



March 30, 2011

The Honorable Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
1700 G Street, NW
Washington DC 20552

RE: RIN 2590-AA41

Dear Mr. Pollard:

On behalf of the Community Associations Institute¹ (CAI), I am pleased to submit the following comments regarding the Federal Housing Finance Agency's (Agency) proposed rule concerning private transfer fees.

CAI Urges Elimination of Private Transfer Fees Paid to Unrelated Third Parties

In its proposed rule, the Agency prohibits the government sponsored enterprises (GSEs) from purchasing mortgages secured by properties encumbered by certain private transfer fee covenants and from selling or investing in securities backed by such mortgages. CAI supports the Agency's proposed prohibition on private transfer fees paid to unrelated third parties.

Transfer fees paid to unrelated third parties do not benefit the encumbered properties and violate the traditional standard that any covenant that burdens a parcel of land and purports to run with the land must also touch and concern the land. CAI concurs with the Agency's determination that the purpose of third party transfer fees is solely to create a stream of income for parties that do not have an interest in the land.

¹ CAI is the only national organization dedicated to fostering competent, well-governed community associations that are home to approximately one in every five American households. For nearly 40 years, CAI has been the leader in providing education and resources to the volunteer homeowners who govern community associations and the professionals who support them. CAI's 30,000 members include community association volunteer leaders, professional managers, community management firms, and other professionals and companies that provide products and services to community associations.

CAI Supports Finding that Community Transfer Fees Provide Direct Benefit

CAI is pleased the Agency agrees with the preponderance of legal opinion that community transfer fees² benefit the land and homeowners. It has long been recognized that community transfer fees provide a direct benefit by allowing residents to fund their community association's³ operations and services.

Community associations allow homeowners to protect and enhance the value of their homes and to gain access to additional benefits they would not otherwise be able to enjoy. To accomplish these purposes, community transfer fees are used by residents for association governance, maintaining common property, providing amenities, supporting reserve funds, and for management of these activities and services. Residents and their land benefit from each of these (and other) services and activities provided by their community association.

The use of community transfer fees is merely an additional method by which residents raise revenue and reinvest in their community. Community associations empower residents to protect and improve their neighborhoods, which increases their use and enjoyment of their land. This empowerment of residents is why the community association model of neighborhood governance has been embraced by homeowners, municipalities, and organizations that advise State and local governments on land use and planning decisions.

The rights of residents to govern, maintain, and enhance their communities through the use of community transfer fees has been validated and preserved by courts and State legislatures across the country. CAI strongly supports the Agency's decision to adhere to established jurisprudence and State statute, which find that community transfer fees touch and concern the land, providing a direct benefit to the owners and residents of that land.

CAI Supports Finding that 501(c)(3) & (c)(4) Groups May Provide Direct Benefit

CAI supports the Agency's finding that properties may benefit when community transfer fees are used to support the activities of certain tax-exempt organizations. Across the country community associations work with tax exempt organizations to provide valuable services for residents. In many cases, the services of these tax-exempt organizations are a key component in the decision-making process as individuals and families consider the purchase of a home.

Preservation of open space for environmental, land management, and recreational purposes are important goals for the homeowners who seek out common interest

² CAI defines the term 'community transfer fee' to mean a covenant, including a deed-based fee, whether set forth in a deed, declaration or association bylaws, that is payable to a community association or other entity that is directly engaged in the governance, support, maintenance, enhancement or investment in the common interest community of which the mortgaged lot, home or unit is a part.

³ There are three types of community associations: homeowners, cooperatives, and condominium associations.

communities⁴ with community associations supporting these activities. Other homeowners seek out common interest communities that actively support cultural and other social opportunities for residents.

This aspect of common interest communities helps focus the housing market on the interests and needs of homeowners. This, in turn, ensures that homeowners have the greatest choice of housing options and promotes the greatest enjoyment of their home and neighborhood.

CAI believes the Agency has adopted the appropriate standard to determine if community transfer fees may support the activities of a 501(c)(3) or (c)(4) organization, which is that the activities of the organization must touch and concern the land. This traditional understanding of servitudes is widely accepted by State courts as valid and CAI supports the Agency's recognition of this legal standard.

CAI Supports Prospective Application of the Final Rule

The Agency proposes to apply any final rule regarding private transfer fee covenants prospectively. CAI strongly supports this aspect of the proposed rule.

