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Capital One Financial Corporation
1600 Capital One Drive
McLean, Virginia 22102

August 5, 2022

Chief Counsel's Office
Attention: Comment Processing, Docket ID OCC-2022-0002
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E–218
Washington, DC 20219

Ann E. Misback, Secretary
Attention: Comments, Docket No. R-1769 and RIN 7100-AG29
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

James P. Sheesley, Assistant Executive Secretary
Attention: Comments, RIN 3064-AF81
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Dear Madam or Sir:

Capital One Financial Corporation[1] ("Capital One") appreciates the opportunity to provide comments to the Office of the Comptroller of the Currency (the "OCC"), the Board of Governors of the Federal Reserve System (the "Board"), and the Federal Deposit Insurance Corporation (the "FDIC") (collectively, the "Agencies"), in response to their joint notice of proposed

[1] Capital One Financial Corporation (www.capitalone.com) is a financial holding company whose subsidiaries, which include Capital One, N.A., and Capital One Bank (USA), N.A., had $307.9 billion in deposits and $440.3 billion in total assets as of June 30, 2022. Headquartered in McLean, Virginia, Capital One offers a broad spectrum of financial products and services to consumers, small businesses and commercial clients through a variety of channels. Capital One, N.A. has branches located primarily in New York, Louisiana, Texas, Maryland, Virginia, New Jersey and the District of Columbia. A Fortune 500 company, Capital One trades on the New York Stock Exchange under the symbol "COF" and is included in the S&P 100 index.

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rulemaking proposing to amend the regulatory and supervisory framework of the Community Reinvestment Act (the "NPR" or "Proposal").[2] Capital One has a longstanding commitment to the Community Reinvestment Act ("CRA") as an important and effective means of expanding credit and opportunity to low- and moderate-income ("LMI") families and communities.

At the outset, Capital One fully supports the interagency approach to amending the CRA regulations. The CRA is most effective when the Agencies are coordinated and consistent in their supervisory approaches. A joint NPR is an important step towards an enduring and effective modernization effort.

While this comment letter represents certain views of Capital One, we have also participated in discussions with trade associations on the proposals of the NPR. We are generally in support of the NPR comment letters of the following associations: the American Bankers Association, the American Financial Services Association, the Bank Policy Institute, the Consumer Bankers Association, and the National Association of Affordable Housing Lenders. Also, although the NPR is substantially different from recent agency proposals, this comment letter is intended to align with and build upon the principles and positions expressed in Capital One's prior CRA modernization comment letters provided on November 19, 2018 in response to the OCC's Advance Notice of Proposed Rulemaking, on April 8, 2020 in response to the Notice of Proposed Rulemaking issued by the OCC and FDIC, and on February 16, 2021 in response to the Advance Notice of Proposed Rulemaking issued by the Board.[3]

Capital One agrees with the Agencies' stated objectives in the NPR, particularly adapting to the expanded role of digital banking, increasing clarity and consistency in the application of CRA regulations, and tailoring performance standards to account for different business models. To ensure that the final rule is uniformly aligned with these objectives, we would like to present our views on some areas of the Proposal where the Agencies may more closely align to their stated objectives. Below we identify the encouraging aspects of the Proposal together with certain portions the Agencies should reconsider or modify.

1. Community Development Framework

We are encouraged by some of the clarifying revisions and improvements to the community development framework.

We support the Proposal clarifying that qualifying community development services encompass non-financial functions that are often highly impactful, such as human resources, information technology, legal, and other non-financial functions. Capital One Pro Bono, for example, utilizes employee expertise to support organizations by providing assistance with brand,

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[2] 87 Fed. Reg. 33,884 (June 3, 2022).
[3] 83 Fed. Reg. 45,053 (Sept 5, 2018); 85 Fed. Reg. 1204 (Jan. 9, 2020); 85 Fed. Reg. 66,410 (Oct. 19, 2020).

communications, cybersecurity, data analysis, design, product, technology, and other non-financial services.[4]

In the Proposal, direct, "hands on" services unrelated to financial services would receive credit exclusively in non-metropolitan areas. Our non-profit partners have shared with us that these direct services are important to their operations and their ability to meet the needs of LMI communities. For example, these volunteer activities include Habitat for Humanity builds or preparing food for distribution at a local food bank. We feel these types of services are critical to the viability of many of our non-profit partners in all communities. We recommend the Agencies consider broadening qualifying volunteer activities for all communities, which will appropriately recognize the wide range of impactful activities in which all bank staff, both exempt and non-exempt (including remote staff), are already fully engaged.

