Regulatory Capital Rule: Capital Simplification for Qualifying Community Banking Organizations

COMMENT LETTER

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April 9, 2019
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Re: Regulatory Capital Rule: Capital Simplification for Qualifying Community Banking Organizations

Dear Sir or Madam,

The Conference of State Bank Supervisors ("CSBS") appreciates the opportunity to comment on the Notice of Proposed Rulemaking issued by the Office of the Comptroller of the Currency (the "OCC"), the Federal Reserve Board (the "Board"), and the Federal Deposit Insurance Corporation (the "FDIC") (collectively, the "agencies") titled "Regulatory Capital Rule: Capital Simplification for Qualifying Community Banking Organizations" (the "proposed rule" or "proposal").

The proposed rule implements Section 201 of the Economic Growth Regulatory Relief and Consumer Protection Act of 2018 ("EGRRCPA" or the "Act"). Section 201 directs the agencies to develop a community bank leverage ratio ("CBLR") to serve as a simple measure of capital adequacy which, if exceeded by certain community banks[1], would exempt them from the current regulatory capital rules and associated reporting requirements. Section 201 was intended to provide community banks appropriate regulatory relief from the complexities and burdens of the current regulatory capital rules while ensuring that these organizations maintain a high quality and quantity of capital consistent with that required under the current rules. CSBS believes that Section 201 can be implemented in a manner that fulfills this intent.

As we expressed in our previous letter, we believe that the proposed CBLR Framework, as designed, fails to provide community banks the regulatory relief intended by Section 201 primarily because of the proposed establishment of a separate Prompt Corrective Action ("PCA") Framework within the CBLR Framework.[2] We believe there are alternative approaches to addressing a community bank that opts into the CBLR and subsequently falls below the CBLR and we have outlined one such approach in an Appendix to this letter.

Aside from this larger issue, state regulators believe certain aspects of the proposed rule relating to eligibility for the CBLR Framework also pose an obstacle to providing the regulatory relief intended by Section 201. Additionally, we believe that certain modifications to the proposed rule relating to consultation with state bank regulators would render the proposal more consistent with the spirit of Section 201.

In this letter, CSBS discusses the following points:

- the CBLR Framework should not include the qualifying criteria for concentrations in mortgage servicing assets ("MSAs") and deferred tax assets ("DTAs");
- the definition of "off-balance sheet exposures" in the qualifying criteria is overly broad and unduly burdensome;
- the proposed rule should require agency notification of state bank regulators when a state-chartered CBLR bank opts out of the CBLR Framework between reporting periods; and
- the proposed rule should provide for the appropriate role of state bank regulators in carrying out the CBLR Framework.

Overview of Section 201 of EGRRCPA and the Proposed CBLR Framework

In directing the agencies to establish a CBLR Framework, Section 201 of the Act defines the components and potential levels of the CBLR, limits eligibility for compliance with the CBLR, and, sets out regulatory consequences for compliance with the CBLR.

Under Section 201(a), a "qualifying community bank" is defined as a bank with total consolidated assets of less than $10 billion. Additionally, Section 201(a) authorizes the agencies to determine that banks that fall under this asset threshold are not qualifying community banks based on a consideration of the risk profile of qualifying community banks. Under Section 201(a), the risk profile factors that the agencies may rely on to disqualify an otherwise qualifying community bank are off-balance sheet exposures, trading assets and liabilities, total notional derivatives exposures, and such other factors as the agencies determine appropriate.

To implement this provision, the agencies have proposed to establish "qualifying criteria" to limit eligibility for the CBLR to "qualifying community banks". Specifically, under the proposed rule, to be a "qualifying community bank", a bank must have:

- Total consolidated assets of less than $10 billion;
- Total off-balance sheet exposures (excluding derivatives other than credit derivatives and unconditionally cancelable commitments) of 25 percent or less of total consolidated assets;
- Total trading assets and trading liabilities of 5 percent or less of total consolidated assets;
- MSAs of 25 percent or less of CBLR tangible equity; and
- Temporary difference DTAs of 25 percent or less of CBLR tangible equity.

