

Memorandum

New York Department of Financial Services Implements and Clarifies Loan Forbearance Executive Order

March 25, 2020

Following New York Governor Cuomo's March 21, 2020 Executive Order (the "Executive Order") temporarily requiring (through April 20, 2020) that certain New York state-regulated financial institutions grant 90-day forbearance relief to certain borrowers financially impacted by the coronavirus disease 2019 ("COVID-19") pandemic, the New York Department of Financial Services ("NYDFS") issued emergency regulations (the "Regulations") on March 24, 2020 to implement the Executive Order.

As discussed in our March 23, 2020 memorandum regarding the Executive Order (available [here](#)), the terms of the Executive Order presented several questions as to the ultimate scope of its substantive requirements (including as to the scope of impacted lenders, borrowers, financial products and required forbearance relief), and left open the possibility that a wide swath of financial products could potentially be implicated by a broad reading of the Executive Order's directives. In adopting the Regulations, the NYDFS interpreted and clarified the Executive Order in several important ways pursuant to its broad authority under New York law to interpret and implement provisions of the New York Banking Law. Given the ambiguities and potentially broad scope of the Executive Order on its face, however, it is possible that the Regulations' narrow implementation of the Executive Order could be challenged or otherwise updated by further rulemaking.

Scope of Applicability

The Regulations narrow the applicability of the Executive Order's required forbearance relief in several notable ways, including the following:

- **Scope of Impacted Lenders:** While the Executive Order presented questions as to its applicability to nonbank lenders and New York licensed branches of foreign banking organizations, the Regulations impose forbearance relief measures only on New York regulated "banking organizations" and New York regulated mortgage servicers.

New York regulated "banking organizations" are defined under applicable statute to include only New York state-chartered depository institutions and trust companies, and notably do not include national banks,

out-of-state state banks with branches in New York, or branches of foreign banks (whether New York or federally licensed).¹

- **Scope of Impacted Financial Products:** While the Executive Order presented an interpretive question as to its applicability to commercial mortgage loans and non-mortgage financial products, the required forbearance measures imposed on New York regulated banking organizations and New York regulated mortgage servicers under the Regulations extend only to residential mortgage loans. Further narrowing the scope of the forbearance requirements, the Regulations extend such relief only with respect to residential mortgage loans on property located in New York.

The Regulations expressly do “not apply to any commercial mortgage or any other loans not described” in the Regulations, and also expressly exclude mortgage loans made, insured, or securitized by any U.S. agency or instrumentality, government-sponsored enterprise or Federal Home Loan Bank, as well as the rights and obligations of any lender, issuer, servicer or trustee of such obligations, including servicers for Ginnie Mae.

- **Scope of Eligible Borrowers:** While the Executive Order’s references to a “business” or “entity” suffering from financial hardship presented a question as to the availability of forbearance relief for corporate customers, the Regulations clarify that in-scope lenders are required to make forbearance relief available only to “individual” customers who demonstrate the requisite financial hardship. Further narrowing the scope of the forbearance requirements, the Regulations require that such relief be made available only with respect to individuals who reside in New York.

Forbearance Relief Compliance Requirements

For those New York chartered banking organizations and residential mortgage loans within the scope of the Regulation’s forbearance relief requirements, the Regulations require that such lenders make applications for payment forbearance widely available to eligible borrowers through April 20, 2020. Within 10 business days of the Regulations’ promulgation, in-scope lenders must broadly communicate to customers how to apply for COVID-19 relief and provide the lender’s contact information.²

The Regulations do not specify a basis on which a mortgage borrower must be considered to have a demonstrated financial hardship, but rather leave it to each in-scope lender to develop criteria for individuals to qualify for forbearance relief. The Regulations require that such criteria be clear, easy to understand and reasonably tailored to the lender’s informational needs for purposes of assessing an application for forbearance relief.

In-scope lenders will be required to process and respond to forbearance requests within 10 business days after receipt of all necessary application information, and must develop expedited processing procedures for

¹ Banks, including New York state-chartered and national banks, as well as foreign banking organizations with state or federal branches in New York, are also exempt from New York’s mortgage servicer licensing requirements.

² The required communication may take the form of e-mail, website publication, mass mail, or other similarly broad communication.

forbearance relief applications from borrowers who reasonably demonstrate exigent circumstances. For eligible borrowers who meet the financial hardship criteria, the Regulations require that, through April 20, 2020, in-scope lenders grant 90-day forbearance of any payment due on the borrower's mortgage, subject to the enforcement provisions described below.

Enforcement of Forbearance Relief Requirements

The Executive Order purported to modify subdivision 2 of Section 39 of the New York Banking Law to provide that, through April 20, 2020, an in-scope lender that fails to grant a required forbearance would be deemed to have engaged in an unsafe and unsound business practice. The Regulations interpret this directive, consistent with the scope of the Regulations' general forbearance relief requirements, as applying only to New York regulated banking organizations and New York regulated mortgage servicers with respect to payment forbearance on residential mortgage loans.

Further, the Regulations provide that a denial of forbearance relief will not automatically constitute an unsafe or unsound business practice, but rather the NYDFS will consider a number of factors in assessing whether an in-scope lender should be found to have engaged in an unsafe or unsound practice (including the adequacy of the lender's forbearance application processing procedures, the thoroughness of lender's application review, the borrower's payment history, creditworthiness, and the financial resources, and other applicable law).

Finally, the Regulations provide that NYDFS examiners will not criticize an in-scope lender's prudent and reasonable efforts to grant forbearance of any payment due on a residential mortgage that are consistent with safe and sound practices.

For more information regarding the Executive Order or the Regulations, please contact any member of the Firm's Financial Institutions, Banking and Credit, Litigation, or Bankruptcy and Restructuring Groups, including those listed below.

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