



April 9, 2020

Via Electronic Mail

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street, SW, Suite 3E-218
Washington, DC 20219

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street NW
Washington DC 20429

Re: *Community Reinvestment Act: Joint Notice of Proposed Rulemaking* (FDIC: RIN 3064-AF22; OCC: Docket ID OCC-2018-0008)

Ladies and Gentlemen:

We appreciate the opportunity to comment on the proposal (the "Proposal") of the Office of the Comptroller of the Currency ("OCC") and the Federal Deposit Insurance Corporation ("FDIC") (collectively, the "Agencies") to amend the Community Reinvestment Act ("CRA") regulatory framework. We continue to share in your commitment to help meet the credit and financial needs of the communities we serve, including low- and moderate-income ("LMI") neighborhoods. We also support the Agencies' goals to modernize the framework with greater transparency, objectivity, and clarity.

Based on discussions that we have had with peers, our views are representative of many depository institutions that provide banking and other financial services to our customers nationwide without a traditional branch network, and we feel strongly that any CRA modernization should take into account the variety of different business models that exist in banking and financial services today and that will

continue to evolve over time as we seek to better serve our customers. At the outset, we want to emphasize our strong commitment to the goals of CRA and to fulfilling our CRA responsibilities.¹

The breadth of diverse business models in the industry today—including large corporate institutional banks, banks with significant sweep deposit programs primarily linked to affiliated brokerage accounts, issuers of credit cards and auto loans to consumers and small businesses nationwide, and various combinations of these—illustrates why tailoring is necessary and appropriate for our CRA programs to continue to make impactful loans and investments in a safe and sound manner.

Based on industry discussions in which we have participated and direct input from several other similarly-situated institutions, we believe that this letter represents not only our views but also the views of many more institutions that do not rely primarily on branches to deliver services to customers, and the views of certain branch-based banks that are shifting toward digital platforms. Although we likely share many common concerns with banks that are branch-based, we also have a distinct perspective that we request the Agencies consider. Our operations rely primarily on digital channels rather than physical branches to serve our nationwide base of consumer and business customers. Accordingly, the comments set forth in this letter focus on the potential impacts of the Proposal to banks with nontraditional business models² like ours. We do not address the more common concerns shared among the industry here because we expect our overlapping comments are being addressed in trade association letters.³

EXECUTIVE SUMMARY OF RECOMMENDATIONS

The overarching theme that runs through our recommendations is that changes to bank CRA obligations and associated performance measures should account for the varied and evolving business models of banks. Consistent with this theme, we request that the Agencies consider adjusting the Proposal as follows:

1. **Tailor the Proposal’s evaluation measures (“Proposed Evaluation Measures”) to account for nontraditional bank models that operate nationwide via digital channels.** Older branch-based evaluation measures that focus on geography, such as the retail lending distribution tests (“Retail Lending Distribution Tests”), are not relevant, and should be tailored, to our digital business models. The current CRA framework’s tailored approach for wholesale/limited purpose (“Wholesale and Limited Purpose”) should be retained. Geographic evaluation of non-branch-centric banks should be based on activities inside its facility-based assessment areas (“Facility-Based AAs”) with all CRA-qualifying activities outside Facility-Based AAs counting toward the bank-level evaluation.
2. **Eliminate “deposit-based assessment areas” (“Deposit-Based AAs”) as a geography in which to measure CRA performance, or if retained, apply to all banks.** The proposal to modernize

¹ Although the Proposal would not currently apply to state member banks, we believe it is important for such banks to express views at this time because the OCC, the FDIC, and the Board of Governors of the Federal Reserve System (“FRB”) have expressed a preference for ultimately issuing a joint rule.

² While some of our business models are perhaps becoming less unusual in the banking industry today, our reference to “nontraditional,” “non-branch-centric,” or “branchless” is intended to capture business models that are not primarily based on traditional “brick-and-mortar” retail branch locations that engage in deposit-taking activities and in-person customer interactions.

³ For example, we endorse the comments of others that (i) express concern about the administrative burden associated with the proposal; (ii) advocate for retaining “activities that promote economic development by financing [small] businesses or farms” and “activities that revitalize or stabilize low- and moderate-income geographies” as qualifying CD activities; (iii) express concern about the challenges associated with a metrics-based framework with fixed thresholds that do not account for performance context; and (iv) encourage the OCC, FDIC and Federal Reserve to work together to issue a joint rule..

CRA by imposing Deposit-Based AAs only on nontraditional banks like ours will exacerbate CRA “hot spots” and “deserts,” and also fails to address the much broader issue of deposits gathered outside any bank’s Facility-Based AAs (“Remote Deposits”) in a holistic manner that will be durable as *all* banks continue to conduct an ever-increasing amount of business digitally.

