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Office of the Comptroller of the Currency
400 7th Street SW
Suite 3E-218
Washington, DC 20219

Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

OCC Docket ID OCC-2018-0008
FDIC RIN 3064-AF22

Re: Comment to Joint Notice of Proposed Rulemaking: Community Reinvestment Act Regulations

To Whom It May Concern:

We are writing on behalf of several of our clients, including Synchrony Bank ("Synchrony"), that are limited purpose institutions or wholesale institutions under the Community Reinvestment Act ("CRA") implementing regulations of the Office of the Comptroller of the Currency ("OCC"), to comment on the January 9, 2020 Joint Notice of Proposed Rulemaking regarding the CRA (the "Proposal") issued by the OCC and the Federal Deposit Insurance Corporation ("FDIC" and, together with the OCC, the "Agencies").[1]

With no explanation, the Proposal would eliminate the regulatory treatment for limited purpose and wholesale institutions ("LP/W Institutions") that has been in effect for 25 years.[2]

[1] *See* 12 U.S.C. §§ 2901 *et seq.* (CRA); implementing regulations at: 12 C.F.R. pts. 25 (OCC; national banks); 195 (OCC; savings associations); 345 (FDIC; state nonmember banks); Agencies, *Community Reinvestment Act Regulations*, 85 Fed. Reg. 1,204 (Jan. 9, 2020) (Proposal). For purposes of this comment letter, each reference to "12 C.F.R. § __.XX" is intended to refer to the corresponding section of parts 25, 195 and 345 of 12 C.F.R. for the Agency rule pertaining to national banks, savings associations, and state nonmember banks, respectively.

[2] *See* 12 C.F.R. § __.12(n) ("Limited purpose bank means a bank that offers only a narrow product line (such as credit card or motor vehicle loans) to a regional or broader market and for which a designation as a limited purpose bank is in effect"); *id.* § __.12(x) ("Wholesale bank means a bank that is not in the business of extending home mortgage, small business, small farm, or consumer loans to retail customers, and for which a designation as a wholesale bank is in effect").

We urge the Agencies to preserve in any amendments to the implementing regulations the current CRA regulatory treatment of LP/W Institutions. The business models of these institutions, while varied, all depart significantly from the traditional depository institution business model that is the focus of the CRA. The community development test that applies today to LP/W Institutions, and the methodology in place today for designating assessment areas, are essential to address these difference and each should continue in effect under any amendments. The tests and assessment area determination methodology discussed in the Proposal are so ill suited to LP/W Institutions that these institutions would need to fundamentally change their business models to comply. Moreover, the strategic plan approach is not a viable solution. It provides no certainty for Synchrony or LP/W Institutions generally as to whether they might be forced to change their fundamental business activities.

Background.

Synchrony is an FDIC-insured federal savings association. It does not have any branches. Synchrony's narrow product line is credit cards, primarily private label and co-branded general purpose credit cards. These products are offered in coordination with its retailer, manufacturer, and health care customers. Thus, they are marketed and promoted primarily by these clients to customers that patronize these clients where they are located. Synchrony also offers retail deposits nationwide through an online channel. Because of Synchrony's client-focused lending business model, matching the locations of the borrowers for its narrow product line to the locations of its depositors is not practicable.

Synchrony offers significant responsiveness to communities through its community development activities. For example, Synchrony supports affordable housing in 25 states, including in its assessment area, through equity investments. Synchrony likewise supports economic development of small businesses through both equity investments and loans in many states, including its assessment area.

As the business model of Synchrony evidences, the limited purpose and wholesale designations are vital to the ability of these institutions to satisfy their CRA obligations. Without the current regulatory treatment of LP/W Institutions, Synchrony could not ***both*** continue with its long-standing business model ***and*** comply with the CRA.

Current regulatory treatment of LP/W Institutions aligns their unique circumstances with the legislative purpose of the CRA.

