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Via electronic submission

November 19, 2018

The Honorable Joseph Otting
Comptroller of the Currency
Office of the Comptroller of the Currency
Washington, DC 20552

Re: Reforming the Community Reinvestment Act Regulatory Framework
Docket ID OCC-2018-0008; RIN 1557-AE34

Dear Comptroller Otting:

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”) request for comments in response to its Advanced Notice of Proposed Rulemaking (“ANPR”) on reforming the Community Reinvestment Act (“CRA”) regulatory framework.²

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 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 local communities and focus on supporting the local economy in the communities in which they operate.

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

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

³ 12 U.S.C. §2903(a)(1).

Executive Summary

ICBA appreciates and commends the OCC's initiative to transform and modernize the outdated and overly burdensome CRA regulations and examination process. Highlights from our comments are noted below.

- Community banks' success hinges on the success of their communities; therefore, ICBA and community banks support fair, equitable, consistent and transparent implementation of the Community Reinvestment Act.
- ICBA urges the OCC to work with the Federal Reserve Board ("FRB") and the Federal Deposit Insurance Corporation ("FDIC") in any future modernization efforts. This will not only provide consistency for community banks but will give all institutions the benefit of any relief actions.
- The current regulations are outdated and at times serve as barriers to implementing the very mission they are intended to bring about.
- Community banks are seeing inconsistency in the examination process, which creates uncertainty and confusion.
- ICBA requests that regulators provide performance evaluations in a timely manner so that community banks can quickly adjust their operations to ensure compliance for the next examination.
- The asset thresholds defining "small," "intermediate small," and "large" banks do not adequately reflect the current banking environment and should be adjusted upwards accordingly.
- Assessment areas should be identified and delineated by community banks rather than the regulators as community banks must know and understand their communities to flourish.
- Any examination cycle that includes a newly delineated or revised assessment area should begin at the time the bank is informed of the new or revised assessment area and not applied retroactively.
- A bank should receive consideration for CRA-qualified activities beyond its delineated assessment area in targeted areas; however, the bank should determine whether these areas are included in its assessment area.
- ICBA appreciates that the OCC is exploring new tools and mechanisms, such as a metric-based system, to address deficiencies in the current framework. However, there is great potential for unanticipated ancillary effects in such a system. More importantly, community banks want clear expectations and consistency so that they can focus on serving the needs of their communities rather than speculating what activities will receive credit and what documentation demonstrates compliance.

- A metric-based framework would need to capture and consider all relevant activity and account for data points that might be difficult to quantify, such as “innovativeness,” “responsiveness,” and “complexity.”
- If a metric-based approach is proposed in a future notice of proposed rulemaking, ICBA strongly urges that community banks have the option of continuing to use the current framework.
- ICBA contends that a more forward-looking approach to the examination process that utilizes an illustrative list of activities that provides a presumption of CRA credit would provide consistency and clarity for banks. Such a list, however, should not be considered exhaustive, and activities not on the list should still be eligible for credit.
- Refining many of the definitions in CRA regulations will facilitate more certainty and consistency. In particular, clarifying and simplifying the “small business,” “community development,” and “economic development” definitions would be most beneficial.
- The agencies should not favor national nonprofit organizations over local, lesser known nonprofits.
- ICBA encourages the agencies to award credit for any community service provided by a bank employee, regardless of whether the service is financial in nature or during banking hours.
- Banks should receive credit for loans and investments for improved infrastructure, transportation and other community services that are targeted to the entire community, including LMI populations.
- ICBA recommends that an exemption from documenting compliance with CRA regulations should be given to minority- and women-owned financial institutions, and a streamlined approach be taken for certified community development financial institutions.
- Banks should be provided clear guidance on what documentation and recordkeeping is required for all activities prior to their examination to address the significant inconsistencies and lack of transparency during the examination process.

Current Regulatory Approach

Congress passed CRA more than forty years ago in 1977 to impel banks to help meet the credit needs of the communities in which they serve, including low- and moderate-income areas, while maintaining safety and soundness. ICBA welcomes this ANPR as a thoughtful and holistic review of the existing CRA framework and appreciates the recognition that there have been significant transformative changes in the financial services industry since regulations were first

issued in 1978.⁴ However, a transformation of the implementing regulations should not diminish the original intent of the statute. Rather, the modernization effort should clarify and enhance the ability of banks of all charter types and sizes to serve their communities which will inevitably provide access to credit for all neighborhoods, including low- and moderate-income neighborhoods.

The current regulations are outdated and at times serve as barriers to implementing the very mission they are intended to bring about. Community banks are experiencing inconsistencies in the examination process, which creates uncertainty and confusion for community banks. The inconsistent manner in which loans and services receive CRA credit occurs between examinations within an agency, as well as between agencies. This makes it difficult for community banks to determine how well they are meeting their CRA requirements.

This inconsistency makes it incredibly difficult for community banks to plan and implement their CRA requirements responsibly. ICBA urges the OCC to work with the Federal Reserve Board (“FRB”) and the Federal Deposit Insurance Corporation (“FDIC”) in any future modernization efforts. This will not only provide consistency for community banks but will give all institutions the benefit of any relief actions.

