

Are Fannie Mae and Freddie Mac subject to real estate transfer tax?

Written by: [Kelly Ovitt Puc](#)

In the past four years, numerous state and local taxing authorities across the country have attempted to impose real estate transfer taxes on the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). The combination of dwindling government resources and skyrocketing foreclosures – many of which are conducted by either Fannie Mae or Freddie Mac – made this potential revenue source just too tempting to pass up.

“Fannie Mae and Freddie Mac are private, publicly traded corporations that were created by federal charter to support the development of the secondary mortgage market.” *Town of Johnston*, 2014 U.S. App. LEXIS 16576, *2. The statutes that created Fannie Mae and Freddie Mac exempt them from all state and local taxation, other than taxes on real estate. This exception provides the opening for state and local governments to argue that a tax that applies exclusively to the transfer of real estate, as opposed to a general sales tax, is a tax on real estate and therefore should apply to Fannie Mae and Freddie Mac.

To date, however, this argument has usually failed, and the First Circuit Court of Appeals recently joined the growing number of courts ruling in favor of Fannie Mae and Freddie Mac on this issue. Both Massachusetts and Rhode Island impose a tax based on the sale price of real estate that is paid when the deed or other instrument evidencing the transfer is recorded with the local land recording office. In *Town of Johnston*, the First Circuit ruled that the limited exception that permits taxation of real estate owned by Fannie Mae and Freddie Mac does not apply if the tax is on the transfer, rather than the ownership, of the real estate.

New Hampshire similarly imposes a tax on the transfer of real estate based on the sale price. However, the New Hampshire statute that imposes the real estate transfer tax (RETT) contains a number of exceptions, including an exception for any agency or instrumentality of the United States. This statutory exception mirrors Federal constitutional law, which prohibits any state from taxing the United States.

While the New Hampshire statute does not define “agencies or instrumentalities of the United States,” the New Hampshire Department of Revenue Administration (DRA) has provided some guidance in its rules regarding the RETT. Expanding on the broad statutory exception, DRA’s rules specifically list certain Federal agencies that are exempt from the RETT. Until this year, this list has included Fannie Mae, but not Freddie Mac.

However, in its [recent revision of the RETT rules](#), effective September 9, 2014, DRA removed Fannie Mae from the list of exempted Federal agencies. The list now includes only six entities – the Department of Veteran's Affairs (VA), the Federal Land Bank, the Farmers Home Administration (FmHA), Department of Housing and Urban Development

(HUD), all branches of the military, and the Government National Mortgage Association (Ginnie Mae).

While the removal of Fannie Mae from the list of entities that are exempt from the RETT may seem a curious move considering the overwhelming success Fannie Mae and Freddie Mac have had on this issue, it may be a signal that DRA plans to join the efforts of the other states that are attempting to assess transfer tax against these two agencies. In any event, real estate practitioners, particularly those conducting foreclosures, should at least be wary that DRA may be taking a more aggressive position on which entities are exempt from the RETT as agencies or instrumentalities of the United States.