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Via electronic submission

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

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

Re: COMMUNITY REINVESTMENT ACT REGULATIONS
Docket ID: OCC–2018–0008; RIN 3064–AF22

Dear Sir or Madam:

The Independent Community Bankers of America ("ICBA")[1] appreciates this opportunity to provide feedback to the Office of the Comptroller of the Currency's ("OCC") and Federal Deposit Insurance Corporation's ("FDIC") request for comments in response to its Notice of Proposed Rulemaking ("NPR")[2] on reforming the Community Reinvestment Act ("CRA") regulatory framework.

The CRA was enacted in 1977 to ensure that each insured depository institution serves the convenience and needs of its entire community, including low- and moderate-income ("LMI") neighborhoods, consistent with [its] safe and sound operation.[3] This mission is the essence of

[1]The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ nearly 750,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than $5 trillion in assets, nearly $4 trillion in deposits, and more than $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.
ICBA is dedicated *exclusively* to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.
[2] 85 F.R. 1204.
[3] 12 U.S.C. 2903(a)(1).

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what community banks do. As local businesses themselves, community banks only thrive when their customers and communities flourish. They answer to Main Street. Community bank officers and employees are deeply involved in their communities and focus on supporting the local economy in the communities in which they operate.

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. Furthermore, ICBA supports a new framework that increases the transparency of CRA exams. However, while the proposed rule represents an improvement in some areas, community banks are concerned that the new regulatory framework is too complex and would impose additional data collection costs that are not commensurate with the proposed benefits. Additionally, the use of nationwide performance benchmarks may not be sufficiently well-suited to assess the performance of community banks.

Furthermore, due to the complexity of the proposed regulations, ICBA strongly advocates increasing the current rule's threshold for "small banks" to include intermediate small banks ("ISBs")) and raising the ISB threshold to $5 billion, rather than lowering this threshold to $500 million.[4]

As the agencies review the comments filed, ICBA urges the agencies to be mindful that many community banks may be unable to file individual comment letters due to the outbreak of the COVID-19 pandemic. Because responding to the COVID-19 pandemic and meeting customer needs requires the full attention of community bankers, we have asked, in a separate letter, for a delay to all non-COVID-19 related rulemakings, including this proposal.[5]

Community banks across the country have been working around the clock to respond to this unprecedented national emergency, including by preparing to participate in the CARES Act's Paycheck Protection Program. Because community bank staff often wear many hats and perform multiple functions within the bank, many community bankers have been working over-time on crisis response. Therefore, if the agencies receive fewer comments than expected on this proposal, that should not be viewed as an indication that this issue is not of the highest importance to community banks.

[4] 12 C.F.R. 25.12(u)(1).
[5] Independent Community Bankers of America, COVID-19 Agency Rulemaking Delay Letter (Mar. 30, 2020), available at: https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/icbas-covid-19-agency-rulemaking-delay-letter.pdf?sfvrsn=95fb2b17_0.

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Executive Summary

ICBA appreciates the willingness of the OCC and FDIC to take on the formidable task of overhauling the existing CRA framework. As we have argued before, the existing framework is outdated and lacks transparency. Elements of the proposed rule represent an improvement to the current rule. However, other elements we do not support. Highlights from our comment letter are listed below:

- The opt-in threshold for the rule should be raised from $500 million to the intermediate small bank threshold. This threshold should be raised and should be annually adjusted for inflation.
- Banks with assets less than the small bank threshold should be exempt from any new data collection requirements.
- Traditional, branch-based banks of any size should be exempt from tracking the location of deposits and delineating deposit-based assessment areas.
- The OCC and FDIC should continue to work with the Federal Reserve Board to create a uniform CRA rule.
- Before beginning examinations under the new framework, agencies should publish examiner's guidance on documentation requirements. This will alleviate some of the uncertainty created by the new standards.
- ICBA supports the creation of a qualifying activities list, which should be kept uniform between the agencies.
- ICBA supports the creation of a process that banks can use to receive confirmation from regulators that a loan or activity qualifies for CRA credit.
- Qualifying loans that are sold within 90 days of origination and qualifying loans that are held on the balance sheet for more than 90 days should receive equal credit in the qualifying activities calculation formula.
- In accordance with the current rule, the evaluation of a bank's consumer lending should only occur at a bank's discretion.
- In light of the recognition they have received in both the statutory text of the CRA and its implementing regulations, MDIs and CDFIs should be exempt from CRA examinations and related recordkeeping. The thresholds for delineating deposit-based assessment areas should be raised from 50 percent and 5 percent to 80 percent and 10 percent, respectively.
- ICBA opposes the implementation of the proposed CRA evaluation measure.
    - A dollar-based metric is flawed because it favors large loans and investments over more numerous small loans to LMI families. Additionally, the value of certain qualifying activities, such as community development ("CD") services, are undervalued by a dollar-based measure.

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  - Nationwide benchmarks to establish a presumptive rating are not appropriate because they are not sufficiently tailored for individual banks, especially community banks, and they deemphasize the CRA's core focus on serving the needs of individual communities.
- ICBA opposes the creation of a nationwide community development minimum requirement of two percent of deposits. Rather, regulators should continue to use the current model which considers on an individual basis a bank's capacity and the community's need for CD investment.

Continued Support for One CRA Rule

ICBA supports the OCC and FDIC's effort to continue its process for modernizing CRA. However, while the CRA does not require all the prudential regulators to issue joint rulemakings, joint rules provide community banks the benefits of reducing compliance burden, increasing regulatory certainty, and industry-wide consistency.

On January 8, 2020, Federal Reserve Board Governor, Lael Brainard, spoke at the Urban Institute where she laid out the Federal Reserve Board's ("Board") framework plan to strengthen CRA regulations.[6] Certain features of Governor Brainard's proposal, including "tailored thresholds that are calibrated for local conditions"[7] and the creation of a virtual dashboard that banks could use to evaluate their own performance throughout the exam period, would be beneficial to community banks. We urge the OCC and the FDIC to consider integrating these aspects from the Board's proposal into their final rule.

While we are aware that there were extensive inter-agency discussions regarding a new CRA framework, we urge the OCC and FDIC to continue engaging with the Board to improve the proposal and issue a joint final rule.

Small Bank Performance Standards (Opt-In Threshold)

Like the current CRA framework, the proposed rule makes some distinction between institutions of different sizes. Specifically, small banks, defined by the proposed rule as banks with less than $500 million in assets, would be given the choice to opt-in to the revised framework or to continue to be evaluated by the existing small bank Lending Test.

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[6] Governor Lael Brainard, "Strengthening the Community Reinvestment Act by Staying True to Its Core Purpose," Speech at the Urban Institute, Washington, D.C., Jan., 8, 2020, available at: https://www.federalreserve.gov/newsevents/speech/brainard20200108a.htm.

[7] *Id*.

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Despite this flexibility, the cost of this new rule on community banks is likely to be substantial. The FDIC notes that "[t]he FDIC supervises 3,424 depository institutions, of which 2,665 are defined as small institutions by the terms of the Regulatory Flexibility Act. The proposed rule would affect all FDIC-supervised institutions, therefore the FDIC estimates that the proposed rule would affect 2,665 small, FDIC-supervised institutions."[8] Likewise, the OCC estimates that "if all of the small banks that the proposal would exempt operated under the small bank performance standards, then the proposal would have a significant economic impact of approximately $36 million on 72 small entities supervised by OCC, which is a substantial number of small entities. If all of the small banks as defined by the proposal opted in to the general performance standards, then the proposal would have a significant economic impact of approximately $375 million on 738 small entities supervised by OCC,[9]

ICBA is supportive of giving small banks the choice whether to opt into the new rule. Imposing the revised framework on all institutions would be particularly burdensome for community banks that are familiar with the existing framework. Implementing the new framework would be an extraordinary burden and costly, straining community bank resources to decipher a complicated new framework rather than serving their communities. However, having the ability to opt in to the new framework provides flexibility to small banks that view the new framework as an opportunity to better showcase their commitment to meeting the credit needs of LMI borrowers in their community. To minimize the negative economic consequences of the new rule on community banks, the $500 million asset threshold to be eligible for the opt-in provision should be raised.

