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November 26, 2012

Federal Housing Finance Agency
Office of Policy Analysis and Research (OPAR)
400 Seventh Street SW., Ninth Floor
Washington, DC 20024
Email: gfeeinput@fhfa.gov

Re: Comments Regarding State-Level Guarantee Fee Pricing
No.: 2012-N-13

Dear Acting Director DeMarco:

I am submitting these comments on behalf of the New York State Attorney General ("OAG").[1] The OAG strongly opposes FHFA's proposal to increase guarantee fees that Fannie Mae and Freddie Mac ("the Enterprises") charge when purchasing mortgage loans made to homeowners in states with allegedly longer than average foreclosure timelines. The result of FHFA's proposal is that consumers in New York will be charged an additional 30 basis points to obtain a mortgage loan. This proposal unfairly discriminates against states, like New York, with strong consumer and due process protections for struggling homeowners while ignoring the role of loan servicers and their foreclosure law firms. It is our experience that delays in the foreclosure process are primarily attributable to loan servicers' shoddy loss mitigation and foreclosure documentation practices. The OAG urges FHFA to withdraw this unfair proposal and consider instead alternatives that address the root problem of loan servicers' mishandling of loss mitigation and foreclosures.

I. FHFA's Proposal Punishes New York Consumers for Living in a State with Foreclosure Protections and Ignores Crucial Information Concerning the Cause of Delay

FHFA's proposal is based on a flawed methodology and the erroneous assumption that delays in foreclosure are caused by robust foreclosure laws such as those in New York. FHFA states that its proposal is contingent on three factors: i) the expected number of days to foreclose

[1] These comments are in addition to comments submitted jointly with the Attorneys General of Illinois and Connecticut.

and obtain marketable title, ii) the average per day carrying costs and iii) the expected national average default rate. Given that FHFA provides no information on how it calculates the per diem carrying costs and that the expected default rate in New York is significantly lower than the national average (1 in 2,223 homes as compared to 1 in 706 nationally),[2] it is clear that FHFA's decision to raise guarantee fees in New York by 30 basis points relies primarily, if not entirely, on a single factor – FHFA's calculation that it takes 820 days to foreclose in New York. However, FHFA ignores that at least some of this delay is attributable to protections in place that actually have been found to facilitate home retention, and FHFA fails to consider that the timeline is not due to borrower behavior or New York law but rather to servicer delays.

A. FHFA's Proposal Penalizes States That Have Adopted Critical Foreclosure Protections That Benefit Both Homeowners and Investors

FHFA's proposal ignores the varied foreclosure processes and protections that New York provides to its citizens, which actually foster a borrower's retention of their home, benefitting both homeowners and investors.

To ensure that homeowners take prompt action to avoid foreclosure, New York law requires loan servicers to provide written notice to homeowners at least ninety days prior to commencing foreclosure proceedings.[3] The notice informs the homeowner of the amount needed to reinstate the loan, encourages the homeowner to work with his or her lender, and provides a list non-profit housing counseling agencies that can assist the homeowner in preventing foreclosure.[4] Available evidence indicates that the mandatory notice and ninety-day waiting period prevent a substantial number of foreclosures.[5]

New York law also requires at least one settlement conference in most residential foreclosure actions.[6] The primary purpose of these conferences is "determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home."[7] The court is required by statute to schedule these conferences within sixty days after the

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[2] National Real Estate Trends, RealtyTrac, October 2012, *available at* http://www.realtytrac.com/trend/center.
[3] Real Property Actions & Proceedings Law § 1304.
[4] *Id.*
[5] *See* Neighborhood Economic Development Advocacy Project, *Foreclosure In New York: What's Really Going On*, January 2012 at 1, *available at* http://www.nedap.org/resources/documents/NEDAPForeclosuresinNYS_WhatsGoingOn.pdf (last visited November 14, 2012) (finding the number of 90-day pre-foreclosure notices is much higher than the number of *lis pendens* filings).
[6] Civil Practice Law and Rules ("CPLR") Rule 3408.
[7] CPLR Rule 3408(a).

plaintiff files proof of service of the summons and complaint[8] and a Request for Judicial Intervention ("RJI") with the county clerk.[9]

