



Noah W. Wilcox, *Chairman*
Robert M. Fisher, *Chairman-Elect*
Brad M. Bolton, *Vice Chairman*
Gregory S. Deckard, *Treasurer*
Alice P. Frazier, *Secretary*
Preston L. Kennedy, *Immediate Past Chairman*
Rebeca Romero Rainey, *President and CEO*

Submitted via email to regs.comments@federalreserve.gov

February 16, 2021

Anne E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th St. and Constitution Ave. NW
Washington, DC 20551

RE: ADVANCE NOTICE OF PROPOSED RULEMAKING REGARDING MODERNIZING THE BOARD'S COMMUNITY REINVESTMENT ACT REGULATORY AND SUPERVISORY FRAMEWORK (DOCKET NO. R-1723; RIN 7100-AF94)

Dear Sir or Madam,

The Independent Community Bankers of America (“ICBA”)¹ appreciates this opportunity to provide feedback to the Board of Governors of the Federal Reserve System’s (“the Board[’s]”) request for comments in response to its Advance Notice of Proposed Rulemaking (“ANPR”)² regarding modernizing the Board’s Community Reinvestment Act (“CRA”) regulatory and supervisory framework.

For community banks, reinvesting in their communities is at the core of their business model. Recently, communities across the United States have been devastated by the health and economic crisis of the COVID-19 pandemic. Community banks have played a key role in the nation’s economic response to the pandemic through their outsized participation in the Small Business Administration (“SBA”) Paycheck Protection Program (“PPP”).

ICBA is generally supportive of efforts to modernize CRA regulations to ensure they continue to reflect the changes to the banking industry driven by technology. However, as that framework is developed, we strongly urge the Board to be mindful of the disproportionate burden that additional data collection and reporting places on community banks. Finally, ICBA supports a new framework that increases the transparency of CRA exams.

¹ The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than \$4.9 trillion in assets, \$3.9 trillion in deposits, and \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America. For more information, visit ICBA’s website at www.icba.org.

² 85 Fed. Reg. 66410.

ICBA Priorities

1. **An Interagency Rule with Broad Stakeholder Support:** We strongly urge the Board, the Office of the Comptroller of the Currency (“OCC”), and the Federal Deposit Insurance Corporation (“FDIC”) to develop and issue an interagency rule. With multiple CRA rules, there will be increased confusion about which activities qualify for CRA credit and the potential for regulatory arbitrage. We believe the framework outlined in this ANPR provides a solid basis for a uniform final rule.
2. **Minimize Data Collection and Reporting Burden:** For community banks, data collection is disproportionately burdensome. For this reason, we strongly support the Board’s decision to exempt small banks from geocoding deposit data and recommend that it not be used for large community banks. In our view, increasing compliance burden has played a significant role in pushing the industry towards consolidation as banks must realize economies of scale. A profusion of locally owned small banks with an array of different missions and business models better serves local communities, including underserved areas. Furthermore, every incremental dollar spent on regulatory compliance is a dollar that cannot be reinvested into the communities that banks serve.
3. **Raise Small Bank Threshold(s):** We urge the Board to raise the small bank threshold to \$2.5 billion in assets to reflect the increasing regulatory burden and trend towards bank consolidation since the original threshold was adopted. The adoption of a \$2.5 billion threshold would also be consistent with the OCC final rule. Furthermore, we recommend keeping the intermediate small bank tier to more appropriately distinguish between larger community banks and very large regional and money center banks. This threshold should be set at \$10 billion assets.
4. **Provide Clearer Rules to Establish Ratings:** With some caveats detailed in this letter, we support the Board’s approach of clarifying the use of quantitative benchmarks in establishing CRA ratings. We believe that benchmarks must be tailored to local demographics and past bank performance, rather than to nationwide standards. This will prevent evaluations from becoming “one size fits all.” We further commend the Board’s proposal to create online dashboards that will allow banks to track performance in real time. Finally, while there are obvious merits to an approach that is mostly quantitative, some activities such as volunteer work are best evaluated on a qualitative basis.
5. **Provide Clarity on What Activities Qualify for CRA Credit:** We support the Board’s efforts to clarify definitions of what counts for CRA credit and to create a qualifying activity list and confirmation process. These steps should promote ex ante certainty and promote investment.
6. **Strengthen Incentives for Partnerships with Minority Depository Institutions (MDIs) and Community Development Financial Institutions (CDFIs):** The vast majority of MDIs and bank CDFIs are community banks. These institutions are mission focused and particularly well suited to reaching underserved communities. They often provide services such as banking in languages other than English and have a unique

understanding of the communities they serve. CRA was created as a response to redlining and these institutions can play a key role in promoting financial inclusion. Therefore, we support providing incentives to traditional banks when investing in mission-focused institutions and urge the Board to provide additional regulatory relief for MDIs and CDFIs themselves.

7. **Expand Where Bank Investments Qualify for CRA Credit:** While it is appropriate to assess retail lending within assessment areas, community development loans and investments should not be limited to a bank's assessment area. We support CRA credit for a meritorious loan or investment that is located outside of the bank's assessment areas. The confines of assessment area are less appropriate in an era where even smaller banks are offering internet banking services and tend to concentrate investment in areas with a high concentration of bank branches. This leads to underinvestment in rural counties.
8. **Nationwide Evaluation for Internet Banks:** Branchless internet banks, which did not exist when the current rules were created, should be evaluated on a nationwide basis. These banks solicit deposits and offer loans nationwide, so concentrating their CRA obligations in the location of their main office does not comport with the true intent of CRA. We also favor nationwide assessment areas as opposed to more complicated metrics because we believe they will significantly simplify data collection and reporting and will be much easier for customers to understand.

Summary of the Board's Proposal

The Board is proposing a CRA framework that would divide evaluation of banks into a separate retail test and a community development ("CD") test. This is in contrast to the OCC's recent CRA modernization rule, which combined retail lending and community development into a single, dollar-based CRA metric.³ The retail and CD tests are further broken down into the following subtests.

1. Retail Lending Subtest
2. Retail Services Subtest
3. Community Development Financing Subtest
4. Community Development Services Subtest

The Board differentiates between small and large banks by limiting the evaluation of small banks to the retail lending subtest. Furthermore, small banks have the option to remain under their current evaluation framework or to opt in to the new, metrics-based approach. The Board proposes to create a list of qualifying activities and a process banks can use to confirm whether a loan or investment qualifies for credit. Finally, small banks would have the option of having their retail and community development services evaluated using a qualitative review. The Board's graphical summary of the proposed framework appears below:

³ See 85 Fed. Reg. 34768.

Retail Test



Small retail banks may remain under current framework or may elect to be evaluated under only the Retail Lending Subtest. Can submit retail services activities for optional qualitative review.

Wholesale and limited purpose banks would not be evaluated under the Retail Test.

Community Development Test



Community Development Test would only apply to **large retail banks** and to **wholesale and limited purpose banks**.

Small retail banks can submit community development activities for optional qualitative review.

Banks would receive a conclusion for each applicable subtest in each of their assessment areas. These conclusions would be based on quantitative analysis for the retail lending subtest and the CD financing subtest, and on a qualitative basis for the services subtests. The assessment area conclusions would form the basis of state, multistate, and whole institution CRA ratings.

Small Bank Definition

Under the Board's proposal, an asset threshold of either \$750 million or \$1 billion in assets would be used to distinguish between small and large retail banks.⁴ Under the current Regulation BB, a small bank is defined as a bank that, "as of December 31 of either of the prior two calendar years, had assets of less than \$1.322 billion."⁵ Within the category of small banks exist the two sub-categories of intermediate small banks ("ISBs"), which have assets between \$326 million and \$1.322 billion, and small banks, which have assets below \$326 million.

In its May 2020 Final Rule, the OCC defined small banks as banks under \$600 million in assets and intermediate small banks as banks between \$600 million and \$2.5 billion in assets.⁶ These thresholds are adjusted each year to keep pace with inflation.

Regarding the appropriate asset size threshold to differentiate between a small and large retail banks, the ANPR asks, "[i]s \$750 million or \$1 billion an appropriate asset threshold to distinguish between small and large retail banks?" It further asks, "[s]hould the regulation contain an automatic mechanism for allowing that threshold to adjust with aggregate national inflation over time?"⁷ In response to the first question, ICBA believes that either \$750 billion or \$1 billion are too low for the small bank threshold. This threshold should be raised to \$2.5 billion, to

⁴ 85 Fed. Reg. 66411.

⁵ 12 CFR 228.12(u).

⁶ 85 Fed. Reg. 34791.

⁷ 85 Fed. Reg. 66419.

achieve parity with the OCC rule, or at a minimum, \$1.305 billion, so that no banks currently evaluated under the intermediate small bank test become large banks.

Any threshold adopted by the Board should automatically adjust to account for consolidation in the banking industry. The ever-increasing regulatory burden on banks, which has accelerated consolidation, has made a higher small bank threshold appropriate. When the small and intermediate small bank tests were established in 2005, 92.6 percent of FDIC-insured institutions were below the (then \$1 billion in assets) intermediate small bank threshold. If that percentage were applied to the distribution of bank asset sizes today, the intermediate small bank threshold would be set at \$2.43 billion. Therefore, an asset threshold of \$2.5 billion is an appropriate threshold at this time because it is calibrated to the same asset distribution levels as the original threshold at its inception. The OCC adopted the \$2.5 billion threshold in their final rule, explicitly citing this methodology argued for by ICBA.

