April 4th, 2025

VIA ELECTRONIC FILING

Terry McMahon
Via Email: terry.mcmahon@dfs.ny.gov

**RE: NCRC Comment on the New 3 NYCRR 120 – Compliance with Banking Law Section 28-bb**

Dear Mr. McMahon:

The National Community Reinvestment Coalition (NCRC), a network of over 700 community organizations dedicated to creating a nation that not only promises but delivers opportunities for all Americans to build wealth and live well, appreciates this opportunity to comment on the proposed regulations for how the Department of Financial Services (DFS) will evaluate the performance of nonbank mortgage companies at meeting the credit needs of all New Yorkers. We applaud the elected officials, community-based organizations, and other stakeholders who worked to extend New York's state CRA law to mortgage companies, and the DFS staff that worked on these proposed rules.

This comment is organized by first providing recommendations applicable to the proposed regulations for mortgage companies. These include

- Reconsider allowing mortgage companies with over 1000 loan originations in each of the last two years to have a single statewide assessment area;
- Lower the lending threshold for when mortgage companies will be evaluated to 100 loans; and
- Expanding the definition of community development

We are also providing recommendations that DFS should apply to mortgage companies, as well as banks and credit unions in a subsequent rulemaking. These include

- Incorporating race into performance evaluations;
- Establishing performance ranges tied to each rating category;
- Factoring in the cost of loans;
- Focusing on loan originations, not purchases;
- Clarifying how activities will be considered in high cost areas;
- Adding rural areas as a performance criteria for lending and community development; and
- Ensuring and promoting public participation in the CRA evaluation process.

**Assessment areas**

We support the proposal to have lending-based assessment areas in each MSA or nonmetropolitan area in which a mortgage banker originated at least 100 mortgage loans outside of branch-based assessment areas in the last two years.[1] This is a necessary and reasonable approach given that most mortgage companies do not have physical branches. However, we ask that DFS reconsider the proposal to allow mortgage bankers that have originated at least 1000 loans in the last two years to be evaluated using a single statewide assessment area.[2] A single statewide assessment area is not adequate as local lending patterns, needs, and economic conditions will vary from region to region. For example, a 2021 DFS report that analyzed lending in the Buffalo MSA found that while mortgage companies had more loan originations in census tracts that are majority people of color when looking at the state in its entirety, in the Buffalo MSA banks originated more loans than mortgage companies in neighborhoods that are majority people of color.[3] This report also noted that assessment areas that encourage lenders to track their performance is beneficial since "fair lending problems are more readily identified and can be remedied, either by the lender itself or by regulators or enforcement agencies."[4] However, statewide assessment areas will be less successful at identifying and correcting market specific lending issues. Furthermore, the largest mortgage companies, identified based on originating at least 1000 loans a year, have heightened capacity to meet local credit needs. Lending-based assessment areas at the MSA or nonmetropolitan level will encourage those institutions to proactively monitor the local distribution of their loans and services to ensure they are serving credit needs of all households in markets where they originate at least 100 loans a year. Applying the proposal for lending based assessment areas to all mortgage companies is also feasible. Only 15 mortgage companies originated 1000 loans or more in New York from 2022-2023, out of 197 mortgage companies that originated a mortgage loan in the state during this time. Of those 15 mortgage companies, only one would have to create more than ten lending based assessment areas, four would have six to eight, and ten would have four or less – including five that would just have one or two.[5]

**Lower the lending threshold for when mortgage companies will be evaluated to 100 loans**

DFS should lower the proposed threshold for when mortgage companies will be evaluated from 200 originated loans in the last calendar year to 100 originated loans. This change

[1] New York State Department of Financial Services. New 3 NYCCR 120. Compliance with Banking Law Section 28-bb. Page 6. Available online at https://www.dfs.ny.gov/system/files/documents/2025/02/rp-bank-3nycrr120-text.pdf.
[2] Ibid. Page 7
[3] "Report on Inquiry into Redlining in Buffalo, New York". New York State Department of Financial Services. February 4, 2021. Page 14. Available online at https://www.dfs.ny.gov/system/files/documents/2021/02/report_redlining_buffalo_ny_20210204_1.pdf
[4] Ibid. Page 22.
[5] NCRC analysis of 2022-2023 HMDA data of all mortgage companies active in New York state during 2022 and 2023. Identified as mortgage companies using Bob Avery's FHFA file (2018-2022) and by agency and lender codes in their HMDA submissions. Includes all loan originations and loan purposes, with no additional filters applied.

will more closely align New York's institutional coverage with the level of coverage established by Illinois in their recently finalized regulations for mortgage companies. Based on 2023 lending results, setting the threshold at 200 loans as proposed would cover 57 mortgage companies out of the 177 that made at least one origination in New York in 2023, or 32% of all mortgage companies.[6] Whereas lowering the loan threshold to 100 originated loans in the last calendar year would cover 78 companies, or 44% of all mortgage companies active in New York in 2023. Illinois set their threshold so that all mortgage companies with 50 or more originations in the last calendar year would be evaluated using a lending test, with only mortgage companies that did 200 or more having a service test.[7] Setting the threshold at 50 loans covered 39% of active mortgage companies in Illinois based on reported loans for 2023, very similar to the 44% coverage that New York could have with a 100 loan threshold, and higher than the 32% of coverage as currently proposed with a 200 loan threshold.[8] New York could implement a similar qualification that only mortgage companies with over 200 loans would have a service test, but all mortgage companies with at least 100 loans should be evaluated with a lending test.

**Community development grants and financing should be considered**

DFS should expand the definition of community development to give consideration for grant making and provide a non-exhaustive list of products and services that qualify as community development services, just as the two other states that evaluate mortgage companies as part of their state CRA do. Illinois provides several examples of initiatives that mortgage companies would get positive consideration for on their service test. This includes "establishment of or material support of charitable donation accounts and donor advised funds that benefit charitable organizations which help meet the financial services needs of low-income and moderate-income neighborhoods or individuals within the community" as well as positive consideration for products or services that "increase climate resilience" or "mitigate environmental harm" in low-and-moderate income (LMI) communities.[9] New York has experienced an increasing number of extreme weather events, including Hurricanes Irene and Lee and the unprecedented Superstorm Sandy in 2012, which caused at least 48 deaths and $41.9 billion in damage.[10] There are numerous mortgage products available for borrowers to finance home improvements that protect against extreme weather events or make their homes more

[6] NCRC analysis of 2023 HMDA data of all mortgage companies active in New York state during 2023. Identified as mortgage companies using Bob Avery's FHFA file (2018-2022) and by agency and lender codes in their HMDA submissions. Includes all loan originations and loan purposes, with no additional filters applied.
[7] Illinois Register. Volume 48, Issue 20. May 17, 2024. Pages 7181 and 7188. Available online at https://www.ilsos.gov/departments/index/register/volume48/register_volume48_20.pdf.
[8] NCRC analysis of 2023 HMDA data of all mortgage companies active in Illinois during 2023. Identified as mortgage companies using Bob Avery's FHFA file (2018-2022) and by agency and lender codes in their HMDA submissions. Includes all loan originations and loan purposes, with no additional filters applied.
[9] Illinois Register. Volume 48, Issue 20. May 17, 2024. Page 7189. Available online at https://www.ilsos.gov/departments/index/register/volume48/register_volume48_20.pdf.
[10] Hurricane Sandy Fast Facts. CNN. October 23, 2024. Available online at https://www.cnn.com/2013/07/13/weather/hurricane-sandy-fast-facts

energy efficient and reduce their carbon footprint, such as the Freddie Mac CHOICERenovation loans and Fannie Mae's HomeStyle Energy loans.[11]

