Electronically submitted

October 15, 2010

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 Leading Builders of America, Inc. (LBA)[1] regarding the Federal Housing Finance Agency's Proposed Guidance on Private Transfer Fee Covenants published in the *Federal Register* on August 16, 2010. LBA is deeply concerned that the proposed guidance would have devastating unintended consequences for millions of current and future homeowners if adopted in its current form. Specifically, we believe the proposed guidance would severely disrupt real estate markets across the country, impair the functioning of the secondary mortgage market, and create substantial uncertainty and additional cost for homeowners and homebuilders alike at a time when the national economy is struggling to recover from a deep recession. These far reaching, and presumably unintended, consequences all run counter to FHFA's mission to support housing finance and affordable housing.

We strongly urge FHFA to withdraw the proposed guidance and to instead partner with state legislatures, which have historically regulated such issues and have recently been active in limiting private transfer fees. Alternatively, we would ask FHFA to revise the proposed guidance to avoid adversely affecting millions of homeowners by exempting transfer fee covenants which are used to fund benefits to the community in which their home is located. These "beneficial transfer fees" include those paid to homeowners associations or other nonprofits. Such fees serve to supplement funding for these entities, which typically own and or

[1] Leading Builders of America, Inc. is a national trade association representing 18 of the nation's largest homebuilders both public and private. LBA members build approximately one-third of all new homes built each year.

manage the amenities of the community, and thus benefit both the current and future homeowners living in the community subject to a transfer fee.

In issuing its proposed guidance, FHFA has determined such fees are harmful to the interests of property owners, limit the free exercise of private property rights, and damage real estate markets. This is not the case. Transfer fees used to support the communities in which they are levied are an important funding mechanism for tens of thousands of communities and have been widely and successfully used for more than 30 years with significant benefits to the homeowners living in those communities. Communities with homeowner and condominium associations as well as housing cooperatives have become an important part of the national real estate market and have been embraced by American families. In fact, almost 60 million Americans live in communities that are managed by some form of neighborhood or community association. The vibrancy and success of such communities is underscored by their combined value of $4 trillion.

Many of these communities have transfer fees that fund reserves; capital improvements; open space maintenance; educational, recreational, and social programs; and ongoing association obligations which directly benefit the people who live in these communities and reduce the cost of homeownership. These direct community benefits enhance the property values of the homes in the communities.

The primary impetus for FHFA's proposed guidance appears to be the relatively recent activity of some developers promoting the use of private transfer fees as a mechanism to generate an income stream for the developer (not the homebuilder) who records the fee as a covenant. These covenants typically do not require that the fees collected be used for the benefit of the community in which they are imposed and can be described as "non-beneficial fees." **LBA members do not support such fees.** As you are probably aware, these non-beneficial income generating fees have been recently restricted by many state legislatures – with several more states expected to pass legislation next session. LBA members support these legislative efforts. Most of the state laws that have been enacted specifically exempt transfer fees payable to the homeowner associations and other non-profit entities to the extent the fees are used to benefit the property or community subject to the fee. The proposed guidance would directly contradict the acts of the legislatures in these states by effectively prohibiting beneficial transfer fees.

Unlike state legislatures that have enacted laws to regulate transfer fees, the FHFA lacks the authority to nullify transfer fee covenants through the proposed guidance. As a result, even if the rule is enacted in its current form, it will not make transfer fee covenants unenforceable and such fees will still be due and payable. Thus, the practical impact of the proposed guidelines would be to wipe out home values for millions of American families while leaving transfer fee covenants in place and fully enforceable. Many homebuilders will face a similar result in those large master planned communities subject to private transfer fees (where the proceeds are payable to a developer, not the homebuilder). Homebuilders have invested substantial capital in land comprising the master planned community that will be unmarketable with limited recourse or ability to modify the transfer fee covenants.

To the extent limitations on transfer fee covenants are appropriate, state legislatures should enact legislation - as has been done in 17 states. When a state legislature enacts legislation limiting or prohibiting transfer fees, the legislature can also invalidate the underlying transfer fee covenant. In this case, the property owned by the homeowner (and homebuilder) remains marketable because the underlying covenant is voided by law. This scenario avoids the market disruption which the proposed guideline would create.

Community Benefits of Certain Types of Transfer Fees.

