Regulatory Impact Statement for the Proposed Amendment to 3 NYCRR Part 76

1. Statutory Authority: Banking Law (or "BL") §§ 9-d, 10, 14, and 28-b; Financial Services Law (or "FSL") §§ 102, 201, 202, 301, and 302; and § 296-a of the Executive Law.

BL § 9-d authorizes the Superintendent of Financial Services ("Superintendent") to enforce § 296-a of the Executive Law.

BL § 10 sets forth a declaration of policy, including that banking institutions will be regulated in a manner to insure safe and sound conduct and maintain public confidence.

BL § 14 references, without limitation, the policy of BL § 10 and sets forth certain powers of the Superintendent under the Banking Law, including the power to "make, alter and amend orders, rules and regulations not inconsistent with law."

BL § 28-b, as amended by the Legislature in 2019 (Chapter 264, Laws of 2019), and effective as of January 11, 2020, specifies how the Superintendent obtains information from banking institutions concerning their compliance with the Community Reinvestment Act of 1977, United States Public Law 95-128 ("CRA"), what the Department examines when conducting CRA examinations, and how the Department of Financial Services (the "Department") should consider the performance of banking institutions under CRA criteria when they file notices and applications requiring the Department's approval. BL § 28-b directs the Superintendent to consider, among other things, "[e]vidence of prohibited discriminatory or other illegal credit practices," by a covered institution in evaluating the performance of that institution. The most recent statutory amendment to BL § 28-b adds the treatment of women-owned and minority-owned businesses to the criteria that the Superintendent must consider. The Superintendent is also authorized to promulgate regulations as necessary to enforce the provisions of BL § 28-b.

FSL § 102 sets forth the purpose and goals of the Financial Services Law including, as relevant, to "establish a modern system of regulation, rule making and adjudication," and "to ensure . . . the prudent conduct of the providers of financial products and services, through responsible regulation and supervision."

FSL § 201 sets forth a declaration of policy for the Department and states, as relevant, that the Superintendent shall take such actions as the Superintendent believes necessary to "foster the growth of the financial industry in New York and spur state economic development through judicious regulation and vigilant supervision."

FSL § 202 establishes the office of the Superintendent of Financial Services and provides the Superintendent with broad rights, powers, duties and discretion with respect to matters under the Financial Services Law, the Banking Law, and the Insurance Law.

FSL § 301 sets forth the powers of the Superintendent under relevant law.

FSL § 302 sets forth the power of the Superintendent to prescribe, withdraw or amend rules and regulations involving financial products and services that effectuate and interpret the provisions of the Financial Services Law, the Banking Law, and the Insurance Law, and "govern[] the procedures to be followed in the practice of the Department."

Executive Law § 296-a sets forth unlawful discriminatory practices that creditors may not engage in and empowers the Superintendent "to issue appropriate orders to [a] creditor pursuant to the banking law," upon the Superintendent's "determination that [such] regulated creditor has engaged in or is engaging in discriminatory practices," and that "[s]uch orders may be issued without the necessity of a complaint being filed by an aggrieved person." Section 296-a (9) obligates creditors to certify their compliance with Executive Law § 296-a when making certain applications to the Superintendent. Under Executive Law § 296-a (11), the Superintendent is empowered to promulgate regulations necessary to effectuate the purposes of the statute.

2. Legislative Objectives: To expand the criteria by which the Department assesses a banking institution's record in meeting the credit needs of its entire community to include service to women-owned and minority-owned businesses.

3. Needs and Benefits: The proposed amendment was necessitated by the statutory amendment to BL § 28-b. The proposed amendment is designed to conform 3 NYCRR Part 76 ("Part 76") to this new statutory mandate. The Department needs banking institutions to collect new data during the lending process and report it to the Department to carry out the new statutory requirement, and Section 76.16 specifies how they should do so. The collection of the information also allows the Department to monitor covered institutions' compliance with Executive Law § 296-a. An institution's noncompliance with fair lending laws is a criterion already considered by the Department in CRA examinations, in accordance with BL § 28-b.

The Department needs access to new data on the lending practices of covered institutions to do the analysis required. This data will also serve to improve the Department's CRA examinations and its enforcement of the fair lending law.

4. Costs: The regulation will impose new record keeping requirements on covered banking institutions and related adjustments to their compliance programs. Although banking institutions may incur some additional costs to comply with the amended Part 76, these businesses have the necessary experience, resources, and systems to do so.

The regulation will not result in any fiscal implications to the State.

5. Local Government Mandates: This regulation will impose no new mandates on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: Banking institutions will face new recordkeeping requirements and may need to adjust their lending procedures to comply with the amendment. The Department will not create or require any new forms that must be completed by banking institutions to conform to the new regulation. However, a request for

the new data being collected pursuant to the proposed regulation will be added to the requests for data included in the first day letter sent to each covered banking institution ahead of examination. Banking institutions will not submit any additional filings to the Department.

