April 8, 2020
Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th St. NW
Washington, DC 20429

Via: email to: Comments@fdic.gov

Re: RIN 3064-AF22 – Community Reinvestment Act regulations

To Whom It May Concern:

The new regulations implementing the Community Reinvestment Act (CRA) proposed by the OCC and FDIC (the Agencies) fail, in critically important ways, to comply with the agencies' obligations under the Administrative Procedures Act (APA) and the Federal Fair Housing Act. The Housing Justice Center is a Minnesota non-profit legal advocacy organization whose mission to protect and expand the supply of affordable housing. In our 22 year existence we have litigated dozens of APA and Fair Housing Act claims against federal agencies. As set out below, the agencies can expect successful APA and Fair Housing Act claims, probably by numerous interested parties, blocking implementation of the new regulations.

The proposed regulations violate two key principles of the APA. First, in informal adoption of regulations, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made." *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125-26 (2016), citing *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) and *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *Federal Communications Commission v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1810 (2009); *Bowman Transportation, Inc. v. Arkansas-Best Freight System*,417 U.S. 281, 285 (1974). Yet in drafting these proposed regulations, the agencies adopted critically important ratios with no information provided to establish a "rational connection" between the findings of the agencies' purported studies and its choices of the ratios which establish banks' CRA ratings.

In the proposed regulations, the result of an agency's CRA evaluation of a bank are bank-level and assessment-area evaluation measures determined under Section 25.10. These, in turn under 25.12, produce bank-level and assessment area ratings of outstanding, satisfactory, needs to improve, or substantial non-compliance. The ratings are based on ratios of the value of qualifying activities to deposits. These ratings, are used to evaluate bank applications to the regulatory agencies (25.02). The Supplemental information at page 1222 indicates that, in setting the ratings benchmarks, the agencies estimated what the CRA evaluation measure would have been for all banks from 2011-2018 under the proposed regulations and compared this to the

banks' past performance evaluations. But none of this information, used to set the benchmark ratios for each of the assessment ratings, is public. Nor have the agencies explained the connections between their analysis of the data and their assignment of benchmark ratios used to assess bank CRA performance. As FDIC Board Member Martin Gruenberg noted in a December 12, 2019 statement on the proposed rulemaking, referring to the ratios establishing benchmarks for outstanding, satisfactory, needs improvement, and substantial noncompliance CRA evaluation measures:

> "No explanation is given as to how these specific benchmarks were determined, and none of the analysis referenced is provided. They appear arbitrary. Yet they are the basis for establishing new presumptive standards for CRA performance."[i]

That the approach chosen by OCC and FDIC is questionable is evidenced by the fact that a Federal Reserve analysis "did not find a consistent relationship between CRA ratings and a uniform comprehensive ratio that adds together all of a bank's CRA-eligible activities in an area."[ii] A majority of those commenting on the OCC's Notice of Proposed Rulemaking opposed the single ratio metric.

The agencies having provided no rational connection between facts purportedly found and choices for CRA evaluation measures made, the proposed regulations are indeed, as Director Gruenberg argues, arbitrary at their heart. Therefore, in the face of the inevitable legal challenges under Section 706(2)(A) of the APA they will be held arbitrary and capricious abuses of discretion and ordered set aside by the federal courts.

In addition, the OCC and FDIC have provided no explanation of why the Federal Reserve chose not to participate in the amended regulations or explain how the proposed regulations governing only two of the three agencies charged with CRA oversight can be effective.

The second basic principle violated, subjecting the proposed regulation to being set aside as arbitrary, capricious, and an abuse of discretion pursuant to Section 706(2)(A) is that there is no evidence that the agencies, in promulgating the rule, considered important issues that they are statutorily required to consider. See, 5 U.S.C. Section 706(2)(A)(agency action may be set aside if not in accordance with law); *State Farm*, 463 U.S. at 43 (agency rule is arbitrary and capricious if the agency has failed to consider an important aspect of the problem); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)(reviewing court must consider whether agency decision was based on a consideration of the relevant factors); *Shannon v. Department of Housing and Urban Development*, 436 F.2d 809, 819 (3rd Cir. 1970)(when an agency action is made without consideration of relevant factors, referring to the Fair Housing Act;, it must be set aside.)

Pursuant to 42 U.S.C. Sec. 3608, any Federal agency having regulatory or supervisory authority over financial institutions is required to administer its programs and activities relating to housing in a manner so as to affirmatively further the purposes of the Fair Housing Act. This affirmative duty requires, at a minimum, that agencies consider the effects of their proposed actions with respect to the purposes of the Fair Housing Act and assess the proposed actions in light of those purposes. *N.A.A.C.P. v. Secretary of Department of Housing and Urban Development*, 817 F.2d 149, 151 (1st Cir. 1987)(obligation at a minimum is "to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply"); Shannon, 436 F.2d at 821.

