

November 15, 2018

Via Electronic Submission

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219

**Re: Reforming the Community Reinvestment Act Regulatory Framework
Docket ID OCC-2018-0008**

Dear Madam or Sir:

The American Bankers Association¹ is pleased to comment on the Office of the Comptroller of the Currency's (OCC) Advanced Notice of Proposed Rulemaking (ANPR)² seeking comment on ideas to modernize the regulations that implement the Community Reinvestment Act of 1977 (CRA).³

We appreciate the OCC's leadership in advancing the dialogue on this important issue. Banks care about the vibrancy and vitality of their communities, and they support the goals of CRA. In fact, banks provide more than a \$100 billion in capital each year to low- and moderate-income (LMI) communities.⁴ Banks also supply financial products and services that provide important economic opportunities for individuals, families, and small business owners.

Unfortunately, the objectives of the CRA statute are being undermined by outdated implementing regulations.⁵ For several years, policymakers, bankers, and others have recognized the need to modernize the CRA regulatory framework to reflect how technology has

¹ The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits, and extend nearly \$10 trillion in loans.

² 83 *Fed. Reg.* 45053 (September 5, 2018).

³ Pub. L. No. 95-128, 91 Stat. 1147 (1977) (*codified at* 12 U.S.C. §§ 2901-2908 (2012)).

⁴ Federal Reserve Bank of Dallas, *Closing the Digital Divide, A Framework for Meeting CRA Obligations* (December 2016) p. 2.

⁵ It has been 23 years since the regulations were last changed significantly. *See* Community Reinvestment Act Regulations, 60 *Fed. Reg.* 22156 (May 4, 1995).

transformed the delivery of financial products and services.⁶ There is also broad recognition that CRA examinations are unpredictable and inconsistent.

The ANPR process offers an important opportunity to generate ideas regarding how to modernize CRA regulations so that communities across the country benefit and banks obtain much needed regulatory clarity and certainty. We are optimistic that banks, regulators, communities, and other interested parties will be able to find common ground to improve the effectiveness and administration of CRA.

As the conversation on CRA modernization advances, we are pleased to hear public comments from leadership at the Federal Deposit Insurance Corporation (FDIC) and the Federal Reserve describing their intention to work with the OCC to develop a proposed rule based on comments received in response to the ANPR. It is important that the prudential banking agencies issue uniform CRA regulations and examine banks in a consistent manner. Failure to act in coordination would perpetuate confusion and inconsistency and would create competitive inequities (a problem that we already see with regard to credit unions, which lack the obligations and supervision programs applied to banks to serve their local communities). The comments, observations, and recommendations that we make are not confined to experiences of financial institutions supervised by the OCC, nor are they reflective solely of OCC rules, regulations, and supervision. We offer our comments from the perspective of the entire banking industry and with the expectation that they will be reviewed and considered by all bank regulators, including state banking regulators.

Our comments outline a variety of options recommended by banks with a wide range of business models, asset sizes, and geographic locations. We discuss the pros, cons, and questions associated with these ideas. We offer these in strong support of this review effort and with the intention to promote the development of valuable reforms. Our comments focus on the following themes:

⁶ For example, in 2010, the agencies held a series of joint public hearings across the country and solicited written feedback regarding how to update the CRA regulations in light of, among other things, changes in how banking services were delivered to their customers. From 2014 through 2016, the agencies again solicited feedback on the CRA as part of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 review and received more than 60 comments about the CRA regulatory framework. In addition, in 2017 and 2018, the U.S. Department of the Treasury invited a diverse group of stakeholders to provide feedback on how the CRA regulations could more effectively encourage economic growth in the communities that banks serve. On April 3, 2018, The Treasury Department issued recommendations to the agencies, suggesting broad changes to the fundamental administration of the CRA based on the feedback it had received. *See* U.S. Dept. of the Treasury, Memorandum on Community Reinvestment Act – Findings and Recommendations (Apr. 3, 2018).

- ***Incorporate Technology and Innovation.*** The need to update CRA has existed for years and will grow more pressing as the pace of technological change accelerates. Regulators should revise the CRA framework to incorporate fully the electronic channels through which customers prefer to conduct financial transactions and interact with their banks. In addition, amendments to the CRA regulations must reflect that banks of all sizes are no longer restricted to conducting business in a limited geographic location.
- ***Tailor to Business Models and Geographies.*** Revisions to CRA regulations must continue take into account variations in bank specialization and business strategies and must recognize that CRA needs and opportunities in small towns and rural areas can be vastly different from those in urban centers.
- ***Improve Consistency and Predictability.*** Some regulatory practices interfere with the predictability that banks need to manage their CRA programs effectively and maximize their community impact. For example, regulators seem to have established unofficial and unpublished quantitative thresholds for minimum CRA activity. In addition, banks lack clarity regarding what activities qualify for positive CRA consideration and the documentation standards that examiners will require.
- ***Address Market Distortions.*** In geographies with high concentrations of banks, there is increased competition for community development loans and investments. This issue is exacerbated by the CRA regulation’s overly restrictive concepts of community and economic development that have created geographies in which there are limited opportunities for banks to obtain community development credit. As a result, these areas can experience inflated competition for narrowly defined community development loans and investments, the terms of which can price local lenders out of the markets in their own geographies. This distorted pricing also means that banks are discouraged by regulation from funding many initiatives that could create economic growth and improve the lives of individuals in the broader community as well as LMI neighborhoods. The result is less—not more—community development.

I. The Current Regulatory Approach

Questions #1-6 of the ANPR invite comments on the current CRA regulatory framework. These questions inquire whether (1) certain aspects of the CRA regulations have been successful and should be retained; (2) the CRA regulations are clear, objective, transparent, and applied consistently; and (3) whether the current regulatory framework helps banks serve the convenience and needs of their entire communities effectively, including LMI individuals.

A. Strengths of the Current CRA Regulatory Structure

Differentiated Exams. Current CRA regulations recognize that a one-size-fits all approach to CRA is undesirable. The regulations apply different tests based on a bank's asset size and permit wholesale and limited-purpose banks to be evaluated under the community development test. Banks also have the option to develop a regulator-approved strategic plan for addressing their responsibilities with respect to CRA. The strategic plan option simplifies and enhances predictability of the CRA performance evaluation. Tailored regulation works well and should continue to be part of the CRA regulatory framework.

Performance Context. Today, an institution's performance under the regulatory assessment criteria is evaluated in the context of information about the institution, its community, and its competitors. For example, examiners review demographic data about an institution's Assessment Area(s) as well as information about local economic conditions, a bank's major business products and strategies, and the bank's financial condition, capacity, and ability to lend or invest in its community. Examiners also take into consideration the performance of other institutions serving the same or similar Assessment Areas. Collectively, this information is referred to as a bank's "performance context." Analysis of each bank's performance context remains essential and should be incorporated into a modernized CRA framework.

B. Challenges Presented by the Existing Regulatory Framework

While some aspects of today's CRA regulations work well, other elements inhibit community funding that the law is intended to promote and impose unnecessary compliance burdens on the nation's banks.

1. Community Benefit

When evaluating a bank's CRA performance, examiners consider a bank's loans, qualified investments, and delivery of financial services to LMI individuals. Each of these tests has a community development component.⁷ Many opportunities to participate in community development initiatives that would benefit a bank's entire community—such as hospital construction, water and sewer extension, transportation, workforce development, and financial

⁷ Community development includes affordable housing; community services targeted to LMI individuals; activities that promote economic development by financing businesses and farms that meet specified requirements; and activities that revitalize or stabilize LMI geographies, disaster areas, or distressed or underserved nonmetropolitan middle-income areas. 12 C.F.R. § 228.12(g). Small banks are not subject to a community development test.

literacy instruction, among others—do not receive community development credit. This is because current regulatory practices only recognize such initiatives if they are *targeted* to LMI individuals or have benefits of revitalizing or stabilizing disaster areas or underserved or distressed middle-income areas.⁸

This cannot be what lawmakers intended when enacting CRA in 1977.⁹ This overly restrictive approach to community development excludes many activities that are central to the economic viability and vitality of communities, and in particular small towns and rural areas, and ignores the complexities associated with bringing services to populations spread over large distances. For example, in many parts of the country, community development projects cannot be for the primary purpose of serving LMI. The economic reality is that these projects are designed to benefit all residents in an entire area—sometimes multiple counties. They simply cannot be designed to benefit select segments of the population. Consideration for such projects would clearly be within the purpose of the CRA in meeting local needs and should be credited fully in CRA reviews. A similar issue is presented by the Q&A’s narrow description of “economic development.”

