

Client Alert

Update: DFS Clarifies New York State Executive Order 202.9

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Yesterday afternoon, the New York State Department of Financial Services (“DFS”) issued an emergency regulation implementing the directives of New York State Executive Order 202.9 (the “[Order](#),” available [here](#)), which requires New York-regulated financial institutions to grant loan forbearances to borrowers affected by the COVID-19 pandemic. The regulation (“[Section 119](#),” available [here](#)) clarifies a number of ambiguities regarding the scope and breadth of the original Order’s applicability. In particular, as interpreted by the DFS in Section 119, Executive Order 202.9 does not apply to New York-licensed branches or agencies of foreign banks, or to transactions other than residential mortgages of properties located in New York, resolving questions raised in an earlier Milbank [Client Alert](#) addressing the Order.

Below, we provide additional analysis of the Order and Section 119 and explain the Order’s applicability in light of the newly issued regulation. We are continuing to monitor developments and will issue additional commentary as more information becomes available.

Background and Summary of Executive Order 202.9

New York Banking Law (“[Banking Law](#)”) § 39 grants the DFS Superintendent authority to discontinue “unauthorized or unsafe and unsound” business practices by DFS-regulated entities defined in Banking Law § 2, including “banking organizations,” “bank holding companies,” “registered mortgage brokers,” and others.

The Order – issued Saturday, March 21, 2020 – modifies Banking Law § 39 to expand the definition of an “unauthorized or unsafe and unsound” business practice to include failure by “bank[s]” to grant “person[s] or business[es]” loan forbearances. The Order’s first directive provides:

- “Subdivision two of Section 39 of the Banking Law 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 [i.e., 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 does not define a “forbearance,” and the term is not explicitly defined in the Banking Law. However, DFS indicates on its [website](#) that a forbearance includes situations where a lender “may agree to temporarily agree to reduce or suspend monthly payments for a period of time,” where “[at] the end of the forbearance period regular payments will resume and the missed payments will be added on.”

The Order’s second and third directives address consumer mortgages and credit card and banking fees. Specifically, the Order:

- directs the Superintendent of the New York Department of Financial Services to “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”; and
- empowers the Superintendent of the New York Department of Financial Services 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 . . . [.]”

The modification is effective from March 21, 2020 through April 20, 2020.

The Order came two days after DFS issued [guidance](#) to the heads of all New York State-regulated financial institutions urging those institutions, “in their capacity as creditors to businesses of all sizes, to work with and provide accommodations to their borrowers during this unprecedented global emergency to the extent reasonable and prudent, including refraining from exercising rights and remedies based on potential technical defaults under material adverse change and other contractual provisions that might be triggered by the COVID-19 pandemic.”

Answered: What “Banks” and Loans Does Executive Order 202.9 Cover?

As we discussed in our earlier Alert, a possible reading of the Order’s first provision prior to the issuance of Section 119 was that it directed the DFS Superintendent to hold New York licensed branches or agencies of foreign banks to have engaged in an “unsound business practice” if they denied 90-day loan forbearances to borrowers suffering hardship as a result of COVID-19.¹ However, as discussed further below, Section 119 – issued by DFS itself, the agency charged with enforcing the Order – indicates the DFS Superintendent interprets the Order to apply only to New York regulated banking organizations and mortgage servicers (a group that excludes New York licensed branches and agencies of foreign banks), and only in the context of residential mortgages.

Summary of Section 119

DFS issued Section 119 pursuant to its power to interpret and enforce the Order. Section 119 requires “New York regulated institutions” to:

“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,” see Section 119.3(a); and

¹ In brief, the Order did not define what “banks” it required to grant forbearances, or what “persons and businesses” it permitted to obtain them. For our full analysis, please see the Client Alert at [this link](#).

“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.” See *id.*

Section 119 also construes the Order’s modification of Banking Law § 39 as follows:

“Pursuant to the terms of Executive Order 202.9, Section 39 of the Banking Law was modified to provide that it shall be an unsafe and unsound business practice if, in response to the COVID-19 pandemic, any regulated institution 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, as described herein.” See Section 119(f).

Analysis: Executive Order 202.9 Does Not Apply to Foreign Branches and Agencies

Because the DFS is ultimately charged with implementing the Order, its interpretation thereof should be accorded significant weight. Although Section 119 does not explicitly address the meaning of “banks” in the Order’s first directive, it suggests that DFS reads the Order’s consumer mortgage directive as an instruction to implement, through emergency regulation, the first directive expanding the Banking Law’s definition of “unsafe and unsound conduct.” In other words, DFS appears to interpret the first and second directives as essentially one and the same, not two separate directives covering separate entities and conduct.

Section 119 should provide New York licensed branches and agencies of foreign banks significant comfort that they will not be required to grant forbearances pursuant to Executive Order 202.9, and should provide state-regulated institutions generally comfort that they will not be required to grant forbearances outside the context of residential mortgages of properties located in New York.

We are continuing to monitor this rapidly developing situation and will issue additional updates as more information becomes available. Please feel free to discuss any aspect of this Client Alert with your regular Milbank contacts or any member of our Litigation & Arbitration and Financial Institutions Regulation Groups.

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