

DFS Regulation Clarifies Scope of Governor Cuomo's Forbearance Order

Update of March 24, 2020

This afternoon, the New York Department of Financial Services (“DFS”) released an [emergency regulation](#) implementing Governor Cuomo’s March 21, 2020 [Executive Order](#) that had declared it to be an unsafe and unsound banking practice for a bank subject to the jurisdiction of DFS to fail to “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.”

The broad language of this provision of the Order had raised concerns about whether it was meant to apply broadly to all financial transactions (*e.g.*, commercial loans or repos) and whether it would preclude any exercise of contractual remedies if a counterparty were experiencing financial hardship due to COVID-19.

The regulation, issued in the form of a new Part 119 to 3 NYCRR, clarifies that the Order requires forbearance with respect to only residential mortgages of individuals.

- It appears to be limited to mortgages on residences located in New York, held by an individual who resides in New York.
- Commercial mortgages and other loans are explicitly excluded.
- Also excluded are mortgage loans made, insured or securitized by any U.S. government instrumentality, government-sponsored enterprise or Federal Home Loan Bank, or the rights and obligations of any lender, issuer, servicer or trustee of such obligations, including servicers for Ginnie Mae.

The forbearance requirement and other elements of the Order, as implemented in the regulation, apply only to New York regulated “banking organizations” and mortgage servicers (referred to “regulated institutions” in the regulation).

- The relevant definition of “banking organization” in Section 2 of the New York Banking Law includes “all banks, trust companies, private bankers, savings banks, safe deposit companies, savings and loan associations, credit unions and investment companies.”
- It does not apply to national banks located in New York, since they are chartered by the OCC, not New York state.
- DFS has confirmed informally that New York branches of foreign banks are not covered.

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While the Order appeared to state a flat obligation to grant forbearance, the implementing regulation repeatedly refers to providing forbearance consistent with safe and sound practices.

The general forbearance requirements set out in the regulation, which currently apply through April 20, 2020, are that a regulated institution must:

- (i) “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 who demonstrates financial hardship as a result of the COVID-19 pandemic” (such information must be made available as soon as reasonably practicable, but within 10 business days of today); and
- (ii) “subject to the safety and soundness requirements of the regulated institution, grant such forbearance for a period of ninety (90) days to any such individual.”

In addition, subject to safety and soundness requirements, banking organizations must eliminate (i) ATM fees, (ii) overdraft fees, and (iii) credit card late payment fees, for individuals who can demonstrate financial hardship from COVID-19.

The regulation also describes certain requirements with respect to processing applications for relief and an institution’s development of criteria for qualifying for relief. Institutions must respond to requests for relief in not less than 10 business days from receipt of reasonably required information.

In assessing whether a regulated institution has engaged in an unsafe and unsound practice by denying an application for forbearance, DFS will consider the adequacy of the application process, the thoroughness of review, payment history, creditworthiness and financial resources of the borrower, any state or federal law that would prohibit forbearance, and the safety and soundness requirements of the institution.

The regulation provides that institutions will not be criticized in exams for prudent and reasonable efforts to grant forbearance.

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Cleary Gottlieb has established a [COVID-19 Resource Center](#), providing information and thought leadership on developing events. In addition, we have a [COVID-19 Task Force](#) that is acting as a repository for practical solutions, best practice and issue-spotting to help our clients by sharing market experience, insight and advice from across our global presence.

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