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October 7, 2010

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

Attention: "Public Comments Guidance on Private Transfer Fee Covenants (No. 2010-M-11)"

Dear Mr. Pollard:

California homebuilders, represented by the California Building Industry Association (CBIA), strongly urge the Federal Housing Finance Agency (FHFA) not adopt the proposed guidance on private transfer fee covenants (No. 2010-M-11) and to reject any policy or guidance restricting lending within communities that contain transfer fees and that Fannie Mae, Freddie Mac and the Federal Home Loan Banks (collectively, Enterprises and Banks) be allowed to continue to back and invest in home loans within these communities.

INTERESTS OF CBIA

CBIA is a non-profit trade association comprised of approximately 3,300 companies employing approximately 89,000 people in California. Our member companies are homebuilders, general contractors, subcontractors, architects, engineers, lenders, land planners, real estate sales agents and brokers, attorneys, building product manufacturers and others who collectively are responsible for the production of approximately 75% of all new homes built in California. CBIA's mission includes representing the homebuilding industry in all branches of government to promote and protect the production of high quality housing for all at an affordable level. Unfortunately, we believe that if this guidance is adopted it will only negatively impact the real estate community and hinder any recovery in the housing markets during the worst housing downturn in our history.

THE PROPOSED GUIDANCE IS OVERBROAD

California homebuilders share your concerns about the use of private transfer fees that provide solely private benefits to select market participants (*e.g.*, a developer or former property owner). Indeed, California homebuilders, represented by CBIA do NOT engage in this type of practice and do NOT believe that the "Freehold" model is an appropriate use of a private transfer fee. Therefore, it may be appropriate to limit or restrict the ability of the Enterprises and Banks from investing in mortgages on properties that first become subject to such a fee *after* the effective date of the proposed guidance.

However, we do believe that private transfer fees are an essential tool for providing equitable, long-term financing, for community benefits such as affordable housing, environmental mitigation, community amenities and homeowners associations. These purposes provide a public benefit as well as a benefit to the property subject

to the fee, by allowing the construction of new homes while preserving open spaces, providing clean drinking water, ecosystem management, affordable housing, ride sharing, green energy through roof-top solar systems, neighborhood block parties, etc.. We have included with this letter a number of examples of the way these fees have been used by homebuilders. We hope you will diligently review these examples and view them as an appropriate use of these fees in your evaluation of this issue.

We do not believe that the Enterprises and Banks – entities that represent 90% of the home mortgage industry – should be prohibited from investing in mortgages on properties subject to fees used for these purposes.

DISCLOSURE

In 2007, the California Association of Realtors (CAR) introduced legislation in the California state Legislature to eliminate private transfer fees. California's Legislature declined CAR's invitation to eliminate private transfer fees for the same reasons we have set forth in this letter.

However, California's state Legislature did enact Assembly Bill 980, a measure CBIA and CAR supported. AB 980 establishes definite and clear disclosure laws for transfer fees as defined in the statute. California's disclosure law requires a description of the property, the amount of the fee with examples of how it is calculated, the date of expiration of the fee, the purpose for which the fee will be used, the entity to which the fee will be paid and contact information of the payee. Homebuyers in California are made aware of the existence of these fees if they exist on the property they are purchasing. We agree that disclosure of these fees is essential to the transaction and encourage the FHFA to consider adopting its own disclosure policy similar to California's as a way to address this issue as opposed to eliminating the ability of the Enterprises and Banks from being able to back or invest in mortgages with these fees. We are attaching a copy of AB 980 for your reference.

THE AMOUNT OF THE FEE IS SMALL COMPARED TO OTHER TRANSACTIONAL COSTS

In California, private transfer fees are typically calculated as a percentage of the sales price of the property. The amounts of fees are most commonly 1% of the sales price. We have identified one¹ private transfer fee that exceeds 1% and fees as low as 1/20th of 1%. Real estate transfers include many transactional costs due at the close of escrow such as property taxes, city and county fees, and document transfer taxes, title insurance and escrow costs as well as real estate sales commissions. Title insurance and escrow fees average about 1.5% of the sales price. Real estate sales commissions alone typically amount to 6% of the sales price – SIX TIMES the typical private transfer fee. However, the Enterprises and Banks are not being asked to limit their involvement in transactions that include these types of fees. If the party responsible to pay these fees breaches its obligation, the real estate agent, title or escrow company may obtain a court-ordered lien (writ of attachment) on the real property of the responsible party or parties. Accordingly, every claim made of private transfer fees in the Proposed Guidance can similarly be made of other transactional costs.

NO HISTORICAL EVIDENCE OF A PROBLEM

¹ In the San Francisco Bay Area there is a 1.5% fee that goes to Bay Area Rapid Transit (BART) for transit services to a transit oriented development.

Private transfer fees have been in existence for dozens of years, and yet the Proposed Guidance includes no evidence of a problem for real estate transactions. At best, the Proposed Guidance contains argument, fear and speculation.