The following examples illustrate how examiner application of today’s CRA framework defies common sense and is detrimental to areas that need access to better services, infrastructure, jobs, and transportation. Policymakers should revisit the regulatory definitions of community and economic development to ensure they are consistent with the statute¹⁰ and recognize bank efforts to fund projects that benefit the entire community, including LMI individuals and neighborhoods.

Example #1: The Bus. One bank made loans to a company providing public transportation in a small city. The bank gave regulators maps of the bus routes showing that the company provided transportation services to LMI areas and shopping centers serving these populations. The company also provided a ride program for seniors who are unable to afford transportation to medical appointments. Examiners deemed that documentation insufficient to give the bank credit under the law because the lender could not provide income data on *all* bus riders.

⁸ See *id.*; see also Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance, 81 Fed. Reg. 48,505, 48,525 & 48,528 (July 25, 2016)(citing §__12.(g)-1 and §__12(h)-8).

⁹ CRA requires that banks meet the credit and convenience needs of the communities in which they are chartered to do business. The appropriate federal banking agency must assess an institution’s record of meeting the credit needs of its *entire* community, *including* LMI neighborhoods, consistent with safe and soundness. 12 U.S.C. 2901 and 2903(a) (2018). Over the years, too many regulators have viewed CRA as benefitting LMI exclusively, contrary to the statute.

¹⁰ See *id.*

Example #2: Sewer Improvements. Another bank funded a project to build a sewer line in a rural area that had many LMI residents. But, because the project was not “targeted to” these residents, even though it benefitted them along with their neighbors, it did not receive CRA consideration.

Example #3: The Hospital. A bank helped finance construction of a new hospital serving a rural tri-county area. Thirty percent of the residents in the area are LMI. The examiner refused to provide CRA consideration for this project because the hospital would benefit too many individuals from other income brackets.

Example #4: Job Creation. Another bank provided credit to a business that was going to create an estimated 40 jobs for LMI earners in the area. While the project was located in a middle-income census tract, it was bordered on both sides by affordable housing complexes and was located in close proximity to the only LMI area nearby. The bank provided regulators with additional documentation describing the potential benefits of the project to LMI earners. While the project met the spirit of CRA, examiners disqualified the loan for CRA purposes because the project was not *within* an LMI census tract.

Example #5: School and Municipal Bonds. A bank was not able to count the pro rata portion of a school bond where three of the eight census tracts involved (38%) were LMI. The bank experienced a similar issue involving a municipal bond to fund improvements to streets, water, sewer, and sidewalks in nine census tracts. Three of the census tracts were classified as LMI, but the bank was *not* to qualify 33% of the bond because LMI census tracts were not the *primary* beneficiaries of the bond proceeds.¹¹

2. Peer Comparison

Another problematic regulatory practice arises when banks are compared to institutions that are not true peers. For example, we are aware of a \$10 billion asset bank that was measured against a trillion dollar asset institution serving the same market area. To conduct a meaningful peer

¹¹ The CRA rules’ overly restrictive approach to community development is inconsistent with bond underwriting and purchasing practices. Bond underwriters do not focus on the classification of the census tracts that a bond may impact. As a result, it can be difficult for banks to identify bonds where more than 51% of the bond finances investment in LMI census tracts. Many times, when a bond is offered to an institution, the investment officer has a short window of time to determine whether to purchase the investment. If a bank takes too long researching which neighborhoods or census tracts will benefit from the offering, the bank may lose the investment opportunity to other investors.

comparison, regulators should take into account factors such as asset size, business model, and products offered.

In some cases, examiners request a bank to identify its peers. In other situations, examiners determine the bank’s peers. In virtually all instances, however, regulators provide little transparency regarding their ultimate choice of institutions they use to compare to the bank being evaluated. Revisions to the CRA regulations and corresponding examination procedures should specify that banks—not examiners—identify their peers for purposes of CRA performance.

In addition, CRA regulations should account for situations in which the overall needs of the communities are being met already and should not penalize an institution that falls short of its “peers.” In addition to considering the presence of other banks in the area, regulators should take into account the proliferation of other financial services providers, such as credit unions and other nonbank financial firms. While some opportunities can be created, there remains a finite amount of demand for services, investments, and loans at any point in time. The regulatory framework should consider a bank’s effort to serve LMI customers and its bids on community development loans and investments.¹²

3. Performance Criteria and CRA Ratings

The CRA rating framework is opaque; it is unclear how the agencies assign specific ratings at the conclusion of an exam. Banks cannot predict how they will fare during an evaluation because CRA ratings are subjective and often depend on which examiner conducts the exam.

To remedy this problem, CRA regulations should provide transparent standards for determining a bank’s CRA performance rating. ABA recognizes the value of establishing objective measures of CRA performance, yet we believe that qualitative factors, such as performance context, should continue to be incorporated into CRA evaluations. To that end, the agencies should provide more detail regarding the examination process, how examiners make judgments, the data that they use to inform those judgments, and the weight of other factors that examiners consider in determining a bank’s CRA rating. Providing specific review criteria would improve transparency and would help banks develop effective strategies for attaining the desired CRA rating.

¹² One bank reported that it routinely bids on a significant portion of CRA investments that are not awarded. During its current exam period, over \$70 million of the bank’s bids—nearly 35% of its total requests—were not awarded. While the bank bid competitively, brokers are directing the majority of the investments to large institutions with the expectation of obtaining future, unrelated bond business.

II. CRA Performance Tests

Questions #7-12 of the ANPR invite comments on ways to modernize the CRA regulatory framework by modifying and streamlining the existing CRA performance tests, such as by implementing an alternative evaluation method or by utilizing metrics within the performance tests.

A. Performance Criteria

Generally speaking, under current regulations a Small Bank (defined as a bank with less than \$1.252 billion in assets) is assessed under a streamlined method that focuses on the bank's lending performance. An Intermediate Small Bank (defined as a bank with at least \$313 million and less than \$1.252 billion in assets) is assessed under the Small Bank lending test as well as a community development test that evaluates community development lending, qualified investments, and the community development services the institution provides to its communities.¹³ Large Banks are subject to the lending, service, and investment tests, each of which has a community development component.

ABA recommends the following changes to the CRA performance tests:

Right-size the Small Bank and Intermediate Small Bank Thresholds. The existing Small Bank and Intermediate Small Bank tests have worked well for many institutions. However, regulators should update these tests. The definitions for Small Bank and Intermediate Small Bank were established in 2005 and are adjusted annually for inflation based on changes to the Consumer Price Index. While it was wise to recognize that Small Banks and Intermediate Small Banks grow over time, the Consumer Price Index does not take into account the major changes that have occurred in the banking industry over the past 13 years. For example, at the end of 2005, there were 8,845 banks. The median asset size was \$120 million, while the average asset size was \$1.23 billion. Today, there are 5,551 banks with median assets of \$215 million and average assets of \$3.17 billion.

For these and related reasons, we recommend that the Small Bank and Intermediate Small Bank thresholds be increased. Also, as discussed in Section B below, we recommend that regulators continue to distinguish community banks and other financial institutions, should the agencies adopt an official metric by which to measure CRA compliance.

¹³ Intermediate small banks are not required to collect and report CRA loan data for small business, small farm, and community development loans.

Combine Community Development Lending and Investments. Requiring banks to meet the community development lending and investment tests is a check-the-box exercise that artificially drives funds to certain activities rather than allowing banks to tailor their CRA activities to the unique needs of their communities. For example, one community may benefit from more community development loans, while another community may be better served by more investments. Accordingly, banks should be permitted to combine their community development lending and investment activities. This would provide the flexibility that banks need to serve communities more effectively.