Additionally, the agencies would reserve the authority to disallow the use of the CBLR Framework by banks based on other risk profile factors not captured by the qualifying criteria enumerated above.
According to the proposal, this authority would be based on the general reservation of authority included in the current capital rules[3] and the agencies authority to address to address unsafe or unsound practices or conditions, deficient capital levels, or violations of law or regulation.[4]

As explained below, state bank regulators have concerns with the inclusion of certain metrics as qualifying criteria, how certain qualifying criteria have been defined, the role of state bank regulators in the operation of the CBLR framework.

The CBLR Framework should not include the qualifying criteria for concentrations in MSAs and DTAs.

State bank regulators believe that the proposed qualifying criteria for concentrations in MSAs and DTAs should not be used to determine eligibility for the CBLR. This position is guided primarily by our belief, as put forth in our previous letter, that Tier 1 Capital should serve as the numerator of the CBLR and, consequently, the CBLR should simply be a Tier 1 leverage ratio, a measure with which community banks are very familiar.

Eliminating the MSA and DTA qualifying criteria and defining the CBLR as a Tier 1 leverage ratio would have no affect on the amount of MSAs and DTAs includable in capital. Specifically, if the generally applicable capital rules are revised as the agencies' recently proposed[5], then the amount of MSAs and DTAs that may be included in CBLR tangible equity would be equal to the amount that would be includable in Tier 1 capital. However, eliminating the MSA and DTA qualifying criteria would potentially expand eligibility to a greater number of community banks which would be consistent with the stated goals of the proposed rule.

While the proposed numerator of the CBLR—CBLR tangible equity—is intended to relieve CBLR banks from the complexities and burdens associated with calculating Tier 1 capital, it should be noted that by including MSAs and DTAs as qualifying criteria, the proposal does not eliminate these burdens but simply shifts the burden from the calculation of capital to the calculation of the qualifying criteria. Thus, making Tier 1 capital rather than CBLR tangible equity the numerator of the CBLR would not materially alter the burden and complexity imposed under the CBLR Framework.

In sum, eliminating the qualifying criterion for MSAs and DTAs and defining the CBLR as a Tier 1 leverage ratio would not alter the quality of capital held by CBLR banks or the burden imposed under the CBLR Framework, but would potentially expand eligibility for the CBLR. For this reason, state bank regulators believe the MSA and DTA qualifying criteria should not be included in the CBLR Framework.

The definition of "off-balance sheet exposures" in the qualifying criteria is overly broad and results in regulatory burden that is inconsistent with the purpose of the CBLR.

State bank regulators believe that proposed definition of "off-balance sheet exposures" in the qualifying criteria is overly broad because it incorporates certain terminology and classifications employed in the Basel III standardized approach. Under the proposal, "off-balance sheet exposures" would be defined to include, among other things, "off-balance sheet securitization exposures". "Securitization exposure" is a term used in the Basel III standardized approach to classify the "exposure category"[6] covering securitization transactions. Unlike some of the other components of off-balance sheet exposures (such as unused commitments and letters of credit), the exposure category for securitization exposures originated in the more complex "advanced approach" to risk weighting developed for large, complex banks[7] and was subsequently incorporated into the Basel III standardized approach.[8] In designing the Basel III standardized approach, no major changes were made to address the overlap between advanced approach exposure categories which had previously not applied to community banks and the standardized approach exposure categories with which community banks were familiar through Basel I.[9] The structural clash between these approaches has made the process of categorizing exposures under the Basel III standardized approach incredibly difficult and complex and has been a major source of the complexity of the current capital rules. We believe it would be inappropriate to bring this complexity into the CBLR Framework.

In particular, state bank regulators recommend that the CBLR qualifying criteria avoid reliance on those broad and imprecise Basel III exposure categories that were not employed in the Basel I standardized approach. The securitization exposure category, of which "off-balance sheet securitization exposures" are a part, is one such exposure category and thus should not be employed in the CBLR qualifying criteria.

