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August 3, 2022

RE: **Community Reinvestment Act Proposed Rulemaking [87 FR 33884]**

OCC: 12 CFR Part 25; Docket ID OCC-2022-0002; RIN 1557-AF15
Federal Reserve: 12 CFR Part 228; Regulation BB Docket No. R-1769; RIN 7100-AG29
FDIC: 12 CFR Part 345; RIN 3064-AF81

To Whom it May Concern:

The National Community Reinvestment Coalition (NCRC) appreciates the opportunity to comment on the Notice of Proposed Rulemaking (NPR) regarding updating the Community Reinvestment Act (CRA). This NPR represents the most significant changes to the CRA regulation and exams in 27 years. Nevertheless, it should be strengthened further to realize the statute's full potential to increase loans, investments and services in traditionally underserved communities. NCRC and our 600 member organizations use CRA daily to increase lending, investment and services in traditionally underserved communities. A robust CRA is key to our efforts.

CRA has successfully leveraged loans, investments and services. Between 2009 and 2020, banks have made more than $2.58 trillion in home loans to low- and moderate-income (LMI) borrowers or in LMI census tracts. They made $856 billion in loans to small businesses with revenues under $1 million.[1] Despite the progress, persistent lending disparities remain. A recent national level analysis showed continuing disparities in loan denials by race and when people of

[1] NCRC calculations see https://public.tableau.com/app/profile/ncrc.research/viz/CRAQualifiedLending2009-2020/Dashboard1

color received home loans, their equity accumulation was less.[2] In addition, people of color are more likely to be unbanked and underbanked than their white counterparts. A major contributing factor to this disparity is fewer branches in communities of color and less competition among banks in those communities, which reduces choices for affordable bank products.[3]

CRA will be more effective in bolstering bank reinvestment activity in underserved communities, the more rigorous CRA exams and ratings are. The agencies proposed important improvements in the CRA regulation including increasing the rigor of the subtests on the CRA exams, expanding geographical areas on CRA exams and collecting more data to scrutinize bank performance. However, they did not sufficiently address pressing and persistent racial inequities. The agencies also proposed reducing community development finance and service responsibilities for about 20% of all banks. In addition, the agencies' proposal is uneven regarding increasing rigor across all parts of the CRA exam. Further, the CRA regulation must ensure that its designations of eligible activities are clear, accurate, and effective in serving community needs (such as affordable housing, climate remediation, and other important measures).

This comment first summarizes our position on major issues including:

- CRA exams must explicitly consider banks' records in serving people of color and communities of color.
- Public input mechanisms in CRA exams and merger reviews must be robust and include consideration of community benefit agreements. The agencies and banks must proactively reach out to community organizations and members of the public.
- Improvements to exam rigor and more objectivity in performance measures are needed to reduce ratings inflation and loopholes such as not examining major loan products must be closed.
- Enhancements to community development definitions are needed to more effectively target activities to communities in need.
- Data improvements must provide more insight into banks' records of meeting credit and community needs.
- Anti-discrimination and fair lending reviews must be more transparent. CRA exams must examine affordability and sustainability of lending in order to prevent abusive lending.
- Assessment area changes must sufficiently capture online lending and deposit taking activity.

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[2] Jason Richardson, Joshua Devine, Jamie Buell, *2020 Home Mortgage Report: Examining Shifts During COVID*, NCRC, January 2022, https://www.ncrc.org/ncrc-2020-home-mortgage-report-examining-shifts-during-covid/

[3] Kristen Broady, Mac McComas, and Amine Ouazad, *An analysis of financial institutions in Black-majority communities: Black borrowers and depositors face considerable challenges in accessing banking services*, Brookings Institution, November 2021, https://www.brookings.edu/research/an-analysis-of-financial-institutions-in-black-majority-communities-black-borrowers-and-depositors-face-considerable-challenges-in-accessing-banking-services/

- The proposed asset threshold and bank classification changes would reduce community development financing and branching.

After the summary, this comment letter will next answer the questions posed by the NPR but before doing so we will expand upon our position regarding CRA and race.

Summary of Major Positions

CRA must explicitly consider bank activity by race and ethnicity

Although the CRA statute does not explicitly mention race, it was passed as a measure to remedy and prevent racial discrimination. It required banks to serve all communities, which provides room for the federal bank agencies to incorporate race in CRA exams in order to ensure this end is met. The government should take these measures to rectify ongoing discrimination as well as decades of redlining. The federal government instituted redlining practices in New Deal housing programs and which was later adopted on a widespread basis by the Federal Housing Administration (FHA) and the private sector. Persistent racial disparities in lending must compel the agencies to incorporate race and ethnicity in CRA exams.

The agencies proposed to use the Home Mortgage Disclosure Act (HMDA) data to produce exam tables describing lending by race, but not to use the results of these analyses to influence a bank's rating.[4] NCRC had asserted in a paper co-authored by Relman Colfax PLLC that changes to CRA would comply with legal standards (as well as advance its statutory purpose) if CRA examined lending by race and ethnicity in geographical areas experiencing ongoing discrimination or exhibiting significant racial disparities in lending.[5] NCRC had also proposed including analyses of bank CRA performance in underserved neighborhoods with low levels of lending, which are disproportionately communities of color.[6]

In addition to examining banks' records of lending by race, the agencies should also bolster fair lending reviews accompanying CRA exams for banks that perform poorly in the HMDA data analysis of lending by race. Furthermore, the agencies proposed using Section 1071 data on small business lending by race and gender of the business owner[7], and this data should be used as a screen for fair lending reviews. By including race and ethnicity, CRA can identify and address

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[4] Office of the Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation, Notice of Proposed Rulemaking (NPR) to amend the CRA regulations, May 5, 2022, issued version, https://www.federalreserve.gov/consumerscommunities/files/cra-npr-fr-notice-20220505.pdf, p. 420.

[5] Brad Blower, General Counsel, NCRC; Josh Silver, Senior Policy Advisory, NCRC; Jason Richardson, Director of Research and Evaluation, NCRC; Glenn Schlactus, Partner, Relman Colfax PLLC; Sacha Markano-Stark, Attorney, Relman Colfax PLLC, *Adding Robust Consideration Of Race To Community Reinvestment Act Regulations: An Essential And Constitutional Proposal*, September 2021, https://www.ncrc.org/adding-robust-consideration-of-race-to-community-reinvestment-act-regulations-an-essential-and-constitutional-proposal/

[6] Bruce Mitchell, PhD. and Josh Silver, *Adding Underserved Census Tracts As Criterion On CRA Exams*, January 2020, NCRC, https://ncrc.org/adding-underserved-census-tracts-as-criterion-on-cra-exams/

[7] NPR, p. 385.

persistent racial disparities that have direct impacts on economic inclusion, quality of life and health outcomes.

Public input mechanisms: agencies propose improvements that must be codified

Since CRA requires banks to meet the needs of communities, the agencies must elevate the importance of public comments regarding the extent to which banks meet local needs. The agencies proposed to continue the recent practice of publishing 60 days in advance of each calendar quarter the schedule of CRA exams for the next two quarters,[8] which will help provide ample opportunities for the public to comment on exams. The agencies proposed to continue the current practice of sending any comments on CRA performance to banks and are also considering publishing comments received on agency websites.[9]

Posting comments on agency websites will establish accountability on the part of examiners to consider them. In addition, these comments can be referenced during future merger applications to determine if the banks addressed significant concerns of the public. Also, the agencies should establish a public registry that community organizations can use to sign up if they want to be contacted about community needs and bank CRA performance. Furthermore, we request that the agencies publish which organizations they consult with to understand local community needs, commit to collecting input from a diverse range of organizations that includes organizations led by people of color and women, follow up on needs identified, and detail how community input was factored into the results of CRA performance evaluations.

We also agree with Acting Comptroller Hsu that the agencies must hold frequent public hearings on large bank mergers.[10] CRA exams, if they are made more rigorous by a final rule, will help hold merging banks accountable. However, merging banks must also submit a community benefits plan as part of their merger applications, which could include community benefits agreements negotiated with community organizations. As further described in our recent comments to the FDIC on bank mergers, an Outstanding CRA rating must not be considered evidence that merging banks have satisfied the public benefits legal requirement.[11] Furthermore, CRA exams following merger approvals must review compliance with community benefit agreements or conditional merger approvals.

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[8] NPR, p. 426.
[9] NPR, p. 426.
[10] Acting Comptroller of the Currency Michael J. Hsu Remarks at Brookings "Bank Mergers and Industry Resiliency" May 9, 2022, p. 8, https://www.occ.gov/news-issuances/speeches/2022/pub-speech-2022-49.pdf
[11] Regarding: Request For Comment On Rules, Regulations, Guidance, And Statement Of Policy On Bank Merger Transactions (RIN 3064-ZA31), NCRC, June 2022, https://www.ncrc.org/regarding-request-for-comment-on-rules-regulations-guidance-and-statement-of-policy-on-bank-merger-transactions-rin-3064-za31/

National Community Reinvestment Coalition

Reducing CRA ratings inflation: progress on the lending test of the large bank exam, but not as much on the other subtests

Currently, about 98% of banks pass their CRA exams on an annual basis with just less than 10% receiving an Outstanding rating and almost 90% of them receiving a rating of Satisfactory.[12] CRA has successfully leveraged more loans, investments and services for LMI communities, but it would be more effective in doing so if the ratings system more accurately revealed distinctions in performance.[13] More banks would be identified as significantly lagging their peers, which would motivate them to improve their ratings and increase their reinvestment activity.

The agencies bolstered the rigor on the large bank retail lending test by introducing performance ranges for comparisons among a bank's lending and demographic and market benchmarks.[14] This quantitative approach would decrease ratings inflation and result in more failing and low satisfactory ratings on the lending test. As a result of this proposed reform, several banks would likely respond by boosting their retail lending to underserved communities.

The agencies proposed improvements to the other subtests of the large bank exam but did not establish as many guidelines for the performance measures, which could contribute to inflation on the subtests. The community development finance test, for example, will consist of a quantitative measure of a bank's ratio of community development finance divided by deposits. The bank's ratio will be compared to a local and national ratio.[15] The agencies, however, did not provide enough guidelines to examiners for comparing the bank's ratio to either the local or national ratio, making it possible for an examiner to inflate a rating by choosing the lowest comparator ratio. In addition, the impact review, the qualitative part of the test, must be more fully developed and contribute in a significant way to the score on the community development test.

The possibilities of misplaced examiner discretion can also occur on the retail services test and the community development services test. The retail services test contains quantitative measures comparing a bank's branch distribution to market and demographic benchmarks but does not provide enough instructions to examiners about how to weigh these benchmarks. Furthermore, the proposal would allow examiners to use their discretion regarding how to weight the component tests of the retail services test, which would create inconsistent exams and could

[12] Josh Silver and Jason Richardson, *Do CRA Ratings Reflect Differences In Performance: An Examination Using Federal Reserve Data*, NCRC, May 2020, https://ncrc.org/do-cra-ratings-reflect-differences-in-performance-an-examination-using-federal-reserve-data/

[13] For studies documenting the impact of CRA, see Lei Ding and 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*, Working Paper No. 17-15, June 19, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2991557, and Lei Ding, Raphael Bostic, and Hyojung Lee, *Effects of the CRA on Small Business Lending*, Federal Reserve Bank of Philadelphia, WP 18-27, December 2018, https://www.philadelphiafed.org/community-development/credit-and-capital/effects-of-the-community-reinvestment-act-cra-on-small-business-lending.

[14] NPR, p. 214.

[15] NPR, pp. 311-315.

contribute to another round of ratings inflation.[16] Below, we ask the agencies to develop weights for the components of the service test and develop more guidelines to examiners about how to use performance measures.

Enhancements to community development definitions will increase responsiveness of banks to community needs

The agencies proposed refinements to the definitions of affordable housing, economic development, climate resiliency and remediation, community facilities and infrastructure that we believe would more effectively target revitalization activities to communities such as persistent poverty counties and Native American communities.

The agencies have clarified that revitalization activities must not displace LMI populations.[17] The anti-displacement provision must be applied to all community development (CD) activities including affordable housing. A final CRA rule that does not adequately protect against displacement would not be upholding CRA's requirement that banks serve the needs of LMI populations and communities. For example, multifamily housing that may initially be affordable but then involves rapid rent increases that pushes out LMI tenants is not serving the needs for housing. Further, needs are not met if housing is kept in poor condition and tenants face harassment. In addition, it will be important that the rule ensure sufficient income targeting, promote access to opportunity and promote fair housing and tenants' rights.

Harmful projects like landfills or fossil fuel facilities that are disproportionately placed in LMI neighborhoods and communities of color must not receive CRA credit under the new definition of CD. Instead, they must be penalized by lowering scores on the CD finance test. The proposed addition of climate adaptation and resiliency measures for CRA credit is an important and positive step forward, reflecting the increasing harms of climate change for vulnerable communities and the ways in which climate resilience is a critical foundation for community health and economic stability and growth.

The NPR clarified that financing health services qualifies under the definition of community support services. Essential community facilities now include hospitals and health centers without current documentation requirements, applied inconsistently, that the financing attract and retain residents to the community.[18] This streamlining would boost financing of critical community infrastructure.

The community development finance test will include an impact review[19] which must be further developed and include points and ratings like the other subtests so that the test can be more effective in stimulating responsive community development activities. We ask the agencies to reconsider their proposal to expand CRA consideration for financial literacy with no income

[16] NPR, pp. 255, pp. 262-267, pp. 296-297.
[17] NPR, pp. 73-74.
[18] NPR, pp. 75-77.
[19] NPR, p. 107.

limits[20]; scarce counseling resources need to be targeted to LMI and other underserved populations.

Finally, we ask the agencies to carefully develop their proposed list of illustrative activities that qualify for CRA to avoid the impression that this list is an exclusive list of approved activities. Novel and responsive activities like financing minority-owned media outlets, childcare centers and workforce development for people with disabilities should be highlighted.

Data improvements will help hold banks accountable but all new data should be publicly available

The agencies correctly proposed to include new data collecting requirements for deposits, community development activities and automobile lending. Some of this data such as deposit and automobile lending would not be publicly available[21], which limits the extent to which the public can hold banks accountable for reaching underserved communities. We ask the agencies to reconsider this decision and also to expand data collection to all large banks instead of just banks with assets of more than $10 billion in the case of deposits and automobile lending.[22] Finally, CRA exams should not only analyze access to deposits accounts for LMI communities but also affordability by comparing and refining, if necessary, fee information collected in call report data.

Accountability for discrimination will increase but the agencies need to bolster their reviews concerning the quality of lending

The agencies proposed to include all activities and products such as deposit accounts in addition to credit in anti-discrimination and consumer protection legal reviews.[23] This is an important advance but we urge the agencies to expand their reviews to include the quality of lending. Massachusetts CRA exams include analysis of delinquency and defaults rates in home lending.[24] Federal CRA exams should do likewise in all major product lines including single family, multifamily, small business and consumer lending. Moreover, reviews of lending must include an affordability analysis and impose penalties when banks offer on their own or in partnerships with non-banks abusive, high-cost loans that exceed state usury caps and that exceed borrowers' abilities to repay. Finally, we are pleased that the agencies added the Military Lending Act[25] to the list of laws to be included in the fair lending review but we urge them to also add the Americans with Disability Act.

[20] NPR, p. 94.
[21] NPR, p. 553.
[22] NPR, p. 385.
[23] NPR, p. 371.

[24] Josh Silver, *Massachusetts CRA For Mortgage Companies: A Good Starting Point For Federal Policy*, NCRC, July 2021, https://ncrc.org/massachusetts-cra-for-mortgage-companies-a-good-starting-point-for-federal-policy/
[25] NPR, p. 371.

Assessment areas are expanded to include online lending but performance in smaller areas needs to be considered more carefully

For several years, advocates have urged the agencies to examine lending that occurs online. The agencies proposed to create retail assessment areas where a large bank does not have branches when a bank has issued 100 home loans or 250 small business loans.[26] This proposal would result in the great majority of total lending being incorporated on exams and would therefore hold non-traditional banks more accountable for serving LMI communities.

We ask the agencies to expand upon their proposal to include partnerships with banks and non-banks for retail lending. When a bank partners with more than one non-bank, the lending of all the non-banks needs to be totaled together for calculating if the threshold is exceeded for purposes of creating assessment areas.

In order to ensure that banks serve smaller metropolitan areas and rural counties, the agencies proposed requiring that banks with 10 or more assessment areas must receive at least a Low Satisfactory rating in 60% of the assessment areas in order to pass overall.[27] This still may not be an adequate solution since the smaller areas could represent a minority of areas, allowing a bank to pass the 60% threshold by focusing on the larger areas. One possible fix is to require banks to achieve at least a Low Satisfactory rating of 60% in each of its large metropolitan, small metropolitan and rural assessment areas. The overall passage rate for all assessment areas should be increased to 70% or higher to ensure banks are responding to community needs across their geographical footprint.

Reclassifying banks as small and intermediate small banks (ISB) would reduce community reinvestment activity

By adjusting asset thresholds for qualifying for various CRA exams, the agencies proposed to reclassify about 779 ISB banks as small banks, which would involve no longer holding these banks accountable for community development finance. In addition, the agencies proposed to reclassify 217 large banks as ISB banks, eliminating their service test and accountability for placing branches in LMI communities.[28] These changes lack justification since these banks have been successfully performing these activities for several years. We urge the agencies to eliminate this aspect of the NPR since it would reduce reinvestment activity.

The question the agencies did not ask in the NPR: how to incorporate race in CRA exams

The agencies assert that the increased granularity of their proposed CRA exams would address racial disparities. For example, they have stated that the proposed lending test would explicitly

[26] NPR, pp. 131-133.
[27] NPR, pp. 368-369.
[28] Mark Pearce, Director, Division of Depositor and Consumer Protection, *Memo on Notice of Proposed Rulemaking on Community Reinvestment Act Regulations*, April 27, 2022, p. 4, https://www.fdic.gov/news/board-matters/2022/2022-05-05-notice-dis-a-mem.pdf

scrutinize lending to the smallest businesses with revenues under $250,000. Since these businesses are disproportionately owned by people of color and women, the bolstered scrutiny of lending to these business would help address disparities in access to credit. The agencies' proposal likewise provided more incentives for banks to finance minority-depository institutions, women-owned depository institutions and community development financial institutions (CDFIs). All of these institutions engage in lending focused on traditionally underserved communities including communities of color. However, their reach remains relatively small compared to their larger counterparts.

As important as these proposed changes are, they fall far short of the measures needed to remedy the persisting legacy of discrimination in the areas covered by the CRA. Ongoing disparities and patterns of discrimination continue, against a backdrop of systemic racism that has plagued our nation for centuries. Systematic racism against African Americans started in 1619 when the first slave ships landed on the east coast. Slavery established debilitating disadvantages that were not sufficiently redressed in the short time period known as Reconstruction. Not long thereafter, private and public sector entities embarked on segregation, designed to separate the races and place African Americans and other people of color in crippling disadvantages.

In the midst of a Great Depression and in a genuine effort to uplift the dispossessed through the New Deal and a program to rescue families from foreclosure, the Roosevelt administration nevertheless invented redlining and exacerbated segregation. Within the administration, there were civil rights figures including Eleanor Roosevelt but the overwhelming racism within society guided the Home Owners' Loan Corporation (HOLC).

HOLC sponsored the creation of maps that classified city neighborhoods by risk they posed to lending institutions. Neighborhoods were color coded – green for the most desirable neighborhoods while red classified the most hazardous ones. The classifications were guided by some objective criteria such as the quality of the housing stock but a heavily weighted factor, if not the predominant factor, was the racial composition of the neighborhoods.[29]

A significant presence of African Americans or an in-migration of African Americans usually resulted in a classification of "hazardous." A presence of other "undesirables" such as Jews or other recent Eastern or Southern European immigrants often propelled a neighborhood into the red category.

These classifications later influenced the maps created by the Federal Housing Administration (FHA). The maps and their racist assumptions subsequently guided public and private sector lending across neighborhoods. In the post-World War II years, FHA-guaranteed lending dominated and contributed to segregated white suburbs and established a white middle class of homeowners. African Americans were systematically excluded – only 1% of mortgage loans

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[29] Bruce Mitchell PhD., Senior Research Analyst and Juan Franco, Senior GIS Specialist, *HOLC "Redlining" Maps: The Persistent Structure Of Segregation And Economic Inequality*, NCRC, March 2018, https://ncrc.org/holc/

from 1930 to 1960 went to African Americans.[30] The institutionalized racism in the public sector and in the lending industry was aided and abetted by the KKK and white supremacist violence.

NCRC studied the impact of the HOLC maps on the fate of the urban neighborhoods classified into the various risk categories.

- We found that nationally, 91% of the areas classified as "best" are middle and upper income today, while 74% of the areas classified as "hazardous" are low- and moderate-income today.
- By race, 85% of the "best" areas are predominantly white today while 63% of the "hazardous" areas are majority-minority.[31]
- The average poverty rate increased from 14.3% in tracts in the lowest quartile of historic redlining score to 28.1% in tracts in the highest quartile of historic redlining score.[32]
- In 2019, Black homeownership was lower than it was when segregation was legal.[33]

NCRC also found statistically significant associations between greater redlining and pre-existing conditions for heightened risk of serious health conditions like asthma, COPD, diabetes, hypertension, high cholesterol, kidney disease, obesity and stroke. All of these conditions made the "hazardous HOLC communities" more susceptible to COVID during the pandemic.

On average, life expectancy was lower by 3.6 years in redlined communities, when compared to the communities that existed at the same time, but were high-graded by the HOLC.[34] In addition to health risk factors, the Center for American Progress found that underserved tracts with high percentages of people of color were also more likely to confront environmental hazards.[35]

NCRC partnered with the University of Richmond to create digital and historical maps of the redlined neighborhoods. One of the centers of the civil rights struggle was the City of Birmingham, Alabama. Yet, predominantly African American communities did not escape the disadvantages created by the HOLC maps. An example is a community called Smithfield Court.

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[30] See slide 39 of Unpacking the Black Wealth Gap, CFPB FinEx Webinar, February 22, 2022, presentation by Dr. Charles Nier, Sr.Counsel, Supervision and Policy, CFPB, https://www.youtube.com/watch?v=l2bmkTQpobE
[31] NCRC, *HOLC "Redlining" Maps*, op. cit., p. 9.
[32] Jason Richardson, *Director, Research & Evaluation*, NCRC Bruce C. Mitchell PhD., *Senior Research Analyst, NCRC*, Helen C.S. Meier, PhD, MPH, *Assistant Professor of Epidemiology, University of Wisconsin – Milwaukee*, Emily Lynch, MPH, *Graduate Student Research Assistant, University of Wisconsin – Milwaukee*m Jad Edlebi, *GIS Specialist, NCRC*, *Redlining and Neighborhood Health*, https://ncrc.org/holc-health/
[33] *Redlining and Neighborhood Health*, https://ncrc.org/holc-health/
[34] Ibid.
[35] Michela Zonta and Caius Z. Willingham, A CRA To Meet the Challenge of Climate Change, Center for American Progress, December 2020, https://www.americanprogress.org/article/cra-meet-challenge-climate-change/

Here is what the appraiser creating the HOLC map said about that community:[36]

- Both sales and rental prices in 1929 were about 20% off from the 1926-28 peak.
- Located in this area is Smithfield Court, a few low-cost slum clearance projects containing 544 units. This area is generally considered real African American property in Birmingham.
- Locations of property within this area justifies policy of selling rather than holding. Vandalism. Difficulty of rental collections.
- City jail in area. Heavy traffic. Pan-American Petroleum Refinery in northwest portion presents fire hazard. Birmingham Gas Co. in area. Obnoxious odors, noises and dirt. Fertilizer plant in area. 3 main line railroads.

The disadvantage continues today. Here are the current socio-economic statistics for the community:

- Percent people of color - 94%
- Life expectancy – 69 years
- Poverty rate - 34%
- Rate of serious health ailments: asthma – 13%, high blood pressure – 56%

Recently, a new study found that public and private sector entities continued to place facilities such as oil rigs that exacerbated the disadvantage of the redlined areas.[37] It seems like once damned, forever damned. Note the refinery and jail recorded by the appraiser in the community above.

The HOLC's racist maps created and codified disadvantage more than 80 years ago. This disadvantage became institutionalized through lending practices, public sector zoning and planning and white supremacist violence. The disadvantage continues to the present day as established by a large body of research that reveals stubborn and persistent racial disparities in lending. The high-cost and abusive subprime lending that was a major cause of the financial crisis in the mid-2000s was targeted to communities of color suffering from a paucity of conventional, prime lending reaching those communities. One NCRC paper controlled for a

[36] For maps of several cities, see https://ncrc.org/holc-health/ and scroll down towards the bottom. For a map and statistics of this community, see https://dsl.richmond.edu/socialvulnerability/map/#loc=11/33.523/-86.812&city=birmingham-al&tract=01073004200

[37] Gonzalez, D.J.X., Nardone, A., Nguyen, A.V. et al. Historic redlining and the siting of oil and gas wells in the United States. J Expo Sci Environ Epidemiol (2022). https://doi.org/10.1038/s41370-022-00434-9 or https://www.nature.com/articles/s41370-022-00434-9#citeas

variety of borrower and loan characteristics and found subprime lending and foreclosures concentrated in communities of color in the District of Columbia metropolitan area.[38]

In a series of papers called *Income is No Shield against Disparities in Lending*, NCRC documented that subprime lending disparities remained or increased by race of borrower when borrower incomes increased. For example, NCRC found that middle- and upper-income African-American females were at least twice as likely to receive high-cost loans as middle- and upper-income white females in more than 84 percent of the metropolitan areas examined.[39]

In the post-subprime lending landscape, racial disparities in lending remain entrenched. Martinez and Kirchner found that people of color were 40% to 80% more likely to be denied with the disparity reaching 250% in some metropolitan areas.[40] A more recent paper by a FDIC economist, using creditworthiness data in addition to a series of variables on borrower and loan characteristics, revealed pricing disparities by race in home loans,[41] which costs communities of color in terms of significant reductions in purchasing power.

This volume of evidence suggests that the federal government has a compelling interest in rectifying decades if not centuries of discrimination. In a recent white paper co-authored with Relman Colfax PLLC, NCRC recommended that performance measures examining lending by race contribute to CRA ratings under a variety of approaches that would pass the strict scrutiny legal standard (if that standard were applied, though we also noted it need not be).[42] CRA history establishes a precedent for borrower race to be considered by CRA exams. Before the CRA regulatory reforms in 1995, federal CRA exams conducted data analysis regarding applications from and loans to people of color as part of Factor D, which considered special purpose credit programs.[43]

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[38] Tamara Jayasundera, Joshua Silver, Katrin Anacker, Denitza Mantcheva, *Foreclosure in the Nation's Capital: How Unfair and Reckless Lending Undermines Homeownership*, NCRC, April 2010, https://ncrc.org/wp-content/uploads/2010/04/ncrc_foreclosure_paper_final.pdf

[39] The National Council of Negro Women and NCRC, *Income is No Shield, Part III: Assessing the Double Burden: Examining Racial and Gender Disparities in Mortgage Lending*, June 2009, https://ncrc.org/wp-content/uploads/2009/07/ncrc%20nosheild%20june%2009.pdf

[40] Emmanuel Martinez and Lauren Kirchner, *The Secret Bias Hidden in Mortgage-Approval Algorithms*, August 25, 2021, in the Markup, https://themarkup.org/show-your-work/2021/08/25/how-we-investigated-racial-disparities-in-federal-mortgage-data and https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms

[41] Stephen J. Popick, *Did Minority Applicants Experience Worse Lending Outcomes in the Mortgage Market? A Study Using 2020 Expanded HMDA Data*, June 2022, p. 13, https://www.fdic.gov/analysis/cfr/working-papers/2022/cfr-wp2022-05.pdf?source=govdelivery&utm_medium=email&utm_source=govdelivery

[42] Brad Blower, General Counsel, NCRC; Josh Silver, Senior Policy Advisory, NCRC; Jason Richardson, Director of Research and Evaluation, NCRC; Glenn Schlactus, Partner, Relman Colfax PLLC; Sacha Markano-Stark, Attorney, Relman Colfax PLLC, *Adding Robust Consideration Of Race To Community Reinvestment Act Regulations: An Essential And Constitutional Proposal*, NCRC, September 2021, https://ncrc.org/adding-robust-consideration-of-race-to-community-reinvestment-act-regulations-an-essential-and-constitutional-proposal/

[43] For an example, consider the CRA exam of Signet Bank, https://www.federalreserve.gov/dcca/cra/1996/460024.pdf

Use performance measures assessing lending to people of color

On an interagency basis, the federal bank agencies should conduct periodic statistical studies and identify metropolitan areas and rural counties that either experience ongoing discrimination or exhibit significant racial disparities in access to credit. In the geographical areas with significant disparities, fair lending performance measures like percent of loans to people of color could contribute to CRA ratings. The racial or ethnic group considered on the CRA exam would be identified based on the interagency analysis of disparities. The racial or ethnic group could be African American, Hispanic, Asian or other categories depending on the findings of the study that found likely discrimination against one or more groups in particular geographical areas.

The performance measures could receive separate ratings or scores and thereby contribute to the ratings for the subtests and for the overall rating. Alternatively, the performance on the racial and ethnic measures could boost a rating if the performance is commendable. We would prefer the first alternative but offer the second in the interests of presenting various options for assuring success against a strict scrutiny standard. Of course, as occurs currently in federal CRA evaluations, if a fair lending review uncovers discrimination, the CRA exam should lower a bank's rating, particularly if the discrimination is not confined to a rogue employee or branch office but is widespread across the institution.

Add a category of underserved tracts to the subtests

In addition to performance measures for people of color, we suggest that the federal bank agencies consider developing a category of underserved tracts. The subtests of the CRA exam would then examine lending, service and community development activities in these tracts just as the exams now do for LMI tracts. In a previous report, NCRC described that underserved tracts would be identified via a metric of loans per capita (using households as the denominator in home lending and small businesses as the denominator for small business lending).[44] Tracts in the lowest quintile of loans per capita would be designated as underserved. The study found that across the nation, 57% of underserved tract residents, on average, were people of color.

While most of the underserved tracts were LMI, 1,265 or almost 13% were middle- and upper-income and also predominantly minority.[45] Therefore, using underserved tracts on CRA exams would be another way to increase the focus on communities of color that are not necessarily LMI but receive low levels of lending as a result of the legacy of redlining. Further, using underserved

[44] Bruce Mitchell, PhD. and Josh Silver, *Adding Underserved Census Tracts As Criterion On CRA Exams,* NCRC, January 2020, https://ncrc.org/adding-underserved-census-tracts-as-criterion-on-cra-exams/
[45] Josh Silver and Jason Richardson, *NCRC Proposal For Underserved Tracts Would Increase Lending In Communities Of Color By Billions Of Dollars*, July 2020, https://ncrc.org/ncrc-proposal-for-underserved-tracts-would-increase-lending-in-communities-of-color-by-billions-of-dollars/. The study cited above by Josh Silver and Bruce Mitchell found that 8,682 underserved tracts were LMI. An additional 1,265 tracts were middle- and upper-income as reported by the July 2020 study.

tracts on CRA exams would have concrete benefits such as remediating health and environmental hazards in those areas by spurring reinvestment, removing hazards and adding greenspace. While overlap would occur among the LMI tract category and the underserved tract category, adding the underserved category to CRA exams would draw bank attention to economically disadvantaged neighborhoods as indicated by the lowest lending levels. These neighborhoods are less likely to be experiencing gentrification and are in need of more private market activity, which is essential for revitalization.

The NCRC and Relman Colfax PLLC white paper identified several other methods for increasing the attention of CRA exams to people and communities of color. For example, CRA regulations should mandate that assessment areas (AAs) cannot arbitrarily exclude communities of color just like AAs currently cannot capriciously exclude LMI tracts. In addition, on the proposed Retail Services and Products Test, CRA exams should consider innovative Special Purpose Credit Programs that target formerly redlined communities.[46] Finally, CRA exam performance context analysis should identify communities of color in the AAs that are underserved and whose needs should be addressed by institutions in the area.

The comprehensive evaluations of people of color and underserved tracts recommended by NCRC would be more effective in rectifying systemic discrimination than the indirect methods in the proposed rule. We are confident that our approach would comply with legal standards.

Answers to questions in the NPR

Below, we answer the questions posed by the proposed rule. Each major section of questions is proceeded by an introduction that summarizes our major views.

Community Development Definitions

The agencies proposed a number of expansions to community development (CD) activities that would benefit low- and moderate-income (LMI) communities and increase the number and variety of services and facilities for these communities, thereby boosting the chances of successful community development. For example, the NPR took positive steps in clarifying that a number of climate remediation activities and infrastructure including health care facilities qualify for CRA consideration. The NPR also increased the focus of community development on LMI communities, persistent poverty counties and Native American areas.

One significant proposal that NCRC asks that the agencies reconsider is the proposal to expand CRA consideration for financial literacy and education initiatives for all income groups,[47] instead of a focus on LMI consumers and other underserved populations most in need of financial

[46] For a recent Department of Housing and Urban Development Memorandum on these programs, see https://www.hud.gov/sites/dfiles/FHEO/documents/FHEO_Statement_on_Fair_Housing_and_Special_Purpose_Programs_FINAL.pdf

[47] NPR, p. 95.

education. In addition, the proposal's objective of encouraging bank collaboration with local government agencies is laudable but should be a factor enhancing performance on qualitative parts of the CRA exam instead of requirement that might inhibit community development activities. In some cases, local government plans could actually fuel displacement of LMI residents and people of color. The agencies must take care not to award bank participation in these plans, particularly when the local community has made its opposition known to the plans.

In this vein, anti-displacement requirements must be added to all categories of community development. Banks should be subject to downgrades at an assessment area or institution level if they engage in a significant number of projects (or a few of a large scale nature) that result in displacement.

Lastly, the agencies should consider increasing the opportunities for CRA to advance and align with fair housing principles by promoting integration and broader housing choice in areas of opportunity, as well preventing displacement. The proposal now includes one specific category of CD in high opportunity areas. Below, we offer more suggestions.

The CRA should also incorporate fair housing principles by doing more to avoid encouraging the concentration of new low-income housing in poorly resourced areas (both by enabling credit for "access to opportunity" and by promoting comprehensive neighborhood investment approaches that include both affordable housing and non-housing resources). The agencies should include strong measures to ensure long-term housing affordability, including deep income targeting. They should promote tenants' rights and fair housing by requiring banks to screen developers and property owners.

Question 1. Should the agencies consider partial consideration for any other community development activities (for example, financing broadband infrastructure, health care facilities, other essential infrastructure and community facilities), or should partial consideration be limited to only affordable housing?

The primary purpose standard, as proposed, would require a majority of dollars of the CD loan or investment to be dedicated to one or more of the categories of community development. An exception to this was proposed for activities for which the bona fide intention is community development. NCRC supports the first prong of the definition but is wary that the second prong, a demonstration of bona fide intent as contemplated by the proposal could lead to abuses in which a small percentage of dollars ends up being devoted to community development.[48] Either the agencies should delete the second prong or specify a certain percentage such as 40% as the floor below which no CRA consideration is offered.

The agencies should consider partial credit in the case of essential infrastructure that spans several census tracts (such as four or more tracts). Partial credit would most likely be applied to large-scale infrastructure such as water treatment facilities or transportation or transit services. For example, if water treatment benefits ten census tracts and only three of these tracts are LMI,

[48] NPR, p. 32.

then 30% of the financing should qualify as CD, not 100%. Full credit would inflate the CD ratio in the proposed CD financing test and would encourage banks to finance large scale projects that have citywide benefits but fewer benefits for LMI communities. Other critical CD needs could then remain unaddressed.

Question 2. If partial consideration is extended to other types of community development activities with a primary purpose of community development, should there be a minimum percentage of the activity that serves low- or moderate-income individuals or geographies or small businesses and small farms, such as 25 percent? If partial consideration is provided for certain types of activities considered to have a primary purpose of community development, should the agencies require a minimum percentage standard greater than 51 percent to receive full consideration, such as a threshold between 60 percent and 90 percent?