3. **Enhance the role of the performance context (“Performance Context”) analysis by explicitly factoring it into the presumptive ratings and clarifying it may only adjust the ratings upward.** Having a meaningful Performance Context analysis is particularly important for nontraditional banks, especially in light of the potential for anomalous results if the Proposed Evaluation Measures are enacted without the appropriate tailoring to various business models (*i.e.*, one size does not fit all).
4. **Eliminate the mandatory inclusion of consumer loans.** The current CRA framework allows the reporting and evaluation of consumer loans at a bank’s option, and that same optionality should be retained. The mandatory inclusion of consumer loans represents a significant expansion of a bank’s affirmative CRA obligations and is not supported by an analysis showing that such inclusion would help meet any unmet credit needs.
5. **Optimize the strategic plan framework so it can be a more effective option for banks with nontraditional business models.** Revising certain of the Proposal’s strategic plan requirements will provide nontraditional banks the ability to continue to innovate and provide more tailored services to better serve our communities.
6. **Allow, but not require, the activities of an affiliate to be included in the CRA framework.** The Proposal’s requirements regarding affiliate activity are not clear and may introduce unnecessary administrative burden to banks without a corresponding benefit to communities.

DETAILED DISCUSSION

I. TAILOR THE PROPOSAL EVALUATION MEASURES TO ACCOUNT FOR NONTRADITIONAL BANK MODELS THAT OPERATE NATIONWIDE VIA DIGITAL CHANNELS

The Agencies’ goals to modernize CRA should account for banks with different business models — including banks that do not have traditional branch networks — as we and other banks generally move toward a more digital environment. Tailoring how banks are evaluated is especially important, not only from the perspective of clarifying a bank’s CRA obligations, but also from our fundamental shared goal with the Agencies to better serve our communities. Although some aspects of the Proposed Evaluation Measures attempt to adjust for variances in bank business models, the Proposal doesn’t go far enough to differentiate between banks. Accordingly, we request that the Agencies (A) retain the Wholesale and Limited Purpose designations, (B) retain credit for activities outside Facility-Based AA, (C) narrow the retail domestic deposit definition, (D) tailor the Retail Lending Distribution Tests to banks that have nationwide digital distribution models, and (E) explore whether the metrics to achieve “Satisfactory” and “Outstanding” ratings under the Proposed Evaluation Measures are sufficiently supported by relevant data.

A. Retain the Wholesale and Limited Purpose Designations

The Wholesale and Limited Purpose designations under the existing regulations have served many banks and their communities well for 25 years, the elimination of which would be a step backward in tailoring CRA obligations to banks’ various business model. The designations have given nontraditional banks the ability to focus their CRA activities on community development (“CD”) lending, investment,

and services. When the CRA regulations were updated in the mid-1990's, the Agencies considered the unique business models of these types of banks and tailored the CRA regulations to address the differences in their business models, including by providing for a more expansive view of "community,"⁴ and the consideration of CD activities *anywhere* outside the banks' assessment area(s) ("AAs") "if the bank has adequately addressed the needs of its assessment area(s)."⁵ These distinctions are still valid today, if not more so, given the evolution of banking toward the online delivery of products and services. The evaluation of banks as Wholesale or Limited Purpose institutions promotes community credit needs at least as well as the requirements of the Proposal and does so without mandating or inhibiting particular business lines and products⁶ and also accommodates the banks' nationwide business model. For this reason, we recommend that the Agencies retain the current Wholesale and Limited Purpose designations and continue to evaluate such banks' performance under the procedures that are currently employed.

B. Retain Credit at Bank Level for Activities Outside AAs

One of the Proposal's most positive aspects for nontraditional banks is the provision that allows inclusion of all qualifying CRA activities ("Qualifying Activities") at the bank level for all Qualifying Activities both *inside* and *outside* designated AAs, which should be retained in any final regulation. As a result, banks that are not branch-centric will have flexibility to seek out and make loans and investments at levels that make economic sense and that also respond to actual community credit needs. As discussed in more detail in section II.A below, this market-based approach should be expanded to allow loans and investments to flow more readily to those areas that have greater need as opposed to CRA "hot spots" where loans and investments are driven by the anomalies of CRA obligations.

C. Narrow the Retail Domestic Deposits Definition.

The Proposal bases critical requirements on the calculation of a bank's "retail domestic deposits" (excluding brokered deposits). The call report line from which this figure is drawn, however, includes large corporate and other institutional deposits, as well as deposits held by individuals and small businesses. The inclusion of large corporate deposits distorts the calculation of the Proposed Evaluation Measures by putting banks that focus on such customers at a relative disadvantage to banks that have a retail focus.

From a policy perspective, large corporate and other institutional deposits should be considered fundamentally distinct from individual and small business deposits, and should not be the basis for measuring acceptable CRA efforts. It is the credit needs of individuals and small businesses (more particularly with an emphasis of LMI individuals and neighborhoods) that is and should be the focus of CRA concerns, not large corporations and other institutions for whom access to credit is an entirely different matter. Indeed, the Proposal already excludes brokered deposits from the calculation, for the stated reason that those deposits are not associated with individuals or particular locations.⁷ Large corporate or other institutional deposits are similar, because they are likely to reflect in whole or in part economic activity that is far removed from the headquarters or other single location for that firm.