In addition to grants, DFS should consider offering consideration for community finance in either a new component test or in one of the proposed tests. Massachusetts considers community development loans, grants, and even investments on their performance evaluations for mortgage companies, and allows mortgage companies that would receive a "satisfactory" rating based on the lending and service test to receive a "high satisfactory" or "outstanding" rating based on their community development financing.[12]

**Incorporating Race**

We are offering three recommendations for how DFS could update its CRA regulations for all covered institutions to evaluate how well these companies meet the credit needs of people and communities of color. This would be similar to how New York already evaluates state-chartered banks and credit unions on lending to businesses owned by people of color and women, but would strengthen New York's regulations to better incorporate a racial analysis in evaluating the availability of mortgage lending, community development loans and investments, and banking services.[13]

The first recommendation is to use a disparity study to tailor the incorporation of race into performance evaluations to determine how well institutions are meeting credit needs of those that continue to have less access to loans, banking services, and the wealth this creates. The second is for DFS to identify underserved census tracts that receive the lowest amount of loans per housing units and number of small businesses, or just housing units for mortgage companies, and to evaluate institutions on their level of lending, community development, and services in these tracts. The last recommendation is to provide positive consideration for special purpose credit programs.

*Disparity study*

New York's state CRA laws, like the federal CRA, establishes that covered institutions will be evaluated based on their performance at "helping to meet the credit needs of its entire community."[14] The requirement for covered institutions to serve all communities allows DFS to incorporate race into the CRA performance tests and ratings in

[11] An Overview of FHFA's Key Initiatives to Address Climate-Related Financial Risks. Federal Housing Finance Agency. December 20, 2024. Available online at https://www.fhfa.gov/blog/insights/an-overview-of-fhfas-key-initiatives-to-address-climate-related-financial-risks

[12] 209 CMR 54.00: Mortgage lender community investment. Massachusetts Division of Banks. Available online at https://www.mass.gov/regulations/209-CMR-5400-mortgage-lender-community-investment#54-12-definitions

[13] New York Banking Law. Chapter 2, Article 2. Section 28-B. Available online at https://www.nysenate.gov/legislation/laws/BNK/28-B

[14] New York Banking Law. Chapter 2, Article 2. Section 28-B and 28-BB. Available online at https://www.nysenate.gov/legislation/laws/BNK/28-B

specific circumstances in order to encourage institutions to rectify decades of redlining, as well as ongoing discrimination. This can be done to complement an analysis of bank performance based on income, and can be structured to comply with the Equal Protection Clause of the United States Constitution in order to withstand potential legal challenges.

When a government action or regulation considers race and is challenged in court as violating the Equal Protection Clause, depending on the context, the legality of the government's action could be reviewed using a strict scrutiny test. However, there is a strong argument that the inclusion of race in CRA performance evaluations would not trigger the strict scrutiny test, but instead would be subject to a rational basis review to determine if the regulation is reasonably related to a "legitimate" government interest.[15] First, it is not the race of the would-be recipient of the benefit that figures in the government's provision of a direct benefit. In this instance, the recipient is a covered institution receiving a New York CRA performance evaluation and the benefit is a passing grade. The race of a covered institution's leadership is irrelevant and would have no impact on the rating the institution receives. Second, unlike the race-conscious government programs involving contracts or admissions to an educational institution, the CRA does not deal in limited resources or benefits. In the Supreme Court cases applying strict scrutiny there are finite amounts of government contracts or slots at a state college available. Here, CRA ratings are an unlimited resource and there is no reason every covered institution cannot receive a satisfactory or outstanding rating if it meets the applicable requirements.

Nonetheless, in light of broad statements by the Supreme Court and lower federal appellate courts about the need for a strict scrutiny analysis when race is considered, our recommendation accounts for the possibility that making race a component of CRA ratings and requirements would be reviewed with a strict scrutiny test.[16] Incorporating race should pass a strict scrutiny review, but it is important to keep in mind that the factors described above support that the lower rational basis review should apply.

Strict scrutiny has two basic components. First, the government must have and provide substantial evidence of a compelling interest to justify its consideration of race. Courts have established that remedying the effects of past and present discrimination is a compelling interest, and there is extensive evidence that discrimination continues to impair access to credit, and other banking services, for people and neighborhoods of color despite race-neutral approaches. For example, a 2021 DFS study found that "even today there are far fewer mortgages issued in areas that have a large proportion of minority residents" and "that minority participation in the mortgage market (and therefore their opportunities for home ownership, one of the biggest

[15] See, e.g. City of New Orleans v. Dukes, 427 U.S. 297, 303 (per curiam).
[16] Grutter v. Bollinger, 539 US 306, 326 (2003)("We apply strict scrutiny to all racial classifications to smoke out illegitimate uses of race by assuring that [the] government is pursuing a goal important enough to warrant use of a highly suspect tool."); see also, Adarand Construction, Inc. v. Pena, 515 US 200, 224 (1995) ("any person, of whatever race, has the right to demand that any government actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."); ( (cleaned up).

drivers of long-term wealth for American families)…[is a} substantial societal problem [that] remains to be solved."[17]

Second, the government must act in a manner that is narrowly tailored to achieve its compelling interest. That means several things of particular importance with respect to New York's state CRA. First, race-neutral alternatives need to be found inadequate, and that race should only be considered with respect to racial groups, bank products and geographical areas where evidence indicates that access is currently curtailed due to past or present discrimination.

This comment will now cover:

- New York's compelling interest in incorporating race into their state CRA;
- The inability of race neutral alternatives to address past or present discrimination in access to credit; and
- Updating regulations to detect for ongoing discrimination in order to narrowly tailor race specific elements of the performance tests and ratings;

New York's Compelling Interest in Incorporating Race into CRA

Courts recognize that the government has a compelling interest in remedying the effects of past or present discrimination.[18] This is especially true for discrimination either caused by the government (such as through facially discriminatory laws, regulations or practices), or in which the government is a "passive participant" (such as distributing funding in a market that suffers from discrimination in a way that does not address or remedy that discrimination).[19] The target

[17] "Report on Inquiry into Redlining in Buffalo, New York". New York State Department of Financial Services. February 4, 2021. Pages 7 and 13. Available online at https://www.dfs.ny.gov/system/files/documents/2021/02/report_redlining_buffalo_ny_20210204_1.pdf

[18] See, e.g., City of Richmond v. J.A. Croson Co., 488 US 469, 496-497 (1989) (discussing the distinction between remedying "wrongs worked by specific instances of racial discrimination" and "remedying the effects of societal discrimination") (internal marks omitted); Midwest Fence Corp. v U.S. Dep't of Transp., 840 F.3d 932, 935 (7th Cir. 2016); Associated Gen. Contractors of Am., San Diego Chapter Inc. v. California, 713 F.3d 1187, 1196-1198 (9th Cir. 2013) (discussing lingering effects of discrimination); Ensley Branch, N.A.A.C.P. v. Siebels, 31 F.3d 1548, 1565 (11th Cir. 1994) (interest in remedying past or present discrimination is "widely accepted as compelling"); cf. Grutter, 539 US at 328 ("we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.")