Additionally, the small bank asset threshold should be adjusted each year, to account for bank consolidation. This would better reflect the industry's trend towards consolidation – which also reflects the national economic posture in the aggregate – while still differentiating community banks from the largest regional and money center banks. In the alternative, at a minimum, the threshold should be adjusted automatically to account for Consumer Price Index (“CPI”) inflation.

Under the Board's current rule, small banks are evaluated using only the lending test, whereas ISBs and large banks are evaluated using both the lending test and the community development test.⁸ By contrast, the Board's ANPR would require small banks only to be evaluated under the retail lending subtest. It would further allow small banks the option of having their activities evaluated under the retail services subtest and the community development subtest. In contrast to the OCC rule, small banks would not be required to track or geocode the location of their deposits on an ongoing basis.⁹ Banks above the small bank threshold (“large banks”) would be evaluated under both the retail test and the CD test, including all four subtests, on a mandatory basis.

ICBA appreciates the efforts made by the Board to tailor the rule to address the needs of community banks. The Board's ANPR concluded that, “although increasing the small bank threshold above the existing limit might result in fewer banks' community development activities evaluated for purposes of CRA, it would also better tailor the compliance and data implications of the proposed Community Development Test only to banks with substantial community development activity.”¹⁰

For small banks, data collection is a particularly expensive problem. In addition to meeting their obligation to regulators to collect information, banks must also invest in data security systems to ensure that customer privacy is never compromised. While larger banks typically have in-house software developers and large compliance and legal teams, small banks work with and are dependent on third-party providers. This is more costly, necessitates additional due diligence,

⁸ 12 CFR 228.26.

⁹ 85 Fed. Reg. 66460.

¹⁰ 85 Fed. Reg. 66419.

and ultimately requires reliance on the third-party providers to deliver accurate and timely implementation of new requirements.

We acknowledge that there are important differences between the OCC final rule and the Board's ANPR. Namely, the Board's ANPR eliminates the intermediate small bank category, classifying banks as either small or large. While this change does simplify the rule, it also potentially reduces the tailoring of CRA by eliminating a tier of graduated supervision.

In our view, the Board should not eliminate the category of ISBs, and if it does, it should adopt a do-no-harm rule, which would not cause any current ISBs to automatically become large banks. While this change may result in fewer banks being evaluated under the CD test, we do not believe it will lower levels of CD lending and investment by small banks. Furthermore, not including current ISBs in the definition of large banks will save significant compliance costs related to tracking deposits for a significant number of relatively small, community-focused depository institutions.

The same standards and comparisons will apply to all banks exceeding the small bank threshold, from community banks with approximately \$1 billion in assets to mega banks with more than \$2 trillion in assets. For "large" community banks, the result will be the codification of unfair and burdensome performance expectations as well as inefficient allocation of resources, ultimately limiting the potential positive impact of community banks on the communities they serve. To address these challenges, there must be recognition that the resources available to a community bank on the lower end of the "large" bank scale are much different than a bank with hundreds of billions or trillions of dollars in assets. In addition, more must be done to tailor supervision to reflect not only the capacity of the bank as a whole, but also the capacity of the bank to serve a given assessment area based on its resources in that area.

We are concerned that a two-tier system, where banks are either small or large, does not differentiate sufficiently between large community banks and the largest regional and nationwide banks. Instead, we recommend setting a higher threshold, potentially \$10 billion, for intermediate banks. Banks in this category could also be given additional flexibility, such as an exemption from tracking retail domestic deposits, being exempted from CD lending in smaller assessment areas, or being exempted from the services components of the retail and CD test. As proposed, to meet supervisory expectations in an assessment area, a community bank that crosses the large bank threshold would be required to achieve high performance in all categories and within an assessment area, even if it has lower market share in that assessment area than small banks with larger market shares in that assessment area.

Assessment Area

One of the major reasons that CRA requires modernization is that it has not kept pace with changing technology. When CRA was enacted in 1977 and, indeed, when the rule was last overhauled in 1995, modern online banking did not exist. While we acknowledge that a digital divide persists in this country and that internet access is not universal, online banking, including features such as mobile deposit, has become a necessary service. Furthermore, as the COVID-19

pandemic has proven, mobile banking can be an excellent way for customers to access bank services when they cannot access a branch.

Because of this sea change in bank technology, it is not only appropriate but necessary to rethink the meaning of an internet bank's community. While the meaning of a bank's community will undoubtedly vary from institution to institution, there is a distinction between traditional, branch-based banks and branchless internet banks. For traditional banks, the location of branches is still the best way to identify the community they serve. However, internet banks often operate one main office but conduct their lending and deposit solicitation activities nationwide. To limit the communities of these institutions to the county where their main office is located is an anachronism.

Facilities-Based Assessment Areas

ICBA supports retaining facilities-based assessment areas. Community banks serve as the only physical banking presence in nearly one in five U.S. counties. More than 16 million people in roughly one in three counties would have limited or no physical access to mainstream banking services without the presence of community banks. The location of a community bank's physical presence is still a reliable indication of the community it serves. A critical aspect of what makes community banks unique is the personal connection that bankers develop with small businesses and the families in their community.

Under current Board regulations, assessment areas must be delineated wherever a bank has a main office, branch, or deposit-taking ATM. Assessment areas generally must consist of a whole geography – for example a Metropolitan Statistical Area (“MSA”), a county, city, or town.¹¹ However, a bank may “adjust the boundaries of its assessment area(s) to include only the portion of a political subdivision that it reasonably can be expected to serve. An adjustment is particularly appropriate in the case of an assessment area that otherwise would be extremely large, of unusual configuration, or divided by significant geographic barriers.”¹²

We acknowledge the Board's analysis that: “Branch-based assessment areas can raise fair lending risk and uncertainty when they are not composed of whole political subdivisions, e.g., whole counties. For assessment areas composed of portions of political subdivisions, examiners conduct a more rigorous review that includes a bank's geographic lending patterns to ensure that LMI census tracts are not arbitrarily excluded.”¹³ However, in our view, this is not sufficient justification to prohibit banks from delineating assessment areas that include only the portion of a political subdivision that they reasonably can be expected to serve.

It is entirely appropriate for examiners to scrutinize a bank's decision to delineate an assessment area composed of a portion of a political subdivision to ensure that LMI census tracts were not arbitrarily excluded. However, if, after this analysis, the examiner determines that the decision to

¹¹ 12 CFR 228.41(c).

¹² 12 CFR 228.41(d).

¹³ 85 Fed. Reg. 66416.

exclude a portion of a geography is not a fair lending violation of redlining, a bank's delineation of its own assessment area should be permitted regardless of the bank's asset size.

Therefore, while we favor the Board's proposed approach of allowing small banks to continue "to define facility-based assessment areas that include partial counties or portions of smaller political subdivisions, including portions of cities or townships, as long as they are composed of at least whole census tracts,"¹⁴ as compared to the approach finalized by the OCC, it should not be limited to small banks.

In its ANPR, the Board notes, "Smaller banks may not have the capacity and resources to serve the needs of a geographically large county, especially when a bank is situated near a county border, is otherwise geographically remote from an area where it may have some lending activity but no branches, or faces substantial competition from other financial institutions within the same geographies."¹⁵ In our opinion these difficulties do not cease to exist when a bank crosses an asset threshold differentiating small from large banks. The challenges serving large rural counties faced by a bank in the \$2 billion asset range would closely resemble those of a bank in the \$500 million asset range. For this reason, ICBA recommends that both small and large banks should be able to delineate partial geographies as assessment areas.

In the alternative, for regional, national and money center banks only, we propose setting a threshold for the purpose of assessment area delineation and requiring them to delineate whole geographies. These very large banks possess the capacity and technology to serve broader areas and may encourage greater community reinvestment in rural areas.

Deposit-Taking ATMs

ICBA supports giving banks some flexibility in choosing whether to delineate a facilities-based assessment area in the geography of a deposit-taking ATM. These ATMs can be a valuable customer service and are not the equivalent of a full branch.

Under the 1995 CRA rule, delineation of assessment areas was mandatory in geographies with a deposit-taking ATM. The OCC's June final rule changed this requirement, instead allowing banks to delineate facilities-based assessment areas around deposit-taking ATMs at their discretion.¹⁶ ICBA supported this change because, in our view, "the advancement of technology has shifted the reliance on ATMs to other tools such as smartphones and computers."¹⁷ Under this new technological paradigm, our view was that deposit-taking ATMs should no longer be viewed as branch equivalents, but rather as a customer service. We continue to believe that ATMs whose primary purpose is customer convenience should not automatically require the delineation of additional assessment areas, particularly because they can serve as an access point

¹⁴ 85 Fed. Reg. 66416.

¹⁵ 85 Fed. Reg. 66416.

¹⁶ 85 Fed. Reg. 34798.

