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Submitted via Electronic Delivery at:
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regulations.gov (Docket ID OCC–2022–0002)

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Texas Bankers Association Comments on Community Reinvestment Act Proposal (Docket ID OCC-2022-0002; Docket No. R-1769, RIN 7100–AG29; RIN 3064–AF81)

Dear Ms. Misback, Mr. Sheesley, and Ms. Thomas:

On behalf of the more than 400 bank members of the Texas Bankers Association, we take this opportunity to submit the following comments in connection with the Interagency Notice of Proposed Rulemaking published in the Federal Register on April 6, 2022.

We acknowledge the extensive work of the federal supervisory agencies in their effort to create a measurable, metrics-based approach to gauge each institution's CRA compliance. And while we appreciate that different-sized banks won't be subject to all of the new proposed tests and the proposed delineation of permitted CRA activities, we strongly believe that this proposal will greatly increase costs to community banks, lead to less credit availability, and result in fewer services in low-and moderate-income communities.

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The banking industry is being whipsawed by changing regulatory demands. Over the last twenty years, each time a new President takes control of the executive branch there are new requirements placed on banks or regulations from the prior administration that are withdrawn. We have experienced changes in the approach to fair lending and the use of disparate impact. There is a new proposal to apply UDAAP to financial products not subject to the ECOA. New Federal proposals intended to utilize the banking system to address climate change are being met with state laws opposed to this objective. The last administration proposed CRA reform for national banks that was rescinded by the current OCC. The Federal Reserve Board, the FDIC and the OCC now propose an almost 700-page CRA regulation that will necessitate the purchase of new software and the hiring and training of new employees.

We are concerned about the headlong rush to implement these regulations. The agencies denied a very reasonable request to extend the comment period for thirty days. This is a very complex multi-agency regulatory overhaul, and it is highly likely, similar to major initiatives in the past, that there will have to be extensive amendments and interpretations. The proposed twelve-month phase-in period does not give institutions enough time to set up and trouble-shoot a vast and comprehensive new reporting system. We do not know if third party software providers and core processors will have the technology ready for its implementation. It is important to note that the Dodd-Frank Act Section 1071 small business reporting requirements are expected to be put in place early next year. Service providers have indicated that they may not be ready by then. In almost all of our banks the same personnel will be implementing 1071 data collection and CRA compliance. Most banks will have to hire and train additional employees if, and when, the software is available. At a minimum, the agencies should consult with third party providers to determine when the coding, programs, and systems will be available for both 1071 and CRA.

Retail Lending Assessment Areas

For banks over $2 billion in assets (approximately 60 in the State of Texas), the Facility Based Assessment Areas and the 45% weighting of the Retail Lending Test will make CRA compliance nearly impossible for business models focused on commercial lending with little consumer lending. Some accommodation must be made for banks with alternative business models. Further, the proposal significantly increases the number of RLAAs for most banks. Expanded compliance and reporting requirements will simply draw resources away from lending.

Retail Lending Test

The RLT evaluates banks relative to other banks, 90% to 125% of the market benchmark, rather than a standard set by the agencies. This will make it statistically impossible for all of the banks in an Assessment Area, no matter how hard they try, to achieve an Outstanding or even Satisfactory rating. Is this intentional? Appendix A of the proposal estimates a sharp increase in failures and Low Satisfactory ratings because of the new RLT. The retail lending benchmarks will be an incentive for unsafe and unsound lending in an effort to keep up with the crowd. It could also cause a bank to have a low rating in one MSA that might be a High Satisfactory or Outstanding if located in another MSA. For larger banks, the high 45% RLT weighting and the difficulty in achieving an Outstanding rating could cause banks not to pursue an Outstanding rating on the Community Development Financing Test.

Wholesale Banks

The new test eliminates wholesale banks' ability to rely on community development services to achieve a baseline Satisfactory rating, requiring them to rely instead on community development lending and investment tests. Similar to the treatment of commercial lenders and niche lenders, the proposed rule mandates major changes in the business models of wholesale banks.

Nonbanks and the Community Reinvestment Act

The 2020 Board CRA ANPR asked the question: "…what modifications and approaches would strengthen CRA regulatory implementation in addressing ongoing systemic inequity in credit access for minority individuals and communities?" We believe that the question might have had some relevance in 1977 but in the current financial services marketplace, FDIC-insured institutions are no longer dominant in key areas of lending. Nonbanks originated 72% of all mortgage loans in the country in 2021. The passage of the Dodd-Frank Act caused many of our community banks to stop making mortgages. Six-hundred pages of Qualified Mortgage regulations and 1,200 pages of TRID were too much for many of our rural banks. After the passage of Dodd-Frank in 2010, Texas enjoyed one of the healthiest economies in the United States yet, due to increased compliance costs, there are now 35% fewer banks in our state. Mortgage companies and lightly regulated credit unions stepped into the void. Credit unions now also dominate most new car financing in Texas. Fintech lending to small businesses is increasing. Nine-hundred pages of small business reporting requirements and 700 pages of new CRA regulations will take a further toll on traditional banks and consolidation will continue. Unless Washington broadens the CRA mandate to include nonbanks there won't be much left to reinvest.

Legal Authority

The NPR describes this initiative as making the most significant changes to the implementation of the Community Reinvestment Act since 1995. It goes well beyond that in our view and is better described as constituting a reinterpretation and repurposing of the 1977 statute in the absence of any specific or even general statutory authority to justify this ambitious foray into credit allocation.

In the term just completed, the Supreme Court made this very point in *West Virginia, et al. v. Environmental Protection Agency* in stating that an administrative agency "must point to 'clear congressional authorization' for the power it claims."[1] In this instance, there is no statutory basis in the underlying statute for the NPR's creation of "Retail Lending Assessment Area," let alone some form of "geographic distribution test" purportedly designed to ensure that a bank is making an adequate proportion of loans not just in its areas but also in comparison to its "peer" group.

The agencies offer only vague and general statements about the need for new regulations such as "modernizing" the CRA and "strengthening and clarifying" regulations to "reflect the current

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[1] *West Virginia et al. v. Environmental Protection Agency et al.*, 597 U.S. __ (2022).

banking landscape" and "better meet the core purposes of CRA." We respectfully suggest that this falls well short of the minimum standard required under the principles of the Constitution's "non-delegation" doctrine unless it provides an "intelligible principle" as guidance.[2] Here, as we have noted, there is no statutory guidance whatsoever provided for many of the novel concepts contained in the NPR.

No matter the best of intentions, the Federal banking agencies are likewise not empowered under the Administrative Procedures Act to revise and literally reconstruct a long-standing federal regulation on factors Congress did not intend for it to consider and especially to do this massive rewrite of CRA regulatory criteria and processes.

Lastly, may we suggest that the agencies have also not adequately explained why, in light of the fact that the vast majority of banks have consistently been given Satisfactory or Outstanding ratings under the current system, changes that are deemed necessary – and certainly there are some – cannot be accomplished on an incremental basis.

Thank you for taking these views under consideration.

Sincerely,

[redacted]

Chris Furlow
President & CEO
Texas Bankers Association

[2] *Gundy v. United States*, 139 S. Ct. 2116 (2019) (Emphasis added).