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Submitted via regulations.gov

August 5, 2022

James P. Sheesley
Assistant Executive Secretary
Attention: Comments RIN 3064- AF81
Federal Deposit Insurance Corporation
550 17th Street, NW,
Washington, DC 20429

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

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

RE: COMMUNITY REINVESTMENT ACT REGULATIONS [RIN 3064-AF81; DOCKET ID OCC-2022-0002, RIN 1557-AF15; DOCKET NO. R-1769, RIN 7100-AG29]

Dear Sir or Madam,

The Independent Community Bankers of America (ICBA)¹ appreciates the opportunity to provide feedback in response to the Federal Deposit Insurance Corporation's , Office of the Comptroller of the Currency's , and Board of Governors of the Federal Reserve System's (collectively, the agencies) Notice of Proposed Rulemaking (NPR) proposing a modernized Community Reinvestment Act (CRA) regulatory and supervisory framework.²

The CRA was enacted in 1977 for the purpose of combatting redlining and ensuring that banks, consistent with safe and sound lending practices, meet the financial services needs of low- and moderate- income (LMI) customers in the communities where they do business. For community banks, community reinvestment is at the core of their business model because their financial success or failure is tied to the economic prosperity of the communities they serve. Community banks are committed to

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. Holding more than \$5.8 trillion in assets, over \$4.8 trillion in deposits, and more than \$3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org

² 87 Fed. Reg. 33884, available at: <https://www.regulations.gov/document/OCC-2022-0002-0001>.

The Nation's Voice for Community Banks.®

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

meeting the financial needs of LMI families, small businesses, and small farms, and provide access, including physical access at bank branches, to the financial services system in traditionally underserved rural and urban areas that are less well served by the largest banks.

This NPR is the culmination of a years-long process by the agencies to modernize CRA regulations to better address innovations in the delivery of banking services to customers, including the widespread adoption of online banking. Modernization of CRA is also needed to provide banks and other stakeholders greater clarity about which loans and investments are eligible for CRA credit and how those activities are factored in to overall CRA ratings by regulators assessing a bank's CRA performance. ICBA has been supportive of the efforts of the agencies to modernize the CRA's implementing regulations, though we have strongly and consistently emphasized that any major regulatory overhaul will inevitably create disproportionate implementation costs for community banks.

Given the complexity of the proposal and the quick turnaround required by the 90-day comment period, the true effect of the proposal, and whether it may create unintended consequences, remains difficult to predict. For this reason, we appreciate any efforts made by the agencies to tailor the rule and simplify compliance for community banks.

ICBA Priorities

1. **Uniform Final Rule** – We commend the FDIC, OCC, and FRB for working together to draft and propose a modernized CRA rule on an interagency basis. As we have advocated in the past, we urge the agencies to finalize a uniform final rule. Failure to do so would create confusion for depository institutions as well as the consumers as it could lead to banks being held to different standards depending on which agency serves as their primary regulator.
2. **Minimize New Data Collection Burden** – Data collection and reporting presents challenges for banks of all sizes, but particularly for small community banks. Community banks often lack the ability to build the systems required to comply with new data collection requirements in-house and are dependent on their core processors and other third-party providers to develop the necessary software, often at exorbitant costs. Therefore, it is critical for the agencies to limit new data collection requirements and, where possible, ensure that data collection requirements are harmonious with other regulations that already require data collection (e.g. HMDA and the forthcoming Small Business Data Collection Rule (Dodd Frank Act Section 1071)).
3. **Opt-In For Banks with Assets Below \$10 Billion**– Beginning with the passage of the Dodd Frank Act, \$10 billion has been recognized as an important asset-size threshold. Examples include becoming subject to the Dodd Frank Act Stress Test (DFAST) requirements, direct CFPB supervision, the Volcker Rule, as well as losing the exemption from the Durbin Amendment. \$10 billion is the true dividing line between large and small banks. Indeed, the Federal Reserve Board's definition of a community bank is an institution with less than \$10 billion in assets.³ Even this proposed regulation contains several new requirements that only become effective at the \$10 billion asset level. We propose, therefore, continuing to recognize the importance of the

³ Board of Governors of the Federal Reserve System, "Community & Regional Financial Institutions" (Sept. 15, 2021), available at: <https://www.federalreserve.gov/supervisionreg/community-and-regional-financial-institutions.htm>.

\$10 billion benchmark by allowing all institutions with less than \$10 billion in assets the ability to opt-in to the new tests created for large banks or to retain their current exam framework. If the proposed institution creates greater transparency, these institutions will be incented to opt in, but they will be able to do so after the largest institutions and third party providers have built the compliance systems necessary to do so.

4. **Increased Asset Thresholds** – Due to a variety of factors ranging from consolidation driven by increasing regulatory burden to the swelling of bank balance sheets resulting from fiscal and monetary stimulus, the size of the average bank balance has grown at a rate far faster than inflation since the CRA rule was last overhauled in 1995. Therefore, it is appropriate to raise the asset thresholds for small and intermediate banks to \$750 million and \$2.5 billion, respectively.
5. **Regulators Shouldn't Begin with the Assumption That A Portion Of The Industry Is Less Than Satisfactory** – Under the proposed rule, 10% of large banks below \$10 billion in assets would achieve a “Needs to Improve” rating while 46% would be rated as “Low Satisfactory.” We are concerned that, relative to the current exam framework, the proposed rule would result in a much higher percentage of the banking industry being assigned low ratings which would portray the good work done by small and medium sized banks in an unfairly negative light. Some of this may be solved through semantics – changing “Low Satisfactory” to “Satisfactory” would be a more suitable way to categorize institutions that do not reach the “High Satisfactory” level without characterizing their performance with a pejorative descriptor. However, the challenge remains that the proposed rule is categorizing too many institutions in the “Needs to Improve” category – this problem must be remedied by lowering either the market or community benchmark levels for “Needs to Improve” on the Retail Lending Test.
6. **Expand Where Community Development Activities Are Eligible to Receive Credit** – We commend the agencies for allowing banks to receive credit for community development credit outside of their assessment areas and urge the agencies to finalize this provision of the rule as proposed. It will allow banks to direct resources to the most impactful community development projects, regardless of whether they are located in proximity to a bank branch.
7. **Impose Limits on the Delineation of Retail Lending Assessment Areas**– While we generally acknowledge that Retail Lending Assessment Areas (**RLAAs**) are an appropriate solution to the challenges of evaluating direct banks, we are concerned that they may become overwhelming for smaller, branch-based community banks. We urge the regulators to raise the threshold for delineating RLAAs from \$2 billion to \$10 billion and increasing the number of home mortgage loans and small business loans that triggers the creation of an RLAA to 500. RLAAs appear designed primarily to evaluate large, direct banks and it is not appropriate tailoring to require banks with a community bank business model, even if they are larger community banks, to delineate RLAAs.
8. **Grant Credit for All Activities Conducted in Partnership with Minority Depository Institutions (MDIs), Women Owned Depository Institutions (WDIs), and Treasury Department-Certified Community Development Financial Institutions (CDFIs)** -- The vast majority of MDIs and bank CDFIs are community banks. Partnerships with traditional financial institutions, and with each other, enable these banks to meet their communities' financial needs. These institutions are

mission focused and particularly well suited to reaching underserved communities. They often provide services such as banking in languages other than English and have a unique understanding of the communities they serve. CRA was promulgated in response to redlining practices and these institutions play a key role in promoting financial inclusion of many of the communities previously excluded from traditional banking services. Therefore, we support providing incentives to traditional banks when investing in mission-focused institutions and urge the agencies to provide additional regulatory relief for MDIs and CDFIs.

Asset Thresholds and Opt-In

The business model of community banks is aligned with the very same goals of CRA - meeting the credit needs of the communities that they serve. In many cases these communities are in rural and urban areas, not well-served by larger banks, and often subject to market saturation by predatory nonbank money services businesses. However, community banks are subject to a regulatory burden that far exceeds the risk they pose to the financial system and overall economy. According to the Conference of State Bank Supervisors' Community Bank Sentiment Index, as of Q1 2022, only 2% of community bankers believe that regulatory burden will be better 1 year from today, while 73% believe it will be worse. Of the 7 factors measured by the survey, regulatory burden is the factor that most community bankers are pessimistic about by a double digit margin.⁴ Regulatory burden drives industry consolidation, which ultimately drives branch closures and some communities becoming less well served. Federal regulatory agencies must tailor regulations in a way that ensures the future viability of the community banking sector.

