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Via Email and Federal eRulemaking Portal

Ann E. Misback
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Heidi M. Thomas
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Attention: Comment Processing

James P. Sheesley
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Federal Deposit Insurance Corporation
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Attention: Comments RIN 3064-AF81

Re: Docket No. R-1769 / RIN 7100-AG29
Docket ID OCC-2022-0002
RIN 3064-AF81
Community Reinvestment Act

Dear Ms. Misback, Ms. Thomas, and Mr. Sheesley:

I write as the Acting Executive Deputy Superintendent for Consumer Protection and Financial Enforcement at the New York State Department of Financial Services ("NYDFS" or the "Department") in response to the Joint Notice of Proposed Rulemaking ("NPR") issued by the Board of Governors of the Federal Reserve System ("FRB"), the Federal Deposit Insurance Corporation ("FDIC"), and the Office of the Comptroller of the Currency ("OCC") (collectively, the "Agencies") concerning the federal Community Reinvestment Act of 1977 ("CRA"). I appreciate the opportunity to offer NYDFS's comments on the NPR, given the CRA's essential role in encouraging institutions to meet the credit needs of their communities, including low- and moderate-income ("LMI") consumers.

NYDFS is responsible for the overall supervision, regulation, and enforcement of laws regarding financial services companies in the State of New York, including all New York state-chartered banks. Pursuant to those responsibilities, NYDFS examines state-chartered banks for compliance with the New York Community Reinvestment Act ("NYCRA"), which largely mirrors the current federal CRA.[1] NYDFS therefore has extensive experience with the CRA and shares the Agencies' objective of ensuring that the CRA remains focused on meeting the credit needs of underserved communities.

The Department also shares the Agencies' objective of establishing a consistent approach for all three of the federal CRA regulators. (87 Fed. Reg. 33884, 33885.) Indeed, because NYDFS examiners often conduct CRA examinations concurrently with either the FRB or the FDIC, any divergence among the federal Agencies' approach to the CRA could lead to confusion for New York state-chartered banking institutions on how the NYDFS's examination differs from that of the particular federal regulator with whom they are coordinating on a given exam, as well as the banks subject to dual (state and federal) examinations.

Broadly, the NPR is a positive step towards modernizing the CRA and reflects the years of thought and consideration that the Agencies have devoted to the effort. NYDFS agrees with many of the changes made in the proposed rule, which will increase transparency and clarity as well as account for the rise of new technologies and modern banking practices. That said, in light of the broad scope of the NPR, this comment offers suggestions regarding specific proposed changes to the federal CRA regulation; this comment should not be interpreted as a statement about any topics not specifically addressed herein.

I. Ratings Metrics

In contrast to the current system of qualitative ratings, the Agencies propose to set quantitative standards for CRA ratings based on bank-specific tailored benchmarks. (87 Fed. Reg. at 33949.) NYDFS supports this step to ensure transparent guidelines for how each rating level is earned. The establishment of quantitative thresholds for ratings will enhance predictability for banks and reduce gray areas in the ratings process, all while allowing qualitative evaluation to play a key role in the CRA evaluation process. Although all reviewing agencies must continue to evaluate institutions in the context of the communities in which they operate, including by considering size, business strategy, capacity, and credit needs and opportunities in local communities, established thresholds will provide more clarity and consistency for banks.

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[1] It should be noted that the New York State Legislature recently enacted an amendment to the NYCRA that extends the Department's authority to conduct NYCRA evaluations to non-bank mortgage lenders. *See* New York Banking Law § 28-bb.

II. Updated Thresholds for Bank Size

NYSDFS agrees with the Agencies' proposed asset thresholds, including the new intermediate category. The Department particularly appreciates the Agencies' proposed inclusion of an intermediate bank category to replace the current intermediate small bank category, as NYDFS recommended in its comment letter on the FRB's Advance Notice of Proposed Rulemaking in 2021.

III. Assessment Areas

After consideration, the Agencies have declined to treat a bank's loan production offices ("LPOs") as automatically constituting a facility-based assessment area. (87 Fed. Reg. at 33918.) The Department recommends that the Agencies reconsider this decision and instead consider LPOs that offer retail services in determining facility-based assessment areas, as these offices, while not meeting the definition of bank branches, are physical locations that can factor into a bank's overall lending performance in LMI communities.

