Consumer Mortgage Coalition

April 11, 2010

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

Re: Proposed Regulation on Private Transfer Fees
RIN 2590-AA41

Dear Mr. Pollard:

The Consumer Mortgage Coalition (CMC), a trade association of national consumer mortgage lenders, servicers, and service providers, appreciates this opportunity to provide comments on the Federal Housing Finance Agency's (FHFA) proposed regulation on private transfer fees. We very much share your concerns that private transfer fees can be harmful to unsuspecting consumers.

Concerns With Private Transfer Fees

FHFA describes private transfer fee covenants:

> [P]rivate transfer fee covenants may be attached to real property by the owner or another private party—frequently, the property developer—and provide for a transfer fee to be paid to an identified third party—such as the developer or its trustee—upon each resale of the property. The fee typically is stated as a fixed amount or as a percentage, such as one percent of the property's sales price, and often exists for a period of ninety-nine (99) years.[1]

We share FHFA's concerns that private transfer fees are not necessarily designed to be in the interest of consumers. FHFA also addressed the fact that consumers may be unaware of the fees, which we believe is a very significant problem. As FHFA notes:

> FHFA also expressed concerns about the adequacy of disclosure of these private transfer fee covenants which, in turn, may impede the transferability of property and affect its overall marketability. This can impact the valuation and marketability of the encumbered property. Consumers may also be unaware that

[1] 76 Fed. Reg. 6702, 6703 (February 8, 2011).

600 Cameron Street, Alexandria, VA 22314
Telephone: (202) 617-2101 Fax: (202) 403-3926

> a fee applies even if the resale price of their home drops below the original purchase price.[2]

These concerns are valid and timely. We support the idea behind FHFA's proposed rule to prohibit Fannie Mae, Freddie Mac (the GSEs), and the Federal Home Loan Banks from purchasing or investing in loans on properties encumbered by private transfer fee covenants.

The Cure Should Relate to the Problem

We do note that compliance with the proposed rule will be difficult where the existence of fees is not recorded. FHFA addressed compliance with the rule only by the institutions it regulates directly:

> Acceptable compliance with the final rule may be achieved through the Banks' quality control review process or through the Banks' collateral review process, coupled with appropriate direction to their members, as well as robust representations, warranties, or certifications. The Enterprises would be expected to use similar compliance tools such as appropriate provisions in seller-servicer guides, representations and warranties, and quality-control processes.[3]

FHFA is of the view that private transfer fees are inappropriate for consumers, but as a remedy would require the GSEs, upon discovery that a mortgage is on a property subject to a fee, to require the seller or servicer to repurchase the loan. This would not protect consumers because the fee would still be enforceable and the consumer would still be liable for it. This proposed cure does not seem related to the problem.

Moreover, FHFA's remedy to newly-discovered fees does not recognize the problem that the fees are often just as unknowable to lenders as to consumers and investors. It would not be appropriate for Fannie Mae or Freddie Mac to require a loan to be repurchased if the seller made reasonable, although unsuccessful, efforts to discover the existence of a hidden fee.

Importantly, since the proposed cure does not address the underlying problem that consumers, lenders, and investors may be unaware of the fees, we suggest that Fannie Mae and Freddie Mac are in an excellent position – probably the best position – to establish a database of properties subject to such fees. They should do so based on all the information they have to date. When another transfer fee is discovered, the GSEs should be required to enter that information in their database. In this way, lenders would be able to check the database and make an appropriate consumer disclosure *before* the transaction closes.

This remedy would prevent the problem from arising. It would actually protect

[2] *Id.*
[3] *Id* at 6707.

consumers, rather than shifting liability between a lender and a GSE. This suggested cure would solve the problem better than any other option.

The Information Should be Available to Consumers

The database should be available to consumers so they may protect themselves. Not all home purchases are financed, and there is no reason to protect only consumers who finance their homes.

FHFA has directed the GSEs to develop uniform mortgage and appraisal reporting standards. As FHFA has explained:

> This Uniform Mortgage Data Program is designed to improve the consistency, quality, and uniformity of data that are collected at the front end of the mortgage process. By identifying potential defects at the front end of the mortgage process, the Enterprises will improve the quality of mortgage purchases, which should reduce repurchase risk for originators. This initiative will be phased in over the course of this year and next.
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> Developing standard terms, definitions, and industry standard data reporting protocols will also decrease costs for originators and appraisers. It will allow new entrants to use industry standards rather than having to develop their own proprietary data systems to compete with other proprietary data systems already in the market. The credit and pricing decisions Fannie Mae, Freddie Mac, or any future secondary market firm make based on the data, of course, will be where market participants compete. Proprietary reviews of appraisal and loan information will depend on each firm's own unique business models and policies. But common data definitions, electronic data capture, and standardized data protocols will improve efficiency, lower costs and enhance risk monitoring.[4]

Collecting and making public data on private transfer fee covenants would contribute toward FHFA's goal of "identifying potential defects at the front end of the mortgage process[.]" We support that goal, and we believe private transfer fees should be included in the Uniform Mortgage Data Program. All consumers should be able to access the GSEs' database to see whether a private fee encumbers a home they are interested in purchasing.

Regulation Should Apply Prospectively

FHFA proposes to make a final regulation apply to private transfer fee covenants created on or after February 8, 2011, the date FHFA published its proposed rule. The regulated entities would be required to come into compliance 120 days after FHFA published a final regulation. We support applying the regulation prospectively. This is a helpful

[4] Statement of Edward J. DeMarco, FHFA Acting Director, before the U.S. House of Representatives Subcommittee on Capital Markets, Insurance, and GSEs, p. 5 (March 31, 2011) http://fhfa.gov/webfiles/20687/DeMarco_testimony_for_3-31-11_final.pdf.

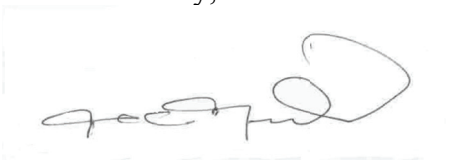
clarification of the proposed private transfer fee guidance FHFA issued last year.

However, we believe the rule should apply only after the GSEs have a reasonable amount of time to establish and make operable the database needed to cure the underlying problem – i.e., that the fees are unknown.

Conclusion

We support FHFA's efforts to prevent the future creation of private transfer fee restrictions. We believe, however, that FHFA is in a position to protect consumers even further by requiring a database that can make the hidden fees knowable.

Sincerely,



Anne C. Canfield
Executive Director