July 28, 2022

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Office of the Comptroller of the Currency
Benjamin W. McDonough, Chief Counsel
Chief Counsel's Office
Attention: Comment Processing
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Board of Governors of the Federal Reserve System
Ann E. Misback, Secretary
20th Street and Constitution Avenue, NW
Washington, DC 20551

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

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

Dear Mr. McDonough, Ms. Misback, and Mr. Sheesley:

I appreciate the opportunity to respond to your Agencies' request for comment on their joint proposed changes to update and clarify the regulations implementing the Community Reinvestment Act ("CRA").[1] The joint Notice of Proposed Rulemaking (the "NPRM") reflects a commendable interagency effort to further the statutory purposes of the CRA—an important American creation designed to advance fairness in credit and deposit services by focusing bank efforts on moderate- and low-income Americans and their financial needs. In particular, the CRA is aimed at groups who have historically not obtained equal access to banking products and services on the basis of race, ethnicity, gender or for other reasons (including income status).

Since the CRA regulations were last updated most substantially in 1995,[2] banking activities have evolved from being primarily local in nature to being more nationally-oriented. The changes prompted by this evolution have created a fertile environment for the Agencies to review the rules implementing the CRA and alone provide cause to adjust those rules. Making

1 87 Federal Register 33884 (June 3, 2022).

2 The Agencies also promulgated revisions in 2005 focused primarily on regulatory relief for small banks. *See* 70 Federal Register 44256 (Sept. 1, 2005).

those adjustments undoubtedly presents challenges to the Agencies, given that the statutory language in the CRA is in many respects locally-focused, reflecting the banking environment in the 1970's. I applaud the Agencies' efforts to address those challenges in the NPRM, and many of the proposed changes are sensible. At the same time, I believe that the NPRM omits certain elements that are, in my view, important. I also am concerned that the new CRA regulation is quite complex and lengthy, and potentially increases burdens on individual beneficiaries of this rule and the community groups that serve them, particularly local and smaller groups, as well as banks of all sizes. With those views in mind, I offer several suggestions aimed at improving the Agencies' ultimate revisions. My suggestions fall into two categories, each addressed in greater detail below.

- First, to the extent possible, the Agencies should modify the proposal to: (a) provide more incentive for promoting activities that will relieve financial distress on low- and moderate-income borrowers during economic downturns, providing relief to the borrowers that the CRA is meant to assist, and reduce any supervisory restrictions that inhibit CRA lending by banks that may themselves be stressed but are not in danger of failing, and (b) extend the CRA to nonbank lenders to expand credit availability to low- and moderate-income communities, as well as level the playing field as much as possible between banks and nonbank lenders.

- Second, the Agencies should: (a) simplify and shorten the proposal, and (b) reduce its potential burden particularly with respect to community banks.

1. Modifications to the Proposal

a. <u>CRA Credit for Countercyclical Relief</u>

For the better part of 50 years, the CRA and its implementing rules have focused on increasing access to banking products and services in underserved areas. Of course, *increasing* access tends to be most feasible in prosperous times and less feasible in periods of economic contraction. Community needs for banking products and services and for relief, however, are at their greatest during recessionary periods. Unfortunately, banks—and, in particular, community banks—are not nearly as well-situated to serve those needs during those periods as during periods of prosperity. Moreover, during periods of cyclical downturn, low-income Americans—in particular, low-income Black and Hispanic Americans—tend to bear the initial brunt of the decline and suffer its consequences the longest. This is not because of any imprudence on their part; rather, because of our country's legacy of racism, discrimination and the economic deprivation in many communities. As a result, it becomes harder, if not impossible, for these Americans to meet their financial obligations, including their monthly mortgage payments. Once beaten down, a generation of disadvantaged Americans in practice loses any real chance of participating fully, if at all, in the American dream. Whatever sliver of wealth they worked for is swiftly taken away. I would emphasize that, for decades, economic downturns and losses for middle and low income Americans have not been the result of their doing or of the banks that serve them, but rather the impact of cyclical phenomena and often the imprudence of non-bank financial institutions, including institutions that in fact prey on the poor.

