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

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

Dear Mr. Pollard:

I am pleased to submit comments on behalf of Community Associations Institute (CAI)[1] regarding the Federal Housing Finance Agency's Proposed Guidance on Private Transfer Fee Covenants published in the *Federal Register* on August 16, 2010. In general, CAI is concerned the proposed guidance published by the agency, if adopted in its current form, will be disruptive to real estate markets across the country, impair the functioning of the secondary mortgage market, create substantial uncertainty at a time when the national economy is struggling to recover from a deep recession, and have a disproportionately negative impact on homeowners in community associations.

I. Unlike Other Private Transfer Fees, Community Transfer Fees Benefit Encumbered Properties.

CAI's members appreciate the time and attention FHFA has devoted to the issue of private transfer fees[2] and recent market innovations that have led to the proliferation of transfer fees that burden properties but offer no benefit to the land or property owner. These fees and the potential securities derived from the income stream they generate are an unreasonable burden on property owners. Additionally, private transfer fees stretch the traditional legal doctrines of servitudes by burdening properties with

[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 members include community association volunteer leaders, professional managers, community management firms and other professionals and companies that provide products and services to associations.

[2] We define Private Transfer Fees as deed-based fees, whether set forth in a deed, declaration or association bylaws, that is payable to an individual or entity who is not directly engaged in the governance, support, maintenance, enhancement or investment in the property upon which the deed-based fee is levied.

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fees that do not benefit the land. CAI's members support efforts in state legislatures to void or otherwise render unenforceable any private transfer fee or other contract requiring payment to an unrelated third party at a real estate closing, but we object to the inclusion of long-standing and beneficial community transfer fees[3] in such regulations.

In issuing its proposed guidance, however, FHFA has determined community transfer fees are similarly harmful to the interests of property owners, limit the free exercise of private property rights and damage real estate markets. Community transfer fees are an important funding mechanism of common-interest communities and have been widely used for more than 30 years. During this time, community, homeowners, and condominium associations and housing cooperatives have become an important part of the national real estate market and have been embraced by American families. A 2009 survey[4] conducted on behalf of the Foundation for Community Association Research found that nearly 60 million Americans live in a community association and the total value of their homes is $4 trillion. Many of these communities have long-standing community transfer fees that directly benefit the community and individual homeowners through funding of reserves, capital improvement projects and ongoing association obligations.

In response to the proposed regulation issued by the FHFA, Community Associations Institute undertook a survey[5] of our membership to gather data on the use and impact of community transfer fees. The survey represents data collected from 1,254 communities in 40 states, representing 959,295 units in community associations. The data support the following findings:

- 49 percent of responding communities reported having a community transfer fee on units/homes in their communities.

- Nationally, an estimated 11 million residential units have a community transfer fee in place.

- Community transfer fees have existed for more than a generation; more than 40 percent of such fees having been in place for 10 years or more.

- Such fees are collected as either a fixed fee, percentage of sale price or a multiple of association assessments.
  - A fixed fee is typically $500 or less.
  - A percentage of sale fee is typically less than three-quarters of one percent of the sale price of the property.
  - Fees based on a multiple of association assessments are typically the equivalent of two to three months of assessments.

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[3] We define Community Transfer Fees to mean any deed-based fees, whether set forth in a deed, declaration or association bylaws, that is payable to a homeowners, condominium, cooperative, or property owners association, or other entity that is directly engaged in the governance, support, maintenance, enhancement or investment in the property upon which the deed-based fee is levied.

[4] http://www.caionline.org/info/research/Documents/national_research_2009.pdf

[5] *For the Common Good: Use of Community Transfer Fees in Community Associations*, CAI, September 2010. (Attachment A)

- Community transfer fees are disclosed to potential purchasers.

- The existence of such community transfer fees results in the loss of a sale of property in less than 1 percent of reported transactions.

- Such fees are used to support their community association and its residents by 99.2 percent of responding communities.

From a macro-standpoint, one of the primary objectives of community associations is the preservation and enhancement of not only property values for residents, but the property itself. The rules, architectural guidelines and provisions of amenities above and beyond those in non-association communities are all factors that act to support this purpose. Thus, a financially healthy community association benefits its residents by ensuring a higher return on their investment than would be possible in a non-association community. This is not mere speculation, a study undertaken by the Cato Institute found that, "HOAs increase [property] values by at least 5 to 6%."[6] It is also known that such privately enforced rules for community association housing maintenance relieves local government of many of the burdens of code enforcement. If community transfer fees are banned, then local government will have an increased burden at a time they can least afford it. Further, since a recognizable percentage of community associations have low/moderate income housing components, lenders will lose the opportunity to earn valuable CRA credits. Lastly, for new associations, both Fannie Mae and Freddie Mac require their own version of community transfer fees — two months of assessments must be paid to help provide sufficient capital for association finances and association reserves.

If FHFA's proposed guidance is adopted without revision, Fannie Mae, Freddie Mac and the Federal Home Loan Bank System will be prohibited from engaging in any activity that will support the flow of mortgage credit to these neighborhoods. With 49 percent of surveyed community associations reporting a community transfer fee, a potential pool of up to 11 million residential units would not qualify for most, if not all, federally related mortgage products. This will affect the lives of millions of Americans who purchased their homes in good faith, had no participation in the creation of private transfer fees, and would be counter to the substantial effort being undertaken to stabilize real estate markets nationwide and foster economic growth.

II. Community Transfer Fees are Disclosed to Consumers.

Community transfer fees are not a new innovation in the real estate market. Community transfer fees are a common method of community association financing and budgeting. CAI members report that such fees exist in 49 percent of community association documents. Based on our national industry data, up to 11 million housing units are subject to such fees by their community association. In more than 40 percent of these communities, such fees have been in place for 10 or more years.