⁴ *Community Reinvestment Act Regulations*, 60 FR 22156, 22160 (May 4, 1995) ("This different treatment [permitting CRA credit for CD loans beyond adequately addressed assessment areas] accounts for the fact that wholesale and limited purpose institutions typically draw their resources from, and serve areas well beyond, their immediate communities.").

⁵ 12 C.F.R. § 25.25(e)(2) (OCC); § 345.25(e)(2) (FDIC).

⁶ 12 C.F.R. § 25.25 (OCC); § 345.25 (FDIC).

⁷ NPR, 85 F.R. at 1218.

Accordingly, the Agencies should consider adding a mechanism to adjust the retail domestic deposit amount by deducting large corporate deposits or capping the amount taken into account for any one deposit relationship. The Proposal is the first time that deposit amounts as reported in the call report have been a determining factor in the assessment of a bank's CRA activity. The impact on individual banks, and on CRA activity industrywide, is untested and unpredictable.

The retail domestic deposit calculation also should be refined to exclude all sweep deposits from broker-dealers and other financial counterparties. Brokered deposits for call report purposes can include sweep deposits. However, not all sweep deposits are classified as brokered deposits. Sweep deposits that would otherwise be classified as brokered but for the fact that they qualify for the primary purpose exemption are classified as retail domestic deposits for purposes of the call report. To align the treatment of sweep deposits, we request that the Agencies also include the definition of brokered sweep deposits used for the Liquidity Coverage Ratio ("LCR").⁸ Under the LCR, sweep deposits are automatically treated as brokered deposits. We request as a technical matter that the language excluding brokered deposits in the definition of "retail domestic deposit" also reference the LCR definition as a basis for exclusion. This is consistent with the rationale stated in the Proposal that brokered deposits are excluded because they "are not associated with any individual or community."⁹

D. Tailor Retail Lending Distribution Tests for Nontraditional Banks

Branch-based evaluation measures such as the Retail Lending Distribution Tests have little relevance to nontraditional banks with nationwide digital delivery channels and should be tailored to such banks. Branch-based banks have traditionally gathered deposits and made loans in the same general geography: the area surrounding a branch. By contrast, the distribution of our products and services is not driven by the physical address of our depositors or loan borrowers, which is irrelevant to the choice our customers make in choosing our services. The issues resulting from this lack of geographic correlation would be compounded if our banks were required to apply the Retail Lending Distribution Tests in Deposit-Based AAs.¹⁰

Additionally, some nontraditional banks may have less ability to control the income distribution of loan applicants than banks making loans through traditional branch networks. This is particularly true of banks engaged in retail lending through partnerships with third parties that are responsible for lead

⁸ 12 C.F.R. § 50.3; § 329.3:

Brokered deposit means any deposit held at the national bank or Federal savings association that is obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker as that term is defined in section 29 of the Federal Deposit Insurance Act (12 U.S.C. 1831f(g)), and includes a reciprocal brokered deposit and a brokered sweep deposit.

Brokered sweep deposit means a deposit held at the national bank or Federal savings association by a customer or counterparty through a contractual feature that automatically transfers to the national bank or Federal savings association from another regulated financial company at the close of each business day amounts identified under the agreement governing the account from which the amount is being transferred.

⁹ NPR, 85 F.R. at 1218.

¹⁰ Another major issue for our banks is the Proposal's requirement for applying the Retail Lending Distribution tests when only 20 loans in a Major Retail Lending Product Line are originated in an AA over a multi-year evaluation period. We believe that the minimum number is far too low to provide a reliable benchmark as to whether a bank's distribution of its lending products is comparable to peers or consistent with a community's needs under the proposed peer or geographic comparator tests, particularly because the evaluation period may be several years and is measured retroactively. We suggest a minimum of at least 100 loans per year per AA would be a more reasonable number.

generation. For example, banks that issue credit cards primarily through partnerships with non-banking organizations may not have the ability to obtain sufficient applications from LMI individuals, depending on the clientele of the partners. Requiring that a set portion of LMI individuals acquire such cards in a particular geography in order to pass the test would at best require a substantial modification of existing business models, and at worst be impracticable, all with a negligible effect on improving credit availability in that local community. The same result would apply to a bank issuing mortgage loans for a non-banking organization. Similarly, banks that make indirect consumer or small business auto loans do not have the ability to insist that dealers accept the banks' offers to finance auto purchases given the competitive nature of that business.

An additional problematic aspect of the Proposal's Retail Lending Distribution Tests is that they appear to evaluate only loan "originations," which is a significant departure from the current measures that explicitly consider both "originations and purchases of loans."¹¹ The Agencies provide no discussion or analysis supporting such a fundamental change from current regulations. As discussed above, it may be difficult for banks to *originate* retail loans on a consistent basis and across a wide array of AAs, so it would be crucial that banks continue to have the ability to have "purchased" loans as well as "originated" loans evaluated in all Retail Lending Distribution Tests.

