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COMMITTEE ON  
FINANCIAL SERVICES

SUBCOMMITTEE ON  
FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

SUBCOMMITTEE ON  
HOUSING AND COMMUNITY OPPORTUNITY

**Congress of the United States**  
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October 5, 2010

The Honorable Ed DeMarco  
Acting Director  
Federal Housing Finance Agency  
Fourth Floor  
1700 G Street, NW  
Washington DC 20552

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

Dear Director DeMarco and Mr. Pollard:

I write to express my general support for the Federal Housing Finance Agency's Notice of Proposed Guidance on Private Transfer Fee Covenants (No. 2010-N-11) published in the *Federal Register* on August 16, 2010. I am, however, concerned with the proposed guidelines as currently written, and strongly support an exemption from guidelines for fees that benefit the homeowner and the property, such as those that go to support homeowners, condominium, and cooperative associations. Without this exemption, I fear that the FHFA will needlessly disrupt real estate markets across the country and visit further financial distress on homeowners by restricting access to credit.

The use of deed or covenant based private transfer fees in planned unit developments, condominiums and cooperatives is a common and long-standing practice in many areas of the country. These fees, paid at closing, ensure that the homeowner or community association in which the home is located has sufficient cash reserves and working capital to fund ongoing and unanticipated obligations. The payment of deed or covenant based transfer fees that accrue to the association directly benefit all owners in an association by protecting property values, ensuring maintenance of community infrastructure such as roads, sewers and lighting and supporting amenities enjoyed by all residents. In fact, I myself have utilized private transfer fees for this exact purpose during my time in the private sector as a homebuilder. These small fees allowed residents of my development to enjoy the benefits provided by the homeowners association without the burden of excessive annual dues or assessments.

As currently drafted, FHFA's proposal will prohibit Fannie Mae, Freddie Mac and the Federal Home Loan Bank System from supplying mortgage liquidity to communities encumbered by any form of deed or covenant based transfer fee. The proposed guidance takes the view that all deed

or covenant based transfer fees limit the alienation of property and negatively affect a property's marketability even when the fee renders a benefit to the property. I am disturbed that FHFA provides neither evidence nor explanation to justify this conclusion. Regrettably, the absence of empirical data, legal opinion or other justification may lead many to conclude the proposed guidance is based on arbitrary assumption or anecdote. Given the number of American households that will be negatively impacted by FHFA's proposed guidance, the agency has a substantial burden to provide a clear analysis to justify its position or modify its proposal.

Some suggest that FHFA's proposal should be adopted as written and that residents of community and homeowner associations will have sufficient interest in modifying deeds and covenants to eliminate transfer fees. Those making such suggestions are simply unfamiliar with the legal structure of common interest communities. The majority of associations require a two-thirds supermajority of all property owners to modify deed or covenant based restrictions. And, a significant number require a three-quarters majority or a unanimous vote by property owners. The burden of modifying deeds and covenants during normal market conditions is exceptional and is rarely undertaken. In the current real estate crisis the likelihood of success is even less given the number of bank Real Estate Owned, property held in estate, bank-foreclosed property where the bank has failed to take title, or property that is otherwise in adjudication. Given these facts, if FHFA's proposed guidance is not revised homeowners across the country who have done nothing wrong will experience additional financial hardship, making the recovery of our housing markets all the more difficult.

I do believe FHFA has identified one new deed based transfer fee in its proposed guidance that should be eliminated from our real estate markets. Deed based fees, paid to a third party, that run with the land but do not benefit the land are burdensome on homeowners and serve no legitimate function. I do not support fees paid by homeowners at closing to unrelated third parties that have performed no service and have no interest in the transaction other than to collect the transfer fee. These fees, which do not benefit the land or homeowners, have been targeted by state legislatures across the country and in many instances have been rendered void or unenforceable through statute. Since these fees have only recently been introduced in the market it is important to halt their spread as quickly as possible and state legislatures have been acting to do so. I encourage FHFA to support this effort by instructing the GSEs to limit exposure to mortgages on properties encumbered by unrelated third party transfer fees, but to also provide states sufficient opportunity to void these arrangements as well.

I appreciate your consideration of my views on this important matter, and I look forward to the courtesy of your response. If I can be of further assistance on this matter, please do not hesitate to contact me or my financial services staffer, Brian Werstler, at 202-225-6605 or at [brian.werstler@mail.house.gov](mailto:brian.werstler@mail.house.gov).

Sincerely,

  
Kenny Marchant  
Member of Congress