

Assessment of Public Comment for the Proposed Addition of 3 N.Y.C.R.R. Part 120

In response to its proposed addition of Part 120 to Title 3 of the NYCRR (the “rule”), published in State Register on February 5, 2025, which implements Banking Law (“BL”) § 28-bb, the Department of Financial Services (the “Department”) received comments from ten commenters, including four community organizations, four community organization associations, one consulting company, and a joint comment from four industry associations. The Department is providing this assessment of public comment in accordance with State Administrative Procedure Act (“SAPA”) § 202(5)(c)(vii).

(1) **Comment:** The industry organizations urged the Department to model the rule as much as possible on a Massachusetts regulation governing Community Reinvestment Act (“CRA”) evaluations for non-depository mortgage lenders in that state to minimize compliance costs for entities subject to CRA evaluations in both states, instead of modeling the rule on 3 N.Y.C.R.R. Part 76, the regulation implementing the New York State CRA for banking institutions.

Response: To adopt the best policy possible and to align regulatory regimes where possible for the ease of stakeholders, the Department tailored the longstanding Part 76 model for the rule and, as appropriate, aligned it with the Massachusetts regulation in numerous respects, such as including lending and service tests that are closely comparable to their Massachusetts equivalents, setting minimum volume thresholds to be subject to evaluation, and using many similar, even identical, provisions and definitions for key terms. Therefore, the Department did not make any changes in response to these comments.

(2) **Comment:** Several community organizations and community organization associations urged the Department to expand from income-level evaluations and require, e.g., race-conscious and fair lending evaluations and periodic analyses of mortgage data to identify racial disparities in access to credit. Commenters argued that the legislative intent is to ensure fair and equal access to mortgages,

especially for minority individuals and communities who have historically faced disproportionate challenges in obtaining mortgages.

Response: As the Department noted in its Regulatory Impact Statement when initially proposing the rule, CRA is one part of a constellation of laws intended to prevent housing discrimination and its attendant harms using different models. The recommendations call for the rule to include provisions that would duplicate anti-discrimination work currently performed by the Department in its existing fair lending exams and redlining-related projects. The rule allows for a downgrade of an entity's CRA rating based on evidence of discriminatory or otherwise illegal credit activity by the mortgage banker. Finally, the rule, like other community reinvestment acts at the state and federal level, focuses on income pursuant to the text of Banking Law § 28-bb. For these reasons, the Department did not make any revisions in response to the comments.

(3) **Comment:** A community organization association recommended that the rule allow credit on the lending test for loans made through special purpose credit programs, a set of credit assistance programs for the benefit of economically disadvantaged classes of persons expressly allowed by the Equal Credit Opportunity Act and its implementing regulations.

Response: The Department intends for the rule's definition of "community development" to encompass special purpose credit programs. For clarity, the Department revised the definition of "community development" in Section 120.1(d) to expressly include special purpose credit programs.

(4) **Comment:** A community organization association argued that banking institutions providing warehouse lines of credit to non-depository mortgage bankers who underperform on their evaluations should themselves face negative consequences on their own CRA ratings.

Response: This comment concerns 3 N.Y.C.R.R. Part 76, implementing BL § 28-b, pertaining to "banking institutions" as defined therein, rather than to mortgage bankers, which is beyond the scope of this rulemaking. Therefore, the Department did not make any changes in response to this

comment.

- (5) **Comment:** A community organization argued that the rule does not include sufficient penalties or enforcement for poor performance and thereby limits the Department's enforcement authority.

Response: Community reinvestment acts, including Banking Law § 28-bb and its implementing regulations, do not provide specifically for monetary penalties. The rule does not limit the Department's existing enforcement authority with respect to violations of the Banking or Financial Services Laws by mortgage bankers. For these reasons, the Department made no revisions to the rule in response to this comment.

- (6) **Comment:** A community organization association recommended that the Department require that mortgage bankers designate single points of contact for U.S. Department of Housing and Urban Development-approved housing counseling agencies to support homeowners in obtaining loan modifications and other alternatives to foreclosure.

