State of California
Office of the Attorney General
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April 8, 2020

Via Federal eRulemaking Portal

Hon. Joseph M. Otting
Comptroller of the Currency
c/o Chief Counsel's Office
400 7th St. SW, Suite 3E-218
Washington, DC 20219

Hon. Jelena McWilliams
Chairman, Federal Deposit Insurance Corporation
c/o Robert E. Feldman
Executive Secretary
550 17th Street NW
Washington, DC 20429

RE: Comments on Joint Notice of Proposed Rulemaking: *Community Reinvestment Act Regulations*, 12 CFR Part 345, RIN 3064-AF22 (Jan. 9, 2020), OCC-2018-0008

Dear Comptroller Otting and Chairman McWilliams:

We, the Attorneys General of the States of California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, and Washington write today to urge the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) to withdraw the above-captioned joint notice of proposed rulemaking relating to Community Reinvestment Act Regulations (Proposed Rule). A similar group of Attorneys General opposed the OCC's September 5, 2018 Advanced Notice of Proposed Rulemaking on this subject as well.[1]

The Proposed Rule is a major overhaul of the enforcement regime of the Community Reinvestment Act (CRA), a critical civil rights law that is responsible for creating trillions of dollars of bank investments in, and loans to, Low- and Moderate-Income (LMI) communities, as well as ensuring access to bank branches and products for members of these communities. This is the first significant change to these regulations in 25 years, making this a generational event.

[1] The letter sent by the Attorneys General on November 19, 2018 is attached to, and is part of, this comment.

Such changes must be undertaken with care, ensuring that any revisions keep to the congressional promise that CRA would be an antidote to the pernicious practices of redlining and disinvestment which have done lasting harm to LMI communities, particularly communities of color. Such caution is particularly apt at a time of such economic turmoil and constriction in credit caused by the COVID-19 pandemic. CRA's goals are more important than ever as LMI communities seek to recover from the profound effects of this public health emergency.

Given the major changes in the banking landscape that have taken place over the past 25 years, thoughtful updates to CRA regulations—made with an eye to Congress's goals in enacting the statute—are appropriate. Such reforms could help ensure that that LMI communities are not left behind in an era of online and mobile banking, including the rise of "fintech" companies that differ significantly from traditional banks.

Unfortunately, the Proposed Rule, far from thoughtfully modernizing CRA's implementation to advance its core purposes, is inimical to them. It would shift the CRA's incentive structure by discarding time-tested methods of assessing banks' performance in meeting the investment, credit and deposit needs of LMI communities in favor of a narrow, purely quantitative test to generate banks' presumptive ratings, using apparently arbitrary benchmarks. This approach would encourage banks to shift their focus away from the actual needs of the communities that the banks are purporting to serve and toward a myopic approach with the dollar value of activities paramount. Further, under the Proposed Rule banks can receive high CRA ratings while failing to meet the needs of almost half of the areas in which they do business. Moreover, the Proposed Rule would greatly expand the activities that qualify for CRA credit, including some activities that have little or no connection to CRA's core purposes. The Rule also virtually eliminates the service test, contrary to CRA's explicit focus on banks meeting the needs of depositors in their assessment areas. Finally, the OCC and FDIC have not cited any concrete data supporting the major proposed changes. Tellingly, the Rule is a product of only two of the three regulatory agencies tasked with oversight of CRA; the third—the Federal Reserve Board of Governors (hereinafter the Board)—has indicated its fundamental disagreement with the approach taken here. Instead, it has proposed an alternative framework—and published supporting data—that would likely be much more consistent with the values that Congress put into law when it passed the CRA. In short, the Proposed Rule is contrary to CRA's purpose and text, will harm communities and the States, and should be withdrawn.

INTRODUCTION

The Community Reinvestment Act was enacted to "prevent redlining, and to encourage banks to help meet the credit needs of all segments of their community, including low- and moderate-income (LMI) neighborhoods and individuals."[2] Under the CRA, financial institutions

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[2] Vonda Eanes, Dir. for CRA and Fair Lending Pol'y, *How Community Development-Related Rehabilitation Efforts Can Qualify for Community Reinvestment Act Consideration*, Off. of the Comptroller of the Currency, U.S. Dep't of Treas. (Feb. 2018),

have a "continuing and affirmative obligation" to meet the credit needs of the local communities in which they operate.[3] The CRA is a core civil rights law, a product of the movement that also produced laws banning credit discrimination like the Fair Housing Act and Equal Credit Opportunity Act. By passing this suite of laws, Congress "created two distinct but complementary toolkits to fulfill" its goals of ending discriminatory housing and credit practices.[4]

CRA enforcement is carried out through the bank examination process, during which regulators periodically review banks' performance on meeting the credit needs of the communities covered by CRA. Three federal financial regulators share responsibility for enforcing the Act: the Board, the FDIC, and OCC.

A significant sign of the extreme nature of this proposal is the fact that the Board is not joining the FDIC and OCC.[5] This is a problem in its own right; pushing forward without the Board would undermine uniformity and effective implementation of CRA because the OCC and

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https://www.occ.treas.gov/publications-and-resources/publications/community-affairs/community-developments-investments/feb-2018/cdi-feb-2018-article-3.html.

[3] 12 U.S.C. § 2901(a)(3).

[4] Ben Horowitz, *Fair lending laws and the CRA: Complementary tools for increasing equitable access to credit*, Fed. Res. Bank of Minneapolis (Mar. 8, 2018), https://www.minneapolisfed.org/article/2018/fair-lending-laws-and-the-cra-complementary-tools-for-increasing-equitable-access-to-credit#_ftn3. A similar group of Attorneys General are signatories to comment letters recently submitted to HUD that discuss the history and importance of the Fair Housing Act to promote nondiscriminatory lending in detail. *See* Xavier Becerra, et al., Comments on Proposed Rule: Docket No. FR-6123-P-02; Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2041 (Jan. 14, 2020), RIN 2577-AA97 (Mar. 16, 2020), https://oag.ca.gov/system/files/attachments/press-docs/2020.03.16_AFFH%20Comment%20Letter.pdf; Joshua Stein, et al., Comments on Proposed Rule: Docket No. FR-6111-P-02; HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (Oct. 18, 2019), https://www.regulations.gov/document?D=HUD-2019-0067-2830.

[5] Jeffrey P. Taft et al., *FDIC and OCC Propose Modernization of Community Reinvestment Act Regulations* (Dec. 16, 2019), https://www.cfsreview.com/2019/12/fdic-and-occ-propose-modernization-of-community-reinvestment-act-regulations/ (suggesting that the Board disagrees with a key aspect of the Rule, namely "the proposal's emphasis on dollars invested due to a concern that it incentivizes banks to invest in wealthier markets"). Board Chair Jerome Powell has nevertheless stated his hope that the three regulators ultimately reach agreement on a common approach "to avoid the inevitable confusion that would result from having two separate regulatory regimes applicable to insured depository institutions."

FDIC have overlapping responsibilities with the Board to regulate financial institutions.[6] Further, this is a troubling break from the practice in prior CRA rulemaking efforts, where the regulators issued joint rules.[7] Substantively, as discussed further below, the Board's alternative proposal highlights some of the problematic aspects of the OCC/FDIC proposal.

In addition to the specific critiques set forth in this letter, it is important to see the Proposed Rule in context. These changes appear to be part of a broader strategy by federal regulators—the OCC in particular—to weaken CRA enforcement, as shown by a number of actions the OCC has taken since the beginning of this Administration. Most significantly, the OCC has issued guidance reducing the frequency of examinations for large banks with more than 30 assessment areas from every three years to every four years;[8] reducing the negative impact of violations of federal credit discrimination or consumer protection law on a bank's CRA rating;[9] relaxing restrictions on banks with failing CRA ratings to grow through mergers;[10] and eliminating the need for banks with failing CRA ratings to develop investment plans with local

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[6] S*ee generally* Admin. Conf. of the U.S., Recommendation 2012-5, Improving Coordination of Related Agency Responsibilities, 77 Fed. Reg. 47,800, 47,810 (2012) (stating that agencies that have "shared, overlapping or closely related jurisdiction" can benefit from interagency coordination, such as joint rulemaking).

[7] *See, e.g.,* Community Reinvestment Act Regulations, 74 Fed. Reg. 31,209 (June 30, 2009) (notice of proposed rulemaking by OCC, Board, and Office of Thrift Supervision to implement CRA); Richard D. Marsico, *The 2004–2005 Amendments to the Community Reinvestment Act Regulations: For Communities, One Step Forward and Three Steps Back*, 2006 Clearinghouse Rev. J. Poverty L. & Pol'y, 534 n.2 (2006) (noting several instances of proposed joint rulemaking by the regulatory agencies involved); *see generally* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131, 1166 n.164 (2012) (noting that these agencies often work together to promulgate joint rules involving their overlapping responsibilities in financial regulation).

[8] Off. of the Comptroller of the Currency, U.S. Dep't of Treas., OCC Bulletin 2018-17, Supervisory Policy and Processes for Community Reinvestment Act Performance Evaluations (2018), https://www.occ.treas.gov/news-issuances/bulletins/2018/bulletin-2018-17.html.

[9] *See* Revisions to Impact of Evidence of Discriminatory or Other Illegal Credit Practices on Community Reinvestment Act Ratings, OCC Bulletin 2018-23, https://www.occ.treas.gov/news-issuances/bulletins/2018/bulletin-2018-23.html, revising and rescinding Impact of Evidence of Discriminatory or Other Illegal Credit Practices on Community Reinvestment Act Ratings, OCC Bulletin 2017-40, https://www.occ.gov/news-issuances/bulletins/2017/bulletin-2017-40.html.

[10] Kenneth H. Thomas, *Is the OCC becoming a 'lone wolf' on bank policy?*, Am. Banker (Aug. 31, 2018), https://www.americanbanker.com/opinion/is-the-occ-becoming-a-lone-wolf-on-bank-policy.

community groups.[11] Taken as a whole, this pattern of behavior raises serious questions about OCC's commitment to CRA's critical purposes and weighs heavily toward withdrawal of the Proposed Rule, rather than changes around the edges.

BACKGROUND ON CRA AND IMPORTANCE TO THE STATES

Congress' enactment of the CRA was driven by the twin and related phenomena of racially driven redlining and disinvestment in urban communities.[12] By 1977, Congress was confronted with ample evidence of both practices, finding that banks were "export[ing] savings despite sound local lending opportunities," and facing "nationwide demands that Congress do something about redlining."[13] For example, the Senate Banking Committee's two-year study uncovered that only ten percent of money deposited by Washington, D.C. residents was reinvested back in their communities.[14] Neighborhoods in Los Angeles, New York, Cleveland, St. Louis, and Indianapolis reported similar disinvestment.[15] These practices were a direct result of the 1930s' Home Owners Loan Corporation (HOLC) maps that demarcated communities as credit worthy based on race,[16] leading banks to adopt similar practices.[17] Forty years after CRA's passage, historical vestiges of inequality and racism continue, as does the need for CRA to remedy them; today, 74% of the neighborhoods once graded high-risk or hazardous and shaded red on the HOLC maps are LMI neighborhoods.[18]

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[11] Off. of the Comptroller of the Currency, U.S. Dep't of Treas., PPM 6300-2 Impact of CRA Ratings and Licensing Application 2 (Nov. 2017), https://www.occ.gov/publications/publications-by-type/other-publications-reports/ppms/ppm-6300-2.pdf (clarifying that a *less than* satisfactory CRA rating should not prohibit a bank merger, implying that community benefits plans are not required to get merger approval).

[12] 123 Cong. Rec. 17,630 (1977) (statement of Senator William Proxmire of Wisconsin, sponsor of the CRA, reporting on the Senate Banking Committee's study on the problem of redlining and disinvestment) (Proxmire statement).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Bruce Mitchell & Juan Franco, *HOLC "redlining" maps: The persistent structure of segregation and economic inequality*, Nat'l Community Reinvestment Coalition (Mar. 2018), https://ncrc.org/holc/.

[17] *Proxmire statement*, *supra* note 12, at 17,630 (noting that "redlining" term stems from banks' practice of "actually or figuratively draw[ing] a red line on a map around the areas of their city" and then avoiding doing business in those areas).

[18] *HOLC "redlining" maps*, *supra* note 16.

Congress surmised that banks are very well situated to take on the role of addressing these persistent inequalities, as commentators have noted:

> [I]mplicit in the CRA is the notion that banks need to take active roles in community revitalization not only because their lending practices help contribute to urban decline, but also because banks are ideally situated to reverse that decline: They have the capital, the know-how, and the efficiency to do the job.[19]

Through the CRA, Congress put banks to work in reversing these "sordid" historical practices.[20]

Unfortunately, many of the serious problems and inequities that motivated Congress to adopt the CRA persist. More than 60 metropolitan areas nationwide continue to exhibit modern day redlining,[21] and financial institutions still engage in discriminatory lending practices based on race.[22] African American and Latinx borrowers continue to be denied conventional mortgage loans at higher rates than White borrowers. A recent study showed that even when minority borrowers are not shut out, a stark lending gap persists. In Baltimore, white borrowers received 201% of the lending relative to their population size, while African Americans received 37% of

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[19] Wendy Cassity, *The Case for A Credit Union Community Reinvestment Act*, 100 Colum. L. Rev. 331, 349 (2000) (quoting *Proxmire statement*, *supra* note 12 at 17,630) (internal quotation marks omitted).

[20] *See* 114 Cong. Rec. 2,278 ("A sordid story of which all Americans should be ashamed developed by this country in the immediate post World War II era, during which the FHA, the VA, and other Federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of white America, leaving behind only [African Americans] and others unable to take advantage of these liberalized extensions of credits and credit guarantees. Traditionally the American Government has been more than neutral on this issue. The record of the U.S. Government in that period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrellevancy [sic] of color.") (Sen. Mondale).

[21] Aaron Glantz & Emmanuel Martinez, *Kept Out: For people of color, banks are shutting the door to homeownership*, Reveal (Feb. 15, 2018), https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/; Aaron Glantz & Emmanuel Martinez, *Kept Out: Gentrification became low-income lending law's unintended consequence*, Reveal (Feb. 16, 2018), https://www.revealnews.org/article/gentrification-became-low-income-lending-laws-unintended-consequence.

[22] Reveal, *The Red line: racial disparities in lending* (Feb. 17, 2018), https://www.revealnews.org/episodes/the-red-line-racial-disparities-in-lending/; Aaron Glantz, *We exposed modern-day redlining in 61 cities. Find out what's happened since*, Reveal (Oct. 25, 2018), https://www.revealnews.org/blog/we-exposed-modern-day-redlining-in-61-cities-find-out-whats-happened-since/.

the lending relative to their population size.[23] Similarly, Latinx homeownership lags 22% behind White homeownership.[24]

On the retail banking side, nearly 49% of Americans are unbanked or underbanked, a problem than disproportionately impacts minorities, lower income earners, and renters.[25] A recent analysis of the New York borough of Queens showed that the density of black and Hispanic populations is the predominant determinant of bank branch density and so-called "banking deserts," with over seven times fewer banks in communities of color.[26]

A. Progress under the Community Reinvestment Act

While problems persist, CRA has been a very successful tool in addressing these inequalities. CRA has driven more than $6 trillion worth of investments in LMI communities and communities of color nationwide,[27] including an estimated $2 trillion in small business and community development loans since 1996.[28]

One of CRA's key accomplishments has been to **unlock lending to small businesses**. Between 2010 and 2016, the CRA expanded the number of small business loans in LMI neighborhoods by 38%[29]; 94% of the small business loans and 80% of the small farm loans

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[23] Jason Richardson et al., *Home Mortgage and Small Business Lending in Baltimore and Surrounding Areas*, Nat'l Community Reinvestment Coalition (Nov. 2015), https://ncrc.org/wp-content/uploads/2015/11/ncrc_baltimore_lending_analysis_web.pdf.

[24] UnidosUS, *Latino Homeownership 2007–2017: A Decade of Decline for Latinos* 13 (2019), http://publications.unidosus.org/bitstream/handle/123456789/1963/latinohomeownership_statsbrief_62119.pdf?sequence=1&isAllowed=y.

[25] Roberto Quercia et al., *The Community Reinvestment Act: Outstanding, and Needs to Improve*, UNC Center for Community Cap. and the John D. and Catherine T. MacArthur Found. (Feb. 2009), https://www.frbsf.org/community-development/files/cra_outstanding_needs_improve.pdf.

[26] U.S. Rep. Gregory W. Meeks, *Meeks Analysis Shows Modern-Day Redlining in Queens* (Mar. 10, 2020), https://meeks.house.gov/media/press-releases/meeks-analysis-shows-modern-day-redlining-queens.

[27] Nat'l Community Reinvestment Coalition, *CRA 101 Manual*, https://ncrc.org/wp-content/uploads/2017/11/CRA-101_b.pdf.

[28] Nat'l Community Reinvestment Coalition, *Forecast: Banking rule changes could reduce lending in poor neighborhoods by $105 billion* (Sep. 6, 2018), https://ncrc.org/forecast-banking-rule-changes-could-reduce-lending-in-poor-neighborhoods-by-105-billion/.