Additionally, examiners will not share their method for determining CRA credit. There is virtually no feedback during or following an examination until the actual performance evaluation is shared with the bank. This policy or practice is problematic as performance evaluations are typically not shared for several months. Additionally, community banks are often compared to institutions that are not peers. For example, a community bank with an assessment area limited to a geographical area surrounding its branch was measured against a national online mortgage company serving customers nationwide.

Asset Thresholds Should Be Adjusted

ICBA believes that the current thresholds defining “small,” “intermediate small,” and “large” banks do not adequately reflect the extensive consolidation and growth that has occurred in the industry since 1977 when CRA was adopted and should be increased. The CRA regulations currently use a tiered approach to evaluating banks. Different evaluation methods are used based on the bank’s size and how it operates.

⁴ 43 Fed. Reg. 47144 (October 12, 1978).

- Small banks—currently those with assets of less than \$1.252 billion—that are not intermediate small banks are assessed under a streamlined method that focuses generally on their lending performance.
- Intermediate small banks—a subset of “small banks” with assets between \$313 million and \$1.252 billion—are assessed under the small bank lending test and a community development test that evaluates community development lending, qualified investments, and the community development services they provide to their communities.
- Large retail banks with \$1.252 billion or more in assets are evaluated under three tests. All lending activity, including community development loans, is evaluated under the lending test. Qualified investments are evaluated under the investment test. Retail and community development services are evaluated under the service test.

ICBA’s recommendations for increasing the asset thresholds are:

- Small banks – increase the asset threshold to include all banks with assets less than \$5 billion that are not intermediate small banks.
- Intermediate small banks – increase the asset threshold to include banks with assets between \$1.5 billion and \$5 billion.
- Large retail banks – increase the asset threshold to include all banks with assets of \$5 billion or more.

Once changed, all these asset thresholds should be subject to annual adjustments based on the percentage increase in total assets of all insured depository institutions.

By expanding the number of banks that fall under the definition of “small bank” and “intermediate small bank,” regulators would significantly ease the CRA regulatory burden for most community banks while not impacting the ability to adequately assess community banks for their CRA performance.

Redefining Communities and Assessment Areas

Shifting Delineation of Assessment Areas Has Created Uncertain Compliance Expectations

The CRA regulations state that, “a bank shall delineate one or more assessment areas within which the [agency] evaluates the bank's record of helping to meet the credit needs of its community. The [agency] does not evaluate the bank's delineation of its assessment area(s) as

a separate performance criterion, but the [agency] reviews the delineation for compliance” with CRA regulations.⁵

Specifically, the CRA states that when examining a financial institution, a federal agency must assess the institution’s record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution.⁶ Additionally, the implementing regulations do not expressly define “community,” but rather implement this provision by requiring a bank to delineate one or more assessment area(s) within certain parameters. Currently, the assessment area(s) determined by a bank must consist of one or more metropolitan statistical areas or metropolitan divisions and one or more contiguous political subdivisions, such as counties, cities, or towns. A bank’s assessment area(s) must include the geographies in which the bank has its main office, its branches, and its deposit-taking ATMs, as well as the surrounding geographies in which the bank has originated or purchased a substantial portion of its loans (including home mortgage loans, small business and small farm loans, and any other loans the bank chooses, such as those consumer loans on which the bank elects to have its performance assessed).⁷

There has been a growing trend recently of examiners reinterpreting geographies and redefining a bank’s assessment area for the bank during an examination, rather than – as the regulations state – deferring to the bank to delineate its own assessment area. Additionally, in some instances, regulators adjust assessment areas every time they visit a bank for an examination.

These fluctuations include, but are not limited to, examiners shifting assessment areas:

- from low- and moderate-income areas to majority minority areas;
- from census tracts to whole counties; and
- from census tracts surrounding a bank’s branches to census tracts distant from a bank’s market area.

Such shifts at times do not correspond to a bank’s community and create significant uncertainty for community banks. At a minimum, these unilateral changes from the regulators complicate CRA planning and compliance for community banks. The bank is operating according to the assessment area it has delineated, but then may be judged during an exam according to an assessment area redefined by examiners. Assessment areas should be identified and delineated by community banks rather than the agencies so that community banks can plan accordingly.

⁵ 12 CFR §25.41 (a).

⁶ 12 USC §2903(a)(1).

⁷ 12 CFR §25.41(c).

Not only does the unilateral change and fluctuation of assessment areas at each examination make it difficult for community banks to plan accordingly, it at times overlooks common sense. There are instances where examiners insist on using whole counties as geographic delineations, rather than the existing use of census tracts or natural partitions to delineate assessment areas. In these instances, the counties are very large or include geographic features, such as large lakes, rivers or mountains, that partition the area making it difficult, if not impossible, to attract customers from the new assessment area. These directives from examiners force community banks to expand their footprint into areas larger than they intended, which is contrary to a community bank's business model. Unlike larger banks, community banks channel their loans to the neighborhoods where their depositors live and work, which helps local businesses and communities thrive.

