Andrew M. Cuomo
Governor

Benjamin M. Lawsky
Superintendent

November 26, 2012

Edward J. DeMarco
Acting Director
Federal Housing Finance Agency
Office of Policy Analysis and
Research (OPAR)
400 7th Street, SW
9th Floor
Washington, D.C. 20024

RE: Proposed State-Level Guarantee Fee Pricing

Dear Mr. DeMarco:

The New York State Department of Financial Services ("DFS") strongly opposes the Federal Housing Finance Agency's ("FHFA") Notice of Proposed Rulemaking ("Proposal") to increase guarantee fees ("g-fees") on single family mortgages[1] in New York State as well as other states that the FHFA has labeled as "outliers" in terms of foreclosure-related costs (see "State-Level Guarantee Fee Pricing; Notice of proposed rulemaking," 77 Fed. Reg. 186, pp. 58991 – 58994 (Sept. 25, 2012)).[2] As set forth more fully below, DFS opposes this proposal for several reasons, including that it:

- Relies on unfair assumptions;
- Will constrain state-level foreclosure policy to the detriment of consumers;
- Seeks to shift the cost of Fannie Mae and Freddie Mac's (the "Government Sponsored Enterprises" or "GSEs") backlog as well as the abuses and misconduct of the servicers they employ onto prospective borrowers; and
- Could harm the housing market recovery in New York by increasing the cost of homeownership.

[1] "Single family mortgages" under the Proposal are mortgages that finance property of 1-4 units in the affected states. See 77 Fed. Reg. 186, at 58991.

[2] The four other states affected by this proposal are New Jersey, Connecticut, Illinois and Florida.

I. Background

The GSEs currently charge a g-fee to lenders for the credit risk the GSEs take on in owning or guaranteeing a mortgage. The fee varies with the type of loan as well as the borrower's credit profile. The lender pays the fee to the GSEs in two parts — an upfront fee that is paid at the time of loan acquisition, and an ongoing monthly fee that is paid for the life of the loan. The GSEs currently calculate their g-fees on a national basis, accounting for expected default costs in the aggregate and not on a state-by-state basis.[3]

The Proposal's stated purpose is to help the GSEs recover a portion of the "exceptionally high costs" they incur in cases of mortgage default in certain states with high foreclosure-related expenses.[4] The factors the FHFA considered in determining the states to which the new fees would apply include: (1) the length of time necessary to secure marketable title to the property in the state; (2) the property taxes that must be paid until title is secured; and (3) the legal and operational expenses during that time period.[5]

In New York, the Proposal would impose an additional one-time upfront g-fee of 30 basis points on each loan acquired by the GSEs after implementation of the Proposal.[6] This is the highest additional g-fee imposed by the FHFA on any state.[7] Under the Proposal the payments may be passed on by the lender to the borrower as an adjustment to the borrower's interest rate.[8] Per the FHFA calculation methodology,[9] borrowers in New York would experience a roughly 6 basis point increase in their annual interest rate. On a typical $400,000, 30-year fixed-rate mortgage, this could result in an additional fee of approximately $5,000 for borrowers for the life of the loan. By way of magnitude, if the g-fee were applied to the two million loans currently

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[3] See 77 Fed. Reg. 186, at 58991.

[4] See id.

[5] See id., at 58991 – 58994.

[6] See id., at 58994.

[7] Under the Proposal, Illinois would have an upfront g-fee of 15 basis points, while New Jersey, Connecticut and Florida would have an upfront g-fee of 20 basis points. See 77 Fed. Reg. 186, at 58994.

[8] See id., at 58991.

[9] See id., at 58992.

being serviced in New York, it would result in an additional fee of over $10 billion to New York borrowers.[10]

II. Analysis

A. The Proposal relies on unfair assumptions.

The Proposal assumes that borrowers in all states will default at the national average rate and that the foreclosure cost for every default in a given state will be identical.[11] New York State's foreclosure rate is significantly lower than the average national rate. In addition, the cost for every default in New York is clearly not identical and varies based on numerous factors. The FHFA should require the GSEs to estimate the statistically-expected foreclosure cost at the loan level, regardless of the loan origination state.

In addition, the FHFA Proposal considers only what the GSEs perceive to be the negative attributes of state consumer protection laws without regard to any cost saving measures the states may have in place. For example, New York State has enacted legislation and has spent considerable time and resources in the recent past to help distressed borrowers and their lenders agree on loan modifications before a foreclosure action is even commenced. This type of proactive intervention by the State has obviated the need for many foreclosures and helped New York minimize the number of foreclosures relative to other states.

Similarly, New York State has enacted tough mortgage fraud laws to prevent lenders and homeowners alike from being defrauded. In addition, the State has established minimum underwriting standards for certain loans to help ensure that the GSEs and the private market acquire loans that meet certain minimum standards (which is especially helpful in light of the GSE's past due diligence failures), created a duty of care for mortgage brokers to help prevent the abuses of the past from happening in the future, and enacted a property tax cap.

All of these measures, together with the unprecedented education and outreach efforts that New York State continues to undertake on behalf of homeowners, help reduce the frequency of foreclosures in the State and minimize foreclosure-related costs for the GSEs. If implemented, the Proposal would create the perverse incentive that states should either give up the fight against mortgage fraud and roll back consumer protections or face the consequences of higher mortgage rates for consumers, as discussed further below.

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[10] Assuming an average loan size of $400,000 and fees of $14 per month per the Proposal.

[11] See id., at 58992.

B. The Proposal will constrain state-level foreclosure policy to the detriment of consumers.

Many of New York's mortgage-related consumer protections were put in place as a direct result of the rampant fraud, failures and the abuses of certain lenders and the servicers they employed which contributed so significantly to the financial crisis. Under the Proposal, New York State would be penalized for such improvements to its laws and policies with higher FHFA imposed g-fees.

The Proposal would also shift the cost of the failures of lenders and servicers onto New York State borrowers. Widely-reported improper servicing practices have contributed significantly to the inefficiencies, delays, and confusion in the foreclosure process in New York. Indeed, many servicers likely do not have sufficient capacity to service and manage their significant portfolios of distressed loans and lack an adequate system of internal controls and oversight with respect to their servicing practices. These failures have resulted in such abusive and inefficient practices as dual tracking modifications and foreclosures, hiring unethical foreclosure counsel, fraud, loss of documentation, and many other significant problems that have caused delays in the courts and necessitated additional judicial intervention.

C. The Proposal could harm the housing market recovery in New York by increasing the cost of homeownership.

Finally, this Proposal could harm the housing market in New York and hamper financial recovery in the State. The FHFA's financial schematic demonstrates that housing prices are recovering in many parts of the country (see FHFA's Housing Price Index, Four-Quarter Appreciation, 2012 Q2, at http://www.fhfa.gov/Default.aspx?Page=14). While New York is much better off than most other states in the nation in terms of foreclosure rates, there are a significant number of loans in New York that are in foreclosure or default.

Given the state of the housing recovery, we cannot support this proposal. To impose an additional cost to borrowers, especially those who are creditworthy and seeking to enter or re-enter the housing market at this time would not be equitable or prudent. Such additional costs could damage the housing market in New York and hamper the housing recovery by increasing the cost of homeownership and making credit less available for otherwise creditworthy borrowers.

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In closing, we urge the FHFA to withdraw its proposed g-fee increase. We are open to working with the FHFA to reexamine options that would meet the goals of the Agency while protecting homeowners in New York State.

Sincerely,

Benjamin Lawsky