



Zombie Properties

Distressed & Abandoned Properties: Understanding New York's New Zombie Property Law

**NYS Bar Association
Local & State Government Law Section
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Well-Manicured Lawns Help Prevent Crime

- **Strong Association Between Indicators of Urban Yard Management and Crime**
 - **Signs of Intentional Landscaping**
Amount of Pervious Area, Presence of Garden Hoses & Sprinklers, & Lawn, Shrubs, or Yard Trees
 - **Signs of Neglect Included Litter, Desiccated Grass, & Uncut Grass**

Zombie Property

- **Property Encumbered with a Mortgage that Is Delinquent, Which the Owner Has Abandoned, But Which the Mortgagee Fails to Foreclose On**



Zombie Properties

Zombie Property Remediation Act

- Chapter 73 of the Laws of 2016
- Signed into Law June 23, 2016
- Effective December 20, 2016
- Department of Financial Services Rule I.D. No. DFS-41-16-00006-A, December 21, 2016



Zombie Properties

Zombie Property Remediation Act

- **Has Four Components**
 1. **Requires Mortgagees to Inspect, Secure & Maintain Mortgage Delinquent Properties**
 2. **Requires Mortgagees to Register Vacant & Abandoned Properties With State Property Registry;**



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Zombie Property Remediation Act

- **Has Four Components**
 3. **Allows Mortgagees to Complete Expedited Mortgage Foreclosure for Abandoned Property; &**
 4. **Enhances Consumer Protections Enacted to Protect Homeowners After Subprime Mortgage Market Collapse In 2008**

Zombie Property Remediation Act

- **Duty to Inspect**
 - a) **Within 90 Days of a Borrower's Delinquency, Servicers Must Inspect Property's Exterior to Determine Its Occupancy Status**
 - b) **After Initial Inspection & Throughout Loan's Delinquency, Servicer Must Conduct Exterior Inspections Every 25 to 35 Days**



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Zombie Property Remediation Act

- **Duty to Secure & Maintain**
 - a) **If, After Inspecting a Mortgage-Delinquent Residential Property, Servicer**
 - i. **Has Reasonable Basis to Believe Property Is Vacant & Abandoned, (RPAPL § 1309) &**
 - ii. **Is Not Otherwise Restricted From Accessing Property,**



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Zombie Property Remediation Act

- **Duty to Secure & Maintain**
 - b) **Then Servicer Must Secure & Maintain Property Pursuant to RPAPL § 1308**



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Zombie Property Remediation Act

- **Duty to Secure & Maintain**
 - c) **Within 7 Business Days of Determining Property Is Vacant & Abandoned, Servicer Must**
 - i. **Post Notice (With Servicer's Contact Information) on Property,**
 - ii. **Monitor Property for Change In Occupancy, &**
 - iii. **Keep Notice Posted**



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Zombie Property Remediation Act

- **Vacant & Abandoned If**
 - a) **After Inspecting Property Three (3) Times, at Each Inspection i) No Occupant Present & No Evidence of Occupancy, AND**
 - **Overgrown or Dead Vegetation;**
 - **Newspapers, Circulars, Flyers or Mail;**
 - **Past Due Utility Notices, Disconnected Utilities, or Utilities Not In Use;**
 - **Trash, Refuse, or Other Debris;**
 - **Absence of Window Coverings Such As Curtains, Blinds, or Shutters;**
 - **Boarded, Missing or Broken Windows;**
 - **Property Open to Casual Entry or Trespass;**
 - **Building or Structure That Is/Appears Structurally Unsound or Has Any Other Condition That Presents a Potential Hazard or Danger to Safety of Persons;**



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Zombie Property Remediation Act

- Vacant & Abandoned If
 - a) (ii) Residential Real Property Is Not Being Maintained in a Manner Consistent with New York Property Maintenance Code; **OR**



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Zombie Property Remediation Act

- Vacant & Abandoned If
 - b) Court or Appropriate State or Local Gov't Entity Formally Determined That Property Is Vacant & Abandoned; **OR**



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Zombie Property Remediation Act

- **Vacant & Abandoned If**
 - c) Property Owner & Each Borrower Have Separately Issued Sworn Written Statements Expressing Their Intent to Vacate & Abandon Property & an Inspection Shows No Evidence of Occupancy**



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Real Property Actions and Proceedings Law Article 19-A

 **Applicable Only to Residential Property** 

**But Not to One- or Two-family Dwellings
That Are Occupied by the Owners**

See RPAPL § 1970



Zombie Properties

Real Property Actions and Proceedings Law Article 19-A

The Municipal Department Charged with Residential Occupancy & Maintenance Enforcement Must First Make an Official Finding That a Dwelling Is Abandoned



Zombie Properties

Real Property Actions and Proceedings Law Article 19-A

An Occupied Dwelling Is Abandoned If

1. Owner Fails to Collect Rent or to Institute Summary Proceedings for Nonpayment of Rent for Three Consecutive Months &

See RPAPL § 1971

Real Property Actions and Proceedings Law Article 19-A

An Occupied Dwelling Is Abandoned If

2. The Dwelling Is Dangerous to Life, Health or Safety Because of the Owner's Failure to Maintain the Dwelling

- Failure to Provide Services
- Failure to Make Repairs,
- Failure Supply Janitorial Service
- Failure to Purchase Fuel
- Failure to Other Needed Supplies
- Failure to Pay Utility Bills.



Zombie Properties

Real Property Actions and Proceedings Law Article 19-A

A Vacant Dwelling Is Abandoned If

1. Structure Is Not Sealed or Continuously Guarded as Required by Law Or

See RPAPL § 1971



Zombie Properties

Real Property Actions and Proceedings Law Article 19-A

A Vacant Dwelling Is Abandoned If

2. Structure Was Sealed or Is Being Continuously Guarded by a Person Other Than the Owner, a Mortgagee, Lienor or Agent Thereof, And Either:
 - a) Vacate Order Currently Prohibits Occupancy;
Or
 - b) Property Tax Has Been Due & Unpaid At Least One Year



Zombie Properties

Real Property Actions and Proceedings Law Article 19-A

Department Responsible for Enforcing Occupancy & Maintenance Laws Shall Make & File Written Certification that a Dwelling Is Abandoned w/i Meaning of Article 19-A, Including Facts on Which It Is Based

Must Affix Certification to Dwelling

See RPAPL § 1971



Zombie Properties

Real Property Actions and Proceedings Law Article 19-A

How to Notify DFS and/or Lenders of Local Government Certification of Abandonment to Trigger Requirement to Secure & Maintain the Property?

Zombie Property Remediation Act

- **NOT Vacant & Abandoned If**
 - a) **Unoccupied Building on Property Is Being Diligently Constructed, Renovated, or Rehabilitated to Completion;**
 - b) **Building on Is Occupied on Seasonal Basis & Is Secure;**

Zombie Property Remediation Act

- **NOT Vacant & Abandoned If**
 - c) **Buildings on Property Are Secure & Property Is Subject of Probate Action, Action to Quiet Title, or Other Ownership Dispute;**
 - d) **Natural Disaster Damaged Building on Property & Owner Intends to Repair & Reoccupy; or**



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Zombie Property Remediation Act

- **NOT Vacant & Abandoned If**
 - e) **Building on Property Is Occupied by Mortgagor, a Relative of Mortgagor, or a Tenant Lawfully In Possession**



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Zombie Property Remediation Act

- **Duty to Secure - If No One Responds to Posted Notice Within 7 Days Thereby Indicating That Property Is Not Vacant or Abandoned, *OR* If Condition Arises Which Could Reasonably Damage, Destroy or Harm Property, Servicer Must:**



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Zombie Property Remediation Act

- **Duty to Secure -**
 - a) **Replace No More Than One Door Lock to Provide Access;**
 - b) **Secure, Replace, or Board Up Broken Doors And Windows;**
 - c) **Secure Any Part of Property Deemed An Attractive Nuisance;**



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Zombie Property Remediation Act

- **Duty to Secure -**
 - d) **Reasonable Measures to Ensure No Harmful Discharge Gases, Steam, Vapor, Hot Air, Grease, Smoke, Odors or Other Gaseous or Particulate Waste Directly Upon Abutting or Adjacent Public or Private Property or That of Another Tenant;**



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Zombie Property Remediation Act

- **Duty to Secure -**
 - e) **Winterize Applicable Plumbing & Heating Systems;**
 - f) **Provide Basic Utilities Needed for Operation of Pumps or Dehumidifiers, Turn Off Water Service to Prevent Water Leaks In The Property;**



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Zombie Property Remediation Act

- **Duty to Secure -**
 - g) **Remove & Remediate Any Significant Health & Safety Issues;**
 - h) **Take Reasonable Measures to Prevent Harmful Mold Growth;**

Zombie Property Remediation Act

- **Duty to Secure -**
 - i) **Respond to Government Inquiries Regarding Property Condition, Subject to Restrictions Regarding Financial Privacy; &**
 - j) **Ensure Required Notice Remains Posted, Easily Accessible & Reasonably Visible**



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Zombie Property Remediation Act

- **Duty to Maintain – If Servicer Determines Property Is Vacant & Abandoned, Servicer Must Maintain Property Until:**
 - a) **Occupant of Property Asserts Their Right to Occupy, or Servicer or Its Agents Have Received Threats of Violence;**
 - b) **Borrower Files for Bankruptcy;**

Zombie Property Remediation Act

- **Duty to Maintain – If Servicer Determines Property Is Vacant & Abandoned, Servicer Must Maintain Property Until:**
 - c) **Court Orders Servicer to Stop Maintaining Property;**
 - d) **Homeowners' Association or Cooperative Prevents Servicer From Gaining Access;**

Zombie Property Remediation Act

- **Duty to Maintain – If Servicer Determines Property Is Vacant & Abandoned, Servicer Must Maintain Property Until:**
 - e) **Property Is Sold or Transferred to a New Owner;**
 - f) **Servicer or Investor Releases Lien on Property; or**



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Zombie Property Remediation Act

- **Duty to Maintain**
 1. **Ensure Property Remains Secure; &**
 2. **Maintain Property Pursuant to Standards Set Forth In New York Property Maintenance Code**



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Zombie Property Remediation Act

- **Enforcing Mortgagee Obligations**
 1. **\$500 Civil Penalty Per Property Each Day Violation Persists**
 2. **Enforced by NYS Dept of Financial Services**
 3. **Enforced by Local Government In Court of Competent Jurisdiction (County or Supreme Court, Maybe Justice Court)**

Zombie Property Remediation Act

- **Preemption of Local Regulations**
 1. **Local Vacant Property Registries Are Preempted As They Apply to Mortgagees**
 2. **Local Property Maintenance Regulations Are Preempted As They Apply to Mortgagees**
 3. **Not Preempted From Regulating Owners**



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Zombie Property Remediation Act

- **State's Vacant Property Registry**
 1. **Department of Financial Services Creates & Maintains Registry**
 2. **DFS Must Provide Local Officials Access to Registry Information Regarding Specific Properties Within Their Jurisdiction**

How Exactly To Be Determined by DFS Rules Yet To Be Issued!