Federal agencies and state legislatures have acted to require disclosure of any fee or assessment payable to a community association in conjunction with a change of ownership. Within the

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[6] *Do Homeowners Associations Raise Property Values? What are Private Governments Worth?*, By Amanda Agan, Alexander Tabarrok, Regulation, Fall 2005, p. 17.

community association markets, CAI members report that such fees are disclosed in nearly all circumstances, with 96 percent of communities indicating that such disclosures are made prior to purchase in their community. Disclosure of deed-based transfer fees are most often the result of state-based regulations that require the disclosure of critical information related to purchases within a condominium, cooperative or homeowners association. The seller usually is obligated to provide this information. These disclosure facts related to community transfer fees are well known to the real estate community.

CAI members report that such regulations account for 40 percent of all disclosures for deed-based transfer fees to potential purchasers. Such consumer disclosures are a critical consumer protection and a public policy goal of CAI and our members.[7] Ironically, our efforts to expand such consumer disclosures are often blocked by the active lobbying efforts of state realtor organizations. Such disclosures provide a purchaser with a full understanding of the costs and the responsibilities of living in a community association. In CAI's experience, such transparency is key to building financially healthy and harmoniously governed communities. Where such disclosures are not a matter of state regulation, disclosures occur through the closing letter, by action of the association, through the professional association manager, or notice by the title company, realtor or escrow agent. Such mechanisms account for non-regulatory methods of disclosure reported by CAI member communities.

Additionally, federal laws already incorporate supplemental consumer protections to those enumerated by states. The Real Estate Settlement Procedures Act (RESPA) contains no less than three disclosure requirements regarding fees payable at a real estate sale closing. Consumer disclosures under RESPA are accomplished (1) by requiring lenders to provide a special information booklet to consumers within three days of a consumer submitting a formal loan application; (2) through enumeration of settlement expenses on the standard HUD-1 Settlement Statement; and (3) by allowing purchasers to obtain and review a completed HUD-1 Settlement Statement one day prior to loan closing.

RESPA requires HUD to publish and lenders to provide to borrowers its *Shopping for your Home Loan: HUD's Settlement Cost Booklet*. This booklet describes the numerous fees attached to real estate purchases and offers practical information so consumers may educate themselves as to their obligations at closing. Included in the special information booklet is a discussion of community association assessments due at closing and an encouragement that all settlement costs be negotiated with the seller to reach agreement on which costs will be paid by the seller, the purchaser or shared.

RESPA requires that all closing costs and transactions associated with a federally-related mortgage be enumerated on the HUD-1 Settlement Statement. The HUD-1 contains specific line items for disclosure of all costs to be paid by the seller or purchaser according to the sales contract agreement governing the closing obligations of the parties. Any community transfer fee will be enumerated on the HUD-1 according to the negotiated sales contract or other negotiated agreement between the parties.

[7] CAI Public Policy, *Disclosure Before Sale in a Community Association*. (Attachment B)

Finally, RESPA offers consumers the opportunity to review the HUD-1 Settlement Statement one day prior to loan closing. Consumers have the opportunity to waive the right to review a prepared HUD-1 prior to closing, but this is the sole decision of the purchaser, not the lender. Community transfer fees are a negotiable fee which can be paid by any party to a closing or as a shared expense. Purchasers receiving and reviewing a HUD-1 will be able to identify the fee in advance of a closing if the purchaser has not understood their obligations through prior state-mandated disclosures.

III. Community Transfer Fees Do Not Impact Marketability; Rarely Impact Title.

Another concern that FHFA cites as a basis for its draft regulation is that private transfer fees impact both the marketability and title of the properties affected. Such assertions do not hold up when applied to community transfer fees. CAI member communities report that such fees are disclosed at transfers of title, yet they also report that such fees are rarely, if ever, the basis of a lost sale or actions against title.

CAI's member survey reviewed the impact of such fees on properties in community associations. As noted, our survey indicates that community transfer fees apply to approximately half of the 24 million housing units in community associations and have been in place for a generation. Despite the tens of thousands of annual transactions involving such fees, there is little evidence that such fees impact title or marketability of community association properties. In fact, survey data indicates that such fees result in a loss of sale in less than one percent of all transactions.[8] Further, failure to pay such fees rarely results in action by the association. CAI members report that such fees result in commencement of a lien action in only 6 percent of all transactions.[9]

IV. Community Transfer Fees are Proportional.

The draft guidance issued by FHFA specifically notes that "even if such fees are dedicated to homeowner associations, they are not proportional." The data on the levy and use of such fees in the context of community association funding stand in direct conflict with FHFA's statement. Community transfer fees are both proportional and, as noted in section I, such fees are used for the direct benefit of the properties and property owners.

CAI survey data reveals that community transfer fees are levied in one of three methods: a fixed fee, a multiple of monthly assessments or a percentage of sale price of the encumbered property. The most commonly reported fee is a fixed-fee which accounts for 74 percent of all community transfer fees. A multiple of monthly association assessments accounts for 16 percent of community payable fees and approximately 10 percent of such fees are a percentage of sale price of the property. Regardless of the method of assessment, such fees provide value to the purchaser and are proportional to internal measures that are both transparent and equitable.

Community transfer fees that are levied as a multiple of monthly assessments or as a percentage of sale price are on their face proportional to the value received and the ownership interest acquired. The sale price of a home is dictated by market factors such as size, lot, location,

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[8] *For the Common Good: Use of Community Transfer Fees in Community Associations*, CAI, September 2010. (Attachment A)
[9] *Ibid.*

condition, local services and the existence of a community association. Thus, because the purchase price reflects the market value of the property and includes an array of factors weighed by the purchaser, a percentage of sale levy is the most directly proportional mechanism to levy such an assessment. In the case of community transfer fees, such percentages are in nearly always a minor percentage of sale price. In three-quarters of percentage of sale based fees, such fees amount to less than one-half of one percent of the sale price of the property, and, in nearly all cases, such fees are less than or equal to one percent of the sale price[10].

