August 5, 2022

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Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429
Attention: Comments RIN 3064–AF81

Chief Counsel's Office
Office of the Comptroller of the Currency
400 7th Street SW
Suite 3E–218
Washington, DC 20219
Attention: Comment Processing, Docket ID OCC—2022-0002

Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551
Attention: Comments Docket R-1769; RIN 7100-AG29

Re: Community Reinvestment Act Regulations

To Whom It May Concern:

The American Bankers Association[1] and 51 state bankers associations (the Associations) are pleased to comment on the Notice of Proposed Rulemaking issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency that would modernize the regulations that implement the Community Reinvestment Act of 1977 (CRA).

Access to capital is fundamental to economic opportunity in the United States. For this reason, banks support the CRA statute's objective of encouraging banks "to help meet the credit needs of the local communities in which they are chartered, consistent with the safe and sound operation

[1] 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 million people, safeguard $19.7 trillion in deposits and extend nearly $11.2 trillion in loans.

of such institutions."[2] In fact, in 2020, banks provided more than $271 billion in capital to low- and moderate-income (LMI) communities.[3]

For several years, there has been broad, bipartisan agreement among policymakers, bankers, and consumer and community advocates that the CRA regulatory framework needs to be updated to reflect technology's transformation of the delivery of financial products and services. There is consensus that the agencies need to ensure that CRA expectations are transparent and that examiners interpret and apply CRA regulations consistently. And, there is wide recognition that a modernized CRA can enhance economic opportunity for underserved consumers and communities.

We support these objectives, and we anticipate that several aspects of the proposed rule would achieve them. In particular, we support the provisions that will give banks greater certainty regarding the activities that will receive credit, allowing them to concentrate their efforts on providing the products and services that will address community needs instead of spending time and resources trying to figure out what will count. Accordingly, we support the proposed preapproval process and list of qualifying activities for community development; the increased specificity regarding what qualifies for community development credit; and the combination of community development lending and investments into a single community development financing test. We also support providing CRA credit at the bank level for community development activities that a bank conducts outside of its assessment area(s). Finally, we appreciate the agencies' sincere effort to tailor the proposal to avoid imposing undue regulatory burden on the smallest banks by adjusting the asset caps for Small Banks and Intermediate Banks.

However, we believe that other elements of the proposal would *not* accomplish the goals of regulatory modernization. In fact, if finalized as proposed, the rule could result in outcomes that are *contrary* to the agencies' intent, particularly as it relates to expanding access to credit for residential mortgages, small business loans, and community development financing. More fundamentally, we are concerned that some aspects of the proposal are unrelated to the goals of modernization, and may be inconsistent with the CRA statute and arbitrary under Administrative Procedure Act (APA) standards.

We offer the following comments, observations, and recommendations, which reflect the perspective of the full range of bank business models, asset sizes, and geographic locations. We offer these comments in the spirit of developing improved CRA regulations to enable banks to more effectively support their communities. However, some of our suggestions and comments

[2] 12 U.S.C. § 2019(b).
[3] Based on mortgages and loans to small businesses in LMI areas. See CRA Data, https://www.ffiec.gov/craadweb/national.aspx and HMDA data, https://ffiec.cfpb.gov/data-publication/2021.

are not fully developed because the agencies did not provide sufficient time for analysis and comment on the sweeping changes contained in it. Consumers, small businesses and other stakeholders would be better served if the agencies re-opened the comment period and provided clearer explanations for many of the proposed changes.

I. Summary of the Comment

We strongly support the modernization effort and are encouraged that the agencies are working together to update the CRA regulations. However, we are concerned that the proposal would not achieve widely-agreed upon goals and be the durable update that is long overdue.

The agencies should re-open the comment period and fully explain their policy choices, including but not limited to why it is appropriate to establish thresholds that result in significant numbers of banks that will not pass their retail lending examinations.

CRA modernization should result in a rule that will stand the test of time. However, the agencies' proposal jeopardizes that goal for several reasons. First, a 90-day comment period for a 700-page proposal that makes sweeping changes to the CRA framework, contains 180 questions and poses numerous alternatives, and yet proposes a 12-month implementation period for the final rule, suggests that the agencies are not seeking informed feedback on the rule, and instead are preparing to issue a final rule quickly with the goal of implementing it before a possible administration change in 2025. Regulators, banks, consumer and community advocates, and other stakeholders have come too far and worked too hard to rush the final stage of this important work.

In the past 90 days, we have worked diligently—meeting multiple times per week with bankers on our CRA working groups—to provide thoughtful comments on the proposed rule. However, the 90-day comment period was insufficient for banks to provide informed, data-driven comments on critical aspects of the proposal. This is particularly true with respect to the proposed formulas, metrics, benchmarks, multipliers and thresholds that will determine banks' ratings, which in total comprise almost 20 pages in the *Federal Register's* three-column compressed format. For example, for the Retail Lending Test, which will receive the heaviest weight in a bank's rating, a bank would have to calculate and compare its metrics and the benchmarks for all of its major product lines in each of its assessment areas, including the new retail lending assessment areas. The sheer amount of detail has been overwhelming for our members, particularly community banks that are considered Large Banks for CRA purposes. This makes it difficult to offer thoughtful feedback or suggest practical alternatives on some of the most critical parts of the proposal.

The comment period stands in contrast to the agencies' repeated emphasis on the need for robust public comment, to ensure that a final rule is calibrated appropriately. As Acting FDIC Chairman Martin Gruenberg observed at during a recent panel discussion, "Nothing is perfect and it is a large, complicated rule. We assume there is a lot there that we didn't get right or may have missed or could be improved."[4] Nevertheless, the agencies denied a request by ten banking trade associations to extend the proposal's comment period by only 30 days.

We do not understand the agencies' rationale in denying this request or why the agencies are proceeding with a comment period that is too short relative to the scope and magnitude of changes being proposed. As history has shown, sweeping regulatory changes that are made in haste require numerous amendments and clarifications, which slows and complicates the implementation process. The agencies risk a scenario in which they are later forced to issue numerous Q&As and guidance documents, which complicate compliance efforts, increase costs of administering a CRA program, and divert bank resources away from lending and investing in their communities.

The final rule must simplify the highly complex, formulaic system of metrics, benchmarks, multipliers, and thresholds, and balance the formulaic approach with more flexibility to consider bank business models and particular community needs.

The agencies have exacerbated the problems caused by the short comment period, by failing to explain their rationale for many of the critical policy decisions underlying the proposal. Areas in the proposal that lack complete rationales include but are not limited to the establishment of Retail Lending Assessment Areas, certain aspects of the Retail Lending Test, and the new metrics for CRA performance. These proposed provisions are a significant departure from the existing CRA framework. Yet, the agencies do not clearly articulate how these provisions would serve the goals of modernization or how they are consistent with the CRA statute.

For example, the agencies state that the proposed numeric "thresholds" that determine a bank's Retail Lending Test Rating "recognize the existing strong performance of many banks while also seeking to appropriately strengthen performance expectations for a 'Satisfactory' Retail Lending Test conclusion."[5] These thresholds will apparently result in 34% banks receiving a less than Satisfactory rating, according to the agencies' analysis of historical data and ratings. The reason for a rule change that could impose such a substantial impact on the industry should be fully explained, so that affected parties can provide informed comment to the agencies.

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[4] Regulatory panel discussion hosted by the Urban Institute. "Modernizing the Community Reinvestment Act: Ensuring that Banks Meet the Credit Needs of Their Communities." (June 3, 2022). https://www.urban.org/events/modernizing-community-reinvestment-act-ensuring-banks-meet-credit-needs-their-communities

[5] 87 FR at 33944.

The agencies do not explain how raising expectations for a Satisfactory rating relates to modernization, increased consistency and predictability, or the statute. They simply assert that it is "appropriate" to increase stringency. However, it is not clear that simply raising the bar will result in more lending to underserved communities; as we discuss in Section VI., the increased stringency may result in some banks accepting a low rating because achieving High Satisfactory or Outstanding ratings is impracticable.

Moreover, the agencies' failure to fully explain their rationale for significant changes invites criticism that the proposal is arbitrary. If the rule is finalized as proposed and without additional explanation and a meaningful opportunity to comment, the rule could be challenged. A legal challenge will ultimately sow confusion, further delay modernization, and possibly delay implementation of the provisions all stakeholders agree *will* advance certainty and consistency for industry and communities alike. These results serve no one. Communities and banks need an updated regulatory framework that achieves this initiative's stated objectives and stands the test of time.

Furthermore, the agencies' attempt to modernize the CRA rule is fundamentally flawed because it would treat banks that lend primarily, but not entirely through branches the same as banks that lend mostly or entirely through virtual channels. The proposal would require all Large Banks to delineate Retail Lending Assessment Areas in geographies where they happen to have some retail loans but no physical presence. Each bank would then be evaluated and rated in these areas by comparing their digital lending to the lending of other banks, including those with branches in the area. The agencies reason that it is "appropriate" to evaluate lending on a local basis because the statute focuses on a bank's "local performance." But that misses the point – virtual lending is not local in its nature, and should be evaluated at the bank level rather than in multiple locales across the country. In effect, the proposal is the regulatory equivalent of trying to put a square peg into a round hole—it just doesn't work.

Finally, the proposal provides a highly formulaic CRA evaluation methodology to address perceived inconsistency in ratings. While we support consistency in evaluations and ratings, consistency must be balanced against the need for flexibility to consider each bank's business models and the unique features and needs of the communities it serves. The proposal, however, imposes a one-size-fits-all approach on all Large Banks regardless of business model and the particular needs of communities. It is premised on the assumption that all banks (with the exception of wholesale and limited purpose banks) can and should make a certain percentage of "retail loans" in each assessment area. This is a faulty premise and will not help to address the needs of LMI neighborhoods. For example, banks that focus primarily on consumer lending (e.g., credit cards and installment loans,) rather than the full range of retail products, would not fare well under the benchmarks. They would be significantly disadvantaged in their CRA evaluations without any apparent benefits to underserved communities.

Any final rule should provide a minimum two-year implementation period.

The proposed 12-month implementation period is wholly inadequate for banks to adjust their programs and data collection capabilities, including conducting program planning and analysis and making upgrades to systems, vendor relationships, and staff training. A 12-month implementation period is especially unrealistic given that banks will likely be required to implement the new CRA regulation in tandem with the CFPB's anticipated final small business lending data collection rule. For many banks, the same staff will be charged with implementing both of these new regulations, particularly as it pertains to overhauling technology systems and standing up new data collection and reporting mechanisms. This dual implementation will make the time pressures of a 12-month implementation period particularly acute.

With these fundamental concerns in mind, we offer the following comments on the proposal's specific provisions.

II. Continue to Tailor the Rule Based on Asset Size and Business Model

Tailored regulation works well and should continue to be part of the CRA regulatory framework. The diversity of bank business models comprising the U.S. banking system is greater today than it has ever been. Therefore, it is more important than ever that a modernized framework continue to avoid a one-size-fits-all approach.

We appreciate that the proposal recognizes the capacity and constraints of Small and Intermediate Banks and that it would permit wholesale and limited purpose banks to be evaluated under a tailored version of the Community Development Financing Test. We are also pleased that the proposal would permit banks to be evaluated under a CRA strategic plan.