IV. Community Development Credit

Statewide assessment in addition to facility-based and retail lending assessment areas

In an effort to evaluate all of a bank's activity, the Agencies propose CRA consideration of qualifying community development activities outside of a bank's facility-based and retail lending assessment areas at the state, multistate MSA, and institution levels. (87 Fed. Reg. at 33916.) Although the Department lauds the Agencies' goals of encouraging qualifying activity in areas with high community development needs, the proposed approach risks undermining the local focus of the CRA. Under the proposal, banks may be able (or even be incentivized) to cherry-pick the easiest way to meet their community development obligations regardless of whether those opportunities are within the bank's local community. Especially given the NPR's separate proposal of new, potentially significant retail lending assessment areas for large banks and some intermediate banks, banks should be encouraged to find community development opportunities within their various assessment areas. It is imperative that CRA regulations continue to effectuate the CRA's community-based focus and ensure that banks stay responsive to the credit needs of the local communities in which they operate.

Community development services evaluation

The Agencies propose allowing intermediate banks the choice of being evaluated under the current community development test for intermediate small banks or the proposed community development financing test. (87 Fed. Reg. at 33923.) In contrast, all large banks would be subject to the community development services test. (87 Fed. Reg. at 33885.)

The Department believes that intermediate banks should all be evaluated on their performance providing community development services, even if they opt into being evaluated under the community development financing test. Many intermediate-sized banks play integral roles in the communities in which they operate. Those banks should be encouraged to participate robustly in community organizations through all the activities that the community development services test evaluates, such as becoming members of community organization boards or co-hosting programs with community organizations on such topics as financial literacy, first-home buying, and small business financing.

List of qualifying activities

Banks and other CRA stakeholders have expressed concerns about the current model, in which a bank does not know whether its community development activity will qualify for CRA credit until the evaluation, often well after the activity has taken place. The Agencies propose maintaining a public, non-exhaustive, and periodically updated list of activities eligible for community development credit, as well as establishing a process through which banks can request preclearance for potential community development activities. (87 Fed. Reg. at 33911.)

The Department generally supports the proposal, which would add much-needed clarity to the community development evaluation process. However, the Agencies should take care to ensure that such a list works effectively in practice. First, the Agencies should ensure that activities that only tangentially help local communities are not included. In a prior federal agency proposal for revising CRA regulations, banks would have received CRA credit for funding infrastructure projects and athletic stadiums. Although some of those projects may be laudable, they fall outside the scope of the CRA's core purpose of helping LMI communities. An itemized list also risks allowing banks to receive credit for activities in which the banks are already engaged in the ordinary course of business; providing CRA credit for these activities could remove banks' incentives to engage in other, more impactful activities that meet the credit needs of their communities. Consequently, care must be taken that the list does not become overly broad.

Separately, the Department recommends close coordination between federal and state agencies administering CRA evaluations regarding the federal preclearance process. Banks receiving preclearance for activities at the federal level might understandably want to know if those same activities will receive community development credit at the state level. Early notice by the Agencies to state counterparts regarding CRA preclearance decisions regarding activity in those states will promote alignment, or at least clarity, between state and federal agencies, resulting in fewer surprises for banks at the time of CRA evaluations.

Finally, NYDFS also notes the inclusion of place-based activities in the definition of community development, such as "qualifying activities in Native Land Areas." (87 Fed. Reg. at 33901.) Encouraging investment in marginalized communities is a commendable goal, and the Agencies should consider also including minority- and women-owned businesses ("MWOBs") in a similar context. The New York State Legislature recently passed an amendment to the NYCRA requiring NYDFS to evaluate covered banks' lending to and technical assistance programs for MWOBs. Including MWOB-related activity in the federal definition of community development will increase equity and ensure that credit needs are met in communities across the country.

Impact review

The Agencies have proposed adding an impact review to their community development tests, a qualitative approach to evaluate the impact and responsiveness of qualifying activities. (87 Fed. Reg. at 33912.) NYDFS broadly supports this idea, which will allow more effective forms of community development to earn banks more credit in CRA evaluations. In addition, the proposal allows some qualitative analysis of community development activities, acknowledging that community development evaluation requires some level of human judgment and analysis.

However, due to this qualitative nature of the proposed impact review, the Department suggests that the final rule include more clarity and definitions about how the Agencies expect to consider and apply these impact factors. Additional insight into the Agencies' approach would help the Department identify and plan for any differences between the federal proposal and the Department's practices.

Separately, further to the comment in the prior section, NYDFS suggests that the Agencies add activities supporting MWOBs to the list of impact factors to further encourage equity in lending to underserved communities.