[29] Eric Rodriguez, *Why Latinos Will Lose Under the OCC and FDIC's Proposal to Modernize the Community Reinvestment Act* 3, Unidos US (Jan. 2020), http://publications.nclr.org/handle/123456789/2012.

originated under CRA in 2018 were for amounts under $100,000.[30] CRA loans reflect the needs of small businesses, the vast majority of which earn under $1 million in annual revenue.[31] Indeed, the greatest need for capital is for small dollar amounts.[32] Recent studies have made clear that banks "are responsive to the incentives that CRA provides" relating to small-business lending, with areas that lose LMI status (and thus CRA eligibility) seeing precipitous drops in lending.[33]

CRA has also significantly **contributed to the availability of affordable housing**, leading to increased homeownership and investment in multifamily affordable housing in traditionally underserved or previously redlined communities.

Under the CRA, the number and dollar amount of mortgage loans to lower-income borrowers grew dramatically, with pronounced effects for minority borrowers.[34] For example, the CRA is credited with facilitating between 15 to 35% of home loans to Latinos in LMI census tracts.[35] As with small-business loans, research indicates that banks respond to the CRA grading system in the single-family housing context.[36] And when a lower-income neighborhood loses

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[30] Fed. Fin. Institutions Examination Council, *Findings from Analysis of Nationwide Summary Statistics for 2018 Community Reinvestment Act Data Fact Sheet* (last modified Dec. 2019), https://www.ffiec.gov/hmcrpr/cra_fs19.htm.

[31] Consumer Fin. Protection Bureau, *Key dimensions of the small business lending landscape* 9 (May 2017), https://files.consumerfinance.gov/f/documents/201705_cfpb_Key-Dimensions-Small-Business-Lending-Landscape.pdf.

[32] *Id.* at 18 (noting that 70 percent of small businesses seek loans of less than $250,000).

[33] Lei Ding et al., *Effects of the Community Reinvestment Act (CRA) on Small Business Lending*, Joint Ctr. for Housing Stud. of Harv. U. (Mar. 2019), https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_Lee_Effects_of_CRA_on_Lending_0.pdf.

[34] O. Emre Ergungor, *The Community Reinvestment Act and the Economics of Lending in Lower-Income Neighborhoods*, Forefront, Fed. Res. Bank of Cleveland 11 (Apr. 2010), https://www.clevelandfed.org/en/newsroom-and-events/publications/forefront/ff-v1n02/ff-v1n0213-the-community-reinvestment-act-and-the-economics-of-lending-in-lower-income-neighborhoods.aspx.

[35] *Why Latinos Will Lose, supra* note 29.

[36] Joint Ctr. for Housing Stud. of Harv. U., *The 25th Anniversary of the Community Reinvestment Act: Access to Capital in an Evolving Financial Services System* (Mar. 2002), https://www.jchs.harvard.edu/sites/default/files/cra02-1.pdf (higher percentage of banks' home purchase loans to LMI borrowers and census tracts occurs in CRA assessment areas).

CRA coverage, banks are less likely to keep up or expand their supply of mortgage credits, instead scaling back offers of credit to minority borrowers.[37]

On the multifamily rental side, the CRA has been instrumental in connecting community development units in banks with local organizations to work hand-in-hand on smaller, more involved projects that rely on state and local subsidies or public-private partnerships.[38] As industry experts have testified, "CRA has made a uniquely valuable contribution to [community development]. Indeed, an entire generation of CD finance has been built on the foundation of CRA."[39]

B. Importance to Signatory States

In addition to the overall beneficial effects of CRA to the Nation, individual states have also benefitted greatly from CRA-driven activity. For example, in California, a 2016 survey showed that responding banks lent over $27 billion in LMI communities and communities of color, and had over $31 billion in total CRA activity.[40] In New Jersey, as of 2018, financial institutions had made over $40 billion in CRA commitments to LMI communities through the work of organizations like the Housing & Community Development Network of New Jersey and New Jersey Citizen Action.[41]

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[37] Lei Ding & Leonard Nakamura, *"Don't Know What You Got Till It's Gone" — The Effects of the Community Reinvestment Act (CRA) on Mortgage Lending in the Philadelphia Market* 1, Fed. Res. Bank of Phila. (2017), https://perma.cc/KDR5-TC9X (home lending in LMI census tracts can decline up to 20 percent when CRA coverage is withdrawn).

[38] Oscar Abello, *Will softer Community Reinvestment Act regulations harm communities of color?*, City & State N.Y. (Jan. 28, 2020), https://www.cityandstateny.com/articles/policy/policy/will-softer-community-reinvestment-act-regulations-harm-communities-color.

[39] Statement of Benson F. Roberts, Nat'l Ass'n of Affordable Housing Lenders to the H. Reps. Fin'l Servs. Comm., Subcomm. on Consumer Protection Hearing on The Community Reinvestment Act (Apr. 9, 2019), quoting from David J. Erickson, *The Housing Policy Revolution: Networks and Neighborhoods* 63, The Urban Inst. Press, Wash., D.C., 2009.

[40] Paulina Gonzalez-Brito, Executive Dir., Cal. Reinvestment Coalition, H.R. Fin'l Svcs. Comm., Subcomm. on Consumer Protection and Fin'l Institutions (Jan. 14, 2020), http://calreinvest.org/wp-content/uploads/2020/01/PGB-Congressional-Testimony-1.14.20-with-Appendix.pdf.

[41] Letter from Housing and Community Development Network of N.J. to Vonda J. Eanes, Off. of the Comptroller of the Currency, Re: Docket ID OCC-2018-0008 (Nov. 1, 2018), https://www.hcdnnj.org/assets/documents/cra%20anpr%20response%20letter%20ac.pdf.

A functioning CRA is critically needed as States grapple with affordable housing and homelessness crises. Large cities facing these crises support the CRA because of its major role in expanding the supply of affordable housing and can ill afford to lose this important tool.[42]

The California Housing Consortium—whose members have helped develop over 350,000 affordable homes serving LMI households throughout California over the past 35 years—credits CRA with enabling these achievements: "CRA-motivated banks have been critical partners in this work by providing not only lower cost more flexible debt but, even more critically, equity generated through the sale of Low Income Housing Tax Credits (LIHTCs)."[43] CHC strongly opposed the OCC's proposed changes to CRA regulations in the ANPR.

As to community development more generally, the Local Initiatives Support Corporation (LISC) also credits the CRA with enabling its work, which involves disbursing approximately $1 billion in community development investments each year in 35 cities and across 2,100 rural counties in 44 states. As LISC's CEO explains: "[B]y far our largest investors in that work are CRA-motivated investors. We could not do our work to anything like the extent we are doing now, but for CRA."[44]

CRA's positive impact on affordable housing directly affects the States' efforts to attract investment for this critical purpose. As the National Council of State Housing Agencies (NCSHA) has pointed out, state housing finance agencies have extensively leveraged LIHTC—"our nation's most effective tool for financing the development of rental housing affordable to low-income Americans"—to achieve their affordable housing development goals.[45] NCSHA

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[42] U.S. Conf. of Mayors, *Letter to Chairman Powell, Comptroller Otting, and Chairman McWilliams* (Nov. 16, 2018), https://greenlining.org/wp-content/uploads/2019/02/US-Conference-of-Mayors-Community-Reinvestment-Act-Support.pdf (describing CRA as a "key policy lever" in "expanding the supply of affordable housing," noting that "38 percent of renters in the United States are spending more than 30 percent of their incomes on housing").

[43] Letter from Cal. Housing Consortium to Comptroller Otting Re: Docket ID OCC-2018-0008, "Reforming the Community Reinvestment Act Regulatory Framework" (Nov. 14, 2018), https://www.regulations.gov/document?D=OCC-2018-0008-1423; *see also* Steve Dubb, *Community Reinvestment Act at Risk: What's at Stake?* Non Profit Quarterly (Mar. 11, 2020), https://nonprofitquarterly.org/community-reinvestment-act-at-risk-whats-at-stake/ (quoting Priscilla Almodovar, CEO of Enterprise Community Partners: "The most efficient, easiest, [most] impactful ways to meet the investment test are LIHTC (Low-Income Housing Tax Credit) and NMTC (New Markets Tax Credit).").

[44] Miriam Axel-Lute, *Pulling the Rug From Under Community Development?*, Shelterforce (Mar. 5, 2020), https://shelterforce.org/2020/03/05/pulling-the-rug-from-under-community-development/.

[45] Letter from Nat'l Council of St. Housing Agencies to Off. of the Comptroller of the Currency RE: Docket ID OCC-2018-0008, Reforming the Community Reinvestment Act Regulatory Framework (Nov. 19, 2018),

notes that "roughly 3 million apartments for low-income households" have been financed through LIHTC, and that the vast majority—roughly 85 percent—of the equity for all LIHTC investments comes from banks subject to the CRA.[46] In short, CRA is of critical importance to the States, who cannot afford to have it weakened by regulatory "reform" that guts its core requirements.

THE RULE IS FUNDAMENTALLY FLAWED

The Proposed Rule is flawed in multiple respects. Each of these is problematic in its own right, but even more troublingly, these problems interact in a way that causes harm to CRA's core purposes, LMI communities, and the States.

I. THE PROPOSED RATING SYSTEM WILL UNDERMINE CRA'S CORE PURPOSES

At the heart of the Proposed Rule is the OCC and FDIC's radical proposal to replace the existing CRA rating system with one that is ostensibly more "quantitative," but which is rigidly formulaic and ignores the fact that CRA activity can and should be measured in ways beyond raw dollar figures. This proposal would be a serious threat to CRA's continuing vitality as a driver of economic progress and justice in LMI communities for the reasons discussed below.

A. The Proposed Formulaic Test Is Seriously Flawed

Under current practice and historically, regulators have examined large banks' CRA compliance through three distinct lenses, known as the lending, services, and investment tests. Banks must perform well in each category to receive a positive CRA rating.[47]

The Proposed Rule would discard this approach in favor of a formulaic test, which experts have called an "aggregate balance sheet ratio"[48] approach. Under this test, the examiner would evaluate a bank's compliance with CRA requirements by simply measuring the dollar value of a bank's total CRA activities as a percentage of its deposits.[49] Although the Proposed Rule would

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https://www.regulations.gov/contentStreamer?documentId=OCC-2018-0008-1124&attachmentNumber=1&contentType=pdf.

[46] *Id.* at 2 (citing Fred Copeman, *What Do Higher LIHTC Prices Mean for Syndicators?*, Affordable Housing News & Views (June 1, 2014), https://www.cohnreznick.com/insights-and-events/insights/what-do-higher-lihtc-prices-mean-syndicators).

[47] Fed. Fin'l Institutions Examination Council, *Large Institution CRA Examination Procedures* 5-14 (Apr. 2014), https://www.ffiec.gov/cra/pdf/cra_exlarge.pdf.

[48] Michael Novogradac, *Proposed CRA Regulations Greeted with Great Concern: Aggregate Balance Sheet Ratio Could Overwhelm Other Changes* (Jan. 2, 2020), https://www.novoco.com/periodicals/articles/proposed-cra-regulations-greeted-great-concern-aggregate-balance-sheet-ratio-could-overwhelm-other.

[49] *E.g.*, proposed 12 C.F.R. §§ 345.10(b)(1), (c)(1), 85 Fed. Reg. 1204, 1259 (proposed FDIC rule for large banks).

examine banks' level of qualifying activities in relation to the value of activities conducted in each of their assessment areas, in addition to the banks' overall deposits, examiners would still rely on narrowly-focused ratios to determine banks' presumptive performance grades.

This proposed new approach would severely undermine the CRA's purpose of ensuring responsiveness to local community needs.[50] This fundamental flaw was reflected in the comments that the OCC received on its ANPR; as the Rule itself acknowledges, a majority of commenters (including a number of the undersigned Attorneys General[51]) "oppose[d] a single metric."[52] The slightly modified aggregate balance sheet ratio approach in the Proposed Rule does not allay these concerns for a number of reasons.

First, as the Board has noted, this approach's narrow focus on the dollar value of banks' CRA-eligible activity would incentivize banks to focus predominantly or exclusively on large-dollar loans and investments.[53] This would enable banks to improve their ratios regardless of whether these investments actually meet local credit needs (e.g., of LMI small businesses and individuals), which can involve more challenging or labor-intensive efforts on the part of banks.

The Proposed Rule's additional provision doubling the standard of what is considered a "small business loan" exacerbates this problem, as banks will now get CRA credit for larger loans (up to $2 million) and for lending to larger businesses (with up to $2 million in revenue). This will also push banks to finance larger, more profitable loans, drying up credit for many "mom and pop" businesses and entrepreneurs, whose credit needs are often for much smaller loans.[54]

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[50] *See* 12 U.S.C. §§ 2901(a)(1)-(3); Remarks by FDIC Dir. Martin J. Gruenberg, *The Community Reinvestment Act: Its Origins, Evolution, and Future* (Oct. 29, 2018), https://www.fdic.gov/news/news/speeches/spoct2918.html (warning that this approach "could obscure the current community-based focus of [the] CRA and undermine its basic purpose.").

[51] *Attorney General Becerra Leads Multistate Coalition to Fight for Rules Protecting Underserved Populations from Banking Discrimination* (Nov. 20, 2018), https://www.oag.ca.gov/news/press-releases/attorney-general-becerra-leads-multistate-coalition-fight-rules-protecting.

[52] 85 Fed. Reg. 1204, 1207.

[53] *See* Lael Brainard, Fed. Res. Board of Governors, Address to the Urban Inst., *Strengthening the Community Reinvestment Act by Staying True to Its Core Purpose* 6 (Jan. 8, 2020), https://www.occ.gov/news-issuances/congressional-testimony/2018/pub-test-2018-61-written.pdf ("an approach that combines all activity together runs the risk of encouraging some institutions to meet expectations primarily through a few large community development loans or investments rather than meeting local needs").

[54] *See, e.g.*, Fed. Res. Banks, *Small Business Credit Survey: 2019 Report on Employer Firms* 10 (Aug. 14, 2019),

Second, commentators have noted that this proposal's failure to examine investments and loans separately could lead to a steep decline in bank equity investments in LMI neighborhoods because they "generally carry higher internal capital charges than lending activities, which makes investing activities comparatively much less desirable."[55] This could have a "seismic effect on bank investment in low-income housing tax credits"[56] and other investment vehicles that have had a major beneficial impact in LMI communities.

Third, the proposal inappropriately diminishes the services test in multiple ways. Specifically, under the Proposed Rule banks would receive very limited CRA credit—amounting to only one percent of their overall rating—for maintaining physical branches in LMI neighborhoods.[57] This significantly undervalues the importance of bank branches, which have continued to be a force for good in neighborhoods even in the era of online and mobile banking, as Federal Reserve studies have consistently shown. For example, one study showed that "local branch presence is still important for small business lending," and that CRA-reporting banks without local branches' share of small business loans was "quite low."[58] Similarly, bank branches are important for individuals in rural communities subject to branch closures, particularly LMI and older customers. A recent Board paper found that these closures caused "increased costs and reduced convenience in accessing financial services," particularly for "those with lower incomes or less reliable transportation, older individuals, and small business owners."[59] Critically for CRA purposes, communities affected by bank closures are "poorer, made up of residents who are less likely to have finished high school or attained a college degree, and have a greater proportion of African American residents relative to their peer communities that have been less affected."[60]

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https://www.fedsmallbusiness.org/medialibrary/fedsmallbusiness/files/2019/sbcs-employer-firms-report.pdf (57% of 6,000 small businesses respondents sought loans of $100,000 or less).

[55] *Proposed CRA Regulations Greeted with Great Concern*, *supra* note 48.

[56] *Id.*

[57] 85 Fed. Reg. 1204, 1220-21.

[58] Elliot Anenberg, et al., *The Branch Puzzle: Why Are there Still Bank Branches?*, Fed. Res. (Aug. 20, 2018), https://www.federalreserve.gov/econres/notes/feds-notes/why-are-there-still-bank-branches-20180820.htm. The Federal Reserve reached this conclusion while acknowledging that the importance of branch presence appears to be slowly declining due to online and mobile banking.

[59] Fed. Res., *Perspectives from Main Street: Bank Branch Access in Rural Communities* (Nov. 2019), https://www.federalreserve.gov/publications/november-2019-bank-branch-access-in-rural-communities.htm.

[60] *Id.*

Further, banks' performance in meeting LMI residents' needs for affordable, accessible bank accounts seems to not be part of the Proposed Rule's criteria. Such accounts are important for a number of reasons, including as a tool to protect against check cashers and other fringe financial services providers, which charge usurious fees that can cost consumers hundreds of dollars annually.[61] This protection is explicitly part of CRA's mandate, which emphasizes banks' ongoing obligation to "serve the convenience and needs of the communities in which they are chartered to do business," including both "the need for credit services as well as deposit services."[62] By drastically reducing or eliminating CRA credit for branches and account services, the proposal substantially departs from this core CRA requirement.

