NEW YORK STATE OF OPPORTUNITY | Department of Financial Services

ANDREW M. CUOMO
Governor

LINDA A. LACEWELL
Superintendent

April 8, 2020

Joseph M. Otting
Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street, S.W.
Washington, D.C. 20219

Re: Docket ID OCC–2018–0008 Community Reinvestment Act Regulations

Dear Comptroller Otting:

I write as New York's Superintendent of Financial Services to share my strong opposition to the Office of the Comptroller of the Currency's ("OCC") notice of proposed rulemaking ("NPR") that solicits comments concerning the federal Community Reinvestment Act of 1977 ("CRA").

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. Pursuant to those responsibilities, NYDFS examines state-chartered banks for compliance with the New York Community Reinvestment Act ("NYCRA"), which largely mirrors the current federal CRA. DFS therefore has extensive experience with the CRA. This proposed rule would significantly weaken the CRA, and I urge you to revise substantially or otherwise to abandon your proposal.

The CRA was enacted 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 1930s to indicate, for purposes of real estate investment, a geographic area's level of security. The HOLC graded neighborhoods on a sliding scale, shading red on maps neighborhoods deemed riskiest. 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.

Although the CRA has had a substantial positive impact on promoting affordable housing and investment, 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 LMI communities.[1] Despite improvements, those LMI neighborhoods continued to be characterized by lower home ownership rates and home values, as well as lower credit scores and credit access for consumers residing in those neighborhoods. These indicators emphasize the need for continued investment in such communities including through the CRA.[2] In sum, now is not the time to weaken the CRA.

The NPR

The CRA has empowered regulators to guard against unfair practices that too often discriminate against consumers based on race and geography, and constitutes a vital tool to maintain investment in underserved communities. However, many proposals in the NPR would lead to devastating impacts, and would further entrench discrimination and economic harm in those communities. As FDIC Board of Directors member Martin Gruenberg, who voted against issuing the NPR, stated, "The [NPR] is a deeply misconceived proposal that would fundamentally undermine and weaken the Community Reinvestment Act."[3]

Flawed Proposed Evaluation Framework

The NPR would essentially reduce CRA evaluations to a single, dollar value comparison of banks' CRA-qualifying activities to deposits. On the one hand, a new CRA evaluation framework that adopts carefully tailored metrics to provide greater certainty and predictability in CRA evaluations could be beneficial for banks, consumers, community groups, and regulators. The misguided framework in the OCC's NPR, however, would undermine the history and purpose of the CRA by eliminating the importance of qualitative aspects of CRA evaluations, including measuring banks are responsive to the unique credit needs of the communities they serve. Indeed, the OCC acknowledges in the NPR that most stakeholders oppose, not support, a single metric CRA analysis.[4] Nevertheless, the OCC's NPR designates a single metric the dominant factor in its proposed evaluation framework. This wrongheaded approach would be harmful to already underserved communities.

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[1] Daniel Aaronson, Daniel Hartley, and Bhashkar Mazumder, Federal Reserve Bank of Chicago, The Effects of the 1930s HOLC "Redlining" Maps, p. 30. Revised February 2019. Available online at: https://www.chicagofed.org/publications/working-papers/2017/wp2017-12.

[2] *Id.*

[3] Statement by Martin J. Gruenberg, Member, FDIC Board of Directors, Notice of Proposed Rulemaking, Community Reinvestment Act Regulations, December 12, 2019, p. 1. Available online at: https://www.fdic.gov/news/news/speeches/spdec1219d.pdf

[4] Community Reinvestment Act Regulations, 85 Fed. Reg. 1204, (proposed January 9, 2020) (to be codified at 12 CFR Parts 25 and 195), at 1207.

The OCC's single metric CRA ratio would be the dollar value of banks' CRA qualifying activities (lending, community development investments, and community development services) divided by the dollar value of retail domestic deposits.[5] The NPR prescribes an 11 percent ratio for an outstanding CRA rating, 6 percent for satisfactory, 3 percent for needs to improve, and less than 3 percent for substantial noncompliance. These benchmarks would apply nationwide, without consideration for local conditions.

Sound community reinvestment principles cannot be relegated to a single nationwide formula. The OCC's flawed metric will not include a qualitative analysis of the impact that banks' activities have in local communities and will lead to dilution of banks' obligation to be responsive to the credit needs of those communities, including LMI areas, which have been a longstanding and important pillar of the CRA. Each community has its own character, composition, and needs. This single metric approach will substantially reduce the importance of considering those local credit needs to the detriment of individuals and families. The single metric will also incentivize banks to focus on large-dollar CRA activities to the detriment of complex and innovative small-dollar projects that are often more impactful. This focus will then serve to diminish banks' incentives to partner with local community development organizations, which have promoted credit access and opportunities in New York and throughout the United States.

