BANK POLICY INSTITUTE

August 5, 2022

Via Electronic Mail

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James P. Sheesley, Assistant Executive Secretary
Attention: Comments RIN 3064-AF81
Federal Deposit Insurance Corporation
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Chief Counsel's Office
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Office of the Comptroller of the Currency
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Washington, DC 20219

Re: Community Reinvestment Act (Docket No. R-1769, RIN 7100–AG29; Docket ID OCC-2022-0002, RIN 1557–AF15; RIN 3064–AF81)

To Whom It May Concern:

The Bank Policy Institute[1] appreciates the opportunity to comment on the federal banking agencies' notice of proposed rulemaking to revise their Community Reinvestment Act ("CRA") regulations.[2]

BPI fully supports the longstanding goals of the CRA and believes that the Act has been 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 to ensure banks continue to provide loans, investments, and services 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.

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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 bank-originated small business loans, and are an engine for financial innovation and economic growth.

2 Community Reinvestment Act, 87 Fed. Reg. 33,884 (June 3, 2022).

Unfortunately, parts of the Proposal would stray from these core values and from the agencies' statutory mandate, resulting in a proposed framework that would be needlessly sweeping, complex, and punitive in its application:

- *First*, the Retail Lending Test is proposed to be calibrated so stringently that it could transform the CRA from a framework for ensuring credit availability into a mechanism for credit allocation. Such a result would be inconsistent with the express purposes of the statute, as reinforced throughout the CRA's legislative and regulatory history.[3] According to the agencies' own calculations, the stringency of the Retail Lending Test would lead to widespread downgrades of large banks' performance, a result that the agencies do not rationalize or adequately explain and that could therefore make the Proposal vulnerable to a challenge that it is arbitrary and capricious. These proposed downgrades appear to be based on the faulty premise that large banks are not currently doing enough to achieve the goals of the CRA, when in fact large banks' existing ratings reflect the serious commitments they have made to fulfilling their CRA obligations – commitments that the agencies themselves highlight in the Proposal.[4] By placing seemingly insurmountable barriers to many large banks receiving Outstanding ratings, the proposed Retail Lending Test would actually reduce banks' incentives to achieve such ratings. Adding to the problem is the fact that the Test would compare banks' performance to benchmarks that they would never know in advance, raising due process concerns. The agencies should alleviate these issues by calibrating the final rule more reasonably and by providing for benchmarks that banks will know in advance of the applicable performance period.

- *Second*, mandatory evaluation of banks' retail lending distribution in areas outside their facility-based assessment areas would be inconsistent with the agencies' statutory authority as evinced in the text, history, and purposes of the CRA. The text of the CRA requires the federal banking agencies to prepare written evaluations of banks' CRA performance in geographies where banks have domestic branch offices, and does not refer to areas where banks provide loans.[5] The text is consistent with the underlying purposes of the CRA, which include ensuring that banks serve any community where they have branches that take deposits from that community.[6] Moreover, it takes time and dedicated resources to build meaningful CRA infrastructure in a given geography. If making retail loans outside a bank's facility-based assessment areas could give rise to a stringent distribution analysis in new,

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3 According to Federal Reserve Vice Chair for Supervision Michael Barr, the agencies have historically eschewed a prescriptive, quotas-based approach to CRA evaluations specifically to avoid criticism that the CRA results in government-imposed credit allocation. *See* Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and its Critics*, 80 N.Y. Univ. L. Rev. 513, 600 (2005) [Hereinafter "Credit Where It Counts"]; *see also* Federal Reserve Chairman Alan Greenspan, Economic Development in Low- and Moderate-Income Communities, Remarks at a Community Forum on Community Reinvestment and Access to Credit: California's Challenge (Jan. 12, 1998), at http://www.federalreserve.gov/boarddocs/speeches/1998/19980112.htm (last visited July 17, 2022) ("'The legislative history indicates that the Congress did not intend for the CRA to result in government-imposed credit allocation.'"). With its rigid proposed approach to evaluating retail lending distribution, the NPR abandons that caution.

4 *See, e.g.,* 87 Fed. Reg. at 33,945 ("The agencies recognize that many banks, especially large banks, frequently employ dedicated CRA teams with strong relationships to the community to ensure that the bank appropriately identifies and helps to meet community credit and community development needs.").

5 *See, e.g.*, 12 U.S.C. § 2906(b)(1)(B).

6 *See, e.g.*, 123 Cong. Reg. S8932 (daily ed. June 6, 1977) (Senator William Proxmire, the bill's sponsor in the Senate, stating in floor debate that the statute was intended to solve the problem 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 . . . .").

separate geographies, banks would have a strong disincentive from offering lending products in many places outside their facility-based assessment areas where they lack these resources. As a result, underserved communities could suffer from a constriction in the availability of credit. The "retail lending assessment areas" and "outside retail lending area" concepts should therefore be optional in the final rule.

- *Third*, several elements of the proposed Retail Services and Products Test would appear to serve as a *de facto* requirement to offer specific deposit services, products, and features, which indicates that the agencies have ventured far from their statutory mandate of encouraging a bank to meet the *credit needs* of its entire community. In particular, parts of this Test appear to have the effect of regulating the cost of deposit account fees. The agencies have no authority to impose price controls by capping these fees, much less indirect authority within the CRA. The final rule's Retail Services and Products Test should therefore focus on credit delivery channels and credit programs responsive to LMI people and geographies, as is done today.

- *Fourth*, the Proposal is unnecessarily complex. The Proposal's multiple new tests, subtests, and factors would subject numerous discrete areas of a bank's operation to evaluation, and the agencies have not explained why they did not offer more straightforward alternatives that would achieve similar objectives. This letter describes multiple ways in which the agencies could easily simplify and streamline the Proposal while still accomplishing their policy objectives and serving the statutory purposes of the CRA. As an example, rather than strain to create a regime in which as many as six different retail products and sub-products could be subject to evaluation depending on the specific geographic area being reviewed, the agencies should focus the Retail Lending Test on the loan types that Congress and the agencies have recognized are core to the CRA: home mortgages (separately analyzing closed-end and open-end home mortgage loans) and small business and small farm loans (analyzing both on a combined basis as a single category). These types of retail loans are core to the CRA because they are proven to help borrowers and their communities create and sustain wealth. The final rule should adopt these recommendations to simplify the evaluation process.

- *Fifth*, the Proposal would take a rigid, "one-size-fits-all" approach to evaluating large bank performance and would lack the flexibility to accommodate large banks with less traditional business models. As an example, the Proposal would apply the same weighting to its four large bank tests regardless of how important retail banking is to the bank being evaluated, which could lead to a disproportionate emphasis on retail loans for banks that focus on other business lines and primarily serve LMI people through their community development activities. The Proposal's lack of flexibility is compounded by its proposed changes to the requirements for strategic plans, which could be read to permit almost no deviation from the performance tests and standards that would apply in the absence of a strategic plan. The agencies should ensure that the final rule meets the their stated goal of tailoring evaluations to banks' business models, including by preserving a strategic plan option that provides true flexibility.

- *Sixth*, the proposed compliance period of just 12 months from the final rule's effective date would be far too short to be workable in light of the Proposal's complexity, the vast new data collection and reporting requirements that the Proposal would impose, and key ambiguities in and unintended consequences of the Proposal that the agencies will need to address. The agencies should streamline the data collection and reporting requirements and, to facilitate an orderly transition to the new framework, provide for a compliance period of at least 24 months for the date collection and reporting requirements and at least 48 months until the beginning of the first evaluation periods in which the new tests and standards would apply. The agencies could use this additional time to help clarify the new CRA framework in advance of its effectiveness through interpretive guidance, thus providing banks with timely advice on how to comply and shape their CRA strategies before they risk an adverse rating.

- *Seventh,* the agencies have proposed to eliminate any reasonable constraints on their authority to downgrade a bank's rating based on a compliance violation. The agencies propose to expand the existing standard, which permits a downgrade based on evidence of "discriminatory or other illegal *credit* practices," to encompass "any discriminatory or illegal practice." The proposed standard appears to stretch far beyond the statutory text and its core objectives. Not only could this standard reach consumer compliance violations that are unrelated to credit, it could even be understood to permit downgrades based on compliance violations that have no direct effect on consumers. The breadth of this language is especially concerning in light of the fact that the NPR's stringent calibration would likely result in almost no large banks receiving an Outstanding rating on performance, meaning that most downgrades would be the difference between a Satisfactory rating and a Needs to Improve rating. Ratings of less than Satisfactory have serious negative repercussions for banks and the communities they serve, including by making it more difficult for a bank to open new branches to better reach customers.

These and other problems detailed in BPI's comments would subject the Proposal to significant risk of legal challenge if finalized in its current form. But all of the shortcomings we describe are avoidable, and this letter focuses on specific, actionable changes that the agencies could make to create a more sustainable and durable final rule.

