

April 8, 2020

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street, SW
Suite 3E-218
Washington, DC 20219

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Docket ID OCC-2018-0008/RIN 3064-AF22 (Proposed Community Reinvestment Act Regulations)

To Whom It May Concern:

Thank you for the opportunity to provide comment on these proposed rule changes. Unfortunately, we and our members have significant concerns with the OCC-FDIC Notice of Proposed Rulemaking ("NPRM"). In our previous comments submitted last month, we urged the regulating agencies to extend the comment period until 90 days after the National Emergency Concerning the Novel Coronavirus Disease ("COVID-19") Outbreak is declared to be over.¹ Given the breadth of proposed changes to the Community Reinvestment Act ("CRA") regulatory framework, as well as the ongoing disruptions that CRA stakeholders are facing due to the COVID-19 pandemic and related health and economic concerns, we believe such an extension is critical.

Aside from our concerns with this process occurring in the midst of a health and economic crisis, the U.S. Impact Investing Alliance ("the Alliance") also has reservations about the substance of the NPRM. We are most concerned with the proposed CRA Evaluation Measure and its potential to reduce banks' accountability to community needs as well as their ability and incentive to partner with other private investors on community-led projects. Our comments will also examine changes to qualifying CRA activities and assessment areas, as well as the need to publicly report on the new CRA data the NPRM requires banks to collect.

The Alliance is a field building organization committed to catalyzing the growth of impact investing in the United States. Members of our boards and councils include individual and institutional investors collectively owning hundreds of billions of dollars of invested assets, in addition to asset and fund managers collectively managing trillions of dollars in assets. We define impact investing broadly to include those investments that create measurable and positive social, economic or environmental impacts alongside financial returns across asset classes.

¹ President Donald Trump, "Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak," March 2020.

One of the core pillars of the Alliance's work is engaging with federal policymakers to secure an enabling public policy environment for impact investing. As such, we are intimately familiar with the federal government's consistent efforts to help spur investments in community economic development, the CRA being a major accomplishment in this regard. The CRA – which sought to undo the legacy of redlining and underinvestment in low-income communities – laid the cornerstones of the community development finance industry in this country. This industry is integral to the work of impact investors, including many of our members, who invest in underserved communities across the United States in order to achieve positive social, economic and environmental returns for residents and local businesses. These investors rely on the certainty and stability that the CRA framework lends to their community and place-based investment activities. For that reason, we urge regulators working on modernization to guard the core intent of the CRA and carefully consider the potential consequences of any changes.

For instance, consider that the Federal Reserve has not endorsed the proposal put forth by the NPRM. If the OCC and FDIC continue without the support of the Federal Reserve, we are concerned about the prospect of divergent regulatory frameworks that could result in three different scoring methods – the new OCC-FDIC proposal, the current rules for small banks, and a potentially different method from the Federal Reserve. Not only would this place a strain on vital community development organizations to understand three separate systems, it would also inject uncertainty into the CRA environment for investors. Impact investors play a critical role in the economic development and revitalization of communities, and regulators should take care to ensure the underlying CRA infrastructure is not altered in a way that will drive away their capital.

Nonetheless, the Alliance acknowledges that CRA should be modernized when the current health crisis has subsided. The below comments outline our specific concerns with the NPRM and include our general recommendations for CRA modernization.

CRA Evaluation Framework

Single-Metric Ratio

The Alliance generally supports the introduction of more objective metrics for CRA ratings, but we oppose the uniform ratio approach put forth in the NPRM. Given that the single metric is tied to a presumptive rating, we assume it is the dominant measure of CRA activity in this proposal. Moving away from the three-part test for large banks that evaluates lending, investments and services separately will reduce the importance of a bank's performance in each of these activities. As such, the proposed metric could lead to several unintended consequences that directly undermine the intent of the CRA.

The Alliance shares the concern expressed by many other commenters that the proposed single metric will artificially inflate CRA scores while decreasing overall responsiveness to community needs. Combining the dollar value of lending, investments and services into one test will incentivize banks to pursue fewer, larger deals at the expense of the smaller, more impactful products, projects and services communities depend upon. As a result of this rulemaking, banks might appear to be engaging in more CRA activity, but the quality and impact of those activities may suffer. Further, banks will no longer have as strong of an incentive to build meaningful partnerships with nonprofit and public entities that support community development initiatives, as banks will more easily reach their CRA obligations with much fewer deals overall.

The Alliance also opposes a single dollar-volume metric because it would fail to properly adjust according to economic conditions. This could result in the thresholds being too high during poor economic conditions or too low during periods of economic growth. During a fast-moving crisis – such as the ongoing health crisis – regulators should not be imposing artificial credit quotas for particular geographies or regions. This could put banks in precarious financial positions and could actually encourage banks to reduce services in certain geographies where they could be required to make unsound transactions to meet a quota.