Further, in our experience, non-exempt staff generally participate in direct service volunteer activities. If the Agencies retain the proposed geographic restriction and benchmark against a bank's full time employee count for volunteer activities that require skills related to the provision of financial services, then the benchmark should exclude non-exempt staff.

Supporting a broader range of volunteer activities will also help increase the capacity of our non-profit partners during difficult economic times. Many of the economic challenges facing the country have also impacted nonprofit partners and their services: lingering disruptions from the pandemic, labor shortages, supply-chain interruptions, and persistent inflation.[5] Our nonprofit partners have shared with us their struggles of maintaining consistent staffing, funding, and services. Even when economic conditions improve, these volunteer activities substantially help our non-profit partners better fulfill their mission of serving LMI populations and areas.

We also support the expanded definition of financial education, which would give banks consideration for these activities without regard to the income level of the participants.[6] At the outset, the Agencies have ensured that LMI communities will still be the most significant beneficiaries of financial education activities by including the condition that qualifying activities cannot be targeted to, or solely benefit, middle- and upper-income ("MUI") individuals or families. In our experience, these activities are predominantly utilized by LMI individuals and families. Therefore, dispensing with the requirement that banks employ imprecise proxies to track the income level of participants will allow banks to better serve a wider array of vulnerable

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[4] *See, e.g.*, "Supporting Small Businesses in Richmond: Capital One's support includes $1.25 million in grant funding and over 1,000 pro bono volunteer hours from associates," Capital One (Dec. 9, 2021), https://www.capitalone.com/about/our-commitments/supporting-small-businesses-in-richmond/ (providing branding and technology support to Team Excel, a Richmond-based startup, strives to encourage student participation through reverse fantasy sports, where students compete on attendance, academic performance and life skill activities).

[5] IU Lilly Family School of Philanthropy, "Giving USA: Total U.S. charitable giving remained strong in 2021, reaching $484.85 billion," (June 21, 2022), available at https://philanthropy.iupui.edu/news-events/news-item/giving-usa:--total-u.s.-charitable-giving-remained-strong-in-2021,-reaching-$484.85-billion.html?id=392.

[6] *See* 87 Fed. Reg. at 33,909.

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constituencies including seniors, veterans, and rural communities. To illustrate, Capital One has a financial education program called "Ready, Set, Bank℠" to assist individuals with online banking, and with a particular focus on seniors.[7] The program is sometimes hosted at a local library, where it is impractical to solicit and document the income level of participants. Dispensing with income-level tracking will facilitate qualification for Ready, Set, Bank℠ sessions hosted at libraries and other locations. This example is no different than many other financial education programs that banks host or support.

We are further encouraged by the implementation of an impact review for community development activities. In an overall framework that is highly quantitative, the impact review has the ability to ensure critical qualitative components of a bank's performance are fully considered in each of the four tests. While there is uncertainty about how individual examiners will apply the impact review factors to particular activities, the incorporation of these specific factors will help to better measure the impact of these activities on the hardest-to-reach populations. In addition, we would encourage the Agencies to use the impact factors to differentiate banks that are otherwise performing at similar quantitative levels, and to reward banks engaged in complex, innovative, responsive, and highly impactful activities.

We are also pleased with the inclusion of a non-exhaustive list of qualifying community development activities. When coupled with the qualifying activities confirmation process, these mechanisms will give banks important tools to plan community development activities, yet still be innovative where circumstances allow.

In addition, the Community Development Financing Test is preferable to the current approach of counting loans and investments separately. By combining the two, the Agencies have recognized the potential disparity between calendar years in terms of community development potential and opportunities. These opportunities can be uneven on a year-on-year basis in all markets but even more so in smaller markets. Under the Proposal, banks will have greater flexibility to determine the most effective financing structure for a development. The Proposal also gives banks an opportunity to meet community development needs in local neighborhoods through its lending if a bank's investment activity is restricted under 12 CFR Part 24.

Although there are several positive aspects of the new community development framework, we have concerns as well. The narrower definition of "affordable housing" could substantially limit the ability of banks to invest in naturally occurring affordable housing. Requiring that rent not exceed 30% of 60% of area median income ("AMI"), rather than the 30% of 80% AMI threshold used historically and in many government programs, could have the unintended consequence of limiting overall investment in affordable housing. This more restrictive definition of affordability could exacerbate the lack of affordable housing at a time when rents are surging even higher than inflation in many markets.[8]

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[7] *See* "Ready, Set, Bank℠" Website, https://www.readysetbank.org/ (last visited July 21, 2022).
[8] *See, e.g.*, "Surviving in a moment of rental hikes and inflation," NPR (July 4, 2022), https://www.npr.org/2022/07/04/1109737472/surviving-in-a-moment-of-rental-hikes-and-inflation (last visited July 24, 2022).