Our comments are organized as follows. To guide the agencies to our specific suggestions, Part I includes an executive summary of our recommended changes to the Proposal. Part II highlights the legal requirements that govern CRA rulemaking, describes BPI's suggested changes to the Proposal in greater detail, and provides supporting legal and policy reasons for why the agencies should adopt these changes. Finally, the Annex to this letter contains a list of provisions in the Proposal that are unclear and the agencies should clarify in the final rule.

We appreciate the opportunity to provide our views and look forward to continued engagement with the agencies on this important initiative.

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I. Executive Summary of Recommendations

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

Assessment Areas (Section II.B below)

- Eliminate both the retail lending assessment area and the outside retail lending area concepts as mandatory elements of the CRA framework for large banks.
- If the agencies do not omit both categories of non-facility-based assessment areas, at least eliminate the retail lending assessment area concept.
- To the extent the agencies choose to move forward with a requirement to establish retail lending assessment areas, mitigate its burdens and unintended consequences by:
  - Considering only home *purchase* mortgage loans, and not home *refinance* loans, toward the home mortgage loan count threshold that triggers a retail lending assessment area;
  - Taking the following steps to ensure a higher degree of contact with a given geographic area is required before an assessment area is mandated: (1) setting thresholds that scale with the bank's level of activity and market presence rather than at the same level for all banks; (2) adding a requirement that, in addition to a threshold of loans, the bank draw a certain monetary threshold of deposits from a given geography for the geography to be a retail lending assessment area; and
  - Only subjecting a product line to evaluation in a retail lending assessment area if the product triggers the relevant thresholds for creating the retail lending assessment area.
- Make it optional for banks to delineate facility-based assessment areas based on the locations of their deposit-taking remote service facilities, including deposit-taking ATMs.

Retail Lending Test (Section II.C below)

- Simplify the Retail Lending Test framework such that the income and gross annual revenue categories for each major product line would be consolidated into one category each and the test would evaluate performance in three categories of major product lines instead of six, so long as each category represents 15 percent or more of the bank's retail lending as determined at the institution level: (1) closed-end home mortgages, (2) open-end home mortgages, and (3) small business and small farm loans (on a combined basis).
- At a minimum, take one or more of the following steps:
  - Excluding automobile loans – and particularly indirect automobile loans – from consideration in the Retail Lending Test. If automobile loans are not excluded from the Retail Lending Test, at least take steps to limit unintended consequences, such as:
    - Capping the weighting of automobile loans so that the agencies can weight retail product lines by loan count rather than dollar amount so as to avoid the underweighting of small business loans;

        - Excluding all automobile loans on a temporary basis so that the agencies can recalibrate the operation of the Retail Lending Test following the collection of data; and

        - Excluding indirect automobile loans from evaluation and from the major product line test;

    - Excluding multifamily loans from consideration under the Retail Lending Test, and evaluating them only under the Community Development Financing Test;

    - Combining the low- and moderate- income and gross annual revenue categories, where applicable, across each of the retail loan categories – with the potential to still incentivize banks to reach low-income borrowers, low-income census tracts, and the smallest small businesses by considering a bank's performance in those categories as beneficial performance context; and

    - Ensuring that loans evaluated as major product lines do in fact represent some meaningful threshold of a bank's retail lending overall or in the locality examined by (1) applying the Retail Lending Test to major product lines that comprise 15 percent of a bank's retail lending as measured at the aggregate *institution* level, rather than at the assessment area level or otherwise, or (2) at the very least, instituting an optional minimum loan count threshold to create a major product line in a particular assessment area.

- Narrow the standard pursuant to which examiners may disregard purchased loans under the Retail Lending Test, such as by establishing a series of presumptions that enable a bank to demonstrate that its purchased loans should be counted and are not indicative of loan churning, or at the very least, provide that in the absence of clear evidence of loan churning, there is no penalty for a bank achieving a given score on the Retail Lending Test by engaging in secondary loan purchase activity.

- Clarify that a bank may count a purchased loan in the numerator of the Retail Lending Test's borrower distribution metrics when the bank has information demonstrating that the borrower is LMI or has gross annual revenues of less than $1 million, even if that information is not reportable on HMDA or the section 1071 rule, and even if the information is as of the time of loan origination, and relatedly, clarify that if the bank purchasing a loan does not have income or gross annual revenue information for the borrower as of the time of origination or purchase, or if such information is not reportable on HMDA or the section 1071 rule, as applicable, the bank may exclude the loan from the denominator of the Retail Lending Test's borrower distribution metrics.

- Eliminate the retail lending volume screen. Alternatively, at a minimum, revise the operation of the screen so that it serves as performance context rather than a basis to downgrade a bank's Retail Lending Test conclusion automatically.

- Exclude corporate deposits from the final rule's definition of "deposits," and define "deposits" for large banks 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) – with alternative definitions for banks with less than $1 billion in assets.

- Provide advance notice of community and market benchmarks by pursuing the alternative described in the preamble to "lock in" such benchmarks at the outset of the evaluation period, using the most recent data available at that time, with the possibility only for downward adjustment of the benchmarks should lending conditions worsen over the course of the period.

- Recalibrate the Proposal's key thresholds and benchmarks, including the punitive proposed Retail Lending Test benchmarks, to make the overall impact of the final rule ratings-neutral for large banks.

- Use loan count rather than dollar volume to determine major product lines and to weight banks' performance across retail loan products within each assessment area. Relatedly, to the extent automobile loans are evaluated in the Retail Lending Test, cap consideration of automobile loans in the denominator of the major product line definition and in the weighting scheme of the Retail Lending Test.

<u>Retail Services and Products Test</u> (Section II.D below)

- Generally clarify in the final rule that the Retail Services and Products Test is not intended to require that any bank must offer specific products, product features, or services – even if one or more of its peer banks do so.

- Omit the evaluation of deposit products. At the very least, clarify that the enumerated factors on which the agencies will evaluate the banks' deposit products responsiveness to LMI needs, set forth in section _.23(c)(2)(i) of the proposed rule text, will be reviewed holistically and will not serve as a checklist.

- Not finalize any requirement to evaluate consumer loans within the Retail Services and Products Test without first providing the public with a meaningful opportunity to understand and comment on such a requirement, which the NPR fails to do.

- Tailor evaluation of delivery systems by:

    - Clarifying that § _.23(b)(1)(iii)(A) of the proposed rule text, which refers to extended and weekend hours, would not result in a bank being expected to offer such hours at branches located in LMI census tracts if it does not do so at similarly-situated branches located in middle- and upper-income census tracts;

    - Clarifying that examiners will consider the business model and purpose of a branch as they review branch hours;

    - Broadening the performance context criteria laid out in § _.23(b)(1)(i) to evaluate a bank's branch distribution for purposes of the Retail Products and Services Test so that the agencies consider the population density and amount of economic activity in a particular census tract;

    - Explaining how the evaluation of branch distribution would apply to a bank that does not operate through branches;

    - Considering ATM placement in LMI geographies on an optional basis, not downgrading a bank if it does not place a certain number of ATMs in LMI census tracts, or, at a minimum providing that (1) the agencies will favorably consider a policy to reimburse fees when customers access out-of-network ATMs; and (2) the agencies will favorably consider a policy to partner with third-party ATM networks that have robust coverage of LMI areas; and

- Clarifying how the remote services facilities element of the Retail Services and Products Test would apply to a bank that does not operate remote services facilities.

- Make the evaluation of usage rates and account openings by people in LMI census tracts merely an optional means for banks to show they are reaching LMI individuals.

Community Development Financing Test (Section II.E below)

- Afford more flexibility for a bank to place greater weight on its performance nationwide, relative to its performance at the assessment-area level under the Community Development Financing Test.

- Specify that commitments to lend and commitments to invest that remain in effect from prior periods will continue to qualify for CRA credit in the current period.

- Clarify that the total amount of a commitment, rather than simply the amount drawn by the customer, will qualify.

- Clarify that a renewed line of credit from a prior period will count in the same way that new line of credit counts for a given period.

- Revise Appendix B, paragraph 1.a. to expressly provide that purchased community development loans and community development investments will receive full and equal credit as originated transactions for purposes of the Community Development Financing Test.

- Grant extra credit to banks that syndicate and/or sponsor funds supporting Low Income Housing Tax Credit (LIHTC) or New Markets Tax Credit (NMTC) projects, consistent with the now-rescinded OCC CRA rule from June 2020. As an alternative to extra credit or a multiplier, at least specify that such efforts will be rewarded during the impact review process.

- Clarify that the "impact review" process proposed at § __.15 will operate as a qualitative and not quantitative evaluation tool – with the potential to increase a bank's score based on positive performance, but without the potential to decrease a bank's score based on an insufficient showing of one or more of the delineated factors.

- Omit the exclusion set forth in section _.24(a)(2)(i) of the proposed rule text, which would provide that "[i]n general, a retail loan may only be considered under the Retail Lending Test in § __.22 and is not eligible for consideration under the Community Development Financing Test." If the exclusion is deemed necessary, at least permit a small business loan that qualifies as having a community development purpose to count under the Community Development Financing Test and *not* the Retail Lending Test.

- Clarify that the limitation in relation to consortium and third party relationships set forth in section _.21(d)(ii) of the proposed rule text does not prevent two institutions from getting credit for the same asset if the asset is sold from one institution to the other.