A. Raise the Intermediate Bank Cap to $3.3 Billion

We are especially mindful of the extent to which regulatory burden impacts community banks, many of which have only one or two employees devoted to CRA. In some cases, CRA is one of several responsibilities for these individuals. Accordingly, we support evaluating Small Banks under the existing Small Bank lending test, unless they choose to opt into the Retail Lending Test. We also support increasing to $600 million the threshold for what constitutes a Small Bank. A cap set at $600 million would apply to approximately the same percentage of banks as were classified as Small Banks under the 2005 CRA rule.[6]

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[6] The Small Bank category was established in 1995, but the Intermediate Small Bank category (referred to as Intermediate Banks in the proposal) was not established until 2005.

Intermediate banks would be evaluated under the Retail Lending Test and the existing community development test, unless they opt into the new Community Development Financing Test. We generally support this approach, although we note that concerns articulated throughout this letter regarding the structure and complexity of the Retail Lending Test also apply in the Intermediate Bank context. We recommend increasing the threshold for what constitutes an Intermediate Bank to $3.3 billion.

The existing definitions for Small Bank and Intermediate Small Bank were established in 2005. At the end of 2005, there were 7,655 banks consolidated by holding company. The median asset size was $124.5 million, while the average asset size was $1.42 billion. As of Q1, 2022, there were 4,194 banks consolidated by holding company with median assets of $312.5 million and average assets of $ 5.4 billion.

Significant changes have occurred since 2005. We recommend that the Intermediate Bank threshold be adjusted to reflect these changes. When the thresholds were established in 2005, 70.8% of banks qualified for the Small Bank test and 21.8% qualified for the Intermediate Small Bank test. Applying those same percentages to the distribution of bank asset sizes today, eligibility for the Intermediate Bank status should be capped at $3.3 billion.

B. Expand the Definition of "Limited Purpose Bank"

Expanding the definition of "limited purpose banks" presents another opportunity for the agencies to craft a rule that is tailored to a bank's business model.

The proposal would define a limited purpose bank as a bank that offers only a narrow retail product line (such as credit cards, other revolving consumer credit plans, other consumer loans, or other non-reported commercial and farm loans) to a regional or broader market and for which a designation as a limited purpose bank is in effect. We recommend that the agencies revise this definition to include banks whose retail lending volume is incidental and would not allow for a reasonable evaluation of the bank's performance under the Retail Lending Test.

To illustrate, the retail lending (home mortgages) of one of our members constitutes less than three percent of the bank's assets. Yet, under the proposal, the bank's Retail Lending Test performance would be judged based entirely on its mortgage lending and compared to other banks that have a full mortgage operation, and possibly some or all of the other five product lines included under the Retail Lending Test. Yet, this bank is not truly comparable to those organizations because its mortgage lending is a very small percentage of one product line and the bank does not offer other products that would be evaluated under the Retail Lending Test. In these circumstances, a bank would more appropriately be evaluated as a limited purpose bank due to its lack of major product lines as defined by the proposal.

In light of situations like this, we recommend that the agencies incorporate into any final rule OCC Bulletin 2019-40, which establishes a framework for designating banks as wholesale or limited purpose institutions. The Bulletin lists the factors that the OCC will take into account when considering a bank's request for a wholesale or limited purpose designation, including (1) the types of activities and the conditions or circumstances under which the bank offers the product or service; (2) the percentage of the bank's assets and income that each activity represents; (3) how any retail or other lending activity relates to the bank's assessment area(s); and (4) whether the volume of incidental lending activity would be sufficient to allow for a reasonable evaluation of the bank's performance under the lending test.[7]

C. Preserve the Flexibility of Strategic Plans

Current CRA regulations permit banks to be evaluated under a strategic plan, which must be developed with public input and receive regulatory approval. Strategic plans enable banks to customize their CRA activities to better reflect their communities, product offerings, business strategy, and expertise. We are pleased that the agencies would retain the strategic plan option. We appreciate that the proposal would maintain strategic plans as an option for non-traditional banks that do not fit neatly within the proposed regulatory framework, which is focused on conventional retail banks. However, the current proposal would significantly diminish the flexibility of the strategic plan option.

The agencies propose to evaluate all types of Large Banks – regardless of business model – using the same fixed assessment areas, performance metrics and performance standards without taking into consideration that banks with different business models should be evaluated differently. The proposal would require banks operating under a strategic plan be subject to the same performance tests and standards as all other Large Banks, unless the bank can demonstrate that these requirements do not apply because the bank is "substantially engaged" in other activities. Instead, we urge the agencies to retain the strategic plan provisions in their current form, but with the modifications described below.

Under the proposal, Large Banks evaluated under an approved strategic plan would be expected to delineate both FBAAs and RLAAs, as applicable. The strategic plan concept is based on the recognition that one size simply does not fit all and that the CRA performance of some institutions may need to be evaluated differently from retail banks. Consistent with this principle, we request that the agencies provide strategic plan banks greater flexibility to choose the

[7] OCC Bulletin 2019-40, Community Reinvestment Act: Guidelines for Requesting Designation as a Wholesale, Limited Purpose, or Special Purpose Bank (July 31, 2019).

geographies they serve beyond FBAA's, as well as more discretion with respect to determining how the performance tests are weighted and the products that are in scope.

Second, the proposal would consider the public's involvement in drafting the proposed strategic plan, the nature of the public input, and whether the bank revised the draft strategic plan in light of the public input received. We request that any final rule explicitly state that a bank may give greater weight to input received from organizations serving or located in regions represented within the strategic plan.

Third, we are aware of the concern that banks could use the strategic plan option to avoid more stringent CRA requirements applicable to retail banks. This concern is not well-founded. Banks relying on the strategic plan must publish their plan for public comment from the community and must have their plan approved by their applicable regulator.[8]

III. Modify the Proposed Assessment Area Framework

In enacting the CRA, Congress established that banks must demonstrate that their deposit facilities serve the convenience and credit needs of the communities in which they are chartered to do business. The statute directs the agencies to assess a bank's record of meeting the credit needs of its entire community, including LMI neighborhoods, consistent with safety and soundness.

The statute was enacted at a time when banking took place at physical bank buildings; interstate banking was not permitted and digital banking had not yet been envisioned. Thus, there was no need for the statute to define "community" or articulate what constituted a "deposit facility." Over the years, regulators created assessment areas to define the geographic locations around a bank's branches that serve as the basis for a bank's CRA evaluation. However, this geographically-focused statutory and regulatory scheme has not kept pace with technological developments and evolving customer preferences.

As a practical matter, CRA cannot be modernized without taking the digital revolution into account. In pursuit of this objective, the agencies propose several updates to how assessment areas are defined and delineated. These revisions would expand significantly the locations where regulators evaluate a bank's CRA performance. The proposal would also revise how banks may obtain community development credit for CRA activities located outside of their assessment areas.

[8] The requirements for community input and regulatory approval should ease concerns from commenters who believe that banks may try to use the strategic plan option to circumvent the full suite of CRA requirements.

When combined with the Retail Lending Test and associated performance metrics, the proposed revisions to the assessment area construct would bring about sweeping change. It is critical that policymakers thoroughly understand the implications of the proposal in order to avoid unintended consequences. More fundamentally, however, the agencies must ensure that any amendments to the CRA regulation are consistent with the CRA statute.

A. Refine the Requirements for Delineating Facility-Based Assessment Areas

Current CRA regulations require a bank's assessment area to include the institution's main office, its branches, and its deposit-taking ATMs, as well as surrounding geographies in which the institution has originated or purchased a substantial portion of its loans. The proposal would retain this overall concept and would refer to these geographically-based assessment areas as "facility-based assessment areas" (FBAAs).

We agree that an institution's physical location should continue to be a critical component of a bank's overall CRA obligations. Yet, we have several concerns regarding some aspects of FBAAs.

1. Permit Partial County Delineations

The FBAAs of Large Banks (defined in the proposal as a bank having more than $2 billion in assets) would be required to consist of one or more metropolitan statistical areas (MSAs) or metropolitan divisions or one or more contiguous counties within an MSA, metropolitan division, or the nonmetropolitan area of a state and may not extend beyond an MSA boundary or beyond a state boundary unless the assessment area is located in a multistate MSA or combined statistical area.

<u>Designation of Entire Counties</u>. A Large Bank would be required to include an entire county in its assessment area; partial counties would not be permitted. By contrast, Small and Intermediate Banks could continue to designate partial-county FBAAs, although such assessment areas must consist of whole census tracts. This approach for Small and Intermediate Banks is intended to reflect the lower asset levels and capacities of these institutions.

The agencies explain that requiring whole counties would create a more consistent standard for the delineation of assessment areas for Large Banks, would encourage them to serve LMI consumers and communities, and would support the proposed metrics and associated data as it would allow data collection at the county level rather than the census tract level.

We support a more consistent and transparent CRA evaluation system. However, consistency must always be balanced against the need for flexibility to accommodate the differences in localities and the banks that serve them. We believe that mandating full county assessment areas is an overly standardized approach to CRA that would impose hardships on banks with no corresponding benefit to LMI communities. Accordingly, the CRA regulatory framework must provide banks with some degree of flexibility in delineating their assessment areas when practical, geographic characteristics negatively affect a bank's ability to successfully execute a full CRA program across an entire county.

Over the years, the agencies have adopted varying approaches regarding full versus partial county assessment areas. This flexibility has enabled banks to take a variety of factors into account when designating their assessment areas. For example, some—but not all—banks delineate full counties to reduce redlining risk. In these situations, examiners apply a broad range of information to more fully understand and review a bank's CRA performance, under performance context.

Other banks designate partial-county assessment areas due to the unique geographic characteristics of the areas where they operate. For example, it may be impractical for a bank to designate a full county where it has a single branch on the edge of a large county such as Riverside County, California, which has a total area of 7,303 square miles and is approximately 180 miles wide in the east-west dimension. Likewise, banks sometimes delineate partial counties where they have a single branch in a county that houses a large city, such as Miami-Dade County, Florida or Cook County, Illinois.

In these situations, it is neither realistic nor helpful to LMI communities to expect a bank to meet the proposal's extensive performance tests across the entire county. Furthermore, we question whether banks in these circumstances would be able to meet the performance metrics that the agencies have proposed for the Retail Lending Test. This is especially true for community banks that are classified as "Large Banks" under the proposal.

We also note that concerns about full county designations extend beyond lending. Because the agencies have historically taken different approaches to full versus partial county designations, there is a significant risk that some examiners will expect banks to provide community development services across an entire county even if the bank does not have employees in those locations.[9]

[9] Because the full-county approach would represent a significant shift for some banks and examiners, it will be critical for the agencies to explicitly direct exam teams to apply performance context to full-county assessment areas. This issue should be addressed in any subsequent regulatory guidance, examiner training, and examination procedures.

2. Permit, but do not Mandate Assessment Areas Based on a Deposit-Taking ATM

As proposed, the updated CRA regulation would require banks to designate a FBAA where they have deposit-taking "remote service facilities." The proposed definition of remote service facilities would capture not only deposit-taking automated teller machines (ATMs), but other deposit-taking facilities as well, such as interactive or virtual ATMs where customers can connect with bank staff through a terminal.