NCRC supports the alternative of a 25% floor for partial credit. In the example above, a floor of this nature would encourage planners of essential infrastructure to expand the project's benefits to more LMI tracts, which in that case would be at least three tracts instead of two. Secondly, a majority of the dollars under the primary purpose standard should be more than 51% to encourage more attention to LMI consumers and communities. Sixty percent would increase attention to LMI needs while not eliminating projects from consideration that also benefit non-LMI people and would therefore not eliminate projects in integrating communities or mixed income communities.

Affordable housing activities

Question 3. Is the proposed standard of government programs having a "stated purpose or bona fide intent" of providing affordable housing for low-or moderate-income (or, under the alternative discussed above, for low-, moderate-or middle-income) individuals appropriate, or is a different standard more appropriate for considering government programs that provide affordable housing? Should these activities be required to meet a specific affordability standard such as rents not exceeding 30 percent of 80 percent of median income? Should these activities be required to include verification that at least a majority of occupants of affordable units are low-or moderate-income individuals?

NCRC recommends that affordable housing can qualify under a stated purpose or bona fide intent standard if it is funded under a federal housing program such as HOME that has income guidelines that correspond with CRA's income limits. Likewise, state and local government programs that have documented income guidelines that are the same as CRA's can qualify under this standard. However, there are likely to be other local programs such as inclusionary zoning with income guidelines that may not be as well defined. In those cases, documentation that rent does not exceed 30% of 80% of median income should be used.[49] Also, the majority of occupants of these units should be LMI.

[49] NPR, p. 41 for discussion of use of bona fide intent documentation.

Further, for the impact review part of the community development test, financing that supports a higher percentage of units for the lowest income tenants should receive the most favorable consideration for geographical areas in which housing cost burdens and vacancy rates are particularly unfavorable for the lowest income tenants.

Community group comments are particularly important in this context to ensure that housing financed by banks are affordable and permanent. Downgrades or lower scores should be considered in cases in which the housing units financed are not affordable.

Question 4. In qualifying affordable rental housing activities in conjunction with a government program, should the agencies consider activities that provide affordable housing to middle-income individuals in high opportunity areas, in nonmetropolitan counties, or in other geographies?

We support using the CRA to promote fair housing, including expanded geographical choice. However, we are not in favor of CRA consideration for affordable housing targeted to middle-income households (that is, those with incomes over 80% of area median incomes) in high opportunity areas or in nonmetropolitan counties. We do urge the agencies to motivate the creation and preservation of housing in high opportunity areas for LMI households. LMI households are especially likely to be rent burdened and confront more difficulties finding affordable housing than middle-income households, particularly in high opportunity areas. Community development financing must therefore be targeted to LMI households.

This question is perhaps the only instance in which the NPR addresses the importance of integration and in an indirect way. NCRC urges the agencies to increase their attention to integration efforts and to work with the Department of Housing and Urban Development (HUD) in aligning CRA with the affirmatively furthering fair housing (AFFH) requirements. Under AFFH, local and state governments receiving HUD subsidies must take meaningful actions to overcome patterns of segregation and foster inclusive communities.[50]

CRA must encourage banks to finance affordable housing in high opportunity areas. It should also encourage them to work with local and state agencies in efforts to create more inclusive communities. For example, if a local agency has a program that finances affordable housing in middle- and upper-income communities, banks that help finance housing under this program should receive favorable consideration on their impact reviews that are part of the Community Development Finance test. The proposed collection of CD data could include a data field indicating if an activity contributes to this type of AFFH activity. CRA should also take into account whether high opportunity developments follow best practices in fair housing, such as providing access for Housing Choice Voucher holders; affirmative marketing to promote diverse communities; and providing sufficient family-sized units. Systematic collection of data of this nature would motivate increased participation in integration efforts.

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[50] U.S. Department of Housing and Urban Development, Affirmatively Furthering Fair Housing, https://www.hud.gov/AFFH

Previous NCRC studies of exams of large banks revealed scant attention to integration. The sample of exams found few instances of examiners highlighting banks financing affordable housing in gentrifying areas or mixed income housing in distressed communities. The studies did not find an instance of an examiner touting an affordable housing program in a middle-income community.[51]

Question 5. Are there alternative ways to ensure that naturally occurring affordable housing activities are targeted to properties where rents remain affordable for low-and moderate-income individuals, including properties where a renovation is occurring?

The agencies proposed to consider naturally occurring affordable housing (NOAH) as rental housing whose rent does not exceed 30% of 60% of the area median income of the metropolitan area or non-metropolitan county. The bank would be required to underwrite the loan, taking into account post-construction or post-renovation costs,[52] which the agencies correctly asserted helps assure that the housing remains affordable to LMI tenants.[53]

The agencies considered a standard under which rents would be affordable to moderate-income tenants with up to 80% of area median income but concluded that a higher percentage of middle-income tenants (46%) likely would occupy the units as opposed to the 60% threshold (24%).[54] The agencies made an appropriate choice: the 60% standard would ensure more housing available to LMI tenants while still preserving an element of mixed income housing. In addition, the 60% threshold is used in the Low Income Housing Tax Credits (LIHTC) program with which banks are familiar. Finally in high cost areas with dense urban populations, a lower threshold such as 40% of area median income might be appropriate. The agencies should further consider assessing affordability in large and dense metropolitan areas and applying a 40% standard to those areas.

Question 6. What approach would appropriately consider activities that support naturally occurring affordable housing that is most beneficial for low-or moderate-income individuals and communities? Should the proposed geographic criterion be expanded to include census tracts in which the median renter is low-or moderate-income, or in distressed and underserved census tracts, in order to encourage affordable housing in a wider range of communities, or would this expanded option risk crediting activities that do not benefit low-or moderate-income renters?

In addition to the rent being affordable to a tenant with income at 60% of the area median income, housing would be qualified as NOAH if it met at least one of the following criteria:

- the housing is located in a LMI tract

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[51] Josh Silver, *CRA Could Do a Better Job Promoting Integration*, in the Poverty and Race Research Action Council (PRRAC): Racial Justice in Housing Finance: A Series on New Directions, pp. 60-70, https://prrac.org/pdf/racial-justice-in-housing-finance-series-2021.pdf
[52] NPR, pp. 43-44.
[53] NPR, p. 46.
[54] NPR, p. 45.

- the housing is financed, developed or improved by a nonprofit organization with a mission of providing affordable housing
- the owner of the housing commits in a pledge to preserve affordability for five years or the length of the financing, whichever is shorter
- the bank provides documentation that the majority of the tenants are LMI such as documentation that a majority of the tenants are recipients of Housing Choice Vouchers.[55]

The criterion of a pledge of five years for preserving affordability is too short. Public sector programs have longer affordability periods; for example, the Low Income Housing Tax credit requires affordability for 30 years.[56] The agencies should revise this criterion to have a longer term, particularly since successful programs and financing have included longer terms. This long term affordability restriction should be required across-the-board, not offered in a menu of options.

Credit must not be awarded in instances where low-income tenants are subject to having their rents increased or to facing eviction (where, for example, development occurs in a LMI area or in a building with a significant number of LMI tenants, but affordability is not then maintained as determined by a CRA examiner looking at past community development financing to see if it continues to qualify). Instead of credit being awarded, banks must face possible downgrades depending on the extent to which they finance abusive property owners.

The agencies further specified that at least 50% of the units in a development must meet the affordability criteria described above.[57] The agencies should consider a standard of 60% or 67% of the units meeting these criteria in order to ensure long-term affordability for most of the units in the development.

If the agencies increased the threshold to 67%, then it is more likely that including census tracts that are not LMI but in which the median renter is LMI would generate housing in which most of the units are occupied by LMI tenants. It is desirable to expand the universe of tracts to include these non-LMI tracts in order to promote integration and to expand the opportunities to develop affordable housing (72% of all tracts would be eligible if this subset of non-LMI tracts are included).[58] However, in the case of non-LMI tracts, the agencies need to increase the affordability requirement to 67% of the units.

Given the uncertainties associated with the proposed criteria and if the agencies retain the requirement that just 50% of the units meet the affordability criteria, the proposed criteria should be studied a few years after implementation of a final rule to see if they are targeting rental housing to LMI tenants as intended. If they are, then additional criteria could be considered. If

[55] NPR, p. 44.
[56] Briefing Book, Tax Policy Center, https://www.taxpolicycenter.org/briefing-book/what-low-income-housing-tax-credit-and-how-does-it-work
[57] NPR, p. 46.
[58] NPR, p. 48.

they are not targeting LMI tenants as intended, they would need to be tightened. The NPR does not have enough information to judge the likely impacts of extending the geographic criteria to distressed and underserved areas.

Finally and importantly, any financing of NOAH qualified units should carefully screen against abusive property owners and landlords. If a bank is financing abusive property owners, it must be downgraded. NOAH housing financed by a CRA incentive must be of decent quality with strong tenant protections. The agencies have adopted an anti-displacement provision for LMI residents in the case of place-based revitalization activities discussed below. This provision should be applied in the case of NOAH housing. Below, we offer more specific recommendations regarding this critical point.

Question 7. Should the proposed approach to considering naturally occurring affordable housing be broadened to include single-family rental housing that meets the eligibility criteria proposed for multifamily rental housing? If so, should consideration of single-family rental housing be limited to rural geographies, or eligible in all geographies, provided the eligibility criteria to ensure affordability are met?

As stated below, NCRC maintains that financing affordable rental single-family housing should not be part of the retail lending test. This financing could be part of the CD financing test or the Retail Services and Products Test (but not both tests) provided it meets the NOAH criteria and the units are certified to be affordable and in decent physical condition. The certification could include confining this option to nonprofit developers committed to affordable housing or for-profit owners that commit in writing to complying with any government guidelines to ensure affordable, fair and decent affordable housing. In addition, CRA exams could exclude consideration for single-family rental housing in any LMI or predominantly minority tract in which more than one third of the single family stock became rental in the last five years (this would prevent speculative activity or a rapid ascent of corporate ownership that could price first time homebuyers out of the market).

If a bank discovers subsequent to financing single-family rental housing, that the recipient of the loan is operating rental housing in an abusive manner, the bank should cut off that loan recipient from future financing. CRA examiners should confirm the bank has due diligence procedures and should monitor the lending activity and penalize a bank if it continues to finance an abusive property owner. The expanded allowance in the proposal for past as well as current CD activity to qualify on CRA exams provides an opportunity for CRA examiners to conduct look-back analyses to assess whether past CD loans or investments are fulfilling the mission of providing long-term affordable housing.

Question 8. How should the agencies consider activities that support affordable low-or moderate-income homeownership in order to ensure that qualifying activities are affordable, sustainable, and beneficial for low-or moderate-income individuals and communities?

The agencies proposed to include activities that support LMI homeownership as part of community development. This would include construction loans for single-family developments or bank downpayment assistance. It would not include home lending considered under the Retail Lending Test.[59] The agencies' proposal is constructive in that it emphasizes activities that will expand homeownership for first time buyers and other underserved populations. It also avoids double counting activities in different tests (such as Retail Lending and Community Development).

The agencies mentioned community land trusts as an example of a CD activity that banks can support. The agencies should recognize both land trusts and land banks in the final regulation. Land banks acquire vacant property, disproportionately located in communities of color, and then returns it to productive and responsible use (including establishing community land trusts) in order to increase affordable housing and wealth building opportunities for people of color and LMI residents.[60]

Question 9. Should the proposed approach to considering mortgage-backed securities that finance affordable housing be modified to ensure that the activity is aligned with CRA's purpose of strengthening credit access for low-or moderate-income individuals? For example, should the agencies consider only the value of affordable loans in a qualifying mortgage-backed security, rather than the full value of the security? Should only the initial purchase of a mortgage-backed security be considered for affordable housing?

As described below, a recent paper by a Federal Reserve economist illustrated that the benefits of bank loan purchases has been over-estimated. It is likely that the same applies to investments in mortgage-backed securities (MBS), in comparison to the beneficial and potentially significant impacts of direct lending, investing and services. Because of this, NCRC supports limits on the consideration of MBS. Only the dollar amount devoted to LMI mortgages should be counted as contemplated by the agencies. Also, only the initial purchase of MBS, and no subsequent purchases, should be counted.[61]

Question 10. What changes, if any, should the agencies consider to ensure that the proposed affordable housing definition is clearly and appropriately inclusive of activities that support affordable housing for low-or moderate-income individuals, including activities that involve complex or novel solutions such as community land trusts, shared equity models, and manufactured housing?

NCRC is supportive of innovative financing that includes community land trusts and shared equity models. Financing of manufactured housing must be accompanied by rigorous due diligence to avoid abusive landowners and lenders. Any community development financing could be confined to resident-owned or nonprofit organizations that provide land for manufactured housing. In addition, banks could collaborate with the Government Sponsored

[59] NPR, pp. 50-51.
[60] For more about land banks and vacant properties, see Center for Community Progress, https://communityprogress.org/services/policy-research/
[61] NPR, p. 53.

Enterprises (GSEs) that are required to finance reputable manufactured housing as part of their Duty-to-Serve requirements.

Economic Development

Question 11. Would lending to small businesses and small farms that may also support job creation, retention, and improvement for low- or moderate-income individuals and communities be sufficiently recognized through the analysis of small business and small farm loans and the qualitative review in the Retail Lending Test?

For large banks, the agencies propose to add a qualitative review to the Retail Services and Products test. Banks should be able to submit data on job creation, retention and improvement to examiners for consideration in the qualitative subtest of the Retail Services and Products test. Examiners should favorably consider high levels of job creation and retention. Banks can also submit information on programs and products tailored to microbusinesses and other underserved small businesses. For the intermediate small bank and small bank tests, the agencies could continue the qualitative reviews of the lending test to consider this information.

This proposed approach would be more inclusive than the current approach that does not consider a loan with amounts greater than $1 million unless the bank can demonstrate job creation or retention.[62] Loans with amounts greater than $1 million could also include supporting new equipment or purchases of land or buildings. These loans would now be considered under the Retail Lending Test if they were made to businesses with less than $5 million in annual revenue.

Question 12. During a transition period, should the agencies continue to evaluate bank loans to small businesses and small farms as community development activities until these loans are assessed as reported loans under the proposed Retail Lending Test?

In the case of loans that exceed the dollar maximum of $1 million,[63] the agencies should consider them as community development activities until Section 1071 data is available and used on exams under the proposed Retail Lending Test.

Question 13. Should the agencies retain a separate component for job creation, retention, and improvement for low- and moderate-income individuals under the economic development definition? If so, should activities conducted with businesses or farms of any size and that create or retain jobs for low- or moderate-income individuals be considered? Are there criteria that can be included to demonstrate that the primary purpose of an activity is job creation, retention, or improvement for low-or moderate-income individuals and that ensure activities are not qualified simply because they offer low wage jobs?

Unlike the current regulation, the proposed regulation would not routinely consider financing to small businesses with revenues over $5 million. The main exception to this is if a bank invests in

[62] NPR, p. 57.
[63] NPR, p. 58.

entity identified in the proposed regulation such as a Small Business Investment Company (SBICs) that support some businesses over the $5 million limit.[64] Some allowance for support for larger businesses financed under government programs would accommodate job creation and likely would weed out businesses that take advantage of workers through low wages and poor working conditions. Thus, NCRC suggests that instead of creating a stand-alone criterion for job creation, the allowance for supporting public sector initiatives or certified entities can accommodate this objective.

NCRC asks the agencies to provide CRA credit for non-SBICs owned by people of color and women as long as these companies adhere to SBIC net worth and after-tax income size limits.[65] Women- and minority-owned investment companies often make equity and debt financing available to small businesses owned by people of color and women that would not otherwise have access to this financing.[66] Moreover, the non-SBIC companies face challenges becoming SBICs. Eliminating CRA consideration for bank support of these companies could reduce the financing available for vibrant and growing small businesses originating from traditionally undeserved communities.[67]

NCRC endorses the proposal to specify that CRA consideration would be offered to bank financing of intermediates like Community Development Financial Institutions (CDFIs) that support small businesses with revenues less than $5 million. Finally, NCRC supports listing technical assistance to small businesses and farms with revenues under $5 million as an eligible community development activity. Support for financial intermediaries and technical assistance would further job creation and retention.[68] The impact review should assess financing to CDFIs and intermediaries that focus on the smaller businesses carefully and award more points to banks that are more focused on intermediaries serving the smallest businesses which have the most difficulties assessing credit.

Community Supportive Services

NCRC supports the proposed § __.13(d) that "defines community supportive services as general welfare activities that serve or assist low- or moderate-income individuals, such as childcare, education, workforce development and job training programs, health services, and housing services programs."[69] As the agencies noted, this definition provides more clarity regarding community services and elevates the importance of these critical services. NCRC also supports that the primary purpose of these activities is to support LMI populations and that various tests

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[64] NPR, pp. 61-62.
[65] See "Regulations governing SBICs." Via https://www.sba.gov/partners/sbics/apply-be-sbic
[66] An example of an investment company owned by women of color is the Fearless Fund, https://www.fearless.fund/about
[67] Monika Mantilla, *These Businesses Can Help Drive the Economic Recovery*, March 2020, Aspen Institute, https://www.aspeninstitute.org/blog-posts/these-businesses-can-help-drive-the-economic-recovery/
[68] NPR, pp. 62-63.
[69] NPR, p. 65.

such as the majority of clients receiving free or reduced lunch or Medicaid be employed to verify that most of the clients are LMI.[70]

Bank financial support for childcare is critical, especially as we recover from the pandemic and women with children seek to increase their participation in the workforce. The childcare industry is in precarious condition. According to a recent Federal Reserve Bank of Minneapolis survey, one in five childcare providers said they might be go out of business within a year, and half could not predict their longevity.[71]

NCRC also supports the proposal to consider workforce development as community supportive services.[72] This would mean that workforce development would no longer be tied to financing or supporting small businesses and farms and would therefore receive broader consideration. In addition, NCRC recommends that workforce development for people with disabilities and other disadvantaged populations should be especially highlighted in impact reviews in the CD tests.

Redefining Revitalization and Stabilization Activities

The agencies proposed to reconfigure revitalization and stabilization activities to be in one of six categories:

- revitalization
- essential community facilities
- essential community infrastructure
- recovery activities in designated disaster areas
- disaster preparedness and climate resiliency activities
- qualifying activities in Native Land Areas

The agencies asserted that this clarification of revitalization and stabilization would expand the range of activities qualifying for CRA consideration.[73] For example, disaster preparedness and climate resiliency and Native Land Areas are new categories and should help qualify new and needed activities for CRA consideration.

The agencies proposed that the six activities share four common elements.

- They must benefit LMI census tracts and distressed or underserved nonmetropolitan middle-income census tracts[74]
- They must benefit residents, including LMI residents of the targeted areas[75]

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[70] NPR, pp. 66-67.
[71] Tu-Uyen Tran, *Half of Minnesota child care providers unsure how long they'll remain in business*, Federal Reserve Bank of Minneapolis, May 2022, https://www.minneapolisfed.org/article/2022/half-of-minnesota-child-care-providers-unsure-how-long-theyll-remain-in-business?utm_source=cc&utm_medium=email&utm_campaign=BigBlast&utm_term=child+care
[72] NPR, pp. 63-64.
[73] NPR, p. 68.
[74] NPR, p. 72.
[75] NPR, p. 73.

- They must not displace LMI residents
- They must be conducted in conjunction with a public sector program, plan or initiative[76]

NCRC is supportive of the first three elements. Geographic targeting to underserved areas is necessary to maintain CRA's focus on formerly redlined and disadvantaged communities. The benefits must also be directed to the most vulnerable and disadvantaged residents of the communities including LMI residents. Moreover, it would be contrary to the goals of CRA to displace LMI residents and people of color as a byproduct of these activities. The agencies cite an example of demolishing LMI housing to make way for commercial development.[77] The agencies should also add that financing luxury housing or other developments in gentrifying LMI tracts would displace LMI residents absent any plans to increase the housing stock dedicated to LMI residents. As described below, NCRC advises the agencies to modify the public sector provision.

Question 14. Should any or all place-based definition activities be required to be conducted in conjunction with a government plan, program, or initiative and include an explicit focus of benefitting the targeted census tract(s)? If so, are there appropriate standards for plans, programs, or initiatives? Are there alternative options for determining whether place-based definition activities meet identified community needs?

As stated above, NCRC urges the agencies to reconsider the requirement that the place-based activities be conducted in conjunction with a government, plan, program or initiative. The agencies had a laudable goal of encouraging collaboration among banks and local government agencies, which is not as common as it should be. Combining public subsidies and support with bank financing would generally make community development activities more effective in targeting LMI populations, particularly lower income populations.

However, local governments across a country as large as ours may not always have a program, plan or initiative for the targeted census tracts with which a bank can combine forces. In other cases, a local agency plan or initiative may not be responsive to needs of modest income residents or people of color or might be harmful to their interests. Thus, when banks are unable to find a government partner with a genuinely helpful plan for underserved populations, some community development activities would not be undertaken, contrary to the goals of CRA.

Alternative options for determining whether place-based activities meet community needs would involve community input into the activities. For example, a government plan should be regarded more highly by a CRA examiner if it received documented endorsements from a wide variety of community-based organizations representing people of color and LMI residents. In addition, a CRA examiner could regard a plan highly if it originated from a community-based organization representing people of color and LMI residents.

[76] NPR, p. 74-75.
[77] NPR, p. 74.

Instead of a requirement, NCRC suggests that collaboration with public agencies should bolster a bank's performance on the impact reviews of the proposed CD tests. The proposal to collect CD data can include data fields indicating whether the project included collaboration and the extent of collaboration such as whether it was consistent with an initiative or also used public sector subsidies. More extensive collaboration resulting in impactful CD would earn higher points on the impact reviews.

Along the same lines, CD projects should earn higher points on the impact review if they feature collaboration with several stakeholders. These would include community-based organizations, hospitals, other banks and universities. Such a project is likely to effectively leverage financial and technological resources and be responsive in a comprehensive manner to needs. An example of a project of this nature is Detroit Home Mortgage, which addressed appraisal gaps in communities of color preventing homeownership opportunities. This program features collaboration among banks, housing counselors, foundations, CDFIs and other stakeholders.[78]

Question 15. How should the proposals for place-based definitions focus on benefitting residents in targeted census tracts and also ensure that the activities benefit low-or moderate-income residents? How should considerations about whether an activity would displace or exclude low- or moderate-income residents be reflected in the proposed definitions?

Data on the number of LMI residents and people of color benefiting from the revitalization activities should be part of CD data submissions and considered on impact reviews. In order to demonstrate anti-displacement, the bank can document that the activities did not displace LMI residents and that any new large-scale CD projects did not reduce affordable housing units or displace small businesses or farms. In its documentation, the bank could include attestations from public sector or nonprofit partners that displacement did not occur.

Question 16. Should the agencies include certain housing activities as eligible revitalization activities? If so, should housing activities be considered in all, or only certain, targeted geographies, and should there be additional eligibility requirements for these activities?

It would seem that housing development should be in the affordable housing part of CD, including reclamation of vacant housing. Place-based revitalization activities and housing activities should be given separate consideration, so that it is clear whether disparities in non-housing resources and investments are being adequately addressed. This is particularly important given the extent to which affordable and subsidized housing is often concentrated in low-resourced areas.

Question 17. Should the agencies consider additional requirements for essential community infrastructure projects and essential community facilities to ensure that activities include a benefit to low-or moderate-income residents in the communities served by these projects?

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[78] Detroit Home Mortgage, http://www.detroithomemortgage.org/

The agencies proposed to include in the definition of essential community infrastructure broadband, telecommunications, mass transit, water supply and distribution, and sewage treatment and collection systems.[79] Financing essential community facilities would include, but are not limited to, financing the development of schools, libraries, childcare facilities, parks, hospitals, healthcare facilities and community centers.[80] NCRC supports these examples of essential facilities and infrastructure. NCRC supports the primary purpose standard for essential facilities under which a majority of the dollars benefit LMI people. This standard might be more difficult to apply to large-scale infrastructure. For that reason, NCRC discussed above how to allocate partial credit depending on the number of census tracts served by the infrastructure.

NCRC seeks to ensure that financing grocery stores including supermarkets is part of the definition of community development. The revised definition of economic development would focus more on assisting small business development than attracting larger businesses to LMI and other disadvantaged communities. In general, this is appropriate since CRA should be targeted to financing that may not occur were it not for the incentive supplied by CRA. Financing larger businesses is a market-based activity that is often accompanied by local or state public subsidies. A CRA incentive is not needed in those instances. In contrast, food deserts are a pressing problem in LMI and other disadvantaged communities. In cases in which financing grocery stores involves those larger than the revenue sizes in the retail lending test or in the economic development prong of community development, perhaps this can be considered essential community facilities or infrastructure.

Recently, a Washington Post report on food deserts in the District of Columbia illustrates the paucity of grocery stores in urban neighborhoods of major cities. The report indicated that Anacostia, the eastern part of the city that is lower income and predominantly African American, had lost seven full-service grocery stores from 2010 through 2020 while other parts of the City gained 37 stores. Moreover, over 75% of the food deserts in the City were in Anacostia. While the article mentioned subsidies offered by the City government to support African American grocery stores, the article did not mention a single bank participating in these efforts.[81] This must change and CRA must become more effective in combating food deserts.

Disaster Preparedness and Climate Resiliency Activities

NCRC supports the elevated attention the agencies are placing on disaster preparedness and climate resiliency. At the same time, we caution the agencies that any separate guidance they finalize directing banks to mitigate climate risk must clearly indicate that a new form of redlining, avoidance of LMI neighborhoods or communities of color because of climate risk,

[79] NPR, p. 77.
[80] NPR, Ibid.
[81] Vanessa G. Sánchez, *Black-owned stores work to end D.C.'s food deserts*, Washington Post, July 7, 2022 https://www.washingtonpost.com/dc-md-va/2022/07/07/dc-food-deserts-anacostia/

would not be tolerated.[82] Instead, the agencies should make clear that the CRA reform will mitigate climate risk in underserved neighborhoods by encouraging banks to engage in climate remediation in these communities.

Question 18. Should the agencies consider any additional criteria to ensure that recovery of disaster areas benefits low-or moderate-income individuals and communities?

The impact review of the community development finance test should consider data provided by a bank on the extent to which LMI individuals and communities benefit from bank financing of disaster-recovery activities. A bank's score on the impact review would be bolstered by disaster recovery financing that targets a higher percentage of LMI individuals and communities.

Question 19. Does the disaster preparedness and climate resiliency definition appropriately define qualifying activities as those that assist individuals and communities to prepare for, adapt to, and withstand natural disasters, weather-related disasters, or climate-related risks? How should these activities be tailored to directly benefit low-or moderate-income communities and distressed or underserved nonmetropolitan middle-income areas? Are other criteria needed to ensure these activities benefit low-or moderate-income individuals and communities?

The agencies document that LMI individuals and communities are more vulnerable to disasters since they reside in housing that is of poorer quality and in communities that are not as well prepared to withstand disasters.[83] They therefore appropriately expand community development activities to include proactive activities related to protection against floods and other natural disasters in addition to the current definition that focuses on recovery from natural disasters.

The agencies contemplated that climate resiliency activities include energy efficiency improvements or renewable energy projects that benefit affordable housing, small businesses and community facilities.[84] NCRC supports an expansion of climate resiliency activities in this manner in order to benefit LMI individuals and communities in a holistic manner. Other illustrative examples listed by the agencies include investments in green space to reduce heat in LMI communities and helping small farms with drought resistance.[85]

The agencies proposed that these activities must benefit LMI tracts and distressed and underserved nonmetropolitan middle-income census tracts. This is appropriate targeting to ensure that LMI individuals benefit from these activities. The agencies also decided these activities would not be targeted to designated disaster areas, which is appropriate considering these areas may include several non-LMI tracts that generally would have more resources for financing these activities.[86]

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[82] OCC Seeks Feedback on Principles for Climate-Related Financial Risk Management for Large Banks, News Release 2021-138, December 16, 2021, https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-138.html
[83] NPR, p. 81.
[84] NPR, p. 82.
[85] NPR, p. 83.
[86] NPR, p. 85.

Question 20. Should the agencies include activities that promote energy efficiency as a component of the disaster preparedness and climate resiliency definition? Or should these activities be considered under other definitions, such as affordable housing and community facilities?

Activities that promote energy efficiency are well suited for the disaster preparedness and climate resiliency definition. Clearly, there will be instances in which energy efficiency improvements will benefit affordable housing and community facilities. When the benefits are multiple, the community development data collection can include data fields indicating whether the financing also promoted affordable housing, or community facilities and/or community infrastructure. Energy efficiency financing that has multiple benefits would boost a bank's performance in the impact review of the community development finance test.

Question 21. Should the agencies include other energy-related activities that are distinct from energy-efficiency improvements in the disaster preparedness and climate resiliency definition? If so, what would this category of activities include and what criteria is needed to ensure a direct benefit to the targeted geographies?

Renewable energy projects can be distinct from energy-efficiency improvements and are one example of activities that should be included in the disaster preparedness and climate resiliency definition. In order to ensure a direct benefit to targeted geographies, a bank should prepare documentation including verifiable data to present to examiners.

Question 22. Should the agencies consider utility-scale projects, such as certain solar projects, that would benefit residents in targeted census tracts as part of a disaster preparedness and climate resiliency definition?

A city-wide utility scale project should not receive CRA consideration because CRA is intended to benefit LMI and other underserved communities. However, if such a project focuses on the targeted geographical areas and documentation can verify this targeting, it should receive CRA consideration. For example if a city-wide solar project is able to document that a certain percentage of the project benefits LMI neighborhoods, then partial credit should be allocated based on the percentage of dollars for LMI neighborhoods.

Question 23. Should the agencies include a prong of the disaster preparedness and climate resiliency definition for activities that benefit low-or moderate-income individuals, regardless of whether they reside in one of the targeted geographies? If so, what types of activities should be included under this prong?

Usually, disaster preparedness and climate resiliency activities for LMI individuals would take the form of a home improvement loan or open-end loan. As discussed below, NCRC recommends that home improvement lending be evaluated on the Retail Lending Test and requests the agencies to consider the extent to which home equity lines of credit (HELOCs) and other open-end loans meet these needs before deciding whether to include them on the Retail Lending Test. The Retail Service and Products test can consider the qualitative aspects of home lending that includes climate resiliency. If the agencies do not include activities that help LMI individuals in these tests, then it could be appropriate to consider them in the Community Development Financing Test. The same would apply in the case of small businesses with revenues less than $1 million.

Question 24. Should the agencies qualify activities related to disaster preparedness and climate resiliency in designated disaster areas? If so, are there additional criteria needed to ensure that these activities benefit communities with the fewest resources to address the impacts of future disasters and climate-related risks?

As discussed in the answer to Question 19, NCRC does not support qualifying these activities in designated disaster areas.

Question 25. Should the agencies also include in the MDI definition insured credit unions considered to be MDIs by the National Credit Union Administration?

The NCUA considers a credit union to be a MDI if a majority of its members, board of directors and the community it serves are minority as defined by Section 308 of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989.[87] Section 308 defines a MDI as one in which more than 51% is owned by socially and economically disadvantaged individuals. Further, the “term "minority" means any black American, Native American, Hispanic American, or Asian America.”[88]

Generally, a minority owned bank or business has more than 51% of its owners that are people of color. This does not appear to be a criterion of the NCUA definition though the agency references a provision of FIRREA that defines a MDI in this manner. Scanning the MDI database created by the NCUA reveals that of the approximately 500 MDIs,[89] several are smaller institutions with membership in the hundreds or thousands. Many of these are also designated as low-income credit unions.[90] Perhaps the smaller NCUA MDIs can be classified in NCUA’s manner. However, those with 50,000 or more members should qualify under FIREA’s Section 308 definition.

Although not asked by this question, NCRC supports the proposal to automatically consider bank activities in partnership with a Treasury-certified CDFI to qualify for CRA consideration.[91]

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[87] NCUA, Minority Depository Institution Preservation, https://www.ncua.gov/support-services/credit-union-resources-expansion/resources/minority-depository-institution-preservation
[88] Board of Governors of the Federal Reserve System, *Preserving Minority Depository Institutions*, https://www.federalreserve.gov/publications/2013-preserving-minority-depository-institutions-section-308-firrea.htm
[89] NCUA, Minority Depository Institutions Annual Report to Congress, 2020, https://www.ncua.gov/files/publications/2020-mdi-congressional-report.pdf
[90] NCUA, Minority Depository Institutions, https://www.ncua.gov/support-services/credit-union-resources-expansion/resources/minority-depository-institution-preservation/mdi
[91] NPR, p. 93.

Question 26. Should the agencies consider activities undertaken by an MDI or WDI to promote its own sustainability and profitability? If so, should additional eligibility criteria be considered to ensure investments will more directly benefit low-and moderate-income and other underserved communities?

The agencies could apply a size cut-off since larger institutions are more likely to undertake these investments in the normal course of business. If a MDI or WDI is a small or ISB bank, well defined investments in their capacity could receive CRA consideration but this should not extend to large banks that are MDIs or WDIs.

CRA consideration for financial literacy should not be extended to all income groups

Question 27. Should consideration of financial literacy activities expand to include activities that benefit individuals and families of all income levels, including low-and moderate-income, or should consideration be limited to activities that have a primary purpose of benefiting low-or moderate-income individuals or families?

The purpose and intent of CRA is to focus on historically redlined communities and the impact of this discrimination on generations of people of color. Any exceptions to the LMI focus should further the statutory intent to counter discrimination and serve neglected populations. For example, financial education to people of color of varying income levels should count since people of color continue to experience widespread discrimination. Data analysis, including the FDIC surveys of unbanked populations, show less access to banking for people of color. Another population that should be targeted is people with disabilities, who confront significant barriers in accessing banking services.

As documented by the FDIC, LMI households were the most likely to be under- or unbanked compared to other income groups.[92] They had the lowest homeownership rates and the lowest level of assets.[93] Therefore, financial education and housing counseling must be targeted towards LMI households and the groups noted above in order to correct for the impacts of discrimination and less access to banking for this population. Financial education must be targeted for LMI households in order to most effectively promote healthy lending and housing markets in LMI communities with educated consumers. Diverting limited resources away from the financial education of LMI people is not justified and is counterproductive.

A survey of NCRC members revealed that 90% of the 50 respondents indicated that banks offered counseling in conjunction with NCRC member organizations.[94] Counseling appears to be

[92] FDIC National Survey of Unbanked and Underbanked Households, 2017, p. 19, https://economicinclusion.gov/downloads/2017_FDIC_Unbanked_HH_Survey_Report.pdf.
[93] Rakesh Kochhar and Anthony Cilluffo, *How wealth inequality has changed in the U.S. since the Great Recession, by race, ethnicity and income*, Pew Research Center, November 2017: people of color in the lower income ranges had the lowest levels of wealth and homeownership rates among all population groups https://www.pewresearch.org/fact-tank/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/.
[94] Josh Silver, *Survey Results: NCRC Members Highlight CRA Reform Benefits, But Note Gaps Too*, NCRC, July 2022, https://www.ncrc.org/survey-results-ncrc-members-highlight-cra-reform-benefits-but-note-gaps-too/

a common bank CD service and as such must continue to be targeted to the populations most in need of it.

Other than the limited exceptions noted above based on documented need, financial education[95] and counseling must not be offered without regard to income levels and remain eligible for CRA credit. The agencies should also clarify that the proposal to open up financial literacy to all income levels does not apply to housing or homeownership counseling. It does not appear so since "supportive housing services" is an example of community supportive services which is targeted to LMI populations.[96] NCRC would oppose allowing banks to offer supportive housing services to all income groups.

Native Land Areas

Question 28. To what extent is the proposed definition of Native Land Areas inclusive of geographic areas with Native and tribal community development needs?

The agencies proposed in § __.12, "to define "Native Land Areas" to include the following geographic areas: Indian country, land held in trust by the United States for Native Americans, state American Indian reservations, Alaska Native villages, Hawaiian Home Lands, Alaska Native Village Statistical Areas, Oklahoma Tribal Statistical Areas, Tribal Designated Statistical Areas, American Indian Joint-Use Areas, and state-designated Tribal Statistical Areas."[97] According to the agencies, they developed this list to be comprehensive and responsive to comments received by stakeholders.[98] NCRC supports an inclusive list given the past and ongoing discrimination against Native Americans.