To rely on Basel III exposure categories of this type would be inconsistent with the purpose of the CBLR because doing so injects into the CBLR Framework the very complexity and burden from which community banks were intended to be exempted by Section 201.

In discussing the proposed definition of total off-balance sheet exposures, the proposed rule states that it "is significantly simpler than under the generally applicable capital requirements, which require that off- balance sheet exposures be converted to on-balance sheet equivalents and assigned the appropriate risk weight." State bank regulators respectfully disagree. Converting off-balance sheet exposures to on- balance sheet equivalents and assigning the appropriate risk weight, although certainly not a simple matter, is only half the battle. Before an off-balance sheet exposure is converted and risk-weighted, it must first be assigned to the appropriate exposure category—a task which, under the current capital rules and reporting instructions, is itself incredibly complex.[10]

As discussed above, the significant complexity involved in appropriately categorizing exposures under the Basel III standardized approach can be attributed primarily to the breadth and imprecision of certain exposure categories. The definition of "securitization exposure" is an exemplar of this breadth and imprecision. Under the generally applicable capital rules, "securitization exposure" is defined as:

"(1) An on-balance sheet or off-balance sheet credit exposure (including credit-enhancing representations and warranties) that arises from a traditional securitization or synthetic securitization (including a resecuritization), or
(2) An exposure that directly or indirectly references a securitization exposure described in paragraph (1) of this definition."[11]

Although seemingly straightforward, to truly understand the nuances of this definition one would have to reference no less than 18 other definitions in the generally applicable capital rules.[12] To make matters worse, other exposure categories significantly overlap with and thus require reference to the definition of securitization exposure.[13] This overlap is evident in the Call Report Instructions for Schedule RC-R-II which, for almost every single line item in RC-R-II, require certain exposures to be reported provided they do not qualify as a securitization exposure which results in almost 100 instances in which the Instructions require a bank to determine whether or not an exposure is a securitization exposure.

Incorporating the Basel III securitization exposure category into the CBLR qualifying criteria would require frequent cross-references to the generally applicable capital rules and, accordingly, minimize the relief provided by the CBLR. For this reason, state bank regulators believe that off-balance sheet exposures should not be defined to include securitization exposures. This is not to say that the exposures qualifying as off-balance sheet securitization exposures should not be taken into account in the CBLR qualifying criteria. Rather, we encourage the agencies to use terminology in the qualifying criteria that identifies specific transactions and products routinely engaged in and acquired by community banks that meet the definition of off-balance sheet securitization exposure.[14]

In any event, state bank regulators believe the inclusion of "off-balance sheet securitization exposures" in the CBLR qualifying criteria is not appropriate because it imports into the CBLR Framework a significant amount of the complexity and burden of the Basel III standardized approach from which the CBLR was intended to relieve community banks.

The proposed rule should require agency notification of state bank regulators when a state- chartered CBLR bank opts out of the CBLR Framework between reporting periods.

In directing the agencies to establish the CBLR Framework, Section 201 requires a CBLR bank to notify the appropriate state bank supervisor when a qualifying community bank it supervises exceeds, or does not exceed after previously exceeding, the CBLR. As discussed in this section, state bank supervisors believe that, while the proposed rule appropriately implements the notification requirement for circumstances when a CBLR bank falls below the CBLR, notification should also be provided when a CBLR bank opts out of the CBLR Framework between reporting periods.

The proposed rule requests comment on whether the publication of the CBLR in the Call Report would provide an operable means of fulfilling the requirement that the appropriate federal agency notify the applicable state bank supervisor when a community bank exceeds or ceases to exceed the CBLR. State bank supervisors generally support this approach to fulfilling the notification requirement when a CBLR bank either falls below the CBLR or opts out of the CBLR Framework at the end of a reporting period by completing the current regulatory capital reporting requirements..

However, for a CBLR bank to opt out of the CBLR Framework between reporting periods, the proposed rule would require the bank to produce capital ratios under the generally applicable capital requirements to the appropriate agency at the time of opting out. With respect to a CBLR bank that opts out between reporting periods, we believe the appropriate agency should promptly notify the appropriate state bank supervisor that the bank has opted out and share the information produced by the bank in order to opt out. Notifying and sharing information with state bank regulators regarding CBLR banks that opt out of the CBLR between reporting periods would, in part, fulfill the state regulator notification requirement in Section 201.

