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Re: Joint Notice of Proposed Rulemaking, Community Reinvestment Act; Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Reserve System (87 Fed. Reg. 33,884 – 34,066, June 3, 2022)

To Whom It May Concern:

The U.S. Chamber of Commerce ("the Chamber") appreciates the opportunity to comment on the joint notice of proposed rulemaking ("NPR") on the Community Reinvestment Act ("CRA") by the OCC, Board, and FDIC ("Agencies"). We also appreciate the interagency coordination on the proposal that we requested with other organizations in a letter in 2021.[1]

CRA's Purpose and the Evolution of Banking

The Community Reinvestment Act, enacted in 1977, was landmark legislation designed to encourage financial institutions "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."[2] The CRA has been a cornerstone of banking ever since and has helped banks meet the needs of communities across the United States. The Chamber supports the goals of the CRA and believes that access to safe and affordable credit is central to achieving the American dream and ascending the economic ladder. Our members work tirelessly to "serve the convenience and needs"[3] of their communities and to fulfill the overarching goals of the statute.

In over 40 years since CRA was enacted, the banking landscape has undergone monumental changes. Technological advancements like the internet and smart phones have led to a revolutionary rise in mobile banking, radically altering how customers interact with

[1] Joint Trades Letter to OCC on Joint Rulemaking on CRA (February 2021). Found at: https://bpi.com/wp-content/uploads/2021/02/Financial-Trade-Associations-Joint-Comment-to-OCC-Thresholds-NPR-Final-2021.02.02.pdf
[2] 12 U.S.C. § 2901(b).
[3] 12 USC §§2901(a)(1) and (3).

banks. A recent survey found that 78 percent of banked Americans prefer to bank digitally.[4] Additionally, the proliferation of nonbank financial institutions has diminished banks' share of the market, and many consumers are getting their mortgages and small business loans from non-banks.

Overarching Concerns with the NPR

CRA regulations play a significant role in banks' operations and are extremely consequential for the communities they serve. Banks are committed to advancing the purposes of the CRA, but they will have to make significant changes to systems, training, and compliance monitoring to adjust to any new CRA regulations. While we appreciate the attempt to update CRA regulations, we feel that the NPR in its current form would create substantial unnecessary challenges for banks while also imposing detrimental impacts on communities.

One of the problematic, overarching themes of the NPR is the presumption that banks have not been doing enough to achieve the goals of the CRA as currently enacted. In a recent speech, FDIC Acting Chairman Martin Gruenberg stated that "currently illegal or discriminatory credit practices are a potential basis for downgrading a bank's CRA rating. These criteria would be retained and expanded so that all discriminatory practices, *whether or not they are tied to the provision of credit*, could be a basis for possible downgrade."[5]

The agencies seem intent on downgrading banks by making it more difficult to receive passing scores and have expanded the bases on which they can downgrade large banks with "new barriers to achieving 'outstanding ratings,' which could lead to *reduced* incentives to strive for such ratings, and thus, undermine the goals of the CRA."[6] Downgrades can occur for more situations under the NPR, such as fair lending concerns, which is not a factor in the current rule. Additionally:

> "by imposing significant barriers to many large banks receiving 'outstanding ratings,' there could be reduced incentives to strive for such ratings, and thus, undermine the goals of the CRA. Of significant concern, certain tests under the proposal would compare banks' performance to benchmarks that they would never know in advance, raising due process and fairness concerns. Banks should be able to know the benchmarks against which they will be evaluated in advance of the applicable performance period.[7]"

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[4] Digital Banking Survey: How Americans Prefer to Bank, Forbes Advisor (March 8, 2022). Found at: https://www.forbes.com/advisor/banking/digital-banking-survey-2022/#:~:text=Survey%20methodology%3A%20Ipsos%20surveyed%20916%20respondents%20aged%2018,mobile%20banking%20features%20within%20the%20last%20year.%20partners

[5] Remarks by FDIC Acting Chairman Martin Gruenberg to the National Community Reinvestment Coalition (June 13, 2022. Found at: https://www.fdic.gov/news/speeches/2022/spjun1322.html

[6] Bank Policy Institute press release on House Financial Service hearing (July 12, 2022). Found at: https://bpi.com/bpi-supports-cra-lending-goals-cautions-new-proposal-may-stray-from-the-laws-core-mission/

