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February 20, 2024

Natalia Li
Director, Office of Consumer Policy
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

RE: Comments on Request for Information on Financial Inclusion (TREAS–DO–2023–0014)

Dear Director Li:

The Independent Community Bankers of America ("ICBA")[1] welcomes the opportunity to provide comment in response to the Department of the Treasury's ("Treasury") Request for Information ("RFI") on the development of a national strategy for financial inclusion. Treasury intends for the strategy to identify opportunities for the public, private, and nonprofit sectors to advance financial inclusion. Overall, ICBA believes a national strategy on financial inclusion will help identify policies and programs that can augment community bank efforts to deploy capital in their local communities.

Specifically, ICBA believes that financial inclusion can be increased so long as Treasury's national strategy incorporates the following recommendations: (1) reexamine policy to promote creation of *de novo* bank charters, (2) produce guidance that *encourages* certain behaviors, (3) create a consistent regulatory environment that promotes innovation, (4) measure indirect cost of regulations on low-to-moderate income ("LMI") populations, and (5) facilitate collaboration among the Federal Banking Agencies.

Background

Community banks are the economic lifeblood of communities across the country

As the financial lifeblood of communities across this country, community banks are eager to participate in strategy sessions that can identify barriers to financial inclusion, and to help develop trial programs to overcome those barriers. Ungirding this sentiment is community banks' commitment to the overall

[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.

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health of their communities. Given their focus on serving local areas, community banks' success is exclusively dependent on the success of their community. Simply put – it is in community banks' own interest to offer their customers the best services and products.

Many community banks specifically design their offerings to cater to unbanked and underbanked people in their communities, especially those that are "credit invisible," those that do not have a credit record, many of which live in low-income census tracts in rural areas.[2]

Importantly, community banks have more of a presence in these areas than other financial institutions, with community banks being the only banking presence in one out of every three counties[3] and maintaining a presence in 93 percent of all majority-minority communities, including 96 percent of African-American majority and 98 percent of Hispanic-American majority communities.

Given their physical presence in so many parts of the country, especially parts that have high concentrations of credit invisible and un-/under-banked people, community bank participation in a national strategy will be crucial in understanding and addressing barriers to financial inclusion.

Recommendations

Reexamine policy to promote creation of *de novo* bank charters

ICBA believes that there are greater opportunities for financial inclusion with a greater number of community banks. Certain studies have shown that the reduction in the number of bank charters has led to less competition and less choice for consumers, which ultimately makes it relatively more expensive for low-income households to maintain bank accounts.[4]

However, regulatory policies have made it more difficult to establish *de novo* charters, with less than 30 *de novos* approved from 2021 through 2023., which is far below historical averages.[5] Capital standards, exam schedules, and other supervisory requirements are some of the greatest hinderances to establish a new bank.

ICBA recommends phasing in capital requirements for *de novo* banks, particularly for minority depository institutions ("MDI") and banks in rural and underserved areas, where access to capital is limited. ICBA recommends that capital requirements be phased in so that the bank would only be required to have 6 percent capital on day 1, 7 percent at the beginning of the second year, and 8 percent at the beginning of the third year. This would give the community bank some extra time to meet current, strenuous capital requirements.

ICBA also recommends that the application process for *de novo* banks should be streamlined.

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[2] Kenneth Brevoort, Jasper Clarkberg, Michelle Kambara, and Benjamin Litwin, "Data Point: The Geography of Credit Invisibility," Bureau of Consumer Financial Protection, (Sept. 2018) at 10.

[3] Data extracted from FDIC Summary of Deposits (SOD) 2011 to 2021 and USDA ERS Urban/Rural Classifications identifying community bank branches per year.

[4] *See* Bord, Vitaly M., "Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors," https://scholar.harvard.edu/files/vbord/files/vbord_-_bank_consolidation_and_financial_inclusion_full.pdf.

[5] Reosit, John, "For statup banks, 2023 was an up-and-down year," American Banker, Dec. 28, 2023, *available at* https://www.americanbanker.com/list/for-startup-banks-2023-was-an-up-and-down-year.

Produce guidance that can *encourage* certain behaviors

ICBA believes that regulator guidance, when issued for notice and comment in adherence to standards set by the Administrative Procedure Act, is a valuable tool for community banks when evaluating new products and services that can be uniquely beneficial for un-/under-banked and credit invisible populations. Guidance can provide interpretation of rules and general statements of policy that address grey areas of the law. While not necessarily dispositive, guidance can provide a community bank with some assurance that their product or service conforms to the spirit of the black letter law.

