

March 25, 2020

NYDFS Superintendent Adopts Emergency Regulation to Implement Executive Order 202.9

NYDFS Superintendent Adopts Emergency Regulation to Implement Relief From Residential Mortgage Payments and Banking Fees for Individuals Experiencing Financial Hardship Due to COVID-19

BACKGROUND

On March 21, 2020, Governor Cuomo issued executive order 202.9 (the “Order”), which empowered the Superintendent of the New York Department of Financial Services (the “DFS”) to promulgate emergency regulations to provide temporary relief to consumers in the State of New York for the forbearance of mortgage payments as a result of the outbreak of the COVID-19 Pandemic¹ and to direct that automated teller machine (“ATM”) fees, overdraft fees and credit card late fees (collectively, the “Banking Fees”) may be restricted or modified during the State disaster emergency.²

On March 24, 2020, the Superintendent promulgated an emergency regulation (the “Emergency Regulation”) to implement the Order.³ The Emergency Regulation sets forth standards and procedures a “Regulated Institution”⁴ must follow as it reviews requests for relief from its customers experiencing financial hardship from COVID-19 and makes determinations on these requests. To the extent that the Emergency Regulation conflicts with two guidance letters previously issued by the DFS on March 19, 2020, the Emergency Regulation prevails.⁵

The Emergency Regulation explicitly does not apply to commercial mortgages or other types of loans.⁶

DISCUSSION

The Emergency Regulation requires Regulated Institutions to provide two forms of relief for individuals experiencing demonstrated financial hardship due to the COVID-19 Pandemic: (i) forbearance of any payment due on a residential mortgage of a property located in New York⁷ and (ii) relief from Banking Fees (together, the “COVID-19 Relief”).⁸ A Regulated Institution must email, publish on its website, mass mail or otherwise similarly broadly communicate to customers how to apply for COVID-19 Relief and provide their contact information, as soon as reasonably practicable and, in no event later than ten business days following the promulgation of the Emergency Regulation.⁹ The COVID-19 Relief is available until April 20, 2020 and may be extended.¹⁰

A. FORBEARANCE ON RESIDENTIAL MORTGAGES

The Emergency Regulation requires that, in addition to adhering to the servicing requirements of Part 419,¹¹ Regulated Institutions 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 demonstrates financial hardship as a result of the COVID-19 Pandemic.¹² Subject to safety and soundness requirements, Regulated Institutions are required to grant such requests for forbearance for a period of 90 days to any such individual.¹³

The Emergency Regulation 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, nor does it impact the rights and obligations of any lender, issuer, servicer or trustee of such obligations, including servicers for the Government National Mortgage Association.¹⁴

B. MODIFICATIONS OR RESTRICTIONS TO BANKING FEES

The Emergency Regulation also directs New York regulated banking organizations to provide financial relief from Banking Fees to any individual who can demonstrate financial hardship due to COVID-19, subject to the safety and soundness requirements of the regulated banking organization.¹⁵ The Emergency Regulation eliminates ATM fees only for ATMs that are owned or operated by the regulated banking organization.¹⁶

The Emergency Regulation provides that Regulated Institutions are not limited to providing only the relief described above and encourages Regulated Institutions to take additional reasonable and prudent actions, consistent with safe and sound banking practices, to assist individuals demonstrating financial hardship due to the COVID-19 Pandemic in any manner they deem appropriate.¹⁷

C. QUALIFICATIONS TO RECEIVE RELIEF

The Emergency Regulation does not define the hardship criteria individuals must meet to qualify for COVID-19 Relief and, instead, directs Regulated Institutions to develop their own clear, easy-to-understand criteria reasonably tailored to the requirements of the Regulated Institution to assess whether it will provide

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relief, consistent with the goals of the Order and the Emergency Regulation.¹⁸ The criteria for granting or denying relief must also be consistent with the requirements of applicable state and federal law and principles of safe and sound business practices.¹⁹

To the extent that an application for relief omits information that the Regulated Institution needs to process the application, the Regulated Institution shall promptly inform the applicant of the nature of the missing information and how the applicant can provide the information to the Regulated Institution.²⁰

D. PROCESSING APPLICATIONS FOR COVID-19 RELIEF

The Emergency Regulation sets forth certain process requirements for reviewing applications for COVID-19 Relief and providing determinations with respect to such applications. Regulated Institutions must process and respond to requests for relief immediately, and in no event later than ten business days after the Regulated Institution receives all the information reasonably needed to process the application.²¹ Regulated Institutions must also develop and implement procedures for the expedited processing of applications for COVID-19 Relief for any individual who reasonably establishes an exigent circumstance and requests expedited processing.²²