B. Creation of a CRA Metric

Another CRA challenge is that regulators have adopted unofficial and unpublished CRA quantitative goals or metrics. CRA Performance Evaluations commonly reference a variety of benchmarks for determining the resources that a bank should allocate to CRA (e.g., a percentage of assets or Tier 1 capital). Such informal policies are highly problematic; regulators should not expect institutions to meet minimum thresholds for CRA activity that are not required by law or regulation.

To address uncertainty regarding “how much is enough,” the ANPR inquires whether regulators should formally establish a metric or metrics by which to measure a bank's CRA performance. Under this approach, regulators would set thresholds or ranges (benchmarks) corresponding to the four statutory CRA rating categories.¹⁴ While the ANPR does not provide detail on what a metric-based approach would entail, this concept could be similar to the CRA goal setting and planning in which many banks engage today and could provide regulatory certainty akin to that enjoyed by banks with approved strategic plans.¹⁵

Based on the information provided in the ANPR, it is unclear how a metric would apply in practice. Some have presumed that it would involve combining all CRA activities into a

¹⁴ The four statutory ratings categories are Outstanding, Satisfactory, Needs to Improve, and Substantial Noncompliance.

¹⁵ To determine CRA goals today, many banks estimate the percentage of assets or Tier 1 the bank will allocate to obtain its desired CRA rating. This goal is based on current and prior period CRA investments; the bank's past ratings and examiner comments; projected growth of the bank; relevant information from the Performance Evaluations of other banks; and available industry studies. Banks then allocate that dollar amount to delineated assessment areas based on the FDIC's Summary of Deposits Report and adjust as necessary depending on several factors, including past performance ratings, opportunities in the assessment area, market competition that results in CRA opportunities, Performance Evaluations of other banks, and other information. Banks monitor their CRA performance relative to their CRA goals and adjust as necessary based on bank growth.

numerator that, applied to a certain denominator, would be used to determine a bank's overall CRA ratio. Others have inferred that regulators would apply a metric to each CRA test and then average or weight the component metrics to arrive at a bank's overall CRA ratio. Still others envisioned applying a metric at each state/market/community level and aggregating up to the enterprise level. Other variations could be imagined.

Even though a CRA metric has the potential to provide needed predictability and transparency to CRA regulation and supervision, a universal metric has the potential to create winners and losers due to the wide array of bank business strategies and operating models that exist in the U.S. banking system.

In fact, assessing all banks according to the same CRA metric would be inconsistent with the need to tailor the regulation to reflect the variety of bank business models. For example, it would be unreasonable to measure wholesale banks based on the same metric that applies to retail banks. Likewise, it would be inappropriate to use the same metric standard to examine community banks as well as large branchless banks that operate nationwide. Accordingly, any proposed rule that requests comment on a metric-based approach should include a variety of metrics that reflect the range of strategies and business models of banks that comprise the U.S. financial system. Furthermore, regulators could propose a metric-based approach as an *option* for banks to select as one factor in their CRA evaluation, rather than requiring that a metric be mandatory for all banks.

In this same vein, metric-related elements of a proposed rule should take into account the unique focus and governance structure of community banks. Community banks by definition focus on local needs. They have an intentionally local geographic footprint, with locally-oriented management and governance. The strength of their employees and the depth of their connections to their communities are often the primary reasons clients do business with them. Community bankers work shoulder-to-shoulder with neighborhood businesses, local governments, and community organizations, and their fellow residents to help their towns and cities thrive. An updated CRA framework should continue to take into account these defining characteristics of community banks and tailor the CRA evaluations of such institutions accordingly. One option could allow community banks to be evaluated based on a lending test similar to the standard applied to Small Banks today. Another option might be to develop a streamlined metric based on an in/out ratio.¹⁶

¹⁶ One aspect of the lending test examines the percentage of a bank's home mortgage, small business, small farm, and consumer loans located in the bank's assessment area as compared to the percentage of loans located outside of the assessment area (the in/out ratio).

Below are some of the advantages and disadvantages that ABA members have identified regarding the metric concept.

1. Advantages

Increase Certainty. A metric-based approach would clarify regulatory expectations regarding the sufficiency of a bank's CRA activities and would provide transparency regarding how CRA ratings are assigned. A metric may be especially helpful in clarifying regulatory expectations regarding community development loans and investments.

Add Flexibility. A metric could provide strategic flexibility that allows a bank to choose the products and activities on which it focuses, as long as the institution meets the prescribed ratio for overall CRA activity. Rather than prescribing separate benchmarks for loans, investments, services, and community development activities, a metric-based approach could allow a bank to tailor its CRA activities based on the institution's expertise, business model, community needs assessment, and the availability of opportunities in its Assessment Area and aggregate those activities into an overall metric score.

Enhance Planning and Tracking. A metric would enable bank executive teams to establish CRA goals based on the metric, obtain board approval, and have confidence that the bank will receive a particular CRA rating if it achieves those goals.

Address "CRA Deserts." A CRA metric could reduce regulatory barriers to making community development loans and investments in communities in need of revitalization that are located outside of a bank's Assessment Area.

Support Bank Growth. A metric-based approach would provide much needed predictability to banks interested in expanding their services and their reach. Rather than *guessing* how much CRA activity is sufficient, a bank would adjust its activities relative to the metric as the bank grows.

2. Disadvantages and Potential Unintended Consequences

Loss or Diminution of Performance Context. It is unclear how a CRA ratio would reflect differences in community demographics or local economies. Some communities have significant community development needs, while other markets are oversaturated. If regulators pursue a metric-based approach, a bank's CRA ratio should be *a factor* in the bank's rating, but it should not constitute the entire performance review. It will be critical to establish a CRA rating system

that includes both objective data (CRA metrics) and appropriate subjective performance data. Proposed regulations should clearly explain how banks can provide, and how regulators will analyze, information regarding relevant factors such as effort, community needs, local economic conditions, and business model considerations.

Challenges Associated with Economic Cycles. A CRA metric would remain in place during changes in economic cycles; it would be applied during downturns despite decreased lending and investment opportunities. On the other hand, if the metric were to adjust for economic cycles, banks could lose predictability. Moreover, there are challenges associated with keeping regulatory expectations synchronized with the pace of economic change.

Risk of Political Volatility. The metric could subject banks to political volatility. The standards of measure could be adjusted up or down based on the political winds, as was witnessed with the metrics applied to the housing government sponsored enterprises in the lead up to the housing bubble and subsequent deflation.

Distortions in Loans and Investment Incentives. A metric could incentivize banks to fill up their “CRA bucket” with large dollar loans and investments at the expense of smaller, impactful transactions. Similarly, a metric-based system could discourage banks from providing loans and investments that take more time and effort (e.g., affordable single-family housing, small business loans, etc.).

Challenges Regarding Market Conditions. The metric concept may disadvantage small and rural markets where loan sizes are smaller. For example, a mortgage loan in California or New York should not receive more CRA consideration than a loan in Arkansas or West Virginia simply because the cost of living may be higher in coastal areas.

Diminution of Community Impact. It is unclear how a metrics-based approach would take community impact into account. Low-dollar/high-value activities can be transformative, but they would unlikely move the needle on a quantitative metric. Likewise, it is unclear how a CRA metric would reward innovation. Regulators perhaps could address these issues to some degree by assigning a multiplier to these activities.

Challenges Quantifying Service-Related Activities. The ANPR suggests assigning a dollar value to service-related activities as a way to incorporate services into a CRA metric. This approach could become cumbersome and may actually add to the complexity of CRA regulations rather than simplifying them. If regulators pursue a metric-based approach, one option would be to

retain a service test that is independent of the metric yet adequately included in CRA compliance evaluation.

3. Content of the Metric

While the ANPR requests comment on using a metric to measure banks' CRA performance, it does not specify how to calculate the numerator and denominator. We offer the following observations regarding the components of a possible CRA metric.

Numerator. A CRA metric must be well-defined, transparent, and objective. As such, regulators must clearly describe the activities that a bank could count toward the numerator of the metric. Otherwise, a metric-based approach would not address the uncertainty that exists today regarding eligible CRA activities. Section V. of this comment letter contains an extensive discussion of activities that should be eligible for positive CRA consideration.

