

March 30, 2020

**CLIENT ALERT -**

**NEW YORK ISSUES EMERGENCY REGULATION COVERING FINANCIAL  
HARDSHIP FROM COVID-19**

Dear Clients and Friends:

Last week Governor Andrew Cuomo signed Executive Order 202.9 (the “Order”) in response to COVID-19 and its potential impact on New York consumers. Among other things, the Order mandates, in pertinent part, “. . . 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 [of Financial Services] (the “DFS”) 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 by its terms is not self-executing; it requires a finding of financial hardship resulting from COVID-19 before the forbearance requirement takes effect. On March 24 DFS issued an emergency regulation to implement the Order (3 NYCRR Part 119; see Press Release 20-29, March 24, 2020) (“Part 119”). This Client Alert is intended to assist affected New York financial institutions in understanding and complying with Part 119; it is not intended as legal advice with respect to any particular situation.

The Order and Part 119 were obviously drafted under intense time pressure, and as a result there are some drafting issues that will presumably be resolved over time. For example, the Order states that it applies to “any bank that is subject to the jurisdiction [of the DFS]”; however, it appears that the Governor was using the term “bank” generically and intended it to have application to a broad array of DFS-licensed and regulated entities. Further, the Order modifies Section 39(2) of the Banking Law, which gives the Superintendent authority to act to prevent unsafe and unsound banking practices, to provide that it is an unsafe and unsound practice to not grant forbearance to certain distressed borrowers – seemingly turning the statute on its head. Part 119 gives the lender (and the DFS) an out from this apparent dilemma by stating that the required actions remain “subject to the safety and soundness requirements of the regulated institutions.” But how the two seemingly disparate definitions of unsafe and unsound can be resolved in a particular case is not entirely clear.

The Order states that it covers any person “or business.” Presumably the DFS could subsequently issue additional emergency regulations to benefit businesses; but Part 119 itself applies only to “individuals.”

It should be noted that the Order and Part 119 deal with institutions chartered or licensed under, and subject to, New York law. As such, they do not apply to national banks or federally-chartered savings banks, savings & loans, or credit unions. The federal (and other state) regulators have issued interagency guidance encouraging such institutions to work with borrowers affected by COVID-19 and relieving certain reporting and capital requirements (<https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200322a.htm>), but to date have not mandated that they do so. They have, however, indicated that institutions subject to the Community Reinvestment Act (“CRA”) will be viewed favorably in their next CRA examination, to the extent they have acted to meet community credit needs during the crisis.

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## **The Emergency Regulation**

Part 119 applies to “Regulated Institutions,” defined to include State-chartered banks, savings banks, savings & loans and credit unions, and State-licensed mortgage lenders and servicers. It provides two forms of relief: forbearance on residential mortgage loans, and elimination of certain ATM and other fees. Both forms of relief require the recipient to demonstrate financial hardship related to COVID-19.

## **Residential Mortgage Forbearance**

Part 119 requires Regulated Institutions:

1. to make applications for residential mortgage forbearance “widely available” to “any individual” residing in the State “who demonstrates financial hardship as a result of the COVID-19 pandemic”; and
2. “subject to the safety and soundness requirements of the regulated institution,” to grant forbearance for 90 days to “any such individual.”

Again, the regulation was drafted hastily; while it seems to require the individual to demonstrate financial hardship as a condition to receiving an application, presumably the intent is that he or she will be given an application upon request, which the Institution will use to determine whether financial hardship exists, based on criteria specified in Part 119.

Part 119 explicitly does not apply to commercial mortgages, or to any other type of loan. It also does not apply to residential mortgages made, insured or securitized by any agency or instrumentality of the federal government, any government-sponsored enterprise (e.g., Fannie Mae and Freddie Mac) or a Federal Home Loan Bank, and does not affect or impair the rights of servicers or trustees for any such obligations.

The relief is available only to New York residents. Thus, for example, it would not be available to a Florida resident who also owns a home in New York. It also apparently would not be available for a mortgage on a Florida vacation home owned by a New York resident, since the property is not in New York. What about a second home owned in New York by a person whose primary residence is also in New York? We would assume this is covered, unless the DFS issues guidance to the contrary. We would also assume that it applies to a loan secured by a cooperative apartment, even though not technically a “mortgage.”

## **Fee Relief**

The Order and Part 119 also provide that, as long as the Order is in effect, Regulated Institutions will eliminate ATM, overdraft, and credit card late fees, for “any individual” (i.e., apparently not limited to NY State residents as is the mortgage forbearance relief) who can demonstrate financial hardship from COVID-19, “subject to the safety and soundness requirements of the regulated banking organization.”

- The ATM fee relief applies only to ATMs owned and operated by the bank. Thus, if you use the ATM of another (“host”) bank, that bank may not charge the fee; but apparently your own bank may do so, since it does not own or operate the ATM machine that was used. The host bank will have to have a means to identify cardholders of other banks who have been granted relief; presumably this will require involvement of the sharing networks.

- A bank must eliminate overdraft fees for qualifying individuals. However, Part 119 does not mandate allowing overdrafts and does not eliminate interest thereon. Nor does it prohibit the bank from refusing to honor an overdraft. We would caution against attempting to modify a “fee” to make it appear as “interest.”
- A bank may not charge late fees on credit cards for qualifying individuals. Again, waiver of interest is not required, only the fee, if any, for late payment.

### **Criteria for Relief and Procedures**

The Order refers to “financial hardship” resulting from COVID-19. Part 119 does not specify what constitutes “financial hardship”; rather, Regulated Institutions must promptly develop their own criteria, which must be “clear, easy to understand, and reasonably tailored” to the legal and regulatory requirements otherwise applicable. To the extent that an application omits information needed by the Regulated Institution, it must promptly notify the applicant what is required and how to provide it. Once complete, applications must be acted upon within 10 days. The Institution must also establish an expedited procedure for applicants who request, and reasonably demonstrate a need for, expedited treatment.

### **Supervisory Considerations**

Part 119 carries supervisory implication for Regulated Institutions. As noted, the Order defines a refusal to provide forbearance as an unsafe and unsound practice; in determining whether an institution has engaged in such a practice by denying relief, the DFS will consider the adequacy of its application procedures; the thoroughness with which the application was reviewed; the borrower’s payment history and creditworthiness; and the effect of any other federal or state law that might prohibit granting relief. During an examination, the Institution will not be subject to criticism for any prudent and reasonable effort to comply with Part 119. Records related to Part 119 implementation must be retained for seven years and made available to the DFS.

Very truly yours,

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