American Bankers Association

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May 13, 2024

James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW Washington, DC 20429
Attention: Comments RIN 3064–AG03

Chief Counsel's Office
Office of the Comptroller of the Currency
400 7th Street SW Suite 3E–218
Washington, DC 20219
Attention: Comment Processing, Docket ID OCC—2022-0002

Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551
Attention: Comments Docket No. R–1830 and RIN 7100–AG75

RE: Community Reinvestment Act; Supplemental Rule

To Whom It May Concern:

The American Bankers Association[1] is pleased to comment on the Interim Final Rule issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency (Agencies) that extends from April 1, 2024 to January 1, 2026 the applicability date of the facility-based assessment area (FBAA) provision and the public file provision of the 2023 Community Reinvestment Act Final Rules (Final Rules).[2] With this action, the Agencies aligned the FBAA and public file applicability dates with the applicability dates for the Final Rules' performance tests and other geographic requirements. The Agencies also aligned the applicability date for the Final Rules' public notice requirements with the applicability date of the CRA Notice in appendix F so that both the substantive public notice requirements and the language for the CRA Notice will be applicable on January 1, 2026.

ABA strongly supports these modifications in the event that the Final Rules—which are currently enjoined—ultimately take effect. At present, the preliminary injunction in place extends the Final Rules' effective date and all other implementation dates for each day the injunction remains in

[1] *The American Bankers Association is the voice of the nation's $23.7 trillion banking industry, which is composed of small, regional and large banks that together employ approximately 2.1 million people, safeguard $18.8 trillion in deposits and extend $12.5 trillion in loans.*
[2] 89 Fed. Reg. 22060 (March 29, 2024).

place.[3] ABA's comments here should not be construed to condone any actions taken by the Agencies in connection with the Final Rules. The Interim Final Rule addresses drafting oversights and transition-related concerns associated with the Final Rules' rolling applicability dates. Equally important, the Interim Final Rule, which also makes a number of technical corrections, underscores the complexity of the Final Rules and provides several "lessons learned" for the future (whether for the Final Rules or for any other rules that the Agencies may propose).

ABA Position

We are concerned by the circumstances surrounding the Interim Final Rule's extension of the April 1, 2024 applicability date. The FBAA, public file, and public notice provisions should have been the most simple and straightforward requirements in the Final Rules. Unfortunately, drafting oversights, including the following, created ambiguity and confusion:

- Both the FBAA and the public file requirements, which would have been applicable on April 1, 2024, contain provisions and terms that will not be applicable until January 1, 2026. For example, the public file requirement includes defined terms—"retail lending assessment areas"; "operations subsidiaries"; "operating subsidiaries"; "large bank" and "small bank"—that do not apply until January 1, 2026.

- Similarly, the FBAA requirements would have utilized the legacy CRA Rule's asset size classification thresholds for Large, Intermediate Small, and Small Banks because the Final Rules' asset size definitions will not be applicable until January 1, 2026. As a result, some Large Banks would have been required to delineate FBAAs consisting of full counties beginning on April 1, 2024, but those banks would be reclassified as Intermediate Banks a mere 20 months later—on January 1, 2026—and the full-county requirement would no longer apply to them.[4] The swings in regulatory treatment would have created unnecessary disruption and uncertainty for these community banks.

- A related issue involved the public notice requirement in §__.44, which was slated to be applicable on April 1, 2024. However, appendix F, which contains the language for the CRA Notice, is not effective until January 1, 2026. Therefore, according to the applicability dates and transfer provisions contained in § __.51, banks would need to utilize the public notice language contained in the legacy CRA rule. This would be problematic because the notice in the legacy rule would not be accurate since it directs the reader to the physical location of the bank's public file even though the Final Rules provide that banks that maintain the public file on their website are no longer required to maintain a physical copy of the public file.

- Finally, the FBAA delineation criteria that would have been applicable on April 1, 2024 would have resulted in bank CRA performance being evaluated based on different FBAA delineation requirements within a single calendar year. Specifically, the assessment area

[3] *See Tex. Bankers Ass'n v. Off. of the Comptroller*, No. 2:24-CV-025-Z-BR, 2024 WL 1349308 (N.D. Tex. Mar. 29, 2024).

[4] Under the legacy CRA Rule, Intermediate Small Banks are defined as banks as having between $391 million - $1.564 billion in assets and Large Banks are defined as having more than $1.564 billion in assets. Under the new CRA Rules, an Intermediate Bank is defined as having $600 million - $2 billion in assets and a Large Bank is defined as having more than $2 billion in assets.

delineation criteria under the existing CRA rule would have applied from January 1 – March 31 and the requirements for designating FBAAs under the Final Rules would have applied from April 1 – December 31. This raised numerous questions about how the Agencies would meld the two regulatory frameworks when examining a bank's CRA performance, particularly for Large Banks that do not currently delineate full-county assessment areas as required under the Final Rules. Prior to issuing the Interim Final Rule, the Agencies had not addressed how they planned to handle this transition issue.