Fourth, bank exams exclusively or primarily focused on balance sheet metrics may well violate the intent and purpose of the CRA to require banks to respond to local needs. Examiners are currently required to consider a bank's responsiveness to community residents' public comments as part of their assessment of CRA performance,[63] and while the Proposed Rule does briefly state that "performance context" will still be considered by examiners,[64] the "presumptive" rating generated by the quantitative test seems likely to be the primary (if not sole) metric in most cases. The Board's Community Advisory Council (CAC) has urged against "adopt[ing] a single quantitative assessment to determine the majority of a bank's score on CRA performance evaluations,"[65] emphasizing that "any metrics used in the evaluation process should reflect overall community impact, and not simply the dollar amount of bank activities."[66] The CAC unanimously agreed that this approach would likely not be able to include a role for public input, nor would it be able to factor in local community needs. In the words of FDIC Director (and former Chair) Martin Gruenberg, the metric-based approach could "fundamentally change the relationship between banks and local communities" because it will "undermine the incentive

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[61] Tony Armstrong, *The Cost of Being Unbanked: Hundreds of Dollars a Year, Always One Step Behind*, Nerdwallet, https://www.nerdwallet.com/blog/banking/unbanked-consumer-study/ (last visited Feb. 12, 2020) (finding that unbanked households who are forced to use check cashers and money order services face almost $200 per year in additional costs).

[62] 12 U.S.C. § 2901(a).

[63] *See* 75 Fed. Reg. 11642, 11654 (noting that examiners consider banks' "responsiveness to credit and community development needs" when determining their CRA compliance).

[64] 85 Fed. Reg. 1204, 1218.

[65] Fed. Res. Board Community Advisory Council, *Record of Meeting, CAC and Board of Governors* 2 (Oct. 5, 2018), https://www.federalreserve.gov/aboutthefed/files/cac-20181005.pdf. The CAC was formed by the Board in 2015 to offer a diverse perspective on the needs of consumers and communities, with a particular focus on LMI populations.

[66] Fed. Res. Board Community Advisory Council, *Record of Meeting, CAC and Board of Governors* 6 (Nov. 1, 2019), https://www.federalreserve.gov/aboutthefed/files/cac-20191101.pdf.

that banks currently have to develop constructive partnerships with community organizations."[67] These partnerships, Director Gruenberg noted, "have been central to community development in low- and moderate-income neighborhoods . . . around the country."[68] As advocates have pointed out, these "formula-based approaches . . . rely on bank performance data that is less transparent and available to the public . . . . All of this comes at the expense of community input, community partnerships, and any activity that cannot be quantified."[69]

Fifth, as commentators have noted, under this change "banks could get a failing grade in as many as 50 percent of their assessment areas and still get a passing grade on their overall CRA examination—something that isn't possible under current CRA regulations."[70] This outcome is possible because the Proposed Rule would require banks to meet CRA criteria in only a "significant portion" of their assessment areas in order to receive a passing rating. The rule suggests that the regulators will define "significant portion" to be more than 50%.[71] Commentators have raised the specter that this could "legalize, and even explicitly invite, redlining" by allowing banks "an opportunity to receive an Outstanding rating while only serving 50 percent of their assessment areas."[72] This provision could also allow banks to ignore harder-to-serve rural areas and fails to include incentives for banks to do so despite the regulators' avowed desire to address "CRA deserts."[73]

OCC and FDIC's approach contrasts sharply with the approach outlined by Board Governor Lael Brainard in January, which aligns much more closely with the core purpose of the

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[67] *Gruenberg 2018 remarks*, *supra* note 50.

[68] *Id.*

[69] *Gonzalez-Brito testimony*, *supra* note 40.

[70] Oscar Perry Abello, *Community Advocates Break Down Proposed Changes to Community Reinvestment Act Regs* (Dec. 17, 2019), https://nextcity.org/daily/entry/community-advocates-proposed-changes-to-community-reinvestment-act-regs.

[71] *See* 85 Fed. Reg. 1204, 1216.

[72] Frank Woodruff, *Redlining Would Be Relegalized by CRA Reform Proposal*, Shelterforce (Jan. 9, 2020), https://shelterforce.org/2020/01/09/redlining-would-be-relegalized-by-cra-reform-proposal/?utm_medium=social&utm_source=linkedin.company&utm_campaign=postfity&utm_content=postfity6c667.

[73] *See, e.g.*, 85 Fed. Reg. 1204, 1207. Industry experts have expressed the view that "[m]any rural areas may be CRA deserts, but they're not generating significant deposits for banks and the proposal offers little real motivation for banks to reach the deserts." Brad Stanhope & Teresa Garcia, *Proposed CRA Regulations Prompt Concerns for Future of Affordable Housing, Community Development Investment and Lending*, Novogradac (Feb. 6, 2020), https://www.novoco.com/periodicals/articles/proposed-cra-regulations-prompt-concerns-future-affordable-housing-community-development-investment (quoting Buzz Roberts, president and CEO of the National Association of Affordable Housing Lenders).

CRA.[74] Among other elements, that proposal preserves distinct CRA retail and community development tests for large banks.[75] As part of the retail test under the Board's proposal, to guard against "inadvertent biases in favor of fewer, higher-dollar value loans," examiners "would rely on loan counts rather than dollar value."[76] That proposal also recognizes the critical point that "the value of retail services and community development services to a local community do not lend themselves easily to a monetary value," making a qualitative element to the retail and community development tests of continued importance.[77] Critically, the Board conducted a thorough data analysis to reach its conclusions (see below), which "did not find a consistent relationship between CRA ratings and a uniform comprehensive ratio that adds together all of a bank's CRA-eligible activities in an area."[78]

In short, while OCC and FDIC claim that adopting their proposed approach for measuring community investment will bring clarity and certainty to CRA examinations, it is likely to be, at best, an inferior method of ensuring that banks are responsive to LMI communities' needs, as Director Gruenberg has strongly stated.[79] At worst, "[p]ermitting such behavior would bring us back to an era where financial institutions had the option to draw red lines around—and deny financial services to—poor neighborhoods and all neighborhoods of color."[80]

B. The Proposed Rule's Benchmarks Are Arbitrary and Not Driven by Data

In addition to improperly resting a bank's presumptive CRA rating on a single quantitative measure, the Proposed Rule sets out benchmarks for determining those ratings that, as far as can be discerned, are arbitrary. While the Proposed Rule states that these benchmarks "reflect the agencies' analysis of the available . . . data,"[81] as Director Gruenberg stated, "No

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[74] Lael Brainard, Fed. Res. Board of Governors, Address to the Urban Inst. (Jan. 8, 2020), *Strengthening the Community Reinvestment Act by Staying True to Its Core Purpose*, https://www.occ.gov/news-issuances/congressional-testimony/2018/pub-test-2018-61-written.pdf.

[75] *Id.* at 4-6.

[76] *Id.* at 6.

[77] *Id.* at 6.

[78] *Id.* at 13-14.

[79] Statement by FDIC Dir. Martin J. Gruenberg re Notice of Proposed Rulemaking: Community Reinvestment Act Regulations 3 (Dec. 12, 2019), https://www.fdic.gov/news/news/speeches/spdec1219d.pdf (stating that this "'count the widgets' approach . . . does not take into account the quality and character of the bank's activities and its responsiveness to local needs").

[80] *Woodruff*, *supra* note 72.

[81] 85 Fed. Reg. 1204, 1218.

explanation is given as to how these specific benchmarks were determined, and none of the analysis referenced is provided. They appear to be arbitrary. Yet they are the basis for establishing new presumptive standards for CRA performance."[82]

Again, in contrast, the Board's approach is informed by a robust analysis of over 6,000 CRA evaluations from a diverse sample of 3,700 banks.[83] From this analysis, the Board "concluded that CRA metrics tailored to local conditions and the different sizes and business models of banks would best serve the credit needs of the communities that are at the heart of the statute," warning against "imposing arbitrary CRA performance measures on a bank and its community."[84]

II. THE PROPOSED RULE FAILS TO PROPERLY TAKE INTO ACCOUNT POTENTIALLY HARMFUL ACTIONS BY BANKS

The Proposed Rule is also flawed because it fails to adequately downgrade banks' CRA ratings when their actions harm LMI communities.

A. Banks' Ratings Are Not Downgraded for Displacement

Many of the States, particularly in their urban areas, are dealing with significant displacement of LMI communities and people of color as a result of development in those communities aimed at wealthier segments of society,[85] much of it financed by banks regulated under CRA.[86] Under the Proposed Rule, banks would continue to be able to get credit for loans that will likely lead to such displacement. Even more problematic, the Rule would explicitly allow banks to get CRA credit for investments in Opportunity Zone Funds—which can finance items such as professional sports stadiums—even when these projects clearly displace local residents.[87]

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[82] *See Gruenberg December 2019 statement*, *supra* note 79 at 4-5.

[83] *Brainard*, *supra* note 53 at 4.

[84] *Id.* at 8, 13.

[85] *See, e.g.*, Andrew Khouri, *Can California boost home building without supercharging gentrification?*, L.A. Times (Apr. 23, 2019), https://www.latimes.com/business/la-fi-housing-affordability-gentrification-20190423-story.html.

[86] *See, e.g.*, Kevin Stein and Zach Murray, *To Address Displacement in Your Community, Start by Asking, "Who's Financing It?"*, Shelterforce (Sept. 23, 2019), https://shelterforce.org/2019/09/23/to-address-displacement-in-your-community-start-by-asking-whos-financing-it/.

[87] *See* 85 Fed. Reg. 1204, 1234 (including "[i]nvestment in a qualified opportunity fund, established to finance improvements to an athletic stadium in an opportunity zone that is also an LMI census tract" in list of qualifying activities); *see also Changing Rules to Help Bankers and Hurt Poor Neighborhoods*, N.Y. Times (Jan. 10, 2020), https://nyti.ms/30bJe5W (noting that

B. Banks Are Not Sufficiently Downgraded for Discrimination

While the Proposed Rule does provide that banks' ratings can be impacted by "discriminatory or other illegal credit practices,"[88] the OCC has taken other actions that could lead to banks which have been found to have engaged in discriminatory practices not facing serious consequences to their CRA rating. Most directly, the OCC has reduced the negative impact of violations of federal credit discrimination or consumer protection law on a bank's CRA rating.[89] This means that a bank with substantial, non-technical violations that are not "egregious" could be, for example, only downgraded from "Outstanding" to "Satisfactory." Such a minor downgrade will not impact regulators' review of their mergers and acquisitions—the only real "stick" for CRA compliance.[90] Further, the OCC has narrowed the universe of consumer protection or credit discrimination violations that will affect banks' ratings.[91] Bank examiners should be able to levy meaningful consequences on banks who not only fail to take the affirmative steps required to assist communities and consumers, but have actively harmed them.

III. PROPOSED ASSESSMENT AREAS WOULD SHIFT FOCUS AWAY FROM LOCAL LMI NEEDS

Assessment areas should be tailored to the type of bank and the kinds of services the bank provides. Under current regulations, examiners use the location of branches and deposit-taking ATMs as proxies for the communities served by the bank at issue. Technology advancements such as mobile banking have made it possible for banks to serve customers who are located far from their physical branches and ATM locations, so it is reasonable for regulators to seek to modernize their approach to assessment areas. The Board's proposal would move in this direction, with banks being "evaluated on their branch and ATM locations and how well they serve customers using online and mobile access channels."[92]

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banks could get CRA credit for financing "new sound system at M&T Bank Park in Baltimore"; generally describing the Proposed Rule as a "perversion of the law," a "partial demolition" of CRA, and "a betrayal of the public interest for the benefit of banks.").

[88] 85 Fed. Reg. 1204, 1218.

[89] *See supra* note 9.

[90] *See, e.g.*, Charles S. Fleet, Fed. Res. Board of Governors, *CRA and Consumer Protection Issues in Banking Applications* (2010), https://consumercomplianceoutlook.org/2010/first-quarter/cra-and-consumer-protection (noting that "[a] less than satisfactory CRA rating can pose a formidable and often insurmountable hurdle for an applicant [for a merger or acquisition]. Denials are made public and therefore carry significant reputational risk.").

[91] *See supra* note 9.

[92] *Brainard*, *supra* note 53 at 9.

However, OCC and FDIC's Proposed Rule would redirect a bank's focus from the local LMI communities where it does business to anywhere a bank accepts deposits, by requiring banks that receive a majority of deposits from outside of their current branch-based assessment areas to delineate deposit-based assessment areas.[93] Rather than radically decreasing the importance of the physical location of bank branches, the Rule should expand consideration of the income level of customers using deposit products to help determine whether banks' online services are fulfilling the needs of LMI communities.[94] Given the customer base of many of the fintech banks that would meet the criteria of the new deposit-based assessment rule, which tends to be younger and live in tech hubs, it is unlikely that these deposit-based assessment areas will be in LMI communities. Further, the Proposed Rule does not take into account where banks' lending activities are taking place, focusing only on deposits. The former is much more indicative of where banks' profit centers are, and including these areas will be more likely to actually expand reinvestment activity into CRA "deserts."[95]

IV. EXPANSION OF CRA-ELIGIBLE ACTIVITIES WATERS DOWN CRA OBLIGATIONS

The Proposed Rule's plan to create a list of CRA-eligible activities will likely be welcomed by members of the financial services industry, who have complained of the "opacity" of the CRA evaluation process.[96] However, the list generated by OCC and FDIC goes far beyond bank activities that forward the core purposes of CRA. Banks will be incentivized to take on the easiest, least expensive, and most profitable of these activities, potentially gutting the important investments, loans, and retail services that have been driven by CRA and meant so much to LMI communities.

For example, banks should not get credit for activities such as social services and individual bank employees' volunteerism that, while laudable, are only tangentially (at best) related to the core purposes of CRA.[97] Further, banks are already engaging in a number of the

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[93] *See, e.g.*, proposed 12 C.F.R. § 25.08(b), 85 Fed. Reg. 1204, 1244 (proposed OCC rule).

[94] *See Gruenberg 2019 statement*, *supra* note 79 at 6 ("We do not know how many or where these deposit-based assessment areas might be, or how they would benefit low-and moderate-income communities. It is not clear that communities that are so-called "credit deserts" would necessarily benefit . . . .").

[95] *Cf.* 25 C.F.R. § 25.08 (including in definition of facility-based assessment areas "surrounding locations in which the bank has originated or purchased a substantial portion of its qualifying retail loans") (OCC regulation).

[96] Brendan Pedersen, *CRA cheat sheet: New regime would look very different*, Am. Banker (Dec. 12, 2019), https://www.americanbanker.com/news/cra-cheat-sheet-new-regime-would-look-very-different.

[97] *See, e.g.*, proposed 12 C.F.R. § 25.05(a), 85 Fed. Reg. 1204, 1231-32, 1243 (proposed OCC rule and illustrative list of qualifying activities). Currently, banks may not receive credit for "personal charitable activities provided by an institution's employees or directors outside the

activities on the list in the ordinary course of their business, and giving them CRA credit for them means that banks are relieved from taking other—potentially more challenging and less lucrative—actions that might better meet LMI communities' needs.[98] This could significantly water down the law's effectiveness in combatting redlining and other practices which diminish access to lending and other banking services in traditionally underserved areas.[99]

CRA's affordable housing development focus would also be diluted by the Proposed Rule's provision that would give banks credit for financing development of housing meant for "middle-income individuals in high-cost areas."[100] Relatedly, banks would be eligible for CRA credit for housing projects that only partially benefit LMI residents,[101] including financing for projects including high-income households. While families in the moderate income band have significant housing needs, and mixed-income housing is generally desirable, allowing CRA credit for activities not focused specifically on LMI needs could have harmful effects. Namely, if regulators give CRA credit for these activities—which many banks routinely engage in without CRA incentives—they could easily become the bulk of CRA-based lending, pushing out more challenging and less lucrative LMI-focused affordable housing development such as LIHTC investments (discussed further below).

Another troubling aspect of the Proposed Rule's expansion of eligible activities is that it would eliminate the requirement that community development activities "primarily" benefit LMI communities to be eligible for CRA credit.[102] Rather, banks would receive pro rata credit for

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ordinary course of their employment," and community development services must "be related to the provision of financial services." 81 Fed. Reg. 48506, 48530 (FDIC "Qs & As" regarding CRA). "[A]ctivities that do not take advantage of the employees' financial expertise, such as neighborhood cleanups, do not involve the provision of financial services" and are expressly excluded under current rules. *Id.*

[98] *See Gruenberg December 2019 statement*, *supra* note 79 at 5.

[99] *See id.* at 5-6 (stating this "broadening of what counts . . . comes at the cost of CRA's historic focus on serving low- and moderate-income communities and individuals, while giving the appearance of expanding the overall level of CRA activity").

[100] *See* 85 Fed. Reg. 1204, 1211. Note that in communities like San Francisco, this could include households of four earning up to $147,800 annually. 85 Fed. Reg. 1204, 1241 (defining middle-income as households earning up to 120 percent of the median area income); City and Cty. of S.F., Mayor's Off. of Housing and Community Dev., *Unadjusted Area Median Income (AMI) for HUD Metro Fair Market Rent Area (HMFA) that Contains San Francisco*, https://sfmohcd.org/sites/default/files/Documents/MOH/Asset%20Management/2019%20AMI_IncomeLimits-HMFA.pdf.

[101] Proposed 12 C.F.R. § 25.04, 85 Fed. Reg. 1204, 1242 (proposed OCC rule).

