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April 8, 2020

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Re: Community Reinvestment Act Regulations (OCC–2018–0008 RIN 1557–AE34; FDIC RIN 3064–AF22)

Dear Officers,

On behalf of more than 500,000 member and supporters of Public Citizen, we offer the following comments in response to the request from two of the three relevant bank regulators regarding proposed changes to the Community Reinvestment Act (CRA). [1] As enthusiastic supporters of the CRA, we express strong opposition to this proposal, which we believe will undermine this crucial law designed to promote fair lending and combat discrimination.

Further, we protest that federal banking agencies would burden the public and itself with unnecessary rulemakings at a time when we all should be laser focused on address the coronavirus crisis. The White House Office of Management and Budget so directed the administration. [2]

Background

The Community Reinvestment Act serves among a constellation of laws aimed at combatting discriminatory lending. Perversely, it was the federal government itself that built discrimination into the loan-making process. In response to the many foreclosures during the Great Depression, Congress

[1] OCC, FDIC *Joint Notice of Proposed Rulemaking, Community Reinvestment Act Regulations*, FEDERAL REGISTER (Jan. 9, 2020) https://www.govinfo.gov/content/pkg/FR-2020-01-09/pdf/2019-27940.pdf
[2] Memorandum for the Heads of Departments and Agencies, OFFICE OF MANAGEMENT AND BUDGET (March 17, 2020) https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-16.pdf

established the Home Owners' Loan Corporation in 1933. This entity provided government support for loans, but it identified certain neighborhoods with red lines on maps to be a higher risk. These neighborhoods had lower income residents and large minority populations. This became the basis for the process referred to as "redlining."[3] The impact lasted for decades, with neighborhoods of color suffering lower mortgage approval rates.

Congress began to address the problem beginning in the 1960s, with the 1968 Fair Housing Act and the 1974 Equal Credit Opportunity Act. In 1975, Congress approved the Home Mortgage Disclosure Act (HMDA) to quantify where and to whom banks made loans. The law required banks to make their annual loan making public, delineated by recipients' neighborhood, income and race.

In 1977, Congress approved the Community Reinvestment Act (CRA), a law authored by Sen. William Proxmire, (D-Wisc.), chair of the Senate Banking Committee. The CRA advanced beyond data collection to an additional mechanism to promote fair lending. As the law states, banks must demonstrate "a continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered."[4] If banks fail to demonstrate a record of fair lending, regulators will "take such record into account in its evaluation of an application for a deposit facility by such institution."[5] (The regulators are the Federal Reserve Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corp. (FDIC)).

To codify this law, regulators identified factors they would consider. These included: efforts by the bank to ascertain the credit needs of the community, including communication with members of the community; geographic distribution of the bank's credit extensions, credit applications, and credit denials; evidence of prohibited discriminatory or other illegal credit practices; and bank participation in local community development projects.[6] Regulators stressed that outreach with the community would be central. The regulators also assigned banks a rating.– Outstanding, Satisfactory, Needs to Improve, or Substantial Noncompliance – and required production of a written report that became a part of the supervisory record of the institution.

Congress has modified the CRA several times. In 1989, as part of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), banks were required to prepare a written evaluation, which includes a public section as well as a confidential section.[7] In 1994, as part of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Congress required banks to provide separate analysis for each metropolitan area where the bank maintains a branch. It also required a report for each state where it operated, and an overall report for the entire region of a bank's operation. In 1995, the regulators issued a rule designed to emphasize performance, as critics contended that the CRA previously overemphasized process. The agencies introduced the concepts of "assessment area" and "performance context." The assessment area described the geographic area within which the performance criteria in the rule would be assessed. The performance context is a measure of how a bank performs compared to its peers in the assessment area.

The Proposed CRA Ratio

[3] Amy E. Hillier, *Redlining and the Homeowners' Loan Corporation*, 29 JOURNAL OF URBAN HISTORY 394-395 (2003)
[4] 12 U.S.C. §2901(a)(3)
[5] 12 U.S.C. §2903(a).
[6] 43 Fed. Reg. 47144, 47152 (Oct. 12, 1978).
[7] 12 U.S.C. §2906.

On Dec. 12, 2019, the Comptroller of the Currency and the Federal Deposit Insurance Corp voted to request comment on a major change in how regulators enforce the CRA. Of note, the Comptroller is also a voting member of the FDIC.

The establishment of a single metric figures at the center of this proposal, dubbed the "CRA evaluation measure." This metric will be measured at the bank and the assessment area level. This single number will determine CRA performance. Specifically, the agencies propose a "bank-level CRA evaluation measure" and an "assessment area CRA evaluation measure." The bank-level and assessment area measures will be the sum of the value of all the CRA qualifying activities. This sum will then be divided by the value of retail domestic deposits at the bank and assessment area levels respectively.

