December 22, 2021

Comment regarding proposed amendment to 3 NYCRR 76 compliance with Community Reinvestment Act Requirements

To Whom it May Concern:

The National Community Reinvestment Coalition (NCRC), an association of 600 community organizations dedicated to increasing access to credit and capital for traditionally underserved communities, commends New York State for amending its banking law to include minority- and women-owned businesses as part of an assessment of whether banks are meeting needs of local communities.[1] We are also pleased the Department of Financial Services has proposed regulations to collect data on small business lending.

Racial and gender disparities in access to small business credit has been well-documented. Consider the following examples:

- On average, women start their businesses with half as much capital as men ($75,000 compared to $135,000). Also, just 5.5 percent of female-owned businesses use bank loans to start their businesses, compared to 11.4 percent of male-owned businesses.[2]
- A Federal Reserve-sponsored paper reconfirmed previous findings that even after controlling for firm characteristics such as profitability and creditworthiness, firms owned by people of color are still more likely to be denied loans than white-owned firms.[3]
- If people of color owned businesses at the same rate as non-minorities, our country would have one million additional employer businesses and more than 9.5 million additional jobs.[4]

By proposing to include access to credit and capital for women- and minority-owned businesses on CRA exams, the Department of Financial Services would increase the accountability of state-chartered banks for serving these traditionally underserved small businesses. We believe that the

[1] To access the law amending New York State CRA, see https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A03235&term=2019&Summary=Y&Actions=Y&Text=Y,

[2] National Women's Business Council – *Problem: Women Entrepreneurs Need Greater Access to Capital*, https://cdn.www.nwbc.gov/wp-content/uploads/2012/01/11091753/fact-sheet-access-to-capital.pdf

[3] Mels de Zeeuw, Federal Reserve Bank of Atlanta Community and Economic Development Department, and Brett Barkley, Federal Reserve Bank of Cleveland Supervision and Regulation Department (November 2019). Mind the Gap: Minority-Owned Small Businesses' Financing Experiences in 2018. Consumer and Community Context, a Federal Reserve System publication, Vol. 1, No. 2, p. 16. https://www.federalreserve.gov/publications/2019-november-consumer-community-context.htm

[4] Kauffman Foundation, *State of Entrepreneurship 2017: Zero Barriers – Three Mega Trends Shaping the Future of Entrepreneurship*, http://www.kauffman.org/~/media/kauffman_org/resources/2017/state_of_entrepreneurship_address_report_2017.pdf

result will be increased access to credit and capital for women-owned and minority-owned small businesses in New York State and a narrowing of racial and ethnic disparities.

In the rest of this comment letter, we offer thoughts about how to include race in CRA exams and how to collect data on lending to small businesses.

Include race on CRA tests and performance measures

Since redlining disproportionately victimized communities of color, the Department of Financial Services should carefully consider how to incorporate race into CRA exams. New York can improve upon the approach of considering race in exams pioneered by the Massachusetts Division of Banks. In a NCRC paper on CRA applied to mortgage companies in Massachusetts, NCRC found that fair lending reviews accompanying CRA exams mostly consisted of descriptive statistical analysis comparing the percent of applications submitted by people of color to the percent of the population that was people of color and the percent of applications submitted by people of color to all lenders in the state. Unfortunately, our paper found that the ratings did not vary with performance of the mortgage company on the fair lending review.[5]

In a recent white paper co-authored with the Relman law firm, NCRC suggested that performance measures examining lending by race like those in the Massachusetts CRA exams could contribute to CRA ratings under a variety of approaches that would pass the strict scrutiny standard and would be found constitutional.[6] The paper recommended that on an interagency basis, the federal bank agencies could conduct periodic statistical studies and identify metropolitan areas and rural counties that either experience ongoing discrimination or exhibit significant racial disparities in access to credit. If the federal agencies adopt this recommendation, the Department of Financial Services could collaborate on this study, which could identify areas in New York that CRA exams could target for addressing racial disparities.