A deposit-taking ATM should not trigger the full lending, service, and community development obligations of a FBAA. Banks with only an ATM in a county do not typically have staff there to generate loans or carry out community development financing activities or services. Moreover, banks do not deploy ATMs to generate accounts. Rather, they are largely an accommodation to provide customers with access to cash. Also, technological developments, including remote deposit capture, have decreased the popularity of ATMs as a deposit-taking channel. Accordingly, the rule should permit, not require, banks to delineate an assessment area around deposit-taking ATMs.

B. Revise the RLAA Construct

CRA rules must account for technology-driven delivery channels, consumer behavior and preferences, and evolving business models. However, modernizing the assessment area concept must be done with particular care.

The banking agencies devoted extensive effort toward developing a modernized regulatory framework that addresses the digital delivery of banking products and services. But, the proposal's creation of RLAAs is not the simple solution that it might appear to be. Moreover, the sweeping nature of these changes presents several problems and leaves a number of questions unresolved.

1. Provide a More Robust Legal and Policy Analysis to Support the Proposal

Under the proposal, Large Banks would be required to delineate a new type of assessment area, known as a RLAA. Generally speaking, a Large Bank would be required to delineate a RLAA where it has a "concentration" of home mortgage or small business lending where the bank does not have a physical presence. These RLAAs would consist of any MSA or the combined non-MSA areas of a state in which the bank originated at least 100 home mortgage loans or at least 250 small business loans outside of its FBAAs in each of the two preceding calendar years. Importantly, a bank would be evaluated for its CRA performance for *all* of its major product lines in each RLAA, regardless of whether the bank surpasses *either or both* of the proposed thresholds.

As explained below, we believe that the agencies' legal and policy analysis for these changes is insufficient. Absent a robust explanation of the agencies' rationale for these revisions, including maps or other presentation showing where RLAAs would be, the proposed RLAA construct appears to be arbitrary. Therefore, we strongly urge the agencies to re-open the comment period and share more data and information to support the proposal.

<u>Local Community</u>. The agencies state that it is appropriate to evaluate banks' retail lending "on a local basis because it accords with CRA's focus on a bank's local performance in meeting community credit needs."[10] They further state that the proposal "is designed to provide a pathway to evaluate banks in a way that provides parity between banks that lend primarily through branches and those banks with different business models."[11] However, the agencies do not explain how relatively large areas—an MSA or the combined non-MSA areas of an entire state—would constitute a "local community" for purposes of the retail lending test and associated benchmarks, particularly when the bank has no physical connection to locations that could span hundreds or thousands of square miles. They do not explain why smaller geographic units were not considered.

Rather than explaining how RLAAs would constitute a "local community" under the CRA statute, the proposal simply states that the agencies "consider it appropriate to evaluate large banks' retail lending in retail lending assessment areas on a local basis because it accords with CRA's focus on a bank's local performance in meeting community credit needs."[12] While the CRA rule needs to be adjusted to reflect the rise of internet and digital banking, that does not mean the agencies must impose a one-size-fits-all approach to lending outside of FBAAs. Similarly, the agencies do not discuss how the triggers of 100 mortgages or 250 small business loans equates to a local community.

<u>Distinction Between Digital and Branch-Based Banking</u>. The agencies appear to ignore the key differences between digital lending and branch-based lending. Unlike branch-based lending, online customers are often scattered across a wide geographic area, if not nationwide, even though a bank does not market in or to those specific geographic locations. The Federal Reserve's 2020 Advanced Notice of Proposed Rulemaking (ANPR) on CRA modernization noted this distinction. The Federal Reserve found that banks that make more than a substantial majority of retail loans outside of their assessment areas have "*lending [that] is relatively dispersed rather than concentrated in particular geographic areas*."[13]

[10] 87 FR 33918.
[11] Id.
[12] Id.
[13] 85 FR 66418 (Oct. 19, 2020).

The proposal attempts to draw parallels between the number of loans evaluated in assessment areas today and the 100/250 loan threshold established in the proposal. The agencies state that they considered the "levels that would appropriately align with the amount of lending typically evaluated in a facility-based assessment area."[14] But they do not explain why it is "appropriate" to align assessments of digital lending with assessments of branch-based lending when the two are fundamentally different. This attempt to create "parity" is misplaced, given the vast differences between banks primarily engaged in branch-based lending and banks that are primarily lending via the internet and digital channels.

Scope of Banks Impacted. The agencies state that the 100/250 loan threshold would require RLAAs where banks "conduct significant retail lending business."[15] This would substantially expand the geographies where regulators evaluate a bank's CRA performance to include regions that may represent an immaterial portion of a bank's overall lending volumes. This is a departure from CRA modernization's goal of addressing the emergence of digital banking as a business model as well as the problems caused by CRA hot spots. Yet, the proposal offers few details regarding the agencies' policy objectives for expanding the CRA obligations of a much wider population of banks. Absent such explanation, the proposal appears to be based on the implied premise that CRA modernization requires an unspecified number or percentage of banks to add additional CRA assessment areas.

Size of RLAAs. Under the proposal, an RLAA exceeding the 100/250 loan cap must be comprised of either an MSA or the combined non-MSA areas of a state. As such, RLAAs would cover a much larger geographic area than RLAAs do today, yet the agencies do not explain the policy objectives that geographically-focused assessment areas of this size would achieve.

Rather, the agencies simply include a single sentence stating that "RLAAs composed of MSAs and non-MSAs provide a way to evaluate retail lending that occurs outside of FBAAs on a local basis." We also observe that the agencies do not explain why they propose to create RLAAs consisting of all of the combined non-MSA areas of a state rather than a smaller geographic unit, such as a county, other than to say it would "ensure appropriate emphasis on these areas."[16]

This lack of analysis is particularly concerning given the agencies' estimated distribution of Retail Lending Test conclusions for RLAAs. Table 12 in the preamble to the proposal states that 71 percent of banks would receive a rating of Low Satisfactory or Needs to Improve in their RLAAs. The significance of these ratings projections, together with the lack of an articulated

[14] 87 FR 33919.
[15] 87 FR 33918.
[16] 87 FR 33919.

policy rationale, makes the RLAA concept (and its associated performance benchmarks) seem arbitrary.

The agencies' decisions in proposing to require banks to take MSAs or the non-MSA counties of a state will significantly and adversely impact Large Banks without a clear benefit to consumers or small businesses. For example, this requirement could have significant implications for banks that operate in areas that are not densely populated. A $5.7 billion bank in Montana reports that it would have to take the entire state as an RLAA because of a single county where the bank has more than 100 mortgage loans. The bank does not have the staff or resources to meaningfully serve the entire state; thus, the proposal would not increase lending in these regions, contrary to the agencies' assertion that the proposal would ensure appropriate emphasis on non-MSA areas.

One of our members in Texas, a bank with $13 billion in assets, would be impacted even more dramatically. The bank does not have any assessment areas outside of Texas, but it has five branches near the Texas-Louisiana border. If the bank makes 100 mortgage loans in Louisiana (outside any Louisiana MSA), the bank would have to take all non-MSA counties in Louisiana as an RLAA. In addition, if the bank were to combine all of the non-MSA areas in Texas that are not part of the bank's FBAA, the bank would have more than 100 home mortgages spread across nearly 200 counties, thereby triggering an RLAA for all of the non-MSA areas of Texas. Therefore, between these two states, the bank would have RLAA responsibilities covering over 300,000 square miles. Yet, the preamble does not discuss any scenarios such these—or explain how they further the goals of modernization and of CRA generally.

<u>Location of RLAAs</u>. In addition to RLAAs that would encompass areas too large for a bank to serve, it appears that the vast majority of RLAAs would be created in areas that are already well-served by banks. For example, in the preamble to its 2020 CRA ANPR, the Federal Reserve stated that lending-based assessment areas "tended to be located in high-density metropolitan areas with multiple active banks." Moreover, the Federal Reserve also found that "this approach may not substantially increase banks' lending to LMI borrowers in the new assessment areas because the percentage of LMI borrowers is similar between banks that would add new lending based assessment areas and banks that already have existing facility-based assessment areas."[17]

The agencies indicate how many new RLAAs would be created in total, but they do not present any data on where the new RLAAs would be, or how many new RLAAs each bank would have. We asked a consultant to conduct an analysis of HMDA and CRA data to determine how many new RLAAs each bank would have and where the RLAAs would be located. The preliminary results are consistent with the Federal Reserve's findings. It indicates that some very large banks would have over 100 RLAAs, some of which would fall in MSAs such as Los Angeles and New York, both of which already well-served by other banks with branches and assessment areas

[17] 85 FR 66418.

there. For example, the New York-White Plains-Jersey City MSA contains FBAAs for 105 banks, and the Los Angeles-Long Beach-Glendale MSA has 44 FBAAs. Each of these MSAs would have as many as 50 additional banks delineating RLAAs in them based on the proposal. These preliminary results indicate that the proposal would exacerbate CRA hot spots. Indeed, 10 banks would be required to establish new RLAAs in the Salt Lake City MSA, which is already known to be a CRA hot spot.

Second, our preliminary analysis indicates that the proposal will not lead to RLAAs in areas that are underserved by banks. Of the 2300 RLAAs that would be created, 85% would be located in MSAs and only 15% would be located outside of an MSA. The RLAAs will be clustered in large urban areas, including not only New York and Los Angeles but also Boston; Washington, DC; Atlanta; Orlando; Tampa; Houston; Dallas; Minneapolis; Denver; Phoenix; and Seattle. Each of these areas has numerous FBAAs; yet, the proposal would result in each of these MSAs having as many as 50 additional banks required to delineate RLAAs in them. In some cases, the banks would be relatively small, and likely unable to serve such large urban areas. Measuring these institutions against the performance of banks with existing branches in well-served MSAs would create artificial competition and distort pricing, much like has happened in community development hot spots over the years.

Moreover, our analysis shows that the fewest RLAAs will be located in so-called "CRA deserts," rural areas, Native Land Areas and statewide nonmetropolitan areas, which is not surprising. These areas are less populated; therefore, demand for mortgage and small business loans is low and fewer banks would meet the threshold for establishing an RLAA. We are concerned that the proposal will incentivize banks to focus their CRA activities on major metropolitan markets and that the realities of managing numerous RLAAs will discourage banks from doing more business in nonmetropolitan areas, thereby making the situation even worse for these communities.

In light of the potential concentration of RLAAs in large cities and the potential creation of CRA hot spots, we request that the agencies undertake a similar analysis and publish it, with a new comment period, to allow all stakeholders an opportunity to see the impact of the proposal and comment on it. Given the sweeping nature of the changes triggered by RLAAs, it is incumbent upon the agencies to ensure that any final rule is consistent with the CRA statute and to share their legal and policy analysis with the public.

2. Avoid Unintended Consequences Associated With RLAAs

We are also concerned that the proposal could result in unintended consequences that are inconsistent with the goal of expanding financial opportunity for consumers and small businesses.

Decreased Focus. The loan volumes that would trigger an RLAA are not sufficiently material to trigger an assessment area. As proposed, many banks would be required to create dozens—and in some cases hundreds—of new assessment areas in geographies where the bank does not have a meaningful market presence or that are not central to the bank's broader business strategy.

For example, one of our members would go from 105 assessment areas today to 170 assessment areas under the proposed rule. One of our community bank members would go from three assessment areas today to over 60 assessment areas under the proposal. This increase in assessment areas may dilute the effectiveness of CRA activity by potentially diverting a bank's focus on areas where it could make a significant difference for LMI individuals and communities. Because bank resources are finite, banks may have to choose between deploying staff to meet community development financing needs in distressed regions outside of the bank's assessment area and hiring additional staff to manage performance, data analytics, and reporting for a myriad of RLAAs that do not represent a material portion of the bank's retail loans. These outcomes represent form over substance and would be contrary to the widely agreed upon policy goal of encouraging banks to do more in struggling communities outside of a bank's assessment area.