Question 29. In addition to the proposed criteria, should the agencies consider additional eligibility requirements for activities in Native Land Areas to ensure a community development activity benefits low-or moderate-income residents who reside in Native Land Areas?

The agencies proposed that community development activities such as revitalization and essential community infrastructure would count on CRA exams if targeted to Native Land Areas.[99] NCRC is fully supportive of this proposal to specifically list Native American Lands as a target geography and to encourage increases in bank financing and activities in these areas.

In addition, this proposal would provide extra assurances that community development financing would reach Native Land Areas, given that AAs have generally not covered Native Land Areas. Although the proposed reforms would recognize community development activity outside of AAs, Native Land Areas should be elevated in importance so that banks do not continue to neglect them in favor of other areas outside of AAs. In fact, the impact review of the community development test should reward banks by giving them higher points if they make a greater

[95] NPR, pp. 93-95.
[96] NPR, p. 65.
[97] NPR, pp. 97-98.
[98] NPR, p. 99.
[99] NPR, p. 100.

percentage of community development financing in Native Land Areas and other underserved and disadvantaged areas.

Question 30. Should the agencies also consider activities in Native Land Areas undertaken in conjunction with tribal association or tribal designee plans, programs, or initiatives, in addition to the proposed criteria to consider activities in conjunction with Federal, state, local, or tribal government plans, programs, or initiatives?

NCRC agrees with the position of Native Community Capital that as long as tribal associations and tribal designee plans, programs or initiatives can be shown to be majority Native-led and endorsed by the tribal government or at least not actively opposed by a tribal government, the agencies should consider such activities.

CRA illustrative list of activities and verification procedures

Question 31. Should the agencies also maintain a non-exhaustive list of activities that do not qualify for CRA consideration as a community development activity?

We are not sure about the utility of a list of activities that do not qualify as community development (CD). If the agencies opt to make a list of this nature, we advise that it be short. Perhaps activities that do not count can be illustrated in conjunction with activities that do count as described below.

In general, NCRC advocates for a principles-based list, which would be shorter than the previous OCC's list of qualified CRA activities. We are concerned that an extensive list like the OCC's would evolve into an ad hoc listing of numerous CRA activities that would end up deluging readers rather than enlightening them. A principles-based list would explain complex issues and illustrate how the definition of CD would work in practice.

The agencies must develop a non-exhaustive list of qualified activities carefully and explain the list in order to avoid banks not engaging in activities that are not included in the list. The banks could develop a tendency to refrain from activities that are not on the list for fear of not receiving credit on CRA exams. This would reinforce an undesirable outcome that some allege occurs today due to uncertainty as to what activities count.

A principles-based list would tackle the most complicated questions regarding what counts and would provide more certainty for banks and community-based organizations. Highly technical matters can also be discussed by the CRA qualified list. For example, refined guidance regarding investments in municipal bonds could be discussed in a list of this nature, including the following recommendation form the Center for American Progress (CAP). CAP states that:

> Municipal bonds would have to be certified as serving low- and moderate-income communities and communities of color, meet green guidelines modeled after either the Green Bond Principles established by the International Capital Market Association or the

Climate Bonds Standard established by the Climate Bonds Initiative and meet the Principles of Environmental Justice.[100]

Other examples of green investments could also be discussed, such as financing for organic farms that use renewable energy.[101] Similarly, examples of community development financing that support affordable and sustainable manufactured home production (as opposed to predatory financing) should be illustrated.

Another program benefiting from clarification in a list of eligible activities is lender fee-for-service payments for housing counseling services. Housing counseling is a critical and under-funded resource to prepare underserved populations for homeownership opportunities. A fee-for-service model, if adopted on a widespread basis, could be instrumental in increasing housing counseling and providing significantly more homeownership and wealth building opportunities for people of color and LMI borrowers.

In the area of small business and infrastructure development, the list should state that financing and supporting Black, Indigenous and People Of Color ("BIPOC") and other media outlets that prioritize traditionally underserved communities (collectively referred to as "Equitable Media") is an important priority. Stakeholders often do not contemplate media companies as examples of small businesses that should be supported in underserved communities. However, Equitable Media is an important communication lifeblood in these communities informing residents of community development opportunities as well as obstacles such as environmental hazards that need to be overcome. In some instances, BIPOC-owned broadcast companies will have annual revenues exceeding $5 million and as such should be regarded of essential infrastructure eligible for CD financing.

A carefully developed illustrative list would not be an ad hoc or miscellaneous discussion of examples but would establish principles for establishing what counts for CRA, particularly instances that involve complexity or careful distinctions between what is useful as opposed to destructive for communities. A principles-based list can be supplemented by an interactive database that is updated frequently and could include hundreds or thousands of examples of CD financing and services that counted on CRA exams. This could be creative and even include pictures, visuals, descriptions of client reactions (e.g., how the financial literacy class helped me) and have data on impacts such as the number of housing units created or jobs created. The database could be updated regularly. This would hopefully inspire and motivate the replication of these activities.

Lastly, we must caution that inclusion on a list of eligible activities does not provide carte blanche for an activity. If an eligible community development activity is conducted in a manner that disadvantages or displaces LMI and people of color, it should not receive credit and should

[100] Michela Zonta and Zoe Willingham, *A CRA To Meet the Challenge of Climate Change: Advancing the Fight Against Environmental Racism, Center for American Progress, December 2020,* https://www.americanprogress.org/issues/economy/reports/2020/12/17/493886/cra-meet-challenge-climate-change/

[101] Zonta and Willingham, *A CRA to Meet the Challenge of Climate Change.*

possibly result in a downgrade at a AA or institution level. The agencies must make clear that the list of eligible activities does not automatically qualify an activity on an exam without consideration of the implementation of the activity.

Question 32. What procedures should the agencies develop for accepting submissions and establishing a timeline for review?

The most transparent and fair method for updating a list of CRA qualified activities would be through regular requests for public comment on proposed revisions and additions to the list. The agencies, especially in the early years after a new CRA regulation, should request comments twice a year (eventually, the process could move to an annual one). Before each comment period, the agencies could solicit suggestions from both banks and community organizations regarding proposed activities. The agencies then would decide which activities they would propose adding to the list. They would request comment on the new additions as well as modifications to existing activities on the list. This process provides all stakeholders with the same opportunities for influencing an important list of this nature. It could also foster collaboration where banks and community groups are suggesting proposals together.

After a public comment period and agency revisions, a revised list could be published in a manner similar to the Interagency Question and Answer (Q&A) document, which is currently published in the Federal Register. It would seem that the model of the Interagency Q&A publication would be more appropriate than an appendix to the regulation since the list would be a non-exhaustive list of examples of qualified CRA activities just like the Q&As are a non-exhaustive list of guidelines for CRA. The agencies should not discard the Interagency Q&A document since it not only discusses what counts but also involves a number of additional issues such as data reporting. Ultimately, the agencies would need to determine how the list of qualified activities relate to the Interagency Q&A document.

A pre-approval process should be open for community-based organizations as well as banks. We ask the agencies to reconsider their proposal to only accept submissions from banks and we note the OCC opens up the process to both banks and community-based organizations.[102] Community- based organizations would be able to present their proposals for activities to banks with more confidence if they had assurances that particularly new or novel approaches would be CRA eligible. Likewise, banks would have more confidence in collaborating with community organizations if an activity had received pre-approval.

A pre-approval process should be flexible and be able to accommodate questions about specific transactions as well as more general questions about CRA eligible activities. The receptiveness to specific proposals would facilitate new forms of financing or other innovations. Likewise, the willingness to answer general questions would increase efficiency for local stakeholders that are not steeped in knowledge of CRA regulations and accompanying guidance. If the agencies are overwhelmed by the volume of inquiries, particularly at the inception of a pre-approval process,

[102] NPR, p. 105.

they will need to develop triage mechanisms such as grouping similar issues together in a response or accommodating some questions via forums and webinars.

Question 33. Various processes and actions under the proposed rule, such as the process for confirming qualifying community development activities in § __.14, the designation of census tracts in § __.12, and, with respect to recovery activities in designated disaster areas, the determination of temporary exception or an extension of the period of eligibility of activities under § __.13(h)(1), would involve joint action by the agencies. The agencies invite comment on these proposed joint processes and actions, as well as alternative processes and actions, such as consultation among the agencies, that would be consistent with the purposes of the Community Reinvestment Act.

See the answers to Question 32 regarding joint action by the agencies to update the list.

Impact Review of Community Development Activities

The agencies proposed to require collection of community development data from large banks and to create a publicly available database with this information. Part of this database should include robust data for the impact review that the agencies can use to evaluate a bank's responsiveness to needs. We advocate for points on the impact review section of the community development tests that would be awarded partly based on the data on impacts. The agencies are contemplating a similar evaluation for the impact review, stating "A greater volume of activities aligning with the impact review factors would positively impact conclusions for each test."[103] However, as discussed below, we urge the agencies to introduce a point system and weights for the impact reviews so that examiners can use the data in a clearer and more transparent way to evaluate performance.

The type of financing should be recorded in data fields that indicate whether the financing was a loan, an investment or a grant. As the agencies acknowledge, grants would receive less consideration under the proposed quantitative metric which would be a ratio of community development financing divided by deposits.[104] However, the impact review could award relatively high dollar amounts of grants per assets or a high percentage of grants out of total financing. Because grants reflect low-cost financing needed by nonprofit organizations, including those lead by people of color engaged in CD, they need elevation on the impact review part of the CD test.

For each community development activity, a data field should indicate whether it was conducted in *collaboration with a public agency*. Different codes could be assigned that would capture the extent of collaboration so that the agencies can award higher points based on the extent of the collaboration. Codes could capture whether the activity was in conjunction with a program, a plan or an initiative. Program and plans would earn higher points, particularly if a majority or

[103] NPR, p. 107.
[104] NPR, pp. 116-117.

more of the activities were executed in conjunction with plans or programs. Also, another data field could indicate if the activity was done in conjunction with a local or state AFFH plan.

For affordable housing, data fields could capture the number of affordable units produced, the number of units affordable to low-income tenants or homeowners and the number of units affordable to moderate-income tenants or homeowners. In areas with particularly low vacancy rates for low-income families and high housing cost burdens for low-income families, higher percentages of units for low-income families would earn more points on the impact review. In response to the agencies' question about special consideration for low-income individuals and families,[105] a careful construction of the CD databases detailing how many low-income families or residents were assisted would enable examiners to do just that.

Regarding economic development, the data fields could contain dollar allocations to CDFIs, other intermediaries that focus on small businesses with revenues less than $5 million and government-certified entities such as Small Business Investment Companies (SBICs). The examiner could then calculate the dollar amounts and percent allocations to each category of intermediaries and make judgements regarding how many points the bank would earn on the economic development part of community development. Higher percentages of dollars to smaller CDFIs as opposed to more established SBICs, particularly in poorer parts of the country such as the South, would earn more points.

Essential community supportive services could have data fields such as the number and percentage of LMI clients served, the number of beds in a health facility, the number of counseling sessions and outcomes of counseling such as increases in savings rates or credit scores. These data fields could include categorical, numerical and text fields for notes. Other data fields should record services to underserved populations such as people with disabilities, older adults and first time homebuyers.

Essential community infrastructure could include data fields on the numbers and percentages of LMI residents served by transit or other transportation projects, the number of LMI households with access to the internet and the number and percentage of LMI households or census tracts benefiting from water treatment.

Climate resiliency and disaster preparedness should include data fields concerning the numbers and percentages of LMI families or households benefiting from these activities. Other data fields could capture improvements in energy efficiency or decreases in neighborhood heat associated with greenspace. Over time, examiners would gain a better sense of which activities are most impactful based on standard measures associated with energy efficiency or heat reduction.

Geographical targeting could also be captured in the database with a data field containing a categorical variable assigning codes to persistent poverty counties, areas with low levels of community development, Native Land Areas and other targeted areas. With this data field, an

[105] NPR, pp. 112-113.

examiner can award higher points on the impact review to banks that target a higher number and percentage of priority areas.

Multifaceted and innovative activities: The agencies appropriately recognized that multifaceted and innovative activities should be awarded by the impact review.[106] For each activity, a well-constructed database could indicate if it involved one or more forms of financing, if it involved technical assistance and if the bank was in a leadership position (without the bank's participation, the activity would not have happened). The impact review could then tally the number and percent of activities that were multifaceted. Likewise, a data field could indicate if the activity was innovative for the bank (the bank had not done it before) or was innovative for the geographical area (the activity had not occurred in the area before). The number and percent of innovative activities would also be a factor in the impact review.

Overall, performance context should be used to judge the allocation of activities across these categories. All of these activities are critical for LMI communities, however, the performance context data should help guide judgments about the percentage of financing devoted to each category. For example, as discussed below, if unemployment is high in a geographical area but housing availability is not as pressing, a low percentage of funding for economic development could lower the impact score. Conversely, an area with an acute shortage of affordable housing or high housing cost burdens would not be assisted if a bank spent an inordinate amount of CD funding on road repaving.

Activities that reduce long standing disparities such as racial disparities in wealth should score highly on an impact review. Banks should be encouraged to provide data related to reducing longstanding disparities either nationally or locally.

The examiners should be trained in conducting due diligence regarding the data the bank submits for the impact review. The examiners should ask for documentation regarding a robust sample of the activities and should also engage community stakeholders regarding their opinions regarding the extent to which the activities were responsive to needs or were multifaceted or innovative.

Finally, examiner training will need to be improved vastly to improve the rigor of qualitative judgements on the impact review. Narratives in the CRA exam cannot be general but should describe in detail the extent to which banks' activities were responsive to need.

[106] NPR, pp. 117-118.

Question 34. For the proposed impact review factors for activities serving geographic areas with high community development needs, should the agencies include persistent poverty counties, high poverty census tracts, or areas with low levels of community development financing? Should all geographic designations be included or some combination? What considerations should the agencies take in defining these categories and updating a list of geographies for these categories?

NCRC recommends that the agencies include these three geographical areas and include a categorical variable discussed above that would capture which of the areas a particular activity benefited. Each of the categories include a mix of areas that need community development activity. As the agencies documented, persistent poverty counties have a poverty rate of 20% over three decades and would include large rural areas in need such as Appalachia, the Mississippi Delta and Colonias regions.[107] High poverty tracts are those with poverty rates of 40% or higher and would bring in several urban neighborhoods.[108]

Areas with low levels of community development are also likely to include LMI tracts and communities of color disproportionately. NCRC had previously found that underserved counties as measured by low levels of retail lending had disproportionately high percentages of African Americans.[109] It is likely that this would be the case as well in counties with low levels of community development financing. Therefore, it is probable that focusing on areas with low levels of community development would target several areas with high percentages of people of color.

Question 35. For the proposed factor focused on activities supporting MDIs, WDIs, LICUs, and Treasury Department-certified CDFIs, should the factor exclude placements of short-term deposits, and should any other activities be excluded? Should the criterion specifically emphasize equity investments, long-term debt financing, donations, and services, and should other activities be emphasized?

In NCRC's discussions with CDFIs, we have learned that CDFIs like the other entities listed in this question experience a dearth of long-term patient capital at below market rates. The agencies recognize this in their NPR discussion.[110] The impact review database should include at least a categorical data field with codes for investments, grants, loans and other financing. Another field should record the term of the financing in months or years. An additional field should indicate whether the financing is below market. Higher points would be awarded to longer term and more affordable finance.

[107] NPR, p. 110.
[108] NPR, p. 111.
[109] Josh Silver and Bruce Mitchell, PhD., *How To Consider Community Development Financing Outside Of Assessment Areas By Designating Underserved Counties*, NCRC, January 2020, https://ncrc.org/how-to-consider-community-development-financing-outside-of-assessment-areas-by-designating-underserved-counties/
[110] NPR, p. 112.

Question 36. Which of the thresholds discussed would be appropriate to classify smaller businesses and farms for the impact review factor relating to community development activities that support smaller businesses and farms: the proposed standard of gross annual revenue of $250,000 or less, or an alternative gross annual revenue threshold of $100,000 or less, or $500,000 or less?

As discussed above, the CD database should include data fields for the economic development criterion. Data fields should capture separately the number and amount of businesses assisted by the CD activity with revenues of up to $100,000 and with revenues ranging from $100,000 to $250,000. These are the businesses that are likely to be most in need of credit or technical assistance since they are likely to be younger; start-ups and younger firms generally have a harder time getting approved for loans. At first, banks and the intermediaries may not have data routinely on revenue sizes of businesses assisted, but over time the collection of this important CD data would encourage banks to work with intermediaries to make this a regular part of data collection.

Question 37. For the proposed factor of activities that support affordable housing in high opportunity areas, is the proposed approach to use the FHFA definition of high opportunity areas appropriate? Are there other options for defining high opportunity areas?

The CD database should record financing of affordable housing in high opportunity areas since this would promote integration and access to opportunities for LMI households. The number of units overall and the number and percent of units for low-income and moderate-income households should be recorded.

Question 38. For the proposed factor to designate activities benefitting or serving Native communities, should the factor be defined to include activities benefitting Native and tribal communities that are not located in Native Land Areas? If so, how should the agencies consider defining activities that benefit Native and tribal communities outside of Native Land Areas?

NCRC advises the agencies to consult with the National Congress of Americans Indians and national, regional and state organizations that have as their members elected tribal leaders such as but not exclusive to the Alaska Federation of Natives, Affiliated Tribes of Northwest Indians, Southern California Tribal Chairman's Association, Inter Tribal Council of Nevada, Inter Tribal Council of Arizona, All Pueblo Council of Governors and United South and Eastern Tribes. Further, we agree with Native Community Capital that activities carried out by Urban Indian organizations that receive federal funds intended for enrolled Native Americans residing in urban areas should also be considered.

Assessment Areas and Areas for Eligible Community Development Activity

Advocates have been urging the agencies for several years to expand assessment areas, geographical areas on CRA exams, to include areas beyond bank branches where banks make significant numbers of retail loans. The proposed expansion of assessment areas creates parity among traditional banks and online lenders and would hold both accountable for making loans to

LMI borrowers and communities. In addition, expanding assessment areas (AAs) likely would result in more lending to LMI borrowers and communities. Research has demonstrated that banks make a higher percentage of their loans to LMI borrowers and census tracts in their AAs than in areas that are not designated as AAs on their CRA exams.[111] This makes intuitive sense because banks will try harder to make loans to LMI populations where they are rated.

The agencies proposed to create retail lending assessment areas (RLAAs) where a large bank does not have branches but in areas with sizable numbers of home or small business loans. The agencies state that it is "appropriate to evaluate large banks' retail lending in retail lending assessment areas on a local basis because it accords with CRA's focus on a bank's local performance in meeting community credit needs. A local evaluation promotes transparency by providing useful information to the public and banks regarding their performance in specific markets."[112]

NCRC agrees with the agencies' assessment because it furthers the law's purpose in §2901 that banks "are required by law to demonstrate that (they) serve the convenience and needs of the communities in which they are chartered to do business."[113] In addition, §2903 requires the federal bank agencies to "assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution."[114] This statutory mandate requires the agencies to assess banks' records of meeting needs in geographical areas where banks are chartered to do business and these areas include where they are lending *or* where they are taking deposits. RLAAs therefore appropriately cover areas where they are lending.

The thresholds for establishing RLAAs are 100 home loans or 250 small business loans in each of the last two most recent years.[115] The agencies calculated that this proposal would cover the great majority of loans that all banks make in all of their assessment areas (90% in the case of mortgage lending and 84% in the case of small business lending).[116]

The proposal to cover the great majority of lending is critical in that NCRC has found that ratings inflation is more likely on the lending test when less than 75% of lending is covered by

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[111] Lei Ding and 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*, Working Paper No. 17-15, June 19, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2991557, and Lei Ding, Raphael Bostic, and Hyojung Lee, *Effects of the CRA on Small Business Lending*, Federal Reserve Bank of Philadelphia, WP 18-27, December 2018, https://www.philadelphiafed.org/community-development/credit-and-capital/effects-of-the-community-reinvestment-act-cra-on-small-business-lending. Urban Institute, Housing Finance Policy Center, January 2022, *Bank lending outside CRA assessment areas*, https://naahl.org/wp-content/uploads/2022/01/Urban-CRA_Project-CRA-Assessment-Areas-v12.pdf
[112] NPR, p. 130.
[113] 12 USC Ch. 30, §2901, https://www.law.cornell.edu/uscode/text/12/2901
[114] 12 USC, Ch. 30, §2903 https://www.law.cornell.edu/uscode/text/12/2903
[115] NPR, pp. 131-133.
[116] NPR, pp. 134-135.

AAs.[117] This finding makes sense intuitively since banks with less of their lending covered by CRA exams will not have to work as hard to make loans to LMI borrowers and communities and still be able to earn higher ratings.

The threshold of 75% coverage is a reasonable target that should guide loan threshold setting for AAs. If less than 75% coverage reduces effort by a single bank to serve the LMI population, it would seem that all banks would likewise lessen their performance if AA coverage falls below 75% for the aggregate. The RLAA thresholds could very well need periodic adjustment in order to take into account more online or non-branch lending and therefore to achieve total AA coverage of 75% or higher as the proposal does. Moreover, banks will have time to adjust to RLAAs and be able to more readily handle lower loan thresholds such as 100 loans for small business and 50 loans for home loans after experiencing exams with RLAAs.

In addition, the agencies should guard against manipulation. Banks should not be allowed to game the system by lending just under threshold amounts. The agencies could detect possible manipulation if their HMDA data analysis identifies several banks just under threshold loan levels in areas that would otherwise qualify as RLAAs. Warding off the possibilities of gaming may necessitate timely adjustments to threshold levels.

The proposal is feasible in that it will affect 91 banks in the case of home loans and these banks would need to create a median number of just two additional AAs. For small business lending, the median number of AAs is larger at about 10, but just 26 banks are impacted, most likely very large credit card banks.[118]

The agencies' analysis revealing how large banks were likely to perform in Facility Based Assessment Areas (FBAAs) and RLAAs indicated that the RLAA proposal is feasible and would also encourage improvement, particularly in lending to the smallest businesses with revenues under $1 million. The percentage of large bank home loans to LMI borrowers and census tracts was similar in FBAAs and RLAAs, indicating that large banks have the capacity to be evaluated for their lending activities in RLAAs. Large banks also offered a similar percentage of small business loans in LMI tracts in their FBAAs and RLAAs. They had the most difficulty reaching the smallest businesses with revenues under $1 million in RLAAs as revealed by significantly lower percentages of loans to these businesses in RLAAs (42%) than in FBAAs (62%).[119] Overall then, large banks have the capacity to be evaluated under RLAAs while needing to improve their lending to the smallest businesses in these areas, which would benefit those businesses.

In a recent report, NCRC also found that banks with branches in geographical areas performed considerably better in making loans to the smallest businesses than banks without branches in those areas. We hypothesized that small business lending depends on relationship lending (under

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[117] Josh Silver, *The Community Reinvestment Act And Geography*, NCRC, May 2017, pp. 8-10, https://ncrc.org/wp-content/uploads/2017/05/cra_geography_paper_050517.pdf
[118] NPR, p. 134.
[119] NPR, pp. 137-138.

which banks acquire knowledge of small businesses' creditworthiness through in-person interactions at a branch) to a greater extent than mortgage lending.[120] However, this dependence on relationship lending may diminish in future years[121] and banks can also engage community-based organizations in the RLAAs for increasing their effectiveness in making loans to the smallest businesses.

While we are pleased that the agencies created RLAAs to evaluate lending, they should consider creating deposit-based assessment areas. Online institutions that collect deposits and offer deposit accounts have received bank charters in recent years. The agencies recognize that online lenders should have local obligations and should be evaluated on a local basis.[122] The same imperative should apply to online institutions offering deposit products and not loans. The agencies likely backed away from deposit-based assessment areas because they did not have the data with which to develop a proposal, particularly for online institutions.[123] However, the agencies could commit to an approach such as requiring banks, including online ones, to designate deposit-based AAs beyond branch networks that have a threshold level of an institution's deposits (such as 5% or 10%) or they could commit to revisiting this important issue in a couple of years after new data collection of deposits required by the rule has occurred.

Finally, the agencies did not propose to create RLAAs based on thresholds for consumer lending. Recently, some large scale online lenders have received bank charters and make large volumes of consumer loans but do not make home or small business loans. While the agencies have only added automobile lending as a major product line, NCRC has urged the agencies to include credit card lending. There is a case to be made to include other consumer loans in order to meaningfully evaluate online lenders that only make consumer loans and may not make credit card loans. In addition, the agencies should establish a threshold similar to 100 or 250 loans to establish RLAAs in the case of non-credit card consumer lending or credit card lending.

Question 39. Should both small and intermediate banks continue to have the option of delineating partial counties, or should they be required to delineate whole counties as facility-based assessment areas to increase consistency across banks?

The agencies proposed to allow small and intermediate small banks to continue to have the option of delineating partial counties because they have fewer assets and less capacity than their

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[120] Bruce C. Mitchell, Josh Silver and Jason Richardson, *Proposed OCC And FDIC Geographic Analysis Of Home Mortgage And Small Business Lending: Permission To Decrease Lending For The Largest Banks?*, March 2020, NCRC, https://ncrc.org/proposed-occ-and-fdic-geographic-analysis-of-home-mortgage-and-small-business-lending-permission-to-decrease-lending-for-the-largest-banks/

[121] Bruce C. Mitchell, PhD, Jason Richardson and Zo Amani, *Relationships Matter: Small Business and Bank Branch Locations*, NCRC, March 2021, https://www.ncrc.org/relationships-matter-small-business-and-bank-branch-locations/

[122] NPR, p. 130.

[123] The Summary of Deposits (SOD) database maintained by the FDIC assigns deposits to a branch. In the case of online institutions, the SOD would assign the deposits to the headquarter's office location, which is not an accurate description of where the deposit customers reside. An example of this is Varo Bank, NA located in Utah; the SOD records all deposits in Utah although the bank collects deposits from across the country. See https://www7.fdic.gov/sod/sodPFMarketRpt.asp?barItem=2

larger counterparts.[124] NCRC requests that the agencies reconsider this decision. Partial county designations have facilitated redlining. If the agencies do not opt for full county designations for small and intermediate small banks, they must amend the AA designation procedures to require that AAs not only do not arbitrarily exclude LMI tracts[125] but they cannot arbitrarily exclude census tracts that are predominantly or majority-minority in order to better protect against redlining. Finally, examiner training must be improved significantly so that examiners spot patterns of discriminatory lending that arbitrarily exclude communities of color or modest income communities due to AA designation.

Research and media reporting concerning redlining of communities of color in the Southern part of Dallas should prompt a reconsideration by the agencies of whether smaller banks should be allowed to designate areas smaller than a county as AAs. The report concluded that 20% of banks that operate in Dallas County do not have branches south of a major interstate, I-30, and have excluded communities of color south of I-30 from their AAs. This includes banks that have branches that are in close proximity to I-30. These banks include more affluent counties with predominantly white populations north of I-30 as part of their AAs. Data analysis revealed that the banks with AAs including communities south of I-30 issued a higher percentage of loans to people of color than banks that excluded these communities from their AAs.[126]

Question 40. Do the proposed definitions of "remote service facility" and "branch" include sufficient specificity for the types of facilities and circumstances under which banks would be required to delineate facility-based assessment areas, or are other changes to the CRA regulations necessary to better clarify when the delineation of facility-based assessment areas would be required?

In proposed § __.12, the agencies appropriately updated the proposed regulation to account for the evolution of branching in the banking industry. The agencies should specify that any examples in the regulation are illustrative and not exhaustive so that banks do not conclude that a particular facility is not a branch merely because it does not have a feature listed in the regulation. NCRC appreciates that the agencies recognized that a branch includes a shared space in which a bank has partnered with a nonprofit organization for providing a branch.[127] However, this should either be explicitly stated in the regulation or in guidance. NCRC and our member organizations have recently negotiated Community Benefit Agreements (CBAs) with banks that involve this arrangement. It is important as a follow-up to CBAs that these types of branches be used to designate facility-based assessment areas (FBAA) so that banks can be rated and held accountable in these geographical areas.

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[124] NPR, p.129.
[125] NPR, p. 129.
[126] David Schechter, Jason Trahan, Chance Horner, T. Nicole Waivers, *"They underestimate what we can do": WFAA finds banks exclude Blacks, Hispanics in Southern Dallas from access to loans*, ABC Ch. 8, November 2020, https://www.wfaa.com/article/news/local/investigates/banking-below-30-southern-dallas-cut-off-by-freeway-also-left-off-banking-maps/287-10557dd3-bbf4-44a2-b786-44c6347a6e48.
[127] NPR, p. 126 and proposed regulatory definition p. 426.

As proposed, the definition of remote service facility includes not only ATMs but also other terminals that accept deposits and through which a customer can connect virtually with bank staff. This proposal indicated that the definition would capture other permutations in the future in which a terminal may not have staff physically present but act likes a remote service facility in that it facilitates deposit transactions and other banking business.

The agencies should consider whether bank participation in third party ATM networks such as Allpoint should count as FBAAs.[128] These ATM networks are accepting deposits from customers and processing withdrawals so this would meet the definition of remote service facility.

The proposed definition in § __.12 of remote service facility includes the functions of not only taking deposits but lending money.[129] The agencies proposed not to include loan production offices (LPOs) as physical facilities that trigger FBAAs[130] but LPOs like remote service facilities can, in some cases, lend money to customers. In those cases, LPOs like remote service facilities should trigger FBAAs since they are performing a similar function and will acquaint a bank to the needs of the locality.

Question 41. How should the agencies treat bank business models where staff assist customers to make deposits on their phone or mobile device while the customer is onsite?

If a facility involves customers on-site receiving instructions from bank staff about making deposits, this facility should constitute a branch for purposes of establishing FBAAs.[131] The bank staff will be acquiring knowledge of community needs at such a facility and should be held accountable for serving those needs.

Question 42. Should the proposed "accepts deposits" language be included in the definition of a branch?

The agencies discussed whether to designate a branch as a facility that "accepts deposits" and is "open to the public."[132] This proposed language is appropriate in that it will capture a range of facilities including branches that are not open full-time and receive customers by appointment. These facilities must be in FBAAs to ensure that the part-time branches are not disproportionately in LMI census tracts. If they are, this practice should be penalized on the proposed service test.

[128] For more information on Allpoint, see http://www.allpointnetwork.com/
[129] NPR, p. 476.
[130] NPR, p. 127.
[131] NPR, p. 127.
[132] NPR, p. 127.

Question 43. If a bank's retail lending assessment area is located in the same MSA (or state non-MSA area) where a smaller facility-based assessment area is located, should the bank be required to expand its facility-based assessment area to the whole MSA (or non-MSA area) or should it have the option to designate the portion of the MSA that excludes the facility-based assessment area as a new retail lending assessment area?

In this circumstance, the bank should be required to expand the FBAA to the entire MSA or non-MSA area. The bank is clearly engaging in significant business activity in the MSA or non-MSA where it has branches and where it does not have physical offices. Therefore, the bank should be acquainted with the credit and capital needs of the entire MSA or non-MSA and should be required to serve those needs with the full large bank test that would consist of retail lending, retail service, community development finance and community development service subtests.

Question 44. Should a bank be evaluated for all of its major product lines in each retail lending assessment area? In the alternative, should the agencies evaluate home mortgage product lines only when the number of home mortgage loans exceeds the proposed threshold of 100 loans, and evaluate small business loans only when the number of small business loans exceeds the proposed threshold of 250 loans?

As proposed, the bank should be examined in all of its major product lines in each retail lending assessment area (RLAA).[133] If it has exceeded the threshold in either home or small business lending, it is likely that the bank is a major lender in more than one of its product lines even if it does not hit a specific threshold in one if its lines. For example, it could be making 200 small business loans, which is often a significant market share in a locality and hence should be examined. The conclusions and scores for each product line can be weighted averages to reflect the relative contribution of each product line to the score and to reflect the bank's area of expertise by providing a heavier weight to the higher volume product.

Question 45. The agencies' proposals for delineating retail lending assessment areas and evaluating remaining outside lending at the institution level for large banks are intended to meet the objectives of reflecting changes in banking over time while retaining a local focus to CRA evaluations. What alternative methods should the agencies consider for evaluating outside lending that would preserve a bank's obligation to meet the needs of its local communities?

As proposed, RLAAs would capture a significant amount of lending outside of FBAAs. As proposed by the agencies, considering lending in both FBAAs and RLAAs would capture the great majority of bank retail lending. This approach therefore is effective in holding banks accountable for providing retail lending to LMI borrowers and other underserved populations. Moreover, considering other lending that is dispersed at the institution level will hold banks accountable for serving LMI borrowers and communities in additional communities as well. The metrics at the institution level are not as stringent as those at the FBAA or RLAA levels, which is appropriate since the bank may not have as well developed approach to serving communities

[133] NPR, p. 135.

where its lending is not as concentrated[134] and is likely to fluctuate in volume to a greater extent in FBAAs and RLAAs. However, this lending activity appropriately would contribute to performance conclusions.

<u>Intermediate small banks should not be exempt from creating RLAAs</u>

The agencies proposed an alternative method of capturing loans outside of FBAAs for intermediate small banks (ISB) banks. Under the proposal, if an ISB bank made more than 50% of its loans outside of FBAAs, the lending activity would be evaluated at the institution level only.[135] This proposal, however, would be counter to the rationale for creating RLAAs, that is, creating AAs that capture concentrations of lending activity outside of FBAAs. The agencies reasoned that ISBs have less capacity than large banks, but these banks include those with more than $1 billion in assets. Moreover, it is likely that where ISBs have concentrations of lending, they will have knowledge of the local lending markets and needs in those markets. Their capacity to make loans in these areas should therefore generate a requirement for a retail lending examination.

Question 46. The proposed approach for delineating retail lending assessment areas would apply to all large banks with the goal of providing an equitable framework for banks with different business models. Should a large bank with a significant majority of its retail loans inside of its facility-based assessment areas be exempted from delineating retail lending assessment areas? If so, how should an exemption be defined for a large bank that lends primarily inside its facility-based assessment area?

A large bank with a significant majority of its retail loans inside its FBAA should not be exempt from designating RLAAs.[136] This bank nevertheless likely has a sizable volume of loans in RLAAs and should be held accountable to meeting credit needs in those areas. The weighted average approach proposed by the agencies would account for the disproportionate amount of loans in the FBAA by providing them a higher weight. The agency approach therefore accommodates the business model of the bank, which remains branch-based, while still holding the bank accountable to communities in which it has no branches but still makes a sizable number of loans.

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[134] NPR, p. 131.
[135] NPR, p. 131.
[136] NPR, p. 136 discusses the alternative of exempting banks from RLAA requirements if a substantial majority of their loans are in FBAAs.

Question 47. The agencies propose to give CRA consideration for community development financing activities that are outside of facility-based assessment areas. What alternative approaches would encourage banks that choose to do so to conduct effective community development activities outside of their facility-based assessment areas? For example, should banks be required to delineate specific geographies where they will focus their outside facility-based assessment area community development financing activity?

NCRC agrees that banks should receive CRA consideration for community development financing outside of FBAAs, however the performance in FBAAs should receive priority for traditional banks with branch networks. Banks will likely have greater knowledge of the needs of communities where they have branches and thus will have more insights into what types of community development financing is needed in FBAAs and how best to complement retail lending and services with community development financing. The emphasis should remain with FBAAs with allowance for community development outside of FBAAs, particularly in underserved areas.

The agencies proposed a weighting scheme that proposes more weight for FBAAs in the case of banks that rely on their branches. Below, we offer more comments on how performance in FBAAs should be weighted.

The agencies should reconsider their choice not to include the community development financing test for RLAAs. It would seem that banks that are making a significant number of loans in RLAAs have acquired knowledge of the markets and needs in those geographical areas even if they do not have branches there. They would have insights with which to offer types of community development finance that can address needs and further help stimulate lending markets for LMI borrowers and communities in RLAAs.

We are skeptical of allowing banks to designate additional areas for focusing their outside FBAA community development finance. If given wide latitude, banks could abuse this option, choosing the easiest areas to serve rather than those with pressing needs. If the agencies narrowly targeted this option to rural counties and metropolitan areas in need based on data, then this option could effectively target underserved areas. Examples of this could include Native American reservations or areas including communities of color with low levels of community development based on data analysis.

Question 48. Should all banks have the option to have community development activities outside of facility-based assessment areas considered, including all intermediate banks, small banks, and banks that elect to be evaluated under a strategic plan?

