

March 8, 2011

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Alfred M. Pollard, Esq.  
General Counsel  
Attn: Comments/RIN2590-AA41  
Division of Federal Loan Bank Regulation  
Federal Housing Finance Agency  
Fourth Floor  
1700 G Street, N.W.  
Washington, D.C. 20552

Re: RIN2590-AA41, Notice of Proposed Rulemaking, 76 Federal  
Register 6702 *et seq.* (February 8, 2011)

Dear Sir:

Associations, Inc. (“Associa”) submits the following comments on the above-referenced Notice of Proposed Rulemaking (“NPR” or “Proposed Rule”), which seeks to prohibit the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal Home Loan Banks (“Regulated Entities”) from purchasing or investing in any mortgages on properties encumbered by private transfer fee covenants or securities backed by the income stream from such covenants. The Proposed Rule would ban all private transfer fees other than those excepted, in one way or the other, by the proposed definitions in proposed 12 C.F.R. § 1228.1.

It appears that the Proposed Rule does not prohibit property owner associations (“POAs”) or their management agents from charging administrative fees that are directly related to services provided to home sellers and buyers during a transfer of ownership since these fees are contract-based and typically are not imposed by covenant or deed. Given the way that the proposed definitions are interrelated, however, Associa believes that such administrative fees should be explicitly exempted from the Proposed Rule’s scope. These administrative fees are directly related to services provided to homeowners, and in no way impose a risk to the stability and liquidity of the housing market. Accordingly, Associa requests that the Proposed Rule be revised to set forth such an exception. Specifically, Associa requests that the following be added to the list of exceptions in the proposed definition of “private transfer fee” in proposed 12 C.F.R. § 1228.1:

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(5) Arising from the performance of services by a covered association or its agent in connection with the transfer of real property.

### **Discussion**

On August 16, 2010, FHFA published notice of a proposed Guidance (“Guidance”), which would have prohibited the Regulated Entities from purchasing or investing in mortgages on residential property subject to virtually all private transfer fee covenants. After reviewing the comments on the proposed Guidance, FHA decided to publish the Proposed Rule. The Proposed Rule would more narrowly prohibit the Regulated Entities from involvement in situations where private transfer fees would be paid to developers, builders, and related parties and in mortgages involving certain other private transfer fees.

Associa is a leader in community association management and supports POAs across the country by providing association management, association consulting, financial management and developer consulting services. When a home is sold, the POA or a management agent such as Associa commonly charges new homeowners (i) a processing fee to cover the costs associated with providing information in connection with the resale of the property, which information is often required to be provided by state law (“Processing Fee”), and (ii) a post-closing fee to pay for specified administrative tasks, such as updating the POA’s records and systems to include the new homeowner and providing new keys, gate-control devices, and vehicle bar code identification for security purposes (“Post-Closing Fee”). Associa normally provides the necessary documentation and performs these administrative tasks pursuant to a contract with the POA.

For the reasons stated below, such administrative fees appear to be outside the scope of the Proposed Rule, as they are fees commonly assessed to homeowners as part of the transfer process as payment for administrative services rendered by the POA or its management agent. However, the need for clarity means that these fees should be explicitly excluded in the final regulation.

Before discussing these issues in more detail, Associa wants to commend FHFA for removing transfer fees to POAs from the scope of the Proposed Rule. These fees have been determined on a consensual basis and there is no evidence that buyers are not informed of them. Some revisions to the Proposed Rule may be needed to assure that this exception works in the way that it should. However, Associa leaves the determination as to whether revisions are needed and the scope of any such revisions to the Community Associations Institute and individual POAs.

In considering these administrative fees, it must be remembered that both types of fee are compensation for services that benefit the parties to the transaction. The Processing Fee benefits

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the seller and the POA, who are responsible for providing the required documentation to the buyer. The Processing Fee is no different than charges such as surveyor's fees, title search fees, appraiser fees, and title insurance premiums. All these are payments for services that are required for the property transfer. Similarly, Post-Closing Fees pay for management aspects of the POA's business directly related to the property transfer. Further, both types of fees are compensation for services rendered by the POA or Associa. These services do not benefit other members of the POA. If the fees for these services are not paid by the buyer and seller, all the POA members would have to pay the costs of providing these services in order to benefit just the seller and buyer.