While guidance is traditionally proscriptive, prohibiting certain products and activities, guidance can also be used to encourage certain behaviors and activities. A Federal Reserve Bank blog found that 2020 guidance on small dollar lending found that, "[t]his guidance was atypical in that it encouraged an activity whereas past guidance tended to highlight areas of concern."[6] Through empirical research, the blog found that the guidance on small dollar lending drove "discernable increases in lending in the small-dollar space."[7]

Other areas of guidance that have *encouraged* certain behavior is the special purpose credit programs ("SPCP"), where the federal banking agencies and Consumer Financial Protection Bureau ("CFPB") have issued guidance that encourages banks to offer SPCPs. SPCPs allow lenders to create lending programs "to extend credit to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants."[8] All participating borrowers in such programs "may be required to share one or more common characteristics (for example, race, national origin, or sex)."[9]

ICBA supports the issuance of SPCP guidance, which allows community banks to voluntarily create SPCPs to benefit economically disadvantaged or historically discriminated against customers. However, as ICBA has raised in other venues, ICBA believes that SPCP guidance documents need to be renewed to reflect the agencies' opinion on the continued legality of SPCPs in light of Supreme Court decision in *Students for Fair Admissions v. Harvard*. That case held that race-based affirmative action college admissions programs violate the Equal Protection Clause of the Fourteenth Amendment,[10] partly overruling the 1978 decision in Regents of the University of California v. Bakke, which permitted the use of race as a 'plus factor' in college admissions.

ICBA believes that such programs continue to be permissible under the Equal Protection Clause of the Fourteenth Amendment, but we request that Treasury and the federal banking agencies could provide additional clarification that such programs remain legally sound. An additional written confirmation of the continued permissibility of SPCPs and a legal analysis of their constitutionality in light of the Supreme Court's decision in *Students for Fair Admissions v. Harvard* would provide lenders who offer such programs additional certainty that they remain in compliance with fair lending laws.

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[6] https://www.federalreserve.gov/econres/notes/feds-notes/empirical-assessment-of-sr-ca-small-dollar-lending-letter-impact-20230728.html

[7] https://www.federalreserve.gov/econres/notes/feds-notes/empirical-assessment-of-sr-ca-small-dollar-lending-letter-impact-20230728.html

[8] 12 CFR 1002.8(a)(3)(ii).

[9] 12 CFR 1002.8(b)(2).

[10] See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023).

Create a consistent regulatory environment that promotes innovation

ICBA recommends that the Agencies take steps to alleviate uncertainty caused by inconsistent policies that inhibit banks' adoption of products and services that would otherwise benefit unbanked and under-banked consumers. Community banks are hesitant to invest in projects that might be permitted or even encouraged in one administration, only to have that same project scrutinized or even prohibited in subsequent administrations.

For example, agency programs that used presumptive safe harbors from enforcement actions, including pilot programs, sandboxes and no action letters, encouraged the use of technology and novel methodologies to reach less traditional customers. One such program used alternative data to underwrite credit invisible people. However, over the past several years, many of these programs have been eliminated or deprioritized, as have the offices of innovation that spearheaded them. This inconsistency has, in turn, provided less opportunity for policy-based conversations and solutions. Policy-based solutions are desperately needed to increase financial inclusion, and as such, ICBA requests that Treasury encourage the reconstitution of these programs, especially if they are focused on increasing access to credit.

A fertile area for Treasury to innovate would be trial programs for Community Development Financial Institution ("CDFI") certification, including a streamlined application for MDIs and banks located in predominantly LMI areas or persistent poverty counties. Under the streamlined certification, the federal banking agencies would perform initial loan portfolio analyses on behalf of the bank. This would be similar to a National Credit Union Administration program in which the agency analyzes a credit union's loan portfolio and produces a report for the credit union to use in their CDFI application.

According to ICBA surveys, community banks view loan portfolio analysis as the most burdensome aspect of the CDFI application. If the prudential regulators were to perform the analysis on behalf of the banks, ICBA believes that eligible community banks would take advantage of the streamlined process and obtain CDFI status. If a bank does not want the prudential regulator to conduct the analysis for them, the bank can still use the current, non-streamlined application to become designated as a CDFI.

