Bank of America.

September 10, 2007

Public Information Room
Office of the Comptroller of the Currency
250 E Street; S. W. Mail Stop 1-5
Attention: Docket ID OCC-2007-0012
Washington, DC 20219

Via e-mail: Regs.comments@occ.treas.gov

RE: Response to Notice and Request for Comment on Interagency Questions and Answers Regarding Community Investment.
Docket ID: OCC-2007-0012

To Whom It May Concern:

Bank of America Corporation ("Bank of America") appreciates the opportunity to comment on Docket No. OCC-2007-0012 jointly issued by the Office of the Comptroller of the Currency ("the OCC"), Board of Governors of the Federal Reserve System ("Board"), Federal Deposit Insurance Corporation ("FDIC") and the Office of Thrift Supervision ("OTS") (collectively, "Agencies") regarding the proposed revisions to the Interagency Questions and Answers Regarding Community Reinvestment.

Bank of America is committed to creating opportunities for customers and clients to help them realize their dreams of homeownership, starting or growing a small business or achieving financial security. Through innovative technologies and the commitment of its associates, Bank of America provides individuals, small businesses and commercial, corporate and institutional clients across the United States and around the world new and better ways to manage their financial lives. The company provides customers unparalleled convenience in banking and investing whenever, wherever and however they choose through the nation's largest financial services network, including approximately 5,700 domestic offices and more than 17,000 ATMs, as well as 35 international offices serving clients in more than 150 countries, and the nation's leading online banking and bill-pay services. The company's Web site is <http://www.bankofamerica.com/>.

Bank of America supports the efforts of the agencies to update and improve the clarity of the existing CRA Interagency Q & As. We would also encourage further steps to modernize the regulation, keeping pace with changes in the community development industry and bringing focus on sustainable strategies and business models that foster greater flexibility and impact in meeting the credit needs of the communities in which we operate. To that end, we will respond to the specific updates identified by the Agencies in their Notice and Request for Comment. Additionally, we will take this opportunity to provide a number of other suggestions on how the CRA Interagency Q&As and/or the CRA regulations themselves may be altered to better align the CRA examination process with the financial industry's efforts to serve all communities.

I. Response to Proposed New Q&As.

The Agencies proposed nine new Q&As. Bank of America provides the following comments to the newly proposed Q&As.

A. New Q&A for section __12(g)-4.

The Agencies have proposed the following new Q&A:

> §__.12(g)—4: *The CRA provides that, in assessing the CRA performance of non-minority- and non-women-owned (majority-owned) financial institutions, examiners may consider as a factor capital investments, loan participations, and other ventures undertaken by the institutions in cooperation with minority- or women-owned financial institutions and low-income credit unions, provided that these activities help meet the credit needs of local communities in which the minority- or women-owned institutions or low-income credit unions are chartered. Must such activities also benefit the majority-owned financial institution's assessment area?*
>
> A4. No. Although the regulations generally provide that an institution's CRA activities will be evaluated for the extent to which they benefit the institution's assessment area(s) or a broader statewide or regional area that includes the institution's assessment area(s), the agencies apply a broader geographic criterion when evaluating capital investments, loan participations, and other ventures undertaken by that institution in cooperation with minority- or women-owned institutions or low-income credit unions, as provided by the CRA. Thus, such activities will be favorably considered in the CRA performance evaluation of the institution (as loans, investments, or services, as appropriate), even if the minority- or women-owned institution or low-income credit union is not located in, or such activities do not benefit, the assessment area(s) of the majority-owned institution or the broader statewide or regional area that includes its assessment area(s). The activities must, however, help meet the credit needs of the local communities in which the minority- or women-owned institutions or low-income credit unions are chartered.

Bank of America is generally supportive of this new Q&A __.12(g)—4, and believes that the new Q&A correctly recognizes that restricting Agency consideration of the benefits of Qualified Investments to the limited Assessment Area of the investing institution is not consistent with the overarching goal of the CRA. Bank of America encourages the Agencies to review other areas of their regulations and guidance for areas where a similar expansion of consideration might be appropriate.

B. New Q&A for section __12(h)-3.

The Agencies have proposed the following new Q&A:

> §__.12(h)—3: *May an intermediate small institution that is not subject to HMDA reporting have home mortgage loans considered as community development loans? Similarly, may an intermediate small institution have small business and small farm loans and consumer loans considered as community development loans?*
>
> A3. Yes. These loans may be considered, at the institution's option, as community development loans provided they meet the regulatory definition of ''community development.'' However, these loans may not be considered under both the lending test and the community development test for intermediate small institutions. Thus, if an institution elects that these loans be considered under the community development test, the loans may not also be considered under the lending test, and would be excluded from the lending test analysis.

Bank of America expresses no opinion about proposed new Q&A __.12(h)--3.

