

Locke Lord QuickStudy: New York to Impose New Foreclosure, Loss Mitigation, and Reporting Requirements for Home Equity Conversion Mortgages

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On December 15, 2020, New York Governor Andrew Cuomo signed into law Senate Bill 4408, which amends the Real Property Law by adding a new section 280-d. The amendment will become effective on April 14, 2021, and the Department of Financial Services (“DFS”) is charged with issuing regulations to implement the new statute. A copy of Senate Bill 4408 is available [here](#).

The amendment imposes new foreclosure, loss-mitigation, and reporting requirements for HUD-insured home equity conversion mortgages (“HECMs”) in New York. It does not apply to proprietary reverse mortgages in New York. The new requirements are as follows:

- A lender must submit the following documents and information to the DFS “upon commencement of a foreclosure” on a New York HECM: (a) proof that HUD has approved accelerating the loan; (b) proof of the default notice to the borrower; and (c) any other information relating to the loan that the DFS deems necessary. NY RPL § 280-d(2). The DFS’s regulations will presumably identify any such other information that may be required.
- Upon receipt of the required documents and information, the DFS will provide the borrower with a notice that includes the borrower’s rights in the foreclosure process and contact information for legal service organizations that may be able to assist the borrower with the default and/or foreclosure. NY RPL § 280-d(2).
- Any loan commitment issued for a New York HECM must include a notice that the lender will notify DFS of any default or foreclosure so the DFS can assist the borrower. NY RPL § 280-d(3).
- Lenders may not make advance payments for any obligation arising from the mortgaged property—e.g., property taxes and homeowner insurance premiums—in relation to a New York HECM. Lenders may only pay such obligations that are in arrears. NY RPL § 280-d(4).
- Pursuant to regulations the DFS will promulgate, New York HECM lenders must engage in mandatory loss mitigation procedures “to be specified by [DFS].” NY RPL § 280-d(5). The statute provides that DFS’s requirements must comply with HUD’s requirements and must be updated as needed to maintain compliance. *Id.*
- The lender must provide loan-level reporting to the DFS for any HECMs receiving loss-mitigation assistance. For loans that have a repayment plan, such reporting must include the following: (a) monthly surplus income; (b) term of repayment plan; (c) amount of monthly repayment plan payment; (d) due date of next monthly payment; (e) when a mortgagor experiences a hardship; and (f) reason for hardship. NY RPL § 280-d(5).

Section 280-d also institutes draconian penalties for any failure to comply with the above requirements by providing borrowers with a private right of action, allowing recovery of treble their actual damages plus

reasonable attorney's fees if a claim is successful, and making any such failure to comply a complete defense to a foreclosure action. NY RPL §§ 280-d(6)-(7).

This amendment raises a number of questions that the DFS regulations will need to answer.

- Does the requirement to provide notice to the DFS “upon the commencement of the foreclosure proceeding” permit notice be sent on the same date a foreclosure is filed, or at some earlier time (e.g., upon acceleration)?
- Must a lender provide notice to the DFS if a foreclosure arises from a maturity event such as the borrower's death or sale of the property? The statute requires proof of HUD's prior approval to accelerate the loan, but HUD does not require prior approval if foreclosure is based on death or sale of the property.
- What does a lender do if, despite the statutory mandate, the DFS loss-mitigation requirements are inconsistent with HUD loss-mitigation requirements?
- Do the loss-mitigation reporting requirements apply to all HECMs, or only to those where a borrower qualifies for, is offered, and agrees to a loss-mitigation option?

Lenders should keep a close eye on the regulations the DFS will issue to see if those regulations address any of these issues. Lenders should also consult with competent counsel for guidance, and should consider raising these issues with the DFS during any public comment period with respect to the regulations.

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