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Re: Comment on the Joint Notice of Proposed Rulemaking Regarding the Community Reinvestment Act [Docket ID OCC–2022–0002, RIN 1557–AF15; Docket No. R–1769, RIN 7100–AG29; RIN 3064–AF81]

To Whom it May Concern:

The National Consumer Law Center (NCLC) submits these comments on behalf of its low-income clients in response to the request for comments issued by the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), and the Federal Deposit Insurance Corporation (FDIC) regarding the proposal to amend regulations implementing the Community Reinvestment Act of 1977 (CRA). [1]

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[1] Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation, *Community Reinvestment Act, Joint Notice of Proposed Rulemaking, Request for Comment*, 87 Fed. Reg. 33884 (June 3, 2022) (hereinafter, the "NPR"), https://www.federalregister.gov/documents/2022/06/03/2022-10111/community-reinvestment-act.

The National Consumer Law Center is a nonprofit corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. NCLC has a long history of engagement in advocacy, research, training, and litigation challenging abusive and discriminatory credit practices. Every year, NCLC educates hundreds of lawyers regarding the credit discrimination laws and other civil rights statutes at its Consumer Rights Litigation Conference and other online trainings. The Center works to strengthen credit discrimination and civil rights statutes to bring about justice for consumers trapped in predatory financial transactions, including older adults, veterans, and people of color.

This modernization of the CRA represents an important opportunity to improve the banking system for low-and middle-income (LMI) individuals and people of color. As discussed below, while there are many important proposals that will improve the process, key questions or concerns remain regarding several aspects of the proposal which may hamper its potential to advance equitable access to banking products and services for all consumers.

I. GENERAL COMMENTS

A. The agencies must assess bank activity by race and ethnicity.

Federal banking regulatory agencies must evaluate a financial institution's record of meeting the credit needs of its entire community, including low-income and moderate-income neighborhoods.[2] Though the CRA was passed to address redlining and other discriminatory practices in banking, the proposal fails to incorporate an analysis of race and ethnicity in CRA exams. The mandate to serve all communities provides room for the agencies to incorporate a robust analysis of race and ethnicity within constitutional bounds as outlined in the white paper, *Adding Robust Consideration of Race to Community Reinvestment Act Regulations: An Essential and Constitutional Proposal*, by the National Community Reinvestment Coalition (NCRC) and Relman Colfax PLLC.[3]

Redlining is a problem today, not a relic of the past. In the past week, the Consumer Financial Protection Bureau (CFPB) and U.S. Department of Justice (DOJ) took action against Trident Mortgage Company for redlining majority-minority neighborhoods in the greater Philadelphia area through its marketing, sales, and hiring practices.[4] This first of its kind action against a non-depository institution followed years of enforcement actions against banks for similar practices.

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[2] 12 U.S.C. § 2903.

[3] Brad Blower, et. al., *Adding Robust Consideration of Race to Community Reinvestment Act Regulations*, Relman, Colfax PLLC and National Community Reinvestment Coalition, Sept. 16, 2021, at https://ncrc.org/adding-robust-consideration-of-race-to-community-reinvestment-act-regulations-an-essential-and-constitutional-proposal/

[4] CFPB, "CFPB, DOJ Order Trident Mortgage Company to Pay More Than $22 Million for Deliberate Discrimination Against Minority Families," at https://www.consumerfinance.gov/about-us/newsroom/cfpb-doj-order-trident-mortgage-company-to-pay-more-than-22-million-for-deliberate-discrimination-against-minority-families/.