As noted above in section I.A. with respect to retaining the Wholesale and Limited Purpose designations, the current evaluation of CRA performance for Wholesale and Limited Purpose banks is flexible and focused on CD activities. This process promotes the fulfillment of community credit needs at least as well as would be the case under the Proposal for nontraditional banks, and does so without mandating or inhibiting particular business lines and products.¹² Requiring nontraditional banks to satisfy the Proposal's Retail Lending Tests, to the same degree as traditional banks, would undermine the ability of nontraditional banks from helping to meet community needs.

E. Impact Test Rating Thresholds Should be Based on Data and Tailored to Business Models

The current metrics established under the Proposed Evaluation Measures establish 6% as the threshold for "Satisfactory" and 11% as the threshold for "Outstanding." However, there is simply not sufficient relevant data for banks to be able to evaluate the Proposal's potential impact on their CRA programs. Our banks are especially concerned because the substantial majority of our current CRA activity consists of CD loans and investments. The thresholds of 6% and 11% of retail domestic deposits may be supportable based on historical data analysis for full-service traditional branch-centric banks with significant volumes of retail lending products, but these thresholds do not appear to be developed with the business models and balance sheets of nontraditional banks in mind.¹³ The difficulty in satisfying the Proposed Evaluation Measures would be further compounded at the AA level, particularly if the Agencies include Deposit-Based AAs.

¹¹ 12 C.F.R. § 25.22(a)(2) (OCC); § 345.22 (a)(2) (FDIC).

¹² 12 C.F.R. § 25.25 (OCC); § 345.25 (FDIC).

¹³ The Federal Reserve Board has recently released CRA Analytics data tables "intended to provide insight into the historical relationship between bank lending activity and regulatory assessments," but this information does *not* include data from banks that are Wholesale or Limited Purpose banks. *Federal Reserve Board publishes Community Reinvestment Act Analytics Data Tables* (March 6, 2020), available at: <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200306a.htm>

II. ELIMINATE DEPOSIT-BASED AAS

We urge the Agencies to eliminate Deposit-Based AAs¹⁴ from any final regulation. There is no statutory requirement that the Agencies evaluate CRA performance in geographies where *depositors* are located. Although we believe the Deposit-Based AAs concept is intended to recognize the evolution of banking in the United States away from branch-centric business models, such an approach will exacerbate the issue of banking “hot spots” and “deserts,” present practical problems, and cause significant anomalies that would work at cross-purposes to the goals of the CRA. We believe the better approach is to permit banks to meet the credit and financial needs of their “entire community” which may be nationwide for banks like ours. If, however, Deposit-Based AAs are retained, then it would be appropriate for the Agencies to apply such geography thresholds to *all* banks regardless of the bank’s overall percentage of Remote Deposits.

A. Negative Policy Effects and Practical Problems

1. CRA “Hot Spots” and “Deserts”

As noted in the Proposal, the Agencies seek to incentivize greater CRA activity in areas currently in need of financial resources and clarify how banks can achieve a “satisfactory” or an “outstanding” rating in their AAs and expand the circumstances under which banks can receive credit beyond the immediate areas surrounding bank branches.¹⁵ However, from a policy perspective, Deposit-Based AAs would actually undermine the Agencies’ stated intention to mitigate the dual problem of CRA “hot spots” and “deserts.” Our experience demonstrates that the largest sources of deposits are geographically concentrated in a relatively small number of major metropolitan areas where there is already significant competition for CRA-qualifying loans and investments among numerous banks in those areas. Consequently, the addition of Deposit-Based AAs will intensify the CRA “hot spots.”

Furthermore, the Deposit-Based AAs will exacerbate existing for CRA “deserts,” such as rural areas and distressed communities. Those areas are not typically the source of a large enough volume of deposits to constitute a Deposit-Based AA; thus aligning proportionate requirements of CRA activity to the level of deposits in that same geography will minimize the investment in areas that require it most.

2. Practical Problems and Anomalous Results

From a practical perspective, non-branch-centric banks may be required to make extensive CRA investments and loans in particular geographies where the bank has little or no “on the ground” knowledge of that area’s needs and opportunities. In such cases, the most accessible investments may be low-income housing tax credits (“LIHTC”) through syndicators and mortgage-backed securities (“MBS”). However, because Deposit-Based AA’s would appear to heavily weight investment in large metropolitan areas, such as New York, Los Angeles, and San Francisco, competition for LIHTC and MBS will likely increase beyond available supply, increasing prices and distorting the marketplace for such investments.

Also, smaller community development investments and loans become very difficult to manage because there is little substitute for first-hand knowledge of a project’s management and governance track

¹⁴ Under the Proposal, only banks that receive more than 50% of their retail domestic deposits from geographic areas outside of their Facility-Based AAs would have to designate Deposit-Based AAs. These areas would have to be smallest geographies that include 5% or more of the bank’s retail deposits. Such Deposit-Based AAs would be subject to the same Retail Lending Distribution Tests, CRA Evaluation Measure thresholds, and 2% of retail deposits minimum for CD activities as Facility-Based AAs.

