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New York Department of Financial Services Emergency Regulations — Mandatory Forbearances for Residential Mortgage Loans

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On March 21, 2020, New York Governor Andrew Cuomo issued an Executive Order relating to 90-day forbearances for borrowers that are suffering financial hardship as a result of the COVID-19 pandemic. In part, this Executive Order called on the New York Department of Financial Services (DFS) to promulgate emergency regulations in furtherance of the Governor's directive. On March 24, 2020, the New York Superintendent of Financial Services, Linda A. Lacewell, promulgated regulations implementing the Executive Order (Emergency Regulations). Importantly, the Emergency Regulations clarify ambiguities in the Executive Order and demonstrate a focus on consumer and individual forbearances.

The Executive Order (E.O.), Number 202.9, has three components, each of which is effective from March 21, 2020 until April 20, 2020, with the possibility of extension. First, the Executive Order modifies the New York Banking Law, Section 39, Subdivision two. Subdivision two provides that "[w]henever it shall appear to the superintendent [of Financial Services] that any [bank] in this state is conducting business in an unauthorized or unsafe and unsound manner, he or she may, in his or her discretion, issue an order directing the discontinuance of such unauthorized or unsafe and unsound practices[.]" New York Banking Law § 39.2. The Executive Order modifies this provision by declaring that "it shall be deemed an unsafe and unsound business practice if, in response to the COVID-19 pandemic, any bank which is subject to the jurisdiction of the Department shall not grant a forbearance to any person or business who has a financial hardship as a result of the COVID-19 pandemic for a period of ninety days." E.O. 202.9.

The second and third components of the Executive Order authorize the Superintendent to take additional action in support of the forbearance directive. The second part of the Executive Order directs the Superintendent to ensure that banks provide opportunities for consumers to apply for forbearances, and to require that applications be made widely available for consumers and granted in all reasonable and prudent circumstances. The third part of the Executive Order empowers the Superintendent to restrict or modify banks' ability to charge fees for ATM machines, overdraft, and late credit card payments. The Executive Order applies only to state-regulated banking institutions, and therefore not to national banks, federal savings associations, and federally licensed branches of non-U.S. banks.

The Emergency Regulations are published at 3 NYCRR § 119. Section 119 contains eleven subsections, and their contents are summarized below. They apply only to state-regulated institutions, that is, "any New York regulated banking organization as defined under New York Banking Law and any New York regulated mortgage servicer entity subject to the authority of the [DFS]." 3 NYCRR § 119.2(c). As a result, although they apply to New York-licensed banks, trust companies, savings and loan associations, savings banks, and credit unions, they do not apply to state-licensed branches and agencies of non-U.S. banks, which are not “banking organizations.”

- 119.3(a) requires New York banks to make forbearance applications widely available and to grant them for a period of 90 days, subject to safety and soundness requirements. The applications shall be directed only to forbearance of “payment due on ***a residential mortgage*** of a property located in New York” and need only be widely available “to ***any individual*** who resides in New York.” In addition, this requirement is not applicable to mortgage loan obligations that individuals may owe to bodies created by the federal government, including Government Sponsored Enterprises, Federal Home Loan Banks, and the Government National Mortgage Association.
- 119.3(b) provides that any “individual” who can demonstrate financial hardship flowing from the COVID-19 pandemic is entitled to have banks eliminate ATM fees, any overdraft fees, and any credit card late fees, “subject to the safety and soundness requirements” of the particular banking organization.
- 119.3(c) requires all banks to publish instructions for how customers may apply for COVID-19 relief within 10 days of the promulgation of the regulation, *i.e.* by April 7, 2020.
- 119.3(d) covers the qualifications banks should use to determine whether individuals are eligible to receive COVID-19 relief.
- 119.3(e) covers the manner in which banks must process applications for COVID-19 relief.
- 119.3(f) details the factors that DFS will consider in reviewing banks’ denials of forbearance applications as an “unsafe and unsound practice” per the Executive Order. These include the adequacy of the bank’s application-processing procedures; the thoroughness of the review afforded to the application; the payment history, creditworthiness, and the financial resources of the borrower; any state and federal laws or regulations that would prohibit the grant of a forbearance; and the safety and soundness requirements of the bank.
- 119.3(g) states that, during DFS examinations, DFS’s examiners will not criticize banks’ “prudent and reasonable efforts to grant forbearance of any payment due on a residential mortgage.”
- 119.3(h) requires banks to maintain copies of all files relating to implementation of these regulations for seven years from the date of creation, and to make the files available at the DFS’s next examination.
- 119.3(i) encourages banks to seek guidance from DFS regarding any aspect of these regulations.
- 119.3(j) states that § 119 supersedes the two guidance letters issued by DFS on March 19, 2020 (titled, (i) “Guidance to New York State Regulated and Exempt Mortgage Servicers Regarding Support for Borrowers Impacted by the Novel Coronavirus (COVID-19),” and (ii) “Guidance to New York State Regulated Financial Institutions Regarding Support for Consumers and Businesses Impacted by the Novel Coronavirus (COVID-19)”), to the extent there are any inconsistencies.
- Significantly, § 119.3(k) expressly states that, “for the sake of clarity,” these regulations do not apply to “any commercial mortgage or any other loans not described [t]herein.”

The effect of the Emergency Regulations is to clarify, until such time as other regulations are adopted, if at all, that the forbearance relief mandated by the Executive Order relates to residential mortgages and individual consumers. The Emergency Regulations therefore eliminate ambiguities in the Executive Order that could have implicated complex financial transactions. Moreover, the Emergency Regulations indicate that, at this time, the DFS does not intend to affect practices in the commercial real estate lending market.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's Coronavirus (COVID-19) Response Team.

The following Gibson Dunn lawyers prepared this client update: Mylan Denerstein, Matthew Biben, James Hallowell, Mitchell Karlan, Arthur Long and Emil Nachman. Gibson Dunn lawyers regularly counsel clients on the issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. Please feel free to contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Public Policy, Financial Institutions, or other practice groups, or the following authors:

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