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Determining Eligibility for Exemptions under New York State's "Zombie Properties" Law

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The New York State Department of Financial Services ("DFS") has published the first annual data that will allow a mortgagee to determine whether it qualifies for an exemption under New York State's "Zombie Properties" law, the legislation that imposes certain requirements on lenders with respect to vacant and abandoned properties.

On June 23, 2016, Governor Cuomo signed legislation amending several provisions of New York State law, including Real Property Actions and Proceedings Law ("RPAPL") Section 1308. The new law requires certain mortgagees and servicers of first-lien mortgages authorized to accept payment of the loan to take specified actions to determine if a one-to-four family residential real property unit is vacant and abandoned, and to secure and maintain such a property if it is determined to be vacant and abandoned. The law, commonly referred to as the "Zombie Properties" law, takes effect on December 20, 2016. DFS also recently issued a proposed regulation concerning vacant and abandoned property reporting requirements, which is discussed in our earlier advisory.

As discussed below, to determine whether it qualifies for an exemption under the new law, each mortgagee should divide the number of mortgages that the mortgagee originated, owned, serviced and/or maintained in the state <u>during 2015</u> *by* 212,646. If the calculated *percentage* is less than 0.3%, the mortgagee may qualify for a complete exemption. If the calculated percentage is between 0.3% and 0.5%, the mortgagee may qualify for a partial exemption.

I. Entities Exempt from RPAPL Section 1308's Inspection and Maintenance Requirements

The obligations imposed by RPAPL Section 1308's new inspection and maintenance provisions do <u>not</u> apply to state and federally-chartered banks and credit unions that (i) engage in mortgage origination, mortgage ownership, mortgaging servicing, and mortgage maintenance; <u>and</u> (ii) have less than three-tenths of one percent [0.3%] of the total loans in the state which the mortgagee either originated, owned, serviced, or maintained for the calendar year ending two years prior to the current calendar year.

RPAPL Section 1308's requirements shall only apply <u>prospectively</u> (December 20, 2016, and onward) for all state and federally-chartered banks and credit unions that (i) engage in mortgage origination, mortgage ownership, mortgaging servicing, and mortgage maintenance; <u>and</u> (ii) have *between* three-tenths of one percent [0.3%] and five-tenths of one percent [0.5%] of the total loans in the state which the mortgagee either originated, owned, serviced, or maintained for the calendar year ending two years prior to the current calendar year.

II. Exemption Calculation

For purposes of the exemption calculation, whether a mortgagee had less than 0.3% (complete exemption) or between 0.3% and 0.5% (partial exemption) of the total loans in the state during the calendar year ending two years prior to the current calendar year shall be calculated as follows:

Number of mortgages issued in the state during that calendar year that the mortgagee originated, owned, serviced and/or maintained [*numerator*]

Total Number of Residential Real Property Mortgages Originated in the State During the Calendar Year Ending Two Years Prior to the Current Calendar Year [denominator]

To assist institutions in determining whether either exemption applies to them in 2017, the DFS published, based on available data, the "Total Number of Residential Real Property Mortgages Originated in the State During the Calendar Year Ending Two Years Prior to the Current Calendar Year," that is, in 2015. That "Total Number"—i.e., the denominator in the above equation—is 212,646. Each institution's numerator would be equivalent to the number of mortgages issued in the New York State during 2015 that the mortgagee originated, owned, serviced and/or maintained.

Accordingly, if an institution's numerator equals 637 or less, it will be completely exempt for 2017. If an institution's numerator falls within 638–1063, it will qualify for the partial exemption.

In order to establish an exemption from the requirements of RPAPL Section 1308 (complete or partial), an institution must submit to the Superintendent of Financial Services by December 31, 2016, on the form required by the Superintendent, a statement explaining how the mortgagee satisfies the requirements of the applicable exemption. The prescribed form has not yet been issued by DFS.

III. Impact of Qualifying for an Exemption

If a mortgagee had less than 0.3% of the total loans in the state during 2015 and qualifies for the complete exemption, the inspection, and maintenance obligations imposed by RPAPL Section 1308 will not apply during 2017 (and, presumably, between December 20, 2016, and December 31, 2016).

If a mortgagee had between 0.3% and 0.5% of the total loans in the state during 2015 and qualifies for the partial exemption, the inspection and maintenance obligations imposed by RPAPL Section 1308 will not apply to mortgages that become delinquent before December 20, 2016, the effective date of the law.

All mortgagees should perform the exemption calculation annually each November as soon as DFS releases new data regarding the prior year's loan volume. If, after being subject to the obligations imposed by RPAPL Section 1308 for one or more calendar years, a mortgagee subsequently qualifies for an exemption, then the obligations imposed by Section 1308 shall continue to apply to all residential real property that became vacant and abandoned during a year when the mortgagee was not exempt and for which the mortgagee continues to hold the mortgage. Since qualification for an exemption is determined annually, a mortgagee who determines that it no longer qualifies for an exemption needs to be prepared to commence (or recommence) its obligations under Section 1308 with respect to residential real property that becomes vacant and abandoned, if circumstances so require.

Further Information

If you have any questions regarding the exemption calculation, the “Zombie Properties” legislation, or the DFS’s proposed reporting regulation, please feel free to contact Joseph D. Simon at 516-357-3710 or via email at jsimon@cullenanddykman.com, Elizabeth Murphy at 516-296-9154 or via email at emurphy@cullenanddykman.com, or Adam Barazani at 516-357-3767 or via email at abarazani@cullenanddykman.com.

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- Joseph D. Simon