Moreover, the OCC's ratio for ratings would rely on questionable data, particularly for the deposit measure to be utilized as the denominator of the single metric ratio. To this point, the OCC itself acknowledges this shortcoming, recognizing that deposit data has "limitations" in that banks do not currently report this data, and noting existing discrepancies in how banks record depositors' addresses.[6] The NPR expresses hope that data will improve "over time" and has issued a separate data request to collect additional deposit data.[7] A regulatory overhaul of this magnitude should not be based on a *hope* that the accuracy of critical data to be utilized in the new model will improve over time. Likewise, the new model should not be reliant on information not presented for public comment within the scope of the NPR.

Further, the selection of the benchmark numbers for ratings appears arbitrary. The NPR states that "the agencies believe" that the benchmark numbers fall within appropriate ranges. However, the NPR does not state how the numbers were determined, nor does it provide underlying analysis to support the numbers.

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[5] Although the NPR also provides for supplemental retail lending and community development tests, these tests are pass/fail, given significantly less weight, and appear unlikely to alter a bank's CRA rating from the results of the single metric ratio.
[6] 85 Fed. Reg. 1222.
[7] *See* Community Reinvestment Act Regulations; Request for Public Input, 85 Fed. Reg. 1285 (proposed January 10, 2020).

Including carefully considered new metrics in CRA evaluations would be a positive step that could improve the transparency and clarity of the examination process. However, the OCC's flawed, unsupported formula risk undermining the statutory purposes of the CRA.

Detrimental Redefining of CRA Qualifying Activities

The NPR would alter the scope of activities that qualify for CRA credit at the expense of low- and moderate-income individuals, families, and communities.

The NPR's proposal to eliminate consideration of the geographic distribution of loans could have a particularly detrimental impact on these communities. The NPR frames this change as an attempt to exclude activities that foster displacement, such as making loans to high-income borrowers in LMI census tracts. However, the consequence of this change will be that banks will not have an incentive to make *any* loans in LMI census tracts. This could have the perverse result of reducing access to credit in those areas—the very problem that the CRA was enacted to address. NYDFS shares the OCC's stated concern about displacement, but has addressed this problem directly by not providing NYCRA credit for loans that demonstrably foster displacement.[8] The OCC should reconsider this overbroad attempt to reduce displacement and instead adopt an approach, like that of NYDFS, that directly addresses displacement.

In addition, providing CRA credit for several new activities, as proposed in the NPR, will allow banks to improve their CRA ratings by making loans or investments which do not clearly positively impact low- and moderate-income communities. For example, under the new proposal, banks could receive CRA credit for funding infrastructure projects, hospitals, and athletic stadiums. Although some of these projects may be laudable, they fall outside the scope of the CRA's core purpose of helping LMI communities. Banks are already engaged in many of these activities in the ordinary course of business, and therefore providing CRA credit for these activities could remove banks' incentives to engage in other, more impactful activities that meet the credit needs of communities.

Moreover, the proposed rule would require the OCC to provide an illustrative list of activities that qualify for CRA credit. Although these disclosures arguably would improve the consistency and transparency of CRA evaluations, if implemented, it will be critical for the OCC to ensure that activities included on the list meet the CRA's core purpose of helping LMI individuals and communities.

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[8] Final Guidelines for Bank Lending to Multifamily Properties Under the Community Reinvestment Act, issued December 4, 2014.

Failure to Properly Evaluate Assessment Area Changes

The NPR would continue the requirement that banks delineate assessment areas where they have a physical presence ("facility-based assessment areas") and add a requirement that banks delineate assessment areas where they have significant retail deposits ("deposit-based assessment areas"). A bank that receives 50 percent or more of its deposits from areas outside of its facility-based assessment areas would be required to establish deposit-based assessment areas where it receives five percent or more of its total deposits.

NYDFS agrees that the definition of assessment areas could be updated to reflect changes in the delivery of retail banking services since the CRA regulations were last amended in 1995. However, changes should be made only after engaging in thoughtful, data-based analysis. The NPR's assessment area proposal suffers from the same questionable data and arbitrary selection of benchmarks as its single metric proposal. The OCC did not rely on existing deposit data to create this framework and therefore has not provided any information regarding how many banks would be impacted or how many new facility-based assessment areas would be created by the rule. The NPR also fails to address how these new assessment areas would benefit LMI communities, if at all. This lack of information could lead to a host of unintended consequences. The NPR acknowledges this problem, stating, "[i]t is difficult to accurately quantify these aspects of the proposed rule with the information currently available."[9] This is no way to engage in significant rulemaking, and the OCC should conduct further analysis, based on actual data, before proceeding with this proposal.