The proposal also contains numeric grades. At the bank and assessment area level, a CRA evaluation measure of 11 percent would be required for an "outstanding" rating; 6 percent for a "satisfactory" rating; and 3 percent for a "needs to improve" rating; and less than 3 percent for a "substantial noncompliance" rating. In addition, the bank would need to achieve a rating of outstanding or satisfactory in a "significant portion" of its assessment areas in order to receive an overall outstanding or satisfactory rating. The proposed regulation does not define the term "significant portion."

When Comptroller Otting introduced the concept of a single metric during the Advance Notice of Proposed Rulemaking on CRA in 2018, it drew little to no support. As this rulemaking observes, "The majority support objective measurement of CRA performance, although they oppose a single metric." Despite this lack of support, the single metric stands as the foundation of this overhaul of CRA.

Numerous problems explain why a majority opposes this proposal for a single metric. For starters, banks calculate the value of CRA qualifying activities at the bank and assessment area level, based on the dollar value of qualifying activities originated, made, and purchased by the bank. Adding a dollar value fails to account for the quality and character of a bank's activity. For example, a bank might lend so that major league football stadium can install a new speaker system. Since that football stadium might be in a neighborhood that is otherwise considered to house low- and moderate-income residents, the dollar value of this loan would figure equally to loans for affordable apartment construction.

Compounding this problem, the proposal expands eligible and qualifying CRA activities to include some of what banks already do in the ordinary course of business separate from what they do to meet CRA objectives. The agencies propose that standard community development activities, such as loans, investments, and services would not need to be targeted at low- and moderate- income individuals and areas, or with small businesses or small farms, or underserved or distressed rural areas.

Then, proposing to make the metric into a ratio by dividing these loan and other activity values by the bank's retail domestic deposits poses other problems. Current data records deposits based on branches. But the account holder may not actually live near that branch. In an age of electronic banking, where citizens move, this deposit figure can be highly inaccurate as a measure of how much the bank is gathering in deposits from specific neighborhoods. The proposal itself notes that "Deposit data …have limitations because the current reporting framework records deposits by attributing them to a branch location, rather than the account holder's address and uses a different definition of deposits than the proposed rule."[8]

Further clouding the data, the proposal explains that a bank that receives 50 percent or more of its domestic deposits from outside of its current branch-based assessment areas would be required to

[8] OCC, FDIC *Joint Notice of Proposed Rulemaking, Community Reinvestment Act Regulations*, FEDERAL REGISTER (Jan. 9, 2020) https://www.govinfo.gov/content/pkg/FR-2020-01-09/pdf/2019-27940.pdf

delineate deposit-based assessment areas where it receives five percent or more of its total retail based deposits. But current deposit data is already deficient. It's not clear where these deposit-based assessment areas are, or how they would benefit low-and moderate-income communities. The proposal doesn't explain how "credit deserts" could benefit from the five percent test. A bank might focus on Silicon Valley, Seattle, or northern Virginia. While there are pressing needs in each of these areas, there are also profound needs West Virginia or other rural areas.
According to bankers interviewed by by Politico, the proposal "could further concentrate CRA dollars in high population cities like New York."[9]

The proposal would establish a grading system that allows a bank to concentrate its CRA activity in as little as 50 percent of its assessment areas and disinvest in the other 50 percent. With this strategy it could win an "outstanding" CRA rating.

The proposed CRA ratio would also undermine the current community-based focus of CRA and undermine its basic purpose. The ratio is inconsistent with the statutory requirement that CRA evaluation be presented separately for each metropolitan area in which a bank maintains one or more branches. Perhaps most problematic, the ratio and the grading grid aren't based on transparent data. The agencies provide no explanation as to how they set these benchmarks. They provided no data and no analysis. For community activists, this opacity will frustrate efforts to engage in good faith conversation with banks when they seek to secure investments in their respective communities. Banks can hit their metric and be done with dialogue. Even under the current system, regulators have obviously handed out high CRA scores to banks that were not deserved since the problem of discrimination persists. Since 1995, regulators have assigned passing grades to roughly 98 percent of banks.[10]

Public Citizen acknowledges that the CRA is not perfect. However, this proposal is missing key reforms that could improve this important consumer protection law. For example, the pivot upon which the CRA operates is the approval for mergers and branch expansion. The statute directs regulators to deny such expansions for firms with deficient CRA scores. These decisions can be critical in how banks operate in a community. Yet it is uncommon for Washington regulators to call for a CRA hearing for bank mergers. There have been thousands of bank mergers in the last two decades, but there have been less than 10 hearings about CRA compliance. From 2004 to 2008, there were no CRA hearings on mergers.[11] We believe hearings should be commonplace and frequent.

