



NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

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Superintendent

November 19, 2018

Comptroller Joseph Otting
Office of the Comptroller of the Currency
400 7th Street SW
Washington, DC 20219

**Re: Reforming the Community Reinvestment Act Regulatory Framework
Docket ID OCC-2018-0008**

Dear Comptroller Otting:

I write as Superintendent of the New York State Department of Financial Services (“NYDFS”) in response to the Office of the Comptroller of the Currency (“OCC”)’s advance notice of proposed rulemaking (“ANPR”) that solicits comments concerning the federal Community Reinvestment Act of 1977 (“CRA”). I appreciate the opportunity to offer NYDFS’s comments on the ANPR given the importance of this essential law to communities across the country and in New York State.

NYDFS is responsible for the overall supervision, regulation and enforcement of laws regarding financial services companies in the State of New York, including all New York state-chartered banks. As a part of that responsibility, NYDFS examines state-chartered banks for compliance with the New York Community Reinvestment Act (“NYCRA”), which largely mirrors the federal CRA. NYDFS also oversees all insurance companies and producers operating in New York, all non-depository financial institutions operating in New York, and all mortgage lenders, originators and servicers for New York mortgage consumers. NYDFS chartered entities and licensees comprise more than 3,500 companies with assets exceeding \$7 trillion, as well as thousands of individuals.

History and Intent of the CRA

In considering the ANPR and any proposed changes to existing rules implementing the CRA, it is important to recall the history and purposes of the CRA. The CRA was enacted in 1977 to address discrimination and lack of access to credit, including “redlining,” a term that dates back to color-coded maps that the federal Home Owners’ Loan Corporation (“HOLC”) developed in the 1930’s to indicate an area’s level of security for real estate investment. The HOLC had graded neighborhoods on a sliding scale, with neighborhoods it deemed riskiest colored red on the maps. A significant majority of those neighborhoods had predominantly minority and/or low- or moderate-income (“LMI”) populations, and the maps had the effect of driving disinvestment

in those areas to the detriment of those communities. Congress passed the CRA in part to rectify these types of practices and specifically to ensure that LMI communities are served by the financial institutions providing services in those communities.

The community-based focus of the CRA is evident in the original legislation—including the name of the Act—and has remained the CRA’s driving principle. Congress made clear when enacting the CRA that banks have a “continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.”¹ Congress focused on banks’ obligations in historically underserved LMI communities, and required the federal banking regulators—the OCC, Federal Reserve Bank (“FRB”), and the Federal Deposit Insurance Corporation (“FDIC”)—to “assess [a bank’s] record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods.”²

Soon after the CRA was enacted, the federal banking regulators promulgated regulations that reflected Congress’s intent that they focus on banks’ performance in local LMI communities. The regulations established criteria by which regulators would measure banks’ compliance with the community-based focus of the CRA, including by providing that evaluations would be based on banks’ efforts to engage with local communities, and the geographic distribution of banks’ loans, in order to ensure non-discriminatory access to credit.

Congress has affirmatively preserved the local focus of the CRA, even when enacting legislation that permitted banks to expand geographically. The most recent significant statutory changes to the CRA were made in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (“Riegle-Neal”). Riegle-Neal permitted banks to expand beyond the local communities in which they were chartered by eliminating restrictions on interstate banking and branching; however, Congress at the same time included several provisions in Riegle-Neal intended to ensure that banks’ expansion would not undermine the original intent of the CRA that banks meet the credit needs of local communities in which they operate, including LMI communities.³ By including these provisions in Riegle-Neal, Congress made clear that expanded bank footprints must not undermine the community-based focus of the CRA, true to the CRA’s initial enactment and purpose.

¹ 12 U.S.C. § 2901(a)(3).

² 12 U.S.C. § 2903(a).

³ Riegle-Neal required regulators to separately evaluate each metropolitan area in which a bank maintains a branch (12 U.S.C. § 2906(b)(1)(B)). For banks with interstate branches, Riegle-Neal required regulators to separately evaluate the bank’s performance in each state in which it maintains a branch (12 U.S.C. § 2906(d)(1)). As a part of interstate evaluations, regulators separately evaluate every metropolitan area in which a bank maintains a branch, and separately evaluate the nonmetropolitan area of a state in which it maintains a branch (12 U.S.C. § 2906(d)(3)).