Response: The Department made no revisions to the rule in response to this comment, which suggests action that is beyond the scope of implementing BL § 28-bb of the Banking Law.

- (7) **Comment:** The industry associations urged the Department to eliminate commutable distance limitations for mortgage bankers.

Response: The Department made no revisions to the rule in response to this comment, as it relates to mortgage banker licensing requirements that are outside the scope of BL § 28-bb.

- (8) **Comment:** A community organization association and a community organization requested that the rule mandate public hearings for all applications by mortgage bankers, such as change in control, branch openings, or mergers, where there is any public opposition, and that the Department send any responses from the applicant regarding the public opposition to all commenters on the application.

Response: The Department has an existing process for soliciting independent public comments in connection with licensing and expansionary applications. Providing for mandatory hearings on

opposition generally, that may or may not be related to service to the community, would be beyond the scope of the rule. The Department notes that it publishes the schedule for upcoming CRA evaluations for depository institutions at the beginning of each calendar year, and, as part of each evaluation, the Department solicits and considers comments from interested and impacted community members as part of the evaluation process. Therefore, the Department did not make any changes in response to these comments.

(9) **Comment:** The industry associations expressed a concern that, if CRA evaluation results are factored into decisions on applications such as branch openings and change of control, an entity without CRA evaluation results—due to, for example, not meeting the volume threshold for regular evaluation under the regulation or not having been evaluated yet—would be unable to have any applications approved.

Response: A lack of CRA evaluation results for a mortgage banker would not, by itself, impede a mortgage banker from having an application approved. For clarity, the Department revised Section 120.3(b) to provide that decisions on applications will take into account evaluation results, “if any.”

(10) **Comment:** Three community organization associations and a community organization urged the Department to lower the volume threshold for conducting CRA evaluations of mortgage bankers from 200 loans originated in the last calendar year to various lower amounts.

Response: In setting the minimum number of loans that would make a mortgage banker subject to the CRA requirements, the Department sought to balance the aims of the Legislature in enacting BL § 28-bb to apply CRA to mortgage bankers and limiting the impact on smaller mortgage bankers. The 200-loan origination threshold was set based on a review of mortgage banker origination data for 2018 through 2024, which showed that 95.88% of New York State mortgage originations made by non-depository mortgage bankers were made by mortgage bankers who originated at least 200 mortgages in the last year. Accordingly, the Department believes the 200 originations threshold

reflects an appropriate balance that captures a substantial part of the industry and determined not to modify the threshold.

- (11) **Comment:** The industry associations recommended that the Department clarify whether the 200-origination volume threshold applies only to New York State originations.

Response: Section 120.4(a) of the proposed regulation specifically states that the threshold only applies to New York State originations. Therefore, the Department did not make any changes in response to these comments.

- (12) **Comment:** A community organization advocated that the Department modify references to discriminatory, illegal, and harmful practices in the rule to require that findings of such practices result in a ratings downgrade, as opposed to giving the Department the discretion whether to make such a downgrade.

Response: As noted elsewhere in this Assessment of Public Comment, the Department performs fair lending examinations and HMDA data reviews, in addition to exercising its authority to investigate potentially discriminatory lending activity, separately from its CRA evaluations. As fair lending violations and discriminatory practices take many forms and occur with varying levels of severity and scope of impact, the Department determined that allowing supervisory discretion with respect to downgrades is appropriate. Therefore, the Department did not make any changes in response to this comment.

- (13) **Comment:** The industry associations expressed concerns that Section 120.4(d)(1), which grants the Department the authority to downgrade ratings based on discriminatory or otherwise illegal patterns or practices, including violations of a list of state and federal statutes, may result in CRA evaluations becoming, in practice, an additional fair housing and compliance examination.

Response: The language in Section 120.4(d)(1) is consistent with the statutory provisions in BL § 28-bb(1)(g), which states that the Department may consider “[e]vidence of prohibited discriminatory

or other illegal credit practices,” including relevant findings of other state and federal agencies, in its CRA evaluations of mortgage bankers. The Department notes that the referenced provision aligns with substantially similar provisions of both the Massachusetts non-depository community reinvestment act regulation, 209 C.M.R. § 54.25(3), and 3 N.Y.C.R.R. § 76.5(b). Therefore, the Department did not make any changes in response to these comments.

