PUBLIC LAW CENTER

PROVIDING ACCESS TO JUSTICE
FOR ORANGE COUNTY'S LOW INCOME RESIDENTS

April 7, 2020

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RE: Community Reinvestment Act Regulations
RIN 3064-AF22: Notice of Proposed Rulemaking,
Docket ID OCC-2018-0008

To Whom It May Concern:

Public Law Center strongly opposes the proposed changes to the Community Reinvestment Act (CRA) regulations. Contrary to the OCC's and FDIC's Notice of Proposed Rulemaking (NPRM), the proposed changes do not modernize the CRA or make reporting under the CRA more transparent. Rather, the proposal is misconceived and undermines the basic principle that banks should serve their customers and their communities. Regulators at the OCC and FDIC should not trample on the CRA by depriving the communities who most need access to the banking system, including low-income communities and communities of color. To the extent that OCC and FDIC regulators want to amend the CRA, the OCC and FDIC, should at a minimum, seek the input of those who are most affected by the need to have access to financing: those in low- and moderate-income communities and communities of color. However, PLC proposes that the best option would be to pull the proposal entirely and start over.

PLC is a 501(c)(3) not-for-profit organization that provides free civil legal services to low-income individuals and families across Orange County. Our services are provided across a range of substantive areas of law, including consumer, family, immigration, housing, veterans, community organizations, and health law. PLC represents low-income individuals in housing and consumer matters, including access to credit, safe and affordable housing, and debt collection. PLC works with partners in our local, regional and statewide communities to advocate for affordable, inclusionary housing and access to banking and credit. PLC also represents emerging small businesses and nonprofits, whose access to diverse capital is necessary for them to thrive, employ members of their communities and serve their communities.

The CRA is an unimaginably important resource for Orange County. As California engages with the effects of a housing crisis and increasing housing insecurity, the CRA has made it possible for Low- and Moderate-Income (LMI) families to secure mortgages and help stabilize their Orange County neighborhoods. These loans also assist with the building of affordable housing, making it possible for many LMI individuals and families to remain in and do essential work in our community. Further, the affordable loans provided through CRA investments keep Orange County a friendly place for small businesses, who are essential to the creation of jobs and keep our county's economy thriving. The

CRA is undeniably a key tool in maintaining the diversity and economic health of Orange County and weakening it would only be a detriment to our community.

The proposed changes to the CRA would mean:

Less accountability, less public input, less clarity, less investment. The agencies would lessen the public accountability of banks to their communities by enacting unclear performance measures on CRA exams that would not accurately account for banks' responsiveness to local needs. Public input into this obtuse evaluation framework would be more difficult and limited. Despite the agencies' assertions that their proposal would increase clarity and bank CRA activity, the result would be significantly fewer loans, investments and services to LMIcommunities.

Moving away from a core CRA principle, less focus on LMI. The agencies would dramatically lessen CRA's focus on LMI people and communities in contradiction to the intent of the law to address redlining in and disinvestment from LMI and communities of color. The NPRM proposal would expand what counts to allow bank CRA credit for things like financial literacy classes geared towards upper income people. Even though 95% of businesses have less than $1 million in revenue, and need financing under $100,000, the proposal would double existing thresholds, allowing banks to get even more CRA credit for loans of up to $2 million to businesses with up to $2 million in revenue. PLC's small business project regularly works with low-income entrepreneurs, all of whom have revenue under $1 million. As such, banks will turn away from less lucrative lending to the small businesses that serve their communities and hire locally. Distressingly, the proposal would now permit projects that only "partially" benefit LMI people and neighborhoods, such as large infrastructure and energy projects. The losers in this will certainly be low income people, entrepreneurs, and small businesses.

Moving away from a core CRA principle, less focus on local communities. The OCC and FDIC propose a new bank level evaluation framework that allows banks to count ALL eligible loans and investments made anywhere, including outside the areas where bank branches are located. CRA implementation has focused on banks serving the local communities where they are operating. Now, big banks could seemingly get a large amount of CRA credit for subprime credit card lending to LMI consumers anywhere. While the proposal does seek to expand reinvestment obligations to the increasing number of banks that do not have a branch model (such as fintech and internet banks), it does so in a way that few banks will actually be covered, and only accounts for where deposits are taken, not where these non-branch banks are making loans and making money. As proposed, the rule will likely do nothing to address the critical issue of bank deserts, and only serve to weaken the connection between banks and local communities.

Acknowledging displacement, but worsening the problem. The proposed rule purports to address displacement, but only exacerbates it. The definition of affordable housing would be relaxed to include middle-income housing (for people with incomes up to 120% of area median income) in high-cost areas. In addition, the NPRM would count rental housing as affordable housing if LMI people could afford to pay the rent, even if the actual tenants are not low or moderate income. Such a definition would be disastrous for individuals and families in our client community because it prevents jurisdictions that fail to contribute their fair share to develop affordable housing from being held accountable. It is our experience that some cities in Orange County, for instance, who have a

poor track record with creating affordable housing for residents most in need, would take advantage of this proposed definition and situate market rate housing in their locality and call it "affordable housing," when it is not and get credit under the revised CRA. Worse still, banks would get credit for financing athletic stadiums, storage facilities, and luxury housing in Opportunity Zones, which will only fuel gentrification in the very communities vulnerable to it.

