February 16, 2021

Via Electronic Mail

Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Re: *Community Reinvestment Act: Advance notice of proposed rulemaking; request for comment* (Docket No. R-1723, RIN 7100-AF94)

Ladies and Gentlemen:

We are a group of digitally based depository institutions that are not tied to traditional branch networks[1] and we appreciate the opportunity to respond to the Advance Notice of Proposed Rulemaking[2] ("*ANPR*") issued by the Board of Governors of the Federal Reserve System ("*Board*") to amend the Community Reinvestment Act ("*CRA*") regulatory framework. We feel strongly that any CRA modernization should account for the current variety of banking and financial services business models, which will continue to evolve to better serve our customers, including those in low- and moderate-income ("*LMI*") communities. While we appreciate the Board's focus on modernization, we believe targeted revisions—instead of a complete overhaul of the CRA regulatory framework—will more effectively advance the spirit and impact of the CRA. Our recommended targeted revisions are as follows:

1. Adopt performance tests and standards specifically for digitally based banks, while avoiding lending-based or deposit-based assessment area delineation frameworks;

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[1] While some of our business models are becoming less unusual in the banking industry today, our reference to "nontraditional," "non-branch-centric," or "branchless" banks throughout this letter is intended to capture business models that are not primarily based on traditional, staffed "brick-and-mortar" retail branch locations that offer customers physical access to a facility to conduct banking activities, including deposit-taking and disbursing loans. Capital One is joining these comments on behalf of its limited purpose charter, Capital One Bank, N.A.

[2] 85 Fed. Reg. 66410 (Oct. 19, 2020).

2. Continue tailored evaluation for wholesale and limited purpose banks, but compare such banks to true peers (other wholesale or limited purpose banks); and

3. Preserve and strengthen the current strategic plan evaluation framework by providing strategic plan banks with optionality to define assessment areas to include geographies outside of their branch-based areas or receive credit for CRA activity outside of their assessment areas when the plan's goals support such consideration.

Although we expect that we share many common concerns with branch-based banks, we appreciate the opportunity to share our perspective as a coalition of digitally based banks. We rely primarily on digital channels rather than physical branches to serve our respective consumer and business customer bases, which (for some of us) extend from coast-to-coast. We therefore hope our collective experience executing non-branch business models within a CRA framework designed primarily for branch-based banks can help assist the Board in making improvements to the CRA framework.

The range of diverse business models in the industry today—including large corporate institutional banks, banks with significant sweep deposit programs primarily linked to affiliated brokerage accounts, issuers of credit cards, lenders of auto loans to consumers and small businesses nationwide, and various combinations of these—illustrates why tailoring is necessary and appropriate for our CRA programs to continue to make impactful loans and investments and to engage in community development ("*CD*") activities, all while operating in a safe and sound manner.

As we have seen during the COVID-19 pandemic, financial transactions have become increasingly digital to meet consumer demand. We believe the concerns shared in this letter will become more common among existing branch-based banks as the industry evolves toward digital banking. To that end, a durable final rule should account for possible future banking industry changes and should be jointly adopted by the Board, the Federal Deposit Insurance Corporation ("*FDIC*") and the Office of the Comptroller of the Currency ("*OCC*"). Our letter is focused on providing feedback that is responsive to the questions posed in the ANPR and sets forth recommendations that would have positive impacts on the communities and consumers that are served by banks with business models and delivery channels like those of the undersigned institutions. In our view, the principles reflected in these recommendations are equally applicable irrespective of any given bank's primary federal regulator and would, if adopted, serve to advance the spirit and purpose of the CRA.

<u>DISCUSSION</u>

I. Adopt performance standards and tests tailored to digitally based banks

A. Create a "digitally based bank" designation for qualifying institutions

The Board has stressed the importance of determining an approach to "address the issue of how to define a bank's local communities, which impacts where banks' CRA performance is evaluated and is critical for ensuring that the CRA fulfills its purpose of encouraging banks to meet the credit needs of their local communities."[3] A critical component of any CRA modernization effort is to create an evaluation framework for retail banks that predominantly deliver products and services digitally nationwide. To that end, we support the ANPR's suggestion to designate any institution that gathers 80 percent or more of its deposits from geographies outside of its traditional branch network as a "digitally based bank" (referred to in the ANPR as an "Internet bank").