[19] See Associated Gen. Contractors of Am., 713 F.3d at 1197 (government actor could meet strict scrutiny standards "if, looking at the evidence in its entirety, the data . . . suggest[ ] that public dollars are being poured into 'a system of racial exclusion practiced by elements of the local construction industry.'")(quoting Croson, 488 US at 492); Concrete Works of Colo., Inc. v. Denver, 321 F.3d 950, 958 (10th Cir. 2010) (Denver "clearly may take measures to remedy its own discrimination or even to prevent itself from acting as a 'passive participant in a system of racial exclusion practiced by elements of the local construction industry.'") (quoting Croson, 488 US at 492); W. States Paving Co. v. Wash. State Dep't of Transp., 407 F.3d 983, 991 (9th Cir. 2005); see also Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1165 (10th Cir. 2000) (Slater) ("the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds"); DynaLantic Corp. v. U.S. Dep't of Def., 885 F. Supp. 2d 237, 252 (D.D.C 2012) ("the government may implement race-conscious programs not

must be specific, though, because "claims of general societal discrimination—and even generalized assertions about discrimination in an entire industry—cannot be used to justify race-conscious remedial measures."[20]

The government must also have a "strong basis in evidence" to support its compelling interest. When the interest is addressing discrimination, this means evidence that discrimination has occurred and requires remedial action.[21] The government must identify evidence of current exclusion from the precise activity or area at issue that is the result of discrimination, demonstrating why a race-conscious remedy is necessary to eliminate that exclusion.[22]

The federal CRA was created to address the impact of discrimination on US credit and financial markets. Both private and public actors engaged in widespread redlining, building discrimination into the foundation of modern credit markets. Through much of the twentieth century, the federal government and private lenders denied communities of color access to prime mortgage products, significantly curtailing homeownership opportunities for Americans of color, and allowing discriminatory practices that both stripped wealth and prevented the accumulation of wealth by people of color. In the 1930s, the federal government created the Home Owners' Loan Corporation (HOLC) and the Federal Housing Administration (FHA). The HOLC assisted homeowners who were in default on their mortgages and in foreclosure.[23] The FHA provided direct assistance to individuals to finance home purchases and federal insurance to back private mortgage lending.[24]

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only for the purpose of correcting its own discrimination, but also 'to prevent itself from acting as a 'passive participant' in private discrimination in the relevant industries or markets'") (internal citations omitted).

[20] W. States Paving Co., 407 F.3d at 1002.

[21] See, e.g., Midwest Fence Corp., 840 F. 3d at 945 (quoting Wygant v. Jackson Bd. of Educ., 476 US 267, 277 (1986)).

[22] See Croson, 488 US at 510 ("Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects.")

[23] "Redlining" Maps: The Persistent Structure of Segregation And Economic Inequality." NCRC. 2018. Available online at https://ncrc.org/holc/

[24] See John Kimble, Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans, 32 Law & Social Inquiry 399, 402 (2007), available at https://www.jstor.org/stable/20108708 ("The passage of the National Housing Act in 1934 inaugurated a vigorously interventionist approach to the [financial crisis of the Depression] in which the federal government could orchestrate private market activity without acting as a mortgage lender. The act created the Federal Housing Administration and empowered it to coordinate several mortgage market reforms, chief among which was to insure lenders against any loss on loans made for purchasing homes."); Ellen Seidman & Andrew Jakabovics, Learning from the Past (Center for American Progress, Sep. 19, 2008), https://www.americanprogress.org/issues/economy/reports/2008/09/19/4902/learning-from-the-past/; John Griffith, The Federal Housing Administration Saved the Housing Market (Center for American Progress, Oct. 11, 2012), https://www.americanprogress.org/issues/economy/reports/2012/10/11/40824/the-federal-housing-administration-saved-the-housing-market/.

HOLC and FHA programs expanded access to affordable mortgages, helping millions of families obtain the financing needed to own their own homes.[25] However, people of color were systematically excluded from these programs from the start, which also largely excluded them from private credit markets, since private lenders depended heavily on government programs.[26] HOLC surveyed neighborhoods based on lending risk and created Residential Security Maps that graded neighborhoods from A (best) to D (hazardous).[27] The presence of people of color in a neighborhood systematically led to lower D grades.[28] D-grade neighborhoods were depicted on

[25] See, e.g., Seidman & Jakabovics, Learning from the Past, supra note 120 (between 1933 and 1936, HOLC issued approximately 1 million refinance loans with an average value of slightly more than $3,000 per property; approximately 20% ultimately were foreclosed upon); Alan S. Blinder, From the New Deal, a Way Out of Mess (New York Times, Feb 24, 2008), https://www.nytimes.com/2008/02/24/business/24view.html; John Griffith, The Federal Housing Administration Saved the Housing Market; NFHA, The Case for Fair Housing https://nationalfairhousing.org/wp-content/uploads/2017/07/TRENDS-REPORT-2017-FINAL.pdf (2017) at 17 ("One of the great contributions of the HOLC was the creation of the low down payment, long-term, fixed-rate, fully-amortizing mortgage. Although the 30 year, fixed-rate loan is the most common type of mortgage in the US housing market today, before the HOLC mortgages had very short terms (five to ten years) and were non-amortizing, so that at the end of the five- to ten-year period, borrowers needed to take out a new loan to pay off the remaining principal balance. The HOLC's innovative mortgage product eliminated much of the volatility of the mortgage market and made mortgages (and therefore homeownership) less risky for borrowers.")

[26] See, e.g., Becky Little, How a New Deal Housing Program Enforced Segregation (Oct. 20 2020), https://www.history.com/news/housing-segregation-new-deal-program ("One of the multiple programs a newly-elected Franklin D. Roosevelt established to stimulate the economy offered home-buying aid for Americans—but only white Americans. The Federal Housing Administration, operated through the New Deal's National Housing Act of 1934, promoted homeownership by providing federal backing of loans—guaranteeing mortgages. But from its inception, the FHA limited assistance to prospective white buyers."); Terry Gross, A 'Forgotten History' Of How The U.S. Government Segregated America (May 3, 2017), https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-howthe-u-s-government-segregated-america; but see Amy E. Hillier, Who Received Loans? Home Owners' Loan Corporation Lending and Discrimination in Philadelphia in the 1930's, 2 Journal of Planning History 3 (2003) (HOLC did make loans to African Americans, Jews, and immigrants in Philadelphia; HOLC supported racial segregation in the process of reselling properties acquired through foreclosure).

[27] See NFHA, The Case for Fair Housing, supra note 121, at 18 ("HOLC undertook a survey to assess risk in cities all across the country–virtually all of those with populations of 40,000 persons or greater. Through this undertaking, the HOLC standardized and formalized the appraisal process. Its methodology was not new; rather, it codified the typical private sector practices of the time, which reflected a view of neighborhood dynamics and their impact on property values that was blatantly discriminatory against Black people, immigrants from certain countries, and some religious groups.")