The financial institutions best situated to serve the needs of those hardest hit by economic downturns are often Community Development Financial Institutions ("CDFI") and Minority Depository Institutions ("MDIs"). Indeed, it is generally the mission of CDFIs and MDIs to promote banking in traditionally underserved communities. However, by virtue of that mission, CDFIs and MDIs, much like their constituents, are often among those hardest hit by economic downturns.[3] Again, this is not typically because of imprudence on their part.

I recognize that the Agencies have, to a very limited degree, afforded banks credit for certain activities that address the needs of their communities during times of economic distress.[4] Although these efforts are laudable, in my view, they do not adequately account for measures that banks of all sizes can and should be encouraged to undertake—at all times, but especially in times of economic distress—to blunt the impact of cyclical downturns on those who tend to be hardest hit, including CDFIs and MDIs. The NPRM presents the Agencies with an important opportunity to address this important omission. Although a variety of measures are feasible, I wish to propose two:

- First, the Agencies could permit banks to receive CRA credit for contributing to one or more funds or employ other mechanisms that have the express and limited purpose of supporting low- and moderate-income individuals, small businesses, small farms, MDIs and CDFIs during economic downturns. During those downturns, the amounts contributed to and deployed by these funds would be used to provide relief (*e.g.*, loan forgiveness, grants, etc.) to low- and moderate-income individuals and small businesses and farms in geographies adversely affected by the downturn and to provide financial assistance (*e.g.*, capital or low cost funding) to struggling MDIs and CDFIs. Depending on the circumstances,

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3 *See, e.g.*, Federal Reserve Bank of Chicago, Economic Perspectives, *Minority-Owned Banks and Their Primarily Local Market Areas*, Vol. 41, No. 4 (May 2017), available at https://www.chicagofed.org/publications/economic-perspectives/2017/4 ("Minority-owned community banks were nonminority bank peers.").

4 For example, banks may be afforded community development credit for foreclosure prevention programs to homeowners in low- or moderate- income geographies and favorable consideration under the lending test for loan programs that provide modifications to homeowners facing foreclosure. Indeed, at the outset of the COVID-19 pandemic and related economic downturn, the Agencies issued guidance clarifying that, effective through the six-month period after the national emergency declaration is lifted, they will, among other things, favorably consider retail lending activities in a bank's assessment areas that are responsive to the needs of low- and moderate-income individuals, small businesses, and small farms affected by COVID-19, including waiving late payment fees and overdraft fees and offering payment accommodations, including modifications and restructurings. Joint Statement on CRA Consideration for Activities in Response to COVID-19 (March 19, 2020), available at https://occ.gov/news-issuances/bulletins/2020/bulletin-2020-19a.pdf. The Agencies further clarified that community development activities that promote housing stability for low- or moderate-income individuals and families experiencing financial hardship due to COVID-19 would be considered responsive to community needs, including, among other things, loan forbearance, reduced payments, loan modifications, and debt restructurings. Community Reinvestment Act (CRA) Consideration for Activities in Response to the Coronavirus Pandemic Frequently Asked Questions (FAQs) (May 27, 2020, updated March 8, 2021), available at https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-12a.pdf.

CRA credit could be provided under the various corresponding retail lending tests, as well as under the community development financing test. The positive impact of these funds could be substantial, helping individuals, small businesses, and small farms avoid foreclosures and bankruptcies, as well as avoiding the kinds of community-wide downward spirals that occurred during and after the 2008-2009 financial crisis.