At the Dec. 12, 2019 meeting of the OCC and FDIC, Martin Gruenberg, now a member and formerly the Chair of the FDIC, issued a scathing dissent. He called it a "a deeply misconceived proposal that would fundamentally undermine and weaken the Community Reinvestment Act."[12]

Importantly, the Federal Reserve declined to join in this rulemaking. The Federal Reserve is one of three regulators responsible for enforcing CRA. What this means is that some institutions will operate under the new rule, while others will operate under the current rule.

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[9] Victoria Guida, *Bank-friendly regulator troubles lenders with redlining law rewrite,* POLITICO (Feb 27, 2020)

[10] Comment Letter, NATIONAL COMMUNITY REINVESTMENT COALITION, (Nov. 8, 2018) https://www.regulations.gov/document?D=OCC-2018-0008-0285

[11] Hearing, *Community Reinvestment Act*, HOUSE FINANCIAL SERVICES COMMITTEE (Feb. 13, 2008) https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg41181/html/CHRG-110hhrg41181.htm

[12] Martin Gruenberg, *Statement,* FDIC (Dec. 12, 2019) https://www.fdic.gov/news/news/speeches/spdec1219d.html

Progressive members of the U.S. House of Representatives demonstrated their displeasure by attending the meeting in person, held in the board room of the FDIC. [13] This included Representatives Maxine Waters (D-Calif), Chair of the House Financial Services Committee, Brad Sherman (D-Calif), Chair of the Subcommittee on Investor Protection, Entrepreneurship and Capital Markets; Bill Foster (D-IL), Chair of the Task Force on Artificial Intelligence; Cindy Axne (D-IA); Ayanna Pressley (D-MA); and Jesús "Chuy" García (D-IL).

Biased Process

We believe this proposed rule would undermine the CRA--by design, by intention. Abundant evidence shows that Comptroller Otting brings an unsympathetic bias to this rulemaking effort. Comptroller Otting encountered the CRA as the CEO of OneWest, where he was employed starting in October 2010. Mr. Otting's record meeting the bank's obligations to the CRA drew criticism from the California Reinvestment Coalition.[14] Instead of "reinvesting," Otting oversaw tens of thousands of foreclosures, including 35,000 in California alone, and the victims were concentrated in minority communities.

Staff at the California Attorney General's office prepared a litigation memo summarizing their accusations of "widespread misconduct." [15] According to a media summary, OneWest "rushed delinquent homeowners out of their homes by violating notice and waiting period statutes, illegally backdated key documents, and effectively gamed foreclosure auctions.[16] In the reverse mortgage business, the OneWest-controlled firm Financial Freedom engaged in practices that led to more than 16,000 foreclosures, a far greater number than would be expected based on the company's market share. Elderly individuals who had recently suffered the death of a spouse were victimized. In one case, Financial Freedom attempted to evict a 90-year-old woman from her home over a 27-cent error on an insurance payment. [17] [18] In another case, a New York State Supreme Court judge called OneWest's foreclosure practices "harsh, repugnant, shocking, and repulsive."[19]

Over Otting's signature, OneWest Bank signed a consent order with the Office of Thrift Supervision for "certain deficiencies and unsafe or unsound practices in the Association's residential mortgage servicing and in the Association's initiation and handling of foreclosure proceedings."[20] OneWest affiliate Financial Freedom paid $89 million following allegations that it violated the False Claims Act. This involved a

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[13] Statement, Waters to Lead Trip, HOUSE FINANCIAL SERVICES COMMITTEE (Dec. 12, 2019) https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=404974

[14] *CRC Fact Sheet: Joseph Otting's Track Record at OneWest Bank,* CALIFORNIA REINVESTMENT COALITION (website accessed Nov. 14, 2018) http://calreinvest.org/research_crc/crc-fact-sheet-cfpb-complaints-about-onewest-bank/

[15] Memorandum, Department of Justice, State of California, (Jan. 18, 2012) https://www.documentcloud.org/documents/3250383-OneWest-Package-Memo.html

[16] David Dayen, *Treasury Nominee Steven Mnuchin's Bank Accused of "Widespread Fraud" in Leaked Memo,* THE INTERCEPT (Jan 3, 2017) https://theintercept.com/2017/01/03/treasury-nominee-steve-mnuchins-bank-accused-of-widespread-misconduct-in-leaked-memo/

[17] Bess Levin, *Foreclosing on a 90-year old woman*, VANITY FAIR (Dec 1, 2016), http://www.vanityfair.com/news/2016/12/foreclosing-on-a-90-year-old-woman-over-27-cents-steven-mnuchins-days-at-onewest

