
March 25, 2020

New York DFS Issues Emergency Regulation on Mortgage Forbearance and Certain Fees in Response to COVID-19 Pandemic

On March 24, 2020, the New York Department of Financial Services (“DFS”) issued an emergency regulation entitled “Emergency Relief for New Yorkers Who Can Demonstrate Financial Hardship as a Result of COVID-19.”¹ The regulation provides for two forms of COVID-19-related relief. First, DFS-regulated banking organizations and DFS-regulated mortgage servicers are required to grant—subject to the “safety and soundness requirements” of each institution—a ninety-day forbearance on residential mortgage payments for individuals who reside in New York and demonstrate financial hardship as a result of the COVID-19 pandemic. Second, DFS-regulated banking organizations are required to eliminate certain ATM, overdraft, and credit card late fees for such customers, but this mandate is also subject to safety and soundness requirements.

DFS promulgated this emergency regulation pursuant to Governor Cuomo’s Executive Order 202.9, which was issued on March 21, 2020 and which we discussed in a prior memorandum.² The regulation is effective through the date prescribed in the executive order, which is April 20, 2020 but is subject to extension by the Governor.

Unfortunately, the regulation does not bring clarity to an issue that has been much-discussed in recent days: the scope and effect of the first provision of the Governor’s executive order, which deems it an “unsafe and unsound” business practice for DFS-regulated banks to fail to grant ninety-day forbearances to any “person or business” experiencing financial hardship resulting from the pandemic, without limitation as to the categories of loans or other obligations. Although the regulation discusses and applies that provision in the context of residential mortgages, the regulation does not on its face purport to narrow the breadth of the provision in the executive order. At a minimum, however, DFS has shown that its first priority is providing relief to individuals.

We summarize the emergency regulation below and discuss its implications. For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss’s [Coronavirus Resource Center](#).

Requirement to Grant Ninety-Day Forbearances for Residential Mortgage Payments in Certain Circumstances

The emergency regulation defines “regulated institutions” to mean any DFS-regulated “banking organization as defined under New York Banking Law” and any DFS-regulated mortgage servicer.³ The reference to DFS-regulated “banking organization” appears to exclude DFS-licensed branches of non-U.S. banks.

Regulated institutions are required to make applications for forbearances “widely available,” and they are required to grant ninety-day forbearances in the following circumstances:

- the forbearance is for “any individual who resides in New York”;
- the individual “demonstrates financial hardship as a result of the COVID-19 pandemic”;
- the forbearance is for “any payment due on a residential mortgage of a property located in New York”;
- the forbearance is consistent with the “safety and soundness requirements of the regulated institution”; and
- the mortgage at issue is not specifically excluded from the scope of the regulation.
 - The regulation provides that it does not apply to or 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 the rights and obligations of any lender, issuer, servicer, or trustee of such obligations, including servicers for the Government National Mortgage Association.”
 - The regulation also provides, “for the sake of clarity,” that it does not apply to any “commercial mortgage or any other loans not described herein.”

These provisions appear to be intended to implement the second provision of Governor Cuomo’s executive order. Although that provision refers to “consumers,” it also refers to providing 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.” Notably, despite the reference to “entity,” the DFS emergency regulation applies only to individuals.

Eliminating ATM, Overdraft, and Credit Card Late Fees in Certain Circumstances

The emergency regulation requires that each DFS-regulated banking organization provide the following financial relief to any “individual who can demonstrate financial hardship from COVID-19, subject to the safety and soundness requirements” of the institution:

- Eliminating fees charged for the use of ATMs that are owned or operated by the banking organization;
- Eliminating any overdraft fees; and
- Eliminating any credit card late payment fees.

Notably, the regulation requires the elimination, rather than forbearance, of these fees.

Regulated institutions are encouraged, consistent with safe and sound banking practices, to take additional steps to assist individuals who demonstrate financial hardship as a result of the pandemic.

Application Procedures and Other Provisions

The emergency regulation includes a number of other provisions, including:

- Criteria
 - The criteria developed for individuals to qualify for COVID-19 relief shall be “clear, easy to understand, and reasonably tailored” to the requirements of the regulated institution to assess whether it will provide COVID-19 relief “consistent with the goals of Executive Order 202.9 and this regulation, applicable state and federal law, and the principles of safe and sound business practices.”
- Applications
 - Regulated institutions shall, as soon as reasonably practicable and in no event later than ten business days, broadly communicate—by e-mail, website, mass mail, or otherwise—to customers how to apply for COVID-19 relief.
 - If an application for relief is missing needed information, a regulated institution shall promptly communicate with the applicant.

- Applications shall be processed “immediately” and in no event later than ten business days from receiving all information reasonably required. Regulated institutions shall implement procedures for expedited processing for individuals who establish exigent circumstances.
- All determinations shall be communicated in writing “where reasonably feasible and warranted.” If an application is denied, the notification must include the reason and must provide that complaints may be filed with DFS.
- Record Retention
 - All files relating to the implementation of this regulation must be retained for a period of seven years.

