February 16, 2021

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

Re: Community Reinvestment Act, Board Docket No. R-1723 and RIN 7100-AF94

Dear Ms. Misback:

Better Markets[1] appreciates the opportunity to comment on the above captioned proposal ("ANPR" or "Release"),[2] issued by the Board of Governors of the Federal Reserve System ("Board" or "Federal Reserve") regarding amendments to its rules implementing the Community Reinvestment Act ("CRA").

Overall, the ANPR reflects a thoughtful approach to modernizing the CRA. Consistent with the necessarily preliminary nature of an ANPR, Better Markets offers some general comments on the considerations that should guide the Federal Reserve as it distills the ANPR into a concrete rule proposal. Adherence to such core principles is especially important when an agency is formulating a rule concerning a topic as complex and nuanced as the CRA, to prevent the details from obscuring or overwhelming the broad policy objectives that Congress sought to achieve. Where appropriate, we also offer comment on specific aspects of the ANPR that implicate the general considerations we lay out.

BACKGROUND

Banks enjoy a special status in the American financial system and, accordingly, receive special privileges.[3] Bank deposits, up to $250,000, are fully and explicitly backed by the

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1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

2 85 Fed. Reg. 66,410 (Oct. 19, 2020).

3 *See generally*, GERALD E. CORRIGAN, FEDERAL RESERVE 1982 ANNUAL REPORT, ARE BANKS SPECIAL, http://www.bu.edu/econ/files/2012/01/Corrigan-Are-Banks-Special_main-text.pdf.

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American government, and no depositor has ever lost a penny of an insured deposit.[4] This, in and of itself, confers a huge benefit on banks by helping to sustain the banks' profitable business model. Under that model, banks are able to fund long-term assets, such as mortgage loans that bring in relatively high returns for the bank, with short-term liabilities, principally on-demand deposits that cost the banks a relatively low payout rate. Absent federal deposit insurance, depositors would only place deposits in the healthiest banks (or the banks perceived to be the healthiest), and even then would insist on a higher interest rate to compensate for this significant risk.[5] And even those healthy banks able to attract deposits would be subject to runs by nervous depositors at the first sign of trouble, real or imagined. Essentially, all banks would exist under the constant threat of a funding crunch. Federal deposit insurance all but eliminates this threat, allowing banks to easily fund their assets via deposits, despite the significant mismatch in maturity between their assets and liabilities.

Banks enjoy other unique benefits and privileges. For example, banks with a federal charter benefit from the preemption of state laws, which allows them to operate under a set of uniform federal standards that is in many cases less stringent than state law with respect to consumer protection, significantly decreasing compliance cost and risk. Further, they have access to the Federal Reserve's discount window, and the largest banks benefit from the ultimate backstop: a virtual guarantee that if they come to the brink of failure, they will be bailed out by the U.S. taxpayer.[6]

Banks are afforded these privileges because, among other things, they provide access to the financial, credit, and payment system for Americans, and that access is critical to financial well-being and to achieving the American dream.[7] Banking touches on every aspect of life, from helping people pay for groceries and other necessities, to enabling savings, to providing credit for home purchases which, for many people, will end up being their most significant source of

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4 FDIC, *Symbol of Confidence*, https://www.fdic.gov/consumers/assistance/protection/depaccounts/confidence/symbol.html, last accessed Feb. 5, 2021.

5 *See* Nicholas J. Colombo, *The Flawed Explicit Safety Net: How Federally Sponsored Deposit Insurance Contributes to Financial Crisis,* 82 FORDHAM L. REV. 1237, 1258 (2013) ("Absent deposit insurance, if depositors believed a bank was taking excessively risky actions with their funds, they would either withdraw their funds (potentially initiating a bank run) or demand higher interest rates.").

6 *See* Better Markets Letter to Financial Stability Board on Too-Big-To-Fail Reforms (Sept. 30, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_Comment_Letter_on_FSB_TBTF_Consultation_Report.pdf; DENNIS M. KELLEHER, PRESIDENT & CEO BETTER MARKETS, THE TOO BIG TO FAIL PROBLEM IS ALIVE, WELL AND GETTING WORSE (Sept. 16, 2019), https://bettermarkets.com/sites/default/files/documents/Better_Markets_Too-Big-To-Fail_FSB_Conference-9-16-2019.pdf.

