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December 6, 2012

Massachusetts Division of Banks  
1000 Washington Street, 10<sup>th</sup> Floor  
Boston, MA 02118-6400

Re: Proposed Regulations 209 CMR 18.00  
Conduct of the Business of Debt Collectors and Loan Servicers

On behalf of its low income clients and the Massachusetts Alliance Against Predatory Lending, the National Consumer Law Center<sup>1</sup> submits the following comments to the Division of Banks regarding proposed amendments to 209 CMR 18:00 (Conduct of the Business of Debt Collector and Loan Servicers). These comments specifically address subparts (1) and (2) of section 18.21A (“Mortgage Loan Servicing Practices”).

*The Proposed Regulations Fail to Address the Need for Effective Protections Against Dual Track Foreclosures.* Under the “dual track,” mortgage servicers proceed with a foreclosure and conduct a sale before completing the loss mitigation review process for the borrower. This problem has exacerbated the foreclosure crisis since it began, leading to countless unnecessary foreclosures. The Division of Banks’ Proposed Rule 18.21A(2)(c) prohibits only the *referral or initiation* of a foreclosure while a loan modification application is pending. The regulation says foreclosure process has begun. This is the essence of the “dual track” problem, and the proposed regulation does not address it at all.

The effect of the proposed rule will likely be to promote the worst aspects of the dual track process. By limiting the obligation to review for loss mitigation to the period *before* the foreclosure begins, the regulation implicitly

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<sup>1</sup> The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of sixteen practice treatises and annual supplements on consumer credit laws and bankruptcy, including Truth In Lending, (5th ed. 2003) and Cost of Credit: Regulation, Preemption, and Industry Abuses (3d ed. 2005) and Foreclosures (2d ed. 2007), as well as bimonthly newsletters on a range of topics related to consumer credit issues. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low income people, conducted training for thousands of legal services and private attorneys on the law and litigation strategies to deal predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC’s attorneys have been closely involved with the enactment of all federal laws affecting consumer credit since the 1970s, and regularly provide extensive comments to the federal agencies on the regulations under these laws.

endorses dual track proceedings *after* a foreclosure has begun. Homeowners are most likely to seek out attorney or housing counselor assistance and request loss mitigation reviews after, not before, the referral to foreclosure. Thus, for the very time when homeowners are most likely to make informed decisions about loss mitigation requests, the Division of Banks' proposed rule signals to mortgage servicers that the dual track is fine.

We recommend that the Division of Banks adopt a standard similar to the one the five largest mortgage servicers agreed to in the national 49-state Attorney Generals' settlement earlier this year. That standard requires a foreclosure to stop pending a request for loss mitigation review even after a case has been referred to an attorney. When the servicer receives a complete loan modification application more than 37 days before a foreclosure sale is scheduled and while such loan modification application is pending, the servicer must not proceed with the foreclosure sale. (National AG Settlement Standard Consent Decree Part IV. B.6.). Requiring the cancellation of a scheduled foreclosure sale as long as the borrower submits a loan modification application at least seven business days before a scheduled sale has been the standard rule under the Treasury Department's HAMP program since early 2009. The Division of Banks proposed rule is a significant step back from these two recognized national industry standards.

*The Regulations Should Set Time Limits For Completion of Loss Mitigation Reviews.* Servicers' delays in performing loss mitigation reviews exacerbate the dual track problem. By delaying reviews, servicers often complete foreclosures without providing a decision to a homeowner on a pending application. The proposed Division of Banks' regulation requires a servicer to acknowledge promptly the receipt of the borrower's loss mitigation application documents. (§18.21A(2)(b)). This is a good first step. However, the requirements need to go further. For example, the New York State Department of Financial Services ("DFS") recently promulgated rules that address the same mortgage servicing issues addressed by the Massachusetts Division of Banks proposed servicing rules. A copy of the New York mortgage servicing rules is attached to these comments. The New York rules set a 30-day time limit for the servicer to inform the borrower of a decision on a loss mitigation application. (N.Y. DFS Rules § 419.11.d). The New York regulations also set deadlines for compliance with other homeowner requests to servicers. For example, the servicer must provide a three-year detailed account history within thirty days of the homeowner's request. (N.Y. DFS Rules § 419.7.b)). The servicer must respond within ten days to the homeowner's request for identification of the loan owner (N.Y. DFS Rules § 419.4.d). In addition, upon contact by a homeowner, the servicers must provide complete and accurate descriptions of their loss mitigation procedures, including "[t]he average length of time for a decision to be made regarding a loan modification or other loss mitigation option." (N.Y. DFS Rules § 419.11(c)(2)).

*The Regulations Should Set a Clear Requirement for Loss Mitigation Review.* To the extent that the Division of Banks' proposed rules set a requirement for servicers to review homeowners for loss mitigation options, the requirement is a very qualified one. (Div. of Banks Proposed Rules § 18.21A(2)(a) and (e)). The New York regulations, on the other hand, set clear standards for when loss mitigation review and loan modifications should take place. (N.Y. DFS Rules § 419.11(a) and (b)). For example, the New York regulations unambiguously state, "Servicers that are participating in HAMP shall offer loan modifications in compliance with the HAMP guidelines or directives, including using reasonable efforts to remove prohibitions or

impediments to their authority and to obtain third party consents and waivers that are required, by contract or law, in order to effectuate a loan modification under HAMP.” (N.Y. DFS Rules § 419.11(b)). Instead of requiring servicers to take reasonable steps to overcome barriers to homeowners’ eligibility for modifications, the Division of Banks rules treat all potential restrictions on loan modifications as absolute barriers and encourage servicers to yield to these obstacles. (Div. of Banks Proposed Rules § 18.21A(2)(a) and (e)).

*The Regulations Should Require Escalation Procedures and Provide for Appeals of Loss Mitigation Decisions.* The proposed Division of Banks rules do not mandate any type of review protocol for homeowners to dispute a servicer’s loss mitigation decisions. Both the New York DFS rules and the 49-state Attorney Generals’ settlement direct servicers to implement escalation and review protocols. (N.Y. DFS Rules § 419.11(g); National AG Settlement Consent Decree Model Servicing Standards IV.G). Under the New York DFS rules, homeowners may also appeal directly to the state agency for review of a servicer’s loss mitigation decisions. (N.Y. DFS Rules § 419.d).

*Miscellaneous Issues.* Several other aspects of the New York DFS regulations should be incorporated into the Massachusetts rules. These include a definition of the servicer’s duty of fair dealing (N.Y. DFS Rules § 419.2) and the clear prohibition on certain fees and charges (N.Y. DFS Rules § 419.10). The Division of Banks rules should mandate public disclosures of fees along with clear descriptions of how and when those fees may be incurred.

A major drawback of the nationwide attorney generals’ settlement has been that its servicing standards are not directly enforceable by homeowners. However, by incorporating those standards into state regulations defining unfair and deceptive acts and practices, the Division of Banks can significantly strengthen efforts to enforce the national settlement standards. By recognizing a duty of good faith and fair dealing in servicer conduct, as the New York rules do (N.Y. DFS Rules § 419.2), the Division of Banks can further encourage private enforcement of these important standards. Unfortunately, in their current form the Division of Banks’ proposed regulations are missing out on this critically important opportunity to provide long term remedies to Massachusetts homeowners.

Sincerely,

Geoff Walsh  
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