[28] See University of Richmond, Mapping Inequality, https://dsl.richmond.edu/panorama/redlining/#loc=5/39.745/-97.217&text=intro; NFHA, The Case for Fair Housing supra, note 12, at 18 ("On the so-called Residential Security maps on which its survey results were recorded, these were color-coded green, blue, yellow, and red, respectively. Neighborhoods could be coded red, or 'hazardous,' for a number of reasons, one of which was the presence of Blacks or other 'inharmonious' racial or social groups.")

HOLC maps in red, which is how the term redlining originated, to indicate that lending in those areas was risky and discouraged.[29] These maps were then used by the FHA.[30]

In 1939, the FHA outlined its core principles in a piece called "The Structure and Growth of Residential Neighborhoods in American Cities," which "emphasized the importance of maintaining racial segregation."[31] The FHA also "gathered extensive data on the racial composition of neighborhoods and instructed financial institutions not to lend to households in integrated or predominantly African American areas."[32]

Many have documented the continuing effects of discrimination on the financial markets and on access to credit. Redlining, other forms of discrimination, and their legacy are felt in myriad ways, from disparities in homeownership rates that are worse now than even prior to the passage of the Fair Housing Act, to disparities in wealth, and discouragement in the lending process that prevents small businesses owned by people of color from having full and fair access to credit.[33] In 2021, all 12 districts of the Federal Reserve System hosted a multipart program to understand the implications of structural racism on America's economy.[34] Contributors to the program documented how the continuing effects of discrimination influence housing, entrepreneurship and business lending, education, employment, and numerous other areas of

[29] See Mitchell, HOLC "Redlining" Maps. HOLC maps document which areas were considered lower risk, and therefore preferred for loans, and higher-risk areas where lending was discouraged.); University of Richmond, Mapping Inequality, ("Conservative, responsible lenders, in HOLC judgment, would 'refuse to make loans in [hazardous] areas or only on a conservative basis.'" (internal marks omitted)).
[30] See Kimble, Insuring Inequality, at 405 (FHA's "City Survey Files" contained HOLC maps).
[31] Id. at 404.
[32] See Kimble, Insuring Inequality, at 405 and 406 (FHA's "City Survey Files" contained HOLC maps and discussing FHA Real Property Inventories).
[33] Urban Institute, Data Talk: Black Homeownership Gap: Research Trends and Why the Growing Gap Matters and Lee, Mitchell, & Lederer, Disinvestment, Discouragement and Inequity in Small Business Lending.
[34] Federal Reserve Bank of Minneapolis, Racism and the Economy (2021), https://www.minneapolisfed.org/policy/racism-and-theeconomy.

society and the economy.[35] All of these influence the finances of people of color and their access to credit.

To take homeownership as an example, numerous studies demonstrate that systemic racism has affected and continues to affect homeownership rates in markets across the United States. These disparities lead to and compound disparities in wealth, which in turn affect business owners and entrepreneurs of color's ability to access credit and capital.[36] Black and Latine Americans continue to rely more heavily on personal and family savings as a source of small business financing than White Americans, despite having only a fraction of the wealth of White Americans.[37] Black-owned businesses are turned down for loans twice as frequently as White-owned firms.[38] Recent studies indicate that small businesses in communities of color were not able to access federal COVID-19 relief on par with businesses in White areas, including due to possible discrimination.[39]

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[35] Alyssa Augustine, Fed's "Racism and the Economy" series explores housing inequity (Mar. 5, 2021), https://www.minneapolisfed.org/ article/2021/feds-racism-and-the-economy-series-explores-housing-inequity. Victor W. Hwange, The "Right to Start" Can Expand Entrepreneurial Opportunity in Community of Colors and Beyond https://www.
minneapolisfed.org/~/media/assets/events/2021/racism-and-the-economy-focus-on-entrepreneurship/hwang-proposal.pdf?la=en; Jay Lindsay, Overcoming history: Entrepreneurs of color forced to confront constraints from the past, (June 7. 2021),
https://www.minneapolisfed.org/article/2021/overcoming-history-entrepreneurs-of-color-forced-to-confront-constraints-from-the-past. Alyssa Augustine, Fed's "Racism and the Economy" series explores racial inequity in the education system (Jan. 15, 2021), https://
www.minneapolisfed.org/article/2021/feds-racism-and-the-economy-series-explores-racial-inequity-in-the-education-system. Federal Reserve Bank of Minneapolis, Fed's "Racism and the Economy" series explores racial inequities in labor markets (Dec. 2, 2020)
https://www.minneapolisfed.org/article/2020/feds-racism-and-the-economy-series-explores-racial-inequities-in-labor-markets.

[36] See, e.g., Fairlie & Robb, Disparities in Capital Access between Minority and Non-Minority-Owned Businesses, supra note 136; Algernon Austin, The Color of Entrepreneurship: Why The Racial Gap Among Firms Costs The U.S. Billions (Apr. 20, 2016),
http://globalpolicysolutions.org/report/color-entrepreneurship-racial-gap-among-firms-costs-u-s-billions/.

[37] See Alicia Robb, Financing Patterns and Credit Market Experiences: A Comparison by Race and Ethnicity for U.S. Employer Firms (Feb. 2018),
https://www.sba.gov/sites/default/files/Financing_Patterns_and_Credit_Market_Experiences_report.pdf at 3-4.

[38] Gene Marks, Black-owned firms are twice as likely to be rejected for loans. Is this discrimination? (Jan. 16, 2020), https://www.theguardian.com/business/2020/jan/16/black-owned-firms-are-twice-as-likely-to-be-rejected-for-loans-is-this-discrimination.

[39] See, e.g., Sifan Lieu & Joseph Parilla, New data shows small business in communities of color has unequal access to federal COVID-19 relief (Sep. 17, 2020),
https://www.brookings.edu/research/new-data-shows-small-businesses-in-communities-of-colorhad-unequal-access-to-federal-covid-19-relief/; Anneliese Lederer & Sara Oros. Lending Discrimination During COVID-19: Black and Hispanic Women-Owned Businesses,
https://www.ncrc.org/lending-discrimination-during-covid-19-black-and-hispanic-womenowned-businesses/.

To summarize this section, historical discrimination entrenched inequalities in access to credit and financial markets, and these inequalities have not been addressed and eliminated. The lingering and substantial effects, compounded in several cases by current instances of discrimination, prevent people of color from accessing credit fully and fairly. More recent and ongoing discrimination is also well documented. This provides the required strong evidence to conclude that the DFS can, and should, update the rules for implementing New York's CRA to incorporate race in order to advance the compelling interest of addressing discrimination in access to credit.

The Inability of Race Neutral Alternatives to Address Past or Present Discrimination

There is strong evidence to support the conclusion that race-neutral alternatives are insufficient to overcome the impact of discrimination in lending. The nearly 48-year history of the federal CRA is a telling example. The core components of the federal CRA and its implementing regulations have been race-neutral throughout, with primary attention given to census tracts identified based on income and some focus on other factors closely related to economic well-being.[40] While illegal racial discrimination adversely affects a bank's performance rating, that is very different from incorporating an evaluation of how well a bank is meeting the needs of people and neighborhoods of color.[41] For example, one company might largely ignore neighborhoods of color because of racial prejudice, while another ignores the same neighborhoods because it has always focused on others. In each case, the needs of neighborhoods of color are poorly served, but only the former would be viewed as illegal discrimination, and therefore negatively considered by an examiner.