¹⁷ Independent Community Bankers of America, Comment Letter Responding to NPR on Reforming Community Reinvestment Act Regulatory Framework (Apr. 8, 2020), available at: https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/icba-letter-regarding-cra---april-8.pdf?sfvrsn=bd572b17_0.

to financial services for LMI individuals in rural areas that do not have a mobile phone or reliable internet access.

However, in August of 2020, reports emerged that a significantly large financial institution had entered into discussions with the United States Postal Service to place ATMs in USPS branches.¹⁸ This national bank would not be required to delineate assessment areas in geographies surrounding these ATMs under the OCC's June 2020 rule. The institution's stated goal was "to place ATMs to better serve some historically underserved communities." This is a laudable goal, and we continue to believe ATMs can be an important access point for LMI customers. However, ICBA is concerned that the practical effect of the proposed ATMs would be to extract deposits from rural areas, lend that money in urban centers, all without incurring any community reinvestment obligation in the communities where the deposits originated.

These negotiations highlight a fundamental difference between a deposit-taking ATM that serves the needs of existing customers or that expands access to financial services to LMI customers and an ATM that exists primarily to extract deposits from a community and transfer them elsewhere.

ICBA's proposed solution is that, in geographies that are immediately adjacent to a geography that contains a bank's branch, the delineation of an additional assessment area in that geography based on the presence of a deposit-taking ATM should be at the bank's discretion. Conversely, in a geography that is not adjacent to any geography containing a bank's branch, the placement of a deposit-taking ATM should trigger the mandatory creation of a new assessment area for that bank. This would allow banks to place ATMs in proximity to their existing branch network (their community broadly defined) for the purpose of customer service, without being asked to take on an additional full scope examination. Conversely, it would prevent banks from placing ATMs in rural counties and extracting deposits without being required to reinvest in that community.

Alternatively, the Board could consider a test based on proximity to a current branch (i.e. if an ATM is within 25 miles of a current branch but in a separate geography, delineating a separate assessment area would be discretionary) or only allowing small banks the discretion whether to delineate additional assessment areas around deposit-taking ATMs.

Deposit-Based and Lending-Based Assessment Areas

Deposit-based and lending-based assessment areas would require banks to delineate additional assessment areas in geographies where a bank has no physical branch but has a concentration of deposits or lending activity. ICBA does not support the creation of deposit-based assessment areas or lending-based assessment areas. We think either approach would have the effect of deepening the divide between CRA hot spots and CRA deserts. Large urban areas, where most of the country's deposits and lending activity are located, would be delineated as bank assessment areas, but rural areas, where the concentration of these activities is more diffuse, would be

¹⁸ Hugh Son, "JPMorgan Chase held talks with U.S. Postal Service about installing ATMs in post offices," CNBC.com (Aug. 19, 2020), available at: <https://www.cnbc.com/2020/08/19/jpmorgan-chase-held-talks-with-us-postal-service-about-installing-atms-in-post-offices.html>.

unlikely to cross the concentration threshold that would require the delineation of an assessment area.

Furthermore, the creation of either deposit-based or lending-based assessment areas would require significant data collection and reporting burden. Most banks do not currently maintain data regarding the location of their deposits and there is no clear, publicly available data about the location of bank deposits. Currently, the best available dataset is the FDIC Summary of Deposits (“SOD”) data which tracks deposits at the level of their branch of record.

Likewise, delineating lending-based assessment areas would require tracking and reporting the location of each loan and significant changes to bank systems. This new recordkeeping would be wasteful, considering Board analysis showed that, “only 167 banks would be required to delineate at least one additional assessment area using a threshold of 100 mortgages loans and only 65 banks would be required to delineate at least one additional assessment area using a threshold of 250 mortgage loans.”¹⁹ This is a very small number of banks and would not meaningfully address the problem of CRA deserts.

Nationwide Assessment Area for Internet Banks

According to the ANPR, “[t]he Board is considering whether to allow internet banks to delineate nationwide assessment areas.”²⁰ ICBA supports this approach. The current system, wherein the assessment area of an internet bank is located solely around its main office does not reflect the community that the internet bank actually serves. If a bank solicits business nationwide and is equally accessible from across the street from the main office or 1,500 miles away, the most logical approach is to evaluate its business on a nationwide scale.

In ICBA’s view, an internet bank should be defined as one that conducts a “substantial majority” of its activity through online channels. Relatively few banks operate through solely online channels. Rather, most banks operate at various points along a continuum between online and branch-based business models. Some internet-focused banks may offer services traditionally associated with branches at their main office or even operate a limited branch network (i.e., hybrid banks). Likewise, most traditional banks currently offer online banking services, and the trend towards digitization is unlikely to reverse in coming years.

A bank that wishes to be evaluated as an internet bank should have the option to certify to the Board that it is an internet bank, at which time, the Board would verify that the bank conducts a “substantial majority” of its business through online channels. In limited circumstances, the Board should designate a bank as an internet bank if the bank conducts a “substantial majority” of its business through online channels, does not have a traditional branch and does not certify itself as one.

CRA obligations for internet banks should be proportionate to the obligations for traditional, branch-based banks. As compared to non-bank fintech companies, which are not subject to the requirements of CRA, internet banks do assume community reinvestment obligations. Therefore,

¹⁹ 85 Fed. Reg. 66418.

²⁰ 85 Fed. Reg. 66418.

while we support expanding CRA to non-bank fintechs, it is important that CRA is not employed punitively to internet banks. Making the benchmarks for internet banks overly difficult to meet would discourage online lenders from seeking full bank charters and becoming regulated depository institutions. This would exacerbate the increasing regulatory and supervisory disparities in the lending marketplace.

For the purposes of the retail test, it would be appropriate to evaluate internet banks on a nationwide basis by comparing their performance to a national benchmark of overall bank retail lending activity. ICBA has some concerns that national benchmarks may favor internet banks because they would be able to “cherry-pick” their areas of focus, for example by not lending in high-cost, low-income urban areas where finding qualifying retail loans would be more difficult. By contrast, a bank with facilities-based assessment areas only in such markets would have no choice but to satisfy their CRA obligations within the confines of a difficult geography. However, this concern would be alleviated somewhat if the regulation clearly enshrines a comparison to peer lenders within an assessment area as one of the relevant benchmarks.

In general, it is untenable to require banks, internet, traditional, hybrid, or otherwise, to delineate as assessment areas discrete geographies where they do not have a physical presence. It produces no marginal benefit to LMI individuals regarding the amount of CRA activity conducted nationwide and introduces tremendous complexity into the assessment area framework. Similarly, it has limited potential to address the disparity between CRA hotspots and CRA deserts as any activity concentration-based assessment areas are, almost by definition, unlikely to be areas that are currently underserved.

Retail Test: Evaluation of Retail Lending and Retail Services Performance

ICBA has long supported making CRA exams more transparent and objective. The Board’s proposed retail lending subtest uses a metrics-based approach to evaluate retail lending performance for all large retail banks and small retail banks that opt into the new framework. We see this approach as an improvement compared to the Board’s current rule as it will increase the transparency of CRA exams. Furthermore, for small banks, we strongly support the optionality that the proposal provides.

We believe that the increased transparency created by the rule as proposed may lead to a significant number of small banks opting into the metrics-based approach as more systems are developed to comply with a new CRA framework. However, until that time, the option to remain under the current framework is helpful to small banks. By being able to opt in at their discretion, small banks will have ample time to evaluate the new rule and consult with third party providers who will require time to develop compliance solutions at reasonable costs.

Dashboards

To help banks track their progress and comply with the new rule, the Board has proposed to create an online retail lending dashboard. This dashboard “would show thresholds for each major product line for a specific assessment area, with updates made on a quarterly or annual basis, as

applicable.”²¹ ICBA views the creation of this dashboard as an extremely beneficial innovation that will help bankers understand their position relative to applicable benchmarks as well as the broader public understand how CRA exams are conducted.

Retail Lending Subtest

The Board is proposing to create a two-part, metrics-based retail lending subtest. The first component would be the dollar-based retail lending screen, and the second part would be the loan-count-based retail lending distribution metric. In the Board’s proposal the dollar-based retail screen is not predominant, and its distribution tests form the basis of a bank’s presumptive rating in an assessment area. Additionally, the Board proposes to evaluate retail lending and community development in separate tests, as is done under the current framework, rather than combining both retail and CD loans into a single dollar-based metric.

ICBA agrees with the Board’s decision to make the retail lending distribution tests the central part of its overall retail lending subtest. In our view, a dollar-based metric favors large institutions that make a smaller volume of large loans. While we acknowledge that large community development investments can be valuable to communities and to LMI individuals, we believe they are not generally as responsive to community needs as smaller loans to LMI families and small businesses. Therefore, an evaluation focused on a loan-count analysis better captures the value of smaller loans to LMI families and small businesses, which aligns with the purposes of CRA.

Retail Lending Screen

According to the ANPR, the retail lending screen would be the first step of the evaluation under the retail test. The screen “would determine whether a bank should be eligible for a metrics-based evaluation of retail lending that could result in a presumption of “satisfactory,” or should instead be evaluated subject to examiner discretion as a result of having relatively low levels of retail lending in an assessment area.”²² The screen would be applied in each of a bank’s assessment areas, taking into account “the average annual dollar amount of a bank’s originations and purchases of retail loans in the numerator—including home mortgage, small business, and small farm loans—relative to its deposits in the denominator.”²³ The bank’s performance on the retail lending screen would then be compared against a benchmark established by the level of lending of peer lenders in the same assessment area.