7. Duplication: This amendment does not duplicate or conflict with any existing state or federal rules or other legal requirements. Consistent federal law exists, as noted below, but neither duplicates nor conflicts with the proposed amendment. Further, Section 76.16 (g) provides an alternative compliance standard if future federal regulations should create any conflicts or duplication. The Department, in its discretion, may determine that compliance with any relevant future federal regulation constitutes compliance with Part 76 requirements.

8. Alternatives: There are no viable alternatives to this regulation. The Department is legally obligated to conform Part 76 to changes in BL § 28-b. The Department initially responded to the new version of BL § 28-b by issuing an Industry Letter on June 30, 2020:

https://www.dfs.ny.gov/industry_guidance/industry_letters/il20200630_alert_amends_nycra

This Industry Letter is insufficient in the long term for compliance purposes. A formal regulation is needed to mandate data collection by banking institutions, particularly due to restrictions on data collection imposed by a federal regulation discussed below.

The Department posted a draft text of this regulation on its website for 10 days to solicit comment from small businesses that might be affected. The Department received 2 comments. These comments came from a single banking institution.

Comment: The Department should consider exempting designated Minority Depository Institutions ("MDI") from reporting data as set forth in the draft text of Part 76 because MDIs focus on providing services to minority populations.

Department Response: Exempting MDIs would contravene the purpose of the regulation and may limit the usefulness of the data collected overall by failing to account for meaningful segments of the market.

Comment: Depending on an institution's loan operating system, it may be impractical to prevent underwriters from accessing the data collected.

Department Response: 76.16(d) of the draft accounts for this concern, specifying that, "[w]here feasible," loan underwriters or other officers or employees of a banking institution involved in making determinations concerning applications for credit shall not have access to the information collected. The provision does not bar access to the information absolutely.

9. Federal Standards: The Dodd-Frank Act, Public Law 111-203, enacted on July 21, 2010, as codified at 15 U.S.C. § 1691c-2, requires financial institutions to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses. 15 U.S.C. § 1691c-2 (b) requires financial institutions to:

(1) inquire whether an applicant business is a women-owned, minority-owned, or small business, without regard to the mode of submission of its application or whether or not such application was made in response to a solicitation by the financial institution; and

(2) maintain a record of the responses to such application, separate from the application and accompanying information.

The Dodd-Frank Act requires that this information be submitted annually to the Consumer Financial Protection Bureau ("CFPB"). However, at present, covered institutions are not obligated to comply with this provision, as the CFPB in 2011 advised covered institutions that they are not obligated to comply until the CFPB issues implementing regulations. The Dodd-Frank Act explicitly requires the CFPB to promulgate such regulations (15 U.S.C. §1691c-2 (g)(1)), and on September 1, 2021, the CFPB published a notice of proposed rulemaking for the regulation. No date for final adoption has been set.

CFPB's Regulation B, 12 C.F.R. Part 1002, is promulgated to implement ECOA. Part 1002.5 of Regulation B limits inquiries concerning the ethnicity, race, and sex of an applicant seeking a loan from a

financial institution. 12 C.F.R. 1002.5 (a) (2) and 1002.5 (b) create a relevant exception to these limitations. Under Part 1002.5 (a)(2), "a creditor may obtain information required by a regulation, order, or agreement issued by, or entered into with, a court or an enforcement agency (including the Attorney General of the United States or a similar state official) to monitor or enforce compliance with the Act, this part, or other Federal or state statutes or regulations."

The Department's proposed amendment to Part 76 creates a regulatory requirement that falls within the scope of this provision. Information provided to the Department will be used to monitor performance under the federal CRA, New York's version of the CRA codified in BL § 28-b, the federal ECOA, and New York's parallel fair lending statute, Executive Law § 296-a.

10. Compliance Schedule: The proposed amendment will be effective upon adoption. The Department does not believe any transition period is necessary for this amendment. Banking institutions already should be familiar with the relevant change in BL § 28-b. The Department also issued an Industry Letter on June 30, 2020, concerning the new statutory requirements. See:

https://www.dfs.ny.gov/industry_guidance/industry_letters/il20200630_alert_amends_nycra

Accordingly, banking institutions should have already modified their practices to a significant extent.

Regulatory Flexibility Analysis for Small Businesses and Local Governments for the Proposed Amendment to 3 NYCRR Part 76

1. Effect of the Rule: State Administrative Procedure Act ("SAPA") § 102(8) defines a small business to mean "any business which is resident in this State, independently owned and operated, and employs one hundred or less individuals." This amendment affects all companies regulated under the Banking Law equally, including banking institutions that are small businesses. The amendment to Part 76 will require banking institutions to collect relevant data from loan applicants to allow the Department of Financial Services ("Department") to implement the legislative mandate established by the recent amendment to Banking Law § 28-b. As amended, Banking Law § 28-b adds the treatment of women-owned and minority-owned small businesses to the Community Reinvestment Act ("CRA") criteria that the Superintendent of Financial Services must consider when evaluating certain notices and applications.

To the extent any lender is a small business, it is operating in a highly regulated environment and should be adequately prepared to comply with the proposed rule. Additionally, the Department advised lenders that this regulatory change would be forthcoming in a June 30, 2020, Industry Letter. Small businesses that are women-owned and minority-owned businesses are among the intended beneficiaries of this amendment.