It has been ICBA's long-standing position that the current CRA rule's thresholds for small and intermediate small banks are too low and do not represent the current state of the banking industry. An increasing regulatory burden has fueled a trend towards consolidation and made it harder than ever to be a small bank. Therefore, we have long advocated for the intermediate small bank threshold to be raised to $5 billion in assets. This threshold better reflects a current assessment of an intermediate small institution.

While ICBA is mindful that the proposed rule eliminates the distinction between small and intermediate small banks, we believe that the opt-in threshold should be set to the intermediate small bank threshold and that the threshold should be raised to the aforementioned level of $5 billion. The current rule defines a small bank as "a bank that, as of December 31 of either of the

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[8] 85 F.R. 1237.
[9] 85 F.R. 1235.

prior two calendar years, had assets of less than $1.305 billion."[10] The current rule then makes a distinction between small banks and intermediate small banks.

Alternatively, we suggest that the opt-in threshold be raised to $2.5 billion. 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 alternative because it is calibrated to same asset distribution levels as the original threshold at its inception.

Given the scope of the changes made by the proposed rule, allowing all small banks, whether they are intermediate small or the very smallest, the choice of whether to opt in minimizes the burden of the changes on community banks. This policy is consistent with current regulations. These institutions may eventually choose to opt into the new framework, but many of these small banks depend on core processers, who will need time to develop new systems needed to comply with the new framework, and will have high up-front costs. Raising the threshold will allow more banks to continue operating under a framework with which they are familiar while core processors and other third parties develop and implement new systems and eventually reduce costs for smaller institutions.

As both the current and proposed regulation require, any threshold used should be indexed to inflation.

Assessment Area

Under the current CRA rule, banks delineate assessment areas in geographies where they have a main office, branches, or deposit taking ATMs.[11] By contrast, the proposed rule creates two types of assessment areas – *facilities-based assessment areas* and *deposit-based assessment areas*. Facilities based assessment areas are delineated in much the same manner that banks delineate their assessment areas under the current rule, subject to a few changes at the margin. However, a bank that receives more than 50 percent of its retail domestic deposits from outside of its facilities-based assessment areas would also be required to delineate "separate, non-overlapping assessment areas in the smallest geographic area where it receives five percent or more of its retail domestic deposits."[12]

[10] 12 C.F.R. 25.12.
[11] 12 C.F.R. 345.41(c).
[12] 85 F.R. 1244.

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This change is intended to address the existing model of assessment areas, which is based on the location of brick and mortar branches and "is challenged by how today's consumers meet their banking needs and banks provide services."[13] ICBA appreciates the agencies' efforts to modernize the CRA to reflect that new technology has made possible new, non-branch-based business models. At the same time, the data collection and assessment area delineation requirements that will be imposed by the proposal on traditional, branch-based banks are a significant burden.

Facilities-Based Assessment Areas

ICBA and its community bank members support 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 families in their community.

The proposed rule requires banks to designate facilities-based assessment areas based on "whole geographies" (MSAs, counties, etc.). This is similar to the current rule, except that the current rule permits whole geographies to be modified to reflect only the areas of those geographies that banks could be "reasonably expected" to serve. These modifications can only be made in limited circumstances such as when an unmodified assessment area would be "extremely large, of unusual configuration, or divided by significant geographic barriers."[14]

The elimination of this provision limits banks' discretion to appropriately tailor their assessment areas to their specific circumstances. For this reason, and because the modification could only be made in cases where not doing so would be unreasonable, we urge the agencies to retain the language of the current 12 C.F.R. 25.41(d).

[13] 85 F.R. 1215.
[14] 12 C.F.R. 25.41.

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Furthermore, both the current and proposed regulations require delineation of assessment areas in geographies containing deposit-taking ATMs. While the ATM has been a useful tool for banks by dispensing cash and providing a reliable method for customers to deposit funds, the advancement of technology has shifted the reliance on ATMs to other tools such as smartphones and computers. Additionally, community banks are increasingly relying on networked ATMs owned by others to meet their customers' cash access needs. While not commonplace today, many expect ATMs to accept deposits from the customers of any bank participating in the network. Requiring geographies surrounding deposit-taking ATMs, rather than relying on banks to determine if such areas are appropriate, is outdated and does not serve the purpose of CRA.

Exemption for Traditional Banks

While the current CRA framework is not well-suited to address the challenges posed by Internet banks without a significant branch footprint, many banks use a traditional, branch-based business model. While many of these traditional banks do offer digital services like mobile deposit and online banking, they do not actively solicit deposits from distant parts of the country. The branch remains at the core of their business model. For these institutions, the best way to determine the bounds of the community that they serve is to examine their branch footprint.

The NPR says, "[u]nder the proposal, small banks would be required to collect and maintain information on depositors necessary for the designation of deposit-based assessment areas. To limit the recordkeeping burdens for small banks, the agencies are considering alternatives for small bank data collection, including a full exemption from any recordkeeping requirements. For example, the agencies could exempt a small bank from any recordkeeping requirement associated with the designation of deposit-based assessment areas—which is designed to capture non-traditional business models of Internet banks or other banks that have one or a few physical locations but operate on a national basis—if the bank demonstrates that it has a traditional business model to the agencies' satisfaction."[15]

ICBA supports including into any final rule a process by which banks that have a traditional, branch-based business model would become exempt from delineating deposit-based assessment areas or tracking the location of deposits for a predefined period of time. Requiring every bank, regardless of size or business model, to collect such data to capture the few banks without a

[15] 85 F.R. 1228.

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traditional branch model is overreaching and excessive. The inclusion of such a provision would allow the agencies to better assess Internet banks, which do not have a physical branch network, without placing an undue burden on banks who serve their communities through physical branches.

Deposit Thresholds

Under the proposal, a bank that receives more than 50 percent of its retail domestic deposits from outside of its facilities-based assessment areas will be required to delineate separate assessment areas in geographies where it has a greater than five percent share of its deposits. ICBA suggests that the current thresholds be raised to avoid inadvertently classifying traditional, branch-based banks as Internet banks.

A 50 percent threshold casts too broad a net that risks capturing branch-based banks that are not tech-focused Internet banks that the proposed rule is intending to address. This threshold disproportionately affects small and intermediate institutions. The largest banks, which have networks of thousands of branches in multiple states are less likely to delineate deposit-based assessment areas since the largest cities with the richest concentrations of deposits are already part of their facilities-based assessment areas. Even if they maintain a significant amount of deposits from rural areas through online banking, they are unlikely to cross the 50 percent threshold.

If the current deposit-based assessment area framework is maintained, ICBA suggests requiring banks that receive 80 percent, as opposed to the current 50 percent, of their retail domestic deposits from outside of their facilities-based assessment areas to delineate deposit-based assessment areas. The higher threshold would capture Internet banks that have a limited branch footprint, make loans and solicit deposits nationwide. However, it would apply to fewer traditional branch-focused banks, whose communities are best understood in terms of the geographies where they have a physical presence.

