April 8, 2020

Via Electronic Mail

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

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Community Reinvestment Act Regulations (Docket ID OCC-2018-0008; RIN 1557-AE34; RIN 3064-AF22)

Ladies and Gentlemen:

The Bank Policy Institute[1] appreciates the opportunity to comment on the proposal by the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation to revise the agencies' Community Reinvestment Act regulations.[2]

BPI fully supports the longstanding goals of the CRA and believes that the Act should continue to be an effective force for strengthening the development of the communities that our member banks serve. We share with community advocates and other stakeholders the goal of continuing to promote and advance economic opportunity by building on the CRA's foundations and enhancing the framework to ensure banks provide financial opportunities and resources broadly across the communities they serve, including low- and moderate-income ("LMI") areas, small businesses, and communities in need of financial services to sustain economic development. We support efforts to ensure that the CRA remains an essential part of the framework for sustaining and revitalizing communities. And, as the federal banking agencies recently recognized in their Joint Statement on CRA Consideration for Activities in Response to COVID-19, the CRA can also be a valuable tool to encourage and reward activity that helps communities and LMI individuals respond to economic crises.

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1 The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

2 85 Fed. Reg. 1,204 (Jan. 9, 2020) (the "Proposal"). In this letter, we refer to the OCC and FDIC as the "agencies" and the OCC, FDIC, and Federal Reserve collectively as the "federal banking agencies."

We appreciate the agencies' willingness to explore innovative ways to ensure that the CRA remains relevant and effective as the banking industry continues to evolve. We support the Proposal's focus on transparency, objectivity, and clarity. In particular, we strongly support the Proposal's establishment of a qualifying activities list and a mechanism for banks to seek confirmation that a new activity will qualify. We also support the Proposal's recognition that a broad range of activities can benefit local communities, including LMI individuals and neighborhoods, and should receive credit under the CRA. For example, the Proposal's provisions granting credit for activities in Indian country and permitting banks to receive partial credit for qualifying activities that serve both LMI and non-LMI communities are both laudable.

At the same time, the Proposal represents a significant departure from the current CRA framework. In the broad sweep of its changes, the Proposal contains significant flaws that are critical for the agencies to fix in any final rule:

- First, we have significant concerns that the agencies may not have gathered the data necessary to calibrate the rule's various thresholds appropriately, nor fully anticipated the rule's many significant consequences, including the issues described below. Our members have not had sufficient opportunity to source and process enough of the Proposal's new data inputs to meaningfully assess the Proposal and its potential impacts, or to develop an informed view on the appropriateness of the Proposal's numerical thresholds. Compounding this issue, some of the Proposal's most important concepts and definitions are ambiguous and subject to divergent interpretations.[3] We urge the agencies to take the time necessary to consult with stakeholders, collect appropriate data, and tailor and calibrate the rule so as to ensure that any final rule is workable and sustainable across economic cycles.

- Second, and underscoring the agencies' current lack of data to support the Proposal, the Proposal would impose unprecedented new data collection, recordkeeping, and reporting burdens on banks. Banks do not currently collect or have direct access to much of the data the Proposal requires, including data necessary to quantify newly-qualifying CRA activities, small loans to businesses and farms pursuant to a new loan size threshold, deposit-based assessment areas ("AAs"), and performance under the new Retail Lending Distribution Tests. Collecting and reporting this data would require banks to build new systems, connect existing systems in new ways, train employees, and validate the integrity of the data. Despite the breadth of these obligations, the Proposal would provide a conformance period of just one year for its data collection and recordkeeping requirements – a period that is far too short given banks' experiences implementing much less onerous new recordkeeping requirements in recent years. Demands on banks' resources in connection with the COVID-19 pandemic, which banks expect to continue far beyond the end of the immediate health crisis, would further exacerbate the difficulties banks would face in complying with these new requirements in such a short timeframe.

- Third, the rigid focus of the CRA Evaluation Measure and Community Development ("CD") Minimum on balance sheet value would significantly understate the value to communities of activities that are off balance sheet, do not remain on a bank's balance sheet for long, or have positive impacts well beyond the dollar amount recorded. Most notably, the Proposal would give only partial credit for loans originated and sold in the secondary market. This credit would be only a small fraction of what a buyer that is a bank would receive. In the case of single- and multi-family residential mortgage lending, such a restricted focus could significantly disrupt the established and productive relationship between banks seeking to meet their CRA objectives and Fannie Mae's and Freddie Mac's seeking to meet their affordable housing goals. More generally, this treatment discounts the importance of origination activity to a bank's communities and the prudent risk management, substantial costs, and necessary expertise

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[3] We summarize these key ambiguities in Appendix A to this letter.

associated with that activity. Treating origination activity in the manner proposed could discourage banks from originating CRA-eligible loans.

- Fourth, subjecting consumer lending to mandatory evaluation under the Retail Lending Distribution Tests could encourage banks engaged in certain types of consumer lending, including unsecured loans, to expand into riskier subprime segments at scale in order to achieve the volume of loans to LMI borrowers required to receive a Satisfactory or better rating. This result is antithetical to the stated purpose of the CRA, which requires community reinvestment to be consistent with the safe and sound operation of the bank.

- Fifth, far from boiling CRA performance down to a single metric, the Proposal sets forth a gauntlet of tests at the AA and bank levels that a bank would need to pass in order to receive a Satisfactory or better rating. In fact, a bank could be required to pass as many as *ten different specific tests* within a single AA in order to receive a Satisfactory or better rating there. A bank's overall CRA rating as determined under the Proposal could thus fail to accurately reflect its overall record of serving its community.

- Sixth, the Proposal is built around a key term – "retail domestic deposit" – that is a misnomer because it would include corporate deposits. As a result, the Proposal would exacerbate the problem of creating CRA "hotspots" in geographies where major corporations and institutional investors are headquartered, as well as inflate and geographically distort banks' CRA obligations.

- Finally, the Proposal would fail to be adaptable to the wide variety of bank business models, capabilities, and opportunities that exist. Specifically, banks with non-traditional business models – including those banks currently approved for wholesale bank or limited purpose bank designations – would face significantly greater challenges meeting the Proposal's general performance standards, including the Retail Lending Distribution Tests. The agencies have not articulated any reasons for rescinding the wholesale and limited purpose designations and subjecting currently-designated banks to the Proposal's general performance standards. At the same time, the Proposal would make strategic plans more challenging to develop and fulfill by requiring those plans to cover deposit-based AAs.

This letter describes these and other issues in more detail, and provides practical, actionable solutions that the agencies can and should use to address each issue.

We are also concerned that having different CRA standards apply to banks regulated by different federal banking agencies may harm the overall ability of the banking industry and the communities it serves to work together to identify and act upon meaningful community reinvestment opportunities. We accordingly urge the OCC and FDIC to continue to work with the Federal Reserve to achieve a consensus on how best to modernize the CRA regulations and to issue common rules that apply to all banks.

Section I of this letter summarizes our key recommendations for changes to the Proposal. The remainder of this letter addresses each element of the Proposal in turn and provides support for our recommendations.

I. Executive Summary of Key Recommendations

For the reasons discussed in detail in the sections of this letter that follow, the agencies should make the following key changes or clarifications in any final rule:

<u>Data Collection, Reporting, and Validation, and Public Disclosures</u> (Section II below)

- Provide banks other than small banks with a single compliance period of three years and allow banks to determine how to allocate this time to implementing systems to comply with the different elements of

the new regulatory framework, rather than breaking the compliance dates for the AA, data collection, recordkeeping, and reporting into two separate compliance phases.

- Ensure that the compliance date for the final rule's reporting requirements is January 1 of the year following the end of the three-year compliance period, rather than a date in the middle of a calendar year.

- Rather than make annual cost of living adjustments to the gross annual revenue limit for a small business or small farm loan and the loan size limit for a small loan to a business or farm, make such adjustments every 10 years, using round numbers.

- Require a bank to collect and report data on particular CD activities only if the bank seeks to count those activities toward its CRA Evaluation Measure and CD Minimum.

- Provide for public disclosures that cover a bank's average performance over a completed evaluation period rather than annual disclosures covering subsets of multi-year evaluation periods.

- Clarify that in the context of an omnibus or intermediated account (*e.g.*, in a sweep program or prepaid program) the bank can treat the address of the depositor as that of the accountholder of record.

- Clarify that banks must capture a customer's income and geography only at the time the customer opens an account, so that customers are not required to report sensitive data to their banks more frequently.

<u>Calibration of CRA Evaluation Measure</u> (Section III below)

- Set the final benchmarks for various ratings (*e.g.*, the percentages to earn an Outstanding or Satisfactory rating) only after the agencies collect better data and conduct further analysis.

- Set the benchmark for an Outstanding rating at a level that is no more than 150 percent of the threshold required for a Satisfactory rating, rather than nearly double that threshold.

- Create additional, tangible incentives to motivate banks to strive for an Outstanding rating, such as by presuming that a bank with an Outstanding rating has a satisfactory record of meeting the convenience and needs of its community if it submits a licensing application that requires consideration of that factor.

- Commit to providing at least one full evaluation period (whether three years or five years) of advance notice prior to any increase in the benchmarks' becoming effective.

- At least double the maximum increase to a bank's CRA Evaluation Measure that applies based on the percentage of the bank's branches located in LMI neighborhoods, from 1.0 to 2.0, and count branches that *serve* LMI communities toward this increase to the same extent as branches that are *located* in LMI census tracts.

<u>Use of Balance Sheet Value in CRA Evaluation Measure and CD Minimum</u> (Section IV below)

- Count the origination value rather than balance sheet value of a qualifying retail loan in the numerator of the CRA Evaluation Measure of the originating bank, as if held on the balance sheet for the entirety of a single evaluation period, or provide a much higher floor than 90 days, or a significant multiplier, for the value of a qualifying retail loan that is originated and sold.

- Count the balance of a CD loan for at least the entirety of one full evaluation period, as if the loan were on the bank's balance sheet each month during the period and paid on schedule.

- Count the value of a community development donation or grant for at least the entirety of one full evaluation period.

- Count unfunded commitments to lend, applying a conversion factor that is similar to the regulatory capital rules' standardized credit conversion factors that apply to off-balance sheet exposures.

- Apply at least a 10X multiplier to CD services after the bank has multiplied the employee hours by the actual median hourly compensation value.

- Incorporate explicit up-weighting of the dollar value attributable to special CRA lending programs (analogous to the multiplier for certain CD activities). For example, lending that has contributed to revitalization of a neighborhood, providing social and economic benefits to families and businesses in the neighborhood, could be weighted more than dollar-for-dollar.

- Provide a bank syndicating low income housing tax credits ("LIHTC") or new market tax credits ("NMTC") projects with credit based on a percentage of the amount of LIHTC and NMTC syndicated by the bank (*e.g.*, 50% of the amount syndicated), applicable for each year the syndicator manages the investment for the third party.

Retail Lending Distribution Tests (Section V below)

- Subject consumer lending to the Retail Lending Distribution Tests only at a bank's option, and not whenever a consumer lending sub-category is a major retail lending product line for the bank.

- Remove "other consumer loans" and "other revolving credit plans" as consumer loan sub-categories, and if necessary, replace those sub-categories with narrower sub-categories for specific types of loans that are responsive to community needs.

- Clarify that "consumer loans" is not its own retail lending product line, but instead that each sub-category of consumer loans is a retail lending product line for purposes of determining whether it is a "major" product line.

- Raise the 15 percent threshold within the definition of "major retail lending product line" to at least 30 percent, which would be particularly important to do for consumer loans, which, unlike mortgages, have not traditionally been evaluated on distribution under the CRA.

- Raise the 20 loan minimum for application of the Retail Lending Distribution Tests to 50 loans *per year*, and set an even higher number for consumer loans, such as 100 loans per year.

- Provide that a retail lending product line is only "major" if it meets or exceeds the requisite percentage of the dollar volume of the bank's total retail loan originations during the prior evaluation period *and* during the current evaluation period.

- Adopt a single Borrower Distribution Test and, if applicable, a single Geographic Distribution Test for each AA, such that each test covers all of the types of loans subject to that test on a combined, weighted basis. In the alternative, the final rule could provide that a bank satisfies the Borrower Distribution Test and Geographic Distribution Test for an AA if 50 percent or more of the bank's major retail lending product lines subject to such tests within the AA satisfy the Borrower Distribution Test and, where applicable, Geographic Distribution Test.

CD Minimum (Section VI below)

- Include a CD Minimum requirement only at the bank-level and not at the AA level, or at least reduce the AA-level CD minimum requirement to 1 percent.

Bank-Level Rating and Ratings Adjustments (Section VII below)

- Require a bank to receive a given rating in a significant portion of its AAs *or* in those AAs where the bank holds a significant amount of deposits, in order to receive the same rating at the bank level.

- Provide that a bank will receive a bank-level rating for a particular element of the general evaluation framework (*e.g.*, the CRA Evaluation Measure or Retail Lending Distribution Tests) if the bank receives that rating in a significant portion of its AAs or in those AAs where the bank holds a significant amount of deposits – even if those AAs are not the same for each element of the framework. Thus, for example, a bank with three AAs should be eligible to receive a bank-level Satisfactory rating if it has a 6 percent or higher CRA Evaluation Measure in AAs 1 and 2 (*i.e.*, a significant portion of its AAs), passes the Retail Lending Distribution Tests for its major retail lending product line in AAs 2 and 3 (*i.e.*, a significant portion of its AAs), and satisfies any CD Minimum in AAs 1 and 3 (*i.e.*, a significant portion of its AAs).

Definition of "Retail Domestic Deposit" (Section VIII below)

- Define "retail domestic deposits" as the sum of total deposits intended primarily for personal, household, or family use, as reported on Schedule RC-E of the Call Report, items 6.a, 6.b, 7.a(1), and 7.b(1).

Designation of Assessment Areas (Section IX below)

- Clarify ambiguities in the proposed definition of "non-branch deposit-taking facility" such that each qualifier following the term "other than a branch" modifies the term "banking facility" rather than "branch."

- When requiring a bank to establish facility-based AAs where a bank "maintains" a main office, branch, or non-branch deposit-taking facility, clarify that the term "maintains" means that the bank has a *permanent or semi-permanent* branch or non-branch deposit-taking facility at the location.

- Revisit and revise the framework for addressing the growth in remote deposits based on key principles underlying the CRA, rather than finalizing the deposit-based AA framework as proposed.

- Provide that a bank that adds a branch or non-branch deposit-taking facility in a geography outside its current AAs should only be required to designate a new facility-based AA for that geography for the following evaluation period, and in all events not subject a new facility-based AA to evaluation until the AA has been designated for a full, complete calendar year.

- Cease to evaluate a bank's performance in a facility-based AA immediately once the bank has closed its last branch or non-branch deposit-taking facility in the AA, and only subject such an AA to evaluation based on full, completed calendar years in which the bank satisfied the relevant condition for evaluation in the AA.

- Allow a bank to change the boundaries of an *existing* AA once during a three-year evaluation period, or twice during a five-year evaluation period.

<u>Allocation of CD Activities to Particular AAs</u> (Section X below)

- Provide that a bank that cannot document the allocation of CD funding or services to a particular project may allocate the activity as it deems appropriate among its AAs that are located in the state(s) or region(s) that benefit from the activity.

<u>Qualifying Activities List</u> (Section XI below)

- Provide CRA credit for a loan to a non-LMI borrower in an LMI census tract as required by the statute.

- Provide CRA credit for CD activities financing small businesses or farms that promote economic development by "support[ing] permanent job creation, retention, and/or improvement" for low- or moderate-income persons; in low- or moderate-income geographies; in areas targeted for redevelopment by Federal, state, local, or tribal governments; by financing intermediaries that lend to, invest in, or provide technical assistance to start-ups or recently formed small businesses or small farms; or through technical assistance or supportive services for small businesses or farms, such as shared space, technology, or administrative assistance.

- Provide CRA credit for the types of activities that the federal banking agencies recently recognized as being responsive to the needs of LMI individuals, small businesses, and small farms affected by COVID-19, when those activities are undertaken in response to any global, national, or local economic crisis.

