Flagstar Bank

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Re: The Community Reinvestment Act (Docket No. R-1769 and RIN 7100-AG29—Board; RIN 3064-AF81—FDIC; and Docket ID OCC-2022-0002-OCC)

To Whom It May Concern:

We appreciate the opportunity to comment on the joint notice of proposed rulemaking (the "Proposal") issued by the Board of Governors of the Federal Reserve System (the "Board"), the Federal Deposit Insurance Corporation (the "FDIC"), and the Office of the Comptroller of the Currency (the "OCC," and together with the Board and FDIC, the "Agencies"), soliciting feedback on proposed amendments to the regulations implementing the Community Reinvestment Act of 1977 (the "CRA") to update how CRA activities qualify for consideration, where CRA activities are considered, and how CRA activities are evaluated.

Flagstar Bank, FSB ("Flagstar" or the "Bank") was founded in Troy, Michigan, in 1987 as a federal savings bank with a mission to serve its communities. Today, Flagstar offers exceptional full-service banking and lending expertise with a distinctive, personal focus. The Bank operates 158 branches in Michigan, Indiana, California, Wisconsin, and Ohio and provides a full complement of products and services for consumers and businesses. Flagstar's commercial banking business is based on relationships and built on trust, relying on talented bankers to tailor solutions to our customers' needs. The Bank's mortgage division operates nationally, making Flagstar the sixth largest bank mortgage originator in the country today. Flagstar is also a leading servicer and sub-servicer of mortgage loans—handling recordkeeping for $300 billion in home loans.

Flagstar supports the longstanding goals of the CRA and is committed to serving the communities in which we operate and live. The Bank carefully crafts lending products to meet the specific needs of our customers and offers flexible mortgage loans and down payment assistance programs that support our communities. The Bank's community commitment also extends to our employees, who serve our communities by volunteering more than 6,500 hours per year, including by serving on boards and committees of organizations that support homebuyer fairs, financial literacy seminars, neighborhood revitalization, and more.

Because Flagstar supports the goals of the CRA, the Bank submits this comment letter to highlight our concerns about the Agencies' proposed reforms to the CRA framework. This Proposal would undermine the objectives of the CRA and run contrary to the Agencies' stated efforts to ensure that the law continues to be an effective force for strengthening banks and the communities they serve, which includes (i) low- and moderate-income ("LMI") individuals, families, and neighborhoods; (ii) small businesses and farms; and (iii) communities in need of financial services and economic development. Flagstar is particularly concerned about the proposed retail lending assessment area requirements, which would impose significant regulatory, operational, and staffing burdens on banks (especially when coupled with the proposed data collection requirements); force banks to spread limited CRA resources thin and undermine the effectiveness of their CRA programs; and place banks at a competitive disadvantage to nonbanks and other lenders not subject to the CRA. In our view, these challenges will discourage banks from engaging in retail lending and other CRA activities that could otherwise benefit local communities, contrary to the spirit of the law. Moreover, as applied to Flagstar, the proposed retail lending assessment area requirements would be so overly burdensome and unworkable that they would likely cause us to question and rethink our business model.

As discussed in greater detail below, Flagstar believes that the proposed retail lending assessment area requirements suffer from four fatal flaws:

1. There is insufficient data to justify abandoning longstanding interpretations of the CRA to require the delineation of lending-based assessment areas;

2. Requiring the delineation of a lending-based assessment area would go beyond the text and purpose of the CRA;

3. The burdens associated with retail lending assessment areas will disincentivize critical CRA activities by banks and directly contravene the Agencies' stated goals of strengthening the CRA and encouraging activities in local communities; and

4. The new requirements will further competitively disadvantage banks and diminish the quality and quantity of their CRA activities, contrary to the goals of CRA reform.

Each of these flaws is addressed in detail below. In addition, this comment letter highlights challenges presented by the new definition of community development activities, which Flagstar believes could, in fact, decrease the community development activities in areas of most need.

I. The thresholds relevant to delineating the proposed retail lending assessment areas lack adequate data and analytical support, reflect a desire by the Agencies to achieve a predetermined outcome, and fail to meet the heightened standards applicable to departures from prior agency policy.