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[3] ANPR, at 66410.

While the CRA performance of digitally based banks is currently evaluated based on qualifying activities conducted within their branch-based assessments areas (i.e., focusing on main office and branch locations), the business of banking for digitally based banks is not tied to any particular geography or local community. Digitally based banks operate nationally and have a customer base that is not localized to any particular geographic area and, as a result, such institutions' CRA performance should be evaluated in a manner that accounts for our unique business models. In much the same way that the Board's existing retail test is not suitable or appropriate to apply to wholesale and limited purpose banks with their very different business models, digitally based banks are sufficiently distinct from branch-based retail banks to merit an independent, tailored evaluation framework.

B. Adopt a holistic, whole-bank evaluation framework consistent with the digital banking business model

For digitally based banks, deposit markets and lending markets alike have considerable cross-country reach and are not tied to physical branch or main office locations. As long as such banks' CRA efforts are rationally designed to satisfy the credit and community development needs that are the focus of the CRA—providing credit and investment capital in LMI neighborhoods, for LMI individuals and families, and for community development—it is unnecessary to require such efforts to be focused only in certain geographies based on deposit concentrations.

The CRA itself does not stipulate any requirements regarding CRA assessment areas. Instead, the CRA (1) requires a bank to demonstrate that its deposit facilities meet the convenience and needs of the communities in which it is chartered to do business; (2) states that the convenience and needs of communities include credit as well as deposit services; and (3) requires the Board, the FDIC, and the OCC to "assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution."[4] The CRA also specifically permits a bank that caters predominantly to military personnel to delineate its entire deposit customer base as its community for evaluation purposes without regard to geographic proximity, and some banks have adopted this approach.[5] An evaluation of a bank's CRA activity that permits certain banks to adopt an assessment area that reaches beyond just its facilities or branches, for the purpose of reflecting the unique nature of those banks' business models, therefore has precedent in the statutory language itself to provide flexibility for varying bank business models.

Accordingly, we encourage the Board to adopt an evaluation framework tailored to digitally based banks. Overall, we support retaining the Board's existing focus on branch-based assessment areas, including for digitally based banks, which should be evaluated with respect to branch-based assessment areas around their main office and any physical branches that they have, as required by current regulation. However, because a digitally based bank's "entire community" may reflect broad regional geographies or even a national community, digitally based banks with a majority of deposits and lending outside of their branch-based assessment areas should be evaluated on a holistic, whole bank basis. For example, under a whole bank evaluation, retail lending borrower and geographic distributions would be compared to national benchmarks – such as the percentage of LMI households nationwide – and, where data is available, the national aggregate of peer performance. Additionally, a digitally based bank should have use of performance context to the extent it does not meet such national benchmarks.

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[4] 12 U.S.C. § 2903(a)(1).

[5] 12 U.S.C. § 2902(4).

The Board should adopt a CD test for digitally based banks that mirrors the current CD test for wholesale and limited purpose banks.[6] For decades, this approach has been effective in allowing banks with unique business models to address the needs of both the local communities where they have physical locations and other areas around the country that are in need of investment and support. Many of us have wholesale or limited purpose bank designations and have found that the structure of the Board's current CD evaluation is both fair and flexible. If a digitally based bank has adequately addressed the CD needs of its branch-based assessment areas (i.e., the geographies including and surrounding its main office and any of its physical branch locations), it should be able to receive consideration for any additional CD activity outside its assessment area. Adopting this framework would ensure a digitally based bank meets the needs of its local community and has the flexibility to assist LMI communities outside its branch-based assessment area given the bank's capacity to do so based upon the size and scope of the institution.

C. Refrain from adopting a lending-based or deposit-based assessment area delineation framework

The ANPR asks whether the Board should delineate deposit- or lending-based assessment areas for digitally based banks. We strongly discourage the Board from doing so, because requiring institutions (digitally based banks or otherwise) to delineate deposit- or lending-based assessment areas would only intensify CRA activity in areas that are already well-served ("CRA hot spots") while areas of need ("CRA deserts") receive little to no relief. As the Board recognizes in the ANPR based on stakeholder feedback and its own analysis of data, the largest sources of deposits geographically are concentrated in a relatively small number of major metropolitan areas where there is already significant competition for CRA-related investments and loans among numerous banks.[7] The addition of deposit-based assessment areas will exacerbate these disparities.