A commonly cited example regarding branches on or near state borders is the exclusion of areas close to the branches, yet the inclusion of areas that are distant from a branch. In one situation, examiners accepted the assessment area of a bank with branches in two bordering states during one examination. However, during the next examination, the examiners removed one census tract from the bank's stated assessment area, resulting in two separate assessment areas – one for each state – and examined the bank using the new assessment areas. As a result, the bank was examined using an area that was previously not in its assessment area.

Another common situation is one in which branches closely border a state line. Due to geographical features or infrastructures, many residents of the bordering state conduct their banking in the branches just over the border in the other state. Examiners insist that the bordering state (or large county) be included in the bank's assessment area and perform two separate performance evaluations. If a bank is not carving out LMI neighborhoods from its assessment area, a bank should be able to include the census tract of the bordering state in its assessment area, without expanding the assessment area further into that state.

These examples underscore the importance of ensuring that banks determine their own assessment areas rather than regulators. Each community bank is founded to serve its community – whether that community is urban or rural, densely or sparsely populated, or naturally delineated by rivers or mountains – and each bank must know and understand its community to serve it. Furthermore, the diversity of community banks' workforces understand and support the financial services needs of diverse consumers and small business owners in rural and suburban communities, small towns and big cities throughout America and should be trusted to know the boundaries of their communities.

If an examiner determines that a bank is not appropriately delineating its community, the regulator and community banker should *jointly* determine any appropriate changes that should be made to the bank's assessment area. Any examination cycle that includes a new assessment

area should begin at the time the bank is informed of the new assessment area and not applied retroactively.

Updating Assessment Areas for Evolving Banking Practices

To recognize evolving banking practices, the OCC is seeking comments on ways to update how a bank's community is interpreted for purposes of implementing the CRA. While the OCC states that banks would continue to receive consideration for CRA-qualifying activities within their branch and deposit-taking ATM footprint, it is considering an updated approach that would enable banks to receive consideration for providing certain activities in LMI areas outside of their branch and deposit-taking ATM footprint by including these areas in their assessment areas.

Community banks are entrenched in their communities and are in the best position to define their assessment areas. A bank should receive consideration for CRA-qualified activities beyond its delineated assessment area in targeted areas or areas that have historically been largely excluded from consideration, such as LMI and underserved areas. However, these areas should not necessarily be included in a bank's assessment area unless the bank determines that they should. Giving consideration to CRA-qualifying activities conducted in these areas without requiring banks to expand their assessment areas would address concerns of the current system, which at times restricts bank lending or investment in areas of need, while also helping community banks with footprints or assessment areas with few or no LMI areas. Additionally, and importantly, it will help banks execute the true mission of CRA by making sure loans and investments go to where they are needed most.

The current CRA regulations specify what must be and what cannot be included in the assessment area delineation. The assessment area delineation for a bank currently requires that the bank include the geographies in which the bank has its main office, its branches, and its deposit-taking ATMs, as well as the surrounding geographies in which the bank has originated or purchased a substantial portion of its loans.⁸

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

⁸ 12 CFR §25.41(c)(2).

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.

To recognize evolving banking practices, the OCC is also inviting comments on an updated approach to define assessment areas by allowing a bank to include additional areas tied to its business operations. Permitting a bank to determine whether its assessment area includes areas in which the bank has a concentration of deposits, loans, or other offices would enable a bank to determine its own community based on its unique business operations. However, requiring an assessment area to include areas in which a bank has a concentration of deposits, loans, or other operations rather than deferring to the bank to make that determination would severely limit certain community banks' ability to meet the needs of their communities.

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. This underscores that while, in certain instances, it may be appropriate to include areas of deposit or loan concentrations in an assessment area, in other instances it does not.

While technological advances are changing financial environments, community banks continue to be deeply involved in their local communities. Unlike larger banks that may take deposits in one state and lend in others, community banks channel their loans to the neighborhoods where their depositors live and work, which helps local businesses and communities thrive.

Assessment Area Reforms Should Allow for Service and Activities That Are Not Prevalent in a Bank's Current Area

CRA regulations require a bank to delineate one or more geographic assessment areas within which a bank's regulator will evaluate a bank's record of meeting the credit needs of its community. The assessment areas must include geographies in which a bank has its main office, its branches, its deposit-taking ATMs, and the surrounding geographies in which it has purchased a substantial portion of its loans. The OCC is seeking comment on qualifying activities outside of these areas in addition to activities in a bank's traditional assessment areas or local geographies.

In the compliance examination manual, examiners must compare credit extended inside versus outside of a bank's assessment area. It states, "[i]f the percentage of loans or other lending related activities in the assessment area is less than a majority, then the institution does not

meet the standards for “Satisfactory” under this performance criterion.”⁹ This is typically referred to as the in/out ratio.

Assessing the credit that is extended to the local communities in which banks are chartered is consistent with the purpose and intent of CRA. However, strictly adhering to a 50 percent benchmark produces unintended consequences and can stifle banks’ lending or investments in areas of need, particularly for community banks in rural areas and those with few or no LMI areas.

