NEW YORK creditunion ASSOCIATION

strength in members.

Superintendent Maria T. Vullo
New York State Department of Financial Services
One State Street
New York, NY 10004-1511

Dear Superintendent Vullo:

I am writing this letter on behalf of the New York Credit Union Association to comment on the Department of Financial Services' regulations implementing portions of New York's Zombie Property Law (Ch. 73, L2016 Part Q). As presently drafted, the regulation is inconsistent with the intent of the Legislature to exempt credit unions and banks that don't do a large volume of first lien mortgage loans from abandoned property maintenance requirements, places the burden on institutions to prove they are exempt based on information that the DFS is in the best position to interpret, and imposes unnecessary reporting requirements. As financial institutions struggle to comply with a growing list of compliance mandates, I urge you to amend aspects of this regulation.

New Section 1308 of the Real Property Actions and Proceedings Law imposes substantial new requirements on mortgage servicers and originators. They must identify and monitor property that may be abandoned by following a legislatively proscribed 90 day timeline; they must follow strict requirements for notifying the public that property is being classified as abandoned; and ultimately, they must maintain abandoned and vacant property upon which they have not yet foreclosed. Institutions violating these provisions are subject to fines of up to $500 per day, per property.

No exemption for credit unions and banks was included in earlier versions of the zombie property legislation. (See, e.g. the "Abandoned Property Neighborhood Relief Act of 2016.") This was particularly troubling to the Association since the property maintenance requirements are particularly challenging for many smaller institutions which don't have the staff or resources necessary to monitor and maintain property on an ongoing basis. The median size credit union in New York has less than $19 million in assets and six staff persons. Mindful of these concerns, in the closing days of the legislative session, credit unions and community banks successfully lobbied to improve the legislation by exempting institutions that don't engage in a high volume of mortgage lending. The resulting amendment is reflected in the proposed regulations as follows.

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3 NYCRR 422.3 provides that:

(b) 1. For each calendar year, the obligations imposed by RPAPL 1308 shall not apply during that calendar year to a mortgagee that is able to establish all of the following:

A. It is a state or federally chartered bank, savings bank, savings and loan association, or credit union;

B. It engages in all of the following activities during that calendar year: mortgage origination, mortgage ownership, mortgaging servicing, and mortgage maintenance; and

C. It had less than three-tenths of one percent of the total loans in the state which the mortgagee originated, owned, serviced, or maintained for the calendar year ending two years prior to the current calendar year.

It is well-settled that, "[w]hen a statute is ambiguous and requires interpretation, the construction given to the statute by an administrative agency responsible for its administration should be upheld by the courts unless the agency's interpretation is irrational, unreasonable, or inconsistent with the governing statute." *Brown v. New York State Racing and Wagering Bd.*, 871 N.Y.S.2d 623, 629 (App. Div. 2d Dep't 2009); *see In re Toys "R" Us v. Silva*, 89 N.Y.2d 411, 418 (1996); *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 62 N.Y.2d 539, 545 (1984) (Internal citation omitted).

In Part Q of Chapter 73 of the Laws of 2016, the Legislature set forth various mortgage foreclosure reforms and imposed new obligations on financial institutions with respect to vacant and abandoned residential real property. This legislation contains two contradictory clauses within the same provision regarding an exemption for certain financial institutions. Specifically, section one provides as follows:

> For each calendar year this section shall not apply to state or federally chartered banks, savings banks, savings and loan associations, or credit unions which: (1) originate, own, service and maintain their mortgages or a portion thereof; and (2) have less than three-tenths of one percent of the total loans in the state which they either originate, own, service, or maintain for the calendar year ending December thirty-first of the calendar year ending two years prior to the current calendar year.

This provision is ambiguous on its face. In the first instance, it states that the exemption applies to institutions that originate, own, service, *and* (conjunctive) maintain at least some of their mortgages. At the same time, it states that, to be exempt, an entity must also originate, own,

service, *or* (disjunctive) maintain less than the threshold number of loans. As written, it would seem that virtually zero financial institutions would fall within the exemption.

This problem can be easily addressed by amending 422.3(B) as follows;

> "B. It engages in {all} <u>any</u> of the following activities during that calendar year: mortgage origination, mortgage ownership, mortgaging servicing, and mortgage maintenance…"

The burden should not be placed on financial institutions to prove they are exempt

A second problem with the regulation is that it places the burden on individual financial institutions to prove they are exempt. As the government body responsible for implementing and interpreting this legislation, the DFS is in a much better position than individual credit unions to determine who must comply with the regulation. Most importantly, the regulation provides that the DFS provides by November 15th a "Total Number of Residential Real Property Mortgages Originated in the State During the Calendar Year Ending Two Years Prior To the Current Calendar Year" as determined by the Superintendent. However, this is not all the information financial institutions will need to know in order to prove their exempt status. The statue stipulates that institutions which originate more than three-tenths of one percent of the total loans in the state in which they originate, own, service, or maintain for the calendar year ending December 31st of the calendar year ending two years prior must comply with the statute. Without further clarification in the final regulations, credit unions will have to individually categorize loans that they originate, service and maintain to determine they qualify for the exemption.

At the very least, the final regulation has to provide a detailed explanation as to how financial institutions are to calculate the number of applicable loans. If this is not done, the DFS will be faced with a flood of exemption requests from financial institutions on how best to interpret the regulation.

If the DFS is unwilling to make this change, it should consider postponing the date by which it must be complied with. There are substantial operational issues with which nonexempt credit unions must comply. Coupled with the continued confusion over how the statute should be interpreted, a delay in implementing this regulation makes sense for both the DFS and impacted institutions, particularly since the Department was unable to provide the necessary information by November 15.

A third issue that needs to be addressed in the final regulation deals with preemption. New Real Property Actions and Proceedings Law 1308(13) preempts local Zombie Property requirements. It provides that "No local law, ordinance, or resolution shall impose a duty to maintain vacant and abandoned property… in a manner inconsistent with the provisions of this section." Given

the number of local laws, the regulation should be incorporated into the final draft of the regulations so that there is no doubt that mortgagees must only comply with one set of requirements. This will in no way diminish the authority of localities to police their vacant property. The legislation gives localities the authority to independently enforce the 1308 requirements.

Finally, the reporting requirements are duplicative. Both the statue and regulation require mortgagees to report abandoned property to the Department of Financial Services. There is no requirement to report on abandoned property on a quarterly basis. There are more than enough oversight mechanisms to ensure compliance with this law, ranging from steep fines and municipal oversight to the incentive to treat property as abandoned for foreclosure purposes.

I appreciate the fact that the DFS has been willing to listen to the concerns of the Association as it finalizes this regulation and hope to continue to have an ongoing dialogue about this issue as compliance issues arise. The Association recognizes that abandoned property is a top legislative priority and that zombie property has to be dealt with more effectively than it has been over the last several years. The suggestions that I have made will ensure that those institutions in the best position to deal with abandoned property are responsible for doing so without having the unintended consequence of making it even more difficult for smaller institutions to provide mortgage loans to their members.

Sincerely,

William J. Mellin
President/CEO
New York Credit Union Association