The ANPR also inquires whether regulators should give greater weight to certain CRA activities. If regulators weight certain activities, it is imperative that there be transparency regarding what the weights are and the activities to which they apply. Importantly, regulators would need to develop and apply the weightings in a manner that does not become too complex to understand or administer. In no case should weights be used to create artificial distinctions between primary and secondary market activities.

Denominator. There are multiple standards on which a denominator could be based. Below is a discussion of possible alternatives, including their advantages and disadvantages.

- ***Option A: Deposits.*** Regulators could use deposits as the standard against which CRA performance would be measured. The CRA was enacted with a view in mind of ensuring that banks provide credit to communities from which they take deposits. Accordingly, comparing a bank's CRA performance to its deposits would align with the spirit of CRA. On the other hand, a deposit-based methodology may not be feasible for certain specialized institutions, such as custody banks, which are responsible for safeguarding financial assets of businesses and individuals and are not significant holders of customer deposits. Similarly, deposits play a small role in other bank business models.
- ***Option B: Average Assets.*** Alternatively, a CRA metric could be based on a bank's average assets. Data regarding a bank's average assets is readily available and would not require additional calculations or reporting. In addition, average assets is a common benchmark on which banks base their internal CRA planning and goal setting today.

FDIC deposit insurance premiums are assessed, by law, on a bank's assets. A disadvantage of this approach is that it would not align as closely with the history of the statute.

- ***Option C: Tier 1 Capital.*** A third option would be for regulators to base a metric on Tier 1 capital. Today, some Performance Evaluation reports reference Tier 1 capital when discussing CRA performance. As a result, some banks use Tier 1 capital as the basis for establishing their bank's CRA goals. However, capital structure varies by bank, business model, bank size, and other factors, and therefore, would provide an inconsistent and uneven measure of CRA-related activity.

5. Metric Testing

The information presented in the ANPR is very high-level. It is unclear what the denominator would be, which activities would count toward the numerator, or which ratios would correspond to the four statutory CRA ratings categories. The myriad of unknown variables makes it very challenging—if not impossible—for banks to determine whether a metric-based approach *alone* would provide an adequate and accurate assessment of how a bank is meeting financial services needs of its community.

The adoption of a CRA metric, particularly when combined with potential revisions to the delineation of Assessment Areas, would constitute fundamental changes to the CRA framework and associated performance evaluations. Therefore, it is critical that the agencies conduct extensive testing of any proposed metric to evaluate how a metric-based approach would impact banks and communities. The agencies should make public the methodology of such testing when issuing a proposed rule.

We understand that the OCC is considering testing a potential metric using 100 banks. ABA is concerned that a sample of 100 banks may not represent adequately the diversity of U.S. banking industry, nor would it be a large enough sample to enable regulators to identify how different metrics will impact different business models. Therefore, testing of a CRA metric must be structured to include *and* to differentiate among groups of banks based on asset size, geography, business models, and other relevant factors—all of which influence banks' CRA activities. This will enable a richer evaluation of the results and help inform the agencies about how tailored metrics could be used to reflect most fairly and accurately the financial services that banks provide to their communities.

6. Reporting

Questions #29-31 of the ANPR invite comment on CRA recordkeeping and reporting requirements. In particular, the OCC inquires about new recordkeeping and reporting that may be necessary if the agencies adopt a metric-based approach.

As a general matter, regulators should not impose new public reporting requirements that attempt to provide a near real-time picture of a bank's CRA activities, as doing so is unlikely to provide an accurate representation of a bank's CRA performance. Banks often do not know whether a loan or investment will qualify for CRA consideration until weeks or months after the transaction closes. Typically, banks engage in extensive document collection and analysis after the fact to determine the extent to which an activity qualifies for CRA credit under the existing rules. This process can be very time consuming and often hinges on the responsiveness of community partners and other outside parties.¹⁷

Additionally, for some institutions, community development activities do not occur on a regular cadence. Identifying and underwriting transactions take time. For example, a bank may not consummate a qualified transaction during the first and second quarter but may close several deals in the third quarter of the year. For these reasons, any metric-based framework should rely on the internal CRA tracking and regulatory reporting mechanisms that banks use today. A more frequent reporting requirement would not provide an accurate representation of a bank's CRA performance at a given point in time. Nor is it apparent what supervisory purpose would be gained by doing so.

C. Strategic Plans

A bank may apply to its primary federal regulator to be evaluated under a strategic plan. The strategic plan option provides a bank with the opportunity to customize its CRA objectives to the needs of the community and to its own capacities, business strategies, and expertise. Banks with strategic plans benefit from greater certainty regarding the adequacy of their CRA activities. Even if regulators adopt a CRA metric, the strategic plan should remain an option for all banks, including those who have an approved strategic plan in place today.

Option for All Banks. In addition to preserving the strategic plan option, regulators should take care not to discourage (directly or indirectly) banks from pursuing a strategic plan. Indeed, we would recommend that regulators make improvements to the strategic plan approval process to

¹⁷ Even if regulatory changes increase transparency and predictability, not all loans will be identified as CRA-eligible at the time they are made.

make the option more accessible. Many institutions are deterred from pursuing a strategic plan due to the time and burden associated with having a strategic plan approved, amended, or re-approved. In some cases, regulators have discouraged community banks from submitting strategic plans by claiming that the option was intended for larger or non-traditional institutions. However, all banks could benefit from the certainty and flexibility of design that strategic plans provide.

Strategic Plan Guidance. Regulators should provide detailed information regarding the factors considered when evaluating a strategic plan. In particular, regulators should provide transparency regarding the weight that public comment carries in strategic plan approval. This guidance should be public and should emphasize that there is no regulatory requirement or expectation that banks enter into an agreement with a community group in order for the strategic plan to be approved.

Moreover, regulators should help banks understand how to draft a strategic plan. Currently, regulators do not provide guidance on the merits of a proposed strategic plan or on the adequacy of measurable goals.¹⁸ This approach does not facilitate the development of strategic plans that will receive regulatory approval.

Amendment Process. Regulators should streamline the process for amending the strategic plan. A strategic plan that is up for renewal should normally be approved absent significant change in a bank's strategy or business model.

IV. Assessment Areas

Questions #13 – 14 of the ANPR invite comment on how to update the definition of Assessment Area to accommodate digital lending channels, while retaining a focus on the communities in which bank branches are located.

In enacting the CRA, Congress established that banks must demonstrate that their deposit facilities serve the convenience and credit needs of the communities in which they are chartered to do business.¹⁹ The CRA statute does not define “community.”

¹⁸ “...the Agencies’ guidance during plan development and, particularly, prior to the public comment period, will *not* include commenting on the merits of a proposed strategic plan or on the adequacy of measurable goals.” Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment Guidance, 81 *Fed. Reg.* at 48,546 (emphasis added)(citing §__.27(c)-1).

¹⁹ *See* 12 U.S.C. § 2901(a).

Regulators created Assessment Areas to define the geographic locations that serve as the basis for a bank's CRA evaluation. Today, the CRA regulations require that a bank's Assessment Area include the institution's main office, its branches, and its deposit-taking ATMs, as well as surrounding geographies in which the institution has originated or purchased a substantial portion of its loans. This definition was developed when banking was based largely on physical branch locations as the primary means of delivering products and services.

Most banks continue to conduct the majority of their CRA-qualifying activities within their Assessment Area(s), even though advances in technology, shifting business models, and changes in consumer behavior and preferences permit financial institutions to engage in the business of banking regardless of whether they have branches or, if they do, the location of their branches.

Regulators should revisit with particular care the Assessment Area construct in light of these changes in the banking industry. The manner in which modernized CRA regulations implement the statute's concept of community will have significant implications for banks and the communities they serve.

