

October 12, 2010

Timothy A. Vanderver, Jr.
(202) 457-6074
tvanderver@pattonboggs.com

Alfred M. Pollard, Esq.
General Counsel
Division of Federal Loan Bank Regulation
Federal Housing Finance Agency
Fourth Floor
1700 G Street, NW
Washington, DC 20552

Attention: Public Comments “Guidance on Private Transfer Fee Covenants, (No. 2010-N-11)”

Dear Sir:

Associations, Inc. (“Associa”) submits the following comments on the above-referenced Notice of Proposed Guidance (“NPG”), which seeks to prohibit government sponsored enterprises (“GSEs”) from purchasing or investing in mortgages encumbered by private transfer fee covenants or securities backed by private transfer fee revenue. 75 Fed. Reg. 49932 *et seq.* (August 16, 2010). The Guidance would ban transfer fees charged to homeowners to fund project development and enhance community investments. The proposed Guidance should not prohibit homeowners associations (“HOAs”) or their management agents from charging processing/administrative fees that are directly related to services provided to home sellers and buyers during a transfer of ownership since these fees are contract based and typically are not imposed by covenant or deed. However, Associa is concerned that the broad definition of the term private transfer fee covenant and ambiguous language in parts of the proposal mean that the Guidance could be interpreted to prohibit such fees.

Further, the proposed Guidance specifically prohibits fees attached by deed or covenant to real property which are paid to a HOA. Associa is concerned about the adverse impacts this would have on the HOAs for which it is the management agent and on the homeowner members of those HOAs.

Associa requests that the Federal Housing Finance Agency (“FHFA”) revise the Guidance to clarify that the rules relating to private transfer fees are not applicable to fees charged by HOAs or their management agents for services associated with the transfer of property to new

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homeowners. Such fees are directly related to services provided to homeowners, and in no way impose a risk to the stability and liquidity of the housing finance markets. In addition, Associa requests that FHFA exclude from its Guidance fees paid to HOAs, which are used to benefit HOA members and the property. If FHFA does not exclude such fees, it will be imposing on HOAs its views as to how they should be funded; ironically, the proposed Guidance will harm the marketability of properties which it seeks to enhance.

SUMMARY

On August 16, 2010, FHFA published notice of its proposed all-encompassing Guidance (the "Guidance"), which seeks to prohibit Fannie Mae, Freddie Mac, and the Federal Home Loan Banks (collectively, the "Banks") from purchasing or investing in mortgages on residential property subject to transfer fees authorized by covenant. The Guidance sets forth a broad general policy statement against the practice of having a third party impose a transfer fee upon the sale or resale of a property to fund project developments or to enhance community investments. It cites concerns about the use of private transfer fee covenants, which range from the limitations the fees place on property transfers, making them legally uncertain, to the complications the use of the fees create in residential transactions.

In moving beyond the general policy statement, however, to actually defining the fees in which FHFA is seeking to prohibit the Guidance is ambiguous and confusing in a number of respects. First and foremost, the Guidance provides the following vague, but sweeping, definition of a "private transfer fee covenant":

A private transfer fee covenant is attached to real property by the owner or another private party (frequently, the property developer) and requires a transfer fee payment to an identified third party, such as the property developer or its trustee, a homeowners association, an affordable housing group or another community or non-profit organization, upon each resale of the property. The fee typically is stated as a percentage (*e.g.*, 1 percent) of the sales price and often survives for a period of ninety-nine (99) years.

75 Fed. Reg. at 49933. The Guidance should not apply to contract-based fees that are directly related to services provided to homeowners, which are not imposed by covenant or deed and which do not relate to any of the general policy concerns described in the Guidance. Still, this definition is so vague and sweeping that it raises concerns about how it would be interpreted vis-à-vis these fees. As a result, the Guidance should provide an exception for fees that are

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commonly charged to borrowers during the sale or resale of a property for services rendered by HOAs or their management agents. Many of these services are required by state law. However, the Guidance does not have such an exception, and by failing to recognize such fees, it creates a great amount of confusion and uncertainty as to whether fees commonly assessed during the transfer process are acceptable.

Similarly, the proposed prohibition on fees to an HOA will have drastic and unjustified adverse effects. Unless hard data shows that these fees to HOAs are creating a problem, they should be exempted from the final Guidance.

DISCUSSION

Associa is a leader in community association management and supports HOAs across the country by providing association management, association consulting, financial management and developer consulting services. When a home is sold, the HOA or a management agent such as Associa commonly charges new homeowners (i) a processing fee to cover the cost associated with providing information in connection with the resale of the property, which information is often required to be provided by state law, and (ii) a post-closing fee to pay for certain administrative tasks, such as updating the HOA's records and systems to include the new homeowner, and providing new keys, gate-control devices, and vehicle bar code identification for security purposes. For the reasons stated below, such administrative fees should very clearly be exempted from the definition of "private transfer fee covenant," as they are fees commonly assessed to homeowners as part of the transfer process in exchange for administrative services rendered by the HOA or its management agent.

In addition, transfer fees paid to HOAs which are used for the benefit of the homeowner members should be excluded from the prohibition. These fees have been determined on a consensual basis, and there is no evidence that buyers are not informed of them. Further, the documents which provide for such fees are extremely difficult to change because a super majority is normally needed. The end result of this is that property transfers in developments subject to these fee requirements will be impeded, not made easier. Therefore, they should also be exempted from the prohibition.