- Second, the Agencies should ensure in the CRA regulation that supervisory constraints imposed on small banks—in particular, CDFIs and MDIs—do not adversely and unnecessarily affect these institutions' ability to meet community credit needs during difficult times. Constraints on lending and other activities may disproportionately affect the ability of small institutions to meet community credit needs in times of stress, even for banks that are not in danger of failing. Instead, supervisors should carve out appropriate CRA activities from lending and other restrictions that supervisors may impose on such institutions that are subject to additional supervisory scrutiny, but not in danger of failing,

These measures would be fully consistent with the purposes of the CRA and the Agencies' authorities under the CRA.

b. <u>Extending the CRA to Nonbank Lenders to Expand Credit Availability and Level the Playing Field</u>

Since the CRA was enacted in 1977, the landscape for financial services has changed dramatically. In 1977 most of the financial activity of the United States was handled by banks.[5] Today, less than 50 percent of that activity is handled by banks. Between 2010 and 2017 alone, lending by technology-based financial services firms grew from less than one percent to more than 36 percent of all U.S. personal loans.[6] And, as of 2018, nonbank firms (both technology-based and non-technology based) accounted for the majority of both the non-mortgage consumer loan market and the residential mortgage market in the United States.[7]

A principal distinguishing factor between banks and these nonbanks that comprise the majority of many U.S. lending markets is the comprehensive set of laws and rules that govern the former, but generally not the latter. The CRA is one important example. Banks must expend enormous resources ensuring they meet the convenience and needs of the communities they serve and otherwise comply with the rules implementing the CRA. Nonbanks, in contrast, generally face no comparable obligations and, as a consequence, there are no similar assurances

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5 For this purpose, "banks" includes other chartered institutions, including savings associations and credit unions.

6 *See* U.S. Department of the Treasury, A Financial System That Creates Economic Opportunities Nonbank Financials, Fintech, and Innovation at 4 (July 2018), available at https://home.treasury.gov/sites/default/files/2018-07/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financi....pdf.

7 *Id.* at 84.

that nonbanks also meet the convenience and needs of their communities.[8] This asymmetry—banks make less than half the country's loans yet are the only entities obligated to ensure their lending (and deposit) activities serve the convenience and needs of their communities—needs to be addressed, including because it calls into question whether traditionally underserved communities in fact have equal access and promotes business behaviors by nonbanks that are of a lower standard. All financial organizations that offer products and services comparable to banks should be subject to CRA-like obligations comparable to banks. Indeed, as Federal Reserve Chairman Powell stated last year in the context of the CRA, "like activities should have like regulation."[9]

I recognize that the authority of the Agencies to impose such obligations on nonbanks is severely constrained and that congressional action likely is required for a fully comprehensive CRA scheme. However, I encourage the Agencies, in connection with the NPRM, to explore opportunities to, and authorities under which they may, subject nonbanks to comparable requirements, particularly when the nonbanks have close partnerships with banking organizations and, at least indirectly, receive benefits from the presence of deposit insurance and the comprehensive supervision of banks. If congressional action is the only solution, the Agencies should advocate for the same. Moreover, I encourage the Agencies, in connection with the NPRM, to explore opportunities to level the CRA playing field between banks and nonbanks. A certain degree of leveling can be achieved by simplifying and shortening the NPRM and reducing, instead of increasing, the burdens the rules implementing the CRA impose on banks, as discussed in the section that follows.

2. Simplification and Burden Reduction

a. Simplification

As I mentioned at the outset: the CRA serves a critically important purpose by advancing fairness in access to banking products and services. Notwithstanding its importance, the CRA occupies only a few pages of fairly plain-language statutory text. The NPRM in the Federal Register, in contrast, includes 130 pages of small-print triple-column explanatory text, followed by complex rule requirements that are nearly 50 similarly small-print, triple-column pages that only experts can understand and then only after lengthy study and analysis. The NPRM imposes, among other things, new methods for identifying assessment areas, complex new tests under which banks must or may be evaluated, new multi-step frameworks for assigning conclusions and ratings, and new data collection and reporting requirements. Although rule detail can, at times, prove helpful both to those subject to the rule and the public, I believe the NPRM's length and complexity outweigh the potential benefits associated with providing sufficient detail to

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[8] Massachusetts, Illinois, and New York have CRA-like laws and (in the case of Massachusetts, rules) applicable to certain mortgage lenders. *See* Mass. G.L. Ch. 255E, § 8, 205 ILCS 735, and N.Y. Banking Law § 28-bb (effective Nov. 2022). Legislation has been proposed in other states, including California and Pennsylvania.