C. New Q&A for Section__.22(a)(2) – 4.

The Agencies have proposed the following new Q&A:

> §__.22(a)(2)—4: *In addition to MECAs, what are other examples of ''other loan data''?*
>
> A4. Other loan data include, for example:
> - Loans funded for sale to the secondary markets that an institution has not reported under HMDA;
> - Unfunded loan commitments and letters of credit;
> - Commercial and consumer leases;
> - Loans secured by nonfarm residential real estate, not taken as an abundance of caution, that are used to finance small businesses or small farms and that are not reported as small business/small farm loans or reported under HMDA;
> - Loans that do not have a primary purpose of community development, but where a certain amount or percentage of units is set aside for affordable housing; and
> - An increase to a small business or small farm line of credit if the increase would cause the total line of credit to exceed $1 million, in the case of a small business line, or $500,000, in the case of a small farm line.

Bank of America appreciates the Agencies efforts to provide a more comprehensive list of activity that they will consider as “other loan data” under the Lending Test. Bank of America is wholly supportive of this effort at providing additional transparency and guidance.

However, Bank of America respectfully takes the position that many of the items designated as “other loan data” in this proposed Q&A, in fact, should be considered as primary lending activity, and not merely as “other loan data.” By relegating categories of lending activity that provide significant benefit to low- and moderate-income communities and/or to small business or small farms to the status of “other loan data”, the Agencies undervalue the CRA benefit of these valuable financing tools.

Bank of America believes that a case could be made that each of the categories of “other loan data” described in the new Q&A actually should be considered as primary lending activity rather than as merely supplemental “other loan data.” But we will limit our discussion to two categories at this time. (1) Unfunded loan commitments and letters of credit; and (2) Loans that do not have a primary purpose of community development, but where a certain amount or percentage of units is set aside for affordable housing

As we will discuss in greater detail below, it is Bank of America’s position that unfunded loan commitments and letters of credit, as legally binding obligations of the lending institution, provide substantial value to the recipient and present identical credit risk to the lending institution as a traditional loan or line of credit. As such, Bank of America believes that it is inappropriate to minimize the community development value of such commitments by merely considering them to be “other loan data.”

Similarly, we will also discuss projects where less than a majority of units are set aside for affordable housing in greater detail below. But, to provide a brief description of our view here, we strongly believe that anything less than full consideration of the amount lent to or otherwise invested in “mixed-use” projects undermines the most practical and useful efforts by municipal and state governments’, and by their financial institution partners’, to address the affordable housing crisis facing this country. Allowing full consideration only for projects that preserve a majority of units for affordable housing is an approach inconsistent with current approaches to urban and suburban efforts to serve LMI individuals and communities.

D. <u>New Q&A for Section__.22(a)(2) – 6.</u>

The Agencies have proposed the following new Q&A:

> §__.22(a)(2)—6: *Do institutions receive consideration for purchasing loan participations?*
>
> A5. Yes. Examiners will consider the amount of loan participations purchased when evaluating an institution’s record of helping to meet the credit needs of its assessment area(s) through the origination or purchase of specified types of loans, regardless of examination type.

Bank of America is supportive of the new Q&A __.22(a)(2)—6.

E. New Q&A for Section__.22(a)(2) – 7.

The Agencies have proposed the following new Q&A, in relevant part:

> §__.22(a)(2)—7: *How are refinancings of small business loans, which are secured by a one-to-four family residence and that have been reported under HMDA as a refinancing, evaluated under CRA?*
>
> A6. *For banks subject to the Call Report instructions:* A loan of $1 million or less with a business purpose that is secured by a one-to-four family residence is considered a small business loan for CRA purposes only if the security interest in the residential property was taken as an abundance of caution and where the terms have not been made more favorable than they would have been in the absence of the lien. (See Call Report Glossary definition of ''Loan Secured by Real Estate.''). If this same loan is refinanced and the new loan is also secured by a one-to-four family residence, but only through an abundance of caution, this loan is reported not only as a refinancing under HMDA, but also as a small business loan under CRA. (Note that small farm loans are similarly treated.). It is not anticipated that ''double-reported'' loans will be so numerous as to affect the typical institution's CRA rating. In the event that an institution reports a significant number or amount of loans as both home mortgage and small business loans, examiners will consider that overlap in evaluating the institution's performance and generally will consider the ''double-reported'' loans as small business loans for CRA consideration. The origination of a small business or small farm loan that is secured by a one-to- four family residence is not reportable under HMDA, unless the purpose of the loan is home purchase or home improvement. Nor is the loan reported as a small business or small farm loan if the security interest is not taken merely as an abundance of caution. Any such loan may be provided to examiners as ''other loan data'' (''Other Secured Lines/Loans for Purposes of Small Business'') for consideration during a CRA evaluation. [Note: footnote and Thrift-related language has been deleted by Bank of America]

Bank of America does not object to the new Q&A __.22(a)(2)—7.

F. New Q&A for Section__.23(a)(2) – 2.

The Agencies have proposed the following new Q&A:

> §__.23(a)—2: *In order to receive CRA consideration, should an institution be able to demonstrate that an investment in a national or regional fund with a primary purpose of community development meets*

the geographic requirements of the CRA regulation by benefiting one or more of the institution's assessment area(s) or a broader statewide or regional area that includes the institution's assessment area(s)?

