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July 15, 2022

SENT VIA FIRST CLASS MAIL AND E-MAIL

Federal Deposit Insurance Corporation
James P. Sheesley, Assistant Executive Secretary
Attn: Comments RIN-3064-AF81
550 17th Street NW
Washington, DC 20429
Email: comments@fdic.gov

Re: Request for Comment: Request for Comment Regarding Community Reinvestment Act, Docket ID. RIN 3064-AF81.[1]

Dear Federal Deposit Insurance Corporation,

The Kentucky Bankers Association (KBA) is pleased to submit this response to the Request for Comment (the "Request") from the Federal Deposit Insurance Corporation (FDIC), which seeks comments on its proposed rule to "assess the institution's record of meeting the credit needs of its entire community, including low-and-moderate-income neighborhoods, consistent with the safe and sound operation of such institution" consistent with the Community Reinvestment Act[2] ("CRA") (the "Purpose").[3]

After consulting with representatives from the Kentucky Bankers Association's one hundred and fifty-four (154) member institutions ranging in asset size from twenty-one million dollars ($21,000,000) to over three hundred and seventy billion dollars ($370,000,000.00), the Kentucky Bankers Association submits its comments to the Request as set forth below.

1. Assessing Solely Banks for CRA is Misguided

The Purpose is clear: CRA is designed to assess whether institutions are meeting the credit needs of their community. However, when a large populace of lenders, online and physically in these communities which are not taken into account and thus exempt from the proposed rule. That results in the rule being fatally flawed.

The Community Reinvestment Act became effective in 1977.[4] "During the last two decades, the lending landscape has transformed. Traditional providers—namely banks—have consolidated and reduced their number of branches, in large part because of over

[1] Federal Deposit Insurance Corporation, Request for Comment: Request for Comment Regarding Community Reinvestment Act, 87 Federal Register 33884, June 3, 2022.
[2] 12 U.S.C. 2901.
[3] Request, page 33886.
[4] 12 U.S.C. 2901.

regulation. The number of banks in the U.S. has declined from over 18,000 in 1986 to under 5,200 today. The number of branches declined by 14 percent from 2009 to 2020."[5]

"In the past, small businesses principally sought credit from banks; however, as banks have merged and consolidated, particularly in the wake of the Great Recession, they have provided less financing to small businesses. As noted earlier, the number of banks has declined significantly since a post-Great Depression peak in 1986 of over 18,000 institutions to around 5,200 institutions today, while 13,500 branches closed from 2009 to mid-2020, representing a 14 percent decrease. Although nearly half of counties either gained bank branches or retained the same number between 2012 and 2017, the majority lost branches over this period. Out of 44 counties that were deeply affected by branch closures, defined as having 10 or fewer branches in 2012 and seeing five or more of those close by 2017, 39 were in rural counties. Of rural counties, over 40 percent lost bank branches in that period; the rural counties that experienced substantial declines in bank branches tend to lower-income and with higher proportion of African American residents relative to rural counties, raising concerns about equal access to credit."[6]

Meanwhile, new providers and products, such as independent finance companies, fintechs and merchant cash advances (MCAs), have become increasingly prevalent in the small business lending market. Financing by MCA providers is estimated to have increased from $8.6 billion in volume during 2014 to $15.3 billion in 2017. From 2017 to 2019, the volume may have increased further to $19 billion. Meanwhile, financing by fintechs is estimated to have increased from $1.4 billion in outstanding balances in 2013 to approximately $25 billion in 2019.[7] And, although credit unions are in some ways considered traditional small business lenders, they are not covered by CRA and "[c]redit unions increased their small business lending from $30 billion in 2008 to at least $55 billion in 2019."[8]

"During a period in which depository institutions have been providing relatively less funding, small businesses have increasingly relied on other nondepository institutions for financing. Since nondepositories typically do not report their small business financing activities to regulators, there are no authoritative sources for either the number of such entities or the dollar value of financing they provide to small businesses. However, what data is available makes it clear that fintech firms are rapidly increasing their share of the small business financing market."[9]

"The Bureau estimates that the market for small business financing products totaled $1.4 trillion in outstanding balances in 2019. The Bureau estimates that small business <u>*financing by depository institutions makes up just over half of small business*</u> financing by private institutions. In 2020 and 2021, COVID-19 emergency lending programs added a further $1 trillion to this value, bringing the overall size of the small business financing market up to $2.4 trillion."[10] "$190 billion in outstanding balances for