All determinations for COVID-19 relief must be communicated to the applicant in writing where reasonably feasible and warranted, and must state whether the application was granted or denied. If the Regulated Institution grants relief, the determination should communicate what the applicant must do to secure the relief.²³ If the application is denied, the determination should provide the basis for the denial and a statement that the applicant may file a complaint with the DFS if the applicant believes the request was wrongly denied.²⁴

E. UNSAFE AND UNSOUND PRACTICES AND DFS EXAMINATIONS

The Emergency Regulation provides that, pursuant to the terms of the Order, Section 39 of the New York Banking Law was modified to provide that it is an unsafe and unsound business practice not to grant a request for forbearance of any payment due on a residential mortgage for a period of 90 days to an individual who has applied for forbearance and demonstrated a financial hardship as a result of the COVID-19 Pandemic.²⁵ In assessing whether a Regulated Institution has engaged in an unsafe or unsound practice by denying a requested forbearance, the DFS will consider the adequacy of the Regulated Institution's procedures to process forbearance applications; the thoroughness of the review of the application; the payment history, creditworthiness and financial resources of the borrower; the application of any state or federal laws that would prohibit the grant of a forbearance and the safety and soundness requirements of the Regulated Institution.²⁶

The Emergency Regulation provides that during an examination of a Regulated Institution, the DFS examiners will not criticize the Regulated Institution's prudent and reasonable efforts to grant forbearance of any payment due on a residential mortgage pursuant to the Emergency Regulation and consistent with

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safe and sound practices.²⁷ The Emergency Regulation directs Regulated Institutions to maintain copies of all files related to the implementation of the Emergency Regulation for a period of seven years from the creation of the document and to make such files available for inspection at the Regulated Institution's next examination.²⁸ Regulated Institutions are also encouraged to seek guidance from the DFS with respect to notices, communications, application processes, reviews and any other provisions of the Emergency Regulation.²⁹

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ENDNOTES

- 1 The Emergency Regulation defines “COVID-19 Pandemic” as “the global outbreak of COVID-19, the disease caused by the novel coronavirus first identified in Wuhan, China, in or about December 2019, that has been detected in increasing numbers in the United States, including the State of New York.”
- 2 Executive Order Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, *available at*: <https://www.governor.ny.gov/news/no-2029-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.
- 3 New Part 119 to Title 3 of the Official Compilation of Codes, Rules and Regulations of the State of New York, Emergency Relief for New Yorkers Who Can Demonstrate Financial Hardship as a Result of COVID-19, *available at*: https://www.dfs.ny.gov/system/files/documents/2020/03/re_new_pt119_nycrr3_text.pdf.
- 4 The Emergency Regulation defines “Regulated Institution” as “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 the [DFS].”
- 5 3 NYCRR § 119.3(j). The DFS’s earlier guidance letters dated March 19, 2020 that are preempted are: (i) Guidance to New York State Regulated and Exempt Mortgage Servicers Regarding Support for Borrowers Impacted by the Novel Coronavirus (COVID-19), *available at*: https://www.dfs.ny.gov/industry_guidance/industry_letters/il20200319_coronavirus_mortgage_relief and (ii) Guidance to New York State Regulated Financial Institutions Regarding Support for Consumers and Businesses Impacted by the Novel Coronavirus (COVID-19), *available at*: https://www.dfs.ny.gov/industry_guidance/industry_letters/il20200319_consumer_support_coronavirus.
- 6 3 NYCRR § 119.3(k).
- 7 3 NYCRR § 119.3(a).
- 8 3 NYCRR § 119.3(b).
- 9 3 NYCRR § 119.3(c).
- 10 3 NYCRR § 119.3(a), (b).
- 11 3 NYCRR § 419.
- 12 3 NYCRR § 119.3(a).
- 13 *Id.*
- 14 *Id.*
- 15 3 NYCRR § 119.3(b).
- 16 3 NYCRR § 119.3(b)(1).
- 17 3 NYCRR § 119.3(b).
- 18 3 NYCRR § 119.3(d)(1).
- 19 *Id.*
- 20 3 NYCRR § 119.3(d)(2).
- 21 3 NYCRR § 119.3(e)(1).
- 22 3 NYCRR § 119.3(e)(2).
- 23 3 NYCRR § 119.3(e)(3).
- 24 *Id.*

ENDNOTES (CONTINUED)

- 25 3 NYCRR § 119.3(f).
- 26 *Id.*
- 27 3 NYCRR § 119.3(g).
- 28 3 NYCRR § 119.3(h).
- 29 3 NYCRR § 119.3(i).

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