- Provide that any removal of a CRA qualifying activity from the list of qualifying activities should not become effective for a prospective investment or loan until one year after a final rule removing the activity is adopted, or until the start of the bank's next evaluation period, whichever is later.

- Amend 12 C.F.R. Part 24 to maintain the Volcker Rule's exemption for "qualified investments" existing at the time the final CRA rule goes into effect, as well as any investments made in the future that are qualifying investments at the time they are made.

- Provide for a 30-day, rather than six-month, timeline for the agencies to update the qualifying activities list pursuant to a request for confirmation that an activity qualifies.

<u>Multiplier for Certain CD Activities</u> (Section XII below)

- Include investments in mortgage-backed securities ("MBS") in the list of activities eligible for the 2X multiplier in the CRA Evaluation Measure and CD Minimum.

- Extend the 2X multiplier to (1) CD loans (in addition to CD investments); (2) mortgage loans in Indian country; (3) lending and investment in certain other geographies, such as rural census tracts, colonias, and other areas with persistent poverty; and (4) small loans to businesses and small loans to farms located in LMI census tracts.

<u>Affiliate Activities</u> (Section XIII below)

- Preserve the current CRA regulations' standard for counting affiliate activities, which is that any affiliate activity may qualify but consideration of such activity is optional, and may only count toward the performance of a single affiliated bank.

Wholesale Banks, Limited Purpose Banks, Special Purpose Banks, and Banks Operating Under Strategic Plans (Section XIV below)

- Preserve the wholesale and limited purpose designations and the current Community Development Test for wholesale and limited purpose banks.

- Confirm that banks currently designated as "special purpose" would be considered "exempt banks" under the final rule.

- Limit strategic plans to facility-based AAs.

- Provide that a strategic plan is presumptively approved for two evaluation periods of up to five years each, unless the bank or its primary federal supervisor determines, in the first evaluation period, that an existing strategic plan would no longer be appropriate for the second evaluation period in light of the bank's size, business model, strategy, or opportunities.

- Expressly confirm that, consistent with the current CRA regulations' approach to strategic plans, a strategic plan need not include a measure of credit distribution, and the benchmarks that apply under the general evaluation framework (*i.e.*, the 11 percent benchmark for Outstanding performance on the CRA Evaluation Measure) are not minimum requirements in a strategic plan.

- Retain a 60-day timeline for approval of a strategic plan.

- Exempt banks operating under strategic plans from certain recordkeeping and reporting requirements, such as any requirement to collect and report data on the general performance standards as set forth in § _.19(b) of the proposed rule text, or data covering qualifying activities under § _.19(c) if such activities are not measured in the bank's strategic plan.

Transitional Issues (Section XV below)

- In addition to the transitional recommendations discussed above and throughout this letter, provide banks the option to receive only an indicative rating under the new framework, which option should be available after the evaluation period ends and a rating has been assigned.

The remainder of this letter describes the need for each of these changes and clarifications in greater detail.

II. Data Collection, Reporting, and Validation, and Public Disclosures

The Proposal would impose significant data collection and reporting obligations for the apparent purpose of facilitating the operation of the Proposal's general evaluation framework. While we understand and appreciate the goal of establishing a more data-driven, objective, and transparent CRA framework, the substantial burdens discussed in this section highlight why, in promulgating any final rule, the agencies should more carefully balance the burdens of that framework against its benefits. Thus, many of the suggestions we offer throughout this letter to streamline the Proposal and reduce the large number of tests to which a bank would be subject under the general evaluation framework would not only better tie the framework to the underlying purposes of the CRA as a substantive matter, but also have the important benefit of reducing the operational burdens of the Proposal.

A. Burdens Created by the Proposal's Data Collection and Reporting Requirements

The Proposal would require banks to collect and report volumes of new data that they currently do not collect or report, which would impose significant upfront and ongoing obligations and costs. For instance, the Proposal would require banks to geocode loan and deposit data in connection with the Retail Lending Distribution

Tests and the designation of deposit-based AAs. Very few banks currently use geocoding technology for this purpose, and many banks would need to hire outside vendors to help them comply. Anecdotally, BPI members are aware of very few vendors with this capability, which creates concerns over the industry's capacity to geocode so much data in a short period of time. Further, banks would be required to perform the geocoding on a continuous basis, as income levels and designations shift over time. A moderate-income census tract in one year may be a middle-income census tract the next year, and accounts will need to be recoded to account for such changes. Similarly, the Proposal would require banks to code loan and deposit data based on borrower or account owner income, and this coding would need to be refreshed as median family income changes.

In addition, most banks currently are not collecting, evaluating, or reporting retail and consumer loan data in the manner the Proposal would require. For example:

- Banks are not currently pulling balance sheet data that would facilitate computation of the CRA Evaluation Measure at the bank level, let alone at the AA level, partly because so few of the Proposal's data inputs are coextensive with existing Call Report or other reporting categories. For instance, although banks currently collect and report extensive data on their mortgage lending for HMDA purposes, the data collection and reporting requirements of the Proposal would not leverage this existing framework, as the Proposal defines the required data by reference to the Call Report rather than the HMDA Loan Application Register.

- Likewise, banks' current internal records of qualifying CD activities generally are not tied to their balance sheets or related regulatory reports.

- The Proposal would add reporting requirements or change the scope of certain existing categories of information that banks already collect and report, including requiring banks to collect revenue information from small business borrowers and raising the qualifying revenue threshold for small loans to businesses from $1 million to $2 million.

- The preamble to the Proposal (unlike the proposed rule text) states that banks would be required to maintain and report average monthly deposit data, which banks do not necessarily collect currently.[4]

It will take time for banks to build the needed systems to collect the appropriate data and conduct testing to ensure that this newly collected information is complete and accurate for reporting, in line with the agencies' supervisory expectations regarding data integrity. It is not clear that it will even be possible for banks to collect the necessary data with respect to all existing loans and investments. Even if banks currently collect some of the required data, to implement the Proposal's requirements banks will have to build system inputs and combine data that in many cases is not currently stored on the same system.

We understand that some vendors may have suggested that these data challenges could be addressed by a simple "check-the-box" solution, which would allow designation of an activity as CRA-qualifying and geocoded to the qualifying geography at the time the activity is entered into the system during the underwriting or investment review process. A "check-the-box" solution is not as easy as it sounds, nor would it address all the data challenges that the Proposal would create. Banks have multiple systems for different activities and business areas. For example, the system generating Call Reports, which ties into the Call Report line items of retail lending activities the agencies have identified as CRA-qualifying, in many cases is not the same system used by the bank's underwriters at the time of approval and entry of a loan into a bank's core system. Accordingly, enterprise-wide systems changes could be required for banks to comply with the Proposal's reporting requirements.

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[4] *Compare* 85 Fed. Reg. at 1,227 (preamble providing that "[b]anks also would be required to report annually . . . the average monthly value of retail domestic deposits"), *with* 85 Fed. Reg. at 1,250 (proposed rule text providing that "[a] bank subject to this section must annually report its average quarterly retail domestic deposits as of the close of business on the last day of each quarter.").

Furthermore, the decision of whether an activity is CRA-qualifying requires expertise and consideration of complex regulatory factors. Historically, banks' CRA compliance departments and legal functions have generally made internal decisions as to whether investments will be CRA-qualifying. Front line personnel approving loans and investments would need to undergo extensive, ongoing training in order to "check the box." While some banks already train key front line personnel to be familiar with CRA eligibility standards, this training may not extend to all personnel involved in entering loans and investments into a system.

Even if a bank were to build the required systems, connect existing systems, and successfully train its staff to identify correctly the activities that are CRA-qualifying, the bank would still need to obtain and maintain backup documentation for purposes of internal reviews and testing to ensure integrity of the data and subsequent supervisory reviews. Consequently, a "check-the-box" solution would not obviate the need for banks to continue to dedicate significant resources and expertise to CRA qualification decisions.

B. Ways to Reduce the Burdens of the Proposal's Data Collection and Reporting Requirements

Given the substantial burdens discussed above, banks would need more than a year to implement the proposed data collection, recordkeeping, and reporting requirements. Rather than breaking the compliance dates for the AA, data collection, recordkeeping, and reporting into two separate compliance phases, the final rule should provide banks other than small banks with a single compliance period of three years and allow banks to determine how to allocate this time to implementing systems to comply with these different elements of the new regulatory framework. Federal financial agencies have recognized the need for multi-year timeframes to implement new data collection and reporting requirements in other circumstances. For example, when the Consumer Financial Protection Bureau made significant changes to HMDA data collection and reporting requirements in 2015 – changes that were not as extensive as those included in the Proposal – the Bureau provided a two-year compliance period.[5] Many BPI members have reported that they needed the full two years to implement the HMDA changes. BPI members have had similar experiences when complying with other recent rules that have required changes to their recordkeeping systems, such as the FDIC's deposit insurance recordkeeping rule and the Federal Reserve's Single Counterparty Credit Limit rule. The current COVID-19 pandemic, the consequences of which banks expect to demand the dedication of significant resources even beyond the end of the immediate health crisis, further exacerbates the resource constraints requiring an extended implementation timeframe.

Further, to align the timing of the final rule's first reporting requirements with other reporting workstreams, the agencies should ensure that the compliance date for the final rule's reporting requirements is January 1 of the year following the end of the three-year compliance period, rather than a date in the middle of a calendar year.

To minimize the need for further systems changes going forward, rather than make annual cost of living adjustments to the gross annual revenue limit for a loan to a small business or small farm and the loan size limit for a small loan to a business or farm, which would require frequent, burdensome changes to banks' systems, the agencies should make such adjustments every 10 years, using round numbers. This change would reduce the ongoing burdens of CRA compliance.

Additionally, the agencies should take particular care not to impose any new reporting or disclosure requirement that does not serve specific purposes under the Proposal's evaluation framework. This principle is not only good regulatory policy, it is a requirement of the Paperwork Reduction Act.[6] For example, when it comes to qualifying activities like CD loans, investments, and services, there is no need for the agencies to collect data from a bank that does not seek to count the activity toward its CRA Evaluation Measure. If the agencies required banks to report all qualifying activities regardless of whether those activities are counted, banks would be in violation of that

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[5] *See* Home Mortgage Disclosure (Regulation C), 80 Fed. Reg. 66,128, 66,162 (Oct. 28, 2015).

[6] *See* 44 U.S.C. § 3508 (requiring a collection of information to be "necessary for the proper performance of the functions of the agency" and to "have practical utility").

requirement unless they implemented systems to determine, for example, whether *any* of their employees volunteer in any capacity at any time during the evaluation period, and then log those volunteer hours and the tasks performed. The costs of detecting and tracking this activity would far exceed the benefit to banks of counting it toward their CRA Evaluation Measures. In other words, the CD activities that banks report should be required to be *accurate*, but the report should not be required to be *complete*.

Likewise, the agencies should not make public disclosures of a bank's CRA performance on an annual basis, since CRA ratings would be calculated on the basis of average performance over a three-year or five-year evaluation period. Unlike HMDA, the CRA imposes no requirement for annual disclosures, and we do not believe an annual CRA disclosure regime would serve any purpose under the Proposal's framework. To the contrary, annual CRA disclosures could provide a misleading picture of a bank's overall performance, and they could subject a bank to unwarranted criticism based on a below-average year of performance that occurs in a period of overall satisfactory performance. Under the final rule, disclosures should instead cover average performance over a completed evaluation period.

The agencies should similarly tailor the recordkeeping and reporting requirements for banks operating under strategic plans. The standards by which these banks are measured may vary significantly from the CRA metrics that ordinarily apply. Imposing recordkeeping and reporting requirements that are identical to those that apply under the general performance standards would thus add unnecessary burden for these banks, dilute the incentive to adopt strategic plans, and provide agencies a large amount of data irrelevant to assigning a CRA rating.

The Proposal raises certain interpretive issues regarding the way in which a bank is required to geocode deposit and loan data, and the final rule should resolve these issues by minimizing the burden on banks. For example, the final rule should clarify that in the context of an omnibus or intermediated account (*e.g.*, in a sweep program or prepaid program) the bank can treat the address of the depositor as that of the accountholder of record, since the bank may not have access to the addresses of the underlying customers of the accountholder.[7] The final rule should also clarify that banks must capture a customer's income and geography only at the time the customer opens an account, so that customers are not required to report sensitive data to their banks more frequently.

III. Calibration of CRA Evaluation Measure

A. Calibration of CRA Evaluation Measure's Benchmarks

1. Data Limitations in Setting Benchmarks

The agencies calibrated the proposed 11 percent and 6 percent benchmarks for an Outstanding or Satisfactory rating under the CRA Evaluation Measure using a flawed methodology that overstates the amount of qualifying CRA activity in which banks are currently engaged. As a result, the proposed benchmarks are likely to have been set at levels that are more difficult to achieve than the agencies have assumed or intended.

The agencies' proposed benchmarks are based on analyses they conducted using historical data from 2011 through 2017 to determine a range of reasonable estimates for the amounts of CRA-qualifying loans held on bank balance sheets. Because *balance sheet* figures cannot be measured directly using currently-reported data,[8] the agencies relied on separate data sets that provide information on loan *origination* activity.[9] As discussed below,

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[7] We note, for example, that interagency guidance exempts certain intermediated accounts from Customer Identification Program requirements. *See, e.g.*, Interagency Guidance to Issuing Banks on Applying Customer Identification Program Requirements to Holders of Prepaid Cards (Mar. 21, 2016).

[8] Call Report data submitted quarterly by banking institutions to the FFIEC provide only aggregate balance sheet amounts by broad loan category, including total first-lien home mortgages, credit cards, and consumer loans.

[9] *See* 85 Fed. Reg. at 1,220–22.

there are serious limitations to this indirect approach, particularly with respect to residential mortgages and consumer loans. Due to these limitations of the agencies' current data, the agencies should collect better data and conduct further analysis before setting the final benchmarks.

Home Mortgages

For home mortgage loans, the agencies identified all loans in HMDA data that were reported as "originated and held (not sold)" within each calendar year from 2011 through 2017, for each HMDA-filing institution. The agencies then assumed that the share of loans originated to LMI borrowers would be the same as the share of loans on banks' balance sheets that are to LMI borrowers.[10] Based on the brief description of this process that the agencies provided in the preamble to the Proposal, the agencies appear to have overlooked significant limitations of the data in proceeding with their calculations.

First, the description indicates that the agencies based their calculation on the entire year of HMDA data, without considering the fact that loans originated near the end of the year – whether intended for sale or not – will not be reported as sold within the year when HMDA filers submit their year-end data. Generally, HMDA data will significantly overstate the held share for loans originated at least in November and December, because sale is not immediate.

By misclassifying loans originated in the last quarter as held when they are going to be sold soon after the end of the year, the agencies' calculation could significantly overstate the dollar share of loans to LMI borrowers originated and retained on banks' balance sheets. The dollar share of originations to LMI borrowers among loans that are sold generally tends to be higher than among loans that are held, because of the predominance of jumbo-size mortgages among held loans.[11]

Additionally, market conditions during the period of the agencies' data set, 2011 through 2017, may not be representative of typical market conditions, and in fact likely result in a further overstatement of the proportion of mortgage loans to LMI borrowers. The early part of that period was an unusual time in the housing market, during which the demand for mortgages by first-time homeowners (who are more likely to be LMI borrowers) was atypically high. This period of atypically high demand by LMI borrowers inflates the proportion of loans to LMI borrowers for the seven-year sample period compared to normal market conditions.[12]

There are other ways in which the data set may understate or otherwise not reflect the actual share of mortgages to LMI borrowers held on banks' balance sheets. For instance, the preamble to the Proposal indicates that the agencies based their calculation on *all* HMDA reported mortgage originations indicated as not sold, which would include home purchase loans as well as refinancings. A refinancing simply exchanges the original loan for a new loan with different terms, resulting in little net overall impact on bank balance sheets. Counting the gross amount of refinancings and home purchase loans without considering that refinancings reduce the amount of home purchase loans on lenders' balance sheets would constitute a double-counting that overstates the amount of lending to LMI borrowers. Additionally, if the proportion of refinancings to LMI borrowers is different than the share of home purchase loans to LMI borrowers, the agencies' estimates would be off base.