¹⁵ NPR, 85 F.R. at 1207.

record. Even a sizeable number of smaller loans and investments will not be sufficient to meet the required thresholds. The combined impact of significantly enhanced volume of loans and investments and lack of deep background of project management and governance in those geographies will greatly increase the burden on banks managerial and compliance resources.

Furthermore, to the extent that the definition of retail domestic deposits is not limited, attributing deposit amounts to the address of the depositor can lead to other anomalous results. For example, nationwide and multi-national companies often manage their banking relationships from the company headquarters even though the deposits are the product of economic activity nationwide (or even worldwide). A few large corporate depositors could easily skew a bank's deposit "geography," by single-handedly establishing a Deposit-Based AA for the bank while also creating a sufficiently large retail deposit "denominator" in a limited area such that the required thresholds for the Proposed Evaluation Measures become very challenging to meet. At a minimum, such a situation would crowd out other banks that need to demonstrate CRA activity, all without any assessment of whether that geography is underserved or whether there are a sufficient number of viable opportunities for safe and sound lending and investment.

3. Continued CRA Commitment

While eliminating Deposit-Based AAs may change the geographies in which banks must meet their CRA obligations, such elimination will not reduce our overall commitment to, or beneficial effect of, our CRA activities. The bank-level Proposed Evaluation Measures would still remain and be reflective of the bank's overall deposit base, which would require a commensurate aggregate level of beneficial activity to LMI individuals and neighborhoods and the "entire community." Additionally, as discussed in more detail in section III below, the final regulations should not reduce examiner's ability to consider the qualitative aspects of CD loans and investments.

B. Establish Nationwide "Entire Community"

1. Consistent with CRA Statute

Defining the "entire community" as nationwide is consistent with the CRA statute. The CRA requires that the appropriate federal supervisor assess and prepare a report on "the institution's record of meeting the credit needs of *its entire community*, including low-and moderate-income neighborhoods."¹⁶ The statute *does not* define what constitutes a bank's "entire community."¹⁷ However, the CRA does include specific language requiring the federal banking agencies to prepare and make public a written CRA evaluation "presented separately for each metropolitan area in which a regulated depository institution *maintains one or more domestic branch offices*," and similar requirements for each state in which the bank maintains one or more branches.¹⁸ In other words, the federal banking agencies are required by statute to report on the bank's *overall* record of meeting community credit needs, and to separately report on metropolitan areas and states where the bank has branch offices (including deposit-taking ATMs).

¹⁶ 12 U.S.C. §§ 2903(a)(1); 2906(a)(1) (emphasis added).

¹⁷ We note that the CRA does permit a bank "whose business predominately consists of serving the needs of military personnel who are not located within a defined geographic area may define its 'entire community' to include its entire deposit customer base without regard to geographic proximity." 12 U.S.C. § 2902(4).

¹⁸ See *supra* note 7.

2. Consistent with Digital Distribution Model

For banks with digital distribution models like ours, the “entire community” is nationwide as a practical business matter. The Proposal already recognizes that reality by permitting credit under the Proposed Evaluation Measures at the bank level for Qualifying Activities nationwide. Yet, the Proposal explains the creation of Deposit-Based AAs as conforming with “the CRA’s intent to ensure that banks help meet credit needs where they collect deposits,” citing remarks by Senator Proxmire, the congressional father of the CRA.¹⁹ We respectfully suggest that Senator Proxmire’s remarks—which focused on “redlining” in inner city neighborhoods and the phenomenon of small town banks sending funds to major money markets rather than reinvesting in those small towns—should be viewed differently today. In 1977, interstate banking was in its infancy and online banking was unknown. Banks, even large ones, had limited geographic reach in terms of deposit acquisition and lending. Today, both deposit markets and lending markets have considerable nationwide reach and are much less tied to physical branch locations.

3. Artificial Connection to Deposits

While local conditions and physical presence in a locale remain important for some bank business models, banks like ours consider our markets to be nationwide. As long as our CRA efforts are reasonably designed to satisfy the credit and community development needs that are the focus of the CRA’s purpose—providing credit and investment capital in LMI neighborhoods, for LMI individuals and families, and for community development—it should not matter whether those efforts are focused on geographies where our depositors are more or less concentrated. Indeed, it is more important that banks have incentives to focus CRA activities on those areas where local community credit needs are greatest. We believe that our “entire community” for CRA purposes should be consistent with our “entire community” for our business model purposes: a nationwide community.

C. Need for Comprehensive Treatment of Remote Deposits

The Deposit-Based AAs concept appears to be the Agencies’ attempt to modernize CRA, but the attempt has negative policy effects (as discussed above) and falls short of a comprehensive method and rationale for the treatment of *all* Remote Deposits. For example, the Proposal’s Deposit-Based AAs apply only to a portion of the banking industry (primarily non-branch-centric banks), with no regard to the large number of branch-based banks that have an ever-increasing number and amount of Remote Deposits or that many branch-based banks are intentionally (and publicly) going into new geographic markets with a “digital only” strategy.

