



March 15, 2021

RE: Comment on Brex's charter application

To Whom it May Concern:

The National Community Reinvestment Coalition (NCRC) maintains that Brex's application for deposit insurance for an Industrial Loan Charter (ILC) would not accord with safety and soundness standards for banks and has not demonstrated a significant commitment to meeting the convenience and needs of the community to be served as required per the Federal Deposit Insurance Act (FDIC Act) and the FDIC statement of policy on applications for deposit insurance.¹ Brex has developed an incomplete strategic plan for its Community Reinvestment Act (CRA) evaluation that does not adequately serve the credit and deposit needs of the communities, including low- and moderate-income (LMI) communities. Its application also does not address compliance with fair lending or consumer protection laws.

I. ILCs, Brex's included, present an unacceptable risk to the financial system

NCRC is opposed to Industrial Loan Charters (ILC) charters as problematic from a safety and soundness perspective. Federal agencies cannot comprehensively examine the parent institution of an ILC nor other affiliates and subsidiaries for their safety and soundness. The ability of the FDIC to thoroughly monitor the relationship between the ILC and its parent and to monitor the risk the parent poses to the ILC has been questioned by the Government Accountability Office and other stakeholders.²

During the financial crisis, two ILCs, Security Savings Bank, based in Nevada, and Advanta Bank Corp., based in Utah, failed. In addition, many parents of ILCs, including Lehman Brothers, General Motors, Flying J Inc., CIT Group Inc., CapMark Financial Group Inc., and Residential Capital, LLC, filed for bankruptcy.³

In its revisions to ILC regulations and examination last year, the FDIC did not resolve the ILC safety and soundness concerns nor did the FDIC establish any sensible guardrails or limits in response to anti-trust concerns. The agency fell far short of re-assuring the public that ILCs are a safe and sound option and do not pose systemic risk to the financial industry.⁴ Prudent limits on an ILC's market share would have helped alleviate concerns about monopolization and systemic risk but the FDIC did not address this issue. Because of this, NCRC opposes ILC charters.

II. Brex does not demonstrate a commitment to serve convenience and needs

While NCRC opposes this application on safety and soundness reasons, NCRC also opposes the proposed CRA strategic plan as inadequate. The FDIC's statement of policy on applications for deposit insurance

¹ FDIC. (2014, September 14). *FDIC Statement of Policy on Applications for Deposit Insurance*. Retrieved at <https://www.fdic.gov/regulations/laws/rules/5000-3000.html>

² General Accounting Office. (2005, September 15). *Industrial Loan Corporations: Recent Asset Growth and Commercial Interest Highlight Differences in Regulatory Authority*. GAO-05-621. Retrieved at <https://www.gao.gov/products/GAO-05-621>

³ *Statement of Martin J. Gruenberg, Chairman, Federal Deposit Insurance Corporation on De Novo Banks and Industrial Loan Companies before the Committee on Oversight and Government Reform*; U.S. House of Representatives; 2157 Rayburn House Office Building, <https://www.fdic.gov/news/news/speeches/spjul1316.html>

⁴ Federal Deposit Insurance Corporation, Final Rule, Parent Companies of Industrial Banks and Industrial Loan Companies, 12 CFR Part 354, RIN 3064-AF31, Federal Register, Vol. 86, No. 34 Tuesday, February 23, 2021, p. 10703, <https://www.fdic.gov/news/board/2020/2020-12-15-notice-dis-b-fr.pdf>.

states that a factor for consideration of approval of a charter application is the willingness and ability of the applicant to serve financial needs (credit and deposit needs).⁵

Receiving a bank charter is a privilege, not a right. Brex proposes a CRA strategic plan that focuses on community development only, although it will be a significant retail lender offering small business term loans, credit card loans, working capital and venture debt.⁶ Although Brex will be engaged in retail lending nationwide, it does not want to be evaluated regarding whether its retail activity is serving small businesses and LMI communities. In other words, it is asking the FDIC to refrain from evaluating its ability to serve financial needs of small businesses. Since the application does not show a willingness to serve needs commensurate with the applicant's ability, the FDIC must reject the application.