(14) **Comment:** Two community organization associations recommended that the rule require the Department to solicit public comments on upcoming evaluations.

Response: The Department anticipates following its practice associated with CRA evaluations for depository institutions of discretionarily soliciting public comments as part of each evaluation and posting a schedule for upcoming evaluations at the beginning of each year. A mandatory process could result in significant delays in completing evaluations, and undermine the overarching goal of providing timely feedback to ensure mortgage bankers are able to improve in response to evaluation results. Therefore, the Department did not make any changes in response to these comments.

(15) **Comment:** A community organization association urged the Department to require mortgage bankers to post a CRA notice in branches and on websites to encourage public participation in the evaluation process.

Response: As noted above, the Department anticipates following its practice associated with CRA evaluations for depository institutions of discretionarily soliciting public comments as part of each evaluation and posting a schedule for upcoming evaluations at the beginning of each year. Therefore, the Department did not make any changes in response to this comment.

(16) **Comment:** The industry associations requested that there be no punitive actions or financial penalties for a mortgage banker’s first evaluation under Part 120 and, instead, the Department should provide constructive feedback after the mortgage banker’s first evaluation.

Response: As noted elsewhere in this Assessment of Public Comment, neither BL § 28-bb nor the

proposed Part 120 provide for financial penalties or other punitive action. Feedback is an integral part of the Department's evaluation process. Therefore, the Department did not make any changes in response to these comments.

- (17) **Comment:** The industry associations requested additional clarity on the timing and frequency of evaluations, noting that Part 76 for banking institutions, unlike the proposed Part 120, specifies a rough frequency of evaluations.

Response: In general, the Department's consumer examinations do not take place on a specified frequency; the specific evaluation cadence in Part 76 is an exception to this general practice. The Department elected not to enumerate a specific evaluation frequency for mortgage bankers because there are more mortgage bankers than banks and, due to both changes in volume among individual lenders and mergers and new entrants within the industry, it may be difficult to maintain a set schedule. Therefore, the Department did not make any changes in response to these comments.

- (18) **Comment:** Three community organization associations and a consulting company urged the Department to eliminate Section 120.5(f) of the rule, which allows mortgage lenders who have originated at least 1,000 mortgages in New York State in the past year to be evaluated for the CRA using a statewide assessment area. That provision would be an exception to the general requirement of separate assessment areas—for the lending test only—in each metropolitan statistical area ("MSA"), or the nonmetropolitan area of New York State, where the mortgage banker has originated at least 100 mortgages in the past year. The commenters argued that the largest mortgage bankers to whom this provision would apply are the best equipped to devote individualized attention to each MSA in which they originate a significant number of mortgages, and that a statewide assessment area would allow such mortgage bankers to prioritize some parts of the state and ignore others.

Response: The Department reconsidered this provision, determined that the commenters' reasoning was persuasive, and removed the statewide assessment area option from the rule.

(19) **Comment:** The industry associations and two community organization associations requested more clarity in the rule on how the Department will evaluate marketing as part of the CRA evaluation.

Response: In response to these comments, the revised rule includes a new subdivision (f) to Section 120.8, providing that, “The service test includes an evaluation of the extent and nature of the mortgage banker’s marketing activities, if any, relative to the mortgage banker’s available resources.”

(20) **Comment:** A community organization association urged the Department to adopt specific criteria for evaluating mortgage bankers on their activity in nonmetropolitan areas to encourage geographical diversity in lending and community development activity.