<u>Community Development Services Test</u> (See Section II.F below)

- Exclude the Community Development Service Hours Metric.

<u>Qualifying Community Development Activities and Impact Review</u> (See Section II.G below)

- Allow support directly to a small business, as well support to an intermediary not licensed by the SBA, to qualify as economic development activity when the existing "size" and "purpose" tests are satisfied.

- Eliminate the language in various prongs of the community development definition that would require activities not to "displace or exclude" LMI residents.

- Simplify the standards for qualifying naturally occurring affordable housing to the single requirement that the housing be *affordable*.

- Raise the affordability standard for naturally-occurring affordable housing from 60 to 80 percent of area median income.

- Revise section _.13(a)(1)(ii) of the proposed definition of a "Primary purpose of community development" to state only: "If the express, bona fide intent of the activity is one or more of the community development purposes in paragraph (a)(2) of this section."

- Omit the proposed requirements that various forms of qualifying community development activities be conducted "in conjunction with" a government plan, program, or initiative. Alternatively, at a minimum, require only that the activity be conducted "consistent with" such a government action.

- Clarify that disaster preparedness and climate resiliency activities include energy-related activities – such as projects that provide access to renewable energy, including utility-scale projects – that benefit residents in targeted census tracts.

- Make clear that renewable energy activities (*e.g.*, construction of a wind or solar power plant) can benefit residents in targeted census tracts even if the plant where the renewable energy is generated is developed outside of the targeted census tract.

- To the extent that an activity must be done "in conjunction with" or "consistent with" a government action, in the climate resiliency context, provide that such a plan, program, or initiative may be developed by a local utility.

- Not limit credit for purchases of mortgage-backed securities that are majority-backed by loans to LMI individuals or to finance affordable housing to the first purchaser or by providing only pro rata credit.

Limited Purpose and Wholesale Banks (See Section II.H below)

- Confirm the continued validity of existing guidance regarding the scope of the regulatory definitions of a limited purpose bank and a wholesale bank, including guidance addressing the amount of unrelated lending that a bank can do and keep the designation.

- Confirm that banks that currently have limited purpose bank and a wholesale bank designations do not need to re-apply for them.

- Clarify that evaluation of a limited purpose or wholesale bank under the Community Development Services Test is not required for the bank to receive an overall Outstanding rating if it otherwise demonstrates outstanding levels and impact of community development financing activities under the Community Development Financing Test.

- Exclude foreign assets and central bank deposits from the denominator of the Wholesale or Limited Purpose Bank Community Development Financing Metric.

- To the extent that the agencies begin to use benchmarks to determine the ratings of limited purpose and wholesale banks' ratings, evaluate each limited purpose or wholesale bank against a benchmark specific to its business model.

- Ensure that the final rule does not look to the Wholesale or Limited Purpose Bank Community Development Financing Metric in isolation, ignoring the broader context in which these banks operate.

Strategic Plans (See Section II.I below)

- Preserve the existing CRA regulations' standards for strategic plans, which give banks the flexibility to tailor evaluations to their business models.

Affiliate Activities (See Section II.J below)

- Clarify that an affiliate's activities need to be included in the bank's data collection and reporting only to the extent that the category of lending or investment is actually included in the bank's evaluation.

- Exempt functionally regulated subsidiaries from the general rule that operating subsidiaries' activities must be included within a bank's performance evaluation and data collection and reporting requirements.

Data Collection, Reporting, and Disclosure (See Section II.K below)

- Permit banks of all sizes, including those with assets over $10 billion, to use FDIC Summary of Deposit ("SOD") data in their CRA calculations rather than geocode, collect, report deposits data based on the residence of their depositors.

- Exclude banks from reporting data that do not pertain to the tests and goals under which they are being evaluated.

- If the final rule does not evaluate automobile loans and multifamily loans in the Retail Lending Test, as we recommend in sections II.I.C.1.b) and II.I.C.1.c) of this letter, omit the data collection and reporting requirements that would have been associated with such an evaluation.

- Not require CRA evaluations to include race and ethnicity data disclosures.

- Reassess the agencies' faulty estimate of the rule's compliance burdens.

Other Scoring Issues (See Section II.L below)

- Maintain the existing regulatory standard whereby a bank's rating may only be downgraded due to evidence of discriminatory or other illegal *credit* practices and forgo expanding that language to cover "any discriminatory or illegal practice."

- At the very least, specify that if the agencies bring a CRA downgrade based on a compliance violation, the violation must directly pertain to (1) the treatment of consumers, and (2) a banking product subject to evaluation under the CRA.

- 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 be a logical nexus between the bank's assigned rating and the practices, and (2) full consideration to be provided to remedial actions taken by the bank.

- Provide flexibility for weighting the four main tests at the institution-level rating stage, rather than impose a rigid weighting scheme on all banks. Alternatively, at a minimum, permit this flexibility within a strategic plan.

- If the final rule does not provide for more flexible weighting of the four tests, increase the weight accorded to the community development financing activities, such as by combining the Community Development Financing Test with the Community Development Services Test and allocating this combined community development test a 50 percent weight, and combining the Retail Lending Test with the Retail Services and Products Test and allocating this combined retail test a 50 percent weight.

- Omit the proposed requirement that a large bank with at least 10 facility-based or retail lending assessment areas must receive at least a low satisfactory rating in 60 percent or more of its assessment areas, by number, in order to receive a Satisfactory rating or higher overall.

- Limit examiner discretion to adjust scores downward based on performance context factors, such as by requiring the agencies to provide a bank with prior notice and the opportunity to be heard if such downward adjustments would adversely affect the bank's institution-level rating.

- Allow examiners to consider innovative and responsive credit products and programs as beneficial performance context across any of the four tests to which they are relevant, such as the Retail Lending Test in the case of programs that are designed to increase the pool of potential LMI borrowers.

- Clarify that any downgrade of an assessment area-level rating from Needs-to-Improve to Substantial Noncompliance based on the bank's failure to exhibit improvement should only be made by examiners in full consideration of performance context, and should not be automatic.

Compliance Period (See Section II.M below)

- Extend the compliance period for the regulation's data collection and reporting requirements to at least 24 months after the effective date.
- Begin performance periods under the new performance tests and standards no less than 48 months after the effective date of the final rule.
- Allow banks the option to receive only an indicative rating for the first cycle of the new evaluation framework.

Other Issues (See Section II.N below)

- Amend other rules concerning permissible public welfare investments (*e.g.*, Regulation H and Part 24) as needed to provide banks with clear legal authority to make investments that meet the CRA definition of "community development investments" without advance approval from their regulators, including through revisions to Regulation H or issuance of interpretive guidance making clear that *all* CRA-qualifying investments are permissible investments for state member banks.
- Consider counting any investment that is permissible under public welfare investment authority as a qualifying community development investment for purposes of the CRA.
- Establish additional incentives for banks to achieve an Outstanding CRA rating, including by deeming a bank that has achieved an Outstanding rating to have a satisfactory record of meeting the convenience and needs of its community for purposes of the processing of a licensing application that requires consideration of that factor.

II. Legal and Policy Reasons for Recommended Changes to Proposal

After describing the framework that limits the agencies' CRA-rulemaking authority, the remainder of this letter sets forth the legal and policy need for each of BPI's proposed changes in greater detail.

A. Overview of the Legal Limits on CRA Rulemaking

The agencies' authority to promulgate a new CRA assessment regime is subject to important statutory and constitutional limits. These limits present challenges for several aspects of the agencies' Proposal, and help inform the remainder of BPI's comments.

First, any final rule cannot exceed the "bounds of [the agencies'] statutory authority" as set out in the CRA.[7] The CRA's objective is laudable, but narrow: Congress enacted it to prohibit redlining by incentivizing banks to meet the "credit needs" of the local LMI, rural, and other underserved communities in which they maintain "domestic branch offices."[8] In so doing, Congress aimed to mirror

[7] *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 326 (2014) (citation omitted); *see* 5 U.S.C. § 706(2)(C); *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

[8] *E.g.*, 12 U.S.C. §§ 2903(a)(1), 2906(a)(1), (b)(1)(B).

existing provisions governing the accessibility of financial institutions' "deposit facilities."[9] The statute's focus on banks' offering credit in communities where they have physical locations does not support generally placing CRA mandates on banks without any tie to the lending context or banks' geographic footprints.[10] Nor is the CRA a "directive to undertake any particular program or to provide credit to any particular individual."[11]

Second, the agencies also must abide by the baseline Administrative Procedure Act ("APA") requirement of "reasoned decisionmaking."[12] If the agencies' rulemaking process or end product violates the APA, a reviewing court must set the final rule aside.[13] As relevant here, courts have identified several requirements agencies must meet to satisfy the APA's checks on notice-and-comment rulemaking. Agencies must rationally connect the evidence and chosen solution with their regulatory goals.[14] They must acknowledge and adequately account for all important aspects of the problem presented, including potential countervailing consequences of a proposed approach.[15] Agencies must consider reasonable, less-onerous alternatives to, and the costs and benefits of, their proposed action.[16] Agencies must respond to significant compliance and implementation challenges a commenting party identifies.[17] And to permit meaningful opportunity for input by interested parties, agencies must "reveal[] for public evaluation" any data underlying the agencies' analysis.[18]

Third, both the APA and the U.S. Constitution requires agencies to acknowledge, account for, and give fair notice of changes in their regulatory approach. Agencies may not alter a previous position regarding the meaning of a statute or the need for a particular regulation without adequately acknowledging and explaining the change.[19] As part of this analysis, agencies must consider "that longstanding policies may have engendered serious reliance interests," and take those interests into

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9 12 U.S.C. § 2901(a)(1).