Zombie Properties

Zombie Property Remediation Act

- **State's Vacant Property Registry**
 1. **Within 21 Days of Learning a Property Is Vacant & Abandoned, Lender/Service Provider Must Report to DFS Following Information:**
 - a. **Contact Information for Lender/Service Provider Responsible for Maintaining Vacant Property;**



Zombie Properties

Zombie Property Remediation Act

- **State's Vacant Property Registry**
 1. **Within 21 Days of Learning a Property Is Vacant & Abandoned, Lender/Service Provider Must Report to DFS Following Information:**
 - b. **If Foreclosure Action Has Been Filed & Commencement Date; &**
 - c. **Mortgagor's Last Known Address & Contact Information**



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Zombie Property Remediation Act

- **State's Vacant Property Registry**
 2. **Lender/Servicer Must Update Registry Within 30 Days of Learning of Change to Registry Information**



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Zombie Property Remediation Act

- **State's Vacant Property Registry**
 3. **To Report Hazards, Blight or Other Concerns Related to Vacant & Abandoned Property:**
 - **800-342-3736**
 - **www.dfs.ny.gov/consumer/fileacomplaint.htm**



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Zombie Property Remediation Act

- **Expedited Mortgage Foreclosure Process for Vacant & Abandoned Properties**
- **Enhanced Consumer Protections**



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Zombie Property Remediation Act

- **Potential Unintended Consequences**
 - 1) **Banks Abandon Mortgages - Certificate of Discharge**
 - 2) **Banks Withdrawing from the Mortgage Market**



LEGISLATIVE UPDATE

August 2, 2016

NYCOM Analysis of Newly Enacted Zombie Property and Foreclosure Prevention Law

One of the most significant reforms passed during the 2016 New York State Legislative session was included in Chapter 73 of the Laws of 2016.¹ Signed into law on June 23, 2016, this omnibus legislation includes substantial changes to New York's Real Property Actions and Proceedings Law (RPAPL) that are intended to address zombie properties, a major cause of the distressed, vacant, and abandoned properties that blight New York's cities and villages. Zombie properties are mortgage-delinquent properties that have been abandoned by the owner but which languish for years in a state of disrepair and neglect until the mortgagee completes the foreclosure process.

The zombie property provisions were included as Part Q of Chapter 73. Although the zombie property legislation does not have an official title, it is commonly being referred to as New York's 2016 Zombie Property and Foreclosure Prevention Legislation (hereinafter referred to as "the Act").

The Act becomes effective December 20, 2016,² and has four main components:

1. It requires certain mortgagees to inspect properties that are 90 days mortgage-delinquent and to secure and maintain properties that are found to be vacant and abandoned;
2. It requires certain mortgagees to register vacant and abandoned properties with a State-maintained property registry;
3. It allows mortgagees to complete mortgage foreclosure via an expedited process when the property is vacant and abandoned; and
4. It enhances many of the consumer protections that were enacted to protect homeowners after the subprime mortgage market collapse in 2008.

Although amendments may need to be made to the Act to address vague or ambiguous provisions or gaps in the regulations, this law is a major step forward in the fight to combat blight. The following article provides a detailed explanation of the law's inspection and maintenance requirements as well as the state-administered abandoned property registry. A brief overview of the expedited foreclosure process and consumer protection provisions is also provided.

¹ The legislation (A.10741(Farrell)/S.8159(Flanagan)) was introduced in the Assembly and the Senate on June 17, 2016 and, after a Message of Necessity was issued, passed the same day.

² Part Q of Chapter 73 of the Laws of 2016 becomes effective 180 days after it is enacted. Because Chapter 73 was signed into law on June 23, 2016, the effective date is December 20, 2016.

Requirement for Mortgagees to Inspect, Secure, and Maintain Vacant and Abandoned Properties

Overview of RPAPL § 1308

The Act adds Section 1308 to the Real Property Actions and Proceedings Law (RPAPL). Section 1308 requires loan servicers to inspect, secure, and maintain mortgage-delinquent properties that have become vacant and abandoned.

Section 1308 only applies to vacant and abandoned one- to four-family residential real property. Additionally, the duty to inspect, secure, and maintain vacant and abandoned property under Section 1308 applies only to first lien mortgage holders. Although not defined in State law, the first lien mortgage holder generally refers to the individual or entity in the first or priority position to benefit from a mortgage foreclosure.

Additionally, small lenders are excluded from Section 1308's requirements. Specifically, for each calendar year, Section 1308 does not apply to state- or federally-chartered banks, savings banks, savings and loan associations, or credit unions that:

1. originate, own, service, *and* maintain their mortgages or a portion thereof; *and*
2. originate, own, service, or maintain less than 0.3 percent of the total loans in the state for the calendar year ending two years prior to the current calendar year.

For medium-sized lenders, Section 1308 only applies prospectively.³ Medium-sized lenders are state- or federally-chartered banks, savings banks, savings and loan associations, or credit unions which originate, own, service, and maintain between 0.3 percent and 0.5 percent of the total loans in the State for the calendar year two years prior to the current calendar year.

It is anticipated that questions and determinations regarding whether specific lenders will be subject to Section 1308 will be handled by the State's Department of Financial Services.

Mortgagee's Duty to Inspect and Determine the Occupancy Status of Mortgage-Delinquent Properties

Within 90 days of a borrower's delinquency, servicers authorized to accept payment of a loan must inspect the subject property's exterior to determine its occupancy status. After this initial inspection and throughout a loan's delinquency, the servicer must conduct exterior inspections of the property every 25 to 35 days.⁴

If, after inspecting a mortgage-delinquent residential property, the servicer (a) has a reasonable basis to believe the property is vacant and abandoned, as defined in RPAPL § 1309, and (b) is not otherwise restricted from accessing the property, then the servicer must secure and maintain the property pursuant to RPAPL § 1308(3), (4), (5), (6), & (7).⁵

Within seven business days of determining that a property is vacant and abandoned, the servicer must (a) post a reasonably visible notice (containing the servicer's toll free number or similar contact information) on an easily accessible part of the property, (b) monitor the property for any change in occupancy or contact with

³ Although not defined in the law, "prospectively" is believed to mean that the duty to inspect, secure, and maintain property will only apply to property that becomes mortgage delinquent after the law's effective date.

⁴ RPAPL § 1308(1).

⁵ RPAPL § 1308(2).

the borrower, property owner, or occupant, *and* (c) monitor the property to ensure that the notice remains posted so long as the duty to maintain the property applies.⁶

For the purposes of Section 1308, residential real property⁷ is defined, pursuant to RPAPL § 1309(2)⁸, as vacant and abandoned if:

1. After inspecting the property three times⁹, at each inspection
 - (a) There was no occupant present and no evidence of occupancy at the property as evidenced by
 - (i) overgrown or dead vegetation;
 - (ii) the accumulation of newspapers, circulars, flyers or mail;
 - (iii) past due utility notices, disconnected utilities, or utilities not in use;
 - (iv) the accumulation of trash, refuse, or other debris;
 - (v) the absence of window coverings such as curtains, blinds, or shutters;
 - (vi) one or more boarded, missing or broken windows;
 - (vii) the property being open to casual entry or trespass; or
 - (viii) the property having a building or structure that is or appears structurally unsound or has any other condition that presents a potential hazard or danger to the safety of persons; **and**
 - (b) The residential real property is not being maintained in a manner consistent with the standards set forth in New York Property Maintenance Code §§ 301, 302¹⁰, 304.1, 304.3, 304.7, 304.10, 304.12, 304.13, 304.15, 304.16, 307.1 and 308.1;¹¹ **or**
2. A court or other appropriate state or local governmental entity¹² has formally determined, following due notice to the borrower at the property address and any other known addresses, that the residential real property is vacant and abandoned; **or**
3. The property owner and each borrower have separately issued sworn written statements expressing their intent to vacate and abandon the property and an inspection of the property shows no evidence of occupancy to indicate that any persons are residing there.

Residential real property *may not* be deemed vacant and abandoned if:

1. An unoccupied building on the property is diligently¹³ being constructed, renovated, or rehabilitated to completion;
2. A building on the property is occupied on a seasonal basis and is secure;
3. Any buildings on the property are secure *and* the property is the subject of a probate action, action to quiet title, or other ownership dispute of which the servicer has actual notice;

⁶ RPAPL § 1308(3).

⁷ RPAPL § 1305(a) defines “residential real property” as “real property located in this state improved by any building or structure that is or may be used, in whole or in part, as the home or residence of one or more persons, and shall include any building or structure used for both residential and commercial purposes.”

⁸ Note that RPAPL § 1309(2) requires plaintiffs in mortgage foreclosure proceedings seeking to take advantage of the expedited foreclosure process to prove, by a preponderance of the evidence, that the property is abandoned. A court order finding that the property is abandoned is not required to trigger the servicer’s maintenance obligations.

⁹ Each inspection must be conducted 25 to 35 days apart and at different times of the day.

¹⁰ Excluding §§ 302.2, 302.6, 302.8.