[9] *See, e.g.*, The Wall Street Journal, *Powell Says Low-Income Lending Rules Should Apply to All Firms Offering Consumer Credit* (May 3, 2021), available at https://www.wsj.com/articles/powell-highlights-slower-recovery-for-low-wage-and-minority-workers-11620065926?mod=searchresults_pos1&page=1.

banks and specialized providers of CRA services.[10] This is not to suggest there are not many excellent elements of the NPRM, including the Agencies' approach to "tiering" responsibilities based on bank size. The positive aspects of the NPRM notwithstanding, I believe a great deal of effort should be expended by the Agencies to make the rule shorter and more understandable.

To this point, many community banks and the communities they serve may benefit most from electing, when allowed under the NPRM, to be evaluated under certain new tests—most notably, the Retail Lending Test for small banks and the Community Development Financing Test for intermediate banks.[11] Given the length and complexity of the NPRM, though, I question whether many community banks will have the resources available to adequately consider the benefits of electing to be evaluated under the new tests as opposed to simply maintaining the *status quo*. This is particularly true given the relatively brief comment and transition periods for implementation set out in the NPRM. Without sufficient access to expert resources and adequate time to consider the NPRM, many small and intermediate banks may choose to continue to be evaluated under the existing performance standards, potentially leading to a sub-optimal result, not only for those banks, but for the communities they serve. The rules implementing the CRA should be equally accessible to banks of all sizes; access should not effectively be limited only to those banks that have the resources to comb through the NPRM and consider the benefits of the new tests over the abbreviated three-month comment period. Indeed, given the NPRM's length, complexity, and abbreviated comment period, I believe that small and intermediate institutions are effectively encouraged to maintain the *status quo*, which would be an unfortunate outcome if those banks and the communities they serve would benefit most from electing to be evaluated under a new standard.

b. Burden Reduction

As to burden reduction specifically, I acknowledge that the bulk of the burden under the NPRM appears to fall to large banks, as defined in the NPRM. Indeed, the new assessment areas, tests, frameworks for assigning conclusions and ratings, and data collection and reporting requirements appear to impact primarily (but not exclusively) large banks. While I do not wish to diminish the positive aspects of these new provisions, they appear to present few, if any, opportunities to actually reduce burden on banks of any size. In a similar vein, the potential continued preference of many small and intermediate banks to be subject to *status quo* standards, when allowed, necessarily means no burden reduction.

Revisiting the NPRM with a view to reducing burden on banks of all sizes and implementing burden reducing elements is one simple and meaningful step in the direction of leveling the CRA playing field between banks and nonbanks. In this regard, I should note that

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10 In general, a rule should be easily understandable, not only to those subject to the rule, but to a layperson. The CRA proposal is too complex for almost any layperson to understand. While I acknowledge that, as a regulator, I was imperfect in meeting this accessibility standard, I believe accessibility is a goal that regulators should always work towards in rulewriting.

11 Community banks are generally understood to have less than $10 billion in assets, meaning that while most are small or intermediate banks, as defined in the NPRM, many truly community banks are classified as "large banks"—just not the largest large banks.

today a bank of $10 billion is not a large bank, particularly as inflation has been eating into that number since it was established as a benchmark under Dodd-Frank.

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I again appreciate the opportunity to respond to the Agencies' request for feedback on NPRM and commend the Agencies' effort.

Sincerely yours,

[redacted]

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