

New York State Enacts New Procedures for Residential Mortgage Forbearance Plans

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On June 17, 2020, New York Governor Andrew Cuomo signed Senate Bills [8243C](#) and [8428](#) into law, adding Section 9-x to the Banking Law. The section creates new procedures for mortgagors and servicers in relation to forbearances of residential mortgage payments affected by the COVID-19 pandemic.

Previously, on March 30, 2020, Governor Cuomo issued [Executive Order 202.8](#) barring the “enforcement” of eviction or foreclosures for ninety days. On May 7, 2020, Governor Cuomo followed up with [Executive Order 202.28](#), which [barred the “initiation”](#) of certain evictions and foreclosures for 60 days from June 20, 2020. During that time, the legislature undertook efforts to codify forbearance requirements for borrowers affected by the COVID-19 pandemic, which resulted in Banking Law 9-x that became effective immediately upon signature on June 17, 2020.

Covered Period and Defining Qualified Mortgagor, Home Loan, and Financial Hardship

Section 9-x creates a new forbearance program for certain mortgagors during a “covered period,” which is defined as beginning on March 7, 2020 and running until there are no restrictions applicable to non-essential gatherings of any size for the county of the mortgagor’s residence. New York’s 62 counties are divided among [10 regions](#), and restrictions are being lifted on a regional basis, with the northern regions progressing faster than New York City and Long Island. Thus, the end date for the covered period will vary across the state.

A “qualified mortgagor” is defined in Section 9-x(1)(b), which incorporates language found in [RPAPL 1304](#), requiring the borrower be a natural person and the loan be a “home loan” as defined by RPAPL 1304(6)(a). A

qualified mortgagor must also “demonstrate financial hardship as a result of COVID-19 during the covered period.”

Determining whether a loan is a “home loan” is frequently the subject of litigation. The mortgaged property (including cooperative apartments) must be “used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower’s principal dwelling.”

Although a borrower’s current residence may be different, thus exempting the loan from the forbearance requirements, a borrower’s intention to occupy the subject property at some future date could be determinative, as RPAPL 1304 allows a borrower to claim the property “will be occupied” as the primary residence.

Whether a financial hardship is “a result of COVID-19” will likely be the subject of litigation. Although the statute plainly seeks to cover mortgagors affected by the COVID-19 pandemic, it is possible that borrowers who defaulted before the March 7, 2020 covered period start date will also try to claim a financial hardship as a result of COVID-19, thus bringing the loan within the statute.



Servicers’ Proactive Solicitation and Approval of Forbearance Applications

Section 9-x(2)(a) requires servicers to proactively “make applications for forbearance...widely available to any qualified mortgagor who, during the covered period, is in arrears or on a trial period plan, or who has applied for loss mitigation.” Although some borrowers may not be interested in the forbearance, the statute places the burden on servicers to solicit applications for forbearance. Moreover, for those loans that were in arrears long before the covered period, as long as they remain in arrears during the covered period, the servicer is required to solicit applications for forbearance. At a minimum, servicers are required to provide applications for forbearance to any mortgagor who applies for loss mitigation during the covered period.

Section 9-x(2)(b) requires servicers to grant a forbearance of “all monthly payments due” for a period of 180 days, with the option (to be exercised by the mortgagor) to extend for another 180 days, “subject to the mortgagor demonstrating continued financial hardship.” Both the initial 180-day forbearance and additional 180-day extension require the mortgagor’s demonstration of financial hardship. However “financial hardship” is not defined in Section 9-x(1) and, based on guidance from the Department of Financial Services, a bare attestation from the mortgagor may be sufficient to meet this requirement. Moreover, if a borrower does not demonstrate financial hardship for the initial 180-day forbearance, the additional 180-day extension is unavailable. Given the history of litigation arising out of the obligation to negotiate in good faith (see [CPLR 3408](#)), whether a borrower is

experiencing a financial hardship could become a source of litigation going forward. Establishing financial hardship could relieve a borrower from making payments for 360 days.

Options to Resolve Forbearance Amount, Credit Reporting and GSE Exemption

Section 9-x(3)(a)-(c) outlines the options available to borrowers to pay the forborne arrears (a) extend the term of the loan for the length of the forbearance period; (b) pay the forborne arrears on a monthly basis for the remainder of the loan term; or (c) negotiate a loan modification. Section 9-x(3)(d) requires the servicer to make an offer to defer arrears as a “non-interest bearing balloon loan” payable at maturity or earlier during a refinance or sale of the property.

The original language of the 8243C bill stated that a servicer “shall waive interest on the principal for the term of the forbearance and waive any late fees...,” while the enacted amendment in 8428 states that the servicer “shall not charge additional interest or late fees or penalties on the forborne payment.” The original version suggested servicing in the normal course was permitted, with adjustments to be made on the back end by waiving interest and late fees assessed during the forbearance period. However, the amendment in the final version suggests that the legislature intends to prohibit those charges from the outset.

Section 9-x(3)(e) prohibits negative credit reporting if any of the options in Section 9-x(3)(a)-(d) are exercised.

Finally, Section 9-x(5) exempts government sponsored enterprise loans.

Likely Litigation Impact

Section 9-x(3) is likely susceptible to constitutional challenges based on violating the Contract Clause of the United States Constitution (see e.g. [Wells Fargo Bank, N.A. v. Meyers](#), 108 A.D.3d 9 [2d Dep’t 2013]). It gives the mortgagor the unilateral option to extend the term of the loan and prohibits the collection of interest which is an essential term of any loan.

Section 9-x(4) makes servicers’ adherence to Section 9-x a condition precedent to commencing a foreclosure action and allows a “defendant” to raise non-compliance as a defense. The use of the word “defendant” as opposed to “borrower” or “mortgagor” will likely create unnecessary litigation. It is clear that this statute was written to protect homeowners, however, as written, it arguably allows any defendant to assert non-compliance, even those with no connection to the note, mortgage, or property.

Section 9-x(6) covers situations where a financial institution is unable to offer a forbearance because of its precarious finances. This section states that forbearances are subject to capital and liquidity requirements

permitting safe and sound operations. If a servicer is unable to offer a forbearance, it must notify the Banking Department of its financial situation and explain the basis for its inability to offer a forbearance.

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