[10] For non-HMDA filers, the agencies assumed that the balance sheet share of CRA qualifying mortgages equaled the median value of the share of loans to LMI borrowers originated by HMDA filers.

[11] Specifically, the dollar share of home purchase loans originated by banks to LMI borrowers averaged about 8 percent for retained loans and 17 percent for sold loans during 2011–2017.

[12] *See* Paul Calem, Lauren Lambie-Hanson, & Susan Wachter, *Is the Community Reinvestment Act Still Relevant to Mortgage Lending?*, 30 Housing Pol'y Debate 46 (2020), https://ideas.repec.org/a/taf/houspd/v30y2020i1p46-60.html.

Credit Card, Auto, and Other Consumer Loans

For credit card, auto, and other consumer loans, the agencies used consumer credit reporting data to calculate the average annual share of new credit accounts associated with borrowers *residing in* LMI census tracts and used that geographic data as a proxy for borrowers' *actual incomes*. This approach provides a potentially inaccurate assessment of the share of consumer loans originated to LMI borrowers.

In particular, as depicted in Figure 1, the size of an auto loan or credit card balance correlates with household income: higher income households have larger credit card balances and larger auto loan amounts.

Figure 1: Average Auto Loan Amounts and Credit Balances by Family Income Classification[13]

Income Category	*Auto Loan Amount ($1,000)*	*Card Balance ($1,000)*
Low	17.6	0.53
Low-middle	17.7	1.28
Middle	21.2	1.89
High-Middle	29.1	2.96
High	35.0	3.80

Because of this correlation, middle- and upper-income households contribute disproportionately to the dollar volume of borrowing in LMI census tracts. Conversely, LMI households will contribute less to the dollar volume of borrowing in middle- and upper-income census tracts. Consequently, use of census tract in place of borrower income category potentially overstates the dollar share of loans originated to LMI borrowers.

To see why, let Q be total credit card borrowing for the U.S. population and let $Q_{i,j}$ be total credit card borrowing by households who are in household income category i and reside in Census tract income category j, where $i \ or \ j = 1$ for low- or moderate-income and $i \ or \ j = 2$ for middle- or upper-income. Then the qualifying share (the dollar share of borrowing by LMI households) is:

$$\text{Qualifying Share} = \frac{Q_{1,1} + Q_{1,2}}{Q}$$

In other words, the true qualifying share is the amount of borrowing by LMI individuals in LMI census tracts, plus the amount of borrowing by LMI individuals in non-LMI census tracts, all divided by the total borrowing in the United States. At the same time, the calculated qualifying share of borrowing by LMI households based on the agencies' approach is:

$$\text{Agency-Calculated Qualifying Share} = \frac{Q_{1,1} + Q_{2,1}}{Q}$$

[13] Federal Reserve Board, *2016 Survey of Consumer Finances (SCF)*, https://www.federalreserve.gov/econres/scfindex.htm (last updated July 23, 2018). Auto loan amount is household total (up to 2 loans included). Card balance is for the household's highest-balance card. Income categories are based on family income quintiles of the full U.S. population.

In other words, the agency-calculated qualifying share is the amount of borrowing by LMI individuals in LMI census tracts, plus the amount of borrowing by non-LMI individuals in LMI census tracts, all divided by the total borrowing in the United States. Thus, the agency calculation will over-estimate the true qualifying share of revolving card credit if $Q_{2,1} > Q_{1,2}$; that is, if total borrowing by middle- and upper-income households residing in low- or moderate-income census tracts exceeds total borrowing by LMI households located in middle- or upper-income census tracts. Because revolving card balances increase with income (among those consumers that utilize revolving card credit), this condition might hold. Of course, the degree to which the agencies' calculation provides an accurate measure of the true qualifying share would also depend on the degree to which households of different income levels segregate by neighborhood.

There are other potential limitations in the agencies' data set that could further result in the agencies making an inaccurate estimate. These limitations include, but are not necessarily limited to, the following:

- First, credit bureau data do not indicate whether a bank-originated auto loan or credit card balance is held on balance sheet or securitized. Inability to exclude securitized loans from the agencies' calculation introduces potential inaccuracy into their measurement of qualifying share of on-balance sheet loans. It may be that banks are generally more likely to securitize and sell consumer loans to LMI borrowers.

- Second, the agencies' description does not indicate whether loans originated by a nonbank lender or (in the case of student loans) government agency are excluded from their calculation. Such loans bear no relation to the balances held on bank balance sheets.

- Third, card balances recorded in consumer credit report data are spending balances, not revolving balances as recorded in Call Report data. Therefore, the dollar share of credit card balances as measured using the agencies' approach using credit report data may be very different from the actual share as would be measured by the Call Report category of credit card loans.[14]

Rather than setting benchmarks using historical data that are not necessarily consistent with the data that would be evaluated under the Proposal, the agencies should collect data for two years before setting the benchmarks for various ratings under the CRA Evaluation Measure. They should then use this data to set benchmarks that would create an aggregate distribution of CRA ratings across the industry that is similar to the distribution of ratings under the current regulations. Such an approach would ensure both that the benchmarks reflect how banks operate under the new requirements and that industry-wide stratification of banks' CRA performance remains consistent as banks transition from the current CRA regulations to the new regime.

2. Other Benchmark Calibration Issues

Under the Proposal, the benchmark required to earn an Outstanding presumptive rating (11 percent) is almost double the benchmark to earn a Satisfactory presumptive rating (6 percent), which could disincentivize banks to reach for an Outstanding rating. It would be more appropriate to set the benchmark for an Outstanding rating at a level that is 150 percent of the threshold required for a Satisfactory rating. Doing so would still require a bank to have a meaningfully higher level of CRA qualifying activities to achieve an Outstanding rating versus a Satisfactory rating. And with the bar proposed to be set so high for an Outstanding presumptive rating relative to a Satisfactory presumptive rating, the final rule should create additional, tangible incentives to motivate banks to strive for an Outstanding rating, such as by presuming that a bank with an Outstanding rating has a satisfactory record of meeting

[14] In fact, based on the Federal Reserve Board's 2016 Survey of Consumer Finances, only about a quarter of consumers with credit cards regularly revolve their balances, whereas 60 percent carry only transactions balances—they regularly pay in full their entire statement balance each month.

the convenience and needs of its community if it submits a licensing application that requires consideration of that factor.

Further, the agencies' description of the proposed rating benchmarks as "initial" and subject to review every three years creates uncertainty that undermines the agencies' goals of predictability and objectivity. The agencies should commit to providing at least one full evaluation period (whether three years or five years) of advance notice prior to any increase in the benchmarks becoming effective.

B. Increase to Numerator for Branches Serving LMI Communities

The Proposal provides an up to 1.0 percent increase in the numerator of the CRA Evaluation Measure based on the proportion of the bank's branches that are located in LMI census tracts, distressed areas, underserved areas, and Indian country. This "add-on" for LMI branches does not provide adequate recognition of the community benefits derived from physical branches located in LMI neighborhoods. These branches often serve as a cornerstone of economic and even social activity in LMI neighborhoods and provide a visible sign of a bank's commitment to the community. However, a bank that had 100 percent of its branches located in LMI neighborhoods would receive only a 1.0 percent credit to its CRA Evaluation Measure. The multiplier applied to the percentage of a bank's branches located in LMI neighborhoods should be at least doubled to 2.0 percent.

In addition, the final rule should count branches that *serve* LMI communities toward this increase to the same extent as branches that are *located* in LMI census tracts. Such an approach would be consistent with OCC guidance on the current CRA regulations' large bank Service Test, which affords CRA credit to branches outside of LMI geographies that serve the needs of residents of an LMI area, so long as evidence exists that those branches serve customers in an LMI area.[15]

IV. Use of Balance Sheet Value in CRA Evaluation Measure and CD Minimum

The restricted focus of both the CRA Evaluation Measure and CD Minimum on the balance sheet value of qualifying activities would significantly undervalue the benefits to a bank's communities of several important types of community reinvestment activities that are conducted entirely off the bank's balance sheet, reflected on the bank's balance sheet for a short period, or have beneficial impacts not reflected in their dollar amounts.

First, and most importantly, providing only 90 days' worth of credit to a qualifying retail loan that a bank originates and sells within 90 days, as the Proposal would do, gives far too little credit to the bank originating the loan. For an illustration of how drastically this treatment would understate the value of originating a loan compared to holding it, consider the example of a bank ("Bank A") that originates a $100,000 30-year mortgage to an LMI borrower and immediately sells the loan to a different bank ("Bank B") that holds it on balance sheet for 30 years. If Bank A were subject to a three-year evaluation period, the value of the loan it originated would count for 1/12th of one of Bank A's evaluation periods (or the equivalent of $8,333.33); on a five-year evaluation period, the value of the loan would count for just 1/20th of one evaluation period (or the equivalent of $5,000). In contrast, for Bank B, for which the average outstanding balance over the life of the loan would be 5/8ths of the initial balance (or $62,500) assuming full repayment, the outstanding value of the loan would count for *ten full* three-year evaluation periods (or the equivalent of $625,000), or six full five-year evaluation periods (or the equivalent of $375,000). Thus, originating a 30-year mortgage would count for just *1/75th* of the value of buying and holding it through maturity under the Proposal.

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15 *See* Community Reinvestment Act: Supervisory Policy and Processes for Community Reinvestment Act Performance Evaluations, OCC Bulletin No. 2018-17 (June 15, 2018), https://www.occ.gov/news-issuances/bulletins/2018/bulletin-2018-17.html (citing "bank marketing practices that target LMI areas" as an example of such evidence).

The agencies have not offered, nor can BPI identify, any valid policy justification for such a starkly unfavorable treatment of loan originations. In fact, there are several reasons why the CRA regulations should accord significant credit to loan originations. In particular, CRA credit for loan originations promotes:

Credit to communities that need access to credit

- Making credit more broadly available, particularly to LMI borrowers or neighborhoods, to small businesses, or for development of affordable rental housing requires an understanding of the needs and circumstances of the community. A bank often needs "boots on the ground" in order to develop that understanding firsthand. By investing in the infrastructure necessary to originate loans that are responsive to its community's needs and circumstances, the bank provides true value to its community.

- The activities of the government-sponsored enterprises ("GSEs") Fannie Mae and Freddie Mac are designed to encourage home loan origination by supporting a secondary market that enables banks to sell the loans they originate, then extend additional credit. Moreover, Fannie Mae and Freddie Mac are mandated to achieve specific goals for affordable home mortgages. Originators also sell Federal Housing Administration ("FHA") and U.S. Department of Veterans Affairs ("VA") loans into securitizations guaranteed by Ginnie Mae. By severely discounting the value of originated loans, the Proposal would remove a key incentive for banks to originate GSE-conforming loans, FHA loans, and VA loans, which are a key source of mortgage financing for LMI individuals and veterans. The Proposal would thus directly counter the longstanding public policy objectives of these entities and agencies, potentially disrupting a market structure that has helped make the U.S. mortgage markets the deepest, most liquid mortgage markets in the world, promoting home ownership as a core means for consumers to build wealth.

- It is axiomatic to say that a loan cannot be made without an originator to make it. Yet, the Proposal would create substantial disincentives for banks to originate loans rather than to buy loans. In turn, this treatment could constrict credit to the underserved communities the CRA aims to serve and result in unregulated or lightly regulated originators filling the void, with attendant increased consumer protection risks.

- As the federal banking agencies recognized in the preamble to the 1995 final rule adopting the current CRA regulations, counting originations "rewards, rather than penalizes, institutions for selling loans on the secondary market, which frees up capital for additional lending and increases credit availability."[16] Conversely, discouraging loan originations, as the Proposal would do, may decrease the amount of credit available to LMI communities.

Robust consumer protection, grounded in banks' established compliance processes

- The originating lender is responsible for complying with a host of federal and state consumer protection requirements, such as the Equal Credit Opportunity Act, Federal Housing Act, and the TILA-RESPA Integrated Disclosure rules for a mortgage, and typically bears sole or primary liability for compliance violations. Banks invest substantially in their compliance and customer relations functions to comply with applicable requirements and ensure a smooth customer experience. CRA regulations should appropriately value these efforts.

[16] 60 Fed. Reg. 22,156, 22,164 (May 4, 1995).

<u>Prudent risk management by individual banks and the overall stability of the financial system</u>

- A market structure whereby banks originate loans and sell them to institutional investors can reduce risk in the banking system. But, by encouraging banks to purchase loans that non-banks originate, the Proposal could lead to the opposite outcome and increase systemic risk.

- The originating lender can retain significant risk exposure after sale or securitization of a loan, such as through repurchase risk (especially in the case of residential mortgages) or via credit guarantees.

One way to address this problem is to count the origination value rather than balance sheet value of a qualifying retail loan in the numerator of the CRA Evaluation Measure of the originating bank, as if held on the balance sheet for the entirety of a single evaluation period. For a bank that purchases the loan, the dollar value at the time of purchase would be counted for a single evaluation period, as if held on the balance sheet for the entirety of the evaluation period in which it was purchased, so long as the bank holds the loan on balance sheet for at least three years. If the loan is renewed or refinanced, the adjusted methodology would dispense credit again at the time of renewal or refinancing. In the context of open-end credit facilities, the methodology would count the credit limit for the first evaluation period.[17] Because qualifying retail loans would generally only count for a single evaluation period, the numerator of the CRA Evaluation measure would need to be recalibrated downward. An advantage of this approach is that it would be consistent with banks' existing records and reporting, and therefore reduce the substantial burdens that the Proposal would impose. And because many originations – especially those sold to or guaranteed by U.S. government agencies or GSEs – are securitized upon sale and purchased by institutional investors, CRA credit would often accrue solely to the loan's originator, mitigating any concerns over double-counting.

An alternative solution to this problem that does not require abandoning the balance sheet focus of the Proposal is for the final rule to provide a much higher floor than 90 days, or a significant multiplier, for the value of a qualifying retail loan that is originated and sold. Preliminarily, we believe it would be appropriate to count the balance of a qualifying retail loan that a bank originates for at least the entirety of one full evaluation period (whether that evaluation period is three years or five years), as if the loan were on the bank's balance sheet each month during the period and paid on schedule.

Second, the proposed CRA Evaluation Measure and CD Minimum would not apply any floor or multiplier to a CD loan that a bank sells after origination, but it should. For example, under the Small Business Administration's 504 Loan Program, a bank may make loans to small businesses to promote economic development and sell those loans to a Certified Development Company ("CDC"). These loans require expertise and infrastructure to originate, but the Proposal would award very little (if any) credit for the bank's role in the program. The final rule should extend the same floor or multiplier that applies to a qualifying retail loan originated and sold by the bank to a CD loan originated and sold by the bank. Thus, it would be appropriate to count the balance of the CD loan for at least the entirety of one full evaluation period, as if the loan were on the bank's balance sheet each month during the period and paid on schedule.

Third, the Proposal's focus on balance sheet value would significantly understate the value of donations or grants to CD organizations. Donations and grants are much more beneficial to the recipient than a loan, because they do not need to be repaid. But the Proposal would only allow a donation or grant in support of community development one year's worth of credit, whereas the outstanding balance of a loan would count for the entire life of the loan, potentially spanning multiple evaluation periods. Similar to our suggested change for loan originations, the final rule should count the value of a community development donation or grant for at least the entirety of one full evaluation period.

[17] As discussed further below, unfunded commitments to lend provide tangible benefits to consumers and businesses, and such commitments should receive CRA credit under any final rule.

Fourth, the proposed CRA Evaluation Measure would largely ignore an unfunded commitment to lend, even though legally binding commitments to lend can have significant value to the recipient. For example, a home equity line of credit made to an LMI borrower provides that borrower with the financial security to withstand a large unexpected payment obligation. Similarly, a letter of credit from a bank can allow a CD organization to expand its operations and reach. The agencies should address this issue by applying a conversion factor to commitments to lend, similar to the regulatory capital rules' standardized credit conversion factors that apply to off-balance sheet exposures, which are intended to calculate the likelihood that a bank will be required to fulfill the commitment.

