



COMMONWEALTH of VIRGINIA

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The Honorable Judy L. Worthington
Clerk of the Circuit Court
Post Office Box 125
Chesterfield, Virginia 23832

Dear Mrs. Worthington:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac”), when they are parties to the transaction, are exempt under federal or state statutes from the collection of recordation taxes, as required by the Virginia Recordation Tax Act on documents presented for recordation in the Circuit Court’s Deed Book.

Response

It is my opinion that applicable federal statutes exempt Fannie Mae and Freddie Mac from the taxes levied by the Virginia Recordation Tax Act when they are the grantor or grantee on a deed, instrument or other writing in a transaction for the conveyance of an interest in real property.

Applicable Law and Discussion

The Virginia Recordation Tax Act requires every circuit court clerk in Virginia to collect certain recordation taxes.¹ Nevertheless, in accordance with the Supremacy Clause of the Constitution of the United States,² this Office previously has opined that “Congress may create exemptions from taxation for specific entities even if such exceptions are not memorialized in the states’ laws. Implicit in [this] opinion is the authority of the federal government to exempt specific real estate transactions from state taxation.”³

¹ See VA. CODE ANN. §§ 58.1-800 through 58.1-817 (2009 & Supp. 2012).

² U.S. Const. art. VI, cl. 2; see *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 211 (1824) (stating that act of Congress is supreme and state law must yield to it and must not interfere with or be contrary to laws enacted pursuant to Constitution). See also 2003 Op. Va. Att’y Gen. 177, 178; 1992 Op. Va. Att’y Gen. 183, 185; 1990 Op. Va. Att’y Gen. 259.

³ 2003 Op. Va. Att’y Gen. 177, 179 (citing 2002 Op. Va. Att’y Gen. 328, 329).

In this regard it is important to examine the language of the statutory exemptions Congress granted specifically to Fannie Mae and Freddie Mac.⁴ Fannie Mae's federal charter provides that:

The corporation, including its franchise, capital, reserves, surplus, mortgages or other security holdings, and income, *shall be exempt from all taxation* now or hereafter imposed *by any State*, territory, possession, Commonwealth, or dependency of the United States, or by the District of Columbia, *or by any county, municipality, or local taxing authority*, except that any real property of the corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent as other real property is taxed.^[5]

In nearly identical terms, Freddie Mac's charter states:

The Corporation, including its franchise, activities, capital, reserves, surplus, and income, *shall be exempt from all taxation* now or hereafter imposed by any territory, dependency, or possession of the United States or *by any State, county, municipality, or local taxing authority*, except that any real property of the Corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.^[6]

In addition, the Housing and Economic Recovery Act of 2008 ("HERA"),⁷ which created the Federal Housing Finance Agency ("FHFA")⁸ to oversee Fannie Mae and Freddie Mac,⁹ provides that the FHFA:

including its franchise, its capital, reserves, and surplus, and its income, *shall be exempt from all taxation imposed by any State, county, municipality, or local taxing authority*, except that any real property of the Agency shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed^[10]

Thus Congress has exempted Fannie Mae and Freddie Mac, and the FHFA, their conservator and successor in rights, powers and privileges, from "all taxation" by state and local governments. Nonetheless, Congress also has provided an exception in each of the three statutes allowing Fannie Mae, Freddie Mac, and FHFA to be taxed on "real property . . . to the same extent according to its value as other real property is taxed."

⁴ See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1989) ("It is well settled that the starting point for interpreting a statute is the language of the statute itself.").

⁵ 12 U.S.C. § 1723a(c)(2) (emphasis added).

⁶ 12 U.S.C. § 1452(e) (emphasis added).

⁷ Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008).

⁸ See 12 U.S.C. § 4501 *et seq.* (FHFA created as a federal agency to regulate Fannie Mae and Freddie Mac).