Volunteer activity

The Agencies propose that in non-metropolitan areas, banks may receive community development credit for volunteer activities unrelated to financial services. This proposal must be carefully implemented. Volunteer activities are admirable, but they are not the kind of community reinvestment that the CRA was designed to promote. The CRA was enacted to address discrimination in the provision of financial services in historically underserved communities, and, in fact, significant disparities persist. The CRA evaluation process must remain focused on addressing those disparities. More broadly, while any individual or group can volunteer, banks are in the rare position of having the financial resources to support community development. The Agencies should strive to ensure that banks focus on reinvesting in their local communities.

To the extent that the final rule does include community development credit for volunteering, the Agencies should require that volunteering must be done on the bank's time to receive community development credit. Banks should not be permitted to receive CRA credit for employees' activities on their own time, whether coordinated by the bank or not. Separately, volunteering should not be the sole source of a bank's community development credit. At the very least, the Agencies should set a limit for credit for volunteering, perhaps a maximum of 50 percent of a bank's community development credit.

V. Climate Change

The Department applauds the Agencies' proposal to revise the community development definitions to include disaster preparedness and climate resiliency activities, providing a non-exhaustive list of potentially eligible activities such as energy efficiency improvements or funding heating and cooling centers. NYDFS has been a national leader on treating climate change as a systemic threat to the safety and soundness of the financial services industry and has issued guidance on how institutions can obtain community development credit for activities that support climate change mitigation and adaptation efforts.[4]

It is important to ensure access to credit in LMI communities and underserved non-metropolitan middle-income geographies to support climate resiliency actions. As noted in the NPR, there is ample evidence that LMI individuals and areas are especially vulnerable to climate-related risks. Accordingly, the Department supports the Agencies' proposal to put forth a definition for disaster preparedness and climate resiliency activities that is separate from the current CRA framework's designated disaster areas category. The Department also supports including a separate prong that focuses on activities that benefit low- or moderate-income individuals.

However, the Department has concerns about crediting only activities that are conducted in conjunction with a federal, state, local, or tribal government plan, program or initiative, as many areas that would benefit from climate resiliency activities may not have such plans, programs or initiatives in place. Banks have the capacity to engage in climate resiliency activities both with and without formal government involvement, and they should receive credit for such activities in both cases.

VI. Retail Lending Test

The Agencies propose a retail lending test for large and intermediate banks and for small banks who opt in. (87 Fed. Reg. at 33919.) As part of this test, the Agencies propose a product line threshold in which banks will be evaluated on the product lines that constitute at least 15 percent, by dollar value, of the bank's retail lending in each assessment area. (87 Fed. Reg. at 33928.) The Agencies propose including closed-end home mortgage loans, open-end home mortgage loans, multifamily loans, small business loans, small farm loans, and automobile loans as product lines subject to potential evaluation. (87 Fed. Reg. at 33928.)

NYDFS supports the creation of a quantitative threshold for what constitutes a major retail lending product line. This approach will help ensure more consistent CRA evaluations and provide clarity for banking institutions, without relying on examiner judgment as to what constitutes a sufficiently substantial product line. The 15 percent threshold is also low enough to ensure that all significant areas of bank's retail lending portfolio will be evaluated.

VII. Unfair, Deceptive, and Abusive Acts and Practices

As before, the proposed rule would allow the evaluation of a bank's performance to be adversely affected by evidence of discriminatory or other illegal practices. The NPR expressly includes unfair, deceptive, or abusive acts or practices ("UDAAPs") as conduct that may adversely affect a CRA rating.

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[4] *See* New York State Department of Financial Services, *Industry Letter: CRA Consideration for Activities that Contribute to Climate Mitigation and Adaptation*, February 9, 2021, *available at* https://www.dfs.ny.gov/industry_guidance/industry_letters/il20210209_cra_consideration.

The Department applauds the express inclusion of UDAAPs. Regardless of the extent to which the current regulation identifies UDAAPs as cause for a downgrade, the additional clarity is a welcome change. It is especially important to consider UDAAPs when evaluating a bank's CRA performance as a check against the unfair and abusive practices such as predatory lending, unfair loan fees, and mark-ups that so often harm LMI individuals and communities. These acts and practices can cause significant financial injury to consumers, erode consumer confidence, and undermine the financial marketplace. It is important that banking institutions conduct their CRA-related activity in a way that promotes a healthy marketplace and protects consumers.

Conclusion

The NPR represents a significant, positive modernization of the CRA, and the Department appreciates the time, effort, and dedication to LMI individuals and communities that has led to the promulgation of the NPR. The Department urges the Agencies to consider its feedback and stands ready and willing to work with the Agencies as the revised rule is finalized and implemented.

Sincerely,

Kevin R. Puvalowski
Acting Executive Deputy Superintendent
Consumer Protection and Financial Enforcement