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COVID-19 and Consumer Financial Services: Navigating New U.S. and State Orders, Rules, Laws, Guidance, and Pleas

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Over the past several weeks, the coronavirus (COVID-19) pandemic has sparked a litany of new orders, rules, laws, guidance, and plain asks from federal and state leaders, agencies, and courts. The President and federal and state leaders have all begun to focus on how COVID-19 is likely to impact Americans' ability to continue to pay their mortgages or rent, credit card bills, and student or personal loans as a result of COVID-19.

It is imperative that financial institutions stay abreast of COVID-19-related issues as they develop and consider the risks of failing to implement the various policies espoused in the federal and state orders and guidance, including those that are aspirational and not mandatory requirements. Even if financial institutions believe the new rules do not impact their current business or product line(s), the very existence of such rules and guidance could spawn future private litigation or state or federal enforcement actions if the pronouncements—or the reasoning and purpose behind them—is not followed. While the industry on the one hand is better equipped to handle current events through lessons learned from the Great Recession, participants should be mindful that on the other hand, so is the bar of government enforcement and private plaintiffs' attorneys whom are well-versed and experienced in the consumer financial laws.

FORECLOSURE MORATORIUMS

Housing has been the primary focus of federal and state agencies seeking to provide consumer relief amidst the ongoing pandemic. Stated concerns have focused on the immediate impact that an influx of foreclosures and evictions could have on government efforts to contain the COVID-19 pandemic, as well as the long-term economic impact.

Last Wednesday (March 18), both the Department of Housing and Urban Development (HUD) and the Federal Housing Finance Agency (FHFA) issued immediate foreclosure and eviction moratoriums for a minimum of the next 60 days, through at least mid-May. The HUD moratorium prohibits any foreclosure or eviction on single family homeowners with FHA-insured mortgages. Similarly, the FHFA policy directs Fannie Mae and Freddie Mac to suspend all foreclosures.

A number of states and localities have also issued similar directives. For example, California's governor issued an executive order placing a moratorium on foreclosures and related evictions when the foreclosure "arises out of a substantial decrease in household or business income, or substantial out-of-pocket medical expenses, which were caused by the COVID-19 pandemic, or by any local, state, or federal government response to COVID-19." One of the stated bases for the order is the need for individuals to self-quarantine and/or social distance, and the concern that homelessness could exacerbate the public spread of COVID-19. Similar orders and legislation have been issued or passed in many other states, including New York, the District of Columbia, and Massachusetts. Still others have de facto foreclosure moratoriums because courts have closed or halted judicial foreclosure proceedings, or localities have ceased all evictions. In certain jurisdictions where government leaders or courts have yet to act, private plaintiffs have invoked COVID-19 in an attempt to stop foreclosure proceedings—seeking, for example, injunctions that would prohibit lenders from foreclosing on or evicting borrowers because of the pandemic. Housing industry participants should expect to see many similar actions in the coming weeks and months in jurisdictions that have not yet issued official moratoriums.

Likewise, servicers and investors should proceed with caution even if a moratorium is not in place, as potential plaintiffs may attempt to marshal non-jurisdictional laws, rules, and court and executive orders to argue unfair or deceptive acts or practices (UDAP) or similar theories arising from the current crisis.

FORBEARANCE MANDATES AND BORROWER ASSISTANCE

Separate from foreclosure and eviction moratoriums, last week, the Government Sponsored-Enterprises (GSEs) mandated that mortgage lenders and servicers offer a number of assistance options to GSE-securitized borrowers potentially impacted by COVID-19. In addition to the 60-day foreclosure moratorium, Fannie Mae and Freddie Mac have stated that all homeowners with a GSE loan are eligible for a forbearance plan to reduce or suspend their mortgage payment for up to 12 months. The GSEs further stated that homeowners in such a forbearance plan cannot incur late fees and, after forbearance, the servicer must work with the borrower on a permanent plan to help maintain or reduce monthly payment amounts as necessary (including a loan modification). Servicers are familiar with these procedures following the last financial crisis, however, questions left unanswered are to what extent a borrower must be impacted by the virus—whether it be that the health of a borrower or family member is directly affected, or an indirect impact resulting from the many work and travel restriction orders. In addition, there may be questions about the extent to which borrowers' difficulties in making payments (many of whom may have already had difficulties making payments for reasons unrelated to COVID-19) are actually caused by the virus.

Relatedly, a coalition of federal and state regulators—including the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Office of the Comptroller of the Currency (OCC), the Consumer Financial Protection Bureau (CFPB), and the State Banking Regulators—recently issued interagency guidance encouraging financial institutions to work with borrowers affected by COVID-19. Although the agencies indicated that they "will not criticize institutions for working with borrowers" at least with respect to credit risk and for accounting purposes, the guidance encouraged banks to offer payment accommodations and waive fees. In the face of guidance that "encourages" behavior, financial institutions are left to question whether they are at risk of future litigation by failing to offer accommodations, such as a forbearance, modification, and fee waivers that may otherwise not be required by law.