[102] *See* proposed 12 C.F.R. §§ 345.12(g)(2), (h)(1).

activities that only "partially" benefit such communities, such as large infrastructure projects which benefit whole regions.[103]

In contrast, the Board's proposal to allow banks to seek "conditional examiner review of particular activities before making financial commitments, particularly for activities that revitalize and stabilize targeted areas"[104] is a promising way to help banks address their legitimate need for predictability and certainty while not creating incentives for banks to forgo important CRA-related activities.

V. THE PROPOSED RULE WOULD HARM COMMUNITIES AND THE STATES

While the flaws in the Proposed Rule identified above are tied to the technical changes in how regulators review banks' performance, their likely consequences are not restricted to balance sheets or mathematical formulae. Rather, they will inflict real-world harms in and on the States, particularly to our most vulnerable individuals and communities.

A. The Proposed Rule Reduces Banks' Incentives to Undertake Needed Activities in LMI Communities, Contrary to CRA's Core Purpose of Remedying Redlining

The Proposed Rule **incentivizes banks to engage in activities with larger dollar amounts**, as this will enable them to more easily generate a larger numerator for purposes of the balance sheet ratio tests. This will likely come **at the expense of the smaller**—and often more challenging and less lucrative—**loans and investments that truly meet community needs**.[105] The proposed expansion of assessment areas and codification of a number of activities that are not focused on serving LMI communities as eligible for CRA credit further encourages banks to opt for big-dollar loans and investments in easier-to-serve markets. Simultaneously, this disincentivizes consultation with community stakeholders, who may give banks input about the actual community needs that runs counter to banks' narrow self-interest.[106] Since banks can fail in nearly 50% of their assessment areas and still obtain an overall passing grade, banks may opt to perform most of their CRA-eligible activities in the assessment areas that they perceive as

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[103] *See Gruenberg December 2019 statement*, *supra* note 79 at 5 (citing proposed 12 C.F.R. § 345.04; *see also* 85 Fed. Reg. 1204, 1210 n.22).

[104] *Brainard*, *supra* note 53 at 11-12.

[105] *See Gruenberg December 2019 statement*, *supra* note 79 at 5 ("single, dollar value-based metrics favor large, easy-to-accomplish investments and loans over more complex and innovative activities that may take longer to develop but have a higher impact on the community").

[106] *See id.* ("These presumptive standards undermine one of the most important benefits of CRA—the incentive for banks to develop partnerships with local community organizations and other stakeholders to address community needs—because the banks can satisfy their CRA obligations by simply hitting the metric").

easier to serve (which are likely to be more affluent and less diverse)[107] at the expense of LMI areas.[108]

For example, a California-based non-profit—the Santa Barbara Rescue Mission (SBRM)—submitted a comment letter in response to the Proposed Rule expressing concern that the "proposed changes to assessment area performance standards and expansion of qualifying CRA activities" would diminish New Markets Tax Credit investments.[109] SBRM recently received such an investment, allowing it to "renovate [its] aging facility so that [it] can serve 1,600 unique homeless individuals annually."[110] SBRM is "strongly concerned that projects like these will not be financed if the proposed changes to CRA reforms are enacted [which] will encourage banks to quickly meet their minimum regulatory obligations through business-as-usual investments instead of incentivizing them to meet the true credit needs of low and moderate income (LMI) communities in which they do business."[111]

One of the most critical LMI needs that banks' CRA activities have helped to meet is affordable housing. The Proposed Rule would predictably lead to a **decrease in affordable housing investments and exacerbate the affordable housing and homelessness crises** in the States. A comprehensive analysis of CRA evaluations for mid-sized banks found that if the community development test were eliminated for mid-size banks, communities could face a loss of community development financing (much of which goes toward affordable housing) of $3

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[107] *See Woodruff*, *supra* note 72 ("A bank could choose half of its assessment areas to serve, ignore the rest, and still receive an outstanding rating. Which half of a bank's communities do you think will get left out?").

[108] *See Gruenberg December 2019 statement*, *supra* note 79 at 5 ("[T]his proposal would allow a bank to achieve a less than satisfactory rating in nearly half of its assessment areas and still receive a satisfactory or even outstanding rating. Banks would have the flexibility to focus their stronger community reinvestment-qualifying efforts on as few as half of their assessment areas while minimizing their efforts elsewhere").

[109] Letter from Santa Barbara Rescue Mission RE: Notice of Proposed Rulemaking Community Reinvestment Act Regulations Docket ID OCC-2018-0008 RIN 3064-AF22 (Feb. 19, 2020), https://www.regulations.gov/contentStreamer?documentId=OCC-2018-0008-1835&attachmentNumber=1&contentType=pdf.

[110] *Id.*

[111] *Id.* A number of other California municipalities and community- and tribal-based organizations have expressed concerns about the Proposed Rule, including the City and County of San Francisco, Oakland Community Land Trust, Yurok Alliance for Northern California Housing, and dozens of others. *See* Regulations.gov, Community Reinvestment Act Regulations, https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&s=california&dct=PS&D=OCC-2018-0008.

billion annually.[112] Another analysis showed that the Proposed Rule's dilution of CRA requirements could result in a dramatic loss in home and small business lending over a five-year time period, ranging from $52 billion to $105 billion.[113] The Housing and Community Development Network of New Jersey estimates that New Jersey alone stands to lose as much as $380 million in small business investments, and up to $2.26 billion in mortgages, if the Proposed Rule goes into effect.[114]

It is clear that CRA has been effective at encouraging banks to significantly invest in affordable housing. For example, one study estimated that $10 billion of capital is committed to housing tax credit investments annually, and that over three-quarters of the surveyed LIHTC properties are located in areas where at least one of the top 20 U.S. commercial banks has CRA responsibility.[115] That report lauded the "great synergy . . . between the CRA and the housing tax credit program; while the latter program spurs the development of affordable housing projects, the former acts as a source of capital formation for many of those very projects."[116] The study found that "the largest single determination of housing tax credit pricing" is whether the property is in a bank's CRA assessment area.[117] Experts are concerned that "[s]ince CRA is driving more competitive pricing," the Proposed Rule's drastic changes "may reduce the amount a commercial bank needs to reinvest in the communities they serve," and that the expansive list of CRA-eligible activities could "provide other alternative investments outside of LIHTC for banks looking to meet their CRA goals."[118] In short, the Proposed Rule puts this synergy at serious risk

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[112] Adam Dettelbach, et al., *Intermediate Small Banks: The Forgotten but Significant Resource for Affordable Housing and Community Development*, Nat'l Community Reinvestment Coalition (Oct. 2017), https://ncrc.org/intermediate-small-banks-forgotten-significant-resource-affordable-housing-community-development/.

[113] Nat'l Community Reinvestment Coalition, *Forecast: Weakening the Community Reinvestment Act Would Reduce Lending by Hundreds of Billions of Dollars* (Sept. 2018), https://ncrc.org/ncrc-forecast-weakening-the-community-reinvestment-act-would-reduce-lending-by-hundreds-of-billions-of-dollars/.

[114] HCDN of N.J. letter, *supra* note 41.

[115] CohnReznick, *The Community Reinvestment Act and Its Effect on Housing Tax Credit Pricing*, https://ahic.org/images/downloads/Research_and_Education/the_community_reinvestment_act_and_its_effect_on_housing_tax.pdf.

[116] *Id.*

[117] *Id.* at 5, 6-8.

[118] H. Blair Kincer & Mark O'Meara, *A Look at the LIHTC: Past Pricing Trends, the Current Market and Future Concerns*, Novogradac (Mar. 3, 2020), https://www.novoco.com/periodicals/articles/look-lihtc-past-pricing-trends-current-market-and-future-concerns (quoting Sam Shupe, senior vice president, director of feasibility at Raymond James Tax Credit Funds Inc.) (internal quotation marks omitted); *see also* Affordable Housing

at the expense of affordable housing development. But there is no indication that OCC and FDIC are taking this harmful dynamic into account in their proposed rulemaking.

Specific to the States, the National Council of State Housing Agencies expressed significant concerns about the ANPR's proposed elimination of the investment test, noting that it "has been essential in stabilizing the purchasing power of Housing Credits amidst recent market uncertainty."[119] Further, NCSHA stated its concern that a formula-based model "could result in far less investment in the Housing Credit and Housing Bonds" which have been the foundation of the state housing agencies' affordable housing finance efforts.[120]

Further, the proposed rule would **depress investment in the States' rural areas**, as banks would be incentivized to choose larger deals to meet CRA benchmarks quickly. Because the proposed rule expands eligible and qualifying CRA activities to include activities banks already perform in the ordinary course of business, banks can choose to count these easy activities to meet their dollar metric, instead of more complex community development targeted to underserved or distressed rural areas.[121] And given the five percent threshold for banks with significant online activity, many rural counties or smaller cities would likely not qualify as assessment areas, exacerbating these areas' potential to remain or become credit and branching deserts.[122]

In the States' urban areas, the **Proposed Rule could result in increased displacement in LMI neighborhoods**, as banks focus on **Opportunity Zone investments**. Banks can receive both CRA credit and Opportunity Zone tax credits for activities with little or no connection to community needs. These projects will hurt communities by displacing long-time LMI residents

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Finance, *Positive Outlook for LIHTC Market* (Mar. 4, 2020), https://www.housingfinance.com/finance/positive-outlook-for-lihtc-market_o (quoting Scott Hoekman, president and CEO of Enterprise Housing Credit Investments: "We are very concerned that [the Proposed Rule] would ultimately have a negative impact on the LIHTC market.").

[119] *Id.* at 3.

[120] *NCSHA letter*, *supra* note 45 at 3; *see also* Cong. Res. Serv., *The Effectiveness of the Community Reinvestment Act*, (Jan. 16, 2020), https://crsreports.congress.gov/product/pdf/R/R43661.

[121] *See Gruenberg December 2019 statement*, *supra* note 79 at 5.

[122] *See Initial NCRC Analysis of the FDIC and OCC Notice of Proposed Rulemaking Concerning the Community Reinvestment Act* (Dec. 18, 2019), https://ncrc.org/initial-ncrc-analysis-of-the-fdic-and-occ-notice-of-proposed-rulemaking-concerning-the-community-reinvestment-act/.

and businesses, and stifle funding for true community needs.[123] The Opportunity Zone program lacks documentation or data to specify who benefits from the financing. Thus, if CRA financing is not constrained to meet the definition of community development, the financing could be used for a range of projects from luxury condominiums[124] to funding private prisons and professional sports stadiums.[125]

Finally, the proposed rule's virtual **elimination of the service test will depress banks' efforts to serve the retail needs of LMI communities**. The service test is "arguably the aspect [of CRA] best-aligned with the original spatial premise of the CRA,"[126] as it is directly aimed at services located within LMI communities. The Federal Reserve Bank of Philadelphia found that CRA "motivated banks to keep their branches open in LMI communities in the aftermath of the Great Recession."[127] Indeed, there is a direct correlation between a bank's presence in the community and credit opportunities.[128] This is true for the community as a whole, as well as on an individual level—studies have shown that living in a CRA-eligible area significantly increases individuals' access to the mainstream financial system.[129]A large majority of mortgage lending

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[123] Noah Buhayar and Jesse Hamilton, *Financing for Sports Stadiums Could Count as Helping the Poor*, Bloomberg (Dec. 16, 2019), https://www.bloomberg.com/news/articles/2019-12-16/banks-may-call-nfl-stadium-financing-aid-to-poor-in-rule-change.

[124] *Initial NCRC Analysis*, *supra* note 122.

[125] *See, e.g.*, exchange between Congresswoman Rashida Tlalib and Comptroller of the Currency Joseph Otting during the U.S. House Committee on Financial Services Hearing on *The Community Reinvestment Act: Is the OCC Undermining the Law's Purpose and Intent?* (Jan. 29, 2020) at 2:04:37 https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=406021 (Congresswoman Tlalib: "You are allowing them to codify into CRA that yes, for-profit prisons and stadiums can actually get CRA credit in LMI communities, and that's wrong." Comptroller Otting: "And that's why we should change it in the comment period.").

[126] Roberto Quercia, et al., *The Community Reinvestment Act: Outstanding, and Needs to Improve*, Fed. Res. Banks of Boston and S.F. (Feb. 2009), https://www.frbsf.org/community-development/files/cra_outstanding_needs_improve.pdf.

[127] The current service test's explicit focus on branch distribution in census tracts with different incomes prevented the closures of economically viable branches in LMI tracts. *See* Lei Ding and Carolina K. Reid, *The Community Reinvestment Act (CRA) and Bank Branching Patterns*, Fed. Res. Bank of Phila. 20 (Sept. 2019), https://philadelphiafed.org/-/media/research-and-data/publications/working-papers/2019/wp19-36.pdf.

[128] *Id.* at 9 (noting direct correlation between the number of bank branches and ATMs located in a neighborhood and the credit opportunities available to the surrounding community).

[129] Kristin F. Butcher & Ana Patricia Muñoz, *Using Credit Reporting Agency Data to Assess the Link Between the Community Reinvestment Act and Consumer Credit Outcomes*, 19 Cityscape: A Journal of Policy Development and Research 2 (2017), https://www.huduser.gov/portal/periodicals/cityscpe/vol19num2/ch7.pdf.

occurs near a physical branch.[130] Conversely, access to credit declines and rates go up the farther the borrower is from the bank.[131]

Deprioritizing physical bank branches will create a vacuum for consumers in need, leaving predatory alternative financial services providers to fill the gap.[132] When consumers are cut off from mainstream banking institutions, they rely on expensive alternative financial services, like pawn shops and check cashing services.[133] People of color and low-income households are already underserved by bank branches and overserved by alternate financial services.[134] This comes with a high cost; in 2017 alone, underserved communities paid $173 billion in fees and interest for such services.[135]

Non-profit developers working in underserved communities will also be harmed by the Proposed Rule. As discussed above, the Proposed Rule will push banks to engage in larger, more lucrative, and simpler investments over the smaller, costlier, and more complex investments that could be more impactful for a community's needs. This could, for example, discourage financing for mission-driven nonprofit developers to build and improve deeply and permanently affordable housing in favor of large-scale deals with for-profit developers. In

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[130] Donald Morgan et al., *Banking Deserts, Branch Closings and Soft Information*, Liberty Street Economics blog (Mar. 7, 2015), http://libertystreeteconomics.newyorkfed.org/2016/03/banking-deserts-branch-closings-and-soft-information.html.

[131] Hoai-Luu Q. Nguyen, *Do Bank Branches Still Matter? The Effect of Closings on Local Economic Outcomes* (Oct. 2015), https://economics.mit.edu/files/10143 ("The impact of branch closures were found to be more severe in tracts with lower median income, a higher fraction of minority households, and where firms were, on average, closer to their lending.").

[132] U.S. Gov't Accountability Off., *Community Reinvestment Act: Options for Treasury to Consider to Encourage Services and Small-Dollar Loans When Reviewing Framework*, (Mar. 16, 2018), https://www.gao.gov/assets/700/690311.pdf.

[133] Lael Brainard, *Keeping Community at the Heart of the Community Reinvestment Act*, Fed. Res. Board of Governors (remarks delivered May 18, 2018), https://www.federalreserve.gov/newsevents/speech/brainard20180518a.htm.

[134] FDIC, 2017 *FDIC National Survey of Unbanked and Underbanked Households*, 2, 8 (Oct. 2018), https://www.fdic.gov/householdsurvey/2017/2017execsumm.pdf.

[135] Christopher Brown et al., *The Future of Banking: Overcoming Barriers to Financial Inclusion for Communities of Color*, Unidos US & PolicyLink 3, https://www.policylink.org/sites/default/files/future_of_banking_52419_v3.pdf.

addition, the Rule's "quantity over quality" approach could lead to fewer grants to support neighborhood and community-based organizations.[136]

VI. THE PROPOSED RULE IS UNLAWFUL

As discussed above, Congress's purpose in adopting the CRA was two-fold: combatting redlining and meeting the credit and deposit needs of communities. The CRA was inspired by the need to address the "stark lending disparities across the country" where only a small percentage of deposits remained in underserved communities, while banks loaned a majority of the assets deposited there to businesses and individuals outside the community.[137] The Proposed Rule runs contrary to those purposes and the plain text of the CRA. This is not only bad policy, it is unlawful.

A. The Proposed Rule Is Contrary to Law

Multiple of the Proposed Rule's provisions are contrary to clear Congressional intent and frustrate the policies that Congress sought to implement in passing the CRA. Thus, the Proposed Rule is subject to being struck down by courts.[138]

The Proposed Rule is contrary to the CRA's intended purposes of meeting the credit and deposit needs of LMI communities in particular,[139] as well as its mandate that regulators examine how well a given bank is meeting the needs "of its entire community, including low- and moderate-income neighborhoods"[140] in multiple ways.

The Rule **gives no consideration to how banks are meeting LMI communities' need for deposit accounts** and other retail products, effectively eliminating the retail test which has been one of CRA's pillars. The Proposed Rule eliminates the current regulations requiring

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[136] Housing Oregon, *Proposed changes to CRA would undermine role of nonprofit CDCs and affordable housing*, https://housingoregon.org/proposed-changes-to-cra-would-undermine-role-of-nonprofit-cdcs-and-affordable-housing/.

[137] 123 Cong. Rec. 17630 (1977).

