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New York Department of Financial Services Issues Emergency Regulation Mandating Mortgage Forbearances and Certain Fee Waivers for Individuals Impacted by COVID-19

March 28, 2020

As directed by New York Executive Order 202.9, the New York Department of Financial Services ("DFS") issued an emergency regulation on March 24, 2020 to require regulated institutions[1] to grant a forbearance on residential mortgage loans for 90 days to any individual who demonstrates a financial hardship as a result of the COVID-19 pandemic, and to eliminate overdraft fees, credit card late payment fees and certain ATM fees. These requirements are effective for the duration of the Executive Order, which is through April 20, 2020 (but is subject to extension by the Governor).

Mortgage Forbearances

Executive Order 202.9 issued on March 21, 2020 temporarily modified Section 39(2) of the New York Banking Law to provide that it is an unsafe and unsound business practice for any bank subject to the jurisdiction of DFS to refuse to grant a mortgage forbearance for a period of ninety (90) days to any person or business who has a financial hardship as a result of the COVID-19 pandemic. That Executive Order also directed the DFS Superintendent to adopt an emergency regulation on mortgage forbearances.

The Superintendent has now promulgated the emergency regulation as Part 119 of the New York Banking Regulations. Part 119 applies to residential "mortgage loans"[2] to individual borrowers; it does not apply to commercial mortgages or any other loans not otherwise described in the regulation[3]. Please note that while Part 119 is limited to residential mortgage loans, the scope of modified Banking Law Section §39(2) is broader, covering loans to both persons and businesses. Additionally, the Executive Order applies to any *bank* subject to the jurisdiction of the DFS, while Part 119 applies to regulated institutions which is a broader category of institutions. Further clarification as to this discrepancy between the Executive Order and Part 119 has not been issued.

Part 119 requires regulated institutions to make applications for forbearance of any payment due on a residential mortgage of a property located in New York "widely available" to any individual who resides in New York and who demonstrates financial hardship as a result of the COVID-19 pandemic. Subject to the safety and soundness

requirements, Part 119 requires regulated institutions to grant a forbearance for a period of ninety (90) days to any such individual.

ATM, Overdraft and Credit Card Late Fee Waiver

Subject to safety and soundness considerations, regulated banking organizations[4] must provide the following financial relief to any individual who can demonstrate financial hardship from COVID-19:

- eliminating fees charged for the use of ATMs that are owned or operated by the regulated banking organization;
- eliminating any overdraft fees; and
- eliminating any credit card late payment fees.

In addition to the above, Part 119 expressly encourages regulated institutions to take action, consistent with safe and sound banking practices, to provide additional reasonable and prudent actions that assist individuals who demonstrate financial hardship as a result of the COVID-19 pandemic in any manner they deem appropriate.

Notice to Customers

As soon as reasonably practicable, and in no event not later than April 7, 2020, all regulated institutions must e-mail, publish on their website, mass mail, or otherwise similarly broadly communicate to customers how to apply for COVID-19 relief and provide their contact information.

Evaluation Criteria

Each regulated institution must develop evaluation criteria to determine whether an applicant is qualified for COVID-19 relief. Such criteria must be clear, easy to understand, reasonably tailored to the requirements of the regulated institution, as well as consistent with the goals of Executive Order 202.9 and Part 119, applicable state and federal laws, and the principles of safe and sound banking practices.

Processing and Determination

1. Timing: Regulated institutions must process and respond to requests/applications for COVID-19 relief no later than ten (10) business days after receiving all information they reasonably require to process the application.
2. Expedited Processing: Expedited processing procedures must be developed and implemented for COVID-19 relief for any individual who reasonably establishes an exigent circumstance and requests the expedited processing.
3. Incomplete Applications: For an incomplete application, the regulated institution must promptly communicate to the applicant: (a) the nature of the missing information; and (b) how it can be provided to the regulated institution.
4. Determinations: All determinations must be communicated to the requester/applicant in writing where reasonably feasible and warranted.

- Approval: The approval notice must state that: (a) the request/application was granted and specify (b) what, if anything, the requester/applicant needs to do to secure the relief.

- Denial: If denied, the denial notice must state: (a) the application was denied; (b) the reason(s) it was denied; and (c) that the applicant may file a complaint with the New York State Department of Financial Services at 1-800-342-3736 or http://www.dfs.ny.gov if the applicant believes the application was wrongly denied.

Record Retention

Copies of all files relating to implementation of Part 119 must be kept for a period of seven years from the date of creation.

Further Information

A copy of the emergency regulation is available here. We will continue to monitor this rapidly changing environment and provide updates as necessary. If you have any questions regarding this emergency regulation or a financial institution's obligations during this time, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at jsimon@cullenllp.com, Elizabeth A. Murphy at (516) 296-9154 or via email at emurphy@cullenllp.com, or Mandy Xu at (516) 357-3850 or via email at mxu@cullenllp.com.

[1] Regulated institution means 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 DFS.

[2] Pursuant to Section 590 of the New York Banking Law and Part 419 of the New York Banking Regulations, "mortgage loan" means a loan to a natural person made primarily for personal, family or household use, secured by either a mortgage or deed of trust on residential real property, any certificate of stock or other evidence of ownership in, and proprietary lease from, a corporation or partnership formed for the purpose of cooperative ownership of residential real property or, if determined by the superintendent by regulation, shall include such a loan secured by a security interest on a manufactured home. "Residential real property" means real property located in this state improved by a one-to-four family dwelling used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons, but shall not refer to unimproved real property upon which such dwellings are to be constructed.

[3] Please note that Part 119 does not apply to, and does not affect any mortgage loans made, insured, or securitized by any agency or instrumentality of the United States, any Government Sponsored Enterprise, or a Federal Home Loan Bank, or the rights and obligations of any lender, issuer, servicer or trustee of such obligations, including servicers for the Government National Mortgage Association.

[4] Banking organization means and includes all banks, trust companies, private bankers, savings banks, safe deposit companies, savings and loan associations, credit unions and investment companies.

Practices

- Financial Institutions and Lending

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