In our view, the retail lending screen is not a necessary component of the CRA exam. The screen is designed to be set at a low level, to capture the relatively small number of banks that engage in retail lending that is dramatically less than their capacity to lend in a given assessment area. These banks will then be subject to a traditional, full-scope examination. It seems likely that, in most cases, banks that make relatively few retail loans relative their capacity on a dollar basis will also underperform on the loan count-based distribution tests. In other words, it seems as

²¹ 85 Fed. Reg. 66424.

²² 85 Fed. Reg. 66420.

²³ 85 Fed. Reg. 66421.

though the banks that the retail lending screen flags would be equally likely to be flagged for further review by poor performance in a distribution test.

In short, while ICBA does not categorically oppose evaluating the dollar value of retail lending relative to capacity, it is not clear that such an evaluation provides enough incremental value to justify the increase to regulatory complexity. Even banks that receive a presumptive satisfactory rating on the retail lending distribution tests will be subject to examiner review and could have their presumptive rating adjusted up or down based on performance context or presence of illegal credit practices. During this phase, an examiner could identify banks that dramatically under-lend compared to capacity and make appropriate modifications. This seems to be a less burdensome solution compared to adding a distinct and infrequently relevant retail lending screen, which will be easily cleared by most banks, to every CRA exam.

Retail Lending Distribution Metrics for a Presumption of “Satisfactory”

According to the ANPR, “[f]or banks that pass the retail lending screen, the Board proposes comparing a pair of retail lending distribution metrics against local quantitative thresholds to determine whether a bank is eligible for a presumption of “satisfactory” on the retail lending subtest in an assessment area.”²⁴ These presumptive ratings will be combined with (for large banks) the results of the retail services subtest and reviewed by examiners, who may adjust ratings up or down based on performance context and/or the presence of illegal credit practices.

The Board proposes to evaluate banks using both a geographic distribution metric and a borrower distribution metric in each assessment area. Using home mortgage loans as an example, a bank’s geographic distribution metric would be the quotient of bank loans located in LMI census tracts over total bank loans. A bank’s borrower distribution metric would be the quotient of bank loans made to LMI borrowers over total bank loans. The denominator of these metrics would include loans originated or purchased during the evaluation period.

The above metrics would then be compared to benchmarks. “First, a community benchmark would reflect the demographics of an assessment area, such as the number of owner-occupied units, the percentage of low-income families, or the percentage of small businesses or small farms. Second, a market benchmark would reflect the aggregate lending to targeted areas or targeted borrowers by all lenders operating in the same assessment area.”²⁵ A bank would be required to exceed a fixed percentage of either the community or the market benchmark in order to achieve a presumption of satisfactory.

For each distribution metric, the lower of the community threshold or market threshold would be selected as the binding threshold. The Board is currently proposing to set the threshold level for the “satisfactory” presumption at 65 percent of the community benchmark and 70 percent of the market benchmark. The Board illustrates how this process would work in an example:

If the community benchmark shows that 30 percent of families in an assessment area are LMI, then the community threshold would be 19.5 percent (30 percent times 65 percent).

²⁴ 85 Fed. Reg. 66421.

²⁵ 85 Fed. Reg. 66422.

If the market benchmark shows that 35 percent of mortgage originations in the assessment area are to LMI borrowers, then the market threshold would be 24.5 percent (35 percent times 70 percent). Because the community threshold is lower than the market threshold, a bank's performance on the borrower distribution metric for mortgage lending (which measures the percentage of a bank's mortgage lending to LMI borrowers) would need to meet or exceed the binding threshold of 19.5 percent in order to earn the presumption of "satisfactory."²⁶

ICBA believes the proposed approach is an appropriate way to increase the clarity, consistency, and transparency of CRA exams. Under the Board's current supervisory approach, bankers know they are evaluated in comparison to their peers and the demographics of their assessment areas, but there is little clarity regarding exactly how these comparisons are made. The proposed framework will create clear empirical benchmarks that will make it easier for banks and members of the community to evaluate bank performance.

The advantage of the proposed loan-count distribution tests is that it ensures that loans are actually being made to LMI families. This appropriately incentivizes banks to meet one of the core purposes of CRA, which is to ensure that the credit needs of LMI people in their assessment areas are being met.

The Board's proposed approach of using a percentage of either the community benchmark or the market benchmark to set the threshold required to establish a presumptive satisfactory is appropriate. In assessment areas that have very few low-income census tracts and/or very few LMI borrowers, it can be extremely difficult to make qualifying loans.

Use of HMDA Data

In our view, it is not appropriate to use Home Mortgage Disclosure Act ("HMDA") data to calculate the home mortgage lending benchmarks because some mortgage lenders, such as credit unions and non-bank financial technology companies, are HMDA reporters but are not subject to CRA. We support parity in the application of CRA and believe that any financial firm that serves consumers and small businesses should be committed to providing service to entire communities and should be subject to CRA. Until that happens, it is not appropriate to include lending by entities not subject to CRA in the CRA benchmarks. Instead, we encourage the Board to use bank data from past CRA exams to calculate the benchmarks for the mortgage product line.

Retail Services Subtest

The retail services subtest proposed by the Board uses both qualitative and quantitative analysis to evaluate how large retail banks deliver services in LMI communities. This test would not be mandatory for banks below the small bank threshold. When the CRA rule was last substantially revised in 1995, branches were still the primary way that customers accessed retail banking services. However, the widespread adoption of online and mobile banking since that time means

²⁶ 85 Fed. Reg. 66425.

that it is appropriate for the Board to update regulations to explicitly consider banks' efforts to provide access to services through online channels.

The retail services test should provide incentives to banks that provide access to retail services through bank branches and through digital channels. It may be particularly appropriate to grant favorable consideration to alternative channels if banks make a proactive effort to make their digital products accessible to LMI customers and to onboard LMI customers into their digital ecosystem.

According to the Consumer Financial Protection Bureau's ("CFPB") interpretation of Regulation B, the Equal Credit Opportunity Act (ECOA) permits banks to "affirmatively solicit or encourage members of traditionally disadvantaged groups to apply for credit, especially groups that might not normally seek credit from that creditor."²⁷ Thus, it would be appropriate to grant CRA credit under the retail services test for any affirmative marketing efforts undertaken by banks that have the purpose of outreach to LMI borrowers and other historically disadvantaged groups.

While location of branches at the county level may be a reasonable way to delineate a bank's community, a county may include many census tracts (Los Angeles County, for example, has 2,344 census tracts). In urban areas these census tracts may be no larger than a few blocks. As such, a bank branch often serves many more census tracts than the one where it is physically located. Therefore, examiners should be more flexible when evaluating the location of bank branches, rather than simply focusing on whether or not they are located in an LMI census tract. For example, banks that are in middle income census tracts or banks that are located nearby to LMI census tracts may still provide services to a considerable number of LMI customers. In these cases, if a branch serves a sufficient concentration of LMI customers, it may be appropriate to designate it as an LMI branch even if it is not strictly located in an LMI census tract.

The Board's proposed branch distribution analysis is mostly sound.²⁸ We agree with the Board's conclusion that quantitative thresholds are not the best fit for an analysis of branch distribution and may do more harm than good. Performance context in this area must be preserved. For example, if low-income census tracts in a bank's assessment area are already being well served by other branches, punishing a bank for not operating additional, loss-incurring branches in low-income census tracts may violate principles of safe and sound banking. A quantitative analysis of branch distribution is a useful starting point, but it may not tell the whole story of how well a bank is serving LMI customers and census tracts. Consideration should be given for delivering services to LMI consumers from branches located in middle- and upper-income census tracts.

Deposit Products

The Board proposes to evaluate a bank's deposit products, including checking and savings accounts, focusing on those tailored to meet the needs of LMI individuals by elevating the focus on deposit products offered and the degree to which these products are available and responsive to the needs of LMI individuals and LMI communities. While there are some concerns about the

²⁷ 12 C.F.R. Part 1002, Supplement I, ¶ 4(b), comment 2.

²⁸ See 85 Fed. Reg. 66431.

recordkeeping burden and proprietary business considerations, we believe it is reasonable for the Board to evaluate deposit products designed to meet the needs of LMI consumers as a component of the retail services subtest. These products, which could include accounts with low or no overdraft and insufficient funds fees or reasonably priced remittance services, can promote financial inclusion for the underbanked.

As is currently the case, the evaluation of deposit products should be weighed less heavily in the Board's evaluation than branch distribution or non-branch delivery channels. It is appropriate for the Board to consider both the availability and usage of deposit products tailored to the needs of LMI consumers and to offer favorable consideration to banks that promote the use of low-cost products to LMI consumers.

However, banks should not be required to provide a strategic statement articulating their approach to offering retail banking products. In our view, it is not clear that such a written statement adds enough incremental value to consumers or regulators to justify its mandatory inclusion in regulations. It may be appropriate for banks to be given the option to provide a strategic statement on a voluntary basis to aid examiners in assessing performance context.