The proposed rule should provide for the appropriate role of state bank regulators in carrying out the CBLR Framework.

In directing the agencies to establish the CBLR Framework, Section 201 requires the agencies to consult with state bank supervisors in carrying out Section 201. Importantly, the consultation obligation requires engagement with state regulators not only in the development and establishment of the CBLR Framework but also in the ongoing implementation and operation of the CBLR Framework. In this section, we highlight the importance of consultation prior to implementation and recommend several minor revisions to the proposed rule that would more appropriately address the requirement for ongoing consultation as well as the impact of the CBLR framework on state regulatory authority.

Given that nearly 80 percent of banks with less than $10 billion in total assets are state-chartered banks, how the CBLR Framework is designed and calibrated is critically important to the supervisory work of state bank regulators. For this reason, we request that the agencies not take an unduly narrow view of the consultation requirement and, instead, more actively include state bank supervisors in deliberations regarding CBLR implementation. We believe that Congress clearly intended for the agencies and state bank regulators to have ongoing, meaningful dialogue about the implementation of Section 201.

While we appreciate the consultation that has taken place so far, we also believe that going forward certain revisions to the proposed CBLR Framework would more accurately reflect the requirement to consult with state bank supervisors in the operation of the CBLR Framework. Specifically, as discussed below, we believe an adjustment to how case-by-case disqualification determinations are made and clarification regarding the impact of the CBLR Framework on state bank regulatory authority would be appropriate.

As explained above, the agencies have proposed qualifying criteria that, if not met, would disallow a qualifying community bank from using the CBLR. In addition to these enumerated qualifying criteria, the proposal also indicates that the agencies may, from time-to-time, rely on their other general authority to disallow use of the

CBLR by an otherwise qualifying community bank based on risk profile factors not captured by the enumerated qualifying criteria. State bank regulators believe this is a prudent approach.

While it is important to promulgate clear and uniform concentration thresholds to serve as CBLR qualifying criteria in order to provide certainty to the industry, we believe it is imperative that, as bank supervisors, we retain the flexibility to take appropriate supervisory action on a case-by-case basis.

As the chartering authority for state banks, state law provides state bank regulators with the general authority to address unsafe and unsound practices, deficient capital levels, and violations of law and regulation, just as federal law provides the agencies with such authority. These independent sources of authority are exercised concurrently with the FRS, with respect to state member banks, and the FDIC, with respect to state nonmember banks.

In light of this concurrent regulatory scheme, we believe the proposed rule should be revised to expressly provide that for an otherwise qualifying community bank that is state-chartered to be disqualified from using the CBLR based on criteria other than the enumerated qualifying criteria, such a determination must be made jointly by the FDIC or FRS and the appropriate state bank supervisor. At a minimum, the proposed rule should be revised to at least require consultation with the appropriate state bank regulator prior to making such a determination effective because Section 201(d) mandates that the agencies consult with the "the applicable State bank supervisors in carrying out this section."

Lastly, for the avoidance of doubt, state bank regulators wish to emphasize that the Section 201 and the CBLR Framework do not prevent state bank regulators from imposing capital requirements in addition to the CBLR. As mentioned above, state bank regulators, like the agencies, have a general authority to impose capital requirements on state-chartered banks through the supervisory process. We believe that the language or intent of Section 201 cannot reasonably be interpreted to prevent state bank regulators from exercising this general prudential authority. The reservation of this authority is all the more important here, where less risk-sensitive measures of capital adequacy will be employed and more reliance will be placed on the supervisory process to ensure the safety and soundness of community banks.