For example, the Proposed Guidance states that private transfer fees will increase homeownership costs. Yet there is no evidence or analysis presented for such a claim. The reality is that if private transfer fees are restricted as proposed, those costs don't go away. Instead those costs will be paid through higher homeowners' association dues, property assessments or taxes, or higher upfront housing costs which mean higher down payments and higher mortgage amounts. Those costs are typically collected on a monthly basis, resulting in higher monthly homeownership costs and reduce affordability – contrary to the claim made in the Proposed Regulation.

The Proposed Guidance also claims that private transfer fees are “legally uncertain.” Yet no case law in California has called them into question. Title companies have expressed no reluctance to provide insurance for properties subject to the fee. Moreover, AB 980 (above) expressly defined a transfer fee, further legitimizing existing practice.

The Proposed Guidance claims that private transfer fees may present a risk of “unknown” potential liens or title defects, are difficult to discover, are not disclosed to sellers, represent dramatic, last-minute, out-of-pocket costs for consumers. All of these concerns can be resolved with proper disclosure as we have suggested above, rather than restricting financing properties subject to these fees.

The Proposed Guidance claims that private transfer fees may reduce liquidity in both primary and secondary mortgage markets. Again, no evidence has been presented demonstrating a causal connection between private transfer fees and the liquidity of the mortgage market. Private transfer fees instituted by builders in California do not result in liens unless the fees are not paid. The lien priority of lenders is protected and there is an exemption from paying the fee for foreclosure transactions. Under the circumstances, it is hard to imagine that private transfer fees could reduce the liquidity of the mortgage market.

Finally, and perhaps most importantly, the Proposed Guidance claims that private transfer fees will complicate residential real estate transactions and introduce confusion and uncertainty for buyers as well as present “non-financeable” costs. At the heart of this claim is an implicit suggestion that if buyers do not receive proper disclosure they may look to the real estate agents involved in the transaction to pay the transfer fee out of their 6% commission. Of course, with proper disclosure, these hypothetical claims are avoided.

FAIRNESS

Some of the supporters of the Proposed Guidance would prefer to put the entire costs of these benefits on the original homebuyer. Such a system inflates the cost of a new home and turns subsequent purchasers into freeloaders, getting the benefits without paying for them. Yet private transfer fees pay the cost for benefits that accrue not only to the original homebuyer, but to every subsequent homebuyer. For this reason, it is only fair that subsequent homeowners bear some of the burden for those costs.

Among the benefits private transfer fees proved are:

- Preserving open spaces/park land and view sheds;
- Providing clean drinking water;
- Ecosystem management;
- Affordable housing;
- Public Infrastructure;
- Ride sharing and public transit service;
- Green energy through roof-top solar systems;
- Neighborhood block parties;
- Concerts and movies on the Green;
- Harvest festivals and holiday events;
- Resident-formed clubs; and
- Community-wide sports programs

These community benefits help to foster a sense of community, clear the way for permission to construct the community, and protect the environment. These benefits do not cease when the first homebuyer moves out. Therefore it would be inappropriate to allow subsequent purchasers to get something for nothing. In short, while CBIA says no to Freehold, we also say no to freeloaders.

RETROACTIVE APPLICATION

In today's moribund housing markets, 90 percent of home loans are GSE backed loans. It is likely that millions of properties in communities throughout the nation are already encumbered with private transfer fee covenants for one purpose or another, and it is unclear in the Proposed Guidance how FHFA intends to treat properties. Some questions and concerns are raised by the lack of language specifically addresses how these properties will be treated by FHFA: How will homeowners with these properties ever be able to refinance their homes? And/or how will these homeowners ever be able to sell their properties? How does placing these homeowners in limbo un-complicate residential real estate transactions, increase affordability, increase liquidity of the mortgage market, reduce foreclosures and limit confusion and uncertainty?

PROPOSED LEGISLATION AFFECTING TRANSFER FEES

Recently, Congresswoman Maxine Waters introduced H.R. 6260 which seeks to limit the uses of private transfer fees and would likely eliminate the need for the Proposed Guidance. A copy of HR 6260 is attached for your reference. HR 6260 recognizes that private transfer fees have legitimate uses as indicated in this comment letter. While in need of some modification, HR 6260 represents a more thoughtful approach to private transfer fees.

CONCLUSION

In conclusion, California homebuilders would support an effort by the FHFA to ensure that private transfer fees are fully disclosed to homeowners and homebuyers (as already the law in California); would support an elimination of the "Freehold" model or the use of these fees to purely private continuous streams of income for select market participants and would instead

support the limitation of collection of these fees to a fully independent and transparent third party (e.g., homeowners associations, non-profits and trusts or community benefit funds, etc.).

Again, we feel that the Proposed Guidance, if adopted, would have a particularly detrimental effect on very fragile housing markets. We encourage you to extend the public comment period and continue to investigate this issue and seriously consider other options before adopting guidance that will so negatively impact housing markets.

Thank you for considering our comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Elizabeth Snow", with a long horizontal flourish extending to the right.

Elizabeth Snow
President & CEO

Cc: The 55 Members of the California Congressional Delegation