Reduced Importance of Branches in CRA Evaluations

Bank branches remain critical to serving communities' needs, particularly LMI communities. Studies show that branch closings result in a decline in local credit supply that is concentrated in low-income and minority neighborhoods.[10] Although the NPR claims to preserve the importance of bank branches in CRA evaluations, it will likely have the opposite effect.

The current CRA regulations include a separate service test under which regulators evaluate the distribution of banks' branches among census tracts of varying income levels, with a particular focus on how branches serve LMI communities. A recent student by the Federal Reserve Bank of Philadelphia confirmed that the CRA has helped ensure branches remain in LMI areas.[11] The NPR's proposed evaluation framework would eliminate this separate test and instead include

[9] 85 Fed. Reg. 1237.
[10] 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.
[11] Lei Ding and Carolina Reid, The Community Reinvestment Act (CRA) and Bank Branching Patterns, Federal Reserve Bank of Philadelphia, Working Papers, WP 19-36, September 2019, https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2019/wp19-36.pdf

branches as a minor component in the single metric ratio, which will likely diminish the importance of branches in determining CRA ratings. The OCC should reconsider this proposal and instead create further incentives for banks to establish and maintain branches in LMI and underserved areas.

New Bank Classifications and Associated Burdens

In addition to perpetuating economic harm to LMI individuals, families, and communities, the NPR will impose new burdens on banks. These burdens will disproportionately impact community banks with assets between $500 million and $1.3 billion, which are evaluated as "intermediate-small banks" under the current CRA evaluation framework. A significant number of New York state-chartered banks are in this category.

The current CRA regulations include separate evaluations for small, intermediate-small, and large banks. The NPR would eliminate the intermediate-small category and classify any bank over $500 million as a large bank. Banks with under $500 million in assets would be classified as small banks and have the option to be evaluated under the existing standards or the NPR's new standards. Banks with over $500 million in assets would be subject to substantial new data reporting and recordkeeping requirements, leading to significant implementation costs. These new requirements would be particularly burdensome for intermediate-small banks. The burdensome requirements could cause banks to intentionally slow growth, in order to remain with the small banks category. Accordingly, the OCC should consider increasing the threshold for large banks or, alternatively, retaining the intermediate designation.

Likewise, the NPR's proposed elimination of the "wholesale" and "limited purpose" bank test could negatively affect the wholesale banks NYFDS supervises. Wholesale banks do not operate like traditional retail banks and therefore have not previously been subject to the CRA's retail lending test; there would likely be unintended consequences of subjecting them to the one-size fits all approach of the NPR. However, the NPR does not address this issue in any detail. As with many of its proposals, the NPR ignores the potential impact of this proposed change.

An Alternative Approach: The Federal Reserve Board Proposal

The banking system has undergone significant changes since regulators last amended the CRA regulations in 1995. The regulations could be amended to provide greater clarity to banks and community organizations, and to account for the manner in which technology has impacted consumers access to banking products and services. However, it is critical than any amendments to the CRA regulations be made only after careful consideration and analysis, while focusing on preserving the CRA's statutory purpose of ensuring banks serve the entire communities in which they operate.

In January 2020, Federal Reserve Board Governor Lael Brainard described a thoughtful, considered approach to modernizing the CRA regulations. This approach seeks to strengthen the CRA while retaining its core focus on LMI individuals and communities.[12] Governor Brainard's approach includes metrics that, unlike the NPR's single metric ratio, are based on a detailed analysis of data from 2005 to the present, and calibrated for local thresholds. Governor Brainard's proposal also retains substantive retail and community development tests, which she correctly stated remain true to the CRA's original purpose of meeting the credit needs of underserved communities while allowing for CRA evaluations to account for variance in bank size and model. These metrics also consider the number of bank loans, thereby averting the potential incentive, as spelled out in the NPR, for banks to make a small number of high-dollar loans to meet the single metric ratio benchmark. Importantly, in Governor Brainard's proposal, evaluating a bank's distribution of branches remain a key component of CRA evaluations. The proposal also sensibly includes a separate classification for wholesale and limited purpose banks.

Conclusion

NYDFS recognizes a need to modernize the CRA regulations to reflect recent developments in the current banking environment and provide greater transparency and clarity in the CRA examination process. Changes to the CRA regulations should remain focused on the needs of local communities, particularly LMI communities. To the contrary, the proposed rule would weaken the CRA to the detriment of LMI communities. The OCC therefore should revise or completely abandon the proposed rule.

Sincerely,

Linda A Lacewell

Linda A. Lacewell
Superintendent of Financial Services

cc: Chairman Jelena McWilliams, FDIC
Governor Lael Brainard, Federal Reserve Board

[12] Remarks by Lael Brainard, Member of the Board of Governors of the Federal Reserve System, at the Urban Institute, Washington, D.C., January 8, 2020. Available online at: https://www.federalreserve.gov/newsevents/speech/brainard20200108a.htm