COMMENT LETTER

Community Reinvestment Act Regulations

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Federal Deposit Insurance Corporation
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RIN 3064-AF22

Office of the Comptroller of the Currency
Chief Counsel's Office
400 7th Street, SW, Suite 3E-218
Washington, DC 20219
Docket ID OCC-2018-0008

Re: *Community Reinvestment Act Regulations.*

Dear Sir or Madam,

The Conference of State Bank Supervisors ("CSBS")[1] appreciates the opportunity to comment on the joint notice of proposed rulemaking issued by the Federal Deposit Insurance Corporation (the "FDIC") and the Office of Comptroller of the Currency (the "OCC") (collectively, the "Agencies") titled "Community Reinvestment Act Regulations". The proposed rule would fundamentally transform where and how banks are evaluated under the Community Reinvestment Act (the "CRA"). CSBS believes that more information gathering, more interagency consensus, and more harmonization with existing rules is needed before such fundamental reforms are undertaken.

Numerous aspects of the proposal are concerning to CSBS and its members, including the non-involvement of the Board of Governors of the Federal Reserve System (the "Board") in issuing the proposed rule, the lack of information and analysis needed to understand the impact of the proposed revisions, the duplicative and incomprehensive nature of the proposed data collection reforms, the burden imposed by the proposed rule on small banks relative to the benefit provided to these banks, and the lack of clarity as to the impact of the proposal on wholesale and limited purpose banks. As for the proposed CRA evaluation metrics in particular, CSBS is concerned that insufficient incentives are provided to maintain branches in certain areas and the potential for creating inadvertent biases in favor of higher-dollar activities.

In light of these concerns, CSBS requests that the Agencies:

- not create an inconsistent CRA regulatory framework across the federal banking agencies;

- take a more comprehensive approach to data collection and reporting which avoids duplication and unintended consequences by accounting for other regulatory uses of depositor data;
- give greater attention to providing relief to small banks that is proportionate to the potential burden;
- provide greater incentives for establishing and retaining branches in LMI areas, Indian country, underserved areas, and distressed areas; and
- place greater emphasis on the total number of CRA qualifying activities rather than the total dollar amount of CRA qualifying activities.

The Agencies should not create an inconsistent CRA regulatory framework across the federal banking agencies.

The proposed rulemaking has been issued by the OCC and FDIC without the involvement of the Board. If adopted in the same manner it was proposed, the proposal would result in the OCC and FDIC applying a vastly different CRA regulatory framework than that applied by the Board. As a result, state member banks would be subject to different CRA rules than apply to state nonmember banks and national banks. For the reasons outlined below, CSBS believes that the Agencies should not create an inconsistent CRA regulatory framework by proceeding with the proposed rulemaking without the involvement of the Board.

CSBS has long maintained that the federal CRA regulatory framework should be applied consistently for banks regardless of their chosen charter type or their chosen primary federal regulator; we continue to adhere to this belief.[2] Adopting inconsistent federal CRA regulations would result in multiple practical and legal problems for banks and state regulators alike.

For instance, numerous banking organizations are multi-bank holding companies with a state member bank subsidiary and a state nonmember bank or national bank subsidiary. If inconsistent federal CRA rules are adopted, these banking organizations would have to run dual compliance systems for the FDIC/OCC proposed CRA framework and the current CRA framework retained by the Board. While these banking organizations could certainly restructure to avoid this outcome, it seems undesirable to interfere with an institution's business decision as to its preferred charter or regulator simply because the federal banking agencies cannot agree on a uniform approach to CRA reform.

State regulators would also encounter problems if the Agencies create an inconsistent CRA regulatory framework. For instance, states that supervise for federal CRA compliance or compliance with state community reinvestment laws currently often rely on the FDIC for training and educational resources with respect to CRA supervision. However, if the FDIC and Board have different CRA rules, state supervisors could be left without training resources with respect to supervising their state member banks or, at least, would have to undergo two sets of training with respect to the distinct FDIC and Board regulations.