As noted in CAI's comments on the Agency's prior proposed guidance, denying millions of homeowners whose property is subject to a private transfer fee or a community transfer fee access to mortgage credit would devastate families and communities. The GSEs continue to provide vital support to the housing finance system. As private capital has not returned to the housing finance system by any meaningful measure, the GSEs continue to be the primary access point homeowners have to the secondary mortgage market. Protecting this access is crucial for homeowners in common interest communities. Prospective application of a final rule will benefit the market while not harming homeowners.

Recommendations on Definitions

CAI appreciates the thoughtful and careful consideration given by the Agency to the definitions contained in its proposed rule. Given the impact of the proposed definitions on homeowners and their community associations, CAI urges the Agency to consider the following recommendations.

Adjacent or Contiguous Property

The limitation the Agency seeks to place on the use of community transfer fees by community associations through its definition of 'adjacent or contiguous property' could have significant negative impacts on common interest communities. CAI does not believe the Agency's proposed 1,000 yard proximity test is necessary as it does not follow the established touch and concern standard and will negatively affect common

⁴ The term 'common interest community' is defined in the Uniform Common Interest Ownership Act and describes the legal relationship of an owner to their community association, irrespective of the form of property ownership or construction.

interest communities by restricting the future land acquisition and use decisions of residents. CAI strongly believes that residents of common interest communities have a right to purchase, maintain, and govern property through their community association for their common use and enjoyment and to use revenue generated from a community transfer fee for this purpose.

The use of commonly owned property is a driving factor in its location. It can be impractical for common interest communities to locate certain community assets, for example a golf course or a marina, in such close proximity to its property lines as the Agency seeks to require. The result of the Agency's proposed 1,000 yard standard would be to limit the future ability of community associations to acquire land—as directed by residents—for the enjoyment of all residents. This difficulty will also apply to new common interest communities under development. CAI advises against adopting a definition that restricts a homeowner's choice of community as well as the ability of residents to determine how community assets are supported.

An additional area of concern regarding the use of a proximity test relates to master and sub-associations. In communities with this legal structure, all owners are members of a sub-association and the master association. Owners support the operations of their sub-association as well as the operations of the master association, but do not fund or participate in the governance of other sub-associations. The proximity test in the Agency's definition of 'adjacent or contiguous property' fails to capture this form of common interest community governance. In this instance, it is more likely than not that commonly owned or controlled property of the master association would be located well outside the 1,000 yard proximity limitation envisioned by the Agency for many sub-associations.

CAI respectfully urges that the Agency adopt a standard focused on common ownership and use of a property rather than a property's proximity to a controlling common interest community. A standard focused on common ownership, governance and jurisdiction meets the touch and concern test applied by State courts and is in agreement with the Agency's determination that community transfer fees that touch and concern the land provide a direct benefit.

CAI recognizes the Agency is seeking balance in the distance between properties encumbered by a transfer fee and the property that benefits from the fee proceeds. It is, therefore, important for the Agency to consider master associations in its proposed definitions. Regardless of whether the Agency opts to include a proximity test in a final rule, it will be necessary to account for master and sub-associations in any final rule.

Accordingly, CAI offers two recommended modifications to the term 'adjacent or contiguous property'. CAI strongly believes the Agency should adopt Recommendation 1, as it ensures consistent application of the doctrine of touch and concern, respecting established State law and jurisprudence. Recommendation 1 will also remedy the identified issue regarding master and sub-associations.

If the Agency opts to retain the proximity test of 'adjacent and contiguous property', CAI offers Recommendation 2 for the Agency's consideration as this recommendation ensures that master and sub-associations will have the future ability to support

commonly owned and controlled property that is in close proximity to the master association with a community transfer fee.

Recommendation 1

Community controlled property means property that is commonly owned, governed or subject to the jurisdiction of an association or members of the same common interest community whose property is encumbered by a private transfer fee covenant;

Recommendation 2

Adjacent or contiguous property means property that borders or lies in close proximity to the property that is encumbered by a private transfer fee covenant or to other similarly encumbered properties located in the same community and owned by an association or members of the same common interest community.

Covered Association

CAI supports the Uniform Common Interest Ownership Act (UCIOA)⁵, developed under the auspices of the National Conference of Commissioners on Uniform State Laws. CAI believes that clear, strong, and uniform State laws governing common interest communities benefit homeowners and their community associations by offering consistent legal protections to all parties. UCIOA ensures, where adopted, that homeowners in common interest communities across the country have the same rights, obligations, and protections. This has led to strong industry standards for the establishment, governance, and management of common interest communities. Accordingly, CAI strongly urges the Agency to use terminology in UCIOA to the greatest extent practicable in its final rule.

