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DFS Issues Guidance on New Law Requiring Mortgage Forbearances

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The New York State Department of Financial Services ("DFS") has issued guidance on Banking Law Section 9-x, the new law that requires New York State regulated institutions to grant mortgage forbearances to qualified mortgagors impacted by the COVID-19 pandemic.

Section 9-x was enacted on June 17, 2020 and applies to: (1) "qualified mortgagors," who are defined as individuals with residential mortgage loans secured by owner-occupied, one-to-four family primary residences located in New York State who can demonstrate financial hardship as a result of COVID-19 during the "covered period" (i.e., in a county where an Executive Order regarding COVID-19 continues to apply); and (2) "regulated institutions" which include any New York regulated banking organization and DFS-supervised mortgage servicer entity. Our prior advisory on Section 9-x can be found here.

DFS has now issued frequently asked questions ("FAQs") to address certain issues under Section 9-x, including mortgage forbearance and repayment options. Please see a brief summary of the FAQs below.

General

Financial Hardship

Section 9-x does not define "financial hardship as a result of COVID-19." In assessing whether a borrower is facing a financial hardship, regulated institutions should establish reasonable standards, which takes into consideration a borrower's resources, income, expenses and the uncertain duration of the impact of the pandemic.

Applicability

New York regulated banking organizations and any New York regulated mortgage servicers must comply with Section 9-x. A "banking organization" means any bank, trust company, private banker, savings bank, safe deposit company, savings and loan association, credit union, and investment company chartered by DFS. "Banking organization" does not include New York-regulated branches or agencies of foreign banks. A "regulated mortgage servicer" means any entity that is registered with DFS to engage in mortgage servicing activities pursuant to Article 12-D of the Banking Law. Section 9-x also applies to mortgage bankers, brokers, and New York-regulated branches and agencies of foreign banks that engage in mortgage servicing activities that are exempt from the

New York's servicer registration requirement.

Section 9-x does not apply to banks and credit unions that are licensed by another state or a federal authority. The FAQs explain, however, that the "regulation [sic] does apply to a Credit Union Service Organization (CUSO) of a federal credit union where the mortgage servicing activities are under the responsibility of the CUSO." Additionally, Section 9-x does not apply to federally backed mortgages.

Mortgage Forbearance

Forbearance of "All Monthly Payments Due"

Section 9-x requires the forbearance of all components of a mortgage payment that the qualified mortgagor is obligated to pay to the lending institution, including escrow payments (as applicable).

Forbearance Period

- Subject to the safety and soundness requirements of the regulated institution, Section 9-x requires a forbearance up to 180 days be granted to qualified mortgagors, but does not require the forbearance to last 180 days.
- The requirements of Section 9-x may be satisfied by extending an existing forbearance agreement pursuant to New York State Executive Order 202.9, or entering into a second forbearance agreement that complies with the requirements of Section 9-x.
- The forbearance period commences when the forbearance is granted to the borrower. If a qualified mortgagor previously received a forbearance under Executive Order 202.9 of 2020 and wants to extend the period of the forbearance under Section 9-x, the forbearance period shall be deemed to have commenced on the date that the forbearance was granted pursuant to the requirements of New York State Executive Order 202.9.

Amendment of Existing Agreements

While Section 9-x does not require the amendment of existing COVID-19-related forbearance agreements, it does provide that any qualified mortgagor who received a forbearance agreement pursuant to Section 9-x or New York State Executive Order 202.9, is entitled to select one of the repayment options specified in Section 9-x(3). To the extent that a qualified mortgagor who previously received a COVID-19-related forbearance asks to repay a forbearance using one of the options listed in Section 9-x(3), a regulated institution is required to conform the forbearance agreement.

Repayment Options

Options

Section 9-x(3) allows a qualified mortgagor to select one of three repayment options for a COVID-19 related forbearance. Below are the specific options detailed in Section 9-x(3)(a-d).

- Extend the term of the loan for the number of months the loan was in forbearance;
- Repay the arrears accumulated during the forbearance period on a monthly basis;

- Negotiate a loan modification or any other options that addresses the qualified mortgagor's changed circumstances; or
- Only if the qualified mortgagor and the lender cannot reasonably agree on a loan modification, the regulated institution must offer to defer the amount of the forbearance into a non-interest bearing balloon loan due at the maturity of the loan or at any time when the loan is satisfied through a refinance or sale.

Regulated institutions must inform qualified mortgagors who receive a COVID-19 related forbearance of such options. Furthermore, regulated institutions may not prioritize or encourage qualified mortgagors to select one repayment option over any other, or place them into loan modifications that are not affordable or sustainable.

Treatment of Interest

- Capitalizing the interest due as part of each monthly forborne payment and charging interest on such capitalized amount are prohibited.
- Although Section 9-x(3)(b) does not specifically prohibit charging additional interest, the clear intent of the legislation is to make repayment options available to borrowers that do not result in capitalizing interest into the existing principal balance or compounding interest.

Repayment for Loan Extension

For a loan extension under Section 9-x(3)(a), the term of the loan will be extended for the length of the forbearance and the forborne payments repaid during the extension. Qualified mortgagors who select this option would resume payments under their existing amortization schedule once the forbearance period is over with the forborne payments to be paid in equal monthly installments during the extended term of the loan.

Further Information

The FAQs on New Banking Law Section 9-x is available here. If you have any questions regarding Section 9-x, the FAQs or forbearance requirements in general, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at jsimon@cullenllp.com, Kevin Patterson at (516) 296-9196 or via email at kpatterson@cullenllp.com, Elizabeth A. Murphy at (516) 296-9154, or via email at emurphy@cullenllp.com, or Mandy Xu at (516) 357-3850 or via email at mxu@cullenllp.com.

Please note that this is a general overview of the issues addressed and does not constitute legal advice.

Practices

- Regulatory and Compliance

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