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Submitted Electronically via Regulations.gov and via email to comments@fdic.gov and regs.comments@federalreserve.gov

Re: Comments on Proposed Rule entitled "Community Reinvestment Act" (Docket ID OCC-2022-0002, RIN 1557-AF15; Docket No. R-1769, RIN- 7100-AG29; RIN 3064-AF81)

Hunton Andrews Kurth LLP submits these comments on the proposal of the Board of Governors of the Federal Reserve System ("Board"), the Federal Deposit Insurance Corporation ("FDIC"), and the Office of the Comptroller of the Currency ("OCC") (collectively, the "Agencies") to amend their regulations implementing the Community Reinvestment Act of 1977 ("CRA"). 87 Fed. Reg. 33,884 (Jun. 3, 2022) ("Proposed Rule").

The Agencies are seeking comment on the Proposed Rule's various changes to how the Agencies will evaluate a bank's CRA performance. This comment letter explains that the Proposed Rule is unsound legally and as a matter of public policy, particularly with respect to the standard the Agencies propose to apply to designated wholesale banks.

BACKGROUND

I. Legal background

A. The Community Reinvestment Act and current regulations

The CRA was enacted in 1977 for the purpose of "requir[ing] each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions." 12 U.S.C. § 2901(b). The CRA requires the Agencies to (1) "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," *id.* § 2903(a)(1), and (2) "take such record into account in its evaluation of an application for a deposit facility by such institution," *id.* § 2903(a)(2). The CRA also instructs the Agencies to issue "[r]egulations to carry out the purposes of this chapter. . . ." *Id.* § 2905.

The current CRA regulations set forth five different tests for evaluating a bank's CRA efforts:

- The lending test evaluates retail banking activities such as small business, consumer, small farm, and residential mortgage loans in low- and moderate-income ("LMI") communities.

- The investment test evaluates direct lending and investment in secondary markets qualifying as public welfare investments or community development investments.

- The service test evaluates the geographic distribution of retail branches, availability of alternative systems for delivering banking services, range of retail services, and community development services.

- The community development test evaluates (1) the number and amount of community development loans; (2) the use of innovative or complex qualified investments, community development loans, or community development services and the extent to which the investments are not routinely provided by private investors; (3) the bank's responsiveness to credit and community development needs.

- A "strategic plan" approved by the bank's primary regulator that takes into account the bank's individual business model and the credit needs of the community.

12 C.F.R. §§ 25.21–25.29.

Small banks are evaluated under the lending test, intermediate small banks are evaluated under the lending and investment tests, large banks are evaluated under the lending, investment, and service test, and wholesale banks are evaluated under the community development test. *Id.* A "[w]holesale bank" is defined as "a bank or savings association that is not in the business of extending home mortgage, small business, small farm, or consumer loans to retail customers, and for which a designation as a wholesale bank or savings association is in effect." *Id.* § 25.12(x). Finally, any bank can choose to be evaluated under a "strategic plan." *Id.* § 25.27. Each bank is then given a rating of "outstanding," "satisfactory," "needs to improve," or "substantial non-compliance" based on its performance. *Id.*§ 25.28. The regulators take a bank's CRA rating into account when the bank seeks regulatory approval for mergers, acquisitions, or charters.

B. The Administrative Procedure Act

The Administrative Procedure Act ("APA") imposes requirements on all agency decision-making. Agency actions taken in violation of those requirements are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

With respect to legislative rules—rules of general applicability that have the force and effect of law—the APA obligates the agency to provide advance notice to the public, allow for public comment, and "incorporate in the rules adopted a concise general statement of their basis and purpose." *Id.* § 553(b), (c). These protections ensure that regulated parties have fair notice of what is required of them and have a meaningful opportunity to comment on the proposed regulation. A meaningful public comment opportunity makes for better policy outcomes and allows interested parties to provide evidence that facilitates judicial review. *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

II. The Proposed Rule

The Proposed Rule sets forth six tests for evaluating a bank's CRA activities:

- The retail lending test evaluates a bank's lending record, including small business, consumer, small farm, and mortgage loans in LMI communities.

- The retail products and services test evaluates a bank's deposit products, such as low- or no-cost checking accounts, loans, and other financial services.

- Community development services test evaluates a bank's record of helping to meet the community development services needs of its community.

