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Attachments: Testimony of Katy Crosby on behalf of NCRC.pdf

Attached you will find my testimony to the Subcommittee on Consumer Protection and Financial Institutions hybrid hearing entitled, "Better Together: Examining the Unified Proposed Rule to Modernize the Community Reinvestment Act" on Wednesday, July 13th. I am submitted the testimony for comment on the updates to the CRA regulations.

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APEX
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Testimony of Catherine Crosby, Town Manager, Town of Apex; Board Chairperson, National Community Reinvestment Coalition

"Better, Together: Examining the Unified Proposed Rule to Modernize the Community Reinvestment Act"

House Financial Services Subcommittee on Consumer Protection and Financial Institutions, July 13, 2022

I am honored to testify before you today on the proposed regulatory reform of the Community Reinvestment Act. I am the board chairperson of the National Community Reinvestment Coalition (NCRC). NCRC is a coalition of 600 community-based organizations. Our members use CRA on a daily basis to increase lending, investments and services for our country's underserved communities. I am also the town manager for Apex, North Carolina, home to approximately 73,000 residents. Prior to that I served in Dayton and Toledo, Ohio.

The Notice of Proposed Rulemaking (NPR) issued by the federal bank agencies represent the most significant changes to the CRA regulation and exams in 27 years.

CRA will be more effective in bolstering bank reinvestment activity in underserved communities and ensuring underserved groups' ability to move into high opportunity communities, the more rigorous CRA exams and ratings are. The NPR proposed some significant improvements in test rigor but the improvements are not across the board on all aspects of exams.

Legislation can supplement the regulatory reforms proposed by the agencies

I am pleased with the Making Communities Stronger through the CRA bill circulated by the committee today. The bill would require banks to establish community advisory committees which would be consultative bodies providing input on banks' CRA strategies, plans for meeting the needs of people of color, and on banks' merger and branch plans. In addition, the bill would increase oversight of banks meeting important needs such as those for small dollar mortgages. Finally, NCRC is pleased we were able to influence the bill's proposal for periodic interagency statistical studies on racial disparities.

We are pleased that the American Community Investment Reform Act of 2022 would require CRA exams for securities companies and assess their community development financing activities. We do not support the presumption that a financial institution with an Outstanding rating satisfied the convenience and needs of communities as part of its merger application. We outline our views about this in recent comments to the FDIC.

We strongly support applying CRA to independent mortgage companies as the American Housing and Economic Mobility Act would do. In a previous report, we describe how the application of CRA by the state of Massachusetts to mortgage companies is a model for federal law.

CRA needs to address racial disparities and also make up ground in modest income communities

Persistent racial and ethnic disparities in lending should compel the agencies to incorporate race and ethnicity in CRA exams. A NCRC national level analysis showed continuing disparities in loan denials by race and when people of color received home loans, their equity accumulation was less. NCRC had asserted in a paper that it is possible for changes to CRA to comply with legal standards if CRA examined lending by race and ethnicity in geographical areas experiencing ongoing discrimination.[1]

By including race, CRA could address racial disparities that have direct impacts on quality of life and health outcomes. The COVID pandemic disproportionately affected communities of color in terms of unemployment, rates of COVID and business closures. In part, this is a legacy of 80 years of redlining. NCRC studies have shown that communities of color identified as risky on redlining maps produced by the Home Owners Loan Corporation (HOLC) remain economically depressed and experience a higher incidence of adverse health outcomes.

I represent communities that have been distressed for decades due to redlining. The NPR is helpful in that it proposed that CRA exams would assess lending separately in low-income and moderate-income tracts. This will help the distressed and lower income communities. I also urge the agencies to go a step further and to examine lending in underserved neighborhoods with the lowest levels of lending. As documented by NCRC, these tracts are disproportionately communities of color.

I was formerly the Chief of Staff in Toledo, Ohio which is located in Lucas County. CRA reform is needed because in that county low- and moderate-income neighborhoods are receiving low levels of lending. NCRC documented that from 2018 through 2020 in Lucas County, just 12.4% of home purchase loans were made in LMI neighborhoods despite 32% of people living there.

No lender in Lucas County is doing an adequate job at serving the Hispanic population. Among the top 20 lenders, the percentage of loans to Hispanic applicants varied from 1% to 3% despite being 7% of the county population.

In Wake County, where the Town of Apex is located, 20% of the population is African American. Of the top twenty lenders in the county, only two make 20% or more of their loans to African Americans. The rest make 8% or less of their loans to African Americans. None are providing loans to the Hispanic community proportionate to their representation.