7 Mehrsa Baradaran, *How the Poor Got Cut Out of Banking*, 62 EMORY L.J. 483, 489 (2013) ("Policy makers have always recognized that access to financial services and credit is a significant step toward individual economic advancement.");

wealth.[8] Simply put, it is nearly impossible to achieve any measure of financial health without banking.

Unfortunately, access to banking services has never been fair or equal in America, with certain Americans, especially Black Americans and other Americans of color, disproportionately being shut out of the banking system. For most of the history of banking in America, this exclusion has been deliberate and explicit, on the part of both banks and regulators.[9] Most famously, banks and government agencies, such as the Federal Housing Administration and others, literally drew red lines around areas where Black Americans lived, to denote neighborhoods where they would not extend mortgage loans.[10]

Beyond explicit racism, profit motives have also excluded minorities from the banking system. Banks are above all profit-seeking enterprises. Accordingly, every decision banks make, including where to locate branches, who to loan money to, and what services to provide, is driven, at least in part, by its expected return on investment. Banks naturally gravitate towards locations and clientele that will make them the most money. What this means is that some areas and Americans, particularly rural areas and low- and moderate-income Americans, respectively, are underserved, or unserved, by the banking system.[11]

The unsurprising result of these forms of intentional discrimination, which feed off of each other, is an underclass of Americans left without sufficient access to banking services. In order to help remedy this situation, Congress passed the CRA in 1977, which was intended to ensure that banks fulfill the public purpose that justifies their many privileges, i.e. to provide all Americans—Black and white, wealthy and privileged—the opportunities that access to banking and the broader financial system afford.[12] As explained in the Release, the CRA was part of a series of federal laws enacted in the late 1960s and 1970s "to address systemic inequalities in access to credit and other financial services that contributed to often dramatic differences in

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8 *See* Cassandra Jones Havard, *Doin' Banks*, 5 U. PA. J.L. & PUB. AFF. 317, 320 (2020) ("financial inclusion--access to and participation in the formal banking economy--remains the primary way to enter the financial mainstream.").

9 Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787, 793 (1995) ("Before the major federal fair lending laws were enacted in the 1960s and 1970s, a wide array of actors contributed to more or less overt forms of discrimination in housing and lending: federal agencies, state and local governments, lenders, and others involved in the housing industry, such as appraisers and real estate agents.")

10 Charles L. Nier, III, *Perpetuation of Segregation: Toward A New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 620-27 (1999).

11 *Cf.* Mehrsa Baradaran, *Credit, Morality, and the Small-Dollar Loan*, 55 Harv. C.R.-C.L. L. Rev. 63, 87 (2020) ("In order to compete, small banks merged with larger banks and larger banking conglomerates abandoned low-profit communities and customers.").

12 *See* Release at 66,412.

economic access and financial well-being."[13] Those other laws included the Equal Credit Opportunity Act, the Fair Housing Act, and the Home Mortgage Disclosure Act.

The CRA essentially requires a number of federal agencies to evaluate a bank's record of meeting the credit needs of its community, including low- and moderate-income communities, under a number of "assessment factors."[14] The resulting ratings, which are made public, are considered by regulators as they evaluate bank applications for mergers, acquisitions, branch openings, and other elements of a bank's business plan.

The Federal Reserve, along with other agencies promulgated rules implementing the CRA in 1978. The Federal Reserve's CRA rules are housed in Regulation BB ("Reg BB").[15] The CRA rules have since been updated in 1995 and 2005. The rules are due for an update, in part, because of the significant technological shifts that have occurred since the last major update in 2005. Online banking was still relatively new, and limited, in 2005. Now, not only can nearly every banking transaction, from depositing a check to applying for a mortgage loan, be entered on a computer, they can also be entered on a smartphone, which themselves did not exist in 2005.[16]

However, the passage of time and great leaps forward in technology are not the only reasons Reg BB is due for an update. They are also due for an update because, frankly, for far too many Americans the promises of the CRA have remained unfulfilled. As observed in the Release, "the harmful legacy of redlining and other discriminatory practices too often continues to be felt. In 2016, the 'wealth gap [was] roughly the same as it was in 1962, two years before passage of the Civil Rights Act of 1964."[17] There is ample data confirming that a huge swath of American society remains un- or under-banked,[18] [and this deficit is striking and disproportionately large among Black and Hispanic households:

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13 Release at 66412.