Conclusion

State bank regulators appreciate the opportunity to comment on the proposed CBLR Framework. This letter was intended to outline our concerns with the inclusion of certain metrics as qualifying criteria, how certain qualifying criteria have been defined, and the role of state bank regulators in the operation of the CBLR Framework. State bank regulators share the agencies' goal of ensuring the CBLR provides appropriate regulatory relief to qualifying community banks while ensuring the continue strength and resiliency of the banking industry. We believe Section 201 can and should be implemented in a manner that meets these goals. As with the recommendations in our previous letter, we are confident that, if the recommendations in this letter are adopted, this goal can be achieved.

Sincerely,

John Ryan
President & CEO

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1 In this letter, we use the terms "bank" and "community bank" to refer to both depository institutions and depository institution holding companies.

2 CSBS' previous letter commenting on the proposed CBLR Framework is available here: https://www.csbs.org/regulatory-capital-rule-capital-simplification-qualifying-community-banking-organizations .

3 See 12 CFR 3.1(d) (OCC); 12 CFR 217.1(d) (Board); 12 CFR 324.1(d) (FDIC).

4 See 12 CFR 3.1(b) (OCC); 12 CFR 217.1(b) (Board); 12 CFR 324.1(b) (FDIC).

5 See Simplifications to the Capital Rule Pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996, 82 Fed. Reg. 49984 (October 27, 2017).

6 In this letter, we use the term "exposure category" to refer to the classifications employed in the capital rules to distinguish different classes of "exposures" for purposes of risk-weighting. The term "exposures" refers to balance sheet assets and off-balance sheet items, collectively.
Under risk-based capital rules generally, the methodology used for calculating the denominator of risk-based capital ratios—risk-weighted assets—requires a bank to (1) assign its exposures to the appropriate exposure category, (2) determine the amount of the exposure based on its exposure category, and (3) assign the appropriate risk-weight to the exposure based on its exposure category.

7 This more complex risk-weighting approach is called the "advanced approach" to credit risk and was first introduced the Basel II Framework issued in 2006, see Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework - Comprehensive Version, and implemented by the agencies in 2007, see Risk-Based Capital Standards: Advanced Capital Adequacy Framework — Basel II, 72 Fed. Reg. 69288 (December 7, 2007). Although the Basel II Framework outlined a "standardized approach" to credit risk that treated securitization exposures as a distinct exposure category, the agencies issued but never finalized a proposal to implement the Basel II standardized approach in the U.S., see Risk-Based Capital Guidelines; Capital Adequacy Guidelines: Standardized Framework, 73 Fed. Reg. 43982 (July 29, 2008).

8 In this letter, we use the term "Basel III standardized approach" to refer to the standardized approach to credit risk established by the agencies in 2013, see Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk weighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule, 78 Fed. Reg. 62018 (October 11, 2013). Although the Basel III Framework did not contain a revised standardized approach, in implementing Basel III, the agencies decided to also implement the standardized approach outlined in the Basel II Framework.

9 The standardized approach applicable under Basel I refers to the standardized approach to credit risk applicable to non-advanced approaches banks under the general risk-based capital rules in effect prior to the Basel III standardized approach taking effect in 2015. See 12 CFR part 3, appendix A (2014); 12 CFR part 167 (2014); 12CFR parts 208 and 225, appendix A (2014); 12 CFR part 325, appendix A (2014); 12 CFR part 390, subpart Z (2014).

10 The task of determining the exposure amount can also be quite complex, particularly for securitization exposures. For instance, the exposure amount of a securitization exposure may equal the exposure's carrying value (subject to adjustment) or notional amount (subject to adjustment) depending on whether the securitization exposure is on- balance sheet or off-balance sheet and whether or not it is an available-for-sale security, a held-to-maturity security, a repo-style transaction, an eligible margin loan, an over-the-counter derivative contract, a cleared transaction, or an exposure to an asset-backed commercial paper program. See §.42 of the regulatory capital rules; see also the Call Report Instructions for Schedule RC-R, RC-R-45, available here: https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_FFIEC041_201812_i.pdf.