[5] Consumer Financial Protection Bureau, Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B), 86 Federal Register 56360, October 8, 2021.
[6] Consumer Financial Protection Bureau, Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B), 86 Federal Register 56364, October 8, 2021.
[7] Consumer Financial Protection Bureau, Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B), 86 Federal Register 56364, October 8, 2021.
[8] Consumer Financial Protection Bureau, Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B), 86 Federal Register 56365, October 8, 2021.
[9] Consumer Financial Protection Bureau, Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B), 86 Federal Register 56365, October 8, 2021.
[10] Consumer Financial Protection Bureau, Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B), 86 Federal Register 56365, October 8, 2021.

private term loans and lines of credit was extended by various non-depository institutions, namely commercial finance companies, fintechs, and non-depository CDFIs"[11]

"Using NCUA Call Report data for December 2019, the Bureau estimates that credit unions account for a total of about $55 billion in outstanding credit to members for commercial purposes."[12]

While many of the above statistics are limited to small businesses, these numbers could continue for pages if you consider all lending. Nonetheless, the summation is the same: large groups of lenders that are not banks are extending significant amounts of credit to customers who had prior to the convenience of the internet and the influx of nontraditional lenders borrowed. However, unlike banks, these lenders are not subject to CRA. Simply put, if the FDIC or any other agency really wants to accomplish the purpose, these lenders must be subject to CRA. The FDIC and other bank regulators must encourage Congress to expand the lenders covered by CRA—this seems to be a change that is necessary in order for bank regulators to ensure the compliance of the industry they oversee, while limiting imposition of regulations, mandates and citations which could impact the safety and soundness of these same banks. Otherwise, the rule remains outdated, inaccurate, and provides no true measure as to whether the needs of their communities are being met.

A lot has changed since 1977. As stated above, banks no longer dominate the market. Many community banks have closed and alternative forms of lending now occupy substantial portions of the lending space. If the FDIC and others are serious about accomplishing the Purpose, alternative lenders must also be subject to CRA. Otherwise, there is simply no means of understanding whether communities are truly being served. Without including these new classes of lenders, the data is skewed—against banks! As long as CRA remains a metric solely for banks, it will remain an archaic law with limited information and demographics as to the true market and will not resolve any issues on which communities need additional assistance.

For these reasons, the KBA disagrees with the fundamental Purpose of the Request as it applies solely to banks.

2. The New Test and Implementation Periods Set the Stage for Failure

Depending on asset size, a bank could be subject to four tests to determine its CRA rating: the Retail Lending Test; Retail Services and Products Test; Community Development Financing Test; and Community Development Services Test.[13]

While the new forms and scoring of the various tests is clear, the results of implementing these new tests is extremely concerning. Table 10 to Section _.22 titled *Distribution of Estimated Retail Lending Conclusions Among Banks by Asset Size, Without Applying the Retail Lending Volume Screen* is particularly concerning.[14]

The table shows that "15% of banks below $600 million in asset size are estimated to fail under the proposed new Retail Lending Test. The Table also reveals the Agencies estimate that 7% of banks classified as "Intermediate Banks" and 7% of banks defined as "Large Banks" would receive less than Satisfactory "conclusions"".[15]

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[11] Consumer Financial Protection Bureau, Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B), 86 Federal Register 56365, October 8, 2021.

[12] Consumer Financial Protection Bureau, Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B), 86 Federal Register 56365, October 8, 2021.

[13] Proposal, page 33890.

[14] Proposal, page 33955.

[15] 2022 CRA NPR: *A 5-Alarm Fire in the Making for Banks*, GEODATAVISION, 2022.

"Even more alarming is the estimated number and percentage of banks that would earn a Low Satisfactory "conclusion." 24% for Small Banks, 38% for Intermediate Banks, and 40% for Large Banks. In other words, when "conclusions" are combined, 41% of the banks used by the Agencies for this table would either fail the test or be a hair's breadth above a less than satisfactory "conclusion"![16]

"This observation is very important because, although the Retail Lending Test would account for only 45% of a bank's CRA composite performance rating, the proposed rule requires banks to attain at least a satisfactory rating on the Retail Lending test."[17]

Table 11 to Section _.22 titled *Distribution of Reporter Bank Assessment Area Estimated Retail Lending Conclusions, by Location*, further adds to the concerns about implementation of the new tests.