A2. Yes. A financial institution should be able to demonstrate that the investment meets the geographic requirements of the CRA regulation, although the agencies will employ appropriate flexibility in this regard. There are several ways to demonstrate that the institution's investment meets the geographic requirements. For example, if an institution invests in a new nationwide fund providing foreclosure relief to low- and moderate-income homeowners, written documentation provided by fund managers in connection with the institution's investment indicating that the fund will use its best efforts to invest in a qualifying activity that meets the geographic requirements may be used for these purposes. Similarly, a fund may explicitly earmark all projects or investments to its investors and their specific assessment areas. (Note, however, that a financial institution has not demonstrated that the investment meets the geographic requirements of the CRA regulation if the fund "double counts" investments, by earmarking the same dollars or the same portions of projects or investments in a particular geography to more than one investor.). In addition, if a fund does not earmark projects or investments to individual institution investors, an allocation method may be used that recognizes that each investor institution has an undivided interest in all projects in a fund; thus, each investor institution may claim its pro-rata share of each project that meets the geographic requirements of that institution. If, however, a fund does not become involved in a community development activity that meets both the purpose and geographic requirements of the regulation for the institution, the institution's investment generally would not be considered under the investment or community development tests. See Q&As §ll.12(h)—6 and §ll.12(h)— 7 for additional information about the geographic requirements for qualified investments (recognition of investments benefiting an area outside an institution's assessment area(s)).

Bank of America is generally supportive of the flexibility described in the new Q&A and is particularly supportive of the Agencies proposed use of side letters. However, Bank of America strongly urges the regulators to take the additional step of clarifying that examiners should consider investments in funds (and investments in general) based upon the Bank's knowledge and intent at the time of the investment, rather than the precise outcome of the investments after the investment dollars have left the Bank's control. Bank of America invests in national and regional funds based on economic opportunities present in the assessments. It is not unusual for market forces beyond the control of the fund sponsor or the investor to shift away from the institution's assessment areas.

The ability for the fund to find investment products in certain assessment areas within a specified time frame can actually *limit* the availability of capital for national or regional funds. Bank of America proposes that the Agencies establish a rule of allocation of funds at the point an investment is made into the funds directing the funds to certain assessment areas. The intent is that the fund be bound to make its best efforts to accommodate the bank's request. However, if the fund is unable to find investment products in the specific assessment areas, no retro-active adjustments are required. Applying this standard at the outset would greatly reduce the regulatory burden of "after-the-fact" fund allocation of loans and investments for institutions that have reached a certain size.

In addition, BAC makes every effort to allocate investment funds deployed through intermediaries to the geographies they will benefit at the time the transaction is made. However, as projects progress, opportunities and needs often dictate that funds earmarked for specific geographies will be more impactful if deployed elsewhere. Current exam practices obligate institutions to scrub allocations to ensure that funds originally targeted for one area at origination remained allocated to those geographies at the time of examination. Based on exam cycles, this often translates to a three year or longer retrospective scrub and multiple reviews by both the financial institution and the intermediary to verify original and final allocation targets. Scrub processes like these impose a huge regulatory burden, especially for institutions the size of BAC.

It is suggested that the Agencies reconsider the requirement that allocations be accurate at the time of examination, rather than origination of the investment, as this does not seem to promote either the foundation and spirit of CRA or the efficient operation of a bank. For these reasons and to reiterate our support for the Agencies proposed treatment of side letters, we respectfully ask consideration of the following for incorporation into the Q&A (and make appropriate adjustments to the Examiner guidelines):

> §__.23(a)—2: **(a)** *In order to receive CRA consideration, should an institution be able to demonstrate that an investment in a national or regional fund with a primary purpose of community development meets the geographic requirements of the CRA regulation by benefiting one or more of the institution's assessment area(s) or a broader statewide or regional area that includes the institution's assessment area(s)?* ***(b) If so, may the institution rely upon the representations made by the national or regional fund regarding the geographic allocations at the time of the investment?***
>
> A2. **(a)**Yes. A financial institution should be able to demonstrate that the investment meets the geographic requirements of the CRA regulation, although the agencies will employ appropriate flexibility in this regard. There are several ways to demonstrate that the institution's investment meets the geographic requirements. For example, if an institution invests in a new nationwide fund providing foreclosure relief to low- and moderate-income homeowners, written documentation provided by fund managers in connection with the institution's investment indicating that the fund will use its best efforts to invest in a qualifying activity that meets the geographic requirements may be used for these purposes. Similarly, a fund may explicitly earmark all projects or investments to its

investors and their specific assessment areas. (Note, however, that a financial institution has not demonstrated that the investment meets the geographic requirements of the CRA regulation if the fund "double counts" investments, by earmarking the same dollars or the same portions of projects or investments in a particular geography to more than one investor.). In addition, if a fund does not earmark projects or investments to individual institution investors, an allocation method may be used that recognizes that each investor institution has an undivided interest in all projects in a fund; thus, each investor institution may claim its pro-rata share of each project that meets the geographic requirements of that institution. If, however, a fund does not become involved in a community development activity that meets both the purpose and geographic requirements of the regulation for the institution, the institution's investment generally would not be considered under the investment or community development tests. See Q&As §ll.12(h)—6 and §ll.12(h)— 7 for additional information about the geographic requirements for qualified investments (recognition of investments benefiting an area outside an institution's assessment area(s)).
(b) Yes. If an institution makes an investment in a national or regional fund that (1) establishes a written and binding description of geographic and/or assessment area allocation; (2) provides a representation that, at the time of the institution's investment in the fund, there are adequate opportunities in each of the geographies to support the description of geographic allocation; and (3) commits to making commercially reasonable efforts to make investments consistent with the description of geographic allocation, then the institution may rely upon the representations made by the fund with regard to geographic distribution. This means that, at the time of the examination, the institution need not retroactively scrub or justify the actual geographic distribution of investments by the fund, and the examiner may rely upon the documentation provided to the institution by the fund at the time of the investment.