A brief survey of mortgage lending related cases brought by the federal government in the last ten years demonstrates the pervasiveness of this problem. They include:

- *United States & CFPB v. Trustmark National Bank*, 2:21-cv-2664 (W.D. Tenn.): Complaint alleged that Trustmark redlined majority Black and Hispanic communities in the Memphis MSA by discouraging prospective applicants from applying for credit, avoiding locating branches or assigning loan officers in these communities, and failing to monitor fair lending compliance.[5]
- *United States v. Cadence Bank,* 1:21-cv-03586-JPB (N.D. Ga.): Complaint alleged that Cadence Bank engaged in redlining by avoiding providing home loans and other home mortgage services in majority-Black and Hispanic neighborhoods in and around Houston, Texas.[6]
- *United States v. First Merchants Bank,* 1:19-cv-02365-JPH-MPB (S.D. Ind.): Complaint alleged First Merchants Bank failed to provide mortgage credit services to majority-Black areas within Indianapolis-Marion County, Indiana between 2011 and 2017.[7]
- *United States & CFPB v. BancorpSouth Bank*, 16-cv-0118 (N.D. Miss.): Complaint alleged that BancorpSouth failed to provide its home mortgage lending services to majority-minority neighborhoods on an equal basis as provided to predominantly white neighborhoods in the Memphis metropolitan area.[8]
- *CFPB v. Hudson City Savings Bank, F.S.B.*, 15-cv-7056 (D. N.J.): Complaint alleged that from 2009 to 2013, Hudson City failed to provide its home mortgage lending services to majority Black and Hispanic neighborhoods on an equal basis.[9]

Despite these troubling examples, approximately 98% of banks pass their CRA exams on an annual basis, with close to 10% receiving an "Outstanding" rating and almost 90% of receiving a rating of "Satisfactory."[10] These ratings reflect the relatively low standards that banks must meet to pass a CRA exam. Considering race and ethnicity in bank examinations, in keeping with the law's original intent, will increase the rigor of the exams and combat redlining and other racist practices.

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[5] *Consent Order, United States and Consumer Financial Protection Bureau v. Trustmark National Bank*, 2:21-cv-02664-SHM-atc (W.D. Tenn.) Oct. 27, 2021, https://www.justice.gov/crt/case-document/file/1445181/download.

[6] *Consent Order, United States v. Cadence Bank, N.A.*, 1:21-cv-03586-JPB, (N.D. Ga.) Aug. 31, 2021, https://www.justice.gov/crt/case-document/file/1429051/download.

[7] *Consent Order, United States v. First Merchants Bank*, 1:19-cv-02365-JPH-MPB (S.D. Ind.) Aug. 12, 2019, https://www.justice.gov/crt/case-document/file/1174051/download.

[8] *Consent Order, United States & CFPB v. BancorpSouth Bank*, 16-cv-0118 (N.D. Miss.), July 25, 2016, https://www.justice.gov/crt/file/879006/download.

[9] *Consent Order, CFPB and United States v. Hudson City Savings Bank, F.S.B.*, 15-cv-7056 (D. N.J.), Nov. 4, 2015, https://www.justice.gov/crt/file/791046/download.

[10] 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-anexamination-using-federal-reserve-data/

A focus on income levels alone simply does not provide a complete picture of discriminatory practices and inequities in the banking system. These include barriers to accessing credit and price discrimination in home loans. A 2022 analysis by the National Community Reinvestment Coalition (NCRC) found that total home loans in majority-minority neighborhoods declined during the COVID-19 pandemic, and the loan denial rates were higher for Black and Latino consumers than for white consumers.[11] A recent study by the FDIC found differences in loan denial rates and pricing between people of different races and ethnicities even after controlling for credit scores, debt-to-income ratios, and loan-to-value ratios.[12]

The agencies propose to use Home Mortgage Disclosure Act (HMDA) data to produce exam tables describing lending by race, but not to incorporate the data into banks' CRA exam ratings. This is a missed opportunity. Disclosure of data is not enough; accountability through the exam process would have a greater impact. However, at the very least, if the HMDA data reveals a troubling pattern of lending by race or ethnicity, the agencies should bolster the bank's fair lending review.

The CRA can play a greater role in curbing persistent and pervasive discrimination in credit and banking services and mitigating the impact of these practices on communities color. Examining race and ethnicity in the CRA exam will allow the agencies to assess whether financial institutions are meeting their lending and banking obligations in communities of color and ensuring unfettered access to credit.

