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Submitted via Regulations.gov

October 29, 2021

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

RE: COMMUNITY REINVESTMENT ACT REGULATIONS [Docket ID OCC-2021-0014; RIN 1557-AF12]

Dear Sir or Madam,

The Independent Community Bankers of America (ICBA)¹ appreciates this opportunity to provide feedback to the Office of the Comptroller of the Currency's (OCC) request for comments in response to its Notice of Proposed Rulemaking (NPR)² on rescinding its 2020 Community Reinvestment Act (CRA) rule.³ This proposal would replace the OCC's 2020 CRA rule "with rules based on the 1995 CRA rules, as revised, issued by the OCC, Board of Governors of the Federal Reserve System (Federal Reserve), and Federal Deposit Insurance Corporation (FDIC)."⁴

Community banks are dedicated to meeting the financial services needs of the communities they serve. CRA's guiding purpose, to ensure that low- and moderate- income (LMI) individuals have access to credit, is central to community banks' mission because community banks do not succeed unless their entire community succeeds. However, due to changing laws and technology, the banking industry looks very different today than it did when the 1995 CRA framework was adopted. Therefore, ICBA has generally supported the modernization of CRA regulations by the prudential regulators and commends the OCC for being at the vanguard of this effort.

¹ The Independent Community Bankers of America creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties.

² 86 Fed. Reg. 52026, available at: <https://www.govinfo.gov/content/pkg/FR-2021-09-17/pdf/2021-19738.pdf>.

³ 85 Fed. Reg. 34734.

⁴ 86 Fed. Reg. 52026.

Nevertheless, we share the OCC’s opinion that, while the 2020 rule was an important step in the modernization of CRA, its “implementation revealed ... some of the rule’s complexities and demonstrated where there were opportunities for improvement.”⁵ **We further agree with the OCC that the most significant challenge associated with the implementation of the 2020 rule was its increased data collection and reporting requirements.** Additional data collection and reporting requirements have a disproportionate impact on community banks and make it more difficult for small institutions to serve their communities. The lessons learned from the OCC’s 2020 rule, along with the Federal Reserve’s October 2020 Advanced Notice of Proposed Rulemaking⁶ and the comments submitted by stakeholders, will serve as a good starting point for an interagency effort to create a robust and lasting modernization of CRA.

ICBA Position

ICBA remains generally supportive of efforts to modernize CRA regulations to ensure they continue to reflect the changes to the banking industry, including those driven by technology. We support an interagency framework which considers both quantitative and qualitative factors designed to increase the transparency and consistency of CRA exams. **We support the OCC’s decision to rescind the 2020 rule, which is inoperable in its current state, but believe that an outright return to the 1995 standards would be disruptive to the banking industry.**

Therefore, we urge the OCC issue a final rule that adopts the portions of the OCC’s 2020 rule that had a compliance date of October 1, 2020 and reinstates the 1995 rule for the 2020 rule provisions for which the compliance dates have not yet occurred. This compromise would allow banks to use the newly implemented small and intermediate small bank thresholds of \$600 million and \$2.5 billion, respectively. It would also allow banks to a) continue to rely on the revised qualifying activities criteria, the list of qualifying activities and associated confirmation process, b) maintain strategic plans approved under the 2020 CRA Rule, c) continue to designate partial geographies that do not arbitrarily exclude LMI census tracts as assessment areas, and d) retain their updated notices and public files.

We further support the OCC’s commitment to working with the Federal Reserve and FDIC to reach agreement on a joint proposal and eventual final rule. **A consistent regulatory framework shared between the prudential regulators is the most critical aspect of a lasting CRA reform.** A uniform rule makes CRA ratings more easily understood by consumers and allows for true apples-to-apples comparisons of CRA ratings. Additionally, a uniform rule is fairer to regulated banks and prevents financial institutions, both existing or de novo, from engaging in regulatory arbitrage or charter shopping or selecting the regulatory agency whose framework is perceived to be most advantageous to their business model.

⁵ 86 Fed. Reg. 52030.

⁶ 85 Fed. Reg. 66410.