To avoid these undesirable outcomes, we recommend that the agencies revise the proposal to create a framework that incentivizes banks to focus on locations where they can make a meaningful impact toward meeting the financial services needs of LMI communities. Allowing banks to concentrate their efforts in areas where they have more substantial activity than the 100/250 loan thresholds is more likely to achieve the goals of CRA than requiring them to spread their efforts across numerous new assessment areas. We urge the agencies to refer to the comment letter submitted by the National Association of Affordable Housing Lenders (NAAHL), which discusses a recent analysis from the Urban Institute, which evaluated adding a local market share threshold and a bank materiality test threshold to the proposed 100/250 loan threshold.

A related problem is that the proposal would require evaluation of all of a bank's major product lines in each RLAA even if the bank meets the trigger for only one product line. For example, if a bank makes 125 mortgage loans (thereby triggering an RLAA) and 75 small business loans, both products would be subject to the Retail Lending Test (provided the 75 small business loans are a major product line), even though the bank's small business lending volume is insufficient to trigger an RLAA on its own. In the spirit of focusing on lending that is material to the bank and to the community, we recommend that the Retail Lending Test not apply to a product that, by itself would not trigger a RLAA designation. In this same vein, we recommend that any final rule carefully calibrate what constitutes a major product line.

Reductions in Lending. The proposal could also incentivize banks to curtail retail lending in locations that are incidental to the bank's business strategy and where the bank does not actively market its loan products. For example, one of our members exceeds the 100 mortgage loan threshold in Boston even though the bank does not have branches in Boston and does not market its mortgage products there. Nonetheless, the bank would be required to add the Boston MSA as an RLAA and meet the same CRA performance benchmarks as banks with a branch in the city or that market their products in the area. Under these circumstances, some banks may take a hard look at the costs and benefits of accepting loan applications from and managing a CRA program in a geography that is incidental to the bank's business strategy. This may result in reduction of lending options in some markets if banks with no branch locations in those communities limit lending in the market to avoid triggering a RLAA requirement.

On a more technical point, we note that the 100 mortgage loan threshold is further complicated by the manner in which banks report Housing Finance Agency (HFA) loans. HFA loans help meet the affordable housing needs of the residents of their states. Down payment assistance for HFA loans is often funded through a "soft second" subordinate mortgage loan that is used to cover down payment and closing costs. Many soft seconds are forgivable over a specified term. In these situations, a bank would report both the mortgage and the soft second. In other words, two loans would be reported for one purchase transaction. This example illustrates how the proposed RLAA framework has the potential to create disincentives that would harm LMI borrowers.

Incompatibility with Some Business Models. While the agencies sought to tailor the proposal to reflect a bank's asset size and capacity, the proposed RLAA structure and weighting of the Retail Lending Test will disadvantage some bank business models. For example, one of our members has only one retail lending product, which is a small business credit card offering. This book of business represents a mere 1.8% of the bank's total loan portfolio, yet the bank would be required to add 181 RLAAs. Moreover, this product line would comprise 45% of the bank's entire CRA rating even though it represents less than 2% of the bank's total loan portfolio. To be effective and workable, a final rule must take these types of situations into account.

3. Evaluate Non-FBAA Activity at the Bank Level

We commend the agencies for their effort to devise a CRA evaluation methodology that can be applied to digital, hybrid, and branch-based banks and everything in between. But the proposed approach is fundamentally flawed because it treats the digital marketplace and the physical marketplace as equivalent. While the digital world and the physical world overlap in many respects, they are not the same. As a result, the proposal is the regulatory equivalent of trying to put a square peg into a round hole—it just doesn't work.

As the agencies are aware, there is no perfect solution for modernizing the CRA regulations given the wide range of banking models, strategies, and specializations in the United States. For this reason—and to avoid the legal and policy concerns described above—we recommend that the agencies evaluate non-FBAA lending at the bank level.

This approach could work as follows:

- Weight a bank's FBAAs in proportion to the percentage of the bank's loans or deposits in the assessment area (based on the bank's total deposits or number of loans).
- To address the growth of online lending, separately evaluate the retail loans of banks with a substantial portion of out-of-assessment area lending. This should be done at the bank level.
- A bank making the majority of its retail loans within its assessment area would not be subject to the Retail Lending Test for non-assessment area lending.

We urge the agencies to conduct additional analysis to determine whether it would be appropriate to base such tests on national, regional, or state benchmarks or whether to tailor such benchmarks to reflect each bank's actual mix of markets served and request comment on the data and analysis.

Importantly, this approach draws upon aspects of the existing CRA rules that address situations where bank customers are scattered across large geographies. Military banks, which are banks "whose business predominantly consists of serving the needs of military personnel or their dependents *who are not located within a defined geographic area*" may delineate their entire deposit customer base as their assessment area. This provision recognizes that military communities are not limited to military installations. Rather, they are global. As a result, a bank whose business predominantly consists of serving the needs of military personnel or their dependents who are not located within a defined geographic area may delineate its entire deposit customer base as its assessment area.

To be clear, we do *not* recommend that all banks should be permitted to designate their entire deposit base as an assessment area. However, the treatment of assessment areas for military banks provides helpful instruction for how to deal with a customer base that is widely dispersed—much like the customer base of digital and hybrid banks.

Evaluating banks with a substantial portion of non-FBAA lending at the bank level reflects the reality that digital banking simply does not fit into a geographically focused evaluation framework and that loan and account generation is not always driven by bank marketing or a customer's physical address. Our proposal would also:

- Provide a means by which to evaluate lending that is not evaluated today;

- Incentivize rather than disincentivize lending in non-FBAA markets that are difficult to serve;
- Build upon existing regulatory provisions that address geographically scattered customers;
- Allow banks to focus their CRA efforts in areas where they have a substantial portion of their lending, thereby increasing overall impact and effectiveness;
- Avoid creating RLAA hot spots;
- Streamline the product mixes subject to CRA examination rather than varying major product lines by assessment area; and
- Reduce (but not eliminate) burden associated with geocoding deposits.

IV. Simplify the Retail Lending Test

The proposal would create a new Retail Lending Test for Large Banks and Intermediate Banks; Small Banks would be subject to the existing Lending Test or could opt in to the new Retail Lending Test. The Retail Lending Test would evaluate whether the retail lending activities of the bank meet the needs of LMI individuals, small businesses, small farms, and individuals and businesses in LMI census tracts.

A bank's retail loans would potentially be subject to evaluation in six categories: (1) automobile; (2) closed-end home mortgage; (3) open-end home mortgage; (4) multifamily; (5) small business; and (6) small farm loans. The test would primarily evaluate the distribution of a bank's retail loans in its assessment areas, and the geographies outside its assessment areas as a whole, across the retail lending categories that constitute "major product lines" for the bank within the assessment area.

The distribution of a bank's loans in major product lines in a given area would generally be evaluated across two dimensions: (1) a "geographic distribution" metric that would evaluate the bank's proportion of originated and purchased loans to borrowers located in LMI census tracts in the assessment area, and (2) a "borrower distribution" metric that would evaluate the bank's proportion of originated and purchased loans to LMI borrowers, small businesses, and small farms in the assessment area overall, regardless of geography. For both metrics, the bank's performance would be compared to the comparable proportion reported by all reporting lenders in the assessment area in a "market benchmark" and local demographics in a "community benchmark."

A. Determine Major Product Line at the Bank Level Rather Than in Each Assessment Area

For closed-end home mortgages, open-end home mortgages, multifamily loans, small business and small farm loans, a "major product line" would be defined as a retail lending product line constituting 15 percent or more of the dollar value of the bank's retail lending in the respective geography. [18] This definition of "major product line" creates multiple problems.

First, it has the potential to create situations where a product constitutes a major product line only in a limited number of markets, yet review of that product would not be material to a bank's overall loan portfolio or aggregate CRA rating.

Second, a major product line would be defined as a product that comprises 15 percent or more of a bank's lending in the assessment area "over the relevant evaluation period." This means that banks would not know which products would be subject to CRA evaluation until the end of an examination cycle, which would undermine, not advance, predictability.

Third, determining what constitutes a major product line at the assessment area level rather than the bank level is overly granular and would create significant administrative and managerial burden for banks and examiners alike, without clear benefits.

To address these problems, and in the spirit of focusing on lending that is material, we recommend that the agencies determine a major product line at the bank level rather than the assessment area level. This would help to ensure that resources are not diverted from FBAAs and would avoid creating significant regulatory burden for lending that would be minimally probative of the bank's overall performance. Identifying major product lines at the bank level would also ensure consistency across a bank's assessment areas and would enable banks to know at the beginning of an exam cycle which product lines would be subject to examination.

B. Focus the Scope of the Retail Lending Test

We also offer several comments regarding the loans that would be subject to the Retail Lending Test. As we explain below, multiple aspects of the test do not take the diversity of the banking system into account, which would have significant repercussions for some of our members.

[18] Automobile loans would be a major product line in an area if they comprised 15 percent of the bank's total retail lending, measured as average of the dollar percentage and loan count percentage in the assessment area.

1. Treat Mortgage Purchases as Equivalent to Originations

The agencies pose a number of questions regarding the CRA consideration that should be provided to mortgages, including whether purchased loans in general should be treated as equivalent to loan originations. Loan purchases are an important part of community reinvestment and should continue to be included in CRA evaluations. Furthermore, we support equal treatment of purchased and originated loans. We note that purchases from nonprofits such as Habitat for Humanity create additional capital for these organizations, which in turn supports continued lending, providing overall benefit to communities.

Purchased loans provide an important source of liquidity to the mortgage market and should continue to be treated the same as originations for CRA purposes. Importantly, if purchased loans do not receive positive CRA credit—particularly in RLAAs where banks do not have a physical presence—there is a high risk that banks will exit the mortgage market. Banks' share of mortgage lending has declined steadily since the financial crisis, with nonbanks making 72% of mortgage loans today. This situation should be particularly concerning to the agencies, considering that nonbanks do not have CRA obligations.

In addition to evaluating a bank's retail lending performance metrics, the proposal includes a list of additional factors in __.22(e) that examiners would take into account when evaluating FBAA performance, including information indicating that a bank has purchased retail loans "for the sole or primary purpose of inappropriately influencing its retail lending performance evaluation, including but not limited to subsequent resale of some or all of those retail loans or any indication that some or all of the loans have been considered in multiple banks' CRA evaluations."

However, the proposed language in __.22(e) is ambiguous and has the potential to be applied inconsistently, and potentially unfairly. What does "inappropriately influencing its retail lending performance" mean? How would this provision be applied? We assume that this provision is intended to address loan churning, although it is unclear whether loan churning has had any impact on banks' CRA ratings. If the agencies believe churning is inappropriately impacting CRA ratings, they could consider setting reasonable limits on the number of times a loan could be sold before a purchasing bank will not be able to obtain CRA credit. Further study and analysis of this issue is warranted.

