



April 11, 2011

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

ATTENTION: Public Comments on RIN 2590-AA41 [Fannie Mae, Freddie Mac and the Federal Home Loan Banks: Restrictions on the Acquisition of, or Taking Security Interests in, Mortgages on Properties Encumbered by Certain Private Transfer Fee Covenants and Related Securities]

Dear Mr. Pollard:

On behalf of the more than 3,800 member companies of the American Land Title Association (ALTA), we applaud the Federal Housing Finance Agency (FHFA) for protecting homeowners, the GSE's and our real property transfer system by proposing this rule that bans the Enterprises from purchasing a mortgage when the collateral is encumbered by a private transfer fee covenant. Most importantly, this rule recognizes the long standing principle of real property law that says a direct benefit is absolutely necessary when seeking to burden the land through a covenant.

ALTA, founded in 1907, is the national trade association and voice of the real estate settlement services, abstract and title insurance industry. With more than 8,000 offices throughout the country, ALTA members operate in every county in the United States to search, review and insure land titles to protect home buyers and mortgage lenders who invest in real estate. ALTA members include title insurance companies, title agents, independent abstracters, title searchers and attorneys, ranging from small, one-county operations, to large national title insurers.

ALTA strongly supports FHFA's efforts to protect consumers by eliminating these predatory fees while protecting legitimate fees that benefit homeowners associations and appropriate nonprofits. Private transfer fee covenants represent an attempt to utilize the legitimate mechanisms of our real estate transfer system to enrich private investors at the expense of homeowners, the public and the safe, efficient and legal transfer of real estate.

As you know, a private transfer fee commonly occurs when a developer or homeowner places a covenant or other restriction in the public records that affect a property's title. This covenant requires that upon every sale of the property for 99 years, the seller must remit a

percentage (usually 1%) of the final sale price back to the covenantor. If the seller fails to remit the fee, a lien is established against the property, which secures the unpaid amount plus any costs and interest. Failure to satisfy this lien could hinder the future sale of the property and leave the title unmarketable.

While this rule seeks to ban these purely private transfer fees, it also correctly recognizes that not all transfer fees are problematic for private property rights. Some transfer fees can actually convey a benefit to the property and do not run afoul of the common law rule that for a covenant to run with the land both the burden and the benefit must touch and concern the land. Thus, we support the proposed rule's well reasoned exemption for, "private transfer fees that are paid to homeowners' associations and similar associations, and to tax-exempt non-profit organizations, where the fees are used for the direct benefit of the encumbered properties."

ALTA also supports the other principal differences from the proposed guidance including the prospective nature of the rule and the 120 day implementation period. While ALTA is eager to move forward with this rule, some clarification is necessary to help title professionals, lenders and the Enterprises better understand how the rule will be implemented.

### **How Will the Enterprises Discover Whether Property is Encumbered by a Transfer Fee Covenants?**

To properly implement this rule, the Enterprises and lenders will need to develop a process for determining whether the collateral intended to secure a mortgage loan is encumbered by a private transfer fee covenant. Without a process to alert the parties to the presence of a private transfer fee covenant early on in the process, homebuyers and the Enterprises are at risk for losses related to delays in, or the inability to complete the closing.

Discovery of the covenant during the title search and examination would occur too late in the process. By design private transfer fee covenants are meant to be complex and opaque. Private transfer fee covenants are often buried in a stack of documents in the chain of title called the Covenants, Conditions and Restrictions (CC&R). In most cases, the discovery of the private transfer fee obligation would occur at or right before closing when homebuyers are too invested in the deal to challenge the fee and lenders have already expended the bulk of their underwriting costs. This would leave buyers and lenders in the unenviable position of having to walk away from the deal or pay off covenantors to release the obligation.

A separate, conspicuous disclosure in the public record would not sufficiently protect the Enterprises or homebuyers because a title search is routinely performed after the consumer enters into a contract to purchase the home, creating the same problem as mentioned in the previous paragraph.

