

June 30, 2023

New York State Department of Financial Services
Attn: Kathleen Scott
One State Street, 19th Floor
New York, NY 10004

Re: Proposed Guidance on Character and Fitness

Dear Ms. Scott:

On behalf of the American Financial Services Association (“AFSA”)¹ thank you for the opportunity to provide comments on the Department of Financial Services’ (“DFS”) Proposed Guidance on Character and Fitness. We have significant concerns about this proposal’s applicability to non-depository financial institutions and the overly broad scope of the specific questions and requirements.

Applicability to Non-depository Financial Institutions

This guidance emphasizes DFS’ core mission of protecting the safety and soundness of regulated entities and would apply to regulated banking organizations and regulated non-depository financial institutions alike. While we understand that DFS oversees both banking organizations and non-depositories, this one-size-fits-all approach doesn’t reflect the crucial differences between banking organizations and non-depository financial institutions and fails to consider why safety and soundness restrictions are not a fit for non-depositories. Safety and soundness principles are a well-established regulatory requirement for banking organizations due to the risk posed to the consumer deposits held by those organizations; if a banking institution were to fail, consumers could lose access to their money held by the bank. Conversely, no such consumer risk exists for financial institutions that do not hold consumer deposits, and no risk is posed for a consumer’s own funds. Accordingly, non-depository financial institutions do not warrant the same safety and soundness scrutiny and regulation imposed on banking organizations, and should thus be excluded from this guidance.

Senior Officer Definition

Under the proposed guidance, the term “senior officer” is defined to include “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.” This definition is overly broad and would even include employees of the covered institution whose job functions fall outside the scope of

¹ Founded in 1916, the American Financial Services Association (AFSA), based in Washington, D.C., is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including direct and indirect vehicle financing, traditional installment loans, mortgages, payment cards, and retail sales finance. AFSA members do not provide payday or vehicle title loans.

licensed activity in New York. Accordingly, we respectfully request that the guidance limit “senior officer” to include only officers with authority over major policy-making functions engaged in pursuant to the covered institution’s license or charter from DFS. Additionally, we believe DFS should clarify what qualifies as “major policy-making functions” because this term is also vague and overly broad.

Flexibility for a Risk-based Approach

While we agree that covered institutions should undertake character and fitness assessments, the breadth and implementation of these assessments should be left to the discretion of the covered institutions who are better suited to tailor such assessments to their actual business needs based on the risk posed to the individual institution. While companies already have their own onboarding procedures to assess the character and fitness of their executive level employees, we believe the guidance should provide more flexibility for Covered Institutions to operate within these existing processes, which are appropriate to the size and complexity of their business. Although the proposed guidance states that “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,” the rest of the proposed guidance undermines the ability of Covered Institutions to do so. The requirements throughout do not provide the flexibility necessary for institutions to actually implement a risk-based and proportionate approach that is appropriate to the complexity and risk profile of the institution.

Putting into place very specific procedures and processes to comply with one state’s character and fitness assessment rules will likely add no value to consumers and will only serve to increase the cost of doing business and negatively affect consumers (for example, through increased cost of doing business, which may be passed on to customers). Further, onboarding and ongoing monitoring procedures would become overly cumbersome if all 50 states added their own requirements.

The proposed guidance also states:

The Department has found that although Covered Institutions generally investigate a Designated Person’s background as part of the appointment and onboarding process, (1) the investigative resources and standards for such reviews may be outdated and in need of modernization, and (2) Covered Institutions should also have a robust process for on-going review, to confirm that there have been no intervening circumstances that would make continuation as a Designated Person inappropriate or improper.

The guidance notes, as an example, a failure to assess possible conflicts of interest or other forms of misconduct that does not result in criminal conviction; however, conflict of interest reporting is among one of the most common requirements for senior officers, and the guidance does not expand on what other specific shortcomings it found among covered institutions to necessitate this guidance. Accordingly, we request that DFS provide additional information regarding its findings and specifically what areas the Department believes Covered Institutions’ existing standards are outdated and in need of modernization.

The guidance further provides that results of the onboarding and ongoing assessment should be reported to the Board of Directors and Chief Compliance Officer. Onboarding and assessment activities are often handled by Human Resources and contain very sensitive personal information about employees. It is not appropriate or necessary to report that information to the Board of Directors when it can be appropriately handled through existing Human Resources processes.

Additionally, the guidance provides that if a Covered Institution identifies a materially adverse finding during an ongoing assessment and removes a person from their position, the Covered Institution must notify the Department of such determination. This notification should be limited to notification that the person is no longer serving in the identified capacity and the name of the person who will be taking their place.

Suggested Questions to Facilitate Initial and Ongoing Assessment of Designated Persons' Character and Fitness

The list of Suggested Questions is overly broad and will be onerous and cumbersome to complete and maintain responses to. In addition, qualified employees may be dissuaded from wanting to hold senior positions if they are subject to such onerous and detailed reviews by DFS in order to hold their positions. The proposed questions should, at a minimum, be limited in scope to their time at the Covered Institution. With respect to specific questions, we also share the following comments:

- Question 3 – this disclosure should be limited to convictions related to fraud or the scope of employment. Requiring disclosure of charges is inappropriate given persons are considered innocent until proven guilty.
- Question 6 – 10 years is far too long of a lookback and an unreasonable request. Instead, we recommend a 3-year lookback. In addition, having to disclose civil litigation or investigations against a prior employer is overbroad, as the person may not have familiarity or connection to these matters or may not be able to disclose them due to confidentiality obligations
- Question 7 – this question is overbroad and should be removed. Many states have at-will employment and employers can dismiss employees or ask them to resign for a variety of reasons, many of which may not involve any wrongdoing on the employee's part.
- Question 8 – this question should be removed. Employees likely would not be able to disclose this information for entities they previously worked at due to confidentiality obligations.
- Question 9 – this question should be removed. Whether an employee's family member has worked for the covered institution is completely irrelevant to their ability to perform their role.
- Question 10 – the request for information on family members should be removed.
- Question 12 – lobbying activities in a personal capacity are irrelevant to the position and this question should be removed.
- Question 13 – this question is irrelevant and should be removed. An employee's personal litigation matters are irrelevant to their position with the Covered Institution.

- Question 14 – this question should be removed. Whether the employee owes child support is irrelevant to their position with the Covered Institution.
- Question 15 – this should be limited to settlements in a professional capacity, and with respect to the Covered Institution only.
- Question 16 – this should be limited to the Covered Institution only.
- Question 17 – this is irrelevant to the employee’s position with the Covered Institution and should be removed.
- Question 20 – this information is irrelevant, and the question should be removed.

Thank you in advance for your consideration of our comments. We encourage DFS to keep these concerns in mind as it moves forward with further drafts of this guidance. If you have any questions or would like to discuss it further, please do not hesitate to contact me at mkownacki@afsamail.org or at (202) 469-3181.

Sincerely,



Matthew Kownacki
Director, State Research and Policy
American Financial Services Association