The NPRM also suggests that bank must achieve a “satisfactory” rating in a “significant portion” of its assessment areas – which the preamble defines as at least 50 percent – to receive a bank-level passing score. What this means in practice is that a bank could ignore close to half of its assessment areas and still receive a “satisfactory” or even “outstanding” rating. This would encourage banks to focus lending in higher income areas, exacerbating so-called “CRA hotspots” and “CRA deserts” in direct contrast with the stated intent of both this rulemaking and the CRA more broadly.

Community Development Minimum

From an impact investing perspective, we are concerned that removing a separate test for investments will result in less CRA-driven equity investments in vital Community Development Finance Institutions (CDFIs), and tax credits, such as the Low-Income Housing Tax Credit (“LIHTC”) and the New Markets Tax Credit (“NMTC”). These tax credits expand on the CRA framework to crowd in additional private capital and better target underserved individuals and communities. Evaluating community development loans and investments under one combined test creates an incentive for banks to only pursue loans, given that the cost of capital for equity investments is much greater. Consider that for decades, CRA-motivated banks have provided the lion’s share of capital to CDFIs. And so as written in the NPRM currently, this skewed incentive will jeopardize a major source of capital for important community development tools.²

Recommendations for a Metrics-Based Proposal

Generally, the Alliance supports maintaining the three-part test for large banks, which evaluates a bank’s performance in lending, investments and services separately. We support the current system for the aforementioned reason that it requires large banks to pursue impactful activities for communities and residents in each of these areas. If the regulators ultimately decide to move away from the three-part test, we urge that they incorporate other proposals put forth that reflect the intent of the CRA while delivering on the objectivity mentioned in the NPRM. For example, others have proposed separate retail and community development tests for large banks.³ This separation would maintain the importance of both retail lending and community development activities, and in doing so, protect the core purpose of the CRA. A separate community development test is particularly important for investors such as our members who depend upon the strength of the overall community development ecosystem. If the main impetus for banks to make community development investments is removed, there could be cascading effects as other investors are forced to reevaluate their activities.

² Opportunity Finance Network, “20 Years of Opportunity Finance: 1994-2013: An Analysis of Trends and Growth,” November 2015.

³ Dr. Lael Brainard, Member, Board of Governors of the Federal Reserve System, “Strengthening the Community Reinvestment Act by Staying True to Its Core Purpose,” Urban Institute, January 2020.

Furthermore, the Alliance also encourages the OCC and FDIC to consider alternative metrics in their approach. For example, the dollar value metric in the NPRM's proposed evaluation framework cannot appropriately define community need, a nuanced and dynamic concept. Contrast that with another proposal in which the retail lending test would examine loan counts rather than dollar value to determine how well a bank is serving low- and moderate-income ("LMI") individuals and communities.⁴ This helps mitigate the risk that banks would be incentivized to pursue fewer, large-dollar loans at the expense of community priorities. Finally, we suggest that any metrics are thoughtfully tailored to a bank's size and business strategy, as well as local and cyclical conditions.

Qualifying Activities

The Alliance is supportive of the notion that banks should have more clarity as to what activities qualify for CRA credit. We believe that added certainty will encourage banks to more frequently dedicate the time and resources to pursue innovative, impactful transactions that address the needs of the communities. Therefore, we generally support the NPRM's inclusion of a non-exhaustive, illustrative list of qualifying CRA activities to be updated on an ongoing basis. However, we urge regulators to ensure that the listed activities truly reflect the CRA's focus of benefitting LMI communities. Our comments in this section will center around the inclusion of certain Opportunity Zone investments as qualifying, the definition of community development activities and mortgage-backed securities.

Opportunity Zones

The Alliance appreciates the inclusion of Opportunity Zone investments as a qualifying CRA activity. Opportunity Zones and the CRA share similar policy goals – such as benefitting low-income and underserved areas – and so linking the two makes sense for furthering community development goals. The Alliance has been actively engaged on Opportunity Zones for several years, recognizing the policy's potential to uplift economically distressed communities, while introducing a new wave of actors to the practice of investing for impact. Unfortunately, given a lack of transparency within the administration of Opportunity Zones, CRA regulators cannot assume that an Opportunity Zone investment will align with the intent of CRA to benefit LMI communities.

For example, the NPRM's qualifying Opportunity Zone investment examples include "Investment in a qualified opportunity fund, established to finance improvements to an athletic stadium in an opportunity zone that is also an LMI census tract." It is unclear how such an investment would serve the needs of LMI individuals and communities. Simply because the investment is located in an LMI census tract does not ensure that the beneficiaries are LMI residents.

For this reason, we support the method for limiting the scope of CRA-eligible Opportunity Zone investments put forth by the Economic Innovation Group ("EIG") in their comments. EIG proposes replacing the definition for qualifying Opportunity Zone investments in the NPRM with the following: "Qualified opportunity funds, as defined in 26 U.S.C. 1400Z-2(d)(1), that make investments directly or indirectly in qualified opportunity zones, as defined in 26 U.S.C. 1400Z-1(a), that benefit low- or moderate-income individuals or communities."