However, such permissibility should be entirely at the option of the bank. Regulators should not require banks to serve LMI areas outside their typical assessment area. Many community banks will still be dependent on branch-centric customers – those that choose to serve their existing assessment areas should not be required to expand beyond those areas.

Expanding CRA-Qualifying Activities

Refining Definitions Will Facilitate More Certainty and Consistency

The OCC is seeking feedback on the type and categories of activities that should receive CRA consideration and whether certain terms could be better defined to address community needs and incentivize banks to lend, invest and provide services that further the purposes of the CRA. Indeed, the Treasury Department’s review of the CRA framework identified ambiguous definitions as a key problem to be addressed. The Treasury Department succinctly described the problem as “no formal process available to aid in the determination of whether a loan or investment will qualify for CRA credit.”¹⁰

ICBA has received dozens of examples from banks of all charter types that have not received credit for activities while other banks in similar markets or under a different regulator have received credit for the same activity. There are also several instances where a bank received credit for an activity during one examination, only not to receive credit for the same activity during subsequent examinations. ICBA believes that consistency could be improved by better defining terminology and clearly establishing which activities will be given credit.

While many of the definitions in CRA regulations could benefit from revisions, clarifying and simplifying “small business,” “community development,” and “economic development” would be most impactful.

⁹ OCC 2006-17(Attachment B).

¹⁰ Memorandum from the U.S. Department of the Treasury to the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation (April 3, 2018) (available at <https://home.treasury.gov/sites/default/files/2018-04/4-3-18%20CRA%20memo.pdf>), at 10.

Under the current regulations, the “small business loan” definition mirrors the Call Report definition, as loans “with original amounts of \$1 million or less” and reported as either “loans secured by nonfarm residential property” or “commercial and industrial loans.”¹¹ In addition to receiving consideration for business loans in amounts of \$1 million or less, a bank may also receive CRA consideration for business loans of more than \$1 million if the loan has a primary purpose of “community development” as that term is defined in the CRA regulations.¹²

The OCC is contemplating changing the definition of “small business” to be simpler and without as many stipulations. As the OCC and other regulators consider these changes, ICBA recommends against adopting the definition set forth by the Small Business Administration (“SBA”). The SBA’s standards for small business have thousands of definitions, each varying based on the business’s industry, number of employees, and revenue. While ICBA appreciates the OCC’s interest in simplifying the definition, adopting SBA standards are more likely to complicate the process.

Regarding “community development,” ICBA contends that the definition of what can and cannot be classified as a community development loan or activity is confusing and overly prescriptive. In part, the Interagency Questions and Answers Regarding Community Reinvestment (“Q&As”) define a community development loan as a “loan [that] has a primary purpose of community development... designed for the express purpose of community development.”¹³ This circular definition is not helpful and actually serves as a hindrance to banks that are required to seek and pursue community development activities. Similarly, the Q&As explain that activities that “promote economic development” count as community development.¹⁴ However, “promot[ing] economic development” is, itself, a term that establishes a multi-prong test that does not provide much clarity.

Finally, ICBA does not believe that the lack of community development activity should count negatively in a bank’s CRA score. Community development loans are not always available in an assessment area and are extremely competitive as many banks are competing for the same limited loans. This creates bidding wars, and community banks typically cannot compete with the mega banks which creates an uneven playing field.

Need for More Equitable Treatment of Nonprofit Activity

Currently, Q&A §__.12(g)(2)-1 provides guidance and includes examples of ways that an institution can demonstrate that community services are offered to LMI individuals. Examples

¹¹ Interagency Questions and Answers Regarding Community Reinvestment §__.42(a).

¹² See Reforming the Community Reinvestment Act Regulatory Framework, 83 Fed. Reg. 45,053 (Sept. 5, 2018), footnote 29.

¹³ Interagency Questions and Answers Regarding Community Reinvestment §__.12(g).

¹⁴ *Id.*

include: a community service offered by a nonprofit organization that is located in and serves a low- or moderate-income geography; or, a community service targeted to the clients of a nonprofit organization that has a defined mission of serving low- and moderate-income persons.

While this clarification is helpful, ICBA members relay instances where examiners do not count the services of all nonprofit organizations or require more documentation than is otherwise required for other, more nationally-recognized nonprofits. Certain favored and nationally recognized nonprofits often serve as turnkey solutions for banks seeking CRA credits quickly and easily. By contrast, certain local nonprofits seeking to strengthen the specific community in which they and the bank are located, are unfairly burdened with additional compliance hurdles and documentation for CRA credit. This creates a barrier that weakens the partnerships that community banks strive to foster within their own communities and is counter to implementing the very mission of the statute.