With a structure focused on income and not race, CRA has not sufficiently addressed the continuing financial disparities that are the direct result of the persistent effects of redlining and systemic racial bias. For example, according to national survey data, White families had a median wealth of $188,200 and a mean wealth of $983,400; Black families' median and mean wealth was $24,100 and $142,500, respectively. That is less than 15% of White families. Latine families' median and mean net worth was $36,100 and $165,500.[42] Studies conducted by the federal government looking at median wealth by race from 1989 through 2019 show that the median wealth gap between White and Black families hardly changed over this 30-year period, and that the gap between White and Latine families has only slightly improved and remains

[40] 12 U.S.C. § 2903(a)(1); 12 C.F.R. § 228.11(b)(1) and 12 C.F.R. § 228.12(g)(4)(iii)(A) (rates of unemployment and population loss).
[41] 12 C.F.R. § 228.28(c); OCC, Federal Reserve Board, and FDIC, Large Institution CRA Examination Procedures (April 2014) at 2, available at https://www.ffiec.gov/cra/pdf/cra_exlarge.pdf at 18 (§§ 13-15) (Interagency Large Institution Exam Procedures).
[42] "Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances." Neil Bhutta et al. 106 Fed. Rsrv. Bull. 5. 2020. Available online at https://www.federalreserve.gov/publications/files/scf20.pdf.

large.[43] Similarly, rates of minority homeownership overall have changed little in the past 25 years, while homeownership rates for African Americans have regressed to levels lower than when the Fair Housing Act was passed in 1968.[44]

The regulators in charge of implementing the federal CRA have acknowledged the outsized racial gaps that CRA has not closed. Both the Republican-appointed former OCC Acting Comptroller Brian Brooks and the Democratic-appointed former Acting Comptroller Michael Hsu have cited the continuing challenges facing communities of color.[45]

The federal CRA's effectiveness at increasing access to credit and the financial market for individuals with LMI indicates that it can be a powerful and effective tool for increasing access among underserved borrowers.[46] But the efficacy has been largely tied to those measures that are explicitly discussed and considered by regulators as part of the CRA examination framework, such as evaluating banks on their record of lending to borrowers with LMI.[47] Lacking an extensive and direct focus on race, the federal CRA's benefits are often distributed in a manner that is not targeted at ameliorating racial inequity and inequality that exists due to past and continuing discrimination. To successfully address the legacy of discrimination in our banking

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[43] "Racial Differences in Economic Security: The Racial Wealth Gap." US Department of the Treasury. September 15 2022. Available online at https://home.treasury.gov/news/featured-stories/racial-differences-economic-security-racial-wealth-gap

[44] "Data Talk: Black Homeownership Gap: Research Trends and Why the Growing Gap Matters". Urban Institute. 2019. Available online at https://www.urban.org/events/black-homeownership-gap-research-trends-and-why-growing-gap-matters.

[45] Remarks by former Acting Comptroller Brian P. Brooks at the Access to Capital Forum (July 17, 2020), https://www.occ.gov/newsissuances/speeches/2020/pub-speech-2020-96.pdf,("While we can applaud the trillions of dollars that CRA has encouraged banks to spend in the communities they serve since 1977, we must be honest that we have not moved the needle much on important economic equality indicators…Minority homeownership has not changed much in 25 years, and African American homeownership has regressed to 1968 levels. The wealth gap is as large as it has ever been.…Banks have closed thousands of branches in poor areas, starved for financial services. The status quo has not worked.") (internal citations omitted) and Statement of Michael J. Hsu, former Acting Comptroller of the Currency, before the US Senate Committee on Banking, Housing, and Urban Affairs (Aug. 3, 2021), https://www.occ.gov/news-issuances/congressional-testimony/2021/ct-occ-2021-79written.pdf (noting "In the average US metropolitan area, homes in neighborhoods where the share of the population is 50 percent Black are valued at roughly half the price as homes in neighborhoods with no Black residents, suggesting that the most important source of generation wealth building has been denied this segment of the population.")

[46] Brooks Access to Capital Forum, supra note 9 ("While we can applaud the trillions of dollars that CRA has encouraged banks to spend in the communities they serve since 1977, we must be honest that we have not moved the needle much on important economic equality indicators.")

[47] See Statement of Michael J. Hsu, Acting Comptroller of the Currency, before the US House Financial Services Committee (May 19, 2021), https://financialservices.house.gov/uploadedfiles/hhrg-117-ba00-wstate-hsum-20210519.pdf ("Historically, many low-income individuals have been treated by banks as either credits to be avoided or credits to be exploited. The OCC's twin missions of ensuring equal access to financial services and fair treatment speak to both of these challenges…To address this problem, the OCC must work to strengthen regulations implementing the Community Reinvestment Act (CRA).")

system, the New York CRA's regulatory framework must be updated to explicitly consider a covered institution's lending, service, and community development activities from the perspective of race.

In addition to programs addressing credit specifically such as the federal CRA, there have long been many race-neutral government programs focused on economic disadvantage and opportunity, which are crucial underpinnings of access to credit. For example, the federal government has supplemented incomes through the Temporary Assistance for Needy Families, Housing Choice Vouchers, and Supplemental Nutrition Assistance programs.[48] It supports access to higher education through Pell Grants, student loans, and loan forgiveness.[49] It subsidizes health insurance premiums under the Affordable Care Act.[50] Other programs provide job training.[51] All of these race-neutral programs and many more aim to put people on, and help them maintain, the sound financial footing that lenders want to see when evaluating applications for credit, but despite all of these efforts - the racial wealth gap persists.

To summarize this section, the federal government's varied and longstanding race-neutral efforts have been insufficient to overcome the deep and abiding impact of discrimination on access to credit and wealth building. Race-conscious remedies are needed, and New York's CRA should be implemented in a race conscious manner to advance New York's compelling interest in addressing the effects of past and present discrimination that race-neutral efforts have been insufficient to address.

Updating Regulations to Detect for Ongoing Discrimination in Order to Narrowly Tailor Race Specific Elements of the Performance Tests and Ratings

New York should update its CRA regulations, both the currently proposed regulations for mortgage companies and already established regulations for state-chartered banks and credit unions, to direct DFS to analyze data with respect to racial groups, bank products, and geographical areas to determine if access to credit and capital is currently curtailed due to past or

[48] "Administration for Children and Families, Temporary Assistance for Needy Families (TANF)". Available online at https://www.acf.hhs.gov/ofa/programs/temporary-assistance-needy-families-tanf and "About the Housing Choice Vouchers Program." HUD. Available online at https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about and "Supplemental Nutrition Assistance Program (SNAP)."USDA. Available online at https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program

[49] US Department of Education, Office of Federal Student Aid, Types of Financial Aid, https://studentaid.gov/understandaid/types and US Department of Education, Office of Federal Student Aid, Federal Pell Grants, https://studentaid.gov/understand-aid/types/grants/pell and US Department of Education, Office of Federal Student Aid, Income-Driven Repayment (IDR) Plan Request https://studentaid.gov/articles/student-loan-forgiveness/ and US Department of Education, Student Loans, Forgiveness, https://www2.ed.gov/fund/grants-college.html?src=pn.

