

NY Regulated Banks, Mortgage Servicers Must Provide 90 Day Forbearance to Impacted Borrowers, Issue Procedures by April 7

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03.26.2020

On March 21, 2020, New York Governor Andrew M. Cuomo issued Executive Order No. 202.9 (EO 202.9) temporarily modifying state banking law to grant the superintendent of the New York Department of Financial Services (DFS) authority to issue emergency regulations to ensure that regulated entities—such as banks or registered mortgage loan servicers—provide mortgage forbearance opportunities to persons and entities facing “a financial hardship due to the COVID-19 pandemic.”

EO 202.9 modified—effective from March 21, 2020 until April 20, 2020—Section 39(2) of the state banking law to provide that a refusal by any regulated entity to grant forbearances to these impacted parties for a period of 90 days is deemed an unsafe and unsound business practice.

Banks Must Establish Means for Making Forbearance Requests

On March 24, 2020, the DFS superintendent issued an emergency regulation (3 NYCRR 119 or Part 119) requiring banks to establish a mechanism for consumer borrowers to apply for a 90-day mortgage payment forbearance **by April 7, 2020 and respond to any applications within 10 days.**

The Part 119 regulation applies to regulated institutions, defined 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 Department.” Under state banking law, “banking organizations” means and includes “all banks, trust companies, private bankers, savings banks, safe deposit companies, savings and loan associations, credit unions and investment companies.” N.Y. Banking Law § 2(11).

The Part 119 regulation implements the 90-day forbearance requirements called for under EO 202.9, subject to safety and soundness requirements of the regulated institution, and makes the requirements effective until April 20, 2020, unless extended further.

More specifically, regulated institutions must:

- Email, publish on their website, mass mail, or similarly communicate broadly to customers by April 7, 2020, how to apply for COVID-19 relief and provide contact information.
- Develop clear and easy to understand criteria—reasonably tailored to the requirements of the regulated institution—for individuals to qualify for COVID-19 relief.
- Communicate promptly to an applicant if an application omits any information reasonably necessary to process the application about what information is missing and how the applicant can provide the information.
- Process and respond to requests for COVID-19 relief no later than ten (10) business days after receiving all information reasonably required to process the application.
- Develop and implement procedures for the expedited processing of applications for COVID-19 relief for any individual who (1) reasonably establishes an exigent circumstance and (2) requests the expedited processing of the individual's application.
- Communicate all determinations on applications for COVID-19 relief to the applicant in writing where reasonably feasible and warranted. If the application is granted, the communication must state what, if anything, the applicant needs to do to secure the relief. If the application is denied, the communication must state the basis for denial and provide a statement that the applicant may file a complaint with the DFS at 1-800-342-3736 or <http://www.dfs.ny.gov> if the applicant believes the application was wrongly denied.
- Maintain copies of all files relating to the implementation of the Part 119 regulation for a period of seven (7) years from the date of creation, and make such files available for inspection at the time of DFS's next examination of the regulated institution.

Implications of Denying Borrower Forbearance

To determine if a regulated institution has engaged in an unsafe or unsound practice by denying an application for COVID-19 forbearance relief, the DFS will consider the following: (1) the adequacy of the means established to process such forbearance applications; (2) the thoroughness of the review afforded to the application; (3) payment history, creditworthiness, and the financial resources of the borrower; (4) the application of any state and federal laws or regulations that would prohibit the grant of a forbearance; and (5) the safety and soundness requirements of the regulated institution.

It is not clear whether the borrower has a private right of action to enforce a violation of the Part 119 regulation. Generally, under New York law, “[t]o be entitled to sue for a statutory violation, the plaintiff must demonstrate: (1) that he or she is a member of the class for whose benefit the statute was enacted, (2) that the recognition of a private right of action would promote the legislative purpose, and (3) that the creation of such a right would be consistent with the legislative scheme.” *Negrin v. Norwest Mortg., Inc.*, 263 A.D.2d 39, 45–46 (2nd Dept. 1999).

Factor (1) seems to be clearly met in any claim by a consumer borrower. Factor (2) would have to be examined given that the forbearance requirement emanates from EO 202.9 and is not a legislative enactment. Factor (3), however, operates against private enforcement and may provide some comfort to regulated entities. Section 39(2) of the banking law provides for enforcement by the DFS superintendent. Section 39(2) provides that the superintendent may “issue an order directing the discontinuance of such unauthorized or unsafe and unsound practices, and fixing a time and place at which [a regulated entity] may voluntarily appear before him or her to present any explanation in defense.” Section 44 of the banking law sets forth certain fines and penalties for violations of Chapter 2 (which includes section 39(2)), which the superintendent may recover “in a proceeding after notice and a hearing.”

Thus, a court may find that enforcement of Section 39(2) of the banking law is the exclusive jurisdiction of the DFS superintendent. Since EO 202.9 amends Section 39(2)—and the Part 119 regulation was issued under the DFS powers in the banking law and under EO 202.9—a

court may find that enforcement of the 90-day forbearance requirement is in the exclusive jurisdiction of the superintendent also.

Regulatory Exemptions

The Part 119 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—or affect the rights and obligations of any lender, issuer, servicer or trustee of such obligations, including servicers for the Government National Mortgage Association. The Part 119 regulation also does not apply to any commercial mortgage or any other loan not described in the regulation.

Part 119 contains other requirements and provisions not discussed in this writing which are available [here](#).