NEW YORKERS FOR RESPONSIBLE LENDING

c/o NEDAP / 176 Grand Street / New York, NY / 10013
Tel: (212) 680-5100 / Fax: (212) 680-5104 / nyrl@nedap.org

November 26, 2012

VIA EMAIL: gfeeinput@fhfa.gov

Edward J. DeMarco
Acting Director
Federal Housing Finance Agency (FHFA) OPAR
400 Seventh Street SW, Ninth Floor
Washington, D.C. 20024

Re:State-Level Guarantee Fee Pricing [No. 2012-N-13]

Dear Director DeMarco:

The undersigned members of New Yorkers for Responsible Lending (NYRL) submit the following comments in opposition to the state-level guarantee fee pricing proposal set forth in Federal Register, Vol. 77, No. 186, Tuesday, September 25, 2012 (at 58991-58994). We strongly oppose the proposal, as it is an unreasonable attack on state consumer protection laws, is based on seriously faulty presumptions and reasoning, and is fundamentally unfair to mortgage loan borrowers in New York and the other targeted states.

New Yorkers for Responsible Lending (NYRL) is a 162-member state-wide 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. Coalition 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.

I. The proposal represents an unwarranted attack on state consumer protection laws.

The FHFA's proposal to raise the guarantee fee for all New York borrowers because it does not like New York's laws is an unwarranted and unprecedented attack on the ability of our state's legislature to pass laws that are in the best interest of its citizens. New York is one of several states that has implemented protections within the foreclosure process designed to maximize loan modifications and minimize unnecessary foreclosures. In 2009, New York put into place a mandatory settlement conference process for all residential mortgage foreclosures on

homeowners' primary residences, in order to bring the parties together at the very beginning of the process to see if a loan modification or other workout could be achieved before proceeding to foreclosure. In addition, in October 2010, in the wake of the robo-signing scandal, 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. New York also requires mortgagees to send a notice to homeowners at least 90 days prior to filing a foreclosure complaint with a list of non-profit housing counseling agencies in the homeowner's area.

These requirements in New York law are eminently reasonable, are not burdensome to lenders, and do not cause lengthy delays in the foreclosure process. Instead, they bring fairness and integrity to the foreclosure process. Nevertheless, the FHFA's proposal contains a poorly disguised threat to the legislatures of New York and the other targeted states: eliminate your consumer protections or we'll raise the cost of mortgages. "If those states were to adjust their laws and requirements sufficiently to move their foreclosure timelines and costs more in line with the national average, the state-level, risk-based fees imposed under the planned approach would be lowered or eliminated."

In addition to fundamentally ignoring the primary reason for delays in our foreclosure process (see below), the FHFA has grossly over-stepped its authority by using a threat of increased loan pricing to try to change state policies that the agency disagrees with on ideological grounds. The role of state legislatures is to enact laws that are in the best interest of their citizens. We are fortunate in New York to have a legislature that has been active in trying to prevent more homeowners from losing their homes to the dilatory and abusive behavior of mortgage servicers. The most resounding success of New York's settlement conferences has been in bringing homeowners to the bargaining table. According to the 2011 Report of the Chief Administrator of the Courts for NYS, "only ten percent of homeowner-defendants did not appear for any of their scheduled conferences, down from an estimated 90 percent prior to the legislation." The report further notes that the settlement rate in foreclosure cases increased 29 percent over the eleven month period studied (November 2010 through September 2011). The settlement conferences in NY have provided direct oversight of servicer compliance with the HAMP process, ensured that servicers are properly reviewing applications, and prevented foreclosures where loan modification is in the best interest of both parties.

The FHFA's proposal to use its price-setting power to manipulate states' foreclosure and consumer protection policies, if permitted here, would open a Pandora's box. This kind of "environmental" pricing opens the door to selective attacks on disfavored policies and impermissibly intrudes on states' ability to govern their own court processes and enact their own consumer protections.

II. <u>The foreclosure process in New York would be significantly shorter were it not for mortgage servicer delays.</u>

In New York, the current long delays in our foreclosure process are not caused by the consumer protections in the process. The long delays are caused by mortgage servicers failing to comply with rules and timelines, failing to promptly evaluate homeowners for modifications, and

generally failing to advance cases at all stages of the process. If mortgage servicers reviewed homeowners for modifications timely, and if they only filed foreclosures when they had documentation to support their claim of ownership *and the intention to advance* those cases through to conclusion, New York's foreclosure process would be no longer than any other judicial foreclosure jurisdiction. The common servicer delays can be grouped into three categories:

1) Servicers'and their attorneys' dilatory practices are causing settlement conferences in foreclosure cases to be adjourned multiple times. Section 3408 of New York's civil practice rules, our settlement conference statute, mandates that the parties negotiate in good faith to avoid foreclosure if an alternative resolution—loan modification, short sale, or deed in lieu of foreclosure—is economically viable. Plaintiff lender/servicers must appear in person or by a representative who is fully authorized to settle the case. More often than not servicers violate this statutory mandate by failing to send anyone to the conference who has the authority to make decisions, by failing to negotiate, and by repeatedly asking homeowners to submit duplicative documents. This servicer conduct causes multiple adjournments of the settlement conferences and long delays in the foreclosure process, to the detriment of both investors and homeowners, who simply want their loans modified so they can resume paying. It typically takes *four to eight conferences* before a servicer will produce a final determination on a simple loan modification application. Consider the following case examples, which are characteristic of the experience of homeowners and advocates throughout the state:

- *Mr. B, a Schenectady homeowner, defaulted on his FHA mortgage in October, 2010 after his tenant stopped paying rent and he lost hours at work. By April 2011, he had a new tenant and attempted a workout with his loan servicer, Wells Fargo. In June 2011, Wells Fargo told him that his application for modification was being reviewed by an underwriter. Nevertheless, in August 2011 Wells Fargo served Mr. B. with a foreclosure summons and complaint. Mr. B. had his first settlement conference in February 2012. At the first conference, Wells Fargo requested a new loan modification package, which Mr. B submitted at his second settlement conference in March 2012. At the third conference in May 2012, Wells Fargo said that his documents were outdated and a new package was needed. Mr. B. submitted the new package at his fourth conference in June 2012. At his fifth conference in August 2012, Wells Fargo said that the documents submitted in June were now outdated and a new application was required. Mr. B. submitted this fourth loan modification package, and is awaiting his sixth settlement conference scheduled for November 27, 2012.*

- *Mr. C., a Rochester homeowner, has been in the foreclosure settlement conference process for 18 months. He qualified for a HAMP trial payment plan in February 2010 and had made two trial payments to Wilshire, the servicer of his mortgage, when Wilshire notified him that Bank of America had purchased his loan servicing rights. Bank of America then told Mr. C. that he had to go through debt counseling to remain in the HAMP program. Mr. C. did so, but after he made three more trial payments, Bank of America told him that he did not qualify for a permanent HAMP modification. To date, Mr. C. still has not received a loan modification or a valid explanation from Wilshire of why he does not qualify.*

- *There have been 30 settlement conferences in Mr. S's case in Staten Island. The loan has been serviced by both Home Eq and Ocwen during that time. The first 18 appearances were spent trying to get the servicer to perform a proper modification review. In April 2011, the 18th appearance, the servicer finally approved Mr. S for a HAMP trial modification. It took three more conferences before the servicer converted the trial plan to a permanent modification in October 2012. Then the servicer dishonored the agreement based on an unnecessary second lien subordination. At the May 2012 settlement conference, the plaintiff insisted that the defendant's attorney negotiate a lien subordination between the plaintiff and the 2nd lien holder. The parties appeared in conference eight more times before plaintiff approved the subordination form in October 2012. Conferences are ongoing to ensure Plaintiff restores the HAMP modification that it should have given three years ago.*

2) Lenders and their attorneys are violating court rules, creating a "shadow docket" of cases that have been filed but are not moving forward. Thousands of foreclosure cases are sitting in limbo in New York courts, because servicers and their attorneys are refusing to comply with the New York courts' rule that requires attorneys to affirm the accuracy of foreclosure complaints. Lenders' attorneys must file the attorney affirmation before a judge can be assigned to the case. Many cases are stuck in what has become known as our "shadow docket", with no movement forward, because servicers and their attorneys will not file the simple attorney affirmation. Some lenders' attorneys are even voluntarily seeking dismissal of actions, presumably to avoid filing the affirmation.

Consider the following example:

- *Mr. and Mrs. H of Staten Island received a foreclosure summons and complaint in June 2012. They promptly answered the complaint per state procedure in late June. Five months have now passed and Deutsche Bank has yet to file the request seeking assignment of a judge. The bank has made no effort to negotiate a settlement and has refused to make a decision on Mr. and Mrs. H's loan modification application, even though the homeowners should receive a modification under applicable guidelines.*

The shadow docket delays were worsened by the robosigning practices of an infamous law firm, Stephen J. Baum, which handled nearly half of the foreclosure lawsuits in the state but was forced to close in the wake of investigations into its fraudulent foreclosure practices by the U.S. Department of Justice and the N.Y. Attorney General.