In these geographical areas, fair lending performance measures could contribute to CRA ratings. The performance measures could receive a separate rating or score and thereby contribute to the rating for the subtests and for the overall rating. Alternatively, the performance on the racial and ethnic measures could boost a rating if the performance is commendable. We would prefer the first alternative but offer the second in the interests of presenting various options for assuring success against a strict scrutiny standard. Of course, as occurs currently in federal CRA

[5] Josh Silver, NCRC, *Massachusetts CRA For Mortgage Companies: A Good Starting Point For Federal Policy*, July 2021, https://ncrc.org/massachusetts-cra-for-mortgage-companies-a-good-starting-point-for-federal-policy/

[6] Brad Blower, General Counsel, NCRC; Josh Silver, Senior Policy Advisory, NCRC; Jason Richardson, Director of Research and Evaluation, NCRC; Glenn Schlactus, Partner, Relman Colfax PLLC; Sacha Markano-Stark, Attorney, Relman Colfax PLLC, *Adding Robust Consideration Of Race To Community Reinvestment Act Regulations: An Essential And Constitutional Proposal*, NCRC, September 2021, https://ncrc.org/adding-robust-consideration-of-race-to-community-reinvestment-act-regulations-an-essential-and-constitutional-proposal/

evaluations, if a fair lending review uncovers discrimination, the Department of Financial Services should lower a bank's rating, particularly if the discrimination is not confined to a rogue employee or office but is widespread across the institution.

In addition to performance measures for people of color, NCRC suggests that the Department consider developing a category of underserved tracts. The subtests of the CRA exam would then examine lending, service, and community development activities in these tracts just as the exams now do for low- and moderate-income (LMI) tracts. In a previous report, NCRC described that underserved tracts would be identified via a metric of loans per capita (using households as the denominator in home lending and small businesses as the denominator for small business lending).[7] Tracts in the lowest quintile of loans per capita would be designated as underserved. NCRC found that across the nation, 57% of underserved tract residents, on average, were people of color in these tracts. Therefore, using underserved tracts on CRA exams would be another way to increase the focus on communities of color.

The NCRC and Relman white paper identify several other methods for increasing the attention of CRA exams on people and communities of color. For example, CRA regulations should mandate that assessment areas cannot arbitrarily exclude communities of color just like assessment areas currently cannot exclude LMI tracts. In addition, on the criteria of innovation and flexibility on the subtests, CRA exams should consider innovative Special Purpose Credit Programs that target formerly redlined communities.[8] Finally, CRA exam performance context analysis should identify communities of color in the assessment areas that are underserved and whose needs should be addressed by institutions in the area.

Coordinate with the Consumer Financial Bureau (CFPB) in collecting data on small business lending

We are pleased that the Department of Financial Services proposed to allow state-charted banks to comply with the state's regulation by submitting data required by the CFPB. In the proposed regulation, the Department stated:

"The Department may, at its discretion, determine that a banking institution's or group of banking institutions' compliance with the requirements of Section 704B of the Equal Credit Opportunity Act, codified at 15 USC § 1691c-2, as implemented by regulation, shall constitute compliance with the requirements of this section."

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[7] Bruce Mitchell, PhD. and Josh Silver, *Adding Underserved Census Tracts As Criterion On CRA Exams*, NCRC, January 2020, https://ncrc.org/adding-underserved-census-tracts-as-criterion-on-cra-exams/

[8] For a recent Department of Housing and Urban Development Memorandum on these programs, see https://www.hud.gov/sites/dfiles/FHEO/documents/FHEO_Statement_on_Fair_Housing_and_Special_Purpose_Programs_FINAL.pdf

We encourage the Department to work with the CFPB in developing a robust federal data requirement. After this is accomplished, the Department should exercise its discretion to allow compliance with the federal law to constitute compliance with the proposed state regulation. It would be preferable for state-chartered banks to comply with one robust data disclosure requirement that was coordinated among federal and state agencies than for banks to submit data to various agencies that may have different definitions and procedures for various data points. One rigorous dataset that can be used by regulatory agencies, banks and community organizations is more effective in achieving the objectives of transparency and equity than competing databases that might be difficult to reconcile and understand.

If New York chartered banks need to submit data to the Department before the Section 1071 rule is completed and implemented, the Department can nevertheless work with the CFPB and make its rule as consistent as possible with the anticipated federal rule.

Conclusion

We appreciate the Department of Financial Services in adopting a leadership position for reducing the stark racial and gender disparities our country faces. Including data analysis and examinations of access to credit and capital for women-owned and minority-owned small businesses on CRA exams is an important step towards achieving equity in small business finance and wealth building for undeserved communities.

Thank you for the opportunity to comment on this important matter. If you have any questions, please contact myself on jvantol@ncrc.org or Josh Silver, Senior Advisor, on jsilver@ncrc.org.

Sincerely,

Jesse Van Tol
President and CEO