Including housing produced under inclusionary zoning in which 30% of the units are for middle income households in high cost areas is problematic and troubling. The proposal would divert too much financing away from low- and moderate-income affordable housing, especially in high costs areas. Virtually all of the "affordable" housing in several high-cost areas financed by the CRA would be for middle-income households. California is experiencing its worst housing shortage in decades and the recent pandemic of the COVID-19 virus has further reduced the available housing stock. Close to six million of the state's 40 million persons are renters, and renters with the lowest incomes face the greatest challenge in finding affordable housing. In California, a renter who earns the state's minimum wage of $12 to $13 an hour must work approximately 116 hours and earn a median wage of at least $34.69 per week to afford market rent in California. Further, in Orange County, very few of the 34cities have adopted a robust inclusionary housing ordinance.[1] The result is that much of the diverse housing options are sited in high-cost areas of the county that are unattainable for much of our client community. This has unfairly deprived LMI communities of the opportunity for upward mobility, which is contrary to the intent of the CRA.

Weakening CRA's emphasis on branches and deposit products. CRA has rightly maintained a focus on whether banks have a branch presence in LMI communities, and whether banks make their products accessible to all consumers. But this proposal provides almost no incentive for banks to maintain and open LMI branches, and it seems to do away entirely with any consideration of whether banks are offering affordable bank account and other consumer products, such as payday alternative small dollar loans and age friendly account products, which are needed by LMI and senior communities. The result of this proposal will be fewer bank branches in LMI and rural communities, and LMI consumers turning more to predatory check cashers and payday lenders. PLC has seen the impact that predatory check cashers and payday lenders have on LMI communities, including debt collection, bankruptcy and general economic distress. Many of PLC's clients who seek out these loans do so because the check cashers and payday lenders are what are visible in their communities.

Failing to downgrade banks for harm. Sadly, redlining and discrimination are still with us. But this proposal does nothing to address this fact, and may very well lead to more redlining as banks are allowed to fail to serve some of their assessment areas. OCC policies provide more excuses than the other regulators for banks that show evidence of discrimination, discourage double CRA rating downgrades for violations of law, and allow banks that discriminate and redline to still pass their CRA examinations. CRA rules should provide greater scrutiny of, and punishment for, evidence of discrimination, and provide CRA rating downgrades for other forms of harm to the community, such as the financing of displacement. Under this proposal, if regulators are to consider giving banks positive credit for the activities of their affiliated companies, they must scrutinize the affiliated companies for evidence of discrimination, displacement and harm, and downgrade CRA ratings accordingly.

[1] *See Out of Reach* (2019), National Low Income Housing Coalition, available at https://reports.nlihc.org/oor/california#, last visited on April 6, 2020.

Developing a complicated and weaker evaluation system. The agencies propose an evaluation system that would further inflate ratings while decreasing the responsiveness of banks to local needs. Now, 98% of banks pass CRA exams; the proposal would likely push this higher. The agencies propose a version of the one ratio measure that consists of the dollar amount of CRA activities divided by deposits. This approach is made even more bank-friendly by not only dramatically increasing the activities and the places banks can receive credit (increasing the numerator), but at the same time also decreasing what are considered deposits by excluding brokered and municipal deposits (shrinking the denominator).

This ratio measure would likely encourage banks to find the largest and easiest deals anywhere in the country as opposed to focusing on local needs, which are often best addressed with smaller dollar financing for small businesses, homeowners and projects. Banks, for example may move away from important Low Income Housing Tax Credit investments in favor of simpler and easier investments.

Further, the proposal would actually allow banks to FAIL in half of the areas on their exams and still get a passing grade. Low income neighborhoods of color that are perceived of as harder to serve will no doubt be more likely to be ignored by banks that can meet their CRA obligations elsewhere.

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 be only pass or fail. In contrast, the retail lending test now has ratings and counts for much more of the overall rating. Banks should be required to exceed benchmarks in lending compared to both area demographics and compared to peers, not either or, and the goals should be strong.

The agencies establish numerical targets under the one ratio exam for banks to hit in order to achieve Outstanding or Satisfactory ratings. These targets appear both arbitrary and low. Banks may be able to achieve Outstanding ratings in reliance on large subprime credit card lending, even if that does not well serve LMI consumers. The agencies base the targets on their research, which the agencies do not reveal in the NPRM. The public, therefore, cannot make informed judgements about whether the numerical targets would result in increases in activity, stagnant levels or decreases.

The agencies also propose to allow banks that receive Outstanding ratings to be subject to exams every five years instead of the current two to three years. This aspect of the proposal deviates from the agencies' statutory duties to ensure banks are continuing to respond to community needs. Banks with a five-year exam cycle would likely relax their efforts in the early years of the cycle. Banks would also have less accountability to maintaining acceptable CRA performance when they seek permission to merge with other banks.