[138] *See* 5 U.S.C. §§ 706(2)(A), (C) (Administrative Procedure Act (APA) provisions requiring courts to strike down agency action that is "not in accordance with law . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."); *see also, e.g.*, *Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006) ("In reviewing an agency's statutory construction, we must reject those constructions that are contrary to clear congressional intent or that frustrate the policy that Congress sought to implement").

[139] Josh Silver, *The purpose and design of the Community Reinvestment Act (CRA): An examination of the 1977 hearings and passage of the CRA,* Nat'l Community Reinvestment Coalition (June 14, 2019), https://ncrc.org/the-purpose-and-design-of-the-community-reinvestment-act-cra-an-examination-of-the-1977-hearings-and-passage-of-the-cra/.

[140] 12 U.S.C. § 2903(a).

consideration of banks' efforts to provide affordable products, low-cost transaction and savings accounts, and other services intended to expand access to the banking system to low- and moderate-income individuals who are currently unbanked.[141]

Further, the Proposed Rule **deviates from the statutory focus on low- and moderate-income communities**, a focus made clear multiple times in the CRA.[142] As discussed above, examiners would be required to give banks CRA credit for a host of activities that have little to no connection to the needs of low- and moderate-income communities, and indeed some activities that could affirmatively harm those communities through, for example, displacement. This flies in the face of clear congressional intent.

B. The Proposed Rule Is Arbitrary and Capricious

Under the APA, courts must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[143] Agency action is "arbitrary and capricious if the agency has [1] relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[144] When an agency reverses course by changing a prior policy, the agency must provide a "reasoned explanation," and show that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better."[145] The Proposed Rule fails this test in numerous respects.

First, as discussed above, the OCC and FDIC relied on factors that Congress did not intend when they crafted the Proposed Rule by deviating from the CRA's statutory focus on LMI communities and the importance of retail services in those areas.

Second, the regulators fail to assess the likely impact of the Proposed Rule in multiple respects, ignoring important aspects of the problem. Among other problems, the Proposed Rule:

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[141] *See, e.g.*, 12 C.F.R. §§ 345.24(a), (d)(4) (FDIC regulations) ("The service test evaluates a bank's record of helping to meet the credit needs of its assessment area(s) by analyzing . . . the availability and effectiveness of a bank's systems for delivering retail banking services . . . [including] [t]he range of services provided in low-, moderate-, middle-, and upper-income geographies and the degree to which the services are tailored to meet the needs of those geographies.").

[142] *See* 12 U.S.C. §§ 2903(a)(1), (b), (d); 2906(a)(1).

[143] 5 U.S.C. §706(2)(a); *see also United States v. Mead Corp.*, 533 U.S. 218, 227, 229 (2001).

[144] *Motor Veh. Mfrs. Ass'n of U.S., Inc. v. St. Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983).

[145] *F.C.C. v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009).

- Generally, fails to meaningfully analyze the likely effects of any proposed changes on credit access and community development in LMI areas.
- Fails to examine the effect of the elimination of the service test. Tellingly, the data the OCC relies on (the FFIEC CRA files) provides no information on how the service test affects LMI borrowers.
- Fails to address how specific changes such as broadening the definition of qualifying activities and changing how assessment areas are determined will impact LMI communities.

Third, for many of the proposed changes, the OCC and FDIC have not provided the analysis and/or data underlying their conclusions. Without this information, it is impossible to determine whether the Proposed Rule is consistent with the evidence before the agencies. For example:

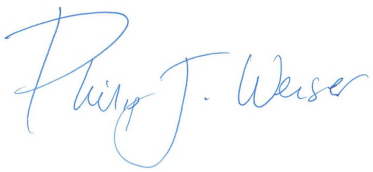
- As discussed above, no explanation is given as to how the thresholds for CRA performance were determined. While the Proposed Rule mentions an analysis, no details are provided and no rationalization for benchmarks is given.
- No analysis is given on how the empirical benchmarks were set for the new retail lending test, what those benchmarks measure,[146] or how the percentages correlate, if at all, with banks' current CRA ratings.

CONCLUSION

For the foregoing reasons, we urge the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation to withdraw the Proposed Rule.

Sincerely,

XAVIER BECERRA
California Attorney General



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[146] Gerron S. Levi, Testimony before the U.S. H. of Reps. Comm. on Fin. Servs., Subcomm. on Consumer Protection and Fin'l Institutions, *The Community Reinvestment Act: Reviewing Who Wins and Who Loses with Comptroller Otting's Proposal*, (Jan. 14, 2020), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba15-wstate-levig-20200114.pdf.

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November 19, 2018

Submitted via eRulemaking Portal

The Honorable Joseph M. Otting
Comptroller of the Currency
Legislative and Regulatory Activities Division
400 7th Street, SW
Washington, DC 20219

Re: Comment from State Attorneys General Regarding Reforming the Community Reinvestment Act Regulatory Framework (Docket No: OCC-2018-0008-0001)

Dear Comptroller Otting:

This letter is submitted on behalf of the States of California, Illinois, Iowa, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Oregon, Virginia, and the District of Columbia, in response to the Office of the Comptroller of the Currency's (OCC) September 5, 2018 Advanced Notice of Proposed Rulemaking (ANPR)[1] regarding the agency's intentions to revise its Community Reinvestment Act regulations.

The States have a strong interest in ensuring that banks take affirmative steps to ensure robust investment in, and fair treatment of, communities which have traditionally been poorly served by the banking industry. We write to state our concern that the proposals contained within the OCC's ANPR will significantly weaken banks' obligations under the CRA. The proposed changes will lead to disinvestment in low- and moderate-income communities, undermining the very purposes of the Act. A weakened CRA could result in a loss of up to $101 billion dollars of investment and lending activity nationally over the next five years, over $25 billion in California alone.[2]

The Community Reinvestment Act of 1977 (CRA) was enacted to "prevent redlining and encourage banks and savings associations . . . to help meet the credit needs of all segments of

[1] Reforming the Community Reinvestment Act Regulatory Framework, 83 Fed. Reg. 45,053 (proposed Sept. 5, 2018).
[2] National Community Reinvestment Coalition, *Weakening the Community Reinvestment Act would reduce lending by hundreds of billions of dollars* (Sept. 2018), https://ncrc.org/wp-content/uploads/2018/09/CRA-Impact-dollar-loss-V5.pdf.

their communities, including low- and moderate-income neighborhoods and individuals."[3] Under the Act, financial institutions have a "continuing and affirmative obligation" to meet the credit needs of the local communities in which they operate.[4]

Our Nation has a troubled history of credit and housing discrimination in working-class and lower-income communities. For decades, banks rejected lending to communities of color, preventing working-class residents from buying homes and building small businesses. This widespread practice came to be known as "redlining." Redlining prevented millions of people from building wealth through home ownership and entrepreneurship.

A landmark series of fair lending laws including the Fair Housing Act, Equal Credit Opportunity Act, and the Home Mortgage Disclosure Act aimed to stop redlining. The Community Reinvestment Act was passed as a companion to these laws. Its purpose was to remedy redlining by requiring banks to affirmatively expand credit access in local communities. The CRA has been transformative. Trillions of dollars have been reinvested in working-class neighborhoods that for years were excluded from participating in the American Dream.

Unfortunately, credit access remains a problem for communities of color. From 2001 to 2016, African-American homeownership rates fell by 5% compared to only 1% for white homeowners.[5] In 2017, African-American and Hispanic applicants experienced higher denial rates for conventional home purchase loans than comparable white applicants.[6]

Minority-owned businesses also still struggle to access credit. While African-American-owned businesses applied for credit in numbers 10% higher than white-owned companies, their approval rates are 19% lower.[7] And such disparities cannot be explained by differences in credit scores; only 40% of minority-owned businesses with good credit received the full amount they asked for compared to 68% of nonminority-owned firms.[8]

Thus, strong implementation of the CRA is still needed, and it has been effective at ameliorating some of the ongoing disparities. For example, a 2017 study found that the CRA is linked to increased small business lending in LMI communities.[9] Any measures to modernize

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[3] OCC, U.S. Dep't of Treasury, Community Developments Fact Sheet: Community Reinvestment Act (2014), https://www.occ.treas.gov/topics/community-affairs/publications/fact-sheets/fact-sheet-cra-reinvestment-act.pdf.
[4] Community Reinvestment Act of 1977, 12 U.S.C. § 2901(a)(3) (2012).
[5] Laurie Goodman, Alana McCargo, & Jun Zhu, *A closer look at the fifteen-year drop in black homeownership*, Urban Institute (Feb. 13, 2017), https://www.urban.org/urban-wire/closer-look-fifteen-year-drop-black-homeownership.
[6] Federal Financial Institutions Examination Council, *FFIEC Announces Availability of 2017 Data on Mortgage Lending* (May 7, 2018), https://www.ffiec.gov/press/pr050818.htm.
[7] Federal Reserve Bank of Cleveland & Federal Reserve Bank of Atlanta, *2016 Small Business Credit Survey, Report on Minority-Owned Firms*, iii (2017), https://www.clevelandfed.org/~/media/content/community%20development/smallbusiness/2016%20sbcs/sbcs%20minority%20owned%20report.pdf.
[8] *Id.*
[9] Raphael W. Bostic & Hyojung Lee, *Small Business Lending Under the Community Reinvestment Act*, 19 Cityscape 2, 81 (2017).

the CRA should maintain its robust role in compelling banks to meet the local housing, agriculture, or small business credit needs of the communities they serve.

There is broad agreement among financial institutions,[10] advocates,[11] and elected officials[12] that the CRA should be modernized to reflect new consumer banking habits and changes in technology. However, many of the OCC proposals would weaken, rather than modernize, CRA enforcement. They will undermine the core purposes of the CRA—namely, ending redlining and requiring banks to be responsive to the needs of LMI individuals and communities. Thus, we urge the OCC to withdraw the proposed regulations. If the OCC decides to go forward with rulemaking, we recommend the following:

I. Engage in Joint Rulemaking to Provide Uniformity and Effective Implementation.

The OCC has issued this ANPR on its own, without the participation of the Federal Reserve and the Federal Deposit Insurance Corporation (FDIC), despite these regulators' shared responsibility for implementing the CRA. This is a break from the practice in prior CRA rulemaking efforts, where the regulators issued joint rules.[13] These agencies often work together to promulgate joint rules involving their overlapping responsibilities in financial regulation.[14] The Administrative Conference of the United States (ACUS) adopted recommendations stating that agencies that have "shared, overlapping or closely related jurisdiction" can benefit from interagency coordination, such as joint rulemaking.[15] Where, as here, the OCC has overlapping responsibilities with the Federal Reserve and the FDIC to regulate financial institutions, joint rulemaking is best practice.

Federal Reserve Board Governor Lael Brainard recently affirmed the "importance of having the agencies work toward one set of CRA regulations," so that any new regulations are "clear and consistently applied."[16] We encourage the OCC to join with the Federal Reserve and the

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[10] American Bankers Association, *CRA Modernization: Meeting Community Needs and Increasing Transparency* (Dec. 2017), https://www.aba.com/Advocacy/Documents/CRA-WhitePaper2017.pdf.
[11] Federal Reserve Board Community Advisory Council, Record of Meeting, CAC and Board of Governors (Oct. 5, 2018), https://www.federalreserve.gov/aboutthefed/files/cac-20181005.pdf.
[12] Office of U.S. Sen. Mark Warner, Warner Leads Effort to Urge Banking Regulators to Strengthen Credit Access for Low-Income Communities (May 2018), https://www.warner.senate.gov/public/index.cfm/2018/5/warner-leads-effort-to-urge-banking-regulators-to-strengthen-credit-access-for-low-income-communities.
[13] *See, e.g.,* Community Reinvestment Act Regulations, 74 Fed. Reg. 31,209, 31,209 (June 30, 2009) (notice of proposed rulemaking by OCC, Federal Reserve, and Office of Thrift Supervision to implement CRA); Richard D. Marsico, *The 2004–2005 Amendments to the Community Reinvestment Act Regulations: For Communities, One Step Forward and Three Steps Back*, 2006 Clearinghouse Rev. J. Poverty L. & Pol'y, 534 n.2 (2006) (noting several instances of proposed joint rulemaking by the regulatory agencies involved).
[14] Jody Freeman and Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131, 1166 n.164 (2012).
[15] Admin. Conference of the U.S., Recommendation 2012-5, Improving Coordination of Related Agency Responsibilities, 77 Fed. Reg. 47,800, 47,810 (2012).
[16] Federal Reserve Board, Remarks by Governor Lael Brainard, Community Investment in Denver, 2 (Oct. 15, 2018) https://www.federalreserve.gov/newsevents/speech/files/brainard20181015a.pdf.

FDIC to work collaboratively on any joint rulemaking, which will provide uniformity and clarity in CRA implementation to the benefit of both financial institutions and the communities they serve.

II. Rescind Lenient Guidance on Credit Discrimination.

We urge the OCC to rescind recently issued guidance that will weaken enforcement of credit discrimination and consumer protection laws through the CRA. OCC Bulletin 2018-23 unnecessarily limits the impact that credit discrimination or consumer protection violations will have on CRA exams in two ways. First, the OCC will only consider those violations that are "directly relate[d]" or have a "logical nexus" to a bank's CRA lending activity.[17] This means that even significant violations of consumer protection or credit discrimination laws will not affect a bank's CRA rating unless they fall within this narrow definition. This guidance ignores the clearly negative implications that such violations have for the bank's entire operations as they relate to consumers and members of protected classes.

Second, the OCC's guidance adopts a "general policy" that downgrades for violations of credit discrimination and consumer protection laws will only be by "one rating level unless illegal practices are found to be particularly egregious."[18] This means that a bank with substantial, non-technical violations that are not "egregious" could be, for example, only downgraded from "Outstanding" to "Satisfactory." Such a minor downgrade will not impact regulators' review of their mergers and acquisitions—the only real "stick" for CRA compliance.[19] Bank examiners should be able to levy meaningful consequences on banks who not only fail to take the affirmative steps required to assist communities and consumers, but have actively harmed them.

Additionally, OCC Bulletin 2018-17[20] should be substantially revised. Historically, if a bank was under investigation for credit discrimination by the OCC or another federal agency, the OCC would delay release of the Bank's CRA exam results. This allowed examiners to incorporate findings from that investigation and adjust the bank's final CRA rating accordingly. The downside of this practice was that a particularly complex or serious investigation could delay the final release of the results for years.

Bulletin 2018-17 ends this practice but creates a more serious problem. Now, the OCC will not take findings of illegal credit discrimination practices into account in its assessment of the

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[17] OCC, PPM 5000-43, Impact of Evidence of Discrimination or Other Illegal Credit Practices on Community Reinvestment Act Ratings (2018) (as updated by OCC 2018-23), https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/ppms/ppm-5000-43.pdf.
[18] *Id.* at 2-3.
[19] See, e.g., Charles S. Fleet, Federal Reserve, *CRA and Consumer Protection Issues in Banking Applications* (2010), https://consumercomplianceoutlook.org/2010/first-quarter/cra-and-consumer-protection (noting that "[a] less than satisfactory CRA rating can pose a formidable and often insurmountable hurdle for an applicant [for a merger or acquisition]. Denials are made public and therefore carry significant reputational risk.").
[20] OCC, Bulletin 2018-17, Supervisory Policy and Processes for Community Reinvestment Act Performance Evaluations (2018), https://www.occ.treas.gov/news-issuances/bulletins/2018/bulletin-2018-17.html.

banks' performance during the time period for the exam in which these issues arise, but only as part of the bank's next CRA exam. For large banks, this next exam will not occur for four years, far too long to effectively hold banks accountable for discriminatory practices. Rather than wait to incorporate findings of credit discrimination for the subsequent exam, OCC and other federal agency examiners should be permitted to retroactively downgrade the bank's last CRA rating, if the investigation occurred during the bank's last examination period.

III. Reject a "One-Ratio" Approach to CRA Evaluation.

Under current examination procedures, banks are evaluated under both quantitative and qualitative standards. The ANPR suggests that the OCC could evaluate a bank's compliance with CRA requirements by simply measuring a bank's total CRA activities as a percentage of its total assets, a so-called "one-ratio" approach which would severely undermine the CRA's purpose of ensuring responsiveness to local community needs.[21]

Under current practice, a CRA examiner, through public comment and other methods, evaluates priority needs for a given geography. While one area may, for example, need affordable housing development due to rapidly increasing housing prices, another with high unemployment may need to prioritize small business lending and job creation. Adopting a "one-ratio" formula will make it more difficult for CRA examiners to evaluate how well banks are responding to these *local* needs, as expressed by community members. A one-ratio formula would likely incentivize banks to focus predominantly or exclusively on large-dollar loans and investments that qualify under the CRA, enabling banks to bump up their ratios regardless of whether these investments actually meet local credit needs (e.g., of LMI small businesses and individuals) which can involve more challenging or labor-intensive efforts on the part of banks.