⁹ Pursuant to the authority granted to him and to the FHFA by 12 U.S.C. § 4617, the FHFA Director placed Fannie Mae and Freddie Mac into the FHFA's conservatorship on Sept. 6, 2008. See *In re Conservatorship of Fed. Nat'l Mortg. Ass'n*, Notice Regarding Determination and Appointment of Conservator, *available at* <http://www.fhfa.gov/webfiles/1858/NoticeregardingconservatorFNMA.pdf>; *In re Conservatorship of Fed. Home Loan Mortg. Corp.*, Notice Regarding Determination and Appointment of Conservator, *available at* <http://www.fhfa.gov/webfiles/1857/NoticeregardingconservatorFHLMC.pdf>.

¹⁰ 12 U.S.C. § 4617(j)(2) (emphasis added).

Your opinion request references a decision of the United States District Court in the Eastern District of Michigan earlier this year.¹¹ Interpreting Michigan law, the court in that case found that the Michigan “transfer tax” is an excise tax levied on the use or transfer of real property, and not a direct tax levied on the property itself. The court held that the statutory exemptions from “all taxation” provided by Congress to Fannie Mae and Freddie Mac do not apply to excise taxes and, thus, the entities are liable for payment of the transfer tax.¹²

The *Oakland County* court found the United States Supreme Court case *Wells Fargo* to be dispositive of the case: the district court interpreted the *Wells Fargo* opinion to stand for the proposition that a statutory exemption from “all taxation” means all direct taxation and does not apply to excise taxation.¹³ This interpretation springs from the following passage in *Wells Fargo*:

[A]n exemption of property from all taxation had an understood meaning: the property was exempt from direct taxation, but certain privileges of ownership, such as the right to transfer the property, could be taxed. Underlying this doctrine is the distinction between an excise tax, which is levied upon the use or transfer of property even though it might be measured by the property’s value, and a tax levied upon the property itself. The former has historically been permitted even where the latter has been constitutionally or statutorily forbidden.^[14]

More recently, however, two other federal courts have reached the opposite conclusion in cases involving the same question.¹⁵ On August 9, 2012, the United States District Court for the District of Columbia decided *Hager v. Federal National Mortgage Association*, a case in which plaintiffs alleged Fannie Mae and Freddie Mac violated the District of Columbia False Claims Act because they claimed to be exempt from recordation taxes when they were not.¹⁶ In ruling against the plaintiffs, the judge stated his analysis of the exact statutory language at issue in this opinion:

[T]he language here is sweeping and unambiguous. Fannie Mae and Freddie Mac “shall be exempt from all taxation” imposed by D.C., with a single, narrow exception all agree is inapplicable here. The recordation tax is undoubtedly a form of taxation imposed on the Enterprises. That should be “the end of the matter.” *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409, 113 S. Ct. 2151, 124 L. Ed. 2d 368 (1993) (internal quotation marks omitted). True, “exemptions from taxation are not to be implied; they must be unambiguously proved,” *Wells Fargo*, 485 U.S. at 354, but Congress created precisely such an “unambiguous[]” exemption here.^[17]

¹¹ *Oakland County v. Fed. Hous. Fin. Agency ex rel. Fed. Nat’l Mortg. Ass’n*, No. 11-12666, 2012 U.S. Dist. LEXIS 40099 (E.D. Mich. Mar. 23, 2012).

¹² *Oakland County*, 2012 U.S. Dist. LEXIS 40099 at *10-14 (citing *United States v. Wells Fargo Bank*, 485 U.S. 351, 355 (1988)).

¹³ *Id.* at *16, *21.

¹⁴ *Wells Fargo*, 485 U.S. at 355 (the tax exemption set forth in the Housing Act of 1937 for state and local public housing agency obligations, known as project notes, does not exempt the value of those notes from being included in the taxable estate of a decedent who owned the notes for purposes of calculating the federal estate tax).