Furthermore, inconsistent federal CRA regulations could interfere with the ability of states to apply state CRA laws by putting states in a difficult legal situation with respect to interstate banking. State community reinvestment laws are generally modeled after the federal CRA regulations and apply to home state banks, member and nonmember, and branches of out-of-state banks, state and national.[3] But, in order to avoid conflict with federal requirements, states would have to adopt different community reinvestment rules patterned after the Board and the FDIC regulations with respect to home state member and nonmember banks, respectively. However, adopting different community reinvestment rules for home state member and nonmember banks, would potentially result in state community reinvestment rules not applying to host state branches of out-of-state banks because they could then be construed as having a discriminatory effect between home state member banks and out-of-state national banks.

The manner in which Congress intended for state community reinvestment laws to apply to interstate banking operations is clear indication that Congress intended that the federal CRA regulations would be consistent across the agencies. The proposed rule undermines this intention and creates a dilemma for states that will potentially interfere with their ability to adopt and apply state community reinvestment laws. In sum, CSBS continues to believe that the federal CRA framework should remain the same regardless of the type of charter or regulator chosen. Given the multiple legal and practical problems that would result from creating an inconsistent CRA regulatory framework, CSBS urges the Agencies maintain a consistent CRA regulatory framework across the federal banking agencies.

The Agencies should conduct the information gathering needed to understand and explain the necessity for and impact of the proposed reforms to how assessment areas are delineated.

The proposed rule is intended to modernize the CRA regulatory framework while creating a more transparent and objective method for measuring CRA performance. The proposal would modernize the CRA rules by creating a standardized process for identifying a bank's community (i.e. assessment area(s)) which accounts for changes in technology and the expansion of interstate banking over the past two decades. The proposal would make CRA evaluation more transparent and objective by, among other things, establishing CRA evaluation metrics and listing CRA qualifying activities. In short, the proposal updates where activities count for CRA credit to modernize CRA and what activities qualify for CRA credit to enhance objectivity.

It is worth noting that these modernization and objectivity aspects of the proposal are not inherently intertwined as it would be feasible (and probably more desirable) to propose a rule that reforms how assessment areas are delineated separate and apart from a proposal to create CRA evaluation metrics. While some of the changes proposed to enhance objectivity may be desirable, CSBS is concerned that there has been insufficient information gathering to understand the necessity for and impact of modernizing how assessment areas are delineated. According to the proposal, the current assessment area delineation methodology needs to be modernized to account for "the fact that many banks receive large portions of their deposits from outside their facilities-based assessment areas". To extent this is true, then indeed the current facilities-based approach to delineating assessment areas would fail to conform to the CRA's purpose to ensure that banks help meet credit needs where they collect deposits.

The problem is that the Agencies do not have the data needed to know the extent to which banks are in fact receiving deposits outside their branch-based assessment areas. The Summary of Deposits data collection and reporting does not contain this data as deposits are attributed to branch location for purposes of this report. Moreover, the FDIC has not sought out this information at all and the OCC has only recently done so and only after issuing the proposal. Obtaining this data would seem to be all the more important given that, when considering the question of whether the current definition of assessment area needs to be updated in light of modern banking practices, the Agencies have previously concluded that adopting any alternative definition would impose unjustifiable regulatory costs, would not be administrable, and raised questions best left to Congress.[4]

For instance, in previously considering how to ensure assessment areas include areas where a bank conducts a significant level of activity, the issue of whether the relevant metric should be the percentage of a bank's deposits or the percentage of the bank's deposit market share was deemed a "fundamental question[] about the scope and purpose of CRA that entail[s] political judgments that may be better left to elected officials in the first instance."[5] Yet, the proposed rule simply decides, without explanation, that deposit concentration is preferable to deposit market share as the relevant metric for delineating assessment areas. The lack of explanation is concerning given that the chosen metric will likely result in few banks having assessment areas in less populous areas even when they have a significant market share in those areas.

CSBS believes that gathering information as to depositor location should be the initial first step in proposing reforms to how assessment areas are delineated because this is the only way to know the extent to which banks are taking deposits outside their current branch based assessment areas. Without this information it cannot be known whether the proposed concentration thresholds are appropriately calibrated, whether concentration, as opposed to market share, is even the appropriate metric, or whether the burden imposed is justified in light of the prevalence of the perceived problem. Accordingly, CSBS urges the Agencies to first gather, study and report out on the requisite information needed to gauge the necessity for and impact of the proposed reforms to how assessment areas are delineated before adopting these proposed reforms.