As currently proposed, this threshold is particularly significant to community banks because, unlike the general performance standards, even small banks below the "opt-in" threshold, would be required to calculate and comply with the new assessment area rules.

ICBA also suggests raising the threshold to delineate a new assessment area from five percent to 10 percent of a bank's deposits. A threshold of 10 percent is better calibrated to find the geographies where banks are regularly and systematically doing business. These geographies can

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more fairly be understood as part of the community a bank serves because the chance of incidentally or inadvertently crossing the 10 percent threshold is low. Because 10 percent of deposits represents a material part of a bank's depositor base, it makes more sense to apply a CRA obligation to these areas.

Deposit-Based Assessment Areas

For banks that do not use a traditional, branch-based business model, a facilities-based assessment area may not be a complete representation of the community they serve. A facilities-based approach requires these banks to concentrate community reinvestment activity in the location of their physical branches, frequently only one location, even if a majority of their LMI customers live in other geographies. It also prevents them from getting credit for the loans and investments they make in LMI areas outside of the vicinity of the physical branches.

However, while the current regulation's facilities-only approach limits where the bank can receive credit for qualifying activity, there are significant issues created by using deposits to delineate additional assessment areas for all banks. The first, and most significant challenge presented by using deposits to delineate assessment areas is that 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. At present, the FDIC Deposit Share Market Report, the closest available resource to such a dataset, only tracks the market share of deposits of banks that have a physical presence in each given geographic area.

This lack of publicly available data makes the industry-wide effects of the creation of deposit-based assessment areas difficult to evaluate, not only for banks, but for all stakeholders. In counties where an Internet bank has a majority percent market share of deposits, and small banks with branches have the remaining small market share, FDIC data would show the small banks with the entire market share, Meanwhile, the branchless Internet bank that actually had the majority of deposits in the county would not show up in the data.

The proposal attempts to make up for this lack of publicly available data by requiring banks to "collect and maintain data on the value of each retail domestic deposit account and the physical address of each depositor as of the close of business on the last day of each quarter."[16] This

[16] 85 F.R. 1250.

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requirement would apply to all banks, even banks that do not opt into the proposed general performance standards. The process of collecting this data would be costly for all institutions, but the burden would significantly and disproportionately affect community banks. Core processors would need to reconfigure their systems, increasing costs. Furthermore, some customers may use P.O. boxes, which would make verifying location more difficult. In short, in order to address the challenged posed by evaluating a small minority of non-traditional, Internet banks, the proposal places a burden on the entire banking industry.

Moreover, no matter how much the industry invests in data collection, it is likely the end result would still be flawed. Banks would be required to verify the address of every depositor on a quarterly basis and would incur significant costs from sending out mailers or online surveys. Furthermore, no matter which method they use to contact customers, it is likely that a significant number will not respond. This will leave a portion of the bank's data on the address of each depositor out of date and impossible to verify.

Additionally, given the complexity of the definition of "retail domestic deposits," it is likely there will be other problematic cases that neither the industry nor regulators have yet foreseen.

The location of lending could be used as an alternative to the location of deposits for the purpose of delineating new assessment areas. In many cases, residential mortgage and business loans are secured by real estate or other fixed assets which have a definite location. In other cases, such as for consumer loans, the act of origination provides a point in time which location are established – the borrower's address at that moment becomes the location of the loan. This clarity simplifies recordkeeping and creates a set of expectations that are understood by both the lender and the borrower. Regulators consider the location of loans in their current examinations. Deviating significantly from this practice will be disruptive to the industry.

ICBA is concerned that the delineation of deposit-based assessment areas may have unanticipated consequences for community banks. Small banks may inadvertently cross the 50 percent threshold if they have a few large, institutional depositors outside of their assessment area. Requiring a small, community bank with a traditional, branch-based model to delineate additional assessment areas in distant states or on opposite coasts is counterproductive and does not serve the purposes of the CRA.

In no conventional sense of the word are these distant states these community banks' "communities." The banks are presented with the difficult choice of attempting to find qualifying loans and investments in unfamiliar markets, without the benefit of branches or lending officers

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on the ground, or of opening new lending offices thousands of miles away from their existing branch networks.

Community banks are rooted in their local communities and they understand their local needs. They have relationships with local businesses and families and can accurately assess where loans and investments will have the biggest positive impact. By definition, requiring banks to lend and invest in unfamiliar markets will leave them less able to assess whether their activity is positively affecting the community.

By contrast, while a bank has limited control over the location of its depositors, and therefore, under the proposed rule, limited control over the delineation of the community it serves, it is able to focus its CRA lending on the needs of the communities it best understands.

Frequency of Assessment Area Updates

The proposed rule states, "[u]nless pursuant to an approved application … for a merger or consolidation with an insured depository institution, an assessment area delineation can only change once during an evaluation period and must not change within the annual period used to determine an assessment area CRA evaluation measure."[17] The relative infrequency with which banks may update their assessment area delineation has a limiting effect on growth and expansion. Allowing banks to update their assessment areas on a quarterly or annual basis would enable them to be more dynamic and would lead to assessment areas that more accurately represent a bank's footprint in the community.

Data Collection

The proposal states, "the proposed data collection, recordkeeping, and reporting requirements would require upfront changes that will result in increased costs, particularly for smaller banks" but argues that these costs would be mostly an up-front expense and that they would decrease over time.[18] It further states that this record-keeping would increase transparency and that it would provide banks greater insight into their own businesses. ICBA disagrees with this characterization.

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[17] 85 F.R. 1244.
[18] 85 F.R. 1227.

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The proposed rule would require banks subject to the general performance standards to collect, maintain, and report the results regarding their performance, including the results of their retail and geographic distribution tests in each assessment area, bank-level and assessment area level results calculated under the new CRA evaluation formula, and presumptive ratings. Furthermore, banks subject to the general performance standards must collect, maintain, and report data and supporting documentation for all qualifying activities. Finally, all banks, whether they are subject to the general performance standards or not, will be required to collect and maintain data regarding the location of retail domestic deposits.

Far from being a one-time expense, the proposed data collection rules would create several new and ongoing obligations. The current rule says that banks *may* collect information on consumer loans *at their option*.[19] By contrast, the proposed rule makes collection of consumer loans mandatory for all banks evaluated under the general performance standards. In addition, the proposal creates mandatory record keeping requirements for the date of loan origination and loan location – data collection that is not required under the existing framework.[20]

Most troubling, however, is the requirement to collect data on the location of retail domestic deposits. The proposal requires banks to collect and maintain "[t]he value of each retail domestic deposit account and the physical address of each depositor as of the close of business on the last day of each quarter during the examination period."[21] Banks evaluated under the general performance standards would be required to annually report this information to their regulator. There is no corresponding requirement under existing CRA regulations, and no community banks maintain information about the location of deposits that they update on a quarterly basis.

The NPR states that, regarding deposit location, "most of the information is available currently or could be obtained without undue cost going forward."[22] ICBA disagrees with this. While obtaining customer addresses is required at account opening and maintained pursuant to record keeping requirements under the Bank Secrecy Act, banks are not required to collect, update, or report those addresses quarterly.

The NPR incorrectly assumes that current availability automatically translates into a quarterly collection and reporting process that can be tapped for meeting CRA requirements.

[19] *See* 12 C.F.R. 25.42(c).
[20] *Compare* 12 C.F.R. 25.42(c); 85 F.R. 1249.
[21] 85 F.R. 1250.
[22] 85 F.R. 1227

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Tracking and maintaining this data will be costly and onerous for community banks, as well as potentially intrusive for bank customers. ICBA understands that tracking the location of deposits is one option to delineate deposit-based assessment areas, but as we said above, we do not support the inclusion of deposit-based assessment areas in the final rule. Eliminating the measure entirely or creating additional assessment areas based on lending and using assets rather than deposits in the CRA evaluation measure would eliminate the need to track deposit location.

