



BETTER MARKETS

October 29, 2021

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

Re: Request for Comment on Replacement of the Current Community Reinvestment Act Rule with Rules Based on the 1995 Community Reinvestment Act Rule (Docket No. OCC-2021-0014; RIN 1557–AF12)

Dear Ladies and Gentlemen:

Better Markets¹ fully supports and applauds the proposal by the Office of the Comptroller of the Currency (“OCC”) to replace the current Community Reinvestment Act (CRA) rule² (“2020 CRA Rule”) with rules largely based on those adopted (“1995 CRA Rule”) by the OCC, Federal Deposit Insurance Corporation (FDIC), and Board of Governors of the Federal Reserve System (Board) (collectively, “the Agencies”).³

The 2020 CRA Rule was a clearly misguided effort to modernize the 1995 CRA Rule, and Better Markets appreciates the OCC’s efforts to rescind the 2020 rule and work with the Board and the FDIC on a more thoughtful, effective modernization of the 1995 CRA Rule. A modernized, inter-Agency CRA rule is critical to increasing the provision of lending, investment, and financial services to individuals and small businesses in low- to moderate-income (LMI) communities. This is especially important after the economic hardships caused by the COVID-19 pandemic, which have disproportionately affected lower-income individuals, especially economically marginalized people of color.⁴

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies— including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans’ jobs, savings, retirements, and more.

² 85 FR 34734

³ 60 FR 22156

⁴ See the February and July 2021 issuances of the Board of Governors of the Federal Reserve System *Monetary Policy Report*, https://www.federalreserve.gov/monetarypolicy/files/20210219_mprfullreport.pdf and https://www.federalreserve.gov/monetarypolicy/files/20210709_mprfullreport.pdf

Even before the COVID-19 pandemic, the wealth gap had been growing for decades.⁵ Access to banking products and services provide a fundamental means of enhancing financial well-being and to achieving the American dream.⁶ Access to and the provision of credit can help individuals start and operate small businesses or purchase wealth-building assets, particularly homes, which are the most significant source of wealth for many people.⁷ If designed properly, the CRA can be a critical component to starting to close the income and wealth gaps and to achieving the goal of a more inclusive American economy.

The 2020 CRA Rule Should Not Have Been Proposed or Finalized

An OCC Rule Separate from the Board and FDIC Prevents the CRA from Being Appropriately Implemented

The OCC’s decision during the Trump administration to finalize its own rule in 2020 without the Board and the FDIC was detrimental to the implementation of both the letter and the spirit of the CRA, which requires that banks demonstrate they are serving “the convenience and needs of the communities in which they are chartered to do business.” The CRA is intended to apply to all LMI communities and all banks. The OCC does not supervise and regulate all banks, and so having a different set of standards for banks regulated by the OCC compared to banks regulated by the Board and the FDIC results in an unequal assessment by unequal criteria. If a community has banks that are regulated by all of the Agencies, then that community would have banks applying unequal efforts to comply with the CRA.

There must be only one set of criteria used by the Agencies that applies to all federally regulated banks. Otherwise, there would be an unequal definition of the “convenience and needs” of communities across the U.S. and an unequal assessment of the degree to which banks are indeed serving the communities in which they are chartered to do business. The OCC’s pursuit and implementation of its own separate CRA rule is reason in itself to rescind its 2020 CRA Rule.

The 2020 CRA Rule Was Clearly an Insufficiently Rigorous Execution of the Rulemaking Process

The 2020 CRA Rule was apparently hastily assembled and rushed through to finalization. The “final” 2020 CRA Rule was indeed not actually final but rather was incomplete and left open the setting of evaluation measure benchmarks, retail lending distribution test thresholds,

⁵ See the Board of Governors of the Federal Reserve’s data and plot of the distribution of household wealth since 1989, available at <https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/chart/>

⁶ Mehra Baradaran, *How the Poor Got Cut Out of Banking*, 62 EMORY L.J. 483, 489 (2013) (“Policy makers have always recognized that access to financial services and credit is a significant step toward individual economic advancement.”)

⁷ See Cassandra Jones Havard, *Doin’ Banks*, 5 U. PA. J.L. & PUB. AFF. 317, 320 (2020) (“financial inclusion--access to and participation in the formal banking economy--remains the primary way to enter the financial mainstream.”)

and community development minimums. The setting of these metrics was attempted to be addressed in a subsequent proposal in December 2020⁸ with an accompanying information collection⁹ that was intended to be used to calibrate these metrics. This “figure it out as you go” rulemaking process demonstrates the lack of sufficient thoughtfulness that is necessary for a rulemaking as impactful and consequential as one associated with the CRA. Any subsequent rulemaking must gather the necessary information in advance, as was the case with the Board’s roundtable discussions¹⁰ and advanced notice of proposed rulemaking (ANPR) in October 2020.¹¹

The 2020 CRA Rule Has Numerous Issues that Threaten to Result in Underserved Communities Being Further Underserved

The 2020 CRA Rule had numerous issues. One of the largest of these was the rule’s switch to a “one ratio” metric, which essentially reduces the CRA examination to a single ratio of the amount of “qualifying” activities divided by deposits. Such a crude and oversimplified metric removes incentives for banks to take a meaningful and targeted approach to providing products and services. Different communities have different needs, and this must be recognized and acted upon, as banks are supposed to be serving the needs of the communities in which they do business. For example, some communities may have more need for lending while others may have more need for investment. That is why the 1995 CRA Rule had separate tests with separate metrics.