As currently drafted, the Proposal would require a large bank, such as Flagstar, to delineate a retail lending assessment area in any metropolitan statistical area ("MSA") or the combined non-MSA areas of a state, respectively, in which the bank originated in that geographic area, as of December 31 of each of the two preceding calendar years: (i) at least 100 home mortgage loans outside of its facility-based assessment areas; or (ii) at least 250 small business loans outside of its facility-based assessment areas.[1] The Proposal explains that "[t]o determine these thresholds [of 100 home mortgage loans and 250 small business loans], the [A]gencies considered what levels would appropriately align with the amount of lending typically evaluated in a facility-based assessment area."[2] For the home mortgage loan threshold, the Agencies relied on "the median number of home mortgage loans within a facility-based assessment area by a large bank."[3] For small business lending, "the Agencies considered it appropriate to propose a higher threshold of 250 small business loans . . . because this level would result in a large share (62 percent) of bank loans that are currently outside of facility-based assessment areas being evaluated within a retail lending assessment area." The specific thresholds for home mortgage loans and small business loans were set using data from a single year, 2019.

Flagstar respectfully submits that the entire framework for establishing retail lending assessment areas, including the process and thresholds involved, reflects a lack of adequate data and analytical support, which, in turn, suggests that the Proposal was designed to achieve a predetermined outcome. The Proposal is also inconsistent with reasoned agency decision-making generally required under Administrative Procedures Act (the "APA"), particularly where the Agencies are departing from longstanding policy that has created a significant reliance interest. An agency engaged in rulemaking must demonstrate that it engaged in reasoned decision-making by providing an adequate explanation for its decision.[4] An agency's justification for rulemaking cannot be conclusory; rather, the agency must be

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1 Community Reinvestment Act, 87 Fed. Reg. 33884, 33919 (proposed May 5, 2022) (to be codified at 12 C.F.R. part 345) [hereinafter Proposal].

2 *Id.*

3 *Id.*

4 *Motor Vehicle Mfrs. Ass'n v. State Farm Auto Mutual Ins. Co.*, 463 U.S. 29 (1983).

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able to provide the "essential facts upon which the administrative decision was based" and provide evidence to support its determinations.[5] Moreover, as articulated by the Supreme Court in FCC v. Fox Television Stations, there are several criteria relevant to the review of rulemaking that represents a change in or rescission of previous agency policy.[6] Among other things, the agency must at least acknowledge that it is departing from its prior policy position.[7] Significantly, the agency must provide "a more detailed justification" for a policy change where the previous policy has "engendered serious reliance interests that must be taken into account."[8]

The Agencies relied on data from 2019 to set the thresholds applicable to the establishment of retail lending assessment areas by large banks. This fact alone raises more questions than it answers about the Agencies' decision-making process and, indeed, demonstrates the inadequacies of that process. For example, why did the Agencies use only 2019 data? Did the Agencies consider data from other years, and, if so, why were other years' data not used in articulating the relevant thresholds? If not, why did the Agencies not consider data from other years? Did the Agencies try to obtain data from other years beyond 2019? It is also unclear why mortgage and small business loans, but not other retail loan types, are the appropriate measures for determining the need to establish and have all retail activities be evaluated in an area removed from a bank's domestic branches as required by the CRA statute.

Moreover, a typical CRA evaluation period is three to five years in length, yet the Proposal relies on information from a single year to determine the standards for large banks to use in establishing retail assessment areas—standards that, based on the history of the Agencies' current CRA regulations, could be in place for another quarter century if implemented as proposed. The use of a single year's data departs from the Agencies' past practice in the CRA context where the Agencies, in order to account for the fluctuations within a business cycle, typically look to performance over a number of years to set benchmarks for CRA evaluations.[9] Accounting for these market fluctuations ensures that the triggering thresholds for the proposed requirements more accurately reflect actual performance, which is critical, considering the proposed requirements could have significant regulatory and economic consequences for decades to come.

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5 *United States v. Dierckman*, 201 F.3d 915, 926 (7th Cir. 2000) (quoting *Bagdonas v. Dep't of the Treasury*, 93 F.3d422, 426 (7th Cir. 1996)); *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993).

