April 7, 2025

Superintendent Adrienne A. Harris
New York State Department of Financial Services
1 State Street
New York, N.Y. 10004

Re: Response to Proposed Rule 3 NYCRR 120 – Compliance With Banking Law § 28-bb

Dear Superintendent Harris:

Public Citizen and Americans for Financial Reform Education Fund strongly support the New York State Department of Financial Services' (DFS) proposal to evaluate nonbank mortgage lenders in New York based on their performance in meeting the credit needs of the communities where they operate. All mortgage lenders in New York must provide equitable access to credit, particularly to low- and moderate-income (LMI) communities. This proposed rule is an important step in furthering this goal, which is crucial to the public interest and the DFS's mission.

I. *This rule is necessary to prevent redlining and lending discrimination, particularly as nonbanks expand their market share in mortgage origination*

The landscape of mortgage lending has changed significantly since the global financial crisis, with mortgage origination moving from bank lenders to nonbank lenders at a rapid pace. In 2008, nonbank lenders accounted for 39 percent of mortgage originations, but since 2022, nonbank lenders have originated over two thirds of all U.S. mortgages.[1] This rule is a necessary step to align regulation with structural changes in the financial system. A two-tiered system where nonbank mortgage lenders face less oversight in providing equitable access to credit means a large portion of overall mortgage lending faces a supervisory gap. Application of Community Reinvestment Act (CRA) requirements to nonbank mortgage lenders will not only give necessary attention to the credit needs of all communities, but also help level the playing field for all financial institutions engaging in mortgage lending statewide.

As with banks, nonbank mortgage lenders benefit significantly from the support federal government programs provide to the mortgage market and in turn should bear the same responsibilities in providing benefits to the communities they serve. According to the Financial

[1] REPORT ON NONBANK MORTGAGE SERVICING, FINANCIAL STABILITY OVERSIGHT COUNCIL at 3 (2024), https://home.treasury.gov/system/files/261/FSOC-2024-Nonbank-Mortgage-Servicing-Report.pdf#page=6.

Stability Oversight Council (FSOC), mortgages originated by nonbank lenders are overrepresented in securitizations by Government Sponsored Enterprises (GSEs) such as Fannie Mae and Freddie Mac. Since 2022, nonbank mortgage lenders have originated 66 percent of the mortgages in GSE securitizations and 84 percent of the explicitly government backed mortgages in Ginnie Mae securitizations.[2] The ability of nonbank lenders to move risk off their balance sheets, while collecting fees for mortgage servicing, is key to the successful business model of these firms. Federal support for mortgage markets is premised on the idea that increasing the availability of mortgage credit is an economic good for families and communities. It is the responsibility of regulators supervising firms extending mortgage credit to ensure these economic benefits are conferred to all, including LMI communities and communities of color.

A 2019 study by the National Community Reinvestment Coalition found that traditional banks made a greater percentage of loans, a higher percentage of conventional refinance and home improvement loans, and a higher percentage of government-insured home purchase lending to LMI borrowers and census tracts than non-banks.[3] A 2021 DFS report also found that nonbank mortgage lenders in Buffalo, N.Y. conducted little engagement with nonwhite borrowers and made little effort to track how well they were serving communities of color, resulting in a significant nonbank underrepresentation in the mortgage market as compared to banks.[4] One in 12 of the 140 registered mortgage bankers have settled or are facing scrutiny for allegedly discriminatory practices across the United States.[5]

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[2] *Id* at 18.

[3] Jason Richardson and Josh Silver, *Home Lending To LMI Borrowers And Communities By Banks Compared To Non-Banks*, National Community Reinvestment Coalition (Apr. 18, 2019), https://ncrc.org/home-lending-to-lmi-borrowers-and-communities-by-banks-compared-to-non-banks/.

[4] Report on Inquiry into Redlining in Buffalo, New York, New York State Department of Financial Services (Feb. 4, 2021), https://www.dfs.ny.gov/system/files/documents/2021/02/report_redlining_buffalo_ny_20210204_1.pdf.