¹¹ The Property Maintenance [Code](http://codes.iccsafe.org/app/book/toc/2015/I-Codes/NY/2015_IPMC_HTML/index.html) can be accessed online at:
http://codes.iccsafe.org/app/book/toc/2015/I-Codes/NY/2015_IPMC_HTML/index.html.

¹² The law does not define what constitutes “other appropriate state or local governmental entity.”

¹³ This term is not defined.

4. A natural disaster damaged a building on the property and one or more owners intend to repair and reoccupy the property; or
5. A building on the property is occupied by the mortgagor, a relative of the mortgagor, or a tenant lawfully in possession.¹⁴

Mortgagee’s Duty to Secure Vacant and Abandoned Mortgage-Delinquent Properties

Pursuant to RPAPL § 1308(4), if no one responds to the posted notice within seven *calendar* days thereby indicating that the property is *not* vacant or abandoned, or if an emergent property condition arises which could reasonably damage, destroy or harm the property, the servicer must:

1. In cases where the property contains two or more points of ingress or egress, replace no more than one door lock to provide subsequent access to the property;
2. Secure, replace, or board up broken doors and windows;
3. Secure any part of the property that may be deemed an attractive nuisance including, but not limited to, a water feature that could create a drowning risk, refrigerator or freezer units, outbuildings, wells or septic tanks;
4. Take reasonable measures to ensure that pipes, ducts, conductors, fans and blowers do not discharge harmful gases, steam, vapor, hot air, grease, smoke, odors or other gaseous or particulate waste directly upon abutting or adjacent public or private property or that of another tenant;
5. Winterize the applicable plumbing and heating systems, if appropriate;
6. Provide basic utilities including, but not limited to, water, electricity, natural gas, propane and sewer service, as appropriate and when allowed by the local utility provider, that are needed for the operation of sump pumps or dehumidifiers, or when there are jointly-owned or shared utilities with adjoining properties or units, except for turning off water service to prevent flooding or water leaks in the property, or when other utility service could reasonably create a hazard to the property or an unauthorized occupant or person entering the property;
7. Remove and remediate any significant health and safety issues, including outstanding code violations;
8. Take reasonable measures to prevent the growth of harmful mold;
9. *Respond to government inquiries regarding property condition, subject to restrictions regarding financial privacy* [emphasis added]; and
10. Ensure that the notice required to be posted pursuant to RPAPL § 1308(3) remains posted on an easily accessible part of the property that would be reasonably visible to the borrower, property owner, or occupant so long as the duty to maintain applies.

Servicers may never remove personal property from the property unless:

1. The personal property poses a significant health and safety issue; or
2. There is an uncontested order to do so by a governmental entity.¹⁵

Mortgagee’s Duty to Maintain Vacant and Abandoned Mortgage-Delinquent Properties

Pursuant to RPAPL § 1308(6), a servicer who has determined that a property is vacant and abandoned must take reasonable and necessary actions to maintain the property until the earlier of the following events:

1. An occupant of the property asserts their right to occupy the property, or the servicer or its agents have received threats of violence;

¹⁴ RPAPL § 1309(2)(d).

¹⁵ RPAPL § 1308(5).

2. The borrower files for bankruptcy;
3. A court orders the servicer to stop maintaining the property;
4. A homeowners' association or cooperative prevents the servicer from gaining access to or maintaining the property;
5. The property is sold or transferred to a new owner;
6. The servicer or investor releases the lien on the property; or
7. The mortgage note is assigned, transferred or sold to another servicer.

Reasonable and necessary actions to maintain the property include, but are not limited to:

1. Ensuring that the property remains secure as required by RPAPL § 1308(4); and
2. Maintaining property pursuant to the standards set forth in New York Property Maintenance Code §§ 301, 302,¹⁶ 304.1, 11 304.3, 304.7, 304.10, 304.12, 304.13, 304.15, 304.16, 307.1, and 308.1, to the extent that the mortgage servicer or its agents are able to obtain necessary or required permits or approvals.¹⁷

The Property Maintenance Code can be accessed online from the New York State Department of State's Division of Code Enforcement and Administration website at http://codes.iccsafe.org/app/book/toc/2015/I-Codes/NY/2015_IPMC_HTML/index.html.

Enforcement of Mortgagee Property Maintenance Obligations

Violations of RPAPL § 1308's mandate to inspect, secure, and maintain mortgage-delinquent property may be heard before a hearing officer or a court of competent jurisdiction. If a hearing officer or court determines that, based on the preponderance of the evidence, a mortgagee or agent of a mortgagee has failed to inspect, secure, and maintain a mortgage-delinquent property as required by RPAPL § 1308, the hearing officer or the court may impose a civil penalty of up to \$500 per property for each day the violation persists.

The State's Superintendent of Financial Services may enforce RPAPL § 1308, after giving seven days' notice to the lender, assignee, or mortgage loan servicer of the violation.

Additionally, any municipality may, after giving seven days' notice to the lender, assignee, or mortgage loan servicer, also seek to have RPAPL § 1308's requirements to inspect, secure, and maintain any residential property located within its jurisdiction enforced in any court of competent jurisdiction. Any civil penalty imposed as the result of an action brought by a municipality pursuant to RPAPL § 1308(8)(a) is retained by the municipality.¹⁸

Local Government Authority to Abate Nuisance Conditions Preserved

Notwithstanding the authority to enforce the provisions of RPAPL § 1308, a municipality may enter onto and maintain any mortgage-delinquent residential property in order to address a threat to public health, safety, or welfare. Municipalities must notify any lender, assignee, or mortgage loan servicer of such action as soon as practicable. Any municipality which remediates a residential real property pursuant to RPAPL § 1308(8)(c) may maintain a cause of action in any court of competent jurisdiction against the lender, assignee, or mortgage loan servicer to recover costs the municipality incurs as a result of maintaining the property. The municipality must notify the Department of Financial Services in writing at least ten days prior to bringing such an action. A

¹⁶ Excluding §§ 302.2, 302.6 and 302.8.

¹⁷ RPAPL § 1308(7).

¹⁸ RPAPL § 1308(8)(c).

municipality's failure to notify the Department of Financial Services, however, may not be asserted as a defense by a lender, assignee, or mortgage loan servicer.

Department of Financial Services Rulemaking

The Department of Financial Services is authorized to adopt such rules and regulations to implement, administer, operate, and enforce RPAPL § 1308.

RPAPL § 1308's Effect on Agreements Between the Department of Financial Services and Exempt Mortgagees

Pursuant to RPAPL § 1308(11), any agreement between any state- or federally-chartered banks, savings banks, savings and loan associations, credit unions, or servicers for which RPAPL § 1308 provisions do *not* apply and the Department of Financial Services that is associated with the maintenance and repair of vacant and abandoned property remains in full force and effect for as long as the terms and conditions of the agreement remain in effect.

Preemption of Local Regulations

Pursuant to RPAPL § 1308(13), local governments may not (1) impose a duty to maintain vacant and abandoned properties in a manner inconsistent with the provisions of RPAPL § 1308, or (2) establish or impose a penalty or other monetary obligation *with respect to* a state- or federally-chartered bank, savings bank, savings and loan association or credit union that originates, owns, services or maintains a mortgage related to such property. However, this preemption does not affect the ability of local governments to abate nuisance or dangerous conditions or to recover the cost of doing so from lenders, assignees, or servicers.

Moreover, local governments may not require any state- or federally-chartered bank, savings bank, savings and loan association, or credit union that originates, owns, services, or maintains a mortgage that is not subject to RPAPL § 1308 to maintain a vacant or abandoned property.

NOTE: The preemption provisions found in RPAPL § 1308 do NOT preempt local governments from imposing property maintenance requirements and administering property maintenance programs in general against property owners or other individuals or entities in control of a property, including bank-owned properties (as opposed to properties in which banks have only a mortgage interest).

The State's Vacant and Abandoned Property Registry

Overview

The second major component of New York's 2016 Zombie Property and Foreclosure Prevention Legislation is a vacant property registry. Specifically, the Real Property Actions and Proceedings Law is amended to add Section 1310 which charges the State's Department of Financial Services with maintaining a statewide vacant and abandoned property electronic registry.

Although information provided to the Department of Financial Services for the registry is deemed and treated as confidential, the Superintendent of Financial Services may, at his/her discretion, release the information if it is in the best interest of the public. Any such released information must continue to be treated confidentially by the parties receiving the information.

Additionally, the Department of Financial Services must provide any county, city, town, or village official, upon written request, access to registry information specific to property located in the official's jurisdiction.

Mortgagee Reporting Requirement

Within 21 days of learning¹⁹ that a property is vacant and abandoned, a lender, assignee, or mortgage loan servicer must report to the Department of Financial Services the following information:

1. The current name, address, and contact information for the lender, assignee or mortgage loan servicer responsible for maintaining the vacant property;
2. Whether a foreclosure action has been filed for the property in question, and, if so, the date on which the foreclosure action was commenced; and
3. The last known address and contact information for the mortgagor(s) of record.

Additionally, the lender, assignee, or mortgage loan servicer must update the registry within 30 days of learning of a material change to any of the information contained in initial submission to the registry.

The Department of Financial Services may adopt rules and regulations necessary to administer and operate the registry, including but not limited to rules and regulations governing registry access and specifying the manner and frequency of registration and the information that must be provided.

The Vacant and Abandoned Property Toll-Free Hotline

The law requires the Department of Financial Services to establish and maintain a toll-free hotline to which people may report hazards, blight or other concerns related to vacant and abandoned property. On June 28, 2016, the Department of Financial Services announced its toll-free hotline number, 800-342-3736. In addition, reports may be made online at www.dfs.ny.gov.

Local Vacant and Abandoned Property Registry Preemption

Pursuant to RPAPL § 1310(5), local governments may not (1) impose a duty to register vacant and abandoned property, locally with the municipality in addition to the State registry, or (2) establish or impose a penalty or other monetary obligation related to registering vacant and abandoned properties *with respect to* a state- or federally-chartered bank, savings bank, savings and loan association or credit union that originates, owns, services or maintains a mortgage related to such property.

NOTE: The preemption provisions found in RPAPL § 1310 do NOT preempt local governments from imposing vacant property registry requirements on property owners, including bank-owned properties (as opposed to properties in which banks have only a mortgage interest).