[1] This recommendation implements a solution that is appropriately focused on communities experiencing the ill effects of ongoing or past discrimination as revealed by interagency statistical studies. See the legal analysis in the paper co-authored by NCRC and Relman Colfax discussed in more detail below and obtained via the hyperlink above.

These disparities make a compelling case to examine lending by race on CRA exams in areas experiencing ongoing discrimination. We ask the agencies to reconsider their decision not to do this.

CRA reform must elevate the importance of public comments

Since CRA requires banks to meet the needs of communities, the agencies must elevate the importance of public comments regarding the extent to which banks meet needs. We urge the agencies to post comments on their websites as they proposed to do.

In addition, we ask that the agencies publish a list of organizations that comment and that the agencies identify those led by people of color and women in an effort to seek input from a diverse range of organizations. Finally, CRA exams must assess compliance with community benefit agreements that banks negotiate with community organizations during mergers and with any conditional merger approval order.

Improvement in exam rigor must be consistent across all parts of the CRA exam

The agencies bolstered the rigor on the large bank retail lending test by establishing comparisons among a bank's lending and demographic and market benchmarks. This approach would decrease ratings inflation and result in more failing and low satisfactory ratings on the lending test. As a result, several banks would respond by boosting their retail lending to underserved communities. In addition, the proposal for the lending test to separately examine lending to the smallest businesses with revenues below $250,000 would increase lending to start-ups and younger businesses, which are disproportionately owned by people of color and women.

We are pleased that financing community facilities like childcare centers, climate remediation measures and disaster preparedness would receive more consideration in the community development test. In addition, financing increased broadband in underserved communities as proposed is critical because several small businesses and lower income tenants had difficulties applying for assistance during COVID due to lack of easy access to the internet. We also strongly support the requirement that these activities cannot displace low- and moderate-income residents.

The large bank tests such as community development finance and services include improvements but need to be developed further to guide examiners against inflating ratings. These new tests would have improved performance measures, but the NPR does not provide enough guidance to examiners regarding which of these measures are the most important when assigning ratings.

The proposed assessment area reform is critical

The agencies proposed to create assessment areas where a large bank does not have branches when a bank has issued 100 home loans or 250 small business loans This proposal would result in the great majority of total lending being incorporated on exams and would therefore hold banks more accountable for serving low- and moderate-income communities. However, the agencies must further ensure that exams do not overlook assessment areas containing smaller metropolitan areas and rural counties.

Conclusion

The NPR promises to make parts of CRA exams more rigorous but we urge the agencies to extend the rigor of the large bank lending test to the other tests. We also ask the agencies to incorporate race in CRA exams and to expand the public reporting of their data collection proposals. If CRA is improved while maintaining public input and accountability, we believe the proposed rule could help reduce inequalities, disinvestment and other disadvantages in America's overlooked communities.

Below is NCRC's initial analysis of the proposed rule.

Initial Analysis of the CRA Notice of Proposed Rulemaking

Introduction

On May 5, the federal bank agencies (the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation) issued a long-anticipated notice of proposed rulemaking (NPR) concerning the Community Reinvestment Act (CRA) regulations.[2] Enacted to redress redlining and racialized patterns of disinvestment, CRA requires banks to serve the needs of all communities, including and especially low- and moderate-income (LMI) communities. The federal agencies implement CRA by examining and rating banks based on their level of lending, investing and services provided to LMI people and communities. CRA also considers community development financing of affordable housing, economic development and community facilities as well as community development services such as providing homeownership counseling.

CRA will more effectively bolster bank reinvestment activity in traditionally underserved communities if CRA exams and ratings are more rigorous. In order to increase their effectiveness, the CRA exam process must also be transparent with ample opportunities for public comments on bank performance to be taken into account by examiners.

This NPR represents the most significant proposed changes to the CRA regulation and exams in 27 years. Since that time, profound changes have occurred in the banking industry including the increase in online banking. Meanwhile, persistent racial inequalities have not been addressed by CRA. Because of the technological advances in the banking industry and the stubbornness of our nation's inequities, an update to CRA is urgently needed.

[2] Office of the Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation, Notice of Proposed Rulemaking (NPR) to amend the CRA regulations, May 5, 2022, https://www.fdic.gov/news/board-matters/2022/2022-05-05-notice-dis-a-fr.pdf

The agencies proposed important improvements in the CRA regulations including expansion of geographical areas on CRA exams, more data to scrutinize bank performance and increased rigor on parts of CRA exams. However, they did not sufficiently address racial inequities in the CRA reform. They were also inconsistent in addressing CRA ratings inflation. What follows is a review of the major areas of CRA reform addressed by the NPR.