Finally, the State of New York took the GSEs' and agencies' guidance one step further, declaring that through at least April 20, 2020, it is an "unsafe and unsound" practice for banks to refuse a forbearance on any personal loan, including a mortgage, to any person experiencing financial hardship as a result of COVID-19 for 90 days. Pursuant to the governor's order, the New York Department of Financial Services (DFS) has since promulgated regulations requiring that New York State-regulated financial institutions provide residential mortgage forbearances on properties located in New York. Even if other states do not issue similar orders, the notion that refusing forbearance or modification during the COVID-19 pandemic could be an "unsafe and unsound" practice, or otherwise violate notions of fairness, should give the mortgage industry pause.

STUDENT LOANS AND DEBT COLLECTION

Federal and state leaders have also begun to turn to their attention to alleviating COVID-19-related borrower hardships that may impact their ability to repay student loans and debts.

Student Loan Accommodations

Student lending is currently at the forefront of these efforts. Last Friday (March 20), the Department of Education announced that it would provide student loan relief on federally-held student loans. Specifically, the Department of Education stated that for a period of 60 days, all borrowers holding federally-held student loans will have their interest rate set to 0%, and will also have the option to suspend their payments. Although the

federal order does not facially impact private lenders, it raises the question whether such lenders should nonetheless follow suit for borrowers impacted by COVID-19. For instance, guidance from the California Business, Consumer Services, and Housing Agency recommends (but does not require) that mortgage, student, and personal lenders and services allow borrowers to offer payment accommodations, such as deferring or skipping payments while the COVID-19 emergency persists.

Debt Collection Activity

Other orders and pleas from state governors have the potential to put banks and debt collectors at risk for not accommodating borrowers impacted by COVID-19. Colorado's Governor has issued a plea to debt collectors, asking them to refrain from mandatory debt collection efforts from those who are unable to pay because of financial circumstances. And, on Friday (March 20), Nevada issued guidance clarifying the State's emergency directive closing non-essential businesses to debt collectors, declaring that "[a]ll collection agencies holding a license or certification under Nevada law and located out-of-state must cease collection efforts in Nevada through at least April 16, 2020."

For now, lenders and debt collectors face an evolving patchwork of rules and orders that govern which jurisdictions they may continue to collect on debts. Lenders and debt collectors should assess each jurisdiction in which they operate.

BANKING AND LATE FEE ASSESSMENTS

Finally, both Congress and certain states have begun to consider and enact emergency measures to restrict or preclude altogether the charging of overdraft, nonsufficient fund (NSF), and credit card late fees in the near-term to assist consumers affected by the ongoing pandemic. On Monday (March 23), Democratic senators Cory Booker and Sherrod Brown announced an effort to suspend overdraft fees for the duration of the COVID-19 emergency. It remains to be seen whether this or other similar measures will pass through Congress.

As noted above, however, New York DFS has already promulgated emergency regulations eliminating ATM, overdraft and credit card late fees during the COVID-19 crisis. California's Department of Business Oversight has issued similar guidance for financial operations operating in the state. Banks, loan servicers, and card issuers should continue to monitor legislative, executive, and regulatory efforts to temporarily curb overdraft and late fees in the jurisdictions where they operate. And again, the industry should be mindful that, regardless of whether an official order applies, plaintiffs may attempt to argue that assessing such fees is an unfair trade practice, an UDAP or similar violation so long as the COVID-19 pandemic persists.

CONCLUSION

The potential impact of COVID-19 on the financial services industry is a dynamic situation that will continue to rapidly evolve over the coming weeks. Federal and state leaders and courts are likely to continue issuing new or updated orders and guidance that focuses on protecting borrowers impacted by the COVID-19 pandemic. We recommend that lenders, debt-holders, and servicers make sure they are familiar with the rapidly-growing number of federal and state rules governing debt servicing and forbearance on mortgage, student, and personal loans. Goodwin will continue to monitor this situation as it develops and is available to assist with any questions you may have. For additional updates, please visit Goodwin's Consumer Financial Services Enforcement Watch and Lender Law Watch blogs, which will offer brief ongoing roundups of the new orders, rules, and announcements facing the industry, and address the potential issues they raise and what questions should be top of mind as the industry considers how to respond.

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Please visit Goodwin's **Coronavirus Knowledge Center**, where firm lawyers from across the globe are issuing new guidance and insights to help clients fully understand and assess the ramifications of COVID-19 and navigate the potential effects of the outbreak on their businesses.

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