Further, a depositor's location (especially for nationwide and multi-national corporations) may not represent where the economic activity occurred that generated the deposits. If banks were required to adopt deposit-based assessment areas, a few large corporate depositors could easily skew a bank's deposit "geography," both by almost single-handedly giving rise to one or more deposit-based assessment areas and by creating a sufficiently large retail deposit "denominator" in a limited area that would make it difficult if not impossible for the bank to meet certain required CRA thresholds. At a minimum, such geographic dominance would crowd out other banks that needed to demonstrate CRA activity, all without any consideration of whether the geography ultimately encompassed by this deposit-based assessment area even had a need for additional CRA activity or whether there are a sufficient number of viable opportunities for safe and sound lending and investment.

Given that a digitally based bank's business is open to depositors nationwide, subjecting a digitally based bank to a deposit-based assessment area requirement would likely require it to redirect finite resources from CRA deserts to CRA hot spots. Similarly, a digitally based bank lends to customers nationwide, but would need to focus on more crowded markets if it were subject to lending-based assessment areas. These markets would likely track nationwide population density and would require banks to direct significant resources to these geographies regardless of how competitive these markets already are or whether there is sufficient capacity in the public and non-profit sectors to absorb significant amounts of new investment.

Under the approach adopted by the OCC in its current CRA regulations, banks have the option of drawing deposit-based assessment areas at any level up to the state level in order to mitigate the negative

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[6] *See* 12 CFR § 228.25 (defining the CD test for wholesale and limited purpose banks).

[7] ANPR, at 66417-66418.

consequences of lacking a physical presence in a given geography. However, such statewide assessment areas still do not satisfactorily solve the principal concern of intensifying investments in CRA hot spots, while CRA deserts remain underserved. While a bank may have some additional flexibility outside of its immediate assessment areas, it would remain limited to specific statewide geographies. The effect is to heighten competition within the states where a bank already has a banking presence, rather than permit it to move anywhere it perceives there is a need after it has sufficiently addressed the need in its own assessment areas. Banks that do have a presence in those other states may not have capacity to increase their activity to meet the need. In light of the Board's stated interest in increasing the reach of CD investing and lending, such a regulatory framework is needlessly confining.

Finally, lending-based assessment areas would be somewhat inconsistent with the statutory language of the CRA, which focuses on the credit needs of the local communities in which an institution is chartered[8] and requires the federal banking agencies to prepare written evaluations of a bank's CRA performance based on each metropolitan area in which the "institution maintains one or more domestic branch offices."[9]

II. Continue tailored CRA evaluations for wholesale and limited purpose banks.

The ANPR emphasizes that one of the Board's primary objectives in revising its CRA regulations is to more effectively tailor supervision to a bank's size and business model. An existing example of such tailoring is the separate evaluation framework for wholesale and limited purpose banks based on their CD investments, lending and services. The Board should continue to recognize wholesale and limited purpose bank designations for banks whose business models are not predominately focused on providing retail banking services, and should continue to evaluate the CRA performance of such institutions under a CD test and not retail tests. This approach will continue to encourage community lending and investing by all banks, regardless of whether they raise retail deposits.

With respect to performance benchmarks within the Board's proposed CD tests, wholesale and limited purpose banks should be compared against other wholesale or limited purpose banks. Such true peer comparison would provide a more accurate evaluation of a wholesale or limited purpose bank's CRA activities than one that uses the performance of banks with retail-oriented business models

III. Preserve and strengthen the strategic plan framework.

Several of the undersigned have been successfully operating under approved strategic plans for many years. A strategic plan and its approval process promotes objectivity, transparency, and consistency and may allow a bank that elects to be evaluated based on strategic plan performance to focus on meeting defined community needs in predetermined, targeted areas. The strategic plan framework provides banks with the opportunity to set specific goals to invest in and support communities in a more thoughtful and strategic manner that accounts for a bank's size, business model, and product offerings while still being consistent with safety and soundness considerations.