The modernization of the CRA presents an opportunity to appropriately tailor regulations to community banks, but it also creates the risk of increasing regulatory creep that further makes the community banking business model costly and ultimately unsustainable. The single most straightforward way to tailor this rule is to preserve multiple categories of regulatory oversight (for small banks, for intermediate banks, etc.) and to raise the asset thresholds that correspond to those categories.

For this reason, we urge the agencies to increase the small bank threshold to \$750 million – the current definition of a small business for commercial banks – as defined by the Small Business Administration.⁵ We further urge the agencies to increase the intermediate bank threshold to \$2.5 billion, which was the level established by the OCC in their 2020 CRA rule.

Increasing asset thresholds is particularly appropriate now due to the unprecedented growth of bank balance sheets that resulted from federal stimulus in response to the Coronavirus Pandemic. The total assets of all commercial banks increased from \$17.804 trillion on February 5th, 2020 to \$22.946 trillion on July 6th, 2022 – a \$5.142 trillion increase in less than two and a half years.⁶ During a period of economic uncertainty resulting from the Pandemic, community banks were steadfast in taking steps to keep communities and small businesses in operation, far greater than their large bank counterparts.

⁴ CSBS, Community Bank Sentiment Index, Q1 2022, available at: <https://www.csbs.org/cbindex>.

⁵ U.S. Small Business Administration, "Table of Small Business Size Standards Matched to North American Industry Classification System Codes" (May 2, 2022), available at: <https://www.sba.gov/document/support-table-size-standards>.

⁶ St. Louis Federal Reserve, FRED Economic Data, Total Assets, All Commercial Banks (TLACBW027BOG), available at: <https://fred.stlouisfed.org/series/TLACBW027SBOG>.

Consequently, many community banks, which made a disproportionate share of PPP loans, found that their rapid balance sheet expansion and excess liquidity put them into new supervisory categories much sooner than they anticipated, including new CRA size categories. In gathering feedback from ICBA member banks in response to this proposal, we heard countless stories of community banks whose balance sheets expanded by 40% or more virtually overnight as a result of the federal stimulus. From a CRA perspective, this would mean going from being a \$300 million small bank to a \$500 million intermediate bank without any change to the banks' business model or the community it serves but without correlating infrastructure for data collection and regulatory reporting requirements. Increasing the CRA asset thresholds is important to ensure that these banks are not overwhelmed with regulatory obligations that are not commensurate with the complexity of their business.

In addition to increasing the asset thresholds for small and intermediate banks, an appropriate method of tailoring the CRA rule is to allow banks the option to continue to be evaluated under the current CRA framework or to opt in to the new framework. We commend the regulators for allowing small banks the option to be evaluated under the new Retail Lending Test or the current Small Bank Lending Test and for allowing intermediate banks the option to be evaluated under the new Community Development Financing Test or the existing community development test.

For small banks in particular, as stated previously, the cost of consultants, training, and third-party software required to comply with a new regulation can be especially burdensome. Over time, as compliance solutions enter the marketplace and costs decrease, small banks may choose to be evaluated under the new Retail Lending Test if it delivers on promises of providing greater transparency for their larger peers.

We further urge regulators to extend the opt-in provisions to banks below \$10 billion in assets. As mentioned above, \$10 billion is a well-established asset threshold and a dividing line between small and large banks. This proposed regulation itself includes several new requirements regarding the geocoding of deposits, the evaluation of auto lending, and the evaluation of community development services that only become effective at the \$10 billion level. In our view, this signals a recognition by the agencies that, while a \$2 billion asset bank and a \$10 billion asset bank are both defined as "large," there is a fundamental difference in their average complexity.

We believe that extending the opt-in to as many banks as possible is appropriate given the unpredictability of implementing a regulatory overhaul of this scale. While there are both positive and negative aspects of this proposal for banks, it is difficult to gauge its true effects on individual bank ratings or compliance costs until it is implemented. Giving more banks the option to choose whether to opt in to the framework will have a twofold effect – first it will decrease the cost of compliance as new products and services enter the market, but second it will allow banks to better assess the effects of the rule on ratings and allow for the agencies to course correct if the rule produces unintended effects.

In the alternative to allowing all banks below \$10 billion to opt in to the new tests, we would strongly urge the agencies to allow intermediate banks the option to opt in to the new Retail Lending Test. The quantitative, metrics-based nature of this test is complex and will create significant implementation costs for intermediate banks.

Performance Test Weightings:

For large banks, the agencies propose to determine a bank's state, multistate MSA, and institution rating by combining the bank's performance scores across all four performance tests for the state, multistate MSA, or institution overall. Those proposed weightings of the tests for large banks are:

- The Retail Lending Test would be given a weight of **45 percent**.
- The Community Development Financing Test a weight of **30 percent**.
- The Retail Service and Products Test a weight of **15 percent**.
- The Community Development Services Test a weight of **10 percent**.

Relative to the test for Intermediate banks – which assigns a 50/50 weighting to the Retail Lending Test and to their community development evaluation – we feel that the retail component, which combines lending and services, is weighted too heavily for large banks. Community Development Services are not given appropriate consideration for neither large nor intermediate banks.

As an alternative to the proposed weightings of the tests, we suggest:

- A Retail Lending Test given a weight of **45 percent**.
- A Retail Service and Products Test a weight of **10 percent**.
- A Community Development Financing and Services Test given a weight of **45 percent**.

In this proposed approach, the Retail Service and Products test, which is heavily focused on branch distribution in LMI tracts, is reduced in weight to reflect the relative decrease in the modern relevance of brick and mortar branches as a method for delivering bank services. The 5% reduction in the Retail Service and Products Test is transferred to a combined Community Development Financing and Services Test, which is given a weight of 45%, equal to the Retail Lending Test.

This is preferable to the proposed approach for several reasons. First, we are concerned that, with only a 10% weighting, there would be a limited incentive for banks to strive for an outstanding rating on the Community Development Services Test. Combining the two community development tests into a single metric would allow regulators to evaluate a bank's entire record of community development activity. Some banks are going to excel on the financing component, while others will respond to their communities needs with services which may vary based on different market factors. A single metric would give regulators more discretion to evaluate how responsive a bank is to the particular needs of its assessment areas.

Assessment Areas and Areas for Eligible Community Development Activity

The CRA requires regulated financial institutions to “serve the convenience and needs of the communities in which they are chartered to do business.”⁷ However, since the CRA was enacted in 1977, defining what constitutes a bank's community has become increasingly difficult. While customers now have greater ability to access banking services without visiting a bank branch, for the vast majority of community banks, branch footprint remains a reliable indicator of the community that a bank serves.

⁷ 12 U.S.C. 2901(a)(1).

For this reason, we support the agency’s decision to retain facility-based assessment areas as a “cornerstone” of the proposed framework is appropriate for most banks.

However, as technology has evolved, online banking has taken an increasing share of the banking business. Banks can now solicit deposits and make loans on a nationwide basis with or without a physical branch network. The current CRA framework, which focuses solely on the location of physical deposit taking facilities (branches and ATMs), is unable to evaluate whether Internet and hybrid banks are meeting the needs of LMI customers in the communities where they do business. Therefore, while we will suggest some modifications to the proposed framework, in general, we support requiring large banks to delineate Retail Lending Assessment Areas (RLAAs) in geographies where they conduct a concentration of business without a physical presence.

Facility-Based Assessment Areas

According to the proposal, “banks would continue to delineate assessment areas where they have their main office, branches, and deposit-taking remote service facilities.”⁸ The term remote service facilities would replace the term “deposit-taking ATMs” in the current regulation to capture a broader range of deposit-taking facilities. Large banks and wholesale or limited purpose banks would be required to delineate facility-based assessment areas consisting of “one or more MSAs or metropolitan divisions or one or more contiguous counties within an MSA, a metropolitan division, or the nonmetropolitan area of a state.”⁹ Small and intermediate banks would continue to be allowed to delineate facility-based assessment areas that include a partial county, provided that they are comprised of whole census tracts and do not represent illegal discrimination or arbitrarily exclude LMI census tracts.

We strongly support the agencies’ decision to continue to allow small and intermediate banks to delineate partial counties as facility-based assessment areas. As the agencies note, smaller banks have “lower asset levels and capacities,” and it is not always possible for them to be reasonably able to serve an entire county. This is particularly true in geographically large rural counties, wherein portions of the county may be a long distance from a bank’s branch in that county or in highly populated urban counties where a small bank only has the capacity to serve a niche in a much larger market. For these banks, provided that their assessment areas are an accurate reflection of the community they serve and do not arbitrarily exclude LMI census tracts or represent illegal discrimination, allowing them to delineate partial geographies remains in line with the CRA’s statutory purpose.