In 1995, the Agencies (along with the Board of Governors of the Federal Reserve System and the Office of Thrift Supervision) recognized the need for unique regulatory treatment of LP/W Institutions and put appropriate rules in place to ensure that the responsiveness of such

institutions to community needs would be evaluated fairly in light of their business models.[3] The Agencies and the other federal banking agencies said at that time, "[t]he final rule provides the necessary flexibility to assess the CRA performance of these institutions and does not require any institution to engage in proscribed activities."[4]

The principle underpinning the 1995 Rules has not changed — LP/W Institutions should be treated differently from full-service institutions because they are different, and they serve their communities in different ways. Each LP/W Institution offers a narrow product line that does not include all of the products and services offered by full-service institutions or, particularly in the case of a wholesale institution, is simply not in the business of extending home mortgage, small business, small farm, or consumer loans to retail customers. This key difference found regulatory expression in 1995, and continues to do so today, through the "community development test."[5] The community development test is a critical means of ensuring that LP/W Institutions are able to serve their community while maintaining their business model to comply with the CRA.

An important feature of the community development test is that it does not presume that an institution offers a full set of lending products with which to serve its community. Rather, an institution may satisfy the community development test based on its loans, qualified investments *or* community development services.[6] Because of this flexibility, the community development test as currently applied is the appropriate way to assess responsiveness to community needs for LP/W Institutions and their non-traditional banking models. It enables LP/W Institutions to respond to community needs by using the products and services for which the appropriate federal banking agency has approved their designation. As the Agencies put it in a Q&A leading up to the promulgation of the 1995 Rules, "[e]very institution should be able to demonstrate that it is fulfilling its CRA responsibilities, either within the context of its chosen service specialties or in other ways."[7] The Agencies' continued recognition of this reality is critical particularly to wholesale institutions that do not engage in any retail lending whatsoever. The community development test accomplishes that purpose by ensuring that LP/W Institutions are not forced to engage in lines of business with which they are unfamiliar and would otherwise not choose to engage in.[8] Thus, the community development test recognizes that if an LP/W Institution does not offer a full suite of retail loans such as, for example, residential mortgages, commercial

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[3] Office of Thrift Supervision, Board of Governors of the Federal Reserve System ("Board") & the Agencies, *Community Reinvestment Act Regulations*, 60 Fed. Reg. 22,156 (May 4, 1995) (hereinafter, the "1995 Rules").
[4] *Id.* at 22,161.
[5] *See* 12 C.F.R. § __.25.
[6] *Id.* § __.25(a).
[7] *Interagency Questions and Answers Regarding CRA*, F.R.R.S. ¶ 6-1308.2 (Apr. 1993).
[8] *See, e.g.*, 1995 Rules, at 22,164 (discussing consumer lending evaluation and reporting, and noting that "this aspect of the . . . rule does not affect the evaluation of a limited purpose bank, because the bank will be evaluated under the community development test, not the lending test").

building loans, student loans, *etc.*, then it should not be *required* to begin offering retail loans merely because full-service institutions do so to serve their communities' needs.

Similarly, the current assessment area methodology, together with the current recognition of activities outside of the assessment area, is appropriate for LP/W Institutions because they often have a community presence that bears no relationship to their deposit gathering footprint.[9] However, the Proposal presumes otherwise. Under the Proposal, an institution that receives 50 percent or more of its retail domestic deposits outside of its facility-based assessment areas would be required to delineate "deposit-based assessment areas" where the institution receives five percent or more of its total retail domestic deposits, based on the physical addresses of its depositors.[10] It is incongruous to require an LP/W Institution to meet the credit needs of deposit-based assessment areas when the location of borrowers under the LP/W Institution's business model (if it even has borrowers) is determined by unrelated factors over which the LP/W Institution exercises little or no control. For example, an LP/W Institution such as Synchrony has a credit business that involves the issuance of credit card loans to borrowers through third-party retailers, while the depositors from whom it accepts online deposits are completely geographically unrelated to the borrowers. Moreover, the requirement is more than incongruous in the case of a wholesale institution which, by definition, does not offer retail lending products, except "if this activity is incidental and done on an accommodation basis."[11] Such institutions may provide commercial loans to large institutional borrowers and securities-based loans to institutions or, in limited cases, individual borrowers. They may receive non-consumer deposits, such as deposits from large institutions or government sources. In some cases, particularly wholesale institutions affiliated with broker-dealers, deposits may include brokered deposits and brokered sweep deposits from broker-dealer client accounts of the affiliate. Such institutions do not engage in a retail lending business, and the location of their depositors is determined by factors that bears no relationship to the location of their borrowers.[12] These examples are not extreme cases — each LP/W Institution must fundamentally change the way it does business to exercise control over credit extensions in deposit-based assessment areas and meet the Proposal's demands.[13]