B. The agencies need to bolster their reviews concerning the quality of lending.

The agencies should expand their reviews to focus deeply on the quality of lending. Massachusetts CRA exams include analysis of delinquency and default rates in home lending.[13] Federal CRA exams should do likewise in all major product lines. 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. We are pleased that the agencies added the Military Lending Act 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.

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[11] Jason Richardson, et al, *NCRC 2020 Home Mortgage Report: Examining Shifts During COVID*, National Community Reinvestment Coalition, Jan. 2022, (comparing originations from 2018 to 2020) at https://ncrc.org/ncrc-2020-home-mortgage-report-examining-shifts-during-covid/.

[12] Stephen Popick, *Did Minority Applicants Experience Worse Lending Outcomes in the Mortgage Market? A Study using 2020 Expanded HMDA Data*, FDIC, Center for Financial Research, June 2022, at https://www.fdic.gov/analysis/cfr/working-papers/2022/cfr-wp2022-05.pdf.

[13] *See* MGLc 167, § 14. *See* also Josh Silver, *Massachusetts CRA for Mortgage Companies: A Good Starting Point for Federal Policy*, National Community Reinvestment Coalition, July 2021 at https://ncrc.org/massachusetts-cra-for-mortgage-companies-a-good-starting-point-for-federal-policy/

II. COMMENTS IN RESPONSE TO AGENCY QUESTIONS

Additionally, we offer comments on several key areas in response to specific questions that the agencies have asked. Our comments focus on the need for rigorous examination of the partnerships undertaken by banks with third-party entities, in some instances to evade state usury limits on interest rates; the evaluation of credit card lending and the need to take into account the quality of credit card offerings; the importance of language access and special purpose credit programs; and the scope of auto lending data collection.

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 addition to subsidiaries, the agencies should automatically consider the activities undertaken in the bank's name through third-party partnerships with non-bank entities to make loans and offer other services. In these arrangements, the non-bank often designs the product, determines pricing, handles marketing, takes and processes applications, designs and applies underwriting or approval criteria, and services the loan or handles customer service and collections. Though the bank may nominally approve these activities, 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.

Many of these partnerships are "rent-a-bank schemes" undertaken to evade state usury limits on interest rates. That is not a responsible means of meeting credit needs and must be penalized on CRA exams. In addition to evading the law, providing these high-cost loans to struggling borrowers leads to high default rates and significant other consumer harm.[14] Some of these partnerships also result in deceptive practices and potential violations of the law.[15] For example, one rent-a-bank scheme has resulted in hundreds of consumer complaints, including:

- Outrageous interest rates of 100% to 189% with payments for months and years that have little impact on the balance.
- Hidden information about Interest rates, leaving consumers shocked at the rates they are paying.
- Deceptive promises of full interest rebates.

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[14] *See* Alex Horowitz & Chase Hatchett, *Rent-a-Bank Payday Loans Have Highest Loss Rates in Banking System*, June 23, 2022, at https://www.pewtrusts.org/en/research-and-analysis/articles/2022/06/23/rent-a-bank-payday-loans-have-highest-loss-rates-in-banking-system; District of Columbia Attorney General, Press Release, *AG Racine Sues Online Lender for Making Predatory and Deceptive Loans to 4,000+ District Consumers* (Apr. 6, 2021), https://oag.dc.gov/release/ag-racine-sues-online-lender-making-predatory-and (OppFi charged illegal interest rates of up to 198% and falsely claimed its loans would help struggling borrowers build credit).

[15] *See* Comments of NCLC et al. to FDIC re: Community Reinvestment Act examination of Transportation Alliance Bank (June 20, 2022), https://www.nclc.org/images/pdf/high_cost_small_loans/TAB_Bank_CRA_comment_June_30.pdf.