By a similar logic, just because a bank fits into the “large bank” category at the institution level, does not mean that its presence in every county where it does business will be correspondingly large. Large banks may have a relatively smaller presence in some markets, and it is not appropriate to require them to serve a portion of a county larger than they can “reasonably be expected to serve.” Therefore, provided that large bank assessment areas are an accurate reflection of the community they serve and do not arbitrarily exclude LMI census tracts or represent illegal discrimination, they should also be permitted to delineate portions of a geography as an assessment area.

⁸ 87 Fed. Reg. 33917.

⁹ 87 Fed. Reg. 33918.

Remote Service Facilities (formerly deposit-taking ATMs)

Regarding remote service facilities, we support the delineation of facility-based assessment areas in some cases, but not in all cases, as required by the proposal. If a bank places a deposit-taking ATM in a county that is adjacent to a county where it has a branch presence, there is a high likelihood that the purpose of that ATM is to serve existing customers who work in or travel to that neighboring county. Therefore, we do not support requiring the mandatory delineation of a facility-based assessment area in counties where a bank has a deposit-taking ATM only if that county is adjacent to a county where a bank has a facility-based assessment area based on the presence of branches.

On the other hand, it is worth acknowledging that deposit-taking ATMs can be used aggressively as a means of collecting deposits from remote areas without incurring a CRA obligation. We would object, for example, to a large bank whose lending is concentrated in large urban areas proposing to open a network of deposit-taking ATMs in rural areas, hundreds of miles from any physical branch, where it does not plan to conduct significant lending or community reinvestment. ATMs of this sort provide the bare minimum of access to the banking system and appear designed to extract deposits from rural areas so that they can be lent in large cities. For this reason, if a remote service facility is located in a county that is not immediately adjacent to a county where a bank has an existing facility-based assessment area, it should be required to delineate an assessment area in that county.

Retail Lending Assessment Areas (RLAAs)

In one of the most notable changes from the current rule, the agencies are proposing to require large banks to “establish retail lending assessment areas where a bank has concentrations of home mortgage or small business lending outside of its facility-based assessment areas.”¹⁰ The purpose of this change is to address that, in an age of internet banking, some banks, particularly specialized internet banks (also sometimes called direct banks), conduct significant business away from their branch network or without a branch network at all. Banks would therefore be evaluated only under the Retail Lending Test, and not under other performance tests, in their RLAAAs.

Large banks (i.e. those with more than \$2 billion in assets, though we believe this level should be higher) “would be required to designate retail lending assessment areas that would consist of either:

- (i) The entirety of a single MSA excluding counties inside their facility-based assessment areas;
- (ii) all of the nonmetropolitan counties in a single state, excluding counties inside their facility-based assessment areas, aggregated into a single retail lending assessment area.

A large bank would be required to delineate a retail lending assessment area in any MSA or the combined non-MSA areas of a state, respectively, in which it originated in that geographic area, as of December 31 of each of the two preceding calendar years:

- (i) At least 100 home mortgage loans outside of its facility-based assessment areas;
- (ii) at least 250 small business loans outside of its facility-based assessment areas.”¹¹

¹⁰ 87 Fed. Reg. 33918.

¹¹ 87 Fed. Reg. 33919.

In previous iterations of CRA modernization, the agencies have proposed both deposit-based and lending-based assessment areas to evaluate internet banks, as well as some traditional branch-based banks in broader geographic areas. ICBA has opposed and continues to oppose the creation of deposit-based assessment areas because it will require significant new data collection requirements for small banks. Therefore, to the extent that they can be delineated with existing data, lending-based assessment areas are the preferable option.

In general, the feedback from community banks has been tepid – while some larger community banks worry it may create an additional burden, others have expressed that there is some fairness to the idea of requiring a larger bank who enters their market and begins conducting significant lending to become subject to CRA obligations in that area. Many see it as a reasonable solution to addressing the inadequacy of the current rules addressing internet banks. If RLAAAs are included in the final rule, therefore, the two important questions for the agencies to answer are: which banks are required to delineate them and what are the appropriate thresholds to determine where they should be delineated?

Under the proposal, all large banks, regardless of business model, could be required to delineate RLAAAs. A more targeted approach would be to limit the requirement of delineating RLAAAs to direct banks that do not have a branch network. This would allow the regulators to better evaluate the lending of internet banks, which is not captured by the current rule, without imposing an additional burden on traditional branch-based banks, some of which could be as small as \$2 billion in assets. In the alternative, the agencies could exempt all “community banking institutions,” defined by the Federal Reserve Board as banks with less than \$10 billion in assets, from the requirement of delineating RLAAAs.¹² This would line up with other aspects of the proposal that create an additional evaluation of auto lending and deposit services for banks over \$10 billion.

Once it is determined which banks should be required to delineate RLAAAs, the next question is what thresholds should be set to require their delineation in a given geography. The agencies have proposed 100 home mortgage loans or 250 small business loans. According to agency estimates, the mortgage lending threshold would require 91 large banks to delineate 641 RLAAAs. These RLAAAs would capture an estimated 50% of outside assessment area lending and 90% of total lending, when also accounting for the lending within facility-based assessment areas. The median bank required to delineate RLAAAs would delineate 2 RLAAAs, while the most RLAAAs estimated to be required by a single institution is 123. The small business lending threshold would require 26 large banks to delineate 877 RLAAAs capturing 62% of outside assessment area lending and 84% of total lending. The median bank required to delineate RLAAAs would be required to delineate 9.5 RLAAAs while the most RLAAAs estimated to be required by a single institution is 233.¹³

Table 1 to Section __.17 of the proposed rule, illustrating the effects of a variety of proposed thresholds is supplied below:

¹² Board of Governors of the Federal Reserve System, “Community & Regional Financial Institutions” (Sept. 15, 2021), available at: <https://www.federalreserve.gov/supervisionreg/community-and-regional-financial-institutions.htm>

¹³ 87 Fed. Reg. 33920.

TABLE 1 TO SECTION __.17—SUMMARY OF POTENTIAL EFFECT OF DIFFERENT RETAIL LENDING THRESHOLDS ON LARGE BANKS

	Number of affected banks (% of all)		Number of retail lending assessment areas (MSAs or state non-metropolitan areas)			Outside-facility-based assessment area lending covered by retail lending assessment areas (%)	Lending covered by facility-based and retail lending assessment areas (% of total loans)
			All banks	Median	Max		
Mortgage Loans:							
-50 loans	148	46%	1,201	2	167	62%	92%
-100 loans (proposed)	91	28	641	2	123	50	90
-250 loans	38	12	204	2	59	32	86
Small business loans:							
-50 loans	103	31	2,676	1	386	76	90
-100 loans	48	15	1,771	5	337	72	88
-250 loans (proposed)	26	8	877	9.5	233	62	84
-500 loans	18	5	488	7	158	54	81
Total (meeting either mortgage or small business thresholds)	104	31	1,382	6	233	60	86

Note: The Retail Lending Assessment Areas are areas that would have been delineated in 2019 based on 2017 and 2018 data (two-year lending thresholds) using the CRA Analytics Data Tables. The bank lending volume was calculated using the 2017–2019 data. The sample includes banks with total assets of at least \$2 billion in both 2017 and 2018. Wholesale banks, limited purpose banks, and military banks were excluded from this analysis.

As a conceptual matter, the soundest way to set the threshold for where RLAAAs should be delineated is by targeting a significant percentage of total lending without creating undue burden to collect incrementally more costly data. Any target inherently has some element of arbitrariness, but crudely the Pareto Principle would suggest that targeting 80% of lending coverage between facility-based assessment areas and RLAAAs would focus collection efforts on the relatively vital few causes without burdening more marginal lenders. This would result in a small business threshold of 500 loans, and a mortgage lending threshold higher than modeled by the agencies, but likely at least 500 loans as well.

Furthermore, we argue that crossing either the home mortgage or small business threshold should not trigger the entire retail lending test – rather the evaluation should be limited to the product line where a bank has exceeded its threshold.

Areas Eligible for Community Development Activity

For large banks or intermediate banks that opt in to the new Community Development Financing Test, banks' community development activity would be evaluated "within each facility-based assessment area, and also to consider any additional qualifying activities that the banks elect to conduct outside of their facility-based assessment areas."¹⁴ Unlike the current approach, "community development activities outside of a bank's facility-based assessment areas would not be required to serve the bank's retail lending assessment areas or any other specific geographies, and would be considered to inform state, multistate MSA, and institution level conclusions."¹⁵ Furthermore, banks would be given credit for these outside assessment area activities even if the bank has not already met the needs of its assessment areas.