Another issue that has arisen with respect to mortgage purchases involves loans without borrower income. The Retail Lending Test's borrower distribution formula would be calculated by dividing "the total number of a bank's originated and purchased closed-end home mortgage loans to low-income borrowers or moderate-income borrowers, respectively, in the geographic areas by the total number of the bank's originated and purchased closed-end home mortgage loans in that geographic area overall."[19] However, approximately 19% of all originated and purchased HMDA loans had no borrower income reported. The proposal would not account for those loans because they cannot be included in the numerator given the lack of income to demonstrate LMI status. Nevertheless, these loans would be included in the denominator.

In particular, this aspect of the proposal would be detrimental to banks that hold large volumes of purchased loans related to Ginnie Mae servicing contractual requirements and loss mitigation. To help servicers manage default servicing, Ginnie Mae allows servicers to purchase a loan out of a mortgage-backed security once the loan becomes 90 days delinquent, in a process commonly referred to as a "buyout." Banks that hold these loans have a significant positive impact on LMI borrowers by helping them remain in their homes through government-approved loss mitigation programs.

To avoid discouraging bank participation in certain programs designed to assist troubled mortgage borrowers, we recommend that the agencies use the borrower's income at origination, when available, to determine LMI status in the borrower distribution metric, and exclude purchased, government-backed loans and Ginnie Mae buyouts from the denominator of the metric when income is not available.

Finally, we note that our members have expressed confusion regarding which aspects of the regulation would include loan originations and which aspects would include originations as well as purchases. For example, designation of RLAAs would be limited to loan originations. But the Retail Lending Test would evaluate originations as well as purchases. We agree with this approach, but request that the agencies highlight the distinction in training materials and outreach that may accompany a final rule so as to eliminate as much confusion as possible. We also recommend that the agencies include a section in the preamble to any final rule that discusses these differences.

2. <u>Define Small Business/Small Farm Lending Based on Loan Size, Permit Banks to Classify a Small Business Loan as Community Development, and Preserve Banks' Ability to Receive Credit for Purchased Small Business Loans</u>

The agencies propose to align the CRA regulation's definition of "small business" and "small farm" with the CFPB's proposed definition of small business in its rulemaking to implement the small business data collection requirements established in section 1071 of the Dodd-Frank Act (Section 1071 rule). Under this approach, a small business or small farm would be defined as having gross annual revenues of $5 million or less for the preceding fiscal year. Further, when these definitions become effective under a final 1071 rule, the agencies would use them to define

[19] 87 FR 34042.

"small business loan" and "small farm loan" in the CRA rule. Until then, the current definition of "small business loan" and "small farm loan" would remain in effect.

We recommend that the agencies define small business lending based on loan size (in keeping with the Call Report) rather than gross annual revenue. While we appreciate the agencies' effort to develop a consistent definition for small business lending for purposes of the Section 1071 rule and for CRA, this would not address the fact that banks would still be required to report small business loans for purposes of the Call Report. As a result, banks would still be subject to multiple, inconsistent regulatory requirements for the same set of loans.

More fundamentally, however, it would not be prudent for the agencies to formulate a new CRA rule based on a proposal issued by another agency. The CFPB's proposal to implement Section 1071 has not yet been finalized, making it impossible for banks to fully assess the rule's full effect on CRA.

Furthermore, basing small business lending on gross annual revenues of $5 million or less would interfere with the Community Development Financing Test by requiring that all small business lending be evaluated under the Retail Lending Test, even if it those loans have a community development purpose. This approach would constitute a significant departure from the current rule and may disadvantage banks in rural areas that have limited community development finance opportunities. It may also incentivize banks to increase secondary market investments rather than increasing on-the-ground community development lending. For these reasons, we request that banks continue to have the option of having small business loans with a community development purpose be evaluated as either a retail loan or a community development loan.

Finally, a revised CRA regulation should preserve banks' ability to receive CRA credit for purchased small business loans. As proposed, the Section 1071 rule would capture only loans that a bank has originated and would not include small business loans that a bank purchases. Therefore, the agencies must provide an alternate method for banks to receive CRA consideration for purchases of small business loans. This will be critical to preserving microlending partnerships between CDFIs and non-CDFI banks, such as those facilitated by the EBA Fund.

3. Evaluate Automobile Lending Under the Retail Services and Products Test

The agencies also propose to evaluate automobile lending under the Retail Lending Test. In addition, the proposal would require new automobile lending data collection by banks with assets over $10 billion. For both practical and policy reasons, we recommend that the final rule permit banks to have automobile lending included in the Retail Lending Test at their option.

Today, CRA examinations typically evaluate a financial institution's consumer lending only if such lending comprises a substantial majority of the institution's business. This reflects CRA's primary focus on home mortgage, small business, and small farm loans, as these loans are widely recognized as wealth-building for families and communities. However, a bank may elect to have its consumer loans included in its CRA evaluation if it has collected and maintained data on these loans. The proposed CRA regulatory framework should maintain this approach for consumer loans. Designating auto lending as a "major product line" if it comprises 15 percent of a bank's lending in an assessment area is a dramatic departure from the current rule's "substantial majority" standard and detracts from CRA's emphasis on mortgage and small business lending as wealth-building tools.

Indirect Lending. Certain aspects of automobile lending are not compatible with the proposal's distribution metrics and performance benchmarks, particularly as it relates to indirect lending relationships. Banks engaged in indirect financing do not market to consumers; rather, they are dependent upon the marketing and sales strategies employed by dealers. This leaves banks with a limited ability to influence the percentage of LMI customers that decide to do business with any particular dealer. Remarkably, the proposal does not address the characteristics of indirect lending, which clearly distinguish it from other major product lines included as part of the Retail Lending Test.

It is also important that the agencies be aware of other characteristics of the indirect lending market. The auto lending market is composed of many nonbanks and captive finance companies not subject to CRA. In fact, as of the first quarter of 2022, banks have only 29.11% market share of new loans or leases.[20] As a result, even some of the largest bank lenders have only a small percentage of the market. This dynamic gives banks little leverage to influence dealers to increase their presence in LMI communities. And, if pressed to do so by banks, these dealerships may simply take their business to nonbanks or captive auto finance companies.

Treatment Relative to Other Consumer Loans. For the first time, automobile loans would be treated differently from other consumer loans under CRA regulations. The agencies have proposed to evaluate all other consumer loans under the Retail Services and Products Test because they are "heterogeneous in meeting low- and moderate-income credit needs and are difficult to evaluate on a consistent quantitative basis."[21] But the agencies do not explain what it is about other consumer loans that make them uniquely heterogeneous, or how or why

[20] *See* Experian, *State of the Automotive Finance Market Q1 2022*, at Slide 12. This market division has been fairly constant over time. The FDIC observed in 2019 that bank share of outstanding auto loans had changed little from 2011 to 2018, and ranged from 33-35 percent. FDIC Quarterly 2019, Vol. 13, No. 4, at 38 (citing Experian Automotive and FDIC Analysis of Call Reports).
[21] 87 FR 33931.

automobile loans are somehow different, i.e., homogeneous and easy to evaluate on a consistent quantitative basis.[22]

The agencies state only that automobile loans "can be important in areas where jobs are a significant distance from where people reside and where public transportation is not readily available," and that "[s]afe and sound automobile loans can also serve as a means of building a credit history."[23] Credit card and small-dollar consumer loans are also a means of gaining access to credit and building credit history, yet they have been (appropriately) excluded from the Retail Lending Test.

Furthermore, the proposal does not offer any public policy goals that would justify the substantial costs created by the new data collection and reporting requirements that the proposal would create for banks over $10 billion in assets, particularly since these new requirements would result in an incomplete dataset due to the limited universe of reporters.

In addition, because banks have only 29% of the market for auto loans, comparisons to market benchmarks are bound to be inaccurate. The agencies will not have data on auto lending by credit unions, captive finance companies, and other nonbanks that are not subject to CRA and the proposed data collection.

For these reasons, we recommend that auto loans be evaluated qualitatively under the Retail Services and Products Test unless a bank elects to have them evaluated under the Retail Lending Test.

4. Evaluate Multifamily Lending Under the Community Development Financing Test

The proposal would evaluate multifamily loans as a product line under the Retail Lending Test. However, multifamily loans that provide affordable housing for LMI individuals would be evaluated under the Community Development Financing Test. Under this approach, multifamily loans would be subject only to the Retail Lending Test's geographic distribution test; borrower income would not be considered. The agencies explain that borrower income would not meaningfully measure whether multifamily loans met community credit needs because few multifamily loans are made to LMI borrowers. We recommend that all multifamily lending be evaluated under the Community Development Financing Test.

[22] The agencies propose to define a consumer loan as an automobile loan, credit card loan, or other secured or unsecured loan to one or more individuals for household, family, or other personal expenditures. The agencies propose to treat automobile lending as the sole consumer loan type evaluated under the metrics-based Retail Lending Test.
[23] 87 FR 33931.

First, applying the Retail Lending Test's distribution analysis to a bank's multifamily lending would not be a true measure of whether LMI individuals benefit from multifamily properties. Not all multifamily units are in LMI areas even though some renters may be LMI individuals. Thus, the location of the housing is likely a less significant indicator of serving local LMI needs than its affordability to LMI residents. Sometimes developers set aside a portion of units as affordable. Additionally, some communities do not want to be known for "solely affordable" multifamily housing because they believe it keeps their neighborhoods perpetually characterized as low- or moderate-income.

Second, the Retail Lending Test would focus on the location of the borrower, but in the case of multifamily lending, the location of the corporate borrower is distinct from the location of the actual property benefiting LMI individuals. It would be more appropriate for regulators to consider the location of the property for purposes of the geographic distribution test. But, more fundamentally, multifamily loans are distinct from other types of loans evaluated under the Retail Lending Test because they involve loans to developers or corporate borrowers as opposed to providing credit to consumers and small businesses. Therefore, multifamily loans would be better suited to evaluation under the Community Development Financing Test.

Finally, we do not believe that multifamily lending will constitute a major product line for most banks. However, we are aware that evaluating multifamily lending under the Community Development Financing Test would disadvantage institutions who specialize in this type of lending due to the weight given to the Retail Lending Test, which will drive a bank's CRA rating. In these situations, we recommend that the agencies give banks the option of classifying multifamily loans as either retail lending or community development (but not both).
The treatment of multifamily lending illustrates the challenges arising from applying the proposal's overly formulaic approach to an industry with significant specialization. It also highlights the need to balance retail lending and community development equally, as discussed in Section VI. of this letter.

C. Eliminate the Retail Lending Volume Screen

The Retail Lending Test would begin with a retail lending volume screen that assesses a bank's volume of retail lending (including originations and purchases) relative to its deposit base in each FBAA. This ratio would need to be at least 30 percent of the market average ratio of Large Banks in the area for a bank to receive a "Satisfactory" rating in the area. Where a Large Bank fails the retail lending volume screen, barring an adjustment arising from a performance context assessment, the agencies would assign the bank either a "Needs to Improve" or "Substantial Noncompliance" conclusion on the Retail Lending Test in that assessment area.

Where an Intermediate Bank (or a Small Bank opting to be evaluated under the Retail Lending Test) fails the retail lending volume screen, the agencies propose that the bank would not be limited to receiving only a conclusion of "Needs to Improve" or "Substantial Noncompliance" on the Retail Lending Test in that assessment area. Instead, the bank's outcome on the retail lending volume screen would be reviewed as an additional factor indicative of its lending performance that is considered when reaching Retail Lending Test conclusions for the assessment area.