Subject to the conditions and parameters described in our answer to Question 47, all banks could have the option of outside FBAA community development financing being considered.

Performance Tests – General, Tailoring, Performance Context, Levels of Aggregation

Question 49. The agencies' proposed approach to tailoring the performance tests that pertain to each bank category aims to appropriately balance the objectives of maintaining strong CRA obligations and recognizing differences in bank capacity. What adjustments to the proposed evaluation framework should be considered to better achieve this balance?

In answers to Question 50 and 51, NCRC will describe our opposition to the asset threshold adjustments in the proposal. The agencies' proposals also assume that data collection regarding deposits and automobile lending would burden large banks that have assets less than $10 billion. NCRC believes that all large banks have the technological capacity to collect this data.

The agencies should consider that for large banks, the data cost issue might be less of a matter of the asset size than the amount of business the bank conducts in the product line. A large bank that is a major automobile lender presumably would have less difficultly collecting and reporting automobile loan data than one that offers such loans on an incidental basis. Accordingly, the agencies could consider a loan threshold instead of an asset threshold for reporting automobile loans. Moreover, since most large banks collect a sizable number of deposits, they should report the proposed deposit data. Alternatively, the agencies could include more large banks in this requirement based on a deposit threshold.

A bank should not receive wholesale and limited purpose designation if it is a monoline lender with a large volume of credit card or other loan types or purposes. Such a bank must be subject to a retail lending test that ensures that the lending reaches LMI borrowers and communities in an affordable, sustainable and responsible manner.

Question 50. The proposed asset thresholds consider the associated burden related to new regulatory changes and their larger impact on smaller banks, and it balances this with their obligations to meet community credit needs. Are there other asset thresholds that should be considered that strike the appropriate balance of these objectives?

The agencies proposed to raise the small asset bank threshold from $346 million to $600 million.[137] Likewise, the intermediate small bank (ISB) asset threshold would be adjusted and would range from $600 million to $2 billion. Currently, the ISB asset thresholds range from $346 million to $1.384 billon.[138]

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[137] Mark Pearce, Director, Division of Depositor and Consumer Protection, *Memo on Notice of Proposed Rulemaking on Community Reinvestment Act Regulations*, April 27, 2022, p. 4, https://www.fdic.gov/news/board-matters/2022/2022-05-05-notice-dis-a-mem.pdf

[138] OCC Bulletin 2021-67, *Community Reinvestment Act: Revision of Small and Intermediate Small Bank and Savings Association Asset Thresholds*, December 2021, https://www.occ.treas.gov/news-issuances/bulletins/2021/bulletin-2021-67.html#:~:text=Beginning%20January%201%2C%202022%2C%20a,association%E2%80%9D%20under%20the%20CRA%20regulations.

As a result of this proposal, 779 banks that are ISB banks now would be reclassified as small banks.[139] These banks would no longer have community development finance responsibilities, resulting in a loss of considerable amounts of community development finance. Based on a NCRC study, we estimate that on an annual level, community development finance would decline by about $1.214 billion (in the study, 197 banks with assets between $346 million and $600 million made this amount of community development financing on an annual basis based on a sample of CRA exams conducted in 2016).[140] Likewise, 217 banks would be re-classified from large banks to ISB banks.[141] These banks would no longer have a service test, requiring them to pay attention to the branching and service provision in LMI communities.

NCRC found that the change in classifications from ISB to small banks would disproportionately impact smaller cities and rural communities. We estimated that 25% of the banks that would become small are located in rural counties. This is in contrast to 7% of the large banks that would become ISB under the proposal. Likewise, 22% of the ISB banks that would become small are located in small metropolitan areas while 16% of the large banks that would become ISB are headquartered in small metropolitan areas. A map of the bank classification changes shows that the change from ISB to small bank disproportionately affects less populated areas in the Midwest and South, parts of the country that can ill afford less community development financing.[142]

At the very least, the agencies' proposal should expect the same range of reinvestment activity as CRA currently does for all ISB and large banks. In this respect, the proposal goes backwards with no justification about how any reduction in burden for these banks would somehow offset the loss of reinvestment activity from a public benefits perspective. The banks impacted have been engaging in community development or service provision for several years without any apparent deleterious impacts.

Question 51. Should the agencies adopt an asset threshold for small banks that differs from the SBA's size standards of $750 million for purposes of CRA regulations? Is the proposed asset threshold of $600 million appropriate?

Per question 50, NCRC opposes raising the threshold to $600 million in assets.

[139] FDIC memo
[140] Adam Dettelbach, Josh Silver, Bruce C. Mitchell, *Intermediate Small Banks: The Forgotten But Significant Resource For Affordable Housing And Community Development*, NCRC, November 2017, https://www.ncrc.org/intermediate-small-banks-forgotten-significant-resource-affordable-housing-community-development/
[141] FDIC memo
[142] Josh Silver, *MAP: Here's Where Changes To CRA Asset Thresholds Will Undermine Community Reinvestment*, NCRC, July 2022, https://www.ncrc.org/map-heres-where-changes-to-cra-asset-thresholds-will-undermine-community-reinvestment/

Question 52. The agencies propose to require that the activities of a bank's operations and operating subsidiaries be included as part of its CRA evaluation, as banks exercise a high level of ownership, control, and management of their subsidiaries, such that the activities of these subsidiaries could reasonably be attributable directly to the bank. What, if any, other factors should be taken into account with regard to this requirement?

Question 53. As discussed above, what factors and criteria should the agencies consider in adopting definitions of "operating subsidiary" for state non-member banks and state savings associations, and "operations subsidiary" for state member banks, for purposes of this proposed requirement?

In answers to questions 53 and 54, NCRC strongly supports the proposal to include subsidiaries automatically in CRA exams since, as the agencies concluded, banks have a high degree of control over subsidiaries.[143] The subsidiaries are acting as arms of the banks in making loans and engaging in other activities. As such, they must be subject to the same CRA obligations.

In the same vein, the agencies should automatically consider bank and third party partnerships with non-bank entities to make loans and offer other services. In these arrangements, the bank is often asking the non-banks to market and underwrite loans on behalf of the bank. Since this is a high degree of delegation of decision-making to the non-bank, the non-bank is essentially acting as an arm of the bank just like a subsidiary. CRA exams should therefore scrutinize the activity of these partnerships and ensure that they are serving LMI customers responsibly. A good number of these partnerships are undertaken to evade state usury limits on interest rates, which is not a responsible means of meeting credit needs and must be penalized on CRA exams. In addition, the agencies' more expansive definition of assessment areas including RLAAs should apply to these partnerships.

In other arrangements, some chartered institutions work with third-party non-banks to provide credit or deposit accounts. Increasingly, the banks offer accounts within a "banking-as-a-service" framework, where the bank performs virtually all of the activities associated within the business of banking as well as those required for compliance. In spite of that scope of commitment, the lending and deposit-taking that occurs through these partnerships is almost uniformly excluded from CRA exam scrutiny.

In cases where banks have multiple partners, the scope of activity should be considered in aggregate for determining qualification for AA coverage. For example, if a bank partners with three non-banks to make a total of 200 loans in a metropolitan area, and the threshold for an AA is 100 loans, then the bank should be evaluated for its performance even if no single partnership produces 100 loans individually. Similarly, thresholds for deposit-taking should also be collapsed into aggregated baskets for the purposes of determining any deposit-based AAs should the agencies adopt our suggestion for deposit-based AAs.

[143] NPR, p. 154.

If multiple banks partner with the same non-bank, the exam of each of these banks would take into consideration the activity of the non-bank on the relevant tests and AA designations.

Question 54. When a bank chooses to have the agencies consider retail loans within a retail loan category that are made or purchased by one or more of the bank's affiliates in a particular assessment area, should the agencies consider all of the retail loans within that retail loan category made by all of the bank's affiliates only in that particular assessment area, or should the agencies then consider all of the retail loans made by all of the bank's affiliates within that retail loan category in all of the bank's assessment areas?

NCRC has advocated for several years that consideration of affiliates should be mandatory and not optional. Affiliates are engaging in activity on behalf of the bank and as such should be automatically on CRA exams. Given that, we strongly support the alternative suggested by the agencies to expand the range of affiliate activities on CRA exams, including examining all retail loans within a loan category made by affiliates in all assessment areas should a bank wish to include affiliate retail lending in exams.[144] This expanded treatment would best avoid a bank cherry picking only the best performing affiliates and asking that only they be included on exams.

A NCRC study of the 50 largest banks by asset size revealed that 29 or 80% chose to include affiliates on their exams. About 41% of them included affiliates that engaged in retail lending and 76% of them included affiliates that engaged in community development finance.[145] Since a sizable number of banks already include affiliates in their exams, a more expansive consideration of their activities on exams should not deter banks from including them and some banks may welcome heightened consideration.

Question 55. The agencies request feedback on the proposed performance context factors in § __.21(e). Are there other ways to bring greater clarity to the use of performance context factors as applied to different performance tests?

The agencies are considering whether to establish a specific mechanism seeking input about needs and conditions across localities.[146] This could be useful in ascertaining the extent to which banks are responding to community needs. The agencies need to ask specific questions about the most pressing needs and which types of financing are offered or not offered by banks in response to those needs. This would be the best way to obtain the most useful performance context information for evaluating bank performance and the banks' responsiveness to needs.

Comments from the public and community organizations must inform examiner conclusions on the performance tests. For example, if a community organization documents that lenders are not making a sufficient number of small dollar mortgages in a locality, the proposed credit and

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[144] NPR, p. 156.
[145] Josh Silver, *An Evaluation Of Assessment Areas And Community Development Financing: Implications For CRA Reform*, NCRC, July 2019, https://ncrc.org/an-evaluation-of-assessment-areas-and-community-development-financing-implications-for-cra-reform/
[146] NPR, p. 427.

deposits products part of the retail service test should evaluate whether banks in that locality have small dollar mortgage programs that are being utilized to a significant extent. Examiners must do a better job at soliciting specific observations from community stakeholders rather than generic observations such as needs for more affordable housing, which is true in several localities.

The agencies are contemplating making demographic and economic information about localities available to banks and the public.[147] The agencies should decide upon half a dozen or so data fields that succinctly summarize conditions in localities as NCRC has previously suggested.[148] These could include measures of housing vacancy rates, housing cost burden ratios, unemployment levels, poverty rates, levels of segregation and measures of health and environment quality standards. Exams should then judge, in the impact reviews and other qualitative aspects of the subtests, the extent to which banks are responsive to priority needs as revealed by this data. For example, if unemployment rates are particularly high in a locality, the examiner would look for higher levels of economic development financing. Alternatively, if health and environmental quality standards are particularly low, the examiner would look for higher levels of financing for community health centers or climate remediation.

Question 56. Should the agencies aggregate closed-end home mortgage loans of all purposes? Or should the agencies evaluate loans with different purposes separately given that the factors driving demand for home purchase, home refinance, and other purpose home mortgage loans vary over time and meet different credit needs?

NCRC recommends that the agencies separately evaluate home purchase and home refinance loans. As the agencies recognize, the needs for and volume of these different loan purposes will ebb and flow during different economic conditions.[149] Considering these loans separately is a more precise way to determine if the needs for LMI borrowers for these loans are being met by banks in their locality.

Question 57. Should the agencies exclude home improvement and other purpose closed-end home mortgage loans from the closed-end home mortgage loan product category to emphasize home purchase and refinance lending? If so, should home improvement and other purpose closed-end home mortgage loans be evaluated under the Retail Lending Test as a distinct product category or qualitatively under the Retail Services and Products Test?

NCRC recommends that home improvement and other purpose closed-end home loans be evaluated on the retail lending test because LMI communities have significant needs for these loans. For example, families will need these types of loans to weatherize their homes and improve energy efficiency, particularly in colder climates such as in the Midwest. This type of lending should not be considered only under the proposed retail services and products test

[147] NPR, p. 161.
[148] Josh Silver, CRA Performance Context: Why it is Important for Community Development and How to Improve it, NCRC, April 2016, https://www.ncrc.org/cra-performance-context-paper/
[149] NPR, pp. 166-167.

because doing so would reduce the level of quantitative rigor present in the proposed retail lending test. Home improvement and other purpose closed-end lending should be considered separately in a third category if the agencies opt to consider home purchase and refinance lending separately.

Question 58. Should the agencies include closed-end non-owner-occupied housing lending in the closed-end home mortgage loan product category?

Our strong preference would be that non-owner occupied housing lending be removed from the retail lending test. Large corporate entities are buying single family housing disproportionately in communities of color and LMI communities.[150] A significant number of these corporate owners are not responsible, making tenants pay high rents and not maintaining the properties. Furthermore, the competition from these corporations are bidding up home prices and making homeownership out of reach for many modest income families. CRA exams should not exacerbate these adverse market dynamics by including these loans on a quantitative-driven retail lending test as the agencies propose.[151] Some banks may respond by loading up on loans to non-occupant owners and thereby intensifying racial, gender and income inequalities in homeownership, the opposite of what the CRA statute intends to do.

If the agencies seek to evaluate lending to non-owner occupied housing, they should do so under the proposed Retail Services and Products test. This test would entail a more qualitative evaluation and would consider whether these loans create rental housing that is affordable and well maintained. In addition, the test could give preference for non-profit organizations that own the housing and intend to help tenants eventually become homeowners under lease-purchase programs.

Question 59. Should open-end home mortgage loans be evaluated qualitatively under the Retail Services and Products Test rather than with metrics under the Retail Lending Test?

Agencies should evaluate the extent to which LMI households use these products for critical needs and whether the lending is responsible before making a decision. The proposed retail lending test should consider this lending separately for the reasons mentioned above.

If CRA exams include home equity lending, the exams must also scrutinize the affordable and sustainability of these loans and penalize banks that make abusive open-end loans. A Consumer Financial Protection Bureau (CFPB) review of recent HMDA data illustrated that home equity lines of credit (HELOCs) continued to be a riskier form of lending than closed-end mortgage lending. Multiple risky features were layered on HELOC loans, further increasing the chances of abusive lending and defaults. The CFPB reported that in 2018, 77 percent of HELOC loans were adjustable rate, half featured interest-only payments, and prepayment penalties were present on

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[150] Peter Whoriskey and Kevin Schaul, *Corporate landlords are gobbling up U.S. suburbs. These homeowners are fighting back*, Washington Post, March 31, 2022, https://www.washingtonpost.com/business/2022/03/31/charlotte-rental-homes-landlords/

[151] NPR, p. 167.

28 percent of the loans.[152] These trends continued in 2019 according to the CFPB.[153] In addition, interest rates on HELOCs were high.[154]

Some HELOC lending responds to legitimate needs such as home improvement and repair. Hence, a rationale exists for including this lending on CRA exams. However, the agencies should conduct more research to see the extent to which this lending is critical for LMI households in meeting needs and whether such lending is affordable and sustainable. Similar to the loans to non-occupant owners, open end lending might be more appropriately evaluated under the proposed Retail Services and Products Test[155] which is more qualitative and should take into account sustainability and affordability issues.

Question 60. Should multifamily lending be evaluated under the Retail Lending Test and the Community Development Financing Test (or the Community Development Test for Wholesale or Limited Purpose Banks)? Or should multifamily lending be instead evaluated only under the Community Development Financing Test?

A rationale for considering multifamily lending in the proposed retail lending test is to assess under the most rigorous quantitative test the geographical distribution of multifamily lending (the number and percentage of loans in LMI tracts). This would help ensure that banks are not redlining but are meeting an important need for affordable rental and multifamily lending in LMI communities. The agencies contemplated evaluating the number of units rather than the number of loans in LMI tracts to better reflect responsiveness to the need for units of housing.[156] This is an intriguing alternative but the current HMDA data does not offer a reasonably precise way to consider the number of units since data on units is reported in broad ranges.[157] For now, it might be more accurate to use loan counts until the data is improved. The number of units could be considered qualitatively in the proposed CD finance test.

As well as including multifamily lending in the retail lending test, NCRC recommends that this lending also be considered in the CD finance test. This treatment would not be duplicative because the tests would be looking at different facets of multifamily lending. The retail test would look at the geographical distribution of these loans whereas the community development test would consider the dollar amount of the loans.

The impact review of the community development test would further consider affordability and ensure that the bank is financing rental housing that serves the lowest income tenants that usually

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[152] CFPB, *Introducing New and Revised Data Points in HMDA: Initial Observations from New and Revised Data Points in 2018 HMDA*, August 2019, pp. 33-37, https://files.consumerfinance.gov/f/documents/cfpb_new-revised-data-points-in-hmda_report.pdf
[153] CFPB, *An Updated Review of the New and Revised Data Points in HMDA Further Observations using the 2019 HMDA Data*, August 2020, pp. 35-36, https://files.consumerfinance.gov/f/documents/cfpb_data-points_updated-review-hmda_report.pdf
[154] CFPB, Ibid, p. 67.
[155] The NPR raises this option, p. 168.
[156] NPR, pp. 168-169.
[157] Group Letter On CFPB's RFI On HMDA, January 2022, https://ncrc.org/group-letter-on-cfpbs-rfi-on-hmda/

have the most trouble finding affordable housing as well as moderate-income tenants. If the impact review uncovers evidence that a bank is financing middle- and upper-income rental housing disproportionately in LMI tracts, the bank should be penalized through lower scores or a possible downgrade. Conversely, if the great majority of the units are affordable for and occupied by LMI tenants in LMI tracts as revealed by HMDA data and other bank documentation, then the score could be adjusted upwards.

In high-cost areas of the country, abusive multifamily lending in LMI tracts has facilitated the displacement and eviction of LMI tenants. In response to concerns raised by NCRC members and others, banks have implemented reforms to their multifamily lending practices, and state agencies have issued guidelines to ensure responsible multifamily lending.[158] For example, New York state advises banks to conduct due diligence of landlords and property owners, assess if appraisals are accurate, and analyze loan terms and conditions to make sure that current rents would not have to increase substantially in order for property owners to repay loans.[159] CRA examiners must monitor banks and penalize them on CRA exams through ratings downgrades if they are financing abusive activities in LMI census tracts or communities of color. Examiners must disallow community development data being reported under the category of affordable housing that includes predatory financing. Finally, any community development lending that is identified as abusive must not count on either the retail lending test or the community development finance test.

Question 61. Should banks that are primarily multifamily lenders be designated as limited purpose banks and have their multifamily lending evaluated only under the Community Development Financing Test?

We do not believe it would be appropriate to designate multifamily specialists as limited purpose banks. Such banks do not have a retail lending test. As indicated in the previous question, an evaluation of the geographical distribution of multifamily lending is needed to ensure that banks are not avoiding LMI communities. Moreover, it is likely that in many cases any bank that devotes most of its business to multifamily lending will nevertheless make a sizable number of single family home loans and may offer other product lines as well.

[158] See Blog Posts of the Association of Housing and Neighborhood Development, https://anhd.org/blog/bad-boy-carveoutand https://anhd.org/blog/new-york-state-lenders-you-are-accountable-multifamily-displacement-lending. Also see Kevin Stein, *Banks Should do More to Prevent Renters from Being Displaced*, American Banker, August 14, 2018.

[159] New York State Department of Financial Services, *DFS Advises State Chartered Banks of Their Responsibilities in Lending to Landlords of Rent-Stabilized or Rent-Regulated Multifamily Residential Buildings*, September 25, 2018, https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1809251.

Question 62. Should the agencies adopt a size standard for small business loans and small farm loans that differs from the SBA's size standards for purposes of the CRA? Is the proposed size standard of gross annual revenues of $5 million or less, which is consistent with the size standard proposed by the CFPB in its Section 1071 Rulemaking, appropriate? Should the CRA compliance date for updated "small business," "small business loan," "small farm," and "small farm loan" definitions be directly aligned with a future compliance date in the CFPB's Section 1071 Rulemaking, or should the agencies provide an additional year after the proposed updated CRA definitions become effective?

NCRC has advocated for several years to replace the current CRA small business and farm data with the CFPB's Section 1071 database because the Section 1071 data would be more comprehensive and include race and gender of the small business owner. We are pleased that the agencies proposed to use Section 1071 data once it becomes available. The agencies should include data tables on CRA exams tabulating small business and farm lending by race and gender of the small business owner just as they proposed to do with the HMDA data. Furthermore, banks should find it less burdensome to collect and report just the Section 1071 data instead of both Section 1071 data and CRA data.

The Section 1071 definitions of small business and farms is an improvement over the CRA data. The CRA data bases its definition of small business loans on the loan size; a loan of $1 million or less is considered a small business loan.[160] Focusing on the dollar amount of the loan is not an accurate method to consider a loan as one to a small business; loans of under $1 million could also be made to larger businesses.

In contrast, the CFPB's proposed definition for Section 1071 data is more precise since it defines a loan to a small business or farm as one to business or farm with revenues under $5 million. The CFPB estimated that this definition would capture most of the small businesses and farms and exclude consideration of larger businesses.[161] Because the retail lending test is focused on the credit needs of small business and farms, a database that records lending to these entities and excludes larger businesses is preferable to the CRA data that likely includes lending to larger businesses.

The proposed retail lending test includes performance measures that would calculate the percentage of loans to small businesses in low-income and moderate-income tracts. The agencies should consider two performance measures in each of these tract categories: percent of loans to businesses with revenues under $1 million and percent of loans to small businesses with revenues between $1 million and $5 million.

[160] NPR, p. 171.
[161] NCRC Comment On Proposed Section 1071 Small Business Lending Data Collection, January 2022, https://ncrc.org/ncrc-comment-on-proposed-section-1071-small-business-lending-data-collection/?utm_source=rss&utm_medium=rss&utm_campaign=ncrc-comment-on-proposed-section-1071-small-business-lending-data-collection

Because Section 1071 data has not yet become available, neither the public nor researchers know whether larger small businesses with revenues closer to $5 million are significantly more successful in accessing loans than their smaller counterparts.[162] Therefore, at least in the first few years of the new CRA regulation and Section 1071 data availability, it would be advisable to have more rather than fewer performance measures to more accurately measure credit availability to different-sized businesses in LMI tracts and to encourage banks to serve businesses with different revenue sizes. If the larger small businesses end up having more success in accessing credit than their smaller counterparts, the agencies may want to delete or alter the performance measure of lending to businesses with revenues between $1 to $5 million in LMI tracts. In contrast, if these larger smaller businesses include grocery stores and other critical businesses and continue to have difficulties applying for credit, this performance measure should remain on CRA exams.

The agencies should not use the SBA definition of a small business since the SBA definition includes revenue categories considerably higher than $5 million with employees up to 500. It also involves several revenue categories based on the North American Industrial Classification system (NAICs).[163] It would be cumbersome for banks to use. In contrast, a definition of $5 million or less in revenues would be much simpler and would focus attention on the smaller businesses that traditionally had the most difficulty accessing credit.

Question 63. Should the agencies' current small business loan and small farm loan definitions sunset on the compliance date of the definitions proposed by the agencies?

The current definitions of small business and small farm loans should switch to the Section 1071-driven definitions the first full year of availability of the Section 1071 data.

Question 64. Should retail loan purchases be treated as equivalent to loan originations? If so, should consideration be limited to certain purchases – such as from a CDFI or directly from the originator? What, if any, other restrictions should be placed on the consideration of purchased loans?

Retail loan purchases should not be treated as the equivalent to loan originations. Purchasing activity should be evaluated as a separate product line and should receive less weight than originations on the retail lending test. Also, only purchases from the originating lender should be counted; any subsequent purchases after the first sale must not be counted. Purchasing loans does not entail as much effort and resources in responding to local credit needs as originating loans. Originating loans involves determining which products best respond to local needs, conducting flexible underwriting that preserves safety and soundness while increasing access to underserved

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[162] NCRC consulted with Federal Reserve surveys of credit availability for small businesses, raw Federal Reserve survey data and other studies. We could not determine the answer to the question of credit availability to the larger small businesses.
[163] U. S. Small Business Administration Table of Small Business Size Standards Matched to North American Industry Classification System Codes, https://www.sba.gov/sites/default/files/2022-05/Table%20of%20Size%20Standards_Effective%20May%202%202022_Final.pdf and see https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf

populations and marketing to underserved communities. In contrast, when a bank purchases loans, it is relying on another entity to do the multiple tasks associated with originating loans.

We are recommending that purchases be evaluated on the retail lending test out of recognition that some banks have business models that involve large scale purchasing from brokers. Thus, consideration of purchases is appropriate to account for differences in business models. The agencies could create a weighing scheme similar to their proposal for community development financing regarding banks with a branch network and those that operate mostly online.[164] Just like that weighing scheme, traditional banks that do not use brokers to a large extent would receive the least weight for purchases and those that heavily rely on brokers would have a larger weight for purchases with a range for more hybrid banks. In no case would purchases be weighed more heavily than originations; the agencies had proposed equal weights,[165] while we suggest originations being weighed more heavily for most categories of banks.

In addition, the retail services and products test should consider and regard favorably bank purchases from institutions that do not have regular access to the Government Sponsored Enterprises (GSEs) or other secondary market outlets. These institutions include Community Development Financial Institutions (CDFIs), minority-owned depository institutions, women-owned depository institutions and low income credit unions. Banks could create purchasing programs for these entities and other institutions that have less than average access to the secondary market (as confirmed via data analysis).

A recent paper by Kenneth P. Brevoort, a Federal Reserve economist, documented limited benefits of including purchases on CRA exams.[166] He found that purchases did not increase access to lending to LMI borrowers and communities.[167] Purchased loans made in LMI tracts were also disproportionately made to middle- and upper-income borrowers.[168] Furthermore, loan purchases did not significantly increase liquidity for lenders originating loans.[169] Instead, loan purchases for CRA purposes primarily decreased the share of loans purchased by GSEs initially (these loans appeared to be resold to the GSEs within four months).[170]

The Brevoort paper supports the proposition of assessing purchases separately from originations and weighting them less for the retail lending test rating. It did not appear to consider differences in business models of banks, including those that purchase from brokers. Therefore, the paper should not by itself support eliminating purchases from CRA consideration but it does offer strong evidence for changing the treatment of loan purchases on CRA exams.

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[164] NPR, pp. 334-335.
[165] NPR, p. 172.
[166] Kenneth P. Brevoort, Federal Reserve Board, *Does Giving CRA Credit for Loan Purchases Increase Mortgage Credit in Low-to-Moderate Income Communities?*, May 2022, available via SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4100514
[167] Brevoort, p. 3.
[168] Ibid., p. 20.
[169] Ibid., p. 24.
[170] Ibid., pp. 35-36, p. 57.

Finally, NCRC appreciates that the agencies proposed to not use purchases as part of the market benchmark in the Retail Lending Test. The agencies did "not consider the aggregate level of loan purchases to reflect the extent of local lending opportunities. Aggregate loan originations, in contrast, are directly tied to these opportunities."[171] We agree with this reasoning that purchases of peer lenders are not reflective of the loan market in which banks are competing and seeking opportunities to serve LMI borrowers.

Question 65. Would it be appropriate to consider information indicating that retail loan purchases were made for the sole or primary purpose of inappropriately influencing the bank's retail lending performance evaluation as an additional factor in considering the bank's performance under the metrics or should such purchased loans be removed from the bank's metrics?

The agencies presented evidences in the NPR that loan churning, the serial purchasing of loans made to LMI borrower or tracts, has occurred. The agencies found that bank purchases of LMI loans are five times more likely to re-sold within the same year as loan purchases of non-LMI loans.[172] Of course, any attempted manipulation of CRA exams must be considered on CRA exams. If it occurs on a large scale for a bank, the examiner must downgrade the bank. Further, loans that are churned must not be included in the retail lending test.

Question 66. Do the benefits of evaluating automobile lending under the metrics-based Retail Lending Test outweigh the potential downsides, particularly related to data collection and reporting burden? In the alternative, should the agencies adopt a qualitative approach to evaluate automobile lending for all banks under the proposed Retail Lending Test?

Automobile lending should be considered under the metrics-based Retail Lending Test since, as the agencies recognize, this type of lending is important, particularly in areas lacking transit.[173] Only considering automobile lending under a more qualitative test would not ensure that it is readily available to LMI borrowers or borrowers residing in LMI tracts.

However, a qualitative test such as that proposed under the Retail Service and Products test must scrutinize this lending from a safety and soundness and a consumer protection perspective. High-cost automobile lending that mires consumers in debt and is beyond consumers' abilities to repay must be penalized on CRA exams. In order to meet credit needs, this type of lending must be sustainable and affordable. Examiners must use call report data to assess whether a bank's loans are performing worse or better than their peers. Call Report data includes information on charge-offs, the dollar amount of loans that are 30 to 89 days past due and the dollar amount of loans that are 90 or more days past due.[174] In addition, information offered by community-based

[171] NPR, p. 204.
[172] NPR, p. 173.
[173] NPR, p. 174.
[174] FDIC Statistics on Depository institutions, https://www7.fdic.gov/sdi/main.asp and Details and Financials – Institution Directory, https://www7.fdic.gov/idasp/advSearchLanding.asp for copies of banks' Consolidated Reports of Condition and Income for A Bank With Domestic and Foreign Offices - FFIEC 031, which includes information

organizations and other stakeholders about abusive lending must be considered by CRA examiners.

Question 67. Should credit cards be included in CRA evaluations? If so, when credit card loans constitute a major project line, should they be evaluated quantitatively under the proposed Retail Lending Test or qualitatively under the proposed Retail Services and Products Test?

NCRC supports the inclusion of credit card and other consumer loan products on CRA exams but believes that inclusion of this lending on CRA exams must be implemented carefully so it becomes an affordable alternative to payday and other fringe non-bank lending. Consumer lending is a credit need that is not being served adequately by banks. If credit card lending passes the threshold defining a major product line, credit card lending should be evaluated by the quantitative driven Retail Lending Test to increase credit card lending to LMI borrowers and communities. In addition, a qualitative evaluation under the Retail Services and Products Test must ensure that credit card lending is affordable and sustainable. Monoline large scale credit card banks must no longer qualify for the wholesale and limited purpose test under which credit card lending is not examined.

In addition to credit card lending, CRA exams should evaluate personal, unsecured consumer lending. Currently, consumer lending is evaluated at a bank's option or if it is a substantial majority of a bank's lending.[175] At the very least, this procedure should remain if the agencies do not opt to include credit card and unsecured consumer lending on the proposed retail lending test. In addition, NCRC supports the inclusion of all types of consumer lending on the proposed Retail Services and Products test to ensure that this type of lending is responsive to needs and not abusive.[176]

According to Bankrate.com, twelve million Americans use payday loans, the average payday loan is $375 on a two-week term with an average of $520 in fees, and only 14% of borrowers can pay back their loans.[177] This demand for payday and other high cost fringe products is unlikely to abate due to the difficulty large segments of the population have in meeting an unexpected $400 in expenses. A Federal Reserve survey indicated that as of 2020, 36% of respondents would have difficulty meeting this expense with higher percentages of employed African Americans and Hispanics having difficulties.[178] The overall percentage of respondents having difficulty meeting an unexpected expense declined in 2021 but half of adults with $25,000 or less in annual income

on past due and non-accrual loans by product type including credit card and automobile loans.

[175] 12 CFR 25.22(a)(1), https://www.ecfr.gov/current/title-12/chapter-I/part-25#p-25.22(a)(1)
[176] NPR, p. 174.
[177] Raija Haughn, *Payday Loan Statistics*, Bankrate.com, February 2022, https://www.bankrate.com/loans/personal-loans/payday-loan-statistics/
[178] Michael Grover, *What a $400 emergency expense tells us about the economy*, Federal Reserve Bank of Minneapolis, June 2021, https://www.minneapolisfed.org/article/2021/what-a-400-dollar-emergency-expense-tells-us-about-the-economy#:~:text=The%20survey%20estimated%20that%20only,pay%20the%20expense%20at%20all.

had difficulty paying their bills in full each month.[179] If credit card lending is a major product line, CRA exams must encourage banks to compete better against the high cost non-banks and offer responsible credit card lending to LMI borrowers.

If the agencies do not carefully examine consumer lending on CRA exams, inclusion of this lending could encourage high-interest rate and abusive credit card lending and other lending with high and hidden fees. CRA examiners should analyze data on fees, costs and delinquency and default rates (using Call Report data as discussed above) to ensure that the consumer lending is responsible and sustainable. If it is not, a ratings downgrade should be possible, depending on the extent and degree of harm of the abusive lending.

Some banks partner with non-banks for the sole purpose of the non-bank evading state usury laws. In a recent comment letter on a CRA exam, NCRC and several consumer and community organizations documented that EasyPay Finance partnered with TAB Bank after the New York Attorney General forbade EasyPay to offer loans above the state usury limits. The loans are offered through merchants such as puppy mills or auto repair shops that often cannot or will not describe loan terms and conditions. Consumers are then mired in unaffordable loans with Annual Percentage Rates as high as 188%. Despite a high volume of complaints registered with the CFPB's consumer complaint database, the most recent TAB CRA exam awarded the bank an Outstanding rating.[180]

The bank is also running afoul of recent interagency guidance. The Interagency Guidelines on Third-Party Risk Management obligate banks to take responsibility for risks created through their relationships with non-bank third parties. Additionally, the guidelines call for banks to apply higher standards to review "complex or significant arrangements." The guidance holds a bank responsible for all risks associated with the activities of the third-party and lists numerous potential areas of risk.[181] The high volume of third party lending facilitated by TAB Bank suggests that the bank is assuming unduly high levels of risk.

CRA reform must eliminate these abusive third party relationships and instruct CRA examiners to consult a variety of resources for consumer complaints. These include:

- State Attorneys General
- State banking commissioners
- State consumer finance regulators

[179] Board of Governors of the Federal Reserve System, *Economic Well-Being of U.S. Households in 2021*, https://www.federalreserve.gov/publications/files/2021-report-economic-well-being-us-households-202205.pdf, p. 36.
[180] 40 Groups Urge FDIC To Downgrade TAB Bank, NCRC, June 2022, https://www.ncrc.org/40-groups-urge-fdic-to-downgrade-tab-bank/
[181] Federal Deposit Insurance Corporation. (2008, June 6). *Guidance For Managing Third-Party Risk*. FIL-44-2008. https://www.fdic.gov/news/financial-institution-letters/2008/fil08044a.html

- Consumer-serving community service providers
- Online consumer complaint aggregators such as the Better Business Bureau
- Groups engaged in the coordination of state and national community benefits agreements
- Judge Advocate Generals, military service organizations, and veterans service organizations.

Examiners should also solicit input from other regulators who have supervisory authority for regulations that involve consumer protections. For example, examiners should proactively contact the Consumer Financial Protection Bureau, the Federal Trade Commission, and the Department of Justice.

Furthermore, CRA exams must retain robust qualitative criteria like responsiveness in the proposed Retail Services and Products Test. If the qualitative criteria are not enhanced, CRA exams could provide considerable credit to subpar products including secured credit card products that do not include pathways for LMI consumers graduating to lower cost products that are more helpful in building savings and creditworthiness.

CRA exams must scrutinize pricing in a more systematic manner on CRA exams. Recently, Native American representatives at a webinar conducted by the Federal Reserve Bank of Minneapolis' Center for Indian Country Development stated that Native Americans residing near or on reservations encounter interest rates and fees on a variety of loan products, including vehicle loans, which are considerably higher than going rates. Fair lending reviews accompanying CRA exams must ensure that no price discrimination is occurring.

Question 68. What data collection and reporting challenges, if any, for credit card loans could adversely affect the accuracy of metrics?

The agencies mentioned that some banks may not have the capability to record borrower income for credit card loans and that they would confront a new data reporting requirement if credit card lending was a regular part of CRA exams.[182] NCRC believes that the NPR overestimated the difficulty of collecting this data. The number of data points would be small and income at the issuance of the card could be collected instead of requiring banks to continually ask borrowers for their incomes. The benefits of making the consumer lending market more competitive with better rates for LMI consumers outweighs the additional and modest costs faced by banks.

Question 69. Should the agencies adopt a qualitative approach to evaluate consumer loans? Should qualitative evaluation be limited to certain consumer loan categories or types?

NCRC maintains that if consumer loans other than credit card lending exceed the thresholds for a major product line, they should be evaluated by the Retail Lending Test as well as the Retail Service and Products Test. The reasons stated above in the case for credit card loans for applying

[182] NPR, p. 175.

both tests also apply for non-credit card consumer lending. The market for consumer lending needs to be made more competitive for LMI consumers and communities. Applying both tests will help achieve this.

