February 16, 2021

Ann E. Misback, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave. NW
Washington, DC 20551
RE: Docket Number R-1723 and RIN Number 7100-AF94

Dear Ms. Misback:

In its October 2020 Advance Notice of Proposed Rulemaking (ANPR), the Federal Reserve Board (FRB) invited public comment on ways that Community Reinvestment Act (CRA) regulatory implementation could be strengthened to address ongoing systemic inequity in credit access for borrowers of color and communities of color. We wanted to take the opportunity to augment responses included in comments submitted by a number of the undersigned organizations on the issue of systemic inequity and race, given an additional review of the CRA statute and the Equal Protection Clause jurisprudence on race-conscious policies in government contracting and university admissions. This is a consequential conversation, and we appreciate that the Federal Reserve has taken the lead in recognizing that a stronger CRA can and must be a tool to address systemic inequities in access to credit for people of color and communities of color.

Despite the statutory purpose and history of the Community Reinvestment Act (CRA) to address "persistent systemic inequity in the financial system for [low- and moderate-income] LMI and minority individuals and communities,"[1] the prudential regulators have to-date resisted affirmatively examining financial institutions for how they are lending and investing to borrowers of color and in communities of color. While there is no legal certainty, the CRA statute itself and the constitutional parameters set out by court cases around race-conscious policies demonstrate that the prudential regulators have substantial latitude to incorporate race and ethnicity in CRA evaluations and within the agency's framework design.

A greater consideration of race is permitted by the CRA statute

As a threshold matter, there is nothing that prohibits an explicit consideration of race or ethnicity in CRA examinations on the face of the CRA statute. The law fairly encompasses race. Its aim is "to encourage [regulated financial institutions] to help meet the credit needs of the local communities in which they are chartered," 12 U.S.C. § 2901(b), and regulators are to "assess the institution's record of meeting the credit needs of the entire community, including low- and moderate-income neighborhoods," id. § 2903(a)(1). Borrowers and communities of color plainly are part of these communities. Moreover, the emphasis on LMI neighborhoods is not exclusive; rather, it demonstrates that regulators may properly look at constituent parts of a community to aid in evaluating performance in the "entire community."

The CRA statute also explicitly incorporates race by providing banks CRA credit for partnerships with and assistance to minority- and women-owned financial institutions.[2] Nothing on the face of these specific provisions suggests that these are the only considerations of race Congress intended to permit. These explicit references undermine any broad claim that Congress intended regulators to be blind to race when evaluating how well institutions are meeting community credit needs.

The purpose of the law - to ensure the financial institutions meet the credit needs of their local communities and enacted after a long history of banks disserving specific parts of their communities -

[1] Federal Reserve's Advance Notice of Proposed Rulemaking (ANPR), p. 66412.
[2] 12 U.S.C. §§ 2903 and 2907.

provides a great deal of guidance to regulators deciding how and to what degree to incorporate race explicitly into CRA evaluations.

The government has a compelling interest in using race-conscious approaches

There are two main questions in a constitutional analysis of whether race may be used under CRA. Does the government have a "compelling interest" in using race, and, if so, is a particular use "narrowly tailored" to further that interest?[3] This is the "strict scrutiny" standard that courts have used to review race-conscious policies. The court might review the explicit incorporation of race in CRA performance evaluations under a strict scrutiny standard notwithstanding important distinctions between race-conscious CRA examinations and government procurement and university admission policies facing challenges under the Equal Protection Clause of the U.S. Constitution.

First, the supply of the highest CRA ratings are not limited, unlike the supply of contracts awarded through a government procurement process or the number of students admitted to college. One institution's receipt of an "outstanding" CRA rating does not reduce another institution's opportunity to receive one, too. Second, unlike the owner of the small business or a student, nothing about the financial institution's own racial identification would be relevant to the government's CRA rating. Nonetheless, if a strict scrutiny review were applied by the courts, it is a high standard – sometimes described as strict in theory, fatal in fact – though not insurmountable.

