: 8070-01-P

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1228

RIN 2590-AB61

Amendment Reinstating "Grandfather" Exceptions to Restrictions on Private Transfer Fee Covenants

AGENCY: Federal Housing Finance Agency.

ACTION: Final rule; technical amendment; request for comments.

SUMMARY: The Federal Housing Finance Agency (FHFA) is making a technical amendment to its Private Transfer Fee Covenants (PTFC) Regulation. The PTFC Regulation restricts FHFA's 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 purchasing, investing in, accepting as collateral, or otherwise dealing in mortgages on properties encumbered by certain types of PTFCs, or related securities, subject to certain exceptions. The technical amendment reinstates timing and transitional applicability ("grandfather") exceptions that were removed by FHFA's 2024 amendments to the PTFC Regulation. The reinstated "grandfather" exceptions are applicable *nunc pro tunc* beginning July 16, 2012.

DATES:

Effective date: The final rule is effective **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

Applicable date: Section 1228.3(a) is applicable beginning July 16, 2012.

FOR FURTHER INFORMATION CONTACT: Sara L. Todd, Assistant General Counsel, Office of General Counsel (OGC), (202) 649-3527, sara.todd@fhfa.gov, Federal Housing Finance Agency, 400 Seventh Street, SW, Washington, DC 20219. This is not a

toll-free number. The mailing address is: Federal Housing Finance Agency, Fourth Floor, 400 Seventh Street SW, Washington, DC 20219. For TTY/TRS users with hearing and speech disabilities, dial 711 and ask to be connected to the contact number above.

SUPPLEMENTARY INFORMATION:

I. Background

A. *Regulatory History*

The PTFC Regulation was originally published on March 16, 2012 and became effective on July 16, 2012 (the 2012 Final Rule),[1] following issuance of a proposed rule on August 16, 2010.[2] The PTFC Regulation restricts FHFA's regulated entities—the Enterprises and the Banks—from purchasing, investing in, accepting as collateral, or otherwise dealing in mortgages on properties encumbered by certain types of PTFCs, or related securities, subject to certain exceptions.[3]

On September 26, 2023, FHFA published a proposed rule (the 2023 Proposed Rule) to amend the PTFC Regulation to add an exception to the restrictions for loans and related securities on properties with PTFCs if the loans meet the shared equity loan program requirements for Resale Restriction Programs (other than the 100 percent of area median income (AMI) limit), in § 1282.34(d)(4)(i)(A) and (d)(4)(ii) of FHFA's Duty to Serve Regulation.[4] On March 12, 2024, FHFA published a final rule (the 2024 Final Rule) adopting the proposed amendments (with technical changes to improve clarity regarding the intent of the provisions).[5] The 2024 Final Rule became effective May 13, 2024.

The 2023 Proposed Rule also proposed removing the prospective application and effective date provisions from § 1228.3 of the PTFC Regulation, which included "grandfather" exceptions. The "grandfather" exceptions were for mortgages on properties

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[1] 77 FR 15566 (March 16, 2012).
[2] 75 FR 49932 (Aug. 16, 2010).
[3] 12 CFR part 1228.
[4] 88 FR 65827 (Sept. 26, 2023).
[5] 89 FR 17711 (March 12, 2024).

encumbered by PTFCs if those PTFCs were created before February 8, 2011, or if those PTFCs were created on or after February 8, 2011 pursuant to an agreement entered into before February 8, 2011 applicable to land identified in the agreement, if the agreement was in settlement of litigation or approved by a government agency or body. The 2023 Proposed Rule also proposed omitting the provisions stating that the PTFC Regulation also applies to securities backed by mortgages to which the PTFC Regulation applies, and to securities issued after February 8, 2011 backed by revenue from private transfer fees, regardless of when the covenants were created. In addition, the 2023 Proposed Rule proposed omitting the statement expressly requiring the regulated entities to comply with the 2012 Final Rule not later than July 16, 2012. FHFA proposed these changes in the mistaken belief that the transitional "grandfather" exceptions were no longer necessary because the Enterprises and the Banks had been operating under the provisions of the PTFC Regulation since July 16, 2012, and the Enterprises subsequently had been operating under the terms of a regulatory waiver (the Enterprise Regulatory Waiver) since July 1, 2023.

The 2023 Proposed Rule preamble solicited public comments on the proposed amendments, and FHFA received no specific comments on the proposed removal of the "grandfather" exceptions provision. Accordingly, FHFA did not include the provision in the 2024 Final Rule.