11 See §.2 of the regulatory capital rules.

12 See id. The definition of securitization exposure directly incorporates four other definitions in §.2 ("traditional securitization", "synthetic securitization", "resecuritization", and "credit-enhancing representations and warranties") and indirectly incorporates fourteen other definitions in §.2 ("underlying exposures", "tranche", "operating entity", "investment fund", "money market fund", "synthetic exposure", "resecuritization", "credit-enhancing interest-only strip", "clean-up call", "eligible clean-up call", "asset-backed commercial paper program", "asset-backed commercial paper program sponsor", "bankruptcy remote", "eligible ABCP liquidity facility").

13 See e.g., the definitions of "corporate exposure", "residential mortgage exposure" and "equity exposure" in §.2 of the regulatory capital rules.

14 The use of specific, concrete terminology to describe transactions and products that today qualify as securitization exposures was the approach taken in the Basel I standardized approach as well as the "simplified standardized approach" outlined Basel II Framework. See Annex 11 of the Basel II Framework, supra note 7; see also Regulatory Capital Rules: Standardized Approach for Risk-Weighted Assets; Market Discipline and Disclosure Requirements, 77 Fed. Reg. 52887, 52913 (August 30, 2012) (contrasting the proposed treatment of "securitization exposures" under the Basel III standardized approach with the treatment of "recourse obligations, residual interests, direct credit substitutes, and asset- and mortgage-backed securities" under the Basel I standardized approach). For what its worth, employing precise, discrete terminology rather than open-ended, overlapping definitions is one approach the agencies could take in developing a simplified standardized approach for community banks.

Appendix: Alternative Procedure for Treatment of a CBLR Bank that Falls Below the CBLR

In directing the agencies to establish the CBLR Framework, Section 201 of EGRRCPA clearly specifies the consequences of exceeding the CBLR but is much less clear as to the consequences for subsequently falling below the CBLR. Section 201 directs the agencies to "establish procedures for treatment" of a CBLR bank that falls below the CBLR after exceeding the CBLR.

To establish these procedures, the agencies have proposed creating a separate PCA framework for CBLR banks and allowing CBLR banks to "opt out" of the CBLR Framework. In light of these procedures, a CBLR bank can either opt out of the CBLR Framework prior to falling below the CBLR or, after falling below the CBLR, remain in the CBLR Framework and be deemed less than well-capitalized. In our prior letter, CSBS outlined its policy concerns with these proposed procedures, particularly the establishment of the new PCA Framework, and expressed that the consequence of falling below the CBLR should be that the bank is required to resume reporting and complying with the generally applicable capital rules.

State regulators are sensitive to concerns that immediately transitioning back into compliance with the current capital rules upon falling below the CBLR may be a difficult and burdensome task, particularly for a bank that has only reported the CBLR for a number of years. For this reason, in this Appendix, CSBS outlines an alternative procedure for the treatment of a CBLR bank that falls below the CBLR. We believe this approach is preferable to the establishment of a PCA Framework and will encourage community banks to elect to use the CBLR.

Our proposed alternative for the treatment of a CBLR bank that falls below the CBLR would be designed as follows:

- A CBLR bank that falls below a CBLR of 9 percent would be given a two-quarter “grace period” to restore its CBLR to greater than 9 percent. If the CBLR bank fails to exceed a CBLR of 9 percent by the end of the two-quarter grace period, then, at the end of the two-quarter period, it would be required to comply with the generally applicable capital rules, including the reporting of risk-based capital information.
- A CBLR bank that falls below a CBLR of 8 percent would, in the same quarter, be required to comply with the generally applicable capital rules, including the reporting of risk-based capital information.

There are several benefits to this proposed approach. In allowing for a grace period, this approach would avoid requiring a bank to transition back to the current capital rules when it falls only slightly below the CBLR for a limited time. Additionally, by limiting the length of the grace period, community banks would be discouraged from maintaining a CBLR between 8 and 9 percent. Lastly, by requiring a bank that falls below a CBLR of 8 percent to immediately begin complying with the generally applicable capital rules, the bank will have the opportunity to show whether or not it is well capitalized for PCA purposes, all information needed to assess the capital adequacy of the bank will then be available, and there will be no confusion as to the status of the bank for PCA purposes.

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