The Expedited Mortgage Foreclosure Process for Vacant and Abandoned Properties

The third major component of the 2016 Zombie Property Legislation is the establishment of an expedited foreclosure procedure for property that is vacant and has been abandoned by the owner. Specifically, the law adds a new Section 1309 to the RPAPL, which authorizes plaintiffs in any foreclosure proceeding (e.g., a mortgagee) to apply, by notice of motion or order to show cause, for a judgment of foreclosure and sale on the grounds that the property is vacant and abandoned. The court must make a written finding as soon as practicable as to whether the plaintiff has proven that the property to be foreclosed upon is vacant and abandoned. If the court determines that the property is vacant and abandoned, it must set forth:

1. The evidence relied upon in finding the property vacant and abandoned;
2. The evidence showing that the plaintiff is the owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner of same; and

¹⁹ Or within 21 days of when the lender, assignee or mortgage loan servicer should have learned.

3. The sums due and owing upon the subject mortgage and note after a review of the detailed and itemized account of each fee, each cost, and a calculation of interest accrued.

The court may not enter a judgment pursuant to Section 1309 if

1. The mortgagor or any other defendant has filed an answer, appearance, other written objection that is not withdrawn, or has otherwise demonstrated an intention to contest the foreclosure action; or
2. The court does not find that the mortgaged property is vacant and abandoned.

In addition, the 2016 Zombie Property Legislation amends RPAPL § 1351 to require plaintiffs in mortgage foreclosure proceedings to sell the property within 90 days of the date of the judgment. Moreover, RPAPL § 1353 is amended to provide that if a plaintiff in a mortgage foreclosure proceeding purchases the property, then the plaintiff-purchaser must place the property on the market for sale or other occupancy within 180 days, or within 90 days of completing repairs, renovation, or rehabilitation of the property. A court may grant an extension for good cause.

Additional Protections for Homeowners Delinquent on Mortgage Payments and In Foreclosure

This legislation also provides additional protections for homeowners as part of the mandatory settlement conference in residential foreclosure actions, including the creation of a new “Consumer Bill of Rights” and supplemental notice requirements informing property owners of their rights, including their right to remain in their homes until the completion of the foreclosure process. Additional information regarding the 2016 Zombie Property and Foreclosure Prevention Legislation’s expedited foreclosure process and the consumer protections for homeowner provisions may be found on the Empire Justice Center’s website at www.empirejustice.org.

Municipal Certification of Property Abandonment Triggering Mortgagee/Service Provider Duty to Secure and Maintain Property

A mortgagee/mortgage service provider's duty to secure and maintain property pursuant to New York's new zombie property law may be triggered by (a) the servicers' finding of abandonment, (b) a court, state, or local government entity formally determining that the property is abandoned, or (c) the borrowers and owners swearing in writing their intent to vacate and abandon the property. See Real Property Actions and Proceedings Law § 1309(2)(b). Local governments may, pursuant to Real Property Actions and Proceedings Law ("RPAPL") Article 19-A, determine that residential property is abandoned.. RPAPL Article 19-A is applicable only to residential property, but not to one- or two-family dwellings that are occupied by the owners.

Under RPAPL Article 19-A, a municipality's department or agency ("the department") responsible for regulating the occupancy and maintenance of residential property takes the lead in initiating abandonment proceedings. See RPAPL § 1970. RPAPL § 1971 sets forth the standard and process for local governments to certify that a property is abandoned.

The department may find an occupied dwelling to be abandoned if

1. The owner fails either to collect rent or to institute summary proceedings for nonpayment of rent for three consecutive months and
2. The department finds that the dwelling has become a danger to life, health or safety as a result of the owner's failure to maintain the dwelling, which may be shown by the owner's failure to provide services including but not limited to the failure to make repairs, supply janitorial service, purchase fuel or other needed supplies, or pay utility bills.

The department may find a vacant dwelling to be abandoned if

1. The structure is not sealed or continuously guarded as required by law or
2. The structure was sealed or is being continuously guarded by a person other than the owner, a mortgagee, lienor or agent thereof, and either:
 - (a) A vacate order of the department or other governmental agency currently prohibits occupancy of the dwelling; or
 - (b) The tax on the property has been due and unpaid for a period of at least one year.

The department may find a building for which an administrator has been appointed pursuant to RPAPL Article Seven-A to be abandoned if

1. No motion for the termination of the judgment entered pursuant to article seven-A of this chapter has been granted by the appointing court;
2. No mortgagee or lienor has commenced foreclosure proceedings; and
3. At least six months have passed since the granting of a judgment appointing an administrator pursuant to article seven-A of this chapter.

Once the department finds that a dwelling is abandoned, it must then file in its records a certification containing the finding of abandonment and the facts on which the finding is based. In addition, the department must immediately, prominently, and conspicuously attach to the dwelling a notice that the building has been found to be abandoned and that it is a crime to take, remove or otherwise damage any fixture or part of the building.

Local government certifications of abandonment should be filed both with the Department of Financial Services and the mortgagee and mortgage service provider.

**NEW YORK STATE
DEPARTMENT OF FINANCIAL SERVICES
3 NYCRR 422**

Inspecting, Securing and Maintaining Vacant and Abandoned Residential Real Property

I, Maria T. Vullo, Superintendent of Financial Services of the State of New York, pursuant to the authority granted by sections 202 and 302 of the Financial Services Law and sections 1306, 1308, and 1310 of the Real Property Actions and Proceedings Law, do hereby promulgate Part 422 of Title 3 of the Official Compilation of Codes, Rules and Regulations of the State of New York, to take effect upon publication in the State Register, to read as follows:

(ALL MATERIAL IS NEW)

(Statutory authority: Real Property Actions and Proceedings Law, sections 1306, 1308 and 1310)

Sec.

422.1 Preamble.

422.2 Definitions.

422.3 Applicability and Exemptions under RPAPL 1308.

422.4 Vacant and Abandoned Property Reporting.

422.5 Quarterly Reporting.

422.6 Applicability of RPAPL 1310 Reporting Requirements.

422.7 Federal Law and Federal Guidelines.

422.8 Disclosure of Information Maintained in the Statewide Vacant and Abandoned Property Registry.

422.9 Enforcement.

422.10 Effective date.

Section 422.1 Preamble.

- (a) As enacted by Part Q of Chapter 73 of the Laws of 2016, Real Property Actions and Proceedings Law (“RPAPL”) Section 1308 requires certain holders of first lien mortgages to inspect, secure and maintain vacant and abandoned one to four family residential real property and Section 1310 establishes a statewide vacant and abandoned property registry in the form of an electronic database to be maintained by the Department of Financial Services (the “Department”).
- (b) RPAPL Sections 1308(12) and 1310(4) authorize the Superintendent of Financial Services (“superintendent”) to issue the rules and regulations necessary to implement RPAPL Sections 1308 and 1310.
- (c) This Part establishes rules necessary to implement RPAPL Sections 1308 and 1310.

Section 422.2 Definitions.

As used in this Part:

- (a) *mortgage* means a lien upon residential real property as is commonly given to secure advances on, or the unpaid purchase price of, real property under the laws of this state, together with the credit instrument or instruments, if any, secured thereby.
- (b) *mortgagee* means the holder of a mortgage and/or note secured by residential real property, including, as applicable, the original lender under a mortgage, its successors and assigns, and the holders of credit instruments issued under a trust indenture, mortgage or deed of trust pursuant to which such holders act by and through a trustee therein named.
- (c) *assignee* means a current mortgagee if different from the original mortgagee.
- (d) *mortgage maintenance* means the continued ownership of a mortgage and/or note by the person or entity that originated that mortgage.
- (e) *mortgage origination* means for compensation or gain, either directly or indirectly, advancing funds to an applicant for a mortgage loan or a mortgagor as a mortgage loan.
- (f) *mortgage servicing* means receiving any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan, including amounts for escrow accounts, subject to section 6-k of the Banking Law, title 3-A of article IX of the Real Property Tax Law or section 10 of 12 U.S.C. 2609. In the case of a reverse mortgage as referenced in section 6-h of the Banking Law, sections 280 and 280-a of the Real Property Law, servicing includes making payments to the borrower or having been delegated by the mortgagee as responsible for oversight and maintenance of the mortgage even though payments are no longer being made to the borrower. The term includes making or holding a mortgage loan if such activities directly or indirectly include holding the mortgage servicing rights or having been delegated servicing functions for the mortgage loan.
- (g) *public official* means a member of the New York State legislature, a member of the elected governing body of a county, town, village or city, and in the city of New York, the city council, and the highest ranking elected executive official of a county, city, town or village.
- (h) *residential real property* means real property located in this state improved by any building or structure that is or may be used, in whole or in part, by not less than one nor more than four families.
- (i) *state or federally chartered bank, savings bank, savings and loan association, or credit union* means one of the following: (i) any corporation, organized under or subject to the provisions of article three of the New York Banking Law; (ii) any corporation organized under or subject to the provisions of Article 11 of the New York Banking Law; (iii) any corporation organized under or subject to the provisions of Article six of the New York Banking Law, including stock-form savings banks; (iv) any corporation organized under

or subject to the provisions of article ten of the New York Banking Law, including, but not limited to, stock-form savings and loan associations; (v) a state-chartered branch and agency of a foreign bank subject to the provisions of Article 5 of the New York Banking Law; (vi) any national banking association organized pursuant to the National Bank Act; (vii) any federal savings association as such term is defined by the Federal Deposit Insurance Act, as amended, (12 USC § 1813(b)(2)); (viii) a federal branch and agency of a foreign bank, as such terms are defined by the International Banking Act of 1978, as amended (12 USC § 3101); or (ix) a federal credit union, as such term is defined by the Federal Credit Union Act, as amended (12 USC § 1752(1)).

- (j) *Servicer or mortgage loan servicer* means an individual or entity engaged in mortgage servicing.