¹⁵ See *Hager v. Fed. Nat’l Mortg. Ass’n*, No. 11-2090, 2012 U.S. Dist. LEXIS 111709 (D.D.C. Aug. 9, 2012); *Hertel v. Bank of America, N.A.*, No. 1:11-CV-757, 2012 U.S. Dist. LEXIS 132744 (W.D. Mich. Sept. 18, 2012).

¹⁶ *Hager*, 2012 U.S. Dist. LEXIS 111709 at *3.

¹⁷ *Id.* at *11-12.

The court in *Hager* then refuted the rationale of the *Oakland County* court by noting that the current case involving Fannie Mae and Freddie Mac is substantively different than the case cited as precedent for the *Oakland County* decision.¹⁸ In particular, the judge noted that:

[T]he *Wells Fargo* provision exempted property from taxation....

The statutory provisions at issue in this case, on the other hand, exempt an entity from all taxation....

Wells Fargo did not mandate an atextual reading of “all taxation”; it simply considered the inherent limitations of exempting property, rather than its owner, from taxation....

[A]ccepting plaintiffs’ argument would lead to near absurdity. It would leave the statutory provisions, so sweeping in their language, virtually meaningless.”^[19]

The *Hager* court then held that Fannie Mae and Freddie Mac are statutorily exempt from paying District of Columbia recordation taxes.²⁰

On September 18, 2012, in *Hertel v. Bank of America*, the United States District Court for the Western District of Michigan granted summary judgment to defendants FHFA, Fannie Mae and Freddie Mac and dismissed an action originally brought by the Ingham County Register of Deeds seeking to recover from defendants unpaid real estate transfer taxes.²¹ After examining the statutory exemptions from state and local taxation under 12 U.S.C. §§ 1723a(c)(2) (Fannie Mae), 1452(e) (Freddie Mac) and 4617(j)(2) (FHFA), the court concluded:

There is no possible reading of the statutes other than that Fannie Mae, Freddie Mac, and the FHFA are exempt from all state taxation, regardless of whether it is termed a recording or excise tax. “All” is an inclusive adjective that does not leave room for unmentioned exceptions. Indeed, the fact that one exception is explicitly included further supports this conclusion. Each statute contains an exception for the taxation of real property. See 12 U.S.C. §§ 1723a(c)(2), 1452(e), 4617(j)(2). “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”^[22]

The court in *Hertel* also found plaintiffs’ reliance on *Wells Fargo* to be misplaced.²³ While the statute at issue in *Wells Fargo* exempted from all taxation certain property (specifically, project notes issued by state and local public housing agencies), the *Hertel* court noted in contrast that the Fannie Mae, Freddie Mac and FHFA statutes:

have a broader exemption. They exempt the entities, not just the property involved, [which] means that the exemption is triggered if the owners of the property, [Fannie Mae, Freddie Mac and FHFA], are held liable for the [transfer tax]. While the [transfer tax] is a tax on the transfer of property, to tax the transfer is to tax the entity who has to pay the

¹⁸ *Id.* at *12-16.

¹⁹ *Id.* at *13-15.

²⁰ *Id.* at *16.

²¹ *Hertel*, 2012 U.S. Dist. LEXIS 132744 at *3.

²² *Id.* at *9 (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)).

²³ *Id.* at *13-22.

tax, and by statute, [Fannie Mae, Freddie Mac and FHFA] are exempt from all taxation.^[24]

In ruling for defendants FHFA, Fannie Mae and Freddie Mac, the court observed that “[p]laintiffs ask the Court to ignore the unambiguous language of multiple federal statutes and impose tax liability on the Enterprise Defendants under a Michigan statute, without providing a satisfying explanation as to why, after years of having no problem with the defendants’ claimed exemptions, there is an issue now.”²⁵

