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Fourth Floor, 1700 G Street NW
Washington, DC 20552

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

Dear Mr. Pollard:

On behalf of the Real Property, Probate and Trust Law Section of The Florida Bar ("Section"), I am submitting comments regarding the Federal Housing Finance Agency's "Guidance on Private Transfer Fee Covenants" (No. 2010-N-11) (the "Guidance") published in the Federal Register on August 16, 2010.

The Section is a group of over 9,500 Florida lawyers who practice in the areas of real estate, probate, trust and estate law, and who are dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public pro bono, draft legislation, draft rules of procedure, and occasionally offer advice to the judicial, legislative and executive branches to assist on issues related to our fields of practice.

The Section is writing to the Federal Housing Finance Agency ("Agency") because the Section has a substantial, institutional history and perspective involving private transfer fee covenants and how they are used in practice, which viewpoint may benefit the Agency. The perspective of the Section is oftentimes broader and more independent than those of individuals or a particular constituency. Indeed, the Section and its executive council are comprised of members who represent virtually every segment of the residential real estate market, including condominium unit owners, residential lenders, consumer purchasers, real estate brokers, contractors, non-developer controlled community associations, construction lenders and developers, to name a few.

The Section wishes to share our experience with private transfer fee covenants because its membership, many of our clients and the public will be adversely impacted by the Guidance in its current form.

In 2008, the Section closely examined private transfer fee covenants and was instrumental in drafting and supporting the passage of Section 689.28, Florida Statutes (2010) (the "Statute") which prohibits most private transfer fee covenants in Florida but permits certain customary, widely accepted ones. A copy of the Statute is attached for your reference. In the course of drafting the Statute, the Section devoted considerable analysis to distinguishing between "detrimental" and "beneficial" transfer fees and to avoiding Constitutional taking claims. The Section believes that the Statute embodies an appropriate public policy balance and commends it to the Agency as a solid framework for revising the Guidance. The impetus for the Florida legislation was serious efforts by promoters to encourage the use of covenants to collect a fee from the seller or buyer at each resale of a home in a community; most or all of the fee are paid to the developer or landowner who records the covenants, a promoter or investors. Such private transfer fees are included in a declaration of covenant recorded in the public records and become a perpetual obligation. The Section concluded that those covenants which generated income for a private third party, but did not enhance the community or support cultural, educational, charitable, recreational, environmental, conservation, or other similar activities benefiting the community subject to the declaration, impeded the marketability of the properties encumbered by them. The Section also discovered that an overly broad prohibition on transfer fees, such as that proposed in the Guidance, would inadvertently restrict many customary business practices in real estate, such as deferred payment of real estate commissions, shared appreciation sales or mortgages or options to purchase.

In drafting the Statute, the Section recognized that that proponents of private transfer fees could readily structure around any narrowly defined prohibition and crafted a statute of very broad scope of application with specific exceptions. The Statute defines "transfer fee" broadly as "a fee or charge required by a transfer fee covenant and payable upon the transfer of an interest in real property, or payable for the right to make or accept such transfer, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the property, the purchase price, or other consideration given for the transfer."

The Statute carves out certain exceptions from the broad definition in order to permit and preserve many legitimate even desirable payments. The Statute excludes the following fees from the definition of transfer fee:

- Any tax, fee, charge, assessment, fine, or other amount payable to or imposed by a governmental authority.

- Any fee, charge, assessment, fine, or other amount payable to a homeowners', condominium, cooperative, mobile home, or property owners' association pursuant to a declaration or covenant or law applicable to such association, including, but not limited to, fees or charges payable for estoppel letters or certificates issued by the association or its authorized agent.

- Any fee, charge, assessment, dues, contribution, or other amount imposed by a declaration or covenant encumbering four or more parcels in a community with a

homeowners association, and payable to a nonprofit or charitable organization for the purpose of supporting cultural, educational, charitable, recreational, environmental, conservation, or other similar activities benefiting the community subject to the declaration or covenant.

- Any fee, charge, assessment, dues, contribution, or other amount pertaining to the purchase or transfer of a club membership relating to real property owned by the member, including, but not limited to, any amount determined by reference to the value, purchase price, or other consideration given for the transfer of the real property.

- Any payment required pursuant to an environmental covenant or servitude that imposes limitations on the use of real property pursuant to an environmental remediation project pertaining to the property.

- Any consideration payable by the buyer to the seller for the interest in real property being transferred, including any subsequent additional consideration for the property payable by the buyer based upon any subsequent appreciation, development, or sale of the property. An interest in real property may include a separate mineral estate and its appurtenant surface access rights.

- Any commission payable to a licensed real estate broker for the transfer of real property pursuant to an agreement between the broker and the seller or the buyer, including any subsequent additional commission for that transfer payable by the seller or the buyer based upon any subsequent appreciation, development, or sale of the property.

- Any interest, charges, fees, or other amounts payable by a borrower to a lender pursuant to a loan secured by a mortgage against real property, including, but not limited to, any fee payable to the lender for consenting to an assumption of the loan or a transfer of the real property subject to the mortgage, any fees or charges payable to the lender for estoppel letters or certificates, and any shared appreciation interest or profit participation or other consideration measured by the success of the venture and payable to the lender in connection with the loan.