FDIC Director (and former Chairman) Martin J. Gruenberg recently emphasized that a single ratio approach for CRA evaluation "could obscure the current community-based focus of [the] CRA and undermine its basic purpose."[22] He cautioned that a single ratio evaluation would "fundamentally change the relationship between banks and local communities" because it will "undermine the incentive that banks currently have to develop constructive partnerships with community organizations."[23] These partnerships, Director Gruenberg noted, "have been central to community development in low- and moderate-income neighborhoods . . . around the country." Lastly, he noted that a single ratio approach could potentially violate "the statutory requirement that . . . [a] CRA evaluation be presented separately for each metropolitan area in which a bank maintains one or more branches."[24]

Similarly, the Federal Reserve Board's Community Advisory Council (CAC) has urged banking regulators, including the OCC, "not to adopt a single quantitative assessment to

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[21] *See* 12 U.S.C. § 2901(a)(1)-(3).
[22] FDIC, Remarks by Director Martin J. Gruenberg, The Community Reinvestment Act: Its Origins, Evolution, and Future (Oct. 29, 2018), https://www.fdic.gov/news/news/speeches/spoct2918.html.
[23] *Id.*
[24] *Id.*

determine the majority of a bank's score on CRA performance evaluations."[25] The CAC was formed by the Federal Reserve Board in 2015 to offer a diverse perspective on the needs of consumers and communities, with a particular focus on LMI populations. The CAC unanimously agreed that a one-ratio approach would likely not be able to include a role for public input, nor would it be able to factor in local community needs. Further, the CAC noted that a strictly quantitative approach could make "the CRA far more complex, which would be detrimental to all stakeholders and would negate the goal of simplifying performance evaluations."[26]

In short, while OCC claims that adopting a one-ratio approach for measuring community investment will bring clarity and certainty to CRA examinations, it is likely to be an inferior method of ensuring that banks are responsive to LMI communities' needs.

IV. Highlight Community Benefits Agreements as a Tool for CRA Compliance.

The OCC should encourage and recognize community benefits agreements as a positive factor in CRA ratings.

Banks' applications for mergers and acquisitions are subject to public comment periods. These comments often involve discussion of CRA performance ratings. Banks that receive adverse comments have, on some occasions, entered into agreements with community groups to demonstrate how they will meet local credit needs post-merger or acquisition. These community benefit agreements include specific lending and investment goals in designated LMI communities or commitments to not close certain branch locations, and are highly useful means of injecting local public input into the CRA process.

Unfortunately, in a recent guidance document, the OCC failed to recognize the importance of these agreements, allowing banks with failing CRA ratings to merge, acquire, or grow their business without any requirement or incentive to enter into community benefits agreements or otherwise respond to local community concerns.[27] The OCC should remedy this failure in the ANPR by affirming the important role that community benefits agreements can play in helping banks with less than satisfactory CRA ratings to come into CRA compliance.

Federal policymakers have recommended that regulators formalize the use of these agreements. Treasury's April 2018 CRA memorandum states that regulators should make clear to banks that a community benefits agreement "can be an effective tool for banks with less than Satisfactory ratings . . . to demonstrate how the approved application [to merge, acquire or

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[25] CAC meeting minutes, *supra* note 11 at 2.
[26] *Id.*
[27] OCC, Bulletin 2017-51, Impact of CRA Ratings on Licensing Applications (2017), https://occ.gov/news-issuances/bulletins/2017/bulletin-2017-51.html.

expand] would benefit the communities served."[28] The OCC should adopt this recommendation, and encourage banks to enter into community benefits agreements as part of their CRA compliance.

Community benefits agreements have led to billions of dollars of additional investment in LMI communities.[29] For example:

- Fifth Third Bank pledged $30 billion in community investment across 10 states in a 2016 agreement.[30] This included $11 billion in mortgage lending for low-to-moderate income individuals and communities, $10 billion in small business lending, and $9 billion in community development loans for affordable housing and revolving loan funds.

- Also in 2016, Key Bank promised $16.5 billion in community investment.[31] These investments included: $5 billion in mortgage lending to low- to moderate-income communities and borrowers; $2.5 billion in small business and farm lending, targeted to low- to moderate-income urban and rural communities; $8.8 billion in community development lending and investment commitments; and $3 million in an "innovation fund" to support the development of banking services for underserved communities and populations.

The OCC should encourage and recognize community benefits agreements in order to motivate financial institutions to use these highly effective means of meeting the credit needs of the communities that banks serve.

V. Maintain Primacy of Physical Branch Locations in Any Revisions of Assessment Areas to Reflect Technology-Driven Changes to Service Delivery.

There is no question that the financial services marketplace has evolved with the advent of mobile banking, online lending, and other technologies. CRA regulations should account for these market changes, but the importance of branches and deposit-taking ATMs as a proxy for communities served should not be diminished in that effort.

For instance, rural areas and smaller metropolitan areas receive little CRA attention and have few bank branches. CRA exams should be flexible to include these additional assessment areas,

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[28] U.S. Dep't Of Treasury, Community Reinvestment Act - Findings and Recommendations, 22 (2018), https://home.treasury.gov/sites/default/files/2018-04/4-3-18%20CRA%20memo.pdf. This memorandum does note that such plans are neither required nor the only such tool.

[29] PolicyLink, *Banks' Community Benefits Agreements Bring Billions in Community Reinvestment* (Mar. 21, 2017), http://www.policylink.org/equity-in-action/newsletters/banks-cbas.

[30] Ben Lane, *Fifth Third pledges $30 billion for community development, mortgage lending*, HousingWire (Nov. 18, 2016), https://www.housingwire.com/articles/38561-fifth-third-pledges-30-billion-for-community-development-mortgage-lendin.

[31] Teresa Dixon Murray, *KeyBank promises to pump $16.5 billion into lower-income communities*, Cleveland Plain Dealer (Mar. 24, 2016), https://www.cleveland.com/business/index.ssf/2016/03/keybank_promises_to_pump_165_b.html.

where banks and their financial technology partners collect deposits and make loans, while still retaining a local geographic focus. Bank branches remain critical for rural and LMI communities and are essential for small business credit, as many low-income census tracts remain bank deserts.[32] A recent study found that when a low-income neighborhood loses its CRA-eligibility status, lending decreases by at least 10%.[33]

FDIC Director Gruenberg recently advised that when federal regulators update CRA assessment areas, they should consider how "to include communities in which banks do substantial business but do not fall within existing assessment areas."[34] He further urged that while the definition of assessment areas could be reevaluated, and potentially expanded, current assessment areas should not be eliminated, and it is essential that policymakers "retain the central focus of [the] CRA on local communities."[35] To meet these goals, rather than decreasing the importance of bank branches or eliminating assessment areas, the OCC could expand its consideration of the income level of banks' customers to determine whether these banks and their technology partners are fulfilling the needs of LMI communities.

VI. Include Banks' Affiliates' Activities as Part of CRA Examinations.

Several banks own mortgage companies as affiliates. The current regulations give banks the option of including their affiliates as part of any CRA examination, but does not require that the activities of affiliates undergo CRA scrutiny.[36] This loophole has created serious deficiencies in the CRA examination process; for example, it allowed several banks' affiliate mortgage companies with abusive practices to avoid examination for CRA compliance.[37] A properly modernized CRA would require the activities of bank affiliates to be considered in any examination. Notably, Treasury commented negatively on this loophole in its April 2018 memorandum, and recommended that regulators take steps to address it.[38]

The undersigned States fundamentally disagree with the proposed ANPR. If adopted, the ANPR's proposals will undermine the affirmative and continuing obligation banks have to meet the credit needs of *all* of the communities they serve, in particular, low- and moderate-income communities. We urge the OCC to withdraw the ANPR and rescind recently issued CRA guidance. In the alternative, the changes recommended above should be considered as part of any future joint rulemaking. Thank you for your consideration of our views.

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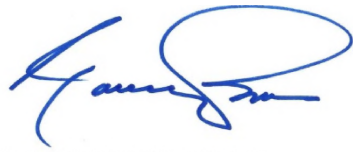
[32] *See Small Business Lending, supra* note 9.
[33] Lei Ding and Leonard Nakamura, *"Don't Know What You Got Till It's Gone" - The Effect of the Community Reinvestment Act on Mortgage Lending in the Philadelphia Market,* Federal Reserve Bank of Philadelphia, Working Paper 17-15, 16 (June 2017), https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2017/wp17-15.pdf.
[34] Gruenberg speech, *supra* note 24.
[35] *Id.*
[36] Community Reinvestment Act and Interstate Deposit Production Regulations, 12 C.F.R § 25.24(c).
[37] Ellen Harnick, Center for Responsible Lending, *Testimony at Community Reinvestment Act Regulation Hearings* (Aug. 31, 2010), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/Ellen-Harnick-CRA-Testimony-Atlanta-August-6.pdf.
[38] *See* Treasury memo, *supra* note 28 at 24.

Sincerely,



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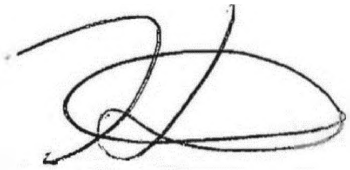
California Attorney General



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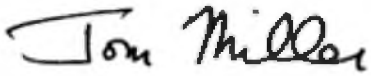

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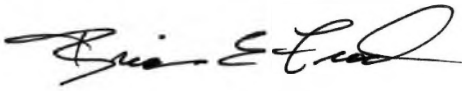

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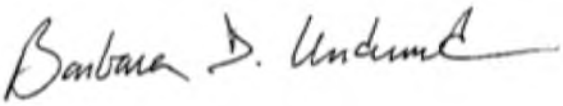

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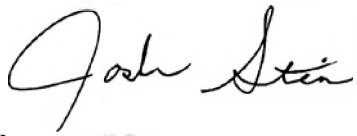

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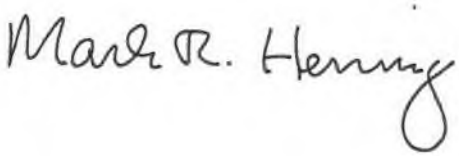

State of California
Office of the Attorney General
XAVIER BECERRA
ATTORNEY GENERAL

February 16, 2021

Via Email

Ann E. Misback, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, D.C. 20551
regs.comments@federalreserve.gov

RE: Comments on Advanced Notice of Proposed Rulemaking: Regulation BB, 12 CFR Part 228, RIN 7100-AF94, Docket No. R–1723

Dear Secretary Misback:

We, the Attorneys General of the States of California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington write in support of the Federal Reserve Board of Governors' (Board) above-captioned advance notice of proposed rulemaking relating to Community Reinvestment Act Regulations (ANPR). More specifically, we write to highlight three important objectives the Board should consider as it moves forward with rulemaking: (1) focusing on CRA's core purpose to serve Low- and Moderate-Income (LMI) communities and combat racially discriminatory redlining; (2) addressing the crucial housing needs of these communities; and (3) incentivizing increased credit and deposit services to LMI communities and small businesses. The Board's proposal, which is far superior to the rule adopted by the Office of the Comptroller of the Currency (OCC) last year, should be the basis for joint rulemaking by the three regulatory agencies.

CRA is a critical civil rights law responsible for creating trillions of dollars of bank investments in, and loans to, LMI communities nationwide. CRA's mandate is to prevent redlining, and to encourage banks to help meet the credit needs of all segments of their community, including LMI neighborhoods and individuals. The regulators hold banks accountable to these goals by grading their performance in providing credit and deposit services to LMI communities. If a bank fails its CRA evaluation, regulators can prevent mergers or branch openings. A robust CRA has never been more needed, as it is imperative to incentivize banks to meet the needs of LMI communities most impacted by the severe economic downturn caused by the COVID-19 pandemic.

THE BOARD MUST ENSURE THAT ONCE-IN-A-GENERATION CRA REFORM MEETS THE NEEDS OF LMI COMMUNITIES

It has been over twenty years since the Board, OCC and Federal Deposit Insurance Corporation (FDIC) last engaged in significant joint CRA rulemaking. As mentioned above, in 2020, the OCC adopted its own rule—alone, without the support of the other two regulatory agencies (OCC Rule). A group of Attorneys General opposed the OCC Rule for a number of reasons,[1] including that the Rule: (1) was inimical to CRA's core purposes; (2) shifted CRA's incentive structure and discarded time-tested methods of assessing banks' performance in meeting the investment, credit and deposit needs of LMI communities in favor of a narrow, purely quantitative test to generate banks' presumptive ratings, using arbitrary benchmarks without the support of a robust data set; (3) created a rating system that diverted the focus away from the actual needs of LMI communities and toward a myopic approach that rewarded the dollar value of activities; (4) expanded qualifying activities to include those with little or no connection to CRA's core purposes—and virtually eliminated the service test—contrary to CRA's explicit focus on banks meeting the needs of depositors in their assessment areas; and (5) shut the communities that CRA was intended to serve out of the evaluation process.

The Board's ANPR stands in stark contrast to the OCC's misguided rule, and offers a chance to return to a regulatory regime that advances CRA's objectives. First, the ANPR appropriately acknowledges that any rulemaking must be rooted in CRA's core purpose of meeting the credit and deposit needs of LMI communities, and cognizant of CRA's aim to stop racial redlining.[2] The signatory States agree that the Board must focus on CRA's historical context and understanding that CRA operates as a "crucial mechanism for addressing persistent systemic inequity in the financial system for LMI and minority individuals and communities."[3] Second, the States support the Board's evaluation framework, which maintains distinct retail and community development evaluations, recognizing the value of these services to communities in addressing the CRA's aims. Additionally, the States support the Board's plan to assess retail services and deposit products separately under the ANPR's Retail Services Subtest. The ANPR includes proposals that zero in on areas where credit and deposit needs are unmet, focuses on addressing needs of the smallest businesses and those in rural areas, and includes proposals to promote financial inclusion in Indian Country and other underserved areas, including investments in Minority Depository Institutions and Community Development Financial Institutions. Overall, States are encouraged that the Board's ANPR rejects the OCC Rule's harmful one ratio approach. For example, in the case of mortgage lending, the ANPR proposes evaluating a bank's retail lending in its major product lines using metrics that measure the number of loans a bank makes, not the dollar value of these loans. Further, the States strongly support the Board's data-driven approach. The Board's use of a robust data

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[1] The letters sent by the Attorneys General on November 19, 2018 and April 7, 2020 are attached hereto.

[2] 85 Fed. Reg. 66410, 66412 (Oct. 19, 2020).

[3] *Id.*

set of 6,000 CRA evaluations from a diverse sample of 3,700 banks is a superior foundation for rulemaking than the OCC's Rule, which lacked such supporting data.

The OCC's highly divergent approach could generate significant confusion and disruption when banks and communities need clarity the most. A unified approach fosters consistency across regulators, including state agencies seeking to join or enforce related reforms. We urge the Board to engage in inter-agency consultations with an eye to encouraging the OCC and FDIC to follow its lead in this reform effort. However, the Board should proceed with its planned rulemaking even if doing so on its own.

THE NEED FOR A ROBUST CRA IS HEIGHTENED BY THE CRISES CREATED BY THE COVID-19 PANDEMIC

The States have benefitted from billions in CRA-driven activity and lending. CRA has fostered lending to communities of color, spurred affordable housing development, and, with the help of community development agreements, been a helpful tool to address specific community needs. A 2016 survey showed that responding banks lent over $27 billion in LMI communities and communities of color, and over $31 billion in total CRA activity in California alone.[4] In 2018, New Jersey financial institutions made over $40 billion in CRA commitments to LMI communities through the work of organizations like the New Jersey's Housing and Community Development Network and New Jersey Citizen Action.[5]

As the Board notes, CRA was enacted to tackle "economic challenges in predominately minority urban neighborhoods that had suffered from decades of disinvestment and other inequities."[6] Today's CRA is challenged with tackling generations of disinvestment, while navigating a post-pandemic economic recovery which could last up to a decade.[7] Americans now face unemployment numbers "not seen since the 1930s," with

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[4] Paulina Gonzalez-Brito, Executive Dir., Cal. Reinvestment Coalition, H.R. Fin'l Svcs. Comm., Subcomm. on Consumer Protection and Fin'l Institutions (Jan. 14, 2020), http://calreinvest.org/wp-content/uploads/2020/01/PGB-Congressional-Testimony-1.14.20-with-%20Appendix.pdf.

[5] Letter from Housing and Community Development Network of N.J. to Vonda J. Eanes, Off. of the Comptroller of the Currency, Re: Docket ID OCC-2018-0008 (Nov. 1, 2018), https://www.hcdnnj.org/assets/documents/cra%20anpr%20response%20letter%20ac.pdf.

[6] 85 Fed. Reg. 66410, 66412 (Oct. 19, 2020).

[7] Mary C. Daly, President and CEO of the Federal Reserve Bank of San Francisco, *We Can't Afford Not To*, Speech to the National Press Club Virtual Event (June 15, 2020) https://www.frbsf.org/economic-research/publications/economic-letter/2020/october/is-federal-reserve-contributing-to-economic-inequality-speech/?utm_source=frbsf-home-refresh-feature-small-2-title&utm_medium=frbsf&utm_campaign=featured-content.

the worst yet to come, as pandemic job losses are expected to triple.[8] A robust CRA is needed more than ever to serve LMI communities decimated by the pandemic and avoid further exacerbating existing inequities.

I. The Rule Must Maintain Fidelity to CRA's Core Purpose

The States appreciate the Board's recognition of CRA's core purpose of addressing racist lending and banking practices, like redlining, as well as ongoing racial systemic inequality.[9] The States urge the Board to ensure that its rulemaking, unlike the OCC's, takes bold steps to meet CRA's promise.