[18] Chris Isodore, *Trump Treasury Pick Steven Mnuchin has a 'widow foreclosure' problem, CNNMONEY (Dec. 15, 2016)* http://money.cnn.com/2016/12/15/news/companies/mnuchin-reverse-mortgage-foreclosure/index.html

[19] Kleran Crowley, *Judge Blasts Bad Bank, Erases 525G Debt*, NEW YORK POST (Nov 25, 2009) http://nypost.com/2009/11/25/judge-blasts-bad-bank-erases-525g-debt/

[20] Consent Order, in the Matter of OneWest Bank, OFFICE OF THRIFT SUPERVISION (April 13, 2011) https://www.occ.gov/static/ots/misc-docs/consent-orders-97665.pdf

five-year pattern from 2011 to 2016 where Financial Freedom claimed government fees that the U.S. Justice Department said "they were not entitled to receive."[21]

Comptroller Otting helped arrange a sale of OneWest to CIT group. Consummation of this transaction promised him $24 million in compensation, according to financial documents. [22] When the California Reinvestment Coalition challenged the deal, threatening this compensation, Mr. Otting organized a controversial petition campaign to defend the bank's CRA record. One petition was composed of 593 individuals purportedly supporting the merger with Yahoo email accounts. (Yahoo has a 3 percent market share for email.) A large number of these emails are timestamped as 2 A.M. February 13, 2015. Other emails came from persons who, after they received receipt confirmation from the Washington regulator, denied they had originated them and theorized their email had been hacked.[23]

From his first speeches as Comptroller, Otting has promised to change CRA. At congressional hearings, Mr. Otting has evinced slight regard for the basic problem of discrimination in lending. For example, at more than one hearing, he declared that he has little knowledge of discrimination.

Recently, the Wall Street Journal reported that Otting "is personally lobbying bank chiefs to win support for his signature initiative: an overhaul [of CRA.]"[24] As the newspaper observed, "While regulators routinely consult with industry, it is rare for the head of an agency to lobby executives on a pending proposal, according to former regulators and bank officials." In fact, it is unlawful for regulators to advocate on behalf of the proposals in an open rulemaking. For example, the Government Accountability Office criticized officials at the Environmental Protection Agency when it asked the public through social media and other venues to support an Obama administration proposal regarding clean water.[25]

This episode and Otting's repeated promises to change CRA suggests that he fails to bring an "open mind," but rather an "unalterably closed mind, to this rulemaking process.[26] An unalterably closed mind disqualifies a rule maker.

Add to this the current coronavirus crisis, in which a responsible bank regulator would pause all unrelated rulemakings, and this effort is simply callous.

Conclusion

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[21] Financial Freedom Settles Alleged Liability for Servicing of Federally Insured Reverse Mortgage Loans, DEPARTMENT OF JUSTICE (May 16, 2017) https://www.justice.gov/opa/pr/financial-freedom-settles-alleged-liability-servicing-federally-insured-reverse-mortgage

[22] CIT Proxy Statement, CIT GROUP (April 11, 2015) $24 million

[23] *OneWest/CIT Merger: Fabricated Email Inquiry,* CALIFORNIA REINVESTMENT COALITION, (website visited Nov. 15, 2019) http://calreinvest.org/wp-content/uploads/2018/10/CRC-FOIA-Request.pdf

[24] Andrew Ackerman, *Bank CEOs Courted by Regulator on Low Income Lending Overhaul*, WALL STREET JOURNAL (Feb. 21, 2020) https://www.wsj.com/articles/top-u-s-regulator-said-to-lobby-bank-ceos-on-overhaul-of-low-income-lending-rules-11582309318

[25] Eric Lipton and Michael D. Shear, *E.P.A. Broke Law With Social Media Push for Water Rule, Auditor Finds, New York Times, (*Dec. 14, 2015) https://www.nytimes.com/2015/12/15/us/politics/epa-broke-the-law-by-using-social-media-to-push-water-rule-auditor-finds.html

[26] Jack Beerman, *Emanuel Law Outlines for Administrative Law,* WALTERS KLUWER (2020) https://books.google.com/books?id=7yHXDwAAQBAJ&pg=PA119&lpg=PA119&dq=unalterably+closed+mind&source=bl&ots=EaE2aPbkle&sig=ACfU3U0OHXfeK-AD1Did6LJOEMIbkt6QVw&hl=en&sa=X&ved=2ahUKEwjv6qHhtMfoAhWXmHIEHXmfC4AQ6AEwB3oECAsQOg#v=onepage&q=unalterably%20closed%20mind&f=false

Public Citizen enthusiastically supports the CRA and opposes this proposal to weaken it. Discriminatory lending persists, and a robust CRA should be sustained as a key tool to correct this problem.

For questions, please contact Bartlett Naylor at bnaylor@citizen.org.

Sincerely,

Public Citizen