



Department of Financial Services

ANDREW M. CUOMO
Governor

LINDA A. LACEWELL
Superintendent

February 16, 2021

Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Re: Community Reinvestment Act Modernization
Docket No. R-1723; RIN Number 7100-AF94

Dear Secretary Misback:

I write as Superintendent of the New York State Department of Financial Services (“NYDFS”) in response to the Federal Reserve Board’s (“FRB”) Advance Notice of Proposed Rulemaking (“ANPR”) 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 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. Pursuant to those responsibilities, NYDFS examines state-chartered banks for compliance with the New York Community Reinvestment Act (“NYCRA”), New York Banking Law § 28-b, which largely mirrors the current federal CRA. DFS therefore has extensive experience with the CRA and shares the FRB’s objective of ensuring that the CRA meet its core purpose of addressing inequities in the credit markets. As we face the ongoing the public health crisis, and the resulting economic crisis, an effective CRA that remains focused on the credit needs of underserved communities is more important than ever. The ANPR is a positive step towards modernizing the CRA.

Impact of the CRA

As you know, the CRA has had a substantial positive impact on promoting investments and affordable housing in local communities, which must be preserved in any revised regulations.

CRA lending and investment has had a notable, quantifiable impact on New York 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 FRB), found that in 2017 those banks made more than \$3 billion in community development loans, more than \$2.1 billion in CRA-eligible investments, more than \$72 million in CRA-eligible grants, and employed more than 420 dedicated community development staff.¹ These CRA loans and investments have significantly increased access to credit in low- or moderate-income (“LMI”) communities.²

In particular, 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 especially 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.³ 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.⁴

However, there is still more to do. NYDFS recently issued a report that found the negative effects of historic redlining are evident to this day in Buffalo, New York.⁵ Despite improvements, LMI neighborhoods still have lower home ownership rates and lower home

¹ Association for Neighborhood & Housing Development, *The State of Bank Reinvestment in New York City: 2018* (2019), available at https://anhd.org/sites/default/files/2018_bank_report_final.pdf.

² Kristin F. Butcher & Ana Patricia Munoz, *Using Credit Reporting Agency Data To Assess the Link Between the Community Reinvestment Act and Consumer Credit Outcomes*, 19 *Cityscape* 2, 97-98 (2017) (finding that the CRA increases credit activity in LMI neighborhoods by nine percent), available at <https://www.huduser.gov/portal/periodicals/cityscape/vol19num2/ch7.pdf>; Raphael W. Bostic & Hyojung Lee, *Small Business Lending Under the Community Reinvestment Act*, 19 *Cityscape* 2, 81 (2017) (finding that the CRA increases small business lending in LMI communities), available at <https://www.huduser.gov/portal/periodicals/cityscape/vol19num2/ch6.pdf>.

³ See *supra* note 1.

⁴ New York State Department of Financial Services, *Guidance on Permissible Lending Practices Regarding Rent-Stabilized Multi-Family Residential Buildings* (Sept. 25, 2018), available at <https://www.dfs.ny.gov/system/files/documents/2020/03/i1180925.pdf>.

⁵ NYDFS, *Report on Inquiry into Redlining in Buffalo, New York* (Feb. 4, 2021). Available online at: https://www.dfs.ny.gov/system/files/documents/2021/02/report_redlining_buffalo_ny_20210204_1.pdf.

values, strongly indicating the need for continued investment in such communities including through the CRA.⁶

Now, as the country faces extraordinary economic and social challenges, ensuring that the CRA remains a strong, effective, and modern tool for opportunity and justice is more important than ever. We must make sure that, as the country begins to move onward from the coronavirus pandemic, we ensure a fair and equitable recovery despite the fact that the burdens of the current turmoil have fallen disproportionately on lower-income and minority Americans.⁷ The CRA's focus on ensuring credit access to LMI communities will help those communities fully participate in the recovery and encourage banks to continue to join in the renewed commitment across all sectors towards racial justice and equity.

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

The ANPR

Elimination of Intermediate Small Bank Classification

Under the current framework, intermediate small banks – defined as institutions with assets between \$326 million and \$1.305 billion for the two prior calendar years – are evaluated under the retail lending test for small banks and a community development test.⁸ A significant number of New York state-chartered banks are in this category.