We recommend that the agencies eliminate the retail lending volume screen because it arbitrarily creates winners and losers based on business model, is an inaccurate measure of bank capacity, and because it overlaps with other banking laws that regulate loan-to-deposit ratios.

For banks that specialize in consumer loans, application of the retail lending screen would paint a distorted picture of whether those institutions "meet the credit needs of [their] entire community…relative to [their] community presence, capacity, and local opportunities." These institutions anticipate that they would consistently fail the retail lending volume screen because the numerator of that calculation (small business, small farm, mortgage, auto) would not consider the bank's emphasis on consumer loans.

Some of these banks are rural, mission-driven CDFIs that specialize in small-dollar loans. They operate in depressed markets where there is little or no non-agricultural business, new businesses are not forming, and housing rarely turns over. In these communities, the need is for affordable, small-dollar loans; there is no demand for mortgages or small business loans.[24] We are concerned that the punitive aspects of the retail lending screen, in conjunction with the substantial complexities of the proposal overall, will lead to consolidation and/or branch closures by some CDFI banks that are subject to the Retail Lending Test. Often, these institutions are the only bank serving a community. If they close their doors, the community would be left without a highly regulated, insured depository institution. Only the local check casher and payday lender would remain. This would be the antithesis of what CRA modernization is intended to achieve.

Problems with the retail lending screen may also arise in other contexts. For example, another member that specializes in consumer lending shared that retail lending counted by the CRA proposal would constitute less than two percent of its total lending operations. Therefore, the bank is likely to always fail the retail lending screen. Together, these examples illustrate the unintended consequences of the proposal. The retail lending volume screen would shoehorn all banks into the same formulaic approach, even though their communities, the credit needs in those communities, and their business models are vastly different.

[24] The comment letter submitted by the Mississippi Bankers Association discusses this problem in detail.

The proposal seeks to address these concerns, by providing that an examiner may consider a variety of factors to determine whether there is an acceptable basis for a Large Bank failing to meet the retail lending volume screen. Factors may include the bank's institutional capacity and constraints, including the financial condition of a bank, the presence or lack of other lenders in the geographic area, safety and soundness limitations, business strategy, and other factors that limit the bank's ability to lend in the assessment area. However, the details are vague on how this analysis will be applied. This creates uncertainty for impacted institutions, particularly for banks that focus on consumer lending and whose retail lending comprises a small fraction of the product lines included in the Retail Lending Test. This is concerning, as failure of the screen would have significant consequences for the bank's assessment area rating.

There are additional challenges with the proposal's formulas and thresholds for the retail lending volume screen. First, including commercial deposits in this calculation could distort a bank's capacity to engage in qualifying activities for the benefit of individuals, small businesses, and small farms in a particular assessment area, particularly if the bank holds deposits of a large national or international corporation. Moreover, a bank that is an active seller to the secondary market may have the potential to replenish its capacity to lend in a way that would not be reflected by looking at its deposit base. The screen, therefore, would serve as a flawed and ineffective proxy for retail lending capacity.

Second, the market volume benchmark would be based on a limited subset of banks (Large Banks with a branch in that assessment area), while a true market volume benchmark would consider the total number of banks that are lending in that assessment area. In other words, a bank's entire retail lending exam in an assessment area would depend on the arbitrary standard of how well it stacks up against *some* market participants.

Third, banks will not know what the market benchmark will be at the beginning of an examination cycle; it will only be known at examination time. This aspect of the proposal is inconsistent with fair notice, and it undermines certainty and transparency.

Fourth, the pass/fail nature of the retail lending volume screen is unnecessarily harsh. The impact of being rated "Needs to Improve" or "Substantial Noncompliance" on an assessment area could have a significant impact on a bank's overall CRA rating considering the weight the proposal provides to the Retail Lending Test. There is no indication in the statute that Congress intended the CRA to have such an effect, nor have the agencies explained how the CRA compels this result.

Finally, Congress has already established a loan volume screen in the form of the Riegle-Neal interstate loan-to-deposit ratio requirement. If the agencies adopted the proposed retail lending volume screen, they would be second-guessing Congress's carefully-crafted method for requiring banks to make a minimum amount of loans relative to their deposits, and thereby substituting the agencies' own judgment for that of Congress.

V. Adjust the Retail Services and Products Test

The Retail Services and Products Test would predominantly use qualitative means, informed by quantitative metrics, to evaluate a bank's delivery systems as well as the responsiveness of its credit and deposit products. The Retail Services and Products Test would account for 15 percent of a bank's CRA rating. Certain components of the Retail Products and Services Test would be optional for Large Banks with assets of $10 billion or less (in order to reduce the data burden of new data collection requirements for banks within this asset category). Banks with assets over $10 billion would be subject to the full evaluation under the proposed Retail Services and Products Test.

The branch availability and services evaluation component of the test would compare the distribution of a bank's branches in LMI census tracts to community benchmarks and market benchmarks, with examiners retaining discretion about how to use that data to produce a conclusion. Similarly, digital and other delivery systems would be evaluated at the institution level based on (1) digital activity by individuals in LMI census tracts compared to that of middle- and upper-census tracts, including usage and account openings, (2) the range of digital and other delivery systems that the bank offers, and (3) the bank's strategy and initiatives to serve LMI individuals through such systems. This review would introduce new elements to CRA evaluations by considering the rates of usage of mobile apps and other digital platforms by customers in different income categories.

We support the goal of expanding access to products and services for LMI consumers. However, the demographics of census tracts may not be an effective proxy for determining whether banks are delivering deposit products to LMI households. As discussed above with respect to multifamily lending, some LMI individuals reside outside of LMI areas. Further, outside of metropolitan areas, there is less concentration of LMI individuals by census tract. For these reasons, we caution the agencies against using geography as the primary factor in determining whether a bank's deposit products and delivery channels are serving LMI individuals.

Because of the pitfalls of relying on geography to determine service to LMI individuals, we recommend that the agencies focus their evaluation on qualitative factors, such as a bank's strategies and initiatives for reaching LMI individuals as well as an assessment of whether the bank's deposit offerings are responsive to their needs.

We also emphasize that it will be critical for regulators to take performance context into account when evaluating a bank's products and services. Absent the application of performance context, banks operating in communities with no or spotty broadband access will fall far short, even though those institutions may be digital leaders in helping to promote broadband access in these communities.

VI. Revise the Community Development Financing Test

The Community Development Financing Test would consist of a community development financing metric and benchmarks as well as an impact review. These components would be assessed at the FBAA, state, multistate MSA, and institution levels, and would inform conclusions at each of those levels. The Community Development Financing Test would not be part of a bank's CRA examination in its RLAAs.

The proposal includes several helpful provisions pertaining to community development, including combining the community development lending and investment test, establishing a preapproval process by which banks can receive advance confirmation that an activity would receive CRA credit, creating an illustrative list of qualifying activities, and providing CRA credit at the bank level for community development financing that a bank provides outside of its FBAAs. We strongly support each of these provisions.

A. Revise and Clarify Qualifying Activities

The proposal would also revise the activities that would qualify for CRA credit under the Community Development Financing Test. These activities are categorized into the following categories: affordable housing; economic development; community supportive services; revitalization and stabilization; activities with minority depository institutions (MDIs), women-owned depository institutions (WDIs), low-income credit unions (LICUs), and Treasury-certified community development financial institutions (CDFIs); financial literacy; and activities in Native Land Areas.

1. Broaden the Definition of Affordable Housing

The proposal would provide credit for activities that support affordable housing for LMI individuals. We recommend that the agencies make the following revisions with respect to affordable housing.

Naturally Occurring Affordable Housing. The proposal establishes the criteria that a loan or investment in naturally occurring affordable housing must meet in order to qualify for CRA credit. Among other things, the agencies propose that the rent for the majority of the units in a multifamily property could not exceed 30 percent of 60 percent of the area median income (AMI) for the metropolitan area or nonmetropolitan county. In adopting the 60 percent standard, the agencies state that "limiting eligibility to those units with affordability levels under 60 percent of AMI median income may therefore help to ensure that the households served by this housing are in fact low- or moderate-income households."[25]

There is a dearth of affordable housing in the U.S. and inflationary pressures are exacerbating the supply shortage. Rents rose nearly 18 percent in 2021, far outpacing incomes. As a result, the number of low-rent properties is dwindling, and the number of rent burdened households with incomes of 60-80 percent of AMI is growing.[26] In the face of these market realities, the agencies should encourage—not discourage—banks from helping to address housing affordability for LMI individuals more broadly. Therefore, we specifically request that the affordability standard be set at 30 percent of 80 percent of AMI. This would be consistent with the housing goals for Fannie Mae and Freddie Mac, which include a goal for the total number of units affordable to LMI families with income no greater than 80 percent of area median income.[27]

Similarly, we recommend an affordability standard of 100-120 percent of AMI in cost-burdened renter markets designated by the Federal Housing Finance Agency (FHFA). To address the critical shortage of affordable housing in specific high-cost markets, FHFA uses a data-driven approach to designate markets in which loans on units affordable to cost-burdened renters with incomes up to 100 percent of AMI or 120 percent of AMI (depending on the market) will be classified as mission-driven for Fannie Mae and Freddie Mac. We request that the agencies adopt this same standard for identifying naturally occurring affordable housing in high-cost areas.

State and Local HFA Bonds. Section __.13(b)(4) would classify purchases of mortgage-backed securities (MBS) as a qualifying activity under the Community Development Financing Test. However, MBS are not the only type of bond that can help meet affordable housing financing needs. We recommend that the agencies revise this provision to include bonds issued by state and local Housing Finance Agencies.

2. Retain the Jobs Component and Include Certain Non-SBIC Funds in the Definition of Economic Development

[25] 87 FR 33895.

[26] https://www.politico.com/news/2022/03/18/housing-costs-inflation-00015808

[27] "There are three multifamily housing goals: a goal for the total number of units affordable to low-income families (income no greater than 80 percent of area median income), a goal for the total number of units affordable to very low-income families (income no greater than 50 percent of area median income), and a goal for the total number of units in small (5- to 50-unit) multifamily properties affordable to low-income families. The proposed Impact Factors provide additional consideration for targeting at/below 50 percent of AMI. https://www.fhfa.gov/PolicyProgramsResearch/Programs/AffordableHousing/Pages/Affordable-Housing-FNMandFRE.aspx

The proposal would no longer permit small business/small farm lending to be considered as economic development for CRA purposes.[28] We have significant concerns with this approach, as discussed in Section III.B.2 of this letter and request that banks continue to have the option of classifying small business/small farm loans with a community development purpose as either a retail loan or a community development loan.

Furthermore, we do not support the proposal's elimination of the jobs component (the "purpose" test) of the definition of "economic development," especially in light of the Agencies' 2016 specific expansion of that concept.[29] The preamble contains no policy discussion to explain the reversal of position. We have previously provided detailed discussion and analyses regarding the importance of CRA retaining all categories of the "size" and "purpose" tests as part of "economic development" in two previous comment letters and incorporate them by reference rather than repeating them in this letter.[30]

However, we support the proposal's inclusion of "support for financial intermediaries that lend to, invest in, or provide technical assistance to businesses or farms with gross annual revenues of $5 million or less."[31] We urge the agencies to expand this definition to include certain non-SBIC funds that currently qualify under economic development. Specifically, we urge the agencies to include in the definition of economic development financial intermediaries that lend to, invest in, or provide technical assistance to businesses that (1) have more than $5 million in gross annual revenues but still meet the size eligibility standards of the SBDC or SBIC Programs, and (2) support permanent job creation, retention, and/or improvement for (a) LMI individuals, (b) in LMI areas, or (3) in areas targeted for redevelopment.