- Any rent, reimbursement, charge, fee, or other amount payable by a tenant to a landlord under a lease, including, but not limited to, any fee payable to the landlord for consenting to an assignment, subletting, encumbrance or transfer of the lease.

- Any consideration payable to the holder of an option to purchase an interest in real property or the holder of a right of first refusal or first offer to purchase an interest in real property for waiving, releasing, or not exercising the option or right upon the transfer of the property to another person.

In adopting the Statute, the Florida legislature sought to strike a balance between prohibiting those which unduly burdened the property and its owners and preserving widely accepted, beneficial fees payable at transfer of the property.

These exceptions to the prohibition fall into several categories. The first type of Florida exceptions deals with deferred or future payments directly agreed to by the impacted parties (as distinguished from those affecting a non-contracting subsequent owner). This category includes deferred purchase prices, commissions payable on resale, profit participations to prior owners or participating mortgagees and "due on sale" clauses in leases, mortgages and other instruments. The distinguishing characteristic of these exemptions is that they are arms-length transactions between consenting parties. These types of restrictions would arguably fall within the Guidelines definition of a transfer fee. They attach to real property as part of a recorded document, are placed by the owner, and require a payment to an identified party upon resale.

A second group of Florida exceptions exempts transfer fees imposed by or payable to a governmental entity and transfer fees imposed pursuant to environmental or conservation covenants (which sometimes require payments on resale or certain other triggering events – e.g. brownfields remediation programs). To the extent documented by a recorded covenant imposed by an owner, these would also be proscribed by the proposed Guidance.

A third group of Florida exceptions are covenants of a type which were not perceived as a significant public policy problem. These include the following covenants: those solely benefitting a community charity, those funding cultural, educational, recreational or other similar activities for a community; those paid to condominium and home owners' associations, and those relating to transfers of club memberships. Several major developers have created transfer fee covenants pursuant to which 100% of the proceeds are paid into a 501(c)(3) charitable organization and applied to community improvements and activities. These have proven popular and generally successful. Many Florida condominium associations and a lesser number of homeowners' associations require association approval of new purchasers in an attempt to maintain the character and harmony of the community. A transfer of property in those communities thus requires an application process and usually some credit and background checks, which are funded by fees that can be characterized as private transfer fees. Some communities also charge fees on a transfer in order to build reserves, fund capital improvements or accomplish other association goals. Almost every Florida condominiums requires a payment of some sort on the transfer of property – whether for estoppel letters, application fees or even the type of percentage of sale price transfer fee which the Guidance seeks to preclude. The same is true of a smaller number of subdivisions with mandatory home owners' associations. These fees are widely accepted and generally popular.

The Guidance will require condominium associations and homeowners' associations to carefully evaluate their covenants and determine how to proceed in light of the adverse consequences for the community. The process will entail significant expenditures for legal advice. Likely, federally insured mortgage lending will slow or cease while this review process occurs. At the end of the evaluation, a significant number of subdivisions and most

condominiums will find themselves excluded from the insured mortgage market, and in the current market all but unmarketable. We anticipate that prices will drop as the pool of potential buyers will be limited to those able to pay cash or to secure financing from the small number of lenders willing to make non-conforming loans.

The Guidance essentially makes any mortgage loan against a property encumbered by a transfer fee covenant "non-conforming" for federal lending purposes. In today's already difficult mortgage market dominated by federally insured mortgages, this will greatly reduce the financing options available and materially diminish the value of those properties – further exacerbating the real estate crisis. The market has demonstrated the consequences of mortgage balances exceeding the value of the collateral: defaults rise, the value and performance of the mortgage decline, and the loan to value ratio increases. We would suggest that one of the unintended consequences of the Guidance is to increase the lender's risks and further destabilize the secondary mortgage market.

The expected reaction by an affected condominium or owners association is to amend its declaration to remove the prohibited transfer fees. Under Florida law, this process typically requires a vote by the board of directors, formal notice to all association members, and approval by the requisite number of owners. Given the requirements in most declarations for super-majority approval, the amendment may not be achievable. Many declarations also require approval of all or a majority of the mortgagees, which is expensive, time consuming and difficult to obtain, assuming the lender responds to the association's request for approval. At a minimum, amending the covenants will necessitate months of effort and attorneys fees. Applying the Guidance to existing communities that cannot readily change their documents unfairly penalizes them for what has been a legal, even desirable, practice.

It is troubling that the Guidance readily admits that it "does not distinguish between private transfer fee covenants which purport to render a benefit to the affected property and those which accrue value only to unrelated third parties." The Agency's position ignores the fact that many transfer fees directly enhance the communities and benefit their residents. Other transfer fees are required by local governments to fund their mandates or preserve environmentally sensitive or historically significant sites. Overly broad language in the Guidance could adversely affect mortgagees or sellers entitled to collect shared appreciation payments or others holding contractual rights to receive deferred payments such as payments under options to purchase or real estate commissions.