Additionally, the Proposal is not based on relevant data or comprehensive analysis. The Proposal does not cite any data upon which the Agencies decided to apply Deposit-Based AAs only to banks having more than 50% Remote Deposits (but states that the Agencies are considering a range between 40% and 60%). Nor does the Proposal cite any data or rationale upon which the Agencies decided that 5% was an appropriate threshold for establishing a Deposit-Based AA (but states that it is considering a range from 2% to 8%, and then poses Question #12 to solicit comments on both the 50% threshold for banks and the 5% threshold for location of depositors; we are concerned that some groups will likely push for an

¹⁹ 85 F.R. at 1208. The 1977 CRA’s “Congressional Findings and Statement of Purpose” states that the purpose of the CRA is to “encourage [banks] to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.” 12 U.S.C. § 2901(b). We respectfully suggest that the terminology of “local communities in which they are chartered” has become anachronistic with the rise of interstate branching and online banking. It is noteworthy that even in 1977 the actual statutory directives use different terminology, requiring the banking agencies to assess a bank’s record of meeting credit needs of “its entire community,” without reference to the “local community.” Nor do the directives reference the community in which a bank is chartered as relevant to that assessment.

extremely low threshold, such as 1% or 0.5%, which could result in several dozen new Deposits-Based AAs where we have no physical presence). Finally, the Proposal does not cite any data or rationale to increase to size of a Deposits-Based AA from a county or MSA to include an entire *state*, or consider any policy ramifications and unforeseen negative consequences of a state AA

In order to formulate a comprehensive method and rationale for the treatment of *all* Remote Deposits, the Agencies would need to first gather relevant data from *all* banks by having them geocode all of their deposits. The Agencies would then need to analyze that data to determine the potential impacts resulting from various thresholds to determine a Deposits-Based AA (the lower the threshold the more the Deposits-Based AAs), including which “hot spots” would be exacerbated by the addition of many new banks competing for the same CRA opportunities in those geographies.

The Agencies should also engage all stakeholders in a policy discussion regarding how Remote Deposits could be addressed in a durable way (including consideration of ongoing shifts in depositor locations, the size of the proposed AA, etc.) in any revised CRA evaluations. Such policy discussion should necessarily include a discussion of whether it makes sense, in our increasing digital world, to force a non-branch-centric bank to change its business model to compel some level of correlation between the physical location of a bank’s borrowers and the physical location of a bank’s depositors absent the physical presence of a branch. We feel strongly that CRA modernization should not in essence force a bank to change its business model to comply with older, geography-based evaluation measures. We also feel strongly that, from a policy perspective, any Proposed Evaluation Measures of a bank’s Remote Deposits should apply to *all* banks, including branch-based banks.

III. ENHANCE ROLE OF PERFORMANCE CONTEXT ANALYSIS

A. Make Role Explicit

The current CRA regulation requires examiners to evaluate a bank’s CRA performance in light of the Performance Context. In other words, the Performance Context is currently an *integral* component of the evaluation. However, it appears that under the Proposal the Performance Context factors will only be applied *after* the presumptive ratings are generated. This after-the-fact consideration of performance context factors poses specific challenges for non-traditional banks that do not offer the full range of lending products that branch-based banks offer and would face the challenges discussed above in satisfying all of the Proposal’s requirements. Consistent with the Agencies’ acknowledgement that “consideration of performance context could be particularly important for a bank that does not engage in retail lending activities,”²⁰ we recommend the final regulations clarify that if a bank engages in limited retail lending activities – for example, if a bank does not provide home mortgage or small business loans – its Performance Context will be taken into consideration prior to the assignment of its presumptive rating.

1. Account for Digital and Other Innovation Factors

Similarly, we ask that the Performance Context analysis more explicitly take into account particularly innovative or effective CRA activities, especially activities that meet credit needs in CRA deserts or other underinvested communities. As the banking industry evolves with the improved application of digital technology, banks should be encouraged to conduct experiments and receive credit in the Performance Context analysis for such innovation, particularly when such activities turn out to be highly beneficial. For example, banks that have a track record of anchoring significant, successful CD

²⁰ NPR, 85 F.R. at 1222-23.

projects and initiatives by assuming the attendant risk that enables the projects to go forward should receive additional consideration when the Performance Context is considered.

2. Factor in Upward Ratings Adjustment

The Performance Context section of the Proposal should be read as authorizing an upward adjustment in the presumptive ratings, but not a downward adjustment. If the presumptive ratings scheme is to have merit, it must ensure that meeting the thresholds means that the final overall or AA ratings can be no lower than the presumptive rating. We recommend that the Agencies clarify the wording accordingly.