Fifth, the CRA Evaluation Measure would undervalue CD services to such a degree that banks may not even find it worthwhile to track the activity. CD services can provide significant value to a community and can help the bank understand its community's needs. For example, a bank officer's service on the board of a community group in an LMI area can give that group the benefit of financial expertise and experience that might not otherwise be readily available to the group. At the same time, the bank officer's service on the community group's board can provide the bank insights into the credit and community development needs of the community, better enabling the bank to meet those needs. Although the true value of this service to the community is difficult to quantify, it far surpasses the hourly compensation value of that bank employee's time. Under the Proposal, even if a bank could assume that the median hourly compensation value for its employees' volunteer hours is $36,[18] 15,000 hours of CD services would count for just $540,000, which understates the significant intangible value these services provide and is a miniscule amount compared to the balance sheet value of a large bank's CD lending and CD investments. To reward this activity properly and encourage banks to continue it, the final rule should apply at least a 10X multiplier after the bank has multiplied the employee hours by the actual median hourly compensation value. In all events, banks should have the option to use a standard $36 per hour figure in order to reduce their recordkeeping burdens.

Sixth, the proposed CRA Evaluation Measure and CD Minimum would fail to properly quantify the most impactful qualifying activities. Despite the Proposal's allowance for qualitative ratings adjustments via consideration of performance context, a dollar-based measure would skew CRA-qualifying lending toward larger but not necessarily more impactful activities. To counter this incentive, the CRA Evaluation Measure and CD Minimum should incorporate explicit up-weighting of the dollar value attributable to special CRA lending programs (analogous to the multiplier for certain CD activities). For example, lending that has contributed to revitalization of a neighborhood, providing social and economic benefits to families and businesses in the neighborhood, could be weighted more than dollar-for-dollar.

Finally, the CRA Evaluation Measure and CD Minimum would not count the substantial efforts associated with sponsoring and syndicating LIHTC and NMTC. A bank syndicator of LIHTC or NMTC engages in a number of activities that are critical to financing of affordable housing. These activities may include, among other things, working with the developer to ensure the project qualifies for LIHTC or NMTC; obtaining tax credit allocations from the CDFI Fund (NMTC) or providing support for tax credit allocation requests by developers to state housing agencies (LIHTC); organizing, sponsoring, and marketing funds for investors that meet their specific geographic and tax-related needs; monitoring the fund and its investments for ongoing compliance with applicable tax and other requirements; and preparing and distributing fund information. Most of this activity is done off the syndicating bank's balance sheet, and therefore would not be counted under the proposed CRA Evaluation Measure and CD Minimum. However, without these syndication activities, other investors may find it difficult or impossible to identify, source, and finance LIHTC and NMTC opportunities. In fact, smaller institutions typically do not have the resources to structure, price, underwrite and manage these investments themselves, which is why they rely on syndicators for these activities. To account for the significant value provided by LIHTC and NMTC syndicators, the final rule should provide the syndicating bank with credit based on a percentage of the amount of LIHTC and NMTC syndicated by the bank (*e.g.*, 50% of the amount syndicated), applicable for each year the syndicator manages the investment for the third party.

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[18] The Proposal notes that the median hourly compensation value for the banking industry is approximately $36 per hour. *See* 85 Fed. Reg. at 1,215.

V. Retail Lending Distribution Tests

A. Scope of Application of Distribution Tests

1. Inclusion of Consumer Loans

The Proposal would, for the first time, subject consumer loans to mandatory evaluation under a borrower income distribution test, even where consumer lending[19] does not constitute a substantial majority of the bank's business activities. We urge the agencies to provide in the final rule that consumer lending is subject to the Retail Lending Distribution Tests only at a bank's option, and not whenever a consumer lending sub-category is a major retail lending product line for the bank. There are several reasons why mandatory inclusion of consumer lending in the Retail Lending Distribution Tests is inappropriate:

- Mandatory evaluation of consumer loans that constitute a major retail lending product line could undermine safety and soundness and increase systemic risk. Some types of consumer lending, particularly unsecured consumer loans, typically present greater credit risk than other types of qualifying CRA activities such as mortgage lending. Many banks limit their overall exposure in riskier product segments by applying conservative underwriting standards, such as by limiting their lending to only prime borrowers or a subset of below-prime borrowers. Under the Proposal, a bank would receive an unsatisfactory CRA rating in an AA unless a substantial portion of any sub-category of consumer loans that constitute a "major retail lending product line"[20] were made to LMI borrowers in the AA, which could force the bank to expand into subprime (or lower subprime) segments in order to pass. Congress never intended this result when it enacted the CRA. To the contrary, Congress specified in several places in the statute that any evaluation measure must be "consistent with the safe and sound operation" of institutions subject to the Act.[21] Consumer lending associated with high delinquency rates would also be inconsistent with the statute's aims of promoting long-term improvement in economic outcomes for borrowers in LMI communities.

- It can be more difficult for a bank to control the income distribution of its consumer loans than other types of loans subject to evaluation under the Retail Lending Distribution Tests. Consumer loans are generally smaller in dollar amount than mortgages, and consumer lending tends to be a high volume business. Additionally, many consumer loans are made in partnerships with third parties, such as auto dealers or retailers, that require credit decisions to be made nearly instantaneously at the point of sale. Given these characteristics, banks often employ automated underwriting models for consumer loans that rely on stated income levels as a proxy for inputs that would be used in a more time-intensive mortgage underwriting process. Such data should not serve as the basis of a bank's CRA performance evaluation.

- Likewise, banks may have little control over the geographic distribution of their borrowers for some types of consumer loans. This makes it challenging for them to control the *demographic* distribution of their borrowers within a particular AA, and therefore to satisfy the proposed Borrower Distribution Test. For a bank that makes consumer loans in partnership with a third party that is responsible for lead generation (such as an auto dealer), even if the bank adjusts its underwriting criteria to approve more LMI loan applicants, the bank may not be able to control whether LMI individuals in a given geography submit loan applications in the first place. For example, a bank may have credit card partnerships with

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[19] We note that mortgage loans, small business, and small farm loans are not considered "consumer loans" for these purposes, and we therefore are not advocating for those loans to be removed from properly constructed distribution tests.

[20] As we discuss later in this section, we interpret the Proposal as assessing each sub-category of consumer loans separately under the Retail Lending Distribution Tests.

[21] *See* 12 U.S.C. §§ 2901(b) & 2903(a)(1).

retailers that generally serve both LMI and non-LMI customers, but in any given AA, the bank's retail partners could locate their facilities in a neighborhood with few LMI consumers. In such circumstances, the bank, which could not control the retailers' real estate decisions in the AA, might not be able to satisfy the Borrower Distribution Test in that AA. In contrast, a bank seeking to receive more mortgage loan applications from LMI individuals in a given AA may have success by opening a branch in an LMI neighborhood within the AA.

- The Proposal could encourage banks to exit or scale back their consumer lending product lines lest they fail the Retail Lending Distribution Tests. In turn, this behavior could lead to a contraction of safe, responsible consumer credit available in the marketplace.

- Consumer loans can include wealth management loans, such as securities-backed loans or loans to finance the purchase of art, that are a poor fit with the CRA's aims of addressing the unmet credit needs of LMI communities.[22] These loans would fall within the sub-categories of "other revolving credit plans" or "other consumer loans." Under the Proposal, the Borrower Distribution Test would compare the income levels of borrowers of these loans to those of borrowers of radically different types of loans within the same broad sub-categories of "other revolving credit plans" and "other consumer loans," including student loans and payday loan substitutes. We do not believe the agencies intend to incentivize a bank with a securities-backed loan business line to market those loans to LMI individuals, or to establish a new business line of unsecured personal loans targeting an LMI population in order to offset the income distribution of its securities-backed loans, but the Proposal could have those effects.

For these reasons, consumer lending should be subject to the Retail Lending Distribution Tests only at a bank's option, and not whenever a consumer lending sub-category is a major retail lending product line for the bank.

Additionally, mandatory evaluation of consumer loans even when consumer lending constitutes a "substantial majority" of the bank's business – as under the current CRA regulations – would not be necessary under the Proposal. The federal banking agencies stated that they adopted the current regulations' "substantial majority" test in 1995 because when a substantial majority of a bank's business is consumer lending, "meaningful evaluation of [those] institutions might have been very difficult" under the framework set forth in the current CRA regulations.[23] But in contrast to the current regulations, the Proposal *would* establish a methodology for meaningful evaluation of a bank for which consumer lending constitutes a substantial majority of its business: the CRA Evaluation Measure. The federal banking agencies' stated reason for adopting the "substantial majority" test would therefore have no relevance under the general evaluation framework set forth in the Proposal. Moreover, the current CRA regulations contain an important 'safety valve' to the "substantial majority" test by allowing a bank that focuses on a particular category of consumer lending to be designated as a limited purpose bank, and thus not be evaluated on credit distribution, but the Proposal would allow no such thing. Nevertheless, including the "substantial majority" test in the final rule would be far preferable to subjecting a consumer lending product line to the Retail Lending Distribution Tests based merely on the 15 percent threshold. And, if the agencies ultimately include the "substantial majority" test, they should clarify its applicability by setting its threshold at 75 percent of total lending, including commercial loans.

If the final rule requires mandatory evaluation of consumer lending under the Retail Lending Distribution Tests in any circumstance (including if the final rule retains the current "substantial majority test"), the agencies should make several changes to make such evaluation more workable:

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[22] The Proposal's definition of "other consumer loans" excludes loans that are for purchasing or carrying securities, but securities-backed loans can be for general household, family, and other expenditures rather than purpose credit.

[23] 60 Fed. Reg. at 22,164.

- The agencies should revise the proposed definition of a "major retail lending product line" to require evaluation of a particular consumer lending product line only if loans in that product line constitute a much higher threshold than 15 percent or more, such as at least 30 percent or more, of the bank's total retail loan originations by dollar volume. We support an increase to the 15 percent major retail lending product line threshold for all retail lending product lines, but an increase to the threshold would be particularly important for consumer lending product lines, which, unlike mortgages, have not traditionally been a focus of CRA evaluations or of banks' CRA programs.

- The agencies should remove "other consumer loans" and "other revolving credit plans" from the types of consumer loans subject to reporting and evaluation under the Retail Lending Distribution Tests. These sub-categories of loans, which are "catch-alls" for consumer loans that are not automobile and credit card loans, tend to include a variety of products that may not be responsive to the needs of LMI individuals, and/or are not appropriate to be compared with other products in the same sub-categories. For instance, the sub-category of "other consumer loans" could include products as wide-ranging as securities-backed loans, art loans, yacht loans, and student loans. If there are particular types of consumer loans within the sub-categories of "other consumer loans" and "other revolving credit plans" that are more responsive to community credit needs, such as student loans, those loan types should form their own sub-categories. Alternatively, the agencies could implement a dollar cap on these two sub-categories so that they exclude at least some loans that are not appropriate to be compared with other loans in those sub-categories.

- The Proposal leaves ambiguous the critical issue of whether "consumer loans" is its own retail lending product line or each *sub-category* of consumer loans is a retail lending product line. The agencies should resolve this significant ambiguity in the final rule with a twofold approach.

  - First, the agencies should clarify that for purposes of determining a bank's major retail lending product lines and the minimum number of originations to be subject to the Retail Lending Distribution Tests within an AA, "consumer loans" should not be considered a single retail lending product line. Instead, each sub-category of consumer loans should be considered a retail lending product line. Thus, for example, if the major retail lending product line threshold remained at 15 percent in the final rule, and credit card loans and auto loans constituted 8 percent and 9 percent, respectively, of a bank's total retail loan originations by dollar volume, the bank should not be required to have either its credit card or its auto loans considered under the Retail Lending Distribution Tests. And if credit card and auto loans each constituted more than 15 percent of the bank's total retail loan originations by dollar volume, but the bank originated fewer than the required number of credit card loans and fewer than the required number of auto loans within an AA during a particular evaluation period, neither credit cards nor auto loans should be subject to the Retail Lending Distribution Tests in that AA for the evaluation period.

  - Second, the final rule should clarify that, if a bank has multiple sub-categories of consumer loans that are each a major retail lending product line, the Retail Lending Distribution Tests evaluate all of those sub-categories of consumer loans on a *combined basis* within an AA. We discuss in Section V.B of this letter, below, how the agencies should combine *all* major retail lending product lines subject to the Retail Lending Distribution Tests. This approach would reduce the large number of tests to which a bank can potentially be subject within an AA.

2. Thresholds for Evaluating a Retail Lending Product Line

As proposed, the thresholds for evaluating retail lending product lines under the Retail Lending Distribution Tests are too low in several respects.

First, as discussed above, the agencies should raise the 15 percent threshold within the definition of "major retail lending product line" to at least 30 percent. Such a change would reduce the maximum number of a bank's retail lending product lines from six to three, which would ease the burden associated with the Retail Lending Distribution Tests, but would still capture product lines that are a substantial part of the bank's business.

Second, the agencies should raise and revise the operation of the 20 loan minimum for application of the Retail Lending Distribution Tests to a major retail lending product line within a given AA. The 20 loan cutoff is too low and does not scale with the size of the bank. Under the Proposal, evaluation periods may last up to five years, and a sample size of four loans per year would be far too small to provide statistically reliable data. The cutoff should be at least 50 loans *per year* of the evaluation period, in order to better indicate the areas in which banks' loan origination volume is statistically meaningful.

The final rule should set an even higher minimum number for consumer loans to be subject to evaluation in an AA, given the smaller size of consumer loans and the challenges in controlling geographic distribution of such loans discussed above. An appropriate number would be 100 loans per year of the evaluation period.

The denominator of the Proposal's definition of "major retail lending product line" – total retail loan originations during the evaluation period – would present challenges for banks in planning their CRA activities. By determining the scope of a bank's major retail lending product line based on the *current* evaluation period, the Proposal could create unpredictable and dramatic swings in the designation of major retail lending product lines that undermine the stability and consistency of a bank's CRA programs. The agencies should base a bank's major retail lending product lines on its product mix in the *prior* evaluation period, unless a bank has exited or scaled back a product line in the *current* evaluation period to below the relevant percentage threshold (*i.e.*, 15 percent as proposed, and 30 percent as BPI recommends). In other words, a retail lending product line should only be "major" if it meets or exceeds the requisite percentage of the bank's dollar volume of the bank's total retail loan originations during the prior evaluation period *and* during the current evaluation period. This approach would promote stability and consistency in a bank's CRA obligations.

B. Number of Distribution Tests

As proposed, the Retail Lending Distribution Tests would impose a labyrinthine set of minimum requirements on banks that have multiple major retail lending product lines. Consider the example of a bank that has six major retail lending product lines – an outcome that appears to be possible under the Proposal because each retail lending product line would only need to constitute 15 percent of the bank's originations to qualify as "major."[24] If the bank has originated the minimum number of loans for each major retail lending product line within an AA, the bank could have to pass as many as eight different distribution tests in that AA to receive a Satisfactory or better rating:

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[24] This analysis assumes that each sub-category of consumer lending would be subject to separate evaluation under the Proposal's Retail Lending Distribution Tests, which is a key unanswered question in the Proposal.

Figure 2: Distribution Tests for Retail-Focused Bank with Six Major Retail Lending Product Lines Under the Agencies' Proposal

<table>
<tr><th>Major Retail Lending Product Line</th><th>Distribution Tests to Which Product Line is Subject</th></tr>
<tr><td>Home mortgage loans</td><td>1. Borrower Distribution Test</td></tr>
<tr><td rowspan="2">Small loans to businesses</td><td>2. Borrower Distribution Test</td></tr>
<tr><td>3. Geographic Distribution Test</td></tr>
<tr><td rowspan="2">Small loans to farms</td><td>4. Borrower Distribution Test</td></tr>
<tr><td>5. Geographic Distribution Test</td></tr>
<tr><td>Automobile loans</td><td>6. Borrower Distribution Test</td></tr>
<tr><td>Credit cards</td><td>7. Borrower Distribution Test</td></tr>
<tr><td>Other consumer loans</td><td>8. Borrower Distribution Test</td></tr>
</table>

On top of these eight distribution tests, the bank would be required to score at least 6 percent on the CRA Evaluation Measure and satisfy the CD Minimum within the AA. Thus, a bank could be required to satisfy as many as *ten different tests* in a single AA in order to receive a Satisfactory or better rating for the AA. A bank that has dozens of AAs could be subject to over a hundred separate minimum requirements to receive a Satisfactory or better rating at the bank level. This result is not only excessively burdensome, but also unfair, because it could lead to a bank receiving an unsatisfactory rating when it plainly has a satisfactory record of community reinvestment when its performance is considered holistically. As a result, the Proposal could generate ratings that have little connection to the reality of a bank's impact on its community.