10 *See* n. 24, below, for a discussion of the sole statutory exception.

11 *Lee v. Bd. of Governors of the Fed. Rsrv. Sys.*, 118 F.3d 905, 913 (2d Cir. 1997).

12 *Judulang v. Holder*, 565 U.S. 42, 53 (2011).

13 The APA directs the courts to "set aside agency actions, findings, and conclusions" that exceed the agency's authority, fail to comply with procedural requirements, or are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

14 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Lab. Rels. Auth.*, 24 F.4th 666, 674 (D.C. Cir. 2022).

15 *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19-20 (D.C. Cir. 2010); *Chamber of Com. v. SEC*, 412 F.3d 133, 140, 144-45 (D.C. Cir. 2005).

16 *Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932, 942 (D.C. Cir. 2017) ("[T]extbook" administrative-law principles require agencies to consider "reasonably obvious" and less onerous regulatory alternatives that fit their goals); *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986).

17 *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015); *Allied Loc. & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000); *Reytblatt v. U.S. Nuclear Regul. Comm'n*, 105 F.3d 715, 722 (D.C. Cir. 1997).

18 *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008); *Chamber of Com. v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006); *see* 5 U.S.C. § 553(b)(3).

19 *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016) (Agency rules that retroactively penalize parties for failing to follow standards that are insufficiently clear violate the APA and do not receive *Chevron* deference because they lack the "force of law"), *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012), *accord Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012).

account.[20] Finally, basic due process principles bar agencies from punishing regulated parties without providing "fair warning" of the standards to which they will be held.[21]

In sum, agencies may only regulate within the bounds of their statutory authority – here, the CRA's directive to assess banks' lending practices tied to banks' geography. Agencies must rationally account for and explain their response to all important aspects of the purported problem that they are attempting to solve – including by addressing the need for a regulation, the negative consequences the regulation would produce, and the availability of reasonable, less burdensome alternatives. And agencies must recognize and justify their position changes while giving industry fair notice of the standards to which they will be held – not set key benchmarks after the fact. As detailed below, BPI has significant concerns that features of the agencies' Proposal violate the above legal constraints, and would thus render the Proposal vulnerable to challenge if finalized without change.

B. Assessment Areas

The NPR's proposed framework for reviewing a bank's retail lending distribution in retail lending assessment areas and outside retail lending areas would introduce evaluation in areas that could be disconnected from the bank's core geographic footprint and communities. The revisions suggested below would help ensure that a final rule conforms with the statute and avoids discouraging banks from serving communities and customers beyond their core facility-based assessment areas.

1. Eliminate Retail Lending Assessment Areas and Outside Retail Lending Areas

The final rule should eliminate both the retail lending assessment area and the outside retail lending area concepts as mandatory elements of the CRA framework for large banks. Mandatory application of the lending-based methodology of the retail lending area and the broad consideration of performance in the outside retail lending area would be antithetical to the text, purposes, and longstanding practical application of the CRA.[22]

a) Mandatory Non-Facility-Based Assessment Areas Are Inconsistent with Statutory Text and Intent

The text of the statute authorizes and requires the federal banking agencies to "assess" and prepare "written evaluation[s]" of banks' CRA performance in geographies where banks have "domestic branch offices." [23] The CRA does not generally refer to areas where banks provide loans.[24] This textual

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20 *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (citation omitted).

21 *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (citation omitted).

22 While the agencies' current CRA regulations provide that assessment areas should encompass geographies in which a bank has its main office, its branches, and its deposit-taking ATMs, "as well as the surrounding geographies in which the bank has originated or purchased a substantial portion of its loans," in practice the agencies appear to have applied the loan-based standard rarely, if at all. Regardless, the existing loan-based standard remains grounded in the areas where a bank has deposit facilities, while the NPR contemplates assessment areas that would be disconnected from facility-based assessment areas.

23 12 U.S.C. §§ 2903(a)(1), 2906(b)(1)(B); Michael Berry & Jessie Romero, *Community Reinvestment Act of 1977*, Federal Reserve History (2017) ("[T]he CRA uses the location of actual bank buildings to determine assessment areas."), https://www.federalreservehistory.org/essays/community-reinvestment-act.

24 The one exception is 12 U.S.C. § 2902(4), which provides that "[a] financial institution whose business predominantly consists of serving the needs of military personnel who are not located within a defined geographic area may define its 'entire community' to include its entire deposit customer base without regard to geographic proximity." This provision indicates that Congress knew how to mandate assessments untethered to banks' geographic location, yet

focus on banks' physical location is reinforced by Congress's repeated reference to "neighborhoods" in further delineating banks' compliance obligations.[25]

The statutory text and structure reflects the stated purposes of the legislation, which include ensuring that banks serve any community where they have branches that take deposits from that community. Specifically, the Congressional findings instruct that "regulated financial institutions are required by law to demonstrate that their ***deposit facilities*** serve the convenience and needs of the ***communities in which they are chartered*** to do business."[26] The legislative[27] and regulatory[28] history further confirms that the CRA was drafted as a mechanism to limit redlining and the excessive exportation of funds away from the communities in which a bank has branches, rather than a vehicle through which to evaluate patterns of bank lending untethered to the bank's physical geographic footprint.

CRA obligations are thus clearly tied to the geographies of a bank's licensed deposit facilities, not just any geography impacted by the bank's business. While certain changes in the banking industry make it prudent to consider community development activity on a broader geographic scale on an optional basis (as is proposed in the NPR),[29] mandatory evaluation of retail lending distribution for all banks through retail lending assessment areas and outside retail lending areas would represent a radical departure from Congress's clear intent.

b) Data Do Not Justify the Proposed Changes

The agencies' own data cast significant doubt on the need for and utility of the proposed retail lending assessment area and outside retail lending area concepts. Table 2 of the NPR's preamble uses historical data to compare LMI lending rates in facility-based assessment areas with rates in geographies that would have been designated as retail lending assessment areas and outside retail lending areas.

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declined to "adopt that . . . alternative" in the remainder of the statute. *Advoc. Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017).

25 *E.g.*, 12 U.S.C. § 2903(a).

26 12 U.S.C. § 2901(a)(1) (emphasis added).

27 *See, e.g.*, 123 Cong. Rec. S8931 (daily ed. June 6, 1977) (statement of Sen. William Proxmire) (Senator William Proxmire, the bill's sponsor in the Senate, stating in floor debate that the statute was intended to solve the problem that "many banks and many savings and loan . . . take money from the community and reinvest it else-where, in some cases abroad, in some cases in other parts of the country."); S. Rep. No. 95-175, at 33 ("The need for new legislation arises because regulating agencies lack systematic, affirmative programs to encourage lenders to give priority to the credit needs of their home areas. . . . the Committee is aware of amply documented cases of red-lining, in which local lenders export savings despite sound local lending opportunities."); 123 Cong. Rec. S16112 (daily ed. Oct. 1, 1977) (statement of Sen. William Proxmire) ("Title VIII, Community Reinvestment, would require Federal bank regulatory agencies to assess the record of institutions which they supervise of meeting the credit needs of the communities in which such institutions are located, including low- and moderate-income neighborhoods").

28 *See, e.g.*, 70 Fed. Reg. at 15,572 (March 25, 2005) (agencies emphasizing that adjustment would be "particularly appropriate" if the assessment area would be "extremely large, of unusual configuration, or divided by significant geographic barriers," highlighting geographic importance to CRA); 60 Fed. Reg. at 22,156 (May 4, 1995) (agencies stating that the CRA was designed to "encourage banks and thrifts to help meet the credit needs of their entire communities" and agencies recognize that "the CRA has come to play an increasingly important role in improving access to credit in communities—both rural and urban—across the country.").

29 The agencies have statutory authority to consider community development activity on a nationwide basis because under the Proposal, banks could conduct all of their community development activities solely in facility-based assessment areas and still receive Satisfactory or Outstanding ratings on the Community Development Financing Test. As a result, this test – unlike the proposed Retail Lending Test – would not create the *obligation* to serve areas outside facility-based assessment areas in any particular way.

The results show a spread of only 2 to 4 percent for mortgage loans to LMI borrowers beyond facility-based assessment areas (21 percent in facility-based assessment areas versus 19 percent in retail lending assessment areas and 17 percent in areas outside of assessment areas) and 1 to 2 percent for mortgage loans in LMI census tracts beyond facility-based assessment areas (15 percent in facility-based assessment areas versus 14 percent in retail lending assessment areas and 13 percent in outside retail lending areas). These differences are extremely minor and hardly suggest that there is a policy problem in mortgage lending that requires or justifies the imposition of novel, complex, and legally dubious CRA methodologies on a mandatory basis.

