

# FHFA Rule Eliminates Private Transfer Fees

By: Jann Swanson | Thu, Feb 3 2011, 12:19 PM

The Federal Housing Finance Agency (FHFA) has issued proposed rules regarding private transfer fees on properties securing mortgages intended for sale to Fannie Mae, Freddie Mac, or Federal Home Loan Bank members. The rules reflect the agency's response to 4,210 letters commenting on a "proposed guidance" outlining the issue in August 2010. The wave of comments came from interested parties that included legal and trade associations, conservation and other non-profit organizations, condominium associations, title companies, developers, and state and local government.

Transfer fees are contractual arrangements where an owner pays a fixed amount or a percentage of the sales price at the time of transferring the property. The transfer fees in question are collected by third parties each time a property changes hands. The fees are memorialized in deed covenants and may benefit a homeowners' association, conservation land bank, non-profit organization or any number of other entities. They are also used by builders and developers to provide themselves with an income stream long after a development is complete.

FHFA proposed enacting restrictions on transfer fees because of concerns that they could:

- Increase the costs of homeownership and reduce liquidity in both primary and secondary mortgage markets;
- limit property transfers or render them legally uncertain;
- detract from the stability of the secondary mortgage market, particularly if such fees will be securitized;
- expose lenders, title companies, and secondary market participants to risks from unknown potential liens and title defects;
- contribute to reduced transparency for consumers because the fees often are not disclosed by sellers and are difficult to discover through customary title searches, especially after repeated purchases;
- represent dramatic, last-minute, non-financeable out-of-pocket costs for consumers;
- deprive subsequent homeowners of equity value; and
- complicate residential real-estate transactions and introduce confusion and uncertainty for homebuyers.

Comments received by FHFA fell generally into five categories:

- **Advocating a complete ban on private transfer fees.** Advocates said these fees increase the cost of homeownership while generating revenue for developers or investors who provide no benefits to the homeowners over time. These comments also noted that there are few binding requirements for disclosure of these fees at closing which adds to the complexity of real estate transactions.
- **Advocating for private transfer fees for condominiums, cooperatives, and homeowners associations.** Commenters maintained that private transfer fees fund the capital reserves of their communities, helping to fund improvements which increase property values, lower member fees, and that these fees are fully disclosed.
- **Advocating for private transfer fees for tax-exempt nonprofit associations that provide direct benefits to the property and advocating for government and other entities that provide benefits to the community at large.** These commenters asserted that certain non-profit organizations and agencies play important roles by supporting the creation and maintenance of community enhancements such as open space, environmental conservation, and preservation, affording housing, and transit improvements. Some comments supported fees even if they did not directly benefit the subject property.
- **Supporting the payment of such fees to for-profit entities and also supporting the securitization and sale of transfer-fee income streams to investors.** These commenters claim that transfer fees raise the same objections and confer the same benefits across the spectrum of the entities that might collect them. They also argued that transfer fees lower the cost of construction by spreading it over future buyers.
- **Level of fees.** FHFA had expressed concern about the reasonable level of fees, whether they were fixed over the life of the covenant, and if they were proportional to the benefit rendered. Comments generally urged FHFA not to consider this issue.
- **Compliance.** Commenters, primarily banks, expressed concern about their ability to compliance without excessive burdens; particularly accessing underlying documents regarding existence of such fees.
- **Prospective Application.** Concern was expressed that the final rules might be retroactive, affecting closed loans that had not yet been securitized, complicating title searches, and impacting the salability of properties with existing covenants.

In response to the comments, FHFA's proposed rule will:

- Exempt from the rule private transfer fees paid to homeowners associations and similar organizations and to tax-exempt non-profit organizations where the fees are used to the direct benefit of the encumbered property. FHFA will not exempt fees paid to non-profit organizations that do not provide a direct benefit to the property on the basis of traditional law that a covenant running with the land must benefit the land it burdens.
- Be prospective, applying only to private transfer fee covenants created after the publication date of the proposed rule.
- Allow an implementation period of 120 days for the regulated entities which may use reasonable means to achieve compliance with this rule.
- Make no attempt to consider or evaluate the level of private transfer fees.

The agency invites further comment on the proposed rule. Comments must be received within 120 days of the rule's publication in *The Federal Register*.

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