To address this issue, the agencies should adopt a single Borrower Distribution Test and, if applicable, a single Geographic Distribution Test for each AA. The Borrower Distribution Test should cover all of the types of loans subject to that test, on a *combined* basis. The Geographic Distribution Test should cover small loans to businesses and small loans to farms, also on a *combined* basis. In our example of a bank that has six major retail lending product lines and has originated the minimum number of loans for each of those product lines in an AA, the bank should be subject to just two tests within the AA:

Figure 3: Distribution Tests for Retail-Focused Bank with Six Major Retail Lending Product Lines Under Alternative, Consolidated Approach

<table>
<tr><th>Distribution Tests to Which Bank is Subject in the AA</th><th>Loans Covered by Test</th></tr>
<tr><td rowspan="6">1. Borrower Distribution Test</td><td>Home mortgage loans, plus</td></tr>
<tr><td>Small loans to businesses, plus</td></tr>
<tr><td>Small loans to farms, plus</td></tr>
<tr><td>Automobile loans, plus</td></tr>
<tr><td>Credit cards, plus</td></tr>
<tr><td>Other consumer loans</td></tr>
<tr><td rowspan="2">2. Geographic Distribution Test</td><td>Small loans to businesses, plus</td></tr>
<tr><td>Small loans to farms</td></tr>
</table>

This revised framework would reduce the number of specific tests to which a bank can be subject within an AA to a maximum of two distribution tests, and up to four tests overall (including the CRA Evaluation Measure and, if retained in the final rule, the CD Minimum). In addition, this revised framework would allow for a more holistic assessment of the distribution of a bank's retail loans by *collectively* assessing the distribution of the bank's home mortgage loans, small loans to businesses and farms, and any other retail lending product line required to be considered. Doing so would help mitigate the potential for the Proposal to require a bank to expand into subprime segments for any individual loan type – perhaps contrary to the bank's business model and interests of safety and soundness – simply in order to pass the distribution tests.

We would also support weighting a bank's originations in each category of major retail lending product line by that product line's percentage of the bank-level dollar volume of total retail loan originations that are in a major retail lending product line.[25] Consider, for instance, a bank that has two major retail lending product lines, home mortgage loans and credit cards, that are responsible for 60 percent and 20 percent of the bank-level dollar volume of total retail loan originations, respectively. The home mortgage line should make up 75 percent of the weighted evaluation of major retail lending product lines (60%/80%), and the credit card product line should make up 25 percent of the weighted evaluation (20%/80%). The bank would thus multiply its percentage of home mortgage loans to LMI individuals and families in an AA by 75 percent, multiply its percentage of consumer loans to LMI individuals and families in the AA by 25 percent, and add the percentages together for purposes of comparing the bank's performance within an AA to the AA's demographic comparator and peer comparator. The bank would apply the same weighting to the lending activity by all banks in the AA in order to generate a single peer comparator that is tailored to the bank's product mix. Finally, the denominator of the tests would be weighted in a similar manner. Thus, for instance, while the denominator of the Borrower Distribution Test measures different demographic data points for home mortgages (percent of residents of the AA that are LMI) and small loans to businesses (the

[25] If consumer loans are excluded from evaluation under the Retail Lending Distribution Tests, it may make sense to conduct the weighting by loan count rather than dollar volume, but because consumer loans tend to be relatively smaller in size but larger in number, inclusion of consumer loans in the weighting would skew the comparison.

percentage of businesses in the AA that are small businesses), a weighting would allow the final rule to maintain these different denominators and still consolidate the Proposal's many distribution tests.

In the alternative, the final rule could provide that a bank satisfies the Borrower Distribution Test and Geographic Distribution Test for an AA if 50 percent or more of the bank's major retail lending product lines subject to such tests within the AA satisfy the Borrower Distribution Test and, where applicable, Geographic Distribution Test. For instance, in the example summarized in Figure 2 above, the bank has six major retail lending product lines subject to the Borrower Distribution Test (home mortgage, small loans to businesses, small loans to farms, automobile, credit card, and other consumer), and two major retail product lines subject to the Geographic Distribution Test (small loans to businesses and small loans to farms). The bank should qualify for a Satisfactory rating in the AA if, for example, its home mortgage, small loans to businesses, and automobile loans product lines satisfy the Borrower Distribution Test and its small loans to businesses product line satisfies the Geographic Distribution test. This approach would make the Retail Lending Distribution Tests based on a more holistic, rather than granular, assessment of the bank's lending in the AA, and avoid penalizing a bank for a single lending product line when 50 percent or more of its lending product lines satisfy the agencies' tests.

C. Treatment of Purchased Loans, Loan Renewals, Extensions, and Credit Line Increases in Distribution Tests

The Proposal is ambiguous about whether the Retail Lending Distribution Tests, as proposed, would count only those loans that the bank originates, and what counts as an origination. For example, §_.11(c)(1) of the proposed rule text provides that to pass the borrower distribution test for a home mortgage lending product line, "a bank's percentage of home mortgage loans to low- and moderate-income individuals and families originated during the evaluation period in the assessment area must meet or exceed the threshold established for either the associated borrower demographic comparator or the associated borrower peer comparator." It is unclear whether the term "originated" (i) requires the specific *bank being evaluated* to have originated the loan, and (ii) includes renewals and extensions of an existing loan, and increases in capacity of a line of credit.

Purchased loans originated by any lender during the evaluation period should be evaluated in the Retail Lending Distribution Tests. Some banks are unable to penetrate LMI borrower markets solely through originations and instead make loan purchases to reach those borrowers. This is particularly true of banks engaged in retail lending through partnerships with third parties that are responsible for lead generation. Such banks may have less ability to control the income distribution of loan applicants than banks making loans through traditional channels. Furthermore, some banks purchase loans originated through state housing finance agency loan programs, which are often targeted to first-time home buyers. Banks may also purchase loans in partnership with community development financial institutions ("CDFIs") and CDCs, or from nonprofits focused on access to housing, such as Habitat for Humanity.

Counting purchased loans in the Retail Lending Distribution Tests would recognize the significance of these loans to LMI borrowers and their communities. It would also promote the liquidity of loans made in LMI areas, which in turn would incentivize originators to lend in these areas, increase competition for lending in these areas, and decrease interest rates for borrowers. Additionally, such an approach would be consistent with the federal banking agencies' current CRA regulations' Lending Test, which explicitly considers both "originations and purchases of loans."[26]

Likewise, under the current large bank performance tests, the federal banking agencies, when assessing the distribution of a bank's home mortgage loans and loans to small business, consider not only the loans initially originated by the bank, but also renewals and extensions of a loan and increases in a line of credit provided to the

[26] *See* 12 C.F.R. §§ 25.22(a)(2) & 345.22(a)(2).

borrower. Each of these actions typically involves a credit review of the borrower, and thus should continue to be considered in an analysis of the distribution of a bank's retail lending within an AA.

D. Calibration of Comparators for Borrower Distribution Test and Geographic Distribution Test

The comparators contained in the proposed Borrower Distribution and Geographic Distribution tests (*i.e.*, 55 percent of the relevant demographic comparator and 65 percent of the relevant peer comparator) present significant concerns insofar as they would apply to products that have never before been subject to mandatory distribution evaluations under the CRA, such as consumer loans. The agencies have not presented historical data on the distribution of these loans, nor have they articulated any basis justifying their evaluation against the same comparators as other loans. Therefore, provisions of any final rule evaluating the distribution of consumer loans should contain comparators that are empirically tailored to the attributes of these loans. Because of their unique safety and soundness concerns discussed in Section V.A.1 above, consumer loans may be better evaluated through comparators significantly lower than 55 percent of the relevant demographic comparator and 65 percent of the relevant peer comparator.

In addition, it is not clear from the proposed rule text whether the borrower comparator and peer comparator would be based on data that are contemporaneous with the bank's evaluation period. We support basing the comparators on the last full calendar year of data available on the first day of each year of the bank's evaluation period so that a bank can know in advance the minimum requirements to which it will be subject for a given year. For example, if the agencies make year-end comparator data available by June 30 of the following year, and a bank were subject to a three-year evaluation period covering the calendar years 2027, 2028, and 2029, the relevant comparators should be based on aggregate data in the AA for the calendar years 2025, 2026, and 2027.

Finally, we note that the peer comparators would be based on only a limited, and potentially unrepresentative, set of industry data, because the activities of small banks and Federal Reserve-regulated banks would not be included in the data.[27] This issue underscores why the OCC and FDIC should achieve consensus with the Federal Reserve before issuing any final rule.

VI. CD Minimum

While we support the inclusion of a CD Minimum requirement at the bank level, the final rule should not include CD Minimums at the *AA* level because of the significant burdens they would impose on banks with a substantial number of AAs. Banks may not have the same opportunities within all of their AAs to conduct CD activities. A bank could have a single branch or deposit-taking ATM in an AA (in the case of a facility-based AA) or even zero branches or deposit-taking ATMs in an AA (in the case of a deposit-based AA). Without a meaningful branch presence, the bank would struggle to identify CD opportunities and carry out CD activities.

If the final rule nevertheless includes AA-level CD Minimums, those minimums should be decreased to 1 percent. If a bank were subject to the same 2 percent CD Minimum obligation at the AA level as at the bank level, the bank could have less of an incentive to engage in CD activities in any AA in an amount exceeding the minimum – including in AAs where those activities could have a greater impact, such as in rural or LMI areas where deposit

[27] There is also ambiguity as to whether the peer comparator for an OCC-regulated bank would be based on data that includes OCC- and FDIC-regulated banks, or only the former (and vice versa). The proposed rule text for OCC-regulated banks states, for example, that "The geographic peer comparator threshold is 65 percent of the percentage of small loans to businesses in low- and moderate-income census tracts originated by all banks evaluated under the general performance standards in § 25.12 in the assessment area." The phrase "all banks evaluated under the general performance standards in § 25.12" could be understood to exclude FDIC-regulated banks, which are subject to 12 C.F.R. Part 345 rather than Part 25.

levels may be lower than in other AAs. Setting a lower CD minimum at the AA level would give a bank more flexibility and incentive to allocate its CD activities to areas where the need for community investment is greater.[28]

VII. Bank-Level Rating and Ratings Adjustments

A. Requirement to Perform Satisfactorily in a Significant Portion of the Bank's AAs and in AAs Where the Bank Holds a Significant Amount of Deposits

The Proposal would require a bank to receive an Outstanding or Satisfactory rating in a "significant portion" of its AAs *and* in those AAs where the bank holds a "significant amount" of deposits to receive the same rating at the bank level. The preamble to the Proposal states that "significant portion" and "significant amount" both mean 50 percent.

The final rule should revise this framework in several respects. First, a bank should only be required to receive a given rating in a significant portion of its AAs *or* in those AAs where the bank holds a significant amount of deposits. This treatment would accord due weight to the distribution of deposits among a bank's AAs, and better tie the bank's CRA obligations to its deposit base.

Second, to receive an Outstanding or Satisfactory rating at the bank level, a bank should only be required to:

(1) receive the rating in the CRA Evaluation Measure in a significant portion of its AAs or in AAs where the bank holds a significant amount of deposits;

(2) pass the Retail Lending Distribution Tests for its major retail lending product lines in a significant portion of its AAs or in AAs where the bank holds a significant amount of deposits;

(3) if the agencies do not eliminate the AA-level CD Minimum as we suggest above, satisfy the CD Minimum in a significant portion of its AAs or in AAs where the bank holds a significant amount of deposits;

(4) receive the rating in the CRA Evaluation Measure at the bank level; and

(5) satisfy the CD Minimum at the bank level.

Importantly, the AAs described in items (1) through (3) above should *not* be required to be the same AAs.

Consider the example of a bank that has three AAs, numbered 1 through 3, and a single major retail lending product line. The bank should be eligible to receive a bank-level Satisfactory rating if it has a 6 percent or higher CRA Evaluation Measure in AAs 1 and 2, passes the Retail Lending Distribution Tests for its major retail lending product line in AAs 2 and 3, and satisfies any CD Minimum in AAs 1 and 3. Figure 4 depicts this example:

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[28] Examiners could also address these issues by effectively lowering the CD Minimum in particular AAs based on the circumstances (*e.g.*, if there are limited CD opportunities in an AA), but such an approach would be far more subjective than decreasing the actual AA-level CD Minimum to 1 percent in the CRA regulations, which would also have the benefit of encouraging banks to engage in more CD activity in AAs where that activity would be more impactful.

Figure 4: Example of Performance Across Assessment Mechanics

<table>
<tr><th>Assessment Mechanic</th><th>AA 1</th><th>AA 2</th><th>AA 3</th><th colspan="2">Rating Under More Holistic Methodology</th></tr>
<tr><td>CRA Evaluation Measure</td><td>9% (Satisfactory)</td><td>10% (Satisfactory)</td><td>5% (Needs to Improve)</td><td>Satisfactory</td><td rowspan="3">Overall Rating: Satisfactory</td></tr>
<tr><td>Retail Lending Distribution Tests</td><td>Fail</td><td>Pass</td><td>Pass</td><td>Satisfactory</td></tr>
<tr><td>CD Minimum</td><td>3% (Pass)</td><td>0.5% (Fail)</td><td>4% (Pass)</td><td>Satisfactory</td></tr>
<tr><td rowspan="2">Rating Under the Agencies' Proposal</td><td>Needs to Improve</td><td>Needs to Improve</td><td>Needs to Improve</td><td colspan="2" rowspan="2"></td></tr>
<tr><td colspan="3">Overall Rating: Needs to Improve</td></tr>
</table>

Under the Proposal, this bank would receive an unsatisfactory rating in each of its three AAs and overall, because the bank did not satisfy *all* of the AA-level tests in a majority of its AAs. But from a more holistic perspective, this bank would clearly be performing satisfactorily, because for any given test, the bank performed well in a majority of its AAs. Its rating should reflect that performance. Our suggested approach would thus prevent circumstances where a bank with a satisfactory level of community reinvestment receives an unsatisfactory rating because of an inability to "check every box" in a requisite number of AAs.

Third, the final rule should clarify the intended meaning of the ambiguous phrase "assessment areas where [a bank] holds a significant amount of deposits." There are at least three different potential meanings of this phrase: (i) only an AA that holds more than 50 percent of the bank's deposits (if one exists); (ii) any selection of AAs collectively responsible for more than 50 percent of its deposits; or (iii) each of those AAs that have deposit volumes greater than the median volume among all of the bank's AA. Provided that the agencies adopt our recommendation to allow a bank to satisfy a given test by performing satisfactorily in a significant portion of its AAs *or* in AAs where it holds a significant amount of deposits, we support the second interpretation.

Finally, the final rule should codify the meaning of "significant portion" of a bank's AAs within the rule text so as to make clear that any future changes to this standard would need to be made through notice-and-comment rulemaking. This change would reduce uncertainty for banks planning their long-term CRA infrastructure.

B. Performance Context Factors and Adjustments to Presumptive Ratings

By quantifying CRA performance and establishing a qualifying activities list, the Proposal would go a long way in promoting objectivity and reducing supervisory discretion, and we support these goals. Consistent with the principle of making the CRA more objective, the final rule should not allow for a downward adjustment to a bank's presumptive ratings based on performance context. We cannot conceive of any circumstance where a bank that presumptively receives a given rating through objective measures of performance should receive a worse rating based on performance context. The final rule should, however, continue to permit upward adjustments based on performance context, because the performance context factors can accommodate mitigating circumstances that have precluded a bank from being able to meet a given quantitative threshold despite its reasonable efforts.