[50] "About the Affordable Care Act." US Department of Health & Human Services. Available online at https://www.healthcare.gov/.

[51] "Programs Serving Adults and Dislocated Workers." US Department of Labor. Available online at https://www.doleta.gov/programs/

present discrimination. This can be accomplished by updating the factors to be considered in the performance criteria.

Adding race will greatly increase DFS understanding of the racial outcomes of the New York financial system, and allow DFS to have a much more comprehensive view of how specific institutions covered by their state CRA are responding to credit needs. DFS should conduct periodic statistical studies to identify metropolitan areas and rural counties that either experience ongoing discrimination or exhibit significant racial disparities in access to credit. This analysis should use regression analysis to determine statistically significant disparities in loan application, origination, and denial rates based on race and ethnicity across different loan purposes using available Home Mortgage Disclosure Act (HMDA) data. The study should also analyze community development loans, investments, and services, as well as branch locations and retail banking services, for communities with higher percentages of people of color to determine if statistically significant disparities exist in the availability of community development, branches, and retail banking services in communities of color.

If the study finds evidence of discrimination and disparities, DFS examiners would then apply the study's findings to the examination of a specific institution's lending to the identified group in the identified assessment area if the examined institution does business there as part of the lending test. DFS could make public which racial groups and assessment areas have been identified as experiencing ongoing discrimination or significant disparities so that examined institutions know well in advance. The study should be updated on a semi-annual or other reasonable periodic basis. This will assure that evaluations only use race to measure an institution's performance towards addressing currently experienced discrimination or disparities.

Updating the performance criteria in this way should not be controversial from a legal perspective because it does not allocate government benefits or impose sanctions based on race. This would be comparable to a host of race-based information already collected and published by the government, such as HMDA data and the census.

*Underserved Tracts*

Another method for analyzing how well institutions meet the credit needs of entire communities is to identify census tracts with the lowest amount of lending and update CRA regulations to factor in the amount and quality of an institution's activities in these tracts as part of the lending test. DFS could sort census tracts into five different groups, or quintiles, based on the highest and lowest amounts of loans made per household unit and small businesses.[52] This grouping can be restricted to just mortgage loans made per household for evaluating mortgage companies.

[52] See "Adding Underserved Census Tracts as Criterion on CRA exams" for more details on this approach. Available online at https://ncrc.org/adding-underserved-census-tracts-as-criterion-on-cra-exams/.

We ran this analysis using 2022-2023 mortgage data and found that census tracts in the lowest 20% of originated loans per household unit, or lowest quintile, across New York state had an average of 97.4 loans per 10,000 housing units, and that the population in these tracts was 56% people of color on average. For contrast, census tracts in the highest quintile had 1,086 loans per 10,000 housing units, and only 45% people of color on average, indicating that there is less lending in census tracts with more people of color. This shows that using underserved tracts could work as a proxy for analyzing lending in communities of color. This method could be used to complement a review of lending in census tracts defined by income.

We also sorted tracts into quintiles in specific Core Based Statistical Areas (CBSA) throughout the state. These are some of the noteworthy findings from this analysis.

- Buffalo-Cheektowaga CBSA - The lowest quintile averages 123.1 loans per 10,000 housing units, and an average population of 73.4% people of color. The highest quintile has 536.8 loans per 10,000 housing units, and an average population of only 16.5% people of color – a difference of over 50 percentage points in the average percent of people of color from the lowest quintile to the highest.
- New York City CBSA - The lowest quintile averages 91.1 loans per 10,000 housing units, and an average population of 68% people of color. The highest quintile has 1394 loans per 10,000 housing units, and an average population of 48% people of color.
- Poughkeepsie-Newburgh-Middletown - The lowest quintile averages 230.8 loans per 10,000 housing units, and an average population of 34.1% people of color. The highest quintile has 1652.7 loans per 10,000 housing units, and an average population of 41.5% people of color. It is noteworthy that in the Poughkeepsie CBSA the highest quintile had a higher percentage of people of color than the lowest. DFS could inquire into why more lending is being done in census tracts with higher percentages of people of color in this market as the opposite trend is observed in the state overall and in specific markets.

*Special purpose credit programs*

DFS should specifically list special purpose credit programs (SPCPs) as an example of innovative or flexible lending practices considered under the lending test. SPCPs allow lenders to extend credit to borrowers who otherwise might not be marketed to, or eligible for credit, under the organization's customary marketing and underwriting processes. SPCPs are expressly authorized by the Equal Credit Opportunity Act (ECOA). ECOA generally prohibits discrimination in loan transactions, but permits SPCPs that are designed to meet special social needs or benefit economically disadvantaged groups.[53] This includes programs that provide down payment assistance, adjust underwriting criteria, or otherwise increase credit access for borrowers who share a common characteristic, such as race or sex.[54]

[53] 15 U.S.C. § 1691(c)(3).
[54] *See* CFPB Advisory Opinion, Special Purpose Credit Programs, 86 Fed. Reg. 3762, 3765 (Jan. 15, 2021), https://www.consumerfinance.gov/rules-policy/final-rules/advisory-opinion-on-special-purpose-credit-programs/

The Consumer Financial Protection Bureau (CFPB) has consistently found that housing program subsidies and mortgage lending programs with special rates and terms for underserved borrowers do not violate fair lending laws.[55] Furthermore, other federal agencies tasked with the supervision and enforcement of fair lending laws have also supported the use of SPCPs in mortgage lending. The Department of Justice has incorporated SPCPs in their settlements, a host of regulators cited SPCPs favorably in the Federal Financial Institution Examination Council examination procedures, and both the Federal Reserve and the CFPB in their official commentary on ECOA provided examples of SPCPs related to homeownership.[56]

Several financial institutions currently offer SPCPs that are designed to increase access to mortgage or small business loans for targeted populations. Rocket Mortgage, for instance, offers credits for first-time homebuyers to use toward mortgage costs in specific census tracts across six major cities.[57] Other large retail lenders have similar down payment programs with certain variations, including income limits, property location requirements, or special underwriting guidelines.[58] There are also several programs that facilitate access to small business credit for businesses owned by people of color, women, and veterans.[59] These products may be especially important given the apparent directive released in March from the Federal Housing Finance Agency (FHFA) to terminate purchase of SPCP loans supported by the government-sponsored enterprises (GSE). The FHFA's recent decision has been criticized by industry trade groups, and

[55] "CFPB Supervisory Highlights." Issue 12, Summer 2016. Section 2.5.2. Available online at https://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_12.pdf

[56] "Special Purpose Credit Programs." National Fair Housing Alliance. November 2020. Available online at https://nationalfairhousing.org/wp-content/uploads/2020/11/NFHA_Relman_SPCP_Article.pdf

[57] Rocket Mortgage Introduces Purchase Plus, Helping Make the American Dream of Homeownership More Attainable." Rocket Companies. December 27, 2022. Available online at https://www.rocketcompanies.com/press-release/rocket-mortgage-introduces-purchase-plus-helping-make-the-american-dream-of-homeownership-more-attainable/

[58] *See, e.g.*, Bank of America, "Bank of America Introduced Community Affordable Loan Solution to Expand Homeownership Opportunities in Black/African American and Hispanic-Latino Communities" (Aug. 30, 2022), https://newsroom.bankofamerica.com/content/newsroom/press-releases/2022/08/bank-of-america-introduces-community-affordable-loan-solution--t.html; Wells Fargo, "Wells Fargo Launches Down Payment Grant Program to Help Bridge Homeownership Gap" (Aug. 10, 2023), https://newsroom.wf.com/English/news-releases/news-release-details/2023/Wells-Fargo-Launches-Down-Payment-Grant-Program-to-Help-Bridge-Homeownership-Gap/default.aspx; U.S. Bank, "U.S. Bank Launches Access Home Loan Mortgage to Increase Access to Homeownership" (July 12, 2023), https://www.usbank.com/about-us-bank/company-blog/article-library/us-bank-launches-access-home-loan-mortgage-to-increase-access-to-homeownership.html.