3. <u>Revise the Elements of Place-Based Revitalization and Stabilization Activities and Clarify the Treatment of Certain Renewable Energy Projects</u>

The agencies propose to replace the current revitalization and stabilization activities component of the community development definitions with six new categories of activities: (1) revitalization; (2) essential community facilities; (3) essential community infrastructure; (4) recovery activities in designated disaster areas; (5) disaster preparedness and climate resiliency

[28] Activities undertaken consistent with Federal, state, local, or tribal government plans, programs, or initiatives that support small businesses or small farms as those entities are defined in the plans, programs, or initiatives could be classified as economic development for purposes of the Community Development Financing Test.
[29] *See* 81 Fed. Reg. 48506 (July 25, 2016), 48507 – 48510 (Agencies expanded the "purpose" test so that jobs for LMI persons would be only one out of five ways to meet the "purpose" test).
[30] *See* ABA Comment to FRB ANPR, February 16, 2021 (at pp. 40-43); and ABA Comment to FDIC and OCC NPR, April 8, 2020 (at pp. 50-52).
[31] 87 FR 34019.

activities; and (6) qualifying activities in Native Land Areas. These are referred to collectively as the place-based definitions.

The six proposed place-based activities share four common elements. Contrary to the agencies' stated intent, two of those elements could result in less community and economic development financing by banks, which would be contrary to the agencies' goals of increasing bank CRA activity.

First, the proposal would require that the activity be conducted "in conjunction with a Federal, state, local, or tribal government plan, program, or initiative." The intent of this requirement is to "ensure that the activity is responsive to identified community needs."[32] However, limiting CRA credit for revitalization and stabilization to government programs would exclude impactful activities with non-profits or in the private sector that would effectuate the same community development purpose as government programs. Likewise, climate resiliency initiatives developed by local utilities would also be excluded. CRA should serve to incentivize, not discourage, private sector and non-profit development involvement in revitalization and stabilization efforts. Moreover, banks should not have to wait for the government to act in order to obtain CRA credit for making loans and investments in communities that are struggling.

Second, the proposal states that revitalization and stabilization efforts must not displace or exclude LMI residents. As a practical matter, it is unclear how banks would demonstrate that a loan or investment would not result in displacement. Therefore, we recommend that in lieu of a blanket prohibition on displacement, the agencies consider a variety of factors that evaluate an activity's overall impacts to LMI individuals, such as displacement mitigation plans as well as the net impact that an initiative will have on the community, and LMI residents in particular.

Expanding the use of renewable energy is a critical part of helping LMI communities that are vulnerable to the effects of climate change, including extreme heat and other weather events. Therefore, we request that the agencies make the following clarifications with respect to the disaster preparedness and climate resiliency prongs of the revitalization and stabilization category. First, any final rule should clarify that disaster preparedness and climate resiliency activities include energy-related activities, such as projects that provide access to renewable energy (including utility-scale projects) that benefit residents in targeted census tracts. Second, the agencies should also clarify that renewable energy activities (e.g., construction of a wind or solar power plant) can benefit LMI residents in targeted census tracts even if the plant where the renewable energy is generated is developed outside of the targeted census tract. Some sources of renewable energy, such as solar and wind farms, may be located outside of the population centers to which energy is transported.

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[32] 87 FR 33903.

4. Clarify Activities Undertaken With CDFIs

The proposal includes multiple provisions intended to support MDIs, WDIs, LICUs, and Treasury Department-certified CDFIs. We support these revisions. In particular, we agree that the lending, investment, and service activities that any bank undertakes in connection with a Treasury Department-certified CDFI should qualify for CRA credit. Positive CRA consideration should not be conditioned on the bank's proximity to the CDFI, as has been the case in the past. This would place CDFIs, including CDFI banks, on equal footing with the treatment provided to MDIs and LICUs.

We also request that the agencies expressly include CDFIs in the group of institutions listed in __.13(j)(1). This section provides that "investments, loan participations, and other ventures undertaken by any bank…in cooperation with MDIs, WDIs, or LICUs" will constitute a qualifying CRA activity. We recommend that the agencies add CDFIs to this list, as they are the only CRA-regulated depositories that are annually certified as primarily serving LMI communities. Including CDFIs in __.13(j)(1) would also reinforce __.13(j)(2), which applies to lending, investment, and service activities undertaken with CDFIs more generally.

5. Revise Regulation H/Public Welfare Investments

As part of the dialogue on CRA modernization, we bring to the Federal Reserve's attention a misalignment between the Federal Reserve's regulations governing public welfare investments (PWI's) and the existing CRA regulations and Q&A's. This disconnect would continue to exist under the proposed rule.

Specifically, Regulation H requires that state member banks obtain approval from the Board of Governors (the Board) prior to investing in certain PWI's, even though such investments receive positive CRA consideration and do not require prior approval by the OCC or the FDIC. This is problematic because Regulation H has requirements that are much more restrictive than CRA. For example, CRA requires only that the "primary purpose" of an investment be for community development, while Regulation H requires Board approval if an investment is not "solely" for the purpose of six narrow categories of activities.[33]

The Federal Reserve has taken the position that a PWI that does not meet the "solely" standard must be approved by the full Board, which can take several years. This misalignment between CRA and Regulation H has created several problems. Some banks have been required to divest PWIs and other banks have had PWI applications pending for extended periods of time (and in some cases multiple years).

[33] 12 C.F.R. 208.22(B)(1)(iv).

It is unclear why the Federal Reserve participated in prior interagency CRA rulemakings only to subsequently interpret Regulation H to prohibit state member banks from engaging in certain CRA-eligible community development investment activities absent prior Board approval. The banking agencies will not be aligned on CRA until they harmonize their treatment of PWIs.

For these reasons, we request that, in conjunction with the CRA modernization process, the Federal Reserve revise Regulation H to clarify that if an investment is a qualified investment under CRA regulations, then such investment also qualifies as a PWI that does not require prior approval from the Board. In lieu of Board approval, banks could be required to provide after-the-fact notice, consistent with the PWI notice requirement for national and state nonmember banks. From a policy perspective, if an investment is important enough to receive CRA credit, the Federal Reserve should give banks the legal authority to make those CRA investments without Board approval.

B. Provide Pro Rata Credit for Community Development Activities

The agencies seek feedback on whether to provide partial consideration for community development activities based on the share of LMI census tracts or LMI individuals that benefit from a particular project. We strongly support this approach. Many community development initiatives benefit wide swaths of a community, sometimes multiple counties. This is particularly the case in rural and nonmetropolitan areas where populations are less concentrated by income and where large-scale projects must benefit the community at large. In these instances, community development projects cannot be restricted to those that benefit only LMI individuals.

Large scale community development initiatives such as hospital construction, water and sewer extension, transportation improvements, and expansion of broadband service are critical to the economic viability of many small towns and rural areas. Providing pro rata CRA credit for these activities would acknowledge the complexities associated with bringing services to populations spread over large distances and would incentivize banks to provide CRA financing for struggling regions that are located outside of a bank's assessment area, yet are in need of investment.

C. Exclude Foreign Assets, Bank Assets Held at Central Banks, and Short-Term Extensions of Credit from the Asset-Based Denominator for Wholesale and Limited Purpose Banks

The proposal would evaluate wholesale and limited purpose banks under the Community Development Financing Test and use a bank's total assets as the denominator for computing a bank's metric. [34] We agree with this approach, which recognizes that the business models of these institutions are distinct from those of retail-focused banks. However, we do not agree that

[34] This is in contrast to the proposed approach for Large Banks, which would use deposits as the denominator.

the calculation should rely on total assets as an input, as it does not sufficiently reflect the nature of these institutions. Instead, we recommend that the agencies consider using "CRA-eligible assets"—that is—those assets held by the bank which have a reasonable nexus to CRA and its mandate to support the LMI communities in which the bank operates. In particular, we request that the agencies exclude foreign assets, central bank placements, and short-term extensions of credit from the denominator from CRA-eligible assets because they are not tied to CRA lending and could distort the denominator's ability to reflect CRA capacity.

VII. Appropriately Balance the Benchmarks, Weightings, and Rating Methodology

The proposal would raise the bar for banks' performance on the Retail Lending Test. As a result, a bank would have to exceed past performance in order to attain the same CRA rating that it received on a prior exam. Regulators believe that these heightened performance standards would incentivize banks to increase lending to underserved communities. However, the agencies do not adequately explain their rationale for the proposed benchmarks and ratings methodology. As explained below, the proposal may actually create a *disincentive* for certain types of lending and investment. For this reason, the agencies must make sure that any new benchmarks and ratings methodologies are calibrated appropriately and explain the rationale and policy objectives for these changes.

Uniform Metrics. In an attempt to standardize CRA evaluations, the proposal would apply the same performance metrics to all banks operating in an assessment area, regardless of whether the bank has a digital or a physical presence. We do not believe that modernization means the agencies must apply the same metrics to banks when they have significantly different business models. The agencies should take great care to ensure any final rule does not competitively advantage or disadvantage certain business models in their quest to modernize CRA.

Overemphasis of the Retail Lending Test. The proposal assigns too much weight to the Retail Lending Test, which would constitute 45% of a Large Bank's CRA rating.[35] Under this approach, a bank could not achieve an overall rating of Outstanding unless it receives an Outstanding rating on the Retail Lending Test, regardless of how well the bank performs on the Community Development Test.

The agencies believe that a weighting of 45% appropriately emphasizes retail lending to LMI individuals and communities. However, this concentration on the Retail Lending Test could have unintended consequences. At the most basic level, weighting the Retail Lending Test at 45%

[35]The proposal would weight the various performance tests as follows for Large Banks: 45% for Retail Lending Test performance score; 15% for Retail Services and Products Test performance score; 30% for Community Development Financing Test performance score; and 10% for Community Development Services Test performance score.

would disadvantage business models that deemphasize retail lending (as defined in the proposal) overall or in particular geographies.

Furthermore, if a bank believes an Outstanding on the Retail Lending Test is unattainable, that bank may choose *not* to pursue an Outstanding on the Community Development Financing Test since the bank would not be capable of achieving an overall rating of Outstanding. In other words, the proposed benchmarks could create a *disincentive* for banks to stretch and do more community development lending and investing. If banks believe the performance measures are out of reach, they have little reason to aim for them. This would be a highly undesirable outcome, particularly for communities that desperately need revitalization and are located outside of the assessment areas of most banks. To avoid these problems, we recommend that the agencies weight retail and community development tests equally.

Achievability. The proposed Retail Lending benchmarks may be unachievable and could incentivize unsafe and unsound risk taking. To obtain a High Satisfactory rating, a bank must meet 110% of the market benchmark or 90% of the community benchmark. For an Outstanding rating, a bank must meet 125% of the market benchmark or 100% of the community benchmark. Importantly, the proposal would evaluate banks on a relative basis rather than an absolute basis. In the limited amount of time that we had to review the proposal, it appears that the proposed performance standards could create an unrealistic target, whereby it will be mathematically impossible for all banks in an assessment area to meet the proposed thresholds.