As we previously noted, we are solicitous of the fact that the agencies are considering a process by which small banks could become exempt from the delineation of deposit-based assessment areas and the associated recordkeeping requirements by utilizing a traditional, branch-based business model. We reiterate our view that any final rule should include a process by which branch based banks become exempt from the delineation of deposit based assessment areas and that such a provision should apply to banks of any size, not just those below the rules "opt-in threshold. The creation of deposit-based assessment areas, and the corresponding deposit location recordkeeping requirements, are intended to address the challenge presented by Internet banks with few branches. Applying these same data collection and recordkeeping requirements to all banks is unduly burdensome.

While no bank actively tracks the location of their depositors on a quarterly basis, many community bankers serve a relatively limited geographic area and are intimately familiar with their customer base. For these community-based institutions, the percentage of their depositors that are located outside of their facilities-based assessment area would not reach 10 percent, let alone the 50 percent of deposits – the threshold required to trigger the delineation of deposit-based assessment areas. In short, because of their traditional business model, they will likely never be required to delineate deposit-based assessment areas. Nevertheless, they would be required to build new systems of data collection to verify this fact. The burden of additional recordkeeping placed on these small banks is not commensurate with the benefit associated with the collection of the data.

Performance Evaluations

ICBA has long supported making CRA exams more transparent and objective. While we appreciate the agencies efforts to create a more objective framework, the proposed metrics introduce significant complexity to the exam process and contain inflexible nationwide benchmarks which do not fit with the CRA's community focus. In our comment letter responding to the OCC's 2018 ANPR on CRA framework, we stated, that while a metric-based approach may produce some benefits, "there is also great potential for unanticipated ancillary

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effects, such as added complexity, static treatment, and stale measurements."[23] We added, "there is broad concern among community banks that a metric will become a "one-size-fits-all" approach and will not capture the unique efforts of community banks of all sizes and charter types with wide-ranging specialized services and lending focuses that meet the unique needs of diverse communities."[24]

The metrics created by the proposed rule do not extinguish these concerns. We have heard consistently from community bankers that the new performance evaluation standards, particularly the new CRA evaluation objective measures, are complicated, hard to understand, and likely to result in the need for additional compliance personnel. Because of the rule's complexity and the lack of available data, community banks have had a difficult time precisely evaluating the proposed rule and its impact on their own CRA performance ratings. However, though ambiguous provisions and a lack of data have made it impossible to precisely evaluate the rule, community banks have uniformly found that, if implemented, the proposal will cause their regulatory compliance costs to increase.

According to the FDIC's estimates, the record-keeping costs of the proposed rule alone will pose "$93,000 in annual costs for small, FDIC-supervised entities subject to the small bank performance standards, and $665,802.45 in annual costs for small, FDIC-supervised entities subject to the new general performance standards."[25] These costs, applied to every FDIC insured bank in the country, paint a striking picture of the expense to the banking industry associated with complying with this rule. As for evaluating the cost of CRA rating changes resulting from the new performance standards, the FDIC concedes that it is "difficult to accurately quantify…the proposed rule with the information currently available to the FDIC."[26]

These costs are not commensurate with the purported benefits of the proposed metrics, which are less clear. The proposed metrics create a uniform evaluation process, which, while potentially incrementally increases transparency, minimizes performance context and examiner discretion.

For this reason, ICBA urges regulators to continue working with stakeholders to develop a framework that addresses changing technology and stays true to CRA's purpose of expanding access to credit in LMI communities before finalizing a performance evaluation framework. As

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[23] Independent Community Bankers of America, Comment Letter Responding to ANPR on Reforming Community Reinvestment Act Regulatory Framework (Nov. 19, 2018), available at: https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/2018-Letters/18-11-19_cracl.pdf?sfvrsn=cd764717_0.
[24] *Id.*
[25] 85 F.R. 1237-38.
[26] 85 F.R. 1237.

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written, the proposed metrics would not modernize CRA, but make it more complex and less tailored to banks of different sizes and business models. *CRA Evaluation Measure*

ICBA does not support the implementation of the proposed CRA evaluation measure as written. While the notion of a quantitative evaluation metric has merit, the formula proposed by the rule simultaneously makes assumptions which may not be appropriate in every circumstance, and is difficult for banks to apply. The evaluation measure, as printed in the NPR, appears below:

$$\frac{\textit{Qualifying Activities Value}}{\textit{Average quarterly}\ \textbf{\textit{Retail Domestic Deposits}}} + .01\left(\frac{\textit{Branches in Specified Areas}}{\textit{Total Branches}}\right)$$

The numerator of the evaluation measure is the qualifying activities value. This is a dollar-based metric, which disproportionately advantages large institutions. Big banks have greater opportunity to participate in large development projects, which boost their activities value, but do not require ongoing engagement with the community. Conversely, community banks are often spending time and resources educating and developing relationships with residents in their communities and underwriting loans to small businesses and mortgages in LMI areas.

ICBA urges the agencies to be mindful that a dollar-based metric may favor large institutions that make a smaller volume of large loans, and to be mindful of the value of small loans to families and small businesses that are at the core of a community bank's business model.

The use of retail domestic deposits is also problematic. The amount of CRA activity that regulators require a bank to engage in should correspond to that bank's size. Most commonly, bank size is understood in terms of asset size, not the dollar value of deposits. Furthermore, a deposit-based rule disproportionately burdens community banks because large banks typically have a higher asset to deposit ratio than their small bank peers. This means that community banks will have a greater CRA obligation, proportionate to their balance sheet, than large banks do. Finally, this proposal, which bases the CRA evaluation formula on the amount of deposits, uses an asset size threshold to determine whether the application of the evaluation formula will be mandatory. Using an evaluation formula with assets as the denominator would resolve this paradox.

As discussed in other parts of this letter, the costs associated with tracking deposit location is high. By contrast, tracking location for most loans is less costly. In the case of loans secured by real estate, the location is the physical address of the property, in the case of consumer loans, the location is the location of the applicants at the time of origination. Furthermore, assets better

reflect a bank's level of lending activity, whereas deposits are a measure of customer activity. Additionally, deposit levels may be prone to seasonal fluctuations or changes in the economic cycle. This will make it difficult for banks to know what level of CRA activity is expected of them in order to obtain a satisfactory or outstanding rating.

Because asset levels exceed deposit levels, sometimes by a significant margin, the use of an asset-based formula would require recalculating the CRA benchmarks that the evaluation measure is to be compared against to establish a presumptive rating. These benchmarks would need to be lowered to reflect the change to the formula's inputs.

Additionally, the use of branch locations in the evaluation metric is paradoxical. Generally, the proposal recognizes, and even stands for the proposition, that the future of banking is less branch-centric. For this reason, ICBA does not support quantifying the value of branch location, nor making it part of the evaluation metric.

After a bank inputs its qualifying activities, retail domestic deposit, and branch location data into the CRA evaluation measure, it compares the formula's output to a series of benchmarks to establish a presumptive rating. The proposed rule establishes thresholds of 11 percent for outstanding, six percent for satisfactory, and three percent for needs improvement.

Due to the lack of data on deposit location, and uncertainty regarding the scope of the new qualifying activities criteria, it has been difficult for community banks to assess the appropriateness of these thresholds or to suggest suitable levels. However, it is improbable that nationally standardized benchmarks would be appropriate in this performance evaluation. This results in a "one-size-fits-all" approach which will not capture the unique efforts of community banks of all sizes and charter types with wide-ranging specialized services and lending focuses that meet the unique needs of diverse communities.

