ATLANTA
MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA
WEST PALM BEACH

CARLTON FIELDS

ATTORNEYS AT LAW

4221 W. Boy Scout Boulevard
Suite 1000
Tampa, Florida 33607-5780
P.O. Box 3239
Tampa, Florida 33601-3239

813.223.7000
813.229.4133 fax
www.carltonfields.com

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 real estate attorneys whose legal practices focus on the development, creation, operation and management of condominiums, subdivisions and master planned communities in Florida, Georgia and Colorado, among other states. We write to provide comments regarding the Federal Housing Finance Agency's "Guidance on Private Transfer Fee Covenants" (No. 2010-N-11) (the "Guidance"), as published in the Federal Register on August 16, 2010. We have significant concerns with the Guidance, and we urge the Federal Housing Finance Agency ("FHFA") to withdraw the Guidance in its entirety or to otherwise modify its terms in the manner outlined in this letter. If the Guidance becomes final in the manner presently proposed, there will be tremendously adverse consequences to the real estate industry and market and numerous communities across the country.

As stated in the Guidance (75 Fed. Reg. 49932-33), there are essentially two types of private transfer fee covenants that exist: "(1) private transfer fee covenants which purport to render a benefit to the affected property, and (2) private transfer fee covenants which accrue value only to unrelated third parties. Despite this recognition of the differences between private transfer fee covenants, the Guidance nevertheless does not distinguish between the two in terms of application, as the Guidance clearly prohibits financial approval where any type of private transfer fee covenant exists. Transfer fee covenants are fairly common. As such, the Guidance would effectively render title to numerous existing residences unmarketable, since purchasers would not have available any federally-backed financing that would be necessary for the purchase. There would also be serious repercussions to existing homeowners, as they would have no ability to refinance their existing mortgages. Such a result would be contrary to the publicly-stated 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); however, the blanket prohibition against all private transfer fee covenants presents an even greater lack of stability due to the impact of the Guidance on the ability to purchase or refinance a home.

We are of the opinion that the Guidance should be withdrawn in its entirety, as decisions pertaining to what is or is not a proper transfer fee covenant, or even if private transfer fee covenants should be permitted or banned, should be left to the state governments, in accordance with state disclosure requirements to purchasers of real property and other local public policy considerations. While the Guidance is not a pronouncement of federal law by Congress, it effectively serves as backhand federal regulation given its broad and sweeping approach and impact across all states. Numerous states have already taken action to prohibit or otherwise restrict the application of private transfer fee covenants, and it should be left to the states to regulate this type of action.

If FHFA insists on proceeding with the Guidance in some format, we implore FHFA to distinguish between the two types of private transfer fee covenants, as outlined above. We agree with the Guidance's prohibition against 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. We do not, however, agree with the Guidance's prohibition against private transfer fees which directly benefit and enhance the community (e.g., fee covenants which serve to fund maintenance or improvement of common properties, preservation of conservation, environmentally sensitive or historically significant lands, funding of affordable housing initiatives, or promotion of the arts and other cultural programs or supporting nonprofit organizations or initiatives that benefit the community). There is a significant and tangible difference between these two types of covenants, and FHFA should clearly recognize such differences and prohibit financing where the covenant only serves as a revenue-generation device and provides no benefit to the community or its residents.

In this regard, we encourage FHFA to follow the example of the Florida legislature in proactively addressing problematic private transfer fee covenants. Section 689.28, Florida Statutes, defines a "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 legislation then specifically excludes the following fees from the definition of "transfer fee:"

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; and

10. Any payment required pursuant to an environmental covenant.

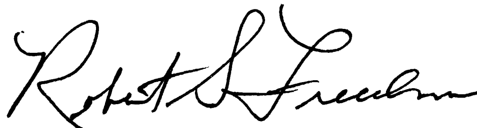
This statute, as adopted in the 2008 legislative session, serves to protect a homeowner against abusive practices of unscrupulous project sponsors, while at the same time permitting and preserving fees which are beneficial to the community and its owners. We believe that this issue came before FHFA because of project sponsors who abused their position and took advantage of unwitting purchasers by imposing perpetual sources of revenue generation. We believe that the Florida statute is an excellent model and balanced approach that FHFA should strongly consider if it determines that it must act and not leave this issue to state regulation.

For the reasons outlined above and in summation, we recommend that FHFA abandon the Guidance and leave the regulation of private transfer fee covenants to the states. However, if FHFA determines that it must undertake action in this regard, we recommend following the Florida model which will prohibit abusive, revenue-generating covenants to a project sponsor or party while preserving the private transfer fee covenants which are beneficial to a community and its owners.

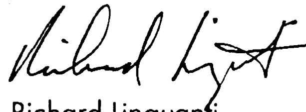
Please do not hesitate to contact us if you have any questions.

Sincerely,

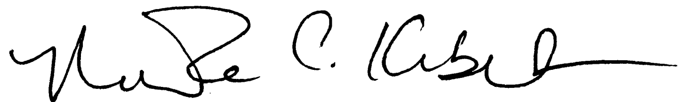
CARLTON FIELDS, P.A.



Robert S. Freedman



Richard Linquanti



Nicole C. Kibert