The ANPR proposes to eliminate the current intermediate small bank category, and asks whether the threshold between the remaining small and large bank designations should be set at \$750 million or \$1 billion in institution asset size.⁹ Under the proposed framework, small banks would have the option of being evaluated solely under the retail lending subtest, while large banks would be subject to both the retail test and the community development test. The ANPR also proposes to exempt small banks from certain obligations such as new data collection requirements.¹⁰

DFS urges the FRB to consider retaining the intermediate small banks designation (and a community development test, to encourage community development activity by those banks), while exempting them from new data reporting and recordkeeping requirements.

⁶ Daniel Aaronson, Daniel Hartley, and Bhashkar Mazumder, Federal Reserve Bank of Chicago, [The Effects of the 1930s HOLC 'Redlining' Maps](https://www.chicagofed.org/publications/working-papers/2017/wp2017-12), at 32 (Revised August 2020), available at <https://www.chicagofed.org/publications/working-papers/2017/wp2017-12>.

⁷ See Steven Brown, [The COVID-19 Crisis Continues to Have Uneven Economic Impact by Race and Ethnicity](https://www.urban.org/urban-wire/covid-19-crisis-continues-have-uneven-economic-impact-race-and-ethnicity), Urban Institute: Urban Wire, July 1, 2020, available at <https://www.urban.org/urban-wire/covid-19-crisis-continues-have-uneven-economic-impact-race-and-ethnicity>.

⁸ 85 Fed. Reg. 66413.

⁹ 85 Fed. Reg. 66419 (Question 13).

¹⁰ 85 Fed. Reg. 66460.

Retail Test and Community Development Test for Large Banks

We agree with the FRB's approach in maintaining separate retail and community development tests for large banks. Unlike the OCC's recently promulgated final rule regarding the CRA (the "OCC Final Rule"), which weakened the CRA to the detriment of LMI communities,¹¹ and relied on one oversimplified metric to determine whether banking institutions are meeting their CRA obligations, the ANPR instead proposes to include both qualitative and quantitative analyses of the loans, branches, and services in LMI communities.¹² Having separate retail and community development tests allows regulators to tailor CRA metrics for the needs of each community, where there may be disparities between opportunities for retail lending and community development financing. The ANPR's approach would continue to incentivize partnerships with local community development organizations, which have promoted credit access and opportunities in New York and throughout the United States and will help ensure that each community receives the attention it deserves.

Evaluation of Retail Lending and Retail Services

The ANPR proposes a metrics-based approach to evaluating retail lending performance.¹³ Both the geographic distribution metric, which measures the number of bank loans in LMI areas compared to total lending in the assessment area overall, and the borrower distribution metric, which measures a bank's loans to LMI individuals relative to total lending in the assessment area overall, would measure the number of a bank's loans, not the dollar amount of these loans.¹⁴ By not relying solely on dollar amounts, the framework would encourage banks to fund complex, innovative, and numerous small-dollar projects that are often more impactful on communities, as opposed to making fewer high-dollar loans that may not be as responsive to community needs.

The ANPR's approach to the retail test will promote greater consistency for all stakeholders. For example, the ANPR proposes to offer specific thresholds for banks to meet in the geographic and borrower distribution metrics, which reflect data specific to each assessment area and local economic conditions.¹⁵ The ANPR also proposes providing an online portal with dashboards displaying target thresholds and a bank's performance relative to those thresholds, allowing banks to track their retail lending performance relative to CRA expectations.¹⁶

¹¹ Final Rule, Office of the Comptroller of the Currency, issued May 20, 2020, available at <https://www.occ.gov/news-issuances/federal-register/2020/nr-occ-2020-63a.pdf>.

¹² 85 Fed. Reg. 66410, 66421, 66430, 66437 (Oct. 19, 2020).

¹³ 85 Fed. Reg. 66419.

¹⁴ 85 Fed. Reg. 66421.

¹⁵ 85 Fed. Reg. 66419-20.

¹⁶ 85 Fed. Reg. 66424-25.

The ANPR modernizes the retail lending subtest in compelling ways. For example, the FRB proposes to measure lending activity by considering the ratio of lending to deposits, to ensure banks are lending and not just holding on to deposits, in addition to the current analysis of lending market share.¹⁷ The FRB also proposes considering the percentage of home loans that are made to LMI individuals and LMI communities, further allowing close examination of a bank's performance with respect to underserved communities.¹⁸

In addition, it is important to note that the ANPR proposes to preserve the geographic distribution subtest, a crucial part of the retail lending test, to ensure that banks still have an incentive to make loans in LMI census tracts.¹⁹ The OCC Final Rule applies the geographic distribution subtest only to home mortgage loans under the guise of attempting to exclude activities that foster displacement, such as making loans to high-income borrowers in LMI census tracts.²⁰ However, by otherwise ignoring geographic distribution considerations, the OCC Final Rule could have the perverse effect of diminishing access to credit in those areas—the very problem that the CRA was enacted to address. NYDFS has addressed the problem of displacement directly by not providing NYCRA credit for loans that demonstrably foster displacement,²¹ an approach that federal regulators should consider.