The foreclosure settlement conferences have been successful in helping servicers and homeowners reach affordable loan modification agreements that benefit both the homeowner and investor. According to the New York State Office of Court Administration ("OCA"), mandatory settlement conferences have led to a significant decrease in homeowner default rates.[10] A 2011 OCA report estimates that homeowners appear at settlement conferences in ninety percent of all cases.[11] OCA estimated the conferences resulted in a settlement rate of approximately fifty-four percent in 2010[12] and found the settlement rate increased by twenty-nine percent in 2011.[13]

Although the settlement conferences may lengthen the foreclosure process in some cases, any delay is offset by the substantial number of settlements reached as a result of the conferences. A recent report from the Uniform Law Commission also found that state foreclosure mediation programs are effective at achieving loan workouts that avoid the need for foreclosure sales.[14] The report concluded that cases can settle in mediation in less time than it would take to complete a foreclosure and that "any added time attributable to the mediation process has to be balanced against the savings in time and money resulting from mediated settlements."[15]

FHFA's proposal ignores the fact that by helping to prevent avoidable foreclosures New York's protections also benefit investors. While there is little doubt that foreclosures have a devastating impact on families and communities, they also result in substantial losses to investors.[16] Investors recover far less than the market value of homes at foreclosure auctions.[17]

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[8] *Id.*
[9] 22 N.Y.C.R.R. § 202.12-a(b)(1)-(2).
[10] State of New York Unified Court System, 2011 Report of the Chief Administrator of the Courts Pursuant to Chapter 507 of the Laws of 2009 at 4 , *available at* http://www.courts.state.ny.us/publications/pdfs/ForeclosuresReportNov2011.pdf (referred to hereafter as "*2011 Court System Report*") (last visited November 14, 2012).
[11] *Id.*
[12] State of New York Unified Court System, 2010 Report of the Chief Administrator of the Courts Pursuant to Chapter 507 of the Laws of 2009 at 4, *available at* http://www.nylj.com/nylawyer/adgifs/decisions/112910foreclosurereport.pdf (last visited November 14, 2012).
[13] *2011 Court System Report* at 6.
[14] Alan White, State Foreclosure Mediation Laws: Examples and Research for a Uniform Statute at 3 (May 11, 2012), *available at* http://www.uniformlaws.org/shared/docs/mortgage%20foreclosure/4_2012may11_RREMFFP_State%20Foreclosure%20Mediation%20Laws%20memo_White.pdf (last visited November 14, 2012).
[15] *Id.* at 4-5.
[16] *The Recently Announced Revisions to the Home Affordable Modification Program (HAMP), Before the H. Comm. on Financial Services,* 111th Cong. 130 (2010) (statement of Alan M. White, Professor, Valparaiso University School of Law) ("first lien foreclosures are resulting in losses in excess of 50%, and second liens foreclosure losses exceed 100%").

When a home is sold pursuant to a foreclosure, investors lose anywhere between forty-nine and seventy-five percent of the remaining unpaid principal owed on the mortgage loan.[18] Foreclosures can also cause further harm "by encouraging additional foreclosures and by reducing home sale prices."[19] Loan modifications that reduce homeowners' monthly payments return far more value to investors than foreclosures.[20]

Although New York's foreclosure laws may cause a delay longer than in other states, the benefits of those procedures to both homeowners and investors far outweigh any downside.

B. The Proposed Rule Unfairly Punishes New York Borrowers For Costs and Delays Caused by the Loan Servicing Industry and Their Foreclosure Counsel

Rather than delay, New York law, which follows the loan modification guidelines established under HAMP, is intended to promote the expeditious handling of loss mitigation requests. Indeed, New York was the first state to establish strict loss mitigation timelines for servicers to follow in handling delinquent mortgages.[21] Thus, for example, New York law requires servicers to provide written acknowledgement of requests for loss mitigation assistance and notify borrowers of any needed documents within ten days of receipt.[22] New York law also requires servicers to make decisions on a completed loan modification application within thirty days of receiving all required documents.[23]