Response: The proposed rule requires that, “[a] mortgage banker must delineate a lending-based assessment area in each MSA or nonmetropolitan area of New York State, respectively, in which it originated, in each of the two preceding calendar years, at least 100 mortgage loans outside of branch-based assessment areas.” The designated nonmetropolitan assessment areas will be subject to the lending test described in Section 120.7, which evaluates the geographic distribution of mortgage lending, including the proportion of the mortgage banker’s lending and the dispersion of its lending in its assessment areas. In general, Section 120.5(b)(3) relating to the delineation of assessment areas supports broader activity by requiring that mortgage bankers must include whole geographies that do not arbitrarily exclude particular areas. Therefore, the Department did not make any changes in response to this comment.

(21) **Comment:** A community organization association and the industry associations urged the Department to adopt specific performance ranges tied to each of the ratings a mortgage banker can receive, citing a similar approach in the since-withdrawn 2023 revision to the federal CRA rule.

Response: The Department uses a combination of qualitative and quantitative analyses on banking

CRA evaluations and expects to do the same on evaluations under Part 120. Specifically, the Department evaluates the extent to which banking institutions are meeting the credit needs of their community as compared to a peer group based in the same location during the same or similar period. Including specific statistical ranges, especially at the level of a regulation, would both prevent the consideration of extenuating circumstances as merited in individual cases and lock evaluations into rigid benchmarks regardless of market variance or the benefit of further experience. Therefore, the Department did not make any changes in response to these comments.

(22) **Comment:** Two community organization associations advocated that the rule include an analysis of the cost of loans, such as interest rate spread and closing costs, as an evaluation factor.

Response: As part of its fair lending examinations, the Department already analyzes various factors relating to the cost of loans, such as interest rates and closing costs, to identify instances of impermissible discrimination in the cost of loans in the course of these fair lending examinations. As noted elsewhere in this Assessment of Public Comment, CRA evaluations, and the lending test in particular, focus on other aspects of lending to low- and moderate-income individuals and geographies. Therefore, the Department did not make any changes in response to these comments.

(23) **Comment:** Two community organization associations recommended that purchased loans should not receive full CRA credit, or, alternatively, any credit at all, arguing that purchasing loans does not entail as much effort and resources in responding to local credit needs as originating loans.

Response: The rule grants credit for purchased loans as credit is granted to banks under 3 N.Y.C.R.R. Part 76. A liquid secondary market, incentivized by, *inter alia*, a purchased-loan credit, drives down the cost of low- and moderate-income (“LMI”) mortgage originations and thereby expands the borrower pool. Therefore, the Department did not make any changes in response to these comments.

(24) **Comment:** The industry associations requested clarity about whether institutions can receive

credit for purchased loans on CRA evaluations, specifically citing Section 120.7(b)(6) of the rule and arguing that not including credit for purchased loans would adversely affect both mortgage bankers and the communities they serve.

Response: As noted above, the rule is not intended to disrupt the secondary market for LMI mortgages. Section 120.7(a)(2) (“The department considers originations and purchases of mortgage loans as reported by the mortgage banker under HMDA”) provides that purchased loans are included in the lending test. Section 120.7(b)(6), cited by the commenter, closely aligns with a similar provision in the Massachusetts non-depository CRA regulation and prevents multiple CRA-covered entities from each receiving credit for originating a single mortgage as part of a joint transaction. Therefore, the Department did not make any changes in response to these comments.

(25) **Comment:** A community organization association urged the Department to consider home repair lending favorably in its Part 120 evaluations.

Response: The definition of “community development” in Section 120.1(d)(1) includes, “mortgage products and other efforts,” which includes home repair lending products. Therefore, the Department did not make any changes in response to this comment.

(26) **Comment:** Two community organizations urged the Department to include in the rule both examples of climate-related initiatives that mortgage bankers can take to receive credit on the service test and examples of mortgage products that are available to borrowers for financing climate-related home improvements and could receive credit on the lending test.

Response: The Department anticipates applying the framework laid out in the February 9, 2021, Industry Letter titled “CRA Consideration for Activities that Contribute to Climate Mitigation and Adaptation,” pertaining to 3 N.Y.C.R.R. Part 76, to the rule. Therefore, the Department did not make any changes in response to this comment.