Impact of the CRA

The CRA has had a substantial positive impact on promoting affordable housing and investment in local communities, which must be preserved in any revised rulemaking. Indeed, the CRA is integral to efforts in many New York communities to provide affordable housing to the benefit of those communities, their residents, businesses and local governments. The CRA's community-based focus is particularly important for affordable housing because it incentivizes banks to offer affordable mortgage products that are tailored to meet the needs of LMI families in banks' local communities. The CRA also incentivizes banks to invest in the construction of affordable multi-family housing. Over 330,000 affordable housing units have been built in New York City alone since the CRA was enacted, due in part to loans and investment leveraged by the CRA.⁴ Because financing for affordable housing often involves vulnerable consumers, regulators should ensure that banks provide such products responsibly. NYDFS has issued guidance to ensure that banks are following best practices in their multifamily lending and not facilitating landlords' schemes to harass tenants or violate rent regulations.⁵

CRA lending and investment has had a notable, quantifiable impact on communities. For example, a study that analyzed the CRA activity of 25 large banks that operate in New York City (including many large national banks regulated by the OCC), found that in 2016 those banks made more than \$4.9 billion in community development loans, more than \$2.1 billion in CRA-eligible investments, more than \$70 million in CRA-eligible grants, and employed more than 400 dedicated community development staff.⁶ These CRA loans and investments have significantly increased access to credit in LMI communities: one study found that the CRA increases credit activity in LMI neighborhoods by 9 percent⁷; another study found that the CRA increases small business lending in LMI communities.⁸ These important results have been achieved because of the longstanding, Congressionally-mandated community-based focus of the CRA.

There is still more to do and the CRA can continue to provide benefits to local communities. Despite the positive impact of the CRA to date, many LMI consumers and communities remain underserved. A recent study by the Federal Reserve Bank of Chicago found that historic redlining practices have had a significant and persistent negative impact on credit access and borrowing costs in certain LMI communities.⁹ Notably, however, neighborhoods that received lower grades in the original HOLC maps experienced rising inequality until around 1980, which

⁴ Association for Neighborhood & Housing Development, The State of Bank Reinvestment in New York City: 2017, (2018).

⁵ NYDFS Guidance on Permissible Lending Practices Regarding Rent-Stabilized Multi-Family Residential Buildings, September 25, 2018. Available online at: <https://www.dfs.ny.gov/legal/industry/il180925.pdf>.

⁶ Association for Neighborhood & Housing Development, The State of Bank Reinvestment in New York City: 2017, (2018).

⁷ Kristin F. Butcher & Ana Patricia Muñoz, Using Credit Reporting Agency Data To Assess the Link Between the Community Reinvestment Act and Consumer Credit Outcomes, 19 Cityscape 2, 97-98 (2017).

⁸ Raphael W. Bostic & Hyojung Lee, Small Business Lending Under the Community Reinvestment Act, 19 Cityscape 2, 81 (2017).

⁹ Daniel Aaronson, Daniel Hartley, and Bhashkar Mazumder, Federal Reserve Bank of Chicago, The Effects of the 1930s HOLC "Redlining" Maps, p. 30. Revised August 2018. Available online at: <https://www.chicagofed.org/publications/working-papers/2017/wp2017-12>.

suggests that legislation enacted in the 1970s, including the CRA, began to reverse that trend.¹⁰ Despite improvements, those LMI neighborhoods still have lower home ownership, home values, credit scores, and credit access, strongly indicating the need for continued investment in such communities including through the CRA.¹¹

In short, now is certainly not the time to dilute the important principles of the CRA, which have had a positive, though incomplete, impact on underserved communities. Now is not the time to go backwards on promoting affordable housing and combatting redlining and other destructive practices. Yet, some of the proposals in the ANPR, if adopted, could have devastating impacts on LMI communities and the progress made in affordable housing. It is critically important that any reform to the CRA regulations maintain the CRA's community-based focus and ensure that banks continue to be responsive to the credit needs of the local communities in which operate. Indeed, taking "community" out of the "Community" Reinvestment Act would be directly contrary to the purposes, intent and language of the CRA.

Below we provide NYDFS's specific input with respect to the ANPR proposals.

ANPR Proposals

Metrics-Based Framework

The ANPR invites comments on expanding the use of metrics in CRA performance evaluations or, alternatively, transforming CRA evaluations entirely by using metrics alone to measure banks' performance. The latter approach, which would evaluate a bank's CRA performance based solely on a comparison of the dollar value of a bank's CRA activities to certain criteria, such as the bank's assets, deposits, or capital, is often referred to as the "one ratio" or "CRA ratio." We strongly disagree with this approach. Community reinvestment principles cannot be relegated to a mathematical formula.