As EIG notes in their comments, this alternative definition would tie CRA qualification to the results of an investment rather than just the location, better addressing the underlying purpose of the CRA to

⁴ Ibid.

ensure banks meet the needs of their communities. The Alliance also supports tying a safe harbor to this definition to provide certainty for banks and investors. We encourage regulators to solicit industry input on what outcomes or activities should be included in such a list to presume an Opportunity Zone investment benefits LMI individuals or communities. There is significant overlap in the intent of the CRA and the Opportunity Zone incentive, and if executed properly, their pairing could serve to multiply the benefits of both.

Community Development Definition

The Alliance was heartened to see the recent joint statement from the three regulating agencies regarding CRA activities in response to the COVID-19 pandemic.⁵ Encouraging banks to work with affected communities – particularly LMI communities that will be the hardest hit during this crisis – by engaging in specific activities for favorable CRA consideration is wise. A crisis such as this only underscores the importance of maintaining economic development, as well as revitalization and stabilization activities within the community development definition for CRA consideration. We noticed that the NPRM fails to include them, and we ask that, especially in light of the ongoing pandemic, they remain a part of the permanent criteria.

Mortgage-Backed Securities

Lastly, we strongly recommend that the final regulations disallow the inclusion of investments in mortgage-backed securities for meeting the community development minimum. These investments are short-term and liquid in nature and do not meet the long-term community development needs of LMI areas. Additionally, removing mortgage-backed security investments from the community development minimum will help further the regulators' goal to encourage Opportunity Zone investments and other meaningful community development activities through the CRA.

Other Issues

Before closing, I will briefly touch on two additional aspects of the NPRM that regulators should consider closely.

Changes to Assessment Areas

The Alliance is supportive of the NPRM's stated goal of encouraging banks to serve more of their communities, especially those currently underserved such as rural or tribal areas. We also understand the need to consider factors in addition to branch location when determining assessment areas, given the rise of online and mobile banking. However, the potential effects of the NPRM's deposit-based assessment areas remains unknown.

As FDIC member Martin Gruenberg noted in his public statement on the NPRM, there is not currently sufficient data to allow stakeholders to predict where the deposit-based assessment areas will be and how many will be created.⁶ Therefore, it is unclear if this change would drive CRA activity in "CRA deserts" or simply exacerbate the problem by adding assessment areas to "CRA hotpots." Given this

⁵ Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, "Joint Statement on CRA Consideration for Activities in Response to COVID-19," March 2020.

⁶ Statement by Martin J. Gruenberg, Member, FDIC Board of Directors on the NPRM, December 2019.

uncertainty, the Alliance recommends reconsidering any changes to assessment areas to determine their potential effects on underserved and LMI communities.

Data Collection and Reporting

The Alliance applauds the inclusion of increased data collection and reporting requirements in the NPRM. Specifically, the proposal would require banks evaluated under the general performance standards to collect and report to the regulating agencies on “data related to their qualifying activities, certain non-qualifying activities, retail domestic deposits, and assessment areas.” We agree that this will help the agencies better measure and analyze CRA activity over time. In addition, we would urge regulators to consider publicly publishing data on community development financing at the county level to increase CRA transparency and accountability, and to arm community groups with relevant data to inform their work.

Conclusion

The proposed changes in the NPRM will dilute the CRA’s effectiveness in assuring that banks serve the needs of their communities, especially for LMI individuals and areas. This threatens the integrity and stability of the CRA market, which undergirds the interests of impact investors. The Alliance is concerned that the single-metric ratio within the proposed CRA evaluation framework will incentivize banks to pursue fewer, larger deals in place of the smaller-scale banking activities that communities depend on to meet their economic needs. Moreover, the Alliance is particularly opposed to the removal of a separate community development investment test, as we fear that it will significantly depress participation in vital community development incentives such as the NMTC and LIHTC. Relatedly, while we applaud the listing of Opportunity Zone investments as a CRA-eligible activity, we encourage regulators to limit the scope of qualifying Opportunity Zone investments to those that demonstrably benefit LMI individuals or communities to better capture the spirit of both laws. Finally, the public still lacks access to much of the proposal’s underlying analyses, which prevents the extensive network of CRA stakeholders from fully understanding and preparing for the potential impacts of the NPRM.

Besides the substance of the NPRM, we are wary of moving forward with a fundamental rewrite of the CRA regulatory framework without interagency alignment. The Alliance requests that the OCC and FDIC incorporate proposals put forth by the Federal Reserve into a broader rulemaking.

In closing, the Alliance urges the OCC and FDIC to revisit the flaws in this NPRM that we have outlined in our comments after the COVID-19 National Emergency has been lifted and after an extended public comment timeline. Any changes to the CRA should be carefully analyzed to ensure they uphold the core purpose of the law and result in more capital and financial services for LMI and underserved communities across the United States.

Sincerely,



Fran Seegull
Executive Director, U.S. Impact Investing Alliance