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[9] *See* 12 C.F.R. § __.41(b); *see also id.* § __.25(e).

[10] *See* Proposal, at 1208.

[11] 1995 Rules, at 22,161.

[12] We note that such wholesale institutions affiliated with broker-dealers do not solicit deposits from individuals for whom they provide brokered deposits or brokered sweep deposits in the way that a full-service bank might solicit deposits accounts at a branch. Rather, the broker-dealer affiliate solicits securities brokerage accounts for individuals seeking such brokerage services in the first instance, not deposit accounts. Thus, wholesale institutions providing deposit account services to clients of an affiliate do not exercise control over the location of individual depositors and similarly do not engage in the kind of deposit solicitation activity that is a predicate to the anti-redlining purpose of the CRA.

[13] The Proposal's deposit-based assessment area concept contrasts sharply with the Agencies' current approach, whereby the Agencies will consider an LP/W Institution's community development activities that benefit areas

The current treatment of LP/W Institutions aligns with the purposes of the CRA because LP/W Institutions do not generally present the types of harms that the CRA was intended to remedy, given the limited scope of their activities. Senator Proxmire articulated during CRA adoption debates the core principles of the CRA and the problems it was intended to remedy:

> [B]anks and savings and loans will take their deposits from a community and instead of reinvesting them in that community, they will actually or figuratively draw a red line on a map around the areas of their city, sometimes in the inner city, sometimes in the older neighborhoods, sometimes ethnic and sometimes black, but often encompassing a great area of their neighborhood.[14]

Because of the nature of their business, however, LP/W Institutions do not accept deposits or issue credit in this manner. An LP/W Institution that makes private label credit card loans in the locations of its retailer customers and collects deposits online is one example. It does not pick and choose the locations of its borrowers, avoiding some neighborhoods where it collects deposits and lending in others. Indeed, the geography of its borrowers is driven by the geographic footprint of its retailer customers. Accordingly, as illustrated by examples like this, LP/W Institutions as a general matter do not solicit deposits or make loans in the manner with which Congress was concerned when it passed the CRA.

Demanding that LP/W Institutions meet a CRA standard that is designed for full-service institutions will force a reworking of how and where LP/W Institutions lend. However, "the sponsors of the legislation emphatically stated that the [CRA] was not intended as a credit allocation measure."[15] That is, CRA regulations should ensure that an institution meets its community's needs in the ways that are within the institution's business model.[16] Subjecting

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outside the institution's facilities-based assessment area, provided that the LP/W Institution has adequately addressed the needs of its facilities-based assessment area. 12 C.F.R. § __.25(e). This is a tailored and reasonable approach that should be maintained because, unlike the deposit-based assessment areas in the Proposal, the current approach recognizes each LP/W Institution's need for flexibility in determining how to address community development needs beyond its physical setting. As the Agencies have said, flexibility is necessary because "wholesale and limited purpose institutions typically draw their resources from, and serve areas well beyond, their immediate communities" and "have a different operational focus" from full-service institutions. *See* 1995 Rules, at 22,160, 22,167. Thus, the Agencies have implicitly recognized that, even if an LP/W Institution is engaged in retail lending, its "different operational focus" precludes it from purposefully availing itself of lending markets where it happens to accept deposits. The flexibility and discretion embedded in the current rules is necessary in determining how an LP/W Institution may meet community needs beyond its geographic areas while preserving its business model, and should be preserved.

[14] 123 Cong. Rec. 17630 (1977) (Statement of Sen. Proxmire).