CRA's consideration of race is lacking in the NPR

Former Senator William Proxmire, the main sponsor of CRA, clearly understood that redlining victimized communities of color. His remarks during the hearings leading up to the passage of CRA in 1977 described in detail the refusal of banks to lend in communities of color despite receiving deposits from these communities.[3] Yet, the original CRA statute did not mention race, perhaps because Senator Proxmire understood that the backlash against affirmative action in the late 1970s would imperil CRA's passage if it included race explicitly. Nevertheless, the statute required banks to serve all communities and is intended to remedy racial exclusion, which provides room for the federal bank agencies to incorporate race in CRA exams to a greater extent than they do presently.

The agencies proposed to use Home Mortgage Disclosure Act (HMDA) data to produce exam tables describing lending by race, but not to incorporate those findings into banks' CRA exam ratings.[4] NCRC and Relman Colfax PLLC asserted that it is possible for changes to CRA to meet current legal standards if CRA examined lending by race and ethnicity in geographical areas experiencing ongoing discrimination or exhibiting significant racial disparities in lending.[5] We also proposed including analyses of lending in underserved neighborhoods with low levels of lending, which are disproportionately communities of color.[6]

The agencies should at a minimum bolster fair lending reviews accompanying CRA exams for banks that perform poorly in the HMDA data analysis of lending by race. In addition, the agencies proposed to use the Section 1071 small business and farm lending data by race and gender on CRA exams when the Section 1071 data becomes available.[7] The Section 1071 data should also be used as a screen for identifying when heightened fair lending reviews are needed.

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[3] Josh Silver, *The Purpose And Design Of The Community Reinvestment Act (CRA): An Examination Of The 1977 Hearings And Passage Of The CRA*, June 2019, https://ncrc.org/the-purpose-and-design-of-the-community-reinvestment-act-cra-an-examination-of-the-1977-hearings-and-passage-of-the-cra/

[4] NPR, p. 420.

[5] Brad Blower, General Counsel, NCRC; Josh Silver, Senior Policy Advisory, NCRC; Jason Richardson, Director of Research and Evaluation, NCRC; Glenn Schlactus, Partner, Relman Colfax PLLC; Sacha Markano-Stark, Attorney, Relman Colfax PLLC, *Adding Robust Consideration Of Race To Community Reinvestment Act Regulations: An Essential And Constitutional Proposal*, September 2021, https://www.ncrc.org/adding-robust-consideration-of-race-to-community-reinvestment-act-regulations-an-essential-and-constitutional-proposal/

[6] Bruce Mitchell, PhD. and Josh Silver, *Adding Underserved Census Tracts As Criterion On CRA Exams*, January 2020, NCRC, https://ncrc.org/adding-underserved-census-tracts-as-criterion-on-cra-exams/

[7] NPR, p. 385.

We will be advocating for this change and our previous recommendations regarding CRA and race.

Public input mechanisms: Agencies propose improvements that must be codified

Since CRA requires banks to meet the needs of communities, the agencies must elevate the importance of public comments regarding the extent to which banks meet those needs. The agencies proposed to continue the recent practice of publishing 60 days in advance of each calendar quarter the schedule of CRA exams for the next two quarters,[8] which will help provide ample opportunities for the public to comment on exams. In addition, the agencies proposed to continue the current practice of sending any comments on CRA performance to banks and are also considering publishing comments received on agency websites.[9]

When community groups wish to have their comments publicly posted, the agencies should definitely post them on their website. This practice will establish accountability on the part of examiners to consider the comments. In addition, the comments form a public record that can be referenced during future merger applications to determine if the banks and agencies addressed significant concerns of the public and community organizations.

Agencies should also document their efforts to reach out to the community and ensure that they are seeking a diversity of organizations (in particular, with regard to race and gender of organizational leadership) to comment on needs and performance. CRA evaluations should include which organizations were contacted as part of the evaluations. The agencies should establish a public directory, which is updated frequently, of organizations that have commented on exams or have been contacted by the agencies. Community organizations should also be able to register and add their name and contact information to the directory. The regulators should be encouraged to hear from community contacts they have not consulted in the past, and to follow up with community contacts to see if issues raised have improved or worsened. A directory organized by geographical area, mission focus, and race and gender of organizations (whether the organization is led by people of color or women) would hold the agencies and other stakeholders accountable for ensuring that a diversity of voices are heard.