The proposed performance standards would create a bell curve of ratings distributions within the Retail Lending Test. In fact, according to the preamble to the proposed rule, 34% of banks would fail the Retail Lending Test in their RLAAs and 39% would only receive a Low Satisfactory rating.[36]

We oppose this approach for which the agencies provide little explanation, other than to state that "some stakeholders have expressed that the ratings process should be reformed to add more rigor and stricter standards."[37] CRA performance benchmarks should be rigorous, yet achievable, and the expectation should be that all banks can meet or exceed the established standard—as is the case with all other consumer protection and safety and soundness regulations. Artificially high benchmarks could incentivize banks to engage in undue risk taking in order to comply with the regulation's performance standards. This would be disastrous for consumers and communities, and it could increase risk in the financial system.

Fair Notice. We recommend that all benchmarks used in the examination be established at the beginning of each exam cycle and remain consistent throughout the examination period. As

[36] See Appendix A for more information regarding potential ratings outcomes under the proposal.
[37] 87 FR 33988.

proposed, banks would not know the specific benchmarks that they must meet until the end of an examination period. This aspect of the proposal raises significant due process and fair notice concerns by failing to set out clear performance expectations in advance.

VIII. Revise Performance Evaluation Provisions

We also make the following recommendations regarding examination reports and downgrades of CRA ratings.

A. Do Not Include a Race and Ethnicity Disclosure in Performance Evaluation Reports

The agencies propose to disclose in the CRA performance evaluation of a Large Bank the distribution by race and ethnicity of the bank's home mortgage loan originations and applications in each of the bank's FBAAs, and as applicable, in its RLAAs. The agencies would disclose the number and percentage of the bank's home mortgage loan originations and applications by race and ethnicity and compare that data against the demographic data of the assessment area and the aggregate mortgage lending of all lenders in such area. The disclosure of race and ethnicity of the bank's home mortgage loan originations and applications on the bank's CRA performance evaluation would have no direct impact on the conclusions or ratings of the bank. However, the agencies state that it would be included in the evaluation "to provide transparent information to the public."

We recommend removing the disclosure from the final rule as HMDA already provides for this transparency, and it is unclear how the proposed transparency relates to CRA. The agencies and the CFPB regularly use HMDA data to produce similar reports, and use them to examine banks for compliance with the Equal Credit Opportunity Act and the Fair Housing Act. In addition, the public can analyze HMDA data to see the distribution of a bank's lending by race and other demographic characteristics. Thus, the disclosure does not increase transparency and is unnecessary. Finally, disclosing the information in the evaluation may suggest to the public that a bank has engaged in discrimination. The CFPB and the FFIEC have stated many times that HMDA data is a screening tool; HMDA data alone cannot establish discrimination.[38]

[38] For example, the FFIEC made this statement when releasing the aggregate HMDA data for 2020: "HMDA data are generally not used alone to determine whether a lender is complying with fair lending laws. The data do not include some legitimate credit risk considerations for loan approval and loan pricing decisions. Therefore, when regulators conduct fair lending examinations, they analyze additional information before reaching a determination about an institution's compliance with fair lending laws." https://www.ffiec.gov/press/pr061721.htm; *see also* https://www.stlouisfed.org/on-the-economy/2018/march/do-hmda-data-prove-lending-discrimination.

B. Limit Downgrades to Discriminatory or Illegal Credit Practices

Under the proposal, the practices that could adversely affect a bank's CRA performance would no longer be limited to discriminatory or other illegal credit practices but would include *any* discriminatory or illegal practice. The agencies note that the CRA statute indicates that banks are required by law to meet the convenience and needs of their communities, which includes the need for credit services as well as deposit services. Based on this interpretation, the proposal would expand the scope of practices that could trigger a downgrade to include any discriminatory or illegal practice.

Basing a CRA downgrade on *any* illegal practice is inconsistent with the statute. Many practices that are against the law are unrelated to Congress's intent in enacting CRA. For example, an illegal employment practice has no relationship to the provision of banking services to LMI individuals and communities. Nor does the violation of securities laws or anti-money laundering requirements. Accordingly, the agencies should only issue a downgrade for discriminatory or illegal credit practices.

IX. Provide a Transition Period of at Least Two Years

The agencies propose to incorporate a transition period comprised of multiple "applicability dates." For the most burdensome aspects of the proposal (including RLAAs, new performance tests, standards, and ratings, and data collection and reporting requirements), the agencies would provide a transition period of one year. However, twelve months is insufficient to implement the proposed changes for a rulemaking this comprehensive and complex.

In addition to parsing the highly technical rule, banks will need to:

- Apply new and complicated formulas to their existing CRA programs;
- Establish administrative oversight over newly designated RLAAs and ensure that they are properly incorporated into the bank's CRA program;
- Ensure that all assessment areas (new and existing) meet the rule's newly established performance benchmarks;
- Implement major data collection, recordkeeping, and reporting mechanisms that significantly exceed existing CRA requirements, including the establishment of data integrity procedures and controls; and
- Evaluate the cost-benefit of certain business lines and geographic markets in light of the burden that the new RLAAs and performance metrics create.

CRA implementation will be a very heavy lift on its own. But, the proposed 12-month implementation period is especially unrealistic given that banks will likely be required to implement the new CRA regulation in tandem with the CFPB's anticipated final small business lending data collection rule (Dodd-Frank Act section 1071). For many banks, the same staff will be charged with implementing both of these new regulations, particularly as it pertains to overhauling technology systems and standing up new data collection and reporting mechanisms. This dual implementation will make the time pressures of a 12-month implementation period particularly acute.

In fact, in anticipation of overlapping implementation periods for these major rules, some banks have initiated their compliance preparations *prior to* the issuance of final rules even though some of this effort may need to be unwound in the event a final rule deviates from the proposal. This is wasteful. Yet, extreme measures like this illustrate the operational challenges associated with unreasonable implementation timelines.

Banks are not the only entities that must dedicate substantial resources to meet the time pressures of a new CRA rule. Banks are dependent on software vendors and core providers to furnish services that will be necessary to implement a new CRA framework. Regulators should solicit input from these third parties regarding the time that will be necessary to develop the requisite coding, programs, and systems necessary for banks to implement a final rule. In the case of prior rulemakings involving HMDA and TRID, bank implementation and testing of vendor products was delayed because third-parties lacked sufficient time to develop systems changes for their clients. We urge the agencies to draw upon these experiences when establishing the implementation period for the final CRA rule.

For the foregoing reasons, we request that the agencies provide an implementation period of at least two years to implement following publication of the final rule in the *Federal Register*. We further recommend that the implementation period be structured such that banks will not be required to report under two different CRA regulations in the same calendar year. Finally, we recommend that the agencies provide extensive interagency training and support to help banks understand and apply a new regulatory framework. Examiner training should also be conducted on an interagency basis.

X. Apply CRA-Like Requirements to Credit Unions and Other Financial Firms

There has been a remarkable transformation in the delivery of financial products and services since the CRA was enacted 45 years ago. In addition to the proliferation of electronic delivery channels, payment processing and loan origination are no longer within the exclusive purview of the local bank. In 2021, nonbanks originated approximately 72% of mortgage loans in the United

States.[39] Non-bank origination of small business loans is also on the rise. Fintech lending to small businesses increased from $14 billion in 2018 to $20.4 billion in 2020.[40]

In like manner, the credit union industry continues to expand. Today's credit unions are a $2 trillion industry. Some credit unions have grown into regional and even national financial institutions that receive significant government benefits to serve LMI individuals, yet they are not required to demonstrate through measurable standards that they are meeting their service obligations.

Analysis shows that credit unions are increasingly targeting wealthy communities, serving wealthy consumers, and are a contributing factor to *widening* economic inequality. [41] Between 2012 and 2021, more than 70% of the branches of banks targeted for acquisition by credit unions were in upper- or middle-income census tracts, and only 13 branches out of almost 200 were in low-income tracts. Per data from S&P Global, banks are already much more likely than credit unions to have branches in at-risk communities—7.7x in poverty-distressed communities, 9.3x in distressed, underserved, or middle-income communities, 12.8x in remote rural communities, and 18.1x in communities experiencing population loss.

Perhaps even more concerning is the recent trend of credit unions buying community banks. Community banks pay taxes and comply with the Community Reinvestment Act, but once the transaction closes, the bank's CRA obligations cease to exist and the acquiring credit union has no CRA responsibility to the community. This outcome is nonsensical.

In light of the foregoing market developments, policymakers should reconsider the entities that have community reinvestment responsibilities. As Federal Reserve Chairman Jerome Powell observed, "Like activity should have like regulation….Consumers require protection and low- and moderate-income communities require credit support, regardless of the nature of the institution."[42]

XI. Looking Forward

Thank you for the opportunity to comment on proposed revisions to the regulations that implement the CRA. Updates to this regulation are long overdue, and we are optimistic that it is possible to improve the effectiveness and administration of CRA on an interagency basis.

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39 https://files.consumerfinance.gov/f/documents/cfpb_2020-mortgage-market-activity-trends_report_2021-08.pdf
40 https://cdn.advocacy.sba.gov/wp-content/uploads/2022/02/15122206/FinanceFAQ-Final-Feb2022.pdf
41 https://fedfin.com/wp-content/uploads/2020/07/FedFin-Paper-The-Credit-Union-Equality-Commitment-An-Analytical-Assessment.pdf
42 https://ncrc.org/ncrc-ceo-jesse-van-tol-with-federal-reserve-board-of-governors-chair-jerome-powell-at-the-2021-just-economy-conference-may-3-2021/

Nonetheless, we remain concerned that the comment period on the proposal was inadequate given the magnitude and complexity of the changes proposed and the lack of legal or policy analysis explaining many of the proposed revisions. We welcome the opportunity to provide additional information and input as the modernization effort proceeds.

Sincerely,

American Bankers Association
Alabama Bankers Association
Alaska Bankers Association
Arizona Bankers Association
Arkansas Bankers Association
California Bankers Association
Colorado Bankers Association
Connecticut Bankers Association
Delaware Bankers Association
Florida Bankers Association
Georgia Bankers Association
Hawaii Bankers Association
Idaho Bankers Association
Illinois Bankers Association
Indiana Bankers Association
Iowa Bankers Association
Kansas Bankers Association
Kentucky Bankers Association
Louisiana Bankers Association
Maine Bankers Association
Maryland Bankers Association
Massachusetts Bankers Association
Michigan Bankers Association
Minnesota Bankers Association
Mississippi Bankers Association
Missouri Bankers Association
Montana Bankers Association
Nebraska Bankers Association
Nevada Bankers Association
New Hampshire Bankers Association
New Jersey Bankers Association
New Mexico Bankers Association
New York Bankers Association
North Carolina Bankers Association
North Dakota Bankers Association
Ohio Bankers League
Oklahoma Bankers Association
Oregon Bankers Association
Pennsylvania Bankers Association
Puerto Rico Bankers Association
Rhode Island Bankers Association
South Carolina Bankers Association
South Dakota Bankers Association
Tennessee Bankers Association
Texas Bankers Association
Utah Bankers Association
Vermont Bankers Association
Virginia Bankers Association
Washington Bankers Association
West Virginia Bankers Association
Wisconsin Bankers Association
Wyoming Bankers Association