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New York Imposes Community Reinvestment Act Requirements on Mortgage Bankers

By Bob Jaworski*

New York has enacted a new law extending the requirements in the state's version of the federal Community Reinvestment Act ("CRA") to state-licensed mortgage bankers. This article provides, as background, a short summary of the federal CRA and its impact on banking institutions, and then outlines the basic policy rationale for and against the new law, its key features, and its potential impact on independent mortgage bankers.

New York has enacted a new law[1] extending the requirements in the state's analog to the federal Community Reinvestment Act ("CRA Requirements") to New York-licensed mortgage bankers, thereby becoming the third state (after Illinois and Massachusetts) to pursue such an initiative. The new law is codified as new Section 28-bb of the Banking Law and becomes effective one year following its enactment. Mortgage bankers should start thinking now about what they will need to do during the next year in order to fulfill the new CRA Requirements when they take effect.

Set forth below as background is a capsule summary of the federal CRA, followed by the basic policy rationale both for and against the new law, an outline of its key features and a brief discussion of its potential impact upon independent mortgage bankers.

CRA BACKGROUND

The CRA is a federal law that has been around since 1977. It essentially requires the Federal Reserve Board, the Office of the Comptroller of the Currency ("OCC") and the Federal Deposit Insurance Corporation ("FDIC") (collectively, the "Federal Bank Regulators") to encourage the depository institutions they supervise to help meet the credit needs of the communities in which they do business, specifically including low- and moderate-income ("LMI") neighborhoods.[2]

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[1] https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A06247&term=2021&Text=Y.

[2] https://www.federalreserve.gov/consumerscommunities/cra_resources.htm#lmi.

The Federal Bank Regulators do this by examining each institution's performance of its CRA obligations; rating that performance as "outstanding," "satisfactory," "needs to improve" or "substantial noncompliance"; taking those ratings into account when analyzing applications for mergers, acquisitions and branch openings;[3] and sharing information about community development[4] techniques with bankers and the public.

To facilitate CRA examinations, the Federal Bank Regulators require that depository institutions delineate a geographic assessment area (or areas), which generally refers to the geographies in which the depository has its main office, branches and deposit-taking automated teller machines, as well as the surrounding geographies in which the depository has originated or purchased a substantial portion of its loans.

Regulations adopted by the Federal Bank Regulators to implement the CRA are currently in the process of being updated in an effort[5] to "achieve a consistent, modernized framework across all banks to help meet the credit needs of the communities in which they do business, including [LMI] neighborhoods."

Some states, including New York, have enacted versions or analogs of the CRA that apply generally to depository institutions chartered by the state.

LEGISLATIVE RATIONALE

The bill that resulted in the new law is New York Assembly Bill No. A6247A. As indicated in a memorandum[6] submitted by the legislature in support of the bill, the impetus for the new law was a report issued in February 2021 by the New York Department of Financial Services ("DFS") raising concerns about redlining within the city of Buffalo. In that report, the DFS recommended that the state's CRA Requirements, which until now only applied to New York-chartered or licensed depository institutions, be expanded to apply also to New York-licensed mortgage bankers. The DFS believed that such an expansion would "increase lending to minorities and low-income borrowers [which] are currently served at higher rates than CRA regulated banks." The memorandum also expressed the legislature's view that "[o]mitting non-depository lenders, [which] currently hold a substantial portion of the mortgage lending market, from CRA monitoring leaves communities vulnerable to fair lending abuses in the New York State residential loan market."

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[3] https://www.federalreserve.gov/supervisionreg/afi/cra.htm.

[4] https://www.federalreserve.gov/consumerscommunities.htm.

[5] https://www.occ.gov/news-issuances/news-releases/2021/nr-ia-2021-77.html.

[6] https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A06247&term=2021&Memo=Y.

In a press release[7] issued after the new law was signed, New York Governor Kathy Hochul stated that the new law "will ensure [that] everyone has fair and equal access to lending options in their pursuit of purchasing a home, especially in communities of color which continue to be impacted by the effects of the pandemic and have historically faced many more hurdles when seeking a mortgage" and Acting DFS Superintendent Adrienne Harris added that the new law "ensures borrowers have equal access to mortgage financing and provides a thoughtful framework for them to be part of the solution to achieve the American dream of homeownership."