[7] Bank Policy Institute letter to House Financial Services Committee (July 13, 2022). Found at: https://bpi.com/wp-content/uploads/2022/07/BPI-Statement-for-the-Record-on-CRA-Reform-2022.07.12.pdf

The Agencies have introduced multiple new standards for banks but have not presented a strong, evidence-based argument for their inclusion. The Agencies should present clear evidence that wholesale change to measuring CRA activities is justified and will benefit banks' communities. Significant changes to metrics should be supported by a strong factual basis indicating that they will create meaningful net benefits compared to the status quo. The Agencies, consequently, should continue to study how best to measure CRA activities. If the Agencies proceed with proposed revisions, they should issue any revised performance metrics for public comment, along with the data supporting the move to the proposed approach.

<u>Recommendations to Improve the NPR</u>

I. Expand CRA-Qualifying Activities to Better Serve LMI Consumers

The Chamber appreciates the NPR's inclusion of a non-exhaustive list of activities eligible for CRA consideration. In previous comments, the Chamber has recommended assigning additional weight to CRA activities that are difficult for banks to meet in order to incentivize investment in the areas that need it most and recommended a non-exhaustive list of activities that would fall under this requirement for the public to assess. Banks want to have the assurance that the investments they make will receive credit when they make the investment. They do not want to be uncertain when they make an investment whether it will receive CRA credit.

Community Development Definition

The NPR notes that "activities with a primary purpose of community development, as proposed, would receive full CRA credit for the Community Development Financing Test and Community Development Services Test."[8] While we appreciate the expansion of "community development purposes" from four to eleven activities, we still believe the rule could be broader and allow for more kinds of activity. Particularly, we appreciate the inclusion of "essential community infrastructure activities" as meeting this test. However, we still believe that the requirement to work in conjunction with an existing government plan, program, or initiative is too narrow and may exclude some activities that could benefit LMI customers. As we noted in our 2018 letter on the OCC's ANPR on CRA, "banking regulators should give credit for community development if activities benefit LMI consumers, not simply if it falls under the rigid 'primary purpose' test…Even if these investments may not have a 'primary purpose' of community development, they would greatly benefit the LMI consumers the CRA was created to serve."[9]

II. Continue to Allow CRA Credit for Job Creation and Economic Development

The NPR greatly reduces the activities that would qualify as "promotion of economic development by financing small businesses." Specifically, the NPR would delete the "job creation, retention, and/or improvement" method in its entirety and instead requires affiliation with some kind of "federal, state, local, or tribal government plans, programs or initiatives," specifically listing SBA Certified Development Companies, Small Business Investment

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[8] NPR at 33892.

[9] U.S. Chamber of Commerce Center for Capital Markets Competitiveness Comments on OCC ANPR, "Reforming the Community Reinvestment Act Regulatory Framework" (November 2018): 9.

Companies (SBICs), etc. We have previously addressed this issue in depth in response to the OCC/FDIC's 2020 NPR that proposed elimination of the "jobs creation, retention, and/or improvement" for LMI persons, in LMI areas, and in areas targeted for redevelopment, and we incorporate those arguments herein.[10] This result is problematic because it is essentially stating that the government has to be involved in order for economic development to occur, disregarding the critical role that private enterprise and commerce have played for decades in economic development. Also curious is that the Agencies expanded the "job creation" component in 2016, and then three years later attempted to delete it without even acknowledging the 2016 expansion. Additionally, the current NPR does not reflect any of the stakeholder feedback that strongly opposed the attempted deletion.

Bank investments in small-business job creation can provide enormous benefits for local communities, and banks have historically received CRA credit for such activities that advance the statute's purposes. While the Agencies intend to continue to support this goal, they would retain only a limited list of specific activities as qualifying for CRA credit. The Chamber believes the Agencies should retain a separate component for job creation, retention, and improvement for LMI individuals and in LMI areas as part of the economic development definition (NPR Question 13).

Specifically, any final CRA rule should continue to allow banks to receive CRA credit for activities that support job creation, retention, and/or improvement:

1) by financing (either directly or through an intermediary) small businesses that meet the current "size" test (the eligibility standards of the U.S. Small Business Administration (SBA) SBDC or SBIC programs, and the current "purpose" test (set forth in the Interagency CRA Questions & Answers at Section ___.12(g)(3) – 1.);

2) by documenting support for permanent job creation, retention, and/or improvement for LMI persons, in LMI geographies, in areas targeted for redevelopment by federal, state, local, or tribal government; or

3) by financing intermediaries that lend to, invest in, or provide technical assistance to start-ups or recently formed small businesses.