14 Another reason it is critical for the Federal Reserve to ensure it promulgates a robust rule that will ensure adequate investment in LMI customers is because the OCC has already promulgated a seriously flawed rule that "will lessen the public accountability of banks to their communities by enacting performance measures on CRA exams that will be complex and opaque, while at the same time over-simplifying how to measure a bank's responsiveness to local needs. NATIONAL COMMUNITY REINVESTMENT COALITION, ANALYSIS OF THE OCC'S FINAL CRA RULE (June 15, 2020).

15 12 C.F.R. Part 228.

16 *See* Jonice Gray Tucker, Daniel Stipano, Kari Hall, Brendan Clegg, Anthony Carral, *Square Peg Meets Round Hole: Regulatory Responses to Challenges Created by Innovation in Banking*, 75 BUS. LAW. 2491 (2020) ("During the past decade, technological advances have impacted the nature of financial products and services, as well as the ways in which they are delivered.").

17 Release at 66412.

18 The Federal Reserve has defined "unbanked" as those without a checking, savings, or money market account, and the "underbanked" as those with a bank account, but who also have used an alternative financial service product. FEDERAL RESERVE, REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 - MAY 2019,

- According to a 2017 survey by the FDIC, up to 25% of American households are either unbanked (6.5%) or underbanked (18.7%).[19] Similarly, the Federal Reserve in 2019 estimated that 22% of households were unbanked (6%) or underbanked (16%).[20]
- According to the Federal Reserve's 2019 study, there is a significant racial component to lack of access to banking services—fully half of Black households are either unbanked (14%) or underbanked (35%). Among Hispanic households, 34% are either unbanked (11%) or underbanked (23%).[21] By comparison, only 15% of white households are unbanked (4%) or underbanked (11%).
- There are also educational and income components to access to banking. Thirty-four percent of households with a high school degree or less are unbanked (13%) or underbanked (21%), compared to households with a bachelor's degree or more, where only 10% are unbanked (1%) or underbanked (9%). Thirty-five percent of households that make $40,000 or less are unbanked (14%) or underbanked (21%). Meanwhile, 19% of households that make between $40,000 and $100,000 are unbanked (2%) or underbanked (17%), and only 8% of households with an income greater than $100,000 are unbanked (1%) or underbanked (7%).

Put simply, there are still far too many households in America without adequate access to banking services, and that lack of access disproportionately impacts the most vulnerable Americans—minorities, the less educated, and those with lower incomes. Being unbanked or underbanked, in turn, has a significant negative impact on people's lives. "The consequences of not having access to mainstream financial services can be severe."[22]

Whereas a fully banked consumer has a transaction account, likely with few or no fees, where their income can be deposited, an unbanked or underbanked consumer may have to use check cashing services that skim anywhere from 2% to 5% off the top of each check—a critical amount for lower income households where every dollar counts.[23] Whereas a fully banked consumer may be able to turn to a credit card if they are facing a cash shortfall, an underbanked or unbanked consumer may have to turn to predatory payday lenders, and face a high likelihood

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https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-banking-and-credit.htm

19 FDIC, 2017 HOUSEHOLD SURVEY RESULTS, https://economicinclusion.gov/surveys/2017household/.

20 FEDERAL RESERVE, REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 - MAY 2019, https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-banking-and-credit.htm.

21 FEDERAL RESERVE, REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 - MAY 2019, https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-banking-and-credit.htm.

22 Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 134 (2004).

23 *See* FEDERAL RESERVE BULLETIN, USE OF FINANCIAL SERVICES BY THE UNBANKED AND UNDERBANKED AND THE POTENTIAL FOR MOBILE FINANCIAL SERVICES ADOPTION 3 (Sept. 2012) ("Being unbanked in today's financial marketplace can be problematic for consumers."), https://www.federalreserve.gov/pubs/bulletin/2012/pdf/mobile_financial_services_201209.pdf.

of getting trapped in a vicious cycle of debt, a debtor's prison without walls, that may see them pay hundreds of dollars more in fees than the original loan amount.[24] Whereas the fully banked have an opportunity to build wealth through savings, the unbanked and underbanked are unlikely to be able to do anything except live paycheck to reduced-by-check-cashing-fees paycheck. And the unbanked and underbanked are unlikely to be able to have access to credit to purchase a home, or a car, or an education. And beyond the direct pecuniary impact of being unbanked or underbanked, those who are unbanked or underbanked also lack critical "consumer protections available to fully banked consumers, such as FDIC insurance and protections provided to credit and debit card users under the Truth in Lending Act and the Electronic Fund Transfer Act, none of which are available to consumers who use alternative financial services."[25]