We further note that the Agencies revised the applicability date for the FBAA, public file, and public notice provisions a mere seven business days before they were slated to go into effect. This created a situation where some banks scrambled to unwind implementation-related changes that bank boards of directors had already approved or that management had already put into effect. This was unproductive and time-consuming for both boards of directors as well as regulatory and compliance staff who are juggling a myriad of new rules, guidance documents, and regulatory proposals.

In sum, we support modifications to the applicability dates for the FBAA, public file, and public notice provisions in the event that the Final Rules take effect. But, the challenges associated with implementation of these comparatively simple aspects of the Final Rules underscore broader problems with far more complex implementation requirements that the Agencies have sought to impose in the Final Rules.

Looking Ahead

The circumstances surrounding the Interim Final Rule provide valuable lessons regarding the importance of providing guidance and training for bankers and examiners.

First, the Agencies should respond to bank inquiries in a timely and coordinated manner. ABA members raised several questions pertaining to the Final Rules' public file and FBAA provisions, some of which ABA shared with the Agencies on February 5, 2024. However, to date, the Agencies have not publicly addressed these topics. A list of questions about the FBAA and public file provisions is attached to this letter.

Second, aligning the 2024 and 2026 applicability dates will provide the Agencies with time to train examiners on the Final Rules so that—if the Rules were ultimately to take effect—examiners are prepared to answer questions from the banks that they regulate. Many members of ABA's CRA Working Group reported that their examiners were unable to respond to questions about the FBAA, public notice, and public file requirements prior to the initial April 1, 2024 applicability date because they had not received training on the Final Rules. And, in some cases, examiners provided conflicting responses to banker inquiries.

Third, the Agencies should consider the complexity of the rules that they issue. It is now abundantly clear that the Final Rules were so complex and contained such radical changes that even the Agencies did not fully appreciate the ambiguities and inconsistencies embedded in them. In short, the Agencies tried to do too much.

Should the Agencies have any questions about our comments, please contact the undersigned at kshonk@aba.com.

Sincerely,

s//Krista Shonk
Krista Shonk
SVP & Sr. Counsel
Fair and Responsible Banking

Attachment

Appendix: Questions and Issues Presented by the CRA Final Rule

ABA's CRA Working Group has identified the following questions and concerns presented by the Final Rules' Facility-Based Assessment Area (FBAA) and public file requirements.

Facility-Based Assessment Areas

1. Substantial Portion

Section __.16(b) of the Final Rules provides that a bank's FBAA must include each county in which the bank has a main office, a branch, or a deposit-taking remote service facility, as well as the surrounding counties in which the bank has originated or purchased a substantial portion of its loans (emphasis added). The Final Rule does not define or explain the "substantial portion" standard.

It is not a new concept for a bank to add to its assessment area surrounding areas where the bank has originated or purchased a substantial portion of loans. In fact, the legacy CRA rule requires that a bank include "surrounding geographies" where it has originated or purchased a substantial portion of loans. This standard differs from the Final Rules, which require banks to include "surrounding counties" where a bank has originated or purchased a substantial portion of loans. Neither the legacy rule nor the Final Rules explain what constitutes a "substantial portion."

The Final Rules' new requirement that FBAAs be comprised of a full county necessitates that regulators clarify the substantial portion standard. Delineating additional counties (as opposed to more limited geographies) would significantly increase the geographic size of a bank's FBAA and a bank would need to prepare accordingly. In addition, some banks have expressed interest in consolidating the number of assessment areas that they must manage under the Final Rules and are seeking regulatory confirmation that it would be permissible to include as part of the bank's FBAA an adjacent county where the bank does not have a branch location, even if that county would otherwise trigger an RLAA designation.

Clarifying the substantial portion standard would also ensure that examiners apply this term consistently. Some examiners have told ABA members that a "substantial portion" means more than 50 percent of a bank's loans; other examiners have told banks that they do not know how a "substantial portion" is determined and acknowledged that absent regulatory guidance, banks have flexibility in determining what constitutes a "substantial portion."

2. Contiguous Counties and Single MSAs

It has been common practice for banks to combine into a single assessment area all counties in a State that are not in a metropolitan statistical area (MSA), even if those counties are not contiguous. However, under the Final Rules, a Large Bank's FBAAs must consist of a single MSA, one or more

contiguous counties within an MSA, or one or more contiguous counties within the nonmetropolitan area of a State.