- Electronic debits that were not authorized, differed from the agreed payment, or continued after a payment plan was fulfilled.
- Rude and unhelpful customer service and administrative errors, leading to missed payments, fees, and loss of the interest-free option.
- Harm to credit reports, including from loans paid in full or reported for the wrong consumer. No response to consumer disputes.
- Debt collection harassment and refusal to honor payment plans, including for those impacted by COVID.[16]

These predatory activities undertaken in a bank's name, which the bank has a duty to oversee, must be considered in evaluating the bank's lending activities.

Rent-a-bank arrangements have also enabled nonbank entities to offer redesigned deposit accounts. Some of these accounts have costly payday loan features and hidden fees.[17] These partnerships must also be considered in evaluating the whole of a bank's activities.

In addition, the agencies' more expansive definition of assessment areas to include areas where large banks do not have branches but make loans should apply to these partnerships.

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?

We support the inclusion of credit cards on CRA exams, but only if it can be done in a way that promotes positive credit card lending and not excessive, unaffordable credit card debt or unfair, deceptive or abusive practices such as fee harvester cards and deferred interest promotions.

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 affordable 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 fair, affordable and sustainable.

CRA exams must retain robust qualitative criteria in the proposed Retail Services and Products Test. If the qualitative criteria are not enhanced, CRA exams could provide considerable credit to products such as high-cost fee harvester cards that harm rather than help LMI consumers.

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[16] *See Stop the Debt Trap, Predatory Auto Repair Loans By TAB Bank and EasyPay Finance*, May 2022, at https://www.nclc.org/images/pdf/high_cost_small_loans/Rpt-TAB_Auto_Repair-5.11.22.pdf.

[17] *See Statement for the Record of NCLC for hearing on Examining Overdraft Fees and Their Effects on Working Families before the Subcommittee on Financial Institutions and Consumer Protection of the Senate Committee on Banking, Housing and Urban Affairs* at 5-17, May 4, 2022, at https://www.nclc.org/images/pdf/overdraft_loans/overdraft_05_05_22_testimony.pdf.

Credit card debt is a major category of consumer debt and a significant cause of bankruptcy filings. If the agencies do not carefully examine credit card lending in CRA exams, inclusion of this lending could encourage unaffordable and abusive high-interest credit card lending and other lending with high costs and hidden fees. CRA examiners should analyze data on interest rate charges, fees, and delinquency and default rates to ensure that the bank's consumer lending is responsible and sustainable.

Some credit card issuers have also engaged in unscrupulous practices that have resulted in significant consumer harm. In particular, deferred interest plans lure consumers in with promotional no-interest offers but then slam LMI borrowers with huge, surprise retroactive interest charges if the consumer is unable to pay off the balance within the promotional period. As described in more detail in our comments to the CFPB,[18] deferred interest credit card plans result in:

- **Inherent deception**, as consumers do not understand the possibility of retroactive interest on amounts already repaid;
- **Minimum payments that do not pay off the balance**, compounding the deception and the risk of harm;
- **Difficulty allocating payments to successfully avoid retroactive interest**; and
- **Harm to the most vulnerable**, as the impact of deferred interest falls on those who find they cannot repay their balances in full.

Low-balance, subprime fee harvester cards result in a different type of harm and deception.[19] Consumers with blemished credit are offered cards with very low credit lines but high up front and continuing fees that cut into the small amount of credit. The result is high costs for little credit and deceptive practices regarding the amount of credit made available. These cards also tend to have very high charge off rates, reflecting their unaffordability.

If credit card lending is not fair, affordable and sustainable, a ratings downgrade should be possible, depending on the extent and degree of harm of the abusive lending.

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. However, the number of data points would be small, and income at issuance of the card – which is already collected – could be used instead of requiring banks to continually ask borrowers for their incomes. Furthermore, credit card lenders do regularly request updated income data from cardholders in order to make

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[18] *See* Comments of NCLC re: CARD Act Rules Review Pursuant to the Regulatory Flexibility Act; Request for Information Regarding Consumer Credit Card Market, Docket No. CFPB–2020–0027 at 13-15, Oct. 27, 2020, https://www.nclc.org/images/pdf/rulemaking/Comments_CFPB_RFA_RFI_CARD_Act.pdf.

