NEW YORKERS FOR RESPONSIBLE LENDING

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September 8, 2014

VIA INTERNET: FHFA.gov

Melvin L. Watt
Director
Federal Housing Finance Agency (FHFA)
Office of Policy Analysis and Research
400 Seventh Street SW, Ninth Floor
Washington, D.C. 20024

Re: FHFA, Fannie Mae and Freddie Mac Guarantee Fees: Request for Input
Question #11 Concerning State-Level Guarantee Fee Pricing Adjustments

Dear Director Watt:

Thank you for the opportunity to comment on the proposal for state-level guarantee fee pricing adjustments. The 41 undersigned members of the New Yorkers for Responsible Lending coalition ("NYRL") submit this letter in strong opposition to the proposal. Members of NYRL previously submitted comments on November 26, 2012 opposing the state-level guarantee fee pricing proposal originally announced in September 2012 (previous comments). We understand that the proposal was suspended in January 2014 pending further review, and that FHFA is now seeking responses to specific questions regarding the proposal.

NYRL is a 162-member statewide coalition that promotes access to fair and affordable financial services and the preservation of assets for all New Yorkers and their communities. NYRL members represent community development financial institutions, community-based organizations, affordable housing groups, advocates for seniors, legal services organizations, housing counselors, and community reinvestment, fair lending, labor and consumer advocacy groups. NYRL members have detailed knowledge of the array of abusive mortgage lending and servicing practices that have caused tens of thousands of foreclosures and devastated communities across the state.

We continue to strongly oppose the state-level guarantee fee pricing proposal. This letter responds to FHFA's Request for Input and State-Level Guarantee Fee Analysis and expands on the information previously submitted. We believe that the proposal to raise guarantee fees in certain states is based on flawed reasoning and misguided policy, and represents an

unreasonable attempt to penalize states whose judicial foreclosure procedures include consumer protections.

The reasoning behind the proposal is fundamentally flawed because it presumes that foreclosing lenders bear no responsibility for protracted foreclosure processes when, in fact, in New York it is foreclosing lenders and servicers who control the pace of the judicial foreclosure process. Recent court decisions, research, and the continued experience of foreclosure prevention advocates clearly show that lenders and servicers are responsible for the delays in New York's foreclosure process. It is therefore inappropriate to penalize New York borrowers for delays in the foreclosure process that are directly attributable to the conduct of the foreclosing lenders and servicers.

I. There is ample additional evidence that delays in New York's judicial foreclosure process are directly attributable to the conduct of foreclosing lenders and their counsel

In our November 2012 comments, we explained that the delays associated with New York's foreclosure process are not caused by the consumer protection provisions of New York's laws, but rather are the result of calculated lender and servicer conduct. FHFA dismisses these concerns in its State-Level Guarantee Fee Analysis, characterizing them as merely anecdotal, concluding, "Lacking more concrete evidence, it is impossible to attribute foreclosure delays to servicers alone or even in the majority of cases." But it is that statement, in fact, that is not supported by any empirical evidence and cannot be reconciled with the facts on the ground in New York State.

Plaintiffs Control the Pace of Foreclosures in New York

In New York, foreclosure actions proceed in the same way as do all civil litigations in New York Supreme Court; in contrast to the procedures applicable in federal court, it is the plaintiff—the foreclosing lender—that controls the pace of the foreclosure action. This is not an anecdotal assertion—it is based on New York's law of civil procedure. Accordingly, after the commencement of a foreclosure action with the filing of a summons and complaint, foreclosing plaintiffs are obligated to file a "Request for Judicial Intervention" (RJI) with the county clerk in order for the case to be assigned to a judge and in order to trigger a mandatory foreclosure settlement conference.[i]

Beginning in 2010, lenders'/ foreclosure plaintiffs' widespread and systematic failure to file RJIs resulted in tens of thousands of cases statewide being trapped in a foreclosure limbo known as the "shadow docket." The shadow docket was documented by New York's Unified Court System in its 2012 report to the New York State Legislature.[ii] In this report, Chief Administrative Judge Prudenti wrote, "Research suggests that plaintiffs are commencing foreclosure proceedings by filing a summons and complaint, but they are not thereafter initiating a court proceeding by filing a request for judicial intervention. The best explanation

for this trend is that these plaintiffs are unable to comply with the affirmation requirement.[iii] … Given this trend, there is an inventory of thousands of cases that have technically been commenced, but are not before the court."