The Agencies should take a more comprehensive approach to data collection and reporting which avoids duplication and unintended consequences by accounting for other uses of the data collected for other regulations and by other regulators.

Despite the data gaps outlined above, the Agencies have proceeded with proposing reforms to how assessment areas are delineated. To this end, the Agencies have proposed to require banks to collect and report data as to the location and value of deposits. This significant new reporting requirement has been proposed without revising existing, duplicative reporting requirements and the rules that rely on data reported through these existing requirements.

Currently, all banks are required to submit the annual Summary of Deposits (SOD) survey which records deposits by attributing them to a branch location, rather than the location of the depositor. In addition to currently being used for CRA, SOD data is used to assess compliance with numerous other federal and state requirements and restrictions on geographic expansion via merger or branching including the prohibition on interstate deposit production, nationwide and statewide deposit concentration limits, and competitiveness analysis for merger applications (i.e. HHI). The proposed data collection would presumably not replace the SOD data reporting with the new deposit data reporting requirements so banks would continue to report SOD data and these other laws would still utilize SOD data.

CSBS is concerned about the effect of assuming deposits are located in one area for purposes of CRA based on the data proposed to be collected while assuming deposits are located in an entirely different area for purposes of other federal rules based on the SOD data collection. This results in a misalignment between what a deposit market looks like for purposes of restrictions on geographic expansion and the community whose credit needs a bank must meet. Ultimately, it makes little sense to impose duplicative reporting requirements so we can then assume deposits are located in one area for purposes of the CRA and entirely different area for purposes of numerous other federal requirements. This is particularly true for certain federal requirements, such as the interstate deposit production prohibition, which are intended to prevent the very problem that the proposed rule is intended to resolve, namely, deposit siphoning. For this reason, CSBS believes the agencies should reform deposit data collection requirements and the rules utilizing this data in a comprehensive, holistic manner and on a joint, interagency basis rather than imposing a duplicative data collection requirement solely for the purposes of CRA.

Furthermore, CSBS is also concerned about the unintended consequences of the proposed data collection requirements for small banks. The proposal would require large banks to collect, keep records, and report depositor data but would only require small banks to collect and keep records of depositor data. For small banks, compliance with the collection and recordkeeping would be assessed through CRA exams. While we appreciate the intent to reduce burden on small banks by not requiring them to regularly report depositor location data, CSBS is concerned that this approach may actually entail more burden for small banks in the examination process.

Requiring small banks to report depositor data may actually be less burdensome because regulators can then review and test depositor data and assessment area delineation offsite. Without reporting, examiners will have to review and test small bank depositor data on-site which will add more burden to the CRA exam process. Accordingly, CSBS encourages the agencies to consider applying the depositor data reporting requirements to small banks, as opposed to just the collection and recordkeeping requirements, because this may actually reduce burden for small banks in the long run.

Lastly, CSBS believes it is imperative that state regulators have access to the data reported regarding the location and value of deposits as well the lending data required to be reported by the proposal. Just as with data currently utilized in CRA exams, states need access to deposit and loan data to be able to apply state community reinvestment laws. More generally, states also need access to any new or revised deposit dataset to assess compliance with and the potential need to recalibrate numerous state laws—including state branching and merger restrictions, statewide deposit concentration limits, and state deposit escheat laws. The proposal does not indicate whether state regulators will have access to the datasets created by the data required to be reported under the proposal. Thus, we encourage the Agencies to clarify that state bank regulators will have access to deposit and loan data collected under the proposal.

The Agencies should clarify the impact of the proposed rule on wholesale and limited purpose banks.

The proposed rule would eliminate the wholesale and limited purpose bank designation provisions of the current CRA rules. As a result, banks that are currently designated as a wholesale institution or a limited purpose institution would no longer be subject to a separate CRA evaluation standards but instead would be evaluated under the same general performance standards that would apply to banks with traditional business models.