The same analysis applies to such fees when they are levied as a multiple of monthly association assessments. The most typical calculation is a fee equivalent to two to three months of the property's required assessment. Assessments are the mandatory fees that association residents pay to maintain the common elements and amenities of the community association. The level of such fees relates to the size of the community, the scope of the infrastructure supported by the community association and the community's amenities. While such fees may vary in amount, they are assessed based on factors that ensure proportionality to ownership interest. Such factors vary by development and the diversity of units within the community association. Condominiums typically calculate monthly assessments based on the square footage of each unit. Square foot calculations are also the basis of assessments in many townhome and single family home communities. In these types of developments, square footage may be augmented by factors such as lot size and location. The common element to association assessment levels is that the amount is related to the same market factors that determine price.

Even in a fixed-fee scenario, such fees are proportionate when viewed as a levy on purchasers into the community, as such payment is required for all buyers into the community. Additionally, benefits of a fixed fee flow back to the property owner in two ways that provide additional proportionality. First, such fees offset the need to raise mandatory monthly assessments and delay or serve to minimize the amount of any special assessment required by the community. As such fees are generally levied based on size or ownership interest, the benefit of a fixed fee payment accrues a proportional benefit to all owners. Second, the maintenance of the association finances ensures that all owners benefit from the five to six percentage value-premium on properties within a community association when they sell their property.

V. Amending Deed Restrictions is Burdensome and Success is Uncommon.

CAI believes FHFA's proposed guidance will devastate community associations because of the nature of deed-restrictions and the significant barriers to modifying them. It is a long-standing and broadly accepted principle of community associations to require an affirmative vote of at least two-thirds of property owners to modify a deed- or covenant-based restriction; many communities require written consent from seventy-five percent of property owners (or in some instances, unanimous written consent) to modify deed- or covenant-based restrictions. This practice has been actively encouraged by the U.S. Department of Housing and Urban Development in *HUD Handbook 4140.2 Land Planning Procedures and Data for Insurance for Home Mortgage Programs* in sample governing documents provided for planned unit developments.[11] Further, in some instances where the covenant imposing the deed-based fee

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[10] *Ibid.*

[11] HUD Handbook 4140.2: Appendix 2 — Article VI: General Provisions, Section 3: Amendment.

preceded the recording of the declaration, the owners have no authority to amend any pre-existing covenants.

Given the exceptionally high threshold of property owner participation required to modify a community association's deed restrictions, the practice is not commonly undertaken and, when attempted, success is rare. The logistics of contacting all property owners in a community association to obtain written consent to modify the association's governing documents is frustrated by numerous factors. Participation of property owners that reside in the association is not guaranteed even despite repeated entreaties for local property owners to do so. Many owners may not reside in the association, having purchased investment properties or relocated for any number of reasons — personal or professional. This is not to suggest the task is impossible; however, the process can be expensive, time consuming and, even if pursued with the utmost urgency and vigor, is not assured of success. The sale and purchase of homes in affected communities will cease as associations struggle to remove offending deed restrictions, placing a hold on the lives of families and causing economic disruptions.

The difficulties discussed above enumerate some of the obstacles facing associations attempting to revise deeds in a normal housing market. The real estate and economic crises compound these problems. Home abandonment by owners owing more on their mortgage than their property's value is a significant issue in certain real estate markets. An association cannot be reasonably expected to identify the location of owners who have vacated their property and are no longer meeting their general obligations to the association.

An additional significant challenge in the current real estate market relates to the foreclosure process and bank owned properties. As the housing crisis has deepened and foreclosures increased, from a practical standpoint, it is impossible for an association to identify a growing set of property owners: lenders. The chief difficulty for associations is the refusal of lenders to record a change in title promptly after a foreclosure has been completed. Lenders across the nation are refusing to notify local governments and community associations of their ownership interest in properties. In a recent survey, more than 61 percent of CAI members reported lender ownership of properties in their communities. Of this number, more than 66 percent reported that lenders were not living up to their obligations to fund association operations. Lenders clearly do not view participation in association matters to be important and are blatantly ignoring their obligations to other homeowners. It is unreasonable to expect that a lender that refuses to pay monthly assessments or that has intentionally failed to take ownership of a property after a foreclosure has been completed will exercise its voting rights in any association matter.

That these conditions may be an anomaly persisting in the real estate market for the medium-term will make no difference to property owners with unmarketable properties if FHFA's proposed guidance is adopted without revision. A careful examination of community association governance shows the removal of deed-based restrictions is exceptionally difficult under normal conditions and in the existing environment even more so. As a result, FHFA's proposed guidance will severely impair the marketability of millions of homes; substantially disrupt housing markets and negatively impact the financial standing and future of millions of American families.

Of additional concern to CAI is the lack of a defined meaning of "private transfer fees." In the literature cited in these comments and in documents used by proponents of bans on private transfer fees, such terminology is applied only to such fees that are payable to third party investors outside of a community. CAI believes that confusing private transfer fees with community transfer fees would have a negative impact on the millions of properties that currently use this funding mechanism. The lack of clearly defined terminology could also expand the rule's application to even more properties.

In a community association context, a deed-based fee regulation might be applicable to a host of requirements in different recorded documents. Such a regulation would clearly apply to any transfer fee recorded in individual deeds, as well as recorded community declarations. It may also be applicable, in some cases, to bylaws adopted by condominium associations, which are recorded in some jurisdictions and are considered to run with the land.

The target of private transfer fee critics and the primary concerns expressed by FHFA are deed-based transfer fees that flow to parties that are not directly affiliated with the operation, management or governance of the communities. This is consistent with both state regulations on the matter and recognized legal principles dealing with deed restrictions. Clearly defining private transfer fees as deed restrictions, payable at time of sale to third party investors or otherwise distinguishing between such investor fees and community transfer fees, will ensure greater clarity of application and work to minimize the negative impact of any regulation on the property market as a whole.

VI. FHFA's Proposed Guidance is Inconsistent with State Regulation.

While FHFA fails to draw any distinction between transfer fees that provide a direct benefit to the land and association in question and those transfer fees that offer no benefit to the land, state legislatures have elected to take a different path. Indeed, the regulation of real estate markets is largely under the purview of the states and is governed by well-established precedent and practice. Many states have chosen to limit third party transfer fees or to put in place a significant consumer disclosure requirement prior to closing if the property in question is encumbered by a deed-based transfer fee.