Similarly immaterial differentials of 2 to 3 percent appear across the rates of small business loans in LMI census tracts – with only a slight decrease from a 24 percent penetration rate in facility-based assessment areas to 22 percent in retail lending assessment areas and 21 percent in outside retail lending areas.

While the differences across penetration rates for the small business loans to the smallest small businesses are greater – 62 percent in facility-based assessment areas to 46 and 40 percent in retail lending assessment areas and the outside retail lending area, respectively – these differences could be explained by other factors. The smallest small businesses may simply seek out loans from banks with a nearby physical presence, resulting in such lending being more concentrated in facility-based assessment areas. Indeed, Federal Reserve Vice Chair for Supervision Michael Barr has attributed this gap to the fact that "[m]ost small businesses rely on lenders with a local presence for credit" because local lenders have an "information advantage" in small business lending.[30]

At the very least, the proposed new assessment area framework appears to be an overbroad solution to the agencies' perceived concerns regarding a single type of distribution (borrower distribution) in a single retail lending category (small business loans). The agencies have not made any showing that the potential benefits of the retail lending assessment areas and outside retail lending area concepts in addressing this narrow distribution issue would outweigh the significant administrative burdens associated with these concepts.

c) Non-Facility-Based Assessment Areas Create Practical Challenges

Building meaningful CRA infrastructure takes time, dedication, and familiarity with the local community, all of which are more challenging to develop on a local basis where a bank does not maintain a branch. If a bank observes lower levels of lending to LMI people or in LMI census tracts near a branch location, it can rectify the situation by leveraging the resources of that branch. Branch employees could connect with local community groups and facilitate marketing efforts or in-person loan clinics that target specific LMI neighborhoods at the exclusion of middle- and upper-income neighborhoods.

Under the proposed retail lending assessment area and outside retail lending area frameworks, however, banks may struggle to alter the balance of loans in areas where they have no physical presence. Evaluating lending outside of facility-based assessment areas may unfairly punish banks for patterns of borrowing over which they have less control than in facility-based assessment areas.

At the same time, for some banks, including digital banks that operate based on a branchless business model, the outside retail lending area framework may provide a clearer means for the bank to demonstrate its ability to reach potentially dispersed LMI individuals where a traditional facility-based

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[30] Credit Where It Counts, at 613.

assessment area evaluation may miss such efforts. As a result, and to tailor the CRA framework for such institutions, the agencies should make the outside retail lending area framework optional for banks.

2. At Least Eliminate Retail Lending Assessment Areas

If the agencies do not omit both categories of non-facility-based assessment areas as we suggest above, the agencies should at least eliminate the retail lending assessment area concept. While such an approach would not resolve the legal deficiencies of the outside retail lending area concept, it would at least reduce some of the administrative complexity of the Proposal while still providing a way for the agencies to review retail lending outside of facility-based assessment areas.[31]

Further, mandating retail lending areas could cause negative collateral consequences that could and should be avoided. If expanding retail lending into a new geography could give rise to an affirmative obligation to undergo the CRA evaluation process in a new, separate assessment area, banks would have a strong disincentive from offering retail loans in some geographies outside their facility-based assessment areas. As a result, underserved communities could suffer from a constriction in the availability of credit – a negative result for both competition and the consumer experience more broadly.

3. At a Minimum, Rationalize the Retail Lending Assessment Area Requirements

While the very concept of retail lending assessment areas is fraught with legal and policy deficiencies and should not be part of any final rule, to the extent the agencies choose to move forward with a requirement to establish retail lending assessment areas, they should modify the requirement in several ways to mitigate its burdens and unintended consequences.

a) Exclude Non-Home Purchase Mortgage Loans from the Mortgage Loan Threshold

Only home purchase mortgage loans should be considered toward the home mortgage loan count threshold that triggers a retail lending assessment area. Originations of home refinance loans should be excluded from this calculation. Consideration of refinancing activity would subject the bank to fluctuations in its number and distribution of assessment areas based on consumer demand and cyclical economic conditions that are beyond the bank's control, namely, interest rates. Refinancing activity is much more driven by consumers approaching the bank under favorable economic conditions than deliberate bank outreach. If refinancings were counted toward the retail lending assessment area triggers, the variability of demand for these loans could undermine the establishment of longer-term CRA initiatives, as banks engaged in refinancing activities may not be able to predict where to most efficiently deploy their CRA infrastructure. To the extent that the imposition of a new assessment area would be the price of a bank expanding its mortgage footprint into areas where it lacks a branch, the unpredictable nature of refinancing activity makes these loans an especially poor basis for creating new assessment area obligations.

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31 The agencies have proposed to tailor performance expectations in outside retail lending areas to match a bank's lending activities outside of its assessment areas. The agencies should maintain this approach, as opposed to creating nationwide market and community benchmarks that would apply to all banks regardless of their business model and the geographic concentration of their retail lending. *See* Question 88, 87 Fed. Reg. at 33,950.

b) Set Higher and/or Additional Thresholds to Establish Retail Lending Assessment Areas

Retail lending assessment areas should not be mandated solely based on the low proposed thresholds of 100 originated home mortgage loans or 250 originated small business loans in a given geography. These thresholds do not vary by institution size, so banks ranging from $2 billion in assets to over $3 trillion in assets will be held to the same standard, even though the thresholds could represent a very different degree of commitment by banks either edge of that range. Subjecting the bank to new geographic areas of evaluation based solely on these low lending levels – levels that may represent a disproportionately small portion of a large bank's business – would be an unnecessary burden.

If the agencies do include retail lending assessment areas in the final rule, they should take the following steps to ensure a higher degree of contact with a given geographic area is required before an assessment area is mandated. First, the agencies should set thresholds that scale with the bank's level of activity and market presence rather than be fixed at the same level for all banks. For example, the agencies could require that the level of originated home mortgage or small business loans triggering a retail lending assessment area represent (1) at least 2 percent of the bank's home mortgage or small business loan volume by loan count or dollar amount and (2) at least 1 percent of the market share for that product in the geography. Second, the agencies should add a requirement that, in addition to a threshold of loans, the bank draw a certain monetary threshold of deposits from a given geography for the geography to be a retail lending assessment area. While the statute does not contemplate that the mere collection of deposits from an geography (without the maintenance of a branch in the geography) would subject a bank to evaluation in the geography, linking retail lending with deposits would at least align more closely with the legislative intent of the CRA to address situations where a bank might "take money from the community and reinvest it elsewhere."[32]

c) Evaluate Only the Products that Trigger a Retail Lending Assessment Area

As proposed, the triggers for designating retail lending assessment areas could lead to the evaluation of products that are extremely immaterial for the bank and for members of the community in that geography. For example, a bank that originates an average of 250 small business loans and 10 home mortgage loans in a geography could, depending on the relative size of the loans, have its home mortgage loans evaluated within the retail lending assessment area. To avoid these anomalous results, the agencies should only subject a product line to evaluation in a retail lending assessment area if the product triggers the relevant thresholds for creating the retail lending assessment area. As described below in this letter, we further recommend subjecting only home mortgage lending and small business and small farm lending to the Retail Lending Test, which would align the products that could trigger a retail lending assessment area with the products that could be evaluated in a retail lending assessment area.

4. Do Not Require Facility-Based Assessment Areas Based on Deposit-Taking Remote Service Facilities

The final rule should make it optional for banks to delineate assessment areas based on the locations of their deposit-taking remote service facilities, including deposit-taking ATMs. The flexibility derived from optionality would, among other things, permit banks to deploy deposit-taking remote service facilities to serve customers when circumstances make a more fixed location impractical, such as

[32] 123 Cong. Rec. at S8931 (daily ed. June 6, 1977) (statement of Sen. William Proxmire).

doing so on a short-term basis to serve the needs of areas affected by natural disasters, or to provide pop-up depository services for events. Further, a contrary approach (including the approach taken in the existing CRA regulations) imposes long-term CRA obligations that would be challenging to satisfy for a bank without a branch office in the geography. Including deposit-taking remote service facilities in the definition of facility-based assessment areas provides a strong disincentive against the deployment of these temporary services and other consumer-friendly remote facilities, which ultimately harms consumers. We therefore encourage the agencies to follow the lead of the OCC in its June 2020 final rule, which excluded deposit-taking remote facilities from the definition of facility-based assessment areas.[33]

C. Retail Lending Test

1. Streamline Retail Lending Test

If the rule is finalized as proposed and once Section 1071 data are available, a bank with a business model of six major product lines in an assessment area could face evaluation of up to 22 different bank metrics in that assessment area alone, as follows:

Figure 1: Distribution Metrics for Retail-Focused Bank with Six Major Retail Lending Product Lines Under the Agencies' Proposal

