

Memorandum

New York Governor Cuomo Signs Executive Order Requiring Loan Forbearance

March 23, 2020

On March 21, 2020, New York Governor Andrew Cuomo signed Executive Order Number 202.9 (the “Executive Order”) to temporarily (through April 20, 2020) require that certain New York state-regulated financial institutions grant 90-day forbearance relief to certain borrowers financially impacted by the coronavirus disease 2019 (“COVID-19”) pandemic. As discussed further below, however, the terms of the Executive Order present questions as to the ultimate scope of its substantive requirements.

Background of Executive Order 202.9

At a press conference held on March 19, 2020,¹ Governor Cuomo announced that consumer mortgage payments will be deferred based on financial hardship relating to COVID-19, and that foreclosures will be suspended or postponed for three months. Soon after Governor Cuomo’s press conference, The New York Department of Financial Services (“NYDFS”) issued non-binding industry guidance to “urge” mortgage lenders to support consumer mortgage borrowers who have been adversely impact by the COVID-19 outbreak, including 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.

¹ Available at: <https://www.cnn.com/videos/politics/2020/03/19/andrew-cuomo-new-york-governor-90day-mortgage-relief-vpx.cnn>.

Following news reports and comments by NYDFS spokespersons noting that adherence to the NYDFS guidance was not mandatory on banks and other New York mortgage lenders, Governor Cuomo issued Executive Order 202.9, apparently in an effort to enforce his mortgage borrower relief goals.

The Executive Order was issued under Section 29-A of the New York Executive Law, which allows the governor to temporarily suspend or modify any state statute, rule or regulation during a state disaster emergency, if compliance with such law would prevent, hinder or delay action necessary to cope with the disaster or if such suspension is otherwise necessary to assist in coping with the disaster. Governor Cuomo previously declared a state disaster emergency due to the coronavirus pandemic on March 7, 2020.²

In addition, on March 20, 2020, Governor Cuomo issued New York Executive Order 202.8, which provides that “[t]here shall be no enforcement of either an eviction of any tenant residential or commercial, or a foreclosure of any residential or commercial property for a period of ninety days.” On March 22, 2020, the Chief Administrative Judge issued an Administrative Order (the “Administrative Order”) stating that “effective immediately and until further order, no papers shall be accepted for filing by a county clerk or a court in any matter of a type not included on the list of essential matters” attached to the Administrative Order (“Essential Proceedings”). Foreclosure actions or enforcement of rights in connection with a loan or credit facility are not included in the Essential Proceedings.

General Overview of Executive Order 202.9

The Executive Order consists primarily of two separate but related directives with respect to loan forbearance measures:

- First, the Governor modified subdivision 2 of Section 39 of the New York Banking Law to provide that, through April 20, 2020, if a “bank” subject to the jurisdiction of the NYDFS does not grant a “forbearance” “to any person or business” who has a “financial hardship” as a result of the COVID-19 pandemic, that bank will be deemed to have engaged in an unsafe and unsound business practice.
- Second, the Executive Order directs the NYDFS to ensure that, through April 20, 2020, any “licensed or regulated entities” provide consumers in the state of New York an opportunity for a forbearance of payments on a mortgage loan.³

Scope of Lenders Subject to Executive Order 202.9

The Executive Order’s first directive is only applicable to a “bank” subject to the jurisdiction of the NYDFS. For purposes of subdivision 2 of Section 39, the term “bank” is defined to include only New York banks organized under or subject to the provisions of the New York Banking Law. By contrast, federally chartered national banks,

² https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.pdf

³ In addition to the loan forbearance measures prescribed by the Executive Order, the Executive Order authorized the NYDFS to adopt emergency regulations to restrict or modify ATM fees, overdraft fees and credit card late fees for “licensed or regulated entities.”