CAI's research finds that 17 states currently regulate private transfer fees, and there is legislation under active discussion in at least three more states.[12] At least 12 of these states have specific statutory exemptions for fees payable to a community association. In the three states contemplating such regulation, fees payable to a community association are also not subject to enacted legislative bans. Each regulated state excludes fees payable to community associations from the definition of private transfer fee and application of transfer fee bans. At the federal level, legislation has also been introduced which would statutorily ban private transfer fees payable to third party investors, but continue to allow such fees when payable to community associations. Collectively, these approaches reflect legislative findings that community transfer fees benefit homeowners and the underlying property — a relationship that does not exist in the fees payable to third party investors.

[12] This list includes Colorado, Georgia and Pennsylvania.

The effect on homeowners of these actions by state legislatures is substantially different than the potential effect on homeowners if FHFA adopts its proposed guidelines as written. States have rendered deed-based transfer fees unenforceable. However, FHFA does not possess the legal authority to void private contracts between unrelated third parties. Thus, if implemented, the regulation would, through lending restrictions, negatively impact properties in states that have already taken decisive action to curb abusive private transfer fees and distinguish beneficial community transfer fees, an outcome contrary to FHFA's goals.

VII. FHFA Should Follow Law of Servitude Precedent and Differentiate Between Servitudes that Touch and Concern the Land.

The current principles of deed restrictions arise from a centuries-long debate as to what extent such restrictions can impose limitations on the use of land by successive owners. An analysis of the treatment of such restrictions ends in the long-recognized principle often cited as the "Touch and Concern Doctrine" or the "Benefit v. Burden Analysis." Although this standard has been loosened in recent years, under both traditional and more recent interpretations of servitudes, community transfer fees have a sound basis in public policy and law that supports their exclusion from FHFA's proposed guidance on this matter.

CAI can find no better argument for this position than a recent discussion of these principles in the American Bar Association's *Probate and Property* magazine.[13] In his article titled *Putting the Breaks on Private Transfer Fee Covenants*, author R. Wilson Freyermuth concisely and effectively lays out the difference between community transfer fees and private transfer fees:

> "The best example [of touch and concern doctrine] is the typical owners association assessment covenant, which imposes an assessment on each lot payable to an owners association and the maintenance of common facilities. These assessments benefit community residents directly (for example, by providing access to pools or parks) or indirectly (such as by preserving/raising property values because of the presence of valued amenities). Ever since the landmark *Neponsit* case, courts have held that both the burden and the benefit of a lot assessment covenant 'touch and concern' land and bind successor owners of that land."[14]

Under the traditional principles of servitudes and existing case law, community transfer fees meet the legal requirement of benefiting the encumbered property and its owners. FHFA should not override this longstanding principle by regulatory fiat. Such analysis stands, even under the more recent, broader restatement interpretation of deed restrictions, which allows deed restrictions, provided they are not unconscionable, arbitrary, or an unreasonable restraint on alienation or competition.[15]

Private transfer fees, as opposed to community transfer fees, do not pass this standard as they are not transparent to consumers, they unreasonably hinder alienability of property and they benefit private parties. Community transfer fees on the other hand, as discussed in these comments, are

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[13] *Putting the Brakes on Private Transfer Fee Covenants,* By Wilson Freyermuth, Probate and Property, July/August 2010, page 21.
[14] Ibid., p. 22.
[15] Restatement (Third) of Property — Servitudes, Section 3.1(1), (3)-(5)(2000).

demonstrably disclosed, do not hinder alienability of property and benefit not a select group of private individuals, but all property owners in the community.

VIII. FHFA's Proposed Guidance will be Disruptive to Efficient Market Operations.

Setting aside CAI's concerns about the negative impact the proposed guidance will have on property owners, CAI is also concerned that using guidance as a mechanism to eliminate private transfer fees from the real estate market will cause numerous disruptions for loan originators and secondary market participants. As previously discussed, FHFA does not have the legal authority to vitiate deed restrictions or covenants that run on privately owned property. This may only be accomplished by an Act of a state legislature or Congress, a legal determination that such restrictions are unenforceable by a court of law, a ruling by a competent federal government agency that such restrictions violate existing federal statute, or by agreement of the contracted parties. The approach taken by FHFA to cure its lack of legal authority to set aside private transfer fees is to force all market participants to alter long-standing business practices and market operations at all levels of the mortgage finance and real estate industries. Unfortunately, given the wide-spread, long-standing use of private transfer fee convenants in accordance with applicable law and precedent, FHFA's actions will cause the greatest amount of disruption to loan originations and secondary market operations.

From the practical standpoint of a consumer seeking to obtain financing to purchase a home, FHFA's proposed guidance will substantially impair a purchaser's and seller's reliance on a lender mortgage pre-approval when agreeing to a sales contract. Given the number of community associations and the wide-spread use of community transfer fees, numerous contracts signed on the basis of a purchaser's pre-approval will be voided. The sales contract will not be voided due to defects in the physical condition of the home, its potential location in a flood zone, the inability to show a clear title to the property or any other traditional underwriting requirement. Rather, the contract will be set aside due to a decision taken by FHFA that all private transfer fee covenants jeopardize the safety, soundness and prudential operation of the government-sponsored enterprises. This notwithstanding the fact that community transfer fees have been in common use for at least 30 years and have not been cited as a causal factor for the collapse of the nation's housing market. Sales contracts will be subject to cancellation not due to a borrower's impaired credit or any impairment to the property in question; sales contracts will be cancelled due solely to FHFA's purchasing guidance to the GSEs.

Real estate closings will be subject to additional last minute cancellations if FHFA's rule is adopted without revision. As lenders complete the loan underwriting process in the days leading up to closing, borrowers will be notified that, while they are financially qualified for credit, the lender will not fund a mortgage on the property because there will be no secondary market for the loan. The withdrawal of mortgage financing by lenders in advance of closing due to a lack of a secondary market for mortgages secured by real property in a community association will cause substantial disruption to real estate markets across the nation.