Rather than the term 'covered association', CAI urges the Agency to adopt the term 'common interest community' as defined in Section 1-103(9) of UCIOA (2008), which is defined, in relevant part, as follows:

(9) "Common interest community" means real estate described in a declaration with respect to which a person, by virtue of the person's ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, or improvement of, or services, or other expenses related to, common elements, other units, or other real estate described in the declaration...

Direct Benefit

CAI has identified three areas of concern with the Agency's proposed definition of 'direct benefit' that have the potential to negatively affect common interest communities. CAI's

⁵ To view the Uniform Common Interest Ownership Act (2008), click [here](#).

concerns are (1) the definition may prevent community associations from serving the general public; (2) the definition restricts the use of community transfer fees by community associations; and (3) the definition degrades the private property rights of residents of common interest communities by limiting their exclusive right to govern the use of common property or common elements.

Community Association Activities That Exclusively Benefit Encumbered Properties

The Agency's proffered definition of 'direct benefit' is robust with regard to the potential activities of a tax-exempt organization affiliated with a common interest community and CAI supports this portion of the Agency's definition, except for the Agency's use of the word "exclusively". CAI urges the Agency to consider amending the definition of 'direct benefit' to require that activities carried out by such organizations *primarily* benefit encumbered properties rather than requiring that these activities *exclusively* benefit encumbered properties.

By requiring that the activities of the organization exclusively benefit encumbered properties the Agency is placing an unnecessary restriction on the use of private property. Specifically, the inclusion of the word "exclusively" in the definition of 'direct benefit' imposes a restriction on how residents of common interest communities determine the use of commonly owned property. If, for example, community association rules permit non-resident use of property controlled by the common interest community but managed by an affiliated tax-exempt organization, the benefit of a community transfer fee is no longer exclusive to the encumbered properties. This negatively affects the right of residents to determine the use of commonly owned property, which seems unrelated to the Agency's application of the touch and concern doctrine.

CAI urges the Agency to substitute the word "primarily" for the word "exclusively" in this portion of the proposed definition. If the Agency adopts CAI's recommendation, the relevant sentence in the definition of 'direct benefit' would read as follows:

"...as well as cultural, educational, charitable, recreational, environmental, conservation or other similar activities that primarily benefit the real property encumbered by the private transfer fee covenants."

Community Association Activities on Behalf of Residents

Community associations may be practically viewed as not-for-profit entities that serve as the legal vehicle through which residents of common interest communities govern, maintain and manage their community. Residents use their community association to deliver at least three core services: governance services, community services, and business services. The Agency's definition of 'direct benefit' fails to capture the range of services that community associations deliver.

The Agency's proposed definition of 'direct benefit' limits the eligible activities of community associations to only those activities that "...exclusively support maintenance and improvements to encumbered properties..." Such a limited definition of eligible

activities of community associations will substantially restrict the activities that association budgets may fund. Associations fund association governance, legal action, contracts for community services, purchase of insurance, reserves planning and contributions, asset investment, and other similar services fundamental to the operation of a common interest community. These activities are beyond the scope of the Agency's proposed definition which allows community transfer fees to fund only those activities that "support maintenance and improvements to encumbered properties".

CAI strongly urges the Agency to revise its proposed definition of 'direct benefit' to include all duties and responsibilities that residents routinely assign to their community associations. Such an amendment would fall within the legal doctrine of touch and concern and therefore should not be subject to limitation by the Agency. CAI recommends the Agency amend its proposed definition of 'direct benefit' to read, in relevant part, as follows:

Direct Benefit means that the proceeds of a private transfer fee are used to provide governance services, management services, or maintenance of and improvements to common elements as such services or elements are described in or required by a deed, declaration or by-law that binds encumbered properties, as well as cultural, educational, charitable, recreational, environmental, conservation, or other similar activities that primarily benefit the real property encumbered by the private transfer fee covenants.

Exclusive Right of Residents to Govern Use of Common Elements & Property

The Agency's proposed definition of 'direct benefit' can fairly be read as restricting the right of residents of common interest communities to determine the use of common elements and common property irrespective of the wishes of residents. The right of property owners to limit the use of and access to their land, subject only to well-established Constitutional restraints, is sacrosanct.