New York and federal branches of foreign banking organizations, and other non-New York chartered state banks are not within the scope of the statute’s definition of a “bank.”⁴

As currently in effect, subdivision 2 of Section 39 of the New York Banking Law applies more generally to allow the NYDFS to issue an order regarding unsafe and unsound practices with respect to any banking organization (including any “bank” as well as trust companies, thrifts and credit unions), any bank holding company of a New York bank, foreign banks with a New York-licensed branch, out-of-state state banks with a branch in New York, and a variety of state-licensed nonbank financial companies (such as registered mortgage brokers and servicers, licensed mortgage bankers and mortgage loan originators, and other licensed lenders).⁵ On its face, however, the Executive Order itself appears not to automatically deem the failure to grant forbearance an unsafe and unsound practice with respect to any such licensed or regulated entities other than a New York-chartered bank. As noted above, however, subdivision 2 of Section 39 has more general applicability authorizing the NYDFS to determine that a variety of other licensed or regulated entities are engaged in an unsafe and unsound practice. Accordingly, it is possible that the NYDFS could subsequently use this authority to deem the failure to grant forbearance an unsafe or unsound practice for any such licensed or regulated entity, irrespective of the scope of the Executive Order, or could otherwise take a broader view of the Executive Order’s scope.

By contrast, the Executive Order’s second directive requires the NYDFS to ensure that “any licensed or regulated entity” provide mortgage borrowers facing financial hardship an opportunity for a forbearance. As noted above, New York “licensed or regulated entities” include a number of institutions other than banks, and could include, with respect to mortgage lending, registered mortgage brokers and servicers, licensed mortgage bankers and mortgage loan originators, and other licensed lenders.⁶ Accordingly, on its face, the Executive Order appears to impose on such non-bank licensed or regulated entities at least a requirement to offer mortgage loan forbearance to customers, even if more general failure to grant a loan forbearance by such non-bank entities will not necessarily be deemed an unsafe and unsound practice.

Scope of Borrowers and Products Subject to Executive Order 202.9

By its terms, the Executive Order’s first and second directives also present questions as to the scope of borrowers and credit products for which the intended forbearance relief will apply. Specifically, the Executive Order’s second directive requires the NYDFS to ensure forbearance opportunities are provided to “any *consumer* in the

⁴ The inapplicability of the New York Banking Law’s definition of “bank” to national banks has been confirmed by New York case law. *See, e.g., People v Calandra*, 565 N.Y.S.2d 467 (N.Y. App. Div. 1991). National banks would also likely benefit from federal preemption in the event that New York state authorities were to attempt to impose forbearance requirements on national banks.

⁵ If a New York state bank or other New York licensed or regulated entity is deemed to be engaged in an unsafe and unsound practice under subdivision 2 of Section 39 of the New York Banking Law, the NYDFS may issue an order requiring that entity to discontinue the practice, and must allow the entity an opportunity to provide a defense of the practice. The NYDFS may impose a civil money penalty for an unsafe and unsound practice (including one under Section 39) only after a notice and hearing. The maximum amount for such a penalty is \$5,000 per day that the violation continues, increasing to a maximum of \$25,000 per day for reckless violations and \$250,000 per day for knowing and willful violations.

⁶ While direct lending asset managers may be within the scope of the second directive to the extent “licensed or regulated” by the NYDFS, such direct lenders making large commercial loans are often not licensed in the state of New York under applicable exemptions to the state licensing rules.

State of New York...for a *mortgage*” (emphasis added). This language, together with statements made by Governor Cuomo in his March 19 press conference and the related NYDFS industry guidance, suggest that the forbearance relief provided by the Executive Order may be intended to extend only to individual New York-resident consumers with respect to their residential home mortgage loans.⁷

However, Executive Order’s first directive requires, on its face, that a New York state bank grant forbearance relief to “any person or business” who has a financial hardship as a result of the COVID-19 pandemic, and is not limited by its terms to individual consumer borrowers, mortgage borrowers, or consumer mortgage borrowers.⁸ Thus, a wide swath of loans by New York state bank lenders could potentially be implicated by a broad reading of the Executive Order’s first directive.

Other Questions Presented by Executive Order 202.9

In addition to questions regarding the scope of lenders, borrowers and products covered by the terms of the Executive Order discussed above, the Executive Order presents other questions as to its ultimate impact, including the following:

- **Financial Hardship Criteria:** What will constitute “financial hardship” for a required forbearance? While the Executive Order does not specify criteria for demonstrating the requisite financial hardship, Governor Cuomo in his March 19 press conference listed “not working [or] working only part time” as examples of financial hardship. Similarly, in its March 19 industry guidance prior to the issuance of the Executive Order, the NYDFS alluded to the financial stress on local communities and consumers caused by the fact that “[c]ompanies in certain sectors are already laying off employees.”
- **Financial Hardship Determination:** Another open question is who bears the burden on the issue of whether a loan customer has experienced the requisite financial hardship? The Executive Order suggests that borrowers would need to apply for forbearance using an application to be made “widely available for consumers” pursuant to the NYDFS’ emergency regulations implementing the Executive Order, but does not indicate whether banks or other lenders would need to proactively extend forbearance relief to loan customers. However, in its March 19 industry guidance, the NYDFS urged mortgage lenders to “proactively [reach] out to mortgagors via app announcements, text, email or otherwise to explain the above-listed assistance being offered to mortgagors.”
- **Form of Forbearance:** What form will the mandated forbearance or other relief be required to take? In his March 19 press conference, Governor Cuomo listed as examples of loan relief “waiv[ing] mortgage payments for 90 days,” a “grace period for loan modification,” “no late fees or online payment fees,” and

⁷ We note that New York Executive Order 202.8 applies to foreclosures of “any residential or commercial property” and is not specific as to the type of the borrower.

⁸ A similar question is raised by language in the Executive Order’s second directive requiring, in the same sentence, that the NYDFS ensure opportunities for forbearance be provided “to any consumer” and “for any person or entity” facing financial hardship as a result of the COVID-19 pandemic.

“postponing or suspending any foreclosures.”⁹ As noted above, the NYDFS suggested similar relief measures in its March 19 industry guidance, along with “refraining from reporting late payments to credit rating agencies for 90 days” and “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.”

Because the Executive Order requires that the NYDFS issue emergency regulations to implement parts of the order, it is possible that the NYDFS will include clarifying guidance addressing some of these issues in its forthcoming regulations. The NYDFS has not indicated when, and whether, such guidance will be provided.

Other Agency Forbearance Measures

In addition to the New York Governor’s Executive Order, other agencies and governmental authorities have taken steps in recent days to provide borrower relief in response to the ongoing COVID-19 pandemic. Prior to the Executive Order, the Federal Housing Finance Agency announced that Fannie Mae and Freddie Mac would suspend foreclosures and evictions for at least 60 days due to the COVID-19 national emergency, and that borrowers who have been impacted by the COVID-19 pandemic and whose mortgage loans are owned by Fannie Mae or Freddie Mac would be eligible for a mortgage forbearance plan to reduce or suspend their mortgage payments for up to 12 months.

One day after the issuance of the Executive Order, federal banking agencies (the Federal Reserve, FDIC, OCC, CFPB and NCUA) and the Conference of State Bank Supervisors issued interagency guidance on working with customers affected by the COVID-19 pandemic.¹⁰ The guidance noted that the agencies “encourage financial institutions to work prudently with borrowers who are or may be unable to meet their contractual payment obligations because of the effects of COVID-19,” and “view loan modification programs as positive actions that can mitigate adverse affects [sic] on borrowers due to COVID-19.” Unlike the Executive Order, however, the interagency guidance does not mandate that lenders offer or grant any such loan modifications.

⁹ Although mentioned by Governor Cuomo in his press conference remarks, waiving a payment would not be typically be viewed as a “forbearance” as that term is commonly understood.

¹⁰ Available at: <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20200322a1.pdf>

For more information regarding this Executive Order, please contact any member of the Firm's Financial Institutions, Banking and Credit, Litigation or Bankruptcy and Restructuring Groups, including those listed below.

NEW YORK CITY

Bryce L. Friedman
+1-212-455-2235
bfriedman@stblaw.com

Sandeep Qusba
+1-212-455-3760
squsba@stblaw.com

William T. Russell, Jr.
+1-212-455-3979
wrussell@stblaw.com

Alan C. Turner
+1-212-455-2472
aturner@stblaw.com

Kathrine A. McLendon
+1-212-455-2589
kmclendon@stblaw.com

Daniel S. Levien
+1-212-455-7092
daniel.levien@stblaw.com

Spencer A. Sloan
+1-212-455-7821
spencer.sloan@stblaw.com

HOUSTON

Matthew P. Einbinder
+1-713-821-5620
meinbinder@stblaw.com

Erland Modesto
+1-713-821-5627
emodesto@stblaw.com

W. Andrew Lanius
+1-713-821-5652
andrew.lanius@stblaw.com

WASHINGTON, D.C.

Keith A. Noreika
+1-202-636-5864
keith.noreika@stblaw.com

Adam J. Cohen
+1-202-636-5578
adam.j.cohen@stblaw.com

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, www.simpsonthacher.com.