From: rw office [rwlawoffice@yahoo.com]
Sent: Friday, August 27, 2010 10:59 AM
To: !FHFA REG-COMMENTS
Subject: Guidance on Private Transfer Fee Covenants, (No.2010-N-11)

August 27, 2010

Alfred M. Pollard, General Counsel
Federal Housing
Finance Agency, Fourth Floor
1700 G Street NW., Washington, DC 20552,
via: regcomments@fhfa.gov
Attn: Public Comments

Re: Guidance on Private Transfer Fee Covenants (No. 2010-N-11)

Dear Mr. Pollard,

I have been a practicing real estate attorney for 24 years. I have represented homeowners, builders, developers and homeowner's associations. I am very familiar with private transfer fees and the issues surrounding them and the attacks from those that oppose them.

Recent media reports show that the housing market is continuing to suffer. Unemployment in the construction industry is well over 17% in some states and even higher in others. Developers, builders and construction companies are defaulting on loans at an alarming rate due to a decrease in property values and stalled projects. The secondary mortgage securitization market is just now beginning to retreat from the abyss of 2008 and 2009.

The absolute last thing that this agency needs to do issue a proposed guideline that will more harm to the real estate market to address perceived unfounded issues. The current economy is simply too fragile to inject a regulation that not only doesn't solve the perceived problems but in reality creates more.

The FHFA's concerns regarding private transfer fee covenants are misplaced. In an effort to address perceived unfounded issues that "may" arise through the use of private transfer fees the agency, after ignoring less harsh regulations and solutions that would actually address the stated concerns, has issued a proposal that would reek havoc on the real estate market and the mortgage securitization market.

Repeatedly the proposal states concerns that "may" happen. The proposal contains no empirical or real evidence of any of these concerns actually occurring. And rightfully so, because the evidence is just the opposite of these perceived fears. Fears by the way, that have been manufactured by the National Association of Realtors (who call these fees a "commission-ectomy" and the American Land Title Association, who want protection from their own negligence). It is no surprise that the industries most vocal in an attempt to ban these fees are real estate agents who receive a commission that is six times higher then any private transfer fee and the title industry who is paid handsomely to find these fees and to disclose them and is subject to liability when they fail to do what they are paid for.

Private transfer fees have been in use for decades and to date they have not had any effect on either the sales of homes or on the liquidity of the

securitization market. If these fears were real, why haven't they surfaced to date in either the real estate market or the securitization market? These fears simply haven't materialized.

Despite widespread use for generations, a search of legal cases and major media publications reveals no evidence of actual harm, either to the homeowner or to the lender, arising from a transfer fee (including a capital recovery fee). The only harm that is likely to arise is when a title company misses the fee, and potentially becomes liable. However, title companies are in the business of identifying the public records and are paid a lot of money for doing it. Policy-makers should not ban an otherwise useful tool simply to protect the title industry from their own negligence, particularly when it comes to a negligible sum in the context of overall liability.

The real solution to the perceived issues raised by the agency is to assure that title companies do their job. That can be made easier through required additional disclosures of the fees as is done in California (Cal. Civ. Code 1098.5). This disclosure would not only protect the homeowners but would also provide additional protection to the secondary market. The solution is not to effectively destroy a valuable and useful financing tool for builders, charities, developers and homeowner associations.

Secondary market participants like Fannie and Freddie receive a title policy in connection with each mortgage they acquire. This policy provides assurance to secondary market participants that their mortgage stands in a superior lien position. As such, the only real beneficiary of this proposed guidance as written would be the title industry.

FHFA has expressed concerns that the fee is hidden. In fact, the vast majority of FHFA's concerns rest upon this unsupported foundation. That is just not true. The reality is that when transfer fees (also called home resale fees) are used for homeowner associations the fee is contained within the subdivision covenants (typically referred to as CC&Rs). CC&Rs can be lengthy, yet title companies and homeowners have no problem identifying the fees and conditions mandated by these documents.

