

Clients & Friends Memo

COVID-19 Update: New York Governor Issues Executive Order on Forbearance Actions

March 23, 2020

On March 21, New York State Governor Andrew Cuomo signed an [executive order](#) declaring that, in light of the COVID-19 pandemic, any bank that is subject to the jurisdiction of the New York State Department of Financial Services (“DFS”) shall be deemed to be engaging in an “unsafe and unsound business practice” under Section 39 of the New York Banking Law if the bank fails to grant a 90-day forbearance to any person or business with a financial hardship as a result of the pandemic. The executive order is already effective and extends through April 20, 2020.

The executive order, by its terms, does not require a forbearance except with respect to a “bank” that is subject to DFS jurisdiction, which would include all state-chartered banks. While not specifically addressed, state-chartered branches and agencies of foreign banks are regulated by the DFS as if they are New York chartered banks, and thus the DFS could view the executive order as applying to New York state-chartered branches and agencies of foreign banks. National banks, as well as federal branches and agencies of foreign banks, should not be subject to the executive order, as such institutions are licensed or organized under federal law and are not subject to Section 39 of the Banking Law.

Separately, with respect to consumer mortgages, the executive order directs the DFS Superintendent to ensure that “any licensed or regulated entities provide to any consumer in the State of New York an opportunity for a forbearance of payments for any mortgage for any person or entity facing a financial hardship due to the COVID-19 pandemic.” The executive order also requires the DFS Superintendent to issue “emergency regulations” to require that applications for forbearance relief be made widely available for affected consumers, and that such applications be granted in “all reasonable and prudent circumstances solely for the period of such emergency.” With regard to fees (including for ATMs, overdraft fees, and credit card late fees), the executive order empowers, but does not explicitly require, the DFS Superintendent to issue regulations to the effect that such fees may be restricted or modified, solely for the period of the emergency, taking into account the financial impact on the New York consumer, the safety and soundness of the licensed or regulated entity, and any applicable federal requirements.

The executive order follows [guidance](#) by the DFS on March 19 urging “all regulated and exempt mortgage servicers” to alleviate the adverse impact caused by COVID-19 on those mortgage borrowers who demonstrate that they are unable to make timely payments, including taking reasonable and prudent actions, and, subject to the requirements of any related guarantees or insurance policies, to support those adversely impacted mortgagors by:

- forbearing mortgage payments for 90 days from their due dates;
- refraining from reporting late payments to credit rating agencies for 90 days;
- offering mortgagors an additional 90-day grace period to complete trial loan modifications, and ensuring that late payments during the COVID-19 pandemic does not affect their ability to obtain permanent loan modifications;
- waiving late payment fees and any online payment fees for a period of 90 days;
- postponing foreclosures and evictions for 90 days;
- ensuring that mortgagors do not experience a disruption of service if the mortgage servicer closes its office, including making available other avenues for mortgagors to continue to manage their accounts and to make inquiries; and
- proactively reaching out to mortgagors via app announcements, text, email or otherwise to explain the above-listed assistance being offered to mortgagors.

By mandating forbearance, the executive order goes beyond recent guidance at the federal banking agency level. For example, on March 22, the banking agencies issued [guidance](#) on loan modifications and encouraged banks to work with affected customers, including by offering payment accommodations and waiving fees.

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Cadwalader is actively monitoring legal and regulatory developments related to the COVID-19 pandemic and its lawyers are available to assist with any questions that you may have. For additional information, please contact the Cadwalader partner with whom you usually work.

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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