Virginia law is consistent with the federal decisions regarding the status of the recordation tax. The recordation tax in Virginia “is not a tax upon property ... but a tax upon a civil privilege, that is, for the privilege of availing ... of the benefits and advantages of the registration laws of the State.”²⁶ Since at least 1992, this Office has opined consistently that when a federal statute prohibits all state or local taxation on an entity created by the federal government, except for taxation on that entity’s real estate, the entity enjoys an exemption from the recordation tax whenever it is a principal to the transaction,²⁷ although not when it is merely serving as a guarantor or beneficiary in the transaction.²⁸ There is no substantive difference between the language at issue in the statutes under consideration in this opinion and those interpreted in prior opinions of the Attorney General. This position also is consistent with the rationale articulated by the courts in *Hager* and *Hertel*, and I find that this position continues to be more persuasive than the *Oakland County* rationale.

Therefore, because the recordation tax is not a tax on property similar to local assessment-based real estate taxes, but instead is a tax on the recording parties for the privilege of utilizing the land recordation system of Virginia, the federal statutory language in 12 U.S.C. §§ 1723a(c)(2), 1452(e), and 4617(j)(2) must be interpreted such that the federal exemption in each charter applies.

²⁴ *Id.* at *15-16 (emphasis in original).

²⁵ *Id.* at *21-22. Indeed, a veritable cottage industry of plaintiffs’ attorneys has seized on this issue since the *Oakland County* decision, resulting in the filing of a spate of cases in recent months, including one here in Virginia. See, e.g., *Small v. Fed. Nat’l Mortg. Ass’n*, No. 3:12-CV-487 (E.D.Va. filed July 3, 2012). The United States Judicial Panel on Multidistrict Litigation recently declined to centralize ten transfer tax actions involving Fannie Mae and/or Freddie Mac pending in seven districts and observed that it had been notified of twenty-eight additional, potentially related actions. *In re Real Estate Transfer Tax Litigation*, MDL No. 2394, 2012 U.S. Dist. LEXIS 139742 at *1-5 (J.P.M.L. Sept. 27, 2012).

²⁶ See *Pocahontas Consol. Collieries Co., Inc., v. Commonwealth*, 113 Va. 108, 112, 73 S.E. 446, 448 (1912). See also *White v. Schwartz*, 196 Va. 316, 321, 83 S.E.2d 376, 379 (1954) (following *Pocahontas*, holding that the recording tax is not a tax on property but a tax on a civil privilege). See also 23 VA. ADMIN. CODE § 10-320-10 (“The recordation tax is not a tax on property but on a civil privilege”).

²⁷ See 1992 Op. Va. Att’y Gen. 183, 185 (federal act exempts Resolution Trust Corporation from recordation tax); 1993 Op. Va. Att’y Gen. 260, 262 (grantor’s tax applicable to a trustee’s deed in a foreclosure sale is on the mortgagor, not on the trustee or mortgagee and, thus, is to be collected, even though the Resolution Trust Corporation as the grantee is exempt from the imposition of recordation tax). See also 2003 Op. Va. Att’y Gen. 177, 178 regarding language in the Farm Credit Act practically identical to that found in the Fannie Mae, Freddie Mac and FHFA statutes.

²⁸ 2002 Op. Va. Att’y Gen. 328, 329 (“The tax imposed under § 58.1-803 in these loans is a cost borne by the grantor and borrower, and not the federal government and its agencies. The mere fact that the federal government is involved in some capacity, either as guarantor or beneficiary, does not exempt a transaction from the recordation tax.”).

Conclusion

Accordingly, it is my opinion that applicable federal statutes exempt Fannie Mae and Freddie Mac from the taxes levied by the Virginia Recordation Tax Act when they are the grantor or grantee on a deed, instrument or other writing in a transaction for the conveyance of an interest in real property.²⁹

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

²⁹ Because Fannie Mae and Freddie Mac are exempt from recordation taxes under the federal statutes that created them, it is not necessary to determine whether they are “federal instrumentalities” or otherwise fall within the definition of the “United States” for the purposes of the exemptions offered in §§ 58.1-811(A)(3) and 58.1-811(C)(4) (2009).