



June 30, 2023

New York Department of Financial Services
1 State St
New York, NY 10004
BankingComments@dfs.ny.gov

Re: Proposed Guidance on Character and Fitness

The New York Mortgage Bankers Association and the Mortgage Bankers Association¹ (the 'Associations') thank the New York Department of Financial Services (the 'Department') for the opportunity to comment on its *Proposed Guidance on Assessment of Character and Fitness of Directors, Senior Officers, and Managers (the 'Proposal')*.² With recent events in the financial industry, our Associations support covered institutions establishing and maintaining policies to reflect proper expectations of the leaders within their respective company.

The Department's Proposal includes general expectations regarding the following:

- Modernizing onboarding vetting processes and instituting and on-going review process;
- Outlining expectations in changes of control through restructuring, acquisition, mergers, and more;
- Expectations of the on-going review framework to include indicators of a more in-depth review required; and,
- Policy review by the Department and expectations in examination.

I. Overall Comments

The Associations generally support their member companies' efforts to ensure policies are in place for ongoing review of their organizational leadership to ensure the highest levels of integrity are maintained within management of their institutions. Consequently, the

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 400,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,200 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

² https://www.dfs.ny.gov/industry_guidance/industry_letters/il20230509_guidance_assessment_fitness

Associations appreciate that the Department has offered members flexibility in meeting the Department's expectations in the Proposal. Specifically, the Proposal includes the following:

Covered Institutions should take a risk-based and proportionate approach to implementing this Proposed Guidance, with the nature and depth of assessments and the frequency of ongoing assessments tailored, as appropriate, to the complexity and risk profile of the institution...Covered Institutions may tailor these suggested questions to their specific business needs, operations, and risks. Covered Institutions are reminded that any information requested should be made in compliance with all applicable laws.

The Associations also appreciate the Department providing a proposed detailed questionnaire/survey instrument which members may use in its current form or modify to serve their current or future onboarding and ongoing assessment processes. However, our Associations urge the Department to provide clarity around components of the Proposal. For example, member companies request more details from the Department regarding successful examination expectations related to the standards for intervening circumstances in the designated persons' lives as well as flexibility to account for the varying structures of Institutions regulated by the Department. In addition, there are certain terms used in the Proposal that are worth more reflection and further clarification.

The Associations also request the Department provide more contextual information about the development of the specific standards in the Proposal. It is not clear from the Proposal what other financial services regulatory examination standards were considered and how the Proposal aligns or, more importantly, may diverge with similar federal requirements or the mandates of other states. Our Associations believe before finalizing the Proposal, the Department should expand their iterative process and provide a differential analysis to any other similar compliance requirements to ensure there is maximum alignment with any other existing regulatory character and fitness assessment mandates for similar regulated activities and charters.

II. Intervening Circumstances

The Department's stated objective is to ensure policies are updated to include not only criminal but other circumstances. In the examples provided, the Proposal states existing assessments may not cover "possible conflicts of interest or other forms of misconduct that does not result in criminal conviction." Without further guidance on what the Institution may need to consider, the impact of this requirement is inherently broad. For example, a citation for speeding is not necessarily an indication an individual is unfit to make policy decisions at an Institution. Additionally, it would not be realistic for an Institution to list all potential indiscretions an individual could not make to retain their position. We would like to see the Department provide guidelines similar to the Federal SAFE Act which includes felony convictions and any financial or honesty related offenses. If the Department wishes to include additional events the Institutions should be instructed on those specific expectations by providing categories the Department has deemed to be indicative of unacceptable behavior as a guideline for a covered institution to follow when making risk-based hiring decisions. An Institution can go further than the Department's direction, but as written this guidance is too vague to prevent an overcorrection which would result in uncertainty in companies currently struggling in a down market. Moreover, absent clearer expectations, the vague guidance

within the Proposal will lead to widely different interpretations by each covered institution and each individual examiner. Providing clarity along with illustrative examples ensures consistent application of the guidance by both examiners and covered institutions. This approach respects the differences in risk or complexity of an individual business and retains autonomy of the covered institution, instead of proposing a far-reaching ban on individuals with specific backgrounds.