Major Product Line	Distribution Metrics to Which Product Line is Subject
Closed-End Home Mortgage Loans	1. Low-Income Borrowers 2. Moderate-Income Borrowers
	3. Low-Income Census Tracts 4. Moderate-Income Census Tracts
Open-End Home Mortgage Loans	5. Low-Income Borrowers 6. Moderate-Income Borrowers
	7. Low-Income Census Tracts 8. Moderate-Income Census Tracts
Multifamily Lending	9. Low-Income Census Tracts 10. Moderate-Income Census Tracts
Small Business Lending	11. Small businesses with gross annual revenues of $250,000 or less 12. Small businesses with gross annual revenues of more than $250,000 but less than or equal to $1 million
	13. Low-Income Census Tracts 14. Moderate-Income Census Tracts

33 In the preamble to its final rule, the OCC stated that it "acknowledges that the statute requires it to produce written evaluations that will continue to state the agency's CRA conclusions and contain facts and data supporting those conclusions for each metropolitan area and nonmetropolitan area of a state containing a deposit-taking facility, including deposit-taking ATMs, consistent with the CRA statute. 12 U.S.C. 2906(b)(1)(B), (d)(3)(A), (e)(1). The data collection and recordkeeping requirements of the final rule, as well as CRA evaluations, will provide examiners with enough facts and data upon which to draw a conclusion in the metropolitan areas containing a deposit-taking ATM, even if a bank chooses not to delineate an assessment area there." 85 Fed. Reg. 34,734, 34,756 n. 85 (June 5, 2020). The agencies could take a similar approach in their own final rule.

Major Product Line	Distribution Metrics to Which Product Line is Subject
Small Farm Lending	15. Small farms with gross annual revenues of $250,000 or less 16. Small farms with gross annual revenues of more than $250,000 but less than or equal to $1 million
	17. Low-Income Census Tracts 18. Moderate-Income Census Tracts
Automobile Lending	19. Low-Income Borrowers 20. Moderate-Income Borrowers
	21. Low-Income Census Tracts 22. Moderate-Income Census Tracts

Rather than the Proposal's complex Retail Lending Test with up to six major product lines – some of which are plainly detached from the legislative intent behind the CRA – the agencies should adopt a streamlined approach that consolidates product lines and income/revenue categories as follows:

Figure 2: Distribution Metrics for Retail-Focused Bank Under Alternative, Consolidated Approach

Major Retail Lending Product Line	Distribution Metrics to Which Product Line is Subject
Closed-End Home Mortgage Loans	1. Low-Income and Moderate-Income Borrowers
	2. Low-Income and Moderate-Income Census Tracts
Open-End Home Mortgage Loans	3. Low-Income and Moderate-Income Borrowers
	4. Low-Income and Moderate-Income Census Tracts
Small Business and Small Farm Loans	5. Borrowers with gross annual revenues of $1 million or less
	6. Low-Income and Moderate-Income Census Tracts

Such streamlining would involve several changes to the NPR: the product lines subject to evaluation under the Retail Lending Test would be consolidated from six to three, automobile loans and multifamily loans would not be evaluated under the Retail Lending Test, the income and gross annual revenue categories for each major product line would be consolidated into one category each, and the 15 percent threshold for a major product line would be calculated at the institution level. Even if the agencies choose not to adopt all of these changes, the agencies should nevertheless adopt as many of them as possible, for the reasons described below.

a) Consolidate Product Lines

The agencies should simplify the Retail Lending Test framework so that it evaluates performance in three categories of major product lines, so long as each category represents 15 percent or more of the bank's retail lending as determined at the institution level: (1) closed-end home mortgages, (2) open-end home mortgages, and (3) small business and small farm loans (on a combined basis). While small farm loans may be functionally considered a type of small business loan such that it would be appropriate to consolidate those categories, closed-end and open-end home mortgage loans have different product structures, markets, and customer profiles, which warrant continued separation of these categories.

This simplification into three categories of product lines would focus the Retail Lending Test on the types of retail loans that the agencies have recognized Congress intended the CRA to cover. In 1993, the agencies stated that "The legislative history of the Community Reinvestment Act reveals that Congress was primarily concerned with the availability of home mortgage loans and small business loans."[34] Presumably, Congress chose to focus the CRA on these loans because, to a greater degree than other types of retail loans, home mortgage loans and small business loans are proven to help borrowers and their communities create and sustain wealth. The agencies have not articulated any reason why this clear existing statutory interpretation would no longer be valid, and indeed, Congress has not since amended the statute in a way that would affect the agencies' prior interpretation. The alternative three-category system we propose would also eliminate the problems associated with evaluating automobile and multifamily lending, as discussed below.

The NPR's complex, assessment area-by-assessment area approach to delineating major product lines is not necessary to achieve the agencies' goals. The preamble to the Proposal presents this approach as a solution for the hypothetical bank that "primarily extends home mortgage and small business loans, but also specializes in small farm lending in a handful of rural assessment areas," by facilitating evaluation where farm loans were dominant but avoiding evaluation "where the bank makes few or no small farm loans."[35] The Proposal articulates a desire to "capture[] lending that affects local communities even if it might not meet a 15 percent standard at the institution level."[36]

The alternative three-category system we propose would also address these concerns, but in a more streamlined and clear fashion. Under the alternative three-category system, the hypothetical bank described in the NPR would be able to consider its small volume farm loan performance in the same grouping as its small business loans. Its farm loans would thus not be ignored, but the bank would also not face the possibility that the locations in which its farm loans would be evaluated would fluctuate unpredictably over time. Banks would still be incentivized to extend a broad range of retail loans to LMI people, across different product lines, but could more easily comply with a simpler evaluation system. This three-category system would facilitate holistic evaluations of the product lines that are most central to the bank's business model and most connected to wealth-building objectives for LMI people and communities.

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[34] 58 Fed. Reg. 67,466, 67,473 (Dec. 21, 1993).

[35] 87 Fed. Reg. at 33,932.

[36] 87 Fed. Reg. at 33,932.

b) Exclude or Limit Evaluation of Automobile Loans

Even if the major product line categories are not consolidated through the three-category system described above, automobile loans – and particularly indirect automobile loans – should not be considered in the Retail Lending Test, for several reasons.

First, inclusion of automobile loans in the Retail Lending Test would represent a departure from the historical focus of the CRA on home mortgage loans and small business loans and would represent a shift in the agencies' interpretation of the statute to cover products that help borrowers create and sustain wealth[37] rather than a product used to purchase a depreciating asset. While automobile loans can be helpful to LMI people, the CRA was never intended to be used as a regulatory mechanism to facilitate access to transportation, much less a specific form of transportation that many LMI people in urban communities do not use and that an increasing number of cities are seeking to disincentivize.

Second, in spite of the questionable policy premise for including automobile loans in the Retail Lending Test, the agencies would force the largest banks to bear a disproportionate burden for generating the data needed to do so. To perform a retail lending distribution analysis and create market benchmarks for automobile loan distribution, the Proposal would require banks with more than $10 billion in assets – and only them – to collect and report extensive data on their automobile loans. This reporting regime would create an incomplete and misleading public database of automobile loans by excluding smaller banks and non-bank automobile lenders, both of which play a major part in the automobile loan market. In fact, banks (including banks with less than $10 billion in assets) make approximately one-third of automobile loans.[38] The market benchmarks for automobile loans fundamentally would be unlike the CRA benchmarks for home mortgage loans and small business loans, which at least would include some non-bank market participants that are subject to reporting requirements under HMDA and Section 1071 of the Dodd-Frank Act.

If automobile loans are as important to LMI individuals as the agencies believe, there is no reason to limit these data collection and reporting requirements to banks with more than $10 billion in assets. The agencies' failure to extend the data requirements more broadly underscores the agencies' lack of statutory authority to create a HMDA-like reporting regime for automobile lenders. Conversely, foregoing evaluation of automobile loans would allow for less burdensome data collection and reporting requirements, as there would be no reason to require banks to collect and report data on automobile loans if these loans were not subject to the Retail Lending Test.

Third, including automobile loans in the Retail Lending Test would create significant unintended consequences for other products evaluated under that test. We believe that the agencies have proposed to weight major product lines by dollar volume rather than loan count (both in the definition of a major product line and in the operation of the Retail Lending Test) to avoid overweighting automobile loans, which are generally smaller in amount than home mortgage loans. However, this approach would severely *under*weight small business loans, which are also generally much smaller in amount than home mortgage loans, especially when the small business borrower has less than $250,000

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[37] *See* n. 34 and accompanying text, above.

[38] As of the first quarter of 2022, banks have only 29.11 percent market share of new automobile loans or leases. *See* Experian, *State of the Automotive Finance Market Q1 2022*, at slide 12. Captive finance companies, which are generally not subject to CRA requirements, have almost half of the market share. *Id.* This market division has been fairly constant over time. The FDIC has reported that banks' share of outstanding auto loans ranged from 33 to 35 percent from 2011 to 2019. *See* FDIC Quarterly 2019, Vol. 13, No. 4, at 38 (citing Experian Automotive and FDIC Analysis of Call Reports).

in gross annual revenues. Based on our members' internal calculations, as a result of the NPR's use of dollar volume rather than loan count, (1) small business loans would not constitute a major product line in many assessment areas for many large banks, and (2) small business loans would represent an immaterial part of many large banks' Retail Lending Test scores in the assessment areas in which they do constitute a major product line.