ICBA has long supported expanded consideration of community development activities conducted outside of bank assessment areas and strongly supports the agencies' proposed change. Banks have limited control over the availability of large community development projects in their assessment areas

¹⁴ 87 Fed. Reg. 33921.

¹⁵ *Id.*

in a given exam cycle and eligible projects in CRA hot spots are often subject to intense competition between lenders and investors. By broadening the geographic eligibility of community development activities, it will allow banks to go outside of their assessment areas into CRA deserts and find impactful loans and investments to make in any given exam cycle. This will allow banks to make meaningful community development investments, and to receive CRA credit for those investments, even in years when the availability of qualifying activities in a bank's own assessment areas is sparse. In our view, this change will benefit banks and community development organizations that provide economic development and affordable housing programs.

Retail Lending Test

The agencies are proposing to use a metrics and a performance standards-based approach to evaluate a bank's lending to LMI borrowers, small businesses and small farms, as well as LMI neighborhoods in its assessment areas. The metrics and performance standards would apply to all large banks and intermediate banks, while small banks would have the option to opt-in to the new test or keep their current retail lending evaluation framework. The test would compare bank performance to comparators to establish a rating of either "Substantial Noncompliance," "Needs to Improve," "Low Satisfactory," and "High Satisfactory" in each assessment area and at the institution level.

Purchased Retail Loans

We agree with the agencies' decision to count purchased retail loans as equivalent to its retail loan originations. As the agencies observe, "The market for purchased loans can provide liquidity to banks and other lenders, such as CDFIs, and extend their capability to originate loans to low- and moderate-income individuals and in low- and moderate- income areas. Banks may also purchase loans to develop business opportunities in markets where they otherwise lack the on-the-ground ability to originate loans."¹⁶

Community banks are both active purchasers and sellers of loans to LMI borrowers and to small businesses. For community banks with less balance sheet capacity, it is important to have a robust market for CRA-eligible loans because they may not be able to hold all of the loans they originate in LMI census tracts in a way that is consistent with their risk management practices. Providing CRA credit for purchase of eligible loans ensures that these loans have a market, which in turn allows smaller banks to sell them and to extend further credit in the LMI customers that it serves. Additionally, it allows large banks to provide capital to LMI areas and customers in areas where they may not have as much expertise as a smaller, local lender.

In the past, some stakeholders have expressed concern about loan churning, where loans to LMI borrowers are essentially bought and sold several times over, without providing significant liquidity for lenders that originate loans in LMI areas. However, Board analysis of HMDA data found that only 3.3 percent of mortgage loans to LMI borrowers purchased by commercial banks were sold to another commercial bank within the same year.¹⁷ In our view, this is not a significant amount of loan churning, and is unlikely to materially decrease the availability of credit to LMI borrowers on the same scale as

¹⁶ 87 Fed. Reg. 33930.

¹⁷ 85 Fed. Reg. 66436, available at: <https://www.federalregister.gov/documents/2020/10/19/2020-21227/community-reinvestment-act>.

removing credit for the purchase of qualifying loans. We believe that the agencies have proposed an appropriate solution of allowing examiners to adjust a retail lending conclusion where they have determined that loan purchases reflect loan churning, provided that this ability is used judiciously.

Retail Lending Volume Screen

First, the agencies are proposing to use a “retail lending volume screen that measures the total dollar volume of a bank’s retail lending relative to its presence and capacity to lend in a facility-based assessment area compared to peer lenders. Large banks that underperform on the retail lending volume screen would have, as applicable, a recommended “Needs to Improve” or “Substantial Noncompliance” Retail Lending Test conclusion in a facility-based assessment area.”¹⁸ The benchmark, in simple terms, measures a bank’s lending as a percentage of its capacity in an area against the percentage of lending against capacity of its peers in that same area.

In order to “pass” the Retail Lending Volume Screen, a bank’s “Bank Volume Metric” in an assessment area would need to exceed 30% of the “Market Volume Threshold.” The Bank Volume Metric would be calculated as a ratio “with the average annual dollar amount of a bank’s originations and purchases of all retail loans in the numerator—including home mortgage, multifamily, small business, small farm, and automobile loans. This overall retail lending amount would be divided by the annual average amount of its deposits collected from that assessment area in the denominator.”¹⁹ The Market Volume Threshold, “would measure the average annual dollar amount of retail originations in the assessment area by all large banks that operate a branch in the assessment area in the numerator, divided by the annual average amount of deposits collected by those same banks from that assessment area in the denominator.”²⁰

Community bankers have expressed concern about the rigid nature of this benchmark. First, failure to cross the 30% results in the grade of “Needs to Improve” or “Substantial Noncompliance.” This overlooks much of the good work that a bank does in a given assessment area that would be revealed by proceeding to the distribution tests. Furthermore, bankers are concerned that this rule will not account for a variety of scenarios that are common in suburban or exurban areas.

For example, in many geographies, a core city or metropolitan area may contain most of the lending opportunities, but significant portions of the deposits may come from more rural exurban counties. If a bank takes opportunities in an exurban county, which is not core to its business, and lends them in the city, it may fail to cross this threshold in that more rural county, despite doing more than adequate lending in the urban county it primarily serves. This bank may be required to close its exurban branches, offering fewer services to those customers, in order to avoid being evaluated in an assessment area where it cannot realistically cross the retail lending screen. This result would be contrary to the statutory purpose of CRA, because deposits are not being extracted from an area that was historically redlined, and the end result is that customers have reduced access to banking services. To prevent this outcome, the agencies should either eliminate the Retail Lending Volume Screen.

¹⁸ 87 Fed. Reg. 33934.

¹⁹ *Id.*

²⁰ *Id.*

Additionally, we are concerned that the largest banks may skew the results of the screen in urban areas where they have high concentrations. Separate Market Volume thresholds, one composed of lending and deposit taking by large banks between \$2 billion and \$10 billion and another composed of lending and deposit taking of \$10 billion + banks only could mitigate this distorting effect.

But finally, it is our opinion that the retail lending screen is not a necessary component of the CRA exam. The Riegle-Neal Act already establishes an interstate loan to deposit ratio requirement which prohibits banks from using interstate authority for deposit production.²¹ Creating an additional deposit production requirement within CRA without statutory authority may exceed the authority granted to the agencies by Congress. At the very least, it appears redundant with existing requirements and unlikely to add incremental value to CRA. Community bankers have expressed the view that the additional data collected by this test does not justify the additional complexity it creates or the potential for misleading outcomes. Therefore, it should be eliminated from the final rule.

Retail Lending Distribution Tests

The proposed Retail Lending Distribution Tests are highly complex and will require substantial investments in systems, personnel, training and overall strategy in order to ensure compliance. These tests will require several steps. In essence, the tests would work by comparing bank performance in each of its major product lines in each assessment area to a series of geographic distribution metrics and borrower distribution metrics. A table of the metrics provided in the NPR is below:²²

TABLE 3 TO SECTION __.22—LENDING DISTRIBUTIONS CONSIDERED IN THE BANK METRICS

Retail lending product line	Geographic distribution metrics (percentage of bank loans for the following categories)	Borrower distribution metrics (percentage of bank loans for the following categories)
Closed-End Home Mortgage Lending	Low-Income Census Tracts	Low-Income Borrowers.
	Moderate-Income Census Tracts	Moderate-Income Borrowers.
Open-End Home Mortgage Lending	Low-Income Census Tracts	Low-Income Borrowers.
	Moderate-Income Census Tracts	Moderate-Income Borrowers.
Multifamily Lending	Low-Income Census Tracts	N/A.
	Moderate-Income Census Tracts	
Small Business Lending	Low-Income Census Tracts	Small businesses with gross annual revenues of \$250,000 or less.
	Moderate-Income Census Tracts	Small businesses with gross annual revenues of more than \$250,000 but less than or equal to \$1 million.
Small Farm Lending	Low-Income Census Tracts	Small farms with gross annual revenues of \$250,000 or less.
	Moderate-Income Census Tracts	Small farms with gross annual revenues of more than \$250,000 but less than or equal to \$1 million.
Automobile Lending	Low-Income Census Tracts	Low-Income Borrowers.
	Moderate-Income Census Tracts	Moderate-Income Borrowers.

In our view, this test could be made significantly simpler by combining the metrics in each product line. For example, in home mortgage lending, we believe that lending in low- and moderate- income census tracts could be combined into a single geographic benchmark and that lending to low- and moderate-income borrowers could be combined into a single borrower distribution benchmark.

We believe this combination of benchmarks should be applied most strongly to the small business and small farm lending borrower distribution benchmarks. Small businesses and small farms with revenues less than \$250,000 borrow from banks to fund their business operations or business formation, but they often do not use traditional small business loans to do so. Instead, they often use credit cards, second

²¹ 12 U.S.C. 1835a.