The lack of any goals for lending activities is contrary to the FDIC's regulatory requirements for a strategic plan. The FDIC's regulation states, "A bank shall address in its plan all three performance categories (lending, investment and services) and, unless the bank has been designated as a wholesale or limited purpose bank, shall emphasize lending and lending-related activities."⁷ As it currently operates, Brex is a specialist in making loans to small- and medium-sized businesses and offering deposit and money management services for these businesses. Because it is focused on making loans to small businesses and the FDIC regulation requires lending goals for such institutions, the lack of lending goals in Brex's strategic plan is a reason, in and of itself, for the FDIC to reject this application.

III. Assessment areas cannot be narrow and must include areas where a substantial amount of business is conducted

Brex proposes to establish Salt Lake County as its sole AA.⁸ The CRA regulations do not prohibit a branchless bank from establishing AAs beyond its headquarters. AAs can include areas where substantial amounts of lending activity occur.⁹ Again, if Brex's AA is restricted to Salt Lake County, it is not demonstrating a willingness to serve the credit and deposit needs where it does business as required by the FDIC statement of policy.

Moreover, Brex is effectively representing that its headquarters is a mechanism akin to branches that generates lending transactions. The headquarters is not analogous to a branch and is thus invalid as a basis for establishing an AA. Instead, customers across the country are using the internet to access Brex's lending and deposit services. The Federal Reserve Board is currently contemplating creating additional AAs on CRA exams that consist of areas with significant amounts of loans or deposits.¹⁰ In the spirit of this proposed reform, Brex could likewise create AAs across the country that include significant numbers of loans and deposits. These AAs should capture the great majority of a bank's lending and deposit activity.

⁵ FDIC. (2014, September 14). Op. cit.

⁶ Brex application, p. 6.

⁷ See the FDIC CRA regulations, § 345.27 (f) (ii) Strategic plan, <https://www.fdic.gov/regulations/laws/rules/2000-6500.html#fdic2000part345.27>

⁸ Application, p. 38.

⁹ See § 345.41 (c) (2), Assessment area delineation, of the FDIC CRA regulation. A document retrieved at <https://www.fdic.gov/regulations/laws/rules/2000-6500.html#fdic2000part345.41>

¹⁰ NCRC Comment On Federal Reserve Board's Advance Notice Of Proposed Rulemaking Regarding The Community Reinvestment Act – February 2021, <https://www.ncrc.org/ncrc-comment-on-federal-reserve-boards-advance-notice-of-proposed-rulemaking-regarding-the-community-reinvestment-act-february-2021/>

NCRC's recent white paper suggests that branchless banks establish AAs using loan and deposit data. The AAs would represent significant levels of lending and/or deposit activity. NCRC also suggests that using loans per one thousand residents as a means of identifying AAs can be effective in assisting branchless banks in identifying areas (metropolitan areas or rural counties) where they make a high number of loans and which are relatively underserved by traditional banks.¹¹ If branchless banks establish AAs that are underserved by traditional banks, they would help to reduce disparities among CRA deserts and better-served areas. The objective is to establish AAs in a healthy diversity of areas, including larger metropolitan areas, smaller metropolitan areas and rural counties.

If Brex was interested in establishing AAs in good faith and in compliance with CRA's statutory purpose to extend credit to where it is needed most, it would publicly review its data on loan counts on a county and metropolitan level and engage community-based organizations and other stakeholders in a conversation about identifying areas for AAs. It could commit to engaging in such a dialogue in its description of its proposed strategic plan.

IV. CRA strategic plan goal setting must be rigorous and in relation to peers and needs

In addition to an unacceptable absence of goal setting for retail lending, NCRC believes that Brex's community development goals in its strategic plan fall short of a thoughtful and comprehensive strategic plan. The following are details regarding the shortcomings in Brex's CRA plan.

