Assessment of Public Comment

In response to its Notice of Proposed Rulemaking published October 26, 2022, the Department of Financial Services ("Department") received comments from three entities, including two industry organizations and a community organization association. The Department is providing this assessment of public comment in accordance with SAPA § 202 (5)(c)(vii).

(1) **Comment:** Two industry organizations urged the Department to extend the compliance deadline for the requirements of the new § 76.16 from six months to eighteen months and thirty-six months, respectively, to give banks sufficient time to implement these requirements, as well as to align the compliance deadline with any deadlines that may be prescribed in the Consumer Financial Protection Bureau's ("CFPB") yet-to-be published final rule implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1071 ("1071 Regulation"), expected to be adopted in 2023. One of those organizations also advocated that the Department delay any rulemaking implementing statutory Community Reinvestment Act ("CRA") revisions until the implementation of the 1071 Regulation.

**Response:** It is not clear at this time when the 1071 Regulation will take effect, and the Department has a statutory mandate with which it must comply.

(2) **Comment:** A community organization association advocated that the Department begin considering data on lending to minority- and women-owned business ("MWOB") as part of CRA evaluations immediately, but only with respect to loans currently considered under the CRA, until the 1071 Regulation takes effect.

**Response:** Even though covered banking institutions already report certain loan information to the Department pursuant to current CRA evaluation rules, that those banks are not collecting data on whether those loans are being made to MWOBs in accordance with a statutory or regulatory framework. The Department believes that any determinations of how well a covered banking institution is lending to MWOBs should be made based on data collected and reported in accordance

with standards set by regulation.

(3) **Comment:** Two industry organizations requested that the Department clarify provisions in § 76.16 to address circumstances where multiple applicants jointly apply for a single loan, such as for a joint venture.

**Response:** The final rule clarifies in § 76.16(f)(6) that a banking institution should obtain information pursuant to § 76.16 for all entities participating in the application.

(4) **Comment:** One industry organization urged the Department to clarify how telephone applications would be treated under the final rule, and another specifically asked whether the disclosures required under § 76.16(b)(2) may be orally provided to the applicant when the applicant applies for a loan over the telephone.

**Response:** The final rule amends § 76.16(b)(2) to allow for disclosures to made orally for applications made via telephone or another medium that does not involve providing any paper or electronic documents.

(5) **Comment:** A community organization association urged the Department to identify other ways to explicitly incorporate race into the Department's CRA evaluations consistent with the original purpose and intent of the Community Reinvestment Act as a tool to combat race-based discrimination in lending.

**Response:** The current rulemaking reflects the efforts of the Department to implement certain statutory amendments to the New York State CRA, and consequently broader reforms to the CRA regulation are outside the scope of the current rulemaking.

(6) **Comment:** One industry group asked whether collected data would be made public, and a community organization association requested that the Department make public the data obtained pursuant to § 76.16.

**Response:** The Department does not anticipate changing its current practice with respect to the

publication of data obtained through CRA evaluations. In accordance with applicable law, DFS does not publish any confidential supervisory information, personally identifiable information, or otherwise legally protected information obtained through the CRA evaluation process but does include aggregated lending totals in the CRA evaluation report which is public. The Department may publish aggregate data gathered pursuant to the amended rule, but it has not finalized the form and manner in which it would do so.

(7) **Comment**: A community association organization raised a concern that the complexity of some of the data points required to be collected under the revised proposal, including pricing data for the credit requested, could delay implementation of the rule.

**Response:** The Department believes that the data points referenced in the comment are already collected by covered banking institutions in the ordinary course of business and thus will not delay implementation of the final rule.

(8) **Comment:** A community organization association requested a data collection form for certain data collection required by the rule, such as information on the applicant's business and the loan requested, in addition to the sample demographic information collection form included in the Department's prior proposal as Appendix A to Part 76.

**Response:** The Department may provide additional guidance or sample forms regarding application data. However, the Department expects that most if not all covered banking institutions already have systems in place to collect this information, so there is less of a need for a form like Appendix A, which is intended to assist covered banking institutions in collecting data they heretofore have not collected..

(9) **Comment:** A community organization association noted that some demographic groups prominent in New York State are not listed in the disaggregated categories included in the sample data collection form in Appendix A.

**Response:** The disaggregated categories in Appendix A are the same as those that banks and other

mortgage lenders already use for collecting data pursuant to the Home Mortgage Disclosure Act ("HMDA"). The Department believes alignment with HMDA data in this respect will eliminate a requirement on covered banking institutions for duplicative but slightly different data collection regimes. However, Appendix A also provides a blank for adding categories not listed.

(10) **Comment**: A community organization association advocated that the Department match the CFPB's rule in the proposed 1071 Regulation in allowing a banking institution to use visual observation or surname to make race or ethnicity determinations for principal owners.