²² 87 Fed. Reg. 33936.

mortgages, home equity lines of credit, or even personal loans. These loans would not be captured in a traditional CRA exam as small business loans. Banks understand that it is important to help the smallest category of small businesses, but for most banks that is not often done through traditional small business loans. If two categories are to be used – we would suggest loans to businesses with >\$1 million in revenue should be the lowest category. Loans to businesses with between \$1 million and \$2.5 million would be an appropriate larger small business category.

Finally, it is not appropriate to consider multifamily lending as a retail product line. Multifamily lending is a low-volume product line and would be prone to producing skewed and statistically misleading results on a distribution test from exam cycle to exam cycle. It would be more appropriate to evaluate a bank's multifamily lending as a component of the Community Development Financing Test.

Retail Lending Performance Thresholds

To establish ratings, bank performance is compared to performance thresholds. To obtain each of the following ratings, banks would need to achieve the following levels, with agencies choosing the lower of the two thresholds in each product line:

- **33 percent** of the market benchmark and **33 percent** of the community benchmark are intended to reflect performance expectations for the “Needs to Improve” threshold.
- **80 percent** of the market benchmark and **65 percent** of the community benchmark are intended to reflect performance expectations for the “Low Satisfactory” threshold.
- **110 percent** of the market benchmark and **90 percent** of the community benchmark are intended to reflect performance expectations for the “High Satisfactory” threshold.
- **125 percent** of the market benchmark and **100 percent** of the community benchmark are intended to reflect performance expectations for the “Outstanding” threshold.²³

First, as a general matter, we believe the “Low Satisfactory” category should be renamed simply “Satisfactory.” The term “Low Satisfactory” is unnecessarily pejorative, especially since most of the banks in that category are earning a “Satisfactory” rating under the current system.

More substantively, however, we view the proposed approach as potentially troubling because it ultimately amounts to grading on a curve. If the goal of CRA is to increase reinvestment in communities served, grading on a curve can backfire if the curve is set too high. Very large institutions place an outsized premium on attaining an “Outstanding” rating. They do so because an “Outstanding” rating can be used to preemptively fend off any challenges to mergers and acquisitions or new branch openings. Unfortunately, as they hyper-compete to buy all available qualifying loans, they distort the market. Smaller banks, then, may be unable to purchase qualifying loans that are in-line with their underwriting standards and having possible Safety and Soundness related consequences.

Because a smaller bank cannot accept the same amount of credit losses from qualifying loans as a large bank, they may become disillusioned and stop trying to attain an outstanding rating because they know they cannot hit the benchmarks set by the larger banks. In our view, separate market benchmarks should be developed, one using data from banks in excess of \$10 billion in assets and one using data from banks between \$2 billion and \$10 billion in assets. Large banks should, in turn, only be compared

²³ 87 Fed. Reg. 33942-43.

to “peers” in their size group. Alternatively, banks should be compared to a benchmark of the performance of near-peer bank, for example those within +/- 15% of asset size.

Additionally, we have heard significant concerns that the proposed thresholds will cause the number of banks ranked in the “Needs to Improve” category to increase dramatically. According to data provided by the agencies, 10% of banks with greater than \$10 billion in assets would receive a “Needs to Improve” rating at the institution level.²⁴

TABLE 9 TO SECTION __.22—DISTRIBUTION OF REPORTER BANKS ESTIMATED RETAIL LENDING TEST CONCLUSIONS, BY BANK ASSETS

Bank assets	<\$10B		\$10B–\$50B		>\$50B	
	Freq.	Percent	Freq.	Percent	Freq.	Percent
“Substantial Noncompliance”	0	0	0	0	0	0
“Needs to Improve”	52	10	6	9	1	4
“Low Satisfactory”	235	46	31	48	15	58
“High Satisfactory”	189	37	24	37	10	38
“Outstanding”	39	8	4	6	0	0

Notes: Table 9 shows the estimated distribution of Retail Lending Test conclusions based on agency analysis of home mortgage and small business lending, deposits, and demographic data from the CRA Analytics Data Tables, over the years 2017–2019. Institution-level conclusions were derived from the weighted average of assessment area level recommended conclusions. The boundaries of facility-based assessment areas were estimated using reported assessment areas, along with the restrictions that assessment areas must generally lie entirely within a single MSA or the non-MSA portion of a single state, and generally consist of (at least portions of) a contiguous set of counties. Analysis included banks that were both CRA and HMDA reporters, and excluded wholesale, limited purpose, and strategic plan banks. Bank asset categories were assigned using the annual average of the prior two years of quarterly assets relative to the exam year. Percentages were rounded to the nearest whole number.

This is a significant change because several times more institutions would receive a “Needs to Improve” rating than under the current framework. Additionally, under the proposal, an institution below \$10 billion in assts is 2.5X more likely to receive a “Needs to Improve” rating than an institution with more than \$50 billion in assets. Accordingly, the proposed framework is punitive to the very banks that consistently serve LMI and underserved populations. We do not believe that this fairly or accurately reflects the work that community banks do in their communities – it appears instead to be driven by a desire to assign a greater number of less than satisfactory scores with a disproportionately negative impact on community banks.

To reduce the number of banks misappropriately falling into the “Needs to Improve” category, we propose the following alternative thresholds:

- **33 percent** of the market benchmark and **25 percent** of the community benchmark are intended to reflect performance expectations for the “Needs to Improve” threshold.
- **66 percent** of the market benchmark and **50 percent** of the community benchmark are intended to reflect performance expectations for the “Satisfactory” threshold.
- **100 percent** of the market benchmark and **75 percent** of the community benchmark are intended to reflect performance expectations for the “High Satisfactory” threshold.
- **115 percent** of the market benchmark and **100 percent** of the community benchmark are intended to reflect performance expectations for the “Outstanding” threshold.²⁵

²⁴ 87 Fed. Reg. 33954.

²⁵ 87 Fed. Reg. 33942-43.

Retail Services and Products Test

The Retail Services and Products Test would apply to banks with greater than \$2 billion in assets and would evaluate: (i) Delivery systems; and (ii) credit and deposit products responsive to low- and moderate-income communities' needs. As in previous comments, we believe the agencies' approach to evaluating delivery systems on a primarily qualitative basis is basically sound. This test remains only appropriate for large banks.

In our view, it is very difficult to quantitatively determine whether delivery systems (like a branch or ATM) are convenient and accessible to LMI customers. The best system is a totality of the circumstances approach that considers the distribution of branches in LMI tracts, the proximity of LMI customers that live within geographic proximity to a branch, the percentage of branch customers that are LMI individuals, branch hours, the availability of 24 hour ATMs, the availability of banking services online 24 hours a day, provision of free bilingual or multilingual translation services, reasonably priced remittances, customer complaints or testimonials, and the banks own policies or procedures.

Furthermore, because of the increased prevalence of online banking – already addressed by the creation of the new RLAAAs – we believe that a 15% weighting for the Retail Services and Products Test places too much emphasis on the physical location of branches. Online banking has made core banking services easier to access – even for many LMI customers – away from a physical branch. We, therefore, suggest a 10% of this test.

Credit and Deposit Products Evaluation

Here, “the agencies propose evaluating the responsiveness of a large bank’s credit products and programs to the needs of low- and moderate-income individuals (including through low-cost education loans), small businesses, and small farms under the Retail Services and Products Test.”²⁶ For banks with more than \$10 billion in assets, deposit products responsive would be evaluated as well. Programs that could be evaluated under this test include:

- (i) Credit products and programs that facilitate mortgage and consumer lending for low- or moderate-income borrowers in a safe and sound manner;
- (ii) Credit products and programs that meet the needs of small businesses and small farms, including the smallest businesses and smallest farms, in a safe and sound manner; and
- (iii) Credit products and programs that are conducted in cooperation with MDIs, WDIIs, LICUs, or Treasury Department-Certified CDFIs in a safe and sound manner.²⁷

Within this section, the agencies highlight that they would look for banks offering innovative and responsible credit programs that are responsive to community needs including: small dollar mortgage loans, consumer lending programs that use alternative credit histories for underwriting, and potentially loans made pursuant to Special Purpose Credit Programs (SPCPs), available under the Equal Credit Opportunity Act.²⁸

²⁶ 87 Fed. Reg. 33965.

²⁷ 87 Fed. Reg. 33966.

²⁸ See 12 CFR 1002.8.