LBA members support the continued use of private transfer fees that offer *direct* benefits to the homeowners and communities in which they are in place. Very often transfer fees are paid to a homeowners association, non-profit entity, or other community association for enhancements that benefit current and future homeowners. They are typically less than 1% of the purchase price and in many cases are only nominal amounts. The revenues generated by beneficial fees are typically used to:

- Provide initial working capital to homeowner associations
- Help fund capital reserves which are used to pay for future maintenance and community upgrades
- Subsidize common expense assessments of homeowners lowering the monthly costs for home owners
- Promote and maintain open space within or adjacent to the community
- Promote cultural, recreational and social programs that enhance the quality of life of the residents
- Provide environmental mitigation and in some cases protect artifacts or archeologically significant features
- Fund non-profit entities that monitor and enforce historic facade easements and conservation covenants
- Help fund affordable housing initiatives.

These beneficial transfer fees are widely used across the country and have been embraced by residents without any impairment to the marketability of homes. Furthermore, they have lowered the costs of homeownership and enhanced the communities in which they exist.

Beneficial Transfer Fees Support Real Estate Markets

LBA respectfully disagrees with FHFA's assertions that beneficial transfer fees create instability or hinder liquidity in the mortgage market, increase the costs of home ownership, or create legal uncertainty or risk not normally present in the title industry. In fact, they do not "complicate a residential real estate transaction" any more than any other financial obligations or liens do. Transfer fees are routinely and easily dealt with today in the normal course of business by real estate attorneys and title companies in virtually every residential transaction. When properly disclosed at the time of purchase – as done in state required disclosures and in other documents - they create no additional confusion or uncertainty.

The draft guidance issued by FHFA specifically notes that "even if such fees are dedicated to homeowner associations they are not proportional or related to the purpose for which the fees are collected." We are concerned that FHFA did not present this issue as a question to be resolved by the rulemaking process. Instead, it presented this statement as an affirmative finding. We believe this "finding" lacks support, and note that FHFA cites no study or data to support this statement. Our experience is in direct contradiction to FHFA's finding. Beneficial transfer fees are both proportional and are directly related to the purpose for which the fees are established.

FHFA's Proposed Guidance Would be Devastating to Homeowners.

If FHFA's proposed guidance is adopted without revision, Fannie Mae, Freddie Mac, and the Federal Home Loan Bank system would be prohibited from engaging in any activity that would support the flow of mortgage credit to communities where a transfer fee is currently in effect. Nationally, we estimate that there are approximately between 15 and 20 million residential units that are subject to beneficial private transfer fees. The proposed FHFA guidance would make it virtually impossible to finance these homes resulting in a significant reduction in the value of such homes. This will affect the lives of millions of Americans and would be counter to FHFA's mission of stabilizing the housing market.

In many cases, beneficial transfer fees are imposed to satisfy requirements imposed by local government as a condition of getting approval for a development. This further strengthens the argument for continuing the current practice of letting state legislatures regulate transfer fees in a manner that allows a homeowner association to terminate transfer agreements that threaten the marketability of homes subject to a transfer fee.

Finally, we believe the proposed guidelines would dramatically destabilize the secondary market for mortgage backed securities by reducing the value of homes that serve as collateral for such securities. This problem would be exacerbated by the fact that mortgage backed securities currently insured by GSE's include millions of mortgages for homes that are subject to transfer fees. This makes it inevitable that GSE losses would increase if homes subject to transfer fees cannot be financed by the GSE's.

The implications of the proposed guidelines are dramatic and far reaching and will leave homeowners with few options for protecting the value of their homes. It would also severely impact the homebuilders' current investments in master planned communities.

We respectfully request that FHFA withdraw the proposed guidance in its entirety and allow state legislatures to continue to regulate private transfer fees at the state level. Alternatively, if FHFA issues guidance, it should be narrowly tailored to define what is "reasonable" for a transfer fee (taking into account jurisdiction, complexity of community, number and type of units/amenities/services and so forth). Guidance should specifically allow beneficial transfer fees. Finally, for fees that will be prohibited, an extended transition period (of no less than 18 months) must be provided for so covenants can be changed, annual budgets and Reserve Studies can be materially revised (all of which will impose substantial and unanticipated consulting and legal fees on the Association's finances) or lots can be sold prior to imposition of the prohibition. An overly broad rule, among other adverse and devastating consequences, will negatively impact millions of homeowners by rendering their homes unmarketable and will financially devastate the already shaky financial condition of many housing markets.

Respectfully submitted,

Kenneth Gear
Executive Director