If the final rule continues to allow examiners to adjust ratings downward based on performance context factors, it should limit that discretion in several ways. First, the agencies should require examiners to consult with the

bank to allow management to rebut any factual inaccuracies on which a proposed downgrade may be premised. Second, any bank-level rating downgrade or AA-level rating downgrade that affects the bank-level rating should then be subject to a mandatory review within a centralized, independent function at the bank's primary federal supervisor. Centralized, independent reviews would allow the agencies to ensure that examiners are making appropriate judgments with an adequate level of supporting facts and analysis. Finally, the agencies should provide a bank with notice and the opportunity to be heard before making a downward adjustment that affects the bank's overall rating.

In general, we support the list of performance context factors set forth in § _.14(b) of the proposed rule text. We would add to these factors consideration of relevant economic conditions, whether those conditions be localized, regional, or national. This new factor would recognize that a downturn in the economy can temporarily make it challenging for a bank to find CRA opportunities or conduct CRA activities in a manner that is consistent with safety and soundness.

Additionally, the final rule should not allow non-CRA-related consumer protection violations to serve as a basis for downgrading a bank's presumptive rating. Instead, the final rule should codify OCC PPM 5000-43, as amended by OCC Bulletin 2018-23, which requires, as a prerequisite to any downgrade predicated on evidence of discriminatory or other illegal credit practices by a bank, that (1) there to be a logical basis between the bank's assigned rating and the practices, and (2) full consideration to be provided to remedial actions taken by the bank. In recent years, the federal banking agencies have based their CRA evaluations in part on criteria not specified in the statute, including consumer compliance or other violations outside the scope of the CRA. This departure from the letter of the law undermines the larger objectives of the CRA. A bank that is satisfactorily meeting the credit needs of its community but nonetheless assigned an unsatisfactory rating by virtue of an unrelated compliance issue has little regulatory incentive to engage in additional lending or CRA-qualifying activity to raise its rating to Satisfactory or Outstanding. That result is wholly inconsistent with the CRA's underlying purpose.

Laws unrelated to community reinvestment are important but have their own enforcement regimes such as Section 8 of the Federal Deposit Insurance Act. When a bank violates a consumer protection law, there is no shortage of enforcement agencies and legal regimes available to seek redress and punishment. Adding the CRA to that long list thus has little marginal benefit, and risks diluting and undermining the CRA's core purpose of promoting community reinvestment.

VIII. Definition of "Retail Domestic Deposit"

The Proposal ostensibly is built around the concept of retail deposits, as the denominator of the CRA Evaluation Measure and CD Minimum, as well as the framework for designating deposit-based AAs, are driven by a bank's "retail domestic deposits." But the term "retail domestic deposits," as defined in the Proposal, is a misnomer, because it includes corporate deposits. The inclusion of corporate deposits in the definition of "retail domestic deposits" has a number of problematic consequences that would be avoided by defining "retail domestic deposits" by reference to the specific Call Report items identified below.

First, because corporate deposits would be geographically allocated to the depositor's headquarters regardless of where the bank has its relationship with the depositor, such deposits could distort banks' CRA obligations significantly. The definition of retail domestic deposit serves as the denominator of the AA-level CRA Evaluation Measure and CD Minimum, meaning that a bank would have greater CRA obligations in an AA where more retail domestic deposits are assigned under the Proposal. But a bank may have a relationship with a corporate depositor that is centered around a satellite office or region of the corporation rather than its headquarters. Allocating that corporation's deposits to its headquarters instead of the location(s) of its relationship with the bank would give the bank an artificially large CRA obligation where the headquarters is located. The fact that the average dollar volume of corporate deposits tends to be significantly greater than that of retail deposits compounds this issue.

Relatedly, the definition of retail domestic deposit determines whether and where a bank is required to designate deposit-based AAs. Thus, a bank that takes a significant amount of deposits from a satellite office of a

corporation headquartered outside the bank's facility-based AAs could be required to add a deposit-based AA in a geography to which the bank has no real connection – the area surrounding the corporation's headquarters. This is a particular risk for wholesale banks that primarily take deposits from corporate and institutional clients.

Considering these effects across the banking system in the aggregate, the allocation of corporate deposits to the depositor's headquarters could lead to CRA "hotspots" in geographies where U.S. corporations tend to concentrate their headquarters, including large metropolitan areas.

Further, corporate deposits tend to fluctuate significantly based on the working capital needs of the corporation. Their inclusion in the definition of retail domestic deposit would create substantial uncertainty about where the bank should allocate its resources towards CRA compliance. That is, even if the final rule did *not* allocate corporate deposits to the depositor's headquarters and instead used some other allocation method for corporate deposits, including corporate deposits in the definition of retail domestic deposit would make it difficult for a bank to anticipate the scope of its CRA obligations and plan its CRA activities accordingly.

Finally, corporate deposits include deposits from investment funds such as U.S. mutual funds and public and private pension plans. For custody banks, these deposits can be significant in dollar value. Including these deposits in the denominator of the CRA Evaluation Measure would create an artificially large CRA obligation for such banks.[29] The CRA was intended to incentivize a bank that receives retail deposits from a community to reinvest in that community; there is no indication Congress had any concern about banks failing to reinvest deposits from investment funds.[30]

To address each of these issues, the agencies should define "retail domestic deposits" as the sum of total deposits intended primarily for personal, household, or family use, as reported on Schedule RC-E of the Call Report, items 6.a, 6.b, 7.a(1), and 7.b(1). This approach would provide a more precise representation of where banks maintain their retail presence. As the Proposal's preamble notes, the agencies considered this approach, but decided against it because of the additional reporting requirements it would impose on banks with less than $1 billion in assets, which currently do not report these items. The agencies could alleviate this concern by allowing banks with less than $1 billion in assets to instead define their retail deposits by reference to Items 1.a and 1.c of Schedule RC-O of the Call Report, which together report all deposits of $250,000 or less. Since retail depositors are much more likely than corporate depositors to limit their deposited amounts to $250,000 or less, these items would provide a reasonable proxy for consumer and small business deposits without imposing additional recordkeeping burdens.[31]

IX. Designation of Assessment Areas

A. Facility-Based Assessment Areas

1. Definition of Non-Branch Deposit-Taking Facility

The Proposal would replace the current CRA regulations' reference to deposit-taking ATMs with a new term, "non-branch deposit-taking facility." The proposed definition of a "non-branch deposit-taking facility" in § _.03 of the proposed rule text is ambiguous as drafted. It provides:

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[29] Additionally, from a practical perspective, custody banks cannot ascertain the physical address of persons that invest in or benefit from assets placed within an investment fund or vehicle other than the physical address of the institutional investor complex.

[30] Similarly, an affiliate within a banking organization may sweep deposits into a bank for various business reasons, and such deposits are not associated with any individual retail depositor or identifiable community.

[31] The agencies should not use FDIC Summary of Deposit data for these purposes. Summary of Deposit data show where corporate deposits are *booked* by the bank and, as a result, can suffer from the same type of deficiencies as the Proposal in their allocation of corporate deposits. A bank, for example, may book all of its Treasury Management (or other business line) deposits to a single office – often its main office – rather than the office(s) most responsible for the customer relationship.

> *Non-branch deposit-taking facility* means a banking facility other than a branch owned or operated by, or operated exclusively for, the bank that is authorized to take deposits that is located in any state or territory of the United States of America.

Each qualifier following "other than a branch" could be read as modifying "branch" or as modifying "banking facility." Since the agencies have not explained why they introduced this new term in lieu of deposit-taking ATMs, we are uncertain of the agencies' intent, but it appears that each term should modify "banking facility" so as to exclude non-branch facilities that do not take deposits.

The following version of the definition would eliminate this ambiguity:

> *Non-branch deposit-taking facility* means a banking facility (other than a branch) that is (1) owned or operated by, or operated exclusively for, the bank, (2) authorized to take deposits, and (3) located in any state or territory of the United States of America.

The new definition of "non-branch deposit-taking facility" creates further ambiguity because the agencies have not explained what types of facilities the definition would include besides deposit-taking ATMs. The agencies should clarify what, if any, types of facilities besides deposit-taking ATMs they intended to include.

2. Temporary Branches and ATMs

The Proposal provides that a bank must establish a facility-based AA encompassing each location where a bank "maintains" a main office, branch, or non-branch deposit-taking facility. We urge the agencies to clarify that the term "maintains," for purposes of their CRA regulations, means that the bank has a *permanent or semi-permanent* branch or non-branch deposit-taking facility at the location. In response to natural disasters or other significant events, banks may deploy mobile branches or ATMs to help meet the short-term banking needs of individuals in the affected communities, even when those areas are outside the banks' designated AAs. For example, following the recent hurricanes that affected the Gulf Coast, some banks from outside the area voluntarily deployed their mobile banking units to the affected communities to help meet the banking needs of the communities devastated by the storms. Similarly, banks may temporarily deploy ATMs to major events (*e.g.*, an outdoor concert or food festival) to make cash available to attendees. Providing such emergency or temporary facilities should not create the risk that the bank would have to include the location and its surrounding geography in its CRA AAs.

B. Deposit-Based Assessment Areas

The Proposal's requirement for certain banks to designate deposit-based AAs would constitute a significant change to the CRA as it has been interpreted and implemented for over forty years. When making such a fundamental change, the agencies should seek to follow certain fundamental principles and policy goals underlying the CRA. The Proposal's deposit-based AAs, however, fail to be consistent with these principles and goals, and the agencies should therefore revisit and revise this element of the Proposal.

The proposed creation of deposit-based AAs seems to react to the proliferation of remote deposits in the decades since the last revisions to the CRA framework. We recognize the growth in the value of remote deposits, as our members have been among the leaders in developing innovative business models driving this growth, including internet and digital banking, and have seen firsthand that these practices afford consumers access to banking that is convenient, widely available, and low-cost. Any changes to the CRA framework in response to this expansion in remote deposits should comply with key CRA principles and policy goals, including:

- ***Avoidance of CRA Hotspots.*** As proposed, deposit-based AAs would create and exacerbate CRA hotspots. Because the Proposal's delineation of deposit-based AAs is based on a percentage of banks'

total retail domestic deposits, these AAs would naturally arise in areas where larger populations, higher costs of living, and greater access to banking services drive greater volumes of deposits. As a result, deposit-based AAs would be clustered in these areas, driving numerous banks to focus CRA activities in the same markets, many of which have been longstanding areas of focus for banks' CRA activities. This phenomenon is plainly in tension with the CRA's aims of expanding credit access to *underserved* communities, and the Proposal's stated goal of "reliev[ing] pressure in overheated markets where banks are already meeting community needs."[32] Instead, changes to the CRA framework to address growth in remote deposits should be carefully calibrated to avoid incentivizing the growth of CRA hotspots.

- ***Encouragement of CRA Activity in Underserved Areas.*** As a corollary to the Proposal's saturation of hotspots, its framework for deposit-based AAs would fail to drive CRA efforts to underserved areas. These include rural areas, which are less likely to have the higher populations and cost of living that would inevitably correlate with the concentrated presence of deposit-based AAs. When making significant changes to the CRA framework, the agencies should design those changes to recognize the immense value that investment and credit access can play in underserved communities, including rural areas.

- ***Predictability and Stability of CRA Requirements.*** CRA requirements should be predictable and stable to allow for the long-term planning and engagement necessary for a bank to engage in meaningful CRA activities, particularly CD activities, in an area and to align with the years-long periods over which a bank's CRA performance is examined. The Proposal's framework for deposit-based AAs would tie a bank's CRA obligations to the geographic sources of its retail domestic deposits. However, over the long term, this approach would be volatile and unpredictable, for reasons out of a bank's control: people move from place to place and geographies experience economic growth and contraction. Pegging the delineation of AAs to geographic sources of deposits immediately following shifts in those sources, as proposed, would therefore interfere with banks' long-term CRA planning and engagement.

- ***Grounding in Robust Data.*** The final rule should not include changes to the CRA framework that are not supported by reliable data. Robust data on remote deposits is scant in general, and especially so with respect to geographic shifts over time. Such data would be crucial for tailoring the parameters of any revisions to the CRA framework to align with the realities of how consumers use remote banking services. Our members share grave concerns that the agencies currently lack the data necessary to consider meaningfully the significant ramifications that would flow from the imposition of deposit-based AAs as proposed. The FDIC's Summary of Deposits data, for instance, only include the geographic source of branch-based deposits. For this reason, we urge the agencies to take all the time necessary to engage in rigorous data collection and analysis of the ways in which consumers use remote deposit services, the geographies generating remote deposits, and the differences in the levels and geographies of remote deposits across banks, before the agencies finalize any CRA requirement designed to address the growth of remote deposits.

Because the Proposal's framework for deposit-based AAs would create and exacerbate CRA hotspots while neglecting rural and other underserved communities, result in significant uncertainty and instability for many banks, and not be assessable based on currently available data, the agencies should revisit and revise this element of the Proposal before establishing any requirement designed to address the growth of remote deposits.

[32] 85 Fed. Reg. at 1,207.

C. Changes to Assessment Areas

Section _.08 of the proposed rule text provides that "an assessment area delineation can only change once during an evaluation period." This standard leaves unanswered several important questions, including the following:

- Would a bank that adds a branch or non-branch deposit-taking facility in a geography outside its current AAs need to designate a new facility-based AA for that geography in the current evaluation period? When would the bank's performance in that new facility-based AA become subject to evaluation?

- When can a bank that closes its last branch or non-branch deposit-taking facility in a facility-based AA cease to be evaluated on its performance in that AA?

- Does § _.08's limitation on changing "an assessment area delineation" apply to a bank's delineation of a single AA, such that a bank can only change the boundaries of a particular AA once during an evaluation period, or does it mean that the bank may only make changes to its *list* of AAs once during the evaluation period?

Additionally, the proposed limitation on changing an AA delineation once per evaluation period would undercut an incentive to obtain Outstanding ratings contained elsewhere in the Proposal. A bank that receives a bank-level Outstanding rating would presumptively receive a five-year evaluation period. However, the limitation contained in § _.08 of the proposed rule text would penalize such a bank for having earned a longer evaluation period by restricting its flexibility over a longer period of time.

The final rule should resolve these issues as follows:

- First, a bank that adds a branch or non-branch deposit-taking facility in a geography outside its current AAs should only be required to designate a new facility-based AA for that geography for the following evaluation period. Additionally, the bank's performance in that AA should not be subject to evaluation until the AA has been designated for a full, complete calendar year. Thus, a bank that adds a branch to a geography outside its current AAs in the final year of an evaluation period should not be subject to evaluation in that AA until year two of the following evaluation period. This grace period would recognize that it takes some time for a bank to develop its CRA programs and community relationships in a new geography.

- Second, a bank's performance in a facility-based AA should cease to be evaluated immediately once the bank has closed its last branch or non-branch deposit-taking facility in the AA. For the evaluation period in which that change in circumstances occurs, the bank's performance in the AA should only be subject to evaluation based on full, completed calendar years in which the bank satisfied the relevant condition for evaluation in the AA. Because of seasonal variations in the use of credit by some banks' customers, evaluating performance based on a period less than a year could paint an inaccurate picture of CRA performance.

- Third, a bank should be allowed to change the boundaries of an *existing* AA once during a three-year evaluation period, or twice during a five-year evaluation period, in order to allow banks to address general changes in activity within an AA over an evaluation period. In all events, such changes to boundaries should be consistent with the criteria for drawing an AA.

X. Allocation of CD Activities to Particular AAs

Banks should have more flexibility to allocate credit for activities benefiting a broader statewide or regional area to particular AAs. When a bank cannot document that CD funding or services it provided were allocated to a particular project, § _.21 of the proposed rule text would allocate the activity within geographies served by the activity

by the share of the bank's deposits in those geographies. While this standard is not entirely clear, it appears that it would (1) allocate more value for the activity to geographies where a bank has more deposits, and (2) potentially allocate some value for the activity to geographies where a bank does not necessarily have an AA. But a bank's share of deposits within an area served by a CD activity may have no correlation to the impact of the activity, rendering the proposed standard arbitrary. Further, this standard fails to recognize that sometimes a bank must engage in CD activities benefiting a statewide or broader regional area because the bank cannot find appropriate CD opportunities specific to certain of its AAs. For example, many banks have programs to allow their employees to serve on the boards of directors (or equivalent) of non-profit organizations with a regional, state-wide, or multi-state focus, and likely would not be able to demonstrate that the services their employees provide are allocated to a particular project. Allocating the activity to a geography where the bank does not have an AA would only make the activity inefficient from a CRA perspective, and therefore disfavored.