In our experience, these uniquely response credit programs can help traditionally underserved groups attain credit in innovative ways, but they can also create the risk of fair lending violations. For example, the CFPB recently terminated a No Action Letter (NAL) that it granted to Upstart, allowing it to use alternative underwriting guidelines consistent with a Model Risk Assessment plan, only to have that NAL later terminated.²⁹ Most traditional lenders are not willing to accept this level of regulatory risk, particularly when it comes to something as serious as fair lending violations.

Therefore, for traditional lenders wishing to engage in – for example – lending through a SPCP, there is significant uncertainty that the rules could change in the future, leaving them exposed to risk of fair lending violations. We would ask for financial institutions to be able to submit information under the credit and deposits evaluation section prong of the Retail Services and Products test and their option and for clearer guidance from regulators and examiners.

Qualifying Activities Confirmation and Illustrative List of Activities

The agencies have proposed to create an illustrative, non-exhaustive list of qualifying activities that are eligible for CRA consideration. A qualifying activities list of this type was a feature of both the 2020 OCC final rule and the 2020 Federal Reserve ANPR. The illustrative list has been consistently popular with community bankers because it will serve as a source of inspiration for new types of qualifying loans and investments that have been made by other banks that they, in turn, can implement in their communities. These can further be incorporated into strategic planning and budgeting initiatives. We believe that the qualifying activities criteria should remain the definitive method of determining which activities qualify for credit. A list will add incremental value without significant downside. The agencies should periodically add new entries to the list, particularly those that are novel or innovative. The list should be published for public notice and comment on no less than a biennial basis.

In addition to an illustrative list, the agencies are proposing to create a qualifying activities confirmation process which would serve as a formal mechanism for banks to receive feedback in advance or after the fact on whether proposed community development activities would be considered eligible for CRA credit. Community bankers have expressed considerable interest in this process and believe that having ex-ante certainty could streamline their approval process for community development loans and investments, and, in some cases, provide them with regulatory certainty that may lead them to make a community development loan or investment that offers such benefits. In addition, this process would promote a healthy dialogue between bankers and their regulators through a collaborative process of achieving CRA goals.

Key to the usefulness of this process, however, would be the ability for bankers to receive timely replies to their confirmation requests. We believe 45 days would be an appropriate and achievable timeline. If a reply is not received from regulators within 45 days, banks should be allowed to proceed with the loan or investment as if they had received confirmation that it qualifies for credit.

²⁹ Consumer Financial Protection Bureau, “CFPB Issues Order to Terminate Upstart No-Action Letter” (June 8, 2022), available at: <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-order-to-terminate-upstart-no-action-letter/>.

Community Development Definitions

In general, we believe that the regulators have expanded and clarified the criteria for community development loans, investments, and services, which should increase the flexibility of community banks to support impactful programs in the communities they serve. As opposed to the current four categories of community development, the agencies have proposed that activities may be counted for credit if they have the primary purpose of community development and fit into one of the following categories:

- i. Affordable housing that benefits low- or moderate-income individuals;
- ii. Economic development that supports small businesses or small farms;
- iii. supportive services that serve or assist low- or moderate-income individuals, as
- iv. Revitalization activities undertaken in conjunction with a federal, state, local, or tribal government plan, program, or initiative that must include an explicit focus on revitalizing or stabilizing targeted census tracts;
- v. Essential community facilities that benefit or serve residents of targeted census tracts;
- vi. Essential community infrastructure that benefits or serves residents of targeted census tracts;
- vii. Recovery activities that support the revitalization of a designated disaster area;
- viii. Disaster preparedness and climate resiliency activities that benefit or serve residents of targeted census tract;
- ix. Activities undertaken with MDIs, WDIs, LICUs, or CDFIs certified by the U.S. Department of the Treasury's Community Development Institutions Fund (Treasury Department-Certified CDFIs);
- x. Financial literacy programs or initiatives, including housing counseling;
- xi. Activities undertaken in Native Land Areas that benefit or serve residents, including low- or moderate-income residents, of Native Land Areas.

Affordable Housing

ICBA supports providing CRA credit for both subsidized and unsubsidized (i.e., naturally occurring) affordable housing. Many geographies will have few opportunities to lend or invest in subsidized housing, so it is important to incentivize the creation of such housing with naturally affordable rents. The agencies are defining affordable housing with "four components: (i) Affordable rental housing developed in conjunction with Federal, state, and local government programs; (ii) multifamily rental housing with affordable rents; (iii) activities supporting affordable low- or moderate-income homeownership; and (iv) purchases of mortgage-backed securities that finance affordable housing."³⁰

In the proposal, the agencies propose to define affordable rents as rents that do not exceed 30 percent of 60 percent of the area median income. Lenders to multifamily housing may have little data about occupant income levels, making this a difficult requirement. Alternative options include using HUD Fair Market Rents (FMR) or LIHTC rents to determine rental affordability. ICBA supports an all-of-the-above approach, meaning that if rents are affordable under any of the listed options, funding for that housing should be eligible for CRA credit. Currently, banks use both HUD FMRs and LIHTC rents to show housing affordability, and they should be allowed to continue to demonstrate affordability using both systems.

³⁰ 87 Fed. Reg. 33892.

Mortgage-Backed Securities

We agree with the agencies' proposal that ownership of mortgage-backed securities ("MBS") should continue to count for credit "when the security contains a majority of either single-family home mortgage loans for low- and moderate-income individuals or loans financing multifamily affordable housing that otherwise qualifies under the proposed affordable housing definition."³¹ The ability to receive credit for MBS, just like the ability to receive credit for either originated or purchased loans, creates the liquidity necessary to ensure that banks can meet the needs of their communities. Small to midsize banks often need to utilize the secondary market to sell loans with long amortization periods in order to free up liquidity and offer additional lending. Accordingly, maintaining the ability to sell these loans on the secondary market in a way that provides CRA credit to the acquiring institution allows them to make more loans in LMI neighborhoods and their communities as a whole thus freeing up additional credit for future borrowers.

Economic Development

The proposed definition of economic development activities appears appropriate as proposed. Receiving credit for financing intermediaries and technical support for businesses up to \$5 million in revenue will allow banks to receive credit for the work they do in supporting local entrepreneurs. In our view it would also be appropriate to support workforce training and development and activities that create or preserve jobs.

Financial Literacy Programs

We strongly support the agencies' decision to award credit for financial education and homebuyer counseling, without regard to the recipients' income level. Community bankers have unique skills in this area and can make a huge impact by providing guidance in terms of planning household finances, interacting with government programs, and building their credit.

Financial literacy is an urgent need. According to a study by FINRA as few as 40 percent of Americans were able to correctly answer four or more of six basic financial literacy questions, and the percentage has decreased over the last 10 years.³² Individuals earning over \$75,000 per year did score higher than lower income groups, but still averaged only 3.6 correct answers. Granting CRA credit for providing financial literacy education to all individuals, regardless of their income level, benefits the financial well-being of the entire community. Community bankers are uniquely situated to provide financial literacy education and granting credit for it without regard to income would incentivize more bankers to engage in outreach to schools and community organizations to teach critical financial skills.

Activities undertaken with MDIs, WDIs, LICUs, or CDFIs

ICBA appreciates the agencies' focus on mission-oriented financial institutions and minority depository institutions. ICBA has a long-standing commitment to MDIs, WDIs, and Community Development

³¹ 87 Fed. Reg. 33897.

³² FINRA Investor Education Foundation, "The State of U.S. Financial Capability: The 2018 National Financial Capability Study" at p. 33 (June 2019), available at: https://www.usfinancialcapability.org/downloads/NFCS_2018_Report_Natl_Findings.pdf.

Financial Institutions (CDFIs) – many of which are which are community banks. These institutions play a crucial role in providing credit, capital, and financial services to low- to moderate-income and minority communities in economically distressed urban, rural, and suburban areas that have historically been underserved by the financial industry. It is appropriate to make changes to the CRA regulatory framework that provides incentives to partner with these institutions.

Therefore, we support the agencies;' proposal that "investments, loan participations, and other ventures undertaken by any bank, including by MDIs and WDIs, in cooperation with other MDIs, other WDIs, or LICUs, would be considered [for CRA credit]." ³³ This change removes an unfortunate legal anomaly that would have prevented MDIs from making qualifying loans and investments in partnership with other MDIs. We further believe the MDIs, WDIs, and CDFIs should be given CRA credit for activities that strengthen their own business such as improving internal technology and systems, hiring new staff, opening a new branch, or expanding product offerings.

We further argue for a presumptive rating of high satisfactory for Treasury Department-certified CDFIs. The requirements to become a Treasury Department-Certified CDFI are rigorous. Not only must CDFIs prove that at least 60 percent of their products and activities serve LMI markets upon initial certification, but they also must annually report data that demonstrates their continued adherence to that requirement. Given this existing requirement to serve the low and moderate income markets, it is unduly burdensome to subject CDFIs to a full CRA exam, particularly when some of their peers – non-bank CDFIs and Low Income Credit Unions, are completely exempt.