Retail Lending Subtest Definitions and Qualifying Activities

Major Retail Product Line

ICBA advocates setting a threshold of 20 percent of a bank's lending within an assessment area to determine whether a bank's home mortgage, small business, and small farm lending should be evaluated as major product lines at the assessment area level. First, setting a quantitative threshold to determine what is considered a major product line (as opposed to the current approach which does not set a threshold) increases the transparency of CRA exams.

Furthermore, evaluating only the major retail product lines for large banks, as opposed to evaluating all product lines regardless of volume, appropriately tailors exams. In many cases, banks are better situated than regulators to assess the needs of the communities they serve and assessing banks in all product lines, whether they do significant lending in that product line or not, may compel banks to increase their investment into product lines where there is insufficient natural consumer demand or compelling community need.

Evaluation of Consumer Loans

Under the current lending test, examiners do not evaluate consumer lending unless it "constitutes a substantial majority of a bank's business."²⁹ If consumer lending constitutes less than a substantial majority of a bank's business, the bank may elect to track and maintain data regarding consumer lending and submit it for evaluation, but it is not required to do so. We urge the Board to maintain this current approach and not to require the mandatory evaluation of all consumer loans for banks.

²⁹ 12 C.F.R. 25.22.

The Board does not currently have a quantitative threshold to determine when consumer lending constitutes a substantial majority of a bank's business, instead, as the Board accurately reports in its ANPR, "examiner judgment is used to determine whether consumer loans constitute a substantial majority of a bank's business, which can be a source of confusion among stakeholders."³⁰ ICBA supports the adoption of quantitative threshold to determine if a substantial majority of a bank's business is consumer lending. We suggest an equally weighted blended loan count and dollar value threshold of 75 percent. For example, if 90 percent of a bank's loans were consumer loans, and those loans accounted for 70 percent of the bank's total loans by loan balance, it would have a blended value of 80 percent and be required to have its consumer lending evaluated.

Finally, we agree that the Board should evaluate consumer loans at the level of separate consumer loan categories (e.g., motor vehicle, credit card, other secured consumer loans, and other unsecured consumer loans). As the Board observes in its ANPR, evaluating all consumer loans in a single bucket does not appropriately differentiate between the differing characteristics, purposes, and average loan size of different categories of consumer loans.

Small Business and Small Farm Thresholds

Under the current rule, small businesses and small farms are defined as having annual revenue of \$1 million or less.³¹ This threshold was first adopted in 1995 and not indexed to inflation. It has not been raised since and no longer provides consideration for all loans to small, locally owned businesses that should be at the heart of CRA. During the PPP program, community banks were frustrated to discover that, because of this outdated threshold, some PPP loans to larger small businesses would not receive consideration for CRA credit. ICBA recommends that the small business and small farm thresholds be adjusted annually to reflect inflation.

Treatment of Purchased Loans

Under the current CRA rule, purchased loans receive the same CRA consideration as loan originations, consistent with their treatment on the Call Report. According to the ANPR, "[t]he Board is considering including only home mortgage loans purchased directly from an originating lender (or affiliate) in CRA evaluations."³² In part, this change is designed to address the issue of "churning," which the Board describes as a practice where, "loans to LMI borrowers are purchased and sold repeatedly by different banks, with the possibility of each bank receiving CRA credit at an equivalent level to the banks that originated the loans."³³ The Board believes this is a problematic practice because it potentially results in many banks getting CRA credit for the same loan, without increasing access to credit for LMI borrowers.

We urge the Board not to adopt its proposed approach and instead to retain the current approach of granting equal credit for purchased loans and originations. It is important that CRA adequately incentivize both originating and purchasing CRA loans. A bank that originates a loan is

³⁰ 85 Fed. Reg. 66434.

³¹ 12 C.F.R. 25.12(g)(3).

³² 85 Fed. Reg. 66436.

³³ *Id.*

responsible for expending significant effort, including evaluating the borrower's creditworthiness, helping borrowers understand their credit options, and, in many cases, continuing to service the loan after it has been sold in the secondary market. Originating banks are often an LMI borrower's point of contact with the financial system, and the work they do to expand access to credit should be encouraged.

Additionally, small community banks simply lack the balance sheet capacity to hold all of the qualifying loans that they originate, and without a robust secondary market for these loans, it would be difficult to access the liquidity necessary to originate new loans in LMI communities. Banks that are net purchasers of CRA loans supply the capital that allows new loans to be written and it is important that they are incentivized to purchase CRA loans in order to keep this developed and complex market liquid.

We believe it is unlikely that loan churning to manipulate CRA evaluations is widespread. As the Board's own analysis of HMDA data found, only 3.3 percent of mortgage loans to LMI borrowers purchased by commercial banks were sold to another commercial bank within the same year. Furthermore, loans that are sold and purchased multiple times likely do not have a significant effect on the outcome of CRA exams. Changing the consideration of purchased loans may harm the secondary market for loans to LMI borrowers, reducing their access to credit. Therefore, we urge the Board not to alter its current approach. If the Board believes that there are bad actors who churn loans simply to manipulate CRA exams, it would be better to address that on an institution-by-institution basis than with a revision to the rule.

Consideration for Retail Activities in Indian Country

We support the Board's proposed approach to evaluate all retail lending activity conducted in Indian Country. Consideration of these activities is warranted due to the high concentrations of poverty and the relative scarcity of banking services. Encouraging lending in Indian Country has proven difficult due to the rural nature of many Indian reservations and the legal complexity resulting from tribal sovereignty. The Board should evaluate all retail lending in Indian Country on a qualitative basis and should not impose limitations or exclusions for certain retail activities. It should provide CRA credit for retail lending activities in Indian Country that are outside of a bank's assessment areas. Finally, it should give additional qualitative consideration for partnerships with Native American MDIs.

Consideration of Construction Loans

We recommend that small banks that are not evaluated under the community development test receive credit for 1–4 family residential construction loans under the definition of mortgage loans if the loans are reported on Item 1.a. (1) of Schedule RC–C of the Call Report. Because access to construction financing is a key ingredient for increasing housing supply, granting CRA consideration for these loans would incentivize the construction of new housing in LMI areas.

Community Development Test: Evaluation of Community Development Financing and Community Development Services Performance

In general, ICBA supports the Board’s decision to maintain its current approach of evaluating small banks under a community development metric only at the bank’s option.³⁴ Furthermore, we generally support the Board’s proposed approach of dividing the CD test into separate evaluations of CD financing and CD services. As with the retail test, we recommend that the services component of the CD test be measured qualitatively and weighted less heavily than the quantitative CD financing subtest.

Community Development Financing Subtest

The proposed CD financing metric “would be the ratio of a retail bank’s community development financing dollars (the numerator) relative to deposits (the denominator) within an assessment area.”³⁵ According to the proposal:

[t]he Board would calculate the assessment area average annual value of new loan originations, investments, and purchases by adding together the initial origination or purchase value of all qualifying activities during the examination period and dividing that result by the number of years in the examination period. The Board would also calculate the assessment area average annual value of qualifying activities remaining on the bank’s balance sheet from a prior year by adding together the remaining balance sheet value of qualifying activities that were originated or purchased in a prior year at the end of each calendar year of the examination period and dividing that result by the number of years in the examination period. The numerator is the sum of these two annual averages. The denominator is the average annual value of a bank’s deposit holdings within its assessment area.³⁶

After a bank’s CD financing metric is calculated in an assessment area, it is compared to a local benchmark. According to the ANPR, “[t]he numerator for the local benchmark would be the annual average of the total dollar amount of all large banks’ qualifying community development financing activities in the assessment area. The denominator for the local benchmark would be the annual average of the total dollar amount of all deposits held by large banks in the assessment area.”³⁷ A bank’s performance would also be compared to either a national metropolitan or non-metropolitan benchmark, depending on the character of the assessment area.

In simple terms, the metric combines a bank’s qualifying loans and investments into a single measure, compares that number to a bank’s own capacity to lend and invest in a given assessment area (through a dollars-over-deposits formula) and compares the bank’s level of performance to the bank’s peer lenders in the same assessment area. A bank’s performance would also be compared to a national benchmark for metropolitan or non-metropolitan areas. The local benchmark serves a tailoring function, acknowledging that there may be different

³⁴ See 12 C.F.R. 228.26(c).

³⁵ 85 Fed. Reg. 66439.

³⁶ 85 Fed. Reg. 66439, footnote 111.

³⁷ 85 Fed. Reg. 66440.

levels of availability of qualifying loans and investments from assessment area to assessment area. Conversely, the national benchmark promotes general consistency of nationwide CRA expectations.

We agree it is appropriate to combine evaluation of community development loans and investments into a single CD financing metric. However, we urge the Board to weight investments and grants more heavily than loans because these activities tend to be more impactful. We believe that a 2X multiplier to the value of investments and a 10X multiplier to the value of grants would be appropriate.

Community Development Activity Outside Assessment Areas

We have consistently heard from community banks of their frustration with the evaluation of community development activity. Specifically, there are many instances when the most impactful loan or investment may be located outside of the confines of a bank's assessment area, and therefore not able to receive consideration for CRA credit. In our view, community development should be evaluated at a whole institution level and banks should be permitted to satisfy a portion of their community development obligation outside of their assessment areas.