- The community development financing test evaluates a bank's community development loans and investments, using a quantitative, metrics-based approach, as well as assess the impact of bank lending and investments in LMI communities.

- The modified community development financing test includes a qualitative review of a bank's community development lending and an institution level-metric measuring a bank's volume of activities relative to its capacity. Assuming a bank has a "satisfactory" rating under that standard, the bank then has the option of having its community development service activities considered to adjust the rating from "satisfactory" to "outstanding."

- A "strategic plan" approved by the bank's primary regulator that takes into account the bank's individual business model and the credit needs of the community.

87 Fed. Reg. at 33,889–91.

Under the Proposed Rule, small banks would continue to be evaluated under the current small bank lending test and may opt into the new retail lending test, and intermediate small banks would be evaluated under the retail lending test and the community development test and may opt into the community development financing test. *Id.* Large banks would be subject to the retail lending test, the retail products, and services test, the community development services test, and the community development financing test. *Id.* Wholesale banks would be subject to the modified community development financing test. *Id.* The Proposed Rule does not change the definition of a "wholesale bank."

DISCUSSION

I. The Proposed Rule is arbitrary and capricious, and bad public policy.

Agency regulations must be the product of reasoned decision-making and supported by evidence. To meet this standard, the agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency fails to meet this standard when it has: (1) "relied on factors which Congress has not intended it to consider," (2) "entirely failed to consider an important aspect of the problem," (3) "offered an explanation for its decision that [is] counter to the evidence before the agency," or (4) offered an explanation that "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* When an agency makes a regulatory change, it is "obligated to supply a reasoned analysis for the change" above that which is required when the agency regulates in the first instance. *Id.* at 42.

The Proposed Rule makes substantial changes to the existing regulations that the Agencies have not supported with reasoned analysis. The Proposed Rule substantially rewrites well-established criteria for assessing a bank's CRA record that have been working effectively since the regulations were last substantively amended in 1995. These changes include three entirely new tests for determining a bank's CRA rating. Yet, the Agencies do not explain why these new standards are necessary given that the vast majority of banks have been receiving satisfactory or better overall performance ratings over an extended period.

The Agencies merely offer general and conclusory statements in support of the Proposed Rule's extensive changes. For example, the Proposed Rule identifies as its purpose "moderniz[ing] the CRA" and "strengthening, clarifying, and tailoring [the regulations] to reflect the current banking landscape and better meet the core purpose of the CRA." 87 Fed. Reg. at 33,888. Similarly, in May 2022, the Agencies issued a joint statement, explaining that the Agencies ". . . recognize that CRA regulations must evolve to address the significant changes in the banking industry." Those general and conclusory statements fail to identify the problem that the Agencies are trying to solve and how the Proposed Rule solves that problem. Specifically, the Proposed Rule does not answer key questions such as: In what ways are the CRA regulations out-of-date and in need of modernization? What empirical evidence shows that the CRA regulations are weak and not fulfilling the objectives of the CRA? What about the regulations is confusing and in need of clarification? And how are the current regulations not tailored to the current banking landscape and not meeting the core purposes of the CRA? Conversely, how is the Proposed Rule tailored to the current banking landscape and meeting the core purposes of the CRA?

Particularly problematic is the Agencies' modified community development financing test for the primary evaluation of wholesale banks. The new test is inherently illogical and lacks any rational connection to the facts. *State Farm*, 463 U.S. at 43. It eliminates wholesale banks' ability to rely on community development services to achieve a baseline "satisfactory" rating, forcing them to rely instead on community development lending and investment. 87 Fed. Reg. at 33,983. Although the test gives wholesale banks the option of using community development services to increase their rating from "satisfactory" to "outstanding," they must rely on lending and investment activities to first achieve a "satisfactory" rating. That is virtually impossible for wholesale banks.

Community development lending is defined as any lending that has as its primary purpose "[c]ommunity development," which includes (1) affordable housing for LMI individuals, (2) community services targeted to LMI individuals, (3) financing small businesses or farms, or (4) activities that revitalize or stabilize LMI geographies. 12 C.F.R. § 25.12(g). That is not the type of lending that wholesale banks do. Wholesale banks generally do not engage in retail or consumer lending, but rather make commercial loans. They are by definition "not in the business of extending home mortgage, small business, small farm, or consumer loans to retail customers." *Id.* § 25.12(x). And the Proposed Rule does not change this definition. Wholesale banks' lending activity could also consist of buying loans pooled from across the country, making it difficult for the bank to select loans that fall within the bank's assessment area (its community for purposes of the CRA) or meet community development needs. It is similarly irrational to base a wholesale bank's CRA evaluation on investment activity. That activity is likely to consist of investments in mortgage-backed securities that are located nationally and not tied to a particular assessment area.