Impact Review of Community Development Activities

The agencies are proposing an "impact review" of community development activities under the Community Development Financing Test, the Community Development Financing Test for Wholesale or Limited Purpose Banks, and the Community Development Services Test. According to the NPR, "[t]he impact review would qualitatively evaluate the impact and responsiveness of qualifying activities with respect to community credit needs and opportunities." ³⁴ This impact review would function by creating impact review factors designed to recognize that certain types of community development activities are more impactful than others – a greater volume of activities aligning with the impact review factors would positively impact conclusions for each test.

The proposed impact factors are:

1. Activities Serving Persistent Poverty Counties and Geographies with Low Levels of Community Development Financing.
2. Activities Supporting MDIs, WDIs, LICUs, and Treasury Department-Certified CDFIs.
3. Activities Serving Low-Income Individuals.
4. Activities that Support Small Businesses or Farms with Gross Annual Revenues of \$250,000 or Less.
5. Activities that Support Affordable Housing in High Opportunity Areas.
6. Activities Benefitting Native Communities.
7. Activities that Are a Qualifying Grant or Contribution.

³³ 87 Fed. Reg. 33908.

³⁴ 87 Fed. Reg. 33912.

8. Activities that Reflect Bank Leadership through Multi-Faceted or Instrumental Support.
9. Activities that Result in a New Community Development Financing Product or Service.

As a concept, impact factors are promising. Community bankers recognize that some community development activities are more responsive to community needs than others and are therefore worthy of additional consideration. It is clear, for example, that a qualifying grant or donation may be more impactful than a loan made to the same organization for the same amount. However, there is some confusion about how impact factors will function within the otherwise quantitative Community Development Financing Test. Some of the advantages of a quantitative test is lost if ratings can still fluctuate based on a qualitative review. Accordingly, we believe that a final rule should include additional clarification regarding how impact factors will affect ratings and how unique cases – for example, if several impact factors apply to a single activity – will be considered.

One possible option is to assign credit multipliers to different impact factors – though this may lead to added complexity because a different multiplier may apply to each impact factor. In general, we consider impact factors an appropriate addition to the rule, provided that there is no penalty associated with not conducting a sufficient number of activities associated with an impact factor. It should be possible to predictably achieve a given rating on the Community Development Financing Test by making a certain dollar volume of qualifying loans and investments – the role of the impact scores should only be to enhance conclusions on this test where appropriate.

With regard to consideration of certain activities within the impact factor framework, the agencies should consider all activities supporting MDIs, WDIs, LICUs, and Treasury Department-Certified CDFIs including short-term deposits. The CRA incentive to provide deposits to CDFIs is the primary way these institutions raise funds to further their mission and it is important for that incentive to be preserved. It may be appropriate to give additional consideration to equity investments, long-term debt financing, donations, and services that support these institutions. For support to small businesses and farms, the appropriate standard is \$500,000 in gross annual revenue. Setting a lower threshold risks creating an incentive to focus unduly on businesses that are not the borrower’s primary source of income.

Community Development Financing Test

The proposed Community Development Financing Test would apply to all large banks and to any intermediate bank that chooses to opt in. It would include a quantitative financing test, where qualifying loans and investments are measured over bank deposits within each assessment area and outside of assessment areas. A bank’s percentage of community development financing is then compared to a benchmark based on the performance of other banks in that area. Finally, a qualitative impact review is conducted to establish a rating.

As a threshold matter, it is important to establish the relevant definition of deposits to use for this test. Currently, banks report deposits and their branch of record to the FDIC for the purpose of creating the Summary of Deposits (SOD). This approach is problematic for online lenders for purposes of CRA because it results in all of their deposits being nominally “located” in the location of their main office. However, for community banks, the overwhelming majority of their customers live in immediate proximity to the branch where deposits are recorded, so SOD data is a reasonable proxy for the location of depositors. Therefore, we believe the agencies’ proposal to use SOD data for banks with less than \$10

billion in assets is an appropriate solution because it does not require an additional data collection burden. The agencies should further consider whether it is appropriate to limit the deposits considered in this proposal to retail deposits – wholesale deposits may lead to unduly high levels of community development obligations in large cities where these deposits tend to be recorded.

Community bankers are generally supportive of the combination of community development loans and investments into a single metric and believe that this simplifies the rule and allows them to use whatever form of financing is most appropriate to meet the needs of their community. There is some concern that weighing loans and investments in a single metric may not provide adequate incentive to make qualifying investments – but there is no firm consensus here. Because of this, it seems most appropriate to implement a rule that combines loans and investments into a single metric and, after a period of time, to evaluate whether the level of community development investments has changed. If it decreases significantly, it may be appropriate to provide additional consideration – either qualitatively or quantitatively – at a later date.

The agencies' proposal to compare bank performance in each assessment area to a local benchmark is appropriate. However, the use of a national benchmark seems unlikely to add much useful information to the analysis because the availability of qualifying community development loans and investments varies considerably from region to region. Therefore, in some regions, it would be reasonable to expect all financial institutions to vastly overperform the national benchmark and in others, it would be reasonable for all local financial institutions to underperform a national benchmark.

Agencies must determine how to weigh community development financing conducted inside bank assessment areas versus community development financing conducted outside bank assessment areas. In general, we believe that allowing banks the ability to make community development loans and investments in different geographies will benefit banks and communities. In the proposal, the agencies propose to measure community development financing conducted inside and outside assessment areas based on a bank's concentration of retail loans and deposits from inside its facilities-based assessment areas.

TABLE 20 TO SECTION __.24—PROPOSED WEIGHTS FOR COMBINED COMMUNITY DEVELOPMENT FINANCING TEST BANK PERFORMANCE SCORE

Average of percentage of retail loans and deposits from facility-based assessment areas	Weight on average assessment area performance score (%)	Weight on nationwide score (%)
80% or greater	50	50
Less than 80%, greater than or equal to 60%	40	60
Less than 60%, greater than or equal to 40%	30	70
Less than 40%, greater than or equal to 20%	20	80
Less than 20%	10	90

Conceptually, we do not object to this approach, but it is difficult, to assess the appropriateness of weightings. Many community banks will fall into the category of having 80% or more of their retail loans and deposits inside their facilities-based assessment area – meaning that less weight would be put on the nationwide score than for less branch-based lenders. While intuitively, this makes sense, we suggest that a 60%-40% balance, or a 70%-30% balance, putting more emphasis on assessment area score, would be more appropriate.

Community Development Services Test

As part of the Community Development Services Test, the agencies will conduct a qualitative review of one or more of the following types of information submitted by the bank:

- i. The total number of community development service hours;
- ii. The number and type of community development service activities;
- iii. For nonmetropolitan areas, the number of activities related to the provision of financial services;
- iv. The number and proportion of community development service hours completed by, respectively, executive and other employees of the bank;
- v. The number of low- or moderate-income participants, organizations served, sessions sponsored; or
- vi. Other evidence that the bank's community development services benefit low- or moderate-income individuals or are otherwise responsive to a community development need.

Community bankers reacted to this test positively. However, some argued that by being weighted at only 10% of the institution's overall CRA score, the incremental incentive to go from a score of satisfactory to outstanding is small. We, therefore, suggest combining the Community Development Services Test with the Community Development Financing Test or assigning it a higher relative weight.

There is more to community banking than simply the dollar value of loans and investments. Bankers are proud of the volunteer work they do in the communities that they serve – taking on leadership roles for local charities, providing financial literacy education, community-based service work, and other impactful engagement – and it is important that this test provides an adequate incentive to capture the intrinsic value and importance of that work.

In our view, a qualitative analysis of community development services is likely the most appropriate solution. The record-keeping burden, for example, of calculating the value of employee time, misses most of what makes connecting with the community by providing community development services. Likewise, we are skeptical of the additional quantitative evaluation of Community Development Services for banks with more than \$10 billion in assets. In our view the burden of the proposed Bank Assessment Area Community Development Service Hours Metric does not commensurate with the added value, and all large banks should be evaluated qualitatively on their community development services.

Wholesale and Limited Purpose Banks

We support the agency's proposal to allow wholesale and limited purpose banks by making an appropriate level of community development loans and investments, based on their capacity. The proposed approach – which uses a slightly modified version of the community development financing metric is appropriate. Wholesale and limited purpose banks should be able to submit evidence of qualifying community development services that they have conducted, but should not be subjected to a mandatory community development services test.