(27) **Comment:** A community organization association and two community organizations urged the

Department to allow mortgage bankers to receive credit on the service test for community development grants and investments, which currently are evaluated on a separate investment test as for banking institutions under 3 N.Y.C.R.R. Part 76. The commenters argued that such a provision would better align the rule with similar regulations in Massachusetts and Illinois, as well as encourage more overall investment in low- and moderate-income geographies.

Response: In response to these comments, the revised rule now includes in Section 120.8 credit on the service test for non-mandatory qualified investments and adds a new defined term, “qualified investments” at Section 120.1, using terminology similar to 3 N.Y.C.R.R. Part 76 to cover community development investments and grants.

Comment: A community organization urged the Department to provide a non-exhaustive list of products and services that qualify as community development, citing a similar provision in the since-withdrawn 2023 revision to the federal banking CRA regulation.

Response: The Department may provide additional guidance through Industry Letters or other appropriate channels concerning projects or activities that may or may not receive credit but does not consider such granular detail appropriate in the rule. Therefore, the Department did not make any changes in response to this comment.

(28) **Comment:** The industry associations requested clarity on the meaning of references to “innovativeness” in Section 120.8, regarding the service test, arguing that an examiner’s subjective sense of what is or is not “innovative” should not adversely impact a mortgage banker’s evaluation rating.

Response: References to “innovativeness” in Section 120.8 mirror 3 N.Y.C.R.R. Part 76. For the reasons identified by the commenter, the Department does not penalize covered entities for any perceived lack of innovation. Instead, activity that is particularly innovative and responsive to community needs can result in additional credit. Therefore, the Department did not make any

changes in response to these comments.

- (29) **Comment:** A community organization association asked the Department to clarify Section 120.9, which allows mortgage bankers to receive credit for lending and activity benefiting middle-income individuals and geographies in certain high-cost areas. The commenter argued, in particular, that mortgage bankers should not receive such credit without first being found to be serving LMI credit needs in high-cost areas in at least a satisfactory manner.

Response: The substance of the commenter's request is addressed in the rule. Specifically, in pertinent part, Section 120.9 states that, "Consideration of such activities shall be in addition to, and not in lieu of, consideration of activities in low- or moderate-income geographies and activities which serve low- or moderate-income individuals." For ease of reading, the revised rule breaks out this passage into its own Section 120.9(b).

- (30) **Comment:** The industry associations requested an extension of the six-month implementation period following the publication of the final rule to 12 months.

Response: The Department concluded that six months provides an adequate transition period and the revised rule maintains the six-month implementation period.

- (31) The commenters also submitted statements generally supporting or criticizing the proposed regulation or particular aspects of it. As these comments did not raise specific issues or suggest significant alternatives in the meaning of SAPA § 202(4-a)(b), the Department is not responding in detail but is including a summary of the comments for informational purposes.

Submissions from community organizations and the community organization association included comments that studies support extending the CRA to mortgage bankers, as the extension of coverage improves delinquency rates and reduces risky lending; that the proposed rule is necessary to prevent redlining and lending discrimination as mortgage bankers' market share has expanded;

that, considering the benefits mortgage bankers receive from federal government programs, they should also be responsible for providing benefits to the communities they serve; that the proposed rule accounts well for structural differences between mortgage lending by mortgage bankers and by banks, in part through the manner in which the proposed rule applies the lending and service tests to lenders without branches and in which it provides for the determination of assessment areas for lenders without branches; and that lending-based assessment areas are good policy.

The industry organizations urged the Department to appreciate the role mortgage bankers play in expanding lending to traditionally underserved communities; noted that, as of 2016, mortgage bankers are the predominant lender for purchase loans and refinances and have gained significant market share since 2008 in every mortgage loan type, including Federal Housing Administration, Veterans Affairs, Rural Housing Service, conventional, and jumbo loans; asserted that mortgage bankers have increased the proportion of their lending to low- and moderate-income borrowers already with support from federal government programs promoting affordable housing; asserted that the mortgage bankers support the Department's approach to minimizing compliance costs for mortgage banker evaluations under the proposed rule; and asserted that HMDA data is the best data for evaluating mortgage bankers' lending.