- (k) *Vacant and abandoned* means residential real property as to which at least one of the following three conditions applies: (1) at three consecutive inspections of such property by the mortgagee or its agent, with each inspection conducted twenty-five to thirty-five days apart and at different times of the day, (i) no occupant was present and there was no evidence of occupancy on the property to indicate that any persons are residing there; and (ii) the residential real property was not being maintained in a manner consistent with the standards set forth in New York property maintenance code chapter 3 sections 301, 302 (excluding 302.2, 302.6, 302.8), 304.1, 304.3, 304.7, 304.10, 304.12, 304.13, 304.15, 304.16, 307.1 and 308.1; or (2) a court or other appropriate state or local governmental entity has formally determined, following due notice to the borrower at the property address and any other known addresses, that such residential real property is vacant and abandoned; or (3) each borrower and owner has separately issued a sworn written statement, expressing his or her intent to vacate and abandon the property and an inspection of the property shows no evidence of occupancy to indicate that any persons are residing there.

Section 422.3 Applicability and Exemption under RPAPL 1308.

- (a) Subject to the provisions of subdivisions (b), (c), and (d) below, the obligations imposed by RPAPL 1308 shall apply to every vacant and abandoned residential real property, irrespective of when the mortgage on the property was originated or became delinquent or when the property became vacant and abandoned.

- (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 mortgage origination and mortgage ownership during the calendar year; and

- C. It had less than three-tenths of one percent of the total loans in the state which the mortgagee either originated, owned, serviced, or maintained for the calendar year ending two years prior to the current calendar year.
2. For purposes of subsection (C), above, whether a mortgagee had less than three-tenths of one percent of the total loans in the state during the calendar year ending two years prior to the current calendar year shall be calculated by *dividing* the number of mortgages issued in the state during that calendar year that the mortgagee originated, owned, serviced and/or maintained *by* the Total Number of Residential Real Property Mortgages Originated in the State During the Calendar Year Ending Two Years Prior To the Current Calendar Year.
 3. The “Total Number of Residential Real Property Mortgages Originated in the State During the Calendar Year Ending Two Years Prior To the Current Calendar Year” shall be determined by the superintendent, based on available data, and shall be published by the superintendent by November 15 of each year.
- (c) 1. The obligations imposed by RPAPL 1308 shall not apply to residential real property when the mortgage became delinquent before December 20, 2016, the effective date of RPAPL 1308, if a mortgagee 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 mortgage origination and mortgage ownership during the calendar year; and
 - C. It had between three-tenths of one percent and five tenths of one percent of the total loans in the state which the mortgagee either originated, owned, serviced, or maintained for the calendar year ending two years prior to the current calendar year.
2. For purposes of subsection (C), above, whether a mortgagee had between three-tenths of one percent and five-tenths of one percent of the total loans in the state during the calendar year ending two years prior to the current calendar year shall be calculated by *dividing* the number of mortgages issued in the state during that calendar year that the mortgagee originated, owned, serviced and/or maintained *by* the Total Number of Residential Real Property Mortgages Originated in the State During the Calendar Year Ending Two Years Prior To the Current Calendar Year.
 3. The “Total Number of Residential Real Property Mortgages Originated in the State During the Calendar Year Ending Two Years Prior To the Current Calendar Year” shall be determined by the superintendent, based on available data, and shall be published by the superintendent by November 15 of each year.

- (d) If, after being subject to the obligations imposed by RPAPL 1308, a mortgagee becomes exempt pursuant to subsections (b) or (c), then the obligations imposed by 1308 shall continue to apply to all residential real property that became vacant and abandoned before the mortgagee became exempt and for which the mortgagee continues to own the mortgage, and, if applicable, to residential real property that becomes vacant and abandoned after the mortgagee ceases to be exempt.
- (e) The burden of proving an exemption pursuant to this Subdivision is upon the mortgagee claiming it. In order to establish an exemption from the requirements of RPAPL 1308, a mortgagee must submit to the superintendent by February 28, 2017 for the 2017 calendar year and for each calendar year thereafter, by December 31 of the year preceding the calendar year in which the exemption is being sought, on the form required by the superintendent, a statement providing the basis for which the mortgagee satisfies all three requirements of the relevant subsection. The statement shall also identify all real property that, by application of subsection (d), will remain subject to the requirements in RPAPL 1308. If a mortgagee fails to timely provide the statement required by this subdivision, the mortgagee shall not satisfy the provisions of subdivision (b) or (c) for that calendar year.
- (f)
1. Subject to subdivision (2), for all mortgages that are ninety days or more delinquent on December 20, 2016, the initial inspection required by RPAPL 1308(1) must be made on or before February 1, 2017.
 2. For any residential real property that satisfies the definition of vacant and abandoned in RPAPL 1309 as of December 20, 2016, the requirements in RPAPL 1308(3) must be satisfied by February 1, 2017.
- (g) Pursuant to RPAPL 1308(11), state or federally chartered banks, savings banks, savings and loan associations and credit unions that qualify for the exemption under subdivision (b), above, and that are parties to the Department's Industry Best Practices: Inspecting, Securing and Maintaining Vacant and Abandoned Properties in New York, issued in May 2015, shall continue to be subject to that agreement for so long as the terms and conditions of the agreement remain in effect.

Section 422.4 Vacant and Abandoned Property Reporting.

- (a) Within twenty-one business days of when a mortgagee or mortgage loan servicer of a property learns, or should have learned, that a property is vacant and abandoned, the mortgagee or mortgage loan servicer shall submit or cause to be submitted on the form prescribed by the Department the following information:
1. the address of the subject property;
 2. the current name, address and contact information for the lender, assignee or mortgage loan servicer responsible for maintaining the subject property;

3. whether a foreclosure proceeding has been commenced as to the subject property, and, if so, the date the proceeding was commenced and the status of the proceeding;
 4. the name, last known address and contact information for the mortgagor(s) of record; and
 5. any additional information requested by the superintendent.
- (b) A mortgagee or mortgage loan servicer of property learns, or should have learned, that a property is vacant and abandoned when the mortgagee or mortgage loan servicer knew or should have known one or more of the following:
1. That three inspections of the subject residential real property conducted twenty-five to thirty-five days apart and at different times of the day indicated, or would have indicated, that (i) no occupant was present and there was no evidence of occupancy on the property to indicate that any persons were residing there; and (ii) the residential real property was not being maintained in a manner consistent with the standards set forth in New York property maintenance code chapter sections 301, 302 (excluding 302.2, 302.6, 302.8), 304.1, 304.3, 304.7, 304.10, 304.12, 304.13, 304.15, 304.16, 307.1 and 308.1;
 2. That a court or other appropriate state or local governmental entity has formally determined, following due notice to the borrower at the property address and any other known addresses, that such residential real property is vacant and abandoned; or
 3. That each borrower and owner has separately issued a sworn written statement, expressing his or her intent to vacate and abandon the property and an inspection of the property shows no evidence of occupancy to indicate that any persons are residing there.
- (c) A mortgagee is required to exercise due diligence to learn of the matters set forth in subsection (b), above. Due diligence includes but is not limited to ensuring that all timelines and requirements set forth in the law and regulation are adhered to and exercising oversight of third parties hired to inspect and investigate.
- (d) The information provided to the Department pursuant to this section will be included in the statewide vacant and abandoned property registry established by RPAPL Section 1310(1).
- (e) At the time of a filing with the Department pursuant to RPAPL 1306, the mortgagee or its agent shall state whether the relevant real property has been inspected and whether the mortgagee or any agent of the mortgagee has any reason to believe that the property is vacant and abandoned and the basis for that belief. The superintendent may prescribe the

form for the submission of such information. All mortgagees subject to this requirement shall provide the quarterly reporting set forth in Section 422.5.

- (f) For all residential real property previously reported to the Department as vacant and abandoned, the mortgagee shall provide the information required by this section by February 1, 2017.

Section 422.5 Quarterly Reporting.

- (a) Every mortgagee that is not exempt from the obligations imposed by RPAPL 1308 shall file with the superintendent, on a form that may be prescribed by the superintendent, a quarterly report containing the following information:
 - 1. Identification of all loans secured by a mortgage on residential real property held by the mortgagee where the borrower has been delinquent for 90 or more days;
 - 2. For each loan identified pursuant to subdivision (a)(1),
 - A. The address of the subject property.
 - B. The date on which each inspection of the subject property to determine occupancy was conducted as required by RPAPL 1308(1).
 - C. The date on which a determination was made that the subject property was vacant and abandoned.
 - D. The date on which the notice required by RPAPL 1308(3) was posted on the subject property.
 - E. Identification of all actions to secure and maintain the subject property that have been taken, the date each action was taken, and the nature of each action.
 - F. Whether a foreclosure proceeding has been commenced as to the subject property, and if so, the date the proceeding was commenced and the status of the proceeding.
 - 3. Any additional information requested by the superintendent.
- (b) The quarterly report shall be filed within 30 days of the end of the calendar quarter to which the report pertains, except that no quarterly report needs to be filed for the calendar quarter ending December 31, 2016.
- (c) Every mortgagee that is not exempt from the obligations imposed by RPAPL 1308 shall maintain for production and inspection all books and records documenting all actions to secure and maintain the subject property that have been taken, the date each action was

taken, the nature of each action, the identity and employer of the person who performed each action, and all other information necessary to evidence compliance with the statute..

Section 422.6 Applicability of RPAPL 1310 Reporting Requirements.

The obligations imposed by RPAPL 1310 shall apply to both the mortgagee and the mortgage loan servicer of every vacant and abandoned residential real property located in the state, provided that only one filing shall in every case be required for each property.

Section 422.7 Federal Law and Federal Guidelines.