[5] *See, e.g.*, *Mortgage company will pay over $8M to resolve lending discrimination allegations*, Associated Press (Oct. 15, 2024), https://apnews.com/article/redlining-fairway-mortgage-discrimination-settlement-birmingham-2308eff407b68aab8c38ec25d91b2158; *MALDEF Sues Rocket Mortgage for Discriminatory Lending Practices*, Mexican American Legal Defense and Educational Fund (July 29, 2024), https://www.maldef.org/2024/07/maldef-sues-rocket-mortgage-for-discriminatory-lending-practices/; *HUD Charges Appraiser, Appraisal Management Company, and Lender with Race Discrimination*, Department of Housing and Urban Development (July 15, 2024), https://archives.hud.gov/news/2024/pr24-181.cfm; *Freedom Mortgage Corporation*, Consumer Financial Protection Bureau (Oct. 10, 2023), https://www.consumerfinance.gov/enforcement/actions/freedom-mortgage-corporation-hmda-2023/; *WA DFI Finalizes Multi-State Settlement Regarding Rocket Mortgage, LLC's (F/K/A Quicken Loans, LLC) Advertising Practices*, Washington State Department of Financial Institutions (Sept. 23, 2021), https://dfi.wa.gov/wa-dfi-finalizes-multi-state-settlement-regarding-rocket-mortgage-llcs-fka-quicken-loans-llc; Agreement, *In re 1st Priority Mortgage, Inc.*, New York Department of Financial Services (Mar. 22, 2021), https://www.dfs.ny.gov/system/files/documents/2023/04/ea20210322_1st_priority_mortgage_inc.pdf; Agreement, *In re Hunt Mortgage Corporation*, New York Department of Financial Services (Jan. 12, 2021), https://www.dfs.ny.gov/system/files/documents/2021/02/ea20210204_hunt_mortgage_agreement.pdf; *Consumer Financial Protection Bureau and Multiple States Enter into Settlement with Nationstar Mortgage, LLC for Unlawful Servicing Practices*, Consumer Financial Protection Bureau (Dec. 7, 2020), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-multiple-states-enter-s

II. The application of a lending test and a service test to nonbank mortgage lenders is appropriate

This rule would require nonbank mortgage lenders to undergo an evaluation of their lending activities (lending test) as well as an evaluation of their effectiveness in serving the communities in which they operate, including through community development services, community outreach, and educational programs (service test). We support the application of both tests to nonbank mortgage lenders.

As is required of bank lenders, nonbank mortgage lenders should be evaluated on their record of helping to equitably meet the credit needs of the communities in which they operate. This should include an evaluation of the geographic distribution and pricing and terms of home purchase, home improvement, and home refinance loans across low-, moderate-, middle-, and upper-income communities; the distribution of loans to low-, moderate-, middle-, and upper-income borrowers; the lenders' use of innovative or flexible underwriting or lending practices to meet the credit needs of LMI individuals; and the distribution of loans across HMDA categories, disaggregated by gender and race of borrower. Additionally, lenders that engage in practices that do not serve or otherwise harm underserved communities should perform poorly on the lending test under this rule. Supervisor evaluation of a firm's mortgage lending should be consistent across lender types.

The service test currently applied to banks is also appropriate for nonbank lenders. While some criteria applied to banks, such as the geographic distribution of bank branches, may not be appropriate for nonbank lenders, the criteria outlined in this rule, including the extent to which a lender provides community development services tailored to meet the needs of LMI geographies and individuals, are suitable for evaluating nonbank mortgage lenders. As is the case with the lending test, the service test should also be applied consistently across lender types.