G. New Q&A for Section__.26(a)(2) – 1.

The Agencies have proposed the following new Q&A:

§ll.26(a)(2)—1: *When is an institution examined as an intermediate small institution?*

A1. When a small institution has met the intermediate small institution asset threshold delineated in §ll.12(u)(1) for two consecutive calendar year-ends, the institution may be examined under the intermediate small institution examination procedures. The regulation does not specify an additional lag period between becoming an intermediate small institution and being examined as an intermediate small institution, as it does for

> large institutions, because an intermediate small institution is not subject to CRA data collection and reporting requirements. Institutions should contact their primary regulator for information on examination schedules

Bank of America does not oppose the new proposed Q&A.

H. New Q&A for Section__.42(b)(2) – 4.

The Agencies have proposed the following new Q&A:

> §__.42(b)(2)—4: *When an institution purchases a participation in a community development loan, which amount should the institution report— the entire amount of the credit originated by the lead lender or the amount of the participation purchased?*
>
> A4. The institution reports only the amount of the participation purchased as a community development loan. However, the institution uses the entire amount of the credit originated by the lead lender to determine whether the original credit meets the definition of a ''loan to a small business,'' ''loan to a small farm,'' or ''community development loan.'' For example, if an institution purchases a $400,000 participation in a business credit that has a community development purpose, and the entire amount of the credit originated by the lead lender is over $1 million, the institution would report $400,000 as a community development loan.

Bank of America does not oppose the new proposed Q&A.

I. New Q&A for Section__.42(b)(2) – 5

The Agencies have proposed the following new Q&A:

> §__.42(b)(2)—5: *Should institutions collect and report data about community development loans that are refinanced or renewed?*
>
> A5. Yes. Institutions should collect information about community development loans that they refinance or renew as loan originations. Community development loan refinancings and renewals are subject to the reporting limitations that apply to refinancings and renewals of small business and small farm loans. *See* Q&A §__.42(a)—5.

Bank of America agrees that institutions should get credit for refinancings and renewals of community development loans.

II. Response to Proposed Revisions to Existing Q&As.

In addition to the nine new Q&As, the Agencies have proposed a number of revisions to existing Q&As. The Agencies have specifically asked for comment on twelve of those revisions.

A. Revisions to Q&A __.12(g)(3)-1

The Agencies have proposed a revision of Q&A __.12(g)(3)-1 to clarify that investments in Rural Business Investment Companies and New Market Tax Credit-eligible ("NMTC-eligible") Community Development Entities ("CDEs") will be presumed to promote economic development.

Bank of America does not oppose this clarification.

B. Revision to Q&A __.12(h)-1

The Agencies have proposed a revision of Q&A __.12(h)-1 to clarify that: (i) loans to NMTC-eligible CDEs will qualify as a Community Development Loan; and (ii) loans greater than $1MM made pursuant to SBA 504 will qualify as a community development loan.

Bank of America does not oppose this clarification.

C. Revision to Q&A __.12(i)-3

The Agencies have proposed a revision of Q&A __.12(i)(3) to clarify that: (i) the opening of branches that are not otherwise considered under the Services test may be considered as a community development service in certain circumstances; (ii) providing credit counseling to help borrowers avoid foreclosure may be considered a community development service; and (iii) providing individual development accounts or free check-cashing services may be considered community development services.

Bank of America is very supportive of the clarifications provided in the revisions to Q&A __.12(i)-3. However, Bank of America believes that the clarification still overly limits the definition of Community Development Services and should be broadened.

Bank of America is proud to provide products and services that demonstrate investment in our customers and communities. We support increasing access to financial services by opening facilities that revitalize and stabilize low to moderate (LMI), disaster, or distressed and underserved areas, as well as propose the agencies extend additional credit for programs that serve the un-banked or under-banked communities in an effort to move them toward mainstream financial accounts and services. Participation in collaborative or proprietary programs that promote low cost or otherwise affordable banking services can spur the un-banked and under-banked to open starter accounts, become more fiscally responsible, and more fully join in the financial mainstream. Providing products with fee waiver provisions, no minimum balance requirements, bundled services, and other features designed specifically to attract un-banked and under-banked LMI individuals warrants additional special service test recognition. This would serve as an incentive for innovation among financial institutions by providing a tangible value for offering less profitable products and services.