For the Retail Service and Products Test, the agencies were correct that the analysis should include "rates of successful repayment under the original loan terms. Other aspects of responsiveness could include the loan terms, underwriting, pricing, and safeguards that minimize adverse borrower outcomes."[183] NCRC has emphasized this type of review throughout our comments.

Question 70. Should the agencies use a different standard for determining when to evaluate closed-end home mortgage, open-end home mortgage, multifamily, small business, and small farm lending? If so, what methodology should the agencies use and why? Should the agencies use a different standard for determining when to evaluate automobile loans?

NCRC agrees with the proposal to calculate the major product line threshold at the AA level rather than institution level since product mixes might differ across AAs in response to local needs and demand. Thus, using the threshold at the AA level would enable evaluation of a particular product if it is important to the bank's business in particular AAs but may not be at the institution level.[184]

The Board proposes to consider a bank's home, small business or small farm loans if the lending constitutes 15% of the total dollar amount of loans in an AA.[185] A threshold should be based on the number of loans, not dollar amounts of loans, since the predominant evaluation methodology in CRA exams is considering number of loans. Number of loans is used most often as the unit of measurement because dollar amounts can result in banks' efforts being diverted to large dollar financing regardless of the need for smaller dollar financing in AAs.

For large banks, the threshold should be 15% or 50 loans, whichever is smaller

A percentage threshold could be workable for a large bank that makes more than 500 or 1,000 loans in each of the product areas. However, if a significant difference exists between loan totals for two products, the 15% threshold could be problematic. For example, a major lender in two product lines could have 5,000 home loans but 500 small business loans. In this case, the CRA exam should examine the 500 small business loans, but under the 15% threshold, the small business loans would not be examined since they are 9% of the loan portfolio. For large banks, the threshold should be based on two criteria: 15% or 50 loans, whichever is smaller.

Examiners can use weighted averages to consider scores from each product line so that large differences in loan volumes across product lines can be appropriately accounted for in calculating the overall score on the retail lending test.

[183] NPR, p. 176.
[184] NPR, p. 179.
[185] NPR, p. 179.

For small banks, threshold should be 15% or 30 loans, whichever is smaller

For small banks, their lower loan volume may result in lending not being examined in an AA when such lending is a major line of business if the 15% threshold is used. Using the CFPB's HMDA loan tables for 2019, NCRC calculated that a smaller bank under $1 billion made 242 HMDA loans, on average. This lending could be spread across two to four or even more AAs, making it less likely that it would qualify under a 15% threshold.[186] Thus, it would make more sense to use an absolute number such as 30 loans for a smaller bank.

Automobile lending should use the same thresholds as for other retail loans

The agencies proposed to use a weighted average of 15% of the dollar amount and loan count to determine if automobile lending would exceed the threshold of a major product line at the AA level.[187] The agencies proposed this out of recognition that average dollar volumes are lower for automobile lending that other lending. NCRC appreciates this sensitivity but suggests that our approach of using loans counts and applying either 15% or a loan count minimum, whichever is smaller, is a simpler and more effective approach for capturing significant lines of business at the AA level.

Question 71. Should the agencies use a different standard for determining when to evaluate multifamily loans under the Retail Lending Test? If so, should the standard be dependent on whether the lender is a monoline multifamily lender or is predominantly a multifamily lender within the geographic area? Relatedly, what should a "predominantly" standard be for determining whether multifamily loans constitute a major product line entail?

A different standard for determining a major product line in the case of multifamily lending is confusing and not necessary. In addition, the alternatives suggested by this question would set a high bar and likely result in significant amounts of multifamily lending not being evaluated under the Retail Lending Test in many AAs.

Retail Lending Test Evaluation Framework for Facility-Based Assessment Areas and Retail Lending Assessment Areas

Because the quantitative approach proposed for the retail lending test would decrease ratings inflation, the retail lending test likely would increase lending to LMI borrowers and people of color. As FDIC Acting Chairman Martin J. Gruenberg recently stated, the proposed CRA reforms including the retail lending test would "raise the bar" and encourage banks to work harder if they want to achieve an Outstanding rating.[188] Acting Comptroller of the Currency

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[186] See Consumer Financial Protection Bureau, *Data point: 2019 mortgage market activity and trends, Table 10 for HMDA lending by size of institution*, https://www.consumerfinance.gov/data-research/research-reports/data-point-2019-mortgage-market-activity-and-trends/.
[187] NPR, pp. 180-181.
[188] Gruenberg remarks at Urban Institute forum, *Modernizing the Community Reinvestment Act: Ensuring Banks Meet the Credit Needs of Their Communities*, June 3, 2022, https://www.urban.org/events/modernizing-community-reinvestment-act-ensuring-banks-meet-credit-needs-their-communities. Also, see Remarks by FDIC Acting Chairman Martin Gruenberg to the National Community Reinvestment Coalition (NCRC), June 13, 2022,

Michael J. Hsu emphasized that increased lending stimulated by CRA reform would help reduce income and racial gaps in homeownership and small business ownership,[189] which would be critical to reducing wealth gaps as well. A more rigorous retail lending test would be a vital instrument to redress redlining and to help underserved communities build wealth and revitalize economically.

The agencies estimated that the historical performance of banks in retail lending would result in more failing and low satisfactory ratings on the lending test, which at 45% of the overall rating, would be the most heavily weighted test.[190] For example, 10% of banks with assets less than $10 billion would likely receive a Needs-to-Improve on the retail lending test as would 4% of the banks with assets more than $50 billion. In addition, 46% and 58% of banks with assets below $10 billion and above $50 billion, respectively, would receive Low Satisfactory ratings.[191] On the other end of the ratings scale, no bank with assets above $50 billion would receive an Outstanding rating.[192]

Some stakeholders have already suggested that this new tougher ratings system would discourage banks from seeking Outstanding since that rating would be so hard to obtain. The banks may just settle for Satisfactory, which would be hard enough to attain. Overall, under this argument, retail lending may stagnant in future years as banks settle for mediocre CRA performance.

This proposition asserting the ill effects of an unrealistic ratings system does not hold up if significant evidence exists that banks have ample room to improve their performance in a safe and sound manner. Using Federal Reserve CRA data, NCRC calculated that the median percentage of home loans to LMI borrowers for large banks over $50 billion with Outstanding ratings on the lending test was about four percentage points lower than for regional banks with assets between $10 and $50 billion.[193]

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https://www.fdic.gov/news/speeches/2022/spjun1322.html. He stated, "the NPR would raise the bar for CRA performance on the retail lending test in order for a bank to earn an outstanding or high satisfactory rating. The NPR incorporates detailed metrics on bank lending activity. As a result, the NPR is able to establish standards for bank performance to achieve a particular CRA rating that would be higher than past experience. The objective is to provide an incentive for increased bank lending to underserved communities."

[189] Hsu remarks at Urban Institute forum.

[190] NPR, pp. 365-366.

[191] NPR, Table 9, p. 251.

[192] NPR, Table 9, p. 251.

[193] Josh Silver and Jason Richardson, *Do CRA Ratings Reflect Differences In Performance: An Examination Using Federal Reserve Data*, NCRC, May 2020, see Table 2, https://ncrc.org/do-cra-ratings-reflect-differences-in-performance-an-examination-using-federal-reserve-data/

The poorer performance of the largest banks is consistent with other research.[194] It is partly due to their retreat from the Federal Housing Administration (FHA) loan market[195] and a lack of compensating the reduction of FHA loans with increases in special affordable conventional home loan products. Furthermore, Table 13 in the proposed rule revealed that all banks performed worse in the 2017-2019 time period than in earlier years in terms of lower percentages receiving Outstanding ratings and higher percentages receiving Low Satisfactory ratings. The economic recovery during 2017-2019 should have been favorable for boosting performance; the fact that the reverse occurred suggests less effort to making home loans to LMI borrowers and communities.[196]

The Urban Institute found that 6.3 million more loans would have been made from 2009 through 2015 had lenders used underwriting standards in 2001, which the Urban Institute believed were reasonable.[197] The Urban Institute asserted that this tightening of credit standards would impact people of color and other underserved populations disproportionately.[198]

It appears therefore that the proposed retail lending test captures this relaxation of large bank home lending for LMI borrowers by not awarding them Outstanding ratings. At the same time, the performance of smaller banks and independent mortgage companies suggest that large banks can realistically make up ground. Therefore, NCRC appreciates that the agencies would use all lenders, including non-banks, as part of the market benchmark in the Retail Lending Test.[199] This would encourage banks, particularly the larger ones, to improve their performance.

On the other end of the scale, the NCRC study found the median percentage of home loans made by banks with Needs-to-Improve ratings to LMI borrowers was 2.13% compared to 11.83% for banks with Outstanding ratings.[200] Again, it seems likely that the banks barely passing or failing the proposed retail lending test can realistically make improvements.

Likewise, in the area of small business lending, it would appear that the largest banks could readily make improvements. The NCRC study cited above found that the median percentage of loans to small businesses with revenues under $1 million made by large, regional and community banks that had Outstanding ratings on the lending test was about 56%, 67% and 63%

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[194] Paul Calem, Lauren Lambie-Hanson, Susan Wachter, *Is the CRA Still Relevant to Mortgage Lending*, Penn Institute for Urban Research, September 2019, https://penniur.upenn.edu/uploads/media/Calem_Lambie-Hanson_Wachter.pdf.
[195] Jason Richardson, Joshua Devine, Jad Edlebi, *2020 HMDA Preliminary Analysis, NCRC August 2021*, *see table towards end of report called Home Purchase Lending by Lender and Loan Type, 2018-2020*, https://www.ncrc.org/2020-hmda-preliminary-analysis/
[196] NPR, p. 255.
[197] Laurie Goodman, *Quantifying the Tightness of Mortgage Credit and Assessing Policy Actions*, March 2017, Urban Institute, p. 9, https://www.urban.org/sites/default/files/publication/88826/quantifying_tightness_of_credit.pdf
[198] Laurie Goodman, p. 25.
[199] NPR, p. 207.
[200] Josh Silver and Jason Richardson, *Do CRA Ratings Reflect Differences In Performance: An Examination Using Federal Reserve Data*, NCRC, op. cit.

respectively.[201] Again, the proposed and revamped Retail Lending Test would no longer award the largest banks the same rating for performance that is not as good. Since their peers achieved significantly higher percentages of loans to the smallest businesses, it would appear that improvements are realistic, casting doubt on claims that the proposed Retail Lending Test is just too hard.

Another way to consider the feasibility of toughening the ratings on the Retail Lending Test is to examine performance versus likely ratings on a local level. In Washington DC, for example, the Federal Reserve web tool estimates that about 16% of banks would score Low Satisfactory or Needs-to-Improve on home lending in low-income tracts and about 15% would do so on home lending in moderate-income tracts.[202] According to NCRC's fair lending tool, lenders during 2018-2020 made an average of 35.6% of their home loans in LMI tracts, which contained about 49% of all families in the District of Columbia.[203] This disparity of about 14 percentage points suggests that all lenders, including banks, could improve. The proposed Retail Lending Test would motivate realistic improvements.

In conclusion, we are pleased that the agencies are proposing a more rigorous Retail Lending Test. We believe that large banks have the capacity to improve their performance as the proposed test would encourage them to do. We also support the application of this new test to intermediate banks,[204] which also have the capacity to be examined under the proposed test and have out-performed large banks in some aspects of retail lending over the last few years as discussed above.

Question 72. For calculating the bank volume metric, what alternatives should the agencies consider to the proposed approach of using collected deposits data for large banks with assets of over $10 billion and for other banks that elect to collect this data, and using the FDIC's Summary of Deposits data for other banks that do not collect this data? For calculating the market volume benchmark, what alternatives should the agencies consider to the proposed approach of using reported deposits data for large banks with assets of over $10 billion, and using the FDIC's Summary of Deposits data for large banks with assets of $10 billion or less?

NCRC urges the agencies to require collected deposits data for all large banks since this data would more accurately measure deposit collection in FBAAs and other geographical areas. NCRC believes that all large banks have the technological capacity to collect this data in a cost effective manner since the data does not involve too many data fields and inputs. The agencies mentioned that large banks would have an incentive to collect this data since any deposits outside of FBAAs would be assigned to FBAAs using the FDIC's Summary of Deposits data. This would have the effect of making the banks' volume metric ratios lower or worse than they

[201] Ibid., see Table 4.
[202] See the Federal Reserve web too and set it to Washington DC, https://www.federalreserve.gov/consumerscommunities/performance-thresholds-search-tool.htm
[203] See the NCRC Fair Lending Tool and set it to Washington DC, https://ncrc.org/2021-fair-lending-report/
[204] NPR, p. 182.

might actually be.[205] Perhaps, this would encourage some banks to collect deposits data, but a more straightforward approach is to mandate this collection for all large banks.

Mandating collected deposits data for all large banks would improve the accuracy of the market benchmark for the bank volume metric. Otherwise the market benchmark would consist of a mix of more accurate collected deposits data (based on geographical location of customers) and the less accurate FDIC data.

Question 73. Should large banks receive a recommended Retail Lending Test conclusion of "Substantial Noncompliance" for performance below a threshold lower than 30 percent (e.g., 15 percent of the market volume benchmark) on the retail lending volume screen?

The threshold of 30% is already too low. The retail lending volume screen is a ratio of the dollar amount of loans divided by deposits. This screen is intended to assure that banks are using their capacity as measured by deposits to make loans in FBAAs. If a bank has a low ratio, the bank is possibly redlining or at the very least, not using its deposit base to make loans in its community. As the agencies stated, "a bank fails to meet the credit needs of its entire community if it makes too few loans relative to its community presence, capacity, and local opportunities."[206] A low ratio as a threshold below which a bank fails its Retail Lending Test would not hold banks accountable for serving its community commensurate with its capacity.

The agencies explained that the proposed 30% threshold appropriately accounted for different business models regarding selling loans to the secondary market. The agencies suggested that the 30% ratio best reflected historical examiner judgements of banks that performed poorly compared to those that did not on the lending test.[207] However, the historical judgments of examiners could be too lax as suggested by the agencies' overall analysis of fail rates under its proposed Retail Lending Test.

While the comparison to an industry aggregate represents an improvement over current procedures, the ratio of 30% is set too low and is inconsistent with other parts of banking law. In 1994, the Riegle–Neal Interstate Banking and Branching Efficiency Act (Riegle-Neal) established loan-to-deposit ratio requirements for interstate banks. Congress wished to ensure that interstate banks were not establishing branches in states beyond their home states for the purposes of generating deposits but not lending. Section 109 of Riegle-Neal requires that branches in so-called "host" states outside of an interstate bank's home state maintain sufficient levels of lending. Specifically, an interstate bank's loan-to-deposit ratio in host states had to be at least half of the host state's aggregate ratio.[208] If it was below that ratio and an examiner deemed

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[205] NPR, p. 187.
[206] NPR, p. 186.
[207] NPR, pp. 189-190.
[208] Federal Reserve Board, Regulation H Section 109 of the Riegle–Neal Interstate Banking and Branching Efficiency Act, in the Compliance Handbook, https://www.federalreserve.gov/boarddocs/supmanual/cch/sec109.pdf, also see https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-61.html.

a bank unresponsive to credit needs in the host state, the bank could experience sanctions such as the closure of branches in the host state or prohibitions from opening new branches.

The 50% Section 109 loan-to-deposit ratio requirement coupled with the possible sanctions seems to have worked to keep banks at 50% or higher of host state loan-to-deposit ratios. NCRC has not heard of any bank over a several year period being sanctioned due to Section 109 violations. Thus, the Board's 30% proposal is too low in this context. NCRC recommends that the Board investigate the incidence of Section 109 violations. If they are quite low as NCRC suspects, this would argue for 50% as a minimal ratio. In fact, a ratio of 60% or 70% might be feasible and desirable in terms of preventing deposit harvesting and redlining.

Question 74. Should the geographic distribution evaluations of banks with few or no low-and moderate-income census tracts in their assessment areas include the distribution of lending to distressed and underserved census tracts? Alternatively, should the distribution of lending in distressed and underserved census tracts be considered qualitatively?

Some rural areas may anomalously have relatively few LMI tracts because either the total number of tracts are low or the non-metropolitan median income level is low, resulting in relatively few tracts classified as low- (up to 50% of area median income) or moderate-income (51% to 80% of median income). The agencies should assess whether rural areas with a lower than average number of LMI tracts or half the average number of tracts would have tracts with pressing needs increased in a meaningful number if distressed and underserved tracts were added to the geographic distribution analysis. The agencies are considering combining all rural areas at a state level to form large rural AAs so it might be the case that there are enough low-income or moderate-income tracts in most states except for the smallest (in terms of population) ten or so states.

Question 75. Is the choice of $250,000 gross annual revenue an appropriate threshold to distinguish whether a business or farm may be particularly likely to have unmet credit needs, or should the threshold be lower (e.g., $100,000) or higher (e.g., $500,000)?

Firstly, NCRC applauds the agencies' approach to separately evaluate lending to low-income and moderate-income categories in both the geographic and borrower analysis. As the agencies noted, when low- and moderate-income categories are combined, banks could focus more on moderate-income borrowers or tracts and neglect low-income borrowers and tracts.[209]

Secondly, the agencies had a similar line of reasoning in the case of small businesses, stating that the smallest businesses with revenues under $250,000 and $100,000 had the most acute needs for credit.[210] NCRC therefore strongly supports the separate evaluations for businesses with revenues up to $250,000 in the proposed lending test. The $250,000 cut-off should not be raised

[209] NPR, pp. 196-198.
[210] NPR, p. 199.

to $500,000, and the agencies should consider adding small businesses of revenues of $100,000 or less as a separate evaluation category.

A revenue category of $100,000 or less could be particularly useful for capturing lending to young small businesses including those with one year of operation. According to JP Morgan Chase, "the median Black-owned firm earned $39,000 in revenues during its first year, 59% less than the $94,000 in first-year revenues of a typical White-owned firm. Small businesses founded by Hispanic owners earned $74,000 in revenues, or 21% less than the median for White-owned firms."[211] Moreover, the $100,000 category could be especially important for women-owned small businesses. According to an American Express report, 88% of all women-owned businesses had revenues less than $100,000.[212]

Question 76. Should the community benchmarks be set using the most recent data available at the time of the examination? Would an alternative method that establishes benchmarks earlier be preferable?

Most CRA exam time periods cover two or three years. The community benchmark data in many instances would be supplied by the American Community Survey (ACS) conducted by the Census Bureau. It would be unlikely in many cases that demographic data from the ACS would change by a great extent over the typical CRA time period. However, a prudent approach would be to average annual family counts, household counts and other demographic data over the CRA exam time period. In this manner, any differences in demographic and economic differences over the exam time period is accounted for and averaged over the time period. We would not be supportive of using demographic data for the community benchmarks for either the beginning of the evaluation time period or for the start date of the exam as this would not account for demographic characteristics over the entire CRA exam period.[213]

Question 77. Should the bank volume metric and distribution bank metrics use all data from the bank's evaluation period, while the market volume benchmark and distribution market benchmarks use only reported data available at the time of the exam? Would an alternative in which the bank volume metrics and distribution bank other and metrics were calculated from bank data covering only the same years for which that reported data was available be preferable?

The bank volume metric and distribution bank metrics should use all data from the bank's evaluation time period even in cases when the comparable market data may not be available for each year of the time period. The threshold performance levels would be calculated just for the years in which both the bank and market data is both available. For years in which the market

[211] JP Morgan Chase & Co. Institute (July 2020) Small Business Owner Race, Liquidity, and Survival. p. 17. https://www.jpmorganchase.com/institute/research/small-business/report-small-business-owner-race-liquidity-survival
[212] American Express. The 2018 State of Women-Owned Businesses Report. p. 9.
[213] See NPR discussion, pp. 212-214.

data is not available, the bank data is still useful for purposes of public review. Dramatic changes in the bank volume and distribution metrics could possibly inform AA conclusions.

Alternatively, the agencies contemplated calculating the market benchmarks with available data even if a year of market data is missing.[214] This could possibly skew market benchmarks, particularly in cases of dramatic economic change during the last year of the CRA exam time period. The agencies could establish a threshold level of economic change such as specified increases in the unemployment level that would be used to confine market benchmarks to only years for which market data is available.

Alternatively, exam completion could be delayed until the market data becomes available, which hopefully would only entail a lag of a few months. The CFPB has made commitments to releasing aggregate HMDA data sooner than in previous years. The bank agencies should do likewise regarding data it would collect.

Question 78. Are the proposed community benchmarks appropriate, including the use of low-income and moderate-income family counts for the borrower distribution of home mortgage lending? Would alternative benchmarks be preferable? If so, which ones?

In general, the agencies proposed reasonable demographic data for community benchmarks. The agencies may want to consider households instead of families[215] for the borrower distribution metrics since households are more inclusive as they include people sharing housing units that may not be related. The agencies considered an alternative that would be low- or moderate-income households in owner-occupied housing units, which we do not support.[216] As the agencies acknowledged, this would constrain the community benchmark since there are renter households that could become homeowners if lenders make loans to them. Renter households would not be considered in an alternative that only included households in owner-occupied housing units.

Question 79. Should automobile lending for all banks be evaluated using benchmarks developed only from the lending of banks with assets of over $10 billion?

NCRC believes that a market benchmark is important even if based on partial data. As the agencies described, it would help better explain lending patterns in anomalous markets including those with ample mass transit where lenders might be offering a percentage of automobile lending to LMI borrowers that is considerably lower than the community benchmark.[217] A solution to this issue, however, is to require automobile lending from all large banks, not just those with revenues over $10 billion. At the very least, the agencies could apply a loan count threshold such as 25 loans to weed out large banks for which automobile lending is an incidental business.

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[214] NPR, p. 213.
[215] NPR, p. 206.
[216] NPR, p. 207.
[217] NPR, p. 212.

Question 80. Are the proposed market and community multipliers for each conclusion category set at appropriate levels? If not, what other set of multipliers would be preferable? In general, are the resulting thresholds set at an appropriate level for each conclusion category?

Proposed multipliers: Select the lesser of two values[218]

Threshold	Market multiplier and benchmark	or	Community multiplier and benchmark
Needs to Improve	33% of mkt. bench.	or	33% of com. bench.
Low Satisfactory	80% of mkt. bench.	or	65% or com. bench.
High Satisfactory	110% of mkt. bench.	or	90% of com. bench.
Outstanding	125% of mkt. bench.	or	100% of com. bench.

The overall objective is to create a ratings system that avoids ratings inflation and in which ratings meaningfully reflects distinctions in performance. The current system, for example, awards about 90% of banks with the overall Satisfactory rating. Regardless of whether the ratings distribution is overall or for the component tests, it is not meaningful to have 90% of banks in any one ratings category. The tables in the proposal suggest that banks would be distributed meaningfully across the categories for the proposed Retail Lending Test and that banks are not bunched in an exaggerated manner in any of the five subtest categories.

A secondary objective is creating a ratings system that makes reasonable judgments regarding the percentage of a bank's loans to a group of borrowers or tracts in relation to peers and demographics. NCRC has observed over the years that banks generally have a more difficult time issuing a percentage of loans that is similar to the percentage of LMI borrowers or tracts than a percentage of loans similar to that of their peers in a geographical area. A subset of LMI populations are not ready for homeownership, which accounts for part of the difficulty of lending in proportion to these populations. Hence, the multipliers for the community benchmark should be lower than those for the market benchmark as the agencies proposed. However, the agencies' multipliers for the community benchmark get progressively more challenging with each ascent up the ratings categories. They are set at 90% for High Satisfactory and 100% for Outstanding, which appropriately signals to banks that if they want the higher ratings they should strive for lending in proportion to LMI borrowers or census tracts.

The market benchmark is the percentage of loans made by all lenders, including non-banks, in the geographical area. It is generally easier for banks to meet or exceed the market benchmark. Hence, the agencies appropriately established higher multipliers for the market benchmark. In order to achieve Low Satisfactory, the bank's percentage of loans to a subgroup of borrowers or tracts needs to be at least 80% of the market benchmark, which acknowledges that a bank is performing below average but not too far below average to achieve a passing rating. The High

[218] NPR, p. 215.

Satisfactory multiplier of 110% implies that a bank needs to be moderately above peer levels to achieve this rating.

In order to achieve Outstanding, the bank needs to be at 125% of peer levels, which is appropriate due to NCRC's observations over the years that banks cluster around the market benchmark. Therefore in order to distinguish performance as Outstanding, a bank should be significantly better than a cluster of its peers. Moreover, Table 9 in the agencies' proposal showed that most banks would achieve Outstanding ratings at modestly less rates than currently (banks with assets at less than $10 billion would be Outstanding at 8% of the time and those with assets between $10 and $50 billion would be Outstanding at 6% of the time).[219] This multiplier raises the bar but does so in a manner that is achievable and realistic.

Question 81. How should the agencies use the calibrated market benchmark and calibrated community benchmark to set performance thresholds? Should the agencies set thresholds based on the lower of the calibrated market benchmark or calibrated community benchmark?

The agencies should consider a weighted average approach instead of choosing the lower of the community or market benchmarks. Selecting the lower benchmark could result in lower thresholds that inflate ratings. For example, in AAs in which the market benchmark is considerably lower than the community benchmark, all lenders could be under-performing in making loans to LMI borrowers or communities. In these situations, using the lower market benchmark could excuse poor performance.

The agencies contemplated a weighted average of between 70% to 90% for the market benchmark.[220] In cases in which the market benchmark is considerably lower than the community benchmark and a lack of performance context factors (such as a local recession) could account partly for this outcome, the weight of the market benchmark should be lower, perhaps at 50%. The agencies could choose weights depending on the discrepancy between the two benchmarks and whether performance context factors explain part of the discrepancy.

Conversely if the community benchmark is lower than the market benchmark, a weighted average approach would more successfully motivate banks to improve performance rather than using the lower community benchmark. Again, weights applied to both benchmarks would depend on the discrepancy between the benchmarks and performance context factors.

The agencies should select weights, not examiners, in order to promote consistency across exams and prevent CRA ratings inflation. The agencies should conduct data analysis, consider performance context factors across metropolitan areas and rural counties, and consider discrepancies between the benchmarks in order to create a range of weights that reflect differences in market and demographic conditions.

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[219] NPR, p. 251.
[220] NPR, p. 216.

Question 82. How should the agencies address the potential concern that the proposed approach may set performance expectations too low in places where all lenders, or a significant share of lenders, are underserving the market and failing to meet community credit needs? Should the agencies consider an alternative approach to setting the performance thresholds that would use a weighted average of the calibrated market benchmark and calibrated community benchmark?

See the answer to Question 81 immediately above and further discussion in response to Question 85.

Question 83. Should the agencies weight the two distribution results equally? Should the borrower distribution conclusion be weighted more heavily than the geographic distribution conclusion to provide an additional incentive for lending to low-and moderate-income borrowers in certain areas? Are there circumstances under which the geographic distribution conclusion should be weighed less heavily, such as in rural areas with few low-and moderate-income census tracts or where the number of investor loans is increasing rapidly?

<u>Overall point system should be tweaked</u>

The agencies proposed to award points for an outcome on each of the performance measures such as percent of loans to low-income borrowers or percent of loans to moderate-income borrowers.

The agencies proposed the following point system:

Outstanding	10 points
High Satisfactory	7 points
Low Satisfactory	6 points
Need-to-Improve	3 points
Substantial Noncompliance	0 points

The agencies correctly pointed out that a range of 10 points would create more distinctions in ratings than a point system of assigning an integer of 0 to 4 for each rating. Under the integer approach, the agencies estimated that more banks would receive one of the two Satisfactory categories.[221] Since the objective is to spread out banks across the ratings, the point system is preferable.

However, the agencies are not creating enough distinction between Low Satisfactory and High Satisfactory which would only differ by one point. Their rationale is that these are two degrees within the Satisfactory range.[222] However, Low Satisfactory is barely passing while High Satisfactory is closer to Outstanding. To fix this, Low Satisfactory should be assigned a point

[221] NPR, p. 225.
[222] NPR, p. 226.

score of 5. Below, we also make the case for adjustments to maximum points for High Satisfactory and Needs-to-Improve.

Weights of low- and moderate-income categories should be set based on the community benchmark

The agencies proposed to weight the low- and moderate-income borrower (and census tract) categories based on the community benchmark.[223] For example, in an AA with a higher percentage of low-income households (60%) than moderate-income households (40%), the low-income borrower performance measure would receive the higher weight (60%) than the moderate-income borrower performance measure (40%). NCRC agrees with this proposal as it reflects the demographics of the community.

Weigh the borrower category higher than the census tract category

The agencies proposed to weigh the borrower and census tract categories equally, asserting that lending to LMI borrowers and communities are both important.[224] While this has merit, an equal weight for both may increase pressure on banks to lend in a manner in LMI census tracts, which could inadvertently exacerbate displacement that can occur in gentrifying communities. In addition, weighing the borrower categories more heavily than the census tract categories could better further the goals of integration since more emphasis would be placed on lending to LMI borrowers regardless of where they reside.

NCRC would suggest a weight of 60% for borrowers and 40% for tracts. A lower weight than 40% for tracts may cause banks to neglect LMI tracts which would be contrary to the goals of revitalizing these tracts. At the same time, the higher weight of 60% for borrowers promotes the objectives of integration and avoiding displacement. In addition, this weighing scheme probably works better in rural communities that do not have as many LMI tracts.

NCRC asks the agencies to consider further safeguards against displacement in LMI tracts undergoing gentrification. An indication of gentrification is rapid increases in sales prices for homes. In LMI tracts with rapid increases in sales prices over the last few years or where the sales price is above average for the metropolitan area or rural county, we ask the agencies not to count loans for CRA purposes in those LMI tracts that are made to middle- and upper-income borrowers or at least, not to upper-income borrowers. This would avoid CRA accelerating what the market is already doing (lending to non-LMI borrowers in those tracts) and would instead focus CRA on what it is supposed to do, that is, focusing on disadvantaged borrowers most of need of public sector protection and assistance.

[223] NPR, p. 226.
[224] NPR, p. 226.

Question 84. Should the agencies use loan count in conjunction with, or in place of, dollar volume in weighting product line conclusions to determine the overall Retail Lending Test conclusion in an assessment area?

The agencies proposed to weigh the product line conclusions by the dollar volume of lending activity.[225] In other words, if closed-end home lending is 60% of total retail loan dollar volume, the conclusion (points) on that test would count for 60% of the retail lending grade. In general, a weighing method should prioritize home and small business lending, which are critical needs and which were the loan types most often withheld from LMI communities during the era of widespread redlining. Nevertheless, responsible consumer lending is also an important need, particularly during recessions when savings rates of LMI people decline and they need more access to credit for emergency expenses.

A weighing method that provides approximately a 40%-40%-20% weight to home, small business and consumer lending, respectively, for a large bank that offers sizable numbers of each type of loan would be appropriate. The agencies should use available data to determine if this type of result is best achieved by using dollars alone to weigh scores or a combination of weights for dollar volume and loan count.

In general, NCRC surmises that loan counts would better achieve the weighing we desire by equalizing loans made to LMI borrowers and more affluent borrowers that often have larger dollar amounts. The only exception to this is if a particular bank makes a very high volume of small dollar consumer loans but also makes sizable numbers of home and small business loans. In that case, a weighted average of count and dollars may better achieve the priority for home and small business lending.

Question 85. Would identifying underperforming markets appropriately counter the possibility that the market benchmarks might be set too low in some assessment areas? If so, what data points should be used to set expectations for the market benchmark? How far below this expectation should an observed market benchmark be allowed to fall before the market is designated as underperforming?

The agencies proposed to use a statistical model to identify underperforming markets. Using sophisticated modeling techniques, the agencies proposed to consider demographic, housing market and economic variables to predict market benchmarks for the Retail Lending Test. When the predicted benchmarks are significantly higher than the actual benchmarks, the agencies would identify the market as underperforming.[226]

Using a model of this nature, the agencies could identify all the geographical markets that would be underperforming. The model would also review the order of magnitude of underperformance. For the geographical markets in the worst quartile in which underperformance is the widest (as measured by the difference between the predicted and actual market benchmark), the agencies

[225] NPR, pp. 228-229.
[226] NPR, p. 231.

could use the predicted market benchmark for calculating the score on the lending test. In the second worst quartile, a weighted average between the predicted and actual market benchmark could be used. In this manner, appropriate corrections to the calculation of the scores would ultimately motivate banks to bolster performance in areas where they have ample opportunities to do so.

Question 86. Should the agencies consider other factors, such as oral or written comments about a bank's retail lending performance, as well as the bank's responses to those comments, in developing Retail Lending Test conclusions?

As they contemplated,[227] the agencies must consider oral or written comments from the public about retail lending performance and use these comments when developing Retail Lending Test conclusions or conclusions concerning the other tests. If a bank, for example, performs poorly regarding a certain product such as closed-end home mortgage lending, and community comments have pointed out this deficiency over a long time period, then the weight on that test should be adjusted upward by the examiner. Conversely, if a bank is performing in an excellent manner on a product, and community comments have lauded the bank regarding an underwriting method or some other factor that could contribute to this performance, the examiner can likewise provide more weight. Any examiner adjustments of this manner should be explicitly discussed in the exam. This would encourage accountability to the public and encourage community stakeholders to comment.

Question 87. Should all large banks have their retail lending in their outside retail lending areas evaluated? Should the agencies exempt banks that make more than a certain percentage, such as 80 percent, of their retail loans within facility-based assessment areas and retail lending assessment areas? At what percentage should this exemption threshold be set?

All large banks must have their outside retail lending areas evaluated at the institution level. The agencies proposed to evaluate retail lending in FBAAs, RLAAs and in areas beyond FBAAs and RLAAs. In the areas outside of the FBAAs and RLAAs, the conclusions would be weighed based on the percentage of loans and deposits that were in areas outside of FBAAs and RLAAs.[228] This proposed weighing procedure would take into account differences in business models and percentages of outside FBAA and RLAA lending. Lesser weight would be accorded to outside FBAA and RLAA lending at the institution level for banks with more of a traditional branch model. Thus, this procedure would not be unduly burdensome for them and would hold them accountable for making loans to underserved populations, particularly in cases where outside FBAA and RLAA lending could be considerable in volume even if it is a smaller percentage of a bank's total lending.

[227] NPR, p. 229.
[228] NPR, p. 234.

Finally, no exceptions should be granted to this procedure such as exemptions for banks with 80% of more of their loans in FBAAs and RLAAs as suggested by the agencies as an alternative.[229]

Question 88. Does the tailored benchmark method proposed above for setting performance ranges for outside retail lending areas achieve a balance between matching expectations to a bank's lending opportunities, limiting complexity, and setting appropriate performance standards? Should the agencies instead use less tailored benchmarks by setting a uniform outside retail lending areas benchmarks for every bank? Or should the agencies use a more tailored benchmarks by setting weights on geographies by individual product line?

The proposed method for creating tailored benchmarks is reasonable. Under this method, the agencies would calculated market and community benchmarks for each MSA and non-MSA portion of a state. The agencies would then apply a weight for each of these benchmarks depending on the percentage of retail lending that occurred in each MSA or non-MSA in areas outside of FBAAs or RLAAs for the particular bank.[230] This is preferable to the creation of nationwide benchmarks since the tailored benchmarks would be more reflective of the demographic characteristics, economic conditions and credit needs in the outside AA areas. Also, the alternative offered by the agencies to apply this approach to each major product line[231] instead of creating weights based on the overall dollar amount of retail lending is more precise and preferable.

Question 89. Should assessment area and outside retail lending area conclusions be weighted by the average of a bank's percentage of loans and deposits there? Is the proposed approach for using FDIC's Summary of Deposits data for banks that do not collect and maintain deposits data appropriate? Should the agencies use another method for choosing weights?