The NPR *would* give CRA credit for "activities that support *financial intermediaries* that lend to, invest in, or provide technical assistance to business or farms with gross annual revenues of $5 million or less"[11] but does not define what "support" means. The Agencies should specifically state that "support" includes a bank's loans to, investments in, and services for these financial intermediaries. Additionally, the Agencies should clarify that for such financial intermediaries, the size of the small business is determined at the time of initial investment. The purpose of capital for small businesses is to grow the business, and businesses should not be disqualified for CRA credit if they grow beyond $5 million in gross annual revenues.

[10] U.S. Chamber of Commerce Center for Capital Markets Competitiveness Comments on FDIC and OCC NPR on "Community Reinvestment Act Regulations," (April 8, 2020) at pp. 7-9.
[11] NPR at 33900

The Chamber also recommends that the Agencies add back a similar provision regarding financial intermediaries that lend to, invest in, or provide technical assistance to businesses or farms (1) with gross annual revenues of $5 million or more but still within the "size" eligibility standards of the SBDC or SBIC Programs, and (2) that meet the "purpose" test by supporting job creation, retention, and/or improvement (a) for LMI people, (b) in LMI communities, or (c) in redevelopment areas.

The Agencies should also retain the current regulatory guidance that provides that "examiners will employ appropriate flexibility in reviewing any information provided by a financial institution that reasonably demonstrates that the purpose, mandate, or function of the activity meets the "purpose test." This would include lists of the number of jobs created, retained, an/or improved for LMI people or in LMI areas, relevant income data, the date the company was incorporated, etc., all of which banks have used successfully for several years to receive CRA credit. Regarding the requirement not to "displace or exclude" LMI residents, it would be difficult for banks to document and would essentially require them to "prove a negative."

Additionally, banks need flexibility in making determinations with regard to "naturally occurring affordable housing" with the threshold raised from 60% to 80% AMI and as high as 120-140% AMI for high-cost areas.

III. Assessment Areas and Retail Lending

The Chamber appreciates the NPR's realization of the changes in the banking landscape since the CRA's enactment and its attempts at expanding areas in which banks receive credit. The Chamber also appreciates that the NPR seeks to allow for CRA credit in areas where banks do not have physical locations, which is a needed update to keep up with the significant technological advancements since the CRA's enactment.

As we have noted, "institutions should be permitted to receive credit for activities outside their assessment area or LMI communities if they can demonstrate they are CRA-qualifying activities."[12] However, "because it takes time and dedicated resources to build meaningful CRA infrastructure in a given geography, banks may be disincentivized from offering lending products in many places outside their facility-based assessment areas where they lack the resources. As a result, underserved communities could suffer from a constriction in the availability of credit, frustrating further the very purpose of the CRA."[13]

Keeping the proposed retail lending assessment areas (RLAAs) in a final rule will make CRA compliance extremely complex and burdensome. The agencies proposed the RLAAs as a means to better evaluate activity outside of the branch footprint, but banks will need to add a significant number of new assessment areas, which could lead to unintended consequences that will not benefit LMI consumers because banks may pull back lending to minimize the creation of new RLAAs. The Chamber believes evaluating out-of-footprint lending at the

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[12] U.S. Chamber of Commerce Center for Capital Markets Competitiveness Comments on OCC ANPR, "Reforming the Community Reinvestment Act Regulatory Framework" (November 2018): 6.

[13] Bank Policy Institute press release on House Financial Service hearing (July 12, 2022). Found at: https://bpi.com/bpi-supports-cra-lending-goals-cautions-new-proposal-may-stray-from-the-laws-core-mission/

institution level satisfies the regulators' goals for evaluating lending beyond facility-based assessment areas, without the need to add RLAAs, and would still represent a significant expansion in the current evaluation process that the agencies seek, while helping the industry manage the additional burdens that will result.