III. Designated Persons

The Proposal broadly defines designated persons for an Institution and includes the term “Senior Officer” which is loosely defined as referring to “every officer who participates or has authority to participate (other than in the capacity of a director) in major policy-making functions of a Covered Institution.” The Associations would like to have clarity on what qualifies as a ‘policy-making’ function as well as clarity on what the ‘capacity of a director’ is since these expectations are not reliant on title. The term ‘director’ could be a higher or lower titled position or role within each Institution. We would like to see the Department consider a more specific definition for a designated person to be an individual who may develop, institute, or vote on institution-wide policy decisions related to certain activities listed by the Department, which could include decisions impacting the financial and/or accounting processes, compliance management systems, enterprise risk tolerances, or ethics standards. This ensures smaller decisions on an internal policy with no impact to the safety and soundness of the operation are excluded from this review while still capturing the true decision makers of the company.

IV. Other Miscellaneous Concerns

The Associations offer the following additional comments on various aspects of the Proposal.

- In general, the proposed survey/questions leave blanks in several places regarding look back time periods. While the Associations appreciate this flexibility, it would be helpful to at least know what the minimal supervisory expectation is with respect to each of these. One suggestion would be to align with the mortgage loan originator requirements of the federal Secure and Fair Enforcement (SAFE) Act, which establishes a seven-year time frame for non-financial felony convictions.³
- Questions #1 and #2 list and refer to policies the individual must confirm they comply with, but some may not apply to every covered institution. The Associations suggest the list contain the “possible” policies of the institution and allow the covered institution to follow what may apply. As an example, “Insider Trading Policy” would not be found at a privately owned covered institution.
- Question #6 uses the term “any civil litigation” with respect to a background check. The Associations strongly believe the question should be limited only to civil litigation that is materially related to an individual’s ability to serve in the proposed role. For example, the Associations believe frivolous lawsuits targeting company leaders should not be included in this review. This item would also need to further define at what level of involvement requires the disclosure. Assisting or providing information in relation to a lawsuit does not mean the individual is named as a party to the lawsuit.

³ Title 12 USC Chapter 51, § 5104

- Question #4 The term “associated with” requires greater specificity. A current company leader who previously worked in a mid-level management capacity at a previous employer could be deemed to be “associated” employer given the current text of the Proposal. The Associations believe this language should be clarified to stress that “association” in this context should be limited to those who served in a broad company-wide decision-making capacity at a previous firm.
- Question #12 requests disclosure of any previous lobbying activity. The Associations believe the scope of this question should be limited to financial services advocacy and not the full spectrum of issue engagement as state and federal lobbying disclosure are public records and publicly available. Reportable “lobbying activity” should be defined to cover activities for which registration is required under state or federal law.
- Question #16 should pertain only to the individual, not a company the individual was associated with unless “associated with” is specifically defined. As it stands, the Proposal would include an individual who was employed by, but not within a position of control of, a company who may have had financial difficulty. The company association is already covered by Question #19.
- Question #19 should clarify the question is for when the individual was at the covered institution. As written, this would be at any time regardless of the individual’s association or involvement with that covered institution.
- The Proposal does not account for instances where the information may not be shared or cannot be shared with the covered institution. The Proposal should provide clarity for situations where the covered institution or designated persons cannot control when or if information is disclosed. This can happen in instances where the employee has a change in control of a public company. The covered institution may not receive that information until it is made public and may not receive the notice directly from their employee. Additionally, as it relates to Question #13 and litigation, some lawsuits are confidentially settled and may include non-disclosure agreements preventing any further disclosure. The Associations strongly urge the Department to review all applicable State and Federal laws relating to securities and public disclosure to ensure there is no conflict.

V. Conclusion

Once again, thank you for providing New York Mortgage Bankers Association and the Mortgage Bankers Association with the opportunity to comment on the Department’s Proposal. The Associations welcome the opportunity to engage with Department staff further to ensure covered institutions continue to improve the safety and soundness of their operations. If you have any questions, please contact Liz Facemire (lfacemire@mba.org or 202-557- 2870).

Sincerely,



Christina Wiley
Executive Director
New York Mortgage Bankers Association



Pete Mills
Senior Vice President
Residential Policy and Member Engagement
Mortgage Bankers Association