In order to overcome a court's strict scrutiny review, a decision to undertake more race-conscious CRA bank examinations could require regulators and defenders of the policy to demonstrate periodically that any quantitative or qualitative considerations that factor race more explicitly into CRA ratings are: goal-oriented and flexible; part of a multifaceted approach to a bank's evaluation; targeted to those parts of the country where race-based measured are demonstrably needed; as well as that more race-neutral approaches have been and continue to be inadequate to address historical and ongoing inequities in access to credit; and, that they do not overly burden those who do not benefit directly from more race-conscious considerations.

Remedying current discrimination and the continuing effects of past discrimination is, as a general matter, a compelling interest.[4] Federal, state and local research as well as studies and reports by non-governmental organizations, including NCRC, demonstrates that the long history of racial discrimination in access to credit, the persistent racial gaps in access, and the barriers to obtaining credit that are highly correlated with the legacy of past and never-remedied discrimination. These patterns persist today despite the focus of CRA examinations on race-neutral low- and moderate-income criteria.

A multifaceted evaluation of bank performance must include race-conscious considerations

A December blog piece outlined several open questions about how race might be incorporated in the framework that the FRB outlined in its ANPR.[5] The FRB's comment process provides stakeholders with

[3] See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). The reliance on race must be in service to a "compelling interest" and "narrowly tailored" to further that interest. Id. at 227, 235.
[4] See, e.g., Grutter v. Bollinger, 539 U.S. 306 (diversity in education is a sufficiently compelling interest to warrant targeted race-conscious measures; "we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination" at 328) (emphasis added); Midwest Fence Corp., 840 F.3d at 935 ("Remedying the effects of past or present discrimination can be a compelling governmental interest.").
[5] Gerron Levi, The Federal Reserve's Proposal on the Community Reinvestment Act (CRA)*: Opportunities to consider race more explicitly in the framework,* NCRC, December 2020, https://ncrc.org/the-federal-reserves-proposal-on-the-community-reinvestment-act-cra/.

the opportunity to explore ways to consider race and ethnicity while also addressing statutory and constitutional considerations.

More Race-Conscious Data

*Performance context***.** There is ample statutory and constitutional support for including racial demographic data in performance context. CRA examiners consider a broad range of economic, demographic, institution- and community-specific data to calibrate the bank's CRA evaluation. Performance context continues to be relevant for all categories of banks regardless of asset size under existing CRA standards. It is also key to both the quantitative metrics and qualitative considerations outlined in the Federal Reserve's proposed framework. Examiners should use race-conscious performance context to inform an examiner's analysis and conclusions when conducting CRA examinations. In particular, if an assessment area has a large population of people of color or a particular racial or ethnic group that remains disadvantaged regarding access to credit, the performance context should note this. The examiner should then assess whether the bank is addressing the needs of this group of borrowers through special affordable loan products or other means.

Community and Market Benchmarks. Similarly, in addition to the percentage of LMI census tracts and LMI families included as a part of the population/demographic data points included in "community" and "market" benchmarks for retail lending, regulators should also publish more race-conscious data points as well. Community data points should include the percentage of majority-minority census tracts and families of color, minority-owned business enterprises (MBEs) and minority-owned farms. Market data points should include the percentage of mortgage, small business, small farm and consumer loans by all lender-reporters in majority-minority census tracts and to borrowers of color, MBEs and minority-owned farms.

In addition to community and market benchmarks on bank branch distribution by tract income level, the agency should provide similar race-conscious community and market data, including on the percentage of all bank branches in majority-minority census tracts in an assessment area.

In addition to publishing total qualifying community development loans and investments at the local, national metropolitan and national nonmetropolitan level, the agency should also publish total qualifying community development financing activities in majority-minority tracts at the local as well as national level.

Regardless of any additional quantitative or qualitative consideration that regulators might give to this data, publishing more race-conscious data will allow policymakers, banks and community stakeholders to understand better the context in which banks are operating.