Retail Lending Test

According to Acting FDIC Chairman Martin Gruenberg, the new Retail Lending Test formula will "raise the bar for CRA performance on the retail lending test in order for a bank to earn an outstanding or high satisfactory rating."[14] While the intent of this change is to provide an incentive for increased bank lending to underserved communities, we have significant concerns with some of the major changes to the Retail Lending Test and believe that many of them could actually have the opposite effect of the statute's intention and could hamper lending in LMI areas. We appreciate the attempt to implement a metrics-based approach and believe that, if implemented correctly, it could introduce more simplicity and predictability to the process. However, we feel that the Retail Lending Test is too heavy on quantitative metrics and leaves little room for qualitative analysis.

Under the new Retail Lending Test evaluation framework in the NPR, large banks' retail lending will account for 45 percent of a bank's score. Banks will be assigned a conclusion and performance score. For example, the agencies could assign a bank a conclusion of High Satisfactory and a performance score of 6.8 for the Retail Lending Test. Banks will receive a performance score on each of the six product lines in the Retail Lending Test, and Agencies will then arrive at a single performance score by calculating a weighted average of the bank's scores on each product line. Banks will receive a similar score for the other performance tests, and these will be averaged for an overall score. We believe that banks should be able to combine product categories and have options to choose them. This would help reduce burdens in connection with the data collection requirements.

The Chamber also feels that retail lending is over-indexed under this new formula, which is inconsistent with statute because it is no longer tethered to a physical location. The change to 45% from the previous 50% has materially increased expectations for banks and has placed an inordinate emphasis on retail lending because it removes community development lending from the Retail Lending Test. In order to get a Satisfactory score under the current metric, a bank would almost certainly have to achieve it via the Retail Lending Test. This is problematic because no large bank would earn an Outstanding rating on this test, which is 45% of overall rating, so they would not be able to get Outstanding overall. We fear this could lead to a "race to the bottom" with banks no longer striving to be Outstanding and accepting a Satisfactory score, which means less service to LMI communities and individuals.

We also have concerns with the new Retail Lending Volume Screen, which we feel should be incorporated into the Retail Lending Test rather than being a separate screen. This screen measures "the total dollar volume of a bank's retail lending relative to its presence and

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[14] Statement by Martin J. Gruenberg, Acting Chairman, FDIC Notice of Proposed Rulemaking on Community Reinvestment Act Regulations (May 5, 2022). Found at: https://www.fdic.gov/news/speeches/2022/spmay0522.html

capacity to lend in a facility-based assessment area compared to peer lenders."[15] By using the dollar amount, this will have a negative impact on small business lending, which is a smaller portion of some large banks' loan portfolio. It is also concerning that, when taking a benchmark of all banks, a particular bank's loans must be at 30% of what the market is doing. If there is more market penetration in that area, it will be more difficult to meet the 30% threshold, and the bank will receive a failing score. Additionally, holding government and large corporate/commercial deposits could also skew the screen calculation and should be excluded.

Additionally, the NPR will implement benchmarks and compare banks to their peers, but the benchmarks will not be published until the end of the year, which would be too late for most banks to adjust. This is unfair, and the agencies recognize this in the NPR, yet the test inexplicably remains. We ask for more flexibility, to allow for changes to economic business cycles and differences in loans and investments due to the significant variance in real estate prices across the country. Under the current proposal, banks could be incentivized to make investments that are not safe and sound in order to meet a particular metric.

The Chamber also supports the view that determining major products should be at the institution level vs. the assessment area (AA) level for the facility-based AA and the RLAA, if those are included in the final rule. Purchased loans should also be included, at least the first purchased loan. For example, one benefit of allowing first purchased loans is that some banks work with state housing finance programs where the bank is a master servicer, which helps provide service to LMI areas. We would also like more flexibility than what the proposal provides for qualifying mortgage-backed securities (MBS). In some situations, it is difficult to determine the origin of the loans in an MBS pool. Also, we have concerns with the inclusion of auto lending, especially indirect auto, which may cause banks to step back from that line of business. Banks have little control in how dealers present their bank as a financing option for auto loans or which lender a purchaser chooses.

In our 2018 letter to the OCC, we urged regulators "to exercise caution when developing a standardized approach to ensure there is the necessary flexibility for complex CRA assessments and that unintended consequences are minimized."[16] These fears have been realized with the metrics-based approach put forward in this NPR.