- A. Goals for retail lending: Since Brex issues small business loans currently, it is in a position to review its data and to develop realistic yet rigorous goals for itself. Brex's strategic plan could include specific goals for at least some of proposed metrics such as the percent of loans in LMI tracts and the percent of loans to small businesses with revenues less than \$1 million. At the very least, Brex could indicate the methodology for its metrics such as whether it would compare itself to peers (which peers or the industry at large) and demographic data often used in CRA exams. These goals would be established for each AA.
- B. Goals for deposit accounts and service delivery: For its mobile banking, Brex should have adopted benchmarks based on specific guidance on how CRA examiners evaluate alternative delivery systems in the Interagency Questions and Answers Regarding CRA (Interagency Q&A).¹² The Interagency Q&A advises that CRA examiners will scrutinize whether a financial institution's alternative delivery systems are effectively delivering services to LMI populations by considering a variety of factors including: ease of access, cost to consumers or small businesses, the range of services delivered, ease of use, the rate of adoption and use, and the reliability of the system.¹³

Brex should have established specific performance measures and goals for small businesses for each of these factors. Factors like the rate of adoption and use and the reliability of the system should have separate metrics and goals specifically set for rural as well as urban areas and for

¹¹ Josh Silver. (2021, January 19) *How Can Geographical Areas on CRA Exams Work for Branchless Banks?* Retrieved at <https://www.ncrc.org/how-can-geographical-areas-on-cra-exams-work-for-branchless-banks/>

¹² *Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment Act Guidance*. OCC, Board of Governors of the Federal Reserve System, FDIC, Fed. Reg. 81, 142 at 48506. Retrieved at <https://www.gpo.gov/fdsys/pkg/FR-2016-07-25/pdf/2016-16693.pdf>

¹³ Interagency Q&A at 48542.

underbanked populations. The FDIC has an opportunity to use the Q&A guidance and insist that Brex's CRA plan incorporate these metrics so that the public can discern whether Brex's charter application would specifically meet the convenience and needs of LMI communities.

- C. Goals for community development lending and investment: Brex compares itself against peers and establishes specific ratios of community development financing divided by assets for attaining Satisfactory and Outstanding on this part of its strategic plan. However, the public cannot judge the adequacy of these ratios because Brex does not indicate the resources of its current parent or the estimated levels of its assets or deposits. Ratios can be best judged when more information is available on asset or deposit levels for the applying institution. The estimated asset level can then be compared with the robust data that the Federal Reserve Board last year released on a sample of CRA exams.¹⁴ Without basic information on asset and/or deposit levels, the public is examining an opaque box when attempting to judge Brex's capacity for community development financing. At the very least, information on whether it would be an intermediate small bank or large bank would have been helpful in judging its proposed ratios.

The proposed community development financing is not particularly innovative. Brex will focus on well-established instruments such as mortgage-backed securities or bonds for investing in affordable housing in Salt Lake County.¹⁵ While this is commendable, it would not be adequate. Brex is a small business lending specialist and as such should have insights into how to bolster the creditworthiness of small business applicants for credit. It should therefore devote a considerable amount of its community development financing to supporting small business incubators and other technical assistance providers for small businesses. It could also identify equity financing opportunities including Small Business Investment Companies (SBICs).

Brex briefly mentions communities of color in Salt Lake County.¹⁶ It could determine whether it can help further develop the infrastructure in those communities and other communities of color including tribal communities to support women- and minority-owned small businesses as well as affordable housing.

- D. Goals for community development services: The strategic plan describes goals in terms of volunteer staff hours which is not sufficient.¹⁷ This suggests an ad hoc approach that will not effectively promote financial education or creditworthiness among small businesses. Brex has expertise in developing financial education materials for small businesses as it describes in its CRA plan.¹⁸ It should deploy this expertise in Salt Lake County and in other underserved areas of the country. It should partner with community-based organizations to deliver counseling sessions in person as well as online. Goals should be established such as increases in savings rates, improvements in creditworthiness, and numbers of applications for small business loans. Brex could develop these goals based on its own experience with financial education, comparing itself

¹⁴ Federal Reserve Board, Analysis Data Tables, https://www.federalreserve.gov/consumerscommunities/data_tables.htm

¹⁵ Application, p. 44.

¹⁶ Application, pp. 39-43.

¹⁷ Application, p. 50.

¹⁸ Application, p. 47.



to peers and consulting with small business technical assistance providers about how differing levels of resources and efforts translate into goal attainment.