[59] *See, e.g.*, Chase Bank, "Chase takes nationwide action to expand credit access for small businesses through Special Purpose Credit Program in historically underserved areas" (Nov. 18, 2022), https://media.chase.com/news/chase-takes-nationwide-action-to-expand-credit-access-for-small-businesses-through-special-purpose-credit-program-in-historically-underserved-areas; Zions Bank, "Small Business Diversity Banking: Offering support for minority, women, LGBTQ, and veteran business owners," https://www.zionsbank.com/personal/landing/diversity-lending/.

it is important to remember that SPCPs were in place and supported by many in the industry even before loans made as part of SPCPs were purchased by the GSEs.[60]

While SPCPs hold remarkable promise for addressing persistent and pernicious inequities in credit, some have wondered whether SPCPs are still viable after the Supreme Court's decision in *Students for Fair Admissions v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023) ("*SFFA*"). The *SFFA* decision grabbed headlines when it bucked decades of settled law and held that race-conscious affirmative action in college admissions generally violates the Equal Protection Clause of the Constitution's Fourteenth Amendment. Several other challenges to race-conscious programs were filed or decided shortly after *SFFA*.

So, are SPCPs still lawful in the wake of *SFFA*? The answer is yes. *SFFA* does not apply to SPCPs offered by private entities because it involves notoriously strict *constitutional* standards that apply to government actors and entities like Harvard that receive federal funding. Neither the Constitution nor its strict standards apply to non-government actors who do not receive federal financial assistance. Instead, the standards that apply to private SPCPs come from ECOA and its implementing regulation, Regulation B. These laws expressly permit programs designed to serve groups that might not otherwise receive credit or would receive it on worse terms.

Encouraging lenders to explore SPCPs does not alter this conclusion.[61] Mere "encouragement" is insufficient to create state action; there must instead be coercion or "such significant encouragement" that the private party's choice "must in law be deemed to be that of the State."[62] Private lenders have independent judgement and decision making over whether to offer SPCPs, not DFS or any other regulatory agency.[63] Moreover, the cases filed or decided after *SFFA* involve government action or private activities that fall outside of the SPCP protections. In short, SPCPs that were lawful before *SFFA* continue to be lawful today.

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[60] "Mortgage leaders react to FHFA's ending of SPCPs: 'We need more information'. HousingWire. March 26, 2025. Available online at https://www.housingwire.com/articles/fhfa-ending-special-purpose-credit-programs-spcp-mortgage-mba-chla/

[61] *See, e.g.*, CFPB Advisory Opinion, Special Purpose Credit Programs, 86 Fed. Reg. 3762, 3765 (Jan. 15, 2021), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_special-purpose-credit-program_2020-12.pdf; Interagency Statement on Special Purpose Credit Programs Under the Equal Credit Opportunity Act and Regulation B (Feb. 22, 2022) ("we encourage creditors to explore opportunities to develop special purpose credit programs consistent with ECOA and Regulation B requirements."), https://www.fdic.gov/news/financial-institution-letters/2022/fil22008a.pdf.

[62] *Blum*, 457 U.S. at 1004.

[63] *Compare id.* at 1008 (finding that private decisions at issue did not constitute state action despite role of regulations because the decisions "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State"); *Jackson*, 419 U.S. at 357 ("[R]espondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment."); *Kolinske v. Lubbers*, 712 F.2d 471, 480 (D.C. Cir. 1983) (explaining that "the interposition of the independent judgment of a private party" was "central" to the reasoning in *Blum* and other state action cases).

In order to encourage covered institutions to use all of the tools at their disposal to ensure fair and equitable access to credit, DFS should list SPCPs as an example of innovative and flexible lending practices. New York would not be the first state to take this step, as Illinois included SPCPs as a relevant factor in the lending test for mortgage companies, as well as banks and credit unions.[64] SPCPs should not receive positive consideration if they include credit and underwriting overlays that increase the cost of credit for consumers that the SPCP has identified as less likely to receive credit. All institutions, including mortgage companies, would benefit from expanding and diversifying their client base through SPCPs.

**Performance ranges**

DFS should establish performance ranges tied to each of the ratings an institution can receive, similar to the approach in the 2023 federal CRA rules. This would establish transparent expectations of what would be considered outstanding or satisfactory lending performance, as well as lending performance that shows need for improvement and substantial noncompliance or indifference to meeting the credit needs of the entire community. These ranges would compare a specific institution's lending to the rest of the market, as well as specific demographics such as the percentage of households with low and moderate income in a specific assessment area. DFS could use the federal CRA's performance ranges as a guide in setting these up. For instance, the 2023 federal CRA rules establish that large banks must generally lend at either 80% of aggregate lending or 60% of local demographics to receive a "Low Satisfactory" rating in a specific assessment area.[65]

The federal regulators implemented performance ranges "to increase consistency in evaluations and provide improved transparency and predictability regarding the retail lending performance needed to achieve a particular conclusion".[66] There are many benefits to this approach. All stakeholders: community members, covered institutions, and DFS examiners, will benefit from knowing how much lending is deemed satisfactory or outstanding. That clarity could streamline the lending test review for DFS examiners and provide more time to review qualitative aspects of a covered institution's CRA performance. This will also do more to encourage lenders below satisfactory performance to prioritize increasing lending to borrowers and communities with low or moderate incomes, benefiting customers as well as the overall economy.

[64] Illinois Register. Volume 48, Issue 20. May 17, 2024. Pages 7039 (credit unions), 7115 (banks), and 7187 (mortgage companies). Available online at https://www.ilsos.gov/departments/index/register/volume48/register_volume48_20.pdf.
[65] Federal Register. Vol. 89, No. 22. February 1, 2024. Page 6881. Available online at https://www.govinfo.gov/content/pkg/FR-2024-02-01/pdf/2023-25797.pdf
[66] Ibid. Page 6787.

**Add cost of loans to lending test criteria**

DFS should add the cost of loans as a factor for consideration in the lending test, both in the currently proposed regulations for mortgage companies, as well as for state-chartered banks and credit unions in a subsequent rulemaking. Considering the cost of loans would build upon the criteria of harmful practices in the lending test that would adversely affect ratings and provide more concrete detail of how DFS will ensure that covered financial institutions are not harming borrowers with LMI. Mortgage lenders are already required to submit data on the cost of loans, including information on the interest rate in comparison to the Average Percent Offer Rate (APOR) and closing costs.[67] DFS examiners can use this data to identify patterns of high cost lending and outliers in order to better detect and prevent predatory lending. This is critical to an assessment of how mortgage lenders serve credit needs as the quality of loans is just as important as the number of loans.