[19] *See id.* at 18-19.

proactive credit line increases.[20] 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?

If a consumer loan other than credit card lending exceeds the thresholds for a major product line, it should be evaluated by the Retail Lending Test as well as the Retail Services and Products Test. The reasons stated above in the case for credit cards loans for applying 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 Services and Products Test, the agencies are 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." We support this type of review.

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

The agencies should consider affordable products geared towards consumers for whom English is not a first language and who speak English with limited proficiency as an additional category of responsive credit products and programs. Nearly 26 million limited-English proficient (LEP) consumers in the U.S. are constrained in their ability to access financial products and services.[21] LEP consumers face challenges in all aspects of a credit transaction, from obtaining accurate and reliable information regarding financial products and services, to navigating the loan servicing and modification process in their preferred language. According to the Urban Institute, LEP status is an additional barrier to homeownership.[22] Homeownership rates are lower in zip codes with a high concentration of LEP households, even when controlling for other factors that influence homeownership rates (e.g., income, age, and race or ethnicity).[23] A report by the Kleiman Communications Group produced for Fannie Mae and Freddie Mac found that providing translated documents would eliminate a significant barrier that prevents or

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[20] *See* Consumer Financial Protection Bureau, *The Consumer Credit Card Market*, December 2015, at 116-117, https://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf.

[21] *See* Consumer Financial Protection Bureau, *Spotlight on Serving Limited English Proficient Consumers*, Nov. 2017, at https://files.consumerfinance.gov/f/documents/cfpb_spotlight-serving-lep-consumers_112017.pdf

[22] *See* Ed Golding, Laurie Goodman, et al, *Is Limited English Proficiency a Barrier to Homeownership?*, Urban Institute, March 2018, at https://www.urban.org/research/publication/limited-english-proficiency-barrier-homeownership

[23] *See id.*

delays LEP individuals from buying a home.[24] Spanish, Korean, and Chinese-speaking focus group participants all expressed a preference to receive documents in their primary language.[25] Most servicers interviewed believed that the language barrier, rather than financial literacy, was the primary obstacle to communicating with LEP borrowers, as their financial literacy was comparable to that of non-LEP borrowers.[26]

The agencies should ensure that financial institutions consider the banking needs of consumers with limited English proficiency. Access to the financial marketplace for LEP consumers has increasingly drawn the focus of policymakers, lenders, and advocates. The Federal Housing Finance Agency (FHFA) and the Enterprises have begun a process of expanding access to the mortgage market for LEP communities.[27] The multi-year language access plan calls for the translation of most origination documents into the top five languages spoken by LEP consumers in the U.S., glossaries of key financial terms in these same languages, and the creation of a Mortgage Translations Online Clearinghouse to house these materials. Anecdotal evidence suggests that the materials in the Clearinghouse are significantly underutilized. Lenders and servicers need to increase the use of translated documents and provide high quality oral interpretation to address the barriers LEP consumers face in negotiating loan origination and modifications.

The agencies have also provided examples of responsive credit products such as small dollar mortgages (loan amounts generally under $100,000) and consumer lending products that use alternative credit histories as opposed to credit scores.[28] We are fully supportive of small dollar lending being considered a responsive loan product for purposes of the proposed retail services and products test. Obtaining a small-dollar mortgage for lower-value properties is often a

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[24] Kleiman Communication Group, *Language Access for Limited English Proficiency Borrowers: Final Report*, at 10, April 2017, *available at* https://www.fhfa.gov/PolicyProgramsResearch/Policy/Documents/Borrower-Language-Access-FinalReport-June-2017.pdf.

[25] *Id.* at 14-15 (Spanish), 28 (Korean), 33 (Chinese).

[26] *Id.* at 24.

