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January 28, 2020

Joseph M. Otting
Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219
Docket ID OCC-2018-0008
RIN 1557-AE34
Via portal: https://www.regulations.gov/comment?D=OCC-2018-0008-1515

Jelena McWilliams, Chair
Board of Governors
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429
RIN 2064-AF22
Via email: Comments@fdic.gov

RE: Notice of Proposed Rulemaking, Community Reinvestment Act Regulations

Dear Comptroller Otting and Chair McWilliams:

Empire Justice Center opposes the proposed changes to the Community Reinvestment Act (CRA) regulations. This proposal by the Office of the Comptroller of the Currency (OCC) and Federal Deposit Insurance Corporation (FDIC) lessens the public accountability of banks to their communities by broadening the performance measures on CRA exams so that they do not accurately measure a bank's responsiveness to local needs. Contrary to the agencies' assertions that their changes would increase clarity and CRA activity, the result will be significantly fewer loans, investments and services to low-moderate income (LMI) communities. Empire Justice reserves the right to submit additional comments before the end of the comment period.

Empire Justice Center is a statewide legal services organization with offices in Albany, Rochester, Westchester and Central Islip (Long Island), New York. Empire Justice provides support and training to legal services and other community-based organizations, undertakes policy research and analysis, and engages in legislative and administrative advocacy. We also represent low income individuals, as well as classes of New Yorkers, in a wide range of poverty law areas including foreclosure prevention, public benefits, domestic violence and civil rights. Our Consumer Finance and Housing unit has focused on addressing predatory financial services issues and improving fair access to credit for almost 20 years including practices in mortgage lending, foreclosure prevention, student lending, and consumer finance. Via our data analysis-driven advocacy and convening of the Greater Rochester Community Reinvestment Coalition, for over 25 years we have worked with area banks and their regulators to assure they meet their CRA obligations and serve the entire Rochester NY community, including its low-moderate income families and neighborhoods.

Any final regulations governing the Community Reinvestment Act must meet the following criteria:

- The regulations must be aligned with the origins and purpose of the CRA. One of the later pieces of civil rights legislation of the 1960s and 1970s, the CRA was passed to address years of redlining and disinvestment that deprived communities of color and lower income areas of equitable access to credit. The law creates an affirmative and continuing obligation for banks to help meet the credit needs of the local communities in which they are chartered, including low-moderate income (LMI) neighborhoods, consistent with safety and soundness.

- As we modernize the regulations to bring them up-to-date with the transformations and technological changes in the financial services sector, the regulations need to continue to focus on local communities and LMI communities.

- Moreover, as it has been 25 years since the last major changes in the regulations governing CRA, we need to be very careful in the changes we are making. They need to be driven by thoughtful and thorough data analysis that is shared with all stakeholders, including the public.

The proposal by the OCC and the FDIC does not meet these criteria. Instead, this deeply flawed proposal will very likely result in less lending, investing and services for communities that were the focus of Congressional passage of CRA in 1977. This backtracking violates the agencies' obligation under the statute to ensure that banks are continuing to affirmatively serve local community needs, including LMI neighborhoods. **We urge the FDIC and OCC to discard this proposal and to work with the Federal Reserve Board to write and propose an interagency rule that will augment the progress achieved under CRA instead of reversing it.**

The agencies propose an evaluation system that would further inflate bank CRA ratings while decreasing the responsiveness of banks to local needs. The proposed CRA evaluation measure would consist of the dollar amount of CRA activities divided by deposits, plus 1% of the bank's LMI branches divided by total number of branches. A bank's CRA evaluation measure would be calculated for the whole institution and for each of its assessment areas. This major presumptive determinant of a bank's CRA performance violates the above criteria. The focus on total reinvestment dollars in relation to deposits, even at the assessment area level, fails to measure whether and how those dollars are actually serving needs identified by the local community. The measure also gives very little weight to the distribution of a bank's branches. Even if a bank had 50% of its branches in LMI areas, this would add only 0.5 points to its CRA evaluation measure.

According to W. Edwards Deming, “What gets measured gets done.” Since the dollar volume of CRA activities would be measured in the numerator of the main part of the CRA evaluation measure, banks will be motivated to increase the numerator by focusing on easier large deals, loans or investments, which are most often in larger cities or MSAs, rather than on innovative or smaller loans (including smaller loans to businesses), investments or projects in smaller communities like Rochester, NY or in rural areas.

Combined with the expansion of what counts for CRA credit--i.e. infrastructure, stadiums, and housing projects benefitting middle income families in high cost areas –the CRA evaluation measure encourages banks to bulk up the numerator with big projects and less connection to LMI neighborhoods than that which happens with retail lending. Moreover, banks are already likely to invest in these types of projects even without the incentive of CRA credit.

The proposal puts forth presumptive CRA ratings using the CRA evaluation measure. The OCC and FDIC note that these ratings were developed after analysis; however, while the regulators describe their methodology, they do not share any details or results of their analysis. This lack of transparency, along with the proposed “field testing” and adjusting going forward, is problematic, especially since this is a very new way of summarizing CRA performance. Also, the four benchmarks will be the same for all MSAs, for all of the larger institutions, and in all economic conditions. They do not take the conditions and needs of local communities into account.

The agencies propose that in order to get a presumptive “Satisfactory” or “Outstanding” rating, a bank will need to meet certain CRA evaluation measure benchmarks in a “significant portion” of its assessment areas and in assessment areas where it holds a “significant amount” of deposits. The preamble to the proposal suggests that “significant” means “something more than 50%” of the assessment areas or of the deposits in an assessment area (and Question 17 asks if it should be 50%). So a bank could still pass its CRA evaluation if it did not meet the credit needs of up to one-half of its assessment areas. This creates a large incentive for banks to conduct a cost-benefit analysis on which assessment areas to serve, and it is likely to leave many communities out in the cold—i.e. those that need more creative, innovative, albeit higher-cost and/or lower-return investments and activities. That certainly does not align with the origins and purpose of the CRA.