FHFA's proposed guidance will have an impact on the operations of the GSEs as well. As currently drafted, the proposed governance will prohibit the enterprises and bank system from purchasing or investing "in any mortgages encumbered by private transfer fee covenants or securities backed by such mortgages." The guidance further states, "The Banks should not

purchase or invest in such mortgages or securities or hold them as collateral for advances." This raises substantial questions for the day-to-day business operations of the enterprises and the bank system relative to the quality of assets currently held in portfolio and of any mortgage backed securities issued by the enterprises. Will FHFA's determination that the presence of such mortgages in the pools supporting mortgage backed securities create a legal obligation on the enterprises to cure these pools or create an obligation for a lender to repurchase any offending loans? Will the presence of such mortgages affect any credit rating attached to the securities or affect accounting or other legal obligations of the owners of securities issued by the enterprises that contain impaired mortgages? Will the enterprises be required to review all mortgages held in their respective retained portfolios to determine which mortgages are encumbered by a private transfer fee covenant and therefore must be divested? If so, will there even be a market for such loans that FHFA has determined to be unsafe and unsound?

The Federal Home Loan Banks will experience similar disruption in their day-to-day operations. Will each bank be required to conduct a review of collateral or investments to determine if any of these assets are encumbered by a private transfer fee covenant? If so, will the Bank be able to sell any impaired investments and will the member banks posting the impaired collateral be able to offer replacement collateral? A further subject for consideration is the impact of FHFA's proposed guidance on the bank system's individual members. Many community banks use advances from the bank system to meet regular funding needs. What will be the impact on these banks now that a portion of assets that were available to post as collateral for advances are no longer accepted?

CAI believes FHFA should give additional thought to and be concerned about the impact of the proposed guidance on other participants in the mortgage origination process and in the secondary market. These important questions must be given serious consideration and be subject to meaningful deliberation if unintended consequences are to be avoided. CAI strongly believes it is acutely possible that unintended consequences of FHFA's proposed guidance will reach beyond property owners in community associations and into the operations of lenders and the secondary market.

IX. Recommendations for Revisions to Proposed Guidance.

As noted, CAI believes that the development of private transfer fees that are payable to third party investors outside of the community are problematic and deserve regulatory scrutiny. We believe that these fees are at fundamental odds with standing legal principles, state legislative findings and the development of financially sound, equitably governed communities. For these reasons, Community Associations Institute recommends the following:

CAI recommends that the FHFA rescind the rule as drafted.

The FHFA rule does nothing to address private transfer fees directly; such fees would still exist if the rule were to be enacted. Thus, the regulation offers no protection for consumers and, at best, negligible protection for the secondary mortgage market entities regulated by FHFA. The regulation as drafted would, however, create a pool of up to 11 million housing units that would

be unmarketable because FHFA would block these properties from access to nearly all federally related mortgages.

<u>FHFA should respect current state regulatory and legal paradigms that distinguish between community transfer fees and private transfer fees.</u>

Community transfer fees have long played a vital role in supporting infrastructure, amenities and operations within a community association. Such fees follow recognized legal principles of benefiting the properties affected, and the resulting revenue is an important part of financing for half of all community associations. The role of community transfer fees is not only supported by traditional legal principles, but also recognized by the more than 17 states that regulate private transfer fees. These states rightfully separate community transfer fees from private transfer fees. FHFA should do so as well.

In its current form, the proposed FHFA regulation would serve to undermine existing state regulatory efforts. Because state efforts regarding private transfer fees typically invalidate enforcement and do not remove the language from individual deeds, any encumbered property would still be subject to the FHFA regulation and be redlined from mortgage financing.

<u>State legislative and Federal efforts should be allowed to continue prior to FHFA intervention.</u>

CAI believes that private transfer fees that benefit third party investors outside of community associations should be banned. However, FHFA does not have the statutory authority to accomplish this task. FHFA's regulatory authority can direct and dictate the flow of funds through the mortgage finance system by stating a class of loans and properties are "off limits" to underwriters, but doing so in the manner proposed would be catastrophic for the reasons outlined in this document. Further, it would place the burden of rectifying the troubling use of deed restrictions for private investor gain on the backs of consumers, who would be left with the arduous and likely futile task of amending or rescinding current deed restrictions. As such, CAI recommends that FHFA withhold any additional action on the regulation to provide time for state and federal legislative efforts on this issue to run their course.

<u>Any FHFA action on such fees should be prospective and limited in scope.</u>

CAI believes that FHFA regulatory authority would be best applied by allowing state efforts to continue for a set period of time. All fifty states hold legislative sessions in 2011. States should be provided with the appropriate time to distinguish between appropriate fees, such as community transfer fees and fees that are against the interest of consumers such as private transfer fees payable to investors. This effort is being facilitated by leading advocates against private transfer fees. Such efforts provide the best chance for curbing this practice while providing protection for consumers in properties with such fees in place. FHFA may then choose, after a set period of time, to draw a regulatory line in the sand and impose a funding ban for any private transfer fees payable to third party investors that are recorded after a specific date. Through this approach, FHFA actions would have the maximum impact on abuse of such fees with the minimal impact on consumers.

We look forward to your response and to working with the FHFA to better understand the critical role of such fees on community associations, the need to distinguish community transfer fees from private transfer fees and to take action that is appropriate to provide the greatest consumer protection while minimizing negative impacts on the overall housing market.

Sincerely,

Thomas M. Skiba, CAE
Chief Executive Officer

Attachment A

DISCLOSURE BEFORE SALES
IN COMMUNITY ASSOCIATIONS

Policy

CAI believes that homeowners should be informed about association matters that may impact their decision to purchase a home/unit and will educate them about their personal rights and responsibilities with regard to the community association. Disclosure documents/resale certificates are invaluable consumer information tools because it is vital that buyers know what they are buying. Disclosure documents/resale certificates should be mandated by state statute to ensure that every buyer is aware of essential information relating to his new home or unit and the community association.