To this end, Bank of America encourages the Agencies to consider a full range of deposit and credit related activities that are likely to bring LMI consumers into the financial mainstream, including: (i) informal financial education, such as Bank of America's educational campaign that includes easy-to-understand brochures, revised deposit account agreement and fee schedules, and a financial education micro site on the internet; (ii) efforts made by financial institutions in conjunction with state and local governments to promote participation in the banking mainstream, such as the Bank on San Francisco program sponsored by Mayor Gavin Newsome and the Federal Reserve; (iii) innovative efforts to promote saving and investing opportunities for consumers, such as Bank of America's Keep the Change® program in which Bank of America rounds up every debit card transaction to the nearest dollar and transfers the funds from the consumer's checking account to the consumer's savings account (and matches a portion of the transfer, up to $250 per year); and (iv) efforts to promote responsible use of a deposit account, such as actively promoting programs that provide overdraft transfers from the customer's savings or credit accounts.

D. Revision to Q&A __.12(t)-3

The Agencies have proposed a revision of Q&A __.12(i)(3) to clarify that Federal Home Loan Bank unpaid dividends are not qualified investments.

Bank of America has no comment on the proposed revision to Q&A __.12(t)-3.

E. Revision to Q&A __.12(t)-4

The Agencies have proposed a revision of Q&A __.12(i)(3) to clarify that investments in NMTC-eligible CDEs and in private community development venture capital companies are examples of qualified investments.

Bank of America has no comment on the proposed revision to Q&A __.12(t)-4.

F. Revision to Q&A __.12(u)(2)- 1

The Agencies have proposed a revision of Q&A __.12(u)(2)-1 to clarify that interested persons can view information on the FFIEC website related to asset-size thresholds for small institutions and intermediate small institutions.

Bank of America has no comment on the proposed revision to Q&A __.12(u)(2)-1.

G. Revision to Q&A __.22(a)-1

The Agencies have proposed a revision of Q&A __.22(a)-1 to clarify that loan programs that provide relief to LMI borrowers facing foreclosure warrant favorable consideration under CRA.

Bank of America agrees with the clarification proposed by the Agencies.

H. Revision to Q&A __.22(c)(2)(i)-1

The Agencies have proposed a revision of Q&A __.22(c)(2)(i)-1 to clarify that an institution may not double-count loans originated by an affiliate and purchased by the institution.

Bank of America takes no position as to the proposed revision of Q&A __.22(c)(2)(i)-1.

I. Revision to Q&A __.24(d)-1

The Agencies have proposed a revision of Q&A __.24(d)-1 so that it more closely matches the regulatory language.

Bank of America takes no position as to the proposed revision of Q&A __.24(d)-1.

J. Revision to Q&A __.41(e)(4)-1 and -2

The Agencies have proposed a revision of Q&A __.41(e)(4)-1 and -2 so as to better match the description of Assessment Area with the definitions of the OMB.

Bank of America takes no position as to the proposed revision of Q&A __.41(e)(4)-1 and -2.

K. Revision to Q&A __.42-1

The Agencies have proposed a revision of Q&A __.42-1 to better describe treatment of a small institution as it grows.

Bank of America takes no position as to the proposed revision to Q&A __.42-1.

L. Revision to Q&A __.42(a)-7

The Agencies have proposed a revision of Q&A __.42(a)-7 to align the Q&A with Regulation C.

Bank of America takes no position as to the proposed revision to Q&A __.42(a)-7.

M. Revision to Q&A __.42(a)(2)-1

The Agencies have proposed a revision of Q&A __.42(a)(2)-1 to clarify that the purchase of participations in small business or small farm loans should be treated the same as the purchase of whole loans.

Bank of America takes no position as to the proposed revision to Q&A __.42(a)(2)-1.

III Additional Issues Related to CRA

In addition to the proposed Q&A changes which we have commented on, we would respectfully encourage the Agencies to take further steps to ensure that the regulation and guidelines keep pace with changes in the community development industry. The changes which we present for consideration will ensure that the spirit of CRA flourishes in a way that recognizes changing industry trends and enables financial institutions to be fiscally responsible and innovative in meeting community needs.

A. CRA Modernization #1: Mixed-Income Projects

Decades of urban planning and projects built on concentration of poverty have proven to be counterproductive to creating strong, vibrant and healthy communities. Current theory on and the reality of urban planning is proving that de-concentration of poverty is in the best interests of LMI families, LMI areas and the community as a whole.
Over the past 10 years, affordable housing projects have become much more successful by avoiding majority LMI residency. Mixed income residency projects have become the norm, with many targeting no more than 20% LMI residences. These Mixed-Income projects, known as 80/20 or 90/10 projects are supported not only by developers, but also by many municipal and state governments, many local and state financing agencies, and most urban and suburban planning experts.

In fact, municipal rules often require the inclusion of a percentage of affordable units in projects that are not specifically targeted for affordable housing. These localities and the associated financing agencies may prefer development where a minority of the project's units is designated for low- and moderate-income households, instead of creating projects where LMI borrowers are more concentrated. The government favors mixed-income projects and may also favor developments in middle- and upper-income geographies because it perceives that these types of projects in a variety of census tracts will build more sustainable communities than if they were all relegated to low- and moderate-income geographies. Many experts in community development also agree that mixed-income projects in a variety of census tracts are a key ingredient of community development.