Addressing this problem is more critical than ever in light of the ongoing COVID-19 pandemic**,** as those Americans most likely to be unbanked or underbanked are also the ones who have been hit hardest by the pandemic**.** Black Americans, Hispanic Americans, and other minorities and Americans of color are more likely to be in low-income jobs, which ends up inflicting multiple harms on minority communities. Many of these low-paying jobs are more likely to be considered "essential," meaning those who hold them are more likely to have to continue working even in the middle of a raging pandemic. At the same time, many of those low-income jobs are paradoxically more likely to be lost as a result of the ongoing economic crisis.[26] Because minorities are less likely to have significant savings or any other store of wealth, they are especially vulnerable to severe economic hardship when they lose their jobs and incomes.[27] Unsurprisingly, minority communities have also been hit particularly hard by the pandemic itself—Black Americans especially are more likely to be infected, more likely to face severe health outcomes from COVID, less likely to receive optimal medical care, and more likely to die or suffer long-term ill-effects from the disease.[28]

OVERVIEW OF THE RELEASE

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[24] Better Markets Comment Letter on Payday, Vehicle Title, and Certain High-Cost Installment Loans (May 15, 2019), https://bettermarkets.com/rulemaking/better-markets-comment-letter-cfpb-payday-underwriting-rescission.

[25] Federal Reserve Bulletin, Use of Financial Services by the Unbanked and Underbanked and the Potential for Mobile Financial Services Adoption 3 (Sept. 2012), https://www.federalreserve.gov/pubs/bulletin/2012/pdf/mobile_financial_services_201209.pdf.

[26] ELISE GOULD & VALERIE WILSON, ECONOMIC POLICY INSTITUTE, BLACK WORKERS FACE TWO OF THE MOST LETHAL PREEXISTING CONDITIONS FOR CORONAVIRUS—RACISM AND ECONOMIC INEQUALITY (June 1, 2020) (Black Americans "have suffered record numbers of job losses over the last two months (March 2020–May 2020), along with the ensuing related economic devastation. They also are disproportionately found among the essential workers in the economy today—continuing to go to their workplaces, risking their health and that of their families because they are unable to sustain adequate social distance from their co-workers and customers."), https://www.epi.org/publication/black-workers-covid/.

[27] *Id.*

[28] *Id.*

Generally speaking, the ANPR outlines the following approach to modernizing the CRA:

- **Assessment Areas:** The ANPR seeks an approach that provides for a more thoughtful way to define a bank's assessment areas. The objective of the Board, as stated in the ANPR, would be "to more predictably delineate assessment areas around physical locations, such as bank branches, and to ensure that assessment areas are contiguous, do not reflect illegal discrimination, do not arbitrarily exclude LMI census tracts, and are tailored to bank size and performance context."[29] The Board is also considering other approaches to delineating assessment areas, particularly for internet banks.[30]
- **Evaluation Framework:** The Board proposes establishing an evaluation framework that would consist of a Retail Test and Community Development Test.[31] which would focus on how well banks serve the retail lending, and other banking services, needs of "LMI census tracts, LMI borrowers, small businesses and small farms."[32] The Board also proposes a more quantitative approach, that includes thresholds for presumptions of a rating of "Satisfactory," for the Retail Lending Tests.[33] The Community Development Test would, as its name implies, focus on activities that contribute to community development, such as financing affordable housing, providing "community services," and promoting economic development.[34] Larger banks (between $750 million and $1 billion in assets) would be evaluated under the new approach; smaller banks would have the option to continue to be evaluated under the current CRA framework, "but would have the option to be evaluated under the Retail Lending Subtest alone and could also elect to have their retail services and community development activities evaluated."[35]
- **Ratings:** The Board proposes an updated approach for "the way in which state, multistate metropolitan statistical area (MSA), and institution ratings are reached." The approach is based on the Board's belief that "it is appropriate to anchor a bank's overall rating in its performance in all of its local communities," and therefore would stop designating "full- and limited-scope assessment areas in the evaluation process."[36]
- **Data Collection and Reporting:** The Board would revise its data collection and reporting requirements, being "mindful of the potential tradeoff between the expanded use of metrics to provide greater certainty and consistency and the expanded need for data collection and reporting."[37]

COMMENTS

I. A STRONG CRA RULE THAT BENEFITS CONSUMERS AND PROMOTES ACCESS TO BANKING WILL NOT UNDERMINE FINANCIAL STABILITY

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29 Release at 66,410.
30 Release at 66,410.
31 Release at 66,410.
32 Release at 66,419.
33 Release at 66,419-433.
34 Release at 66,437-446.
35 Release at 66,411.
36 Release at 66,411.
37 Release at 66,411.