CAI supports mandating disclosure documents/resale certificates for all ownership transfers of homes or units in a community association to ensure that the association is notified of every pending sale and that the transferee is aware of the obligations with respect to the property

It is the Public Policy of CAI that state legislatures should mandate disclosure to potential buyers of homes or units in community associations by providing copies of the following information:

1) ***Amount of current monthly assessments, maintenance fees and other charges for common expenses;***
2) ***Amount of approved special assessments;***
3) ***Association governing documents;***
4) ***Amount of reserve and capital funds available and committed to current or pending projects;***
5) ***Reserve study, if any;***
6) ***Current operating and reserve budgets and year-to-date financial statement;***
7) ***Insurance certificates indicating association-provided coverage;***
8) ***Pending litigation excluding routine assessment collections;***
9) ***Outstanding judgments against the association;***
10) ***Any amounts the current owner owes the association;***
11) ***Notice of any association alleged and uncured violation pertaining to the home/unit;***
12) ***Fees relating to the transfer of ownership or other transactions;***
13) ***A statement of the remedies available to the association as a result of non-payment;***
14) ***Current collection policy;***
15) ***Notice of any restrictions related to the leasing of a unit;***
16) ***List of association amenities;***
17) ***Contact information for the association;***

CAI recognizes that the preparer of the disclosure documents/resale certificates incurs expenses relating to the preparation and production of such documents and supports the right of the preparer to charge a reasonable fee for such transactions.

Background

The Community Associations Institute (CAI) recognizes that buying a home or unit in a condominium, cooperative or planned unit development should be a positive event, but can be a stressful and confusing time for the buyer.

CAI believes that full disclosure is an essential tool to ensure that the consumer is aware of all relevant data that may impact the decision to purchase a home or unit in the community association. Resale certificates will also educate the consumer about rights and obligations as an owner of a home or unit in a community association.

Additionally, while community associations are obligated to maintain a roster of current owners, it is often impossible to track sales because of the voluntary nature of resale certificates. The association may not be aware that a new owner has taken possession of a home or unit until months or perhaps years later. Mandating the submission of resale certificates will enable associations to be alerted to ownership changes in a timely manner.

Frequently an association's management company serves to fulfill the requests for document production related to the sale of a property. Such requests may come several months in advance or with short notice. Preparers incur labor and material costs for such production and must attest to the accuracy of the information. As such, preparers should be allowed to charge a reasonable fee for the liability risk incurred by affirming the correctness of the information as well as the preparation and production of disclosure documents/resale certificates. Although most disclosures are of a routine nature, there may be transactions or circumstances that justify additional charges. Such fees, at the discretion of the association or its agent, may be required in advance of production to ensure costs incurred to the association are properly allocated to the parties to the transaction and in a timely manner. If the resale package is demanded without reasonable notice, an expedited charge may be warranted.

Adopted by the Board of Trustees, March 3, 2010

Attachment B

For the Common Good:

Use of Community Transfer Fees by Community Associations

September 27, 2010

Department of Government & Public Affairs
225 Reinekers Lane, Suite 300
Alexandria, VA 22314
(703) 548-8600
www.caionline.org

Background

On August 13, 2010, the Federal Housing Finance Agency (FHFA) issued a draft regulation addressing the issue of "Private Transfer Fees." The proposal would prohibit Fannie Mae, Freddie Mac and federal home loan banks from purchasing mortgages for any property that contained a "deed-based transfer fee" payable at time of sale. Regulatory interest in this matter was driven by the advent of investment vehicles that relied on deed-based transfer fees that require payment to parties outside of the community in which the deed is recorded at the time of transfer — a fee often referred to as a "Private Transfer Fee." In its draft language, FHFA chose to apply the regulation banning mortgage funding to any property with any deed-based transfer fees, including fees payable to community associations.

In their justification for the proposed regulation, it was noted that "FHFA is concerned that the fees fund purely private streams of income for select market participants and do not benefit homeowners." The FHFA went on to note, "even if the fees are dedicated to homeowners associations, they are not proportional or related to the purposes for which the fees are collected." FHFA offered no study or data to justify this position.

In response to these FHFA "findings," CAI surveyed its membership to gather data on the nature, use and benefits of deed-based transfer fees in community associations across the country. The goal of the survey was to provide empirical evidence that demonstrates how "Community Transfer Fees[16]" are used and benefit homeowners in community associations across the country. This report is the product of that survey.

Community Associations Institute (CAI) is a membership organization representing the interests of the more than 60 million Americans who live in community associations. Our 30,000 members represent volunteer board members of associations, managers of community associations and businesses that support community associations across the country. CAI members work to promote harmonious and vibrant communities through our national organization and our more than 60 chapters across the country.

[16] "Community Transfer Fee" is used to refer to a deed-based fee payable to a community association or affiliated entity where the funds collected are used to benefit the properties paying such fees.

Survey Process

CAI's Transfer Fee Survey contained 19 questions on the topic of transfer fees within community associations. The survey was sent electronically to all CAI members.[17]

To ensure data from individual respondents was not duplicated, the survey captured the names, addresses and communities responding to the survey; 99% of the respondents provided this data. When this data was not provided, the responses were not included in the calculations published in this report.

As the terms "private transfer fee" or "deed-based transfer fee" are not clearly defined legal terms, the questions were structured to ensure that respondents provided accurate data on deed-based fees rather than any other fees that may be charged at the time of transfer. CAI data on deed-based transfer fees reflects deed-based fees payable to the community association or community association based entity, not to outside third party investors.[18]

The survey was open from August 31 to September 17, 2010. A total of 1,254 communities, representing 959,295 housing units, responded to the survey.

Although this survey did not use a random sample of communities, CAI believes that the number of communities responding and the geographic diversity of such responses provide data that may be used as the basis to provide accurate estimates for the uses of deed-based transfer fees throughout the national community association universe. This report shall distinguish between summaries of the actual data and national estimates based on such data[19].

