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Re: Notice of Proposed Rulemaking under the Community Reinvestment Act (CRA)
OCC: Docket ID OCC–2018–0008; FDIC: RIN 3064–AF22

I submit this letter as my comments on the proposed Community Reinvestment Act (CRA) regulations published by the Office of the Comptroller of the Currency (OCC) and Federal Deposit Insurance Corporation (FDIC).

I am an attorney with 40 years of experience and more than 3 decades of federal government service as a litigator and regulatory lawyer. My experience includes working on CRA regulations. For over 23 years, I drafted, interpreted and provided legal advice on federal financial services regulations affecting consumers and communities, including the CRA.

Currently, I serve as a member of the Montgomery County (Maryland) Advisory Committee on Consumer Protection. I submit these comments as my own individual views and not on behalf of any other person or entity.

I'm no stranger to the CRA rulemaking process. I understand the need generally to have bank regulations that make sense for institutions of varying sizes with different business models while still fulfilling the statute's intent and purpose. The current OCC and FDIC proposal for CRA fails that test.

The Proposed Rule Would Undermine and Weaken the Community Reinvestment Act.

The CRA's core purpose is making credit and retail banking services available in *local* low- and moderate-income (LMI) neighborhoods. The proposal is misconceived and would fundamentally undermine and weaken the CRA. The reasons for opposition given by FDIC board member Martin Gruenberg in his statement dated December 12, 2019 are accurate and I adopt those reasons in my opposition to the proposal. *See* https://www.fdic.gov/news/news/speeches/spdec1219d.html and the particulars noted below.[1]

The 2019 Proposal Must Be Revised and Adapted to the Current Economic Circumstances.

The changes proposed by the OCC and FDIC would undermine the CRA and would occur during a national economic crisis that did not exist and was not foreseen when the agencies issued their proposed rule for public comment. The current economic crisis magnifies the flaws in the proposal

[1] In particular: (1) The proposed rule would establish a CRA evaluation framework relying on a single metric approach that would allow a bank to concentrate its CRA activity in as little as 50 percent of its assessment areas, disinvest in the other 50 percent, and still receive a satisfactory or even outstanding CRA rating; (2) The metric would establish presumptive percentage standards for CRA ratings for which the OCC and FDIC have stated no basis. Such a proposed metric is arbitrary and fails the rational rulemaking standard required under the Administrative Procedure Act; (3) That metric, as well as new CRA assessment areas, is reliant on retail domestic deposits for which reliable data is deficient; (4) The proposal would expand current CRA eligible activities and thereby reduce the focus of CRA on low- and moderate-income individuals and communities. It would virtually eliminate the retail services test that currently encourages low cost bank accounts to expand access to the banking system to those who are currently unbanked; (5) The proposed rule would undermine the historic goal to encourage bank engagement and dialogue with stakeholders in local communities to understand and better serve historically underserved areas.

because the changes being proposed would de-emphasize community investment at a time when community reinvestment will be more important than ever. The proposed rule must be reconsidered and redrafted to address the actual circumstances that will exist when the rule is finalized rather than the circumstances that existed in 2019 when it was proposed. Otherwise, it cannot be a rational rulemaking as required under the Administrative Procedure Act. Then redrafted rule must be re-published as a second proposal for comment. That should be done in coordination with the Federal Reserve, which wisely refused to join the current OCC–FDIC proposal and instead published an outline for a much better proposal.

The Legislative Process Should Be Used to Enact Meaningful Reform that Can Address <u>Communities' Needs in the Wake of the Current Economic Crisis</u>.

It is evident that the current CRA rules, largely issued in 1995 to implement a 1977 statute, should be modernized to reflect today's electronic banking environment. That isn't seriously disputed. Nevertheless, the effort to modernize the rules is constrained by statutory language that was drafted over 40 years ago, in vastly different circumstances, before the era of electronic commerce.

The CRA's statutory language might not afford the agencies the full flexibility they want or need to update the rules for the world of internet and mobile banking while still fulfilling the CRA's intended purpose That suggests, however, that it would be better to take the time to update the statute, especially in light of the economic conditions and challenges the nation now faces based on the COVID-19 health crisis. Unfortunately, the OCC and FDIC proposal represents an effort to get "rushed" changes in place before the impending presidential election even though those proposed changes would weaken the CRA. Expediency is not a substitute for effectiveness.

The OCC and FDIC Should Coordinate With the Federal Reserve so that the <u>3 Agencies Jointly Issue Identical Rules that Apply to All Banks</u>.

The OCC and FDIC should adopt the proposed approach outlined by the Federal Reserve, and work with the Federal Reserve to develop a different proposed rule that implements the Federal Reserve's approach. The resulting draft regulation can then be published for public comment to allow for further refinements. In doing this, all three agencies can coordinate their work. The three agencies should jointly issue identical rules that follow the Federal Reserve's approach, so all U.S. banks will be evaluated under one set of standards. Having banks governed by different CRA regulations based on which agency supervises and examines them is bad public policy. The supervisory standards should be identical for all banks.

The Federal Reserve Has Outlined an Approach to Updating the CRA Rules that <u>Should Be Adopted by the OCC and FDIC</u>.

The OCC and FDIC should revise their proposals in light of the ideas, proposals and critical analysis set forth in the January 8, 2020 speech by Federal Reserve Governor Lael Brainard as well as the previously cited statement by FDIC board member Gruenberg. As Governor Brainard points out, bank branches remain as important as ever to their local communities, even with the growth of mobile and online services. Governor Brainard's speech is published at <u>https://www.federalreserve.gov/newsevents/speech/brainard20200108a.htm</u>.