More quantitative and qualitative consideration of race in a performance ranges approach

The Federal Reserve is proposing quantitative thresholds for retail lending and community development financing, and performance ranges to achieve specific ratings on CRA subtests. Requiring banks to meet specific quantitative thresholds for borrowers of color or lending in communities of color in order to receive a certain rating may run afoul of strict scrutiny review. But as in the *Grutter* case (see footnote 4), we believe it is constitutional to add consideration of race to factors already considered by regulators, just as an admissions officer may constitutionally consider an applicant's race as part of the broader picture so long as it is not "the defining feature of the application."[6] Regulators have significant room to incorporate

[6]Ibid at 4. Grutter, 539 U.S. at 309.

race as part of a multifaceted evaluation of bank performance where race-conscious considerations are among many other considerations.

Aspirational goal-setting. Mortgage lending data reported as a result of the Home Mortgage Disclosure Act (HMDA), and soon small business lending data reported as a result of the implementation of Section 1071 of the Dodd-Frank Act, make setting flexible race-conscious lending goals possible. Such aspirational goal-setting would be informed by the performance context and any community and market benchmark data, but also loan application and denial data. In those markets where analysis of lending data indicates that specific borrowers of color have been and continue to be excluded from access to mortgage loans or business loans, regulators should set quantitative goals for lending. Examiners could evaluate bank effort towards meeting those goals in addition to other quantitative and qualitative factors considered as part of the proposed CRA performance ranges approach.

Qualifying geographies. The Board is considering whether to include underserved census tracts based on low levels of retail lending on CRA examinations. Examiners can consider the extent to which these areas are affirmatively included in bank assessment area(s) and also provide banks with credit for qualifying bank activities in these areas outside of bank assessment areas.[7] The ANPR also considers providing banks CRA credit for qualifying activities in designated areas of need outside eligible state(s), territories and regions. We believe the agency should consider race in the designating of these areas. Banks should receive consideration for qualifying bank activities in underserved census tracts and other designated areas of need that have high-minority concentration[8] as well as those areas that correspond to historical patterns of redlining.[9]

Qualifying Activities. A number of comment letters have also identified race-conscious activities that can be incorporated into qualifying activities and impact scores. Examiners can also consider a principles-based list of illustrative activities that establishes how banks can receive CRA credit for activities that are particularly impactful for borrowers of color and communities of color. We believe there is support in the statute and the case law to provide examiners with the discretion to assign impact scores for banks demonstrating an excellent distribution of retail lending and services to borrowers of color, community development financing and services and bank branches in communities of color.

Conclusion

By passing CRA, Congress aimed to reverse redlining and disinvestment associated with years of government policies and lending discrimination that deprived lower-income areas and communities of color of credit. Today, the market continues to fail to provide equitable access to credit products and services to borrowers and communities of color. With the flexibility of CRA's statutory framework and the constitutional parameters as a guide, we expect to develop these and other ideas on how to incorporate race and ethnicity into the CRA regulatory framework and build a broader conversation among stakeholders and with the prudential regulators in anticipation of an interagency rulemaking that will embrace a more race-conscious CRA.

National Groups

[7] See Bruce Mitchell, PhD and Josh Silver, *Adding Underserved Census Tracts As Criterion On CRA Exams*, NCRC, January 2020, https://ncrc.org/adding-underserved-census-tracts-as-criterion-on-cra-exams/.
[8] See Katherine Schaeffer, *In a rising number of U.S. counties, Hispanic and black Americans are the majority,* Pew Research Center, November 2019, https://www.pewresearch.org/fact-tank/2019/11/20/in-a-rising-number-of-u-s-counties-hispanic-and-black-americans-are-the-majority/
[9] See Jason Richardson, Bruce Mitchell, Juan Franco, NCRC, HOLC "redlining" maps: The persistent structure of segregation and economic inequality, March 2018, https://ncrc.org/holc/

National Community Reinvestment Coalition (NCRC)
American Sustainable Business Council
Americans for Financial Reform Education Fund
Center for Community Progress
Consumer Federation of America
Center for Responsible Lending
Consumer Action
Leadership Conference on Civil and Human Rights
National Consumer Law Center (on behalf of its low-income clients)
National Fair Housing Alliance
National Urban League

State Groups

California Reinvestment Coalition
Empire Justice Center
Hope Policy Institute
Massachusetts Communities Action Network
New Jersey Citizen Action