

NY Governor Expands Executive Order, NY Department of Financial Services Issues Further Guidance on 90-Day Mortgage Relief Directive in Response to COVID-19 Pandemic

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Note: This Alert updates and supersedes our March 20, 2020, Alert titled “New York Issues Guidance on 90-Day Mortgage Relief Directive Issued as Response to COVID-19 Pandemic.”

On Thursday, March 19, 2020, New York Governor Andrew Cuomo announced a new directive to mortgage servicers to provide 90-day mortgage relief to New York borrowers impacted by the COVID-19 disease pandemic. That same day, the New York State Department of Financial Services (DFS) issued guidance to New York state regulated and exempt mortgage servicers urging that they provide relief to New York mortgage borrowers harmed by the COVID-19 pandemic.

While DFS’s March 19 guidance was nonbinding, on Saturday, March 21, 2020, Governor Cuomo issued Executive Order No. 202.9 (EO 202.9) to expand this directive. EO 202.9 temporarily amends the state banking law and empowers the DFS superintendent to issue emergency regulations to implement some of the provisions of the governor’s initial directive.

The DFS Guidance

DFS’s March 19 guidance urged—but did not mandate—that servicers help “alleviate the adverse impact caused by COVID-19” on New York mortgage borrowers who “demonstrate they are not able to make timely payments” 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 do not affect mortgagors’ 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.

The DFS guidance applies to consumers but is not explicitly limited to consumer loans. The DFS encourages New York’s mortgage servicers and banks to “assist these mortgagors under these unusual and extreme circumstances” and requests that New York servicers take the above-stated steps, deeming them “consistent with safe and sound banking practices” and ones that are “in the public interest and will not be subject to examiner criticism.”

Significantly, DFS did not exercise its rule-making authority but instead issued a “guidance document” under New York’s Administrative Procedures Act. A guidance document is not legally binding and only “provides general information or guidance to assist regulated parties in complying with any statute, rule or other legal requirement.” N.Y. A.P.A. Law § 102. (Note that the DFS has not yet responded to our query about whether it intends to exercise its rule-making authority concerning this subject.)

A copy of the guidance document can be found [here](#).

At the press conference earlier on March 19, Governor Cuomo said, “If you are not working, or working only part time, we will have banks and financial institutions waive mortgage payments for 90 days.” He made clear that servicers would not be asked to waive payments. “We’re not exempting people from the mortgage payments. We’re just adjusting the mortgage to include those payments on the back end,” Cuomo said. The measures will be reassessed at the end of the 90-day period, he said.

Executive Order 202.9: Amendments and Directives

After the DFS guidance was issued, on March 21, 2020, Governor Cuomo issued EO 202.9, which is part of a series of orders relating to the COVID-19 pandemic emergency in New York. In Part 1 of EO 202.9 and under the authority granted the governor by the New York Executive Law to temporarily suspend or modify statutes during a disaster emergency, the governor modified section 39(2) of the Banking Law to require banks to allow a 90-day forbearance to any person or business with a financial hardship, effective immediately and through April 20, 2020.

Ordinarily, section 39(2) of the Banking Law authorizes the DFS superintendent to issue orders to regulated entities, including banks and mortgage servicers, “directing the discontinuance of...unauthorized or unsafe and unsound practices[.]” EO 202.9 temporarily modifies the statute “to provide that it shall be deemed an unsafe and unsound business practice if, in response to the COVID-19 pandemic, any bank which is subject to the jurisdiction of [DFS] shall not grant a forbearance to any person or business who has a financial hardship as a result of the COVID-19 pandemic for a period of ninety days.” With this change, any bank subject to DFS regulation that does not grant 90-day forbearances could be ordered by DFS to do so.

In Part 2 of EO 202.9, the governor issued a two-part directive to the DFS focused more, but not exclusively, on consumer mortgages and other financial services. First, it directs that the DFS superintendent “shall ensure under reasonable and prudent circumstances that any licensed or regulated entities provide ... an opportunity for a forbearance of payments for a mortgage for any person or entity facing a financial hardship due to the COVID-19 pandemic” and adopt emergency regulations to make forbearances “widely available.”

Second, it empowers (but does not mandate) that the DFS superintendent promulgate emergency regulations to direct, for the period of the emergency, that ATM fees, “overdraft fees and credit card late fees, may be restricted or modified in accordance with the Superintendent’s regulation of licensed or regulated entities 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.”

Executive Order 202.9: Scope and Effect

The full scope and applicability of EO 202.9 remains uncertain and gives DFS broad discretion. For example, Part 1, the amendment to the Banking Law encompasses a broad swath of both consumer and commercial obligations, as it requires that forbearances be given to “any person or business who has a financial hardship as a result of the COVID-19 pandemic.” The language is not limited to specific financial products such as loans. Part 2, which directs the forbearance of consumer mortgage payments, applies only under “reasonable and prudent circumstances” and requires the application for forbearance to be granted “in all reasonable and prudent circumstances.” Such broad power and wide discretion will have to be circumscribed by DFS regulation.