6 556 U.S. 502 (2009).

7 *Id.* at 515.

8 *Id.* at 515–16. The Court explored this requirement further in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016). There, the Court explained that a "summary discussion" of the rationale for a change to a previous agency position "may suffice in other circumstances," however, where there has been "decades" of reliance on this policy, the agency must provide a "more reasoned explanation" for the change. *Id.* at 2126.

9 See Proposal at 33939–33942 for a discussion of the various benchmarks relevant to the evaluation of a bank's retail lending performance over the evaluation period.

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Flagstar also notes that the Agencies used mismatched criteria for establishing the thresholds of 100 home mortgage loans and 250 small business loans used to require the delineation of retail lending assessment areas. The Proposal justifies the use of inconsistent criteria by explaining that the Agencies set the thresholds to "align with the amount of lending typically evaluated in a facility-based assessment area."[10] But this explanation only confirms that the Agencies had a predetermined outcome in mind and engaged in only the pretense of analysis to cherry-pick thresholds that would achieve the Agencies' desired result.

Moreover, as noted above, the Agencies' longstanding interpretation of the CRA, as embodied in its equally longstanding implementing regulations, is that assessment areas are to be delineated in connection with a bank's main office, branches, and deposit-taking ATMs and the surrounding areas in which it has originated or purchased a substantial portion of its loans. The Agencies would be departing from this well-established position by introducing retail lending assessment areas based on pockets of activities in subcategories of retail lending. Such a departure from long-held positions must be supported by reasoned analysis, which the Agencies have not done in the Proposal.[11]

While we do not believe it would be appropriate under the CRA to require the delineation of retail lending assessment areas based on pockets of lending activities far removed from a bank's domestic branches, were the Agencies to do so, they would need to marshal more data, engage in more thorough analysis, and provide more reasoned support than they have in the Proposal. Because the Proposal is clearly flawed in this respect, and the Agencies appear to have crafted thresholds based on discrete and hand-picked data sets to support a predetermined outcome, we respectfully submit that the proposed retail lending assessment area requirements should not be included in the final rulemaking, since doing so would run afoul of the APA.

II. Requiring the delineation of retail lending assessment areas is beyond the scope of the CRA.

Pursuant to the CRA statute, banks have a continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.[12] The statute requires that the public evaluation of CRA performance by the Agencies address those geographic areas "in which [the] regulated depository institution maintains one or more domestic branch offices."[13] Accordingly, one of the core requirements of the CRA's current implementing regulations is that each bank delineate the areas in which their CRA performance will be assessed. The CRA regulations refer to these areas as "assessment areas." In keeping with the plain text of the statute, the Agencies' CRA regulations currently define assessment

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[10] Proposal at 33919.

[11] *See Fox Television Stations*, 556 U.S. at 515–16; *Encino Motorcars*, 136 S. Ct. at 2126.

[12] 12 U.S.C. § 2901(a).

[13] *Id.* § 2906(b)(1)(B).

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areas in connection with a bank's main office, branches, and deposit-taking ATMs and the surrounding areas in which it has originated or purchased a substantial portion of its loans.[14]

Flagstar supports the existing regulations' approach to delineating assessment areas. We are also supportive of the Proposal's goals of ensuring "that facility-based assessment area would remain a cornerstone of the proposed evaluation framework."[15] We further believe that the proposed requirement for large banks to delineate their facility-based assessment areas on a whole-county basis is positive in that the uniformity of assessment areas among large banks may simplify the performance evaluation process and facilitate peer comparisons, as well as allow banks to deploy their resources in a broader geographic area, rather than focusing their activities into tightly packed geographies.

However, the Proposal's requirement that banks delineate assessment areas around pockets of lending activities (based on mortgage and small business lending volume) where all retail lending would then be evaluated would not comport with the text of the statute, the Agencies' longstanding interpretations of the text, or the well-established, practical implementation of the statute. As noted, the text of the CRA statute requires the Agencies to evaluate CRA performance in geographies where banks have domestic branch offices and does not refer to areas where banks provide loans. Moreover, since the statute's inception and as captured in the Agencies' rules going back more than a quarter century, assessment areas have been tied to banks' domestic branches and surrounding areas. One reason for this is to ensure that the rules implementing the statute effectuate a key purpose of the CRA: encouraging banks to serve the communities where they have branches that take deposits—that is, financial resources—from community members. The proposed retail lending assessment area framework would, with the barest of justification (in fact, as discussed above, without any real data or analytical support), create a new set of requirements that would run counter to the CRA's text, purpose, and longstanding policy. As such, the proposed retail lending assessment area requirements should not be included in the final rulemaking.