The agencies are considering whether to establish a specific mechanism seeking input about needs and conditions across localities.[10] This could be useful in ascertaining the extent to which banks are responding to community needs. The agencies need to ask specific questions about the most pressing needs and which types of financing are offered or not offered by banks in response to those needs to obtain the most useful performance context information for evaluating bank performance and the banks' responsiveness to needs.

[8] NPR, p. 426.
[9] NPR, p. 426.
[10] NPR, p. 427.

Missed opportunities on merger reviews

The agencies proposed no changes to how they consider CRA performance when reviewing merger applications. The agencies instead argue that improving the CRA exams used as a measuring stick in merger review is sufficient, stating that:

> *…by making the assessment of CRA performance more transparent, consistent, and predictable, the proposed CRA methodology would provide greater certainty to a bank regarding the level and distribution of activity that would achieve a "Satisfactory" rating when the bank contemplates making an application. It would also provide clear metrics regarding the bank's record of meeting the credit needs of its entire community, including low-and moderate-income neighborhoods.*[11]

This statement appears to offer benefits to banks and community-based organizations. It suggests that banks will have more certainty about how to achieve a Satisfactory rating after CRA reform, making it easier for them to submit applications more likely to be approved without delays. It also suggests that the public will have more transparent metrics with which to understand and comment upon a bank's CRA performance.

If CRA reform makes exams more rigorous, CRA exams will be become a more effective standard for expecting more reinvestment activities from banks seeking to merge. However, CRA performance may have changed since a bank's last CRA exam. Other existing merger oversight tools can help address this potential lag.

NCRC urges the agencies to improve upon their implementation of the "convenience and needs" (public benefits) standard required under banking law for mergers.[12] In short, the agencies must expect concrete plans including encouraging community benefit agreements (CBAs) from merging banks concerning how they will increase lending, investment and services to traditionally undeserved communities.

In addition, these plans and other aspects of mergers can be better judged by the agencies if they hold more public hearings. We agree with Acting Comptroller Hsu who recently stated:

> *For mergers involving larger banks, the OCC is considering adopting a presumption in favor of holding public meetings. We partnered with the Federal Reserve to hold a public meeting in March for the proposed U.S. Bank and MUFG/Union bank merger. Over 120 community members attended and shared their views on the needs of the community and how they may be impacted by the merger.*[13]

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[11] NPR, p. 384

[12] For more about NCRC's views regarding merger applications, see *NCRC Comments On DOJ Merger Review Guidelines*, October 2020, https://www.ncrc.org/ncrc-comments-on-doj-merger-review-guidelines/

[13] Acting Comptroller of the Currency Michael J. Hsu Remarks at Brookings "Bank Mergers and Industry Resiliency" May 9, 2022, p. 8, https://www.occ.gov/news-issuances/speeches/2022/pub-speech-2022-49.pdf

Reducing CRA ratings inflation: Progress on the lending test of the large bank exam but not as much on the other subtests

Currently, about 98% of banks pass their CRA exams on an annual basis with fewer than 10% receiving an Outstanding rating and almost 90% receiving a rating of Satisfactory.[14] The idea that 90% of all banks are performing in the same manner is implausible, as is the near-perfect pass rate. CRA has successfully leveraged more loans, investments and services for low- and moderate-income communities but it would be more effective in doing so if the ratings system more effectively revealed distinctions in performance.[15] Banks performing in a mediocre or worse fashion would be motivated to increase their reinvestment activity if their performance was more accurately depicted by a ratings system. NCRC called for either five ratings overall (there are four ratings currently) or instituting a point system that could also reveal more distinctions in performance.

Proposed retail lending test would reduce ratings inflation

The agencies did not introduce a fifth overall rating but they preserved five ratings on the subtests and assigned points to each of these five ratings. The new point system will not only reveal more distinctions on the subtests but will also do so overall.[16] In addition, the agencies bolstered the rigor on the retail lending test by introducing performance ranges for comparisons among a bank's lending and demographic and market benchmarks. For example, for a bank to receive a low satisfactory rating on home lending to moderate-income borrowers, its percentage of loans to moderate-income borrowers would need, at a minimum, to match either 80% of the market benchmark (percent of all lenders' loans to moderate-income borrowers) or 65% of the community benchmark (percent of all families that are moderate-income).[17]

The agencies should be encouraged to implement their proposal to identify assessment areas in which the market benchmark is ineffective because all lenders are underperforming. The agencies proposed to use a statistical model to project the market benchmark for assessment areas, taking into account demographic, economic and housing market characteristics. When the statistical model identifies assessment areas with market benchmarks that are significantly lower than the predicted market benchmarks, examiners would consider this as a factor and may adjust