The proposal does not explicitly state that the current wholesale and limited purpose treatment for CRA is being eliminated, nor does it explain why the proposal would eliminate these designations or why this change is justified. The proposal would revise the definition of special purpose bank, but it is not clear whether or not this is intended to capture some or all of the institutions currently designated as wholesale or limited purpose because this revision to this definition is also not discussed or explained in the proposal. The question is further complicated by the fact that the proposal would retain wholesale and limited purpose designation for purposes of the interstate deposit production regulations, Subpart B of the Agencies' CRA regulations.

For this reason, CSBS requests that the proposal address whether the wholesale and limited purpose bank status would be eliminated by the proposed rule and, if so, the justification for eliminating this aspect of the current CRA rules. We also request that the Agencies explain the proposed revisions to the current definition of special purpose bank, including any affect this may have on banks currently designated as wholesale or limited purpose institutions. Lastly, CSBS requests clarity as to how eliminating the wholesale and limited purpose bank designations would interact with the retention and exclusion of these institutions with this status from the interstate deposit production regulations.

The Agencies should give greater attention to providing relief to small banks that is proportionate to the potential burden created by the proposed rule.

CSBS is concerned the burden imposed by the proposed rule is broadly distributed across the banking industry while the relief provided is localized among the larger institutions. It is unclear that it would even be feasible for small banks to elect to comply with the proposed CRA general performance standards. For instance, several of the proposed CRA metrics will require purchasing access to private datasets which can be a very costly proposition for a small bank. The conclusion that small banks are unlikely to be able to opt in is underscored by the fact that the burden estimates in the proposal assume that no small banks will opt in.

Even though small banks will not partake in the relief provided by the proposal, the proposal still goes on to impose new regulatory burdens to the same extent as larger banks that actually partake in the relief. While not knowable due to the data limitations discussed above, there is the possibility that small banks will need to hire additional CRA compliance staff in the event that the proposal would create new assessment areas for small banks in geographic areas with which they have no business experience. In light of these concerns, CSBS would prefer that the Agencies give greater attention to providing relief to smaller banks than is provided in the proposal.

For instance, the agencies could consider raising the small bank threshold, which would be set at $500 million, to account for changes in the industry since the CRA regulations were previously updated. Under the proposed rule, 26 percent of banks (excluding state member banks) would be classified as large banks, and they held 96 percent of assets of total bank and thrift industry assets based on data reported as of June 30, 2019. This is a much higher percentage of the industry than qualified as a large bank under CRA in the 1994/1995 time period when only 20 percent of institutions were classified as large and they held 86 percent of total industry assets. In light of the changes in the composition of the industry, CSBS encourages the agency to consider recalibrating the small bank asset threshold as a way of providing additional relief to small banks.

The proposed CRA evaluation metrics should provide greater incentives for establishing and retaining branches in LMI areas, Indian country, underserved areas, and distressed areas.

CSBS is concerned that the proposed rule places insufficient emphasis on the value of physical branches, particularly in certain areas most in need of banking services. For instance, the proposed CRA evaluation metrics would give a maximum credit of one percent (towards the 11 percent needed for an outstanding rating) for banks that maintain branches in LMI areas, Indian country, underserved areas, and distressed areas. CSBS believes the proposal should provide greater incentives for establishing and retaining branches in LMI areas, Indian country, underserved areas, and distressed areas.

Since the CRA was last updated over two decades ago there has been a significant reduction in the number of branches and other banking offices in the United States. LMI areas, both rural and urban, have endured the brunt of this shift away from physical office locations. At least one study has shown that the current CRA framework has helped reduce the emergence of banking deserts in lower income neighborhoods by reducing the risk of branch closure in these areas.[6] The presence of physical branches in low-income communities has been particularly important in overcoming credit barriers by helping to ensure more convenient access to banking services at a lower cost to communities and small businesses in these areas. Underserved communities have reported that they also benefit from access to important community leadership from branch personnel.[7] Accordingly, CSBS believes the proposed CRA evaluation metric should give more credit for maintaining branches in LMI areas, Indian county, underserved areas, and distressed areas, particularly local, full-service branches.