The agencies proposed a reasonable method for weighing FBAA, RLAA and outside AA conclusions. The FBAA and RLAA scores in a state or multi-state area would be weighed by a simple average of the percentage of deposits and loans in each FBAA and RLAA. The agencies offered a rationale for even weights implying both deposits and loans are important indicators of the extent of a bank's business and capacity in an area. For the institution level score, the weights would be applied in the same manner with weights also calculated for outside AA performance.[232]

The score for the Retail Lending Test would be displaced numerically as well as the assigned rating.[233] For example, a score of 8 could be displayed and since this score was closer to High Satisfactory (a score of 7) than Outstanding (a score of 10), the rating would be High Satisfactory. The numerical score would be meaningful in that it would advise the public

[229] NPR, p. 235.
[230] NPR, pp. 237-238.
[231] NPR, p. 238.
[232] NPR, pp. 245-247.
[233] NPR, p. 244.

whether the bank was closer to Outstanding or High Satisfactory. In other cases, a numerical score would similarly inform the public whether a bank was just barely passing (low end of Low Satisfactory) or passing with some room to spare (higher end of Low Satisfactory). The scores add needed nuance and reveal more distinction in performance.

Finally, the agencies engaged in additional discussion of how imperfections in the FDIC Summary of Deposits (SOD) would leave out deposits in RLAAs and outside AA areas. This could reduce the weights assigned to these areas, which in some instances could be important areas of business for a bank.[234] Thus, large banks below $10 billion in assets or ISB banks opting into the large bank exam may have an incentive to voluntarily collect the better deposit data required for large banks with assets above $10 billion. The agencies would have no alternative but to use SOD in this manner for banks that do not collect the better data. Perhaps this approach could motivate more data reporting as the agencies surmised. The best approach, however, is to require better deposit data for all large banks.

Retail Services and Products Test

The proposed retail service and products test for large banks would have two components:

- delivery systems;
- credit and deposit products responsive to the needs of LMI communities.[235]

For large banks with assets of more than $10 billion, the delivery systems test would have three components:

- branch availability and services
- remote service availability
- digital and other delivery systems.

Large banks with assets below $10 billion would only have the first two parts of this delivery systems test.[236]

For the branch availability and services component, the agencies would evaluate branch distribution, branch openings and closings and banking hours and services responsive to LMI customers and communities.[237] The banking hours and services component would include consideration of:

- Extended business hours, including weekends, evenings, or by appointment;
- Providing bilingual/translation services;
- Free or low-cost check cashing services, including government and payroll check cashing services;

[234] NPR p. 242.
[235] NPR, p. 255.
[236] NPR, p. 261.
[237] NPR, p. 262.

- Reasonably priced international remittance services; and
- Electronic benefit transfer accounts

The proposed delivery systems test would be improved by the use of community and market benchmarks for assessing a bank's performance. However, as described below, more guidance is needed for examiners about how to employ the benchmarks. The new focus on low- and very-low branch access areas is important but this should be a criterion that is regularly employed instead of a form of bonus points as the agencies' proposal seems to read.

The branch openings and closings component needs to be further developed. Currently, CRA exams consider the number and percent of openings and closings in each tract income category. The exams rarely describe whether a disproportionate amount of closings in LMI tracts would lower a score or a disproportionate amount of openings in LMI tracts would raise a score. The final rule should add guidance to examiners regarding how any disproportionate closings or openings in LMI tracts would affect the retail services score.

The banking hours and services component of the delivery systems test is vital since it assesses what services and products are actually made available in branches in LMI and underserved communities. A branch is not useful if the range of products is narrow and inconsistently available. Redlining often consisted of branches in LMI and communities of color not offering the standard suite of credit and deposit products.

As the agencies stated, assessing services and products specifically in branches as opposed in totality (branch and non-branch) is a new aspect of the service test.[238] NCRC agrees this is necessary and is pleased that this part of the service test will assess whether affordable products are available at branches. Access needs to be accompanied by affordability in order for traditionally underserved populations to have access to products they can realistically use. The agencies should also add to the above list whether the same range of credit products is available in branches in LMI and other disadvantaged communities as in non-LMI areas since not offering credit products in branches in redlined areas before CRA was a common practice.[239]

The proposed remote service and availability component of the service test would be an improvement over the current service test because it includes more types of remote services and improved benchmarks. As discussed above, NCRC appreciates that the agencies are not only considering ATMs but also other types of remote facilities that engage in deposit transactions. The agencies proposed to compare the distribution of remote facilities to demographic benchmarks such as the percentage of households and small businesses in LMI tracts.

The agencies should consider the construction of a database that also enables the development of a market benchmark, that is, the distribution across tracts of all banks' remote service facilities in

[238] NPR, p. 278.
[239] Josh Silver, The purpose and design of the Community Reinvestment Act (CRA): An examination of the 1977 hearings and passage of the CRA, June 2019, NCRC, https://ncrc.org/the-purpose-and-design-of-the-community-reinvestment-act-cra-an-examination-of-the-1977-hearings-and-passage-of-the-cra/

FBAAs. In addition, the agencies proposed to consider the placement of remote service facilities with retailers.[240] This is positive and should be expanded to community-based organizations as well. The agencies also would consider participation in third party fee waiver alliances for out-of-network usage.[241] This is positive but the agencies should also add third party providers in general.

For the digital and other delivery systems part of the service test, the proposal offered reasonable quantitative measures such as the distribution of digital account activity across census tracts of various income levels. The shortcoming of this proposal is its confinement to banks with assets above $10 billion. NCRC believes that all large banks should be evaluated under this component. At the very least, the agencies could create a threshold for large banks with assets below $10 billion. If more than one third of their deposit activity is digital, they should have the digital component of the large bank exam.

The credit and deposits product evaluation subtest would be an improvement over the current qualitative part of the service test. As proposed,[242] it makes sense to assess responsive deposit and credit products in tandem since a relationship can occur. For example, deposit products that promote savings can help customers obtain credit. This subtest would occur at the institution level[243] instead of the AA level. NCRC much prefers AA level evaluation and would suggest that the test at least consider the distribution of products across AAs and whether responsive products are being offered in AAs with pressing needs as indicated by high rates of unbanked populations or other demographic and economic data.

In addition, this test must rigorously assess quantitative data such as the number and percent of responsive products. It is not enough to have these products in a bank's portfolio if a bank is not offering them to traditionally underserved populations. Current CRA exams are inconsistent in the rigor of their numerical analysis of responsive products.[244] In addition, examiners should award higher points to responsive products banks developed rather than mostly relying on government-guaranteed products.

NCRC asks the agencies to reconsider their proposal that the deposit products part of this subtest would only apply to large banks with assets of $10 billion or more.[245] As stated elsewhere, we believe that all large banks should report the improved deposit data. Even in the absence of the deposit data, all large banks would have basic information on the number of responsive deposits and generally which subgroups of customers use them.

Below, we offer more recommendations regarding weights for the subtests of the Retail Service and Products test. The agencies must develop weights that are fixed. They should not leave

[240] NPR, p. 280.
[241] Ibid.
[242] NPR p. 287.
[243] NPR, p. 285.
[244] Josh Silver, *Do CRA Exams Measure Retail Lending Well?,* NCRC, December 2019, see section under header flexible and innovative, https://ncrc.org/do-cra-exams-measure-retail-lending-well/
[245] NPR, p. 285.

weighing up to the examiners, which would lead to inconsistent exams with ratings that could be inflated.

The delivery systems part of the service test would be scored at the state and multistate MSA level. The scores for each FBAA would be weighted based on the shares of deposits and loans in each FBAA.[246] This proposal creates the same difficulties for smaller metropolitan areas and rural counties as under the lending test. The smaller areas would tend to be weighed less. As for the lending test, NCRC recommends that the agencies require at least a Low Satisfactory rating in 60% of the large metropolitan AAs, the smaller metropolitan AAs and rural AAs in order for a bank to pass on its service test. This would motivate a bank to ensure that it passes muster in most of its smaller areas.

Question 90. Should the agencies use the percentage of families and total population in an assessment area by census tract income level in addition to the other comparators listed (i.e., census tracts, households, and businesses) for the assessment of branches and remote service facilities?

The branch distribution component of the branch availability subtest would compare the percentage of a bank's branches in low- and moderate-income tracts separately to the percentage of tracts that are low- and moderate-income and the percentage of households and businesses in each tract category.[247] These are reasonable demographic comparators. The percentage of families do not need to be added since households captures both families and people in households residing together that are not family members. Of the three demographic comparators, percentage of households and businesses are more important than percentages of tracts that are either low- or moderate-income because households and businesses are more representative of the size of the potential customer base for banks while percentage of tracts is not as informative regarding the customer base.

In addition, the agencies proposed to use a market benchmark, that is, the percentage of all bank branches in each tract category compared against the bank being examined.[248] This is an overdue addition which is not present in current exams. It directly compares a bank against its peers just like the market benchmarks in the Retail Lending Test.

The agencies did not create thresholds or weights for the community or market benchmarks. While NCRC believes it is possible to do so, NCRC at least recommends that the agencies create guidelines for scoring and rating in order to avoid overly subjective assessments. For example to receive an Outstanding rating, a bank should have a higher percentage of branches in low- or moderate-income tracts than its peers and the demographic comparators. In contrast, a Low Satisfactory rating could entail percentages of branches below the community benchmarks and just modestly below the market benchmark.

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[246] NPR, p. 297.
[247] NPR, p. 265.
[248] NPR, p. 265.

The agencies must dramatically improve upon Appendix A in the current regulation that leaves too much to examiner judgement and contributes to ratings inflation. For example, an Outstanding performance in delivery systems is ensuring that they are "readily accessible to geographies and individuals of different income levels in its assessment area(s)."[249] This inadequate guidance does not specify any relationship to community and market benchmarks for an Outstanding rating to be achieved. Finally, just as with the Retail Lending Test, NCRC believes it is important to separately analyze performance in low- and moderate-income tracts.

Question 91. Are there other alternative approaches or definitions the agencies should consider in designating places with limited branch access for communities, such as branch distance thresholds determined by census tract population densities, commuting patterns or some other metric? For example, should the agencies not divide geographies and use the more flexible, second alternative approach?

Question 92. How should geographies be divided to appropriately identify different distance thresholds? Should they be divided according to those in the proposed approach of urban, suburban, and rural areas; those in the alternative approach of central counties, outlying counties, and nonmetropolitan counties; or some other delineation?

Question 93. How narrowly should designations of low branch access and very low branch access be tailored so that banks may target additional retail services appropriately?

Question 94. Is a fixed distance standard that allows the concentration of low and very low branch access areas to vary across regions, such as that in the proposed approach, or a locally-determined distance threshold that identifies a similar concentration of low and very low branch access areas within each local area, such as that in the alternative approach, most appropriate when identifying areas with limited branch access?

Question 95. Should the agencies take into consideration credit union locations in any of the proposed approaches, or should the analysis be based solely on the distribution of bank branches? For example, in the proposed or local approach, having a credit union within the relevant distance of a census tract population center would mean that the census tract would not be a very low branch access census tract (if there were no bank branch present).

Question 96. If the local approach were adopted, how frequently should the local distances be updated?

This answer addresses aspects of Questions 91-96.

NCRC appreciates that the agencies are considering banking deserts or areas with low levels of branch access in the proposed rule. It is unclear, however, how systematically the proposed Retail Service and Products Test will consider this factor. It appears that banks would earn bonus points of some sort if they place branches in banking deserts. NCRC would prefer that the

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[249] 12 CFR Appendix A to Part 25(b)(3)(i)(A), https://www.ecfr.gov/current/title-12/chapter-I/part-25#p-Appendix-A-to-Part-25(b)(3)(i)(A)

agencies add a regular performance measure to the service test. The measure could be the percent of a bank's branches that are in low- and very-low branch access census tracts. Banks with a percentage of branches in deserts that are higher than their peers in FBAAs would receive higher scores on this measure and lower scores if they trail their peers. A regular evaluation of branching in deserts would be more effective than bonus points in encouraging banks to expand branches in areas with low access.

In its assessment of bank branching in deserts, the agencies proposed to consider a bank's record of maintaining branches in deserts and opening branches in deserts.[250] Maintaining branches in deserts is similar to NCRC's proposal above that the agencies consider the percent of branches in deserts. Opening branches in deserts could be an additional factor and could be defined as percent of branch openings during the CRA exam cycle that involved openings in deserts. Finally, the agencies proposed to consider the effectiveness of alternative delivery in deserts where banks closed branches.[251] NCRC does not support this proposal as it might become a loophole excusing closings.

NCRC does not support the alternative of a more qualitative evaluation of assessing branches in LMI census tracts with few branches.[252] These tracts would not be defined in a quantitative manner and would therefore lead to inconsistent and subjective judgments by examiners. It would have the potential to increase ratings inflation on the service test.

The agencies described two quantitative approaches to identifying low- and very-low branch access areas. Under both, branching would be considered within a specified distance away from a census tract's center of population.[253] Under the fixed distance approach, an area would be a low- or very low-branch area if there were one or none branches within two miles of the tract's population center in an urban area, within five miles in a suburban area and within 10 miles in a rural area.[254]

In contrast under the local approach, the agencies would devise distances based on access to the nearest branch for 90% of a tract's residents traveling from the tract's population center.[255] The agencies estimated that about 8% of the nation's population would be in low- and very-low branch access areas under the local approach in contrast to 3% under the fixed approach. Similar percentages result when dividing up tracts by location (urban, suburban, rural) and income levels.[256]

NCRC prefers the local approach not only because of the broader reach but because it is a more precise measure on local level based on the travel distances for 90% of a tract's residents. It would also probably result in a more robust performance measure with more units of observation

[250] NPR, p. 274.
[251] NPR, p. 274.
[252] NPR, p. 274.
[253] NPR, p. 268.
[254] NPR, p. 269.
[255] NPR, p. 269.
[256] NPR. p. 272.

for a bank and its peers. In addition, we support the definition of low-branch access as one branch within the specified distance from the census tract's population center and very-low as no branches. A higher number of branches under each definition would include areas that are not branch deserts.

Credit union branches should not be considered because credit union membership restrictions could disqualify significant numbers of a census tract's residents from access to those branches.

Under the local approach that we prefer, the definitions of low- and very-low branch access should be updated annually to coincide with the FDIC Summary of Deposits database releases. CRA exams consider activity on an annual basis so updating the branch database annually aligns comparisons among a bank, its peers and demographic and census tract benchmarks.

Question 97. What other branch-based services could be considered as responsive to low-and moderate-income needs?

As stated above, NCRC does not support allowance for a bank providing branch-based services in a low- or very-low branch access area that does not involve a branch. A branch provides a more complete range of services over more hours during a week than alternatives to branches can. Branches can also better accommodate more complicated transactions or questions than non-branch delivery. For example, changing or protecting accounts in the case of fraud is a labor intensive process that is best executed by branch personnel working with a customer in person than over the phone. This part of the service test is designed to asses branch placement in underserved areas; that should be its narrow and very important purpose.

Question 98. Should branches in distressed or underserved middle-income nonmetropolitan census tracts receive qualitative consideration, without documenting that the branch provides services to low-or moderate-income individuals?

NCRC would support a quantitative measure expressed as a percentage of branches in distressed or underserved tracts[257] in the Retail Services and Products Test. A bank should be compared to its peers and demographic benchmarks such as the percentage of households and businesses in these tracts categories. Performance measures and benchmarks must be employed to reduce subjective examiner judgments that could inflate ratings on the Service Test. Further, banks should supply data including usage of the branches and services by LMI customers for the qualitative part of the Retail Service and Products Test. The presence of branches in these tract categories should not count unless the bank can document that they offer products that are used by LMI populations just as with the other parts of the Service Test.

[257] Discussion in the NPR on page 276.

Question 99. Should the agencies provide favorable qualitative consideration for retail branching in middle-income and upper-income census tracts if a bank can demonstrate that branch locations in these geographies deliver services to low-or moderate-income individuals? What information should banks provide to demonstrate such service to low-or moderate-income individuals?

NCRC is opposed to providing qualitative consideration for retail branching in middle- and upper-income tracts as contemplated in the proposal.[258] This occurs currently in an inconsistent manner on CRA exams, which can lead to subjective judgments and the potential for inflating ratings. Some stakeholders will say that NCRC's position would disqualify branches in non-LMI tracts that are nevertheless on the boundaries of LMI tracts. However, any arbitrariness in this position is offset by implicitly considering the importance of any branches in non-LMI tracts in other performance measures. In particular, if the agencies implement their proposal to consider deposit products used by customers residing in LMI tracts, that performance measure would capture branches in non-LMI tracts that effectively offer deposit products to customers residing in LMI tracts.

NCRC is urging the agencies to require all large banks to submit the more robust deposit data so that measuring deposit access of residents of LMI tracts would be on the exams of all large banks. This would be the best way to consider branches in non-LMI tracts.

Question 100. How could the agencies further define ways to evaluate the digital activity by individuals in low-, moderate-, middle-, and upper-income census tracts, as part of a bank's digital and other delivery systems evaluation?

Under the proposed digital subtest, the agencies would consider:

- digital activity by individuals in low-, moderate-, middle-, and upper-income census tracts,
- the range of digital and other delivery systems, and
- the bank's strategy and initiatives to serve low-and moderate-income individuals with digital and other delivery systems.[259]

The agencies proposed to evaluate the number of account openings by census tract categories. In addition, the agencies proposed to assess account "usage" by income category of tract.[260] An analysis of openings is necessary but should also include the percentages of account transactions (deposits and withdrawals) in the various census tract categories (perhaps that is what the agencies mean by "usage.") In response to the agencies' contemplation of a use of a comparator[261], a bank should be compared to its peers with the use of a market benchmark.

[258] NPR, p. 275.
[259] NPR, p. 281.
[260] NPR, p. 282.
[261] NPR, p. 282.

The agencies should clarify whether they would include data on transaction activity such as the median number of deposits and withdrawals on a monthly or other time period basis. Robust transaction activity reveals a useful deposit account in contrast to dormant accounts that exhibit few transactions. CRA examiners should assess how active digital accounts are across census tracts of various income levels. An important precedent exists. The St. Louis Fed and Cities for Financial Empowerment (CFE) Fund operate the Bank On National Data hub which has transactional data of this nature for participating banks.[262] The agencies' contemplation of a standard template[263] for collecting data on digital activity is necessary and would be similar to how the St. Louis Fed and CFE collect data (which is available for download into excel).

Current CRA exams conduct this analysis for large banks on an inconsistent basis.[264] When they do include this analysis, the exam may not present data tables, leaving the reader to wonder whether the examiner representations are valid. It is clear that large banks have the ability to generate data on digital activity and this activity should be clearly and transparently displayed in exam tables.

Examiners should verify bank representations regarding the range of access to digital service by testing whether the various modes of access (mobile or online) are indeed available to residents of LMI tracts. Finally, the component of the digital subtest that assesses strategy and initiatives for providing these services should involve examiner discussions with community stakeholders and bank partners. The examiner should further assess the marketing approaches the bank employs; general ads over the internet will not be as effective as distributing information via community-based media such as minority-owned media.

Question 101. Should affordability be one of the factors in evaluating digital and other delivery systems? If so, what data should the agencies consider?

Affordability must be one of the factors in evaluating digital and other delivery systems. According to the most recent FDIC survey of household use of banking and financial services, the unbanked ranked expense of accounts as major impediments to establishing accounts. Almost 49% of FDIC survey respondents stated they did not have enough money to avoid charges associated with not maintaining minimum balances and 34% indicated that bank fees were too high.[265] As in past FDIC surveys, lower income people and people of color were more likely to be unbanked.[266] Thus, affordability is key to CRA's mandate to serve all communities with banking services and products.

Data that can be collected include monthly fees, any additional fees charged for falling below minimum balances and overdraft fees. Online deposit-based banks clearly advertise affordable

262 See https://www.stlouisfed.org/community-development/data-tools/bank-on-national-data-hub
263 NPR, p. 282.
264 Josh Silver, Recent CRA Exams Offer Hints For How To Improve Bank Accountability To Communities, April 2022, NCRC, https://ncrc.org/cra-exams-hint-at-improvements/
265 *How America Banks: Household Use of Banking and Financial Services, 2019 FDIC Survey*, last updated December 17, 2021, https://www.fdic.gov/analysis/household-survey/index.html, p. 17.
266 FDIC 2019 Survey, p. 13

features including the absence or presence of fees.[267] This should be relatively straightforward data collection.

Question 102. Are there comparators that the agencies should consider to assess the degree to which a bank is reaching individuals in low-or moderate-income census tracts through digital and other delivery systems?

See answer to Question 100.

Question 103. Should the evaluation of digital and other delivery systems be optional for banks with assets of $10 billion or less as proposed, or should this component be required for these banks? Alternatively, should the agencies maintain current evaluation standards for alternative delivery systems for banks within this tier?

Large banks with assets less than $10 billion must be required to collect digital data and be evaluated. At the very least, the agencies could create a threshold such as one third of deposits being generated digitally that would trigger data reporting. The data reporting is not onerous and is necessary for CRA compliance. Data fields do not have to be lengthy nor complex.

Credit and Deposit Products Evaluation

As discussed above in response to Question 66 about automobile lending and Question 67 about credit cards, NCRC believes that CRA exams must analyze the affordability, suitability and sustainability of credit and deposit products. Banks are not meeting credit and deposit needs if the products are abusive, high cost and mire customers in debt. The credit and deposit products evaluation is a logical part of the CRA exam to examine the quality of loans and deposits. Banks should receive low scores or be penalized via downgrades if they are offering unsuitable and unaffordable products on their own or in partnership with non-banks. The credit and deposit evaluation focuses on responsive products. Clearly, an integral part of responsiveness is affordability and avoidance of abusive practices that increase indebtedness or extract wealth from customers.

The only exception to evaluating quality of lending in this part of the exam is perhaps multifamily lending. NCRC suggests in the case of multifamily lending, the evaluation of quality can occur in the CD Finance Test which would consider issues of affordability and impact.

Question 104. Are there additional categories of responsive credit products and programs that should be included in the regulation for qualitative consideration?

The agencies provided important examples of responsive credit products such as small dollar mortgages (loan amounts generally under $100,000), consumer lending that uses alternative credit histories as opposed to credit scores, and microloans with loan amounts usually under $50,000.[268] The agencies also appropriately included a category of responsive credit products for

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[267] For example, see https://www.varomoney.com/
[268] NPR, pp. 288-289.

small businesses and farms in addition to home loans and consumer loans.[269] These products serve important and different credit needs, so their responsiveness should be assessed. In addition, products offered in conjunction with CDFIs, MDIs, WDIs and LICUs would be included in this review,[270] which would help increase the volume of these products.

Another set of products that should be considered are products offering lower rates after a borrower establishes a payment history. For example, banks should offer a traditional credit card product for customers that were initially placed in secured credit cards (with higher interest rates) after the customers have a proven payment record after a specified time period. The same should apply to home and small business/farm products. We have had discussions with banks that offer the higher cost entry level product but then do not consider graduating customers to lower cost products.

In addition, the agencies should consider affordable products geared to borrowers with Limited English Proficiency (LEP) in this category. The Urban Institute documented that 5.3 million households are LEP and that homeownership rates are lower in zip codes with higher rates of LEP households.[271] The CFPB reported that the FDIC has found considerably higher rates of unbanked households among Spanish speakers than among non-Spanish speakers.[272] Moreover, the CFPB cited studies conducted by the California Reinvestment Coalition finding that LEP borrowers had difficulty negotiating loan modifications.[273]

In order to avoid abusive lending that takes advantage of LEP borrowers, banks need to identify reputable resources and design responsible home products for LEP borrowers. The Federal Housing Finance Agency has partnered with the Government Sponsored Enterprises to offer translations of mortgage documents in various languages.[274] CRA should be used to encourage banks to offer responsible deposit and loan products for LEP consumers.

The agencies should consider lending programs and underwriting that do not discriminate against those with a criminal record. On March 31, 2022, President Biden declared April as Second Chance Month, emphasizing the importance of helping persons with criminal records reenter society, reunite with their families and find stable and safe homes. Banks should be promoting reentry to society, not obstructing it, through sustainable lending to persons who are creditworthy. The Department of Housing and Urban Development's (HUD) Office of Fair

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[269] NPR, p. 290.
[270] NPR, p. 290.
[271] Edward Golding, Laurie Goodman, and Sarah Strochak, *Is Limited English Proficiency a Barrier to Homeownership?*, Urban Institute, https://www.urban.org/sites/default/files/publication/97436/is_limited_english_proficiency_a_barrier_to_homeownership.pdf
[272] Consumer Financial Protection Bureau (CFPB), *Spotlight on serving limited English proficient consumers: Language access in the consumer financial marketplace,* November 2017, p. 13, https://files.consumerfinance.gov/f/documents/cfpb_spotlight-serving-lep-consumers_112017.pdf
[273] CFPB, p. 16.
[274] Jonathan Lawless, *Help for Borrowers with Limited English Proficiency*, Fannie Mae, October 2018, https://www.fanniemae.com/research-and-insights/perspectives/help-borrowers-limited-english-proficiency

Housing and Equal Opportunity recently issued a memorandum opinion stating that consideration of criminal records "to screen, deny lease renewal, evict, or otherwise exclude individuals from housing may be illegal under the Fair Housing Act" because that would result in disparate treatment or impact for minorities.[275] For the same reasons, banks should not collect and consider information related to criminal records because of the possibilities of disparate impact and treatment of protected classes in violation of the Equal Credit Opportunity Act and Regulation B. The only exception to data collection would be in the case of complying with other federal law such as Know Your Customer (KYC) and Anti-Money Laundering (AML) laws.

The agencies should also consider responsive loan products to include those offered by NeighborWorks organizations. The products are focused on people of color and LMI populations. They include community land trusts and housing cooperatives, which are products and programs that help low-wealth populations acquire assets. In fiscal year 2020, NeighborWorks organizations provided more than $9.3 billion in affordable housing and community development.[276] This sum would increase if encouraged more consistently in CRA exams.

In the area of small business, the agencies should reference responsive loan products that finance Equitable Media. Equitable Media experiences a shortage of bank and CDFI financing. They are an important communication lifeblood for communities of color in an era in which local media is disappearing. They are not only a source of employment but inform residents of underserved communities about community development opportunities which could include how to participate in helping banks formulate strategic plans.

Question 105. Should the agencies provide more specific guidance regarding what credit products and programs may be considered especially responsive, or is it preferable to provide general criteria so as not to discourage a bank from pursuing impactful and responsive activities that may deviate from the specific examples?

NCRC agrees with the agencies to emphasize responsiveness and to delete "flexible" and "innovative" as specific terms in the regulation.[277] Responsiveness gauges the extent to which banks are responding to pressing needs such as small dollar mortgages in geographical areas with relatively low home values. However, measuring responsiveness can also include applying concepts of flexibility such as use of alternative credit history or innovation such as the first time a bank has used the product or the first time the product has occurred in the market. The agencies

[275] Memorandum Opinion, Principal Deputy Assistant Secretary for Fair Housing and Equal Opportunity, Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (June 10, 2022).
[276] See https://www.nnwa.us/our-membership/our-members/ and https://www.neighborworks.org/Community/Shared-Equity-Housing
[277] NPR, p. 287.

should emphasize that any guidance about responsive products does not preclude product features or attributes not listed in the guidance.

Question 106. Should special purpose credit programs meeting the credit needs of a bank's assessment areas be included in the regulation as an example of loan product or program that facilitates home mortgage and consumer lending for low-and moderate-income individuals?[278]

As discussed above, NCRC has conducted an extensive amount of research finding that communities of color redlined eighty years ago still confront significant economic and health disadvantages today. In addition, people of color experience less equity accumulation after receiving home mortgage loans.

A recent FDIC-sponsored paper corroborated the NCRC research. After controlling for creditworthiness, other borrower characteristics and loan characteristics, the paper found that African American and Hispanic borrowers paid 6 basis points more for conventional purchase loans than whites.[279] Over a thirty year term of $200,000 loan, African American borrowers paid $1,583 more than White borrowers for a conventional purchase loan and $541 more than White borrowers for FHA purchase loans. Likewise Hispanic borrowers paid $1,725 more than White borrowers for conventional purchase loans.[280] When this finding is multiplied several times over in communities of color, the collective purchasing power of communities of color is significantly depressed as a result of these significant racial disparities in lending pricing.

The cumulative, widespread and persistent disadvantages caused by redlining and discrimination must be remedied. Special purpose credit programs (SPCPs) are not the complete solution but they are an important part of the remedy by targeting formerly redlined neighborhoods or people of color. The final regulation must indicate that SPCPs can include programs that focus on either people of color or communities of color. The NPR discussed SPCP programs serving the needs of LMI borrowers[281] but the final regulation must explicitly recognize that these programs usually have been utilized to extend credit to people of color and communities of color.

The final regulation should mention that SPCP programs can include home lending, small business lending, consumer lending or deposit products. The question above does not reference small business lending but using SPCP to focus on minority-owned and women-owned businesses redresses the relative lack of credit that these businesses regularly experience. A rigorous credit and deposit products evaluation would elevate the importance of SPCPs.

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[278] NPR, p. 289.
[279] Stephen J. Popick, *Did Minority Applicants Experience Worse Lending Outcomes in the Mortgage Market? A Study Using 2020 Expanded HMDA Data*, June 2022, p. 13, https://www.fdic.gov/analysis/cfr/working-papers/2022/cfr-wp2022-05.pdf?source=govdelivery&utm_medium=email&utm_source=govdelivery
[280] Ibid. p. 16.
[281] NPR, p. 289.

It is probable that SPCPs will have more impact, the more widespread the lending industry adopts them and increases their product volume. Hopefully, recognizing SPCPs in the CRA regulation will facilitate use and replication of SPCPs.

Question 107. Are the features of cost, functionality, and inclusion of access appropriate for establishing whether a deposit product is responsive to the needs of low-and moderate-income individuals? What other features or characteristics should be considered? Should a minimum number of features be met in order to be considered 'responsive'?

NCRC appreciates the agencies' proposed definition of responsive deposit products. The agencies proposed to consider a deposit product responsive if it has low-cost features, features facilitating broad functionality and accessibility, and facilitates inclusivity of access.[282] Under the low-cost features, the agencies contemplated no or low monthly fees, low minimum balances and free or low cost checking and bill payment services.[283] Functionality refers to immediate access to funds and broad accessibility to the accounts through ATMs and other means. Inclusivity refers to making the accounts widely available including to people with no or limited experience with banking or credit.[284]

The functionality prong should be elaborated upon to include whether people with disabilities have equal access to the products. Older adults are another population that could be targeted by the responsive features of deposit products.

Question 108. The agencies wish to encourage retail banking activities that may increase access to credit. Aside from deposit accounts, are there other products or services that may increase credit access?

Financial counseling is a product or service that can increase credit access. The agencies should evaluate in-person counseling as well as counseling that is available digitally. More responsive counseling should be results-oriented so the agencies should encourage banks to ask clients to track progress toward improving credit history or savings. The banks should encourage clients to report results to the banks or nonprofit community-based partners which the banks can include in data submissions to the agencies. Counseling is an activity that would be considered by the CD service test discussed below.

Question 109. Are the proposed usage factors appropriate for an evaluation of responsive deposit products? Should the agencies consider the total number of active responsive deposit products relative to all active consumer deposit accounts offered by the bank?

The agencies proposed to develop the following usage factors:

- the number of responsive accounts opened and closed during each year of the evaluation period in low-, moderate-, middle-, and upper-income census tracts, respectively;

[282] NPR, p. 292.
[283] Ibid.
[284] NPR, p. 293.

- the percentage of total responsive deposit accounts compared to total deposit accounts for each year of the evaluation period;
- marketing, partnerships, and other activities that promote use of responsive accounts.[285]

The agencies should create a market benchmark to compare a bank's percentage of accounts in low- and moderate-income tracts to its peers. Openings and closings are a useful indicator that should be paired with transaction activity as discussed above in the answers regarding digital activity. The percentage of total responsive accounts compared to total accounts is an insightful performance measure similar to what NCRC recommends for evaluating responsive credit products. Market benchmarks should be developed for this performance measure. Finally, marketing and partnerships should be evaluated and examiners must reach out to community stakeholders to assess the extent and rigor of the marketing and partnerships.

We would also urge the agencies to require the collection on the income of the customers receiving deposits and those receiving responsive deposits and to include analysis of this data on the retail service test. Banks have stated that income levels of customers can change, making it difficult to determine how to collect this data. The agencies could provide clear instructions such as requiring income data to be collected at account opening and perhaps on an annual basis thereafter. A more complete picture is obtained of access to deposits if the service test examines income of customer as well as income of the tract in which the customer resides.

Question 110. Should the agencies take other information into consideration when evaluating the responsiveness of a bank's deposit products, such as the location where the responsive deposit products are made available?

The agencies should assess whether responsive deposit products are offered in branches and remote service facilities in LMI tracts. As stated above, a feature of redlining was offering reduced product choices in branches in communities of color.

Question 111. Should large banks with assets of $10 billion or less have the option of a responsive deposit products evaluation, as proposed, or should this component be required, as it is for large banks with assets of over $10 billion?

As stated elsewhere, this data and evaluation requirement should be applied to all large banks.

Question 112. For all large banks, the agencies propose to evaluate the bank's delivery systems (branches and remote service facilities) at the assessment area level, and the digital and other delivery systems at the institution level. Is this appropriate, or should both subcomponents be evaluated at the same level, and if so, which level?

The evaluation should be at the same levels, which would be the AA and institution level for both the delivery systems and digital systems components. It would be possible to conduct the digital evaluation at the AA level since a bank would collect digital data that can be coded at the

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[285] NPR, p. 294.

AA level. It is also preferable to include an AA evaluation since local responsiveness to needs is best evaluated at the AA level rather than the institution level.

Question 113. The agencies propose weighting the digital and other delivery systems component relative to the physical delivery systems according to the bank's business model, as demonstrated by the share of consumer accounts opened digitally. Is this an appropriate approach, or is there an alternative that could be implemented consistently? Or, should the weighting be determined based on performance context?

Since LMI customers rely on branches to a greater extent than other customers[286], the physical delivery systems of the test should be heavily weighted. At the same time, the business model of the bank needs to be considered. At the extreme, a bank that does not have branches/remote service facilities or only a few branches/remote service facilities cannot have high weights on the physical delivery systems part of the test.

A bank that gathers 50% or more of its deposits from physical delivery systems should have a weight for the physical delivery systems that is approximately two thirds and one third for digital delivery systems. Banks that gather between 30% to 50% of their deposits from their branches should have a weight of 50% to 67% for their physical delivery systems. Banks that gather less than 30% of their deposits from branches, would have less than 50% weight for their physical delivery systems. Under this proposal, primacy would still be accorded to physical delivery systems but the weights would vary based on business model.

Examiners should not decide weights for the various components of the delivery systems test on their own discretion as contemplated by the proposal.[287] This has the potential to create inconsistent and subjective exams.

The importance of branches cannot be over-emphasized. In addition to retail customer usage in LMI communities, small businesses rely to a great extent on branches for daily transactions and acquiring loans. Studies demonstrated that after bank mergers and branch closures, small business lending in LMI communities decreased significantly for several years.[288]

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[286] FDIC surveys revealed that lower income customers use branches more often than their affluent counterparts, see tables B.2 on page 22 and B.5 on page 28 that breakdown teller and online access to bank accounts in *How America Banks: Household Use of Banking and Financial Services 2019, FDIC Survey, Appendix Tables,* https://www.fdic.gov/analysis/household-survey/2019appendix.pdf

[287] NPR, p. 299

[288] Xu, Y. (2018). *The importance of brick-and-mortar bank offices: Evidence from small business and home mortgage lending, 1998-2016* [Thesis, University of Delaware]. https://udspace.udel.edu/handle/19716/23925 This paper finds that declines in small business lending after mergers and branch closures can persist up to six years: Nguyen, Hoai-Luu Q. 2019. "Are Credit Markets Still Local? Evidence from Bank Branch Closings." American Economic Journal: Applied Economics, 11 (1): 1-32. https://www.aeaweb.org/articles?id=10.1257/app.20170543.

Question 114. How should the agencies weight the two subcomponents of the credit and deposit products evaluation? Should the two subcomponents receive equal weighting, or should examiner judgment and performance context determine the relative weighting?

In contrast to the proposal,[289] examiners should not determine weights because this can lead to inconsistent and subjective exams that are prone to ratings inflation. In general, the weights for credit and deposit products could be equal since both are important. However, if a bank is mostly a lender (more than 67% of its activity is making loans), credit should be more heavily weighted. The converse is true for a bank that mostly offers deposit services. The agencies could develop a table of weights based on business models.