The thousands of New York homeowners who found themselves trapped in this "shadow docket" were tangibly harmed, as their loans accrued substantial mortgage arrears and became harder to modify as a result. The lenders' creation of this "shadow docket" of stalled foreclosure cases across the state was well-documented and widely reported,[iv] leading the legislature to address the problem by requiring lenders to file key documents at the outset of a foreclosure proceeding. This new law will reduce foreclosure timelines in New York given that foreclosing lenders and servicers regularly delayed months, or even years, in filing requests for judicial intervention.

Foreclosing Lenders and Servicers Routinely Fail to Negotiate in Good Faith

In our prior letter, we detailed how servicers' and their attorneys' dilatory practices cause settlement conferences in foreclosure cases to be adjourned multiple times. We provided three case examples, characteristic of the experience of homeowners and advocates throughout the state. Since that time, New York courts have adjudicated countless cases in which lenders have caused the settlement conference process to be delayed, and in which they have failed to negotiate in good faith in accordance with the requirements of New York's settlement conference law—for example, by repeatedly losing paperwork, improperly denying loan modifications, and failing to appear with authority to settle. This is not merely anecdotal—there are scores of New York judicial decisions memorializing judicial findings of delay solely attributable to lender conduct.

Most recently, the Appellate Division for the Second Department, the intermediate appellate court overseeing the New York counties with the highest concentrations of foreclosures in New York State, reviewed (and affirmed) a trial court finding of lender delay and failure to negotiate in good faith in a case presenting facts familiar to anyone who has participated in New York's settlement conference process. *US Bank N.A. v Sarmiento,* 2010 NY Slip Op 05533 (2d Dep't July 30, 2014). The *Sarmiento* court's findings were unequivocal:

> "The totality of the circumstances supports the Supreme Court's determination that the plaintiff [lender] failed to act in good faith, as the plaintiff thwarted any reasonable opportunities to settle the action, thus contravening the purpose and intent of CPLR 3408… Viewing the plaintiff's conduct in totality … we conclude that its conduct evinces a disregard for the settlement negotiation process that delayed and prevented any possible resolution of the action and, among other consequences, substantially increased the balance owed by Sarmiento on the subject loan. … [T]he plaintiff created an atmosphere of disorder and confusion that rendered it impossible for Sarmiento or the Supreme Court to rely upon the veracity of the grounds for the plaintiff's repeated denials of Sarmiento's HAMP application."

Sarmiento is the most recent New York appellate decision documenting the dilatory behavior by lenders that plagues New York's settlement conference process, but it is not isolated. Indeed, there numerous decisions finding servicers guilty of failing to negotiate in good faith and of delaying New York's foreclosure settlement conference process (while we know of not one single adjudication of borrower failure to negotiate in good faith). *See, e.g., LaSalle Bank N.A. v Dono,* 2014 NY Slip Op 24224 (Sup. Ct. Suffolk Cty. August 12, 2014); *Bank of America v. Lucic,* Index No. 810026/2011 (New York Cty. July 29, 2014); *U.S. Bank National Assoc. v. Young,* Index No. 28686/2009 (Kings Cty. July 7, 2014); *Deutsche Bank National Trust Co. v. Husband,* Index No. 2452/2008 (Kings Cty. June 27, 2014); *OneWest Bank v. Gardner,* Index No. 26652/2009 (Kings Cty. June 26, 2014); *American Home Mortgage Servicing, Inc. v. Bobbitt,* 19093/08, NYLJ 1202635568948 (Sup. Ct. Kings Cty. Dec. 12, 2013); *, U.S. Bank, N.A. v. Green*, Index No. 9220/09 at *3-4 (Sup. Ct. Kings Cty. Mar. 25, 2013); *Deutsche Bank National Trust v. Hinds*, 500398/12, NYLJ 1202622170047 (Sup. Ct. Kings Cty. Sept. 19, 2013); *Deutsche Bank Nat. Trust Co. v. Izraelov*, 40 Misc. 3d 1238(A), 2013 WL 4799151 (Table) (Sup. Ct. Kings Cty. 2013); *HSBC Bank USA v McKenna*, 37 Misc 3d 885, 914, 952 N.Y.S.2d 746; *Deutsche Bank National Trust Co. v. Soriano*, Index No. 13873/10 (Sup. Ct. Kings Cty. Oct. 23, 2012); *BAC Home Loans Servicing v. Westervelt*, 2010 N.Y. Slip Op. 51992(U) (Sup. Ct. Dutchess Cty. 2010).

