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COVID Law Imposes Forbearance and Loss Mitigation Requirements

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On June 17, 2020, Governor Andrew Cuomo signed S8428/A10530 and S8243-C/A10351-B into law. Collectively, in relevant part, the legislation creates N.Y. Banking Law § 9-x, which relates to residential forbearances as a result of COVID-19.

Who does the legislation apply to?

The requirements of the legislation generally apply to "regulated institutions," which are defined as regulated banking organizations and New York regulated mortgage servicers subject to supervision by the Department of Financial Services.

Who qualifies for relief and what are the time periods the legislation applies to?

The relief granted by the legislation is limited to an individual whose primary residence is located in New York and is encumbered by a home loan, who has suffered a financial hardship related to COVID-19 during the covered period. For purposes of these requirements, the covered period begins on March 7, 2020. It runs "until the date on which none of the provisions that closed or otherwise restricted public or private businesses or places of public accommodation, or required postponement or cancellation of all non-essential gatherings of individuals of any size for any reason in Executive Orders 202.3, 202.4, 202.5, 202.6, 202.7, 202.8, 202.10, 202.11, 202.13 or 202.14, as extended by Executive Orders 202.28 and 202.31 and as further extended by any future Executive Order, issued in response to the COVID-19 pandemic continue to apply in the county of the qualified mortgagor's residence."

However, the legislation does not apply to mortgage loans made, insured, purchased, or securitized by any agency or instrumentality of the United States, any government-sponsored enterprise, or a federal home loan bank, or a corporate governmental agency of the state of New York constituted as a political subdivision and public benefit corporation. As a result, among others, loans purchased by Fannie Mae or Freddie Mac, VA loans, and FHA loans are not subject to the requirements. Similarly, loans being serviced for Ginnie Mae are not subject to these requirements.

Not all borrowers in New York will qualify for relief at the same time.

One thing to note is how this legislation may affect borrowers, and therefore servicers, differently depending on what region of New York that person lives in. As it relates to the phasing out of "stay at home orders," New York is taking an approach based on various factors on a region by region basis, and each county is assigned to a specific region. As a result, some regions may not be subject to the referenced Executive Orders at the same time that others will. Accordingly, there is potential for the determination of whether a borrower qualifies for the relief provided for by the legislation to require a county-by-county analysis or a servicer to adopt policies and procedures to address those borrowers whose loans are still in the covered period.

What type of relief does the legislation provide for?

For loans subject to the legislation, a servicer is required to provide borrowers a forbearance of up to 180 days, with the option of extending the forbearance for up to an additional 180 days. The extension may be conditioned on the borrower demonstrating continuing financial hardship. The forbearances may be backdated to March 7, 2020, but the maximum length is not required to be longer than 180 days, subject to the additional 180-day extension.

In addition, the legislation dictates the form of long-term loss mitigation relief associated with loans that have been forborne under the legislation, EO 202.9 or 3 NYCRR Part 119. It allows the borrower, not the servicer or mortgagee/holder, to choose the repayment option. Such forbearances are subject to the following repayment options, at the ***choice of the borrower***:

- Extending the term of the loan for the length of the period of forbearance. Additional interest and late charges cannot be assessed on the forborne payments;
- Having the arrears payable on a monthly basis for the remaining term of the loan, without late charges being assessed on the forborne payments;
- Negotiating a loan modification or other option that meets the mortgagor’s changed circumstances; or
- Deferral of arrears accumulated during the forbearance period as a non-interest bearing balloon loan payable at maturity or at the time the loan is satisfied through refinance or sale. Late charges are waived as a result of the forbearance.

A borrower exercising one of these repayment options cannot result in negative reporting to consumer reporting agencies.

Legislation does not apply to institutions without sufficient capital and liquidity.

Finally, the requirement to provide forbearance relief does not apply to institutions without sufficient capital and liquidity to meet its obligations and to operate in a safe and sound manner. If an institution determines it is unable to provide relief, however, the institution is required to, among other things, provide notification to the Department of Financial Services within five business days of making such determination. In addition, the servicer is required to provide notification to the borrower informing them that the application for relief was denied and that the applicant may file a complaint with the Department of Financial Services.

Please reach out to one of the authors or any member of McGlinchey’s Consumer Financial Services Compliance team for help or questions.

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