Banking is not a one-size-fits-all business, nor are the needs of the consumers and small businesses they serve. Rather than rigid, nationwide benchmarks, we suggest the agencies develop flexible metrics that account for various bank models. Among other considerations, this would provide allowances for different business models and products, market characteristics, economic cycles, institutional maturity, and other situations that could result in skewed metrics than would otherwise occur.

Under the proposal, community banks with assessment areas that contain few LMI census tracts would have their performance in these assessment areas compared to a nationwide benchmark

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that would be unfairly high. While such banks may be able to do fairly well at the whole-bank level, they would still not be eligible for a presumptive rating of satisfactory because they would also be required to receive a satisfactory rating, "in a significant portion of its assessment areas and in those assessment areas where it holds a significant amount of deposits."[27]

While ICBA does not support the proposed evaluation measure, if the agencies finalize the CRA evaluation measure, we recommend more flexible benchmarks that can be adjusted to better reflect the communities banks serve. Furthermore, examiners should be permitted to exercise discretion when evaluating banks with disproportionately few opportunities to make qualifying loans.

Retail Lending Distribution Tests

Under the proposed rule, in each assessment area, a bank must apply a geographic distribution test to its small loan to a business product line or a farm product line if those product lines are major retail lending product lines (i.e., account for more than 15 percent of revenue bank-wide) with 20 or more originations in a given assessment area during the evaluation period.[28] Additionally, the bank must apply a borrower distribution test "for each major retail lending product line with 20 or more originations in the assessment area during the evaluation period."[29] Whereas the CRA evaluation measure is designed to measure the dollar volume of qualifying activity, the distribution tests are designed to assess the number of qualifying loans or "loan count" to LMI borrowers, small businesses, small farms, and LMI geographies in a community.

In general terms, loan-count-based distribution tests conducted on an assessment-area-by-assessment-area level resemble the current CRA performance evaluation. The use of distribution tests shows how much a bank's lending activity is concentrated in LMI areas without being skewed by a few large loans.

Under the current rule, the calculations of a bank's loan distribution are handled by bank examiners. Under the proposed rule, these calculations will be shifted from bank examiners to the bank staff. This creates unnecessary and additional compliance costs and will likely require hiring and training additional personnel. This burden is heaviest for community banks evaluated under the general performance standards.

[27] 85 F.R. 1246.
[28] 85 F.R. 1245.
[29] *Id.*

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Furthermore, the loan count threshold of 20 originations, which triggers a retail distribution test, is too low. To conduct statistically meaningful analyses, ICBA urges regulators to raise this threshold to at least 50 originations for each product line. For product lines where loan amounts are small, like credit cards and personal loans, the threshold should be raised to a minimum of 100 originations.

Finally, the pass-fail nature of the distribution tests is problematic in that, if a bank fails a distribution test, it will be unable to receive a presumptive satisfactory rating in that assessment area, regardless of its CRA evaluation measure. For this reason, ICBA urges regulators to evaluate retail lending distribution using the full scope of ratings (i.e. substantial non-compliance, needs to improve, satisfactory, and outstanding) rather than the proposed pass-fail system. Loan distribution should be considered part of a holistic evaluation of a bank's performance. Less than satisfactory performance in one measure should be offset by superlative performance in another.

Geographic Distribution Test

To pass the geographic distribution test in an assessment area, a bank's percentage of small loans to businesses or farms must meet or exceed either the demographic comparator or the peer comparator for that assessment area. The geographic comparator assesses whether the percentage of a bank's small loans to businesses originated in LMI census tracts meets or exceeds 55 percent of the percentage of businesses located in LMI tracts in the assessment area. The peer comparator assesses whether the percentage of a bank's small loans to businesses originated in LMI tracts meets or exceeds 65 percent of the percentage of small loans to businesses in LMI tracts originated by all banks evaluated under the general performance standards in the assessment area. Banks may use either comparator.

The principles of the geographic distribution test are not a new concept. Current performance evaluations compare the distribution of a bank's lending activity to the percentage of businesses in LMI tracts and compare a bank's performance with that of the performance of its peers within a given assessment area. The proposed rule amends the current framework by establishing a formula to calculate the empirical benchmarks that a bank's performance will be measured against.

However, questions remain about the appropriateness of 55 percent and 65 percent as the appropriate levels for the demographic and peer comparators. As with the CRA evaluation measure, it is difficult to evaluate these thresholds without a comprehensive, publicly available

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dataset. There is a possibility that, in rural counties, the relatively small number of businesses might lead to a statistically unusual distribution of businesses in LMI tracts. This would create an artificially high demographic comparator. Likewise, it may be difficult to find appropriate peers to establish a reliable peer comparator in such counties, because the idiosyncratic behavior of a competing bank may skew the peer comparator data. Both of these scenarios could lead to a comparator that would be difficult to meet in a safe and sound manner.

If demographic and peer comparators are included in the final rule, agencies should issue guidance for examiners about the use of performance context to raise the bank's final rating above its presumptive rating if the circumstances warrant. Empirical thresholds will provide banks more clarity and consistency between exams, but they do have limitations. Banks should not be punished if the thresholds in a given assessment area are artificially high due to statistical abnormalities like small sample size. Performance context must be used to take into account the unique circumstance of individual banks.

Borrower Distribution Test

As is the case with the geographic distribution test, there is little clarity into how the agencies concluded that 55 percent would be an appropriate demographic comparator and 65 percent would be an appropriate peer comparator. Without a publicly available dataset – particularly regarding the peer comparator – it is impossible for banks to assess how these thresholds would affect their rating or to provide appropriate feedback.

Community banks need clarity on how peers are determined when used as a comparator. ICBA urges the agency to consider the use of multiple peer comparators, based on broad categories of whole institution asset size such as money center bank, midsize/regional bank, and community bank because the capacity to lend across institutions of different sizes may vary widely. Comparing the biggest banks against a community bank, even in the context of a single assessment area, may disproportionately impact small institutions.

The NPR states, "[t]he agencies would collect and provide public data that would allow banks to apply the borrower distribution tests for home mortgage and consumer loans, small loans to businesses, and small loans to farms, and the geographic distribution test for small loans to farms and small loans to businesses. However, the agencies recognize that, even if the proposal were implemented, the available data for the small loans to businesses and small loans to farms

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borrower distribution tests may be insufficient and, therefore, banks may need to rely on private datasets. Because banks may have to purchase access to these datasets, the agencies invite comment on options for tailoring this requirement by, for example, allowing banks below a certain asset size to use publicly available data as a proxy."[30]

ICBA does not support implicitly requiring banks to purchase additional private datasets to carry out CRA exams. The use of private datasets, which may be prohibitively expensive for small banks, gives an advantage to large institutions that can "shop around" for the most favorable dataset on which to base their comparators. Using agency data, which by the agencies own admission may be insufficient, or public data as a proxy, will disfavor community banks that do not have access to prohibitively expensive private data collection. For this reason, ICBA recommends that the use of private datasets not be permitted, and that all banks be required to use the agency-provided datasets as the basis for their distribution test benchmarks. In cases where agency data is insufficient, banks should be exempt from the retail lending distribution test.