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We are also generally concerned about the proposed requirements that various forms of qualifying community development activities be conducted "in conjunction with" a government plan, program, or initiative. This requirement could curtail existing community development activities and discourage banks from pursuing worthwhile non-governmental activities that currently qualify under the existing CRA framework (e.g., economic development, revitalization, and recovery in designated disaster areas). The activities Capital One conducts with its community development partner organizations are often not conducted in conjunction with a government plan, program, or initiative, but are nevertheless highly impactful and responsive to local needs. To be clear, conducting activities in conjunction with a responsive and impactful government plan, program, or initiative can and should still qualify. But, other impactful activities should also continue to receive full consideration. The impact and responsiveness of these activities far outweigh the potential benefit of any additional clarity in the Proposal.

2. CRA Modernization and Retail Lending Assessment Areas

As encouraged as we are by some of the improvements to the community development provisions, we believe the NPR can better align with modern banking practices. CRA was never intended to be the main driver of banking business strategies, yet the Proposal would create more of a compliance framework that favors particular business models and may even discourage some banks from lending outside their current assessment areas. This interagency modernization process is a prime opportunity to encourage banks to use innovative means to meet LMI needs, rather than creating a one-size-fits-all approach premised on historical understandings about the delivery of banking services. In particular, the Proposal should do more to recognize the inherently diffuse nature of digital banking.

While likely a well-intentioned modification of the deposit-based assessment areas proposed in prior modernization efforts, the creation of new Retail Lending Assessment Areas ("RLAAs") is a misguided approach in our view. The RLAA concept effectively obligates banks to stand up the resources of a "virtual" branch in geographies where they have no physical presence and incidentally originate an immaterial number of loans relative to their overall lending. The concept does not account for the fact that banks heavily engaged in digital lending employ business strategies that are agnostic to geography.[9] From a policy perspective, evaluating lending distribution in RLAAs where banks have a relatively small number of loans and no physical presence could unintentionally cause banks to reallocate limited resources to diffuse geographies and dilute the overall effectiveness of CRA.

Rather than implement a geographically-focused concept like RLAAs that assesses bank performance in diffuse geographies with relatively small numbers of loans, the goals of CRA would be better served by looking at a bank's performance in total, at the institution level, to draw conclusions about its overall lending distribution. Using an institution-wide metric gives a

[9] The same underlying flaw exists for the proposed Outside Retail Lending Areas, which would create a third area for evaluation that depends entirely on what geographies and borrowers remain after evaluating a bank's RLAAs and Facility-Based Assessment Areas.

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more complete view of lending distributions, provides geographic coverage the Agencies are seeking, and is also agnostic to delivery channels in a way that better reflects the current and future state of the banking industry. The Agencies can still, in the first instance, conduct a local lending analysis where a bank has a physical presence, i.e., in the Proposal's Facility-Based Assessment Areas ("FBAAs"), which is consistent with the CRA statute.

We strongly support an institution-wide approach that would align better with the goals and intent of CRA. However, should the Agencies retain the RLAA concept in the final rule, the loan thresholds used to establish an RLAA should be adjusted to ensure banks are engaged in a material volume of lending relative to the bank's overall business. The Agencies could still ensure a minimum number of loans have been originated to create an RLAA, but the threshold should constitute at least 1% of the bank's institution-wide loan count for that particular product line over the exam period.

For banks like Capital One with a substantial small business credit card portfolio, the 250 small business loan threshold would more than quadruple our number of assessment areas as a result of our digital lending. Even so, small business loans would not constitute a major product line in the vast majority of our new assessment areas. In fact, small business lending would only be evaluated in approximately 20% of the new RLAAs. These outcomes are due to small business credit card lending being a business that may have large numbers of originations, but dollar volumes that are relatively small compared to the other proposed major product lines. To avoid this issue, in the following section we propose replacing the major product line approach with a more appropriate methodology for determining the evaluation of mortgage and small business lending in the newly created RLAAs.

Including multifamily loans as part of the Retail Lending Test is also problematic. We believe the Agencies' concern that "the geographic distribution of a bank's multifamily loans does not indicate whether LMI individuals benefit from the loans" is justified because the definition of "multifamily housing" requires only five or more units.[10] Accordingly, these loans could finance housing in LMI census tracts yet be unaffordable for LMI individuals and families. Alternatively, loans in MUI census tracts that do provide affordable housing would be excluded. In short, the analysis of multifamily housing as proposed is not well correlated with its CRA impact. For these reasons, as the Agencies alternatively suggest,[11] we support evaluating multifamily loans exclusively under the Community Development Financing Test where banks can receive appropriate consideration for their efforts in providing affordable housing for LMI individuals and families.