To address these issues, the final rule should allow a bank that cannot document the allocation of CD funding or services to a particular project to allocate the activity as it deems appropriate among its AAs that are located in the state(s) or region(s) that benefit from the activity. This revised standard would provide a bank with more options to address community needs in areas with less CD infrastructure. And the revised standard would be consistent with the current CRA regulations' inclusion of CD activities that benefit an AA or a broader statewide or regional area that includes the AA.

XI. Qualifying Activities List

In general, BPI supports the agencies' approach to clarifying what activities qualify for CRA credit. We strongly support inclusion in the final rule of a qualifying activities list and the agencies' development of a process for banks to seek confirmation that a new activity qualifies for credit. These steps, which are long overdue, would provide a bank with clarity that an activity will receive CRA credit before the bank conducts the activity, and in so doing, would remove the uncertainty that has prevented banks from engaging in certain CD activities. We also support the agencies' clarification that qualifying activities include naturally occurring affordable housing, rental housing for LMI individuals in high-cost areas, renewable energy projects, community support services, essential community facilities, and essential infrastructure that serve LMI individuals. We also support the rewarding of *pro rata* credit to activities that partially, but not exclusively, benefit LMI individuals.

We nevertheless have concerns with the proposed qualifying activities list's failure to include certain community reinvestment activities that have long established precedent and are a cornerstone of the current CRA framework; the Proposal's treatment of activities removed from the qualifying activities list; the agencies' failure to address the Volcker Rule treatment of activities that currently or in the future will be qualifying activities, but cease to be qualifying; and the timeline for the agencies to act on a request for confirmation that an activity qualifies. We address each of these issues in turn.

A. Activities That Should Be Added to the Qualifying Activities List

1. Loans to Borrowers in LMI Neighborhoods

A loan to a non-LMI borrower in an LMI census tract should continue to receive CRA credit. In fact, under the statute, loans to non-LMI borrowers in LMI census tracts are *required* to count toward a bank's rating. The CRA's very first requirement is that the federal banking agencies shall "assess the institution's record of meeting the credit needs of its entire community, *including low- and moderate-income neighborhoods*, consistent with the safe and sound operation of such institution."[33] Congress could easily have specified that CRA evaluations assess a bank's record of meeting the credit needs of LMI *individuals*, but it did not. The legislative history of the act is consistent with the text. Congress enacted the CRA to address concerns over redlining, which was a practice whereby certain

[33] 12 U.S.C. § 2903(a)(1) (emphasis added).

institutions refused to lend in particular *neighborhoods*.[34] This is why the federal banking agencies' CRA regulations have *always* provided banks CRA credit for extending credit to individuals and families living in LMI neighborhoods.

Moreover, loans to non-LMI individuals residing in LMI neighborhoods (particularly mortgage and small business loans) can provide broad benefits to the community, including LMI individuals. For example, a middle-income individual might use the proceeds of a loan to renovate a dilapidated home, which in turn can generate economic activity in the LMI neighborhood and improve the quality of life and safety of the neighborhood. Many LMI neighborhoods comprise a mix of LMI and middle- or even upper-income households, and this diversity helps maintain the stability of these neighborhoods. The agencies should therefore include loans to any borrowers in LMI census tracts as qualifying retail loans under § _.04(b) of the final rule text.[35]

2. CD Activities Financing Small Businesses or Farms That Promote Economic Development by Supporting Job Creation, Retention, and/or Improvement

The current climate of economic uncertainty and its effect on small businesses show the critical need for the CRA to incentivize and reward loans and investments that support small businesses and job creation.

Qualifying activities in the final rule should continue to include CD activities financing small businesses or farms that promote economic development by "support[ing] permanent job creation, retention, and/or improvement" for low- or moderate-income persons; in low- or moderate-income geographies; in areas targeted for redevelopment by Federal, state, local, or tribal governments; by financing intermediaries that lend to, invest in, or provide technical assistance to start-ups or recently formed small businesses or small farms; or through technical assistance or supportive services for small businesses or farms, such as shared space, technology, or administrative assistance.[36] The agencies state that they omitted this language of the current CRA framework from the Proposal because they could not find objective ways to demonstrate economic development other than determining if the activity would create additional low-wage jobs. However, the agencies have articulated no legal or policy reason why low-wage job creation does not merit CRA credit. Low-wage jobs allow LMI individuals to meet their financial obligations and serve as a stepping stone to moderate- and high-income jobs. In addition, not all jobs to LMI individuals are low-wage jobs. Moderate income under the CRA is defined as up to 80 percent of area median income. Activities supporting the creation of these jobs provide significant value to communities and should continue to receive CRA credit.

Additionally, the agencies' statement inaccurately characterizes the scope of the current framework, which, as noted above, provides credit for job creation not only for LMI persons, but also in LMI geographies, in areas targeted for redevelopment, through financing intermediaries, or through providing technical assistance or supportive services. The agencies have not explained why the Proposal does not award credit to these other economic development activities, such as investments in intermediaries that lend to or invest in start-ups. These intermediaries may not have the same legal status as CDFIs, small business investment companies, or other classes of recipients of loans or investments that are favored under the Proposal, but they still can make impactful investments in small

[34] Senator William Proxmire, the bill's sponsor in the Senate, made this focus clear during debate over its passage. *See, e.g.*, 123 CONG. REC. S8932 (daily ed. June 6, 1977) (statement of Sen. Proxmire) ("The committee believes that the Community Reinvestment Act responds to nationwide demands that Congress do something about redlining."); *id.* at S8958 ("Mr. President, for more than 2 years the Banking Committee has been studying the problem of redlining and the disinvestment by banks and savings institutions in older urban communities. By redlining let me make it clear what I am talking about. I am talking about the fact that banks and savings and loans will take their deposits from a community and instead of reinvesting them in that community, they will invest them elsewhere, and 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.").

[35] A focus on individual borrower income also creates ambiguity as to the treatment of co-signed loans that the Proposal does not explain how to address. This issue not only arises frequently in the context of consumer loans, including student loans where the student is LMI and a parent co-signer is non-LMI, but also arises when a bank makes other types of qualifying retail loans.

[36] Interagency CRA Q&As § _.12(g)(3)–1.

businesses that create jobs, including jobs for LMI individuals, to the same extent as those other entities. Loans and investments supporting these intermediaries are valuable to communities and should continue to receive CRA credit.

At the very least, the agencies should grandfather existing loans or investments that support job creation, retention, or improvement, given that banks made these loans or investments in reliance on the current CRA regulations.

3. Activities Undertaken in Response to Economic Crises

BPI members are proud of their efforts to help their communities withstand financial hardships caused by the COVID-19 pandemic, and appreciate that the federal banking agencies recognized and encouraged those efforts in their Joint Statement on CRA Consideration for Activities in Response to COVID-19 on March 19, 2020.[37] The CRA should continue to reward such efforts that are responsive to community needs in an economic crisis. In the final rule, the agencies should therefore codify as qualifying activities the activities that they recognized in the recent Joint Statement as being responsive to the needs of LMI individuals, small businesses, and small farms affected by the pandemic, when those activities are undertaken in response to any global, national, or local economic crisis.

4. Loan Commitments

For the reasons discussed in Section IV above, qualifying activities should include unfunded loan commitments. The agencies could recognize the significant value loan commitments provide a bank's communities by converting commitments into balance sheet amounts using credit conversion factors similar to those included in the regulatory capital rules.

B. Qualifying Activities Removed from the Qualifying Activities List

Under the Proposal, the agencies would review and revise the list of CRA qualifying activities at least every three years and potentially add or remove activities from the list. While we support the agencies' plan to adhere to the notice and comment rulemaking process when reviewing and revising the list, and support language in the Proposal's preamble providing that a bank would continue to receive credit for existing activities that remain on-balance sheet,[38] we are concerned that the Proposal does not provide banks a transition period to adjust their *prospective* CRA activities to any removal of a qualifying activity from the list. Banks engage in long-term CRA planning based on the types of activities known to qualify for CRA credit. In addition, CD loans and investments can take months or years of planning, particularly for novel or complex loans or investments.

For these reasons, any removal of a CRA qualifying activity from the list of qualifying activities should not become effective for a *prospective* investment or loan until one year after a final rule removing the activity is adopted, or until the start of the bank's next evaluation period, whichever is later. This would provide banks the time necessary to adjust their CRA plans in light of the change, and avoid penalizing banks that made commitments to fund projects that qualified for CRA credit at the time project planning commenced. We also support codification into the final regulatory text of language in the preamble to the Proposal providing that a bank will continue to receive credit for *existing* activities that remain on balance sheet.

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[37] Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, and Board of Governors of the Federal Reserve System Joint Statement on CRA Consideration for Activities in Response to COVID-19 (March 19, 2020), https://www.fdic.gov/news/news/financial/2020/fil20019a.pdf.

[38] 85 Fed. Reg. at 1,213–14 ("In addition to updating the illustrative list on an ongoing basis, the proposal provides that the list would also be revised at least every three years, through a public notice and comment process, to add activities that meet the criteria and to remove activities that no longer meet the criteria (*e.g.*, if broadband were universally available and no longer considered to be essential infrastructure). If it were determined that an activity no longer meets the criteria, a bank with that activity on-balance sheet would continue to receive credit if the obligation remains on-balance sheet; however, that activity would not be considered a qualifying activity for any subsequent purchasers.").

C. Treatment of Formerly Qualifying Activities Under the Volcker Rule

Relatedly, any finalized rule should resolve regulatory ambiguity that the Proposal would create regarding the application of the Volcker Rule to currently qualifying investments promoting economic development, as well as any future investments that become non-qualifying through revisions to the list of qualifying activities. Under current regulations, the Volcker Rule provides an exemption to "covered fund" status for public welfare investments of the type permitted under Section 24(Eleventh) of the National Bank Act.[39] The OCC's regulation implementing Section 24(Eleventh) includes within the scope of public welfare investments any activity that would receive credit under the current CRA regulations' Investment Test as a "qualified investment,"[40] which includes "[a]ctivities that promote economic development by financing businesses or farms that meet [certain size eligibility standards]."[41] Interagency CRA Q&As from the federal banking agencies currently provide that activities are considered to promote economic development if they "support . . . permanent job creation, retention, and/or improvement," in a number of ways, including "by financing intermediaries that lend to, invest in, or provide technical assistance to start-ups or recently formed small businesses or small farms."[42] Because the Proposal would exclude this broader type of economic development activity from its list of qualifying activities, it therefore could render certain existing investments impermissible under the Volcker Rule (as well as impermissible under the National Bank Act), without any acknowledgement in the preamble or rule text that it could have this effect.

Institutions entered into these investments in good faith reliance on current regulations that deem them "qualifying investments" under the CRA and therefore permissible under the Volcker Rule. As drafted, the Proposal could effectively revoke the Volcker Rule exemption midstream, disrupting these investments and unnecessarily injecting regulatory uncertainty. The OCC should address this concern by amending 12 C.F.R. Part 24 to maintain the Volcker Rule exemption for "qualified investments" existing at the time the final CRA rule goes into effect, as well as any investments made in the future that are qualifying investments at the time they are made. An amendment maintaining the exemption for such investments would preserve reliance interests and recognize the value of the infrastructure and resources that were necessary to make these investments in the first place. Thus, even if the final rule does not grandfather existing "qualified investments" from a *CRA* perspective, it should grandfather them from a *public welfare investments* perspective so that banks do not violate the Volcker Rule by virtue of regulatory changes outside of the scope of the Volcker Rule. Similarly, the OCC should also amend or clarify Part 24's cross-reference to the term "qualified investment," which the Proposal would render a nullity.

D. Timing of Approval for Qualifying Activities

The final rule should provide for a 30-day, rather than six-month, timeline for the agencies to update the qualifying activities list pursuant to a request for confirmation that an activity qualifies. Some CRA activities require months or years of planning, while others require banks to make the decision of whether to engage in the activity on an expedited basis. In either case, the need to wait up to six months for confirmation that the activity will receive credit could discourage banks from engaging in new, innovative CRA activities.

XII. Multiplier for Certain CD Activities

The Proposal would include a 2X multiplier for certain CD activities, including activities that support CDFIs and other CD investments, but in both cases would disqualify investments in MBS from being eligible for the multiplier. Investment in MBS is as valuable to the community as the purchase of a loan that has not been packaged into MBS. The agencies' stated reason for disqualifying MBS is that the current CRA regulations provide too much credit for "frequently traded" MBS, which our members interpret as the agencies' concern with the practice of multiple

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[39] *See* 12 C.F.R. §§ 44.10(c)(11)(ii)(A) & 351.10(c)(11)(ii)(A).

[40] *See* 12 C.F.R. §§ 24.2(c), 24.3, & 24.6(c).

[41] 12 C.F.R. §§ 25.12(g)(3) & 345.12(g)(3).

[42] 81 Fed. Reg. 48,506, 48,507–08 (July 25, 2016).

banks receiving credit for the same investment. However, that concern would have no relevance under the proposed CRA Evaluation Measure, since investments would be counted based on their average balance sheet value over the evaluation period, meaning that a bank would only receive credit for a MBS investment to the extent it held the investment on its balance sheet. The final rule should therefore include MBS investments in the list of activities eligible for the multiplier.

Certain activities that are particularly impactful should also be eligible for a multiplier to properly reflect their positive effects in LMI communities. These activities include:

- CD loans (in addition to CD investments);
- Mortgage loans in Indian country;
- Lending and investment in certain other geographies, such as rural census tracts, colonias, and other areas with persistent poverty; and
- Small loans to businesses and small loans to farms located in LMI census tracts.

A multiplier for these activities is also necessary to effectively encourage banks to engage in such activities over other CRA activities, since they often entail higher costs than other CRA activities. For example, laws in Indian country often differ from those in the surrounding geographies and present unique legal requirements, which can make it relatively more difficult for banks to perfect liens or use their general processes and procedures to monitor and handle loans in these areas. Due to a lack of established infrastructure, identifying and pursuing lending opportunities in rural areas often requires banks to invest relatively more resources per dollar of lending than is necessary in urban areas. Providing a multiplier for these activities would not only more appropriately reflect the value they provide to communities, but also encourage banks to engage in these activities.

XIII. **Affiliate Activities**

The Proposal's articulated standard for including affiliate activities – counting all such activities when the bank is "substantively engaged" in the activity – is not clear, and the Proposal would eliminate language in current CRA regulations governing affiliate activities without explanation. This ambiguous standard, which could reach activities by nonbank affiliates, is in tension with the statutory text of the CRA, which limits its definition of a "regulated financial institution" to insured depository institutions,[43] thereby mandating evaluation only of the activities of insured depository institutions. In the past, the agencies have disfavored vague, subjective standards in assessing affiliate lending. The federal banking agencies' 1994 proposed rule that preceded the adoption of the current CRA regulations included a provision that would have made the inclusion of affiliate activity in the lending test mandatory where "integral to the institution's business," but the federal banking agencies rejected this provision in the 1995 final rule because it set forth an "unclear" standard.[44] The Proposal's "substantively engaged" standard is no more clear than the standard the federal banking agencies rejected in 1995.

Instead, BPI supports preserving the current regulations' standard, which is that any affiliate activity may qualify but consideration of such activity is optional, and may only count toward the performance of a single affiliated bank. This approach fits cleanly within the federal banking agencies' established practice of allowing banks flexibility to choose the overall scope of activities against which their lending is measured.[45] Currently, providing banks the

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[43] 12 U.S.C. § 2902(2).

[44] 60 Fed. Reg. at 22,165–66.

[45] *See, e.g.*, *id.* at 22,166 ("[I]f an institution elects to have the lending activities of its affiliates considered in the evaluation of the institution's lending, the geographies served by the lending's activities do not affect the institution's delineation of assessment area(s).").

option to receive CRA credit for investments or activities held in the name of an affiliate allows them financial flexibility that is helpful in effectively managing tax implications and applicable limits on public welfare investments, among other things.

