by the proposed ban on private transfer fees by FHFA. FHLBNY submitted comments on October 15, 2010 to address its

concerns with FHFA's proposed guidance.<sup>25</sup> FHLBNY argues that FHFA's Proposed Guidance is overly broad. FHLBNY states that not all private transfer "are created equal...[and] that a distinction must be made between those 'good' [private transfer fees] that provide value in which they benefit the affected property homeowners association and community as opposed to those 'bad' [private transfer fees] which accrue value only to unrelated parties."<sup>26</sup> FHLBNY claims that co-op share loans, condominiums, and planned urban development projects should be excluded from the ban on private transfer fees. FHLBNY does support FHFA in prohibiting the purchase and collateral use of mortgage loans burdened by for-profit private transfer fees.

**a. For-Profit Private Transfer Fees Do Not Benefit the Relevant Property**

The FHLBNY echoes FHFA's concern over the negative impact of for-profit private transfer fees.<sup>27</sup> The FHLBNY finds, "Such fee covenants appear to only benefit either the developer by providing a lucrative and long lasting revenue stream, or the investors in securities backed by these revenue streams."<sup>28</sup> The FHLBNY further comments that "FHLBanks should not lend against mortgage collateral or purchase mortgage loans that are subject to" for-profit private transfer fee covenants.<sup>29</sup>

While FHLBNY is correct that the for-profit private transfer fee are not paid back to the community or property owner, the FHLBNY fails to address Freehold Capital Partners' proposition that for-profit private transfer fee do benefit the relevant property, because it provides developers with upfront capital to build infrastructure for the community at lower

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<sup>25</sup> Federal Home Loan Bank of New York, *Public comments on "Guidance on Private Transfer Fee Covenants,"* October 15, 2010 available at [http://www.fhfa.gov/webfiles/19270/2497\\_FHLBank\\_of\\_New\\_York.pdf](http://www.fhfa.gov/webfiles/19270/2497_FHLBank_of_New_York.pdf) [hereinafter *FHLBNY's Comments*].

<sup>26</sup> *Id.* at 5.

<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

developing costs. In a tight credit market, for-profit private transfer fees may provide consumers with the opportunity to purchase a home at low cost, which will increase demand and homeownership.

**b. Exemptions for Private Transfer Fees on Co-ops and Homeowner Associations**

The FHLBNY argues that “not all [private transfer fees] are created equal.” The FHLBNY urges FHFA “that distinction must be made between those ‘good’ [private transfer fees] that provide value in which they benefit the affected property homeowners association and community as opposed to those ‘bad’ [private transfer fees] which accrue value only to unrelated parties.”<sup>30</sup> As such, FHLBNY believes that the “good” community private transfer fees should be exempt from the ban on private transfer fees.

The FHLBNY argues that 50% of New York City co-op buildings have private transfer covenants attached to the property.<sup>31</sup> These transfer fees go directly to investments in the building to fund ongoing maintenance, modernization projects, and unexpected repairs to the buildings. Transfer fees have replaced the traditional income stream for co-ops of monthly maintenance fees. However, transfer fees are preferable to monthly maintenance fees, and actually increase the value of the co-op, because transfer fees provide adequate reserve funds. Without the large reserves provided by transfer fees, special assessments levied against shareholders are necessary to cover shortfall and unexpected repairs.<sup>32</sup> Moreover, FHLBNY argues that because so many New York City co-op buildings have adopted private transfer fee covenants, a complete ban will result in disqualifying a currently eligible and actively used form of collateral that is pledged by FHLBNY members. Furthermore, applying the ban to co-ops will result in the disruption in liquidity and stability in the New York City co-op market.

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<sup>30</sup> *Id.* at 5.

<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.*

**c. Concerns With Community Private Transfer Fees**

As FHLBNY proposes, transfer fee covenants are a better alternative to monthly maintenance fees because they provide large reserve funds. However, FHLBNY monthly maintenance fees could also provide adequate reserve fund by simply raising monthly maintenance fees to each shareholder. Thus, transfer fees are not a necessary financing tool for co-ops. Moreover, many of the risks associated with for-profit private transfer fees also apply for community transfer fees.

First, similar to for-profit private transfer fees, the person paying the community private transfer fee receives no direct benefit from the fee. The community private transfer fee is paid by the shareholder to the co-op only when the shareholder sells his or her share in the co-op. Thus, the selling shareholder does not realize the benefits of the fee that he pays. Arguably, every shareholder who benefits from the transfer fee paid by the selling shareholder, will at some point also be a seller who has to pay the fee. However, the payer of the fee still does not benefit from the fee directly, which may carry some serious implications for current shareholders, particularly in the current depressed housing market. For example, the current income stream from private transfer fees is relatively low for co-ops, because with the sluggish housing market, housing prices are depressed and the volume of home sales is reduced. Thus, co-op boards have to raise monthly fees to account for the decline in income from private transfer fees. Accordingly, current shareholders are not benefitting as much from the transfer fees in the sluggish housing market and have to pay greater monthly maintenance fees. However, as the housing market begins to recover, housing prices will increase and selling shareholders will pay a proportionally greater transfer fee relative to the benefits he or she received from the fee during the struggling housing market.

Second, community transfer fees reduce liquidity in the co-op housing market. The transfer fees act as a restraint on the alienation of the property, because the fee is imposed each time the property is sold. FHLBNY states that transfer fees are advantageous over monthly maintenance fees, because they provide large adequate reserves. However, as a restraint on the alienation of the property, transfer fees deter the very thing that sustains them and the co-op reserve funds—the selling of property. As the housing market continues to struggle, all transfer fees encumber and devalue property unnecessarily. This further impedes the return to a robust housing market.