III. Requiring large banks to define retail lending assessment areas would be overly burdensome and would disincentivize critical CRA activities by banks, contrary to the stated goals of CRA reform.

Under the Proposal, large banks with more than $10 billion in assets, such as Flagstar, would be required to delineate a retail lending assessment area where they have a small concentration of 100 mortgage or 250 small business loan originations outside of their facility-based assessment areas, and the Agencies would evaluate the banks under the retail lending test in these areas. To enable the evaluations under the retail lending test (and other performance tests under the Proposal), the Agencies would require banks like Flagstar to collect and maintain county-level deposits data based on the county in which the depositor's address is located, rather than on the location of the bank branch to which the deposits are

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14 *See, e.g.*, 12 C.F.R. § 25.41(c)(2) (emphasis added).

15 Proposal at 33916.

assigned, as is the case with the FDIC's Summary of Deposits data.[16] Banks like Flagstar also would be required to collect, maintain, and report certain retail lending data, as applicable, for small business, small farm, automobile, and home mortgage loans (including closed-end home mortgages, open-end home mortgages, and multifamily loans).[17]

In Flagstar's experience, building a meaningful CRA performance infrastructure takes time, dedication, and familiarity with the local community. The costs and burdens of this process include having to collect, maintain, and report the data to regulators for purposes of designating an assessment area. In addition, banks typically dedicate significant staff and operational resources to develop an understanding of the local community to ensure good performance under any evaluation. Where banks choose to locate a branch within a given geography, they have made a conscientious choice to expend these resources and have balanced and offset those expenses with careful planning. This is why we support continuing to require the delineation of assessment areas where banks have branches. Banks will have dedicated staff and operational resources and familiarity with the community in these geographies, which is essential for understanding community needs, developing responsive strategies, and undertaking actions to best serve those needs. One of the nation's leading community groups has reached the same conclusion, noting that "[a] key stakeholder is the local branch that has unique value in learning about community residents and making safe and sound loans to them."[18]

Banks, however, could be disincentivized from lending in new geographies where the banks do not maintain a branch presence if expanding retail lending to these geographies would significantly increase the costs and burdens to designate and be evaluated under a distinct, additional assessment area. These cost and burdens become particularly acute in the context of the significant data collection, maintenance, and reporting requirements that would be imposed by the Proposal. There will be significant expenses associated with rationalizing, building, and upgrading the necessary systems to effectuate the data requirements in the Proposal. Given the finite nature of banks' resources, forcing institutions to delineate additional retail lending assessment areas based on pockets of lending (and imposing significant data requirements) could spread bank resources exceedingly thin and effectively weaken bank CRA performance and, more importantly, their ability to serve local communities. Thus, the costs and burdens are likely to function as disincentives that could constrict credit availability, thereby harming the underserved communities and consumers the regulatory framework is meant to protect.

16 *Id.* at 33995.

17 *Id.* at 33996.

18 Josh Silver, *The Importance Of CRA Assessment Areas And Bank Branches* (June 12, 2018), available at https://ncrc.org/the-importance-of-cra-assessment-areas-and-bank-branches/.

IV. The retail lending assessment area will put CRA large banks at a competitive disadvantage and reduce the quality and quantity of CRA retail lending, contrary to the stated goals of CRA reform.

The CRA was designed to help banks meet the credit needs of the local communities in which they are chartered. Yet the CRA is confined to banks and thrifts, and it does not cover nonbank lenders or credit unions. This loophole, coupled with the changing nature of lending in key retail lending product types, highlights how the burdens associated with the proposed retail lending assessment area framework would further competitively disadvantage banks like Flagstar relative to nonbank and credit union lenders, weakening the quality and quantity of bank CRA retail lending, contrary to the stated goals of CRA reform.