A. CRA Rulemaking Must Focus on Systemic Inequities and Race

The most important modernization goal should be maintaining fidelity to the law's original purpose as an antidote to the pernicious practices of redlining and disinvestment that inflected lasting harm to LMI communities, particularly communities of color.[10] As noted in the ANPR, the racial wealth gap remains largely unchanged since CRA's enactment.[11] The COVID-19 pandemic recession has exposed the "long-lasting impact of racial segregation and redlining in shaping the enduring contours of marked inequality in American cities."[12] Just as the pandemic has raged through minority and low-income communities with higher intensity,[13] the long-term economic fallout will also disproportionally impact communities of color. States already feel the pain. Nearly three-quarters of renter households in California affected by COVID-related job losses are households of color.[14]

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[8] Daniel Flaming, et al., *Locked Out: Unemployment and Homelessness in the COVID Economy*, Economic Roundtable (Jan. 2021) https://economicrt.org/publication/locked-out/.

[9] 85 Fed. Reg. 66410, 66412-13 (Oct. 19, 2020).

[10] Question 1, 85 Fed. Reg. 66410, 66411 (Oct. 19, 2020).

[11] 85 Fed. Reg. 66410, 66413 (Oct. 19, 2020).

[12] *Not Even Past: Social Vulnerability and the Legacy of Redlining,* University of Richmond's Digital Scholarship Lab and the National Community Reinvestment Coalition https://dsl.richmond.edu/socialvulnerability/ (1930s HOLC maps overlap with near surgical precision with communities hardest hit by the pandemic).

[13] Ruchi Avtar, Rajashri Chakrabarti, and Maxim Pinkovskiy, *Understanding the Racial and Income Gap in Covid-19: Health Insurance, Comorbidities, and Medical Facilities*, Fed. Res. Bank of N.Y. Liberty Street Economics (Jan. 12, 2021), https://libertystreeteconomics.newyorkfed.org/2021/01/understanding-the-racial-and-income-gap-in-covid-19-health-insurance-comorbidities-and-medical-facil.html.

[14] Elizabeth Kneebone, Carolina Reid, *COVID-19 and California's Vulnerable Renters*, Terner Center for Housing Innovation (Aug. 4, 2020), https://ternercenter.berkeley.edu/research-and-policy/covid-19-and-californias-vulnerable-renters/.

CRA reform must employ laser-sharp focus on bank responsiveness to the lowest-income communities and underserved communities of color.[15] The Board can consider embedding this core purpose in the ANPR's proposed incentive structure as part of impact scoring for community development activities. Under the Board's proposal, impact scores are qualitative measures that range on a scale of one to three to gauge responsiveness to community needs. A score of three should be available for projects that serve LMI communities of color or address systemic inequities. The Board could also add consideration under the service test, or identify such activity as a "particularly responsive" qualifying activity. The States encourage the Board to evaluate lending and investing in underserved LMI neighborhoods of color by adding it as a separate category, such that banks could earn CRA credit even if the activity is located outside of a bank's CRA assessment area.

To that end, States support the Board's first-ever consideration of investments in disaster recovery and climate resilience as a CRA-qualifying activity.[16] Disaster relief and climate mitigation are both racial justice and equity issues that demonstrate how the need to invest in long-term resilience for LMI communities and communities of color intersect and can be incentivized in CRA evaluations.[17] When disaster strikes, those without liquid assets struggle to flee, relocate, and rebuild. This past year, the United States suffered 22 separate billion-dollar-plus disaster events.[18] States are beginning to take measures to address these issues,[19] but climate and disaster mitigation projects are often costly multi-year projects, such as critical infrastructure

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[15] Stella J. Adams, *Putting Race Explicitly into the CRA, Revisiting the CRA: Perspectives on the Future of the Community Reinvestment Act*, 169 https://www.frbsf.org/community-development/files/putting_race_explicitly_cra.pdf ("CRA should explicitly reward financial institutions that aggressively engage in investments in minority wealth creation and minority neighborhood development").

[16] Question 62, 85 Fed. Reg. 66410, 66448 (Oct. 19, 2020).

[17] *See* Laurie Schoeman, *Pre- and Post-Disaster Investments in Housing and Community Development Under the CRA*, Community Development Innovation Review, Fed. Res. of S.F., (Oct. 17, 2019), https://www.frbsf.org/community-development/publications/community-development-investment-review/2019/october/pre-and-post-disaster-investments-in-housing-and-community-development-under-the-cra/.

[18] National Oceanographic and Atmospheric Administration, *Billion-Dollar Weather and Climate Disasters: Table of Events* (2020), https://www.ncdc.noaa.gov/billions/events/US/2020 (disasters caused $94 billion in damage in 2020).

[19] Press Release, Governor Phil Murphy, Governor Murphy Signs Historic Environmental Justice Legislation (Sept. 18, 2020), https://www.nj.gov/governor/news/news/562020/20200918a.shtml. New Jersey recently enacted sweeping legislation requiring the state's Department of Environmental Protection to evaluate the environmental and public health impacts of certain facilities on overburdened communities when reviewing certain permit applications. New Jersey is the first state in the nation to require mandatory permit denials if an environmental justice analysis determines a new facility will have a disproportionately negative impact on overburdened communities.

that require public/private partnerships. Investments in resiliency today will prevent billions in losses[20] and great loss of life and livelihood.[21]

B. The Board Should Strengthen the Evaluation Process and Ensure that CRA Credit Is Focused on Activities that Benefit LMI Communities

The Board can ensure that the ANPR's evaluation process prioritizes the needs of the lowest-income communities by raising thresholds so more is expected, downgrading for harm, and only considering targeted proxies to identify harder-to-serve low-income populations.

First, the Board should adopt more aggressive thresholds and penalties, ensuring that banks' harmful behavior is properly accounted for in their rating. At a minimum, any evidence of discrimination must result in an automatic ratings downgrade. Additionally, a bank that scores "needs to improve" should receive an immediate downgrade to "substantial non-compliance" if it does not improve by the next examination.[22] Second, the Board should ensure that full CRA credit is not awarded for activities that do not directly benefit LMI communities. For example, CRA credit for financial literacy programs or community service projects without a clear nexus to LMI communities' needs should be eliminated in favor of other activities that prioritize LMI communities' urgent needs such as food insecurity or eviction protection.[23]

The States are encouraged that the ANPR measures the number and impact of community development financing activities, rather than simply tallying a lump-sum dollar amount. States are also hopeful that measuring impact through a qualitative assessment will encourage banks to engage with community stakeholders to meet targeted needs. But this encouragement needs to be made explicit.[24] There is no substitute for a seat at the table, and community-benefit agreements must remain an integral component of CRA compliance work. Likewise, banks that opt to pursue a strategic plan should not be able to avoid community involvement or a potential benefit

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[20] K. Porter, et al., *Natural Hazard Mitigation Saves 2017 Interim Report*, National Institute of Building Sciences Multihazard Mitigation Council (2017), http://www.wbdg.org/files/pdfs/MS2_2017Interim%20Report.pdf (explaining that each dollar spent in disaster preparation can save up to $11 in subsequent costs).

[21] Bradshaw, et al., *Underestimating the Challenges of Avoiding a Ghastly Future*, Frontiers in Conservation Science (Jan. 13, 2021) at 5, doi:10.3389/fcosc.2020.615419 (explaining that unless "large, additional commitments are made and fulfilled . . . the projected rise of Earth's temperature will be catastrophic for biodiversity and humanity").

[22] Question 80, 85 Fed. Reg. 66410, 66455 (Oct. 19, 2020).

[23] Questions 51 and 56, 85 Fed. Reg. 66410, 66444 (Oct. 19, 2020). *Economic Fallout From COVID-19 Continues To Hit Lower-Income Americans the Hardest*, PEW Research Center, (Sept. 24, 2020) https://www.pewsocialtrends.org/2020/09/24/covid-19-financial-hardships-methodology/ (poll showing Black, Native, or Latino respondents were twice as likely as white respondents to report lacking access to food. The poll also illustrated that 48% of Black adults and 40% of Latino adults have relied on charitable food resources).

[24] Questions 73 and 74, 85 Fed. Reg. 66444, 66453-4 (Oct. 19, 2020).

agreement. The States support additional measures to ensure community engagement at every step, such as increasing the minimum time for public comment during mergers from the current 30 days.

II. The Rule Must Incentivize Keeping LMI Communities Housed and Incentivize Affordable Housing Development

CRA is a critical tool to address the ever-worsening affordable housing and homelessness crises.[25] Among the myriad challenges already facing low-income communities, pandemic-related job losses have threatened the housing stability of communities hit hardest by the virus. In California alone, 903,000 renter households are on the precipice of eviction due to COVID-19 related job losses.[26] At a macro level, states face complex competing crises. Take, for example, California's tripartite housing crisis: over 150,000 Californians are homeless, 7.1 million live in poverty when accounting for housing costs, and homes cost seven times the average household income.[27] With nearly a million households on the precipice of housing insecurity in a single state, it is unsurprising that pandemic-related unemployment is predicted to spur a "brutal cycle of homelessness" over the next few years. Some estimates project that Los Angeles County, with the second-largest population of unhoused persons in the country, will see its unhoused population double and chronic homelessness increase by 86%.[28] And this crisis only stands to

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[25] U.S. Conf. of Mayors, *Letter to Chairman Powell, Comptroller Otting, and Chairman McWilliams* (Nov. 16, 2018), https://greenlining.org/wp-content/uploads/2019/02/US-Conference-of-Mayors-Community-Reinvestment-Act-Support.pdf (describing CRA as a "key policy lever" in "expanding the supply of affordable housing," noting that "38 percent of renters in the United States are spending more than 30 percent of their incomes on housing").

[26] Elizabeth Kneebone, Carolina Reid, *COVID-19 and California's Vulnerable Renters*, Terner Center for Housing Innovation (Aug. 4, 2020), https://ternercenter.berkeley.edu/research-and-policy/covid-19-and-californias-vulnerable-renters/. This is more than the typical total number of renter households that experience a judicial eviction, nationwide, annually. Eviction Lab, *National Estimates: Eviction in America*, Princeton University (May 11, 2018), https://evictionlab.org/national-estimates (explaining in a typical year, approximately 900,000 U.S. renter-occupied households experienced a judicial eviction).

[27] Matt Levin, *Commentary: Five things I've learned covering California's housing crisis that you should know*, CalMatters (Jan. 6, 2021), https://calmatters.org/housing/2021/01/california-housing-crisis-lessons/.

[28] Daniel Flaming, et al., *Locked Out: Unemployment and Homelessness in the COVID Economy*, Economic Roundtable (Jan. 2021) https://economicrt.org/publication/locked-out/ (also projecting chronic homelessness to increase 49 percent in the United States and 68 percent in California over next four years due to the COVID-caused recession).

worsen once eviction protections expire.[29] Many other states are facing the same crisis.[30] The ANPR must incentivize keeping LMI communities housed and encourage affordable housing development.

A. The Board's Rule Must Prioritize Keeping LMI Communities Housed

The States applaud the Board's consideration of housing for very low-income, homeless, or other harder-to-serve populations as particularly responsive in CRA evaluations.[31] To keep low-income families housed, the Rule should employ every incentive available in the evaluation structure: if the Board creates a list of pre-approved CRA qualifying activities, the States encourage the inclusion of groups facing housing insecurity. Additionally, LMI communities facing housing insecurity and eviction should also be included in the groups designated as "particularly responsive" for community development activity.[32] The Board should also consider consequences in conjunction with incentives, such as automatic score downgrades for displacement. At the same time, community service activities should include eviction protection, foreclosure prevention, and assist with pandemic aid distribution in LMI communities.[33]

B. The Board's Rule Must Encourage Inclusive Affordable Housing Development

CRA has been undeniably effective in directing investment into affordable housing projects because banks are incentivized to provide flexible debt and equity generated through the sale of Low Income Housing Tax Credits (LIHTC).[34] LIHTC investments are the primary source

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[29] Liam Dillon, *Eviction Cases in California Projected to Double*, L.A. Times (Jan. 20, 2021), https://www.latimes.com/homeless-housing/story/2021-01-20/california-eviction-cases-slated-to-double-covid-19.

[30] Harvard Joint Center for Housing Studies, *America's Rental Housing 2020*, https://www.jchs.harvard.edu/americas-rental-housing-2020 (follow "Excel Data" hyperlink; then follow "Table W-7" link in spreadsheet). In New Jersey, before the pandemic, over 322,000 families paid more than half of their monthly income towards rent.

[31] Question 54, 85 Fed. Reg. 66410, 66445 (Oct. 19, 2020).

[32] *Id.*

[33] Question 54 Fed. Reg. 66410, 66445 (Oct. 19, 2020).

[34] Letter from Cal. Housing Consortium to Comptroller Otting Re: Docket ID OCC- 2018-0008, "Reforming the Community Reinvestment Act Regulatory Framework" (Nov. 14, 2018), https://www.regulations.gov/document?D=OCC-2018-0008-1423 (the California Housing Consortium—whose members have helped develop over 350,000 affordable homes serving LMI households throughout California over the past 35 years—explains "CRA-motivated banks have been critical partners in this work by providing not only lower cost more flexible debt but, even more critically, equity generated through the sale of Low Income Housing Tax Credits (LIHTCs)."); *see also* Steve Dubb, *Community Reinvestment Act at Risk: What's at Stake?* Non Profit Quarterly (Mar. 11, 2020), https://nonprofitquarterly.org/community-reinvestment-act-at-risk-whats-at-stake/ (quoting Priscilla Almodovar, CEO of Enterprise Community Partners: "The most efficient, easiest,

of affordable housing financing.[35] Even so, across the Nation, affordable housing production and supply does not meet demand. One report estimates that nationwide there is a 7 million rental home shortage for extremely low-income residents.[36] In California, the gap is over 1 million rental homes.[37]

1. The Board's Rule must do no harm to LIHTC, the lifeblood of affordable housing development

Protecting LIHTC, the "nation's most effective tool for financing the development of rental housing affordable to low-income Americans," is imperative.[38] The vast majority—roughly 85 percent—of the equity for all LIHTC investments comes from banks subject to CRA.[39] Indeed, the relationship between CRA incentives and housing is so clear "the largest single determination of housing tax credit pricing" is whether the property is in a bank's CRA assessment area.[40]

While the Board's proposal rejects the OCC Rule's one ratio approach in favor of evaluating the number of loans—thus avoiding the direct blow to the LIHTC market expected from the OCC Rule—the States remain concerned that LIHTC investments are at risk. Because

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[most] impactful ways to meet the investment test are LIHTC (Low-Income Housing Tax Credit) and NMTC (New Markets Tax Credit)").

[35] Letter from Tia Boatman Patterson, Executive Director, CalHFA, re OCC Docket ID OCC-2018-0008 (Apr. 8, 2020), https://downloads.regulations.gov/OCC-2018-0008-3348/attachment_1.pdf. *See also* CohnReznick, *The Community Reinvestment Act and Its Effect on Housing Tax Credit Pricing*, https://ahic.org/images/downloads/Research_and_Education/the_community_reinvestment_act_and_its_effect_on_housing_tax.pdf (estimating that $10 billion of capital is committed to housing tax credit investments annually, and that over three-quarters of the surveyed LIHTC properties are located in areas where at least one of the top 20 U.S. commercial banks has CRA responsibility).

[36] *The Gap: A Shortage of Affordable Rental Homes*, National Low Income Housing Coalition (accessed Jan. 31, 2021) https://reports.nlihc.org/gap/2017/caFor (explaining that no state has an adequate supply of affordable rental housing for the lowest-income residents).

[37] California Housing Partnership, *Affordable Homes Shortfall* (accessed Jan. 31, 2021), https://chpc.net/housingneeds/.

[38] Letter from Nat'l Council of St. Housing Agencies to Off. of the Comptroller of the Currency RE: Docket ID OCC-2018-0008, Reforming the Community Reinvestment Act Regulatory Framework (Nov. 19, 2018), https://www.regulations.gov/contentStreamer?documentId=OCC-2018-0008-1124&attachmentNumber=1&contentType=pdf.

[39] *Id.* at 2 (citing Fred Copeman, *What Do Higher LIHTC Prices Mean for Syndicators?*, Affordable Housing News & Views (June 1, 2014), https://www.cohnreznick.com/insights-and-events/insights/what-do-higher-lihtc-prices-mean-syndicators).

[40] *Id.* at 5, 6-8.

the ANPR combines community development ("CD") lending and CD investments, this could disfavor LIHTC investments, which can be complex and expensive for banks to transact and may provide a lower return than CD lending. To that end, the States echo the concerns of state housing agencies and encourage the Board to take care to protect crucial LIHTC investments. Additionally, the States encourage the three regulators to coalesce around the Board's proposal in order to avoid splitting the LIHTC market.