Additionally, the agencies should also consider giving credit in some manner to small banks that maintain offices in these areas. Small, local banks have an outsized physical presence in LMI, underserved and distressed areas relative to their share of domestic deposits. Indeed, based on SOD data and census data for the year 2018, of the total number of bank offices located in distressed and/or underserved census tracts, 47 percent were offices of banks with total assets less than $500 million even though the total number of offices of these small banks only constituted 16 percent of the total number of bank offices in the industry. Further, of the small bank offices located in in distressed and/or underserved census tracts, 90 percent were offices of local banks, that is, banks without any interstate branches. CSBS believes that the greater presence of small, local banks in areas most in need of banking services should be recognized and encouraged in some manner by the proposed rule.

The proposed CRA metrics should place greater emphasis on the total number of CRA qualifying activities rather than the total dollar amount of CRA qualifying activities.

CSBS is concerned that, by focusing on the total dollar amount, rather than the number, of CRA qualifying activities, the proposed CRA evaluation measure may incentivize banks to make fewer, highdollar value loans for CRA purposes. By evaluating banks solely on the basis of the dollar value of their CRA activities, the proposed rule places insufficient emphasis on the quality and impact of a bank's activities. The proposed approach may result fewer financing options for smaller nonprofits to build and preserve deep affordable housing as well as fewer smaller retail loans, including small business loans.

CSBS believes that CRA should not be revised in a manner that will result in CRA activities which are less impactful, less targeted to LMI individuals and underserved communities, and with less effective strategies. Therefore, CSBS believes the proposed CRA evaluation metric should place greater emphasis on the total number of CRA qualifying activities rather than the total dollar amount of CRA qualifying activities.

Conclusion

CSBS appreciates the opportunity to comment on the proposed rule to reform the Agencies' CRA regulatory framework. While we appreciate the intent and need to modernize the current CRA regulatory framework, the proposed rule presents multiple significant concerns, particularly regarding the noninvolvement of the Board in the proposed rulemaking, existing data gaps and the proposed data collection requirements, and the impact of the proposed reforms on state regulators, industry, and communities.

In light of these concerns, CSBS requests that the Agencies not proceed with the proposed rulemaking without the Board's involvement, that additional information gathering and study be done, and that a more comprehensive approach to data collection is undertaken. CSBS also requests, with respect to the proposal itself, that the Agencies focus more on relief for small banks and modify the proposed CRA metric to be more in line with the purpose of CRA. CSBS and state regulators would be willing and eager to consult with the Agencies regarding any concerns highlighted in this letter as the Agencies continue the CRA modernization effort.

Sincerely,

John Ryan
President & CEO

Footnotes

[1] CSBS is the nationwide organization of state banking and financial regulators from all 50 states, American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. CSBS supports the state banking agencies by serving as a forum for policy and supervisory process development, by facilitating regulatory coordination on a state-to-state and state-to-federal basis, and by facilitating state implementation of policy through training, educational programs, and exam resource development.

[2] In commenting on a previous CRA reform proposal in 2004, we stated "CSBS supports consistency in the application of CRA rules for banks regardless of the type of charter they chose. Until recently, the rulemaking process of federal banking agencies reflected a goal of generally consistent application of the CRA. . . . However, recently, the agencies' record of consistency in the adoption of CRA rules has unraveled. . . . CSBS

recommends that the FDIC assume a leadership role as the federal insurer of all banks and thrifts by bringing the federal agencies back to the table to identify a consistent approach to fulfill the initial intent of CRA when passed in 1977."

[3] *See* 12 U.S.C. §§ 36(f)(1)(A), 1831a(j)(1), 1831u(b)(3).

[4] *See* 69 Fed. Reg. 5729, 5736 (Feb. 6, 2004) ("Although limitations in the current definition of "assessment area" might grow in significance as the market evolves, we believe any limitations are not now so significant or pervasive that the current definition is fundamentally ineffective. Moreover, none of the alternatives we studied seemed to improve the existing definition sufficiently to justify the costs of regulatory change. Many of the alternative definitional changes to assessment area we reviewed were not feasible to implement,. . . ").

[5] *Id.*

[6] *See* Lei Ding and Carolina K. Reid, "The Community Reinvestment Act (CRA) and Bank Branching Patterns", Federal Reserve Bank of Philadelphia (2019).

[7] *See* Board of Governors of the Federal Reserve System, Perspectives from Main Street: Bank Branch Access in Rural Communities (November 2019).

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