"The foregoing table indicates that in 17% of the Facility-Based Assessment Areas within an MSA and 18% outside an MSA banks would receive either a "Needs to Improve" or "Substantial Noncompliance" conclusion! Then look at the percentages receiving a "Low Satisfactory" conclusion (33% for AA's in MSA's and 27% in non-MSA AA's)." In nearly 50% of those Assessment Areas banks would either receive a less than satisfactory rating or be on the verge of such rating.

Table 12 to Section _.22 titled *Distribution of Estimated Reporter Bank Retail Lending Conclusions, in Retail Lending Assessment Areas and Outside Retail Lending Areas* further exemplifies the drastic effects these new tests will have one some banks.

"The table reveals that in more than one-third (34%) of "Retail Assessment Areas" banks would receive less than a satisfactory "conclusion" and in "Outside Retail Lending Areas" almost one third (31%) would get a "Needs to Improve" or "Substantial Noncompliance" "conclusion"."

These comments are shocking! Why would the federal regulators responsible for the safety and soundness of the banking industry seek to impose changes that are designed to harm that industry when the lending market has changed so dramatically and those changes are not taken into consideration.

Banks will have one (1) year to comply with the new rules after publication. The Proposal is six hundred and seventy-nine (679) pages long. It has been a challenge for many banks just to read the proposed rule and create proper commentary within the two (2) month time deadline and it will take much longer for banks to implement the new rule and ensure that they continue to meet the needs of their community under a revised measure. The result of the very short deadline may make it seem that many banks are unconcerned with the changes, but you can be assured that this is not the case.

The reality is that banks are absolutely overwhelmed with the length of the proposal and the complexity of the changes and based on the statistics above, many banks that previously have been fully compliant with their CRA examinations are already predetermined to fail under the new tests. Banks will need much longer than one (1) year to implement changes under the new rule as proposed. It will take at least that long to read and comprehend the changes and select the test that is or may be applicable to each bank. Then, data systems used will have to changed and compliance standards put into place. At a minimum, banks should have at least two (2) years to comply with these new standards.

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[16] *Id.*
[17] *Id.*

Banks have continuously served the needs of their communities in good times and bad times. This can be seen by their efforts during COVID as well as their CRA ratings under existing rules. Extending the timeline for implementation of this new rule will not cause consumer harm but rather allow banks to ensure that they can appropriately comply with the new rule, that current activities count toward credits under the various tests, and that the focus remains on the customers; not a rushed implementation of a new rule.

For these reasons, the KBA disagrees with the timing for implementation of the new rule.

3. The Assessment Areas are Inconsistent

"The CRA is designed to encourage regulated banks to help meet the credit needs of the local communities which they are chartered."[18] "The CRA statute requires the agencies to "assess the institution's record of meeting the credit needs of its entire community, including low-and-moderate income neighborhoods, consistent with safe and sound operation of such institution."[19]

"The existing CRA regulations require a bank to delineate one or more assessment areas in which its record of meeting its CRA obligations will be evaluated. The regulations require a bank to delineate assessment areas consisting of geographical areas (metropolitan statistical areas (MSAs) or metropolitan divisions) or political subdivisions in which its main office, branches and deposit-taking automated teller machines (ATMs) are located, as well as the surrounding geographies where a substantial portion of its loans are originated or purchased.[20]

"The assessment area requirements and emphasis on branches reflects the prevailing business model for financial service delivery when the CRA was enacted. The statute instructs the agencies to assess a bank's record of meeting the credit needs of its "entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution, and to take such record into account in its evaluation of an application for a deposit facility by such institution." The statute does not prescribe the delineation of assessment areas, but they are an important aspect of the regulation because they define "community" for purposes of the evaluation of a bank's CRA performance."[21]

As Senator William Proxmire, who authored the CRA legislation, testified before it was enacted stated, "By redlining let me make it clear what I am talking about. I am talking about the fact that banks and savings and loans will take their deposits from a community and instead of reinvesting them in that community, they will actually or figuratively draw a red line on a map around the areas of their city, sometimes in the inner city, sometimes in the older neighborhoods, sometimes ethnic and sometimes black, but often encompassing a great area of their neighborhood."[22]

CRA was originally designed for traditional "brick and mortar" banks to ensure banks would not just take community deposits and then fail to serve that community and particularly underserved areas of that community. However, times have changed. Banks are no longer solely "brick and mortar" buildings. In fact, regulators like the Consumer Financial Protection Bureau (CFPB) have encouraged "open banking" where consumers can

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[18] Proposal, page 33886.
[19] Proposal, page 33886.
[20] Proposal, page 33887.
[21] Proposal, page 33887.
[22] Proposal, page 33888.

essentially move their accounts online without restriction.[23] "As CFPB Director Rohit Chopra said, switching bank accounts isn't easy. Doing so, he remarked this week, "involves new account numbers, new debit cards, updating direct deposit, updating auto-debits, and much more." With open banking in place, "[i]t will be harder for banks to trap customers into an account for the purpose of fee harvesting," he added."[24] While we disagree with the premise of his statement in so far as "fee harvesting" is considered, we agree that the banking community has evolved to be much closer to his anticipated "open banking" world.