When municipalities require developments to provide for a minimum number of affordable units, in some instances, these units may only represent 10 to 20 per cent of the total so that the public subsidy is reduced. Additionally, the subsidy portion may be less per unit than what was historically available. Often this still requires the developer to make up for those additional costs elsewhere within the project. Therefore, the required number of affordable units may reflect a government decision based the number of affordable units that the overall project could reasonably support with available public dollars. The number of affordable units in these situations would never be a majority nor reasonably be considered the primary purpose of the development. However, under this type of Mixed-Income approach, there is clearly a benefit to the LMI population, demonstration of responsiveness to community need, and evidence of making communities stronger.

Mixed-income developments, however, often do not fit easily into the Agencies' requirement that the "primary purpose" of a development be community development. Under the Agencies' current definition of "primary purpose," it is extremely difficult to get credit if the majority of the funds/project does not benefit low- or moderate-income individuals.

As such, Bank of America proposes that institutions should receive full credit for making mixed-income projects possible through financing and investments. At the very minimum, an institution should receive full CRA credit for investments in mixed-income developments when local or state government or financing agencies have expressed a preference for mixed-income development.

Bank of America can understand that the Agencies may be reluctant to give an unqualified promise of full CRA credit for any project that contains a single affordable unit, and could support a reasonable minimum in order to qualify. Given current theory around the sustainability of communities with affordable housing, Bank of America would encourage the Agencies to consider 10% of the units to be the appropriate minimum to qualify for full CRA credit.

Alternatively, if the Agencies were concerned about abuse, the Bank would recommend, at a minimum, a proportional credit approach where an institution would receive proportional credit, possibly as a multiple of the percentage of affordable units. For example, a multiplier of 3 would allow an institution investor to get credit for 60% of their investment in an 80/20 mixed use product. Bank of America understands that the regulators would give no credit above 100%.

B. CRA Modernization #2: Performance Context

Context matters. And context matters in the community development world as much or more than in other aspects of business. San Antonio does not face the same community development challenges as St. Louis. Market variety and economic conditions often require different approaches for effective community development.

Importantly, the Agencies have explicitly recognized that Performance Context matters in evaluating a bank's CRA performance (see, e.g., OCC Examination Procedures). This recognition is not only appropriate, but it is essential to effectively measuring a bank's performance because different markets and economic conditions often require very different approaches to meet the community development needs. For example, as the recent trend in foreclosure rates has demonstrated, lenders do not benefit low-income borrowers when they put the borrowers in home mortgages that the borrower cannot afford. However, in markets with particularly high housing costs, if the CRA examination does not take into account the local housing conditions, the examination may conclude that the lender is not meeting its CRA obligations when, in fact, the lender is acting very responsibly by not encouraging nor enabling borrowers to over-extended themselves.

The Agencies do a good job of recognizing this dynamic in the large market assessment areas that are subject to a full scope examination. However, in its Examiner Guidance, the OCC[1] has advised its examiners that Performance Context only applies to AAs that are subject to full scope examination.[2] To the Bank's view, it is insufficient to limit the Performance Context only to full scope AAs. The same dynamic that affects the Bank's performance in large markets also affects the bank in minor markets. The Bank advocates for application of Performance Context across all AAs to support consistent, comprehensive and equitable analysis and conclusions.

This problem is perhaps most stark in the context of the Investment Test. In talking about the Investment Test, the Examiner Guidance provides some guidance that is difficult to reconcile. On the one hand, the Guidance explicitly and effectively recognizes that "The most important aspect of evaluating a bank's investment performance is understanding the context in which the bank operates. Specifically, an examiner should understand the opportunities available to the bank to invest within a community and the capacity of the bank to make or develop opportunities to invest within that community." On the other hand, the Guidance goes on to say, "Performance context should only be developed for full-scope AAs."

The Bank agrees with the first statement – that context is the most important aspect of evaluating a bank's investment performance. When a bank like Bank of America has investment goals set based on Tier 1 capital and not adjusted for the context of the specific market in which it is being evaluated, the bank cannot realistically meet the goals for all markets. There are some AAs for Bank of America that simply do not offer meaningful investment opportunities, or, at least not opportunities that are proportionate to the Bank's Tier 1 capital goals.

Moreover, the approach of only considering Performance Context in the full-scope AAs creates an uneven playing field among different banks. A truly national bank like Bank of America will face many AAs that are not subject to full scope review, and hence, are subject to an examination in a vacuum without context. In contrast, a smaller bank that only serves one or two AA's will be wholly examined with appropriate consideration to the context in which the bank operates.

We are asking the Agencies to require Performance Context to be considered in all aspects of the examination, not just the AA's that are subject to full scope review.

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[1] I single out the OCC here because it is Bank of America, N.A.'s primary regulator.

[2] The Examiner Guidance provides in relevant part, "For full-scope reviews, the data used to evaluate performance under each test are analyzed considering complete performance context information, quantitative factors (e.g., lending volume, geographic and borrower distribution, level of investments, distribution of branches) and qualitative factors (e.g., innovation, complexity). … For areas that receive limited-scope reviews, the data are analyzed considering primarily quantitative factors with performance context data limited to the comparable demographics in the standardized tables."

Clarification also is needed on how Performance Context should be used to implement specific goals. For example, the OCC Examination Procedures provide: "The examiner will review demographic and economic data about the institution's assessment area(s) and information about local economic conditions, …" But the Procedures are not clear on exactly how an examiner should adjust its expectations or assessment in light of the data. Lack of clarity may lead to inconsistency in the application of Performance Context between banks. Vagueness on this point makes it very difficult to accurately set goals and gauge progress throughout an exam cycle.