As Federal Reserve Governor Brainard set forth, there are several principles that should guide CRA reform and the new regulations. The revised rules:

- Should reflect the credit needs of local communities and work consistently through the business cycle;
- Should be tailored to banks of different sizes and business strategies;
- Should provide greater clarity in advance about how activities will be evaluated;
- Should encourage banks to seek opportunities in distressed and underserved areas; and
- Should recognize that the CRA was intended to promote an inclusive financial sector.

After years of conducting outreach to stakeholders, Federal Reserve Board officials working with its own Federal Reserve System experts, used metrics to sketch out a proposed approach that would use a set of tailored thresholds that are calibrated for local conditions. It would create two tests: a retail test and community development test.

Having two separate tests ensures that expectations are tailored for banks of different sizes and business models. The Federal Reserve smartly proposes one set of qualitative standards for evaluating retail services within the retail test, and a second, separate set of qualitative standards to assess community development services within the community development test.

Under the Federal Reserve's proposed approach, all retail banks would be evaluated under a retail test, which would assess a bank's record of providing retail loans and retail banking services in its assessment areas. "Large banks, as well as wholesale and limited-purpose banks, would also be evaluated under a separate community development test that would evaluate a bank's record of providing community development loans, qualified investments, and services. Using bank data and other publicly available data, the supervisory agencies would be able to provide a bank with a dashboard indicating how its retail lending activity compares to thresholds for presumptive satisfactory performance (thresholds that reflect the activity of other lenders and credit demand in the local area). Separate metrics reflecting a bank's assessment area can be provided related to the evaluation of its community development performance."

The Federal Reserve proposes a retail lending test that "at its core would use widely available data to assess two clear objectives: how well a bank is serving LMI borrowers, small businesses, and small farms in its assessment area, and how well a bank is serving LMI neighborhoods in its assessment area. The Fed wisely suggests that the metrics used to evaluate these two questions should rely on loan counts rather than dollar value, to avoid inadvertent biases in favor of fewer, higher-dollar value loans."

The Federal Reserve's proposed approach "would measure a bank's performance in serving the needs of both low- and moderate-income borrowers (and small businesses and small farms) and LMI places in the community." The Federal Reserve, for mortgage loans, would use "an LMI borrower distribution metric that would calculate the percentage of a bank's number of loans made to LMI borrowers relative to its overall mortgage originations, and assess this percentage against an assessment area threshold determined by local demographics and the aggregate lending of other in-market competitors. A separate LMI neighborhood distribution metric would evaluate the percentage of a bank's number of loans in LMI tracts to its overall loan count and assess this against a threshold determined by local demographics and the aggregate lending of other in-market competitors."

"A bank that meets or exceeds both the LMI borrower and LMI neighborhood thresholds for each of its major product lines would be presumed to have a satisfactory-or-better level of retail lending performance in that assessment area. Using a customized dashboard, each bank could track its own activity against the threshold on an ongoing basis reflecting recent data, eliminating the lengthy uncertainty associated with the current evaluation methodology, which many banks have highlighted as the most important area for reform."

Importantly, as Governor Brainard pointed out "[t]he retail lending metrics would be tailored to the needs of the local community. This tailoring is not possible with a uniform benchmark that applies to all banks and all communities." Moreover, "the proposed retail lending metric would automatically adjust to changes in the business cycle." That would be especially useful given the economic uncertainties we now face. "A uniform ratio that does not adjust with the local business cycle could provide too little incentive to make good loans during an expansion and incentives to make unsound loans during a downturn, which could be inconsistent with the safe and sound practices mandated by the CRA statute."

The OCC and FDIC rules should adopt a "Community Development" test like the one proposed by the Federal Reserve. The "Community Development" test would apply to large retail banks, as well as wholesale and limited-purpose banks. In her speech, Governor Brainard reported that the establishment of a separate community development test reflects stakeholder feedback emphasizing that the value of community development finance is distinct and not directly comparable to retail activity. A separate test also allows for a broader area to be taken into account for purposes of community development relative to retail lending.

The Federal Reserve's proposed test would "compare the combined measure of a bank's community development financing relative to deposits in its local assessment area to a national average, set differently for rural and urban areas, and a local average in the bank's assessment area. The national comparator would be set differently for metropolitan statistical areas and rural areas to reflect the comparatively lower average levels of financial infrastructure in rural communities."

Conclusion

The OCC and FDIC should revise their current proposal and work with the Federal Reserve on drafting joint CRA rules, applicable to all banks, that seek to implement the approaches outlined in Governor Brainard's January 8, 2020 speech. The Federal Reserve has shared its work publicly to solicit public input on a broader set of options for reform –with the goal of reaching interagency agreement on the best approach. The sharing of data and analysis and obtaining public feedback on these additional options improves the regulatory process. The approach taken by the OCC and FDIC shortcuts that process to the public's detriment.

History shows that the revised CRA regulations are likely to be in place for DECADES. For that reason, it is more important for the OCC and FDIC to get CRA reform done right than to do it quickly to meet artificial timelines dictated by election politics. This requires giving external stakeholders sufficient time and analysis to provide meaningful feedback on a *range* of options for modernizing the regulations. The OCC and FDIC failed to do that; they should now go back and work with the Federal Reserve on that effort, starting with the Fed's approach, and redraft their proposed rules.

Respectfully Submitted,

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