The 2024 Final Rule also revised § 1228.3 to include the retrospective component of the Enterprise Regulatory Waiver by allowing the Enterprises to retain in their portfolios shared equity loans on properties with private transfer fees that were purchased or securitized by the Enterprises with promissory note dates prior to the effective date of the Enterprise Regulatory Waiver (July 1, 2023), regardless of whether the loans met the Duty to Serve shared equity loan program criteria for Resale Restriction Programs in 12 CFR 1282.34(d)(4)(i)(A) and (d)(4)(ii).

B. *Subsequent Input on Removal of the "Grandfather" Exceptions*

After the 2024 Final Rule was adopted, FHFA received informal communications regarding stakeholders who had relied upon the "grandfather" exceptions provision when they entered into an agreement during the transitional period contemplated by the 2012 Final Rule. The concerns indicated that, as a result of removal of the "grandfather" exceptions provision, any covenants, agreements, statutes, or other documents that were entered into or adopted while the 2012 Final Rule was in effect and that referred to § 1228.3 of the 2012 Final Rule no longer direct readers of those documents to the text of the "grandfather" exceptions provision. Thus, lenders, title insurance agents, or prospective purchasers might not be able to verify that the stakeholders' agreements and covenants fall within an exception created by the "grandfather" exceptions provision. The resulting inability to confirm the existence or applicability of an exception under the "grandfather" exceptions provision could result in a cloud on the title of a stakeholder who had relied upon that provision.

II. Limitations on Applicability – Reinstatement of "Grandfather" Exceptions—§ 1228.3

FHFA agrees that the stakeholders' concerns warrant addressing. While the new version of § 1228.3 adopted in the 2024 Final Rule – which codified the retrospective component of the Enterprise Regulatory Waiver – is correct as written, the "grandfather" exceptions were deleted without thorough consideration of potential unintended consequences. Accordingly, this final rule makes a technical amendment to reinstate the deleted "grandfather" exceptions as § 1228.3(a), applicable *nunc pro tunc* beginning July 16, 2012, so that all prior and current components of the transitional and timing requirements of the PTFC Regulation are available for any stakeholder whose property meets the requirements. Availability and applicability of the "grandfather" exceptions is determined with reference to the operative dates specified in § 1228.3, rather than with

reference to the effective dates of amendments to the PTFC Regulation, so that continuity of the "grandfather" exceptions is not affected by the temporary omission of the "grandfather" exceptions from the PTFC Regulation.

The current heading for § 1228.3 – "Limitation on applicability" – was changed in the 2024 Final Rule from the former heading – "Prospective application and effective date," because the passage of time has altered the nature of the provision from prospective to identification of several limitations based upon dates that occurred in the past. The final rule revises the word "Limitation" in the heading to the plural "Limitations" to reflect that the timing aspects of the Enterprise Regulatory Waiver that were codified in the 2024 Final Rule, combined with the "grandfather" exceptions, establish multiple limitations.

III. Administrative Procedure Act

The Administrative Procedure Act (5 U.S.C. 551 *et seq*.) (APA) generally requires public notice and comment before promulgation of regulations. *See* 5 U.S.C. 553(b). Unless notice or hearing is required by statute, however, the APA provides an exception "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B).

FHFA finds for good cause pursuant to 5 U.S.C. 553(b)(B) that the notice and comment procedure required by the APA is unnecessary and contrary to the public interest for this final rule because: (i) the "grandfather" exceptions provision that is being reinstated is unchanged from the version that was subjected to notice and public comment previously; (ii) the technical amendment is technical in nature, so no further comment should be necessary; and (iii) expeditious correction of the omission is merited for the members of the public who relied on the deleted exceptions provision.

IV. Consideration of Differences Between the Banks and the Enterprises

When promulgating regulations relating to the Banks, section 1313(f) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended, requires the Director of FHFA to consider the differences between the Banks and the Enterprises with respect to: the Banks' cooperative ownership structure; mission of providing liquidity to members and housing associates; affordable housing and community development mission; capital structure; and joint and several liability. In developing the 2012 Final Rule, FHFA considered the differences between the Banks and the Enterprises as they related to the above factors and determined that the 2012 Final Rule was appropriate to the structure, operations, and execution of the mission of the Banks with respect to the five factors, and would not result in any inappropriate treatment of the Banks as compared to the Enterprises.