While we support a transitional rule that allows banks to rely on any aspect of the 2020 rule that has already gone into effect, we acknowledge that this is not the approach the agency has proposed. The agency is instead proposing a rule that is, in many respects, a complete reversion to the 1995 rule, for the purpose of providing “consistency throughout the banking industry” and “facilitat[ing] an interagency rulemaking process.”⁷ If the OCC chooses to proceed with a more complete return to the 1995 standards, we urge the OCC to consider our specific recommendations regarding the small bank asset thresholds, qualified activities list, and the delineation of assessment areas.

Bank Type Changes/Asset Thresholds

The OCC’s 2020 rule raised the small bank threshold to \$600 million in assets and the intermediate small bank (ISB) threshold to \$2.5 billion in assets. Under the 1995 standard, as proposed in the NPR, certain ISBs that became categorized as small banks and certain large banks that became categorized as ISBs as a result of the 2020 rule “would transition back to their prior bank type.” These thresholds are currently \$330 million for small banks and \$1.322 billion for ISBs.

As ICBA contended throughout the rulemaking process leading up to the 2020 rule, the thresholds set by the 1995 rule are too low and do not reflect the current state of the banking industry. When the small and intermediate small bank tests were established in 2005, 92.6 percent of FDIC-insured institutions were below the (then \$1 billion in assets) intermediate small bank threshold. If that percentage were applied to the distribution of bank asset sizes today, the intermediate small bank threshold would be set at \$2.43 billion. Therefore, our analysis indicates that the \$2.5 billion set by the OCC’s 2020 rule is an accurate metric in light of the increasing regulatory burdens faced by small banks and the trend towards industry consolidation.

We urge the OCC to work in concert with the Federal Reserve and the FDIC to develop a rule that appropriately tailors its data collection burden and the scope of its evaluation to community banks. Any interagency rulemaking should include raising asset thresholds from their 1995 levels.

In the interim, we urge the OCC to maintain the \$600 million threshold for small banks and the \$2.5 billion threshold for ISBs established by the 2020 rule. Since these thresholds went into effect on October 1, 2020, small national banks and savings associations have relied upon them and altered their lending and investment activity to reflect being evaluated under a small bank test. A sudden reversion to the 1995 size standards would subject banks currently considered small banks to the investment test and banks currently considered ISBs to the

⁷ 86 Fed Reg. 52031.

services test, for which they may not be prepared and may not have kept the records necessary to demonstrate compliance.

Ultimately, we believe that it is appropriate to reach a final resolution on bank size standards in the subsequent interagency rulemaking. However, a temporary reversion to the 1995 size standards will be disruptive to the banking industry without improving the accuracy of CRA ratings or providing meaningful benefits to consumers.

Qualifying Activities List and Confirmation Process

In its NPR, the OCC is considering whether to “implement a qualifying activities confirmation process based on the community development [CD] definition in the 1995 Rules, as interpreted through the Q&As, while the OCC is working on the interagency CRA rulemaking process.”⁸ The agency is also proposing to “maintain the illustrative list of qualifying activities on its website as a reference for banks to determine whether activities that they conducted while the June 2020 Rule was in effect are eligible for CRA consideration,”⁹ with the caveat that activities included on the illustrative list may not receive consideration if they are conducted after the effective date of the return to the 1995 rules.

ICBA supports the agency’s decision to maintain a qualifying activities list and qualifying activities confirmation process. However, until a joint rule can be finalized, we believe that banks should be able to receive CRA credit based on the criteria in either the 1995 rules or the 2020 rules. While we appreciate the agency’s clarification in the recently issued FAQs that an activity that met the qualifying criteria on the date it was conducted would remain a qualifying activity for the bank that undertook the activity, we still believe that a more flexible approach would be less disruptive to the banking industry. Many banks have not yet updated their recordkeeping and reporting systems to account for the new qualifying activities, but for those that have, it would be burdensome for them to modify these systems again for a second time in two years. Therefore, an interim framework that allows banks to receive credit under both the 2020 and 1995 standards, even after the 2020 rule is rescinded, would be less disruptive to banks that proactively prepared for compliance with the 2020 rule.