- (a) Where a specific provision of RPAPL 1308 is directly inconsistent with a federal law or court order, the inconsistent provision of RPAPL 1308 shall not be applied to the mortgagee. Instead, the mortgagee's compliance with RPAPL 1308 shall be evaluated by reference to the applicable federal law or court order.
- (b) Where a specific provision of RPAPL 1308 imposes an obligation on a mortgagee that is greater than what is imposed by a provision in a federal law or court order, the specific provision of RPAPL 1308 shall not be deemed to be directly inconsistent with the federal law or court order.
- (c) Where a specific provision of RPAPL 1308 imposes an obligation on a mortgagee and there is no similar provision in a federal law or court order, the specific provision of RPAPL 1308 shall not be deemed to be directly inconsistent with the federal law or court order.
- (d) Where the Federal National Mortgage Association requires that the servicing of a specific mortgage comply with the investor or insurer guidelines issued by Federal National Mortgage Association, compliance with the property preservation requirements included in such guidelines as they exist on December 20, 2016, shall be deemed to be in compliance with Section 1308. If the property preservation requirements included in the investor or insurer guidelines issued by Federal National Mortgage Association change after December 20, 2016, compliance with such future property preservation requirements shall be deemed to be in compliance with Section 1308 only if the future property preservation requirements impose the same or greater property preservation requirements as compared to the requirements included in guidelines in effect on December 20, 2016.
- (e) Where the Federal Home Loan Mortgage Corporation requires that the servicing of a specific mortgage comply with the investor or insurer guidelines issued by Federal Home Loan Mortgage Corporation, compliance with the property preservation requirements included in such guidelines as they exist on December 20, 2016, shall be deemed to be in compliance with Section 1308. If the property preservation requirements included in the investor or insurer guidelines issued by Federal Home Loan Mortgage Corporation change after December 20, 2016, compliance with such future property preservation requirements shall be deemed to be in compliance with Section 1308 only if the future property

preservation requirements impose the same or greater property preservation requirements as compared to the requirements included in guidelines in effect on December 20, 2016.

Section 422.8 Disclosure of Information Maintained in the Statewide Vacant and Abandoned Property Registry.

- (a) The information maintained in the statewide vacant and abandoned property registry shall be deemed and treated as confidential and shall therefore be exempt from disclosure pursuant to New York's Freedom of Information Law, Public Officer Law, Article 6.
- (b) The superintendent may, in his or her sole discretion, release any information in the statewide vacant and abandoned property registry if the superintendent determines that such disclosure is in the best interest of the public.
- (c) Upon written request in the form prescribed by the Department, the superintendent shall release to a public official, as defined in this Part, the information maintained in the statewide vacant and abandoned property registry that is specific to the geographic scope of the public official's district or political subdivision. The superintendent may require, in addition to any agreements or certifications required by subdivision (d), that a public official certify, as a condition to receiving information maintained in the statewide vacant and abandoned property registry, that the release of the requested information furthers the purposes of Section 1307, Section 1310, or Article 18 of the RPAPL, or any other law, code, rule, regulation or ordinance that the superintendent determines to be related to Section 1307, Section 1310, or Article 18 of the RPAPL.
- (d) The superintendent may require any party receiving information maintained in the statewide vacant and abandoned registry pursuant to this section to execute, as a condition of receiving the information, a confidentiality agreement and/or periodic certifications affirming that the confidentiality of the information has been maintained.

Section 422.9 Enforcement.

RPAPL 1308 and 1310 and the rules in this Part will be enforced as provided under RPAPL section 1308(8), the Financial Services Law and the Banking Law.

Section 422.10 Effective Date. This Part shall be effective on December 20, 2016.

Comment:

Clarification is requested as to whether determinations pursuant to subdivision 592.4(2)(b) to alter the stated purposes or to extinguish the conservation easement require publication of the "determination and summary of the determination" in the Environmental Notice Bulletin (ENB).

Response: Changes to the proposed regulatory language clarify that the DEC will publish a notice of determination in the ENB.

MISCELLANEOUS

Comment:

The proposed regulations do not adequately take into account funding sources and their associated limitations.

Response: The funding sources used to acquire a conservation easement will be reviewed prior to any modification or extinguishment in order to ensure consistency with the terms and conditions of funding. Prior to modification of an existing DEC conservation easement, an appraisal is required to determine the value of the modification. While these regulations do not alter DEC's historic practice of declining to extinguish conservation easements, ECL § 49-0307 does enumerate situations where extinguishments may occur. Most conservation easements have been purchased and paid for with public funds; thus any extinguishment would have to address repayment of the benefit received by the private grantor for the easement.

Comment:

The draft regulations preclude landowners who donate conservation easements to the DEC from qualifying for federal tax benefits and allow the DEC to extinguish conservation easements without satisfying federal tax requirements.

Response: The draft regulations do not change the statutory process under which the DEC entertains modifications or extinguishments of conservation easements. Landowners who wish to qualify for any federal tax benefits associated with a conservation easement should consult a tax attorney before they seek modifications.

Comment:

The proposed regulations appear to authorize land swaps and will potentially erode public access for the purpose of hunting, trapping and recreation.

Response: The proposed regulations do not propose wholesale land "swaps" nor do they alter the premise for acquisition of conservation easements - public recreation and natural resource protection. In recognition of these goals, the proposed regulations include a transparent public notice and participation component.

Comment:

The requirements for conservation easements should be uniform and protective of the original purpose of the easement and changes or modifications to conservation easements should be undertaken "to the minimum extent necessary" and in accordance with ECL Article 49.

Response: While the DEC acknowledges that uniformity among conservation easements can be beneficial, it recognizes that the purpose and negotiation surrounding each individual easement will vary thereby requiring a case specific analysis. The proposed regulations protect the original purposes and policies of DEC conservation easements as enumerated in statute and a modification that does not further the purpose of the existing conservation easement, will not be approved. The ECL provisions providing that a conservation easement be amended only "to the minimum extent necessary" apply only to modifications caused by utility transmission lines. With respect to other modifications, no proposed modification may alter the original purposes of the original easement.

Comment:

The proposed regulations should include an Adirondack Park State Conservation Easements Lands Master Plan.

Response: The 2010 Memorandum of Understanding between DEC and the Adirondack Park Agency (APA) Concerning State-Owned Conservation Easements on Private Lands within the Adirondack Park outlines how DEC and APA work together on conservation easements. The DEC does not seek wholesale changes. Each proposed modification will be examined on a case by case basis and the DEC and APA will continue to work together on conservation easement lands.

Comment:

A Recreation Management Plan (RMP) must be completed before DEC conducts a net benefit analysis to ensure that some level of site investigation, data collection and planning analysis is done with the landowner and DEC.

Response: Requiring a RMP is unnecessary since the Attorney General requires the DEC to have an Interim Recreation Management Plan and an approved Baseline Report in place at the time of closing.

Department of Financial Services

NOTICE OF ADOPTION

Inspecting, Securing and Maintaining Vacant and Abandoned Residential Real Property

I.D. No. DFS-41-16-00006-A

Filing No. 1113

Filing Date: 2016-12-06

Effective Date: 2016-12-21

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of Part 422 to Title 3 NYCRR.

Statutory authority: Real Property Actions and Proceedings Law, sections 1306, 1308 and 1310

Subject: Inspecting, Securing and Maintaining Vacant and Abandoned Residential Real Property.

Purpose: To implement the requirements imposed by the recent additions to the Real Property Actions and Proceedings Law.

Substance of final rule: Section 422.1 is the preamble, which explains the basis for the regulation, i.e., the implementation of amendments to the Real Property and Procedures Law (RPAPL) enacted in June 2016.

Section 422.2 provides definitions of certain terms used on the legislation and in the regulation, including: mortgage; mortgagee; assignee; mortgage maintenance; mortgage origination; mortgage servicing; public official; residential real property; state or federally chartered bank, savings bank, savings and loan association, and credit union; servicer or mortgage loan servicer; and vacant and abandoned.

Section 422.3 explains how entities that may be subject to RPAPL 1308 are to determine whether they qualify for two possible exemptions to the inspection and maintenance requirements under the statute, and how they are to report that information to the Superintendent of Financial Services.

Section 422.4 explains what information entities subject to the statute are to report to the Superintendent once they learn, or should have learned, that a property is vacant and abandoned. The section also provides guidance how entities are supposed to learn, or should learn, that the property is vacant and abandoned.

Section 422.5 identifies additional information that entities subject to the statute are to provide to the Superintendent on a quarterly basis, to supplement and update the information provided pursuant to Section 422.4.

Section 422.6 identifies the entities to whom the reporting requirements are applicable.

Section 422.7 explains how the requirements of the statute interact with federal law and federal guidelines.

Section 422.8 implements the confidentiality provisions of the statute, explaining how information about vacant and abandoned properties will be treated as confidential and the circumstances under which the information may be released.

Section 422.9 explains how the statute will be enforced.

Section 422.10 identifies the effective date of the regulation.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 422.2, 422.3, 422.4, 422.5, 422.7, 422.8 and 422.9.

Text of rule and any required statements and analyses may be obtained from: Celeste Koeleveld, NYS Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1663, email: Celeste.Koeleveld@dfs.ny.gov

Revised Regulatory Impact Statement

1. Statutory Authority.

Part Q of Chapter 73 of the Laws of 2016 enacted two new sections to the Real Property Actions and Proceedings Law ("RPAPL"), 1308 and 1310, which impose requirements on certain persons to maintain vacant and abandoned residential real property in New York and to report vacant and abandoned properties to the New York State Department of Financial Services (the "Department"), and authorizes the Department to promulgate regulations to implement the new requirements.

In addition, RPAPL Section 1306 requires that lenders, assignees and mortgage loan servicers file a notice with the Department before commencing a foreclosure proceeding in New York.

2. Legislative Objectives.

The Legislature added Sections 1308 and 1310 to the RPAPL to address the vacant and abandoned property problems facing affecting New York.

These properties create health and safety concerns for the communities in which they are located, drag down property values in the neighborhood and may be subject to criminal activity. The new RPAPL sections address these issues by requiring that all vacant and abandoned properties to be reported to a database maintained by the Department and imposing requirements on certain persons to maintain vacant and abandoned properties.

3. Needs and Benefits.

The regulation explains the process that will be used to identify state or federally chartered banks, savings banks, savings and loan associations, or credit unions subject to the requirements of Section 1308, how and when enforcement action, except by a municipality, will be taken and application of federal law and investor guidelines under Section 1308(10). In addition, the regulation explains the process to be followed by covered persons in reporting vacant and abandoned properties to the Department and the process to be followed by public officials in asking for information concerning vacant and abandoned properties to be released by the Department.