V. Execution of the plan must involve robust community input

Brex's application lacks a robust description of how it plans to engage the community in assessments of whether it is meeting community needs, which of course, is the central aim of the Community Reinvestment Act (CRA). NCRC urges applicants for charters to commit to establishing CRA committees composed of representatives of community organizations. These committees would meet on a periodic basis to consider a bank's CRA plan, to review the bank's progress in meeting the plan's goals, and to offer additional proposals for improving CRA performance. In Brex's case, including a sizable number of small business owners and technical assistance organizations would be key to improving its ability to serve small businesses in underserved communities.

VI. Absence of discussion of fair lending or consumer protection compliance is unacceptable

Brex's application lacks a sufficient discussion of compliance with fair lending and consumer protection compliance in the context of serving small- and medium-sized businesses. The application lacks discussion of these issues, although access to branchless banks presents challenges for underserved populations, including people of color, older adults and people with disabilities. Moreover, compliance with consumer protection laws becomes even more important for a lender like Brex because disclosures are online without in-person or phone discussions of loan terms and conditions. Brex needs to explain in a clear and detailed manner how its online operations will comply with consumer protections, disclosure laws and regulations, as well as fair lending law. The application fails in this regard.

VII. Approval of applications involving branchless banks is premature before the completion of an interagency CRA modernization rule

The Federal Reserve Board issued an Advance Notice of Proposed Rulemaking (ANPR) on CRA that entails a more thoughtful approach to CRA evaluations for branchless banks than the approach utilized in this application. The Board is considering establishing local AAs that capture significant amounts of lending activity beyond the headquarters of branchless banks.¹⁹ This important component of the Board's proposal would define how a branchless lender would be examined for its lending and community development activity. Given the evolving landscape in the regulatory approach to CRA, we believe that charter applications that would be affected by an interagency update to the CRA regulation are premature and should not be considered until the issue of AAs for branchless banks has been adequately proscribed on an interagency basis. If this application moves forward, it must, at minimum, address the meaningful AA designation and strategic plan goal setting described in this letter.

¹⁹ Federal Reserve Board issues Advance Notice of Proposed Rulemaking on an approach to modernize regulations that implement the Community Reinvestment Act, September 21, 2021, <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200921a.htm>



VIII. Brex's application is incomplete

Brex's application falls short of providing necessary information that would explain how it can oversee important compliance and community reinvestment activities. Many important leadership positions are currently unfilled.

Brex has filled only two of its top seven senior management officer positions. It does not have a Chief Credit Officer, a Chief Operations Officer, a Chief Audit Officer, a Chief Risk Officer, or a General Counsel. The individuals who manage these roles will ultimately oversee many critical aspects of the bank during its de novo period. It is difficult to assess Brex's application when leadership of the departments most central to compliance, fair lending, and community reinvestment remain an unknown.

For example, Brex's Chief Risk Officer will be assigned responsibility for oversight of Fair Lending, including adherence of the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA). Brex's Chief Risk Officer will be assigned to manage all aspects of risk, a sizable task made far more difficult given the Bank's exclusive focus on digital banking. Moreover, that same position will be responsible for overseeing the Bank's Community Reinvestment Act (CRA) function.

Brex says that it takes CRA seriously, a belief on which we find alignment, but its business plan suggests otherwise. According to Brex's application, the CRA Officer will be a partial Full Time Employee (FTE) position. The application states the "CRO will also be designated as the Bank's CRA Officer." That would suggest that the CRA portfolio would be a very small responsibility, as the same CRO would be assigned to oversee BSA, AML, OFAC, and all other compliance-related activities will also be the sole CRA officer.

The FDIC cannot fully assess the capabilities of Brex to fulfill these responsibilities absent of an understanding of the makeup and qualifications of the senior leadership assigned to those functions.

IX. Conclusion

The FDIC must not approve this application. The application poses significant safety and soundness concerns. Its minimal CRA plan is not commensurate with the bank's ability. It lacks a fair lending approach and a plan for consumer compliance.

Thank you for the opportunity to comment on this important matter. If you have questions, contact me, or Josh Silver (jsilver@ncrc.org) at 202-628-8866.

Sincerely,

A handwritten signature in black ink, appearing to read "Jesse Van Tol".

Jesse Van Tol
Chief Executive Officer