The Agencies also fail to support their change in policy with respect to the evaluation of wholesale banks with "a reasoned analysis for the change." *State Farm*, 463 U.S. at 42. The Agencies do not explain why they are eliminating the ability of wholesale banks to use community development services to achieve a baseline "satisfactory" CRA rating in their primary evaluation. Wholesale banks have used these services successfully for many years, including by providing the public with financial literacy education and counseling using FDIC's Money Smart course. The Proposed Rule does not explain how these services are insufficient to meet the needs of the community and serve the purposes of the CRA. Further illustrating the irrationality of the Agencies' decision, community development services are still part of the primary evaluation criteria for large banks. The Agencies do not provide a rational explanation for their decision to allow large banks to use services for achieving a baseline "satisfactory" rating while wholesale banks are evaluated based on lending and investments alone. That is arbitrary and capricious. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) ("[A]n unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.") (internal quotation marks and citation omitted).

The Proposed Rule's limited consideration of the business model of wholesale banks only further highlights the Agencies' faulty reasoning. The Proposed Rule provides for computing the wholesale bank's community development financing metric by dividing the annual average of the bank's nationwide community development financing activity by the quarterly average of the bank's total assets for the same years. The Agencies were aware that wholesale banks have a different business model as the Proposed Rule puts the bank's community development financing activity (community development loans and investments) in the numerator and the bank's *assets* (rather than the bank's deposits) in the denominator. 87 Fed. Reg. at 33,983. The Proposed Rule explains that it uses assets rather than deposits because wholesale banks may not collect retail deposits. *Id*. But this acknowledgment only further calls attention to the unreasonableness of the Agencies' decision—they recognize that wholesale banks do not engage in retail lending and investments, but fail to explain why they are looking to those activities at all.

The Proposed Rule also neglects a critical factor that Congress intended the Agencies to consider. *State Farm*, 463 U.S. at 43. Congress instructed the Agencies to consider the "safe and sound" operation of banks in assessing a bank's CRA record. 12 U.S.C. § 2903(a)(1). The Proposed Rule fails to consider that wholesale banks may have to change their business model, or spend a significant amount of time and money on the alternative approach of developing a "strategic plan." The Proposed Rule nowhere acknowledges the implications of these changes on the safety and soundness of banks.

Finally, the Proposed Rule ignores the fact that wholesale banks have relied on the ability to use community development services to achieve a "satisfactory" CRA rating. "When an agency changes course, . . . it must 'be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account."'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)). It is arbitrary and capricious to ignore these reliance interests. *Id.* Although the agency is not required to take any specific action on the basis of reliance interests or "'consider all policy alternatives,'" it is required to consider "whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 1914–15.

The Agencies have failed to consider the reliance interests of wholesale banks and weigh those interests against any countervailing policy considerations. Many wholesale banks invested in community development services under the previous CRA evaluation framework. The Proposed Rule upsets these reliance interests and imposes unnecessary costs on wholesale banks, by forcing them to change their business model even though they have been receiving favorable CRA assessments. At a minimum, the Agencies must explain how they took these significant reliance interests into account in setting the standards under the Proposed Rule.

These same problems illustrate that the Proposed Rule is not only legally flawed but also bad public policy. The Proposed Rule imposes significant costs on wholesale banks without any benefit in ensuring that banks meet the credit needs of their community as intended by the CRA.

II. The Proposed Rule is inconsistent with the Community Reinvestment Act.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The Community Reinvestment Act requires the Agencies to (1) "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," 12 U.S.C. § 2903(a)(1); and (2) "take such record into account in its evaluation of an application for a deposit facility by such institution," *id.* § 2903(a)(2). The CRA also instructs the Agencies to issue "[r]egulations to carry out the purposes of this chapter. . . ." 12 U.S.C. § 2905. The statute states that its purpose is "to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions." 12 U.S.C. § 2901(b).