The OCC should not promulgate regulations that reduce CRA performance evaluations to a single formula. The underpinning of the CRA is banks' obligation to be responsive to the credit needs of the communities in which they operate, including LMI areas, and such responsiveness must take into account the individual communities being evaluated, their needs and the impact of certain reinvestment approaches. A "one ratio" CRA assessment would be inconsistent with the principles Congress set forth in the CRA, and could result in gaming of the system to the detriment of the communities that the CRA was enacted to protect. It is unclear how regulators could evaluate a bank's performance in LMI communities if CRA evaluations were reduced to a single metric representing a bank's activity in its entire assessment area. Such a metric would also remove the essential analyses of the credit needs of communities in a state, each of which

¹⁰ *Id.*

¹¹ *Id.*

has its own character, composition and needs, which analyses have guided regulators and community development officers at banks and in the communities for decades.

Moving to evaluations based exclusively on metrics would incentivize banks to focus on large dollar CRA activities, to the detriment of impactful small dollar projects. It would also allow banks to pick and choose the products they offer and communities they serve, and could lead to reduced access to financial products and services for the very LMI communities that the CRA was enacted to help. An evaluation framework based primarily, but not exclusively, on metrics would present similar problems. While some relevant metrics are an element in the analysis, they cannot be the guidepost for CRA compliance or ratings.

In addition, a metrics-based framework would limit regulators' ability to evaluate institutions in the context of the communities in which they operate, including by considering factors such as size, business strategy, capacity, demographics, economic conditions, and credit needs and opportunities in local communities. Moreover, a metrics-based framework would limit regulators' ability to analyze the qualitative impact of a bank's reinvestment activities. A metrics-based evaluation process would also remove banks' incentives to partner with local community development organizations, which key partnerships have promoted credit access and opportunities for many Americans.

The OCC should not undermine the statutory purposes of the CRA by promulgating regulations that would require purely or primarily metrics-based evaluations. Metrics can be a factor, but they should not be a determinant that creates wrong incentives or undermines the CRA.

Communities and Assessment Areas

The ANPR also invites comments on ways to update how a bank's community is interpreted for purposes of implementing the CRA in light of consumers' increasing adoption of online and mobile banking. One suggestion in the ANPR is that banks could include in their assessment areas additional areas in which they have a concentration of loans or deposits, non-bank affiliates, or loan production offices, and thereby receive CRA credit for qualifying activities within those areas.

NYDFS agrees that the definition of assessment areas could be updated to reflect the effect that online and mobile technology has had on access to and the delivery of banking services. For example, the definition could be updated to include areas in which banks accept deposits and do substantial business, but do not fit within current assessment areas. The definition of assessment area could also be revised to include geographies in which banks have loan production offices. However, any revisions to the regulations should not alter the CRA's intentional focus on local communities and should not, directly or indirectly, lead to LMI communities within banks' footprints becoming even more underserved. Nor should technology be used as a reason to expand assessment areas so broadly that the CRA analysis would result in disparities within a

broader assessment area. Broadening assessment areas should not take “community” out of the CRA and would result in the problems with redlining and discriminatory access that led to enactment of the CRA in the first place. Moreover, the use of technology to reach communities should not be used as an excuse to gut the requirements of the CRA. The focus must continue to be on communities and ensuring that all communities, particularly LMI communities, have fair and equitable credit access and opportunities for affordable housing. The CRA regulations should continue to require banks to equitably serve all communities in which they operate, without expanding an assessment area such that portions of the area receive no or little benefits.

CRA-Qualifying Activities

The ANPR invites comments on the type and categories of activities that should receive CRA consideration, and suggests that a broad range of activities supporting community and economic development could be included in performance evaluations. The ANPR also suggests that regulations could provide greater clarity on which activities qualify under the CRA.

The CRA regulations currently require community development services to be “related to the provision of financial services.”¹² Any revisions to the CRA regulations that broaden the scope of activities that qualify for community development credit must retain this connection to financial services. The CRA was enacted to address discrimination in the provision of financial services in historically underserved communities, and disparities in financial services persist in those communities.¹³ The CRA must remain focused on addressing those disparities.

NYDFS agrees that revised regulations could provide greater clarity on CRA-qualifying activities. However, any updates to the regulations should ensure that the CRA remains focused on providing access to equitable and affordable financial products and services for the communities in which banks operate. CRA-qualifying activities should also promote the financial well-being of, and have a quantifiable positive impact on, consumers, particularly LMI consumers. CRA-qualifying activities should not be expanded to a point where banks get credit for activities that do not actually serve LMI communities and provide better credit access such as through affordable housing.

The ANPR also asks whether there are activities that might otherwise qualify for community development credit that should be limited or excluded. Loans to develop or refinance multifamily buildings in LMI communities should only be eligible for community development credit when the loans contribute to, and do not undermine, the availability of affordable housing. Such loans should not be considered for community development credit if they foster displacement or substandard living conditions. NYDFS has issued guidelines to its regulated

¹² 12 C.F.R. § 195.12(i)(2); *see also* 3 N.Y.C.R.R. § 76.2(h)(2).