3. Retail Lending Test

There are several aspects of the Retail Lending Test that could be improved. First, we agree with the Agencies that safe and sound automobile loans can serve as a means of building credit

[10] § __.12, at 87 Fed. Reg. at 34,018.
[11] 87 Fed. Reg. at 33,929.

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history, and car ownership often means more financial stability and economic opportunity. In response to the Agencies' request for feedback,[12] we believe the inclusion of automobile loans as the sole consumer loan type to be evaluated quantitatively as part of the metrics-based Retail Lending Test should be reconsidered for banks that primarily have an indirect lending model. Unlike the other major product lines to be evaluated under the Retail Lending Test, banks with an indirect lending model cannot directly affect the distribution of auto loans to LMI borrowers because banks must rely on the marketing and sales strategies of automobile dealers. On the other hand, if automobile loans are evaluated more qualitatively, the Agencies can better focus on banks' efforts to offer auto loan products responsive to the needs of LMI individuals and families in a safe and sound manner.

In addition, rather than pursuing the 15% major product line approach, we propose that core CRA lending activities - mortgage and small business loans - should be evaluated in all assessment areas to the extent there is sufficient volume, e.g., origination of at least 50 or 100 loans in an assessment area over the evaluation period. This alternative approach is very similar to the current methodologies that help ensure statistical validity of the analysis, and it would maintain the integrity of the distribution analysis. It would also avoid the problem in the Proposal where banks have different major product lines in different geographies and across evaluation periods, which would make exams more complicated and difficult to administer for both the banks and the Agencies. This inconsistency could also be confusing for external stakeholders.

Finally, the Retail Lending Test assigns conclusions according to complex metrics that include market and community benchmarks. We are particularly concerned about the market benchmark that would require a bank to lend 125% of the market volume to achieve an "Outstanding" rating. Depending on the market and the bank's position in that market, banks seeking to achieve the highest rating on the most valuable part of the exam would be forced to stretch their lending distribution in ways that could lead to unsafe and unsound banking practices. This safety and soundness concern is heightened when considering the benchmark would necessarily be adjusted upward as banks compete to exceed the new 125% market benchmark in each subsequent exam period.

This benchmark for "Outstanding" also seems to disadvantage banks that have a substantial market share (e.g., high volume lender in a particular assessment area). In contrast, banks with a smaller market share (e.g., a smaller volume lender in a particular assessment area) can more easily improve their lending distribution. This disparity is due to the fact that larger volume lenders in the market drive the overall market share benchmark. Achieving 125% of the market benchmark for these large volume lenders, who drive the benchmark, is a business impossibility.

If a market benchmark is in the final rule, we submit that the goals of CRA modernization would be better served by utilizing a benchmark for "Outstanding" that is no higher than 100% of

[12] 87 Fed. Reg. at 33,931-32.

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market (a longstanding and feasible benchmark applied under the current framework). This approach would ensure high-performers remain high-performing, and underperforming banks can target an achievable goal without engaging in unsound or unsafe lending practices.

4. Retail Services and Products Test

We are encouraged by certain aspects of the Retail Services and Products Test. For example, giving consideration to banks offering deposit products with low-cost features, such as no overdraft or insufficient fund fees, will undoubtedly benefit LMI communities. Similar to our comments on other aspects of the Proposal, the Retail Services and Products does not fully facilitate CRA modernization. Generally, the evaluation of delivery systems over-emphasizes the means of delivery, without acknowledging the banks that are effectively meeting the needs of LMI communities through their existing delivery channels. For example, if a bank's lending distribution under the Retail Lending Test is "Outstanding," the delivery channels should matter less or not at all. If a bank's lending results show the bank is effectively serving LMI populations and small businesses, then the channels and strategies for achieving that performance are inconsequential. Moreover, the Proposal's continued emphasis on physical branches makes it more likely the rule will need to be updated again in the near future as digital banking becomes even more common. Now is the opportunity for the Agencies to structure CRA regulation for the present and future in a manner that avoids the risk of being obsolete.

* * *

Capital One looks forward to continuing our participation in this effort to modernize and continue the fulfillment of the goals, intent, and spirit of CRA.

Sincerely,

[redacted]

James V. Matthews
Senior Vice President, CRA Strategy & Program Management
Corporate CRA Officer