STATE OF MARYLAND
DLLR
DEPARTMENT OF LABOR, LICENSING AND REGULATION

OFFICE OF THE COMMISSIONER OF FINANCIAL REGULATION
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Baltimore, MD 21202-3651
Mark Kaufman, Commissioner

November 26, 2012

Edward J. DeMarco
Acting Director
Federal Housing Finance Agency
400 Seventh Street SW
Ninth Floor
Washington, DC 20024

Dear Acting Director DeMarco:

The Maryland Office of the Commissioner of Financial Regulation appreciates the opportunity to comment on the Federal Housing Finance Agency ("FHFA")State-Level Guarantee Fee Pricing notice, FR Document 2012-23541, published in the Federal Register September 25, 2012. The proposal to adjust fees to reflect cost of state level foreclosure processes appears to be overly simplistic. For the reasons below, I believe additional evaluation is required before such a charge is appropriate.

A. The background information provided to support the timelines used to evaluate states is inadequate to allow for proper comment or evaluation of the proposed remedy. The proposal notes that the timelines are "derived from an analysis of the Enterprises' actual experience..." Without the detailed information, it is impossible to assess the timelines or whether the changes in state law would impact the problem significantly.

B. The proposed pricing mechanism rewards poor compliance. As the robosigning scandal highlighted, problems in many cases were not a function of new laws, but rather compliance with old laws. Affidavits required in foreclosure filings have always presumed proper procedures to ensure accuracy as they are relied upon by courts. Unfortunately, the foreclosure review conducted by the federal bank regulatory agencies of the nation's largest servicers revealed what it termed "critical weaknesses in foreclosure document preparation processes, and oversight and monitoring of third-party vendors, including foreclosure attorneys."[1] Consent actions followed to ensure proper compliance, as did additional scrutiny by the courts. The extended timelines in judicial states are, at least in part, a byproduct of the effort to ensure compliance. Seeking to accelerate a process that results in taking a person's home should not be done lightly. Yet the proposal turns this process on its head as the states are incented to respond to non-compliance by eliminating consumer protections.

C. The economics are incomplete. As detailed by Cliff Rossi at the University of Maryland School of Business,

[1] Interagency Review of Foreclosure Policies and Practices. Federal Reserve, Office of the Comptroller, Office of Thrift Supervision, April 2011, p. 2.

"The methodology used to determine the state-level add-on fees is overly simplistic, offering no statistical evidence for whether targeted states are truly outliers or not. And the FHFA does not take into consideration any countervailing state-level effects that could reduce losses. For instance, if a state will be punished for its foreclosure laws, why wouldn't it receive credit for its efforts to promote a stable economic environment?" (American Banker, 9/27/12)

D) The proposal ignores the role of the servicer in determining the timeline. Significant responsibility for, and control over, timing remains with servicers and their agents or attorneys. In Maryland, the foreclosure process is initiated with a Notice of Intent to Foreclose (warning letter) which may be sent as soon as 45 days after delinquency. Experience shows that these letters are typically sent at least 150 days after delinquency and, in many cases, months later. This is a servicer decision not a legal requirement. It presumably helps to explain why the proposal cites a 485 day timeline for Maryland which is hundreds of days longer than the legal minimum.

E) Servicers not only control the process, but their performance is NOT uniform. Given the high level of concentration in the industry, varied practices by large servicers drive the data. These variations should be evaluated and addressed by the GSEs and FHFA before any fee is levied on consumers.

Based on data published by the Office of Mortgage Settlement Oversight in connection its September 30, 2012 progress report regarding the National Servicing Settlement, Bank of America accounts for 28% of the loans serviced by the parties (60+% of the market). Yet Bank of America is servicing 65% of the severely delinquent loans (180 days or more delinquent). Maryland level data is similar. This is not a function of state law. Wells Fargo complies with the same laws and maintains a similarly sized portfolio with a similar percentage of loans reported in foreclosure. Yet the percentage of severely delinquent loans not in foreclosure reported in its portfolio is more than 6x that of Bank of America. For whatever reason, whether operational issues or desire not to "flood the market," Bank of America appears to be moving loans to foreclosure far more slowly than others.

As noted above, the Maryland process begins with a Notice of Intent to Foreclose. Just after the FHFA announcement in September, Bank of America submitted more than 10,000 notices, after submitting virtually none for several months. Many of the borrowers were receiving a re-issuance of a prior notice, presumably to ensure legal compliance. For thousands, this was the third such notice as the same pattern had occurred in the spring.