Community Development Minimum

Under the current rule, large and intermediate small banks are evaluated under a community development test, which looks at "[t]he number and amount of community development loans; [t]he number and amount of qualified investments; [t]he extent to which the bank provides community development services; and [t]he bank's responsiveness through such activities to community development lending, investment, and services needs."[31] This test does not set a minimum dollar volume of community development activity required to achieve a satisfactory or outstanding rating. Instead, it considers a bank's community development activity in light of "its capacity for such community development activities, its assessment area's need for such community development activities, and the availability of such opportunities for community development in the bank's assessment area(s)."[32]

ICBA urges regulators to retain a community development test that is based on an institution's performance context, rather than one that uses a nationwide minimum. Many community banks, including banks in rural areas and banks with few LMI tracts in their assessment area, expressed concern that the two percent minimum threshold in the proposed rule would far exceed the benchmark by which they are currently evaluated and would be extremely difficult to achieve in their community in a manner consistent with safe and sound operation.

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[30] 85. F.R. 1220.
[31] 12 C.F.R. 25.26.
[32] 12 C.F.R. Appx. A to Pt. 25.

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The NPR does not provide justification for the two percent threshold nor does it provide data showing that this threshold is appropriate. Additionally, it is unclear how it will affect the nationwide distribution of community development investment. ICBA does not believe that a nationwide, context-independent threshold is appropriate. Calculations based on currently available data suggest that a threshold of two percent is too high. Therefore, at a minimum, we urge the regulators to make available the data used to determine this threshold prior to finalizing the provision.

General Performance Standards and Presumptive Rating

ICBA appreciates the agencies' desire to increase the transparency and predictability of CRA examinations by replacing a system that is primarily based on examiner discretion, with nominal consideration based on data, with a system that is primarily based on data, with nominal consideration given to examiner discretion.

To this end, under the proposed system banks would use the proposed metrics to calculate presumptive ratings, which may then be adjusted by examiners in light of performance context.[33] Examiners may also consider any evidence of discriminatory or illegal credit practices.[34] ICBA seeks clarity regarding the size of the role performance context will play in examinations going forward.

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 is concerned that the proposed rule reduces the Community 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.

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[33] 85 F.R. 1247.
[34] 85 F.R. 1248.

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Qualifying Activities

Under the current CRA rule, it is difficult for banks to be certain that a loan or activity qualifies for CRA credit until their next examination. The determination of whether an activity qualifies is often made by examiners years after the loan or investment was made. Additionally, the ambiguity present in the current rule creates the potential for inconsistent enforcement in cases where one examiner determines that an activity qualifies but another determines that same activity does not. Determinations about which activities qualify often vary agency to agency and examination period to examination period. When a rule is finalized, ICBA urges the agencies to release interagency examiner's guidance regarding the documentation required to certify qualifying activities, and to coordinate examiner training on an interagency basis in order to improve the consistency of examinations.

The qualifying activities provisions of the proposed rule include several positive changes to the CRA framework that will increase the transparency of CRA evaluations. Specifically, ICBA supports the creation of a qualifying activities list and the implementation of a new process that banks can use for confirmation that a loan or activity qualifies for CRA credit.

Qualifying Activities Criteria

The proposed rule creates a new set of qualifying activities criteria. Loans and investments "are qualifying activities if they meet specified criteria at the time the activity is originated, made, or conducted. If the activity is subsequently purchased by another bank, it is a qualifying activity if it meets the criteria at the time of purchase."[35] The criteria, not the qualifying activities list, are what determines whether or not an activity qualifies for CRA credit.

Affordable Housing

ICBA supports the decision to provide credit for housing that "partially or primarily benefits middle-income individuals or families in high-cost areas" under the criteria for affordable housing.[36] This inclusion accurately reflects that, in high-cost, urban areas, housing can be a significant expense, even for families that are classified as middle income. Providing credit for

[35] 85 F.R. 1242.
[36] *Id.*

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funding housing that meets the needs of this group will increase community development and help drive down rents in high-cost areas.

Essential Community Facilities and Services

ICBA supports the inclusion in qualifying CRA activities of providing financing for community facilities and essential community support services.[37] These services include childcare and education, essential community facilities such as hospitals and schools, and essential infrastructure such as mass transit or rural broadband. Granting credit for these facilities will increase access to education and lifesaving fire and EMS services. All of these services and facilities are critical to community development and increase economic prosperity and quality of life for LMI individuals.

To receive CRA credit, investment in any of the above facilities would be required to partially or primarily benefit LMI individuals or census tracts, or to benefit or serve distressed areas, disasters areas, or Indian country. This requirement ensures that the CRA will retain its purpose of serving entire communities, including LMI individuals.

Loans for Family Farms

Proposed 12 C.F.R. 25.04(c)(7) gives CRA credit for lending that supports the purchase of new land or equipment by a family farm, the receipt of technical assistance, and the sale or trade of family farm products. ICBA urges the agencies to include all farm operating loans such as crop and livestock loans to family farmers and ranchers in the qualifying activities criteria. Purchasing new land and equipment is not useful if farmers cannot also receive the financing that they need to purchase seeds or to pay operating expenses.

Financial Literacy Education

ICBA commends the agencies for recognizing the importance of financial literacy education and homebuyer counseling, and supports awarding CRA credit for these services. 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. This is particularly true when it

[37] As described in proposed 12 C.F.R. 25.04(c)(4)-25.04(c)(6).

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comes to financial literacy education in schools. Children, regardless of economic status, benefit from learning about compound interest and how to budget, save, and balance accounts. Developing good financial habits at a young age can set children up for financial well-being later in life. Granting CRA credit for providing financial literacy education will enable more banks to provide this valuable education in their communities.

Small Business Administration Loans

ICBA believes that loans to small businesses are a critical factor in driving job creation in LMI communities. For this reason, any SBA qualifying loan should count for community development credit, not just those that benefit a SBA Certified Development Company.

Qualifying Activities List

ICBA supports the agencies' plan to publish an illustrative list on their websites and through the formal rulemaking (notice-and-comment) process in the Federal Register. We also support periodic updates to the list on an ongoing basis. For years, ICBA has argued that a major flaw in the current CRA rule is its lack of transparency surrounding qualifying activities. The types of loans and investments that qualified for CRA credit varied from region to region and even exam cycle to exam cycle. An illustrative, non-exhaustive list of activities that are pre-approved for CRA credit promotes both nationwide consistency and transparency.

Similarly, ICBA supports the process described in the proposed rule whereby a bank can request confirmation from its regulator that a proposed activity qualifies for CRA credit. This will promote lending and investment, because it will reduce uncertainty and allow banks to ensure that activities qualify before their next exam.

Under the proposal, agencies are required to confirm or deny that an activity qualifies within six months of receiving a confirmation request from a bank. The inclusion of a time limit is critical for the proper function of this provision, but ICBA believes that six months is far too long. Banks cannot realistically wait six months to decide whether to lend or invest in a given project. Many potential opportunities will evaporate or be taken by competitors in the interim. Agencies should endeavor to respond to bank requests as quickly as possible, and a 30-day time limit should be implemented to provide lenders with timely feedback about which activities count for CRA credit.

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The text of the proposed rule requires both the FDIC and the OCC to maintain a qualifying activities list, but it is not clear whether these lists will be uniform or differ between agencies. We believe that the qualifying activities list should be consistent among all agencies and updated through an inter-agency process. Ideally, this process would occur in real time. If the agencies keep separate lists, it is likely to lead to unequal enforcement and create uncertainty about which activities count for CRA credit.

Finally, while the qualifying activities list does increase regulatory certainty, it cannot perfectly do so without the agencies also providing guidance detailing the records and data that would be required to obtain CRA credit for those activities.