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[14] Josh Silver and Jason Richardson, *Do CRA Ratings Reflect Differences In Performance: An Examination Using Federal Reserve Data*, NCRC, May 2020, https://ncrc.org/do-cra-ratings-reflect-differences-in-performance-an-examination-using-federal-reserve-data/

[15] For studies documenting the impact of CRA, see Lei Ding and Leonard Nakamura, *Don't Know What You Got Till It's Gone: The Effects of the Community Reinvestment Act (CRA) on Mortgage Lending in the Philadelphia Market*, Working Paper No. 17-15, June 19, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2991557, and Lei Ding, Raphael Bostic, and Hyojung Lee, *Effects of the CRA on Small Business Lending*, Federal Reserve Bank of Philadelphia, WP 18-27, December 2018, https://www.philadelphiafed.org/community-development/credit-and-capital/effects-of-the-community-reinvestment-act-cra-on-small-business-lending.

[16] NPR, pp. 161-162, pp. 225-226.

[17] NPR, p. 214.

ratings downward. This would provide additional incentives for banks to improve their retail lending performance.[18]

The quantitative approach proposed for the retail lending test would decrease ratings inflation and result in more failing and low satisfactory ratings on the lending test, which at 45% of the overall rating, would be the most heavily weighted test.[19] For example, 10% of banks with assets less than $10 billion would likely receive a Needs-to-Improve on the retail lending test as would 4% of the banks with assets more than $50 billion. In addition, 46% and 58% of banks with assets below $10 billion and above $50 billion, respectively, would receive Low Satisfactory ratings.[20] The Federal Reserve Board has a data tool showing likely ratings on the lending test on a local level.

Proposed community development financing (CDF) test does not match the rigor of the lending test

The quantitative part of the CDF subtest should further be developed

While the revamped lending test is clearly an advance, the agencies did not create as much rigor on the other subtests of the large bank CRA exam. If not corrected, this is likely to diminish the gains in exam rigor from the new lending test. The community development finance test, for example, will consist of a quantitative measure of a bank's ratio of community development finance divided by deposits. The bank's ratio will be compared to a local ratio at the assessment area level and to a national ratio.[21] The agencies, however, did not provide enough guidelines to examiners for comparing the bank's ratio to either the local or national ratio, making it possible for an examiner to inflate a rating by choosing the lowest comparator ratio or placing more weight on the comparison to the lower ratio.[22]

The agencies should have produced guidelines illustrating how performance on the ratio would correspond to a score. For example, guidelines could state that if a bank had a much higher ratio than either the local or national ratio, it would likely score Outstanding on the community development ratio measure. Further in "hot markets" with relatively high ratios (higher than the national ratio), a bank could score High Satisfactory if its ratio was higher than the national ratio but on par with the local ratio. It would score Low Satisfactory if its ratio was on par with the national ratio and lower than the local ratio (but not less than 50% of the local ratio). These benchmarks would not necessarily have precise thresholds like the retail lending test but would be an improvement over just leaving the decision up to the examiner regarding how scores correlate to comparisons between benchmarks. At the very least, the agencies could commit to

[18] NPR, p. 231.
[19] NPR, pp. 365-366.
[20] NPR, Table 9, p. 251.
[21] NPR, pp. 311-315.
[22] NPR, p. 320 discusses examiner discretion.

establishing guidelines in a few years when there is more data to create reasonable but rigorous guidance.

The agencies should revise and replace the existing guidance in Appendix A of the regulation that leads to subjective ratings due to its vagueness. For example, Appendix A advises that a bank will generally rate Outstanding on the investment test of the large bank exam if it has "An excellent level of qualified investments."[23] The agencies could readily develop guidance and a new appendix to replace Appendix A with more detailed descriptions of how ratings would correlate to how a bank's performance compares against benchmarks.

<u>The impact review should also be further developed</u>

Moreover, the agencies proposed a qualitative impact review that is aimed at adjusting a community development rating in cases in which a bank may have lower dollar amounts of financing that is nevertheless more responsive to needs.[24] For instance, this can occur when a bank is helping to finance intermediaries that support very small businesses in an area with high unemployment. Such financing could be of lower dollar amounts than other financing that is of high dollar values but does not directly address the need for job creation.

