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## **Gov. Cuomo Requires New York-Regulated Banks to Grant Forbearances in Light of the COVID-19 Pandemic and Issues Related Directives to NY DFS**

On Saturday, March 21, 2020, Governor Cuomo issued Executive Order 202.9, entitled “Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency.”<sup>1</sup> The order deems the failure of a New York-regulated bank to grant a forbearance to an individual or business in certain circumstances as an “unsafe and unsound” business practice. The order also contains a directive to the New York Department of Financial Services (“DFS”) to ensure that mortgage forbearances are granted in certain circumstances and a directive authorizing DFS to issue emergency regulations modifying ATM, overdraft, and credit card fees.

The provisions in the Governor’s executive order are effective thorough April 20, 2020, although it is possible that the Governor may take further action to extend their duration. These provisions represent sweeping and potentially unprecedented steps to provide emergency relief to companies and individuals from mortgage and other payments. Below, we summarize the provisions of the Governor’s order, identify some interpretive questions regarding their scope, and discuss some practical considerations for banks and other entities that may be affected.

For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss’s [Coronavirus Resource Center](#).

### **1. Modification of the New York Banking Law to Deem Failure to Grant Forbearances under Certain Circumstances an “Unsafe and Unsound” Business Practice**

#### *Scope of the Requirement*

The order invokes the Governor’s authority under Section 29-a of Article 2-B of the Executive Law to temporarily “suspend or modify any statute, local law, ordinance, order, rule or regulation” during a state disaster emergency if compliance with such a legal requirement would “prevent, hinder, or delay” action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster emergency.

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Under this authority, the Governor modified subdivision two of Section 39 of the New York Banking Law for the period running from the date of the executive order (March 21, 2020) to April 20, 2020. That provision, according to the order, is:

hereby modified to provide that it shall be deemed an unsafe and unsound business practice if, in response to the COVID-19 pandemic, any bank which is subject to the jurisdiction of the Department shall not 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 order does not define the key terms used or provide further guidance as to how this temporary provision should be applied. The following are the key elements of the temporary provision:

- **Entities subject to the provision:** The temporary provision applies to “any bank which is subject to the jurisdiction of” DFS. This appears to encompass both banks that are chartered by DFS and also branches of out-of-state or non-U.S. banks, which are licensed by DFS.
- **Who benefits from the provision:** The temporary provision deems it an “unsafe and unsound business practice” if a covered bank “shall not 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.”
  - On its face, the provision benefits both individuals and companies. There may be some question as to whether the provision applies to non-profit entities and other organizations (given the term “business”), although the intent of the provision was likely to cover such entities.
  - The provision applies to “forbearances,” without specifying the kinds of underlying obligations to which the “forbearance” might apply. A “forbearance” typically refers to an obligee’s forbearing from exercising remedies that it would otherwise have an immediate right to exercise (*e.g.*, to declare an event of default on a loan, or to make a call for additional collateral). It is not clear whether the provision is intended to sweep so broadly, however, and, in the course of enforcing the provision, DFS may limit its application to certain kinds of obligations. There may also be debate as to the terms of the forbearance that is contemplated by the provision.
  - There is also some interpretive uncertainty regarding which persons and businesses should be understood to have a “financial hardship as a result of the COVID-19 pandemic.” “Financial hardship” seems to be something less than the inability to make payments on the obligation in question, but how this line should be drawn is not readily clear.
  - There may also be causation-type questions regarding whether an individual’s or company’s financial hardship is “as a result of” the pandemic or “as a result of” some other cause.

- “[F]or a period of ninety days”: “[F]or a period of ninety days” likely modifies “forbearance,” meaning that the forbearance in question must be granted for a period of ninety days. (It does not seem sensible to read “for a period of ninety days” to modify the financial hardship resulting from the COVID-19 pandemic.)
- Effective dates of the provision: As noted, by the executive order’s terms, this temporary provision is effective from the date of the executive order (March 21, 2020) through April 20, 2020. Further action by the Governor could extend the effective dates of the modified provision for additional thirty day periods as long as the state of emergency persists.

### *Consequences of Failing to Grant a Required Forbearance*

Under the temporary provision, the failure to grant a required forbearance shall be deemed an “unsafe and unsound” business practice under subdivision 2 of section 39 of the New York Banking Law. That subdivision authorizes DFS to issue an “order” to a regulated entity to “discontinue” any unauthorized or unsafe and unsound business practice and to fix a time for the entity to appear to present any explanation in defense of its actions.<sup>2</sup> Thus, DFS appears to be empowered to issue an order to a DFS-regulated bank to grant a forbearance required by the temporary provision that DFS believes was incorrectly denied.

If a DFS-regulated bank does not comply with such an order, DFS may pursue an enforcement action under section 44 of the New York Banking Law. Under Section 44(2)(a), the DFS superintendent may, after notice and a hearing, require any DFS-regulated bank to pay a penalty for any violation of, *inter alia*, any “final or temporary order issued pursuant to section [39] of this article.”<sup>3</sup> Section 44(2)(b) provides that the penalty for each violation shall not exceed \$5,000 for each day during which such violation continues. If, however, DFS finds aggravating circumstances enumerated in Section 44(3) and Section 44(4)—including reckless or knowing conduct—the penalties may be up to \$25,000 per day or even higher.