The Definition Provided in the Guidance is Overly Broad and Could be Interpreted to Prohibit Fees Directly Related to Services Provided by Third Parties

The definition of private transfer fee covenant set out in the Guidance needs to be revised to ensure that it is not interpreted to inadvertently prohibit commonly assessed fees for services

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rendered. This definition is so broad that mortgage lenders could conclude that processing/administrative fees, which are often referred to as “transfer fees,” are prohibited. Such fees are usually set as a fixed dollar amount and are based on services provided to homeowners.

The Guidance broadly defines “private transfer fee covenants,” which is alarming for a number of reasons. First, the wording of the definition could arguably, but incorrectly, be read to prohibit fees paid for services related to the transaction. Similarly, the broad definition restricts any fees that may be charged under the HOA’s agreements. As part of the HOA structure, homeowners are typically required to enter into an agreement containing certain covenants, conditions and restrictions. In order to ensure that the agreements will be enforceable, the agreements are attached to the property. Such fees would not be permitted under the proposed Guidance.

Second, given this broad definition, FHFA will effectively restrict HOAs and their management agents from charging administrative fees, a result which FHFA could not have intended. The administrative fees assessed by HOAs or their management agents do not create purely private continuous streams of income for select market participants; they do not represent dramatic, last-minute, out-of-pocket costs for consumers; nor do the fees deprive subsequent homeowners of equity value. Rather, the fees assessed by Associa during the transfer process are assessed for services rendered, are disclosed at the time of purchase, and are directly related to the purpose for which they are collected.

Indeed, processing fees charged by HOAs or their management agents are no different than charges such as surveyors’ fees, title search fees, appraiser fees, and title insurance premiums. All these are payments for services that are required for the property transfer. Similarly, post-closing fees pay for management aspects of the HOA’s business directly related to the property transfer. They do not constitute a burden on the mortgage. As noted above, both types of fees are payments for services rendered by the HOA or management agent.

FHFA Should Also Exclude from its Guidance Transfer Fees Paid to HOAs which are Used for the Benefit of Homeowner Members

The proposed Guidance dismisses fees paid to HOAs with a sweeping and unsubstantiated assertion:

Further, it is unclear that the fees, even if dedicated to homeowners’ associations, are proportional or related to the purposes for which the fees were to be collected.

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75 Fed. Reg. at 49932. This Guidance should be based on substantiated data, not on a bald assertion that the effect of such fees is “unclear.” Governmental action should be based on reality and not on unsupported assertions.

Transfer fees to HOAs are determined by the approved documentation for the HOA. These must be consented to by homeowners and are a source of funding for HOAs. It is overreaching for FHFA to impose its own concepts as to how HOAs are to be funded (*i.e.* by prohibiting a source of funding). This is the purview of state and local governments, if any governmental action is appropriate or legally justified.

These fees for HOAs are contained in the relevant property documentation and are disclosed in the package which the HOA or its managing agent provides in exchange for its processing fee. Thus, the assertion in the proposed Guidance that “they often are not disclosed by sellers and are difficult to discover through customary title searches,” 75 Fed. Reg. at 49933, is simply incorrect for fees provided for in HOA documents and received by the HOA.

Finally, typical HOA documentation is difficult to change and often requires a super majority of all homeowners to do so. This means that relevant HOA fees will remain in place for many developments since obtaining such a super majority is difficult, if not impossible. As a consequence, new loans on homes in these developments could not be sold to or invested in by Fannie Mae, Freddie Mac or the Banks, which would make these homes virtually unmarketable. Perversely, this frustrates FHFA’s objective of preventing limitations on property transfers.

The Proposed Guidance Should be Revised to Exclude Processing and Post-Closing Fees and Fees Paid to HOAs

For the reasons set forth above, the proposed Guidance must be revised to clearly exclude from the prohibition fees which benefit the homeowner by covering the cost of administrative services. Transfer fees paid to HOAs which are used for the benefit of homeowner members should also be excluded. Associa suggests that the definition of private transfer fee covenant be revised by adding the following at the end of this definition:

“Private transfer fee covenant” specifically excludes (i) private transfer fees paid to a property owners association that manages the development and that uses these fees for the benefit of the homeowner members of that association and (ii) fees paid to a

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property owners association or its management agent for services performed in connection with the transfer of property.

There may be other language that achieves this objective, but the language set forth above conveys the essence of what is needed. Conforming revisions will be needed throughout the proposed Guidance to reflect the exclusion of transfer fees to an HOA, as described in (i), above.

Request for On-the-Record Meeting with Appropriate FHFA Staff

Associa requests an on-the-record meeting with appropriate FHFA staff in order to assure that its comments are fully understood and are taken into account. We will contact FHFA shortly to arrange such a meeting.

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For the above stated reasons, Associa requests that the FHFA revise the Guidance to clarify that the rules relating to private transfer fees do not include fees charged by homeowner's associations for services associated with recognizing new homeowners.

Sincerely,



Timothy A. Vanderver, Jr.
Counsel for Associations, Inc.