Unless the Agency revises the positions taken in the Guidance, the Guidance will impair the value, marketability and financability of thousands of homes in communities throughout Florida, and directly impact multiple participants in the residential real estate market including individual consumer owner/buyers, developers, lenders, community associations, real estate brokers, contractors and others. This result would be contrary to the mission of the Agency and disrupt the market for residential real estate sales and mortgages. Again, we submit Florida Statute Section 689.28 for your consideration as striking the appropriate balance.

Thank you for the opportunity to offer our insights into this process.

Sincerely,

REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR

Brian J. Felcoski, Chair

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The 2010 Florida Statutes

689.28 Prohibition against transfer fee covenants.—

(1) INTENT.—The Legislature finds and declares that the public policy of this state favors the marketability of real property and the transferability of interests in real property free of title defects or unreasonable restraints on alienation. The Legislature further finds and declares that transfer fee covenants violate this public policy by impairing the marketability and transferability of real property and by constituting an unreasonable restraint on alienation regardless of the duration of such covenants or the amount of such transfer fees, and do not run with the title to the property or bind subsequent owners of the property under common law or equitable principles.

(2) DEFINITIONS.—As used in this section, the term:

(a) "Environmental covenant" means a covenant or servitude that imposes limitations on the use of real property pursuant to an environmental remediation project pertaining to the property. An environmental covenant is not a transfer fee covenant.

(b) "Transfer" means the sale, gift, conveyance, assignment, inheritance, or other transfer of an ownership interest in real property located in this state.

(c) "Transfer fee" means a fee or charge required by a transfer fee covenant and payable upon the transfer of an interest in real property, or payable for the right to make or accept such transfer, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the property, the purchase price, or other consideration given for the transfer. The following are not transfer fees for purposes of this section:

1. Any consideration payable by the grantee to the grantor for the interest in real property being transferred, including any subsequent additional consideration for the property payable by the grantee based upon any subsequent appreciation, development, or sale of the property. For the purposes of this subparagraph, an interest in real property may include a separate mineral estate and its appurtenant surface access rights.

2. Any commission payable to a licensed real estate broker for the transfer of real property pursuant to an agreement between the broker and the grantor or the grantee, including any subsequent additional commission for that transfer payable by the grantor or the grantee based upon any subsequent appreciation, development, or sale of the property.

3. Any interest, charges, fees, or other amounts payable by a borrower to a lender pursuant to a loan secured by a mortgage against real property, including, but not limited to, any fee payable to the lender for consenting to an assumption of the loan or a transfer of the real property subject to the mortgage, any fees or charges payable to the lender for estoppel letters or certificates, and any shared appreciation interest or profit participation or other consideration described in s. 687.03(4) and payable to the lender in connection with the loan.

4. Any rent, reimbursement, charge, fee, or other amount payable by a lessee to a lessor under a lease, including, but not limited to, any fee payable to the lessor for consenting to an assignment, subletting, encumbrance, or transfer of the lease.

5. Any consideration payable to the holder of an option to purchase an interest in real property or the holder of a right of first refusal or first offer to purchase an interest in real property for waiving, releasing, or not exercising the option or right upon the transfer of the

property to another person.

6. Any tax, fee, charge, assessment, fine, or other amount payable to or imposed by a governmental authority.

7. Any fee, charge, assessment, fine, or other amount payable to a homeowners', condominium, cooperative, mobile home, or property owners' association pursuant to a declaration or covenant or law applicable to such association, including, but not limited to, fees or charges payable for estoppel letters or certificates issued by the association or its authorized agent.

8. Any fee, charge, assessment, dues, contribution, or other amount imposed by a declaration or covenant encumbering four or more parcels in a community, as defined in s. 720.301, and payable to a nonprofit or charitable organization for the purpose of supporting cultural, educational, charitable, recreational, environmental, conservation, or other similar activities benefiting the community that is subject to the declaration or covenant.

9. Any fee, charge, assessment, dues, contribution, or other amount pertaining to the purchase or transfer of a club membership relating to real property owned by the member, including, but not limited to, any amount determined by reference to the value, purchase price, or other consideration given for the transfer of the real property.

10. Any payment required pursuant to an environmental covenant.

(d) "Transfer fee covenant" means a declaration or covenant recorded against the title to real property which requires or purports to require the payment of a transfer fee to the declarant or other person specified in the declaration or covenant or to their successors or assigns upon a subsequent transfer of an interest in the real property.

(3) PROHIBITION.—A transfer fee covenant recorded in this state on or after July 1, 2008, does not run with the title to real property and is not binding on or enforceable at law or in equity against any subsequent owner, purchaser, or mortgagee of any interest in real property as an equitable servitude or otherwise. Any liens purporting to secure the payment of a transfer fee under a transfer fee covenant that is recorded in this state on or after July 1, 2008, are void and unenforceable. This subsection does not mean that transfer fee covenants or liens recorded in this state before July 1, 2008, are presumed valid and enforceable.

History.— s. 1, ch. 2008-35.