The new CRA standard fails to consider the extent to which a wholesale bank can continue to operate as a wholesale bank, as defined by the regulations, if it must make retail loans or investments in order to achieve a "satisfactory" rating. To comply with the Proposed Rule, banks must either begin making the types of loans and investments that are likely to qualify as community development loans and investments—and thus cease being wholesale banks—or create an individualized "strategic plan" in order to comply with the Proposed Rule. Either of these approaches would be extremely expensive, and thus, inconsistent with the CRA's mandate to assess a bank's community credit record "consistent with the safe and sound operation of [the] institution."

III. Congress's broad delegation of authority in the CRA raises constitutional concerns.

The CRA's broad delegation of authority to the Agencies also raises constitutional delegation concerns. Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I, § 1. Congress may not delegate that legislative power to another branch of Government. *Touby v. United States*, 500 U.S. 160, 165 (1991). But it may "confer substantial discretion on executive agencies to implement and enforce the laws." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.). The constitutional question is whether Congress provided "an intelligible principle to guide the delegee's use of discretion." *Id.* Accordingly, a statute cannot delegate "'unguided'" or "'unchecked'" authority. *Id.*

Here, the CRA provides the Agencies minimal guidance. The CRA simply instructs the Agencies to adopt "[r]egulations to carry out the purposes of [the Act]." 12 U.S.C. § 2905. And the stated purpose of the Act does not provide the Agencies much in the way of further instruction, only that they are to "assess the institution's record of meeting the credit needs of its entire community" and "take such record into account" when evaluating an application from such institution. *Id.* § 2903(a). Congress thus conferred on the Agencies vast authority to implement the CRA and make various public policy decisions—for example, how to define the bank's community, what activities will be evaluated as meeting the community's needs, how the regulators will know when those needs are met—without an intelligible principle to guide the Agencies' decision-making. The statute also lacks any guidance on how much weight the regulations should give to the bank's CRA record. That the Agencies now believe they can so dramatically change the CRA regulations—after literally decades of administering the statute one particular way—only highlights just how broad and unchecked the delegation is.

This vague statute stands in contrast to the statute in *Touby* where the Supreme Court determined that Congress had constitutionally delegated to the Attorney General authority to schedule certain prohibited substances provided such action was "'necessary to avoid an imminent hazard to the public safety.'" 500 U.S. at 163. The statute then listed certain factors that were to guide the Attorney General in making such determination, including the drug's "'history and current pattern of abuse,'" "'[t]he scope, duration, and significance of abuse,'" and "'[w]hat, if any, risk there is to the public health.'" *Id.* at 166. The CRA provides nothing close to this level of specificity about the factors the Agencies are to consider in making their decision.

The delegation is more similar to the statute at issue in *Gundy*. In that case, the statute at issue provided that "'[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders . . . .'" 139 S. Ct. at 2122 (plurality op.). By a narrow margin, the Supreme Court upheld the delegation there, but there are indications that a majority of the current Supreme Court would not. *See id.* at 2130-31 (2019) (Alito, J., concurring in the judgment); *id.* at 2131-48 (Gorsuch, J., joined by Thomas, J. and Roberts, J., dissenting); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

IV. The current comment period is insufficient.

The current 30-day comment period does not allow banks and other interested parties sufficient time to conduct a proper review of the Proposed Rules 183 pages of printed text and numerous material changes. The Proposed Rule involves a substantial re-write and expansion of existing regulations that justifies an extended comment period. For these reasons, the comment period should be extended by at least 30 days so that banks and other interested parties may provide more detailed comments that may assist the Agencies as they develop the final rule.

V. The Proposed Rule is also problematic because the FDIC's board is unlawful and unconstitutional.

The FDIC's Board, as currently constituted, violates the FDIC's organic statute. In addition, the organic statute is itself unconstitutional. The current Board violates the FDIC's organic statute in at least three ways.