Homeowners, acting through their community associations, have long reserved the right to lawfully restrict commercial and other activities of residents and visitors as an exercise of their basic private property rights. That residents elect to exercise their property rights through a community association by no means degrades their full use of these rights. While CAI does not believe it is the Agency's intent to diminish the right of homeowners to govern the use of and access to properties owned or controlled by a community association, the Agency's proposed definition will have this effect.

Specifically, the Agency's definition of 'direct benefit' states:

A private transfer fee covenant will be deemed to provide a direct benefit when members of the general public may use the facilities funded by the transfer fees in the burdened community and adjacent or contiguous property only upon payment of a fee, except that de minimus usage may be provided free of charge for use by a charitable or other not-for-profit group.

This definition clearly limits the property rights of homeowners in common interest communities by restraining the right of residents to determine non-resident use of commonly owned property. Association by-laws or rules adopted by an association's board govern the use of common property and common elements. The Agency's proposed definition reaches into every common interest community across the country that elects to put in place a community transfer fee and places limits on the decision of residents regarding the use of property. A community association may wish to condition non-resident use of and access to common property on the basis of a fee; this is a common occurrence. However, this is a decision reserved exclusively for residents.

Further, the proposed definition may also be read as requiring that common interest communities provide public access to common property or elements in exchange for a fee as a condition for access to mortgage financing supported by the GSEs. The proposed definition of 'direct benefit' appears to condition a finding of direct benefit only when the public may, through payment of a fee, access facilities funded by a community transfer fee. The Agency's proposed definition states that community transfer fees provide a direct benefit "*when members of the general public may use the facilities funded by the transfer fees...only upon payment of a fee...*" While unlikely to be the Agency's intention, this could force a community into choosing only among unpalatable alternatives.

CAI understands the concern that the Agency has expressed in regards to ensuring that community transfer fees benefit the properties and communities in which they are levied. However, the Agency's concern over the use of community transfer fees is not appropriately remedied by the potential granting of rights to entry into private communities by individuals who do not own property within the community. The benefit-burden test on deed restrictions also does not support such an analysis. The test does require that the benefits of any deed provision, such as a transfer fee, benefit the property or properties upon which the fee is levied. It does not mandate access, for a fee or on any other basis, to burdened property by the public at large.

CAI is unaware of any similar guidance or rule enforced by the Agency that controls or may condition public access to privately owned property in such an intrusive manner. Residency in a community association supported in part by a community transfer fee does not alter the fundamental right of property owners to determine use of their land either for a fee or free of charge and to lawfully restrict the use of or access to their land by members of the general public.

Based on CAI's strong commitment to the property rights of common interest community residents, CAI respectfully, but strongly, encourages the Agency to strike the final sentence of the definition of 'direct benefit'. This portion of the Agency's proposed definition does not apply the doctrine of touch and concern in a manner generally consistent with existing jurisprudence and will create confusion for common interest communities.

CAI understands the Agency is seeking to achieve a public policy goal through this language. Given that the intent of the existing language is unclear, CAI encourages the Agency to issue a clarification of intent describing the activities it is seeking to regulate

and request additional comment. This process will provide the Agency the benefit of public comment on those proposed restrictions and will improve policy outcomes.

Excepted Transfer Fee Covenant

CAI encourages the Agency to consider the benefits of more clearly defining the private transfer fee covenants it is seeking to prohibit by adopting a separate nomenclature for the fees the Agency does not seek to restrict. Different nomenclature will add clarity and simplicity to the proposed rule by clearly defining for all parties the transfer fees the Agency seeks to prohibit and the transfer fees the Agency seeks to permit.

As the Agency notes in its proposed rule, compliance with a final regulation on transfer fee covenants will be problematic for a number of reasons. The Agency states that the GSEs should issue seller-servicer guidelines, require representations and warranties, and employ other processes to ensure compliance by their members or customers. This places the burden of determining if a transfer fee is prohibited or excepted on loan underwriters, title attorneys, or closing agents. Clearly defining what is prohibited and what is acceptable with terms that are accurately descriptive will improve compliance and offer easily understood protections to homeowners.