The agencies created valuable aspects of the qualitative impact review such as classifying community development financing as impactful if it is directed to counties with persistent poverty, Native American communities or counties experiencing a dearth of community development finance.[25] The agencies also proposed improvements for how to consider community development financing for affordable housing, economic development, community facilities and climate remediation and resiliency for which we will develop detailed comments.[26]

While the qualitative review is needed, it can also be abused and can result in inflating a rating if it is not carefully designed and allow examiners to make vague statements that carry great weight on exams. In particular, the agencies backed away from assigning each community development loan or investment an impact score on a point scale as contemplated in the Federal Reserve's Advance Notice of Proposed Rulemaking.[27]

As an alternative, the agencies could guide the impact review by asking the examiners to calculate the percentage of community development finance that was devoted to persistent poverty counties, counties with low levels of finance and the percentage of activities that involved collaboration and partnerships with public agencies and community-based

[23] 12 CFR Appendix A to Part 25(b)(2)(i)(A), https://www.ecfr.gov/current/title-12/chapter-I/part-25#p-Appendix-A-to-Part-25(b)(2)(i)
[24] NPR, p. 319.
[25] NPR, p. 109
[26] NPR, pp. 31-100 for detailed discussions of activities counting as community development.
[27] NCRC Comment On Federal Reserve Board's Advance Notice Of Proposed Rulemaking Regarding The Community Reinvestment Act – February 2021, p. 72, https://ncrc.org/ncrc-comment-on-federal-reserve-boards-advance-notice-of-proposed-rulemaking-regarding-the-community-reinvestment-act-february-2021/

organizations. In their instructions and templates for collecting community development data, the agencies should include data fields which would record geographical targeting, partnerships and other features. In this manner, the qualitative evaluation can become more quantitative and objective.

The agencies proposed data collection that involves impacts but should be more specific in the regulation and accompanying guidance. Guidance could encourage banks to record aspects of community development like jobs created or retained, number of LMI families housed, number of hospital beds created, and other statistics regarding the impacts of community facilities and infrastructure. In addition, the agencies could ask banks to indicate in data submissions when activities like affordable housing, economic development and climate remediation occur in tandem. The more robust this data collection process, the more objective the impact review can be in using and capturing data such as the number and percentage of community development loans or investments that have significant impacts.

Finally, the impact review should have its own score, rating and weight for the overall community development finance test, which the proposal lacks. Instead, the proposal would direct examiners to conduct an impact review judging the impact of the community development finance overall.[28] As currently constructed, the impact review could lead to inconsistent or careless application of examiner discretion and a contribution to the overall community development finance rating that is not justified by a concrete demonstration of the breadth and depth of impactful finance.

Retail services and products test could also produce inflated ratings

The retail service and products test of the large bank exam could also suffer from flaws similar to that of the community development finance test.[29] The proposal would require examiners to assess the distribution of branches by income level of census tract and conduct a qualitative review of affordability and responsiveness of credit and deposit products. The proposal did not provide enough guidelines for assuring objective evaluations such as guidelines for assigning ratings and points based on comparisons among the percent of a bank's branches in LMI census tracts to market or community benchmarks.

The agencies proposed to enhance their consideration of deposit products and services. The evaluations would include assessing the responsiveness of deposit products in terms of whether they are affordable and easily accessible.[30] However, the proposal did not assign weights to the components of the retail service and products test, again opening the possibilities of examiner

[28] NPR, pp. 318-320.
[29] NPR, pp. 255, pp. 262-267, pp. 296-297.
[30] NPR, p. 292.

misjudgment such as merely weighing the part of the test in which the bank performed better to a greater extent.[31]

Promising data-collection improvements still lack scope and transparency

In order to improve the accuracy and effectiveness of the CDF test and the retail services and products test, the agencies proposed to collect community development and deposit data. All large banks would be required to report community development data, on an individual project level, describing the category of community development (such as affordable housing or economic development), the dollar amount and indicators of the impact of the activity.[32] The agencies proposed to report this data at a census tract or county level.

This data would be a significant advance. It would help make the community development finance test more rigorous by providing more detail, allowing examiners to compare a bank against its peers to determine whether or not a bank is especially responsive to local needs by financing activities that its peers are overlooking. It would also help stakeholders more accurately determine areas that are receiving considerable amounts of community development finance and which areas are not.

Like community development data, the agencies proposed requiring large banks to collect data on deposits by income category of census tracts. The agencies also proposed requiring banks to collect information on how many accounts were opened and closed on an annual basis[33] in order to help determine whether a bank is successful in creating affordable and sustainable accounts or whether consumers do not find the deposit accounts valuable as indicated by high closure rates. This data would significantly bolster the rigor of the service test, but the agencies proposed collecting this data only for banks with more than $10 billion in assets.[34] This limitation does not seem necessary since collection of basic information on deposit accounts does not seem too difficult for any large bank. In addition, while the agencies would collect this data, they did not propose to make it publicly available,[35] eliminating opportunities for the public to use the data to hold banks accountable for serving LMI communities.