Qualifying Activities Quantification

To calculate the value of qualifying activities used in the general performance standards described in Subpart D of the proposed rule, the dollar values of the activities must be entered into the following formula:[38]

$$\begin{matrix}\textbf{Qualifying Loans} \\ \textit{on balance sheet} \\ \textit{for at least 90 days and } \textbf{CD Investments}\end{matrix} + \begin{matrix}\textit{Twenty five percent of the origination value of} \\ \textbf{Qualifying Loans} \textit{ sold within} \\ \textit{90 days of origination}\end{matrix} + \begin{matrix}\textbf{CD Services} \textit{ and } \textbf{Monetary} \\ \textit{and } \textbf{In-kind donations}\end{matrix}$$

Additionally, a 200% multiplier must be applied to the dollar value of activities provided to or that support Community Development Financial Institutions (except activities related to mortgage-backed securities), other community development investments (except community development investments in mortgage-backed securities and municipal bonds), and other affordable housing-related community development loans.[39]

However, while a multiplier is used for some activities, a discount is applied to loans that are sold within 90 days of origination. These loans are given credit for only 25 percent of their origination value. Full credit is given to loans that are held for longer than 90 days. ICBA strongly disagrees with applying a discount to loans that are sold within 90 days of origination because it will decrease the amount of loans originated in LMI areas. One purpose of the Community Reinvestment Act is to stimulate lending in LMI communities --reducing the incentive to originate new loans in these communities is contrary to that purpose.

[38] 85 F.R. 1214.
[39] 85 F.R. 1244.

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A bank that originates a loan is 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 or to a correspondent bank. For many borrowers, the bank that originated their loan is their first point of contact with the banking industry, responsible for handling any issues that arise in the course of underwriting, origination, and repayment, regardless of whether that bank holds the loan on its balance sheet. In addition, selling the loan provides liquidity for the bank to originate additional loans, thereby, serving more borrowers.

Because originating qualifying loans requires active engagement in the community and promotes bringing the unbanked and underbanked into the banking system, it should be promoted by regulators and not discounted. Therefore, ICBA urges the agencies to offer full credit for both loans sold within 90 days of origination and for loans held on the balance sheet for more than 90 days.

Just as it is important not to devalue originations, it is important to continue offering full credit for loans that are purchased by banks and held on the balance sheet. Many small community banks simply lack the capital to hold all of the qualifying loans that they originate, and without a robust secondary market for these loans, it would be difficult to bring new loans into the communities. Therefore, it is important to extend credit to banks that are net buyers of CRA loans and that hold these loans on their balance sheet. These banks are the source of capital that allows new CRA loans to LMI individuals to be underwritten.

The secondary loan market is developed and complex. It requires both originators that sell qualifying loans and buyers that want to hold them. Changing the incentives to originate loans will disrupt this market and will lead to a decrease in originations.

Community Development Services Quantification

Under the proposed rule, the value of a community development service is "[t]he dollar value of …the compensation for the community development service multiplied by the number of hours the employee spent performing the service."[40]

[40] 85 F.R. 1243.

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Community development services should continue to be evaluated on a qualitative basis. 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.

Multipliers

ICBA supports the use multipliers to amplify the value of the most impactful activities and to encourage increased investment. The proposal identifies community development investments, activities that support CDFIs, and affordable-housing related community development loans as activities that are likely to have an outsized positive impact on communities and therefore applies a 200% multiplier to these activities. ICBA suggests this multiplier be raised to 400%.

Additionally, ICBA urges the regulators to apply a 400% multiplier to activities that support minority- and women owned financial institutions. These institutions serve underserved communities and are an important way that underbanked populations enter the financial system. Providing a multiplier to activities that support these institutions is in complete alignment with the purposes of CRA because it will help to ensure that bank services are available to the entire community.

ICBA urges the creation of a 1000% multiplier to be applied to the value of community development services and monetary or in-kind donations. Because CD services involve making face-to-face, personal connections with the community, their value is difficult to express in dollar terms. There is concern that, in the current proposal, these activities will be disincentivized because, for example, a single million-dollar loan would provide as much CRA credit as thousands of hours of CD service activity.

Likewise, ICBA believes it is incorrect to value a donation, either monetary or in-kind, on parity with a loan. Undoubtably, loans are a tool that LMI families and businesses can use to build

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wealth, but a donation is an immediate injection of capital to families or charitable organizations that does not need to be repaid. A multiplier of 1000% could encourage charitable giving and facilitate capital formation in LMI areas.

Retention of Consumer Lending Evaluation Option

Under the current Lending Test, examiners do not evaluate consumer lending unless it "constitutes a substantial majority of a bank's business."[41] 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. By contrast, the proposed rule makes tracking data regarding consumer loans mandatory, includes consumer lending in the CRA evaluation measure, and requires retail lending distribution tests for banks if consumer lending accounts for more than 15 percent of their business.

ICBA urges regulators to maintain the current approach of enabling banks to choose whether consumer lending is evaluated. While community banks are committed to meeting the credit needs of their communities, unsecured consumer debt is not always the best tool for building wealth. Making consumer lending a mandatory part of the CRA examination process may have unintended consequences for LMI borrowers. Furthermore, requiring banks to do additional costly record keeping and reporting regarding their consumer lending would increase the price of consumer loans and potentially harm consumers.

The current rule's consumer lending evaluation option is a best of both worlds approach. Banks are best situated to know their own business model and community, and to assess whether consumer lending constitutes a significant portion of their lending activity. A mandatory requirement to track and be evaluated on consumer lending would provide no benefit to institutions that already have a developed consumer lending business, and choose to be evaluated on it. On the other hand, for banks that engage in consumer lending incidentally, it would require additional expenses and may prompt them to stop offering consumer lending products all together.

The presumptive rating thresholds in the proposed CRA evaluation measure were calculated using the assumption that tracking and reporting consumer loans would be mandatory. If the

[41] 12 C.F.R. 25.22.

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agencies decide to retain the current discretionary status of consumer loan reporting, the agencies must reexamine the benchmarks used to calculate presumptive ratings to reflect the optional status of reporting consumer lending.

Exemption for MDIs and CDFIs

ICBA recommends that CRA regulations exempt minority- and women owned financial institutions from documentation and CRA examinations. The statute specifically recognizes the importance of encouraging the growth and strengthening of minority- and women-owned financial institutions and includes specific statutory bases for consideration of activities designed to accomplish those aims.[42] If majority-owned banks receive credit for investing in or lending to minority- and women-owned financial institutions, then requiring minority- and women-owned financial institutions to document compliance with CRA regulations is redundant.

Similarly, ICBA recommends that the regulations provide accommodations for bank-designated, certified Community Development Financial Institutions ("CDFIs"). CDFIs provide credit to borrowers and communities that have historically been underserved. They offer products with tailored underwriting standards and offer technical assistance that is specifically designed to address these target markets and their needs. CDFIs are familiar with their local markets and are skilled in using a variety of risk-mitigating programs, such as guarantees, subordinated loans, low-cost funding, and pooled risks to lower costs and increase the chances of success for a borrower.[43]

While not discussed in the statute, the CRA regulations have routinely recognized the importance and value of CDFIs and the value they deliver to their communities.[44] Additionally, under the proposed rule, a 200% multiplier is applied to investments that support CDFIs.[45] However, there are many CDFIs that are also banks. Unfortunately, these bank CDFIs are not offered special recognition or acknowledgement during their own CRA examinations, despite their business model and lending activities meeting special criteria reviewed by the CDFI Fund every year.

ICBA recommends that a revised CRA framework recognize certified bank CDFIs by exempting them from CRA examinations, as an acknowledgement that their missions and special

[42] 12 U.S.C. 2903(b).
[43] See "Strategies for Community Banks to Develop Partnerships with Community Development Financial Institutions," Federal Deposit Insurance Corporation, available at https://www.fdic.gov/consumers/community/cdfi/cdfis_entirereport.pdf, at 6.
[44] CDFIs with active certifications from the CDFI Fund are considered to be public welfare investments according to 12 C.F.R. 24.
[45] 85 F.R. 1244.

