Bond
INFORMATION MEMO
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New State Requirements and Federal Guidelines Impacting Financial Institutions

In response to the COVID-19 emergency disaster, New York Governor Cuomo has issued a series of emergency measures affecting New York State regulated or licensed banking entities. On Friday, March 20, 2020, Governor Cuomo issued Executive Order 202.8 prohibiting the foreclosure of any commercial or residential property for a period of 90 days. One day later, on Saturday, March 21, 2020, Governor Cuomo issued Executive Order 202.9 requiring New York State chartered financial institutions to provide forbearance to any person or business experiencing a financial hardship as a result of the COVID-19 pandemic for a period of 90 days. New York State regulated or licensed entities are also required to provide forbearance of mortgage payments under reasonable and prudent circumstances for the period of the disaster emergency. Governor Cuomo also authorized new emergency regulations restricting ATM fees, overdraft fees and credit card late fees for the period of the emergency.

More specifically, Executive Order 202.9 makes it an unsafe and unsound business practice if any bank subject to the jurisdiction of the New York State Department of Financial Services fails to grant a forbearance to any person or business experiencing a financial hardship as a result of the COVID-19 pandemic for a period of 90 days. This is a broad requirement that—on its face—appears to apply to any type of loan granted by a New York State chartered bank to any person or business. In addition, the Banking Law cited in the Executive Order applies to all state chartered banking organizations, which include state chartered commercial banks, credit unions and thrifts. The statute language has yet to be clarified.

This Executive Order further directs the Superintendent of the Department of Financial Services to ensure that licensed or regulated entities provide New York State consumers with an opportunity to forbear mortgage payments for any person or entity facing a financial hardship due to the COVID-19 pandemic for the duration of the emergency. To that end, the Executive Order directs the Superintendent to issue emergency regulations requiring that forbearance applications be made widely available for consumers and that such applications will be granted in all reasonable and prudent circumstances solely for the period of the emergency. Such regulations have not yet been adopted or proposed.

The Executive Order also empowers the Superintendent to issue emergency regulations restricting or modifying the fees charged for the use of ATMs, overdraft fees and credit card late fees solely for the period of the emergency, taking into account the financial impact on the New York State consumer, the safety and soundness of the licensed or regulated entity and any applicable federal requirements. Such regulations have not yet been adopted or proposed.

Aspects of these emergency measures may also apply to subsidiaries of national banks, federal thrifts and federal credit unions to the extent any such institution has an affected New York State licensed or regulated subsidiary, such as a mortgage loan servicer.

In addition to the New York Executive Orders, the Federal and State banking regulators[1] jointly issued the *Interagency Statement on Loan Modifications and Reporting for Financial Institutions Working with Customers Affected by the Coronavirus* (the Statement). This guidance is intended to permit borrowers and financial institutions to implement

1 Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, Office of the Comptroller of the Currency, Consumer Financial Protection Bureau, and the Conference of State Bank Supervisors, including the New York State Department of Financial Services.

strategies in an effort to mitigate the financial impact of COVID-19. The Statement encourages financial institutions to enter into loan modifications with both consumer and commercial borrowers that are or may be unable to meet their contractual obligations due to the effects of COVID-19. These loan modifications may be in the form of short-term (e.g., six months) modifications, including fee waivers, payment deferrals, extensions of repayment terms or other delays in payment that are considered insignificant.

Typically, entering into such loan modifications as a result of a borrower's inability to make loan payments may result in the loan being categorized as a troubled debt restructuring (TDR) in accordance with U.S. Generally Accepted Accounting Practices. TDRs are included in a financial institution's non-performing assets, and higher levels of TDRs generally have a negative impact on the institution's credit quality metrics and may result in adverse regulatory scrutiny. However, the Statement provides that "the agencies have confirmed with staff of the Financial Accounting Standards Board (FASB) that short-term modifications made on a good faith basis in response to COVID-19 to borrowers who were current prior to any relief, are not TDRs." Further, any federal or state mandated modification or deferral program would not cause a loan to be categorized as a TDR. As discussed above, New York State has mandated such a program.

The Statement also addresses past due reporting with respect to these loan modifications. Any loans that have been granted a payment deferral as a result of COVID-19 will not be designated as past due because of the deferral, provided that such loans are not otherwise reportable as past due. If a financial institution modifies a loan and agrees to defer payments, such loan will not be considered past due during the deferral period.

In summary, this interagency statement provides financial institutions with the flexibility to modify loans and avoid reporting such loans as past due. However, financial institutions may have a limited window to implement such loan modification programs prior to being required to report COVID-19 impacted borrowers as delinquent.

The attorneys at Bond, Schoeneck and King are available to help you determine the effect of the New York Executive Orders on your financial institution and its business, and any options your financial institution may have to address the impact of these changes. Further, Bond has the expertise to assist you in implementing the loan modification programs permitted by the interagency statement. Please contact Dori K. Bailey, chair of the Financial Institutions Regulatory Practice, for further assistance. Our Government Relations Practice is also available to assist clients in providing comments to New York State in advance of the forthcoming regulations discussed above.

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