CRA Regulations Should Recognize Entire Communities

In its ANPR, the OCC distinguishes between loans that receive credit regardless of LMI populations, and loans that only receive credit if directed toward LMI areas. The OCC seeks comment on whether these activities and products should only receive credit if they are directed toward LMI areas or populations, or whether CRA credit should be given for all loans and activities, so long as they serve the entire community. Additionally, the OCC asks under what circumstances consumer lending be considered as CRA-qualifying activity. The purpose of CRA is to require banks to serve the needs of the communities in which they do business, including LMI neighborhoods. This has evolved to focus a majority of the review on LMI areas, sometimes to the detriment or exclusion of non-LMI areas within a community. Too many times, banks do not receive credit for loans and investments for improved infrastructure, transportation and other community services that are targeted to the entire community, including LMI populations. This is especially harmful to small cities and towns that need access to improved infrastructure and benefit every income stratum in these areas, including LMI populations.

One example of limiting credit to activities in LMI areas is the regulatory treatment of activity with nonprofits. Q&A §__12(g) lays out the requirements for banks that wish to receive credit for activities directed toward nonprofits. However, credits are limited to nonprofits that serve LMI populations. Instead, the determination should be whether the nonprofit serve the needs of *the entire* community, as well as to those activities that serve LMI populations.

Another example is the treatment of investments in public bonds. When a community bank invests in public bonds where the proceeds are distributed to various upper, middle, moderate,

and low-income census tracts, it does not receive community development credit for those investments because *only* 40 percent of the bond proceeds positively affected LMI census tracts. Such an investment positively affects the entire community and the bank should receive presumptive credit for it. At a minimum, the bank should receive credit for 40 percent of its investment for the portion directly benefitting the LMI census tracts.

Provide a CRA Credit Safe Harbor for Certain Activities

The OCC seeks comment on whether certain categories of loans and investments should be presumed to receive consideration, such as those that support projects, programs, or organizations with a mission, purpose, or intent of community or economic development.

As the OCC and other banking agencies consider amendments and revisions to CRA regulations, ICBA reiterates that community banks desire a framework that is predictable and consistent. This requires the agencies to clarify existing terminology, but more importantly, consistently apply that terminology to each bank examination.

CRA exams are backward looking, with examiners awarding or withholding credit based on *past* performance. This ‘moment-in-time’ assessment does not facilitate predictability. A community bank could offer a service or loan product for years, expecting to receive credit, only to discover upon an examination that the activity is not eligible. In order to educate themselves and make informed guesses as to what activity receives credit, community banks must spend time analyzing past performance evaluations, as well as the performance evaluations of other similar banks in the area.

ICBA contends banks should be able to use a more forward-looking approach that utilizes a list of activities that provide a presumption of CRA credit. While the list would not capture the entire universe of activities that would receive credit, it would provide banks with greater clarity on certain qualifying activities. Additionally, while a list of certain qualifying activities would ensure CRA consideration for certain activities, it should allow for flexibility to capture innovative or unique situations. To address our evolving and expanding industry, a presumptive list could be reviewed and subjected to stakeholder feedback on a recurring basis.

In addition to streamlining the examination process, the safe harbor activities would also reduce the administrative burden for banks that otherwise need to produce various and inconsistent documentation for various activities to obtain CRA credit. It should be clear that such a list is not exhaustive and that activities not on the list will still be eligible for credit; they simply will not *automatically* receive the presumption. ICBA has compiled a list of activities that our members believe should receive a presumption of credit (see appendix A).

Create Parity Between Treatment of Debt and Equity Investments

ICBA recommends that the agency cease the disparate treatment of debt and equity investments. Community banks spend considerable resources to find and lend to CRA-eligible projects within their communities, yet only receive credit for the year in which the loan was originated. In contrast, a bank that makes an investment on the same project will receive credit for each year that the bank holds the investment in its portfolio.

As the Treasury report notes, the differing treatment between debt and equity discourages banks from making loans in their communities, even though loans would provide more benefit to the community.¹⁵ ICBA recommends that the agencies remedy this discrepancy and provide loans with the same annual consideration as investments.

Expand CRA Eligibility for Certain Categories

ICBA supports the use of programs and products that connect banks to CRA-eligible activities, such as CRA-focused investment funds, financial literacy programs, and fintech solutions designed to connect banks with communities that need financial services.

ICBA also encourages the agencies to award credit for any community service provided by a bank employee, regardless of whether the service is financial in nature or conducted during banking hours. In aggregate, banks employ many professionals that comprise a multitude of skills, not always limited to financial services. For example, a bank will likely have professionals with marketing, IT, communication, or legal skills. If these professionals volunteer their services to nonprofit organizations, the agencies should not discount these services merely because they are not financial in nature. One salient example is bank volunteer hours spent with Habitat for Humanity. A bank received credit for giving donations to build a house, but not for providing human capital to build the house. Without question, activities such as this benefit community organizations, which benefits the entire community, which meets the spirit and intent of the CRA statute.

Grant Credit for Serving LMI and “Credit Desert” Areas Outside Assessment Area

ICBA recommends that credit be awarded for loans to, investments in and services for LMI areas, even if those LMI areas are outside the bank’s assessment area. Currently, bank examiners will only award credit for LMI activities outside of an assessment area if the bank has demonstrated that it has adequately served its own assessment area, first.