Measure indirect cost of regulations on LMI populations

A 2017 Federal Reserve report studying caps on interchange fee revenue found that, while regulations have a direct cost to the banks that are subject to the regulations, there is also an indirect cost on the populations that are not subject to the regulations, such as the consumer and small business customers of the regulated banks.[11] The report found that account pricing is dynamic and "may change in response to regulations that target one aspect of account services." Or put more succinctly, banks subject to the cap raised checking account prices by decreasing the availability of free accounts, raising monthly fees, and increasing minimum balance requirements.

Additionally, a 2018 GAO report found that many of the federal banking agencies' initial and final regulatory flexibility analyses were limited. The agencies did not sufficiently discuss alternative regulatory approaches, nor did they disclose data sources or methodologies used for their analyses. For

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[11] Mark D. Manuszak and Krzyszyof Wozniak, "The Impact of Price Controls in Two-Sided Markets: Evidence from U.S. Debit Card Interchange Fee Regulation," Finance and Economics Discussion Series, 2017, *available at* https://www.federalreserve.gov/econres/feds/files/2017074pap.pdf.

most rules GAO reviewed, five of the six agencies were unable to provide documentation supporting their regulatory flexibility analyses.[12]

These findings support a broader contention repeatedly raised by ICBA – regulations that are well-meaning and intended to alleviate burdens of LMI populations typically have the contrary effect of further harming that population, and the agencies' cost-benefit analyses do not adequately nor accurately predict this harm.

This dilemma could be resolved if the agencies adhered to the spirit of the Regulatory Flexibility Act ("RFA").[13] The RFA requires regulatory agencies to conduct a regulatory flexibility analysis of a rule's potential impact on small entities and consider alternatives that may reduce burden. The RFA also permits agencies to forgo the analysis if they certify that a rule would not have a significant economic impact on a substantial number of small entities.

When the federal banking agencies conduct a cost-benefit review of their proposed regulations, ICBA recommends that the agencies conduct an indirect cost-benefit analysis of LMI populations or un- and under-banked populations. These analyses could be limited to the indirect economic effects of a rule that an agency could have reasonably foreseen.

Facilitate collaboration among the Federal Banking Agencies

Treasury, along with several other agencies, is engaged in impressive efforts to address gaps in financial inclusion. These efforts can be categorized as working groups, convenings, technical support, and education. While these endeavors are meaningful in their individual right, efficiencies can be gained, redundancies eliminated, and greater awareness can be raised through interagency collaboration.

For example, the Financial Literacy Education Commission ("FLEC") serves as a model for what this interagency effort could emulate. Established under the Fair and Accurate Credit Transactions Act of 2003, FLEC is designed to "improve the financial literacy and education…through development of a national strategy to promote financial literacy and education."[14] The areas of emphasis include basic personal income and household money management and planning skills.[15] While the FLEC will occasionally focus on financial inclusion and issues unique to unbanked and underbanked individuals, financial literacy is really only a portion of overall financial health. A broader interagency collaboration, sharing the resources and expertise of personnel comprising each individual Agency effort, could achieve new ground.

Additionally, ICBA believes that Agency-led efforts are enhanced when private industry, including community banks, are involved. While FLEC allows for the inclusion of private industry participants, ICBA recommends that the interagency collaboration maintain permanent inclusion for community bank and other private participants. ICBA believes that including private industry in collaborations will better place

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[12] https://www.gao.gov/assets/gao-18-256.pdf.
[13] 5 U.S.C. §§ 601-612.
[14] 20 U.S.C. 9702.
[15] 20 U.S.C. 9703, including how to create household budgets, manage spending, credit, and debt, including credit card debt, effectively; increase awareness of the availability and significance of credit reports and credit scores in obtaining credit, and understand, evaluate, and compare financial products, services, and opportunities.

the inter-Agency effort to not only set the desired outcomes, but to be in the position to put actions into place that result in achieving the desired outcomes.

Conclusion

As it develops its national strategy on financial inclusion, ICBA urges Treasury to directly engage community banks. There is a menu of options for Treasury to pursue, including the development of working groups, technical support, educational sessions, or other similar convenings that would facilitate the exchange of ideas, identify novel opportunities, and spur joint ventures among the community banks.

We are confident that community banks would welcome the opportunity to engage with you to further your goals and increase levels of financial inclusion. If you are so inclined, please contact Michael Emancipator at Michael.Emancipator@icba.org or (202) 821- 4469.

Sincerely,

/s/

Michael Emancipator
Senior Vice President, Senior Regulatory Counsel