Consistent with the purpose of an ANPR, ABA offers multiple ideas for further consideration and discussion as it relates to updating the Assessment Area concept. A proposed rule could solicit comments on one or more of these recommendations. Any proposed rule that modernizes what constitutes a community or an Assessment Area should be based on the following principles:

- ***Physical Location.*** Brick and mortar branches will continue to play an important role in the delivery of financial products and services, and CRA evaluations should continue to evaluate a bank's CRA activities to an appropriate extent in relation to its physical location.
- ***Branch Preference.*** While branches are important, CRA modernization must reconsider the overly strong regulatory preference for physical branch presence that exists today. Not only is the bias toward branches outdated, it penalizes banks that generate deposits online, and it has created situations where banks have been pressured into opening costly branches in locations where the market is saturated with financial institutions or where a branch presence makes little sense.

Historically, branches were the predominant channel through which banks provided financial products and services. However, branch traffic is decreasing as customers utilize direct deposit, remote deposit capture, peer-to-peer transactions, and online/mobile

banking to conduct deposit-related transactions. Customers are also using specialized bank apps to assist with household and small business cash management. On the loan side, online lending platforms enable customers to submit loan applications and to obtain approvals without ever setting foot in a branch. In sum, branch traffic is declining and branches are a delivery channel that customers want less and less. While branches continue to play a role, they are and will be *a* channel, not *the* channel, through which customers conduct banking business. The emergence and growth of the financial services technology sector—particularly in the lending and payment arena—further illustrates consumer appetite for digital financial products and services. Regulators should update the CRA framework to reflect the proliferation and consumer use of online and mobile delivery channels.²⁰

- ***Assessment Area Determination.*** A bank’s size, strategy, and business model are relevant considerations as the bank determines the appropriate geography of its CRA program. Today, examiners consider a bank’s delineation of its Assessment Area during a CRA examination and evaluate whether the Assessment Area complies with the regulation’s criteria. However, over the years, some examiners have disregarded banks’ Assessment Areas and have imposed their own judgment regarding the area that they assert the bank should serve. A bank—not an examiner—should define its Assessment Area based on the market that it can reasonably serve.
- ***Activities Outside of the Assessment Area.*** While banks should not be *required* to engage in community development outside of their designated Assessment Areas, public policy should allow for recognition of efforts by banks to provide funding in areas that have a demonstrated need, even if they are outside of the bank’s Assessment Area.
- ***Community Impact.*** In updating the Assessment Area construct, regulators should take great care not to dilute a bank’s overall CRA impact in communities by creating numerous new Assessment Areas.
- ***Practicality.*** CRA must remain manageable for banks. For example, any new approach that creates multiple new Assessment Areas would pose a significant challenge to most CRA programs—for banks of all sizes. Moreover, it would create situations where a

²⁰ We also note that data collected from four large banks (Bank of America, JPMorgan Chase, U.S. Bank, and Wells Fargo) found that 74% of 3 million previously unbanked individuals who opened accounts at the banks in the past year are digitally active. They are heavy users of online and mobile banking and are statistically no more likely to use a call center or a branch than existing bank customers. American Banker, *There’s No Excuse for Ignoring the Unbanked, Big Banks Own Data Shows* (November 5, 2018).

bank would not have community development personnel on the ground to ascertain the needs of the area and form relationships with local residents, businesses, and leaders.

- ***Holistic View.*** Regulators should analyze revisions to the Assessment Area concept in conjunction with the creation of a CRA metric. Each of these potential reforms is important and would entail significant change in the way that banks administer and are evaluated on their CRA programs. However, *together*, sweeping changes to Assessment Areas and the adoption of CRA benchmarks would revolutionize CRA regulation. Regulators should evaluate the combined impact that these reforms would have on banks and communities.

A. Out of Assessment Area Activities

Today, a bank will not receive CRA consideration for qualified activities outside of its Assessment Area unless the examiner concludes that the institution has, first, been responsive to community development needs and opportunities within its Assessment Area(s). Even then, the current CRA regulations and Q&A guidance generally limit consideration of community development activities to the broader statewide or regional areas (BSRA) that include the bank's Assessment Area(s).²¹

These restrictions deter banks from engaging in community development activities outside of their Assessment Areas. Many banks feel that regulatory guidance is unclear as to what constitutes the areas within the BSRA. In addition, banks do not receive confirmation as to whether they receive CRA consideration for BSRA activities until exam time, which can be years after a transaction closes. As a result, many banks are discouraged from engaging in qualified activities outside of their Assessment Area. This framework has led to a concentration of community development activity in large urban areas, which has created market distortions.

To remedy this situation, regulators could provide full CRA consideration for community development areas nationwide, provided that the bank received an overall Satisfactory rating or better on its previous CRA exam. Under this approach, banks would not be required to hit a threshold in each of their Assessment Areas before they are able to obtain CRA credit for activities outside of their Assessment Areas. Importantly, out of Assessment Area activities

²¹ See Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance, 81 Fed. Reg. at 48, 529 (citing §__.12(h)-6). For banks evaluated pursuant to the community development test for wholesale or limited purpose banks, the agencies also consider qualified investments, community development loans, and community development services that benefit areas outside the bank's assessment area(s), if the bank has adequately addressed the needs of its assessment area(s). 12 C.F.R. §§ 25.25(e)(2), 195.25(e)(2))(2018).

should be considered *additive* to a bank's overall CRA rating; a bank should not incur new or additional CRA *obligations* by virtue of conducting community development activities in other areas. By requiring a Satisfactory rating or better on the previous CRA exam, this option would preserve a bank's focus on its local community while enabling activity elsewhere to be recognized.

Alternatively, regulators could provide credit for all of a bank's community development loans and investments nationwide and assign a CRA multiplier to activities located in the bank's Assessment Area. For example, banks could receive 2x the credit (or some other multiplier) for loans and investments in their Assessment Area, but community development activities outside of the Assessment Area would not receive a multiplier.

Providing greater weight to activities inside of a bank's Assessment Area would retain the emphasis on a bank's community and would recognize CRA activities in areas with community development needs. However, there are drawbacks to this approach. Depending on local market conditions, some banks could be disadvantaged because they operate in markets where there are fewer opportunities to engage in activities that would receive the multiplier.

B. Defining Assessment Areas

Applying the existing definition of Assessment Area to some banks has been like trying to put a square peg in a round hole; the regulatory definition simply does not fit some business models that exist today. When the CRA regulations were last revised significantly, only 10 percent of Americans used the Internet. Today, branchless banks engage with their customers exclusively online and hybrid banks have a few branches but take deposits and make loans in several states or even nationwide. Below are options that regulators could consider when defining Assessment Areas for the Digital Age.

1. Depositor Location

One approach could provide banks the *option* of identifying Assessment Areas based on where depositors are located. Under this alternative, a bank's CRA activities would be focused on geographies from which an institution derives more than a specified percentage of its domestic deposits.²² This deposit concentration measure would be established by regulation and would represent a percentage of the bank's *depositors* rather than deposit totals.

²² The CRA statute establishes requirements for the issuance of CRA performance evaluations, including requirements for metropolitan areas and nonmetropolitan areas where a bank has one or more domestic branches. See 12 U.S.C. §§ 2906 (b)(1)(B), (d). As a practical matter, most banks are likely to have deposit concentrations in

It is important that any depositor concentration threshold be established with great care and robust analysis. A bank should have CRA responsibilities only in markets in which the institution has a meaningful presence of depositors. Creating dozens or potentially hundreds of new Assessment Areas in geographies where a bank has a handful of depositors would dilute the impact of a bank's CRA activities, particularly as they relate to community development. In addition, banks would be unlikely to have a local employee presence in areas without a significant number of depositors. This would impact a bank's ability to build relationships with local residents, businesses, local governments, and other groups.

To enhance predictability and support CRA planning and goal setting, regulators should provide a specified period of time after which a bank crosses the deposit threshold before its CRA activities are evaluated in that location. A transition period would enable banks to establish infrastructural resources to address local community needs and would address deposit swings that may be temporary.

There are a number of pros and cons associated with allowing banks to identify Assessment Areas based on depositor location. On one hand, CRA was intended to ensure that banks provide credit to local communities, where they have a place of business and from which they were receiving deposits. Basing a bank's Assessment Area on additional areas from which they source deposits would align with the spirit of CRA as enacted. In addition, a deposit-focused option would provide a dynamic and long-lasting approach as banking migrates from brick and mortar to digital channels. In addition, establishing a depositor concentration threshold would provide an objective, quantitative means by which to designate Assessment Areas and would avoid situations where examiners attempt to impose their judgment regarding what a bank's Assessment Area should be.