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characteristics already demonstrate adherence to the mission of CRA. Alternatively, ICBA recommends that the agencies conduct streamlined examinations of CDFI banks. Not only are CDFI banks required to submit a thorough application as a prerequisite to receiving the CDFI designation, but they are also required to submit an annual certification report that demonstrates ongoing compliance with CDFI standards.[46] ICBA urges the agencies to use the information captured in the annual reports in lieu of, or to streamline, full-scope CRA performance evaluations.

Definitions

Compensation

The proposed rule defines *compensation* as "the Bureau of Labor Statistics ("BLS") calculation of the hourly wage for that type of work engaged in by a bank employee in the course of conducting community development services."[47] ICBA does not support quantifying the value of community development services. As discussed above, the impact of volunteer work does not lend itself to dollar terms, and a qualitative measure of CD services is more likely to capture its full impact.

In addition, ICBA does not support using BLS data to quantify community development services. The record keeping challenge of assessing into which BLS category volunteer work fell would be immense and would require judgement calls in cases where there is no equivalent BLS job category to the community development work performed. Similarly, an employee's hourly compensation is not an appropriate alternative.

Basing CRA credit on an employee's hourly compensation would significantly complicate the process of calculating the value of qualifying activities. It would require compliance personnel to coordinate with the human resources department and would make calculating the value of CD services infeasible. Furthermore, basing credit on employee compensation unduly privileges volunteer work done by highly compensated employees, because more credit is given for an executive's time. This is most problematic at large banks, where executives can earn tens or hundreds of times the compensation of a branch employee.

ICBA suggests implementing the alternative approach of using the $36/hour median compensation level in the banking industry for all CD services by all employees.[48] Having a

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[46] 12 C.F.R. 1805.201(c).
[47] 85 C.F.R. 1240.
[48] 85 F.R. 1215.

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standardized value would vastly simplify record keeping and would not unduly privilege the time of highly compensated employees. This threshold should be periodically updated as the BLS updates its median compensation for the banking industry.

Consumer Loan

The proposal's definition of consumer loans defines consumer loans as, "[l]oans to individuals for household, family, and other personal expenditures, which include the following product lines: (1) Credit card…(2) Other revolving credit plan…(3) Automobile loan…(4) Other consumer loan."[49] ICBA seeks clarity regarding how this definition would affect proposed 12 C.F.R. 25.11, which requires conducting an assessment area level borrower distribution test "for each major retail lending product line with 20 or more originations in the assessment area during the evaluation period."[50]

Based on the current definition of consumer loan, it is not clear whether each of the four product lines under the definition of consumer loan counts as a separate 'major retail lending product line,' or whether all categories of consumer loans constitute one 'major retail lending product line.' Requiring banks to combine their auto loans, personal loans, and revolving credit plans together to assess the 20-origination threshold in each assessment area will produce very different results than counting each product as a distinct consumer product line. ICBA seeks clarification regarding this and urges the agencies to consider each consumer product as a separate product line.

Retail Domestic Deposit

Due to the centrality of retail domestic deposits to the proposed CRA evaluation measure, how such deposits are defined is critical to the operation of the new general performance standards. The proposed rule defines "retail domestic deposits" as deposits, as defined in the Federal Deposit Insurance Act ("FDIA") (as reported on Schedule RC–E, item 1, of the Call Report), held in the United States, and not obtained through a deposit broker, also as defined in the FDIA. ICBA seeks several clarifications regarding this definition.

[49] 85 F.R. 1241.
[50] 85. F.R. 1245.

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1) Prepaid cards – The agencies should explicitly exclude prepaid cards from the definition of retail domestic deposits. Prepaid cards provide access to the financial system for the unbanked and underbanked and are a valuable tool for many LMI families. However, because these products are often not associated with a physical address, tracking the location of the "depositors" is, as a practical matter, impossible. Furthermore, because the number of prepaid cards purchased is prone to sharp seasonal fluctuations (for example, with spikes around holidays) tracking the average dollar volume is difficult.
2) Sweep Accounts – ICBA seeks clarification regarding the treatment of bank sweep arrangements. Deposits from a bank sweep account may come from a third party that is not subject to depositor location tracking requirements. This would lead to difficulty in determining the "location" of these deposits.
3) Non-brokered reciprocal deposits – ICBA urges the agencies exclude non-brokered reciprocal deposits from the definition of retail domestic deposits in the proposal. Many MDIs and CDFIs rely on reciprocal deposits from outside of their assessment area in order to finance the community development work at which their institutions excel. This type of reciprocal deposits allows MDIs and CDFIs to bring much needed outside capital into LMI areas where it can be invested in housing and small businesses that benefit LMI families. Not exempting non-brokered reciprocal deposits may trigger the creation of additional assessment areas for MDIs and CDFIs in high income geographies that are in less need of community reinvestment activity.

Small Business / Small Farm

Under the current rule, small businesses and small farms are defined as having annual revenue of $1 million or less.[51] This threshold was first adopted in 1995 and not indexed to inflation.[52] It has not been raised since. The proposed rule would raise the revenue level to $2 million.[53]

To keep pace with inflation, as well as to better reflect the business landscape and trend towards consolidation in agriculture, ICBA supports the decision to raise the small business and small farm threshold to $2 million and to index this number to inflation.

Small Loan to a Business / Small Loan to a Farm

The proposal also raises the threshold for a *small loan to a business* and a *small loan to a farm* to $2 million.[54] The current rule does not explicitly set thresholds, except by reference to the

[51] 12 C.F.R. 25.12(g)(3).
[52] *See* 60 F.R. 22178.
[53] 85 F.R. 1242.
[54] *Id.*

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Federal Financial Institutions Examination Council's ("FFIEC") instructions for preparation of the Consolidated Report of Condition and Income.[55] ICBA supports raising these thresholds, setting the same level for small farms and non-farm businesses, and indexing the thresholds to inflation.

Guidance from Regulators and Examiners

The proposed rule represents the first major update to CRA since 1999. Because the rule, as proposed, departs in several important ways from the current framework, it will create significant challenges for community banks. Due to the complexity of the proposed rule, developing new compliance programs and underwriting criteria will be a time consuming and costly process. Furthermore, until banks have a chance to become familiar with the new performance standards, there will be a period of uncertainty and there may dislocations in the secondary market for loans.

In order to provide guidance to community banks, it would be beneficial if the agencies held a series of educational events around the country where bankers could meet with regulators and examiners to discuss the changes to the rule and have their specific questions answered. Similarly, ICBA encourages the agencies to publish guidance describing the examination procedures surrounding the rule.

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

While we understand this NPR 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.

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

[55] 12 C.F.R. 25.12(v); 12 C.F.R. 25.12(w)

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firm that serves consumers and small businesses to compliance with CRA requirements in the same manner, and with the same asset size distinctions, as banks and thrifts.

Conclusion

ICBA thanks the OCC and FDIC for their efforts to modernize CRA. While there are some aspects of this proposal, such as the proposed metrics and the resulting record keeping burdens, that we cannot support, it also includes positive elements that will increase transparency. We hope that the federal banking regulators will continue to work with stakeholders to create a more refined, uniform, and transparent rule.

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.

Please contact me at LillyThomas@icba.org or at 202-659-8111 if you have any questions about the points raised in this letter.

Sincerely,

/s/

Lilly Thomas
Executive Vice President and Senior Regulatory Counsel