The 2008 financial crisis, triggered and fueled by wide-spread illegality and recklessness by large banks and others in the financial sector, brought the world economy to the brink of collapse and exacted a huge cost on our economy and the lives of almost every American. The impact was felt most acutely by those in the low- and middle-income strata.[38] The Dodd-Frank Act was enacted to fundamentally reform our regulatory framework and establish strong financial stability rules that will prevent banks from ever again imperiling the financial system and necessitating a massive taxpayer bailout. It goes without saying, then, that any CRA rule must continue to allow for the safe and sound operation of banks subject to the rule. However, contrary to the claims of some, providing increased access to banking services for low- and moderate-income consumers can be done in a safe and sound manner, without increasing systemic risk.[39]

The most recent iteration of the "CRA increases risk" argument has come from those who have tried to pin part of the blame for the financial crisis on the CRA, ostensibly because it encourages riskier lending. However, multiple economic analyses have concluded that CRA-lending activity was not responsible for the crisis.[40] In the first instance, much of the subprime activity that fueled the crisis took place outside of the banking system, by companies not subject to the CRA in the first place.[41] In addition, much of the crisis was fueled because lenders made **irresponsible, inappropriate and predatory loans.** This came in the form of making more expensive subprime loans to borrowers who qualified for prime loans, a practice that disproportionately impacted Black borrowers.[42] It also took the form of making subprime loans to borrowers who could not afford to repay those loans. Suffice it to say, nothing about the CRA requires that lenders make **predatory loans** to anyone.[43]

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38 BETTER MARKETS, THE COST OF THE CRISIS: $20 TRILLION AND COUNTING (2015), https://bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis.pdf.

39 Indeed, by pushing more financial activity into the banking sector, rather than the shadow banking system, and by allowing more LMI Americans to have a more secure financial footing, a robust CRA rule would enhance financial stability.

40 Raymond H. Brescia, *The Community Reinvestment Act: Guilty, but Not As Charged*, 88 ST. JOHN'S L. REV. 1, 19-21 (2014).

41 Raymond H. Brescia, *The Community Reinvestment Act: Guilty, but Not As Charged*, 88 ST. JOHN'S L. REV. 1, 21 (2014) ("Moreover, as stated earlier, the subprime mortgage market was generally overwhelmingly dominated by loans originated beyond the reach of the CRA, either because they were extended by institutions not covered by it, or made outside of covered institution's CRA assessment areas.").

42 Charles L. Nier, III & Maureen R. St. Cyr, *A Racial Financial Crisis: Rethinking the Theory of Reverse Redlining to Combat Predatory Lending Under the Fair Housing Act*, 83 TEMP. L. REV. 941, 947-48 (2011).

43 Richard D. Marsico, *Subprime Lending, Predatory Lending, and the Community Reinvestment Act Obligations of Banks*, 22 N.Y.L. SCH. J. INT'L & COMP. L. 365, 372 (2003).

Accordingly, the Federal Reserve should discount claims and comments from the industry or others expressing concern that a strong, meaningful CRA rule would require them to take an unacceptable amount of risk, or would undermine the safety and soundness of individual banks or the banking system. Such arguments are not only unfounded but also hypocritical, as Wall Street never hesitates to fight for the right to engage in high-risk behavior—in fact, far riskier than "lending to the underprivileged"—whenever it can boost bank profits and bonuses.[44] In reality, neither the fundamental goals of the CRA nor the specific approaches explored in the ANPR present any conflict with the paramount need to preserve the safety and soundness of the financial system and prevent another financial crisis.

II. ANY CLAIMED BURDENS ON BANKS ARE NOT AN EXCUSE TO ADOPT A WEAK RULE THAT DOES NOT HELP COMMUNITIES LABORING UNDER A HISTORY OF DISCRIMINATION

One popular argument from the banking industry, when opposing strong regulation, is that stronger regulations would impose an unjustifiable "burden" on the industry. While the Federal Reserve should be cognizant of any burdens a strong CRA rule would impose on banks, and should not impose burdens on banks that will not further the goals of the CRA, the Federal Reserve must not let concerns about burdens on banks justify the promulgation of a weak rule.