2. Ensure LMI access to, and occupancy of, affordable housing development

The States encourage the Board to consider additional means to ensure LMI households are the direct beneficiaries of affordable housing development and propose a measurement of both LMI access and occupancy to ensure that low-income households actually live in developments favorably considered in CRA evaluations.[41] Development in an LMI census tract and promises of affordability alone cannot ensure that LMI households will be the majority of renters. This should also extend to any pro-rata approach to mixed development.[42] The ANPR references LMI occupancy pledges;[43] while this may be one measure of accountability, at a minimum, the States encourage requiring that such pledges be made public to community stakeholders, and encourage the Board to consider an accountability mechanism if a project falls short on its promise. The States encourage the Board to consider all available incentives to keep housing insecure LMI communities housed and spur affordable housing production.

Additionally, the States encourage the Board to use the CRA to ensure affordable and accessible housing for people with disabilities. In particular, the Board should consider incentivizing smaller investment projects for both affordable homeownership loans for LMI rural individuals in need of accessible housing and the construction of smaller dollar investment multi-unit accessible affordable rental housing.[44]

III. The Rule Must Incentivize Credit and Deposit Services for LMI Communities and Small and Minority-owned Businesses

LMI communities continue to suffer from inadequate access to credit and financial services. States support the ANPR's consideration of adding a second prong to the Retail Services Subtest to measure the degree to which deposit products are responsive to the needs of LMI consumers.[45] Both LMI communities and small and minority-owned businesses tend to lack

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[41] Questions 52, 53, 54, 85 Fed. Reg. 66410, 66445 (Oct. 19, 2020).

[42] Question 55, 85 Fed. Reg. 66410, 66445 (Oct. 19, 2020).

[43] Question 52, 85 Fed. Reg. 66410, 66445 (Oct. 19, 2020).

[44] See, e.g., National Disability Institute, *Reforming the Community Reinvestment Act Regulatory Framework*, https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/01/cra-remarks.pdf (stating that "[h]ousing development for LMI often critically miss the unique challenges of providing housing that is both accessible and affordable").

[45] 85 Fed. Reg. 66410, 66432 (Oct. 19, 2020).

lender relationships and access to deposit products. CRA reform presents an opportunity to incentivize broadening deposit products to meet the needs of the underserved while closing the gap of the underbanked.

A. The States Encourage the Board to Examine Whether Deposit Products Meet Service Gaps

The ANPR seeks input on the type of data needed to determine whether banks' deposit services are meeting LMI community needs.[46] Given the drastic need created by the pandemic recession, the best measure of responsiveness must be tied to maintaining or strengthening community resiliency, through accessing deposits in no-cost or low-cost accounts and other products that can on-ramp previously unbanked and underbanked communities.[47]

Addressing the needs of unbanked households also helps promote racial justice; nationwide, about 3% of white households are unbanked, while Black, Latino, and Native American households are unbanked at rates of 13.8%, 12.2%, and 16.3%, respectively.[48] Deposit services protect against unscrupulous check cashers and other fringe-financial services providers.[49] In 2017 alone, unbanked Americans paid $173 billion in fees.[50]

As a starting point, the States support suggestions made by community advocates that banks be encouraged to participate in the Bank On program, offering no- and low-cost accounts, waiving bank fees for products, providing low-cost remittance and money order services, providing ATM surcharge-free access (including for public assistance delivered on debit cards), and equitably providing services meant to assist customers with the receipt of direct payments and pandemic economic relief, as well as other state or private/public assistance programs.[51]

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[46] 85 Fed. Reg. 66410, 66433 (Oct. 19, 2020).

[47] Questions 29, 49, 85 Fed. Reg. 66410, 66433, 66443 (Oct. 19, 2020). And specifically, a bank's strategic statement could include information on how it plans to engage unbanked or underbanked communities. Question 31, 85 Fed. Reg. 66410, 66433 (Oct. 19, 2020).

[48] *The 2019 FDIC Survey of Household Use of Banking and Financial Services*, F.D.I.C., https://economicinclusion.gov/surveys/2019household/; *see also* Ellen Rosen, *Trying to Correct Banking's Racial Imbalance*, N.Y. Times (June 30, 2020), https://www.nytimes.com/2020/06/30/business/banking-race-black-inequality.html.

[49] Hoai-Luu Q. Nguyen, *Do Bank Branches Still Matter? The Effect of Closings on Local Economic Outcomes* (Oct. 2015), https://economics.mit.edu/files/10143 ("The impact of branch closures were found to be more severe in tracts with lower median income, a higher fraction of minority households, and where firms were, on average, closer to their lending").

[50] Christopher Brown et al., *The Future of Banking: Overcoming Barriers to Financial Inclusion for Communities of Color*, Unidos US & PolicyLink 3, https://www.policylink.org/sites/default/files/future_of_banking_52419_v3.pdf.

[51] Josh Silver, *NCRC Initial Analysis of Federal Reserve's ANPR on the Community Reinvestment Act: A Step Forward but Needs to be More Rigorous*, National Community

Inclusive bank services are more important than ever as government aid programs need to reach hard-hit residents quickly.

The States also encourage including deposit products responsive to needs of immigrant communities, who are largely unbanked. Inclusive bank services for immigrant communities may help lower the number of unbanked persons and help state and federal governments respond to the pandemic recession. For example, the State of California distributed $75 million in aid to immigrant families through debit cards.[52] Inclusion of non-citizens in mortgage services and loans is critical; for example, DACA recipients recently became eligible for federally insured mortgage loans.[53]

The States are encouraged that the ANPR considers the positive impact of physical branch presence along with availability of responsive products. A bank's presence is the community corresponds to increased credit opportunities,[54] including mortgage lending and other financial services.[55] Conversely, such opportunities diminish with distance from a branch location, including reduced access to small business lending.[56] The ANPR should evaluate the

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Reinvestment Coalition (Oct. 16, 2020), https://ncrc.org/ncrc-initial-analysis-of-federal-reserves-anpr-on-the-community-reinvestment-act-a-step-forward-but-needs-to-be-more-rigorous/.

[52] Miriam Jordan, *California Offers $500 in Covid-19 Aid to Undocumented Immigrants*, N.Y. Times (May 18, 2020), https://www.nytimes.com/2020/05/18/us/coronavirus-undocumented-california.html.

[53] *See* Dep't of Housing and Urban Devel. (Jan. 20, 2021), *FHA to Permit DACA Status Recipients to Apply for FHA Insured Mortgages*, https://www.hud.gov/sites/dfiles/SFH/documents/SFH_FHA_INFO_21-04.pdf.

[54] *See* Lei Ding and Carolina K. Reid, *The Community Reinvestment Act (CRA) and Bank Branching Patterns*, Fed. Res. Bank of Phila. 20 (Sept. 2019) 9, https://philadelphiafed.org/-/media/research- and-data/publications/working-papers/2019/wp19-36.pdf (noting a direct correlation between the number of bank branches and ATMs located in a neighborhood and the credit opportunities available to the surrounding community).

[55] Kristin F. Butcher & Ana Patricia Muñoz, *Using Credit Reporting Agency Data to Assess the Link Between the Community Reinvestment Act and Consumer Credit Outcomes*, 19 Cityscape: A Journal of Policy Development and Research 2 (2017), https://www.huduser.gov/portal/periodicals/cityscpe/vol19num2/ch7.pdf.

[56] Donald Morgan et al., *Banking Deserts, Branch Closings and Soft Information*, Liberty Street Economics blog (Mar. 7, 2015), http://libertystreeteconomics.newyorkfed.org/2016/03/banking-deserts-branch-closings-and-soft-information.html; Fed. Res., *Perspectives from Main Street: Bank Branch Access in Rural Communities* (Nov. 2019), https://www.federalreserve.gov/publications/november-2019-bank-branch-access- in-rural-communities.htm (noting branch closures cause "increased costs and reduced convenience in accessing financial services," particularly for "those with lower incomes or less reliable transportation, older individuals, and small business owners").

breadth of deposit services offered, responsiveness to community need, and impact such as the number of no-/low-cost accounts opened, or aid funds dispersed.[57]

B. Supporting Smaller and Minority-Owned Businesses

Small business activity creates jobs and uplifts local economies. Before the pandemic, California's small businesses created two-thirds of new jobs, employed almost half of all private sector workers, and represented 98.9% of businesses in the state.[58] Now small businesses are shuttering at an alarming rate—many states report nearly 40% of their small businesses closed.[59] These effects are even more pronounced in communities of color [60] where businesses are more cash-constrained and lack existing relationships with large banks, which had the additional consequence of sidelining them from the first rounds of government relief programs.[61]

Small businesses desperately need access to capital and deposit services to stay afloat. As the ANPR notes, the smallest businesses face the most difficulty obtaining credit.[62] Less than a quarter of small business loans are made within LMI census tracts.[63] We know CRA can unlock funding; between 2010 and 2016, CRA expanded the number of small business loans in LMI

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[57] Question 29, 85 Fed. Reg. 66410, 66433 (Oct. 19, 2020).

[58] *Governor Newsom Signs Bills to Support Small Businesses Grappling with Impact of COVID-19 Pandemic, Bolster Economic Recovery*, Office of the Gov. (Sept. 9, 2020), https://www.gov.ca.gov/2020/09/09/governor-newsom-signs-bills-to-support-small-businesses-grappling-with-impact-of-covid-19-pandemic-bolster-economic-recovery/.

[59] *Percent Change in Number of Small Businesses Open*, Opportunity Insights (Jan. 19, 2021), https://tracktherecovery.org/?ehgvc (District of Columbia -43%, New Mexico -37.9%, Michigan -37.8%, Massachusetts -36.9%, California -36.7%, Connecticut -36.4%, Maine - 36.3%).

[60] Fairlie, *The impact of COVID-19 on small business owners: Evidence from the first 3 months after widespread social-distancing restriction,* J. Econ. Mgt. Strategy (Aug. 27, 2020), https://pubmed.ncbi.nlm.nih.gov/32904856/ (showing 41% drop in activity for African-American-owned businesses, a 32% drop for Latino-owned businesses, and 26% drop for Asian-owned businesses).

[61] *Id.*

[62] 85 Fed. Reg. 66410, 66446 (Oct. 19, 2020).

[63] Laurie Goodman, John Walsh, Jun Zhu, *Small business and community development lending are key to CRA compliance for most banks*, Urban Wire: Economic Growth and Productivity, a blog of the Urban Institute (Feb. 7, 2019), https://www.urban.org/urban-wire/small-business-and-community-development-lending-are-key-cra-compliance-most-banks.

neighborhoods by 38%.[64] The States support designating lending to very small businesses and minority-small businesses as an impactful and responsive CRA qualifying activity.[65]

The States also support evaluating banks' responsiveness to small business lending needs separately from other products through lending-based assessment areas. This separate analysis may prevent small-dollar loans to smaller businesses from being crowded out. Further, the States support the use of borrower-distribution metrics to better evaluate banks' service to small businesses and farms. This should include a geographic-distribution analysis, evaluating a bank's loans in low-income, moderate-income, middle-income, and upper-income census tracts to measure responsiveness to low-income communities. Finally, the States support the use of transparent benchmarks and binding performance expectations to encourage loans to small businesses, particularly in predominantly minority neighborhoods.[66]

The States oppose increasing small business revenue size thresholds, as the majority of the smallest businesses operate with under $1 million in revenue.[67] This threshold is already over inclusive in a sense as the smallest businesses, the most in need of credit, have smaller revenues and seek smaller loans. Of the CRA-originated small business loans made in 2018, 94% were under $100,000.[68] Adjusting the revenue ceiling could result in banks avoiding origination of the smaller, more challenging, less lucrative loans most meaningful to the neediest and smallest businesses.

The ANPR should also incentivize bank assistance with accessing government relief, regardless of whether the business had a pre-existing banking relationship.[69] For example, minority-owned businesses had the most difficultly accessing Paycheck Protection Program (PPP) funds.[70] One survey reported only 12% of Black-and Latino-owned businesses successfully obtained all requested funding, and 41% received no assistance whatsoever.[71]

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[64] Eric Rodriguez, *Why Latinos Will Lose Under the OCC and FDIC's Proposal to Modernize the Community Reinvestment Act* 3, Unidos US (Jan. 2020), http://publications.nclr.org/handle/123456789/2012.

[65] 85 Fed. Reg. 66410, 66446-7 (Oct. 19, 2020).

[66] Question 57, 85 Fed. Reg. 66410, 66447 (Oct. 19, 2020).

[67] Question 37, 85 Fed. Reg. 66410, 66436 (Oct. 19, 2020).

[68] Fed. Fin. Institutions Examination Council, *Findings from Analysis of Nationwide Summary Statistics for 2018 Community Reinvestment Act Data Fact Sheet* (last modified Dec. 2019), https://www.ffiec.gov/hmcrpr/cra_fs19.htm.

[69] Questions 57 and 61, 85 Fed. Reg. 66410, 66447-8 (Oct. 19, 2020).

[70] *Minority-owned businesses were last in line to receive loans, latest PPP data show*, CBS News (Jan. 4, 2021) https://www.cbsnews.com/news/minority-owned-businesses-were-last-to-receive-ppp-loans-adding-to-their-despair/.

[71] Anneliese Lederer and Sara Oros, et al., *Lending Discrimination Within the Paycheck Protection Program,* National Community Reinvestment Coalition, (July 2020), www.ncrc.org/lending-discrimination- within-the-paycheck-protection-program/.

Another survey found 90% of minority-owned small businesses were shut out of this program, which was intended to be a lifeline for small businesses.[72]

The lessons learned from the PPP loan debacle show the importance of addressing existing inequities in deposit services *now* and offering deposit products and services even if the community does not traditionally use them. In the case of the PPP loans, initial applications for these funds could only be submitted through SBA lenders, many of whom required an account or loan before they would process applications.[73] Many minority-owned businesses lacked these lender relationships.[74] And even when minority-owned businesses were successful in securing a loan, "on average, it took 31 days for small businesses with paid employees in majority-Black ZIP codes to receive PPP loans, seven days longer than those in majority-white communities."[75]

The ANPR is a solid start as it designates economic development activities that prioritize smaller businesses and minority-owned small businesses particularly impactful and measures retail deposits and services separately. However, the States encourage the Board to further strengthen provisions of the ANPR to meet current deposit and service gaps to LMI communities and small and minority-owned businesses.

CONCLUSION

Low-income communities and communities of color continue to face inequities and discrimination like those that prompted Congress to pass the CRA. As the OCC rule change demonstrated, regulations implementing the CRA's requirements can be used to subvert the explicit purpose of the Act. Therefore, the most pressing objective must be maintaining fidelity to CRA's core purpose of remedying disinvestment in low-income communities and the lingering impact of racially-driven redlining. The States agree that the Board's ANPR is an "important step forward in laying a foundation for the [regulatory] agencies to build a shared, modernized CRA framework that has broad support."[76] To meet CRA's mandate during a

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[72] Megan Cerullo, *Up to 90% of minority and women owners shut out of Paycheck Protection Program, experts fear,* CBS News (Apr. 22, 2020), https://www.cbsnews.com/news/women-minority-business-owners-paycheck-protection-program-loans/.

[73] Lucas Misera, *An Uphill Battle: Covid-19's Outsized Toll on Minority-Owned Firms*, Fed. Res. Bank of Cleveland (Oct. 8, 2020), at 1 https://www.clevelandfed.org/en/newsroom-and-events/publications/community-development-briefs/db-20201008-misera-report.aspx.

[74] *Id.*

[75] Sifan Liu and Joseph Parilla, *New data shows small businesses in communities of color had unequal access to federal COVID-19 relief*, Brookings Inst. (Sept. 17, 2020), https://www.brookings.edu/research/new-data-shows-small-businesses-in-communities-of-color-had-unequal-access-to-federal-covid-19-relief/.

[76] Statement by Federal Reserve Board of Governors Chair Jerome H. Powell (Sept. 21, 2020), https://www.federalreserve.gov/newsevents/pressreleases/powell-statement-20200921.htm.

pandemic, the ANPR must keep focused on addressing racial and systemic inequities; incentivizing banks to serve housing insecure communities and encouraging affordable housing production; and supporting small and minority owned-businesses. For the foregoing reasons, the undersigned state attorneys general support the ANPR and urge the Board to consider strengthening it further as discussed above and work with the OCC and FDIC to encourage them to join the Board's worthy effort.

Sincerely,

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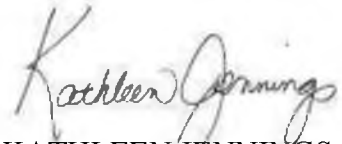

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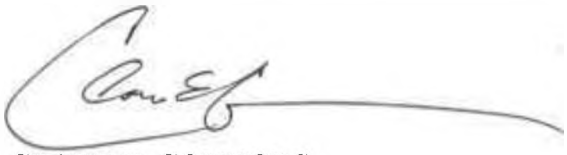

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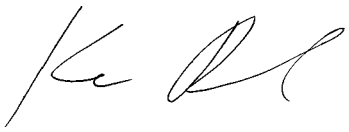

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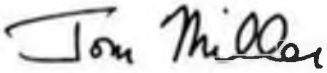

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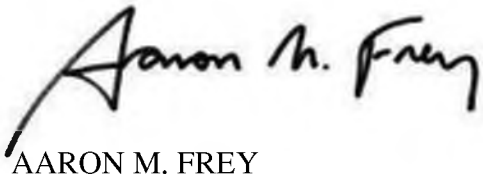

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