Fourth, banks have much less control over the marketing process with automobile loans, which makes automobile loans very different products than home mortgage loans and small business loans. Banks often acquire automobile loans through partnerships with dealers that actually interface with the customer, with credit decisions to be made nearly instantaneously at the point of sale. In this model of indirect automobile lending, the bank does not typically market its loans directly to consumers. Rather, banks provide information to dealers about the terms banks will accept. In a typical scenario, the customer visits a dealership, selects a vehicle, buys the vehicle from the dealer, and the dealer extends credit through a retail installment sales contract ("RISC"). The dealer shops the RISC to multiple lenders. When a bank receives the RISC, it provides an approval, makes a counteroffer, or declines to purchase the RISC. The dealer will then evaluate the responses tendered by the bank and other lenders, choose the lender to which it will sell the RISC, and complete the necessary steps to assign the RISC to the selected lender. The benefit to the customer of using indirect financing is that the dealer does the work of finding favorable financing for the customer.

As a result of this business model, banks have much less control over the geographic distribution of their borrowers for automobile loans than they do for other types of loans subject to evaluation under the Retail Lending Test. For a bank that makes automobile loans in partnership with a third party that is responsible for lead generation or origination (such as an auto dealer in the indirect lending model), even if the bank adjusts its underwriting criteria to approve more LMI loan applicants, the bank is unlikely to have any control over whether individuals in a given census tract submit loan applications in the first place. In any given assessment area, the bank's dealer partners could locate their dealerships in neighborhoods that attract few consumers from particular census tracts, which may make it challenging for the bank to perform well on a geographic distribution test in that assessment area. Banks cannot, and should not be expected to, control the dealer's real estate decisions to solve this problem.

Banks also have less control over the income distribution of their automobile loans than other types of loans subject to evaluation under the Retail Lending Test. Automobile loans are generally smaller in dollar amount than mortgages, and automobile lending tends to be a high volume business. Given these characteristics, and given the prevalence of the indirect automobile lending structure, banks often employ automated underwriting models for automobile loans that rely on stated income levels as a proxy for inputs that would be used in a more time-intensive mortgage underwriting process. Banks also may account for this unique underwriting process by applying conservative underwriting standards, such as by limiting their lending to only prime borrowers or a subset of below-prime borrowers, to mitigate the greater credit risk that automobile loans tend to pose compared to other retail loans such as home mortgages. Applying a borrower distribution test to banks' automobile loans could force banks to expand into subprime (or lower subprime) segments in order to achieve satisfactory CRA ratings. 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.[39]

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

Finally, subjecting automobile loans to the Retail Lending Test could encourage banks to exit or scale back their automobile lending lest they fail the test. In turn, this reaction could lead to a contraction of safe, responsible credit available in the marketplace, ultimately ceding the automobile lending market to non-bank lenders that are not subject to the CRA. The agencies should avoid this outcome by foregoing the evaluation of automobile loans in the final rule's Retail Lending Test.

If the agencies do not exclude automobile loans from the Retail Lending Test, they should at least take steps to limit the unintended consequences described above, which could include:

- Capping the weighting of automobile loans so that the agencies can weight product lines by loan count rather than dollar amount so as to avoid the underweighting of small business loans;
- Excluding all automobile loans on a temporary basis so that the agencies can recalibrate the operation of the Retail Lending Test once they have collected more data on the effect of including automobile loans in the test; and
- Excluding indirect automobile loans from evaluation and from the major product line test.

c) Exclude Multifamily Loans

Multifamily loans should not be evaluated as a major product line under the Retail Lending Test, and should be evaluated only under the Community Development Financing Test, for several reasons.

First, we share the agencies' concern that "the geographic distribution of a bank's multifamily loans does not indicate whether low- or moderate-income individuals benefit from the loans."[40] The Proposal would define a "multifamily loan" as a loan for a "multifamily dwelling" as that term is defined in 12 C.F.R. § 1003.2(n), which encompasses dwellings with five or more units.[41] Multifamily loans thus would include loans for luxury apartment buildings that may offer few opportunities for LMI tenants, even if located within LMI census tracts. The agencies do not appear to have given even the most basic consideration of the complex policy issue of whether incentivizing banks to finance multifamily housing in LMI census tracts – regardless of the affordability of the units or the characteristics of the affected market – would help or hurt LMI individuals and communities. We submit that it is not necessary for the agencies to weigh in on this thorny question. The subset of multifamily loans that are expressly tailored to benefit LMI individuals – affordable housing that serves LMI tenants – would already be considered (and appropriately incentivized) under the proposed Community Development Financing Test.[42]

Second, borrower demand for multifamily development loans may not be spread evenly between LMI and non-LMI census tracts. The business considerations and market forces that may push real estate developers to choose certain census tracts as development sites in a given market are largely beyond the control of their lenders. To the extent government intervention in developers' site decisions is warranted, state and local governmental entities can and do provide appropriate incentives through grants, tax incentives, and other tools. These policy decisions are made based on the unique circumstances of each geography, by governmental entities that are directly accountable to the

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40 87 Fed. Reg. at 33,929.

41 § ___.12, 87 Fed. Reg. at 34,018.

42 *See* 87 Fed. Reg. at 33,929 ("Under the Community Development Financing Test, examiners could alternately account for the affordability and degree to which multifamily loans serve low- or moderate-income tenants.").

communities that are served. The CRA would be a far less appropriate and effective mechanism to affect site development for multifamily housing.

Third, most banks consider multifamily loans (as defined in the NPR) to be commercial loans rather than retail loans and do not house these products within the same business segment. As such, there could be logistical challenges in how banks manage the impact of CRA distribution requirements on multifamily product lines, such as subjecting a commercial lending business to CRA reporting for the first time.

Finally, as with automobile loans, evaluation of the distribution of multifamily loans would represent a departure from the agencies' historical interpretations of Congress's statutory intent.[43]

For all these reasons, the proposed major product line category of multifamily loans should be eliminated, and the agencies should instead consider a bank's efforts to finance affordable housing exclusively through the Community Development Financing Test.

d) Consolidate Low- and Moderate- Income and Gross Annual Revenue Categories

To further simplify and streamline the evaluation process, the final rule should also combine the low- and moderate- income and gross annual revenue categories, where applicable, across each of the retail loan categories. In the preamble, the agencies acknowledge that they considered consolidating the low- and moderate- income categories "in order to simplify the metrics approach."[44] While the agencies express concerns that banks could conceal poor performance in one of the income categories by combining the two categories,[45] the potential upsides of a disaggregated approach do not outweigh the significant expansion in administrative complexity it would create. Additionally, combining the low- and moderate-income categories would allow banks to tailor their approach to retail lending in particular assessment areas so as to ensure the overall safety and soundness of their portfolios and to take advantage of unserved needs in each community. As the Federal Reserve had proposed in its 2020 advanced notice of proposed rulemaking, the agencies could still incentivize banks to reach low-income borrowers and low-income census tracts specifically by considering a bank's performance in those categories as beneficial performance context.

The expanded complexity of a disaggregated approach seems particularly disproportionate to the benefits of such an approach in the case of small business and small farm loans. The NPR proposes to evaluate only one income category for the borrower metric of these two loan categories until Section 1071 Rulemaking data become available,[46] and there is no good reason to change the CRA rule at that time. While the agencies discuss the acute financing challenges that firms with less than $500,000 or $100,000 in revenue face,[47] they have not demonstrated that loans to small businesses or farms with less than $250,000 in gross annual revenues provide special benefits to LMI communities, including whether such loans provide as great a social benefit (such as job creation and retention) as loans to larger small businesses. Moreover, the agencies have not demonstrated that any such benefit outweighs the associated risks and underwriting costs of loans to small businesses with less than

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43 *See* n. 34 and accompanying text, above.

44 87 Fed. Reg. at 33,937.

45 87 Fed. Reg. at 33,937.

46 87 Fed. Reg. at 33,938.

47 87 Fed. Reg. at 33,938.

$250,000 in gross annual revenues. Small business and farm loans are complex and costly to underwrite, and some banks find that they can make a greater impact in their communities by originating larger small business and farm loans. Additionally, the smallest businesses and farms may also have access to methods of financing beyond a traditional commercial loan that may be more appropriate for those businesses to use until they have grown to a greater scale. For example, an entrepreneur may find it more convenient to use a personal credit card or personal loan to finance the initial growth of a very small business, and such financing would not appear as a "small business loan" on the bank's Call Report.

e) Establish Meaningful Minimum Loan Thresholds to Ensure Significance of Product Line

Regardless of whether the agencies consolidate the major product line categories as we suggest, the agencies should take the following steps to ensure that loans evaluated as major product lines do in fact represent some meaningful threshold of a bank's retail lending overall and in the locality examined.