This rule does not affect local governments.

2. Compliance Requirements: The amendment will impose new record keeping requirements on banking institutions and require adjustments to their compliance programs. Although banking institutions may incur some additional costs to comply with the amended Part 76, these businesses have the experience, resources, and systems to comply with these requirements.

New Section 76.16(g) mitigates potential compliance costs if future federal regulations should create any conflicts or duplication. The Department, in its discretion, may determine that compliance with any relevant future federal regulation is sufficient to comply with Part 76 requirements.

No local government will have to undertake any reporting, recordkeeping, or other affirmative acts to comply with this rule because the rule does not apply to any local government.

3. Professional Services: It is not anticipated that small businesses will require any additional professional services to comply with the requirements of this amendment.

No local government will need professional services to comply with this rule because the rule does not apply to any local government.

4. Compliance Costs: As noted above, new recordkeeping requirements will impose some compliance costs on banking institutions.

No local government will incur any costs to comply with this amendment because the amendment does not apply to any local government.

5. Economic and technological feasibility: The rulemaking should not impose adverse economic or technological burdens on small businesses. Banking institutions have the experience, resources, and systems to comply with these requirements and currently comply with similar requirements.

This rule does not apply to any local government; therefore, no local government should experience any economic or technological impact as a result of the rule.

6. Minimizing Adverse Impact: The proposed amendment should not impose significant adverse impacts on small businesses.

No local government should be adversely impacted by this rule because the rule does not apply to any local government.

7. Small Business and Local Government Participation: The Department complied with SAPA § 202-b(6) by posting the proposed rule on its website for informal outreach and notifying CRA officers and trade organizations that represent the interests of small businesses that the proposed rule had been posted. The

Department also will comply with SAPA § 202-b(6) by publishing the proposed amendment in the State Register and posting the proposed amendment on its website again.

Rural Area Flexibility Analysis for the Proposed Amendment to 3 NYCRR Part 76

1. Types and Estimated Numbers: Because the proposed rule will apply to all banking institutions covered by the New York Community Reinvestment Act ("CRA"), Banking Law ("BL") § 28-b, in New York State, it will necessarily apply to covered institutions in rural areas. There are 76 state-chartered banks in New York that will be covered by the proposed rule. The Department of Financial Services ("Department") estimates that those state-chartered banks have 1,010 branches located in rural areas, as that term is defined by Executive Law § 481(7), representing approximately 87.2% of the total number of state-chartered bank branches in New York State.

2. Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services: To allow the Department to comply with a recent amendment to BL § 28-b, which requires the Superintendent to evaluate the extent of covered banking institutions' provision of credit to minority- and women-owned businesses ("MWOBs"), the rule would establish how covered banking institutions should solicit, collect, store, and report information to the Department relating to their provision of credit to MWOBs. This data collection and reporting will be part of institutions' general compliance with longstanding CRA reporting requirements, and the Department has limited the scope of data collection to that which is essential to the Department's ability to comply with the legislative mandate. The size of the collection and reporting obligation will correlate with the covered institution's volume of business. Thus, the Department expects that all covered institutions already have the relevant expertise and resources to perform the data collection and reporting required. It is not anticipated that lenders located in rural areas will need additional professional services other than those used in the normal course of their business to comply with existing regulations.

3. Costs: The requirements of Part 76 do not impose any direct costs on lenders. Although lenders may incur some additional costs as a result of complying with Part 76, banking institutions already have the experience, resources and systems to comply with these requirements. The requirements of Part 76 will apply

uniformly across all lenders and it is not anticipated that lenders located in rural areas will have any costs different than those located in urban or suburban areas.

4. Minimizing Adverse Impacts: The requirements of Part 76 will apply uniformly across all geographic regions. The Department has determined that uniform regulatory requirements are appropriate. BL § 28-b does not provide for any special exemptions for rural areas. During the Department's outreach to industry representatives as part of its development of this rule, industry associations did not raise concerns about adverse impacts on their rural constituents.

5. Rural Area Participation: The Department has complied with State Administrative Procedure Act § 202-bb(7) by publishing a general notice of proposed rulemaking, through outreach to industry associations, and, to the extent covered institutions in rural areas are also small businesses, by providing advance notice of the publication of the proposal in the State Register on the Department's website to comply with the requirements of State Administrative Procedure Act § 202-b(6).

Statement Setting Forth the Basis for the Finding that the Proposed Amendment to 3 NYCRR 76 Will Not Have a Substantial Adverse Impact on Jobs and Employment Opportunities

This amendment should not adversely impact jobs or employment opportunities in New York State. Banking institutions are already regulated under various federal and state laws. These institutions already have the experience, resources and systems to comply with these requirements and currently comply with similar requirements.

Compliance with the amendment is not expected to have a significant adverse effect on jobs or employment activities within the banking industry. To the extent that women-owned and minority-owned businesses obtain improved access to credit from banking institutions, the employment effect may be positive.