However, NYDFS disagrees with one aspect of the ANPR's geographic distribution metric. The FRB proposes combining the low- and moderate-income categories.²² Combining these categories may result in banks focusing on lending to moderate-income borrowers at the detriment of low-income borrowers. Accordingly, NYDFS recommends that low- and moderate-income categories should be reviewed separately to emphasize performance within each category.

NYDFS also is concerned that the proposed framework, based primarily on metrics, without a qualitative review, could lead to reduced access to financial products and services for the very LMI communities that the CRA was enacted to help. While the proposed metrics are important elements in the analysis, we suggest additional factors for measuring CRA compliance and ratings. Regulators must continue to evaluate institutions in the context of the communities in which they operate, including by considering size, business strategy, capacity, and credit needs and opportunities in local communities.

¹⁷ 85 Fed. Reg. 66419.

¹⁸ 85 Fed. Reg. 66422-23.

¹⁹ 85 Fed. Reg. 66420.

²⁰ OCC Final Rule at 129.

²¹ New York State Department of Financial Services, [Final Guidelines for Bank Lending to Multifamily Properties Under the Community Reinvestment Act](https://www.dfs.ny.gov/system/files/documents/2020/03/il141204.pdf), December 4, 2014, available at <https://www.dfs.ny.gov/system/files/documents/2020/03/il141204.pdf>.

²² 81 Fed. Reg. 66422.

With respect to the retail services subtest, we applaud the ANPR's proposal to continue to use a predominantly qualitative approach with some quantitative measures.²³ Likewise, we applaud the FRB's proposal to continue to assess the percent of branches in LMI tracts.²⁴ Bank branches remain especially critical to serving the needs of LMI communities, as studies show that branch closings result in a decline in local credit supply that is concentrated in low-income and minority neighborhoods.²⁵ Indeed, a recent study by the Federal Reserve Bank of Philadelphia confirmed that the CRA has helped ensure branches remain in LMI areas.²⁶ The NYDFS appreciates the FRB's commitment to ensuring bank branches in underserved communities.

Community Development Test Qualifying Activities

The ANPR offers substantive innovations to the community development test as well. The FRB proposes a new community development financing metric that compares community development financing dollars to retail deposits and uses local and national data to create separate benchmarks.²⁷ This will provide greater clarity, consistency, and transparency in assessing the level and rating of community development financing activity. NYDFS agrees with the FRB's proposed approach of complementing the use of the new metric with a qualitative review of impact and responsiveness.²⁸

The ANPR proposes publishing a non-exhaustive list of activities would qualify for CRA credit as community development.²⁹ Although the final details will matter, the FRB's proposal will further ensure that community development activities remain primarily focused on benefitting LMI individuals, families, and communities. At the same time, we remain concerned that the existence of an itemized list of pre-qualified CRA activity may allow banks to simply take credit for activities in which the bank already engages in the ordinary course of business, thereby technically fulfilling its CRA obligations without actually providing credit in underserved communities. For example, the OCC Final Rule also allows for an itemized list, but the OCC's version allows for certain activities to receive CRA credit even if they only partially benefit LMI communities.³⁰ The CRA must remain focused on addressing the disparities in financial services that persist in LMI communities, and so any pre-qualified list must be closely

²³ 81 Fed. Reg. 66428.

²⁴ 85 Fed. Reg. 66429-31.

²⁵ 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>.

²⁶ 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, available at <https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2019/wp19-36.pdf>.

²⁷ 85 Fed. Reg. 66437.

²⁸ 85 Fed. Reg. 66439.

²⁹ 85 Fed. Reg. 66452.

³⁰ OCC Final Rule at 43, 80.

monitored and regularly updated to remove projects that are shown not to meet the statutory purpose of the CRA.

