Phones are ringing; borrowers are panicked and so are their lenders and loan servicers. Borrowers who were profitable, good customers three or four weeks ago are suddenly struggling in the wake of the coronavirus crisis. They are seeking immediate relief from loan payments and modifications to their loans. Lenders are sympathetic and want to help but also need to protect themselves. What is a prudent lender to do?

1. Take a Deep Breath
This is all overwhelming, but don’t rush to a hasty decision. For the most part, the solution is not yet clear. Among other things, it is uncertain how long this crisis will last and what governmental relief may be provided. Also, lenders and servicers are still working to develop an overall strategy to deal with this crisis. COVID-19 has already impacted or will impact all property types and many, many borrowers. Although lenders and servicers should be proactive in assessing the real estate loans in their portfolios regardless of whether a borrower has requested a modification or a clear default has occurred, in general an immediate decision does not need to be made on a loan modification.

2. No Oral Agreements
Although lenders and servicers are and should be sympathetic, immediate agreements with borrowers should be avoided. Yes, it is important to be responsive and proactive, and to let the borrower know the lender understands the its current circumstances. These are trying times for everyone. But, it is also important for the borrower to know that the lender needs time to understand and assess the situation too. Most importantly, the lender should make sure the borrower understands that although the lender is willing to discuss the loan with the borrower, the lender has no obligation to modify the loan and no agreement with respect to the loan will exist until such time, if any, as an agreement is reduced to writing and signed by the lender, borrower, guarantor and any other relevant parties. This should be reinforced in correspondence to the borrower and any guarantors, or even better, in a pre-negotiation letter.

3. Request Information
Ask detailed questions about your borrower’s and the property’s situation. Request updated financial information and projections from your borrower and guarantors in order to assess the prolonged impact of COVID-19 on their business. Ask about the borrower's other properties and properties owned by affiliated entities. You may need your borrower to update this information often—perhaps on a weekly or even a daily basis.
4. Review Loan Documents
Review the loan documents and understand and consider the issues that impact the loan and your borrower. Among other things, review and consider:
- What breaches, if any, by the borrower currently exist?
- Are there force majeure clauses, and are they applicable to your borrower’s situation?
- What are the financial covenants? Have they been or will they likely be breached in the future?
- What are the cash management features of the loan documents, if any?
- Are there any guarantors and what are the obligations of the guarantors?
- What requirements are there regarding the borrower’s compliance with laws? Is the borrower required to operate its business in the current circumstances?
- What are the lender’s funding and other obligations?
- Are there any material adverse change provisions?
- What discretion does the lender have to call a default, not to fund future draws or to take or not to take action?

5. Regulators
Guidance on loan restructures and enforcement actions will continue to evolve. Lenders must always keep the most current guidance posted by regulators in mind when considering and implementing modifications or enforcement actions.

6. Legal
Lenders and servicers should consult with counsel to understand the legal and practical ramifications of loan document provisions, the evolving legislative and regulatory landscape, for advice on loan modifications requests and the exercise of any rights under the loan documents.

7. Approvals
The person on the front lines receiving borrower calls should ask about and make sure to follow all lender and servicer protocols. CMBS servicers must be mindful of requirements contained in the Pooling and Servicing Agreement as well as any REMIC tax issues. Banks and other regulated lenders should be careful to avoid modifying a loan in a way that reclassifies it as a Troubled Debt Restructuring (TDR) thereby subjecting the lender to additional regulatory reporting, tracking and accounting requirements. Most lenders and servicers have or are developing protocols for asset managers and loan officers to follow upon receipt of a loan modification request.

We are all in this together. Stay tuned for more practical advice and refer to the AGG Coronavirus webpage for additional legal alerts.
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