The agencies proposed to examine large banks for their record of making automobile loans to LMI customers and communities. The agencies stated that automobile lending is an important indicator of whether banks are responding to community needs since many geographical areas lack reliable transit for commuting and other travel needs. Just like deposit data, however, its

[31] NPR, pp. 297-301.
[32] NPR, pp. 408-409
[33] NPR, p. 294
[34] NPR, p. 385.
[35] NPR, p. 553.

usefulness would be constrained by the proposal to limit this data collection to banks with more than $10 billion in assets and to not make the data publicly available.[36]

Not enough safeguards against abusive and unsustainable lending

Just as with the current CRA, the NPR would retain the fair lending review which will probe for discriminatory and other illegal practices. In a significant advance, probing for discrimination and other illegal practices will not be confined to credit but will also extend to deposit-taking and other aspects of banking.[37]

Disappointingly, however, the agencies are not proposing to regularly evaluate the quality of credit and deposit products to ensure that they are responsible, affordable and sustainable. Access to credit and banking is not sufficient if the products are high cost and unaffordable, leading to high rates of delinquency and defaults. In Massachusetts, one of the few states with its own CRA law, CRA exams scrutinize delinquency and default rates on mortgage lending and penalize banks with possible ratings downgrades when these rates are high.[38] Federal CRA exams should not only conduct this type of evaluation for home loans but also for other lending and deposit products on exams.

In addition, the NPR did not indicate whether CRA exams will scrutinize bank partnerships with nonbank institutions for the purpose of evading state usury caps and offering high cost products that mire consumers in unsustainable debt loads. The agencies proposed to automatically include operating subsidiaries of banks on exams, which is an advance that could increase the responsiveness of banks to providing safe and sound loans and banking products.[39] However, the proposal would not scrutinize third party relationships under which the nonbank could be performing many of the essential functions of lending such as underwriting that operating subsidiaries perform.

Assessment areas expanded for retail lending and out of assessment activities considered on the community development test

Advocates have been urging the agencies for several years to expand the geographical assessment areas used in CRA exams to include areas beyond bank branches where banks make significant numbers of retail loans. The agencies listened and proposed to create retail assessment areas where a large bank does not have branches when a bank has issued 100 home loans or 250 small business loans there in each of the two most recent years.[40] The agencies calculated that this proposal would cover the great majority of loans of the impacted banks.

[36] NPR, pp. 405-406.
[37] NPR, p. 371.
[38] Josh Silver, *Massachusetts CRA For Mortgage Companies: A Good Starting Point For Federal Policy*, NCRC, July 2021, https://ncrc.org/massachusetts-cra-for-mortgage-companies-a-good-starting-point-for-federal-policy/
[39] NPR, p. 154.
[40] NPR, pp. 131-133.

Moreover, the proposal is feasible in that it will affect 91 banks in the case of home loans and each of these banks will need to create a median number of 2 additional assessment areas. For small business lending, the median number of assessment areas is larger at about 10 but just 26 banks are impacted, most likely very large credit card banks.[41]

Assessment area procedures would be improved for strategic plans. All large banks electing the strategic plan option, including those that are primarily online lenders, would be required to follow the same assessment area designation procedures as they would under the retail lending test.[42] This would ensure that large online lenders would no longer be able to designate just their headquarters' metropolitan areas as assessment areas and not have their lending across the country in several localities scrutinized by CRA exams.

The agencies, however, did not consider creating deposit-based assessment areas on either a metropolitan or rural county basis for banks that collect deposits but do not make loans. We will be urging the agencies to reconsider this since online institutions that are only in the business of collecting deposits and offering deposit-based accounts have received bank charters in recent years.

Agencies must carefully consider out of assessment area community development and services

Unlike retail lending, the agencies would not require banks to create assessment areas to capture community development financing or deposit-taking of large banks outside of their branch network. Instead, community development financing and deposit taking outside of the branch network would be considered at the state or institution level. In the case of community development financing, the agencies need to carefully consider how to weigh and evaluate community development lending outside of branch-based assessment areas to ensure the outside of assessment area activity does not result in high ratings that obscure non-performance inside assessment areas. The agencies proposed a weighing scheme at a state and institution level that appears to be a reasonable approach for banks with different business models (ranging from mostly branch-based to mostly online) when considering branch-based assessment area and outside assessment area performance, but we will be further reviewing this approach.[43]

Measuring deposit-taking outside branch-based assessment areas raises similar concerns. The agencies did not present an approach for weighing services inside and outside assessment areas for determining ratings. We will further consider and review this aspect of the NPR.[44] Evaluating activities wherever they occur is important to make sure traditionally underserved communities are being reached. However, care must be taken to make sure exams evaluate all activities in all areas with rigor.