The Bank, therefore, requests that the OCC clarify what types of data should be considered in all AAs, full and limited scope, and provide examples of how the data can translate into examination results. For example, the Bank requests that the Agencies explicitly instruct examiners to consider:

(a) adjusting demographics to account for families below poverty in all geographies;
(b) allowing for flexibility in lending, investment and service test performance in high-cost housing markets (using Fannie Mae's guidelines) in all geographies;
(c) providing full credit for adjacent banking centers serving the LMI population located within one mile of an LMI census tract; and
(d) adjusting small business borrower statistics to exclude transactions with unknown revenues from the calculations to be consistent with HMDA borrower statistics.

C. <u>CRA Modernization #3: Branch Location and Other Means to Serve LMI Geographies</u>

The Bank endorses the aspect of the CRA Services Test that rewards banks for locating branches in LMI communities. However, the Bank does not agree with the Agencies' interpretation that a branch must be located in an LMI census tract to effectively serve an LMI community. The Bank believes that branches located within one a mile of an LMI census tract can and do effectively serve the residents of that LMI census tract.

Moreover, the Bank submits that each decade, with the census realignment, there are changes in the specific designation of a census tract that may not reflect a fundamental change in the community that a branch serves, but reflects a modest change in the specific census tract in which the branch sits. While a major change in a community, such as a significant gentrification of multiple census tracts, may warrant a reclassification of a branch as no longer serving an LMI community, the Bank does not believe that the change in the makeup of the census tract in which a branch is located in and of itself warrants a change in its status as serving an LMI community.

In addition, BAC respectfully suggests the realities of new technologies that bring greater access and convenience to banking be factored into Service Test evaluations. Institutions should receive full credit for serving LMI customers beyond branch/census tract framework. Many LMI communities and customers enjoy the convenience of our expansive network of banking centers, in addition to our PC banking, telephone banking, and our mobile banking channel. Neither today's additive credit, nor minimal credit considerations take into account the full impact of these types of services when examining the branch distribution network.

D. CRA Modernization #4: CD Loans/Letters of Credit/Affordable Housing Units and Tier 1

The lending test performance criterion considers the number and volume of Community Development ("CD") loans for assessment areas receiving full scope reviews. Determining the percentage of Tier 1 capital that CD loans represent prior to exam consideration can often eliminate otherwise worthy community development lending volume from receiving (additive) credit at all. An unintended consequence of evaluating CD lending as "additive" is the disincentive in generating CD loans. BAC proposes that full credit be extended for community development lending volume and units in all assessment areas, regardless of Tier 1 capital ratios, so that an institution receives full credit and recognition for all of its community development activities.

By way of example, it is very possible that one qualified $1MM CD loan for a multi-family affordable housing can yield 50 affordable rental housing units. Given Bank of America's tier I capital considerations, it is unlikely that a $1MM CD loan will make a difference in any full-scope market. However, 50 affordable housing units can make a noticeable difference in virtually every market. By only considering CD loans in relationship to tier I capital, the Agencies are not fully recognizing the potential value of these loan.

E. CRA Modernization #5: Reissuance of Credit as Qualified Investments

We believe that the Agencies would recognize that a primary purpose of CRA is to ensure that credit and equity flow appropriately to all income segments in a bank's assessment areas. We believe that the Agencies would also agree that sometimes, local third parties can better allocate credit and equity than a bank can. We believe that it is for that reason that the Agencies provides CRA credit for investments that a bank makes to a financial intermediary.

There is no dispute that if a bank recoups an investment – for example, is repaid the principle of a loan or receives a return of an equity investment, -- and the bank chooses to reinvest that recoupment in a new CRA-focused investment, the bank should get CRA credit for that new investment.

Based on this set of understandings, it would make sense that if a bank has made a loan or equity investment in a third party, and if the bank has the right to recoup that investment at certain times, if the bank foregoes that right, and, as the result of the bank foregoing that right, the third party makes a new CRA-eligible investment, the bank should receive CRA credit for that new investment. However, that is not the way the current CRA policies work.

Under current policies, if an institution makes an investment in a third-party, and that third-party utilizes and re-utilizes those funds, generating multiple LMI opportunities, the institution only receives credit for the initial investment. The Bank could maximize its CRA credit by simply withdrawing its original investment or calling its original loan periodically and reinvesting those proceeds into new equivalent investments. The paperwork and disruption to the third party of such bank activity are inefficient transactions costs that add no value to anyone and certainly do not further the substantive goal of CRA, but it is exactly these inefficient transaction costs that the current policies promote. In contrast, allowing a bank to obtain CRA credit for the subsequent investment decisions of the third party would increase the certainty and stability of the funding for the third party, which, in turn, would allow the third party to make more efficient investments.

Therefore, Bank of America requests that the Agencies allow an institution to receive CRA credit for each distinct re-use of capital that a third-party conducts with that capital.