Finally, such fees to Associa are normally based on a contract between Associa and the POA. Such a contract can be terminated or renewed, but it does not purport to continue in perpetuity or even for ninety-nine years. Nor does it purport to run with the land or to give rise to the ability to place a lien on the property.

As noted above, such fees do not appear to fall within the scope of the Proposed Rule. In the first place, prohibiting these administrative fees would not further the objectives of the NPR. FHFA is seeking to prohibit fees that block or impede transfers, impair the marketability of property, or create problems with mortgage underwriting. These administrative fees do none of these things. The Post-Closing Fee obviously cannot block or impede a transfer since it is a post-transfer obligation; non-payment of the Processing Fee does not permit the POA or its management agent from preventing the transfer. Nor does the non-payment of either enable a POA or its agent to place a lien on the property, which would impair its marketability.

Finally, these administrative fees should cause no problems with mortgage underwriting. The Processing Fee is a charge like those for title searches, appraiser's fees, etc., charges which underwriters are fully capable of evaluating. Post-Closing Fees are not incurred until after closing and thus have no effect on the mortgage underwriting. Thus, the NPR's objectives would not be met by including them in the Proposed Rule's prohibition.

Second, these administrative fees do not fall within the proposed definition of "private transfer fee." Such a fee is "a transfer fee...imposed by a covenant, restriction or other similar document..." An administrative fee is not imposed by a covenant or a restriction but arises from a contract. To read "similar document" as including contracts which authorize fees in exchange for services would stretch the concept of private transfer fees beyond all comprehension and indeed, would have totally unintended consequences. For example, the contract between the seller and the realtor would fall within this vastly expanded definition. Since Processing Fees and Post-Closing Fees are not private transfer fees, they are not prohibited by proposed 12 C.F.R. § 1228.2.

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Finally, administrative fees do not involve private transfer fee covenants. Such a covenant is “a covenant that –

- (1) purports to run with the land or to bind the current owners of, and successors in title to, such real property; and
- (2) obligates a transferee or transferor...to pay a private transfer fee upon transfer of an interest in all or part of the property, or in consideration for permitting such transfer.”

First, no covenant is involved with respect to these administrative fees. Second, the right to such fees neither purports to run with the land nor to bind successors in title to the purchaser. Since no private transfer fee is involved, there is no obligation to pay such a fee upon transfer of the property. Finally, the fees paid are not in consideration for permitting such transfer, but are for services rendered in connection with the transfer.

The foregoing establishes that administrative fees would not be affected by the Proposed Rule. Nonetheless, this needs to be made explicit because of the way in which the Proposed Rule is structured. It would prohibit all private transfer fee covenants and then except or exempt certain types of fees through a series of definitions. The result as to whether or not a given fee is covered will be quite confusing, especially since FHFA has tried to broadly include fees that may be regulated and then exempt narrowly. While this may be appropriate as a means of assuring that only justified exceptions are made, it also has the undesirable effect of creating confusing results in some situations. In order to avoid this, Associa requests that the following language be added to the proposed definition of private transfer fee in proposed 12 C.F.R. § 1228.1. This language would add another exclusion from the definition of private transfer fee.

- (5) Arising from the performance of services by a covered association or its agent in connection with the transfer of real property.

Conforming changes are to delete the “or” at the end of proposed exclusion (3) and deleting the period and adding “; or” at the end of proposed exclusion (4).

### **Request for On-the-Record Meeting with FHFA Staff**

Associa requests an on-the-record meeting with appropriate FHFA staff in order to assure that its comments are fully understood and are taken into account. We will contact FHFA shortly to arrange such a meeting.

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For the above-stated reasons, Associa requests that FHFA revise the Proposed Rule to specifically exempt administrative fees paid for services actually performed and performed by property owner associations or their management agents in connection with the transfer of property.

Sincerely,

A handwritten signature in black ink, appearing to read "T. A. Vanderver, Jr.", written in a cursive style.

Timothy A. Vanderver, Jr.  
Counsel for Associations, Inc.