The federal courts have frequently indicated that public actions which limit the supply of affordable housing, which is disproportionately needed by households of color, present a prima facie case of disparate impact violations of the Fair Housing Act. *Gallagher v. Magner*, 619 F.3d 823, 835 (8th Cir. 2010); *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575-76 (2d. Cir. 2003); *Owens v. Charleston Hous. Auth.*, 336 F. Supp. 2d 934, 943 (E.D. Mo. 2004), aff'd in part, *Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729 (8th Cir. 2005); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-35 (2d Cir.), aff'd, 488 U.S. 15 (1988); *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1065 (4th Cir. 1982).

In the Twin Cities seven county metropolitan area, households of color are four times more likely than white, non-Hispanic households to be low income (<=80% AMI) renters with severe housing problems, the most prominent of which is paying more than half of the household income for housing.[iii] Thus public actions which reduce the production of housing affordable at these levels will predictably have vastly disproportionate adverse effects on households of color.

A number of aspects of the proposed regulations potentially have the effect of reducing bank funding of affordable housing, and thus reducing the supply of such housing, with resulting disparate adverse effects on households of color. Yet the proposed regulations' Supplementary Information provides no evidence of agency recognition or consideration of this potential. As noted by FDIC Director Gruenberg, the proposed regulations broaden eligible and qualifying CRA activities, diluting focus on LMI housing and directing bank resources to other purposes. Sections 25.04(c) and 345.04(c) relating to community development loans and activities do this is several ways:

* Under (1)(i)(A) the proposed regulations count as qualifying activity that which "likely" to "partially" benefit LMI households based on project rents rather than projected incomes. But in the Twin Cities metro area, for instance, about 42% of rental units affordable at 30% to 50% of AMI and 46% of rental units affordable at 50% to 80% of AMI are occupied by higher income households.[iv] Thus this expansion of qualifying activities may have little if any benefit to LMI households in this and most other metropolitan areas.

* Under (1)(i)(D) and (E) the proposed regulations count activity benefitting middle income households in high-cost areas. We examined current HUD data on 7 counties surrounding New York City that met the definition in the proposed regulations of high-cost area.[v] The HUD data indicates that in these counties only 5% of the renters with incomes greater that 80% of AMI have housing cost burden greater than 30% of income and only .5% have a severe cost burden paying more than 50% of income. The proposed regulatory provision which counts activity benefitting middle income households could thus benefit a tiny minority of those households with actual housing cost burdens.

* Also as noted by Director Gruenberg, the single, dollar-based metrics favor large, easy to accomplish investments and loans, over more complex activities. The current requirements of the CRA have played a major role in the production of housing affordable at or below 60% of AMI through the Low Income Housing Tax Credit (LIHTC) program., by far the largest federal housing program for low income households. A 2018 study by CohnReznick LLP, for instance, found that approximately 85% of all housing credits are purchased by banks.[vi] But these investments are complex and the proposed rules are likely to substantially reduce CRA-motivated investments in these projects.

* The proposed regulations at Sections 25.04(c) and 345.04(c) count a variety of types of investments in projects located in LMI census tracts, but which are not required to serve LMI

households in any way. See sections (5) - community facilities; (6) - infrastructure; (9) financial literacy programs; and (11) federal opportunity zones.

Given the obvious violations of the APA and the Fair Housing Act, the agencies should withdraw these proposed regulations and work with the Federal Reserve on updates to the CRA which focus on its main mission: encouraging banks to provide financial assistance to LMI households and communities.

Jack Cann
Attorney, Housing Justice Center

---

[i] https://www.fdic.gov/news/news/speeches/spdec1219d.pdf

[ii] "*Strengthening the Community Reinvestment Act by Staying True to Its Core Purpose*"
Federal Reserve Board Governor Lael Brainard, January 8, 2020,
https://www.federalreserve.gov/newsevents/speech/brainard20200108a.htm

[iii] HUD Consolidated Planning/CHAS data, 2012-2016 (Data Download Page).
https://www.huduser.gov/portal/datasets/cp.html Calculated using Table 2 data for the seven county Twin Cities metro area on households with Severe housing problems,

[iv] [iv] HUD Consolidated Planning/CHAS data, 2012-2016 (Data Download Page).
https://www.huduser.gov/portal/datasets/cp.html Calculated using detailed data from Table 15C for the seven county Twin Cities metro area.

[v] We examined HUD Consolidated Planning/CHAS data, 2012-2016 (CHAS Query Tool); https://www.huduser.gov/portal/datasets/cp.html for Bronx, Kings, Nassau, Queens, Richmond, Suffolk, and Westchester counties, all of which met the test of more than 40% of households with housing costs greater than 30% of income.

[vi] "Housing Tax Credit Investments: Investment and Operational Performance, CohnReznick LLP, April 2018, pg. 14.