With respect to mortgage lending, since the 2008 financial crisis, banks' share of home lending has steadily decreased due to a variety of factors, including post-crisis regulatory reforms, changes in supervisory behavior, and changing market dynamics. As bank mortgage lending has declined, independent mortgage companies' share of the market for home lending has increased and credit unions have become formidable competitors against banks as well.[19] In fact, banks today account for a minority of mortgage originations in the United States.[20]

Likewise, the small business lending landscape has changed dramatically in recent decades. As the Consumer Financial Protection Bureau (the "CFPB") noted in its recent small business data rulemaking: there has been a "shift away from traditional providers of small business credit toward newer types of providers . . . ."[21] The CFPB explained that "new providers and products, such as fintechs and merchant cash advances ("MCA"), have become increasingly prevalent in the small business lending market."[22] In fact, the CFPB noted that:

> [f]inancing by MCA providers is estimated to have increased from $8.6 billion in volume during 2014 to $15.3 billion in 2017. From 2017 to 2019, the volume may have increased

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19 Josh Silver, *Expanding CRA To Non-Bank Lenders And Insurance Companies* (Aug. 27, 2020), available at https://www.ncrc.org/expanding-cra-to-non-bank-lenders-and-insurance-companies/ ("A Non-bank mortgage companies, Quicken Loans and United Shore Mortgage, were the largest loan originators in the country . . . . Mainstream credit unions have also become formidable competitors against banks. Navy Federal Credit Union, for example, cracked the top 25 lenders in the country, offering more than 82,000 loans in 2019.").

20 Daniel K. Tarullo, *Regulators should rethink the way they assess bank mergers*, BROOKINGS (Mar. 16, 2020), available at: https://www.brookings.edu/opinions/regulators-should-rethink-the-way-they-assess-bank-mergers/ ("Today independent mortgage companies account for nearly 70% of mortgage originations. These companies have led the way in streamlining the mortgage application process by moving much of it online. They have grown to take advantage of scale economies, including those associated with the digital platforms they have created.").

21 Bureau of Consumer Financial Protection, Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B) Proposed Rulemaking, 86 FR 56356, 36360 (Oct. 8, 2021).

22 *Id.*

further to $19 billion. Meanwhile, financing by fintechs is estimated to have increased from $1.4 billion in outstanding balances in 2013 to approximately $25 billion in 2019.[23]

Even as nonbanks and credit unions become more formidable competitors to banks in key retail lending product lines, they are free from any obligations to serve their local communities under the CRA. In this context, the burdens and costs associated with the proposed retail lending assessment area requirements will further disadvantage banks like Flagstar as we compete to provide home mortgage, small business, and other retail credit products. Our ability to compete in these markets will be hampered as our limited resources are spread thin by the proposed requirements, as we highlighted above. Moreover, the disincentives to lend in geographies where we do not have a branch presence created to satisfy these requirements may harm consumers not only because of the potential constriction in retail credit but also because, as the CFPB has pointed out, "[n]ewer providers, often offering newer products, have less experience complying with . . . laws and regulations. . . [,] they may use [technology], which may create or heighten risks of unlawful discrimination, unfair, deceptive, or abusive acts or practices . . . or privacy concerns. . . . [, and] opaque product terms and high interest rates could trap business owners in cycles of debt."[24]

On the whole, the Proposal does not adequately consider the broader changes occurring in the financial services sector and how strong its effects will be on the activities of regulated banks. By disadvantaging banks with the excessive burdens associated with the retail lending assessment area requirements, the Proposal will inadvertently provide a competitive windfall for nonbanks and other lenders not subject to bank prudential regulation. Thus, the practical consequence of the proposed retail lending assessment area framework is to provide unregulated and underregulated nonbanks and lenders with the Agencies' de facto regulatory endorsement to expand their activities into the markets regulated banks have been driven out of in recent years. Underserved markets and communities—already facing heightened risks of unlawful discrimination, unfair, deceptive, and abusive acts or practices—are the likely cost bearers of this oversight, as history has demonstrated time and again when unregulated or underregulated lenders are consumers' primary option.