This rule takes appropriate steps to consider the structural differences between mortgage lending conducted by banks and mortgage lending conducted by nonbank lenders. Unlike banks, nonbank lenders often do not have branches, meaning assessment areas cannot be delineated based on the location of bank branches. We support the requirements of Section 120.5 of this rule

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ettlement-nationstar-mortgage-llc-unlawful-servicing-practices/; *Attorney General James Announces Payments To Borrowers From $45 Million Multi-State Settlement With PHH Mortgage Corporation*, NEW YORK STATE ATTORNEY GENERAL (June 3, 2019), https://ag.ny.gov/press-release/2019/attorney-general-james-announces-payments-borrowers-45-million-multi-state; *DFS Fines Nationstar Mortgage LLC $5 Million for Violations of New York Banking Law*, NEW YORK DEPARTMENT OF FINANCIAL SERVICES (Apr. 11, 2018), https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1804111; *NYDFS Announces New Day Financial to Pay $1 Million and Surrender New York License For Exam Cheating Scheme*, NEW YORK DEPARTMENT OF FINANCIAL SERVICES (Nov. 19, 2015), https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1511191.

to apply the rule's lending test and the service test requirements to branchless lenders as well as the DFS's rationale in determining assessment areas of branchless lenders.

III. *This rule should consider climate change impacts to the accessibility and availability of mortgage credit*

Improving equitable access to mortgage credit is even more urgent and essential in the context of the escalating climate crisis. Federal Reserve Chair Jerome Powell drew attention to the impacts of climate change on the availability of mortgage credit and other financial services at a hearing before the U.S. Senate Committee on Banking, Housing, and Urban Affairs in February of this year, testifying "If you fast forward 10 or 15 years, there will be regions of the country where you can't get a mortgage, there won't be ATMs, banks won't have branches and things like that."[6] While some financial institutions are seeking to manage their risks by withdrawing from climate vulnerable communities, this strategy deprives communities of essential financial services that they need to build climate resilience, risks violations of fair lending laws, exacerbates economic and racial inequality, and threatens financial stability. Supervisors must be attuned to these dynamics and ensure that risk management by lenders does not violate the objectives of this rule and that lenders do not use climate risk as an excuse for discrimination.

The impact of climate change on the availability of credit is not experienced equally by all communities. Bluelining, or the practice of limiting credit creation and investment in climate-vulnerable areas, often leads to financial exclusion for low-income communities and communities of color.[7] Due to a history of systemic exclusion, including redlining, low-income communities and communities of color are overrepresented in climate-vulnerable areas. This means that the same communities which need the most investment to build resilience and adapt to climate change are often the least able to afford or access capital for these investments. For example, flood maps reveal that, in two-thirds of states, neighborhoods of color shoulder more undisclosed flood risk than the state average.[8] Bluelining can exacerbate existing inequalities, creating further financial exclusion for communities that already face systemic barriers to traditional finance, including credit access and homeownership that are critical to wealth building.

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[6] Claire Boston, *Powell predicts a time when mortgages will be impossible to get in parts of US*, YAHOO FINANCE (Feb. 15, 2025), https://finance.yahoo.com/news/powell-predicts-a-time-when-mortgages-will-be-impossible-to-get-in-parts-of-us-190820841.html

[7] Brooklyn Montgomery and Monica Palmeira, BLUELINING: CLIMATE FINANCIAL DISCRIMINATION ON THE HORIZON, THE GREENLINING INSTITUTE (Aug. 2023), https://greenlining.org/wp-content/uploads/2023/08/FINAL-GLI_Bluelining_report_2023.pdf.

[8] Tim McDonnel, *How new flood risk maps could undermine marginalized neighborhood*s, QUARTZ (July 5, 2020), https://qz.com/1876202/new-flood-risk-maps-could-undermine-marginalized-neighborhoods.

Given the disproportionate impacts of climate change on LMI communities and communities of color and the ways these impacts exacerbate existing credit barriers, this rule should incentivize nonbank lenders to support climate change adaptation and mitigation activities that are needed to protect these homes. These activities include but are not limited to home hardening, greening infrastructure such as green roofs, installation of solar, home electrification, and energy and water efficiency measures. Affordable financing to support these activities in LMI communities and communities of color should qualify under this rule. Likewise, a lender's efforts to conduct educational outreach in LMI communities and communities of color about the availability of climate adaptation- and mitigation-related loans as well as a lender's efforts to target such loans to these communities should also be a part of a lender's performance evaluation under this rule. The DFS should consider issuing a mortgage banker-specific industry letter for activities that contribute to climate mitigation and adaptation as it did for banking institutions in 2021.