[17] CAI's survey was sent electronically to 21,521 individual members. This number varies from our total membership number due to members opting out of e-mail communication as prescribed by the "CAN-SPAM Act." As of July 31, 2010, CAI had 30,100 individual members.

[18] "Private Transfer Fee" and "Deed-Based Transfer Fee" are not clearly defined legal terms. For purposes of this survey, CAI considered any transfer fee payable to a community association and found in a master deed, individual property deed, declaration or bylaw to be a "Deed-Based Transfer Fee." Each of these documents may be considered to run with the land and bind future purchasers. In some jurisdictions, association bylaws are recorded and are considered to run with the land.

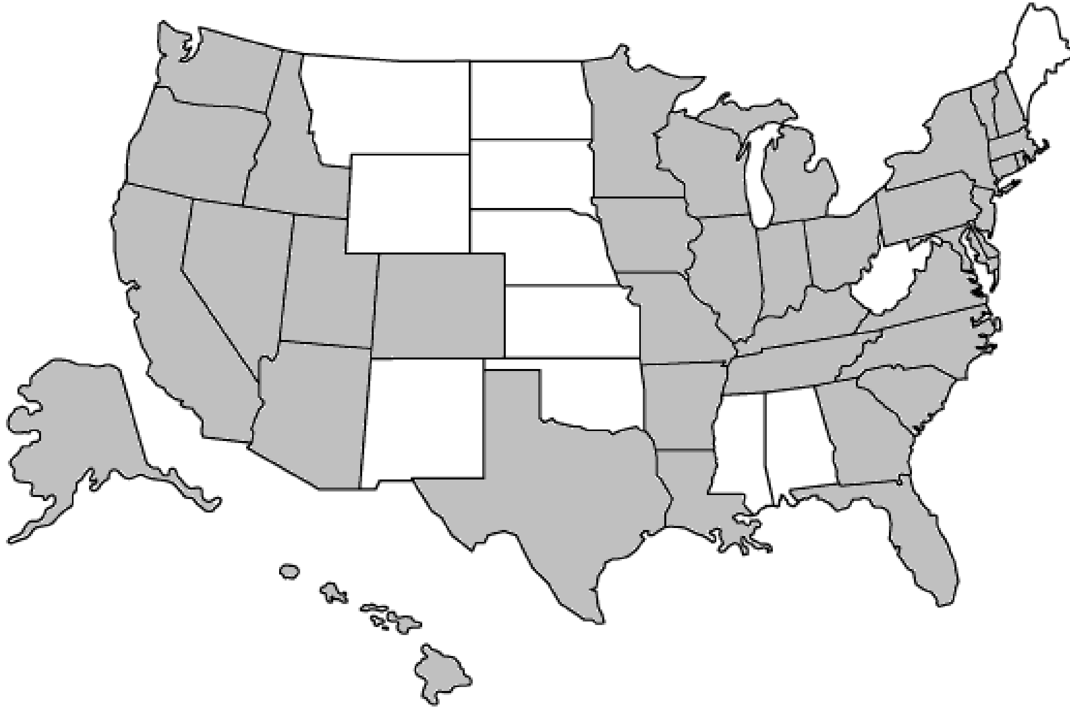
[19] Unless otherwise noted, all results in this report refer to the respondents who indicated that their community has Community Transfer Fees.

Survey Highlights

- CAI's Community Transfer Fee Survey represents data collected from 1,254 communities in 40 states, representing 959,295 units in community associations.
- Community transfer fees on units/homes in their communities were reported by 49 percent of responding communities.
- Community Transfer Fees have existed for more than a generation. More than 40 percent of such fees having been in place for 10 years or more.
- A community-payable, deed-based transfer fee attached to their property was identified by 489,198 units responding to the survey.
- At least two-thirds of all property owners would be required to remove fee provisions by 70 percent of communities with Community Transfer Fees.
- Such fees are collected as either a fixed fee, percentage of sale price or a multiple of association assessments.
- When a Community Transfer Fee is a fixed fee, it is typically $500 or less.
- When a Community Transfer Fee is a percentage of the sale price, it is typically less than three-quarters of one percent of the sale price of the property.
- Community Transfer Fees are disclosed to potential purchasers in nearly all circumstances.
- The existence of such fees results in the loss of a sale of property in less than 1 percent of reported transactions.
- Such fees are used to support the community association and residents by 99.2 percent of responding communities.

Survey Findings

CAI’s Community Transfer Fee Survey represents data collected from 1,254 communities in 40 states, representing 959,295 units in community associations.



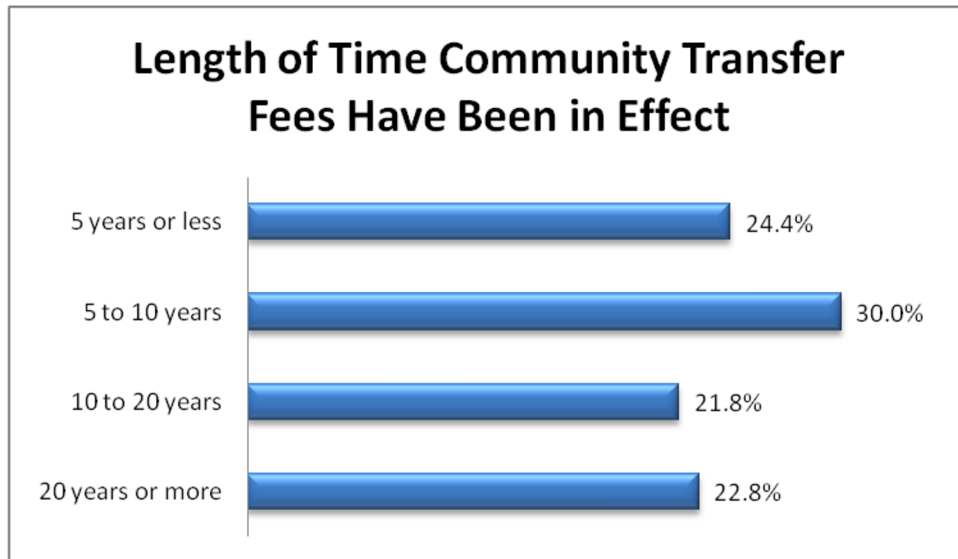
Community Transfer Fees on units/homes in their communities were reported by 49 percent of responding communities.