The requirement that counties be contiguous has prompted a large volume of questions from ABA members. Below are common scenarios presented by these questions. Often, these questions arise as banks grapple with managing and tracking an increased number of FBAAs and are looking for opportunities to streamline the burden created by the contiguous county and single MSA requirements.

a. Scenario 1. Green County is an MSA where the bank has branches. The bank also has branches in the non-MSA counties of Oak County (immediately to the east) and Maple County (immediately to the West). Oak and Maple counties are not contiguous. How should Oak and Maple counties be treated under the new rule? Should they be combined into a non-MSA FBAA? Or, should each have its own FBAA designation?

b. Scenario 2. Best Bank is located in Oak County and has a branch near the county line. The branch is located in an MSA that consists of only Oak County. In prior years, Best Bank has included Maple County in its assessment area. Maple County is contiguous to Oak County and is part of the larger combined statistical area (CSA), but is a separate MSA. Under the Final Rule, is Best Bank prohibited from taking Maple County as part of its FBAA since it is located in a separate MSA?

c. Scenario 3. Best Bank has branches in Oak County and Maple County. These counties are located in the same State and are contiguous, but are located in different MSAs. In this scenario, must Best Bank delineate two separate FBAAs?

3. MSA Counties Without Branches

Today, some banks define their assessment areas by MSA, but do not have branch locations in all of the counties located in that MSA. Several banks who have adopted this practice have inquired whether the Final Rules permit a bank to continue to delineate an FBAA as an entire MSA where it has a branch even though the MSA includes several contiguous counties where the bank does not have a branch location.

4. Metrics-Based Approach for Single-Branch Counties

The Final Rules require Large Banks to designate full counties for their FBAAs; partial counties are no longer permitted. Many banks are concerned about the full-county requirement—particularly in situations where the bank has a single branch that is located just across the county line or where a

county encompasses a large geographic area. In some cases, the full-county requirement will significantly expand the geographic area covered by an FBAA and it may be difficult for a bank to achieve strong CRA performance when it does not have a physical presence that is in close proximity to much of the county.

The preamble to the Final Rules states that the agencies will take these circumstances into account as part of a bank's performance context. However, the preamble does not discuss how performance context will apply or the extent to which examiners will have discretion to consider it as part of the Final Rules' metrics-based approach to evaluating a bank's CRA performance.

Public File

1. ADA Compliance

A bank that maintains a public website would have been required to place its public file on the website by April 1, 2024. The Interim Final Rule appropriately extends this requirement to January 1, 2026. As banks were working to implement this provision, a common question was whether a bank's public file must comply with website accessibility requirements per the Americans with Disabilities Act (ADA). Title III of the ADA requires banks and other public accommodations to provide accessible facilities and to take steps to communicate effectively with customers with disabilities. This requirement also applies to a bank's website. The federal banking agencies do not enforce ADA compliance, and the Final Rules are silent at to accessibility issues. While the banking agencies will not examine a bank's public file for ADA compliance, ADA requirements are enforceable by the Department of Justice and private parties.

Of particular concern is the possibility that documents in the public file (e.g., assessment area maps) may not be compatible with screen readers. To address this issue, some banks have considered conducting an ADA review and others are evaluating whether to provide a disclaimer or an accessibility statement instructing readers to contact the bank for assistance if they encounter an accessibility barrier. This is an example of the practical issues that the Final Rules raise, but that the Agencies do not appear to have considered.

2. Timing Requirements for the Public File

Many banks are confused by and have raised questions about the timing requirements for the Final Rules' public file provisions.

Section __.43(e) of the Final Rules describes the timing requirements regarding the information to be included the public file. It states that "except as otherwise provided in this section, a bank must ensure that its public file contains the information required by this section for each of the previous three calendar years…." However, two of the public file elements—written comments from the

public and the list of branches opened or closed—must include information for "the current year (updated on a quarterly basis for the prior quarter by March 31, June 30, September 30, and December 31) and each of the prior two calendar years."[1]

The preamble to the Final Rules suggests that the Agencies intended to create varying timing standards for certain types of public file information.[2] Nevertheless, it is important that the Agencies be aware of the confusion that these differences have created.

Additionally, bankers have flagged as ambiguous the timing requirements for updating the public file as it pertains to branches open or closed as well as written comments received from the public. Banks must update this information "on a quarterly basis for the prior quarter by March 31, June 30, September 30, and December 31 and each of the prior two calendar years."[3]

ABA members have discussed to two potential interpretations of this requirement. Examiners have instructed multiple ABA members to include the list of branches opened or closed and written comments received from the public on a quarterly basis for the prior quarter—meaning, for example, that by March 31st, all comments received in 4Q of the prior year would be included in the public file (and not yet those received through 1Q). Under this approach, the information would lag by one quarter. Other members, however, are of the view that on March 31st a bank would update the public file to include all of Q1 for that year and there would be no lag time.

[1] § __.43(a)(1) and §__.43(a)(4).
[2] 89 FR 7085.
[3] § __.43(a)(1) and (4).