Doing so would be unacceptable not only as a policy matter but also as a factual and legal matter. As a threshold factual point, the financial services industry classically and incessantly exaggerates the costs and burdens that come with regulation. As we have previously pointed out,[45] the financial industry has a long tradition of baselessly warning that regulation will

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[44] *See* ABA Letter on Volcker Rule (Apr. 1, 2020) (arguing that banks should be able to more freely engage in high risk proprietary trading); Anna Harrington, et al., Bank Policy Institute, *Are Restrictions on Capital Distributions Still Needed Beyond the Rule-Based Capital Framework?*, BPI BLOG (Dec. 21, 2020), https://bpi.com/are-restrictions-on-capital-distributions-still-needed-beyond-the-rule-based-capital-framework/. Better Markets has vigorously pushed back on the industry's talking points on these issues. *See* Better Markets Comment Letter on Volcker Rule (Apr. 1, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_Inc._Comment_Letter_on_Prohibitions_and_Restrictions_on_Proprietary_Trading_and_Certain_Interests_in_and_Relationships_With_Hedge_Funds_and_Private_Equity_Funds.pdf; Better Markets Comment Letter on Eligible Retained Income (May 4, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_Comment_Letter_on_Regulatory_Capital_Rule-Eligible_Retained_Income.pdf.

[45] Better Markets Comment Letter on Prudential Standards for Large Foreign Banking Organizations 18 (June 21, 2019), https://bettermarkets.com/rulemaking/better-markets-comment-letter-frs-enhanced-prudential-standards-fbos.

prohibitively increase costs, stifle markets, and suppress economic growth.[46] This pattern has continued with virtually every rule that has been implemented under the Dodd-Frank Act, which has been met with warnings that the implementation of robust, risk-mitigating rules will be too burdensome for financial firms and ultimately detrimental for American investors and consumers. Yet under the Dodd-Frank reforms, banks have thrived, reaching record lending and revenue levels prior to the onset of the pandemic.[47]

From the standpoint of law and policy, in passing the CRA, Congress has already made the policy judgment that banks should bear whatever burdens may come from ensuring they are reinvesting in the communities they serve. For the Federal Reserve to weaken or eliminate provisions that would further the goal of the CRA because they would impose some burden on banks would be to impermissibly rely "on factors which Congress has not intended it to consider,"[48] a rulemaking approach that the law prohibits. Put another way, Congress has made the sound and in fact inescapable judgment that banks should bear the "burden" of actually serving the communities in which they are located, and it would be improper and unlawful for provisions that serve that goal to be weakened or eliminated to allow banks to avoid the costs and responsibilities that Congress has already decided banks should bear.

Importantly, the Federal Reserve is **not** subject to any requirement that it conduct a cost-benefit analysis. Instead, the Riegle-Neal Act imposes a far less stringent obligation that the Board "consider," along with the benefits of a regulation, any administrative burdens that would result from the regulation.[49] Moreover, President Biden has made clear, in a memorandum to executive agencies, that agencies should take into account a broad and wholesale array of benefits, beyond just those that are easily quantifiable, when adopting regulations.[50] While this memo does not, by its terms, apply to the Federal Reserve, the Board should nevertheless heed its message, particularly with regards to the CRA, which is explicitly concerned with ensuring broad, distributional benefits for the most disadvantaged of Americans.

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46 Marcus Baram, The Bankers Who Cried Wolf: Wall Street's History Of Hyperbole About Regulation, HUFFPOST (June 21, 2011), https://www.huffpost.com/entry/wall-street-history-hyperbole-regulation_n_881775.

47 Hannah Levitt, *U.S. Banks' Record-Breaking Earnings Streak Has Probably Peaked*, Bloomberg (Jan. 10, 2020), https://www.bloomberg.com/news/articles/2020-01-10/u-s-banks-record-breaking-earnings-streak-has-probably-peaked; Mark Whitehouse, Opinion, *There's Nothing Wrong With Stronger Banks*, Bloomberg (Feb. 11, 2019), https://www.bloomberg.com/opinion/articles/2019-02-11/banks-with-more-capital-are-safer-and-tend-to-do-more-lending.

48 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

49 12 U.S.C. § 4802.

50 President Joseph R. Biden, Modernizing Regulatory Review, Memorandum for the Heads of Executive Departments and Agencies (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/.