We further recommend that both a qualifying activities list and a qualifying activities list confirmation process be included in any interagency modernization effort going forward. Until a joint rule can be finalized, it is appropriate to implement a qualifying activities list and confirmation process as interpretive guidance without codifying it in the rule’s text.

⁸ 86 Fed. Reg. 52034.

⁹ *Id.*

Assessment Area

For most community banks, we believe the location of physical branches is a reliable indicator of the community a bank serves. For this reason, allowing banks to delineate an assessment area based on the location of physical branches is appropriate. Furthermore, we support the OCC's proposal that a bank's "assessment areas would not need to coincide with the boundaries of one or more political subdivisions (e.g., counties, cities, and towns or MSAs), so long as the adjustments to those boundaries reflect the areas that the bank reasonably could serve, meet regulatory requirements, and do not arbitrarily exclude LMI census tracts."¹⁰

In certain counties, for example urban counties with large populations or geographically expansive rural counties, it is not reasonable to expect a bank to meet the credit needs of the entire county simply because it has a single branch in that county. **Therefore, so long as the delineation of assessment areas by banks does not arbitrarily exclude LMI census tracts or reflect illegal discrimination, banks should not be required to delineate entire counties or MSAs as assessment areas.**

In our comment in response to the Federal Reserve's ANPR, ICBA stated that, while retail lending is appropriate to evaluate at the assessment area level, CD should be evaluated at a whole institution level and that banks should be able to satisfy their CD obligations outside of their assessment areas.¹¹ Expanding the evaluation of CD activities beyond the assessment area is one of the most significant steps the agencies can take to reduce the prevalence of "CRA deserts" in areas that have struggled to attract loans and investment. Allowing banks to go beyond their assessment areas will increase access to capital in rural and urban communities that have fewer bank branches.

As the NPR notes, "the 1995 Rules provided that the Agencies may consider CD activities that benefit the broader statewide or regional areas that include an [insured depository institution]'s (IDI) assessment areas. With respect to wholesale and limited purpose institutions, the 1995 Rules provided that the Agencies may consider CD activities nationwide if the IDI had adequately addressed the needs of its assessment areas."¹² By contrast, the 2020 rule provided nationwide consideration of qualifying activities for banks evaluated under the general performance standards. **We urge the OCC to adopt the latter approach and continue to provide nationwide consideration of qualifying CD activities.**

¹⁰ 86 Fed. Reg. 52031.

¹¹ See Independent Community Bankers of America, Comment Letter Responding to ANPR Regarding Modernizing the Federal Reserve's Community Reinvestment Act Regulatory and Supervisory Framework (Docket No. R-1723; RIN 7100-AF94) (Feb. 16, 2020), available at: https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/icba-comment-frb-cra-anpr-2-16-2021.pdf?sfvrsn=50530d17_0.

¹² 86 Fed. Reg. 52034.

Conclusion

Once again, ICBA appreciates this opportunity to provide feedback to the OCC regarding its proposed rescission of the 2020 CRA rule and reversion to the 1995 framework. While the 2020 rule was an important step on the road to CRA modernization, it was complex and would have placed additional data collection burdens on community banks. Most importantly, it was finalized without being joined by the FDIC or the Federal Reserve and would have resulted in a fractured regulatory landscape.

Therefore, we support the OCC's decision to rescind the 2020 rule. However, we urge the agency to adopt a proposal that maintains elements of the 2020 rule that went into effect on October 1, 2020 until a new interagency rule can be implemented. This approach will be less disruptive than fully restoring the 1995 rule and will better accommodate banks that reasonably relied on provisions of the 2020 rule. We continue to support clarification and modernization of CRA and hope that the OCC, along with the FDIC and the Federal Reserve, continue to work with ICBA and other stakeholders to create a consistent and uniform rule.

Please feel free to contact me at (330) 314-4746 or Michael.Marshall@icba.org if you have any questions about the positions stated in this letter.

Sincerely,



Mickey Marshall
Director, Regulatory Legal Affairs