Developers use capital recovery fees as a way to spread development costs. In the current environment, spreading development costs is an effective way to eliminate negative equity. The latter, of course, explains the increased use of capital recovery fees in this current environment. While it would be appropriate to assess capital recovery fees by means of the CC&Rs, in practice capital recovery fees are virtually always filed as separate documents, easily identifiable from the public records, and with prominent headers. The reason is obvious: a hidden fee will not get paid. Similarly, the capital recovery fee instrument (or an abstract thereof), must be re-filed within certain time periods, or the instrument is cut off (and title industry liability eliminated) by applicable marketable title acts.

So not only are these fees not hidden, they are conspicuous and are easily found and reported on a title report. If there is any question about that being effective notice, the agency can require that there be separate disclosure of these fees. A simple solution that truly addresses the concern and which has already been done not only in California but in policy guidelines of the major title companies in the country.

As for the perceived concerns of the real estate market and liquidity of the mortgages in the secondary market, this proposed guideline would have the exact opposite effect of its intent. There are hundreds of thousands if not millions of homes and condominiums already built with mortgages in existence currently in the secondary market that have these transfer fees.

Estimates regarding the number of homes encumbered by a transfer fee of some kind, (whether to fund environmental issues, homeowner associations, condo associations or infrastructure costs), range from the hundreds of thousands to millions. Condominiums, co-ops, and master planned communities feature transfer fees, and have for decades. If the guidance is issued, real estate currently encumbered by the fee would become "branded" until the fee expired. Considering the fact that transfer fee covenants run anywhere from 20 years to perpetuity, the damage would be incalculable. It would impose a severe burden on homeowners in the form of non-conforming loan rates, and it would immediately suppress the underlying value of the real estate burdened by the fee, and this burden of lower property prices and higher interest rates would run for generations. For homeowner associations with discretion to remove the transfer fee, the result would be higher monthly assessments, further stifling consumer spending and adding additional debt to homeowners already struggling under collapsed real estate prices. In fact, the damage would be severe enough that it would likely rise to the level of a regulatory taking.

Additionally, the mortgages on these homes currently in the secondary market would instantly lose value as they could not be resold to new investors. Those current mortgages and all new mortgages on these homes would immediately become non liquid because no enterprise or bank could invest in them.

For an example of the damage, imagine the estimated two million condominiums nationwide or the hundreds of thousands of homes in California alone already subject to a property transfer fee suddenly not being able to be sold because a new buyer can't obtain a mortgage due the guideline that prevents this mortgage from being sold in the secondary market or from a bank not being able to issue a mortgage on the property as collateral for an advance. The ripple effect of this regulation on these homes and on the mortgages for them in the secondary market would be immediate and real, as opposed to manufactured fears from those trying to protect their own interests.

This brings me to my foremost concern, which is that the real purpose and only real effect of this guidance is in fact to protect a special interest group at the expense of homeowners, developers, charities and the economy. A review of the recent media campaign by the title industry reveals allegations that are conspicuously consistent with the allegations raised in the FHFA guidance. What I find particularly troubling is that long before the proposed guidance came out, the title industry publicly announced that Fannie and Freddie restrictions would be forthcoming. This seems suggestive of an uncomfortable amount of interaction between a government or quasi- government entity and an industry notorious for anti-consumer practices. Listening to these special interest groups, and accommodating them in their request for special privileges and higher fees, is in large part how we arrived at the current predicament in the first place.

The agency should not yield to these interests through this guideline. I encourage FHFA to REJECT the proposed guidance, and instead ADOPT a disclosure requirement, assuring that homeowners acknowledge the existence of the fee prior

to closing on the mortgage. The latter is the approach taken by California (Cal. Civ. Code 1098.5)

Sincerely,

Robert P. Wilson
Law Office of Robert P. Wilson
26545 IH-10 West, Suite 150
Boerne, Texas 78006
210-698-1933 phone
210-698-1944 fax