

LENDERS UPDATE™

ALT & ASSOCIATES NEWSLETTER

A COMPLIMENTARY SERVICE TO THE MORTGAGE LENDING INDUSTRY

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March 15, 2012

FINAL RULE ON PRIVATE TRANSFER FEES

On March 15, 2012 the Federal Housing Finance Agency (FHFA) announced a Final Rule to be published tomorrow, March 16th, in the Federal Register on Private Transfer Fees. The Rule applies to FANNIE MAE, FREDDY MAC, and the Federal Home Loan Bank when dealing with mortgages on properties encumbered by certain types of private transfer fees. As FHFA says in its news release, “transfer fees are contractual arrangements where an owner pays a fixed amount or a percentage of the sales price at the time of transfer of the property, both initial and successive transfers.

EXCEPTIONS

There are some exceptions. The notice and the Rule exclude private transfer fees paid to home owners associations, condominiums, cooperatives and certain other tax exempt

organizations that use private transfer fees to benefit the property. If the fees do not directly benefit the property, the fees are subject to the prohibition and disqualify the mortgage from sale to either of the agencies or to the Federal Home Loan Bank to be used as collateral for a Federal Home Loan advance. It has, as of this date, limited application because it applies only prospectively to private transfer fee covenants created on or after February 8, 2011. Covenants that pay a transfer fee created before that date as well as covenants enacted after that date pursuant to agreements entered into before that date, are exempted.

EFFECTIVE DATE

The Rule will be published in the Federal Register on March 16, 2012 and effective 120 days thereafter.

DEFINITIONS

Two helpful definitions in understanding the Rule:

A transfer fee paid to a covered association is an exception to the prohibition. A covered association means a non-profit mandatory membership association comprising owners of homes, condominiums, cooperatives, manufactured homes or any interest in real property created pursuant to a declaration, covenant or any other applicable law, or an organization described in Section 501(c)3 or (c)4 of the Internal Revenue Code.

When allowed, the fee must have a direct benefit to the property which means that the proceeds of a transfer fee is used exclusively to support maintenance and improvements to encumbered properties, or acquisition, improvement, administration and maintenance of property owned by the covered association in which the owners of the burdened property are members and the fee is used primarily for their benefit.

When both of these definitions are met, the transfer fee covenant is excepted from the prohibition on these fees.

The Notice and the Final Rule can be found on the Federal Housing and Finance Agency site as a News Release at:

www.fhfa.gov

CALIFORNIA

Transfer fees are also subject to individual state restrictions or limitations. In California, for example, Miller & Starr California Real Estate 3D, states that the enforceability of contract provisions such as transfer fees, is not specifically upheld by recorded cases in the state. Such fees may meet the definition of partial restraint because of the burden or alienation in subsequent transfers of the property, thereby restricting free alienability of the property. They are therefore restrained and subject to the balancing test of whether the restraint is reasonable in light of the purposes served by the restriction; in other words, a case by case determination.

STATUTE REGULATION

In addition, since 2008 transfer fees are further regulated by statute. If the written document imposing the fee meets certain statutory requirements in form and content and the instrument is recorded, the fee may be enforceable. These requirements went into effect January 1, 2008.

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ALT & ASSOCIATES provides regulatory, compliance, operational advice and transactional assistance, as well as litigation representation, to the financial services industry. Over the past two decades, members of the firm have represented Institutional Lenders and Mortgage Bankers and Brokers in all aspects of their operations.

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