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New York State Enacts Statute Requiring Regulated Institutions to Grant Mortgage Forbearance Agreements to Qualified Mortgagors Affected by the COVID-19 Pandemic

June 17, 2020

Governor Cuomo signed a new law today requiring New York State regulated institutions to grant forbearances to qualified mortgagors during a designated period related to the COVID-19 pandemic. The new law, effective immediately, applies to loans to individuals secured by owner-occupied, one-to-four family primary residences located in New York State.

The new law adds Section 9-x to the New York Banking Law ("Section 9-x") and applies to a "regulated institution," which is defined as any New York regulated banking organization[1] and any New York regulated mortgage servicer entity subject to supervision by the Department of Financial Services ("DFS"). The law requires a regulated institution to do the following:

a. make applications for forbearance of any payment due on a residential mortgage of a property located in New York widely available to any qualified mortgagor who, during the covered period, is in arrears or on a trial period plan, or who has applied for loss mitigation; and

b. grant such forbearance of all monthly payments due with respect to the mortgage secured by the qualified mortgagor's primary residence in New York for a period of up to 180 days, with the option to extend the forbearance of such monthly payments for up to an additional 180 days provided that the extension is subject to the mortgagor demonstrating continued financial hardship.[2]

A "qualified mortgagor" is defined as an individual who demonstrates financial hardship as a result of COVID-19 during the covered period and whose primary residence is located in New York State and encumbered by a "home loan" from or serviced by a regulated institution. A "home loan" is a loan to a natural person secured by a one-to-four family dwelling, or a condominium unit, in either case, used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling, as well as a co-operative unit whose shares are encumbered by a loan that otherwise meets the definition of a "home loan."

The "covered period" for purposes of this new requirement is the period from March 7, 2020, until the date on which none of the provisions that closed or otherwise restricted public or private businesses or places of public accommodation, or required postponement or cancellation of all non-essential gatherings of individuals of any

size for any reason in Executive Orders 202.3, 202.4, 202.5, 202.6, 202.7, 202.8, 202.10, 202.11, 202.13 or 202.14, as extended by Executive Orders 202.28 and 202.31 and as further extended by any future Executive Order, issued in response to the COVID-19 pandemic, continue to apply in the county of the qualified mortgagor's residence. The new law also imposes substantive requirements on mortgage forbearance agreements. A mortgage forbearance agreement by a regulated institution pursuant to the new law, Executive Order 202.9, or Part 119 of the DFS regulations to a qualified mortgagor as a result of financial hardship is subject to the following requirements:

a. the mortgagor shall have the option to extend the term of the loan for the length of the period of forbearance (the regulated institution is not permitted to charge additional interest or any late fees or penalties on the forborne payment); or

b. the mortgagor shall have the option to have the arrears accumulated during the forbearance period payable on a monthly basis for the remaining term of the loan without being subject to penalties or late fees incurred as a result of the forbearance; or

c. the mortgagor shall have the option to negotiate a loan modification or any other option that meets the changed circumstances of the qualified mortgagor; or

d. if the mortgagor and regulated institution cannot reasonably agree on a mutually acceptable loan modification, the regulated institution must offer to defer arrears accumulated during the forbearance period as a non-interest bearing balloon loan payable at the maturity of the loan, or at the time the loan is satisfied through a refinance or sale of the property (any late fees accumulated as a result of the forbearance must be waived).

The exercising of any of the above options by a qualified mortgagor cannot be reported negatively to any credit bureau by any regulated institution.

The new law also provides that adherence with Section 9-x is a condition precedent to commencing a foreclosure action stemming from missed payments which would have otherwise been subject to Section 9-x, and a defendant may raise the violation of Section 9-x as a defense to a foreclosure action commenced on the defendant's property when such action is based on missed payments that would have otherwise been subject to Section 9-x.

Section 9-x does not apply to, and does not affect any mortgage loans made, insured, purchased or securitized by any agency or instrumentality of the United States, any government-sponsored enterprise, or a federal home loan bank, or a corporate governmental agency of the state constituted as a political subdivision and public benefit corporation, or the rights and obligations of any lender, issuer, servicer or trustee of such obligations, including servicers for the Government National Mortgage Association.

The obligation to grant the forbearance relief required by Section 9-x is subject to the regulated institution having sufficient capital and liquidity to meet its obligations and to operate in a safe and sound manner. Any regulated institution that determines that it is not able to offer relief pursuant to Section 9-x to any qualified mortgagor must notify DFS within five business days of making such determination. Any such notice must include information about the qualified mortgagor, the reason the regulated institution determined that it was unable to offer any relief, information about the regulated institution's financial condition supporting the regulated institution's determination, and any other information required by DFS. At the same time that the regulated institution provides notice to DFS, it must advise the qualified mortgagor that the application for relief was denied and provide a statement that the applicant may file a complaint with DFS at 1-800-342-3736 or

http://www.dfs.ny.gov if the applicant believes the application was wrongly denied.

If you have any questions regarding Section 9-x or forbearance requirements in general, 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**.

Please note that this is a general overview of the issues addressed and does not constitute legal advice.

Footnotes

[1] "Banking organization" is defined in the Banking Law as a New York State-chartered bank, trust company, private bankers, savings bank, safe deposit company, savings and loan association, credit union and investment company.

[2] If a qualified mortgagor has already received a forbearance pursuant to New York Executive Order 202.9, the time of such forbearance shall be considered as part of the requirement to provide a forbearance of up to 180 days, and any extension thereof.

Practices

- Financial Institutions and Lending

Attorneys

- Joseph D. Simon
- Elizabeth A. Murphy