On the other hand, because this methodology would be based on depositor address, it could trigger additional reporting and/or data analysis that some banks have not conducted in the past. Allowing banks to choose this option could also result in internet banks establishing Assessment Areas in population centers, which could result in the relocation or reinforcement—not elimination—of CRA “hot spots.”

areas near branch locations. We also note that regulators may have some latitude in interpreting the definition of a domestic bank branch.

2. Branchless Banks

Under existing CRA regulations, banks define their Assessment Areas based on counties, metropolitan statistical areas (MSAs), or other geographies surrounding their offices. This Assessment Area concept works well for many traditional banks. However, branchless banks are not always local banks, and it may not be appropriate for them to be evaluated as such for CRA purposes. Rather, regulators should provide flexibility regarding the geographic areas in which these institutions receive CRA credit for qualifying activities. One alternative would be to provide branchless banks the *option* of being evaluated on the geography of their CRA activities more broadly. This approach is consistent with CRA’s statutory mandate that banks should serve the “the communities in which they are chartered to do business.”

While branchless banks should have the option of engaging in CRA activities that are distributed more widely, doing so should not be a requirement. Some specialized banks are household names, but not all banks that engage in lending and deposit-taking activities around the nation are “large” in terms of asset size. Small internet banks originate loans to customers in many places around the country but do not have the capacity or the relationships to engage in investments and community development lending to all of these places, let alone nationwide. For this reason, regulators should provide these institutions the option of selecting their Assessment Area based on the regulation’s existing methodology and should permit them to obtain positive CRA consideration for community development loans and services more broadly, as described in Section A., above.

The CRA requires a bank to be evaluated on each metropolitan area in which the institution maintains one or more domestic branch offices. In addition, regulators must conduct a state-by-state evaluation for institutions that maintain domestic branches in two or more states.²³ If the regulators determine that these statutory provisions require banks to designate an Assessment Area where the bank is headquartered, then a bank’s CRA activity there should be relative to the deposit customers located in that area. This would ensure that the Assessment Area would receive its *pro rata* share of the bank’s CRA activity while helping to address market distortions that have been created by CRA hot spots.

²³ See 12 U.S.C. 2906(b)(1)(B), (d)(1).

3. Streamline Assessment Areas

Banks should have the *option* to combine non-metropolitan areas within a state into a single Assessment Area. Providing banks the option to consolidate non-metropolitan Assessment Areas could make CRA management more efficient for banks while also streamlining CRA examinations.

V. Qualifying Activities

The ANPR invites comment on the type and categories of activities that should receive CRA consideration. In particular, questions #15 - 28 request input on regulatory changes that could provide greater clarity on qualifying activities as well as provide CRA consideration for a broad range of activities supporting community and economic development.

The existing regulatory and supervisory framework presents several challenges for determining CRA eligibility. For instance, some banks have been able to obtain feedback from their examiners as to whether a proposed loan, investment, or service will receive positive CRA consideration, while other banks have not. In some situations, banks have invested considerable time and resources in community development initiatives only to learn—sometimes years later (at exam time)—that that the activity will not receive community development credit. This approach is fundamentally flawed and leaves banks with the impression that examiners are playing a game of “gotcha.” Relatedly, some banks have elected to forego participation in an activity that is innovative or complex because community development eligibility is unclear—an outcome that is at odds with the goals of CRA. We are also aware of situations where one bank received credit for an activity but another did not. In other instances, an activity was qualified for CRA credit during one exam but not the next.

When making financing decisions, banks need to have confidence that activities will receive CRA credit. By providing assurance regarding qualifying activities, regulators would remove barriers to community development that inhibit the flow of capital. Below are several recommendations for steps that regulators can take to provide clarity and predictability regarding activities that qualify for CRA consideration.

A. CRA Database

To promote consistency across agencies and within the same agency, regulators could create a public CRA database developed and maintained by the Federal Financial Institutions Examination Council (FFIEC) that contains information regarding qualified CRA activities and nonprofit agencies. Such a resource would provide better certainty and would improve consistency across examiners and agencies. A database should include the following components.

A CRA database could include a list of types of CRA activities that have some history of receiving CRA credit, are geared toward LMI populations, or are associated with government supported programs and policies that advance CRA-related goals, among others. Examples of government supported activities could include Opportunity Funds, loans and investments in Opportunity Zones, loans guaranteed by the Small Business Administration, workforce development projects, and loans and investments in areas designated by a governmental entity for revitalization or redevelopment. Activities on this list should be strictly illustrative; they should not be viewed as exclusive, nor should they create an expectation that banks engage in all or some of the approved activities. Regulators should solicit public comment on the types of activities that would receive automatic credit.

The agencies should also develop an additional database of innovative activities that have received positive CRA consideration. This collection of information could be similar to the extensive CRA-related information published by the OCC's Community Affairs Division. However, the database should be searchable, cumulative, organized by topic (rather than by date), and updated regularly.

B. Advance Confirmation

While a CRA database could address many of the inconsistencies that have arisen regarding what qualifies for CRA consideration, this mechanism would not provide the certainty that banks need when considering new and innovative activities. To encourage community development activities and support bank engagement in innovative projects, regulators should establish a process through which banks may request confirmation of community development eligibility in advance. The timeliness of the regulatory response will be critical to the success of this process.

C. Comments on Specific CRA Activities

Prior Period Community Development Loans. Regulators should harmonize the treatment of community development loans and investments. Today, banks receive CRA consideration for community development *investments* made during the current exam cycle as well balances of outstanding community development investments made in prior exam cycles.²⁴ However, banks only receive consideration for *loan originations and extensions* made during the current exam cycle.

Limiting CRA consideration for community development loans to the exam cycle in which they were originated incentivizes banks to match the terms of the loans to the cycle of their CRA examination, which results in shorter term loans. CRA regulations should not discourage banks from making longer term loans that can be more impactful to community development than short-term revolvers, depending on market conditions. Accordingly, banks should receive CRA consideration for the outstanding balances of all qualifying community development loans.

Infrastructure. Inadequate infrastructure is a barrier to prosperity. Investments in infrastructure projects are critical to local economic growth; not only do they create jobs, infrastructure investments promote sustained economic growth by enhancing the ability of a community to attract and retain businesses and residents through improvements to communication, transportation, public safety, health care, and education. Unfortunately, existing CRA regulations discourage banks from making loans or investments to build or improve roads, hospitals, schools, and provide broadband access, among other infrastructure projects. Today, a bank will receive CRA consideration for these activities only if the primary purpose of these activities is to serve LMI individuals and/or geographies or revitalize an LMI geography or non-metro middle-income geography. This primary purpose test is detrimental to communities most in need of support. Often, large infrastructure projects simply cannot be targeted to LMI populations. Rather, they may benefit an entire community or even residents spread over multiple counties. To encourage infrastructure investment, regulators could expressly state that banks should receive CRA consideration for infrastructure loans and investments if there is any LMI benefit.

Small Business Lending. For multiple reasons, it is doubtful that the current CRA framework accurately reflects the extent to which banks are financing community and economic development that is tied to small business lending. Accordingly, the agencies should re-examine CRA regulations and reporting requirements pertaining to small business loans.

²⁴ See Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance, 81 Fed Reg. at 48, 533 (citing § __.12(t)—8).

- **Community Development.** Under current rules, a loan that meets the definition of a small business loan must be reported as such. A bank may *not* choose to report it as a community development loan *even if it has a community development purpose*.²⁵ As a result, community development loans are being undercounted. A related issue involves loans to nonprofit organizations that are secured by real estate. These loans must be counted as small business loans—and not as community development loans—even if the loan has a community development purpose. By contrast, loans to nonprofits that are not secured by real estate *may* be counted for community development credit. A bank’s credit decision to require collateral should not be a determining factor as to whether a loan qualifies for community development credit. Banks should have the option of classifying small business loans with a community development purpose as a community development loan or as a loan under the general lending test. This would allow for more accurate tracking of the impact that banks are having in their communities.