IV. Retail Products and Services Test

The Chamber supports the approach of using qualitative vs. quantitative factors for the Retail Products and Services Test, as the metrics are needlessly complex and do not add value in measuring bank performance. If statistics are used, banks should be allowed to explain when efforts fall short. As to the provisions that refer to extended and weekend hours, there must be consideration for different business models. The Chamber also opposes the collecting and reporting of income on deposit accounts as banks currently do not have this information, and it would have to be updated regularly to be meaningful. Additionally, we

[15] NPR at 33934

[16] U.S. Chamber of Commerce Center for Capital Markets Competitiveness Comments on OCC ANPR, "Reforming the Community Reinvestment Act Regulatory Framework" (November 2018): 8.

would like for the Agencies to preserve the option of tracking services to LMI individuals who use non-LMI branches.

V. Provide for Greater Flexibility when Assigning CRA Credit.

While the Chamber appreciates the NPR's stated objective to "tailor performance standards to account for differences in bank size and business models and local conditions,"[17] we note that the financial services landscape has undergone revolutionary changes since the enactment of the CRA. Mobile banking now accounts for more than half of all banking transactions, and non-bank lenders have made their mark on the mortgage and small business lending markets.

We ask the banking regulators to clearly define any activities that would receive extra credit and that are "particularly innovative, complex, or impactful on the bank's community."[18] As we noted in our 2018 letter:

> "An institution's business model might be aimed at expanding a product that has robust benefits for LMI communities, but the institution is still required to meet the rigid metrics and receives minimal credit for alternative approaches. We ask the banking regulators to support alternative approaches in serving LMI communities, instead of disincentivizing institutions from investing in new products. By providing flexibility to institutions based on both market realities and business model, banks will be incentivized to create new and innovative products that will better serve LMI communities."[19]

VI. Maintain the Use of Strategic Plans in the Current CRA Framework

The CRA regulations long have recognized that banks come in all shapes and sizes. For example, certain banks with untraditional business models do not fit readily into the traditional model contemplated by the CRA. The CRA regulations allow these banks to develop strategic plans that are subject to public comment from the community and approval of the regulators. These plans allow the banks to achieve the goals of the CRA in a manner that best serves the unique needs of the communities where they are chartered and that makes sense within the context of their businesses.

We have received significant positive feedback on the use of strategic plans due to the open dialogue between regulators and banks. We urge the banking regulators to maintain the option for institutions to produce a strategic plan with their regulator that is in the current framework.

VII. Ensure that Exams are Transparent and Consistent

Institutions need consistent standards so they know what guidelines they must meet before the exam begins. We urge the banking regulators to notify institutions where the banks

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[17] NPR at 33885.
[18] Ibid.
[19] U.S. Chamber of Commerce Center for Capital Markets Competitiveness Comments on OCC ANPR, "Reforming the Community Reinvestment Act Regulatory Framework" (November 2018): 5.

can receive credit and what activities can receive credit before investments are made and before the exam begins. Open dialogue between the bank and its regulator is critical to ensuring banks are making the correct types of investments in the correct areas. Further, we advocate that exam procedure changes should be prospective, not retroactive, and that new exams should not begin until the institution has received its last exam's performance evaluation and has had time to implement any associated enhancements. Also, banks should not be subject to split evaluation where, depending on their exam cycle, they are evaluated under the old rule for Year 1 but the new rule for Years 2 and 3. We suggest that banks be subject to the same rule for their entire exam cycle.

VIII. Data Collection, Reporting Requirements, and Implementation

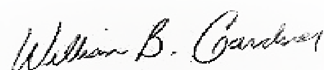
The Agencies have introduced very extensive data collection and reporting requirements that will be expensive and may create new data security risks, and have not established that the significant burdens and risks imposed by the contemplated data collection and associated reporting are outweighed by the incremental benefits. Consequently, the Agencies should not require large scale data collections as part of any final rule—or at least should not do so without a detailed cost-benefit justification based on a thorough evaluation of the practical value of the data that will be collected.

The Chamber would welcome any changes that would reduce burdens. Specifically, we feel that information should not be reported more often than annually, and that reporting should start at the beginning of calendar year with no partial-year data reporting.

Finally, regarding implementation of a final rule, banks would need at least two years instead of the proposed one year to implement, as new systems would need to be developed. Banks would have to conduct extensive staff training and would need to rely on vendors, meaning that much of the implementation would be out of their control. We strongly encourage the Agencies to extend the implementation timeline.

The Chamber thanks you for the opportunity to comment on this NPR, and we look forward to engaging with you in the future.

Sincerely,



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