More importantly, it will allow banks to make their community development loans and investments in areas where they are most impactful. Under the current approach, CRA hotspots form in large cities, where many banks are required to meet community development goals. In these areas, qualifying loans and investments are often bid up to non-market rates as banks are required to chase credit. Conversely, in rural areas, where fewer banks have facilities-based assessment areas, it can be difficult to attract investments, because banks do not receive credit.

By untethering community development evaluation from assessment areas, the Board can drive investment to CRA deserts. This change would not violate the community focus of CRA because (1) banks would still be evaluated on retail lending in a way that is focused on assessment areas³⁸ and (2) banks would still likely conduct a majority of their community development investment in the areas proximate to their branches because these are the communities that banks understand best. In short, broadening where banks can receive CD credit would allow bankers to do more investment in underserved areas and would end the race to the bottom on quality and price for qualifying investments in CRA hotspots.

Qualitative Considerations Within the Community Development Financing Subtest

According to the ANPR, the Board "has considered the use of multipliers to weight certain categories of lending and investment activities differentially,"³⁹ but has ultimately decided

³⁸ As demonstrated by the Board's proposed small bank standards, the evaluation of a bank's retail lending in its assessment areas is sufficient for regulators to determine whether a bank meets its statutorily mandated "continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered." 12 U.S.C. 2901(a)(3). Therefore, the Board need not require community development activity to be constrained to assessment areas because the retail test alone is sufficient to realize Congressional intent. We believe that, as a policy matter, the Board will have more success driving community development investment to CRA deserts if it broadens its focus beyond assessment area.

³⁹ *Id.*

against using them because of difficulties weighting them appropriately. The ANPR points out that “the impact and responsiveness of particular community development financing activities can vary considerably,” making uniform weightings too imprecise.⁴⁰

ICBA acknowledges that these challenges are real, however, we believe that the Board’s analysis does not fully account for the benefits of multipliers – namely that multipliers can incentivize impactful classes of activities in a predictable and quantifiable way. While it is true that there is substantial variability between the impact of qualifying loans and investments, it is also true that some classes of activity are likely to be uniformly more impactful. For example, a grant to a community development organization is reliably more impactful than a loan of the same size. Therefore, a multiplier to amplify the value of grants would incentivize banks to engage in an activity that is reliably impactful. Therefore, we urge the Board to reconsider the use of multipliers and to apply them to certain classes of activities.

As an alternative to multipliers, the Board proposes a new system of “impact scores.” Under this system, examiners would assign an impact score of 1 to 3. Under the proposed approach, community development financing subtest conclusions would include a statement about both the community development financing metric and the impact score, which could be used to adjust the bank’s performance conclusion relative to the quantitative assessment.

The weakness of impact scores is that they are subjective. Their inclusion may add an element of unpredictability to exams. For example, a bank could exceed its quantitative benchmark and still receive a conclusion of less than satisfactory if its loans and investments were judged to be non-impactful. A conclusion based solely on the CD financing metric would be quantitative and therefore easier for a bank to predict.

Despite this element of unpredictability, impact scores are a viable option in principle. While we believe that the CD financing metric should be the primary component of the CD financing subtest, we also recognize that it is likely impossible to formulate a purely quantitative metric capable of assessing every bank’s community development performance. There is simply more to effective community development than a top line number, and it is appropriate to qualitatively consider whether loans and investments are responsive to community needs. Impact scores could be an appropriate method to recognize banks that make innovative and impactful community development loans and investments.

We also support the continued use of performance context because a quantitative metric alone cannot always capture the full picture of bank performance. For the same reason, we support the implementation of the proposed system of impact scores, with the caveat that they should be weighed less heavily than the CD financing metric.

Community Development Services Subtest

The Board is proposing a community development services subtest that is primarily qualitative and would focus on the impact and responsiveness of these activities in each of a bank’s

⁴⁰ *Id.*

assessment area(s). ICBA generally agrees with the Board’s proposed approach. We agree the evaluation of community development services should be primarily qualitative and that it is appropriate to focus on the impact and responsiveness of these activities in each of a bank’s assessment area(s). As discussed above, impact scores would be an appropriate way to recognize activities that are particularly responsive to local needs. Small banks should also have the option to have their community development services evaluated. The non-mandatory evaluation of small banks would provide banks an opportunity to demonstrate the good work that their employees do to serve LMI customers.

The Board has asked whether it should, “develop quantitative metrics for evaluating community development services?”⁴¹ Community development services do not lend themselves to dollar-based quantification because the impact of these services on a community is often more than the value of the employee’s time. For example, volunteering on the board of a local charity may allow bank managers to leverage their financial expertise to further the financial goals of the organization. Teaching a financial literacy class in schools may create benefits for children many years down the line.

The best way to evaluate the impact of community development services is to evaluate them qualitatively, on a case-by-case basis. Furthermore, as is the case under the current rule, evaluation of community development services and tracking community development services data should remain optional for smaller institutions.⁴²

Community Development Services and Volunteer Activities

We support the Board’s efforts to consider “a wider range of volunteer activities that help to support local communities and address important community needs” for CRA credit. We offer the following comments on each proposed expansion of credit:

- Volunteer Activities in Rural Areas Unrelated to the Provision of Financial Services – This proposal would allow banks in rural areas to include volunteer activities that have a primary purpose of community development, but do not use the employee’s technical or financial expertise. We support this proposed change, but do not agree that it should be limited to rural assessment areas. Urban areas would also benefit from more bank employees “volunteering at a homeless shelter or serving food at a soup kitchen.”⁴³
- Other Volunteer Activities in Rural Areas – The Board is proposing to “expand consideration of activities in rural communities to include activities that address local community needs generally, without having to demonstrate a primary purpose of community development.”⁴⁴ This would award credit to bank employees for providing “leadership for nonprofit and civic organizations that are addressing community needs

⁴¹ 85 Fed. Reg. 66443.

⁴² Independent Community Bankers of America, Comment Letter Responding to NPR on Reforming Community Reinvestment Act Regulatory Framework (Apr. 8, 2020), available at: https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/icba-letter-regarding-cra---april-8.pdf?sfvrsn=bd572b17_0.

⁴³ 85 Fed. Reg. 66443.

⁴⁴ *Id.*

and serve as a catalyst for local economic development.” This could include, for example, serving on the board of a local chamber of commerce. ICBA supports extending credit to these activities and recommends it also be extended to urban areas. Community bankers are community leaders, and it is appropriate to recognize that leadership equally in rural and urban areas.

- Financial Literacy and Housing Counseling Without Regard to Income Level – The Board is also considering whether financial education and literacy activities should be considered without regard to the income level of the beneficiaries. We strongly support granting credit to these activities.⁴⁵ Financial literacy is an urgent need. According to a study by FINRA only 40 percent of Americans were able to correctly answer four or more of six *basic* financial literacy questions, and the percentage has decreased over the last 10 years.⁴⁶ Individuals earning over \$75,000 per year did score higher than lower income groups, but still averaged only 3.6 correct answers.⁴⁷ Granting CRA credit for providing financial literacy education to all individuals, regardless of their income level, benefits the financial well-being of the entire community. Community bankers are uniquely situated to provide financial literacy education and granting credit for it without regard to income would incentivize more bankers to engage in outreach to schools and community organizations to teach critical financial skills.

Community Development Test Qualifying Activities and Geographies

Affordable Housing

ICBA supports providing CRA credit for both subsidized and unsubsidized (i.e., naturally occurring) affordable housing. The Board’s proposed definition of subsidized affordable housing as housing that is “purchased, developed, rehabilitated, or preserved in conjunction with a federal, state, local, or tribal government affordable housing program or subsidy, with the bona fide intent of providing affordable housing”⁴⁸ is appropriate. Any definition must be broad enough to capture the full breadth of bona fide federal, state, local, and tribal housing programs.

Regarding naturally occurring affordable housing, the Board proposes to give credit where “(1) The rent [is] affordable ... and (2) the unit(s) [are] located in either an LMI geography or a geography where the median renter is LMI.”⁴⁹ We believe that this definition should be limited only to the first prong. If the rent is affordable, a bank should not be precluded from receiving CRA credit if the housing is not located in an LMI geography. Financing the construction and purchase of buildings with affordable rent will benefit LMI individuals and families, consistent with the LMI focus of CRA.

⁴⁵ See 12 C.F.R. 25.04(c)(9).

⁴⁶ FINRA Investor Education Foundation, “The State of U.S. Financial Capability: The 2018 National Financial Capability Study” at p. 33 (June 2019), available at: https://www.usfinancialcapability.org/downloads/NFCS_2018_Report_Natl_Findings.pdf.

⁴⁷ *Id.* at 35.

⁴⁸ 85 Fed. Reg. 66444.

⁴⁹ *Id.*

A definition of naturally occurring affordable housing that focuses solely on whether rent is affordable is feasible if affordability is appropriately defined. As the Board observes, owners of unsubsidized affordable housing rarely certify tenant income on an ongoing basis, so information about tenant income is unlikely to be available to bankers or examiners. Therefore, a definition of affordability based on a percentage of tenant income is likely impossible.