- **Definition of Small Business Loan.** The CRA regulations contain multiple definitions of loans to small businesses.²⁶ These inconsistencies add unnecessary complexity, and should be harmonized. More importantly, the Call Report’s \$1 million origination cap and CRA’s \$1 million gross annual revenue (GAR) cap exclude many loans to small businesses from being considered in CRA performance evaluations. In fact, the FDIC’s 2018 Small Business Lending Survey estimates that in Q4 2015, “small banks²⁷ held *at least* 28.8 percent more outstanding loan dollars to small businesses than the Call Report captured, whereas large banks held at least 1.4 percent more.²⁸ The FDIC attributes the understatement of small business loans to several factors:
 - **Stale Definitions.** In the early 1990s regulators adopted the \$1 million loan limit as a proxy definition of small business because of the high correlation between loan size and business size. Since that time, the limit has never been adjusted for

²⁵ Federal Financial Institutions Examination Council, *A Guide to CRA Data Collection and Reporting* (2015).

²⁶ A small business loan means a loan included in “loans to small businesses” as defined in the instructions for preparation of the Call Report. The Call Report defines such loans as loans with an *original amount* of \$1 million or less. See Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance, 81 *Fed. Reg.* at 48,533 (citing § __ 12(v)). Community development activities include “activities that promote economic development by financing businesses or farms that meet the certain eligibility standards established by the Small Business Administration (the SBA)”, (13 C.F.R. § 121.301) *or* that have *gross annual revenues* of \$1 million or less.” Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance, 81 *Fed. Reg.* at 48,526 (citing § *Id.* at 48526 (citing __.12(g)(3)).

²⁷ Federal Deposit Insurance Corporation, [2018 Small Business Lending Survey](#). The FDIC Survey defines banks with less than \$10 billion in assets as small, and banks with at least \$10 billion in assets as large.

²⁸ *Id.* at 19.

inflation; if it had been, the cap would have been over \$1.6 million in December 2015.²⁹

- ***Gross Annual Revenue.*** The core data systems of many banks—particularly community banks—report only the loan amount for small business loans. As a result, many are not able to report loans by firm GAR without substantial investments of staff resources. Only 20.4 percent of small banks define small businesses by a GAR limit.³⁰
- ***Loans Secured by Residential Real Estate.*** The definition of small business lending used in the Call Report excludes any lending secured by residential real estate, even though banks commonly accept personal real estate as collateral for small business loans.

Unsubsidized Affordable Housing. Regulators should clarify how banks can document and obtain CRA consideration for financing unsubsidized affordable housing.³¹ Often these initiatives do not qualify or are difficult to qualify for CRA consideration since property owners do not have access to current and ongoing income data for tenants.

Loan Purchases. Loan purchases are an important part of community reinvestment and should continue to be included in CRA evaluations. Furthermore, we support equal treatment of purchased and originated loans. We note that purchases from nonprofits such as Habitat for Humanity create additional capital for these organizations, which in turn supports continued lending, providing overall benefit to communities.³²

Mortgage Backed Securities. Banks should receive equal CRA credit for primary and secondary market activity. Not only do mortgage backed securities (MBS) provide liquidity to the mortgage market, as discussed throughout this letter, some areas do not have many CRA-eligible investment opportunities. This is particularly true in rural areas. We also note that examiner treatment of MBS is unpredictable; some examiners view MBS positively, while others do not. As with other aspects of CRA, regulatory treatment must be consistent.

²⁹ *Id.* at 10.

³⁰ *Id.* at 10-11.

³¹ Banks finance the improvement and preservation of unsubsidized affordable housing for LMI families.

³² While purchased loans provide an important source of liquidity and should be treated the same as originations for CRA purposes, there might be reasonable limits on the number of times a loan could be sold before a purchasing bank will not be able to obtain CRA credit.

Disaster Areas. Today, banks receive CRA credit for activities in disaster areas outside of their Assessment Areas, a policy we support. However, regulators have not specified how such activities translate into actual CRA credit or whether they would have a meaningful impact on a bank's CRA rating. Regulators should update the CRA regulations to explain how CRA activities that revitalize or stabilize a disaster area that is located outside of a bank's Assessment Area will impact the bank's CRA rating.

Workforce Development and Job Creation. The CRA Q&A provide that banks will receive community development credit for workforce development or job training programs targeted to LMI individuals.³³ This limitation is overly restrictive. For example, communities that lose entire industries (e.g., logging, manufacturing, mining) need to retrain their residents in order to reduce unemployment rates and support economic growth and transformation. It should not matter whether workforce development programs benefit LMI or middle-income earners. All activities that support workforce development are consistent with the statute and should receive positive CRA consideration in implementing regulations.

Financial Literacy. All financial literacy initiatives should receive positive CRA consideration; credit should not be limited to providing financial education to LMI individuals or schools where more than 50% of students qualify for free or reduced-price meals. In addition, banks should receive credit for creating financial education materials, whether in print or digital form.³⁴

Frequently, children—regardless of their parents' income bracket—do not receive training at home regarding how to manage a checking account, distinguish between needs and wants, establish short-term and long-term financial goals, or determine the pros and cons of applying for a loan.

In addition, requiring financial literacy initiatives to have a principal purpose of serving LMI is inconsistent with school boundaries in many communities. Rural schools typically draw students from a wide geographic area, and many rural counties have only one high school. Moreover, some school districts in small cities and suburban areas intentionally draw their attendance maps so that the student population is economically diverse. In both of these scenarios, CRA

³³ See Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance, 81 *Fed. Reg.* at 48, 525 (citing §__.12(g)—1).

³⁴ We note that an April 3, 2018, Memorandum from the U.S. Department of the Treasury on CRA modernization implied that banks should implement research-based strategies into their financial education activities that include measurements of effectiveness. As a practical matter, determining impact would have to occur over time and would require hiring a third-party to test recipients and analyze the results. Any such requirement would create significant red tape that would discourage banks from pursuing financial literacy initiatives—a policy outcome that would be highly undesirable.

regulations fail to give due and proper recognition to the efforts of banks to partner with schools to provide financial literacy instruction.

Banks also are important providers of financial education for adults. This may take the form of housing counseling, budgeting instruction, or programs to prevent elder financial exploitation. Unfortunately, a bank does not receive CRA consideration for making these presentations to organizations that do not qualify as having a community development purpose (e.g., Rotary Club, Lions Club, Chamber of Commerce, etc.). Senior citizens in all income brackets are at heightened risk financial abuse, and policymakers, including the Bureau of Consumer Financial Protection, encourage banks to participate in programs to prevent financial exploitation. As such, these activities should receive positive CRA consideration.

Banks also provide instruction pertaining to financial services innovation, such as information regarding merits of different types of payment processors or the use of digital wallets. Digital financial literacy is important for individuals from all income levels—not just those who are low income. We also note that digital outlets can be very effective in improving financial literacy, but examiners give very little CRA consideration for this.

Nonprofit Organizations. We note that examiners have declined to provide positive CRA consideration for bank sponsorship of fundraising events hosted by nonprofit organizations whose mission is to assist LMI individuals. Banks should receive positive CRA consideration for these activities.

Volunteer Service. Under current rules, in addition to meeting the definition of “community development,” community development services must be related to the provision of financial services.³⁵ The interagency Q&A explains that this is limited to the provision of financial expertise, such as credit counseling, financial planning, or other types of financial education. In addition, services reflecting an employee’s role at the bank, such as human resources, information technology or the provision of legal services, will receive positive CRA consideration.³⁶

These restrictions artificially limit a bank’s options for addressing needs in its community. For example, banks are unable to receive positive CRA consideration for volunteer hours to construct a home sponsored by Habitat for Humanity. Banks should receive positive CRA consideration for volunteer service with a community development purpose; credit should not be limited to

³⁵ See Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance, 81 *Fed. Reg.* at 48, 530 (citing §__.12(i)).

³⁶ *Id.* (citing §__.12(i)-1 and §__.12(i)-3).

providing technical assistance or financial education. This approach would broaden the scope of benefits that banks provide and would empower them to deploy CRA resources to meet the unique community development needs of their areas.

