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COVID-19 Temporary Relief: New York-Regulated Banks Required to Grant 90-Day Forbearances for Some Borrowers

Certain businesses and individuals facing financial hardship as a result of the COVID-19 pandemic were granted a temporary reprieve from the consequences of failing to make loan payments to banks that are subject to the jurisdiction of the New York State Department of Financial Services (DFS), pursuant to an executive order signed by New York Governor Andrew Cuomo on March 21.

The executive order consists of two separate directives. The first modifies subdivision two of Section 39 of the New York Banking Law. It provides that it shall be an "unsafe and unsound" banking practice if any "bank" subject to the jurisdiction of the DFS does not grant a 90-day forbearance period to any person or business experiencing a financial hardship as a result of the COVID-19 pandemic. The second directs the DFS to ensure that consumers in the State of New York are provided the opportunity for a forbearance on mortgage loan payments to any "licensed or regulated entities" through April 20, 2020.

The first directive by its terms applies to "any bank which is subject to the jurisdiction of" the DFS. While that term would generally be expected to include only New York state banks, subdivision two of Section 39 of the Banking Law applies more broadly to a laundry list of organizations, including bank holding companies, out-of-state banks with a branch located in New York, registered mortgage brokers and servicers, mortgage bankers and other licensed lenders. Accordingly, read more broadly, the first directive could be interpreted to apply to these organizations and not limited to New York state banks.

The second directive is applicable to "any licensed or regulated entity." This broad language is applicable to an expansive category of licensed lenders making mortgage loans to New York borrowers, including non-bank lenders. Thus, it is clear that any licensed entity making mortgage loans to New York borrowers will be required to offer mortgage loan forbearance, although it is not so clear that the failure to do so will be deemed an unsafe and unsound banking practice under the first directive.

Banks licensed or organized under federal law, including national banks and federal branches and agencies of foreign banks, are not subject to either directive under federal preemption principles.

The first directive applies to any person or business who has experienced a financial hardship as a result of the COVID-19 pandemic and thus is not limited to consumer borrowers, mortgage borrowers or consumer mortgage borrowers. The second directive, however, applies only to New York consumers who have a mortgage. Based on the text of this directive and comments made by Gov. Cuomo, it is reasonable to believe that it is only applicable to New York resident consumers with respect to their residential mortgage loans.

The executive order does not specify whether banks are required to grant borrowers a full moratorium on payments during the forbearance period, or are simply required to negotiate some type of forbearance, which could be a partial reduction of payments, or payment of interest only, for example. In addition, the phrase "financial hardship as a result of the COVID-19 pandemic," is vague and open to various interpretations.

In addition, the order grants to the DFS the power to promulgate emergency regulations modifying ATM, overdraft and credit card late fees, but it does not require such actions. It remains to be seen how DFS will seek to implement the executive order through regulations, and if such regulations will expand or contract the scope of the relief.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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