V. The proposed retail lending assessment area requirements are burdensome and unworkable as applied to Flagstar.

The operational and practical challenges posed by the retail lending assessment area requirements are particularly problematic as applied to Flagstar. The proposed requirements would stretch thin the Bank's CRA resources and thus weaken the Bank's ability to serve its local communities as envisioned by the CRA. Moreover, the proposed requirements could potentially weaken the Bank's safe and sound operations by forcing it to divert a tremendous level of resources from other parts of its operations to

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23 *Id.* (internal citations omitted).

24 *Id.* (internal quotations and citations omitted).

ensure at least satisfactory performance under the CRA in the Bank's numerous newly created assessment areas.

As noted, Flagstar operates a national lending platform to offer credit to communities across the country outside of the Bank's 158 branches in Michigan, Indiana, California, Wisconsin, and Ohio. The Bank's mortgage division operates nationally and relies on a wholesale network of approximately 2,700 third-party mortgage originators. Today, Flagstar maintains a team of six professionals to support the Bank's CRA program and operations and ensure that the Bank maintains at least satisfactory performance in its existing 20 assessment areas that span across five states. These assessment areas are centered around the Bank's branch footprint and the surrounding areas where the Bank engages in a substantial amount of retail lending. The Bank recognizes that, consistent with the existing CRA regulations, while Flagstar lends nationally, it does not (and practically could not) have the same level of familiarity with the needs of all the communities across the country in which small pockets of customers are located that the Bank has with the communities surrounding the 158 branches it operates.

The proposed retail lending assessment area requirements would result in an additional 209 assessment areas for Flagstar, covering nearly all 50 states and DC (including the non-MSA areas of 40 states). This would represent an approximately 1,145 percent increase in the number of assessment areas in which Flagstar would be subject to CRA evaluations. The increase would also stretch our existing team of CRA professionals beyond the breaking point and inhibit the Bank's ability to serve its communities. Our existing team and resources would simply not be enough to enable the Bank's to maintain a meaningful CRA performance infrastructure in all its existing and new assessment areas so as to be familiar with and responsive to local community needs in these geographies. Each of our existing CRA professionals would have responsibility for close to 50 assessment areas. Such responsibility includes having deep understanding of the local communities in these geographies in order to understand community needs, develop responsive strategies, and undertake actions to best serve those needs. In our experience, having one professional oversee so many assessment areas is neither sufficient nor effective to ensure Flagstar maintains meaningful CRA performance in its assessment areas.

Of course, we recognize that the simple answer is for Flagstar to increase the size of its CRA team to deal with the increase in assessment areas required by the proposed retail lending assessment area requirements. At least, this answer would be simple and straightforward enough if the Proposal resulted in a few additional assessment areas. But, as noted, the Proposal would result in hundreds of additional assessment areas for Flagstar. To increase CRA staffing commensurately with these new assessment areas would require expanding our existing CRA team by hundreds of individuals and would involve providing these individuals with the necessary resources through funding, training, and other means to be effective. Such an increase would necessitate drawing on the Bank's finite resources from other areas of the Bank's operations, including product-development and customer-facing areas of the Bank's business. Drawing resources from operational and other areas of the Bank would impact those areas' ability to operate effectively, potentially adversely impacting earnings, compliance, and profitability. Thus, the dramatic increase in the number of assessments areas would have a devastating effect on the Bank's safe and sound operations, and the Bank would need to seriously reconsider whether it could continue its existing business model in light of the CRA regulation if the Proposal is finalized.

To make matters worse, as Flagstar and other banks restructure to comply with the proposed requirements, unregulated and underregulated nonbanks and other lenders will be free to take advantage and further increase their market share in critical categories of retail lending. The restructuring that Flagstar and our peers will have to undertake necessarily involves deciding whether engaging in activities in "banking deserts" can be justified if even minimal lending in such areas would result in the burdens of having to designate, and be evaluated in, additional assessment areas. Thus, the proposed retail lending assessment area requirement is likely to result in a reduction of regulated bank activities and a simultaneous increase in unregulated or underregulated nonbank activities in underserved communities, thereby increasing systemic risk and consumer harm—the latter of which runs in direct contrast to the Agencies' stated goals for reforming the CRA.