4. Costs.

The regulation imposes no costs in addition to those already contemplated by RPAPL Sections 1308 and 1310.

5. Local Government Mandates.

None.

6. Paperwork.

The regulation imposes no paperwork in addition to that already contemplated by RPAPL Sections 1308 and 1310. In addition, any impact on existing paperwork requirements is expected to be minimal.

7. Duplication.

The regulation does not duplicate, overlap or conflict with any other regulations.

8. Alternatives.

The Department is not aware of any alternatives to the rule.

9. Federal Standards.

Not applicable.

10. Compliance Schedule.

The rule will become effective upon publication, but allows covered persons until January 20, 2017 to begin the inspections required by RPAPL 1308. Covered persons who previously reported vacant and abandoned properties to the Department will have until February 1, 2017 to update their information.

Revised Regulatory Flexibility Analysis

1. Effect of the Rule:

The regulation implements authority granted to the New York State Department of Financial Services (the "Department") in Sections 1308 and 1310 of the Real Property Actions and Proceedings Law ("RPAPL"), as enacted by Part Q of Chapter 73 of the Laws of 2016. The regulation explains the process that will be used to identify state or federally chartered banks, savings banks, savings and loan associations, or credit unions subject to the requirements of Section 1308, the reports that persons subject to the requirements of Section 1308 will have to submit to the Department regarding delinquent loans on residential real property and efforts to inspect, secure, maintain and foreclose on those properties, and application of federal law and investor guidelines under Section 1308(10). In addition, the regulation explains the process to be followed by covered persons in reporting vacant and abandoned properties to the Department and the procedures to be followed in the event that the Superintendent of Financial Services determines, in the exercise of her sole discretion, to release confidential information concerning vacant and abandoned properties.

The proposed rule does not have any impact on local governments.

2. Compliance Requirements:

The regulation does not change the compliance requirements imposed by Sections 1308 and 1310 of the RPAPL, but does clarify how covered persons are to comply with the requirements of the RPAPL.

3. Professional Services:

None.

4. Compliance Costs:

None beyond the existing costs to comply with the requirements of the RPAPL.

5. Economic and Technological Feasibility:

Filing of vacant and abandoned property notifications involves common, everyday functions performed by covered persons.

6. Minimizing Adverse Impacts:

The regulation does not impose a new regulatory requirement, but implements the requirements imposed by the addition of RPAPL Sections 1308 and 1310. It is not expected to impact small businesses.

7. Small Business and Local Government Participation:

This regulation does not impact local governments.

The Department complied with SAPA 202-b(6) by providing small businesses and local governments with the opportunity to participate in the

rule making process. This occurred through posting notice of the proposed rulemaking on the Department's website and interacting with interested stakeholders. Furthermore, notice of the proposed rule was published in the State Register and the public was provided with an opportunity to comment on the proposed rule. The Department has reviewed the comments received and has completed an Assessment of Public Comments.

Revised Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

While the regulation is expected to apply to residential real property located in rural areas, it is not expected to increase costs or otherwise have an adverse impact on private or public interests rural areas.

2. Reporting, recordkeeping and other compliance requirements; professional services:

The regulation imposes no paperwork in addition to that already contemplated by Real Property Actions and Proceedings Law Sections 1308 and 1310.

3. Costs:

The regulation imposes no costs in addition to that already contemplated by Real Property Actions and Proceedings Law Sections ("RPAPL") 1308 and 1310.

4. Minimizing adverse impact:

The regulation does not impose a new regulatory requirement, but implements the requirements imposed by the addition of RPAPL Sections 1308 and 1310.

5. Rural area participation:

The Department complied with SAPA 202-bb(7) by providing public and private interests in rural areas with the opportunity to participate in the rule making process. This occurred through posting notice of the proposed rulemaking on the Department's website; and interacting with interested stakeholders. Furthermore, notice of the proposed rule was published in the State Register and the public was provided with an opportunity to comment on the proposed rule. The Department has reviewed the comments received and has completed an Assessment of Public Comments.

Revised Job Impact Statement

The regulation is not expected to have an adverse effect on employment.

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

The Department of Financial Services ("Department") received oral and written comments from a variety of interested stakeholders, including banking associations, advocacy and public interest groups, and local, state and federal government representatives.

422.2 Definitions

(a) Mortgage – Several commenters observed that the definition of "mortgage" should not be limited to the first lien on residential real property, particularly because RPAPL 1310 is not limited to first lien mortgages. The word "first" has been removed from the definition. One commenter objected that the definition includes more than just "home purchase" loans, but the Department believes that the definition appropriately captures the types of mortgages covered by the underlying legislation. Other commenters questioned whether definitions of "mortgage" and certain other terms defined in the regulation are necessary, but the Department believes that all of the definitions are useful components of a comprehensive regulation.

(b) Mortgagee – Several commentators observed that "note holder" should be included in the definition, and that change has been made. One commenter also expressed concern that including trustees in the definition expands the scope of the definition beyond what was intended by the statute, but the Department respectfully disagrees with that assertion and has left the definition unchanged in this respect.

(c) Assignee – One commenter recommended clarifying that an assignee means a current mortgagee "who has been assigned the mortgage note from the original lender or an assignee pursuant to the laws of the state." The Department concluded that no change should be made.

(d) Mortgage maintenance – One commenter recommended clarifying the language to state that "mortgage maintenance means the continued holding and ownership of a mortgage and note by the person or entity that originated the mortgage or by the assignee." The Department concluded that no change was necessary.

(e) Mortgage origination – One commenter pointed out that "origination" should not include the mere commitment to lend money, short of actually making a loan. The Department agrees, and has modified the definition to make this clear.

(f) Mortgage servicing – One commenter recommended a modification to the reference to reverse mortgages, and a change has accordingly been made. Contrary to the objection of another commenter, however, the reference to reverse mortgages remains in the definition because the Department believes it is consistent with the statute.

(g) Public Official – Several commenters suggested additions to the scope of “public officials” who, under the statute, “shall” be entitled, upon request, to information from the vacant and abandoned property registry established pursuant to RPAPL 1310. The Department believes that the definition is consistent with the categories listed in the statute, which are limited to public officials who represent specific state districts, counties, cities, towns and villages. Some commenters believe that the list should be expanded to include other elected officials and also non-elected officials. The Department determined not to change the definition because it believes that the definition reflects the statutory language and purpose of the registry, including that distribution of information in the registry should be limited, to avoid duplicative requests and potentially conflicting enforcement efforts, and to ensure that information in the registry remains confidential to protect the public. The statute and the regulation allow the Department discretion to release the information to other persons if it determines that such release is in the best interests of the public and confidentiality will be protected.

(h) Residential Real Property – Several commenters expressed concern about the proposed definition’s reference to buildings or structures “used for both residential and commercial purposes where no more than twenty percent of the total appraised value is attributable to the commercial purpose.” Accordingly, that part of the definition has been removed.

(i) List of covered financial institutions – One commenter observed that the definition should include state and federally chartered branches or agencies of foreign banks; that addition has been made. Another commenter objected that the definition may broaden the scope of entities that are exempt, but the Department respectfully disagrees with this assertion and has left the definition otherwise unchanged.

(k) Vacant and Abandoned – One commenter asserted that the definition should be amended to include a requirement that the mortgage securing the property be delinquent for up to 90 days prior to the first inspection. It is true that under RPAPL 1308(1), the mortgage must be delinquent to trigger the first inspection requirement, but the Department does not believe that a change is necessary to make this clear. Other commenters expressed concern that the definition is incomplete or inaccurate, but the Department respectfully disagrees because the definition tracks the language of RPAPL 1309(2).

422.3 Applicability and Exemption under 1308

A number of commenters objected that, to qualify for an exemption, an entity must engage in mortgage origination, mortgage ownership, mortgage servicing and mortgage maintenance in the given calendar year. The Department agrees that an entity should be able to qualify for an exemption if it originates and owns mortgages, even if it does not service or maintain them. The language of Section 422.3(b)(1)(B) and of Section 422.3(c)(1)(B) has been changed accordingly.

Commenters also objected that the numerator and the denominator for determining the exemption are not “apples to apples,” but the Department respectfully disagrees with that comment. Both the numerator and the denominator consist of mortgages that were issued or originated in New York during the given calendar year. The formula, as set forth in the regulation, accurately measures each institution’s market participation in the mortgage industry in New York.

One commenter expressed concern that, if it does not qualify for either exemption, the inspection and maintenance obligations will apply to it retroactively. Another commenter objected that it could be required to inspect and maintain properties retroactively if it fails to qualify for the exemption in a particular year despite having qualified for the exemption in the prior year. The Department believes that the exemption provisions in Section 422.3 accurately reflect the statutory rules and that other provisions address the inspection and maintenance requirements.

One commenter objected to placing the burden of proving entitlement to the exemption on the entity seeking the exemption, but the Department believes that allocation of burden is appropriate. Another commenter suggested that entities that miss the December 31 deadline for establishing entitlement to the exemption be given an opportunity to establish good cause for the error. It remains the Department’s position that entities seeking the exemption will have ample time to apply for it, but the Department has extended the deadline to February 28, 2017, for the 2017 calendar year, the first full year that the statute and regulation will be in effect.

Two commenters suggested that the Department add a provision making clear that entities that qualify for the exemption under the statute but that are also subject to the Best Practices Agreement with the Department will continue to be subject to the Best Practices Agreement. The Department has accepted this suggestion.

Two commenters observed that it is unclear whether local laws and ordinances regarding inspection and maintenance of vacant and abandoned properties are preempted by the statute. RPAPL 1308(13) provides that local laws and ordinances may not exceed the maintenance requirements imposed on state or federally chartered banks, savings banks, savings and loan associations and credit unions that are subject to RPAPL 1308, mean-

ing that entities that are not exempt must comply with such local laws and ordinances. The Department sees no need, however, to restate this provision of the statute in the regulation.

Finally, one commenter expressed concern that entities might structure their businesses in such a way as to avoid the obligations created by the statute. The Department believes that such concerns can best be addressed by the Department’s general investigative and enforcement authority.