The Release actually fuels these concerns to some degree. One area in which the proposed approach appears overly deferential to concerns about possible burdens on banks, with little apparent concern for the public interest, is the use of presumptions to determine compliance. For example, in determining whether a bank is meeting the retail lending needs of its community, the Board proposes establishing thresholds based on the composition of LMI households in the community (the "community threshold"), and another based on the percentage of lending to LMI households (the "market threshold").[51] The "binding threshold," i.e. the one that determines whether a bank is afforded a presumption of "satisfactory," is the retail lending test. The Release provides an example of how this would work practically:

> If the community benchmark shows that 30 percent of families in an assessment area are LMI, then the community threshold would be 19.5 percent (30 percent times 65 percent). If the market benchmark shows that 35 percent of mortgage originations in the assessment area are to LMI borrowers, then the market threshold would be 24.5 percent (35 percent times 70 percent). Because the community threshold is lower than the market threshold, a bank's performance on the borrower distribution metric for mortgage lending (which measures the percentage of a bank's mortgage lending to LMI borrowers) would need to meet or exceed the binding threshold of 19.5 percent in order to earn the presumption of 'satisfactory.'"[52]

In other words, under this approach, a bank in this community would receive a presumption that it has met the retail lending needs of its community even though, essentially by definition, it has not. Moreover, every bank in this community could, in theory, meet the threshold for a presumption of satisfactory, even though many of the LMI households in the community are not having their credit needs met.

While the use of presumptions of compliance may be appropriate under certain circumstances, establishing such a presumption primarily benefits banks, who are then essentially relieved of the burden of having to demonstrate they are adequately meeting the needs of their community.[53] The Board should not afford banks such a tremendous benefit without a high degree of certainty that the applicable threshold serves as an accurate stand-in for actual compliance i.e. that simply by virtue of meeting that threshold, banks are adequately serving the financial needs of their community. Absent such certainty, banks **should** bear the burden of demonstrating they are adequately serving the needs of their community—that is what the CRA is all about.

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[51] Release at 66,423-24.

[52] Release at 66,425.

[53] *See* Release at 66,425 ("The Board believes that granting a presumption of ''satisfactory'' can provide banks with greater certainty about performance expectations and their results on the Retail Lending Subtest.")

Unfortunately, there is little evidence in the ANPR that the Board prioritized the public interest, rather than alleviating potential burdens on banks, in allowing banks the opportunity to enjoy a presumption of compliance and particularly in establishing the thresholds for that presumption. Simply put, if a bank is in a community where 30% of households are LMI, but only 19.5% of the bank's borrowers are LMI, it is far from clear that the bank is adequately serving the needs of the community. Indeed, the opposite presumption would seem to be more appropriate. Nowhere in the ANPR does the Board explain how its proposed thresholds for presumptions serve the public interest. Rather, the establishment of a presumption, and the thresholds for meeting it, seem primarily designed to benefit banks. This is inappropriate—if the Board is going to establish presumptions, and other provisions that will benefit banks, it must also demonstrate that such provisions will serve (or at least not hinder) the public interest and the purposes of the CRA.

III. THE BOARD SHOULD PROACTIVELY ENGAGE WITH COMMUNITY GROUPS, BOTH IN THIS RULEMAKING AND IN ITS IMPLEMENTATION

The Federal Reserve is likely to hear from a variety of stakeholders in this rulemaking. While the Federal Reserve should (and indeed must) consider all comments from all stakeholders, not all comments are created equal. The CRA was intended to benefit underserved communities. Groups that are legitimately dedicated to serving their communities have the most useful insight into what actions would be most appropriate to help those communities. By contrast, banks have a profit motive that dominates their point of view and their commentary, even when they challenge a rule with claims that it will harm the public interest, consumers, and communities. Their primary goal is to make money for the benefit of their executives, employees, and shareholders. That is why the CRA is necessary in the first place: banks' profit motive will not be sufficient to ensure they are providing adequate services to their communities or to underserved segments of their communities.