[27] *See* Federal Housing Finance Agency, Mortgage Translations Website, https://www.fhfa.gov/MortgageTranslations; FHFA Language Access Multi-Year Plan (May 2018), https://www.fhfa.gov/PolicyProgramsResearch/Policy/Documents/LEP-Multi-Year-Plan.pdf; Americans for Financial Reform's Language Access Task Force, Comments on the Federal Housing Finance Agency's Request for Input on Improving Language Access in Mortgage Origination and Servicing (July 31, 2017), https://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/comments-afr-task-force-fhfa-rfi-language-access.pdf and Supplemental Comments (Sept. 1, 2017), https://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/letter-fhfa-lep-2nd-submission.pdf; Americans for Financial Reform, *Fair Treatment of Homeowners with Limited English Proficiency* (May 26, 2016), http://ourfinancialsecurity.org/2016/05/language-access-press-release/.

[28] NPR, pp. 288-289.

challenge, particularly for consumers of color in formerly redlined communities, forcing them to turn to land installment contracts and other forms of abusive financing.[29]

The use of alternative data in consumer lending programs, however, must be carefully assessed. For alternative data to be most beneficial to LMI individuals the data should be used only with the explicit and knowing permission or opt-in of the consumer; exclusively consist of positive payment data, and be accessed by means other than through the Big Three Credit bureaus.[30]

Rent data is particularly sensitive. In the last two years, during the pandemic, between six million to thirteen million households have been behind in rent. These households are disproportionately renters of color. For example, in September 2020, about 1 in 4 Black and Asian renters and 1 in 5 Latinx renters said they were not caught up on rent, compared to just 1 in 9 white renters.[31] These tenants would suffer significant harm to their credit reports if rent reporting is not positive-only and voluntary. Programs that report negative or "full file" information have the potential to hurt vulnerable consumers.

Reporting of utility payments also potentially harms low-income consumers by adding reports about payments that are only 30 or 60 days late. The impact could be especially harsh on families who need time to pay off winter or summer bill spikes. Reporting of late payments could also undermine state consumer protections, such as prohibitions against wintertime shut offs for elderly or other vulnerable consumers, by compelling them to immediately pay seasonally high bills at the expense of other necessities. Like rent payments, racial disparities exist in utility payment data.[32]

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?

The proposed regulations should include special purpose credit programs (SPCPs) as an example of a loan product or program that facilitates home mortgage and consumer lending for LMI individuals and people of color. These programs have the potential to increase access to

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[29] See National Consumer Law Center, *Toxic Transactions, How Land Contracts Once Again Threaten Communities of Color*, 2016, at https://www.nclc.org/issues/toxic-transactions-threaten-communities-of-color.html.

[30] In this respect, the use of bank account cashflow information is the most promising form of alternative data, because it does not necessarily involve the credit bureaus but instead relies on third party "data aggregators." See National Consumer Law Center, *No Silver Bullet, Using Alternative Data for Financial Inclusion and Racial Justice*, June 2022 (updated), at https://www.nclc.org/images/pdf/credit_reports/IB_Alt_Data_Is_No_Silver_Bullet.pdf.

[31] Center on Budget and Policy Priorities, *New Data, Millions Struggling to Eat and Pay Rent*, Sept. 2020, at https://www.cbpp.org/research/poverty-and-inequality/new-data-millions-struggling-to-eat-and-pay-rent.

[32] See, e.g., Chun, Yung, et al., *Racial and Ethnic Disparities in Housing Instability During the COVID-19 Pandemic: The Role of Asset and Income Shocks*, April 2021, at https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1038&context=spi_research

credit to racially and ethnically diverse consumers severely underserved by the market.