IV. Remove Mandatory Inclusion of Consumer Loans

We recommend that the Agencies remove the mandatory inclusion of consumer loans from all Proposed Evaluation Measures. Rather, consumer loan business lines should be included in the CRA evaluation only at the bank's option. The Proposal contains a sweeping expansion of affirmative CRA regulatory obligations far beyond the home mortgages, small business/farm loans, and CD loans currently covered by CRA. It would extend a bank's CRA examination to require evaluation of *all consumer lending products*, including credit cards, auto loans, student loans, and other types of consumer loans. There appears to be no policy basis for such a significant expansion; the Agencies provided no research showing that banks are not issuing enough credit cards, auto loans, or student loans to LMI people or people living in LMI areas.²¹

The rationale for continuing optional inclusion for credit cards, auto loans, installment loans, or other forms of consumer credit is not because such products are irrelevant to a community's credit needs. Rather, given the availability of these products online and through highly competitive channels, we do not believe there is substantial evidence of unmet community credit needs (including for LMI neighborhoods and individuals) that additional CRA obligations would satisfy.²² Banks also must engage in fair lending practices. We are rigorously examined for compliance with the anti-discrimination provisions of the Equal Credit Opportunity Act, and the prohibitions on unfair or deceptive acts or practices under Section 5 of the Federal Trade Commission Act and the Consumer Financial Protection Act. Accordingly, the extra incentive of CRA compliance is not necessary to meet community credit needs for these products or to prevent "redlining." The recordkeeping, testing, and reporting requirements needed to include all consumer loans will be highly burdensome, both on a one-time basis and as an ongoing expense. The reporting requirements resemble in some ways the requirements for the Home Mortgage Disclosure Act ("HMDA"). Banks' experiences with HMDA reporting suggest that compiling, assembling, verifying, and reporting the data for additional consumer lending lines will be very expensive and time consuming.

Under the Proposal, even relatively small consumer lending business lines that do not involve mass-marketing could be considered "Major Retail Lending Product Lines." For banks that do not have mass-market consumer lending businesses, there may be limited ability to ensure that LMI individuals (and neighborhoods, if the final regulation includes LMI neighborhoods in consumer lending tests) apply for their loan products. For example, many banks provide accommodation personal secured or unsecured

²¹ The Proposal includes a series of solicitations for comment (Question 16) concerning the treatment of consumer loans in the Retail Lending Distribution tests, but does not specifically request comment on whether inclusion of consumer loans should be mandatory. NPR, 85 F.R. at 1226.

²² See, Ronald J. Mann, *Patterns of Credit Card Use Among Low and Moderate Income Households* at 3 (2008), available at: <http://www.columbia.edu/~mr2651/CreditCardsforthePoor.pdf>. ("Despite lower incomes, credit card use is almost as common among LMI households as it is among more affluent households.")

loans to private banking high-net-worth or brokerage clients. Such products are not susceptible to meeting the Retail Lending Distribution Tests because of the characteristics of the institution's client base, and the banks involved may not have a customer base to make other unsecured consumer loans that would be appropriate for LMI individuals.²³ Because the Retail Lending Distribution Tests counts only *originated* loans, not purchased loans, such banks would necessarily fail the tests. Such accommodation loans may represent a relatively small overall dollar volume, but a relatively high percentage of the "retail" loans originated by that bank, and therefore still be considered a "Major Retail Lending Product Line." Even if the bank could satisfy the Retail Lending Distribution Test in a given AA (which may be doubtful), the actual impact on satisfying a community's credit needs would be negligible. Yet, there would always be a substantial risk that the bank would not be able to pass the test and achieve a Satisfactory rating whether in a Facility-Based AA or a Deposit-Based AA (if the latter category is retained in the final regulation).

Other types of consumer loans present similar issues, where the product and distribution channels may not lend themselves to the bank ensuring that sufficient LMI individuals and neighborhoods receive a sufficient number of loans to pass the tests. For example, banks that issue credit cards primarily through partnerships with non-banking organizations may not have the ability to obtain sufficient applications from LMI individuals, depending on the clientele of the bank's partners. Requiring that a set portion of LMI individuals acquire such cards in a particular area in order to pass the test would at best require a substantial modification of existing business models, and at worst be impracticable, all with a negligible effect on improving credit availability in that local community.

Given the availability of these products online and through highly competitive channels (such as auto dealer referrals of auto financing applications simultaneously to multiple lenders), we do not believe there is substantial evidence of unmet community credit needs that additional CRA obligations will satisfy.²⁴ Worse, from a policy perspective, the mandatory inclusion of consumer loans could actually shift focus away from home mortgages and CD loans and investments.