[15] Roland E. Brandel & David E. Teitelbaum, *The Community Reinvestment Act: Policy and Compliance* (2d ed. 1994) § 2.04(a); *see* Hearings on S.406 before the Committee on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess. 2 (1977) ("1977 Hearings") at 248, 265

[16] In the matter of *Commerce Bancshares, Inc.*, shortly before finalizing its initial regulations under the CRA, the Board considered what it meant to serve the "convenience and needs" of a community when it considered an application of one bank holding company to merge with another under the Bank Holding Company Act, stating:

LP/W Institutions to the evaluation measures and tests in the Proposal would be tantamount to forcing them to engage in lines of business not contemplated by their business plans, in geographies that are equally foreign, because they will not be able to meet the Proposal's standards in the ordinary course of their business activities.[17]

The Proposal's elimination of the treatment that LP/W Institutions receive today will harm their business, with negligible benefit to the public.

Compliance with the Proposal will require drastic changes to the way LP/W Institutions run their businesses because the proposed CRA evaluation measures, retail lending distribution test and redefined assessment area designation process do not align with their business models. It will impose substantial cost and hardship while forcing each to become a different kind of institution. At the same time, the elimination of LP/W Institutions will have marginal policy benefit because there are only a small number of LP/W Institutions relative to the total number of U.S. depository institutions, and those institutions would continue to have CRA obligations under the existing community development test. Of the 5,132 FDIC-insured depository institutions, there are a total of 57 LP/W Institutions in existence today according to the websites of the Agencies and the Board (22 limited purpose and 35 wholesale institutions).[18]

Moreover, the Agencies have complete discretion as "gatekeepers" of the LP/W Institution designation, so there is no risk of full-service institutions unilaterally converting to LP/W Institutions to alter their responsibilities under the Proposal. In order to receive a designation as an LP/W Institution, a bank or savings association must file a request, in writing, with the appropriate federal banking agency, at least three months prior to the proposed effective date of the designation; receive an approval from the appropriate federal banking agency; and

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"The Board finds nothing in the BHC Act that requires or authorizes the Board to dictate a bank's product mix (which credit or deposit services a bank should emphasize) or to dictate what proportion or amount of an institution's funds must, or even should, be allocated to any particular credit need, borrower or neighborhood or on what specific terms credit should be extended." 64 Fed. Res. Bull. 576, 579 (1978) (citing the recently enacted CRA in its approval of the application); *see also Dominion Bankshares Corp.*, 72 Fed. Res. Bull. 789 n.10 (1986) (citing *Commerce Bankshares* to support its statement that "the appropriate mix of [loans, including mortgage and small business loans in meeting CRA requirements] is a business decision to be made by banks").

[17] *See* 1977 Hearings at 9 (statement of Arthur F. Burns, Chairman of the Board) ("Each time a particular credit use is mandated by law or regulation, some other credit use that otherwise would have been accommodated must go unsatisfied"); *see id.* at 2; *cf., e.g.*, Proposal, at 1209 (describing lending products used in bank evaluation measures); *id.* at 1218 (CD minimums comparing loans and deposits in assessment areas).

[18] *See* FDIC, *BankFind*, https://research2.fdic.gov/bankfind/ (last checked April 7, 2020); FDIC, *Approved Limited Purpose, Strategic Plan, and Wholesale Institutions Report*, https://www.fdic.gov/regulations/community/community/apprlp.html (last checked April 7, 2020); OCC, *Wholesale and Limited Purpose Banks under the CRA*, https://www.occ.treas.gov/topics/consumers-and-communities/cra/wholesale-and-limited-purpose-banks-under-cra.html (last checked April 7, 2020); Board, *Community Development Test for Wholesale and Limited Purpose Designations*, https://www.federalreserve.gov/consumerscommunities/cra_wholesale.htm (last checked April 7, 2020).

continue to qualify for the designation or risk revocation of the designation by the appropriate federal banking agency.[19] The fact that relatively few institutions have been so designated in the past 25 years demonstrates that the designation process, together with the scope of the LP/W Institution definitions, has kept full-service institutions from using the LP/W Institution rules to gain an unfair advantage under the CRA. However, if the Proposal is not amended to reinstate the current regulatory treatment of LP/W Institutions, the CRA regulations will provide a structural advantage under the CRA to institutions with traditional retail-focused business models at the expense of institutions with specialized business models, with no corresponding benefit to the public.