The Mortgage Bankers Association, however, has said that imposing CRA Requirements on independent mortgage bankers is "an ineffective and misguided policy choice" that is incompatible with their business models and historical lending activities. It points out in a policy statement[8] that independent mortgage bankers:

- Do not have deposits to reinvest;
- Do not have access to direct government support;
- Already engage in sustainable lending in LMI communities; and
- Are subject to robust oversight and supervision in every state in which they operate as well as from federal regulators.

KEY FEATURES

The new law requires the DFS, before taking action on certain mortgage banker applications, to take into account "an assessment, in writing, of the record of performance of the mortgage banker in helping to meet the credit needs of its entire community, including [LMI] neighborhoods, and consistent with safe and sound operation of the mortgage banker." This requirement applies to applications submitted by mortgage bankers who make more than a specified number of mortgage loans annually (as set by DFS regulation) which are either 1) change-in-control applications or 2) any other application or notice for which the DFS, by regulation, has determined a CRA assessment to be necessary or appropriate ("Covered Applications").

Under the new law, the DFS, in making the required assessment, must consider the mortgage banker's record of performance with respect to each of the following factors:

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[7] https://www.governor.ny.gov/news/governor-hochul-signs-legislation-expanding-new-york-community-reinvestment-act-non-depository.

[8] https://www.mba.org/advocacy-and-policy/residential-policy-issues/state-and-local-issues/state-community-reinvestment-act-(cra)-reqirements-for-independent-mortgage-banks.

- Its efforts to ascertain the credit needs of its community and to communicate with community members regarding the services it provides;
- Any marketing or special programs it has implemented to make community members aware of its services;
- Its participation in community outreach, community development or redevelopment and educational programs;
- The extent of participation by its board of directors, advisory committee or management in formulating its policies and reviewing its performance with respect to CRA Requirements;
- Any practices in which it engages that are intended to discourage applications for types of credit it offers;
- The geographic distribution of its credit extensions, credit applications and credit denials;
- Any evidence on its part of prohibited discriminatory or other illegal credit practices;
- Its record of opening and closing offices and providing services at offices;
- Its participation in governmentally insured, guaranteed or subsidized loan programs for housing;
- Its ability to meet various community credit needs based on its financial condition, size, legal impediments, local economic condition and other factors; and
- Other factors that, in the DFS's judgment, reasonably bear upon the extent to which it is helping to meet the credit needs of its entire community.

The new law also allows the DFS to (1) require a public hearing in connection with a Covered Application to which an objection has been submitted, and (2) create a graduated numerical rating system for assessing mortgage bankers' performance under the new law.

Finally, and perhaps most importantly, the new law provides that any such assessment may (1) provide the DFS with a sufficient basis on which to deny the Covered Application that triggered the need for such an assessment, and (2) either alone or together with any written communications between the DFS and the mortgage banker (other than confidential examination-related communications) be made available to the public upon request.

POTENTIAL IMPACTS

The new law has the potential to negatively impact independent mortgage bankers in a variety of ways. It may, for example:

- Increase mortgage bankers' compliance costs resulting from having to develop and implement policies and procedures to fulfill the CRA Requirements;
- Cause mortgage bankers to strengthen their outreach efforts to consumers in communities within the companies' assessment areas where they currently make few loans, monitor the results of those efforts and adjust or enhance them as needed;
- Result in reputational damage to mortgage bankers determined by the DFS to have an unsatisfactory New York CRA record (or rating, if the DFS determines to assign ratings under the new law); and
- Significantly lengthen the time it takes for the DFS to act on a change in control application (in the case of a proposed merger or acquisition) or any other application for which the DFS chooses to add as a factor for consideration the applicant's New York CRA record (or rating), which can be deal-breaking, particularly in a situation where an objection is filed and a public hearing ordered.

On the flip side, the new law, by forcing some mortgage bankers to at least increase their marketing efforts to LMI communities, may help them find new customers, increase their overall originations and generally improve their public profile in those communities and elsewhere.

The DFS should move cautiously and take industry concerns carefully into account when exercising its regulatory authority under the new law (i.e., when setting the coverage threshold, deciding which other applications, if any, other than change in control applications, should be subjected to analysis under the new law) and determining whether or not to establish a rating system to assess CRA performance under the new law. Not doing so could result in some companies, particularly smaller ones, being put out of business and conceivably make less mortgage credit available to LMI consumers for whom the law is specifically intended to benefit.