



August 22, 2023

Via Electronic Mail

Michael Barr, Vice Chair for Supervision
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Martin Gruenberg, Chairman
Attention: Comments RIN 3064-AF81
Federal Deposit Insurance Corporation
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Michael Hsu, Acting Comptroller
Attention: Comment Processing
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RE: Community Reinvestment Act (Docket No. R-1769, RIN 7100-AG29; Docket ID OCC-2022-0002, RIN 1557-AF15; RIN 3064-AF81)

Ladies and Gentlemen:

The Bank Policy Institute¹ and the American Bankers Association² write regarding the federal banking agencies' notice of proposed rulemaking to revise their regulations under the Community Reinvestment Act.³ Two recent developments threaten to upend how banks design programs to ensure CRA compliance, and we respectfully submit that the agencies must not adopt final CRA rules until the ultimate outcome of these events is clear.

¹ The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's bank-originated small business loans, and are an engine for financial innovation and economic growth.

² The American Bankers Association is the voice of the nation's \$23.7 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2.1 million people, safeguard \$18.7 trillion in deposits and extend \$12.2 trillion in loans.

³ Community Reinvestment Act, 87 Fed. Reg. 33,884 (June 3, 2022). The Associations previously submitted comments in response to the proposal.

First, the banking agencies recently proposed regulations that would substantially increase capital requirements for larger banks in ways that will materially affect key activities underpinning these banks' CRA programs, leading to reduced credit availability and economic growth. Second, the U.S. District Court for the Southern District of Texas recently enjoined the CFPB from implementing or enforcing its new Section 1071 small business lending data collection rule until the Supreme Court rules on a constitutional challenge to the CFPB's funding structure. The injunction will, at a minimum, delay many banks' 1071 data collection and reporting by as much as 10 months. The CRA proposal anticipates using the data collected under Section 1071 in various ways to assess CRA compliance.

ABA and BPI support the longstanding goals of the CRA to promote and advance economic opportunity by encouraging banks to provide loans, investments, and services broadly across the communities they serve, including low- and moderate-income areas. We also support efforts to modernize the CRA regulatory framework to ensure that the CRA remains an effective mechanism for sustaining and revitalizing communities.

However, as described below, we do not believe that the agencies or the public fully understand the impacts that the proposed capital changes would have on banks' CRA programs, which must be considered, both by the agencies and the public, before any new CRA rules are finalized. The agencies should consider whether changes to the CRA proposal are warranted in light of the proposed changes to the capital rules, and, if so, the agencies must seek comment on any such changes. Should the agencies finalize the CRA rules before the capital rules are finalized, the agencies will not have provided the public with a meaningful opportunity to comment on the proposed CRA amendments in light of the changes banks are likely to make to their CRA programs due to revisions to the capital rules. We also believe that the agencies should not finalize the CRA rules until the Supreme Court determines the constitutionality of the CFPB's funding structure and the implications of that decision on the implementation of new CRA rule are understood.

1. The recently issued bank capital proposal could materially change bank decisions to offer certain products, thereby demanding a reassessment of the CRA proposal itself.

The banking agencies recently proposed significant changes to the regulatory capital framework for larger banks that, if finalized, will profoundly affect those banks' business strategies, including how they structure and operate their CRA programs. At a minimum, the agencies have estimated that the proposal would result in an aggregate 16 percent increase in common equity tier 1 capital requirements for covered bank holding companies.⁴

Banks are just beginning to assess the potential implications for their respective institutions of the proposal that spans over 1,000 pages and the resulting changes they may make to their businesses, which would likely extend to their CRA programs. The increased capital requirements alone will lead each large bank to evaluate its business lines and activities and potentially change its existing business strategies or product offerings. More specifically relevant for CRA purposes, the proposed capital rules would reduce incentives to engage in mortgage lending, which is central to the CRA programs of many

⁴ See Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency Press Release, "Agencies request comment on proposed rules to strengthen capital requirements for large banks," (July 27, 2023), available at: [Federal Reserve Board - Agencies request comment on proposed rules to strengthen capital requirements for large banks](#).