Loan servicing companies and their foreclosure attorneys have routinely failed to follow these strict timelines and to process loan modification applications in a timely and appropriate manner. Servicers routinely lose borrowers' paperwork and fail to follow applicable guidelines for modifying loans. In addition, servicers and their foreclosure counsel have engaged in numerous irregularities in the foreclosure process, including bringing legal actions without the necessary proof that the foreclosing party has standing and submitting affidavits and other sworn

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[17] Congressional Oversight Panel, *Foreclosure Crisis: Working Toward a Solution, March Oversight Report* (March 6, 2009) (referred to hereafter as "*COP Foreclosure Report*"), at 1, *available at* http://cybercemetery.unt.edu/archive/cop/20110402010739/http://cop.senate.gov/documents/cop-030609-report.pdf (last visited November 15, 2012) ("lenders will lose an average of $60,000 per foreclosure").

[18] Center for Responsible Lending, *Fix or Evict? Loan Modifications Return More Value Than Foreclosures,* March 22, 2011 at 1-2, *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/fix-or-evict.pdf (last visited November 15, 2012) (referred to hereafter as "*CRL Foreclosure Report March 2011*") ("The total foreclosure costs borne by investors as a proportion of the total unpaid principal on a mortgage, known as the "loss severity" is quite high – estimates suggest that losses for prime, alt-a and subprime loans are 49%, 59% and 75% respectively.").

[19] *COP Foreclosure Report*, at 10 ("housing price declines caused by foreclosures can also fuel more foreclosures, as homeowners . . . with negative equity may choose to abandon their houses. Numerous foreclosures flood the market with excess inventory that depress other sale prices.").

[20] *CRL Foreclosure Report March 2011* at 2.

[21] 3 N.Y.C.R.R. § 419.11.

[22] 3 N.Y.C.R.R. § 419.11(c).

[23] 3 N.Y.C.R.R. § 419.11(d).

legal statements without personal knowledge of the facts. These widespread abuses, which have prevented eligible homeowners from modifying their loans and have obstructed the foreclosure process, are well-documented. They have also been the subject of enforcement actions by federal and state banking regulators and the state Attorneys General.[24]

In response to these documented abuses, the Chief Judge of the State of New York issued a 2010 Administrative Order requiring foreclosure counsel to file a due diligence affirmation "to protect the integrity of the foreclosure process and prevent wrongful foreclosures."[25] The Order requires plaintiff's counsel in residential foreclosure actions to affirm that they have communicated with the plaintiff's employees who have reviewed the accuracy of the relevant records and confirmed the accuracy of the court filings, including the summons and complaint.[26] The Order also requires counsel to affirm that the documents filed with the court contain no false statements.[27] Plaintiff's foreclosure counsel must file the due diligence affirmation when filing the RJI,[28] which triggers scheduling of a settlement conference. The affirmation requirement simply requires foreclosure counsel to perform the same steps that any responsible attorney must complete prior to commencing a lawsuit.[29] These requirements should decrease the length of the foreclosure process by ensuring that the plaintiff's counsel is filing accurate papers to commence a foreclosure action.

However, plaintiffs in New York foreclosure actions have thwarted these requirements by ceasing to file RJIs and due diligence affirmations.[30] Solely as a result of foreclosure counsels' actions, there now exists a "shadow docket" of thousands of foreclosure cases sitting in limbo,

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[24] *See In re: Investigation by Eric T. Schneiderman of Steven J. Baum, P.C. et al.,* Assurance No. 12-002 (finding that the largest New York foreclosure law firm had repeatedly engaged in improper verification and notarization practices, including verifying complaints that attorneys had not reviewed or that did not have adequate documentation), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-announces-4-million-settlement-new-york-foreclosure-law-firm-steven-j (last visited November 14, 2012); Federal Reserve System, Office of the Comptroller of the Currency & Office of Thrift Supervision, Interagency Review of Foreclosure Policies and Practices (April 20111), *available at* http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf (last visited November 14, 2012) (review of review fourteen major mortgage servicers by federal regulators finding extensive problems in the preparation of foreclosure documents as well as inadequate policies, staffing and oversight of internal foreclosure processes); *see also* United States Government Accountability Office (GAO), Mortgage Foreclosures: Documentation Problems Reveal Need for Ongoing Regulatory Oversight, GAO 11-433 (May 2011), at 30, *available at* http://www.gao.gov/new.items/d114433.pdf (last visited November 14, 2012).