VI. The proposed definition of community development activities could decrease the level of activity in communities of need.

We support the Agencies' efforts to provide more detail and transparency to the definition of community development activities and we encourage the Agencies to maintain their historically flexible approach concerning community development activities. Doing so would ensure that increased transparency does not result in increased rigidity, but rather a balanced and flexible approach that allows community development activities under the CRA to continue to be judged in individual context, as appropriate. Here, we highlight some instances where the new definition of community development activities would actually represent a contraction of the scope of the activities currently captured by the Agencies' existing regulations. We respectfully request the Agencies clarify they would maintain their historically flexible approach concerning community development activities going forward and allow banks the opportunities to demonstrate that activities are community development activities in light of specific facts and circumstances.

Currently, subsidized affordable housing is generally viewed as qualifying under the affordable housing criteria if the government program or subsidy has a stated purpose of providing affordable housing to LMI individuals, thereby satisfying existing regulatory guidance that LMI individuals benefit, or be likely to benefit, from the housing. However, under the proposed definition, a government-related affordable housing plan, program, initiative, tax credit, or subsidy would need to have a stated purpose or bona fide intent of supporting affordable rental housing for LMI individuals. Similarly, under the Proposal, the rent for the majority of the units in a multifamily property could not exceed 30 percent of 60 percent of the median income for the metropolitan area or nonmetropolitan county. This rigid definition is in contrast to the approach under the current framework where there is not a specified standard for determining when a property or unit is considered affordable to LMI individuals, allowing for the exercise of examiner judgement.

As another example, housing-related activities would not be covered by the definition of revitalization activities under the Proposal, but under current guidance, activities that provide housing for middle-income and upper-income individuals can qualify as revitalization efforts if the activities meet certain criteria and help to revitalize or stabilize a distressed or underserved nonmetropolitan middle-income geography or designated disaster area. In addition, to qualify under the proposed definition, a disaster recovery activity would need to be undertaken in conjunction with a Federal, state, local, or tribal government disaster plan that includes an explicit focus on the recovery of the geographic area. Additionally, these activities would need to be responsive to community needs, including LMI community needs, and could not displace or exclude LMI residents of designated disaster areas. This stands in contrast to current practice that takes a broad approach to disaster recovery activities, recognizing that disasters affect the entire community or even non-LMI areas of the community, and banks' efforts to assist recovery throughout the community should be given CRA credit.

In our view, these challenges will discourage banks from engaging in retail lending and other CRA activities that would benefit local communities, contrary to the spirit of the law. We respectfully urge that the final rule provide for a balanced and flexible approach that would allow for the continued exercise of discretion in recognizing community development activities.

VII. Conclusion

Flagstar applauds the Agencies' efforts to provide greater clarity and transparency to the CRA evaluation process, and we support the goals of reform reflected in the principles of the Proposal. As highlighted in this letter, however, the proposed retail lending assessment area requirements are simply too burdensome and unworkable when applied to Flagstar and would likely cause significant adverse changes to the Bank's business model and endanger its sound financial operation. More broadly, the proposed requirements are problematic because they would impose significant regulatory, operational, and staffing burdens on banks (especially when coupled with the proposed data collection requirements); force banks to spread limited resources thin and undermine the effectiveness of their CRA and other programs; and place banks at a competitive disadvantage to nonbanks and other lenders not subject to the CRA. These negative outcomes, in turn, will produce knock-on negative policy consequences, including contributing to the displacement of regulated bank lending in favor of unregulated and underregulated nonbank and other lending, especially in underserved communities. By further exacerbating the negative market dynamics and trends that advantage and facilitate the increasing dominance of unregulated and underregulated nonbank and other lending, the proposed retail lending assessment area requirements would ultimately harm the very consumers the updated rule purports to protect. In light of the foregoing, we respectfully urge that the Agencies do not require the delineation of retail lending assessment areas, as least not at the negligible thresholds proposed, as part of the final rule.

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We appreciate the Agencies' consideration of our comments, and we look forward to your responses to these comments in the final rulemaking.

Sincerely

[redacted]

Alessandro P. DiNello
President, Chief Executive Officer

cc: Paul Borja, General Counsel
Beverly Meek, CRA Director