¹⁵ Memorandum from the U.S. Department of the Treasury to the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation (April 3, 2018) (available at <https://home.treasury.gov/sites/default/files/2018-04/4-3-18%20CRA%20memo.pdf>), at 23.

Restricting LMI activity outside a bank's assessment area is counterproductive to the purposes and intent of the CRA. Serving LMI areas across our nation is a goal that should be encouraged. Accordingly, while banks should not be required or expected to serve LMI areas outside their assessment area, the agencies should provide credit to banks that choose to serve LMI areas, regardless of their physical footprint. Credit without regard to physical footprint should also be available for other areas that the federal or state government has designated as targeted areas in need of financial services or credit. These areas should include Opportunity Zones, Persistent Poverty Counties, and areas eligible for New Market Tax Credits, among others.

Exempt Minority- and Women-Owned Financial Institutions and Provide Additional Accommodations for Community Development Financial Institutions

The OCC notes that majority-owned financial institutions may receive CRA credit when they lend to, invest in, or partner with minority- or women-owned financial institutions, even if the activities do not benefit the majority-owned institution's community. Given this fact, the ANPR inquires as to what types of ventures should be eligible for CRA credit.

ICBA supports the current treatment under Q&A § __.12(h)-6, which states that there does not need to be an immediate or direct benefit to the institution's assessment area(s) to satisfy the regulation's requirement that these types of activities benefit an institution's assessment area(s) or broader area that includes the institution's area. Although the activities of the organization or fund may not always directly benefit the institution's assessment area(s), the agencies believe that, at some point, the institution's assessment area(s) may receive some benefit and for this reason such activities will receive consideration.

ICBA recommends that in addition to the existing treatment of activities involving minority- or women-owned financial institutions, CRA regulations should exempt minority- and women-owned financial institutions from documentation and full-scope 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.¹⁶ If majority banks receive credit for investing or lending to minority- and women-owned financial institutions, then requiring minority- and women-owned financial institutions to document compliance with CRA regulations seems redundant.

¹⁶ 12 U.S.C. §2903(b).

Similarly, ICBA recommends that the regulations provide accommodations for bank-designated, certified Community Development Financial Institutions (“CDFI”). 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.¹⁷

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.¹⁸ Banks are awarded credit for lending to, investing in, or partnering with CDFIs. 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 the fact that their business model and lending activities meet 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 acknowledgement that their missions and special characteristics already demonstrate adherence to the mission of CRA. Alternatively, the agencies could 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.¹⁹ ICBA urges OCC and the other agencies to use the information captured in the annual reports in lieu of, or to streamline, full-scope CRA performance evaluations.

Metric-Based Performance

The OCC is contemplating modifying and streamlining the existing CRA performance tests by using an alternative evaluation method, such as the use of metrics within the performance tests. A metric-based performance measurement system would include thresholds or ranges that correspond to the four statutory CRA ratings categories. As envisioned by the OCC, these benchmarks could represent the overall benchmarks for obtaining a particular rating and could be composed of the micro components of CRA-qualifying lending, investments, and services. These components could be aggregated to achieve the overall benchmark or level of performance. The OCC believes such an approach could confer several advantages and is

¹⁷ 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.

¹⁸ CDFIs with active certifications from the CDFI Fund are considered to be public welfare investments according to 12 CFR §24.

¹⁹ 12 C.F.R. §1805.201(c).

seeking comments on the perceived-benefits and potential drawbacks associated with a metric-based approach.

ICBA appreciates that the OCC is taking this opportunity to explore the creation of new tools and mechanisms that could hold the potential for many benefits, including increased objectivity, clarity, and transparency. However, there is not enough information for ICBA to opine on the efficacy or desirability of such a metric. While these benefits could potentially be advantageous, there is also great potential for unanticipated ancillary effects, such as added complexity, static treatment, and stale measurements, all discussed further, below. Although the suggested metric-based framework may remove some of the inconsistencies and subjectivity prevalent in the current framework, it raises concerns. Finally, it is important to stress that any adoption of a metric-based performance framework will first require a complete overhaul of CRA regulations.

Any Metric Must Allow for Differences in Bank Profiles and Markets

An objective, measurable standard would help to provide clarity and consistency in evaluating a bank's performance during an evaluation period. However, 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. Banking is not a one-size-fits-all business, nor are the needs of the consumers and small businesses they serve. If the OCC elects to pursue and implement a metric-based performance approach, ICBA recommends the agencies address these concerns and 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.

Many community banks have expressed the appeal of having a trained examination team use knowledge of the area and market conditions when evaluating a bank. They state that such first-hand knowledge and experience could be more desirable than a static metric developed by personnel with no knowledge of the bank's local area. As the OCC and other banking agencies deliberate on the potential application and flexibility of metrics, ICBA urges the agencies to consider how to incorporate regional and market differences into a widely-adopted metric, and whether local expertise could be leveraged in developing the performance metric.