¹³ Aaronson, et. al., The Effects of the 1930s HOLC “Redlining” Maps.

institutions that describe circumstances in which multifamily loans will not be eligible for credit.¹⁴ The CRA regulations could be revised to incorporate the NYDFS guidelines.

Bank Branches

The ANPR invites comments on whether bank branching patterns and branches in LMI areas should be included in CRA evaluations. Although banking is increasingly moving to online and mobile platforms, branches remain critically important. NYDFS aggressively supports continued branching in communities across New York State, and this has led to the continued opening of new branches by state-chartered banks. The CRA regulations should not be modified to encourage the closing of bank branches. In fact, branch closings result in a decline in local credit supply, especially for small businesses, that is concentrated in low-income and minority neighborhoods.¹⁵ Online lending is not adequately or appropriately filling this gap; the importance of banks remains, and therefore the need for CRA regulations that encourage branching. While banks should utilize technology to better serve their customers, it is problematic that certain non-bank online lenders are not regulated and do not comply with the CRA.

States have ways to encourage bank branching that recognize community needs. For example, NYDFS administers the New York Banking Development District (“BDD”) program, which provides incentives for banks to open and maintain branches in underserved areas and to meet community credit needs. In regulations promulgated under the NYCRA, NYDFS favorably considers a bank’s efforts to establish a BDD as additional criteria under the service test.¹⁶ Actions like these create positive outcomes for communities. Rather than discourage branching, we suggest that federal CRA regulations could incentivize banks to open and maintain branches in underserved areas.

Other Considerations

The OCC should also consider important issues not addressed in the ANPR. For example, under the current CRA regulations, banks can choose whether to include their affiliates’ loans in a CRA evaluation. In its April 3, 2018 Memorandum discussing the CRA, the United States Department of the Treasury (“Treasury”) noted that this allows a bank to exclude affiliates when their performance would have a negative impact on the bank’s CRA evaluation, and strategically include affiliates when an affiliate’s performance would improve the evaluation. Treasury recommended that regulators review this approach to ensure evaluations reflect a banks’ overall

¹⁴ NYDFS Final Guidelines for Bank Lending to Multifamily Properties Under the Community Reinvestment Act, December 4, 2018. Available online at: <https://www.dfs.ny.gov/legal/industry/il141204.pdf>.

¹⁵ See Hoai-Luu Q. Nguyen, *Do Bank Branches Still Matter? The Effect of Closings on Local Economic Outcomes*, December 2014. Available online at: <http://economics.mit.edu/grad/hqn/research>.

¹⁶ 3 NYCRR § 76.10(f)(2).

CRA-eligible activity.¹⁷ However, the ANPR did not address the activity of affiliates. Several Senators have argued that, to remove the troubling incentive that exists under the current structure, all loans made by banks' affiliates should be included in CRA evaluations.¹⁸ Reform to the CRA regulations should address this issue.

Finally, the need for collaboration among regulators is critical in addressing any proposed changes to CRA regulations. Historically, the regulators that share CRA oversight have coordinated efforts to implement regulations and conduct examinations. NYDFS and the FRB and FDIC coordinate examinations of state-chartered institutions for which the agencies share supervisory authority. However, in this case, the OCC alone issued the ANPR. We urge the OCC not to act alone in revising CRA regulations for OCC institutions. We also urge federal regulators to consider the comments above to ensure that there are not significant differences in approach to CRA among the various regulators.

Conclusion

The CRA has been a critical tool for improving the lives of residents of communities that have been underserved and subject to discrimination. However, the job is not yet done. Although there are always opportunities to improve regulations, including the CRA regulations, to reflect developments in the current banking environment and provide greater transparency and clarity, the OCC should not promulgate regulations that undermine the longstanding, statutorily-mandated community focus of the CRA.

Thank you for your consideration of these comments.

Sincerely,



Maria T. Vullo
Superintendent

¹⁷ United States Department of the Treasury, Memorandum for the Office of the Comptroller of the Currency, The Board of Governors of the Federal Reserve System, The Federal Deposit Insurance Corporation: Community Reinvestment Act – Findings and Recommendations, 24 (April 3, 2018).

¹⁸ Senator Mark R. Warner, et. al., May 25, 2018 Letter to Jerome H. Powell, Joseph M. Otting, and Martin J. Gruenberg. Available online at: <https://www.scribd.com/document/380161432/05-25-18-Warner-Letter-Urging-Bank-Regulators-to-Strengthen-Credit-Access-for-Low-Income-Communities>.