Finally, community private transfer fees suffer from the same problems with transparency as for-profit private transfer fees. However, disclosure requirements that provide consumers with actual notice and knowledge of the private transfer can cure the lack of clarity surrounding private transfer fees.

#### **IV. Recommendations by the Center for Regulatory Effectiveness**

##### **a. Decision Process**

CRE reviewed the public comments submitted to the FHFA on its Proposed Guidance for Private Transfer Fees. CRE then identified critical issues raised by the public and sought comment on them through the establishment of an [Interactive Public Docket](#). The resultant analysis performed by CRE result in the following conclusions and recommendations:

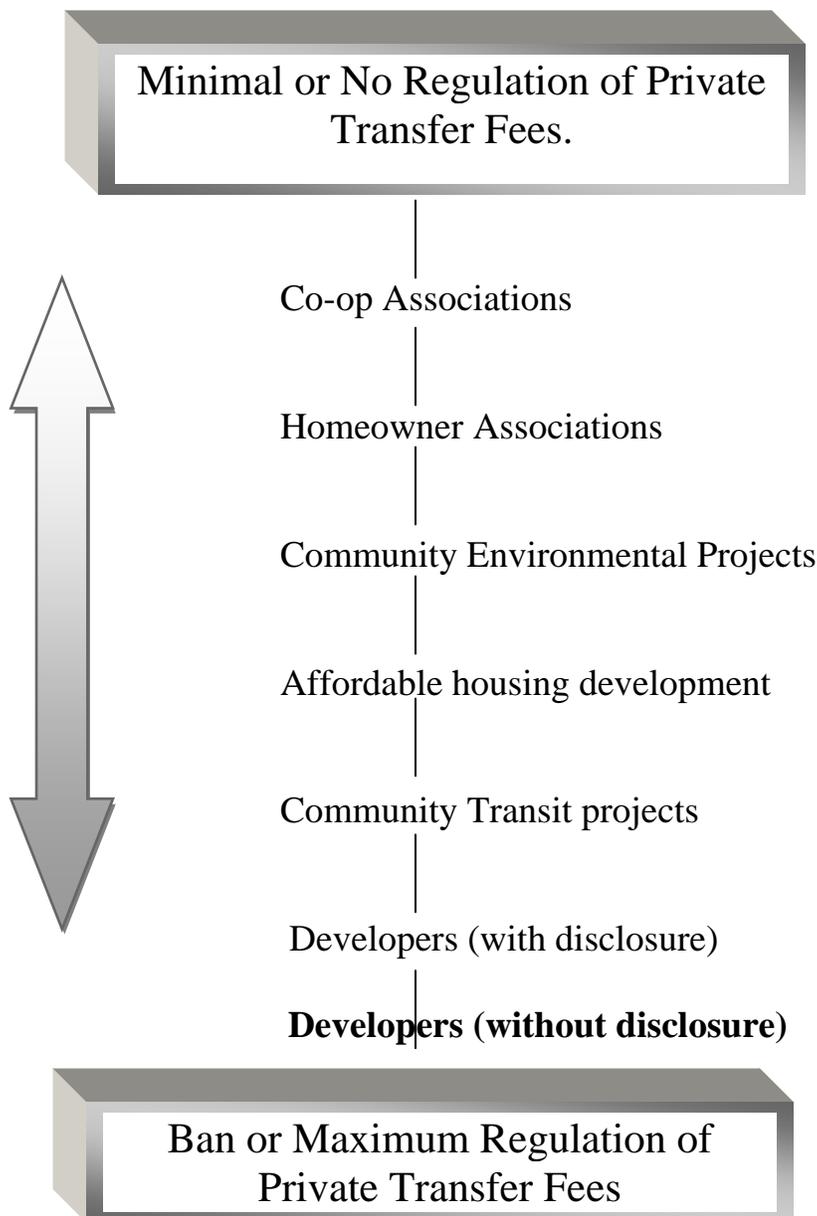
##### **b. Controlling Public Comment: Federal Home Loan Bank—New York**

“As such, the FHLBNY ( Federal Home Loan Bank--New York) believes that a distinction must be made between those ‘good’ [private transfer fee covenants] that provide value in which they benefit the affected property’s homeowners association and community as opposed to those ‘bad’ [private transfer covenants] which accrue value only to unrelated parties.”

**c. Operating Principle**

The more the benefits accrue to the property owners paying the Private Transfer Fee, the less the need for regulation to prohibit their use or to disclose their contents. Figure 4 below, illustrates the increasing level of the need for regulation to prohibit the use or disclosure of private transfer fees.

**Figure 4**



**d. Answers to Questions Raised by CRE**

1. If FHFA is going to regulate private transfer fees, it should be done by regulation, not by guidance.
2. If FHFA is going to regulate private transfer fees either by guidance or by rule, it should prepare a draft environmental impact statement for public comment addressing, at a minimum, the impact on the aforementioned beneficiary classes.
3. If a regulation is to be promulgated to prohibit the use of private transfer fees *prior* to the passage of national disclosure legislation, there is insufficient evidence to regulate all beneficiary classes.

If a regulation is to be promulgated to prohibit the use of private transfer fees *subsequent* to the passage of national disclosure legislation, there is insufficient evidence to regulate all beneficiary classes and a re-examination of the role of for-profit transfer fees should be undertaken depending upon the effectiveness of the disclosure program.