Further valuing local knowledge, many community banks believe that if a metric is implemented, that metric should be used to complement, rather than replace, on-site, examinations for performance context. For example, a bank might have a lower loan-to-deposit

ratio than other banks in the area, but a bank's performance context could reveal and explain extenuating circumstances that could not be captured in a metric. If a metric-based approach is used exclusively as the sole measure, some banks might not meet the required benchmarks because of circumstances outside their control.

A metric-based framework would need to capture and consider all relevant activity and account for data points that might be difficult to quantify, such as "innovativeness," "responsiveness," and "complexity." According to Q&A §__.21(a)-1 – 4, examiners will "consider the responsiveness to credit and community development needs, as well as the innovativeness and complexity...of an institution's community development lending, qualified investments, and community development services."

Establishing a quantifiable metric and scale presupposes the ability to capture and categorize all activity, and then to compare actual bank activity against the dataset of all possible activity, resulting in a measurement, i.e., a percentage or ratio. However, because innovative products are new, it is unlikely that parameters are established for the metric, and these products therefore would not be captured or quantified for the benchmarks.

Of course, the definition of "innovative" can be debated (see discussion on refining definitions, above). Nevertheless, a performance framework that is supposed to use standard metrics will fail when it comes across a product or activity that has yet to be observed, categorized, and accounted for. This difficulty would also arise when trying to capture and measure unique bank business models that have yet to be encountered and contemplated.

There is also a concern that if a metric is incorporated, then examiners will not have the flexibility to provide credit when it does not meet the black letter of the metric. Utilizing a metric-based performance framework may limit examiners to strict, objective measures without the ability to consider the unique differences of community banks and performance context.

Establishing Consistency Is a Prerequisite to Any Metric-Based Performance Test

It is important to note that the existing CRA framework already utilizes ratios and metrics. CRA examiners currently use metrics, such as loan-to-deposit, market share, and "in/out" ratios, as well as the number and dollar amount of loans and investments. These metrics are also used to evaluate activities for LMI populations.

Despite the use of these metrics, community banks still experience nontransparent, as well as inconsistent and subjective examinations. Given that some semblance of a metric-based framework is already in use, it is unclear how additional reliance on metrics will address the

aforementioned issues. The use of these metrics does not necessarily eliminate subjectivity, and it stands to reason that wider adoption might not achieve the desired results of such a transformational approach.

More important than a metric-based standard, community banks want clear expectations and consistency so that they can focus on serving the needs of their communities rather than speculating what activities will receive credit and what documentation demonstrates compliance.

Provide an Option to Retain Existing Performance Framework

Overall, ICBA appreciates OCC's effort to explore and implement a system that would instill more reliability, certainty and predictability into CRA examinations. While a metric-based framework could achieve these desired results, there are steps that the banking agencies should take before adopting a metric-based framework. If OCC opts to include a metric-based approach in a future notice of proposed rulemaking, ICBA strongly urges that community banks have the option of continuing to use the current framework.

Again, ICBA supports the stated goals of a metric-based approach, but its development will take many trials and iterations, and its adoption will take time. As banking agencies probe this idea, ICBA recommends the concurrent exploration of other methods that might achieve the same goals and benefits. Additionally, ICBA urges that the CRA regulations be thoroughly reformed or revised before any such metric is implemented.

Recordkeeping and Reporting

The OCC is seeking comments on how to modernize CRA regulations to promote transparency and consistency in recordkeeping, reporting and examination requirements. The current regulatory approach does not facilitate regular tracking, monitoring, and comparison of levels of CRA performance by banks.

As previously stated, community banks experience inconsistency in the examination process, which creates uncertainty and confusion for community banks. Of primary concern is that many of the community development activities are subjective and are not validated until an exam occurs, and in some instances, until a bank receives its performance evaluation.

Often, documents accepted during one examination are not sufficient in a following examination. For example, in one instance, a community bank was told that a community development loan for revitalization must be directly related to a community plan, or the mayor's office must confirm that the applicable area is blighted and there is a community plan

to revitalize the area before credit is given. However, a community development loan to revitalize a long-standing vacant “big box” retail store in a similar location was given credit for jobs creation without requiring documentation regarding a community plan or confirmation from the mayor’s office. In another situation, a community bank developed a donation program to assist LMI individuals in the community. During one exam, the program was considered innovative and the community bank received credit. However, the program was not even evaluated during the following exam.

Banks should be provided clear guidance on what documentation is required for all activities prior to their exam. The inconsistent way that loans and services receive CRA credit makes it difficult for community banks to determine how well they are meeting their CRA requirements until they receive their performance evaluations well after an exam.

In addition to the inconsistency with documentation requirements, community bankers are seeing a trend of regulators requiring an increasing number of documents to receive CRA credit for similar activities. The documentation and recordkeeping required for CRA compliance should be clearly set and consistent across exam cycles as well as across agencies and should be clearly communicated prior to an exam. Oftentimes, examiners request additional and excessive documentation for activities including donations, service hours and community development loans. During one exam, to qualify a multi-family affordable housing project for CRA credit, a community banker was told they needed to provide proof of advertisement or a letter from the developer that he was targeting LMI tenants. However, the bank already demonstrated the development was in an LMI census tract, and that 100 percent of the tenants were paying rent below HUD guidelines. Obtaining this type of additional data and ensuring the data is in a format that is requested by examiners for analysis is extremely time consuming and cumbersome, particularly when the bank is unsure which specific documents would be required for CRA credit on a particular loan or service.