Furthermore, in light of the events of the Covid-19 pandemic, the FDIC and others have strongly encouraged the use of internet banking. This has resulted in many customers utilizing banking services across the country as they no longer have to travel to a branch to access their account. These services allow customers to not only shop for the institution that is the best fit for their needs, but also those that fit their technical preferences. Banking has changed for the better—to give consumers better access to lending, funding, account management and all the options that come with their bank.

However, under the Proposal, these banks may now be subjected to additional CRA scrutiny because they accept account customers from locations outside of their traditional "brick and mortar" structures.

"The NPR proposes that banks be evaluated under the Retail Lending Test not only in their traditional "Facility-Based Assessment Areas" but in new "Retail Lending Assessment Areas" and "Outside Areas" too. This is one of the most radical provisions of the NPR. It means that bank lending outside the branch assessment areas will be subject to scrutiny for the first time ever – and it can apply to communities thousands of miles removed from a bank's branch system."[25]

"So the CRA NPR is a "Double Whammy" for banks whose lending activity (1) will be subject to examination on a far broader basis than ever before in the 45-year history of the CRA – and (2) there will be no adjustment to the performance standards to reflect the huge difference between being a hometown lender with local branches and a bank that takes applications over the internet with no offices anywhere in the market."[26]

Banks have been pushed to adopt Fintech and internet banking for years by regulators, in order to provide additional access to banking needs and credit for the underserved. However, banks should not be punished for meeting the needs of customers throughout the country at the request of regulators and now be punished for it with additional regulatory burden, while the competing providers of certain banking needs are allowed to operate with no oversight at all.

There is the old saying that "no good deed goes unpunished" and there is no clearer example of that for bankers. The new rule must account for the differences between online and traditional activities with appropriate delineations for CRA purposes. Otherwise, this Proposal could have a chilling effect on the market as to online offerings from banks and limiting the regions for which certain products are available.

For these reasons, the KBA disagrees with the assessment areas as set forth in the Proposal.

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[23] PYMENTS, *CFPB Lays Groundwork for Open Banking's US Push*, [CFPB Lays Groundwork for Open Banking's US Push | PYMNTS.com], December 2, 2021.
[24] PYMENTS, *CFPB Lays Groundwork for Open Banking's US Push*, [CFPB Lays Groundwork for Open Banking's US Push | PYMNTS.com], December 2, 2021.
[25] *New CRA NPR May be a Double-Whammy for Banks*, GeoData Vision, June 23, 2022.
[26] *New CRA NPR May be a Double-Whammy for Banks*, GeoData Vision, June 23, 2022

4. The KBA Supports Full Credit for All LIHTC Credits

"The agencies propose a full-credit approach for an activity that involves low-income housing tax credits (LIHTCs). Specifically, a bank would receive consideration for the full amount of the loan or investment for a LIHTC-financed project, regardless of the share of units that are considered affordable. This proposal is consistent with current guidance adopted in 2010 that clarified that projects developed with LIHTCs had a bona fide intent of providing affordable housing."[27]

As the FDIC and the other agencies are aware, LIHTC credits are unique in nature and directly serve the Purpose. The KBA supports the Proposal in treating all LIHTC loans as full CRA credit loans.

5. The KBA Supports Other Provisions in the Proposal

The KBA appreciates the FDIC, Office of the Comptroller of the Currency and the Federal Reserve System working together to create a uniform framework for CRA. As stated in previous comment letters, a unified measurement of CRA is necessary to avoid confusion amongst institutions.

Additionally, the KBA supports the preapproval process and list of qualifying activities for community development. For the past several years there has been significant confusion as to what activities would be considered CRA activities. Preapproval will provide a better benchmark for banks to know their current status prior to examination.

Finally, the KBA appreciates the agencies' efforts to tailor the proposal to avoid increased regulatory burden on the smallest banks.

Thank you for considering our suggestions. If there are any questions, please do not hesitate to contact the undersigned.

Sincerely,

[redacted]

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[27] Proposal, page 33892.