The ANPR also proposes to broaden consideration of community development services to allow CRA credit for activities unrelated to the provision of financial services, such as volunteering at a homeless shelter or serving food at a soup kitchen.³¹ Although these activities are laudable, any revisions to the CRA regulations that broaden the scope of services that qualify for credit must retain a connection to financial services. The CRA was enacted to address discrimination in the provision of financial services in historically underserved communities and disparities still persist. The CRA must remain focused on addressing those disparities.

Community Development Test Geographies

In the ANPR, the FRB proposes to allow banks to receive CRA credit for community development activities that are not within defined assessment areas, but also within “eligible states and territories” and “eligible regions.”³² While this approach may provide greater clarity regarding what activities would qualify for credit, the proposal could reduce incentives for banks to focus on their assessment areas. 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 they operate. Accordingly, NYDFS urges the FRB not to broaden the existing “broader statewide and regional area” standard.

Assessment Areas

The ANPR proposes to continue using geographical areas with bank branches as assessment areas, which will encourage banks to connect with communities in person, especially in LMI communities.³³ At the same time, the ANPR considers making some changes to how assessment areas are defined. We must be careful to ensure that any regulatory reform maintain the CRA’s community-based focus and ensure that banks serve the entirety of the communities in which they operate.

One question that the ANPR asks is whether assessment areas should be expanded to include loan production offices.³⁴ NYDFS recommends that loan production offices should be considered in determining assessment areas, as these offices, while not meeting the definition of

³¹ 85 Fed. Reg. 66443.

³² 85 Fed. Reg. 66450-51.

³³ 85 Fed. Reg. 66416.

³⁴ 85 Fed. Reg. 66417 (Question 6).

bank branches, are physical locations that extend retail products to the public and can factor into a bank's lending performance in LMI communities.

The ANPR also asks whether new assessment areas should be created to include geographical areas with concentrations of a bank's deposits and/or loans, and whether those new assessment areas should apply only to internet banks.³⁵ These are challenging questions. NYDFS agrees that the definition of assessment areas could be updated to reflect the effects of online and mobile technology on access to and the delivery of retail banking services. However, changes to how assessment areas are defined should be made only after engaging in thoughtful, data-based analysis, with an emphasis on how these new assessment areas would benefit LMI communities, if at all. Technology should not be used as a reason to expand assessment areas so broadly as to result in further disparities, causing LMI communities within a large assessment area to compete with each other for CRA consideration. In practice, overly broad assessment areas may contribute to the problems with redlining and discriminatory access that led to the original enactment of the CRA.

The ANPR also asks whether a national assessment area should apply only to internet banks, and if so, whether internet banks should be defined as banks deriving no more than 20 percent of their deposits from branch-based assessment areas.³⁶ To retain the CRA's focus on local communities, NYDFS recommends that only internet banks qualify for a national assessment area. The definition of an internet bank should be narrowly tailored to avoid allowing existing or new banks to adopt national assessment areas through which they could meet their CRA obligations while leaving LMI communities underserved.

Banking Deserts

Like the OCC Final Rule, the ANPR contemplates additional CRA credit for opening branches in banking deserts characterized by high unemployment or poverty or low levels of lending.³⁷ The NYDFS supports the goal of reducing banking deserts and agrees that establishing full-service branches, branches in supermarkets, or other types of business, including mobile and online methods of providing banking services, in underserved rural and urban areas could potentially justify enhancements to a bank's rating. However, any such changes must be carefully assessed to avoid giving banks opportunities to game the system at the expense of LMI communities within their assessment areas. A bank performing poorly in its own assessment area should not be able to inflate its CRA rating simply by engaging in a small number of large-scale projects not located in or near the communities where it does business.

³⁵ 85 Fed. Reg. 66418 (Question 8).

³⁶ 85 Fed. Reg. 66418 (Question 9).

³⁷ 85 Fed. Reg. 66431-32.

Fair Lending and Consumer Compliance

The FRB is also considering adding violations of the Military Lending Act, the Servicemembers Civil Relief Act, and the prohibition against unfair, deceptive or abusive acts or practices (“UDAAP”) as examples in a non-exhaustive list of misconduct that can result in CRA downgrades.³⁸ The NYDFS supports this proposal, especially in the context of the overall assessment of whether a bank is meeting the credit needs of its entire community. It is especially important to consider UDAAP when evaluating a bank’s CRA performance as a check against the unfair and abusive practices such as predatory lending, unfair loan fees, and mark-ups that so often harm LMI individuals and communities. These acts and practices can cause significant financial injury to consumers, erode consumer confidence, and undermine the financial marketplace. It is important that banking institutions conduct their CRA-related activity in a way that promotes a healthy marketplace and protects consumers.