[41] NPR, p. 134.

[42] NPR, pp. 356-357.

[43] NPR, p. 328 and p. 334.

[44] NPR, pp. 296-301

Agencies must make sure that smaller areas receive weight on CRA exams

Another unresolved issue is how to weigh performance in large metropolitan areas, smaller metropolitan areas and rural counties. The agencies generally would weigh performance at an assessment area level based on the share of loans and deposits in that assessment area. This approach by itself would result in the larger areas not only contributing more to the overall rating but possibly obscuring poor performance in smaller metropolitan areas or rural counties.

The agencies attempted to correct for this by requiring that banks with 10 or more assessment areas must receive at least a Low Satisfactory rating in 60% of the assessment areas in order to pass overall. This still may not be an adequate solution since the smaller areas could represent a minority of areas, allowing a bank to pass the 60% threshold by focusing on the larger areas.[45] This proposal needs more development. One possibility is to require banks to achieve at least a Low Satisfactory rating in 60% of each of its large metropolitan, small metropolitan and rural assessment areas. Any such requirement should also apply to banks with less than 10 assessment areas.

Higher asset level thresholds encourage banks to reduce their level of community development financing and customer services

The agencies proposed to raise the small asset bank threshold from $346 million to $600 million.[46] Likewise, the intermediate small bank (ISB) asset threshold would be adjusted and would range from $600 million to $2 billion. Currently, the ISB asset thresholds range from $346 million to $1.384 billon.

As a result of this proposal, 779 banks that are ISB banks now would be reclassified as small banks.[47] These banks would no longer have community development finance responsibilities, resulting in a loss of considerable amounts of community development finance.

Likewise, 217 banks would be re-classified from large banks to ISB banks.[48] These banks would no longer have a service test requiring them to pay attention to the branching and service provision in LMI communities. The proposal should at the very least expect the same range of reinvestment activity as CRA currently does for all ISB and large banks. In this respect, the proposal goes backwards with no justification about how any reduction in burden for these banks would somehow offset the loss of reinvestment activity from a public benefits perspective. The banks impacted have been engaging in community development or service provision for several years without any apparent deleterious impacts.

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[45] NPR, p. 368.

[46] Mark Pearce, Director, Division of Depositor and Consumer Protection, *Memo on Notice of Proposed Rulemaking on Community Reinvestment Act Regulations*, April 27, 2022, p. 4, https://www.fdic.gov/news/board-matters/2022/2022-05-05-notice-dis-a-mem.pdf

[47] FDIC memo

[48] FDIC memo

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Conclusion: A good start but several improvements need to be made

The agencies' NPR contains important improvements to the CRA regulation. It would make the large bank retail lending test more rigorous and the ratings on that test more accurate in terms of revealing distinctions in performance. It proposed critical improvements in data collected on retail lending, community development financing, deposits and basic banking services. These data improvements would also make exams more objective and transparent. It also updated assessment area procedures to take into account the rise of online banking and other forms of nonbranch delivery including the use of brokers. Further, the agencies expanded and refined categories of community development activities and added considerations of credit and deposit products geared towards underserved populations.

However, the NPR remains a work in progress. While the large bank retail lending test is considerably improved, the other large bank tests including community development financing and retail services need more development concerning objective quantitative and qualitative measures and more instructions to examiners regarding how to weigh various components of the tests. If this is not done, the tests could end up being subjective and contribute to another round of CRA ratings inflation. The good news is that introducing more rigor into these tests is a feasible task that the agencies should be able to accomplish with the foundations they established in the NPR.

Assessment area issues need to also be addressed including ensuring that smaller metropolitan areas and rural counties receive proper consideration towards an exam's overall grade.

New data collecting and reporting is overly constricted and applies mainly to very large banks with assets over $10 billion although all large banks can readily handle these new reporting requirements.

Lastly, the agencies should vastly improve their consideration of CRA and race on CRA exams. There are ample ways to incorporate race and ethnicity into CRA exams that are meaningful and can withstand a legal challenge.

This is the biggest opportunity since 1995 to update the CRA regulations in a way that significantly bolsters reinvestment in formerly redlined and underserved communities. We must help the agencies get this right.