Congress established the special purpose credit provision to increase access to credit by persons previously excluded from the market.[33] The programs "extend credit to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than ... other applicants applying to the organization for a similar type and amount of credit."[34] To serve this "economically disadvantaged class of persons," SPCPs may condition programmatic eligibility on bases otherwise prohibited by law, such as race or sex.[35]

Numerous federal agencies have reaffirmed the role SPCPs might play in pursuing fair housing and fair lending goals. Following the 2021 HUD statement clarifying that SPCPs generally do not violate the Fair Housing Act, HUD's Office of Fair Housing expressly encouraged lenders to deploy SPCPs to remedy historic barriers to credit and wealth generation.[36] In 2022, nearly all the federal housing and finance regulators issued an interagency statement on SPCPs, reminding creditors that such programs are a permissible means of "address[ing] special social needs."[37]

Both Fannie Mae and Freddie Mac have made SPCPs an integral feature of their Equitable Housing Plans. Both plans encourage lenders to establish SPCPs as a remedy for disparities in homeownership, as well as their intent to both buy SPCP loans and launch pilot SPCPs.[38] Moreover, the 2009 Interagency Fair Lending Examination Procedures developed by the OCC, FDIC, Federal Reserve Board, Office of Thrift Supervision, and NCUA specifically directed regulatory examiners to observe whether a financial institution offers an SPCP when evaluating fair lending compliance.[39]

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[33] *See* S. Rep. No. 94-589, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 409; H.R. Rep. No. 94-873, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 428.

[34] 12 C.F.R. § 202.8.(a)(3)(ii).

[35] 15 U.S.C.A. § 1691.

[36] FHEO's Statement by HUD's Office of Fair Housing and Equal Opportunity on Special Purpose Credit Programs as a Remedy for Disparities in Access to Homeownership, Office of Fair Housing and Equal Opportunity (Dec. 7, 2021), https://www.hud.gov/sites/dfiles/FHEO/documents/FHEO_Statement_on_Fair_Housing_and_Special_Purpose_Programs_FINAL.pdf.

[37] *Fair Lending: Interagency Statement On Special Purpose Credit Programs*, 2022 WL 594033 (issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Office of the Comptroller of the Currency (OCC), the CFPB, HUD, the Department of Justice, and the Federal Housing Finance Agency).

[38] *Equitable Housing Plan*, Fannie Mae (June 8, 2022), https://www.fanniemae.com/media/43636/display; *Equitable Housing Plan*, Freddie Mac (June 8, 2022), https://www.freddiemac.com/about/pdf/Freddie-Mac-Equitable-Housing-Finance-Plan.pdf.

[39] *Interagency Fair Lending Examination Procedures* (Aug. 2009), https://www.ffiec.gov/pdf/fairlend.pdf (issued by the OCC, FDIC, Federal Reserve Board, Office of Thrift Supervision, and NCUA).

SPCPs are thus fast becoming an acknowledged tool for remedying credit inaccessibility. The proposed regulations should likewise recognize their potential as a targeted means of community reinvestment. Both the ECOA and Regulation B's flexibility ensure that SPCPs can be tailored in a variety of ways to address specific local needs, whether they denote a particular geographic area to be served, much like the Act itself, or alternatively limit program eligibility to a particularly underserved population, such as "minority residents of low-to-moderate income census tracts, residents of majority-Black census tracts, ... consumers with limited English proficiency, or residents living on tribal lands."[40]

Formally recognizing these programs in the proposed regulations will encourage lenders to experiment with innovative, and targeted credit assistance interventions. Particularly considering that the proposed regulations themselves do not explicitly consider race in assessing CRA compliance, these types of carefully-conceived programs should be all the more encouraged. Provided that these programs are thoughtfully designed, SPCPs are a promising means of meeting the credit needs of underserved and racially and ethnically diverse consumers and their communities.

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?

It is important that the agencies provide more transparency to the auto finance market. Financing the purchase of an automobile consumes a significant portion of consumers' household budgets. Auto loans, along with mortgages and student loans, are the biggest source of consumer debt. Moreover, consumers of color are vulnerable to abusive and discriminatory practices in the auto finance market. The costs of purchasing, financing, and using a car can vary based on race or ethnicity.[41]

Consumers typically obtain financing for the vehicle's purchase at a dealership.[42] Dealers engage a bank or finance company as the ultimate creditor on the transaction. In that interaction the creditor may allow the dealer the discretion to mark up the interest rate, and keep much of the markup as profit. As a result, consumers with the same credit risk can pay dramatically different interest rates.