Fortunately, the location of each encumbered property and information sufficient to analyze the covenant under the proposed rule exists and can be made available to consumers, lenders and the Enterprises earlier in the origination process. Each covenantor, including the developer, homeowners association, non-profit, or a third party licensing company knows which properties are encumbered by their covenants. The hurdle is getting this information to the lender

or the Enterprises so that it can be assessed early enough in the origination process so that it minimally disrupts the process.

FHFA or the Enterprises may want to consider the following questions when determining how to implement this rule:

- How to incentivize covenantors to make certain information available to the borrower, lender or Enterprises?
- When in the origination process this information should be reviewed?
- Whether a central repository of covenant information is desirable?
- What data format should covenantors use to deliver information to the lender or Enterprise?

The answers to these questions can help FHFA determine how to best protect homeowners, lenders and the Enterprises from the surprise of discovering a private transfer fee obligation at or shortly before closing.

### **What Processes will the Enterprises use to Determine Whether a Transfer Fee is Excepted from this Rule?**

Under the Proposed Rule, transfer fees payable to a “covered association” are excepted from the prohibition if the fee is used “exclusively for the direct benefit of the real property encumbered by the private transfer fee covenants.” While ALTA supports this recognition that transfer fees paid to a homeowners association or some non-profits do actually benefit the burdened property, it is unclear what process FHFA envisions for determining if certain covenants falls within the exceptions in the proposed rule. Clarifying this process will help the lenders and the Enterprises develop procedures for analyzing private transfer fee covenants and allow them to produce final closing instructions that will clearly guide title professionals as to whether or not to pay the private transfer fee at closing.

To that end, there are several questions FHFA should consider when developing its guidance:

- Who must determine whether a transfer fee is excepted under the rule?
- What documentation must accompany that determination?
- Must this determination be redone each time a property is resold/refinanced? Each time any property in the development is resold/refinanced?
- What process should exist for covered associations to challenge a determination that their fee is not excepted?

Lenders, homebuyers and covered associations will benefit from a uniformity of outcomes. Each covenant should be tested for compliance with this proposed rule and the outcome should be the same for each covenant in a subdivision. A fragmented system that

requires that each covenant be re-tested each time the property is re-mortgaged would be unnecessarily costly and increase the likelihood of unequal determinations, which could lead to a delay in closing. Further, to ensure equitable results, it is crucial that these determinations be made by the Enterprise instead of the homebuyer, lender or beneficiary of the covenant. ALTA urges FHFA to develop a simple adjudicatory process, run by FHFA or the Enterprises, that makes determinations about each covenant and then records those determinations in the database described in the previous section. This would provide the necessary certainty to allow the market to operate efficiently when it encounters a private transfer fee covenant.

### **Are the Enterprises Permitted Purchase Mortgages on Properties Encumbered by Private Transfer Fee Covenants in a State Where the Law is Unclear About Whether a Private Transfer Fee is Legal?**

Market participants need clarity and certainty to understand how this rule will work in concert with state legislation regarding these fees. § 1228.4 states, “this part does not affect state restrictions or requirements with respect to private transfer fee covenants, such as with respect to disclosures or duration.” In light of this section, how does the proposed rule work when state law is more restrictive than the rule and how does the proposed rule work when state law is less restrictive?

Currently, 24 states ban or restrict private transfer fee covenants in some manner. While most state bans or restrictions are similar to the proposed rule, some state laws may exempt certain covenants that would likely be prohibited under this proposed rule. Without clear guidance, the Enterprises may purchase a mortgage secured by collateral that is encumbered by a private transfer fee covenant acceptable under state law, only to discover that the purchase runs afoul of FHFA’s proposed rule. To alleviate this concern, ALTA encourages FHFA to use this rule as an opportunity to set a floor on state restrictions for private transfer fee covenants, but not a ceiling.

For the reasons discussed above, ALTA strongly supports FHFA’s proposed rule to the Enterprises and the public on private transfer fee covenants. If you require additional information or wish to discuss the contents of this letter, do not hesitate to contact Justin Ailes, Director of Government Affairs at 202.261.2937.

Sincerely,



Anne Anastasi  
President