Additionally, among other problematic changes, the 2020 CRA Rule expanded the scope of what counts as a “qualifying” activity beyond activities that could reasonably be considered beneficial to LMI communities and made modifications to the definition of assessment areas that could lead to activities being diverted from LMI communities. The combined set of provisions of the 2020 rule have the effect of almost encouraging banks to execute on larger-dollar, lower-impact activities.

The 2020 CRA Rule Lacked the Level of Public Support That Should Be Expected for Finalization

The 2020 CRA Rule lacked broad-based support and, in fact, faced opposition from both industry and consumer advocates. And although never explicitly stated by the Board and FDIC, the FDIC’s absence from the final rule – despite having been on the proposal – and the Board’s absence from even the initial proposal as well as the Board’s issuance of a separate ANPR suggest that the other agencies were opposed to the rule as well. In fact, the OCC’s own final rulemaking notice acknowledged the level of opposition – “Although commenters disagreed with

⁸ 85 FR 78258

⁹ 85 FR 81270

¹⁰ See a summary of these discussions published by the Board of Governors of the Federal Reserve System, *Perspectives from Main Street: Stakeholder Feedback on Modernizing the Community Reinvestment Act* (June 2019), <https://www.federalreserve.gov/publications/files/stakeholder-feedback-on-modernizing-the-community-reinvestment-act-201906.pdf>

¹¹ 85 FR 66410

the approach outlined in the proposal, the agency ultimately agreed with the minority of commenters who expressed support for the proposed framework.” Clearly, this rule should not have been finalized in the first place.

Responses to Questions Posed in the Proposal Regarding the Transition That Would be Necessary Upon Finalization

Generally, Better Markets encourages the OCC to transition back to the 1995 CRA Rule as quickly and wholly as possible. As discussed above, inconsistency in standards and requirements between the Agencies is detrimental to the effective implementation of the CRA. Negative effects from the 2020 CRA Rule already have been realized, and those effects will only grow as long as there are differences between the Agencies.

Should banks that were formerly large banks under the 1995 Rules and that return to large bank status as proposed begin data collection in 2022?

Banks that were formerly large banks under the 1995 CRA Rule that were classified as intermediate small banks (ISBs) under the 2020 CRA Rules should be required to begin filing the large bank data collection as soon as possible. These banks likely still have the information technology infrastructure still in place, albeit in a dormant state. After all, the hasty way the 2020 CRA Rule was finalized and the lack of involvement from the Board or the FDIC reasonably should have indicated to the affected banks that the 2020 CRA Rule likely would not remain. As noted above, OCC-regulated banks should revert to the standards and requirements of the 1995 CRA Rule as quickly as possible, and this particular requirement would likely not be an undue burden on the affected banks but would be a significant benefit to the implementation of the CRA.

Is the proposal to consider activities based on whether they qualified at the time the activities were conducted a reasonable approach to addressing the changes to the type of activities that will receive consideration in CRA examinations?

Considering activities based on whether they qualified under the 2020 CRA Rule would be reasonable and appropriate, but it highlights the negative effects that already have been realized by the finalization of the 2020 CRA Rule.

Should the OCC continue to provide consideration for activities that do not directly or indirectly serve a bank’s assessment areas or the broader statewide or regional areas that include a bank’s assessment areas under the proposed rules?

The issue of activities that do not directly or indirectly serve a bank’s assessment areas is a complicated issue that should be addressed in future inter-Agency rulemakings. Additionally, we highlighted above that OCC’s finalization of its rule separate from the other Agencies was problematic since all banks should be held to the same standards. This should apply here as well; that is, the standards should revert to the 1995 CRA Rule so that all Agencies are applying the same standards.

Is the OCC's proposed plan to maintain strategic plans approved under the June 2020 Rule with target market assessment areas a reasonable way of addressing this transition consideration?

The OCC should work with banks through their supervisory processes to modify strategic plans including target market assessment areas. While this would put additional burden on both supervisors and banks, the burden would not be unreasonable considering the special circumstances and that it is not wholly sensible that banks would utilize strategic plans that are based on a rule that no longer applies. These plans could be adjusted over time and various amendments to the original plans could be submitted based on certain deadlines.

Conclusion

Better Markets applauds the OCC's proposed rescission of the 2020 CRA Rule and its commitment to an inter-Agency rulemaking process to sensibly modernize the 1995 CRA Rule. The 2020 CRA Rule must be rescinded as quickly and fully as possible to ensure that the Agencies are applying the same rules and standards to all banks while the Agencies work to propose a new rule. This would prevent additional damage from being caused by the harmful 2020 CRA Rule and set the Agencies on equal footing as they consider the future of the implementation of the CRA.

Sincerely,



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