As evidenced by the use of the term 'community transfer fee' in this document, CAI believes a separate nomenclature offers benefits to all parties covered under the Agency's proposed rule. CAI recommends the following definition of 'community transfer fee covenant' for incorporation in any final rule rather than the Agency's proposed term, 'excepted transfer fee covenant':

Community Transfer Fee Covenant means a covenant, including a deed-based fee, whether set forth in a deed, declaration or association bylaws, that is payable at time of transfer to a community association or other entity that is directly engaged in the governance, support, maintenance, enhancement or investment in the common interest community of which the mortgaged lot, home or unit is a part.

Recommendations on State Adopted Private Transfer Fee Restrictions

As the Agency notes in its proposed rule, several State legislatures have enacted or are actively considering restrictions on the use of private transfer fee covenants. As CAI noted in its comments on the Agency's prior proposed guidance, this is the most appropriate legal venue for private transfer fees that benefit unrelated third parties to be governed. CAI bases this position on the fact that an Act of a State legislature can render a private transfer fee covenant invalid and unenforceable.

It is on this basis that CAI urges the Agency to consider the following amendment to Section 1228.4 of the proposed rule. CAI believes this amendment clarifies the extent to which any State restrictions on private transfer fee covenants are unaffected by the Agency's proposed rule:

§ 1228.4 State restrictions unaffected.

This part does not affect state restrictions or requirements with respect to private transfer fee covenants, such as with respect to validity, enforceability, disclosure or duration.

Recommendations to Improve Disclosure of Deed-Based Fees

CAI strongly supports full and complete disclosure of all rights, responsibilities and obligations of common interest community owners and residents prior to closing. For this disclosure to be meaningful and actionable, buyers must be granted sufficient time to obtain, review and understand all documents relating to the community association's governance, rules and regulations and homeowner obligations. Further, CAI believes a purchaser should have an unambiguous right to cancel a contract to purchase a home in a common interest community on the basis of their review of these documents.

Because different community associations have different requirements, purchasers need prior disclosure to ensure that they are purchasing a home in the common interest community that is best suited to meet their needs. Conflicts between association boards and residents who did not have a clear understanding of association rules and restrictions prior to making a purchase do not benefit any party. These conflicts are all the more frustrating to both homeowners and association boards given that the conflict could have been avoided if meaningful disclosure had been provided to the homeowner well in advance of closing.

UCIOA provides consumers with considerable protections when making a purchase in a common interest community. These protections include, but are not limited to:

- Disclosure of estimated monthly assessments
- Disclosure of any other fee due from the purchaser at closing
- Disclosure of the association's covenants, rules and restrictions
- A consumer's right to cancel, without penalty, a contract to purchase based on their review of required disclosures
- Penalties for disclosures that are false, misleading or by act or omission fail to disclose material information
- A private right of action against parties failing to provide required disclosures to a purchaser while also recommending specific monetary penalties in addition to any damages awarded by a court

CAI believes the Agency could usefully consider the addition of a requirement for mortgages purchased or supported by the GSEs, based on UCIOA, that provides purchasers (1) disclosure of their obligations when purchasing a home in a community association; (2) a reasonable period of time prior to closing to review and understand these obligations; and (3) the ability to cancel, without penalty, a contract to purchase based on their review of the required disclosures.

Such an addition would increase consumer awareness of community transfer fees and other mandatory obligations that are common to community associations. Further, these disclosures are—in many cases, but not uniformly so—mandated by State law. CAI

supports mandated document disclosures or resale certificates and acknowledges an association's right to charge a reasonable fee for their production.

Conclusion

CAI appreciates the open process the Agency has used as it considers the question of private transfer fee covenants. The use of notice and public comment allows all interested parties to review and express support or concern about a public policy prior to its implementation. Not all housing related agencies in the federal government embrace this process, preferring instead to implement significant changes in public policy through administrative order. This process results in poor public policy that can have profoundly negative impacts on homeowners. CAI commends the Agency for its commitment to transparency in government.

While CAI has deep concerns with some aspects of the Agency's proposed rule, CAI does strongly support the Agency's efforts to prohibit private transfer fees payable to unrelated third parties. We wish to continue the productive conversations on this subject with the Agency and will be contacting you soon to arrange an opportunity to discuss the matter in greater depth.

If you require additional information or wish to discuss the contents of this letter, do not hesitate to contact me or Mr. Andrew S. Fortin, Esq., CAI's Vice President for Government and Public Affairs, at (703) 970-9220.

Sincerely,

A handwritten signature in black ink that reads "Thomas M. Skiba". The signature is written in a cursive style with a large, stylized initial 'T'.

Thomas M. Skiba, CAE
Chief Executive Officer