F. <u>CRA Modernization #6 : Duplication of Requirements for Affiliates in the Same Market</u>

Highly competitive assessment areas that house a large number of financial institutions create unique CRA challenges. Specifically, in a small number of MSAs, there are too many banking dollars chasing too few community development projects. This concentration of CRA-focused activity can distort the local marketplace, and ultimately, is not an efficient or effective way to meet the community development needs of the whole nation. Large institutions that have chosen a multi-bank corporate structure face unique challenges when more than one of their affiliated banks serve the same assessment area. These large institutions find themselves not only competing against other institutions for community development opportunities, but actually have subsidiaries within their corporate structure competing against themselves.

Bank of America realizes that, from the Agencies' perspective, this would be a relatively good problem to have – having too much support for community development initiatives – if the net result is that select Assessment areas receive a disproportionate share of community development support while other Assessment Areas receive little or no community development support, the problem does not look so attractive.

Bank of America proposes that one way to better allocate community development dollars is to require corporate families that have multiple entities serving a single AA, to designate one member of the corporate family to have CRA responsibility within that AA and if that member performs at a Satisfactory level within the AA, then allow all other members of that corporate family to fulfill the CRA obligation for that AA through loans, services and investments anywhere else in the country. This would allow the corporate family to look for opportunities where they are most needed while still providing a strong base level of support within each AA that it does business.

G. <u>CRA Modernization #7: Investments should be considered based on the information at the time that they were made.</u>

I have discussed this issue above in responding to the Q&A §__.23(a)—2, but Bank of America believes that the issue is broader than what we addressed above and I'd like to take this opportunity to emphasize that point. Under current Agency guidelines, an examiner makes a determination as to whether to count an investment toward an institution's CRA goals at the time of the examination based on the information available to it at the time of the examination. For a percentage of the institution's investments, the investment's performance may have changed somewhat from the proposal on which the institution decided to invest. For example, an institution may invest $1MM into a fund that commits to look for opportunities in Dallas and Los Angeles, and commits to invest the money within a year. However, as a truly national fund that is conscientiously trying to utilize its money to place the money where it can do the most good, the fund determines that the money is better invested in an effort to revitalize New Orleans. Had the fund followed through on the commitment at the time of the investment, then the institution would have received credit in its Dallas and Los Angeles markets. But, through no wrongdoing on its own part, the institution will receive no credit for its Dallas or Los Angeles markets, and, depending on its monitoring efficiency, may even be reprimanded for data integrity issues if it did not properly track where the dollars actually went.

The result is that the Bank does not receive CRA credit for investments that, at the time they were made, would have qualified for CRA credit in specific geographies and, on which, the Bank was relying to meet its investment goals.

Interestingly, the OCC Examiner Guidance appears to suggest that an examiner should consider investments made during the exam cycle from the perspective of the time the investment was made, rather than at the time of the examination. For example, the Guidance states, "Current-period investments are considered at their original investment amount, even if that amount is greater than the current book value of the investment." Moreover, by defining a qualified investment by its "purpose," the Regulation itself appears to demand that investments be considered from the perspective of the time that they were made rather than the effect of the investment at the time of the examination. This approach of considering an investment based on the information at the time of the investment makes sense to the Bank.

However, despite these indications that investments should be viewed from the perspective of the institution at the time it made the investment, the Bank is aware that, at least as it relates to geographic allocations, the examiners do not always apply this principle. Therefore, the Bank respectfully requests that the Agencies address this issue as appropriate.

Finally, while not directly covered by CRA and Regulation BB, the recently published regulations Part 24 (12 CFR Part 24) promulgated under the Financial Services Regulatory Relief Act (FSRRA) under 12 U.S.C 24 (Eleventh) which amended the definition contained therein (Section 24.2(g)) of *"Benefiting Primarily Low- and Moderate-Income Areas or Individuals*" does have an effect on a national bank's CRA performance. The statutory amendments and the new implementing regulations have narrowed the grant of authority to national banks in Section 24 (Eleventh) and dramatically restricted the ability of national banks to make investments designed to primarily promote the public welfare including investments that would:

· Revitalize or stabilize designated disaster areas, including areas devastated by hurricanes.

· Revitalize or stabilize underserved or distressed middle-income rural communities.

· Finance mixed-income affordable housing in government targeted areas for revitalization.

Reverting to the pre-October 2006 definitions and standards would have the effect of restoring the categories of investments that qualify under the statute for public welfare investments in areas determined by federal, state and local governments to be in need of such investments.

Communities will be the ultimate beneficiaries of corrective action that restores the previously existing definition of *"Benefiting Primarily Low-and Moderate-Income Areas and Individuals"* as well as the previously existing categories of qualified investments, because banks will be able to work with their community partners on projects to help build affordable housing and make other direct investments that they are currently prohibited from making.

Bank of America would encourage the Agencies to consider as broad a regulatory definition of public welfare as is allowable under the new statutory amendments.

Thank you for the opportunity to provide comment on the proposed changes to the Interagency Questions and Answers Regarding Community Reinvestment, as well as our CRA modernization topics. If you have any questions or would like to discuss any of these matters further, please contact me.

Sincerely,

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National Programs Executive
Global Community Impact
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cc: Jeff Bowling/Charles Bowman/Gavin Dowell/Kevin McMillan/Andrew Plepler/Pam Sak/Tish Secrest/Phil Wertz