The agencies stated that examiner discretion could allow for insightful use of performance context factors including the number and percentage of unbanked residents across AAs. These performance context factors are important but they should be used in evaluating performance in the credit and deposit product part of the review rather than allowing examiners to develop weighing schemes.

Question 115. Should the credit and deposit products evaluation receive its own conclusion that is combined with the delivery systems evaluation for an overall institution conclusion? Or should favorable performance on the credit and deposit products evaluation be used solely to upgrade the delivery systems conclusion? For large banks with assets of $10 billion or less that elect to be evaluated on their digital delivery systems and deposit products, how should their performance in these areas be considered when determining the bank's overall Retail Services and Products Test conclusion?

The credit and deposit products evaluation should receive its own conclusion and points. Using it to provide favorable consideration for the delivery systems subtest runs the risk of inflating the delivery systems subtest or avoiding low points on the credit and deposit evaluation if a bank is not offering responsive products or mainly offering high cost and abusive products that extract wealth and savings from customers.

Question 116. Should each part of the Retail Services and Products Test receive equal weighting to derive the institution conclusion, or should the weighting vary by a bank's business model and other performance context?

The component tests of the Retail Services and Products Tests are:

Delivery systems

- Physical branches – this includes branch distribution, openings and closings and banking hours and services
- Remote service facilities
- Digital systems (for banks with assets of $10 billion or more)

[289] NPR p. 300.

Credit and deposit products

- Responsiveness of credit products and programs
- Deposit products responsive to the needs of LMI individuals

The agencies again contemplated that examiners would assign weights to the components of the proposed Retail Services and Product tests,[290] an approach we do not advise. One approach would be equal weighing of delivery systems and credit and deposit products for most banks. Both components have a mix of quantitative (data driven performance measures) and qualitative measures (such as the range of products available at branches or the extent of affordable features of products). This mix would argue for equal weighing since the tests appear to be of equal rigor.

In the case of banks that offer mostly deposit products, the delivery systems component would probably receive more weight since the credit and deposit products component would not have as much credit product evaluation. The agencies could create a table describing various weights based on the extent to which deposit products dominate the product offerings of banks.

Community Development Financing Test

As discussed above, NCRC believes that the proposed community development (CD) financing test represents an improvement over current practice. The proposed benchmarks would be more objective and consistently applied across exams. However, more guidance should inform examiners how to compare the bank's CD ratio (dollar amount of CD financing divided by deposits) against a local and national CD ratio. In addition, the impact review should receive its own score and conclusion and should be informed by NCRC's suggestions above concerning how to construct a database for the impact review.

We ask the agencies to reconsider their reluctance to assign weights to the components of the CD financing test.[291] A lack of weights would lead to inconsistent exams. In order to balance the quantitative CD ratio with the more qualitative impact review, a weight of 60% for the CD ratio and 40% for the impact review would encourage considerable dollars for CD financing but would also acknowledge that smaller dollar amounts of CD financing can be highly responsive to needs.

Combining investments and loans in one CD test would encourage banks to pursue the most appropriate financing for projects without being concerned about achieving specific thresholds for CD loans and investments in each AA. While NCRC supports combining CD loans and investments in one test,[292] we are also sensitive to the issue that CD investments could be overlooked. The agencies should consider the use of an additional metric which would be the percent of CD investments out of total CD financing. If a bank has a considerably lower percentage of CD investments compared to its peers, the CRA examiner should further probe the

[290] NPR, p. 300.
[291] NPR, p. 320.
[292] NPR, p. 307.

reasons for this and award lower points if a bank does not have a compelling rationale based on performance context factors.

On conference calls considering the proposed rule, community-based organizations and affordable housing providers have expressed considerable unease about combining CD loans and investments in one test. Concerns involve reductions in critical Low Income Housing Tax Credit investments and equity investments in small businesses. In addition to using the percent of investments as a performance measure, the agencies should consider subtests within the CD Finance test that would separately consider CD investments and loans. Equal weights could be assigned to these subtests. There is a legitimate rationale for moving CD loans out of the retail lending test. NCRC has found that inclusion of CD loans in the lending test tends to lessen the correlation between performance on the retail lending measures and the lending test ratings.[293] Focusing on retail lending in the lending test would sharpen the rigor and accuracy of that test. At the same time, it is imperative that the agencies devise a CD Finance Test that preserves the importance of both CD loans and investments.

In addition, the agencies proposed to combine present and past CD financing in the numerator of the CD ratio.[294] The rationale for including past CD is to encourage patient, long-term capital, an objective with which NCRC agrees. However, the agencies proposed to consider CD during the current CRA cycle as past CD. The numerator would be an annual average of CD financing. The dollar amount of a CD loan or investment made in year one of the exam cycle would be counted in year one and would also be counted in years two and three as past CD.[295] This could have the effect of artificially boosting the numerator. Instead, past CD should refer to CD loans or investments from the previous CRA exam that are still on the bank's books. In addition, designating CD finance from the previous exam time period as past CD would be more effective in promoting patient capital over a longer time period.

If the agencies use past CD, the exams should present three ratios: current CD divided by deposits, past CD divided by deposits and total CD divided by deposits. Low ratios of current CD divided by deposits when compared to peer banks should result in low scores since the bank might be relying on past CD and not making an effort to find new CD financing opportunities.

CD financing that would have a negative impact on LMI communities must not count on CRA exams and must be penalized. As discussed above, an example is an investment in housing that displaces LMI residents because the investment benefited a predatory property owner. Another example is an investment in a fossil fuel project in a LMI neighborhood or community of color that polluted the area instead of an investment in energy efficiency or renewables. Redlining and discrimination has resulted in the disproportionate placement of oil wells and other fossil fuel projects creating environmental hazards in communities of color and modest income

[293] Josh Silver and Jason Richardson, *Do CRA Ratings Reflect Differences In Performance: An Examination Using Federal Reserve Data*, NCRC, May 2020, op. cit.
[294] NPR, p. 311.
[295] Ibid.

neighborhoods.[296] Lastly, a prison is yet another example of an activity that must not count as CD. The agencies should develop careful guidance as to which activities should be CD because they benefit communities and which ones are predatory and harmful.

The proposed CD finance test would apply to FBAAs and to areas outside of FBAAs. The agencies should also apply the test to RLAAs. Although a bank does not have branches in RLAAs, they have established a business presence in RLAAs and have established relationships with stakeholders including community-based organizations knowledgeable about CD needs which should provide them with insights about CD needs and an infrastructure for engaging in CD finance.

Question 117. Should activities that cannot be allocated to a specific county or state be considered at the highest level (at the state or institution level, as appropriate) instead of allocated to multiple counties or states based upon the distribution of all low-and moderate-income families across the counties or states?

In cases in which the bank cannot provide documentation concerning the allocation of funding, the activities should be allocated to counties based on the percentages of families or households in the counties as the agencies proposed.[297] For example, a multi-county housing fund would most likely fund projects proportionate to the percentages of LMI families or households in the counties. As stated above, households is preferable since it also captures people living together that may not form a family unit.

Question 118. What methodology should be used to allocate the dollar value of activities to specific counties for activities that serve multiple counties? For example, should the agencies use the distribution of all low-and moderate-income families across the applicable counties? Or, should the agencies use an alternative approach, such as the distribution of the total population across the applicable counties? Should the agencies consider other measures that would reflect economic development activities that benefit small businesses and small farms or use a standardized approach to allocate activities?

See above for the response to Question 117.

[296] Gonzalez, D.J.X., Nardone, A., Nguyen, A.V. et al. *Historic redlining and the siting of oil and gas wells in the United States.* J Expo Sci Environ Epidemiol (2022). https://doi.org/10.1038/s41370-022-00434-9 or https://www.nature.com/articles/s41370-022-00434-9#citeas

[297] NPR, p. 309.

Question 119. The agencies are seeking feedback on alternatives to determining the denominator of the bank assessment area community development financing metric. What are the benefits and drawbacks, including data challenges, of implementing an alternative approach that bases the denominator of the metric on the share of bank depositors residing in the assessment area (described above) in contrast to the proposed approach of relying on dollar amounts of deposits?

As discussed above, NCRC has asked the agencies to implement the improved deposit collection procedures for all large banks, which we believe have the capacity to collect this data. The issue of data collection ease is not a pressing concern in our estimation. Rather, the question should be whether a formula of using dollars multiplied by the percent of a bank's depositors in an AA would be intuitive and readily understood by the public, banks and examiners.

While we understand the agencies' desire to account for population and resource differences across AAs and use this approach to achieve a more equitable distribution of deposits across large and smaller AAs,[298] we are not sure this approach would succeed in this endeavor. Larger areas are likely to have a greater percentage of a bank's depositors, meaning that multiplying the dollars by the percentage of depositors may exacerbate deposit base inequalities among larger and smaller areas.

Overall, it would seem that using dollars of CD financing divided by dollars of deposits would be more straightforward and easier to understand. Also, if smaller geographical areas have local ratios that are relatively low, the use of a national comparator may boost CD financing to that area, given that the national comparator would likely be higher in these cases. This is an issue that may need to be reconsidered after a few years of data collection and exam experience. For now, it is probably preferable to use the more straightforward approach.

Question 120. For large banks with assets of $10 billion or less, under the proposed Community Development Financing Test, is it appropriate to use the FDIC's Summary of Deposits data instead of deposits data that is required to be collected and maintained by the bank to tailor new data requirements, or would it be preferable to require collected deposits data for all large banks?

It would be preferable to require collected deposits data for all large banks.

Question 121. What is the appropriate method to using the local and nationwide benchmarks to assess performance? Should the agencies rely on examiner judgment on how to weigh the comparison of the two benchmarks, or should there be additional structure, such as calculating an average of the two benchmarks, or taking the minimum, or the maximum, of the two benchmarks?

The agencies proposed to use two benchmarks to compare against a bank's CD ratio: a local FBAA ratio and a nationwide ratio that would be either metropolitan or non-metropolitan

[298] NPR, p. 313.

depending on whether the FBAA was a metropolitan or non-metropolitan area.[299] Examiners would have discretion regarding how to employ these benchmarks.[300]

As stated above, NCRC does not agree with providing examiners with discretion in this manner, which would lead to inconsistent exams and could contribute to ratings inflation. Guidelines should be developed for employing the local and national benchmarks. Weights for each benchmark contributing to a weighted average should be developed along the following lines:

- In FBAAs where the local ratio is lower than the national ratio, the national ratio would have a weight of 60% and the local ratio would have a weight of 40%. The FBAA could be experiencing a dearth of CD so the objective is to motivate a bank to exceed the local benchmark.
- In FBAAs where the local ratio is higher than the national ratio, the local ratio would have a weight of 60% and the national ratio would have a weight of 40%. In this case, a FBAA may have an usually high number of banks which could be contributing to a ratio that might be elevated simply due to the number of banks. Hence, weigh the local ratio less but still have it contribute to scoring performance.

The agencies could refine these weights further by determining the distribution of local ratios as measured by percentiles or other distances from the median or mean ratios. A local ratio that is far below the median for similarly sized geographical areas, for example, could receive a weight of less than 40% because it is likely that all banks in that FBAA are not responding to needs.

Depending on the degree to which a bank is above or below the weighted average of the local and national benchmarks, the examiners would assign one of the five subtest ratings. Final guidance to examiners must be more refined for use of the benchmarks than current guidance in Appendix A of the regulation. For example, Appendix A for the investment test states that "an excellent level of qualified investments"[301] is consistent with an Outstanding rating. This vagueness undoubtedly contributes to ratings inflation. Instead, Outstanding performance should be higher than the benchmarks such as a 125% level chosen under the proposed retail lending test.

Question 122. What other considerations should the agencies take to ensure greater clarity and consistency regarding the calculation of benchmarks? Should the benchmarks be calculated from data that is available prior to the end of the evaluation period, or is it preferable to align the benchmark data with the beginning and end of the evaluation period?

The agencies contemplated using a time period for calculating benchmarks that ends one year before the end of the exam time period in an effort to provide more certainty to banks.[302] It is not clear why this would provide more certainty. Perhaps the bank would know what the benchmark

[299] NPR, pp. 314-316.
[300] NPR, pp. 310 and 320.
[301] 12 CFR Appendix A to Part 25(b)(2)(i)(A), https://www.ecfr.gov/current/title-12/chapter-I/part-25#p-Appendix-A-to-Part-25(b)(2)(i)(A)
[302] NPR, pp. 317-318.

is going into the final year of the CRA exam cycle so it would know what to aim for in terms of a comparator ratio. However, this approach would not take into account economic and demographic conditions in FBAAs during the entire time period, which is a less accurate method of creating a benchmark. Also, using annual averages to calculate a bank's ratio and the benchmark ratio smooths out abrupt changes in ratios.

Question 123. When calculating the weighted average of facility-based assessment area conclusions and assessment area community development financing benchmarks, is it appropriate to weight assessment area metrics and benchmarks by the average share of loans and deposits, as proposed?

Using the share of deposits and loans to assign weights to FBAAs is appropriate. However, as stated elsewhere in this letter, NCRC urges the agencies to ensure that smaller AAs receive sufficient attention. We suggest establishing a threshold expressed as a percentage of smaller AAs in which a bank must have a Low Satisfactory or higher rating.

The agencies further proposed to establish various measures to determine a bank's rating on a state level. One measure would be the bank's weighted average FBAA performance. In addition, a bank's statewide ratio in which the numerator is CD dollars in FBAAs and outside FBAAs would be compared to an aggregate statewide ratio, which is all banks' CD ratio.[303]

Banks that have 80% or more of their loans and deposits in FBAAs would have a 50% weight assigned to their FBAA performance and 50% to their statewide performance. The agencies stated that since FBAA activities are considered in both the FBAA weighted score and the statewide score, this approach would emphasize FBAA performance. This is appropriate since banks generally are more aware of CD opportunities where they have branches. NCRC agrees with the agencies' approach of a sliding scale for weighing FBAA and statewide performance[304] except that banks with 60% or more of their activity in FBAAs should also have a 50% weight for FBAA performance. Banks with 60% or more of their activity in FBAAs should have a higher weight assigned to FBAA performance than the agency proposal of 40% given that their activity is focused on FBAAs.

The institution level performance would be determined in an approach analogous to the state level.[305] NCRC's recommendations for the national performance are the same as for the state performance.

[303] NPR, pp. 322-327 and p. 325 for a discussion of the aggregate ratio.
[304] NPR, p. 328.
[305] NPR, pp. 334-336.

Question 124. Is the proposed use of the FDIC's Summary of Deposits data for banks that do not collect and maintain deposits data appropriate, or should all large banks be required to collect and maintain deposits data, which would enable the metrics and benchmarks to be based on collected deposits data for all large banks?

As stated elsewhere in this letter, NCRC advocates for all large banks to collect the proposed deposits data. It is true that large banks with assets below $10 billion would have incentives to voluntarily collect deposits data in order to have more accurate CD ratios,[306] but the more effective approach would be to mandate deposits data collection for all larger banks.

Question 125. Considering current data limitations, what approaches would further enhance the clarity and consistency of the proposed approach for assigning community development financing conclusions, such as assigning separate conclusions for the metric and benchmarks component and the impact review component? To calculate an average of the conclusions on the two components, what would be the appropriate weighting for the metric and benchmarks component, and for the impact review component? For instance, should both components be weighted equally, or should the metric and benchmarks be weighted more than impact review component?

As stated above, NCRC suggests a weight of 60% for the CD metrics component and 40% for the impact review. Both components are important but a slightly higher weight for the CD metrics portion would ensure a minimal level of performance of offering a sufficient level of CD financing. It would not be desirable for a bank to offer a low level of CD financing while counting on an impact review to consider this low level of financing to be responsive. At the same time, the impact review ensures that smaller dollar financing that is particularly responsive is recognized.

Question 126. How can the agencies encourage greater consistency and clarity for the impact review of bank activities? Should the agencies consider publishing standard metrics in performance evaluations, such as the percentage of a bank's activities that meet one or more impact criteria?

NCRC believes that standard metrics should be developed for the impact review such as the percentage of a bank's CD finance that meet one or more of the impact criteria. See the discussion immediately after the answer to question 33 for more detail.

Community Development Services Test

The agencies appropriately proposed to make CD services a stand-alone test. LMI populations are disproportionately unbanked and under-banked. A considerable segment of these populations are not comfortable conducting sophisticated banking and lending transactions digitally. They desire and need counseling and advice for qualifying for loans and navigating banking products

[306] NPR, p. 329.

and services. While NCRC does not applaud the trends of branch closures, CD services and counseling becomes even more important if branches continue to decline overall.

In order to replace the informal counseling provided by branch personnel, banks increasing their digital footprint should become more creative in offering counseling and technical assistance to underserved populations. Recent Community Benefit Agreements (CBAs) have included office hours for bank staff at community-based organizations to provide counseling to LMI populations.[307] CD service of this nature is likely to increase in importance over the coming years and thus should be encouraged by a CD service test.

Question 127. Should volunteer activities unrelated to the provision of financial services be considered in all areas or just in nonmetropolitan areas?

NCRC urges the agencies to abandon the proposal[308] to provide CRA consideration for volunteer activities unrelated to the provision of financial services in rural areas. Volunteering for constructing affordable housing or at soup kitchens are admirable activities but can still be encouraged without consideration for compliance with public sector laws and regulations.

Banks should be encouraged to use their expertise in providing financial services when engaging in CD services. Bank staff are about as equally talented as other members of society in providing services in soup kitchens but are generally more talented in providing financial services and counseling than other members of society. Their comparative advantages in financial services provision should be harnessed by a law that requires banks to rectify redlining by offering financial services to traditionally underserved populations. Likewise, offering legal, accounting or other technical expertise to community-based organizations is a better use of bank expertise than non-financial service-related volunteerism.

A survey of NCRC members suggests that there are more opportunities for banks to take advantage of CD service opportunities related to current definitions of CD. Just a third of the 50 NCRC members responding to a survey indicated that banks served on their board of directors and only 10% stated that banks offered them technical assistance related to their financial management systems.[309] In general, these results indicate a need for preserving CD services as part of the CRA exam and also maintaining the current focus of CD for rural areas.

Some stakeholders assert that there are fewer opportunities due to a paucity of nonprofit or local public sector agencies in rural areas to engage in financial services-related activity or counseling. One remedy for this is to encourage banks to earn higher points on the CD financing test to help support the establishment of counseling agencies and other entities in rural areas. Banks could also be creative in offering counseling themselves by working with libraries, local public

[307] Regarding: Request For Comment On Rules, Regulations, Guidance, And Statement Of Policy On Bank Merger Transactions (RIN 3064-ZA31), NCRC, June 2022, https://www.ncrc.org/regarding-request-for-comment-on-rules-regulations-guidance-and-statement-of-policy-on-bank-merger-transactions-rin-3064-za31/
[308] NPR, p. 339.
[309] Josh Silver, Survey Results: *NCRC Members Highlight CRA Reform Benefits, But Note Gaps Too*, July 2022, https://www.ncrc.org/survey-results-ncrc-members-highlight-cra-reform-benefits-but-note-gaps-too/

agencies and other entities in rural areas to provide CD services. If there is a lower level of CD services due to limited partners or other infrastructure, performance context analysis can take this into account.

A case example illustrates that banks can find CD service activities per the current definition that does not include non-financial service-related CD activities. A November 2021 exam of GNB Bank conducted by the Federal Reserve Bank of Chicago found that this bank with assets of $594 million conducted 241 hours of CD service over a three year time period in a three county rural area of Western Iowa with a population of about 68,000.[310] These hours were about half as many as recorded by the previous exam and were depressed due to the COVID pandemic. It would seem that banks can find enough CD activities that correspond to the current financial services-related definition, particularly considering that rural AA areas would generally encompass more counties under the proposed changes than in this exam.

Question 128. For large banks with average assets of over $10 billion, does the benefit of using a metric of community development service hours per full time employee outweigh the burden of collecting and reporting additional data points? Should the agencies consider other quantitative measures? Should the agencies consider using this metric for all large banks, including those with average assets of $10 billion or less, which would require that all large banks collect and report these data?

The metric of community development service hours per full time employee should be required for all large banks and intermediate small banks. The data collection required for this metric is not burdensome as it involves relatively few data points. An example of this data collection is from a February 2022 CRA exam conducted by the Federal Reserve Bank of Chicago of First Eagle Bank. At the time of the exam, the bank had assets of $623 million. The CD test documented the number of hours bank employees devoted to CD service and provided separate totals of CD hours by major category of CD such as affordable housing and economic development.[311]

Question 129. How should the agencies define a full-time equivalent employee? Should this include bank executives and staff? For banks with average assets of over $10 billion, should the agencies consider an additional metric of community development service hours per executive to provide greater clarity in the evaluation of community development services?

The agencies should use a standard definition of a full-time employee. We are not sure that a separate metric for CD services hours per executive would add much rigor to the test. All employees, not just executives, should be engaged in CD service. We are also interested in the quality of CD services as revealed by the qualitative review part of the CD test.

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[310] Federal Reserve Bank of Chicago November 2021 CRA exam of GNB Bank, see pages 41-42 for CD services, p. 27 for demographics of the rural area in Iowa, p. 4 for asset size, p. 3 for time period of exam, exam can be obtained via https://www.federalreserve.gov/apps/CRAPubWeb/CRA/BankRating

[311] Federal Reserve Bank of Chicago, February 2022 CRA exam of See page 21 of the exam. Access the exam via the Federal Reserve Board's search engine of https://www.federalreserve.gov/apps/CRAPubWeb/CRA/BankRating

Question 130. Once community development services data is available, should benchmarks and thresholds for the bank assessment area community development services hours metric be developed? Under such an approach, how should the metric and qualitative components be combined to derive Community Development Services Test conclusions?

NCRC would urge the agencies to develop more guidelines than proposed for the CD services test. The metric of hours per bank employee could be compared to peer banks of similar size in FBAAs in order to inform the conclusions at the FBAA level. The conclusion should be greatly influenced by the extent to which the hours per employee is above or below that of peers of similar asset sizes. The guidelines should state this rather than vagueness present in Appendix A of the current regulation. For example, Appendix A now states that to be Outstanding on CD services the bank is a "leader in providing community development services."[312] The proposal did not indicate that peer comparisons would be made at all or how advice to examiners would be revamped with clearer instructions that replace Appendix A.[313]

The proposed CD services test would include additional factors such as the number of CD activities, the number of LMI participants served, the number of organizations served and other evidence that community needs were addressed.[314] This list is similar to the factors considered currently. In a section of this comment letter directly after question 33, NCRC suggested a development of a database on CD activities. This database could include outcomes of CD services such as number of LMI participants served and average improvements in credit scores or savings rates. In addition, the database could document the number and percentage of CD services targeted to persistent poverty counties and Native Land areas as well as those that involved collaboration with local public agencies. The collection of these data points should facilitate comparisons with peer banks that would inform ratings.

The agencies should develop weights for the components of the CD service test in order to promote consistency and rigor. One option could be a 50% weight for the CD hours per employee metric and a 50% weight for the qualitative factors of the CD test.

The agencies proposed to use CD services outside of FBAAs as an adjustment factor of possibly improving the conclusion or rating at a state and institution level.[315] As currently proposed, there are no guidelines for this adjustment, which can lead to inconsistent and inflated conclusions. The agencies should develop guidelines concerning a minimal level of meaningful outside FBAA activities so that merely incidental level of activities do not boost ratings. In addition, the performance of delivering outside FBAA activities should clearly exceed the performance of FBAA activities as measured by hours per employee or impact factors such as savings rates or improvements in creditworthiness. Finally, any bank that fails in its FBAAs with a Needs-to-

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[312] 12 CFR Appendix A to Part 25(b)(3)(i)(D), https://www.ecfr.gov/current/title-12/chapter-I/part-25#p-Appendix-A-to-Part-25(b)(3)(i)(D)
[313] NPR, p. 342.
[314] NPR p. 340.
[315] NPR, p. 344.

Improve or Substantial Noncompliance rating on its CD services test would not be eligible for a boost provided by outside FBAA activities.

Wholesale and Limited Purpose Banks

Importantly, NCRC disagrees with the current and proposed designation of wholesale and limited purpose banks for large banks that offer credit cards. As discussed above, NCRC believes that responsible credit card lending serves important credit needs and should be encouraged by rigorous CRA exams. Moreover, a large amount of small business lending is credit card lending. For example, American Express issued 303,935 CRA small business credit card loans in 2020 yet did not have credit card lending examined on its most recent CRA exam.[316] The agencies are not assessing whether these lenders are meeting credit needs in a responsible fashion by leaving these large volumes of loans off of CRA exams.

Question 131. How could the agencies provide more certainty in the evaluation of community development financing at the facility-based assessment area level? Should a bank assessment area community development financing metric be used to measure the amount of community development financing activities relative to a bank's capacity? If so, what is the appropriate denominator?

The OCC has a procedure for allocating Tier 1 capital across AAs that it uses to develop ratios of CD financing as a percentage of Tier 1 capital. Perhaps, the agencies could consider a variation of this procedure for developing a CD ratio for wholesale and limited purpose banks at the FBAA level that can be used as a benchmark.

Question 132. Should a benchmark be established to evaluate community development financing performance for wholesale and limited purpose banks at the institution level? If so, should the nationwide community development financing benchmark for all large banks be used, or should the benchmark be tailored specifically to wholesale and limited purpose banks?

The agencies proposed to divide CD financing by assets to develop a ratio. A bank's ratio can be compared to that of other wholesale and limited purpose banks.[317] This is an appropriate methodology since deposits may not work well for all wholesale and limited purpose banks, particularly those that do not collect deposits on a large scale. In addition, a market benchmark must be employed in order to increase objectivity in the CD financing test.

The agencies can use the first few years of data to determine whether peer comparisons should be confined to other wholesale and limited purpose banks or whether a comparator can include all large banks. The determination of which comparator to use would involve whether the ratios are similar or different for wholesale and limited purpose banks compared to other larger banks.

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[316] The FFIEC web page provides small business CRA loan data by institution including American Express. See https://www.ffiec.gov/craadweb/DiscInstList.aspx. Data retrieved from Table 1-1, Small Business Loans – originations, for American Express. OCC 2019 CRA exam for American Express via https://occ.gov/static/cra/craeval/dec19/25151.pdf
[317] NPR, pp. 347-348.

Question 133. For wholesale and limited purpose banks that wish to receive consideration for community development services, should these banks be required to opt into the proposed Community Development Services Test, or should they have the option to submit services to be reviewed on a qualitative basis at the institution level, without having to opt into the Community Development Services Test?

NCRC disagrees with the agencies' proposed use of CD services as an optional test for a wholesale and limited purpose bank to boost its rating from Satisfactory to Outstanding.[318] This could increase subjectivity on the CD test. In addition, a number of banks may opt against this and to cease offering CD services altogether. The number of CD services could decrease significantly in a number of communities across the country. For example, American Express offered more than 10,000 CD service hours in its most recent CRA exam, most of which was outside of its AA (the proposal would consider this to be at the institution level).[319]

Instead, just like the current CRA regulation, CD services should be a required part of the CD exam. There is no justification to make it optional since current CRA experience suggests that wholesale and limited purpose banks offer robust levels of CD services.

Strategic Plans

Question 134. Should the strategic plan option continue to be available to all banks, or do changes in the proposed regulation's assessment area provisions and the metrics approach reduce the need for the strategic plan option for banks with specialized business strategies?

A strategic plan option can be available to all banks provided that the requirements remain sufficiently robust and rigorous.

Question 135. Large banks electing to be evaluated under a strategic plan would have activities outside of facility-based assessment areas considered through retail lending assessment areas and then outside retail lending assessment areas. Should small and intermediate banks electing to be evaluated under a strategic plan be allowed to delineate the same types of assessment areas? What criteria should there be for choosing additional assessment areas? Could such banks have the ability to incorporate goals for facility-based assessment areas and goals for outside of assessment areas?

NCRC appreciates that the agencies proposed that banks submitting strategic plans be required to follow AA procedures regarding FBAAs, RLAAs and outside AA evaluations.[320] NCRC has commented on several "fintech" applications for bank charters in which the online lender proposed using the strategic plan to designate only its headquarters location as an AA although the lender made substantial numbers of loans across the country. Current strategic plans of non-traditional banks likewise have inadequate AA designations involving just the headquarters'

[318] NPR, p. 350.
[319] See American Express CRA exam, p. 15.
[320] NPR, p. 356.

city.[321] Requiring consistent AA designations levels the playing field and ensures that banks are offering loans to LMI communities commensurate with their abilities to do so.

Above, NCRC has suggested that intermediate small banks be required to follow the AA designations of large banks; this should apply also in strategic plans. Intermediate small banks that offer volumes of retail loans large enough to warrant RLAAs and outside AA consideration have the capacity to be evaluated at those levels.

Banks should be required to create goals for all major product lines. Goals for just some product lines would be inconsistent with CRA's mandate to serve community needs. A bank cannot choose to serve needs for home lending, for example, but omit needs associated with automobile lending if the bank offered both loan products. Finally, goals should be established for all types of AAs.

Question 136. In assessing performance under a strategic plan, the agencies determine whether a bank has "substantially met" its plan goals. Should the agencies continue to maintain the substantially met criteria? If so, should it be defined and how? For example, as a percentage (e.g., 95 percent) of each measurable goal included in the plan, the percentage of goals met, or a combination of how many goals were not met and by how much?

A yardstick for measuring substantially met goals must be rigorous, applied to each goal and include 95% attainment. If attainment is not achieved on 67% of its goals, the bank should fail its exam and be required to submit an improvement plan (see below for more discussion of improvement plans).

Question 137. The agencies are considering announcing pending strategic plans using the same means used to announce upcoming examination schedules or completed CRA examinations and CRA ratings. What are the potential advantages or disadvantages to making the draft plans available on the regulators' websites?

NCRC appreciates the proposed improvements to public dissemination of strategic plans including posting the draft plans on agency websites.[322] As the agencies note, public input on strategic plans is limited, most likely due to archaic notification procedures such as notice in newspapers. In addition, banks should make an affirmative effort to engage community-based organizations led by people of color and women as well as a range of advocacy organizations working on behalf of communities (for example, tenants' rights and environmental justice groups) and should document how many and which of these organizations they engaged.

Moreover, NCRC appreciates that the agencies listed a bank merger as a material change that would require an improvement to strategic plan goals since the capacity of the bank to engage in strategic plan activities increased.[323] The agencies must specify that any amendments to a

[321] For example, see FDIC CRA exam of BMW Bank of North America, March 2021, https://crapes.fdic.gov/publish/2021/35141_210315.PDF
[322] NPR, p. 357.
[323] NPR, p. 359.

strategic plan must require a resubmission of the plan for review and public comment. Any group commenting on the merger should be invited to comment on the draft revised strategic plan.

Question 138. In addition to posting draft plans on a bank's website and the appropriate Federal banking agency's website, should approved strategic plans also be posted on a bank's website and the appropriate Federal banking agency's website?

Approved strategic plans must be posted on federal agency websites and on bank websites. Reading CRA exams of strategic plans is currently difficult because the reader lacks context, that is, the reader does not have the approved strategic plan to consult.

Assigned Conclusions and Ratings

NCRC appreciates that the agencies proposed to show the conclusion and score for each test at the AA level.[324] This increased transparency would provide more nuance and precision to the ratings by showing whether a bank was at the low or high end of a particular conclusion or rating based on its score. In addition to the tests, NCRC urges the agencies to also employ this transparency for the overall rating, which would be only one of four categories instead of five categories for the tests. The score becomes even more important at the overall rating level since four ratings by themselves do not reveal as much distinction in performance as would the ratings accompanied by the scores.

The proposed weights for the large bank test would be:

- Retail lending – 45%
- CD Financing – 30%
- Retail Services and Products – 15%
- CD Services – 10%

The agencies discussed that this weighing would be similar to the current large bank test that has lending test at 50%, investment test at 25% and the service test at 25%. The proposed retail lending test would be shaved slightly to weigh at 45%, which is appropriate since community development lending is moved to the CD Financing Test. The weight of the proposed CD Financing Test is roughly comparable to the current investment test and the Retail Services and CD Services Test together is similar to the current service test weighed at 25%.[325] Like the current large bank test, the proposed large bank test provides primacy to lending, a lack of which was the major manifestation of redlining. At the same time, CD financing and retail services are accorded significant weight.

However, the difficulty with the current weighing and scoring is that some perverse and unintended consequences occur. The most significant of these is that a large bank can pass with an overall rating of Satisfactory if it receives a Needs-to-Improve on the CD Finance and Service Tests and a Low Satisfactory on the Retail Lending and Retail Service Tests. This bank is failing

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[324] NPR, p. 365.
[325] NPR, p. 366.

to meet critical community needs and must therefore fail. The agencies should ensure that any final scoring and weighing system must fail a large bank if it receives a Needs-to-Improve on either the two retail subtests or the two CD tests. The agencies should consider failing a bank overall if it receives a Needs-to-Improve on any particular subtest, including the ones with lower weights.

On the other end of the scale, a bank with High Satisfactory ratings on the Retail Lending and Retail Service Test but with Outstanding ratings on the CD finance and service test cannot receive an overall Outstanding rating. Some suggest this might be a disincentive to striving for Outstanding on CD finance and service. To counter this possibility, the agencies should consider making Outstanding available to a bank if it achieves an Outstanding rating on either the retail or CD tests and is High Satisfactory on the other category of tests.

In addition, the agencies should consider changing the scoring system in this manner:

	Agency scoring	Alternative
Outstanding	10	10
High Satisfactory	7	8
Low Satisfactory	6	5
Needs to Improve	3	2

The alternative scoring system creates more distinction among the ratings. For example, the two best scores of 9 and 10 are reserved for Outstanding, which makes sense in terms of awarding banks that perform substantially better than their peers. In addition, more difference between High and Low Satisfactory is appropriate since Low Satisfactory should be thought of as barely passing. In addition, one less point should be awarded to Needs-to-Improve to more forcefully penalize failure.

Moreover, the alternative point system allows a large bank with High Satisfactory on the retail tests and Outstanding on the CD tests to receive a point total of 8.8, which can be rounded up to Outstanding. However, the agency weighing and the alternative point scores would still allow a bank to pass if it is Low Satisfactory on the retail tests and Needs-to-Improve on the CD tests. In order to prevent this outcome, the agencies could implement a rule stipulating that failure on either the retail or CD tests results in failure overall, regardless of the math.

Alternatively, different weights for the subtests could be used to arrive at an outcome in which failure on either the retail or CD tests results in an overall failing rating. If different weights are employed, NCRC would stipulate that the weight for the retail lending test cannot be lower than the weight of any other test. Retail lending represents wealth building in the form of homeownership and small business ownership for a population that has been disenfranchised and discriminated against. It should have the highest weight or at least no lower than the weight for any other subtest.

Question 139. The agencies request feedback on whether it would be more appropriate to weight retail lending activity 60 percent and community development activity 40 percent in deriving the overall rating at the state, multistate MSA or institution level for an intermediate bank in order to maintain the CRA's focus on meeting community credit needs through small business loans, small farm loans, and home mortgage loans.

NCRC urges the agencies to make CD services a mandatory component of the intermediate bank's CD test. The proposal would make CD services optional whereas it is a regular component of the current CD test for intermediate banks. For example, Mt. McKinley Bank based in Fairbanks, AK offered 1,787 CD service hours over a three year time period.[326] Examples of CD service included providing financial expertise to a nonprofit food pantry and serving on an advisory committee of a local public agency regarding revitalization of a moderate-income community.[327] Much of this valuable CD services would be lost if it becomes an optional activity.

A 50%-50% split for retail lending and CD would be appropriate if CD services is a mandatory component of the test. If it becomes optional, the retail lending test weight should be increased to 55% or 60% in order to leverage more lending, that would help compensate for the reduction in CD services.

We agree with the agencies proposal that an intermediate bank must have at least a Low Satisfactory on the retail lending test in order to pass overall, given the primary importance of the lending test. We oppose eliminating the requirement that an intermediate bank must have at least a Satisfactory rating on the CD test.[328] This would have the perverse outcome of reducing overall levels of CD finance. It is not justified in either the intermediate bank case or the large bank case discussed immediately above.