### *Practical Considerations*

It seems important for DFS to provide guidance on some of the interpretive questions discussed above and the consequences of violating the temporary provision. However, given the exigencies of the public health crisis, the timing and comprehensiveness of any such guidance is uncertain.<sup>4</sup> Absent DFS guidance, banks should expect that DFS will interpret the provision to apply in a broad fashion. Banks that interpret the provision narrowly or technically may risk adverse DFS action.

DFS-regulated banks would be well advised to quickly develop procedures for ensuring their compliance with this temporary provision, including guidelines for determining which persons and entities qualify for forbearance and training to relevant employees.

## **2. Directive to DFS to Promulgate Emergency Regulations Concerning Mortgage Forbearances**

The Governor's executive order also invokes his section 29-a authority to issue two directives to DFS for the period from the date of the order through April, 20, 2020. The first directive reads as follows:

The Superintendent of DFS shall ensure under reasonable and prudent circumstances that any licensed or regulated entities provide to any consumer in the State of New York 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. The Superintendent shall promulgate emergency regulations to require that the application for such forbearance be made widely available for consumers, and such application shall be granted in all reasonable and prudent circumstances solely for the period of such emergency.

### *Scope of the Directive*

This directive seems to sweep more broadly than the temporary modification to section 39 described above in that this directive applies to "any licensed or regulated entities." Thus, it appears to apply beyond banks to potentially encompass other entities, such as mortgage servicers.

However, the directive is narrower than the temporary modification described above insofar as it is focused on forbearances with respect to mortgages as opposed to forbearances more generally. It also appears to be narrower because it limits the right to a forbearance to those circumstances where it is "reasonable and prudent."

The directive refers to "any person or entity." As a result, it seems to benefit not just individuals, but companies and other organizations that have mortgages.

And unlike the temporary modification to section 39, which prescribes a ninety-day forbearance period, this directive to DFS seems to suggest that the forbearance period must last "solely for the period of such emergency" (although what this phrase modifies is not completely clear).

### *Practical Considerations*

It is unclear how DFS will go about implementing and enforcing this directive. For example, how will DFS define "reasonable and prudent" circumstances? And under what statutory authority will DFS "ensure" that such forbearances are granted by regulated entities? For any failure to provide a forbearance, what sort of violation will this be considered for purposes of DFS's enforcement authorities?

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It is uncertain whether the Governor's directive to DFS has any binding effect on regulated entities until DFS takes action to implement it. As a practical matter, DFS will need to provide guidance before regulated entities have a clear understanding of what is required. As DFS begins to take action to implement this directive, regulated entities would be well advised to move quickly to put in place procedures for ensuring compliance.

**3. Directive Empowering DFS to Promulgate Emergency Regulations Concerning ATM, Overdraft, and Credit Card Fees**

The Governor's second directive to DFS, which also lasts through April, 20, 2020, reads as follows:

Further, the Superintendent shall be empowered to promulgate emergency regulations to direct that, solely for the period of this emergency, fees for the use of automated teller machines (ATMs), overdraft fees and credit card late fees, may be restricted or modified in accordance with the Superintendent's regulation of licensed or regulated entities taking into account the financial impact on the New York consumer, the safety and soundness of the licensed or regulated entity, and any applicable federal requirements.

This directive empowers—but, read literally, does not command—DFS to issue emergency regulations modifying or restricting ATM fees, overdraft fees, and credit card late fees. Such regulations would seem to impact DFS-regulated banks.

As with the other directive to DFS, it is unclear under what statutory authority DFS would take these actions, and how violations of such regulations would be treated. Regulated entities are left to wait and see whether and how DFS follows up on this authority.

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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- <sup>1</sup> The executive order is available at [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.9.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.9.pdf).
- <sup>2</sup> New York Banking Law section 39(2). Specifically, subdivision 2 of section 39 of the New York Banking Law provides that, whenever it shall appear to the DFS superintendent that any enumerated entity (including DFS-regulated banking organizations and out-of-state banks or foreign banking organizations that have DFS-licensed branches in New York) “is conducting business in an unauthorized or unsafe and unsound manner,” the superintendent may, in his or her discretion, “issue an order directing the discontinuance of such unauthorized or unsafe and unsound practices, and fixing a time and place at which such [enumerated entity] may voluntarily appear before him or her to present any explanation in defense of the practices directed in said order to be discontinued.”
- <sup>3</sup> New York Banking Law section 44. DFS brings these enforcement actions in an administrative proceeding, which would ultimately be subject to judicial review.
- <sup>4</sup> As noted below, the Governor’s order requires DFS to promulgate emergency regulations concerning mortgage forbearances, but this is only a subset of the area covered by the temporary provision.