To help direct these activities and products to provide the intended benefits for the served communities, the DFS should consider demographic data in connection with these activities under the performance test. Activities that contribute to bluelining or employ predatory practices[9] should negatively impact a lender's performance. Robust consumer protections for green lending products are vital to delivering the intended positive outcomes for vulnerable consumers and communities and effectively mitigating climate change. Without thoughtful safeguards, consumer demand for these products may expose households to predatory financing, unsuitable products, and fraud. When reviewing green lending products and programs offered by mortgage bankers, the DFS should consider, among other things, transparency, marketing practices, contract terms, and whether lenders have designed financial products that are sufficiently accessible and affordable, and being offered in an equitable way.[10]

IV. Additional Considerations

This rule should clarify that evidence of patterns or practices that deny, disadvantage or limit access to credit in LMI areas or communities of color, including failure to comply with the Fair Housing Act, or other civil rights violations by covered entities will negatively impact the score of lenders evaluated under this rule. Section 120.4(d)(1) of the rule should be amended to state that evidence of these discriminatory or other illegal patterns or practices will adversely impact not only the department's evaluation of a lender's performance under this rule, but also

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[9] *See, e.g.*, *CFPB Proposes New Consumer Protections for Homeowners Seeking Clean Energy Financing*, CONSUMER FINANCIAL PROTECTION BUREAU (May 1, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-new-consumer-protections-for-homeowners-seeking-clean-energy-financing/.

[10] Coalition Letter, *Equitable and Just Green Lending Starts with Strong Consumer Protections*, AMERICANS FOR FINANCIAL REFORM EDUCATION FUND ET AL. (Aug. 6, 2024), https://ourfinancialsecurity.org/wp-content/uploads/2024/08/Consumer-Protections-for-Green-Lending_AFREF-Sign-On_August-2024.pdf.

the lender's rating. Likewise, Section 120.7(b)(5) of the rule should be amended to state that a lender's rating on the lending test "will," rather than "may," "be adversely affected by harmful practices such as those intended to discourage application for or extension of credit offered by the mortgage banker or which may result in harm to low- and moderate-income individuals."

The DFS should consider whether the suggested repercussions for lenders that are noncompliant with this rule are sufficient, or should be strengthened. As with bank lenders covered under the CRA, nonbank lenders will not face penalties for poor performance under this rule. Instead, the superintendent will consider the lender's record of performance when evaluating a lender's application to open, maintain, or close a branch office and when evaluating a change of control application. The DFS should maintain the language in the statute,[11] and consider what additional points of intervention are necessary to accomplish the goals of the statute, particularly for branchless lenders who will not seek approval to open and maintain branch offices. Unlike other lenders, branchless lenders will be able expand their geographic reach even if they perform poorly under this rule. This creates an enforcement discrepancy between lender types and limits the DFS's ability to incentivize compliance with this rule.

Further, the DFS should assess whether the migration of mortgage lending from banks to nonbanks is impacting investments in community development activities. While banks are incentivized under the CRA to make investments in the lLMI communities in which they operate, including by financing affordable housing development, disaster cleanup efforts, and municipal infrastructure projects, nonbank mortgage lenders have no such community investment requirements or incentives. While the scope of products offered by nonbank mortgage lenders may limit the types of community investments they can make when compared to banks, the DFS should consider ways to increase community investments from entities covered under this rule as well as additional measures to incentivize investments in community development activities from all institutions it supervises.

Thank you for your attention to this important issue. Please reach out to Elyse Schupak (eschupak@citizen.org) and Anne Perrault (aperrault@citizen.org) at Public Citizen and Kelsey Condon (kelsey@ourfinancialsecurity.org) at Americans for Financial Reform Education Fund with any questions.

Sincerely,

Public Citizen
Americans for Financial Reform Education Fund

[11] NY Banking Law § 28-BB(1) ("or on any other application or notice to which the superintendent of financial services shall by rule or regulation make applicable the provisions of this section").