**Focus on loan originations, not purchases**

Purchasing loans does not entail as much effort and resources in responding to local credit needs as originating loans. Originating loans involves determining which products best respond to local needs, conducting flexible underwriting that preserves safety and soundness while increasing access to underserved populations, and marketing to underserved communities. In contrast, when a financial institution purchases loans, it is relying on another entity to do the multiple tasks associated with originating loans.

A recent paper by Federal Reserve economist Kenneth P. Brevoort documented limited benefits of including purchases on CRA exams.[68] Brevoort found that purchases did not increase access to lending for borrowers and communities with LMI, and that purchased loans in LMI tracts were disproportionately to middle- and upper-income borrowers. Loan purchases for CRA purposes primarily decreased the share of loans purchased by government-sponsored enterprises (GSEs) initially, with these loans appearing to be resold to the GSEs within a few months.

Retail loan purchases should not be treated as the equivalent to loan originations. For mortgage companies, our recommendation would be that purchased loans be excluded in most circumstances and to solely focus on originations. If DFS would prefer to keep purchases in the evaluations, then we would recommend that DFS follow Illinois' example in their recently finalized CRA rules and only allow purchases from the originating lender to receive consideration, and that all subsequent purchases after the first will be excluded.[69] This will avoid

[67] "NCRC's HMDA 2018 methodology: How to calculate loan price." NCRC. September 2019. Available online at https://ncrc.org/ncrcs-hmda-2018-methodology-how-to-calculate-loan-price/

[68] Kenneth P. Brevoort, Federal Reserve Board, Does Giving CRA Credit for Loan Purchases Increase Mortgage Credit in Low-to-Moderate Income Communities?, May 2022, available via SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4100514

[69] Mortgage Community Reinvestment. Section 105.220. Lending Test. Available online at https://www.ilga.gov/commission/jcar/admincode/038/038010550B02200R.html

loan churning where the same loans are continuously bought and sold after examinations for companies to artificially boost their lending performance.

We would support consideration of purchases from institutions that do not have regular access to the GSEs or other secondary market outlets. These institutions include Community Development Financial Institutions (CDFIs), depository institutions owned by people of color, women-owned depository institutions, and low-income credit unions. Mortgage companies could create purchasing programs for these entities and other institutions that have less access to the secondary market.

In terms of banks, we recommend that purchases have some consideration on the lending test out of recognition that some banks have business models that involve large-scale purchasing from brokers, but purchased loans should not receive the same weight as originated loans. Purchasing activity should be evaluated as a separate product line and receive less weight than originations on the lending test. DFS could create a weighing scheme where traditional banks that largely do not use brokers would receive the least consideration for purchases, and those that heavily rely on brokers would have some additional consideration for purchases.

**High cost areas**

DFS has proposed that in high cost areas mortgage companies could receive consideration for activities that benefit the credit needs of households and communities with middle incomes, this is also in New York's current regulations for banks.[70] We appreciate that this consideration will be "in addition to, and not in lieu of" activities that benefit the credit needs of households and communities with LMI, however we recommend that DFS clarify in its regulations that activities that benefit middle income households or communities will only be considered if the institution is first found to serve LMI credit needs in high cost areas in at least a satisfactory manner. Developing performance ranges as recommended earlier would help establish if that threshold has been met for borrowers and communities with LMI.

**Rural areas**

DFS should add a performance criteria for lending and community development activities in nonmetropolitan rural markets as part of the lending and service tests for all covered institutions, as well as the investment test for state-chartered banks and credit unions. As discussed earlier in our recommendation to include underserved tracts, we sorted all New York state census tracts into quintiles based on the number of loans made per 10,000 housing units from 2022-2023. We found that 62 of the 143 census tracts located in nonmetropolitan census tracts were in the lowest quintile of loans made per 10,000 housing units, meaning that 43% of rural tracts in New York have the lowest lending in the state. This confirms that much less lending is occurring in rural tracts, as only 19% of urban and suburban tracts were in the lowest

[70] N.Y. Comp. Codes R. & Regs. tit. 3 § 76.14.

quintile. Furthermore, other studies have identified that about 1 in 4 New Yorkers live in rural areas.[71] Adding a specific criteria of how much lending and community development an institution is doing in rural markets will encourage lenders to focus on the geographic diversity of their financing in order to ensure that credit needs in all New York communities are being adequately met. This should lead to increases in lending in rural markets as DFS and lenders identify gaps, as well as more partnerships between financial institutions and the community organizations that serve these markets.

**Public participation**

We appreciate how DFS encourages public comments on CRA evaluations on its website, and posts a schedule of upcoming exams.[72] However, public comments are not currently mentioned in the proposed regulations for mortgage companies, or in the finalized regulations for banks. We recommend that DFS update both regulations to ensure that the public can continue to weigh in on how well institutions are meeting the credit needs of their communities. We encourage DFS to also add a requirement to post a CRA notice at institutions' branches and websites that encourages public participation in the evaluation process, similar to how Illinois requires for banks, credit unions, and mortgage companies.[73] Furthermore, DFS could also better facilitate comments on performance evaluations by providing comment deadlines and contact information for examiners on its website. Finally, in terms of reviewing applications, DFS should add that public hearings will be held when applications receive substantive opposition comments to provide the public and applicants with an opportunity to offer additional information in response to merger applications or other changes in corporate control when there are concerns from the public. DFS could also improve transparency of the application process by committing to send copies of all responses from the applicant institution to the commenters.

**Conclusion**

Adoption of these proposals will give DFS a deeper understanding of how mortgage companies, as well as banks and credit unions, are meeting the needs of their entire communities. Ultimately, these recommendations will strengthen New York's CRA regulations and help it achieve its goal of ensuring that every New Yorker has access to critical financial products and services.

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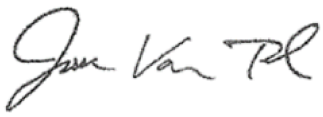
[71] "The population estimates for New York State suggest an overall population of just over 19.5 million people with just over 15.3 million people in Urban counties and 4.2 million in Rural counties (about 21.5%)." State of Rural New York report. Rural Housing Coalition of New York. Page 3. Available online at https://ruralhousing.org/wp-content/uploads/2023-State-of-Rural-New-York-Report.pdf

[72] Examinations and Exam Reports. New York Department of Financial Services. Available online at https://www.dfs.ny.gov/reports_and_publications/exam_reports.

[73] Illinois Register. Volume 48, Issue 20. May 17, 2024. Pages 7088 (credit unions), 7162 (banks), and 7207 (mortgage companies). Available online at https://www.ilsos.gov/departments/index/register/volume48/register_volume48_20.pdf.

Thank you kindly for consideration of our views in this important matter. If you have any questions, please contact Kevin Hill, Senior Policy Advisor, at khill@ncrc.org or myself at jvantol@ncrc.org.

Sincerely,



Jesse Van Tol

President and CEO

National Community Reinvestment Coalition