V. OPTIMIZE STRATEGIC PLAN OPTION

We recommend that the Agencies optimize the strategic plan requirements so it can continue to be a more effective option for banks with nontraditional business models like ours. Some banks have been operating for a considerable period of time under approved strategic plans. Strategic plans provide more certainty and predictability to banks to aid in longer term business planning, enabling CRA programs to be carried out in a more organized manner over a multi-year period. The strategic plan option also permits us to further tailor our programs to more effectively serve our communities with the products and services we offer. Our banks have benefitted from the current CRA framework's requirement that banking

²³ We also request a technical change to the definition of consumer loan to clarify that personal loans made by banks that are secured by marginable stock are excluded. The current definition of "Other consumer loan" specifically excludes loans "for purchasing or carrying securities." The term "purchasing and carrying securities" is a term of art, that would *not* include, for example a loan of \$100,000 or more secured by marginable stock that is nevertheless covered by Regulation U when made by a bank, 12 C.F.R. Part 221. We request that the language in the definition be modified to exclude loans "collateralized by securities (including margin stock under Regulation U, 12 C.F.R. Part 221)." Such loans should not raise CRA issues. This exclusion from the definition of "Other consumer loan" would not affect the CRA-status of loans that are made to small businesses and where such loans may be collateralized by marginable stock covered by Regulation U.

²⁴ See, *Automobile Purchase Decisions and Auto Lending, Report on the Economic Well Being of U.S. Households in 2015*, Board of Governors of the Federal Reserve System, available at: <https://www.federalreserve.gov/econresdata/2016-economic-well-being-of-us-households-in-2015-Automobile-Purchase-Decisions-and-Auto-Lending.htm#subsection-1123-09FA365A> (28.5% of auto purchasers with incomes of less than \$40,000 financed vehicles through banks, credit unions or internet lenders, 33% for purchasers with incomes from \$40,000 to \$100,000, and 31.1% for purchasers with incomes above \$100,000).

agencies consider a bank's Performance Context in determining whether to approve a proposed strategic plan.²⁵ In this regard, the strategic plan procedure should become more, not less, "user friendly" for banks in light of the complexity and potential anomalies of the Proposal, as well as the uncertain impact of the metrics-based presumptive rating scheme. Accordingly, we request the Agencies optimize the strategic plan option by building more flexibility into the plan requirements and changing some of the proposed procedural requirements.

A. Flexible Plan Requirements

We request that the Agencies provide flexibility in the strategic plan requirements by permitting banks to specify alternatives to some of the Proposed Evaluation Measures in their strategic plans. This should include explicitly allowing a bank (1) to propose alternatives to the CRA Evaluation Measures (and any other requirements) that are more appropriately tailored to the bank's specific business model, (2) to exclude Deposit-Based AAs (if they are retained in the final rule), (3) to be excused from data gathering and reporting requirements not directly related to the specific qualifying activities contained in the plan's measurable goals, and (4) to provide that innovative, flexible, or complex activities will be given at least as much credit as under the Performance Context analysis.

B. Procedural Requirements

To make the strategic plan a viable option for banks, we recommend changes to the proposed procedural requirements. First, the strategic plan process should continue to retain the 60-days regulatory review period instead of the proposed six months. Six months could discourage banks from submitting strategic plans because of the material time period when banks would not be certain whether their plans are acceptable to the regulatory agencies. Second, the Agencies should specify the role that public comments play in the process. Under the existing CRA framework, public comments contribute to the identification of community needs and priorities, giving a bank the opportunity to develop products and services in response to those needs and to demonstrate the ways in which the bank has met those needs. The regulation should specify this role as the primary purpose of public comments and should clarify that the final regulation does *not* require banks to enter into any community benefit agreements.

VI. MAINTAIN OPTIONALITY RELATING TO INCLUSION OF ACTIVITIES OF AN AFFILIATE IN THE CRA FRAMEWORK

The Proposal's provisions regarding the Qualifying Activities of a bank's affiliate are not clear, and appear to impose additional requirements. We recommend that the final regulation maintain the optionality to include the Qualifying Activities of a bank affiliate, but not impose an additional obligation. As discussed above, banks have a large percentage of CD loans and investments, and many of the investments are made under our banks' public welfare investment authority ("PWI"). Due to certain statutory and regulatory limitations on the level of PWI that can be held by a bank or its subsidiaries, those types of investments may be made by a bank affiliate. It is important that a bank have the option to include CRA activities of an affiliate, but such inclusion should not be mandatory. The proposed mandatory inclusion of any Qualifying CRA Activity would impose significant increased cost and process burdens on institutions with affiliates that engage in lending and investment activities more generally. Not all such general lending and investment activities are Qualifying Activities, and institutions will need to spend significant resources and develop or modify procedures to glean appropriate, qualifying loans and investments.

²⁵ 12 C.F.R. § 25.21(b) (OCC); § 345.21(b) (FDIC).

CONCLUSION

We appreciate the care and thought that went into constructing the Proposal. We support the Agencies' desire to provide more certainty as to the ratings process through the use of a metric-based presumptive ratings approach, as well as the efforts to offset the rigidity of relying on metrics. We believe, however, that more tailoring and flexibility is required for banks with nationwide digital delivery models like ours in order to allow us to more effectively achieve our shared CRA goals to further meet the credit and financial needs of our communities in a safe and sound manner.

Sincerely,

Goldman Sachs Bank USA
Ally Bank