Plaintiffs routinely delay New York's settlement conference process by violating the legal requirement that a bank representative appear at settlement conferences with authority to resolve the matter; a recent study by advocates observing settlement conferences over a three month period reported that in eighty percent of the observed cases, foreclosing lenders or their counsel appeared either without crucial information required by law for settlement conferences or with admitted lack of settlement authority in explicit violation of the statute.[v] The courts routinely adjourn these conferences when plaintiffs appear without required information or without settlement authority (often ordering the appearance of an authorized representative at the next conference), and these delays are solely attributable to foreclosing plaintiffs.

Two recent case examples illustrate how foreclosing lenders and servicers delay the foreclosure process:

> New York State homeowner, Mr. R, fell behind on his Wells Fargo mortgage and applied for a loan modification in 2012. While Mr. R was under review for a loan modification, Wells Fargo filed a foreclosure action—in violation of banking regulations that prohibit dual tracking. Wells Fargo then delayed the case for 11 months by failing to file the Request for Judicial Intervention that triggers homeowners' right to a settlement conference. During this time, Mr. R successfully made trial modification payments for many months, but Wells Fargo did not make his loan modification permanent. In October 2013, Mr. R and Wells Fargo finally entered a settlement conference. Despite Mr. R's securing subordination agreements from junior lien holders and successfully completing trial plan payments, Wells Fargo has denied his loan modification twice, and, as of April 2014, Mr. R is still in settlement conference.

In 2011, Wells Fargo brought a foreclosure action against Mr. and Mrs. G. In May 2012 Mr. and Mrs. G filed a pro se motion for leave to file a late answer, which Wells Fargo opposed. In August 2012 the court instead dismissed the case for Wells Fargo's failure to prosecute. Wells Fargo filed a motion to reargue, which the court granted in February 2013 and restored the case to its calendar. Incredibly, Wells Fargo has taken no step whatsoever in the case since February 2013.

II. Changes in national mortgage servicing regulations have made New York's pre-foreclosure timeline consistent with timelines in every state

Because of new mortgage servicing regulations promulgated by the Consumer Financial Protection Bureau ("CFPB") earlier this year, federally-mandated pre-foreclosure timelines for *all* states are now consistent with New York's. One of New York's consumer protections that seemed to be under attack in the original FHFA proposal was the requirement that lenders send a pre-foreclosure notice to the homeowner at least ninety (90) days prior to filing a foreclosure action. The CFPB's regulations now mandate a 120 day notice and waiting period for foreclosure filings nationally, so penalizing New York for its 90-day waiting period is particularly inappropriate.

III. The model presented in the proposal for determining the cost of foreclosure is fundamentally flawed, and is not a reasonable basis for identifying those states where loan defaults are significantly more costly than the national average.

The formula that the FHFA uses to determine the cost of foreclosure is fundamentally flawed because it does not acknowledge the higher cure rates in New York and other states with laws that promote prevention of avoidable foreclosures through loan modifications or other home-saving solutions.

Professor Alan White analyzed data from loan servicing files dated December 2006 through December 2013 and found that in New York, 23.3% of loans were modified.[vi] This is significantly (35%) higher than the national average of 17.2%. Although the data only includes subprime and alt-A mortgages privately securitized and excludes GSE and bank portfolio mortgages, the data shows higher than average modification rates for Connecticut, Illinois, and New Jersey, as well as New York. Additionally, data collected by the Connecticut Judicial Branch provides further proof that foreclosure mediation programs are very effective. For example, since 2008, 69% of homeowners who completed the state's foreclosure mediation program kept their homes.[vii]

Before penalizing states with strong foreclosure protections, we recommend that the FHFA conduct a study of its loss mitigation data to determine whether states with strong foreclosure protections have higher cure rates. Higher cure rates lower the costs of foreclosure for the

GSEs, and significantly reduce the broad range of other costs associated with loan defaults, for example by preventing the deterioration of neighborhoods.

IV. Additional implications of the FHFA proposal

If the FHFA implements this proposal to use its price-setting power to manipulate state policy, it would have a chilling effect on state legislatures that want to pass equitable laws to prevent avoidable foreclosures and the associated harms to local communities. The FHFA proposal would open the door to selective attacks by FHFA and other federal agencies on disfavored state policies, and would impermissibly intrude on the states' ability to govern their own court processes and enact their own consumer protections.

The FHFA proposal would also unfairly penalize future New York borrowers. At a time when many communities around the State are struggling, this unwarranted guarantee fee increase, and the corresponding increase in the cost of credit, could further damage New York's housing and economic recovery.