Currently, examiners will not share their method for determining CRA credit. Examiners often do not share which community development loans they accepted, their investment tests or service requirements. Some community banks report that they have attempted to reconcile the agency’s evaluation report with what they submitted to learn what was included and what was excluded so that they could adjust going forward. However, they are not able to perform this beneficial analysis, despite specifically asking their examiners. ICBA urges the agencies to be more transparent during the examination process and provide more guidance to identify what data and documentation are acceptable before the examination so that community development loans, service hours, and investments receive CRA credit.

Furthermore, community banks often express frustration regarding the time and effort it takes to collect and record the appropriate data. They must often describe each investment, collect

various and inconsistent documentation on various organizations as well as community involvement to ascertain the credit needs of the LMI community. Therefore, regulators should utilize available public information prior to requesting records from the bank to verify whether any activity should receive CRA credit so as not to burden community banks with extensive data collection.

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

While we understand this ANPR is seeking comment on reforming 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 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 for taking the initiative to modernize CRA and to reduce regulatory burden on community banks. A community bank's success hinges on the success of its community and therefore, ICBA and community banks support fair, equitable, consistent and transparent implementation of the Community Reinvestment Act. Please contact Michael Emancipator at Michael.Emancipator@icba.org or me at Lilly.Thomas@icba.org if you have any questions or comments.

Sincerely,

/s/

Lilly Thomas
Senior Vice President and Senior Regulatory Counsel

Appendix A – List of Activities That Should Receive Presumption of CRA Credit

ICBA recommends that the following activities receive a presumption of CRA credit. The list is meant to be illustrative, but not exhaustive.

Presumption of credit should be awarded for activities that are part of federal programs that are designed to benefit LMI populations. This should include programs like membership in the Federal Home Loan Bank (FHLB) system. Membership in a FHLB requires the purchase of FHLB stock, which is in turn used, in part, to develop and invest in affordable housing programs and community investment programs. Since the inception of the affordable housing program, the FHLB system has awarded billions of dollars for the acquisition, development, or preservation of affordable owner-occupied and rental housing.

Full CRA consideration should always be given to activities that occur in partnership with any CRA-qualified organization, specifically for board service and volunteerism. Any volunteer activities that benefit LMI, underserved/distressed areas, and small businesses should receive CRA credit regardless of whether the service is related to the provision of financial services if the organization's activities are consistent with the intent of CRA.

Examples include:

- Service on boards or committees of local nonprofits, not limited to financial expertise—including e.g. digital, legal, marketing, administrative
- Providing oversight, review, or advise on nonprofit finances (e.g., operating budget, audits, micro-loans)
- Helping with organizational fundraising
- Helping with organizational marketing or promotion efforts
- Collecting, organizing, or delivering food or supplies (medical, household, disaster items)
- Serving food in a food kitchen
- Providing assistance or care to seniors
- Working with or advocating for foster youth
- Building or repairing homes such as Habitat for Humanity
- Improving community infrastructure (e.g., school repairs, community gardens, environmental clean-ups)
- Assisting with online and mobile banking services

Full CRA consideration should also be given to activities that address the following issues where the majority of beneficiaries are considered lower-income or where successfully addressing these issues result in more stabilized communities. If the mission of the organization is one of the following and the beneficiaries in their mission, vision or goals are CRA qualified, these should receive presumptive CRA credit.

Examples include:

- Food security
- Homelessness
- Senior/elder services
- Health services
- Immigration/refugee assistance
- Workforce development
- Affordable housing
- Economic development
- Domestic violence
- Disaster relief
- Mental & developmental disabilities
- Foster care
- Day care
- Tax preparation
- Thrift store services

All Financial Literacy programs, including but not limited to the following should receive CRA credit:

- Participation in First Time Homebuyer seminars/homeownership education/counseling
- Participation in FDIC Money Smart programs
- Participation in high school Credit for Life Fairs
- Small business technical assistance providers
- Digital access and digital literacy, including financial education webcasts
- Financial education programs targeted to elderly
- Junior Achievement
- Communities in Schools

Government and quasi-government programs should receive a presumption of credit, including the activity related to the following:

- Community Development Financial Institution loans and investments
- Down payment assistance programs – publicly sponsored
- Economic Development Authorities
- Federal Home Loan Bank AHP Grant and Subsidy Application Sponsorship
- Government-Sponsored Enterprises' affordable housing programs
- Housing finance agencies
- Low-Income Housing Tax Credit investments
- Municipal projects focused on community development
- New Market Tax Credit investments
- Qualified Opportunity Zone Funds
- Rural Business Investment Companies
- Small Business Administration Programs
- Small Business Investment Company
- State and municipal obligations
- Subsidized mixed income housing
- Tax advantaged affordable housing programs
- USDA programs, such as USDA Rural Development