People with Disabilities. The CRA regulatory framework should provide positive CRA consideration for community development activities that benefit individuals with disabilities. Data show that persons with disabilities are often financially vulnerable.³⁷ In light of the correlation between disability and LMI status, revisions to the CRA regulatory framework should provide positive CRA consideration to loans and investments to nonprofit organizations whose mission is to serve the disability community.

D. Expanding the Scope

CRA examinations typically evaluate a financial institution's consumer lending only if such lending comprises a substantial majority of the institution's business. This reflects CRA's primary focus on home mortgage, small business, and small farm loans. However, a bank may elect to have its consumer loans included in its CRA evaluation if it has collected and maintained data on such loans.

Any changes to the CRA regulatory framework should continue to provide this option. Many banks—depending on their business models and expertise—provide a variety of products and services that help consumers manage their finances and build assets and credit histories in preparation for becoming homeowners. These offerings tend not to represent a major portion of business for most institutions.

While banks that offer such products should be able to continue to elect whether to have them considered as part of the bank's CRA evaluation, doing so should not be required. Incorporating

³⁷ For example:

- 17.6% were unbanked compared to 6.5% of people without disabilities.
- Only 54% have a checking and savings account, versus 80% of nondisabled peers.
- 37% do not have a credit card, versus 20% of their nondisabled peers.
- People with disabilities are almost 3 times (23% versus 9%) more likely to have extreme difficulty paying bills.
- They are also more likely (55% versus 32%) to report that they could not come up with \$2,000, if an unexpected need arose.
- People with disabilities are more likely to be late on mortgage payments (31% versus 14%), overdraw on checking accounts (31% versus 18%), and take loans from retirement accounts (23% versus 10%).

See National Disability Institute, [Financial Capability of Adults with Disabilities: Findings from the FINRA Investor Education Foundation National Financial Capability Study](#) and [Banking Status and Financial Behaviors of Adults with Disabilities: Findings from the 2015 FDIC National Survey of Unbanked and Underbanked Households](#).

such products and services as a requirement in a CRA evaluation could create a perception among examiners and bankers that there is an expectation that banks enter what may be entirely new product lines that do not align with a bank’s expertise or business strategy.

As part of a separate policy initiative, the OCC encourages institutions to offer responsible short-term, small dollar installment loans. Such products help consumers with their short-term financial needs while establishing a path to more mainstream financial products. Because such loans are for small amounts, they would not impact a bank’s CRA rating. Accordingly, small dollar loans should receive a CRA multiplier if the agencies pursue a metric-based approach.

VI. Improve the Supervisory Process

In addition to updating the regulations and associated guidance, CRA modernization provides an opportunity to review and improve the CRA supervisory process. We offer the following recommendations in that regard.

A. Internal Agency Guidance

Many banks report encountering internal agency “guidance” that has not been made public. The guidance typically involves informal interpretations regarding the CRA regulations, the interagency Q&A, or opinions addressing various aspects of CRA compliance.

In many situations, the examiners cite information posted on internal agency “bulletin boards.” While these informal interpretations may not be intended to represent official agency positions, many examiners treat them as such.

Regulators should ensure that internal, informal agency guidance does not inadvertently create new public policy. If an agency seeks to change policy, it needs to do so through the rule making processes mandated in the Administrative Procedure Act, where it is appropriately exposed to public review and comment. This would be consistent with the joint statement by the OCC and other banking agencies, issued on September 11, 2018.³⁸ Regulators should review “bulletin board” postings for potential violations of their commitment to due process in changing policies. In addition, regulators should regularly review such postings to ensure consistency across agencies and to guard against the inadvertent creation of new policy without adequate public notice.

³⁸ [Interagency Statement Clarifying the Role of Supervisory Guidance](#) (September 11, 2018).

B. Examiner Training

There is an insufficient number of experienced and qualified CRA examiners who possess the skills necessary to apply sound judgment to analyze a bank's performance context. To guard against rigid interpretations that defeat the purpose of CRA, the banking agencies should appoint dedicated CRA examiners and provide a defined and respected career path for such individuals. To promote consistency, regulators should provide examiner training on an interagency basis. We also support training bankers and regulators together in a manner that parallels the model that the agencies employed when rolling out the 2005 version of the *BSA Exam Manual*.

C. Communications During and After Examinations

Regulators have established a quality control process that requires CRA examination reports to go through multiple levels of review before examiners can provide feedback regarding the bank's CRA performance. As a result, most banks receive limited, if any, input prior to receiving a copy of the examination report. Moreover, many banks no longer receive exit interviews at the conclusion of an exam.

In too many cases, banks receive little to no communication from regulators until they are presented with the exam report months (and in some cases over a year) later. Although some banks report that they were given five days to review the report for data accuracy, this occurred after the report had gone through the internal agency review process. As a result, factual errors that might have been identified and corrected have been "baked in" to the final performance evaluation.

Examiners should be required to conduct an exit meeting at the conclusion of a CRA examination. All banks should be permitted to fact check review the draft Performance Evaluation report before it is forwarded for additional agency review. Regulators who identify a CRA issue following the field exam should initiate communications with the bank as soon as they determine that a downgrade may be in order.

D. Transparency of CRA Ratings and Application Approvals

Regulators take CRA ratings into consideration when evaluating a bank's application to engage in certain activities, such as opening branches, relocating the main office or a branch, and making acquisitions. However, the FDIC and the Federal Reserve have not issued guidance or policy statements describing how an unsatisfactory exam rating impacts an agency's decisions on such applications. Similarly, these agencies have not articulated how compliance issues

involving laws or regulations other than CRA will impact a bank’s CRA rating. The OCC’s recent additions to its policies and procedures manual describe the factors that the agency will consider in these types of situations.³⁹ These OCC issuances illustrate the type of helpful clarifications that agencies can provide in this regard.

Regulators should develop consistent policies clarifying that CRA will not be used as a general enforcement tool. Moreover, the agencies should describe the factors that they will take into account when considering applications of a bank with a “needs to improve” CRA rating and should clarify that such a rating will not be a *de facto* bar to opening new branches or engaging in other activities requiring regulatory approval.

VII. Apply CRA-Like Requirements to Credit Unions and Other Financial Firms

One of the primary goals of the Federal Credit Union Act, and a justification for credit union exemption from taxation, is to make credit available to people of modest means. However, credit unions are not required to document their service to these individuals. In fact, a 2006 Government Accountability Office report found that credit unions were more likely to serve middle- to upper-income individuals than the banking industry.⁴⁰

The requirements to meet the financial services needs of all income demographics, including LMI individuals, should apply to all federally insured depository institutions. In particular, credit unions, which receive significant government benefits to serve LMI individuals, should be required to demonstrate through measurable standards that they are meeting their service obligations.

Similarly, as the financial services industry evolves and regulators explore the provision of special purpose charters to financial technology firms, any such charter should ensure that these entities meet the convenience and credit needs of their particular communities, just as banks are expected to do under CRA. Moreover, any such CRA-like responsibilities should be enforced through examination.

³⁹ See Office of the Comptroller of the Currency (OCC), PPM 5000-43, Impact of Evidence of Discriminatory of Other Illegal Credit Practices on Community Reinvestment Act Ratings (2018); see OCC Bulletin 2017-51, Impact of CRA Ratings on Licensing Applications (2017).

⁴⁰ U.S. Gov’t Accountability Office, GAO-07-29, [Greater Transparency Needed on Who Credit Unions Serve and on Senior Executive Compensation Arrangements](#) (2006).

VIII. Looking Forward

Thank you for the opportunity to provide observations and alternatives regarding the regulations that implement the Community Reinvestment Act. We appreciate the OCC's leadership in soliciting ideas and suggestions that would benefit communities and provide needed certainty and transparency for banks. We look forward to reviewing and commenting on a proposed rule, and we reiterate the importance of interagency collaboration and coordination on a joint proposal.

While our members are optimistic regarding CRA modernization, it is important to note that revisions to the existing CRA framework must provide a phase in period that enables banks to "retool" their programs to align with new expectations.

Should you have any questions, please contact the undersigned at kshonk@aba.com.

Sincerely,



Krista Shonk
Vice President, Center for Regulatory Compliance