banks.⁵ Currently, a 50 percent risk weight is assigned to many first-lien residential mortgage loans. Under the capital proposal, regulators would apply risk weights of 40 to 90 percent, depending on a loan's loan-to-value ratio (LTV). Loans with higher LTV ratios would receive higher risk weights. Many banks offer low down payment mortgages as a means of meeting the credit needs of low- and moderate-income families. A proposed reduced cap on mortgage servicing assets that can be deducted from larger banks' regulatory capital also is likely to have second-order effects in the overall mortgage market and banks' roles therein. These proposed changes, if finalized, will significantly affect the regulatory capital treatment of banks' CRA-related activities. We do not believe that the agencies, when developing the CRA proposal, took account of the higher capital costs of mortgage lending and servicing that would result from the regulatory capital proposal and the resulting effects on banks' CRA programs.

These are just some of the specific proposed changes to the existing capital framework under consideration that could affect CRA programs. As we continue to evaluate the proposed capital rules, we may discover additional aspects of the proposal that could change the calculus for certain bank business lines, including those that are core to banks' CRA programs. For example, additional analysis is needed to determine how the capital rules would affect other CRA lending activities, such as multifamily, community development, and small business lending.⁶ In addition, further study is needed to determine whether and to what extent the capital proposal might impact bank partnerships, such as loan participations and correspondent lending, which are central to CRA lending by *all* banks, not just those that would be subject to the capital proposal.

For example, many community banks sell their mortgage loans to larger banks. If the capital rules reduce the risk appetite of larger banks to purchase these loans, mortgage lending by smaller banks could be impacted. In addition, banks of all sizes pool their resources to finance community development projects and provide credit to businesses. To the extent that larger banks reduce certain

⁵ See, e.g. Letter of July 24, 2023, from National Housing Conference; Mortgage Bankers Association; NAACP; National Association of REALTORS®; and National Urban League to The Honorable Jerome Powell, Chairman, Board of Governors of the Federal Reserve System; The Honorable Michael Hsu, [Acting] Comptroller, Office of the Comptroller of the Currency; and The Honorable Martin Gruenberg, Chair, Federal Deposit Insurance Corporation, opposing agencies' reported plan to "significantly increasing capital standards on some mortgages with down payments of less than 20%" in advance of the agencies' approval of the proposed rules. The groups stated that such "a significant increase in capital standards will lead to reduced credit availability for all types of lending and undermine economic growth. If these standards are adopted, they will have a devastating impact on our efforts to increase Black homeownership and disadvantage all first-time, and, in particular, first-generation homebuyers who do not have the benefit of multi-generational wealth or higher than average incomes." Available at: <https://nhc.org/wp-content/uploads/2023/07/Housing-Groups-Letter-re-Bank-Capital-7.25.23.pdf>; see also Laurie Goodman, Ellen Seidman, and Jun Zhu, "Under the Current CRA Rules, Banks Earn Most of Their CRA Credit through Community Development and Single-Family Mortgage Lending," Urban Institute (July 9, 2020), available at: [Under the Current CRA Rules, Banks Earn Most of Their CRA Credit through Community Development and Single-Family Mortgage Lending | Urban Institute](#).

⁶ The risk weight for small business loans would remain 100 percent under the proposal. Nevertheless, due to the allocation of a portion of the new operational risk charge to small business loans, the proposal effectively results in higher capital requirements for small and medium-sized enterprises. Furthermore, banks approach capital allocation with a focus on overall risk weights. This means that when capital requirements increase, their aim is to decrease their overall risk-weighted assets, and since small businesses carry an elevated risk weight, they would likely be prioritized as a primary target for exposure reduction.

credit activities in response to the capital proposal, this dynamic will affect community banks as well as businesses and communities seeking financing. All of these proposed changes, like the proposed changes to the regulatory capital treatment of mortgage activities, change the assumptions on which the CRA proposal rests, about which the public must be able to comment, and the agencies must consider, before the CRA rules are finalized.