[25] New York Courts First in Country to Institute Filing Requirements to Preserve Integrity of Foreclosure Process (October 20, 2010) at http://www.nycourts.gov/press/pr2010_12.shtml (last visited November 14, 2012).

[26] Administrative Order 431/11 *available at* http://www.nycourts.gov/attorneys/pdfs/AdminOrder_2010_10_20.pdf (last visited November 14, 2012).

[27] *Id.*

[28] 22 N.Y.C.R.R. § 202.12-a(b)(1).

[29] *See* Attorney Affirmation Required in Residential Foreclosure Cases, *available at* http://www.nycourts.gov/attorneys/foreclosures/Affirmation-Foreclosure.pdf (last visited November 14, 2012).

[30] MFY Legal Services, Inc., *Justice Deceived: How Large Foreclosure Firms Subvert State Regulations Protecting Homeowners,* (July 2011) at http://www.mfy.org/wp-content/uploads/MFY-White-Paper-JUSTICE-DECEIVED.pdf (last visited November 14, 2012).

waiting for plaintiffs to file the RJI and due diligence affirmation to trigger the settlement conference process.[31] Court officials estimate that as a result there are as many as 25,000 unprosecuted foreclosure cases.[32] This delay is solely attributable to the behavior of the servicers.

Loan servicers also are responsible for increasing foreclosure costs and timelines by failing to negotiate in good faith with homeowners and by failing to send representatives to foreclosure settlement conferences who have the authority to reach a settlement as required by New York law.[33] Foreclosure attorneys often lack up to date information about the status of the homeowner's loss mitigation application. Loan servicers continue to lose homeowners' loan modification applications, fail to ask for the documents they need and fail to review applications in a timely manner. The settlement conference process could easily be completed within sixty days, but often requires four to eight appearances as a result of servicer delays. [34]

FHFA should not penalize all New York homeowners for the myriad delays created by its loan servicers and their foreclosure attorneys.

II. The Proposed Rule Change is Unnecessary and Overbroad

FHFA does not need to change the way it calculates guarantee fees. Guarantee fees charged by the Enterprises are already calibrated to the loan type and borrower attributes that affect credit risk. Lenders routinely price for differences in state variation in foreclosure processes and deficiency laws. Moreover, FHFA's proposal would raise the cost of new loans, which have no relationship to default rates on old loans, and prospectively saddle new borrowers with higher costs even after the crisis abates. In addition, the proposal unfairly seeks to charge all New York borrowers increased fees when only a small number of those borrowers become delinquent on their monthly payments. As of the third quarter of 2012, only about 9% of New York loans were 90-days or more delinquent.[35]

Conclusion

FHFA's proposed rule conflicts with the mission of the Enterprises to promote and preserve affordable homeownership. The proposal penalizes states that adopt statutory protections to keep homeowners in their homes and stem servicer misconduct. Moreover, the proposal unfairly holds all New York homeowners responsible for the bad conduct of loan

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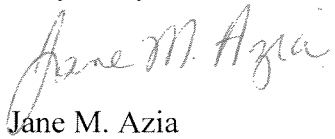
[31] *Id.*
[32] Andrew Keshner, Bill Seeks Early Certification of Foreclosure Actions' 'Merit', New York Law Journal (May 24, 2012).
[33] CPLR Rule 3408(c) & (f).
[34] *See 2011 Court System Report* at 2.
[35] Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit* (August 2012), *available at* http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q22012.pdf (last visited November 15, 2012).

servicing companies and their foreclosure counsel. New York's foreclosure laws are not the problem. Any delays and increased costs in New York's foreclosure process are primarily the result of improper practices by the loan servicing industry and their foreclosure attorneys. FHFA should withdraw its proposed rule and turn its attention to promoting appropriate and timely loss mitigation and foreclosure practices by servicers and their foreclosure counsel.

Very Truly Yours,



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