

FHFA Revised Regulation on Private, Deed-Based Transfer Fees FAQ

What is the status of the proposed FHFA regulation governing private, deed-based transfer fees?

The Federal Housing Finance Agency (FHFA) issued a revised draft regulation on private, deed-based transfer fees in late January 2011. The revisions reflect input from more than 4,000 interested parties. As originally drafted, the FHFA private, deed-based transfer fee regulation would have prohibited federally backed mortgages for any property in a community with a private, deed-based transfer fee. For community associations, this means that up to 11 million housing units in associations with such fees would be cut off from most mortgage products. CAI member comments and survey data were submitted to FHFA to encourage them to rethink their proposal. FHFA's revised regulation is open for comments until April 11, 2011. You can view their proposal [here](#).

How was the proposed regulation revised?

FHFA revised the draft regulation to exclude private, deed-based transfer fees payable to a "covered association" where such fees provide a "direct benefit" to the community in which it is charged. This revision is helpful to community association levied transfer fees and is a reversal of FHFA's initial claim that such fees "provide no benefit to homeowners." FHFA cites CAI members as being very persuasive on this issue. As drafted, the revisions are a significant step in the right direction and reduce the likelihood that buyers in community associations with deed-based transfer fees will be denied mortgages.

How does the draft regulation treat private, deed-based transfer fees charged by associations?

Under the original regulation, any deed-based transfer fee would be grounds for FHFA to deny federally backed mortgage funding. Under the revised draft, FHFA would allow for private, deed-based transfer fees, if such fees met their proposed definition of an "excepted transfer fee" that was payable to a "covered association" and provided a "direct benefit" to the community in which they are levied or property that is "adjacent or contiguous" with the community.

What is an "excepted transfer fee"?

Under the revised draft regulation, an “excepted transfer fee” means:

“... [A] covenant to pay a private transfer fee to a covered association that is used exclusively for the direct benefit of the real property encumbered by the private transfer fee covenant.”

This means that if a community association charges a private, deed-based transfer fee and the fee is used for the exclusive and “direct benefit” of the property upon which it is levied, then the property would still be allowed to qualify for federally backed mortgages.

What is a “covered association” for purposes of community association private, deed-based transfer fees?

FHFA defines a “covered association” as:

[A] nonprofit, mandatory membership organization comprising owners of homes, condominiums, cooperatives, manufactured homes or any interest in real property, created pursuant to a declaration, covenant or other applicable law, or an organization described in section 501(c)(3) or (c)(4) of the Internal Revenue Code.

CAI interprets this provision to apply to community associations, as well as charities and foundations that may be affiliated with such communities. This would mean that transfer fees charged by cultural, recreational or other charities/foundations within the community would not fall under the ban on mortgages contemplated by FHFA. However, any fees charged would be required to provide a “direct benefit” to the community and such benefits must flow to property that is adjacent, contiguous or within 1,000 yards of the property the fee applies to. This means any funds benefiting property within the community itself would be allowed, as would fees that go to property touching or within 1,000 yards of the association. Beyond those parameters, the transfer fees would disqualify an association from federally backed mortgage financing.

How does FHFA define “direct benefit” for purposes of allowable private, deed-based transfer fees?

FHFA’s revised draft allows for private, deed-based transfer fees, where the fee provides a “direct benefit” to the community. FHFA’s draft defines “direct benefit” as:

Direct Benefit means that the proceeds of a private transfer fee are used exclusively to support maintenance and improvements to encumbered properties

as well as cultural, educational, charitable, recreational, environmental, conservation or other similar activities that benefit exclusively the real property encumbered by the private transfer fee covenants. Such benefits must flow to the encumbered properties and their common areas or to adjacent or contiguous property. A private transfer fee covenant will be deemed to provide a direct benefit when members of the general public may use the facilities funded by the transfer fee in the burdened community and adjacent or contiguous property only upon payment of a fee, except when that de minimis usage may be provided free of charge for the use by charitable or other not-for-profit group.

Under this proposal, the money collected from private transfer fees must be used for the maintenance and improvement to the properties upon which the fee is charged or to support other activities that exclusively benefit the property. These benefits must accrue to the association property in question or to adjacent property (e.g., property that touches the association or is within 1,000 yards of it). This means that private, deed-based transfer fees that are paid to organizations outside the association itself, which do not border or are not within 1,000 yards, would not be considered to provide a “direct benefit” and would violate the regulation.

What does CAI consider “good” about the revised draft regulation?

The original FHFA draft regulation would have “banned” all private, deed-based transfer fees by cutting off federally backed mortgages to any property with such fees. As nearly half of all community associations have such fees in place, the proposal would have had a devastating effect. Unless they were able to amend their deed-restrictions, which is an extremely difficult and expensive undertaking, these community associations would have been cut off from nearly all mortgage products. From this perspective, the revisions issued by FHFA are a step in the right direction.

In the revised proposal, FHFA recognizes that private, deed-based transfer fees charged by community associations benefit homeowners. This is a reversal from their initial “findings,” which concluded that such fees do not benefit homeowners. This change was due largely to the incredible response by CAI members. That said, the good news is that FHFA’s draft makes an exception for community association transfer fees. But with any regulation, the devil is in the details, and we have continuing concerns.

What areas of the revised FHFA draft regulation does CAI still think could be improved?

CAI's analysis of the revised draft FHFA regulation has flagged the following areas of concern in the revised regulation:

The Definition of "Adjacent or Contiguous" Property

CAI does not believe that a proximity test is necessary if the property supported by the fee is owned by the association. A proximity test would only impact certain types of communities (e.g., beach communities with "inland" amenities such as a golf course), potentially limit the ability of an association to expand and is an arbitrary distinction if all the property supported by the fee is owned by the association.

The Definition of "Covered Association"

To ensure that all community associations would meet the definition of "covered association," and thus the exemption on the transfer fee "ban," CAI believes that the FHFA should adopt the definition of community association as developed by the National Conference of Commissioners on Uniform State Laws in the Uniform Common Interest Ownership Act (UCIOA).

The Definition of "Direct Benefit"

CAI has three concerns about the definition of "direct benefit":

- (1) The definition may prevent community associations from serving the general public.
- (2) The definition restricts the use of community transfer fees by community associations.
- (3) The definition degrades the private property rights of residents in common interest communities by limiting their exclusive right to govern the use of common property or common elements.

The Definition of "Excepted Transfer Fee Covenant"

CAI encourages the Agency to consider the benefits of more clearly defining the private transfer fee covenants it is seeking to prohibit by adopting a separate nomenclature for the fees the Agency does not seek to restrict. Different nomenclature will add clarity and simplicity to the proposed rule by defining for all parties the transfer fees the Agency seeks to prohibit and the transfer fees the Agency seeks to permit.

What are the next steps, and how can I help ensure that the final rule will not hurt my community?

The deadline for comments on the revised draft of the FHFA transfer fee ban is April 11, 2011. CAI will be submitting comments on behalf of its members.

In the days ahead, CAI will also send out an e-mail with sample comments to be submitted by communities across the country. If we respond with the same enthusiasm and numbers as we did on the first proposal, we can ensure that our remaining concerns will get the highest consideration possible. Look for this alert in the coming days.

Finally, after you submit your sample comments, CAI will provide you with draft letters to send to your members of Congress.

Look for these alerts, and, as always, you can stay up to date by checking CAI's FHFA resource page [here](#).