In the ANPR, the Board suggests several alternative definitions of housing affordability, saying “‘affordable’ rents could be calculated based on area median income (AMI) using the standard that families should pay no more than 30 percent of their income toward housing. Other options include using HUD Fair Market Rents (FMR) or LIHTC rents to determine rental affordability.”⁵⁰ ICBA supports an all-of-the-above approach, meaning that if rents are affordable under any of the listed options, funding for that housing should be eligible for CRA credit. Currently, banks use both HUD FMRs and LIHTC rents to show housing affordability, and they should be allowed to continue to demonstrate affordability using both systems.

Regarding mixed-income developments, we agree that the Board should continue to use its current pro-rata system. Banks should receive credit for the full amount of a loan or investment if a majority of the dollars or beneficiaries of the activity are identifiable to one or more of the enumerated community development purposes. Where 50 percent or fewer of the units meet the affordability threshold, we recommend pro rata credit for the units that are affordable. This approach should be applied uniformly to both subsidized and unsubsidized affordable housing.

Finally, we support continuing to extend credit for the purchase of mortgage-backed securities (“MBSs”) that are backed by loans that finance subsidized multifamily rental housing, loans for mixed-income housing that includes affordable housing for LMI families, or loans to LMI borrowers. Similar to the previously discussed issue of loans sold on the secondary market, MBSs are an important source of liquidity in the mortgage market and changing the CRA incentives of MBSs may reduce the availability of capital to make new loans to LMI borrowers.

The ANPR points out that some stakeholders have stated that “some banks purchase large amounts of MBS just prior to their CRA examinations and then sell them shortly afterwards to another bank, which has little positive impact in their community.”⁵¹ To the extent that this practice is occurring, it should be addressed individually in the performance evaluations of these institutions (through performance context or impact scores) rather than by eliminating the ability for all banks to receive CRA credit for MBSs that benefit LMI borrowers.

Community Services

The Board is proposing to clarify its definition of community services targeted to low- or moderate-income individuals. We believe it is appropriate for the Board to keep the focus of this evaluation component on LMI individuals. We agree that if an activity or relevant organization is located in an LMI census tract, the activity should meet the “targeted to low- or moderate-income individuals” standard.

⁵⁰ 85 Fed. Reg. 66445.

⁵¹ *Id.*

However, we also strongly believe that the standard should be broad enough to cover activities where at least 50 percent of participants served by a program or organization are LMI individuals, even if that activity is not in LMI census tract. Ultimately, CRA is about people, and not limiting programs to LMI tracts will ensure that programs that primarily benefit LMI individuals have access to funding in geographies that have few LMI tracts.

Finally, because many organizations may not maintain records of the income level of the individuals they serve, we recommend that the Board formalize its existing practice of using participation in certain assistance programs as a proxy to prove LMI status. The ANPR mentions that current guidance considers “services that are provided to students or their families from a school at which the majority of students qualify for free or reduced-price meals under the U.S. Department of Agriculture’s National School Lunch Program or are targeted to individuals who receive or are eligible to receive Medicaid”⁵² as proof of LMI status. We recommend formalizing these guidelines in the regulations and adding activities targeted to recipients of federal disability programs, recipients of Supplemental Nutrition Assistance Program (SNAP) benefits, and recipients of federal Pell Grants.

Economic Development

We strongly recommend that the definition of economic development be broadened to include all first and second draw PPP loans. As the Board acknowledges, “the COVID–19 pandemic has raised significant new challenges for small businesses” and “the smallest segment of small businesses often have more difficulty obtaining credit.”⁵³ PPP loans under \$1 million are eligible for CRA credit under the retail test. However, according to interagency guidance released by the Board, the OCC, and the FDIC, “PPP loans in amounts greater than \$1 million **may** [emphasis added] be considered as community development loans if they also have a primary purpose of community development as defined under the CRA.”⁵⁴

The fact that some PPP loans may not qualify for CRA credit has been a source of confusion and frustration for community banks. Community bankers made an unprecedented amount of small business lending in record time. According to SBA statistics, through August 8, 2020 lenders with less than \$10 billion in assets made \$233.7 billion in PPP loans, which protected the paychecks of more than 26 million American workers.⁵⁵ Furthermore, according to a report by the FDIC, community banks continue to hold a disproportionately high share of PPP loans, holding 31 percent of PPP loan balances, despite accounting for only 15 percent of total loan balances.⁵⁶

⁵² 85 Fed. Reg. 66446.

⁵³ *Id.*

⁵⁴ Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, “Community Reinvestment Act (CRA) Consideration for Activities in Response to the Coronavirus Frequently Asked Questions (FAQs)” (May 27, 2020), available at: ..

⁵⁵ U.S. Small Business Administration, “Paycheck Protection Program (PPP) Report: Approvals through 08/08/2020,” available at: <https://home.treasury.gov/system/files/136/SBA-Paycheck-Protection-Program-LoanReport-Round2.pdf>.

⁵⁶ FDIC Quarterly, The Importance of Community Banks in Paycheck Protection Program Lending, Vol. 14 No. 4, (Nov. 2020), available at: https://www.fdic.gov/bank/analytical/quarterly/2020-vol14-4/fdic-v14n4-3q2020-earlyrelease.pdf?source=govdelivery&utm_medium=email&utm_source=govdelivery.

Community bankers were able to see firsthand the good that PPP loans did in their communities and bore witness to the fact that the program, made possible by their work, saved many small businesses. Based on this experience, it is our strong view that all PPP loans, including those in excess of \$1 million, should be eligible for CRA credit for serving the purpose of economic development. Not awarding CRA credit to these loans could potentially reduce incentives to provide disaster relief, both in further rounds of PPP funding or in response to future natural disasters or public health emergencies.

Despite our concerns regarding credit for PPP loans, ICBA generally supports the changes made to the definitions of economic development activities. Our comments regarding each revision are below:

- Encouraging Activities Supporting Small Businesses and Farms and Minority-Owned Small Businesses. The Board proposes to specify “that economic development activity focused on the smallest businesses, smallest farms, and minority-owned small businesses would be considered responsive and impactful in developing a Community Development Test conclusion or rating.”⁵⁷ We agree that the Board should incentivize activities that support the smallest farms and businesses as well as minority-owned small businesses. Specifying that these activities are considered impactful or assigning them a higher impact score is a reasonable approach. However, we favor a multiplier for the value of these activities. A multiplier is a better incentive than an impact score because it increases ex-ante clarity of how loans or investments will affect ratings. Impact scores, while potentially useful to flag activities as responsive or important, are ultimately less predictable than a quantitative multiplier and leave more room for examiner discretion.
- Workforce Development and Job Training Programs. We urge the Board to include workforce development activities as a separate prong of the economic development definition, regardless of whether these activities also support small businesses and farms. These programs are particularly beneficial to LMI individuals and strengthen communities over the long term. Furthermore, workforce development for larger industries is likely to spur the creation of ancillary small businesses.

Revitalization and Stabilization

In general, we support the Board’s proposed approach to codify definitions from the Interagency Questions and Answers to define activities that attract new, or retain existing, residents and businesses. From the perspective of the banking industry, any codified rule that can be relied on increases the clarity of what counts for credit. The Board should codify the existing guidance, which includes eligibility for activities that provide financial assistance for rebuilding needs, or for services to individuals who have been displaced from designated disaster areas. We further support expanding this guidance to include disaster preparedness and climate resilience.

⁵⁷ 85 Fed. Reg. 66446.

Minority Depository Institutions and Other Mission-Oriented Financial Institutions

We appreciate the Board’s focus on mission-oriented financial institutions and minority depository institutions. ICBA has a long-standing commitment to MDIs and Community Development Financial Institutions (CDFIs) – the vast majority of which are community banks. These institutions play a crucial role in providing credit, capital, and financial services to low- to moderate-income and minority communities in economically distressed urban, rural, and suburban areas that have historically been underserved by the financial industry. It is appropriate to make changes to the CRA regulatory framework that provides incentives to partner with these institutions.

The CRA statute specifically recognizes the importance of encouraging the growth and strengthening of minority- and women-owned financial institutions and includes specific statutory mandates for consideration of activities designed to accomplish those aims.⁵⁸ Furthermore, CRA regulations have routinely recognized the importance and value of CDFIs and the value they deliver to their communities.⁵⁹ In our view, the special character of these institutions justifies allowing MDIs or CDFIs to be exempted from CRA examinations unless they themselves choose to opt in. Reduced regulatory compliance expenses will allow these institutions to further reinvest in their communities.

Absent such an exemption, it is important to provide strong incentives for majority-owned banks to partner with MDIs and CDFIs and to reward activities by mission-driven institutions to strengthen themselves. To this end, we strongly urge the Board to grant CRA credit to MDIs and women-owned financial institutions that invest in other MDIs, and women-owned financial institutions. Currently, only majority-owned banks are eligible to receive credit for such partnerships. As the Board notes in its proposal, non-majority-owned institutions vary in size, and we have heard frustration from larger MDIs in particular that they are unable to receive credit for the same partnerships as majority-owned banks. This disadvantages MDIs and decreases the likelihood of fruitful partnerships that are not only mutually beneficial to the banks but also to the communities they are best suited to serve.

