October 15, 2010

VIA E-MAIL: regcomments@fhfa.gov

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

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

Dear Mr. Pollard:

We are the leadership of the Hospitality, Timesharing and Common Interests Development Group and the Commercial Real Estate Transactions Group of the Real Property, Trust and Estate Law Section of the American Bar Association ("ABA"), and we each practice primarily in the area of real estate law. We are dedicated to serving all lawyers and the public in this field of practice and produce educational materials and seminars in our respective leadership capacities within the ABA. We are 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, since the Guidance impacts several practice areas of interest to our respective Groups. However, the views expressed in this letter are solely the personal opinions of the undersigned, and do not necessarily represent the official position of either Group, any client or employer of the undersigned, any entity with which the undersigned are otherwise associated, or the American Bar Association or any of its subdivisions.

The Guidance states that "Fannie Mae and Freddie Mac should not purchase or invest in any mortgages encumbered by private transfer fee covenants or securities backed by such mortgages" and that the Federal Home Loan Banks "should not purchase or invest in such mortgages or securities or hold them as collateral for advances." 75 Fed. Reg. 49932-34. While the Guidance recognizes the difference 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," it nonetheless applies its prohibition to any and all private transfer fees. 75 Fed. Reg. 49932-33. While we agree that the prohibition included in the Guidance should apply to private transfer fees used to fund purely private continuous streams of income for select (unrelated) market participants, either directly or through securitized investment vehicles which do not benefit the affected property or the common interest community where the affected property is located (hereafter, "Non-Beneficial Transfer Fees"), we, however, believe that private transfer fees that directly benefit and enhance the community by, without limitation, funding maintenance and improvements of common areas and infrastructure, preserving environmentally sensitive or historically significant sites, funding affordable housing initiatives, or promoting the arts and other cultural programs or supporting nonprofit organizations or initiatives that benefit the community (hereafter "Beneficial Transfer Fees"), should be permitted for purposes of Fannie Mae or Freddie Mac financing approval.

The application of the Guidance to Beneficial Transfer Fees will have consequences which we do not believe the Federal Housing Finance Agency ("FHFA") has properly considered. The Guidance will effectively render the title to thousands of homes throughout the country subject to these Beneficial Transfer Fees unmarketable and uninsurable, since purchasers will not be able to obtain financing necessary to close on these homes. Further, if this Guidance is approved by FHFA in its current form, homeowners whose title is subject to these Beneficial Transfer Fees will not be able to refinance existing mortgages or seek other financing secured by their homes.

We acknowledge the argument that these communities could simply amend their declarations or covenants to remove these Beneficial Transfer Fees, but in many communities this is impossible, practically speaking, because their declaration (or applicable state law) requires a unanimous or supermajority vote of the common interest community members to effect the amendment to eliminate the Beneficial Transfer Fee. Additionally, many declarations require that a third-party beneficiary of these fees must consent to the proposed amendment and such consent cannot be obtained unless significant consideration is paid to such third party. There may also be requirements for obtaining existing lender consent to such an amendment, which is exceedingly difficult to do in this day of special servicers and lenders not being receptive or responsive to changes. Finally, it is often exceedingly difficult for communities to amend their covenants, regardless of the requisite percentage for approval, because of the time frames involved for meetings as well as general apathy towards amendments regardless of their nature (much in the way of voter apathy for municipal elections, where routinely a minority percentage of registered voters actually participate in the election process), thereby practically rendering the documents as unamendable.

The resulting inability of (a) lot owners subject to these Beneficial Transfer Fees to refinance their homes and (b) prospective buyers to obtain financing for the purchase of a home will destabilize otherwise viable and marketable communities and will further deflate real estate property values. This result seems contrary to the public mission of Fannie Mae and Freddie Mac which is, in part, to "provide stability in the secondary market for residential mortgages." The Guidance states that the "expanded use of private transfer fee covenants poses serious risks to the stability and liquidity of the housing finance markets" (75 Fed. Reg. 49932-33), but the most serious risk to the stability and liquidity of these markets will be the lack of financing that will inevitably result upon the implementation of the Guidance as written.

While we recognize that not all Beneficial Transfer Fee covenants "touch and concern" the land (i.e., the funds generated by such covenant provide a benefit to the affected land or other related lands), there are many local and state level considerations that must be taken into account before determining whether to ban any or all Beneficial Transfer Fees within a given state. This question has been traditionally left to the states to decide and should remain within each state's purview. If a particular state legislature elects to prohibit community associations from imposing any form of Beneficial Transfer Fees, such decision should be within the state's prerogative and purview. It is our understanding that as of the date of this letter, fifteen (15) states have banned the enforcement of private transfer fees, but a significant number of these states have created exceptions for transfer fee covenants imposing a fee payable to an owners' association to fund the provision of services or the maintenance of facilities that benefit the common interest community (basically, the exceptions permit Beneficial Transfer Fees).

For the reasons outlined above, we recommend that FHFA revise the current Guidance to apply only to Non-Beneficial Transfer Fees. Implementation of the Guidance as written will be contrary to the mission of FHFA, Fannie Mae and Freddie Mac and will have a devastating effect on the stability and liquidity of the housing finance markets. Thousands of homes in communities throughout the country will be effectively rendered unmarketable and uninsurable due to lack of financing. Further, the implementation of this Guidance could forestall the already slow recovery of the housing market in this country since the impact of this Guidance will be felt by multiple residential real estate market participants (e.g., homeowner associations, individual owners, sellers, purchasers, builders, developers, real estate brokers and lenders).

We thank you for the opportunity to present our views. Please do not hesitate to contact any of us if you have any questions about any of the matters discussed in this letter or would like any further information.

Sincerely,

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