The combined effect of the proposed changes to the capital rules and the proposed CRA rules could constrict access to credit and undermine the objectives of the CRA. For example, under the proposed CRA rules, “large” bank CRA performance would be measured in new “retail lending assessment areas” (RLAAs) that are areas in which banks have a minor volume of mortgage or small business loans. According to the agencies’ own projections, 34 percent of banks would fail the Retail Lending Test in their RLAAs and 39 percent would only receive a Low Satisfactory rating. As discussed in our respective CRA comment letters, the CRA proposal alone may give banks an incentive to reduce lending or pull out of communities altogether where they have a small presence that would trigger the creation of an RLAA. The issuance of the proposed capital rules has the potential to exacerbate this incentive. The agencies have not grappled with the question of whether the specter of poor CRA performance, *coupled with higher capital requirements*, would cause banks to stop lending in certain RLAAs—a result that would harm customers and communities and surely is not what the banking agencies intend.

For these reasons, the agencies should not issue final CRA rules until they finalize the revisions to the capital framework. At that time, the agencies should provide the public with additional time to comment on the CRA proposal to take account of the changes banks are likely to make to their CRA programs as a result of the proposed changes to the capital rules. Indeed, the agencies also should evaluate whether the capital changes warrant modifications to the CRA proposal and seek comment on any such changes.

2. An injunction barring enforcement of the CFPB’s new small business data collection rule leaves a key component of the new CRA rules incomplete.

There is an additional practical reason to delay finalizing the CRA rules. In March, the CFPB issued a final rule implementing Section 1071 of the Dodd-Frank Act (1071 rule), which requires lenders to collect and report demographic information and other data from small businesses. On July 31, 2023, the Federal District Court for the Southern District of Texas enjoined the CFPB’s enforcement of the data collection rule until the Supreme Court rules on a case challenging the constitutionality of the Bureau’s funding structure.⁷ The District Court’s injunction significantly delays the mandatory compliance with the CFPB’s rule for banks that are members of the ABA or the Texas Bankers Association, which collectively encompass a substantial percentage of banks subject to the CRA.

Several key provisions of the proposed CRA rules anticipate relying on the data to be collected under the 1071 rule. For example, the agencies explained in the CRA proposal that a “significant change compared to the current CRA regulations’ criteria for economic development is that all reported lending to small businesses and small farms would be considered under the proposed Retail Lending Test . . . and not under the proposed economic development definition . . . [t]his change is related to the agencies’ proposal to leverage the CFPB’s proposed small business standard under section 1071 to define “small

⁷ *Texas Bankers Association, et al., v. CFPB*, Civ. Act. No. 7:23-CV-00144, Order Granting In-Part and Denying In-Part Plaintiffs’ Motion for Preliminary Injunction (S.D. TX July 31, 2023).

business” and “small farm” as those with \$5 million in gross annual revenues and below.”⁸ And under the CRA proposal, the market benchmarks for small business and small farm lending, which is one metric that would be used to evaluate banks’ performance in such lending, would be developed using Section 1071 data once it becomes available.⁹

Thus, the data required by the 1071 rule are deeply intertwined with several aspects of the agencies’ CRA proposal. Yet, the 1071 rule may be stayed for a significant period of time. The establishment of benchmarks for small business lending will be significantly delayed without the full 1071 data set. As a result, the agencies will not have the data they need to fully implement the CRA proposal as intended. The possible impact of the 1071 litigation on CRA modernization is one more reason that the agencies should refrain from finalizing the CRA rules until that impact is understood.

3. Conclusion

In conclusion, we respectfully request that the banking agencies delay finalizing the CRA rules until after they finalize changes to the capital rules, at which time the agencies should allow the public to comment on the CRA proposal in light of the likely impact of those rules on banks’ businesses and CRA programs. The agencies also should reevaluate the proposed CRA rules and consider proposing amendments for public comment to account for any such changes. In addition, the banking agencies should delay finalization of the CRA rules until a final determination is made regarding the status of the rules promulgated under Section 1071, which will affect how the agencies administer certain aspects of the CRA rules.

Respectfully submitted,

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⁸ 87 Fed. Reg. 33884, 33898 (June 3, 2022).

⁹ 87 Fed. Reg. at 33940. Until the data reported under the CFPB’s Section 1071 rule making is available, the agencies would rely on the existing small business/small farm data and definitions.