422.4, 422.5 Vacant and Abandoned Property Reporting and Quarterly Reporting

A number of commenters expressed concerns that the reporting requirements impose burdens. On the whole, the Department believes that the requirements in the regulation – including quarterly reporting – are consistent with the Department’s mandate to issue regulations necessary to implement and enforce the provisions of the statute. While the Department has eliminated the quarterly reporting requirement that reporters identify the persons, and their employers, who have conducted inspections and who have secured and maintained property, mortgagees will still be required to maintain such information in their books and records, subject to inspection by the Department. All other reporting requirements remain the same because they are, in the Department’s view, essential to making sure that the obligations imposed by the statute are met.

Some commenters also expressed concern about providing sensitive, private and confidential information to the Department. In some respects, these commenters further asserted, the reporting requirements may exceed reporting permitted under federal law. The Department believes that these concerns are adequately addressed by the fact that the information reported to the Department is deemed confidential under RPAPL 1310 and that the Department only intends to release limited information from the registry about a particular property – such as the address of the property and contact information for the servicer – to the extent that any information is released at all, subject to confidentiality agreements.

Several commenters objected to the “should have learned” language in Section 422.4(b), which is taken directly from the statute, and to the “due diligence” standard in Section 422(c). The Department believes that the “due diligence” standard captures how a mortgagee or mortgage loan servicer “should... learn” that a property is vacant and abandoned. The Department has adopted a definition of “due diligence” to clarify what the standard means. Taken together, Sections 422.4(b) and (c) appropriately convey that a mortgagee or mortgage loan servicer cannot avoid responsibility for inspection and maintenance by claiming that it was unaware that a property is vacant and abandoned, when that fact should have been plain from the ordinary exercise of due diligence.

One commenter recommended making it clear that the obligation to learn that a property is vacant and abandoned, and to report on that property, belongs to the mortgagee, which can delegate the responsibility to a mortgage servicer. The Department does not believe that this change is needed.

Some commenters recommended adding specific details to the reporting requirements. One believes that “status of the proceeding” is too vague, and recommends expanding the requirement to make clear that it includes the date of entry of final judgment and the scheduled sale of the property, but the Department believes that it is commonly understood that such information is what “status of the proceeding” calls for. Another suggested requiring the address of the subject property to be included; that reporting requirement has been made explicit in the regulation. Another commenter favored adding contact information for third-party vendors, but the Department disagrees. Finally, a commenter suggested clarifying that the contact number for the servicer responsible for maintaining the property should be the number of someone actually responsible for handling questions about a vacant and abandoned property, not just a customer service number. Again, the Department believes no change is necessary, although it expects that registrants will be providing adequate information to the Department consistently with the goals of the statute.

422.6 Applicability of RPAPL 1310 Reporting Requirements

Some commentators expressed concern that it is unclear who bears the primary or initial burden for reporting, the mortgagee or the mortgage loan servicer. The Department believes that the regulation is consistent with the language of the statute, which places the reporting burden on the mortgagee or the mortgage loan servicer, meaning that either or both may be held responsible if the reporting requirements are not met.

422.7 Federal Law and Federal Guidelines

It was argued that, under the language of the RPAPL 1308(10), compliance with federal guidelines should be deemed compliance with the maintenance obligations in the statute. As to the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association, the Department has accepted this proposition in the regulation, based upon the existing federal guidelines as of the statute’s effective date; to the extent those guidelines are weakened in the future, such weaker guidelines will not be deemed compliance with the maintenance obligations in the statute.

One commenter argued that compliance with the statute is not required

where the statute imposes an obligation that is greater than that imposed by federal law, court order or the investor or insurer guidelines. The Department believes, however, that more limited obligations do not necessarily obviate the need to comply with RPAPL 1308. Accordingly, Section 422.7 is otherwise unchanged.

422.8 Disclosure of Information from Registry

Some commenters expressed concern that the regulation does not go far enough to protect information in the registry, while others believe that the regulation goes too far in declaring that information in the registry is not subject to disclosure under FOIL. The Department believes that it has struck the right balance in the regulation between confidentiality and disclosure and that it has faithfully interpreted the language of the statute. Accordingly, no change to the regulation has been made.

422.9 Enforcement

Several commenters suggested adding references in this section to the Executive Law, the Civil Practice Law and Rules, and "any other applicable state or federal law." The commenters expressed concern that otherwise, the scope of enforcement under the statute may be unduly narrowed. The Department does not believe that this change to the regulation is warranted, given the statute's enforcement provisions, but did clarify that the enforcement contemplated under the RPAPL would be pursuant to RPAPL section 1308(8). The regulation appropriately reflects the fact that, under the statute, the Superintendent of Financial Services is to pursue, as appropriate and in his or her sole discretion, any alleged violation of the statute. The municipality in which the property is located may also bring an action under the statute, but that authority is "in addition" to the authority given to the Superintendent and must be on ten days' notice to the Superintendent, indicating that the Superintendent is primarily responsible for the efficient and non-duplicative enforcement of the statute. That primary exercise of authority under the statute will, as reflected in the regulation, be exercised under RPAPL section 1308(8), the Financial Services Law and the Banking Law. It is not necessary, in the Department's view, to refer to any other law or procedural rules that may apply in actions or proceedings to enforce the statute.

422.10 Effective Date

Several commenters expressed concern about the need for a phase-in period for the obligations imposed by the statute, particularly for mortgages that are already delinquent and for properties that are already vacant and abandoned as of the December 20, 2016 effective date. In recognition of these concerns, the Department has added phase-in provisions for certain of the obligations. Specifically, under Section 422.3, first inspections of properties with delinquent mortgages must occur by February 1, 2017, and maintenance obligations on vacant and abandoned properties do not go into effect until February 1, 2017. In addition, under Section 422.4, information about vacant and abandoned properties previously reported to the Department must be provided by February 1, 2017.

NOTICE OF ADOPTION

Commercial Crime Coverage Exclusions

I.D. No. DFS-41-16-00012-A

Filing No. 1112

Filing Date: 2016-12-06

Effective Date: 2017-07-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of Part 76 (Regulation 209) to Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; Insurance Law, sections 301 and 2307; and arts. 23, 24 and 34

Subject: Commercial Crime Coverage Exclusions.

Purpose: To prohibit certain insurance exclusions for loss/damage caused by an employee previously convicted of criminal offense.

Text of final rule: I, Maria T. Vullo, Superintendent of Financial Services, pursuant to the authority granted by Sections 202 and 302 of the Financial Services Law and Sections 301 and 2307 and Articles 23, 24 and 34 of the Insurance Law, do hereby promulgate Part 76 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation 209), to take effect on July 1, 2017, with respect to all policies issued, renewed or delivered in this State on or after that date, to read as follows:

PART 76

(INSURANCE REGULATION 209)

COMMERCIAL CRIME COVERAGE EXCLUSIONS

Section 76.0 Preamble and purpose.

(a) Correction Law section 753 states that the public policy of New

York, as expressed in Correction Law Article 23-A, is to encourage the licensure and employment of persons previously convicted of one or more criminal offenses. Correction Law section 752 forbids discrimination based upon a conviction for a previous criminal offense unless there is a direct relationship between one or more of the previous offenses and the specific employment sought or held by the individual; or the granting or continuation of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. Correction Law section 753 specifies eight factors, including the public policy of the state, to be considered in making a determination pursuant to section 752.

(b) However, commercial crime insurance policies often have provisions that will exclude coverage for loss or damage caused by an employee who has been convicted of a criminal offense, where the employer knew about the conviction prior to the loss or damage. This puts employers in the untenable position of either not being able to obtain insurance or violating the Correction Law by not hiring the individual, even though a review of the Correction Law factors would weigh in favor of employment. Given the strong public policy of the State, the Superintendent has determined that it would be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state for an insurer that writes commercial crime insurance policies in this state to exclude coverage where the employer has weighed the factors set out in Correction Law Article 23-A and made a determination favorable to the employee.

Section 76.1 Definitions.

For purposes of this Part:

(a) Commercial crime coverage means coverage under a policy of commercial risk insurance that provides burglary and theft insurance or fidelity insurance; and

(b) Commercial risk insurance has the meaning ascribed by Insurance Law section 107(a)(47).

Section 76.2 Prior convictions.

No policy issued, renewed or delivered in this state that provides commercial crime coverage may exclude or limit coverage for loss or damage caused by an employee on the basis that the employee was convicted of one or more criminal offenses in this state or any other jurisdiction prior to being employed by the employer, if, after learning about an employee's past criminal conviction or convictions, the employer made a determination to hire or retain the employee utilizing the factors set out in Correction Law Article 23-A.

Section 76.3 Determined violation.

A contravention of this Part shall be deemed to be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state, and shall be deemed to be a trade practice constituting a determined violation, as defined in section 2402(c) of the Insurance Law, in violation of section 2403 of such law.

Final rule as compared with last published rule: Nonsubstantial changes were made in sections 76.0(a) and 76.2.

Text of rule and any required statements and analyses may be obtained from: Celeste Koeleveld, NYS Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1640, email: Celeste.Koeleveld@dfs.ny.gov

Revised Regulatory Impact Statement

1. Statutory authority: Sections 202 and 302 of the Financial Services Law and Sections 301 and 2307 and Articles 23, 24 and 34 of the Insurance Law. Financial Services Law Sections 202 and 302 and Insurance Law Section 301 authorize the Superintendent of Financial Services (the "Superintendent") to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law.

Insurance Law Section 2307 sets forth the requirement that property/casualty insurance policies shall not be misleading or violative of public policy. Articles 23 (Property/Casualty Insurance Rates) and 34 (Insurance Contracts-Property/Casualty) are the general articles applicable to most property/casualty insurance policies. Article 24 prohibits any insurer from engaging in unfair methods of competition or unfair and deceptive acts or practices.

2. Legislative objectives: Correction Law section 753 states that the public policy of New York, as expressed in Correction Law Article 23 -A, is to encourage the licensure and employment of persons previously convicted of one or more criminal offenses. The law forbids discrimination based upon a conviction for a previous criminal offense unless there is a direct relationship between one or more of the previous offenses and the specific employment sought or held by the individual; or the granting or continuation of employment would involve an unreasonable risk to