Reducing community input. This proposal appears designed to weaken community input and participation. Why else would such a complicated and substantial change to the rules implementing the nation's redlining law come with a mere 60 days for public comment? Statements and actions by OCC officials also suggest that the OCC does not like to hear from people with whom it disagrees. This is not acceptable for a public rule making process. This reaction against community input is evident in the proposal itself, which includes arbitrary thresholds that are not justified, references data not shared, creates a formula driven process that will make community input and partnerships less relevant, treats performance context as an afterthought, and is not clear on what role, if any,

community input on bank performance will play. As an example as to the lack of transparency and opportunity for community input, the OCC issued a Request for Information (RFI) almost a month after the release of its proposed rule, on January 10th. The RFI seeks data from banks to inform potential revisions to the CRA regulatory framework and is due the day after the 60 day public comment period closes for the rule. This means communities will not have access to this data, to be used by the OCC to make potential revisions to the rule, prior to submitting public comment.

Inviting regulatory arbitrage. In pressing ahead without fair consideration of prior input, and without providing sufficient time for public comment now, the OCC and the FDIC are creating a two (or three) tiered system of oversight. Banks will be able to choose their regulator based on which provides a friendlier CRA framework. Even under the proposal, small banks under $500 million in assets can opt out of the new rules and yet lower their current reinvestment obligations. All banks, especially large banks, should have the same, strong, reinvestment obligations. When regulators choose different rules, and banks can choose their regulators, communities lose.

What we need. Real CRA reform would include:

- A retained focus on low and moderate income people and communities.
- A focus on lending that meets community needs, prioritizing loan originations, not purchases of loans that were made by other banks or for-profit companies. Mortgage lending should focus on owner occupants (not investors), and small business lending should focus on smaller loans and smaller businesses. The Consumer Financial Protection Bureau should finalize a strong small business data collection rule so that the bank regulators and the public can clearly see which banks are serving, which banks are harming, and which banks are ignoring LMI communities and communities of color.
- A hybrid approach to assessment areas that ensures that traditional banks and modern branchless banks are actually serving communities. Banks with retail branch presence should service those areas where they operate. Banks without retail branch presence should have reinvestment obligations that consider where deposits are from, and where loans and profits are made. Non retail bank reinvestment obligations should be developed with an eye towards increasing reinvestment in bank deserts, which this proposal does not do.
- A qualitative and quantitative analysis. Homeowners, small businesses, and impactful community development projects often require smaller loans and investment. Innovation and impact should be valued under CRA. A proposal that only considers what is easily monetized does not have community needs at its center.
- An end to CRA grade inflation. 98% of banks do not deserve to pass their CRA exams. This proposal will only make the problem worse. The goal should be to increase LMI lending and investment from current, inadequate levels, not to devise a system that counts more things in more places and will lead to larger numbers while actually resulting in less lending, less investment, less impact, and less community benefit.
- A greater emphasis on the service test, not the elimination of it, so that branches in LMI communities retain their importance in CRA, as they have retained their importance to communities. The CRA statute references deposit products and banks should ensure that affordable and accessible bank account and consumer products are available to LMI, of color and immigrant communities (including language translation and interpretation services) so that everyone can build wealth and avoid predatory alternative financial providers.

- Downgrading of CRA ratings for discrimination and harm. Evidence of redlining or discrimination should result in a Needs to Improve or Substantial Noncompliance rating. The agencies should bolster fair lending exams which currently can consist of a mere one or two sentences in a performance evaluation. The CRA should focus on race as well as income. CRA grades should also be lowered for violation of consumer protection laws, and for other harm to LMI people and communities. This includes downgrades for bank financing of displacement, which clearly worsens households' community credit needs by creating economic destabilization, evictions, ruined credit histories and decreased ability to be able to qualify for home and small business loans and build wealth.
- Greater community input, not less. The CRA requires that the starting point for reinvestment decisions should be community needs, not a list from a federal banking regulator or the desires of big banks. Performance context, transparency of data regarding bank performance to enable better community input, public hearings during mergers, and the development of Community Benefits Agreements should all be encouraged and bolstered.

This deeply flawed proposal would result in LESS lending and investment in the very communities that were the focus of CRA when passed by Congress in 1977. This proposal will make things easier for banks, all the while retreating from key statutory and regulatory core principles of CRA, such as a focus on low and moderate income people and communities, a focus on banks meeting local community credit needs, and active community participation to ensure that communities, not big banks, benefit.

The OCC should share the data behind its assumptions and analysis, extend the comment period to 120 days, and ultimately, pull this proposal so that CRA reform can proceed in a more thoughtful way that will actually benefit the communities CRA was designed to build up.

Thank you for your consideration of our views.

Sincerely,
PUBLIC LAW CENTER

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cc: California Reinvestment Coalition