The current CRA regulatory framework, which permits banks to pursue the strategic plan option, is effective in fulfilling the objectives and spirit of CRA, and promotes successful bank engagement tailored to provide impact in the communities they seek to serve. Strategic plans can facilitate certainty by affording banks an opportunity to explicitly identify the geographical areas to be served, to set concrete goals and objectives to be achieved and, ultimately, to be evaluated over a multi-year period. Moreover, under the

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[8] 12 U.S.C. §§ 2901(a)(1) and (2).

[9] 12 U.S.C. § 2906(b)(1)(B).

existing framework, each strategic plan is subject to a public comment period, which incentivizes banks to develop their goals and objectives through collaboration with, and input from, the regulators and communities to be served. This process of public engagement helps banks shape their respective strategies and facilitates maximum impact within the identified communities.

As the Board seeks to modernize its overall CRA framework, it should continue to allow banks to adopt and execute strategic plans. A strategic plan is an extremely beneficial tool for communities, banks, and regulators alike. These plans help to identify and meet community needs while also providing for effective and meaningful regulatory oversight. We support the Board's recognition of the opportunity to provide increased flexibility on assessment area delineation within the strategic plan framework[10] and we recommend that the Board codify a related concept within its CRA reforms.

Specifically, the Board should provide that a bank may, at its option, in light of the capacity of the organization, voluntarily elect to delineate its assessment areas for purposes of a strategic plan to include areas outside of its main office and branch network (i.e., geographies beyond those captured by the bank's branch-based assessment area). Allowing a bank to voluntarily expand its assessment area, and thereby allocate additional resources, would conform to the existing framework's requirement that assessment areas take into account a bank's size and financial condition,[11] and would assist an institution to better align its investment, loan, and service goals with its geographical reach without lessening the impact of such goals on LMI communities currently served. In exercising this option, a strategic plan bank would be able to evaluate the capacity of its organization to take on additional CRA activities beyond its branch-based assessment area. We would not support a ***requirement*** that strategic plan filers adopt expanded assessment areas beyond their facility -based assessment areas. Codifying any such requirement has the potential to erode the existing impact to communities currently being served under already established strategic plans.

Providing optionality would permit a bank that, in the absence of a strategic plan, may conduct significant activity outside of its branch-based assessment area to include such areas in its CRA evaluation. As such, this approach would be consistent with the spirit of the existing approach for wholesale and limited purpose banks. Alternatively, the Board could opt to permit a bank that has the appropriate size and scope and meets the needs of its branch-based assessment area to include, at the bank's option, activities conducted nationwide, consistent with our view that a digitally based bank's community may consist of the entire nation. It also would permit banks operating under a strategic plan to conduct activity where there is the most need and opportunity for the greatest impact.

Performance context has always been a critical component of strategic plans, and it should remain so. Current CRA regulations provide that the Board "considers whether to approve a proposed strategic plan in the context of" the enumerated factors that comprise "performance context": demographic data, information about lending, investment, and service opportunities in the bank's assessment area, the bank's product offerings and business strategy, a bank's institutional capacity and constraints, the bank's past performance and the performance of similarly situated lenders, the bank's public file, and any other information deemed relevant by the Board.[12] We encourage the Board to retain and even emphasize this provision as an integral part of the strategic plan development and approval process, with banks having the obligation to demonstrate that a proposed strategic plan (including assessment areas and measurable goals) is appropriate in light of a bank's particular performance context.

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[10] ANPR, at 66453.

[11] *See* 12 CFR § 228.41(e)(3).

[12] *See* 12 CFR § 228.21(b).

CONCLUSION

We encourage the Board to focus its efforts on tailoring and flexibility, especially for digitally based banks like ours. The approaches set forth in this letter will allow us to more effectively achieve our shared CRA goals to further meet the credit and financial needs of our communities in a safe and sound manner.

Sincerely,

Ally Bank
American Express National Bank
Barclays Bank Delaware
Capital One Bank, N.A.
Discover Bank
Goldman Sachs Bank USA
Charles Schwab Bank, SSB
Synchrony Bank