Strategic Plan Evaluation

ICBA commends the agencies for retaining the option for banks to be evaluated pursuant to a strategic plan. For banks with a unique business model or an unusual demographic profile in their assessment area, a strategic plan is a valuable alternative to a traditional evaluation. This alternative is appropriate because banks must solicit community feedback and receive approval from their regulator before being evaluated under a strategic plan.

While it may be appropriate for a bank evaluated under a strategic plan to be evaluated in facilities-based assessment areas and RLAAAs, we would urge the agencies to adopt a more flexible approach. We likewise disagree with the mandatory inclusion of activities conducted by a bank's subsidiaries.

Transition Period

CRA modernization has been a years-long process and several aspects of this proposal are adaptations of previous agency rulemakings related to CRA. It is easy, therefore, to assume that bankers and other stakeholders are already familiar with the provisions of this rule. However, in meeting with hundreds of community bank executives and compliance personnel across the country, we have found that there is still significant uncertainty about the proposed rule. The reality is that, for most bankers, complying with the current regulations occupies much more of their time and attention than analyzing new proposals that may significantly change by the time they are implemented.

Therefore, given that many bankers will be analyzing this proposal with fresh eyes when it is finalized, it is important to ensure that they have adequate time to process the proposal's complicated formulas and the impact on their banks.

The agencies propose for the rule to become effective 60 days after its publication in the Federal Register. On the rule's effective date, the following provisions will become effective: (i) Authority, purposes, and scope; (ii) facility-based assessment area delineation provisions; (iii) small bank performance standards; (iv) intermediate bank community development performance standards; (v) effect of CRA performance on applications; (vi) content and availability of public file; (vii) public notice by banks; (viii) publication of planned examination schedule; and (ix) public engagement.

Many of these provisions will not require significant changes by banks and are largely in line with the current regulation but many will require banks to substantially revise business practices and invest in people and systems needed to ensure full CRA compliance. We further believe that it would be more appropriate to implement the facility-based assessment area provisions and the provisions regarding the content and availability of the public file along with the major new substantive provisions of the rule. Some large banks will be required to reevaluate their approach to facility-based assessment areas because – if the rule is finalized as proposed – they will no longer be permitted to delineate partial counties as assessment areas. Choosing how to delineate assessment areas based on whole geographies – particularly if you will also be required to delineate retail lending assessment areas at a later date – can be a complicated process and more time than 60 days may be required. Until these new assessment areas are delineated, maps of them cannot be included in the public file, so these two requirements should be delayed together.

Regarding the rules' substantive provisions, we recommend a compliance date at least 24 months after publication in the Federal Register rather than the 12 months the agencies have proposed. The implementation of this major rule will likely overlap with the promulgation of the CFPB's major rulemaking concerning the implementation of Section 1071 of the Dodd-Frank Act. At community banks, the same staff members will likely be responsible for complying with both regulations. Because community banks depend on their vendors and core processors to bring compliance software to market, they are limited in the speed with which they can implement the rule by third parties. While we are aware there is a desire, after a very long modernization process, to simply get CRA done, it would be a disservice to the work already done on this rule and to the communities that will eventually benefit to hurry in the final stages.

Effect of CRA Performance on Applications

As stated previously, the new classifications proposed therein may provide certain unintended consequences. We are concerned that the "low satisfactory" category will have a detrimental effect on M&A activity, including bank merger applications and branch activity as well as the ability to raise capital through public offerings or private investment. We urge the agencies once again to change the name of the "low satisfactory" category to "satisfactory" in order to avoid speaking of a significant segment of the banking industry in a way that is unfairly pejorative.

Data Collection, Reporting, and Disclosure

We commend the regulators for attempting to tailor deposit data collection requirements – which are always going to be a disproportionate burden for community banks. According to the agencies, "the proposal would not require small banks, intermediate banks, and large banks with assets of \$10 billion in assets or less to collect deposits data. This approach is intended to minimize the data collection burden on banks with assets of less than \$10 billion, in recognition that large banks with assets of over \$10 billion have more capacity to collect and report new deposits data."³⁵ Instead, banks below \$10 billion in assets would be permitted to use the deposits data from the FDIC SOD – which is already collected and reported by community banks. This tailoring, which will prevent small banks from being required to geocode deposits, is critical to preserve in the final rule.

Despite this tailoring, we are concerned that the new data collection burden presented by this rule, particularly for intermediate and large banks, could be significant. According to the proposal, all large banks would be required to collect and report data, "including community development financing data, branch location data, and remote service facility location data. As noted in earlier sections, the proposal also retains the existing large bank data requirements for small business and small farm lending, although the agencies propose replacing this with section 1071 data once it is available. The proposal also provides updated standards for all large banks to report the delineation of their assessment areas."³⁶

The collection and maintenance of this data is a time-consuming and costly process already governed and overlapping with existing and forthcoming requirements like the Home Mortgage Disclosure Act and the small business data collection provisions of Section 1071 of the Dodd Frank Act. Where possible,

³⁵ 87 Fed. Reg. 33996.

³⁶ 87 Fed. Reg. 33996.

regulators should seek to line up these regulations, including by using the same definitions and asset thresholds. If, for example, a loan counts as a small business loan that triggers reporting under Section 1071 but is not a qualifying small business loan for purposes of CRA, it could lead to confusion. In our view a loan to a business with less than \$1 million in annual revenue, or potentially \$2 million in annual revenue, should be the threshold for both regulations.

Credit Unions and Other Non-Bank Financial Services Providers Should Not Be Exempt from CRA

While we understand that the agencies do not have the ability to extend CRA to non-FDIC insured financial institutions, we must once again restate the strong objection that community bankers have to credit unions' and other non-bank lenders' continued exemption from CRA. We believe that any financial firm that serves consumers and small businesses should be subject to CRA in a manner comparable to banks. It is important to ensure that these institutions are meeting the financial needs of their entire communities, and not simply cherry-picking loans to the detriment of LMI individuals.

In the case of credit unions, the need for CRA is particularly clear. Relaxations to field of membership restrictions – particularly for credit unions with a community charter – and the exemption from the Member Business Loan Cap for LICUs have made many credit unions functionally indistinguishable from commercial banks. Despite this broad expansion of credit union powers, they remain subject to less frequent fair lending exams, exempt from the CRA, and exempt from federal taxation.

Recently, growth-oriented credit unions have leveraged their tax-exempt status to engage in a spree of acquisitions of community banks. Because of their tax-exempt status and lighter regulatory burden, many of these acquisitions have occurred at astronomical valuations that would be impossible for a commercial bank acquirer to match. In our view, these deals are unlikely to benefit the members of the acquiring credit unions or the communities the acquired banks serve. Because credit unions are exempt from CRA, every time one of these deals is consummated, the public loses transparency into the combined institution's mortgage lending to LMI customers, and often to its record of community development lending and investment. In the absence of the transparency and regulatory obligations created by the CRA, it is foreseeable that the level of community reinvestment conducted by the combined institution will decrease.

As ICBA recently commented in response to the FDIC's RFI regarding its review of bank merger transactions, until credit unions are subject to an equal regulatory playing field, we believe that it is appropriate for the FDIC to apply a heightened level of scrutiny to credit union acquisitions of community banks under the convenience and needs factor of its Bank Merger Act review.³⁷

Conclusion

Once again, ICBA appreciates the opportunity to provide feedback in response to the agencies' proposed modernization of the Community Reinvestment Act's implementing regulations. Reforming the CRA has been a years-long effort, and we commend the agencies for their willingness to engage with

³⁷ See Independent Community Bankers of America, "Comment Letter re: Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions," (May 31, 2022), available at: https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/fdic-merger-letter.pdf?sfvrsn=14361c17_3.

stakeholders and to work together to publish a proposal on an interagency basis. With any major regulatory reform, there is the risk of increasing regulatory burden, so we support the agencies' efforts to tailor this proposal by raising asset thresholds and providing an opt-in option.

For community banks, community reinvestment is at the heart of their business model. Meeting the financial needs of small businesses and low- and moderate- income borrowers -- ensuring that entrepreneurship and homeownership remain attainable for as many people as possible -- is necessary to ensure the vitality of the local economies to which community banks are inextricably bound. We believe that this proposal has the potential to increase performance expectations surrounding CRA exams, which allow bankers to spend less time on regulatory guesswork and more time serving the needs of their communities. However, because it is difficult to predict all the effects of such a major regulatory overhaul in advance, we urge the agencies to remain open to tweaking the performance metrics of the rule.

Please feel free to contact me at Michael.Marshall@icba.org if you have any questions about the positions stated in this letter.

Sincerely,



Mickey Marshall
Director, Regulatory Legal Affairs