Deeming the Failure to Provide Forbearance an Unsafe and Unsound Business Practice

The regulation states that, pursuant to the Governor’s executive order, section 39 of the New York Banking Law was modified to provide that it shall be an “unsafe and unsound” business practice if a covered entity “shall not grant a forbearance of any payment due on a residential mortgage for a period of ninety (90) days to any individual who has applied for such a forbearance and demonstrated a financial hardship as a result of the COVID-19 pandemic.” The regulation further provides that, in assessing whether a denial of a forbearance qualifies as an unsafe and unsound business practice, DFS will consider the following factors: the adequacy of the process established by the regulated institution for processing such applications; the thoroughness of the review of the application; the payment history, creditworthiness, and the financial resources of the borrower; the application of any state and federal laws or regulations that would prohibit the granting of a forbearance; and the safety and soundness of the regulated institution.

The regulation’s treatment of “unsafe and unsound” business practices raises the question whether DFS intended to narrow—without comment—the scope of the first provision of the Governor’s executive order. Recall that the first provision of the executive order deems an “unsafe and unsound” business practice the failure of a DFS-regulated bank to grant a 90-day forbearance to any “person or business” who has financial hardship resulting from the COVID-19 pandemic. As we discussed in our prior memorandum, this provision is quite broad on its face, including because it applies to individuals and companies alike and does not appear to limit the types of obligations as to which the forbearance applies.⁴ As we noted, DFS may attempt to narrow the scope of the provision in the course of enforcing it. The breadth of this forbearance provision has already provoked concern that it is being used by counterparties to sophisticated financial products to resist payment to DFS-regulated banks.⁵

The regulation’s discussion of the executive order’s first provision creates uncertainty as to how DFS plans to implement the first provision. Although not entirely clear, it appears that, rather than purporting to somehow revise and narrow the first provision of the Governor’s executive order, DFS was likely addressing

the applicability of that first provision in the context of residential mortgages, which was the main subject of the emergency regulation. Still, the thrust of DFS's regulation shows that it views individual consumers as the first priority and suggests that in implementing the first provision of the executive order DFS may follow that approach. Also, DFS's regulation indicates that in determining whether an unsafe and unsound practice has been committed, DFS will take into account the bank's consideration of traditional factors such as the borrower's history, creditworthiness, and financial resources, and other safety and soundness concerns.

Absent specific DFS guidance, it seems likely that banks and other entities will continue to debate the scope and practical effect of the executive order's first provision.

Implications and Next Steps

Importantly, under the emergency regulation, the obligation to grant forbearances for residential mortgage payments and waive certain fees is subject to a regulated institution's "safety and soundness" requirements. This means that DFS-regulated banking organizations and mortgage servicers may still consider traditional financial factors in making determinations as to COVID-related relief; this relief is not meant to imperil the financial condition of these regulated institutions. The regulation, however, requires that the criteria used be "clear, easy to understand, and reasonably tailored" to safety and soundness considerations. This indicates that DFS may well scrutinize and even take action against banks and mortgage servicers that take an overly conservative approach.

Regulated institutions would be well advised to move quickly to develop policies and procedures for ensuring compliance with the regulation:

- This includes, as noted above, developing "clear, easy to understand, and reasonably tailored" criteria for determining which customers are eligible for relief. In addition to appropriate safety and soundness standards, these criteria should include standards for determining which customers are experiencing "financial hardship" as a result of the COVID-19 pandemic. Application workflows and deadlines should be defined that reflect the specific prescriptions of the regulation.
- In addition, relevant employees need to be trained on these new policies, procedures, and criteria, and this training must not only happen quickly, but in the context of a crisis that has disrupted normal work routines throughout New York.
- Depending on its size, scale, and customer base, a regulated institution should consider ongoing compliance monitoring measures to identify potential non-compliance with the regulation. These measures may include tracking consumer complaints related to denial of COVID-19 relief.

- As an early step, regulated institutions are required to design and “broadly communicate” announcements of the availability of COVID-19 relief, and employees and any call-center personnel must be prepared to answer questions from customers. These communications and scripts should be vetted to avoid statements that could be characterized as deceptive or misleading.

We will continue to monitor the Governor’s and DFS’s responses to the pandemic.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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¹ The emergency regulation, which will be added to DFS regulations as new Part 119, is available at https://www.dfs.ny.gov/system/files/documents/2020/03/re_new_pt119_nycrr3_text.pdf.

² Our memorandum on Governor Cuomo’s executive order is available at <https://www.paulweiss.com/media/3979634/24mars20-dfs-covid-19-guidance.pdf>. The executive order is available at https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.9.pdf.

³ A search may be performed on DFS’s website to determine whether an entity is DFS-regulated: <https://myportal.dfs.ny.gov/web/guest-applications/who-we-supervise>.

⁴ See note 2 for our prior memorandum.

⁵ See, e.g., Erik Schatzker, “Banks Blindsided as N.Y. Virus Relief Order Roils Contracts,” Bloomberg (March 24, 2020), available at <https://www.bloomberg.com/news/articles/2020-03-24/banks-blindsided-as-new-york-virus-relief-order-roils-contracts>.