The agencies propose that if a bank has more than 50% of its deposits outside of its facility-based assessment areas, it must delineate additional deposit-based assessment areas to include those areas where the bank gets more than 5% of its deposits. While we agree that the designation or expansion of assessment areas needs to be modernized to fit the new realities of financial services, this use of deposits for the new areas is problematic. First, the facility-based assessment areas are based on deposits taken or held at brick and mortar branches or ATMs, while the deposit-based assessment areas will be based on the location of the depositor. Secondly, the deposit-based assessment area 5% threshold is based on the proportion of a bank’s deposits. Since wealthier communities make larger deposits and LMI communities tend to make smaller deposits (individually and in aggregate), LMI communities could very well be left out of these deposit-based assessment areas.

Other ways the proposal would dramatically lessen CRA's focus on LMI communities in contradiction to the intent of the law to address redlining include:

- Retail mortgage and consumer lending to LMI communities would be eliminated as eligible CRA activities. Before doing this, the agencies need to more carefully analyze the displacement associated with gentrification in LMI neighborhoods, including where it happens and under what conditions.
- The relaxation of requirements that banks serve areas where they have branches first before they can seek deals elsewhere.
- The definition of affordable housing would be relaxed to include housing in high cost areas benefiting middle-income families, without also benefiting LMI families.
- Rental housing would be counted as affordable if lower-income people could afford to pay the rent without verifying that lower-income people would be tenants.
- Banks would get credit for investing in Opportunity Zones, without also assuring that these investments actually meet the credit needs of LMI families or neighborhoods.
- Income restrictions would be eliminated for financial education programs.

The NPRM would adjust the thresholds for what constitutes small businesses and farms, from $1 million to $2 million for small businesses and as high as $10 million for family farms. This would divert CRA's focus from the smallest businesses and farms. According to the Consumer Financial Protection Bureau (CFPB), 95% of small businesses have receipts less than $1 million.[1] As shown by the U.S. Department of Agriculture, only 1% of farms had sales of $5 million or more and 76% had sales less than $50,000.[2] These figures clearly indicate that the thresholds for small businesses and farms do not need to be raised at this time.

The proposal would retain a retail test that examines home, small business and consumer lending to LMI borrowers and communities but this retail test would only be pass or fail. In contrast, the current retail test counts for much more of the overall rating. Moreover, the proposal would result in more LMI branch closures since it would eliminate the test that scrutinizes bank branching and provision of deposit accounts to LMI customers. As seen in our 2018 report on consumer access to financial services, consumers still use brick and mortar branches, even when they also use online banking or mobile apps. Moreover, banks need to do a better job of providing and marketing affordable accounts.[3]

Under the proposal, small banks with assets less than $500 million would be examined under the current small bank performance standards (which is basically a lending test), unless they have an approved strategic plan or opt for being examined

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[1] Consumer Financial Protection Bureau (CFPB), Key Dimensions of the Small Business Lending Landscape, Table 2, p. 10, May 2017, https://www.consumerfinance.gov/data-research/research-reports/key-dimensions-small-business-lending-landscape/

[2] 2017 Census of Agriculture Highlights: Farm Economics – Value of Production, number of farms, and income down slightly, April 2019, https://www.nass.usda.gov/Publications/Highlights/2019/2017Census_Farm_Economics.pdf.

[3] Barbara Van Kerkhove and Ruhi Maker, "Too Big to Fail…Too Poor to Bank: How Mainstream Financial Services Can Help Low-Income Working Families Succeed," September, 2018 (found at: https://empirejustice.org/wp-content/uploads/2018/09/Access-to-Credit-Report-2018-FINAL.pdf).

under the proposed general performance standards. If a small bank chooses to undergo the general performance standards exam, that bank would be required to engage in community development financing.

Under the proposed $500 million threshold, 5 of the 19 depositories in the Rochester NY MSA would be able to undergo the streamlined small bank exam; this would rise to 7 banks if the threshold for small banks were raised to $1 billion. We are concerned that this will lead to significantly less community development lending and investment in the Rochester NY area.

Rather than making the proposed general performance exam an option for small banks, we urge the agencies to require that all small banks undergo the more rigorous general performance exam, tailoring the minimum level and types of community development financing to the size and business model of the bank. We also want to see the threshold for small banks go no higher than $500 million at this time. These actions will help medium cities like Rochester attract community development financing for its relatively smaller projects.

The current proposal does not address persistent racial disparities in lending. Instead of weakening CRA, the agencies must enact reforms that would increase bank activity in formerly redlined neighborhoods. They could do this by strengthening the fair lending reviews on CRA exams or by adding an examination of bank activity in communities of color to CRA exams. At the very least, the agencies could add a category on CRA exams of underserved census tracts, which would likely include a high number of communities of color.

The agencies also require banks to collect more data on consumer lending and community development activities but do not require banks to publicly release this data on a county or census tract level. Finally, the agencies need to make it mandatory to include on CRA exams all bank mortgage company affiliates, many of whom engaged in abusive lending during the financial crisis.

Due to the myriad of problems with the proposed rule, we urge the FDIC and OCC to discard the NPRM, and instead work with the Federal Reserve Board and propose an interagency rule that will augment the progress achieved under CRA instead of reversing it.

Thank you for your thoughtful consideration of these comments.

Sincerely,

Ruhi Maker, Esq.	Barbara Van Kerkhove, Ph.D.
Senior Attorney	Researcher/Policy Analyst