During the 12 months ending September 30, Bank of America accounted for 48% of the notices filed. The borrowers were, on average, more than 500 days delinquent. By contrast, notices filed by the next three largest servicers averaged 180 days delinquent – creating a gap of *almost a full year*. Leaving aside that state law allows the notice to be sent as soon as 45 days after delinquency, this data suggests that a major statistical driver of time is not the law, but who services your mortgage.

Rather than adjust its laws, the above suggests that Maryland could reduce its timeline and eliminate any potential charge under this proposal not by changing its law, but by banning one of the largest servicers in the nation from serving its citizens. The fact that this alternative is precluded by preemption underscores the importance of the FHFA and the GSEs accepting and exercising oversight of the industry versus simply incenting states to lower the bar.

It appears that a significant driver of foreclosure timing lies with the servicers under the oversight of GSEs that it controls. In that light, allocating cost to consumers would more properly be a last, rather than first, course of action.

The proposal concludes with three specific questions.

1) *Is standard deviation a reasonable basis for identifying those states that are significantly more costly than the national average?*

   Standard deviation identifies states that are above or below average, but the entire approach then allocates cost to timelines and assumes full state control. As noted above, state performance in an industry with such concentration is meaningfully impacted by the performance of a VERY limited set of servicers. Their decision making and execution are critical drivers. The FHFA simplistically assumes that all execution across all states is uniform. The data is not provided to support that assumption and the available data suggests such assumptions are highly questionable. After all, the same logic would suggest that market forces would lead the two largest servicers, Wells Fargo and Bank of America, to perform similarly on a national or state level. Yet the data above highlights that Bank of America appears to execute far more slowly than Wells Fargo in Maryland and nationally. In that light, why would we assume that such unexplained (and critical) variance does not exist between states?

   The analysis also excludes other factors that certainly impact costs. As noted in the proposal, ranking "does not reflect any differences that may exist at the state level in the credit quality of the loans..., expected future house price movements, or other factors that may affect the likelihood of default." This raises questions such as those highlighted by Professor Rossi above. As expected cost is a function of the likelihood of default AND the cost of default, it seems that factors impacting likelihood are critical. According to FHFA data, the House Price Index in NY has declined 6% in total since Q1 2008. During the same period, the index in AZ has declined 33%. It seems certain that these price declines have driven costs of default to the GSEs far higher in AZ than NY, regardless of the fact that the NY has a timeline that is twice as long. Yet any factor reflecting such elements is absent.

2) *Should finer distinctions be made between states than the approach described?*

   Given the data limitations, it would seem that finer distinctions are even more problematic. Factors such as servicer performance and likelihood of foreclosure appear to be ignored. In this light, extending such limited analysis would not be appropriate.

3) *Should an up-front fee or credit be assessed on every state based on its relationship to the national average total carrying cost, such that the net revenue effect on the Enterprises is zero.*

   Aside from the data issues already identified. the cost of foreclosure is not the only factor impacting the "net revenue effect on the Enterprises" with respect to a delinquent mortgage or a new mortgage. Yet no other factors or outcomes are considered as noted. According to Professor Alan White at Valparaiso University,

> "Certainly, foreclosure delays will increase losses on a home if it is eventually sold at a foreclosure sale. However, most loans in foreclosure do not result in a foreclosure sale. Loans that end up with almost any other outcome will usually result in lower losses to the investor. For example, a short sale at today's market value will normally produce a smaller loss than a foreclosure sale. Likewise, a payment plan or modification, if it makes any sense, will produce a smaller loss. That's why these alternatives are called loss mitigation. If a foreclosure delay results in loss mitigation, then by definition, losses are reduced, not increased.
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> For FHFA to credibly determine that total losses on delinquent loans are higher in some states than others, it needs to compare not only the losses on foreclosure sales, but also the loss reduction from foreclosure alternatives. For example, a dataset I have examined for non-GSE loans shows that 22% of delinquent New York loans were modified, compared to 12% in speedy foreclosure state Arizona."

For all of the reasons detailed herein, I suggest that the proposed modifications to the G Fees be re-evaluated and postponed until such analysis can be provided.

Respectfully submitted,

Mark Kaufman
Commissioner of Financial Regulation