Thank you for the opportunity to comment. For the above reasons, we strongly urge the FHFA to reconsider and withdraw its proposal.

Sincerely,

Affordable Housing Partnership of the Capital Region
Albany County Rural Housing Alliance, Inc.
Association for Neighborhood and Housing Development
Bedford-Stuyvesant Community Legal Services
Better Neighborhoods, Inc.
Brooklyn Cooperative Federal Credit Union
Buffalo Urban League
Central New York Citizens in Action, Inc.
CNY Fair Housing Council
Common Law, Inc.
Community Loan Fund of the Capital Region
Cypress Hills Local Development Corporation
District Council 37 Municipal Employees Legal Services
Empire Justice Center
Genesee Cooperative Federal Credit Union
Grow Brooklyn
Housing Help Inc.
JASA/Legal Services for the Elderly in Queens
The Legal Aid Society
The Legal Aid Society of Rockland County
Legal Services NYC
Legal Services NYC – Bronx

Long Island Housing Services, Inc.
Margert Community Corporation
MFY Legal Services, Inc.
Nassau/Suffolk Law Services
Neighborhood Housing Services of New York City, Inc.
NeighborWorks Alliance of New York State
New Economy Project
New York Public Interest Research Group
New York Legal Assistance Group
PathStone Corporation
Queens Legal Services
Rensselaer County Housing Resources, Inc.
South Brooklyn Legal Services
Staten Island Legal Services
SUNY Buffalo Law School Affordable Housing and Community Development Clinic
Troy Rehabilitation and Improvement Program (TRIP), Inc.
University Neighborhood Housing Program
Westchester Residential Opportunities, Inc.
Western New York Law Center

Appendix A

Mortgage Modification Outcomes by State

Mtgs ever in FC, status @ 12/2013

Modified	State	Missing Data	Prepaid	Foreclosed	Current	Delinquent	
25.20%	CT	23.60%	8.30%	41.40%	19.80%	6.90%	100%
14%	FL	21.60%	5.80%	54.40%	15.30%	2.80%	100%
20.10%	IL	20.70%	6.20%	54.50%	13.10%	5.50%	100%
21.30%	NJ	23.20%	7.90%	30.70%	29.80%	8.40%	100%
23.30%	NY	24.70%	8.90%	26.30%	29.40%	10.80%	100%
17.20%	National Avg	17.80%	7.60%	58.20%	12.20%	4.20%	100.00%

Source: Trustee files from a major bank, Dec 2006 through Dec 2013

note - these are subprime and alt-A mortgages privately securitized, excludes GSE and bank portfolio mortgages

missing data refers to loans that were not in the Dec 2013 file but never reported a terminating event

Data and analysis provided by Alan White

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[i] CPLR 3408 requires the court to hold a mandatory settlement conference within 60 days after plaintiff has filed proof of service of the summons and complaint with the county clerk. Uniform Rule 202.12-a requires the plaintiff to file a specialized RJI when it files the proof of service, and the courts use the specialized RJI to trigger the scheduling of a settlement conference.

[ii] 2012 Report of the Chief Administrator of the Courts, available at https://www.nycourts.gov/publications/pdfs/2012ReportOfChiefAdministratorOfTheCourts..pdf

[iii] In October 2010, the New York State Unified Court System implemented a rule that requires the plaintiff's lawyer in a foreclosure case to affirm in writing that the information contained in the foreclosure complaint is correct.

[iv] *See, e.g., Advocates Seek to Eliminate Foreclosure 'Shadow Docket'*, New York Law Journal, 3/27/12; *Casting Light on 'Shadow Dockets'*, Albany Times Union, 8/1/13, available at http://www.timesunion.com/local/article/Casting-light-on-shadow-dockets-4702153.php. *See also* MFY Legal Services' *Justice Deceived*, June 2011, and *Justice Unsettled*, May 2012, available at http://www.mfy.org/projects/foreclosure-prevention-project/.

[v] The report, *Stalled Settlement Conferences: Banks Frustrate New York's Foreclosure Settlement Conferences*, was produced in April 2014 by Legal Services NYC, MFY Legal Services, and JASA/Legal Services for the Elderly in Queens. Available at http://nylawyer.nylj.com/adgifs/decisions14/050214report.pdf.

[vi] Analysis by Alan White. See Appendix A for chart.

[vii] Connecticut Judicial Branch, *Results of the Foreclosure Mediation Program since its inception*, available at http://www.jud.ct.gov/statistics/fmp/FMP_pie.pdf