Additionally, for banking organizations with more than one bank subsidiary, the Proposal's standard for including affiliate activities would provide no direction for how the organization is to allocate credit for an activity across those subsidiaries. The optionality that the current regulations afford allows such banking organizations to allocate the activity to their bank subsidiaries based on a logical geographic nexus between the activity and the banks' AAs.

XIV. Wholesale Banks, Limited Purpose Banks, Special Purpose Banks, and Banks Operating Under Strategic Plans

A. Banks Designated as Wholesale Banks and Limited Purpose Banks

Banks currently designated as wholesale banks and limited purpose banks have been approved for those designations because evaluating those banks' credit distribution under CRA assessment methodologies designed for traditional banks would fail to accurately capture how they serve their communities. Several characteristics of these institutions make them ill-suited to be evaluated through the Proposal's general evaluation framework, and particularly the Retail Lending Distribution Tests:

Wholesale banks

- ***Limited lending infrastructure and balance sheet capacity.*** Wholesale banks focus on non-retail banking, usually meaning custody and trust activities that are off balance sheet. Because of their focus on custodial and trust activities, wholesale banks may lack the infrastructure and balance sheet capacity to originate loans, including both retail and CD loans. As a result, wholesale banks may have more difficulty meeting the same numerator of the proposed CRA Evaluation Measure as more diversified retail banks that engage in qualifying retail lending at a significant scale.

- ***Institutional client focus and deposit base.*** Wholesale banks source their deposits largely from corporate and institutional clients, in very large amounts, or from high net worth individuals. To the extent the CRA is intended to ensure that banks do not take deposits from LMI communities and fail to reinvest in those communities, wholesale banks do not present this concern. Under the Proposal, the deposit base of a wholesale bank would create artificially large CRA obligations overall and in geographies where its corporate and institutional clients are headquartered, since the definition of "retail domestic deposit" would include deposits from these clients. Further, corporate and institutional clients are highly sensitive to interest rate and other risks, which can result in large fluctuations in a wholesale bank's deposit amounts.

- ***Limited branch networks.*** Wholesale banks tend to have limited branch networks, and those branches often are not conducting retail lending or deposit-taking businesses. This limited branch infrastructure can make it difficult for a wholesale bank to identify and capitalize on CRA opportunities that are specific to geographies outside the area surrounding its main office. Exacerbating this issue, a wholesale bank's limited branch infrastructure increases the likelihood that the bank would be required under the Proposal to designate deposit-based AAs – AAs that a wholesale bank would find uniquely challenging to serve.

Limited purpose banks

- ***Focus on consumer lending.*** Limited purpose banks focus on consumer lending, usually credit card lending. As discussed in Section V.A.1 above, unsecured consumer loans such as credit card loans

can entail more risk than other forms of retail loans, and it can be challenging for a bank to control the income and geographic distribution of borrowers of consumer loans. For all the reasons why consumer loans should be exempt from the Retail Lending Distribution Tests, limited purpose banks should not be subject to the Proposal's general evaluation framework, including the Retail Lending Distribution Tests.

- ***Third party partners.*** Limited purpose banks sometimes partner with third party retailers or auto dealers that effectively provide lead generation, and thus control the applicant pool. These third parties also manage many aspects of the interaction with the borrower.

- ***Dispersed and disaggregated sources of deposits.*** Limited purpose banks often source deposits through deposit brokers or listing services, meaning their depositor bases generally consist of consumers residing nationwide. Further, a limited purpose bank's depositors are not necessarily its borrowers, as consumers who place deposits through a broker or listing service do not necessarily need or want to place their deposits at the same bank providing them consumer credit. This natural disconnect between a limited purpose bank's depositors and its borrowers make deposit-based AAs a particular challenge for limited purpose banks.

- ***Branchless.*** Limited purpose banks usually do not have physical infrastructure outside of a main office. As with a wholesale bank, this lack of physical infrastructure can make it difficult for a limited purpose bank to identify and capitalize on CRA opportunities that are specific to geographies outside the area surrounding its main office, and would increase the likelihood that the bank would be required to do so via the Proposal's requirement to serve deposit-based AAs.

In sum, wholesale banks and limited purpose banks generally have non-traditional business models, limited or no branch networks, and an inability in some cases to control the geographic distribution of their deposit-taking and lending activities, all of which make the Proposal's general evaluation framework incongruous with those banks' capabilities and business models.

Because of these challenges, the current CRA regulations evaluate wholesale banks and limited purpose banks on a Community Development Test that appropriately accounts for these banks' capabilities and business models. Banks evaluated on the Community Development Test make billions of dollars of community-related investments annually, providing significant benefits to their communities and LMI individuals nationwide, and have developed substantial relationships with members of the communities that they currently serve. Wholesale and limited purpose banks take great pride in their investments in affordable housing initiatives, local workforce and educational initiatives, Small Business Investment Company programs, and qualified MBS investments supporting LMI borrowers, among other community reinvestment activities. We are not aware of any significant criticism from community groups or lawmakers of the current CRA regulations' treatment of wholesale or limited purpose banks.

Yet, the Proposal would jettison the wholesale and limited purpose designations and evaluate the credit distribution of currently-designated banks for the first time, without so much as displaying awareness that it would do so. The Proposal's lack of any demonstration of awareness of such a substantial change in policy is a significant deficiency under the Administrative Procedure Act,[46] as is the agencies' failure to provide a justification for making this change when reliance interests are at stake.[47]

The strategic plan option would not be a panacea for banks losing their wholesale and limited purpose designations. Strategic plans are administratively complex and require significant internal resources to draft, guide though the public engagement process, and monitor over time. Because wholesale and limited purpose banks have

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[46] *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T[he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* . . . .").

[47] *Id.*

non-traditional business models, strategic plans could require these banks to conduct significantly more extensive public outreach to explain their businesses and their CRA capabilities. These banks' non-traditional business models also would create challenges in developing appropriate alternative, bespoke criteria for CRA evaluations. Each of these issues would be present even if the agencies revised the definition of "retail domestic deposits" as we suggest in Section VIII, above.

Instead of being forced into developing strategic plans, banks currently designated as wholesale and limited purpose banks should retain those designations, and the final rule should continue to include a designation process for other banks that satisfy the relevant criteria. Similar to how the Proposal would grandfather the existing CRA framework for small banks, the final rule should allow wholesale and limited purpose banks to be evaluated using the current framework that applies to them – that is, wholesale and limited purpose banks should remain subject to the current Community Development Test, and also should not be subject to the new requirement to designate deposit-based AAs. Overall, the impact of retaining the wholesale and limited purpose designations would be relatively limited, as the OCC and FDIC have currently designated only 50 banks as wholesale or limited purpose banks.[48] At the very least, wholesale and limited purpose banks should be exempt from the Retail Lending Distribution Tests, and subject only to the CRA Evaluation Measure and CD Minimum.

Additionally, for banks currently operating under wholesale or limited purpose designations, transitioning towards the general performance standards would impose significant administrative burdens, since those banks are not currently equipped to satisfy any test resembling the proposed Retail Lending Distribution Tests, or to meet community needs in geographies outside the areas surrounding their main office. If, despite our recommendations, the final rule subjects currently-designated wholesale and limited purpose banks to the general performance standards, it should provide these banks a longer compliance period than other banks before they are evaluated under the new standards. Specifically, currently-designated wholesale and limited purpose banks should be subject to the existing Community Development Test and AA designation standards for at least one more evaluation period than other banks.

B. Special Purpose Banks

The Proposal would change the current "special purpose" designation to an "exempt bank" status that appears to be substantively similar. Unlike the wholesale or limited purpose designations, a special purpose designation does not currently require agency approval. Instead, a bank has the option to request written confirmation of its status as a special purpose bank pursuant to Interagency Q&A Section _.11(c)(3) and 195.11(c)(2)–2 and OCC Bulletin 2019-40. We recommend that the agencies confirm that under the final rule, banks currently designated as "special purpose" would be considered exempt and the option to request written confirmation would continue to be available for a bank seeking a new exemption.

C. Strategic Plans

If the strategic plan option were properly designed, strategic plans could promote objectivity, certainty, and timeliness of exams, while also accounting for different business models. But under the current CRA regulations, strategic plans have been burdensome for banks to adopt, requiring frequent input from communities and providing little flexibility once the plan is in force. While the Proposal would drive many current wholesale and limited purpose banks and other branchless banks toward the strategic plan option to avoid the application of the Retail Lending Distribution Tests, the Proposal would do nothing to make that option more practicable, unlike the Proposal's efforts to make other elements of the framework more modern, consistent, and quantifiable. In fact, by requiring strategic

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[48] *See* OCC, *Wholesale and Limited Purpose Banks under the Community Reinvestment Act (CRA)*, https://www.occ.treas.gov/topics/consumers-and-communities/cra/wholesale-and-limited-purpose-banks-under-cra.html (last updated Jan. 1, 2020) (listing 11 wholesale and 14 limited purpose institutions); FDIC, *Approved Limited Purpose, Strategic Plan, and Wholesale Institutions Report*, https://www.fdic.gov/regulations/community/community/apprlp.html (last updated Jan. 28, 2020) (listing 18 wholesale and 7 limited purpose institutions).

plans to cover all of a bank's AAs, including deposit-based AAs, the Proposal would make strategic plans even *more* burdensome than they are currently.

There are several ways to make the strategic plan option more effective than as proposed:

- First, strategic plans should not be required to address deposit-based AAs, which would be unpredictable and difficult for some banks (*e.g.*, banks with certain business models, including custody and credit card banks) to control. Instead, limiting strategic plans to facility-based AAs would allow a bank to leverage the strength of its relationships with community groups and understanding of community needs that it has built through its physical presence in the community.

- Second, an approved strategic plan should presumptively be approved for two evaluation periods of up to five years each, unless the bank or its primary federal supervisor determines, in the first evaluation period, that an existing strategic plan would no longer be appropriate for the second evaluation period in light of the bank's size, business model, strategy, or opportunities.

- Third, the agencies should expressly confirm that, consistent with the current CRA regulations' approach to strategic plans, a strategic plan need not include a measure of credit distribution, and the benchmarks that apply under the general evaluation framework (*i.e.*, the 11 percent benchmark for Outstanding performance on the CRA Evaluation Measure) are not minimum requirements in a strategic plan.

- Fourth, the provisions of current CRA regulations requiring agencies to act upon a plan within 60 days of submission should remain intact. The Proposal's six-month window would approximately triple the amount of time that a bank might wait before obtaining approval of its strategic plan. This increased uncertainty would add to the burden of the strategic plan option and undermines the agencies' assertion that "strategic plans would continue to be used in a similar manner"[49] under the Proposal.

- Fifth, banks operating under strategic plans should not be subject to the full suite of recordkeeping and reporting requirements contained in the Proposal. For example, such banks should not be subject to any requirement to collect and report data on the general performance standards as set forth in § _.19(b) of the proposed rule text, as this data is not relevant to a bank operating under a strategic plan, or data covering qualifying activities under § _.19(c) if such activities are not measured in the bank's strategic plan.

Additionally, the agencies should confirm that banks currently operating under approved strategic plans (currently 42)[50] may continue operating under these plans without those plans needing to be re-approved earlier than is currently required.

XV. Transition Issues

The Proposal represents a significant departure from the current CRA framework, and we have serious concerns that banks on their first evaluation cycles under the new general performance standards may not have the capabilities to ensure satisfactory performance on each of the many new tests to which they would become subject. Thus, for the first cycle that the new evaluation framework is used, banks should have the option to receive only an indicative rating under the new framework, and that option should be available after the evaluation period ends and a

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[49] 85 Fed. Reg. at 1,223.

[50] *See* OCC, *National Banks Evaluated on the Basis of a Strategic Plan under the Community Reinvestment Act (CRA)*, https://www.occ.treas.gov/topics/consumers-and-communities/cra/national-banks-eval-basis-of-strategic-plan-under-cra.html (last updated Jan. 1, 2020) (listing 9 institutions); FDIC, *Approved Limited Purpose, Strategic Plan, and Wholesale Institutions Report*, https://www.fdic.gov/regulations/community/community/apprlp.html (last updated Jan. 28, 2020) (listing 33 institutions).

rating has been assigned. Banks should have the option, but not the obligation, to publicly disclose this indicative rating.

In addition, as discussed throughout this letter, there are several aspects of the Proposal where the agencies should adopt more flexible transition periods that would help a bank better plan its CRA activities and generally provide for more stable and consistent CRA obligations. These include the following:

- providing at least one full evaluation period of advance notice prior to any increase in the CRA Evaluation Measure's benchmarks' becoming effective, as discussed in Section III above.
- basing a bank's major retail lending product lines on its product mix in the prior evaluation period, unless a bank has exited or scaled back a product line in the current evaluation period to below the 15 percent threshold, as discussed in Section V.A.2 above;
- calculating the Retail Lending Distribution Tests' comparators based on data that precede each year of the bank's evaluation period, as discussed in Section V.D above;
- delaying the first evaluation of a new AA so that a bank can develop its CRA expertise and infrastructure in the geography, as discussed in Section IX.A.2 above;
- grandfathering existing loans or investments that support job creation, retention, or improvement if such loans or investments are not included as qualifying activities in the final rule, as discussed in Section XI above; and
- providing currently-designated wholesale or limited purpose banks additional transitional relief if, despite our recommendations, such banks become subject to the general performance standards, as discussed in Section XIV.A above.

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BPI appreciates the agencies' consideration of our comments. If you have any questions, please contact either the undersigned, by phone at (202) 589-2412 or by email at katie.collard@bpi.com, or Dafina Stewart, Senior Vice President and Associate General Counsel, by phone at (202) 589-2424 or by email at dafina.stewart@bpi.com.

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Appendix A – Key Ambiguities in the Proposal

- Whether "consumer loans" is its own retail lending product line or each *sub-category* of consumer loans is a retail lending product line.

- Relatedly whether each sub-category of consumer lending would be subject to separate evaluation under the Proposal's Retail Lending Distribution Tests, or a single combined evaluation in each AA.

- Whether the Retail Lending Distribution Tests, as proposed, would count only those loans that the *bank being evaluated* originates during the evaluation period, and what counts as an "origination" for these purposes.

- Whether the borrower comparator and peer comparator would be based on data that are contemporaneous with the bank's evaluation period.

- Whether the peer comparator for an OCC-regulated bank would be based on data that includes OCC- and FDIC-regulated banks, or only the former (and vice versa).

- Whether qualifying activities that cease to be qualifying for CRA purposes would become impermissible under section 24(Eleventh) of the National Bank Act and the Volcker Rule, if the basis for their permissibility under those separate statutes and regulations was their qualification under the CRA.

- When changes to a bank's facility-based and deposit-based AAs would become effective.

- The scope of the Proposal's articulated standard for including affiliate activities – counting all such activities when the bank is "substantively engaged" in the activity – and how such standard should apply to a banking organization with multiple bank subsidiaries that may each be involved in a single activity by an affiliate.

- Whether the phrase "assessment areas where [a bank] holds a significant amount of deposits" means: (i) only an AA that holds more than 50 percent of the bank's deposits (if one exists); (ii) any selection of AAs collectively responsible for more than 50 percent of its deposits; or (iii) each of those AAs that have deposit volumes greater than the median volume among all of the bank's AA.

- Whether a loan to an LMI borrower is rendered non-qualifying under the CRA by virtue of a non-LMI co-signor.

- Whether, in the proposed definition of a "non-branch deposit-taking facility" in § _.03 of the proposed rule text,[51] each qualifier following "other than a branch" modifies "branch" or "banking facility."

- What, if any, types of facilities besides deposit-taking ATMs the agencies intended the new definition of "non-branch deposit-facility" to include.

- Whether banks would be required to maintain and report average deposit data on a monthly basis (as indicated in the preamble to the Proposal) or on a quarterly basis (as indicated in the proposed rule text).

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[51] That definition would provide: "*Non-branch deposit-taking facility* means a banking facility other than a branch owned or operated by, or operated exclusively for, the bank that is authorized to take deposits that is located in any state or territory of the United States of America."