The Agencies have not addressed why the regulatory treatment for LP/W Institutions no longer is appropriate.

The Proposal makes only passing reference to LP/W Institutions, and offers no clues as to why the Agencies propose to eliminate their current treatment under the CRA. We are not aware of any federal banking agency written guidance suggesting that the current regulatory treatment of LP/W Institutions is inconsistent with the objectives of the CRA or otherwise failing as a policy matter. Moreover, to our knowledge, LP/W Institutions are not failing as a group to satisfy the CRA standard to which they are currently subject, but rather continue to find innovative ways to meet the needs of their communities.

Also, the Proposal fails to address how the Agencies expect LP/W Institutions, after 25 years, to change their approach to CRA compliance. Presumably they would be obligated to adopt strategic plans. However, that approach is entirely unreasonable because it does not enable LP/W Institutions to comply with the CRA with any confidence that they will be able to maintain their business models. The strategic plan approval process is fundamentally uncertain, and if a plan is not approved, would expose LP/W Institutions to a risk of non-compliance with material regulatory requirements, with no guidance as to regulatory expectations. Unlike the LP/W Institution designation, there is no objective regulatory standard governing strategic plan approval. It subjects LP/W Institutions to a review process and comment period that leave their business models on unsure footing. Moreover, there is a reason that the vast majority of LP/W Institutions do not take the strategic plan approach today — namely, the strategic plan approach was not designed for institutions that could not comply with the traditional CRA assessment criteria because of a narrow product line or wholesale model. The approach that works for most LP/W Institutions is the community development test as currently applied.[20]

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[19] 12 C.F.R. § __.25(b).

[20] We note that for similar reasons, LP/W Institutions are hesitant to rely solely on the Agencies' consideration of "performance context" in judging CRA performance. *See* Proposal, at 1,222–23. As with strategic plans, consideration of performance context offers little certainty and jeopardizes the business model of LP/W Institutions. Today, LP/W Institutions choose to avail themselves of the objective standard governing their treatment rather than relying solely on performance context for this reason. *See* 12 C.F.R. § __.21(b).

The Proposal refers in several places to a desire to avoid "CRA hotspots" and "CRA deserts." If the Agencies view the existence of LP/W Institutions as bound up with the prevalence of CRA hotspots and CRA deserts, we believe there are alternative ways to address the issue without eliminating LP/W Institutions altogether. For example, the Agencies could propose changes to the community development test, with input from LP/W Institutions, to establish benchmarks that if met would cause a geography to be deemed a CRA hotspot (so that CRA activity would be actively discouraged) or a CRA desert (so that CRA activity would be actively encouraged) and that would create proper incentives for LP/W Institutions to increase their CRA activity in CRA deserts and decrease their CRA activity in CRA hotspots. One possible benchmark could be tied to the trading price of investments in low-income housing tax credits in a given geography — if above a certain threshold, the area is deemed a CRA hotspot and, if below, the area is deemed a CRA desert.

In short, the complete elimination of today's CRA treatment of LP/W Institutions, and the effects it would have on the business of LP/W Institutions and their communities, represents a draconian change in the regulatory environment. We believe there are numerous ways to address the issues of CRA hotspots, CRA deserts or any other ongoing issues that the Agencies might identify, and LP/W Institutions would embrace an opportunity to work with the Agencies to explore those avenues and find solutions that serve the Agencies' goals while respecting the civic and public legislative purposes of the CRA.

Conclusion.

For the foregoing reasons, we request that the Agencies maintain the same treatment of LP/W Institutions under any amendment to their CRA regulations, including with respect to the community development test and the designation of assessment areas, as is in place today. It would be our pleasure to meet with the Agencies to discuss our comments on the Proposal at any time.

Sincerely,

Joel Feinberg

cc: Steve Wallant