RUBIN LUBLIN, LLC

Consumer Protection Financial Bureau (CFPB) Mortgage Servicing Rules: 120 Day Rule; Prohibition Against Dual Tracking

Patricia McKenzie, Associate

The Dodd-Frank Wall Street Reform and Consumer Protection Act created the Consumer Protection Financial Bureau (CFPB). The CFPB has the authority to create and enforce regulations for such institutions as HUD, the National Credit Union Administration, the FDIC and the Federal Reserve. In addition to the authority to regulate those institutions and agencies it was given the authority to supervise mortgage servicers.

On January 10, 2014 CFPB Rule X was put into effect. Two important provisions of Rule X are 1024.41(f)(1) the "120 day rule" and the rule which prohibits "dual tracking" –referral for foreclosure when the borrower has submitted and completed a proposal for loss mitigation.

The 120 day rule provides that "A servicer shall not make the first notice of filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage is more than 120 days delinquent." The first notice in non-judicial states is considered to be the date of first publication of the notice of sale. The delinquency date is to be determined by examining the date the last installment was made and the date when the next installment was due, but not made. Upon such occurrence, a breach letter may then be sent to the borrower.

Prohibition of Dual Tracking of Foreclosure and Loss Mitigation: If a borrower has initiated and completed an application for the loss mitigation process, the servicer is obligated to review the proposal and make a decision as to the feasibility of the proposal. If the request for loss mitigation is denied, the borrower must receive a Denial Notice which states the reason for denial. The servicer is prohibited from referring the loan for foreclosure until there is a final determination as to whether loss mitigation is to be denied.

The complete text of the regulations for the…"Amendments to the 2013 Mortgage Rules…" which include Regulation X can be found at the official website at www.consumerfinance.gov/. Although the provisions for compliance with the 120 day rule and the prohibition of dual tracking of loss mitigation and foreclosure are completely defined, there are no specific penalties spelled out for violations of the same which are so included. A discussion of recent penalties levied against violations of various other regulations can be found at another CFPB website: www.consumerfinance.gov/newsroom.

Because Regulation or Rule X only took effect on January 10, there have been no reports regarding penalties imposed for violations of the 120 day rule and the rule against dual tracking of loss mitigation during the foreclosure process. However, cautionary examples can be found in recent decisions against servicers published by the CFPB. Such violations which led to the imposition of judgments included: failure to properly timely apply payments made by borrowers, negligence in maintaining accurate payment records, robo signing of official documents, failure to honor loan modification agreements reached by previous servicers and deceiving borrowers regarding foreclosure alternatives.

In order to avoid any inadvertent errors which might lead to unintended violations of the new rules, it is recommended that servicers establish a tracking system which would monitor both the 120 day rule and their loss mitigation process. The presence of such system(s) would demonstrate that the servicer is genuinely attempting to comply with the regulations imposed by the CFPB and may ameliorate the severity of penalties imposed if such violations should mistakenly occur.