Question 140. What are the advantages and disadvantages of the proposal to limit the state, multistate MSA, and institution-level ratings to at most a "Needs to Improve" for large banks with ten or more assessment areas unless 60 percent or more of the bank's assessment areas at that level have an overall performance of at least "Low Satisfactory"? Should this limitation apply to all assessment areas, or only facility-based assessment areas? Is ten assessment areas the right threshold number to prompt this limitation, and is 60 percent the right threshold number to pass it? If not, what should that number be? Importantly, what impact would this proposal have on branch closures?

Overall, NCRC and our members feel 70% of all AAs, including FBAAs and RLAAs, should have at least a Low Satisfactory rating in order for a bank to pass overall. The proposed 60% means that a bank can fail in two out of five AAs and still pass overall. This is too high a failure

[326] FDIC exam of Mt. McKinley Bank, October 2021, https://crapes.fdic.gov/publish/2021/19525_211026.PDF, p. 10.
[327] Ibid, p. 19.
[328] NPR, p. 367.

rate and indicates that a bank is not meeting community needs in a sizable number of the geographical areas it serves.

We are not convinced that the proposal will achieve the intended purpose of ensuring that banks serve smaller metropolitan areas and rural counties. Sixty percent of 10 or more AAs could still exclude the smaller metropolitan areas and rural counties, which could be 40% or less of the AAs. In addition to an overall passage rate of 70%, NCRC proposes that Low Satisfactory or higher ratings must be achieved in 60% in each of large metropolitan, small metropolitan (populations of 100,000 or less) and rural AAs.

Ten AAs as a threshold number would mostly apply to the largest banks in the country. In a previous report assessing CRA exams of the top 100 banks by asset size, NCRC found that the median number of AAs for the top 50 banks was 23 and for the bottom 50 banks was 11.[329] Thus, this would not be onerous as it would be applied to the largest banks.

For banks with fewer than 10 AAs, NCRC suggests a modification. Passage rates could be 60% of AAs in a large metropolitan category and in a combined small metropolitan and rural category. This would still require sufficient attention to smaller AAs but would be tailored to the size of the bank and the number of its AAs.

NCRC would also urge the agencies to take additional steps to ensure that banks are serving all communities and AAs. For all assessment areas or subtests in which a bank receives a Low Satisfactory or lower rating, a bank should be required to submit a public improvement plan with measurable performance goals (the same or similar to metrics on CRA exams) indicating how a bank will improve performance. The public improvement plan would be subject to public comment and agency approval. This is similar to a requirement[330] in the American Housing and Economic Mobility Act of 2019 (S. 787 & H.R. 1737) introduced in 2019 and builds upon a requirement to describe efforts to improve upon failed ratings in the current regulation.[331]

Performance Standards for Small Banks and Intermediate Banks

Question 141. The agencies propose to continue to evaluate small banks under the current framework in order to tailor the evaluation approach according to a bank's size and business model. What are other ways of tailoring the performance evaluation for small banks?

NCRC asks the agencies to consider applying the proposed Retail Lending Test for ISB and large banks to small banks. Small banks should undergo a more rigorous examination of their retail lending activities since this is the major activity that will be examined. At the very least, the agencies could establish a threshold of 50 to 100 retail loans, which would be sufficient

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[329] Josh Silver, *The Community Reinvestment Act and Geography: How Well Do CRA Exams Cover the Geographical Areas that Banks Serve?*, NCRC, April 2017, p. 8, https://ncrc.org/wp-content/uploads/2017/05/cra_geography_paper_050517.pdf

[330] S.787 - American Housing and Economic Mobility Act of 2019, https://www.congress.gov/bill/116th-congress/senate-bill/787/text#idACA18BA8119E47D7803690A5F41DBF40

[331] 12 CFR 25.43(b)(5), https://www.ecfr.gov/current/title-12/chapter-I/part-25#p-25.43(b)(5)

sample size, during the CRA exam cycle for applying the proposed Retail Lending Test to small banks.

Question 142. Should additional consideration be provided to small banks that conduct activities that would be considered under the Retail Services and Products Test, Community Development Financing Test, or Community Development Services Test when determining the bank's overall institution rating?

As the agencies proposed, additional consideration should be offered only in the case of a small bank with a Satisfactory rating desiring an Outstanding rating.[332] If a small bank was about to receive a Needs-to-Improve rating, additional consideration for other activities should not compensate for subpar performance on retail lending.

Question 143. The agencies' proposal to require intermediate banks to be evaluated under the proposed Retail Lending Test is intended to provide intermediate banks with increased clarity and transparency of supervisory expectations and standards for evaluating their retail lending products. The agencies propose tailoring the application of this test by limiting data reporting requirements for intermediate banks. Are there other ways of tailoring the Retail Lending Test for intermediate banks that should be considered?

NCRC advocates for full application of the proposed Retail Lending Test to ISB banks. The proposed test is more rigorous but at the same time is more predictable for ISB banks with clearer and more transparent benchmarks and thresholds.

Question 144. The agencies propose to provide continued flexibility for the consideration of community development activities conducted by intermediate banks both under the status-quo community development test and the proposed Community Development Financing Test. Specifically, intermediate banks' retail loans such as small business, small farm, and home mortgage loans may be considered as community development loans, provided those loans have a primary purpose of community development and the bank is not required to report those loans. Should the agencies provide consideration for those loans under the Community Development Financing Test?

NCRC does not support allowing ISB banks to claim CD credit for retail lending in cases in which the retail lending does not involve mandatory data reporting for ISB banks. Retail lending serves a purpose different from CD and thus should not be evaluated on a CD test. If the ISB bank wants credit for the retail lending activity, it should voluntarily report the retail lending which would then be subject to a retail lending test. Currently, almost 124 ISB or small banks voluntarily report CRA small business and farm data in order for that activity to be evaluated on the retail lending test.[333]

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[332] NPR, p. 376.
[333] Federal Financial Institutions Examination Council, *Findings from Analysis of Nationwide Summary Statistics for 2020 Community Reinvestment Act Data Fact Sheet*, December 21, 2021, https://www.ffiec.gov/hmcrpr/cra_fs21.htm

Question 145. Should intermediate banks be able to choose whether a small business or small farm loan is considered under the Retail Lending Test or, if it has a primary purpose of community development, under the applicable community development evaluation, regardless of the reporting status of these loans? Should the same approach be applied for the intermediate bank community development performance standards in § __.29(b) and for intermediate banks that decide to opt into the Community Development Financing Test in § __.24?

Regarding retail lending, see the answer to question 144. Regarding the CD test, NCRC supports the current CD test for ISB banks and does not support the optional CD Financing Test. The difficulty is that the agencies propose to allow ISB banks opting into the CD Financing Test to earn extra credit for CD services and retail services.[334] In contrast, under the current CD test, an ISB bank must offer CD services.[335] NCRC is concerned that the overall level of ISB CD services would drop, which would reduce the amount of counseling and other valuable CD services offered by ISB banks. Instead, the agencies should consider applying the proposed ratio of the dollar amount of CD divided by deposits to the current ISB CD test in order to enhance the rigor of that test.

Effect of CRA Performance on Applications

Question 146. Are the agencies' current policies for considering CRA performance on applications sufficient? If not, what changes would make the process more effective?

As stated above, NCRC submitted a detailed comment letter in response to the FDIC's request for information regarding merger applications. In that letter, NCRC maintained that the agencies have over-relied on anti-competitiveness analysis and have not provided sufficient attention to the legal requirement that merging banks demonstrate a public benefit as a result of their merger application.

We asserted that all merging banks must submit a community benefits plan as part of their merger applications. This plan would establish verifiable performance measures and goals for increasing loans, investments and services to LMI and people of color and LMI neighborhoods and communities of color. A version of a community benefits plan would be a community benefits agreement negotiated with community organizations. In certain circumstances when the agencies or commenters identify fair lending deficiencies, the agencies have also issued conditional merger approvals that require performance goals for improving fair lending performance and other aspects of CRA performance.

After a merger is complete, the next CRA exam must assess compliance with the community benefits plan or community benefits agreement and conditional merger approvals. If a bank has significantly exceeded its goals, it could be rewarded with a higher rating. If it has fallen far short of its goals, it would be penalized via ratings downgrades.

[334] NPR, p. 381.
[335] NPR, p. 377.

An Outstanding CRA rating must not be considered evidence that merging banks have satisfied the public benefits legal requirement. CRA performance may have declined since the Outstanding rating was awarded. Moreover, relying on a rating awarded in the past does not account for institutional changes, which can be considerable during a merger. These could negatively impact future CRA performance such as closure of several branches or changes in the bank's CRA strategy. A bank must therefore account for institutional changes and demonstrate in its merger application via a community benefits plan how the merger would in a concrete and specific manner benefit communities.

Public hearings must also be more frequent as the Acting Comptroller has stated. Instead of a hearing once every few years, a combination of in-person and virtual venues should facilitate a considerable number of hearings on an annual basis. Hearings afford more opportunities for residents of affected communities to present their views on whether the merger will benefit their communities. Moreover, hearings facilitate more discussion, debate and exchange of information which is critical for the agencies to execute their responsibilities of ensuring whether the merger benefits communities.

Data Collection, Reporting, and Disclosure

Deposits data

Question 147. What are the potential benefits and downsides of the proposed approach to require deposits data collection, maintenance, and reporting only for large banks with assets of over $10 billion? Does the proposed approach create an appropriate balance between tailoring data requirements and ensuring accuracy of the proposed metrics? Should the agencies consider an alternative approach of requiring, rather than allowing the option for, large banks with assets of $10 billion or less to collect and maintain deposits data? If so, would a longer transition period for large banks with assets of $10 billion or less to begin to collect and maintain deposits data (such as an additional 12 or 24 months beyond the transition period for large banks with assets of over $10 billion) make this alternative more feasible?

As NCRC has stated elsewhere in this letter, we encourage the agencies to require better deposits data collection for all large banks. The agencies state that banks collect customer location data to comply with Customer Identification Program requirements.[336] At the very least, it would not seem too burdensome for large banks with assets below $10 billion to collect the county in which the customer resides. This data would be more accurate than the FDIC Summary of Deposits (SOD) data for developing benchmarks associated with the Proposed Retail Lending Test and the CD Finance Test.

[336] NPR, p. 391.

Question 148. Should large banks with assets of $10 billion or less that elect to collect and maintain deposits data also be required to report deposits data? Under an alternative approach in which all large banks with assets of $10 billion or less are required to collect and maintain deposits data, should these banks also be required to report the data, or would it be appropriate to limit new data burden for these banks by not requiring them to report the data?

All deposits data collected should be reported and made publicly available in a database. This is the best way to achieve transparency and hold banks accountable for serving communities per their CRA statutory requirements. When data is publicly available, members of the public can analyze the data and offer their opinions on bank performance to federal bank agencies, other public agencies and additional stakeholders. This is the most effective way to hold banks publicly accountable. Finally, reporting data would appear to be a minimal burden in this era of electronic submission possibilities.

Question 149. What are alternative approaches to deposits data collection and maintenance that would achieve a balance between supporting the proposed metrics and minimizing additional data burden? Would it be preferable to require deposits data collected as a year-or quarterly-end total, rather than an average annual deposit balance calculated based on average daily balances from monthly or quarterly statements?

The agencies should stress test this issue. If some sort of quarterly average approach is almost as accurate as daily averages and it reduces cost and facilitates more banks reporting this data, then this could be a viable alternative.

Question 150. Should deposits sourced from commercial banks or other depository institutions be excluded from the deposits data that is reported or optionally maintained by banks? Should other categories of deposits be included in this deposits data?

In general, NCRC advocates for an inclusive definition of deposits since deposits ultimately reflect the savings and wealth of members of society, which banks should reinvest in communities. In addition, deposits form the basis of a number of proposed performance measures including the retail volume lending screen and the ratio of CD dollars divided by deposits.

The agencies clearly think that deposits of commercial banks and other depository institutions should be included in the definition of deposits.[337] NCRC agree with this position.

NCRC asks the agencies to reconsider the exclusion of public sector deposits because they reasoned that such deposits are subject to restrictions and are rotated among banks.[338] However, NCRC notes that a number of municipal governments ask banks to demonstrate their reinvestment records before they place deposits in them. This suggests that these deposits are

[337] NPR, p. 393.
[338] NPR, p. 393.

relatively stable. Moreover, the federal bank agencies should reinforce the views of local governments that banks should reinvest these deposits in communities.

Question 151. For what types of deposit accounts, such as pre-paid debit card accounts, and Health Savings Accounts, might depositor location be unavailable to the bank? For these account types, is it appropriate to require the data to be reported at the institution level? Should brokered deposits be reported at the institution level as well?

These types of deposits should at least be considered at the institution level but the agencies should conduct additional research to determine if location can be coded at the county level. Pre-paid debit card accounts might need to be at the institution level since a consumer can purchase the product in one location and use it in another one. Health Savings Accounts (HSA), on the other hand, could be geocoded at the county level since the bank and employer offering the HSAs are likely to be able to geocode the location of the customers using the HSAs.

Question 152. What is the appropriate treatment of non-brokered reciprocal deposits? Should a non-brokered reciprocal deposit be considered as a deposit for the bank sending the non-brokered reciprocal deposit, but not be considered as a deposit for the bank receiving the reciprocal deposit?

A non-brokered reciprocal deposit should be considered a deposit for the bank sending it, but not for the bank receiving it. Often CDFI banks receive non-brokered deposits to support lending in under-resourced communities. Therefore, the recipient should not have these deposits in the denominator of their retail lending screen or CD ratio since these deposits do not represent the resources of their communities.

Question 153. Do bank operational systems permit the collection of deposit information at the county-level, based on a depositor's address, or would systems need to be modified to capture this information? If systems need to be modified or upgraded, what would the associated costs be?

NCRC believes that this type of data collection is not burdensome. As discussed above, the St. Louis Federal Reserve Bank and Cities for Financial Empowerment (CFE) Fund operate the Bank On National Data hub. This hub allows users to download deposit data by zip code, which would suggest that county-level data can be made readily available.

Question 154. In order to reduce burden associated with the reporting of deposits data, what other steps can the agencies take or what guidance or reporting tools can the agencies develop to reduce burden while still ensuring adequate data to inform the metrics approach?

The agencies are contemplating creating a geocoding platform, which NCRC encourages.[339] This would help banks collect and report deposits data.

[339] NPR, p. 394.

Question 155. Should the agencies consider an alternative approach of publishing a data set containing county-level deposits data in order to provide greater insight into bank performance?

The agencies should publish deposits data at a county level and at the zip code or census tract level. The dataset should be available at the lowest level of aggregation (preferably by individual census tracts) for all banks in the aggregate. The agencies should consider how to publish deposits data for individual banks, perhaps by income category of census tracts and categories of various percentages of people of color. This type of public database would be valuable for assessing in greater detail the extent of banking service availability in communities of color and modest income communities.

Retail lending data

Question 156. Should banks collect and report an indicator for whether the loan was made to a business or farm with gross annual revenues of $250,000 or less or another gross annual revenue threshold that better represents lending to the smallest businesses or farms during the interim period before the CFPB Section 1071 Rulemaking is in effect?

As stated above, NCRC appreciates that the agencies are considering a performance measure of loans to small businesses with revenues of $250,000 or less. Thus, during the interim period before Section 1071 is in effect, the CRA data should have a field indicating if the business had revenues in this range.

In addition, another performance measure of loans to small businesses with revenues of $100,000 or less should be considered since businesses with this revenue size are most likely start-ups and disproportionately owned by people of color or women. The data should have an indicator for revenues of $100,000 to $250,000 and another indicator for revenues of $100,000 and less. This would allow for more granular analysis in a publicly available dataset.

Question 157. Would the benefits of requiring home mortgage data collection by non-HMDA reporter large banks that engage in a minimum volume of mortgage lending outweigh the burden associated with such data collection? Does the further benefit of requiring this data to be reported outweigh the additional burden of reporting?

NCRC disagreed with the CFPB when that agency raised the reporting threshold to 100 loans. We would thus support reporting by non-HMDA reporters. The agencies could consider using the previous threshold of 25 closed-end loans annually and include multifamily loans when calculating if a bank exceeded the threshold. The benefits of this data collection would outweigh the costs. We appreciate that the agencies are considering reporting requirements for banks making sizable numbers of home loans but may not be HMDA reporters because they have branches outside of metropolitan areas.[340] The artifice of an office's location should not trump the public importance of reporting data and holding banks accountable for serving community needs.

[340] NPR, p. 404.

Question 158. Should large banks with assets of $10 billion or less be required to collect, maintain, and report automobile lending data? If so, would a longer transition period for large banks with assets of $10 billion or less to begin to collect, maintain, and report automobile lending data (such as an additional 12 or 24 months beyond the transition period for large banks with assets of over $10 billion) make this alternative more feasible? Does the added value from being able to use these data in the construction of metrics and benchmarks outweigh the burden involved in requiring data collection and reporting by these banks?

As stated above, NCRC believes that all large banks should report automobile lending data.

Question 159. Should the agencies streamline any of the proposed data fields for collecting and reporting automobile data? If so, would it still allow for constructing comprehensive automobile lending metrics?

The proposed data fields are minimal. In addition to a unique loan identifier and date of application, the fields include loan amount, loan location including census tract, whether the loan was originated or purchased, and the income of the borrower the bank relied upon for making a decision on the application.[341] These are few fields and it is unclear how they can be further streamlined. This information should not be difficult for a bank to report.

Question 160. Should the agencies consider publishing county-level automobile lending data in the form of a data set?

The agencies should reconsider their decision not to publish a database.[342] The data should be made available at least on county level with an indicator if the borrower resided in a low- or moderate-income tract along with his or her income level.

Community development data

Question 161. How might the format and level of data required to be reported affect the burden on those banks required to report community development financing activity data, as well as the usefulness of the data? For example, would it be appropriate to require reporting community development financing data aggregated at the county-level as opposed to the individual activity-level?

NCRC strongly believes that the CD data be reported on an individual activity level as the agencies proposed.[343] This would allow the agencies to calculate the number and percentages of CD loans and investments that meet one of the impact factors such as whether the CD finance was conducted in conjunction with a public agency or whether it was in a persistent poverty county. Also, NCRC believes the data should be available on a census tract level so that members of the public can determine which neighborhoods are receiving an adequate amount of CD finance and which neighborhoods need more CD finance.

[341] NPR, p. 406.
[342] NPR, p. 406.
[343] NPR, p. 410.

The agencies can either have banks report addresses or census tracts. If the agencies ask the banks to report addresses to the agencies, the agencies should then geocode the addresses into census tracts.

Question 162. What other steps can the agencies take, or what procedures can the agencies develop, to reduce the burden of the collection of additional community development financing data fields while still ensuring adequate data to inform the evaluation of performance? How could a data template be designed to promote consistency and reduce burden?

The agencies should design a template and a guidebook clearly explaining each data field. The agencies could also provide webinars for banks and members of the public.

Retail Services and Products

Question 163. Should the agencies require the collection and maintenance of branch and remote service availability data as proposed, or alternatively, should the agencies continue with the current practice of reviewing this data from the bank's public file?

The agencies should standardize the collection of branch and remote service availability data as proposed and make this data publicly available. As proposed,[344] systematic data collection on the location of these facilities, the services they offer and their hours is necessary for an evaluation of their usefulness to traditionally underserved communities.

Question 164. Should the agencies determine which data points a bank should collect and maintain to demonstrate responsiveness to low-and moderate-income individuals via the bank's digital and other delivery systems such as usage? Alternatively, should the agencies grant banks the flexibility to determine which data points to collect and maintain for evaluation?

The agencies should proscribe data points similar to those in the Bank On database discussed above. The data needs to be consistent and publicly available so that banks can be compared against each other and compared against demographic benchmarks. As stated above, some large bank CRA exams already conduct this type of analysis but do not present their data in tables in a clear and consistent basis. These beginning stages of digital CRA examination can be improved upon in a realistic and feasible manner.

[344] NPR, p. 412.

Question 165. Are the proposed data collection elements for responsive deposit products appropriate, or are there alternatives to the proposed approach that more efficiently facilitate the evaluation of responsive deposit products? Should the agencies require collection and maintenance of specific data elements for the evaluation of responsive deposit products? Alternatively, should the agencies grant banks the flexibility to determine which data points to collect and maintain for evaluation?

The data to be collected would include the number and percentage of responsive deposit products and the number of responsive products opened and closed annually by income category of census tracts.[345] This proposed data collection is appropriate and must be codified and standardized.

Question 166. Does the proposed retail services data exist in a format that is feasibly transferrable to data collection, or would a required template provided by the agencies be sufficient in the collection of retail services and products information?

A template would be helpful and could be produced with input from the public.

Question 167. What steps can the agencies take to reduce burden of the proposed information collection requirements while still ensuring adequate information to inform the evaluation of services?

The agencies should create a template and guidebooks. Webinars for the general public would help also.

Question 168. Should large banks with assets of $10 billion or less be required to collect and maintain data on deposit product responsiveness and/or digital and other delivery systems? If so, would a longer transition period to begin to collect and report such data (such as an additional 12 or 24 months beyond the transition period for large banks with assets of over $10 billion) make this alternative more feasible? Does the added value from being able to use this data outweigh the burden involved in requiring data collection by these banks?

All large banks should collect this data. The value of the data for holding banks accountable and increasing responsive products would exceed the costs of data collection.

Community services data

Question 169. Should large banks with assets of $10 billion or less be required to collect community development services data in a machine readable form, as prescribed by the agencies, equivalent to the data required to be collected and maintained by large banks with assets of over $10 billion? Under this alternative, should large banks with assets of $10 billion or less have the option of using a standardized template or collecting and maintaining the data in their own format? If large banks with assets of $10 billion or less are required to collect and maintain community development services data, would a longer transition period for these banks to begin to collect and maintain deposits data (such as an additional 12 or 24 months beyond the

[345] NPR, p. 413.

transition period for large banks with assets of over $10 billion) make this alternative more feasible? Does the added value from being able to use this data in the construction of a metric outweigh the burden involved in requiring data collection by these banks?

All large banks should be required to report this data to the agencies, which the agencies should then provide to the public as a downloadable database. The data points are relatively few and straightforward. They include the number of employees at FBAAs, CD service hours at FBAAs, CD purpose and organizations partnering with the bank.[346] Most large banks likely report this information to CRA examiners already. A standard template provided by the agencies should help.

Question 170. Should large banks with assets of over $10 billion be required to collect, maintain, and report data on the number of full-time equivalent employees at the assessment area, state, multistate MSA and institution level in order to develop a standardized metric to evaluate community development service performance for these banks?

All large banks should be required to provide this information.

Data Collection and Reporting Requirements for Operations Subsidiaries, Operating Subsidiaries, and Affiliates

Question 171. Should small banks that opt to be evaluated under the metrics-based Retail Lending Test be required to collect, maintain, and report related data or is it appropriate to use data that a small bank maintains in its own format or by sampling the bank's loan files?

Small banks should be required to report the required information if they elect to be evaluated by the proposed Retail Lending Test.

Question 172. Would a tool to identify retail lending assessment areas based on reported data be useful?

Yes, this tool would be helpful for both banks and the general public. It would provide stakeholders with a sense of how much lending in the aggregate and by individual banks are outside of FBAAs. The agencies should update this tool annually.

Question 173. Should the agencies disclose HMDA data by race and ethnicity in large bank CRA performance evaluations?

Data on home lending by race and ethnicity should be presented in all bank CRA exams. The data tables enable the public to readily compare a bank's performance to its peers and demographic benchmarks. This transparency promotes public participation in the CRA process. Above, we discuss in detail our recommendations regarding CRA and race.

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[346] NPR, p. 415.

Content and Availability of Public File, Public Notice by Banks, Publication of Planned Examination Schedule, and Public Engagement

Question 174. Are there other ways the agencies could encourage public comments related to CRA examinations, including any suggested changes to proposed § __.46?

Above, NCRC suggests that the agencies maintain a public registry of organizations wishing to be contacted regarding commenting on banks' CRA performance. The agencies should proactively reach out to organizations headed by people of color and women. The agencies should develop clear instructions about to whom to send CRA comments and when the due date is for comments on specific CRA exams. The agency websites must clearly and easily display this information. Currently, this information can be difficult to find on the agency websites. After the CRA exam is completed and released publicly, the agencies should inform commenters that the exam is available. This courtesy would signal that the agencies take comments seriously and wish to encourage more comments.

Question 175. Is there additional data the agencies should provide the public and what would that be?

Above, NCRC has advocated that certain data reporting requirements that the agencies have proposed for banks with assets above $10 billion instead be applicable for all large banks and that all of this data collection be publicly reported. In addition, the agencies should develop a well-defined list of economic and demographic indicators for metropolitan areas and rural counties such as housing cost burdens, vacancy rates, unemployment rates and percent of households in poverty that can be used by the public to help develop comments regarding performance context. The demographic indicators should include racial and ethnic breakdowns as well as homeownership and small business ownership rates by race and ethnicity.

Question 176. Should the agencies publish bank-related data, such as retail lending and community development financing metrics, in advance of an examination to provide additional information to the public?

The agencies should publish this data in advance of examination because it would facilitate public comments on bank CRA performance.

Question 177. Should the agencies ask for public comment about community credit needs and opportunities in specific geographies?

The agencies should ask about community needs and opportunities in specific geographical areas. The questions should be specific enough so that answers are not general such as there is a need for more affordable housing. The agencies could ask, for example, whether the affordable housing shortage affects homebuyers or older adult tenants or other specific subgroups of the population. That way, examiners can probe whether banks have designed programs or products targeting clearly identified needs. Likewise, agency staff should ask about support offered to community-based nonprofit organizations. The questions should not be just general such as whether funding is adequate but should ask about certain types of financing from grants to lines of credit. That way, CRA examiners can probe for targeted responses on the part of banks.

The agencies should be as solicitous about questions about CRA performance of banks as they are about credit needs. Both set of questions are important in order for agencies to obtain the full picture concerning the extent to which banks are responding to community needs.

Transition to new rule

Question 178. The agencies ask for comment on the proposed effective date and the applicability dates for the various provisions of the proposed rule, including on the proposed start date for CRA examinations under the new tests.

In general, the transition rules are reasonable. The proposed new performance standards, facility based assessment area definitions and public file requirements would be effective 60 days after publication in the Federal Register.[347] One year after date of the final rule, most definitions, proposed tests and data collection requirements become effective.[348] Banks required to report new data would start collecting such data 12 months after the final rule and would report their data to the agencies by April 1 of the following year.[349] Finally, new CRA exams would start two years after publication of the final rule.[350]

Several elements of the proposed rule would become effective after one year, including data reporting requirements. This is sufficient time for banks to implement changes to their CRA systems including data reporting. Moreover, there is an additional year for banks to prepare themselves for the new CRA exams.

Question 179. Would it be better to tie the timing of a change to the proposed small business and small farm definitions to when the CFPB finalizes its Section 1071 Rulemaking or to provide an additional 12 months after the CFPB finalizes its proposed rule? What are the advantages and disadvantages of each option?

The agencies proposed to require banks to adopt new Section 1071 definitions when the CFPB's rule becomes effective.[351] This would align the CRA Section 1071 implementation with that of the CFPB's and would thus appear to be reasonable.

Question 180. When should the agencies sunset the agencies' small business loan and small farm loan definitions?

Perhaps the CFPB and the bank agencies should coordinate so that the Section 1071 rule is effective at the end of an annual reporting time period for the current CRA small business and farm data.

[347] NPR, pp. 427-428.
[348] NPR, p. 429.
[349] NPR, p. 431.
[350] NPR, p. 431.
[351] NPR, p. 430.

Benefits exceed costs of proposed rule

In her remarks upon introduction of the NPR, Federal Reserve Governor Michelle Bowman stated, "Fundamentally, we do not know if the costs imposed under the proposal will be greater than the benefits."[352] In order to help answer this question, she asked stakeholders to comment on the proposed rule and to provide information that might shed light on this important question.

NCRC believes that an objective and impartial analysis would conclude that the proposed changes to CRA would result in benefits to banks and underserved communities that far exceed the costs. Just for banks, a consideration of costs and benefits shows that benefits exceed costs. For society as a whole, the benefits exponentially outweigh the costs.

In the NPR, the agencies first estimated costs for small entities per their legal obligation. The Small Business Administration (SBA) defines small banks as those with $750 million in assets or less. The OCC estimated that the smallest banks with assets under $600 million would, on average, incur an increased cost of $4,560 from the proposed rule. Intermediate banks in the asset range of $600 million to $750 million would experience an added cost of $9,120.[353] For these categories of banks, the CRA exams would remain very similar and the added costs would consist mainly of bank staff becoming acquainted with the new regulations (in the case of the small banks, this would be a week of work for one staff person and in the case of intermediate banks, this would be two weeks of work).

The OCC further concluded that the costs for smaller banks would not be significant since they would not be greater than 5 percent of the small entity's total annual salaries and benefits or greater than 2.5 percent of the small entity's total non-interest expense.[354] The FDIC and Federal Reserve Board came to similar conclusions.[355]

Also, the agencies calculated additional hours for all banks regarding compliance with the new rule which would consist mainly of new data reporting for public databases and for data submission to CRA examiners. Overall, the agencies estimated that annual total hours would be 450,777.[356] While this would appear to be a huge number of hours, this estimate is a total hours estimate for 4,805 banks. On a per bank basis this equals 94 additional hours, which is quite manageable.

The total costs of compliance should be compared to the total income gain derived from CRA-related lending, investing and service activity. The hours estimate of 450,777 can be multiplied by an average hourly bank staff rate of $114[357] as estimated by the agencies. This would result in $51,388,578 in additional expense each year.

[352] Statement on Community Reinvestment Act Proposal by Governor Michelle W. Bowman, May 5, 2022, https://www.federalreserve.gov/newsevents/pressreleases/bowman-statement-20220505.htm
[353] NPR, p. 436.
[354] NPR, p. 437.
[355] NPR, pp. 442- 443.
[356] NPR, p. 462.
[357] NPR, p. 436.

However, when compared to additional home mortgage lending stimulated by CRA, the benefits from just one product line of lending exceeds the costs. A report conducted by Federal Reserve economists found that CRA increased mortgage lending in LMI tracts by 10% to 20%.[358] In order to make a conservative estimate of benefits, we applied the lower bound of 10% to home purchase loans in LMI tracts in 2020. As a result, the CRA-induced increase in loans in this tract category was about 66,000.[359] According the Mortgage Bankers Association, per loan income recently was about $1,099 per loan.[360] Multiplying the per loan income by the CRA-induced increase in home loans yields $72,562,683 which exceeds the added data collection cost by more than $20 million.

This is just one loan type that produced a benefit exceeding costs. If this type of calculation is replicated for other closed-end home loans, open end home loans, small business, small farm, multifamily lending and automobile lending (the loan categories to be included by the proposed rule), it appears that the benefits for banks considerably outweigh costs.

Moreover, this analysis does not even consider wealth gains from borrowers receiving CRA-eligible loans. The equity gains from home purchase loans can be hundreds of thousands of dollars for just one borrower. For example, a study conducted by Manna, a housing nonprofit developer in the District of Columbia, found that the average equity gain for the LMI homeowners it served was more than $171,000.[361] Wealth gains for small business and small farm owners are likely to be significant as well. From this perspective, it would appear that total societal benefits vastly outweigh costs.

CRA opens up new market opportunities for banks and new wealth building opportunities for residents of underserved communities by compelling banks to affirmatively and continually serve neglected communities. It makes the market work better in that banks are required to collect more data and information about borrowers and communities that they formerly refused to serve. When this is done, markets become more efficient because banks discover that they are more creditworthy borrowers to which they can lend successfully. If the agencies make CRA more rigorous and transparent, banks will need to work even harder at making safe and sound loans to formerly redlined communities. All stakeholders will benefit and total benefits will far exceed costs.

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[358] Lei Ding and 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*, Working Paper No. 17-15, June 19, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2991557

[359] Consumer Financial Protection Bureau, *Data Point: 2020 Mortgage Market Activity and Trends, CFPB August 2021*, Table 2, p. 18 for home purchase loans in LMI tracts, https://files.consumerfinance.gov/f/documents/cfpb_2020-mortgage-market-activity-trends_report_2021-08.pdf

[360] David Krechevsky *Independent Mortgage Bank Profits On Loans Fell Nearly 58% In 4Q 2021*, National Mortgage Professional, March 2022, https://nationalmortgageprofessional.com/news/independent-mortgage-bank-profits-loans-fell-nearly-58-4q-2021#:~:text=Independent%20mortgage%20banks%20(IMBs)%20and,MBA)%20Quarterly%20Mortgage%20Bankers%20Performance

[361] Josh Silver, Seunghoon Oh, Annelise Osterberg andJaclyn Tules, *The Financial Benefits of Homeownership: An Evaluation of a Nonprofit Housing Development Model*, Manna Inc., May 2014, available upon request.

Almost 30 years is too long for a review of the CRA regulation

CRA exams have multiple parts and incentives. No matter how thoughtfully the agencies may try to formulate a rule, implementation of a rule as involved as CRA will uncover results that cannot be anticipated. The rule will also involve the collection of new data that will shed light on the parts of the rule that are working as intended and parts of the rule that need adjusting. Some thresholds, performance measures and definitions may need to be adjusted after a couple of years' experience with the new exams.

NCRC asks the agencies to consider a review after five years following the issuance of this final rule. Subsequent reviews should occur approximately every five years. As part of a review, the agencies should conduct an impact study to estimate the results of the reform.

An impact study should seek to answer several questions. Did the changes to the regulation increase retail lending, homeownership and small business ownership for people of color and LMI borrowers? Were negative impacts avoided such as displacement? Did the new CRA exams effectively guard against abusive lending and promote responsive credit and deposit products. Did the reforms to assessment areas work to cover the great majority of lending and do so in a way that was feasible for banks? What does the new deposit and CD data tell us about the impacts of the reforms? Can the new deposit data be used to more precisely define deposit-based assessment areas? An impact study of this nature should be published in conjunction with a Request for Information (RFI), or an Advance Notice of Proposed Rulemaking (ANPR) or a Notice of Proposed Rulemaking (NPR).

Almost three decades since the last major change to the CRA regulations in 1995 was just too long. This time lag created needless frustration with a law and regulation that stakeholders agree is needed and has created substantial benefits for both banks and communities. Too lessen frustration and to adjust the CRA machinery so it operates more efficiently and equitably, NCRC calls for reviews every five years.

Conclusion

Our country has experienced increases in inequality, strife and polarization over the last couple of decades. CRA cannot completely solve these complex problems and is not designed to be a cure-all. However, by redressing discrimination and redlining, CRA directs banks to make credit and capital available to disenfranchised populations so that they can participate in rebuilding their own communities, acquiring equity and providing for their families. Executed in a comprehensive manner, CRA reform can help empower large segments in society including people of color, poor whites, the LGBTQ community, people with disabilities, LEP households, older adults and small businesses owned by people of color and women.

By empowering these groups, CRA would not only improve their quality of life and increase their resources, but the entire society would benefit economically. And if CRA helps promote integration, social interactions among various socioeconomic and racial and ethnic groups increase. The economic and sociological benefits brought about by an invigorated CRA would help lessen societal strife, tension and inequalities. Lastly, underserved and distressed neighborhoods could benefit from a revitalization that not only makes them economically more viable but healthier and more ecologically sustainable. The country would be richer in multifaceted ways by a stronger CRA.

The agencies must get this right. The proposed reforms are a good start but must be improved to increase exam rigor across all subtests. The agencies must improve upon their approach to incorporate race and ethnicity into exams. The agencies must stick with and improve their proposed reforms of assessment areas so that all banks, no matter their business model, are held accountable for making loans, investments and services to traditionally underserved populations. Data collection and reporting must be robust so CRA can do what it is designed to do: hold banks publicly accountable by enabling the agencies and the public to use data to see what banks are doing and not doing.

This is collectively our best chance in 27 years since the 1995 reforms to improve CRA. This is NCRC's comprehensive comment and our best shot at advising the agencies. The agencies will receive several others with competing viewpoints. If the agencies adhere to their objectives of making CRA more effective and consistent, we are confident that rigor will be enhanced in a transparent manner that helps all communities.

Thank you for the opportunity to comment on this important matter. If you have any questions please do not hesitate to ask me on jvantol@ncrc.org or Josh Silver, Senior Advisor, on jsilver@ncrc.org.

Sincerely,

[redacted]

Jesse Van Tol
President and CEO