Climate Resiliency

The ANPR asks whether renewable energy facilities, energy-efficiency upgrades or water conservation upgrades should be viewed as particularly responsive to affordable housing needs.³⁹ LMI households on average face a higher energy burden than other communities, spending more on gas, electric, and heating fuel as a percentage of household income than non-LMI households.⁴⁰ For this reason alone, NYDFS encourages the FRB to consider renewable energy facilities, energy-efficiency upgrades, and water conservation upgrades as particularly responsive to affordable housing needs.

The community development criterion in a bank’s CRA evaluation has important implications for addressing climate risk. Ensuring access to credit in LMI communities, designated disaster areas, and underserved rural geographies for climate resiliency actions may help mitigate climate change risks and at the same time revitalize and stabilize those geographic areas.

The Federal Reserve Bank of San Francisco has previously called on the community development sector to take a leadership role in addressing climate change.⁴¹ More recently, NYDFS issued an Industry Letter alerting banking institutions subject to the NYCRA of the

³⁸ 85 Fed. Reg. 66459.

³⁹ 85 Fed. Reg. 66445 (Question 54).

⁴⁰ Office of Energy Efficiency & Renewable Energy at the U.S. Department of Energy, Low-Income Energy Affordability Data Tool, available at <https://www.energy.gov/eere/slsc/maps/lead-tool> (last visited Jan. 26, 2021).

⁴¹ Federal Reserve Bank of San Francisco, Community Development Innovation Review, Vol. 14, Issue 1, available at https://www.frbsf.org/community-development/files/CDIR_vol_14_issue_1_.pdf.

opportunity to receive community development credit for climate resiliency activities.⁴² These are steps in the right direction, but more can be done. NYDFS welcomes the opportunity to work with the FRB in deciding which activities promoting climate resiliency could qualify for CRA credit under the federal and New York Community Reinvestment Acts.

Inclusivity

The ANPR includes proposals to encourage majority-owned institutions to partner with and invest in minority deposit institutions (“MDIs”), women-owned financial institutions, and low-income credit unions.⁴³ NYDFS applauds the FRB’s commitment to encourage activities that support MDIs, women-owned financial institutions, and low-income credit unions, all of which can play a significant role in providing equitable financial access to LMI and minority consumers and communities. NYDFS is currently implementing a recent amendment to the NYCRA which will incorporate banks’ lending and technical assistance programs for all minority- and women-owned businesses into NYCRA evaluations.⁴⁴ A focus at the national level on encouraging minority- and women-owned financial institutions can only have a positive impact on the CRA’s mission of enhancing credit access in underserved communities.

Conclusion

For decades, 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. Through the ANPR, the FRB is taking the opportunity to reflect developments in the current banking environment and provide greater transparency, clarity, and opportunity. The NYDFS awaits the FRB’s further rulemaking and urges all federal regulators to take a similar approach to updating the CRA and ensuring that banking institutions continue to improve access to credit in vulnerable communities.

It is important that regulators work together on addressing the need to modernize CRA regulations. Historically, the regulators that share CRA oversight have coordinated efforts to implement regulations and conduct examinations. NYDFS, for example, coordinates with the FRB and the Federal Deposit Insurance Corporation on examinations of the state-chartered institutions for which the agencies share supervisory authority. Although it is most important that the FRB stay true to the CRA’s purpose of ensuring credit access in underserved communities, we also urge federal regulators to maintain consistency among the various regulators wherever

⁴² New York State Department of Financial Services, Industry Letter: CRA Consideration for Activities that Contribute to Climate Mitigation and Adaptation (Feb. 9, 2021), available at https://www.dfs.ny.gov/industry_guidance/industry_letters/il20210209_cra_consideration.

⁴³ 85 Fed. Reg. 66449.

⁴⁴ New York State Department of Financial Services, Industry Letter: Alert Regarding Amendments to the New York Community Reinvestment Act (June 30, 2020), available at https://www.dfs.ny.gov/industry_guidance/industry_letters/il20200630_alert_amends_nycra.

possible. As such, we encourage the OCC to consider withdrawing the OCC Final Rule, and joining the FRB when the FRB provides its notice of proposed rulemaking.

Sincerely,

A handwritten signature in blue ink that reads "Linda A. Lacewell". The signature is written in a cursive, flowing style.

Linda A. Lacewell
Superintendent of Financial Services