First, the statute dictates that the Board "shall" have five members. 12 U.S.C. § 1812(a)(1). But the Board has only three. And unlike other agencies, the FDIC's Board cannot operate with fewer than the prescribed number of directors. *See, e.g.,* 29 U.S.C. § 153(b) (National Labor Relations Board) ("A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board . . . .").[1] Congress did not permit the Board to operate with vacancies because of its unique composition. Unlike other multi-member independent agencies, the Board does not consist entirely of appointed members who serve the agency exclusively. Instead, the Board consists of three appointed directors who serve the FDIC exclusively, and two directors who wear other hats (the director of the Consumer Financial Protection Bureau and the Comptroller of the Currency). *See* 12 U.S.C. § 1812(a)(1). When there are vacancies—as there are now—the balance shifts from the particular composition that Congress specifically prescribed.

Second, the statute dictates that one of the appointed directors "shall have State bank supervisory experience," *Id.* § 1812(a)(1)(C), and currently, the only appointed member has none, *see* FDIC, Board of Directors, Martin J. Gruenberg, Chairman (Acting) (Aug. 5, 2022), https://www.fdic.gov/about/martin-gruenberg/ (last visited Aug. 5, 2022). In fact, "*no one* [on FDIC's Board] has met the state bank regulatory expertise requirement . . . *since* . . . *2012*." Letter from John W. Ryan, President & CEO, Conference of State Bank Supervisors, to The Hon. Ron Klain, Chief of Staff, The White House, at 1 (Jan. 31, 2022), https://www.csbs.org/policy/statements-comments/fdic-board-seat-letter-white-house (emphases added). This thwarts Congress's express directive that the Board have sufficient expertise in this area.

[1] *See also* 47 U.S.C. § 154 (Federal Communications Commission) (same); 15 U.S.C. § 41 (FTC) (Federal Trade Commission); 42 U.S.C. § 2000e-4 (Equal Employment Opportunity Commission) (same).

Third, the statute dictates that "[i]n the event of a vacancy in the position of Chairperson . . . , the Vice Chairperson shall act as Chairperson." 12 U.S.C. § 1812(b)(3). But when the prior Chairperson resigned, the Vice Chairperson position was vacant. Press Release, FDIC, FDIC Chairman Jelena McWilliams Announces Her Resignation (Dec. 31, 2021), *https://www.fdic.gov/news/press-releases/2021/pr21107.html*, (last visited Aug. 5, 2022). Because the organic statute does not authorize any other member to serve as Acting Chairperson, the President was required to designate a new Chairperson, by and with the advice of the Senate. 12 U.S.C. § 1812(b)(1). The President did not do so.

In addition to these statutory violations, the Board's structure is inherently unconstitutional. By statute, all three of the Board's appointed directors are removable for cause. *See id.* § 1812(c) (providing fixed terms for the Board's three appointed members); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 561 U.S. 477, 487 (2010) (assuming that fixed-term SEC Commissioners are removable only for cause). But Article II's "take care" clause requires that principal executive officers be removable at will. *Free Enter. Fund*, 561 U.S. at 492-93. The only exception is for "multimember expert agencies that do not wield substantial executive power." *Seila Law LLC v. Consumer Fin. Prot. Bureau,* 140 S. Ct. 2183, 2199-200 (2020). And that does not apply here, because the Board "wield[s] substantial executive power" in a number of ways. *See, e.g.,* 12 C.F.R. pts. 323-391 (allowing the FDIC to determine how and when banks extend credit).[2]

These constitutional concerns are exacerbated by the current partisan composition of the Board. Consistent with Supreme Court precedent, the FDIC's organic statute requires the Board to have three members of one political party and two members of another, 12 U.S.C. § 1812(a)(2), maintaining the partisan balance that the Court has found critical to ensuring that an independent multimember agency be truly independent, *see Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935) (relying on "nonpartisan" nature of the Federal Trade Commission in upholding for-cause removal provisions). But currently, the Board has only three members, all of the Democratic party.

As a result, there are substantial questions about whether the Board had authority to issue the Proposed Rule and would have authority, as currently composed, to finalize the Rule, imposing binding legal requirements on the regulated public.

CONCLUSION

The Proposed Rule is arbitrary and capricious, inconsistent with the statutory authority, and, in all events, promulgated pursuant to an unconstitutionally broad delegation

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[2] *See also* 12 U.S.C. § 1818 (allowing FDIC to terminate a bank's federal insurance); *id.* § 1818(i)(2) (allowing FDIC to impose "civil money penalties").

and by an agency that is itself unlawfully and unconstitutionally constituted. It is also bad public policy. The proposal should be rejected, and the existing regulations should be left unchanged.