In the preamble to the 2023 Proposed Rule, FHFA requested comments on whether differences related to the section 1313(f) factors should result in any additional or other revisions to that Proposed Rule. No commenter on the 2023 Proposed Rule recommended amending the PTFC Regulation to apply different criteria to the Banks or the Enterprises regarding removal of the "grandfather" exceptions or any other provisions in that Proposed Rule. In adopting the 2024 Final Rule, FHFA determined that the Rule was appropriate as it would have no impact on four of the five factors and could have a modest, positive impact on the fifth factor—the mission of providing liquidity to Bank members and housing associates.

FHFA believes that this final rule is appropriate because it would have no effects that were not considered by FHFA in developing the 2012 Final Rule and the 2024 Final Rule. Accordingly, FHFA's section 1313(f) analyses for those Rules apply to this interim final rule as well, and, therefore, it is not necessary to conduct a new section 1313(f) analysis for this final rule.

V. Regulatory Impact

A. *Paperwork Reduction Act*

This final rule does not contain any information collection requirement. Thus, it does not require approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq*.). Therefore, FHFA has not submitted any information to OMB for review.

B. *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. FHFA need not undertake such an analysis if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of this final rule under the Regulatory Flexibility Act and FHFA certifies that the final rule will not have a significant economic impact on a substantial number of small entities because it applies only to Fannie Mae, Freddie Mac, and the Banks, which are not small entities for purposes of the Regulatory Flexibility Act.

C. *Executive Order 12866, Regulatory Planning and Review*

Executive Order 12866 requires agencies to submit "significant regulatory actions" to the Office of Management and Budget, Office of Information and Regulatory Affairs (OIRA) for review. FHFA has determined the final rule not to be a significant regulatory action for purposes of E.O. 12866. OMB has reviewed FHFA's economic impact analysis and has concurred in the determination that this final rule is not a significant regulatory action and does not require OMB coordination and review under E.O. 12866.

D. *Executive Order 13563: Improving Regulation and Regulatory Review*

Executive Order 13563 directs agencies to analyze regulations that are "outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or

repeal them in accordance with what has been learned." Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. FHFA has developed this final rule in a manner consistent with these requirements.

E. *Executive Order 14192: Unleashing Prosperity Through Deregulation*

Executive Order 14192 requires that for each new regulation issued, at least 10 existing regulations be identified for elimination. Executive Order 14192 also directs that any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least 10 prior regulations. FHFA's implementation of these requirements will be informed by M-25-20, Guidance Implementing Section 3 of Executive Order 14192, Titled "Unleashing Prosperity Through Deregulation" (March 26, 2025). This final rule is not subject to offset requirements under Executive Order 14192 because it is "not significant" and therefore does not meet the Executive Order's definition of a "regulatory action" subject to the Executive Order's requirements.

F. *Congressional Review Act*

In accordance with the Congressional Review Act (CRA) (5 U.S.C. 801 *et seq*.), FHFA has determined that this final rule is not a "major rule" and has verified this determination with OMB. Because it is not a "major rule," FHFA is adopting the final rule without the 60-day delayed effective date generally prescribed under the CRA for major rules (5 U.S.C. 801(3)(A)). In addition, the delayed effective date required by the CRA does not apply to any rule for which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest (5

U.S.C. 808(2)). FHFA has adopted such findings for the reasons set forth in Section III. above.

List of Subjects in 12 CFR Part 1228

Banks, Banking, Condominiums, Cooperatives, Federal Home Loan Banks, Government-sponsored enterprises, Investments, Loan programs−housing and community development, Low and moderate income housing, Mortgages, Nonprofit organizations, Real property acquisition, Securities.

For the reasons stated in the Preamble, and under the authority of 12 U.S.C. 4526, FHFA is amending part 1228 of chapter XII of title 12 of the Code of Federal Regulations 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

1. The authority citation for part 1228 continues to read as follows:

Authority: 12 U.S.C. 4511, 4513, 4526, 4565, 4616, 4617, 4631.

2. Revise § 1228.3 to read as follows:

§ 1228.3 Limitations on applicability.

(a) Beginning July 16, 2012, this part shall apply only to mortgages on properties encumbered by private transfer fee covenants if those covenants were created on or after February 8, 2011, except that this part shall not apply to mortgages on properties encumbered by private transfer fee covenants if those covenants were 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.

(b) This part does not apply to shared equity loans, or related securities, with promissory note dates prior to July 1, 2023, regardless of whether the loans met the Duty to Serve shared equity loan program criteria for resale restriction programs in § 1282.34(d)(4)(i)(A) and (d)(4)(ii) of this chapter.

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[FR Doc. 2026-05160 Filed: 3/16/2026 8:45 am; Publication Date: 3/17/2026]