MFY Legal Services studied the shadow docket in Brooklyn and Queens in its report, *Justice Unsettled: How the Foreclosure Shadow Docket & Discontinuances Prevent New Yorkers from Saving Their Homes*, (May 2012). The study found that in Brooklyn and Queens courts, as of April 2012 almost 75% of foreclosures filed in October 2011 sat in the shadow docket, and as of March 2012, 43% of November 2010 and March 2011 filings remained in the shadow docket (available at http://www.mfy.org/wp-content/uploads/Justice-Unsettled-plus-APP.pdf). A review of cases filed November 2011 through May 2012 in the Capital Region of NY showed that as of August 2011, 67% of cases in Albany and Rensselaer counties, and 59% in Schenectady county sat in the shadow docket.

3) Once removed from the settlement conference part, lenders are not moving cases to judgment and sale. In our experience, when no settlement is possible and the case is cleared to proceed to foreclosure, the foreclosing plaintiffs often simply do not file the next court document (normally a request for an order of reference). There are numerous cases that have left the settlement conference phase of foreclosure nearly a year ago, where the lender simply has not advanced them. They remain in limbo awaiting some action by the plaintiff.

From start to finish, even given generous timelines for courts to act and for servicers' lawyers to file paperwork, a foreclosure case could take less than a year in New York. There is nothing required, or inherent in our state laws that would compel a case to take the 892 days estimated by the FHFA. It is abundantly clear to those of us who are working in foreclosure courts around the state that the vast majority of delays in the process are caused by the servicers, and are definitely not attributable to the borrower protections built into the process.

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 purports to use in the proposal to determine the cost of foreclosure is fundamentally flawed, because it does not include the higher cure rates in New York and other states with laws that give borrowers a better chance at getting a loan modification. In fact, there is evidence that New York's foreclosure protections lead to significantly higher cure rates. For example, in New York, the number of loan modifications increased 29% in the first year of the settlement conferences from the year prior to the initiation of the conferences. New York has one of the higher rates of successful HAMP modifications in the country. In fact, there is evidence that judicial foreclosure states in general have higher rates of default cures than nonjudicial foreclosure states.

Ultimately, the cumulative financial impact of loan defaults is significantly lower in states with higher rates of modifications or other workouts. If the FHFA were really concerned with the cost of foreclosure, as opposed to forcing a certain ideology on the states, then it would reward -- rather than punish -- states with strong laws that maximize foreclosure cures.

IV. An upfront fee or credit should not be assessed on every state based on its relationship to the national average total carrying cost.

The FHFA's proposal would unfairly penalize future borrowers. A g-fee increase as significant as this could have a chilling effect on the impacted real estate markets, such as ours in New York State. At a time when the market is in a downturn across the state, this unwarranted increase in the cost of credit could further damage our state's housing and economic recovery. Mortgage Insurance premiums have already become prohibitive for many, discouraging potential homebuyers.

The FHFA's state-based pricing proposal would create a dangerous slippery slope. Under the FHFA's rationale, a state could be further penalized based on declining property values, higher REO inventory, higher default rates due to employment conditions, or other

circumstances beyond the control of the state or its borrowers, or because of some other environmental condition. The proposal would set a bad precedent and could lead to further decline with less affordable credit available in markets hardest hit by the subprime lending crisis and the resulting financial crisis.

V. Now is not the time to increase the cost of mortgages in New York.

New York is recovering from the worst storm in its history. Many neighborhoods remain in rubble. People whose homes were damaged or destroyed are beginning the complicated process of assessing the damage, their insurance coverage, the cost of repair or replacement, and the economic feasibility of repair or replacement. As the state begins the demolition of unsafe properties, many homeowners will not have the option to repair or rebuild. They will have to relocate. This will be a long and difficult process for thousands of affected people here. Increasing the cost of mortgages in New York while it struggles to recover from the storm would be callous and detrimental to our state's recovery.

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

Sincerely,

Albany County Rural Housing Alliance, Inc.
ANHD, Inc.
Better Neighborhoods, Inc.
Bridge Street Development Corporation
Brooklyn Cooperative Federal Credit Union
Central New York Citizens in Action, Inc.
Chhaya Community Development Corporation
District Council 37 Municipal Employees Legal Services
Empire Justice Center
Genesee Cooperative Federal Credit Union
Greater Rochester Community Reinvestment Coalition
Grow Brooklyn
Housing Help, Inc.
JASA/Legal Services for the Elderly in Queens
Legal Aid Society
Legal Services for the Elderly, Disabled or Disadvantaged of WNY, Inc.
Legal Services NYC
Legal Services NYC – Bronx
Long Island Housing Services, Inc.
Lower East Side People's Federal Credit Union/PCEI, Inc.
Margert Community Corporation
MFY Legal Services, Inc.
MHANY Management, Inc.
National Federation of Community Development Credit Unions

NEDAP
New York Public Interest Research Group
PathStone
Pratt Area Community Council
Queens Legal Services
South Brooklyn Legal Services
Staten Island Legal Services
University Neighborhood Housing Program
Western New York Law Center