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[40] 12 C.F.R. Cmt. 8(a), Supp. I, at 9.

[41] *See* National Consumer Law Center, *Time to Stop Racing Cars, the Role of Race and Ethnicity in Buying and Using a Car*, April 2019, at https://www.nclc.org/images/pdf/car_sales/report-time-to-stop-racing-cars-april2019.pdf.

[42] Raj Date and Brian Reed, *Auto Race to the Bottom: Free Markets and Consumer Protection in Auto Finance*, Cambridge Winter, November 16, 2009.

During the early 2000s NCLC brought several class action cases against the major automobile lenders, including GMAC, Ford Motor Credit, Chrysler Finance Co., Nissan Motor Acceptance Corp., Toyota Motor Credit, American Honda Finance Corp., and several others.[43] The complaints alleged that the auto finance companies and banks maintained policies which permitted car dealers to mark up interest rates on loans based on subjective criteria unrelated to creditworthiness. These mark-up polices had a disparate impact on Black and Latino consumers, who paid more for credit than white consumers with similar credit ratings.[44]

The success of these cases depended on having access to data which uncovered discriminatory patterns and shed light on general trends in the auto market.[45] Greater scrutiny of auto lending practices is necessary given the size and scope of the industry and the loans' increasing share of consumers' budgetary resources, especially for LMI consumers. The data improvements proposed by the agencies will help hold banks accountable but the new data should be publicly available. We also request that the agencies expand data collection to all large banks instead of just banks with assets of more than $10 billion.

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 agencies propose that banks with assets of over $10 billion collect and maintain data for automobile loans originated or purchased by the bank during the evaluation period with: (i) a unique number or alpha-numeric symbol that can be used to identify the relevant loan file; (ii) the date of loan origination or purchase; (iii) the loan amount at origination or purchase; (iv) the loan location (state, county, census tract); (v) an indicator for whether the loan was originated or purchased by the bank; and (vi) the borrower's annual income the bank relied on when making its credit decision. In addition, a bank with assets of over $10 billion would also be required to report the aggregate number and amount of automobile loans for each census tract in which the bank originated or purchased an automobile loan and the number and amount of those loans made to LMI borrowers.

The proposed data fields are minimal. Much of this data is already collected, or readily identifiable in the bank's database. It is unclear how these fields 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?

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[43] A list of cases is available at https://www.nclc.org/litigation/case-index-closed-cases.html#auto.

[44] See NCLC, *Racial Disparities in Auto Loan Mark-Ups: State by State Data*, available at https://www.nclc.org/images/pdf/car_sales/ib-auto-dealers-racial_disparites.pdf

[45] Stuart Rossman, *The Data is Clear, Auto Lenders Discriminate*, Nov. 2015 at https://www.usnews.com/opinion/economic-intelligence/2015/11/17/dont-let-congress-weaken-oversight-of-discriminatory-auto-financing.

The agencies should reconsider their decision not to publish a database or otherwise make the data publicly available. The data should be made available at least on a county level with an indicator if the borrower resided in a low- or moderate-income tract along with the borrower's income level.

CONCLUSION

The agencies' proposal is a good start and promises to make CRA exams more rigorous. The proposal can be strengthened by incorporating an analysis of race and ethnicity in CRA exams, examining the partnerships undertaken by banks with third-party entities, and evaluating credit card lending and the quality of credit card offerings, and requiring the collection and reporting of auto lending data. Moreover, there should be greater emphasis on language access and special purpose credit programs to create a more inclusive credit market. In so doing the proposal will make banking more equitable and reduce economic disinvestment in LMI communities and communities of color.