Furthermore, we also strongly support the Board’s proposal to grant credit to MDIs and women-owned financial institutions for retained earnings (less the amount of any dividends or stock repurchases) that are reinvested in the bank. These investments will lead to stronger banks that are better able to meet their communities’ financial needs.

Finally, we recommend that banks receive automatic CRA consideration for investing in Treasury Department-certified CDFIs whether or not they are located in a bank’s assessment area. We have received feedback from CDFI and non-CDFI banks that examiners are not familiar with the rigorousness of the Treasury Department’s certification process. Not only must CDFIs prove that at least 60 percent of their products and activities serve LMI markets upon initial certification, but they also must annually report data that demonstrates their continued

⁵⁸ 12 U.S.C. 2903(b)

⁵⁹ CDFIs with active certifications from the CDFI Fund are considered to be public welfare investments according to 12 C.F.R. 24.

adherence to that requirement. This oversight of CDFIs should be sufficient for CRA examiners to determine that investing in CDFIs helps meet the goals of CRA.

The Board notes that it is concerned that granting CRA credit for investments outside of assessment areas “could inadvertently reduce the incentive for banks to focus on their assessment areas by granting them CRA credit for investing in CDFIs that serve entirely different geographies.”⁶⁰ We have heard from many banks, especially the smallest banks, that they generally do not partner with other institutions because they prefer to invest their limited capital in the communities where they do business. Yet larger community banks that may be able to spend more money on community development than they can properly allocate within their assessment areas in a given exam cycle, should not be geographically limited. Such limitations may prevent investment in meritorious projects, particularly in areas that are currently CRA deserts.

Strategic Plan Evaluation

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

We support the Board’s proposal to give banks the option to delineate assessment areas beyond the location of their branch network pursuant to a strategic plan. This option may not be appropriate for online banks, which should be evaluated on a national basis but could be a useful alternative evaluation system for hybrid banks (that is, banks that operate both a branch network and solicit deposits online nationwide). We oppose, however, mandatory evaluation of banks beyond their facilities-based assessment areas pursuant to a strategic plan.

We are aware that relatively few banks have chosen evaluation under a strategic plan. The reality is that CRA regulations are complex and bankers fear that they will be graded more harshly under a strategic plan. We support the Board’s proposal to create an electronic template with illustrative instructions to provide a more straightforward approach for the strategic plan request and approval process. We further agree with the Board’s characterization of this as a matter of agency procedure that could be done outside of the formal Administrative Procedure Act notice and comment process.

Retention of Performance Context

ICBA supports the retention of performance context in the rule and urges regulators to clarify that examiners will retain discretion to consider a bank’s unique circumstance, rather than being controlled by the bank’s presumptive rating. While quantitative measures provide transparency, appropriately tailoring them to every institution and every assessment area is inherently limited. ICBA would be deeply concerned about any proposed rule that reduces the Community

⁶⁰ 85 Fed. Reg. 66450.

Reinvestment Act to a mathematical formula that produces an irrefutable pass-fail rating. While a wholly quantitative approach may appear appealing in some form, it is, without consideration of qualitative factors, inadequate for assessing the effect of a bank's reinvestment in its community. Therefore, while we believe that the presumptions established under any of the rule's tests should be robust, examiners should have the ability to account for unique, bank-specific circumstances when warranted.

Ratings

Under the Board's proposal, to retain the community focus of CRA, both the retail test and community development test would be conducted in each of a bank's assessment areas. For large banks subject to the CD test, the proposed approach also incorporates an assessment of community development activities outside of assessment areas in determining the overall state and institution ratings. The Board would continue to consider fair lending and illegal credit violations in determining overall CRA ratings for all institutions. Small banks would remain under the current CRA framework and would have the ability to opt into the retail lending subtest and the proposed ratings approach. Finally, the Board proposes to encourage activities involving MDIs, women-owned financial institutions, and low-income credit unions by making retail and community development activities with these institutions a factor in achieving an "outstanding" retail test or CD test rating.

In general, and particularly for the retail test, we agree with the Board's weighted average approach. Under this approach, the weight applied to each assessment area would average the percentage of a bank's deposits from that assessment area and the percentage of a bank's dollars of loans in that assessment area. In order to combine assessment area conclusions in a manner consistent with these weights, examiners would first convert a retail test conclusion or CD test conclusion to a score in each assessment area according to the following scale: Outstanding = 3, Satisfactory = 2, Needs to Improve = 1, and Substantial Non-Compliance = 0. Examiners would then take the weighted average of these assessment area scores, using the assessment area weights described above, to produce a state, multistate MSA or institution score. These aggregated weighted average scores would be used as the foundation for a bank's ratings. ICBA endorses this scale and approach.

Data Collection and Reporting

As the Board succulently summarizes, "[c]urrently, the Board's CRA regulation does not require banks to collect or report deposits data. Instead, for small banks, total deposits and total loans data from the Call Report are used to calculate the loan-to-deposit ratio for the entire bank. Total deposits allocated to each branch from the FDIC SOD are used for performance context for banks of any size. Deposits data by depositor location are not currently collected or reported."⁶¹ We appreciate the Board's recognition of the importance of minimizing new data collection, especially for small banks.

⁶¹ 85 Fed. Reg. 66459.

The challenge with any new data collection requirement is that, in addition to meeting their obligation to regulators to collect information, banks must also invest in data security systems to ensure that the Gramm Leach Bliley Act's data security and privacy requirements are met and that customer privacy is not compromised. While larger banks generally have in-house software developers and large compliance and legal teams, many small banks utilize third-party providers. This is expensive, time consuming, and it requires small banks to evaluate differing and highly complicated products. Ultimately, it often requires community bankers to rely on the technical expertise of contractors from outside of their banks.

ICBA believes that, for traditional branch-based banks, FDIC summary of deposits (SOD) data is sufficiently accurate to conduct an empirical evaluation. Community banks focus on the community where they have a physical branch footprint. While no bank that we spoke to currently geocodes their deposits or tracks depositor location on an ongoing basis, they are intimately familiar with their customer base. None that operate a traditional business model estimated that more than 10 percent of their deposits originated outside of their facilities-based assessment areas.

The cost of requiring banks to geocode their deposits will be two-fold. Costs may come from core processors or other third-party providers that will need to increase maintenance costs or develop new compliance modules to meet the new data requirements. They will also come from the bank's need to invest in additional training and compliance staff. In addition to the problems with deposit data collection, community banks report that there will be at least equivalent challenges related to recording data for qualifying activities.

Not increasing the data collection burden is among the highest priorities for small community banks. Increased compliance costs threaten the very existence of the smallest bank and invariably accelerate consolidation. This can be damaging in underserved rural markets because it may result in the closing of branches. Therefore, we strongly support the Board's decision to exclude small banks that opt-in to the metrics-based approach from new deposit data collection and reporting.

We also do not support mandatory deposit geocoding for intermediate small banks (which we argue should be banks below \$10 billion in assets). We believe that SOD data is accurate for most banks and that the creation of a deposit geocoding requirement is not justified. For outlier banks, for example those that use an aggressive hybrid branch/internet business model, it may be appropriate for the Board to impose deposit geocoding requirements on an individual basis.

Non-Bank Entities Providing Financial Services Should Not Be Exempt from CRA

While we understand this ANPR is seeking comment on the proposed CRA regulations, we would be remiss if we did not include community bankers' strong objection to credit unions' statutory exemption from CRA. Credit unions, fintech companies, and any financial firm that serves consumers and small businesses should be subject to CRA in a manner comparable to, and with the same asset-size distinctions, as banks and thrifts. ICBA supports financial technology innovation – we recognize that community banks and their partners need to innovate and adapt to

changing technology – however, we also believe that many financial technology companies have business models based more on regulatory arbitrage than true innovation.

Credit unions that perform “bank-like” functions and offer comparable products and services are not subject to CRA. This uneven playing field places community banks at a competitive disadvantage and inhibits their ability to serve their customers and their communities. ICBA will continue to strongly support efforts to subject credit unions, fintech companies, and any financial firm that serves consumers and small businesses, to CRA requirements in the same manner, and with the same asset size distinctions, as banks.

Conclusion

Once again, ICBA appreciates this opportunity to provide feedback to the Federal Reserve Board regarding its ANPR on reforming and modernizing the CRA regulatory framework. Community banks are inextricably bound with the local economy of their community. They only succeed when the entire community, including LMI families, small farms, and small businesses, succeed. Therefore, ICBA and community banks continue to support fair, equitable, consistent, and transparent implementation of the Community Reinvestment Act.

We strongly urge the Federal Reserve to work together with the OCC and the FDIC to create a uniform CRA framework that applies to all regulated banks, regardless of their charter type. We see significant commonality between the OCC’s final rule and the Federal Reserve Board’s ANPR and believe that interagency compromise is still possible. We urge the agencies to consider that the consistent feedback of industry and consumer groups has been that the agencies should proceed together on a rule that has broad stakeholder support.

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

Sincerely,



Mickey Marshall
Director, Regulatory Legal Affairs