The Board must keep these fundamentally distinct perspectives in mind as it analyzes the comments received and crafts a new CRA rule. Specifically, it must serve as the guardian of the public interest and in that role, it should pay special attention to the approaches that public interest advocates and community groups believe will best serve the goals of the CRA. It must further carefully scrutinize input from the banking industry, to ensure that it is credible, well-supported, and above all in alignment with what Congress said and intended in the CRA. None of which is to say that the Federal Reserve must defer, unquestioningly, to the advocacy of community groups or other public interest organizations, nor that they should ignore the industry. But the Federal Reserve must bear in mind the different motivations of different stakeholders and assess the comments of those stakeholders accordingly, recognizing that the regulated industry often has interests that are contrary to the public interest,

By the same token, once the Federal Reserve finalizes a CRA rule, it must ensure that it actively solicits and takes seriously input from community groups, both as it relates to specific

CRA examinations as well as ongoing assessments of the impact of the rule. Community groups are often in the best position to understand the needs of the community they serve and to understand the real-world consequences of reform efforts.

IV. THE FEDERAL RESERVE MUST BE CAREFUL NOT TO EXCLUDE VULNERABLE CONSUMERS

Because smartphones, broadband, and other technological innovations are seemingly ubiquitous today, it would be all too tempting to take a technocratic approach to a revamped CRA, assuming that technological innovations like mobile banking alone can provide adequate access to banking. This thinking would be flawed for at least two related reasons. First, the disparities in access to banking have not disappeared despite these technological innovations, so it would be clearly unjustifiable to depend on these technologies to solve the problem. Second, and relatedly, many of the same people who disproportionately lack access to banking services disproportionately lack access to the most advanced technology.[54]

The ANPR reflects a fairly thoughtful approach to this issue, with the Federal Reserve suggesting a continued focus on branches as part of the CRA assessment process. For example, in discussing potential approaches to assessment areas, the Federal Reserve recognizes the critical role that physical branches still serve, especially to low- and moderate-income customers.[55] As much as the notion of visiting a brick-and-mortar building to conduct banking might feel antiquated to those who are privileged enough to benefit from technological advances, in reality those branches are critical to many of the less privileged communities the CRA is intended to benefit. Accordingly, the Federal Reserve must follow through on its commitment to ensure that physical branches are a key component of a CRA rule that serves low- and moderate-income communities and consumers.

V. CRA RULES CANNOT IGNORE RACE

The racial disparities in access to banking discussed above are the direct result of intentionally racist policies. For decades, banks and government agencies explicitly targeted Black and other minority communities for exclusion from the banking system. Indeed, the CRA was specifically adopted to counteract this intentional racism.[56] The impact of this intentional racism cannot be eliminated without a full understanding of the racist roots of the problem; an acknowledgment of the continuing and significant racial disparities that have resulted from past

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[54] *See* U.S. CENSUS BUREAU, THE DIGITAL DIVIDE: PERCENTAGE OF HOUSEHOLDS BY BROADBAND INTERNET SUBSCRIPTION, COMPUTER TYPE, RACE AND HISPANIC ORIGIN (Sept. 11, 2017), https://www.census.gov/library/visualizations/2017/comm/internet.html.

[55] Release at 66,416.

[56] Gregory W. Meeks, *Before Modernizing CRA, Consider its History*, AMERICAN BANKER: BANKTHINK (June 19, 2018), https://www.americanbanker.com/opinion/before-modernizing-cra-consider-its-history.

policies and practices; and a commitment to solutions that are consciously designed and deployed to combat racism and the toll that is has taken in communities across the country. In short, you cannot be intentionally anti-racist without explicitly dealing with the fact that racial disparities continue to exist. While everyone would love to live in a "post-racial" or "colorblind society" where race no longer matters, the ability to ignore race is a reward for a society that has done the hard work of truly eliminating the barriers that disproportionately impact people of certain races. Simply put, that society is not America in 2021. Racial disparities exist across nearly every aspect of American society, from education to health to criminal justice and, as noted above, access to banking and the financial system.

Accordingly, consistent with legal requirements (including the Equal Protection Clause of the 14th Amendment), the Federal Reserve must not ignore race when formulating a CRA rule. Rather, the Federal Reserve should explicitly make it a goal to reduce the racial gap in access to banking, and should specifically craft proposals to meet this goal. To that end, in the Release the Federal Reserve is, in many cases, frank about the existence of the racial gap in access to banking and about the need to address it. There is, however, little by way of concrete solutions to close that racial gap. That may be understandable given the preliminary nature of the ANPR. Nevertheless, as the Federal Reserve crafts a proposal and eventually a final rule, it should explicitly consider and take into account how each provision will narrow and, eventually, eliminate the racial gap in access to banking.

CONCLUSION

We hope you find these comments helpful.

Sincerely,

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