A Community Transfer Fee attached to their property was identified by 489,198 units responding to the survey.

Action Required to Remove a Community Transfer Fee[20]	
Unanimous Approval	. 3%
Super-majority of two-thirds or more property owners	67%
Super-majority of a quorum of members at a membership meeting	30%

[20] Actions to remove deed restrictions, super-majority or quorums require the participation of all property owners, including bank-owned properties.

Community Transfer Fees apply to the initial and all subsequent sales of the property for 90 percent of respondents.

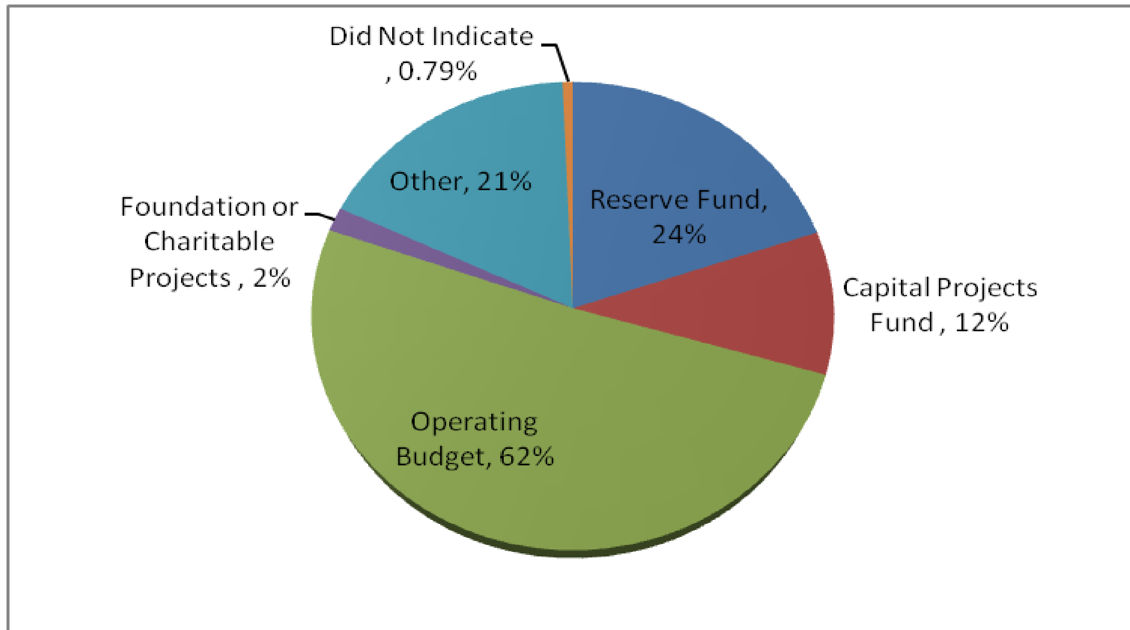


Community Transfer Fees are levied as follows:

1. Fixed fee — 74%.
    - $100 or less — 23%
    - $100 to $250 — 33%
    - $250 to $500 — 22%
    - $500 to $750 — 5%
    - "Other[21]" — 16%
2. A percentage of sale price — 9%.
    - One-quarter of a percent or less — 35%
    - One-quarter of a percent to one-half of a percent — 36%
    - One-half of a percent to three-quarters of a percent — 12%
    - Three-quarters of a percent to 1 percent — 16%
3. Multiple of monthly association assessments — 17%.
    Typically 2 to 3 months of the association assessment.

[21] The response of "other" indicates communities that have a fixed fee that varies depending on the type of unit within the community, e.g., $250 for a townhome and $350 for a single family home.

How are funds from Community Transfer Fees used?



"Other" includes communities who allocate funds to reserves, capital projects *and* operating expenses.

Of communities with Community Transfer Fees, 60 percent report that they would have to increase assessments to recover revenue lost if their ability to collect such fees was prohibited.[22]

Community Transfer Fees are disclosed to purchasers prior to closing by 96.3% of responding communities. Disclosure is accomplished through state disclosure laws, closing letters, action of the association or its agents, notice by the title company, realtor or escrow agent

Community associations with Community Transfer Fees report that such fees result in a loss of sale in less than 1 percent of all transactions.[23]

Failure to pay a community payable, deed-based transfer fee results in the association seeking a lien in 6 percent of reported cases.[24]

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[22] An important distinction with the proposed FHFA regulation is that it does NOT ban such fees; however, it renders properties encumbered with any deed-based fee unqualified for 90 percent of available mortgages. Thus, the impact on a community with such fees would be far more devastating than an increase in assessments.
[23] This figure represents the data as reported to CAI. Associations may not be party to reasons for the cancelation of an individual home sale. As this is an issue raised by the National Association of Realtors, we anticipate their data may supplement our members' reports on the impact of such fees on home sales in community associations.
[24] This figure does not measure if a lien was filed, only if the association began the lien process. American Land Title Association may be able to provide claims experience as to the number of instances where such fees, regardless of beneficiary, have resulted in action against title.

Application of Survey Findings to National Community Association Data[25]

Up to 11 million homes have a Community Transfer Fee in place.

Nearly 45 percent of homes have had a Community Transfer Fee in place for 10 or more years.

Such fees generate up to $3 billion annually to fund community association projects, reserves or otherwise benefit community association residents.

Approximately 7.7 million homes with Community Transfer Fees would require two-thirds or greater consent of all property owners to remove such fees.[26]

The approximate value of all homes with Community Transfer Fees is $1.2 trillion.

[25] CAI industry data is available at http://www.caionline.org/info/research/Pages/default.aspx.

[26] Based on industry practice, obtaining a two-thirds or greater approval of all property owners for deed changes is extremely rare, thus, the proposed regulation issued by FHFA would render many of these homes unmarketable.