**Response**: Although the Department has strived to minimize differences between its rule and the CFPB's proposed 1071 Regulation, the Department has concerns that allowing banks to make their own determinations about the race and ethnicity of the principal owners of their business credit applicants carries the risk of unintended negative consequences without yielding superior data quality.

(11) **Comment:** Two industry organizations requested that the Department issue additional guidance regarding compliance and enforcement standards applicable to the new requirements, including how the data collected will be used as part of CRA evaluations and whether loans to out-of-state MWOBs would be affected.

**Response:** The Department expects to offer additional guidance as necessary regarding the requirements of the final rule and any changes to CRA evaluation procedures. However, the final rule does not change the Department's current practice of evaluating only activity within the assessment area set by the covered banking institution.

(12) **Comment:** An industry group asked the Department to confirm that data collection requirements would not apply to applicants not principally based in or doing business in New York.

**Response:** As is the current practice, covered banking institutions will be required to provide data only for activity within the institution's assessment area.

(13) **Comment:** One industry group requested clarification about whether farms are considered a business under the rule.

**Response:** Section 28-b of the Banking Law expressly refers to minority- and women-owned businesses, and § 28-b refers to small businesses and small farms separately in lists of types of credit applicants. Consequently, a farm will not be considered a business under the final rule.

(14) **Comment:** One industry group asked for clarity on the scope of a reportable loan, given potential concerns about violating Regulation B.

**Response:** The Department believes that the universe of reportable loans (and applications) is sufficiently clarified in the final rule at § 76.16(b). Regulation B provides that a lender may collect race, ethnicity, and sex data from an applicant or other person in connection with a credit transaction to comply with state regulations.

(15) **Comment:** One industry group asked for clarity regarding the requirements for data collection and reporting of technical assistance programs for MWOBs.

**Response:** The Department expects to consider technical assistance programs for MWOBs as community development services evaluated as part of the service test set forth in 3 NYCRR § 76.10. The Department will provide further guidance as necessary regarding specific data that covered banking institutions should collect regarding technical assistance programs.

(16) **Comment:** One industry group asked whether demographic information regarding the principal owners' sex must be collected.

**Response:** No. Section 76.16(f)(2) does not require the collection of information on the sex of each principal owner. However, § 76.16(f)(2)(xvi) does require the collection of information on whether the applicant is a women-owned business. The sample data collection form in Appendix A is aligned with these requirements.

(17) **Comment:** One industry group noted that § 76.16(f)(4) permits banking institutions, in some

circumstances, to reuse previously collected data and asked whether generally required disclosures must be re-disclosed in those circumstances.

**Response:** Section 76.16(f)(4) has been revised to clarify that covered institutions are not required to restate previous disclosures in such circumstances.

(18) **Comment:** One industry group asked for clarification relating to the six-year retention requirement in § 76.16(g) and how this requirement relates to the record retention requirement of Regulation B.

**Response:** The record retention requirements of § 76.16(g) do not conflict with record retention requirements of Regulation B, which imposes a shorter retention period but does not mandate destruction of records.

(19) **Comment:** One industry group asked for the Department to provide a safe harbor for covered banking institutions' determinations as to the feasibility of ensuring that loan underwriters do not have access to information provided under § 76.16(f). In the alternative, the industry group, as well as a community organization association, requested additional guidance regarding when such determinations are appropriate.

**Response:** The language in the Department's final rule mirrors the language in the most recent proposed 1071 Regulation. The Department anticipates that banking institutions will make good-faith determinations of when it is not feasible to prevent underwriters from having access to the demographic information provided pursuant to § 76.16(f) without the need for a safe harbor provision. However, for additional information, the Department's Assessment of Public Comment for the prior proposed revision to Part 76, dated October 26, 2022, includes a more detailed discussion of the "where feasible" language in the proposed 1071 Regulation.

(20) **Comment:** An industry group requested that the Department confirm that there will be no regularly scheduled information submission requirement regarding the information obtained

pursuant to § 76.16(f).

**Response:** The Department does not anticipate any regularly scheduled information submission requests regarding the information gathered pursuant to § 76.16(f) outside the normal CRA evaluation schedule. The Department also expects to rely in part on information made public by the CFPB pursuant to the 1071 Regulation, once it is in effect. In addition, the Department plans to request information from covered banking institutions directly as part of CRA evaluations.

(21) **Comment:** A community association organization asked whether merchant cash advances would count as credit under § 76.16.

**Response:** Section 76.16(f)(2)(xv)(E) provides that covered institutions must report information on merchant cash advances. Although the Department understands that the merchant cash advance market is generally dominated by non-depository lenders not subject to the Community Reinvestment Act, if a covered institution is offering such products, it will be required to report on them under the new rule.