(1) Set Institution-Level 15 Percent Threshold for Major Product Lines

The agencies should apply the Retail Lending Test to major product lines that comprise 15 percent of a bank's retail lending as measured at the aggregate institution level, rather than at the assessment area level. Calculating the 15 percent threshold at the assessment area-level would be burdensome and lead to unpredictable results. For example, a bank could have a large number of smaller assessment areas where modest shifts in consumer demand could meaningfully skew the bank's retail lending portfolio in those geographies year-over-year, leading to different product lines being evaluated each time a bank is examined under the CRA. Further, the retail loan products that would be evaluated in a particular geography might be insignificant to the bank's retail lending operations as a whole, which could lead the bank to cease offering the product or cap its lending rather than risk poor performance on the Retail Lending Test in outlier geographies.

In contrast, calculating the 15 percent test at the institution level would provide more workable parameters that ensure retail product lines subject to the Retail Lending Test are actually a significant focus for the bank's retail lending operation. A bank could therefore devote efforts to ensuring that its most important retail product lines are reaching LMI individuals and neighborhoods across all of its assessment areas, leading to a more consistent and effective approach.

(2) Alternatively, Set Optional Minimum Loan Count Requirement in Assessment Areas

In the alternative, if the agencies do not calculate the 15 percent test at the institution level, they should at least institute an optional minimum loan count threshold to create a major product line in a particular assessment area. This approach would ensure that a bank is actually conducting a meaningful amount of lending in a given retail loan category for that category to be considered "major." The June 2020 OCC CRA rule had incorporated a minimum threshold of 20 loans annually before a loan would be considered a major product line.[48] The OCC explained that it established the 20-loan minimum because "[b]y only evaluating a bank's distribution of retail loans in areas where the bank has at least 20 loans in a major retail lending product line, this approach would be tailored to a bank's business strategy

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[48] *See* 85 Fed. Reg. at 34,766.

and product offerings at the bank and assessment area level."[49] The OCC further explained that the 20-loan minimum would help "ensure that the rule only evaluates a bank's retail lending distribution in markets where it is engaged in retail lending beyond lending done on an accommodation basis."[50] These considerations are still valid today, and warrant the adoption of an optional minimum standard in the current interagency CRA rule if the agencies do not apply the major product line definition at the institution level.

2. Ensure Appropriate Consideration of Purchased Loans

We support the agencies' proposed approach of counting purchased loans in the Retail Lending Test, as the purchase of loans creates liquidity that supports CRA-eligible lending, especially lending by community banks and credit unions that are active in LMI neighborhoods.[51] The agencies should therefore narrow the standard pursuant to which examiners may disregard purchased loans under the Retail Lending Test. The proposed Retail Lending Test would generally consider both originations and purchases of loans. However, the proposed rule text in the NPR would allow examiners to downgrade a bank's Retail Lending Test rating based on "[i]nformation indicating that a bank has purchased retail loans for the sole or primary purpose of inappropriately influencing its retail lending performance evaluation."[52]

We understand that the proposed rule text is meant to discourage the practice of "churning" loans, but the standard articulated in the proposed text – focusing on a bank's "intent" – would be both underinclusive and overinclusive in solving this problem. The bank's "intent" should not be relevant so long as the impact of its activity is to increase the accessibility of retail loans by LMI people or people in LMI geographies.

A rule that discourages purchasing loans through such an ambiguous standard would be fraught with unintended consequences. Banks purchasing whole loans sometimes buy these loans from intermediaries acting as aggregators, rather than directly from the originator. This structure provides a robust secondary market that engenders liquidity throughout the broader mortgage market and provides assurances to originators that they can continue to make and sell loans to LMI individuals because aggregators will efficiently find buyers willing to purchase those loans. Moreover, some banks purchase loans originated through state housing finance agency loan programs, which are often

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49 85 Fed. Reg. at 1,217 (Jan. 9, 2020).

50 85 Fed. Reg. at 1,219.

51 A newly released discussion paper by a staff economist at the Federal Reserve finds that granting CRA credit for loan purchases has a positive effect on market liquidity, as evidenced by a material increase in loans purchased for resale to the GSEs across CRA eligibility thresholds. *See* Kenneth P. Breevort, *Do Low Mortgage Balances Limit Refinancing Opportunities?* (July 14, 2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4163151. Economic theory suggests that the sellers are institutions for which the transaction costs to sell loans directly to the GSEs or to securitize GNMA-backed loans may be prohibitive (such as community banks and credit unions), while the purchasers are institutions that can more easily bear these transaction costs due to economies of scale (such as large banks). The purchasing institutions are typically willing to pay a premium for CRA-eligible loans, and/or are able to purchase more of these loans and pass on cost-savings to the sellers, thus adding liquidity to the market.

Despite the observed liquidity effect, the staff discussion paper does not observe a threshold effect on overall mortgage lending to LMI borrowers or in LMI neighborhoods. However, the inability to detect a threshold effect does not imply that there is a lack of benefit to LMI borrowers or neighborhoods or to the lenders that serve them. For instance, the premium that large banks often pay for CRA-eligible loans may have a positive effect on the profitability of community banks and credit unions that serve LMI communities, enabling these institutions to sustain a robust flow of mortgage credit.

52 87 Fed. Reg. at 34,026.

targeted to first-time home buyers. Banks may also purchase loans in partnership with community development financial institutions ("CDFIs") and Community Development Corporations, or from nonprofits focused on access to housing, such as Habitat for Humanity. The CRA rules should not be written to dampen this liquidity and potentially upset these efficient mechanisms for banks to reach LMI borrowers and LMI geographies.

Moreover, concerns pertaining to churning are overstated in this context. Commonly, banks that purchase whole loans to fill mortgage lending gaps will in turn securitize them and sell them, which prevents another institution from repurchasing the whole loan and claiming credit on its CRA balance sheet.

If the agencies nevertheless remain concerned with the remote possibility of churning in retail loans, the supervisory process would be a more appropriate way to address that concern. The agencies could also establish a series of presumptions that enable a bank to demonstrate that its purchased loans should be counted and are not indicative of loan churning. For instance, if a bank holds a purchased loan for thirty days or longer, the loan should be presumed not to qualify as loan churning.[53] Additionally, a bank that sells loans extended to LMI borrowers at generally the same rate it sells loans extended to middle- and upper-income borrowers does not exhibit behaviors consistent with churning and therefore should presumptively be permitted to include the purchased loans to LMI borrowers in the Retail Lending Test.[54] At the very least, the agencies should rewrite the proposed text of the Retail Lending Test to provide that in the absence of clear evidence of loan churning, there is no penalty for a bank achieving a given score on the Retail Lending Test by engaging in secondary loan purchase activity.

3. Clarify Treatment of Purchased Loans Where Income or Gross Annual Revenue Data is Not Available or Not Reportable

The NPR contains a significant ambiguity about how a bank should treat a purchased home mortgage or small business loan when the borrower's income or gross annual revenue is not reportable under HMDA or the section 1071 rule, is available as of the time of origination but not as of the time of purchase, or is not available for either point in time. The final rule should clarify that a bank may count a purchased loan in the numerator of the Retail Lending Test's borrower distribution metrics when the bank has information demonstrating that the borrower is LMI or has gross annual revenues of less than $1 million, even if that information is not reportable on HMDA or the section 1071 rule, and even if the information is as of the time of loan origination. Additionally, the final rule should clarify that if the bank purchasing a loan does not have income or gross annual revenue information for the borrower as of the time of origination or purchase, or if such information is not reportable on HMDA or the section 1071 rule, as applicable, the bank may exclude the loan from the denominator of the Retail Lending Test's borrower distribution metrics. These two clarifications would ensure that the CRA creates appropriate incentives for banks to purchase loans to borrowers that are LMI or smaller small businesses, and does not create disincentives to make such purchases.

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53 However, loans resold within this 30-day window should not be presumed to constitute loan churning. Banks often sell loans within a brief period of origination or purchase as part of government-sponsored enterprise loan programs, and the agencies should not disincentivize participation in such programs.

54 Similar treatment should apply to a bank that sells loans extended to borrowers in LMI neighborhoods at generally the same rate it sells loans extended to borrowers in middle- and upper-income neighborhoods.

4. Eliminate or Adjust the Retail Lending Volume Screen

The retail lending volume screen should be eliminated in the final rule due to its poor utility as a capacity metric (driven in part by the misguided inclusion of corporate deposits in the denominator), its potential to punish certain business models, and its overlap with other federal efforts to regulate loan-to-deposit ratios.

First, the denominator of the proposed Bank Volume Metric – average deposits in the facility-based assessment area – is not a valid basis for measuring a bank's obligation to make retail loans, nor, as the agencies claim, its capacity to do so.[55] Inclusion of corporate deposits in the proposed definition of "deposits" could inappropriately skew the denominator. For example, a bank that takes in a high volume of corporate deposits in a given geography might serve mostly commercial depositors and borrowers in the geography and not actually have a meaningful practical capacity to originate or service retail loans there. Yet, because of the breadth of the proposed definition of "deposits," such a bank could be required to provide more retail loans in order to pass the Retail Lending Test in the geography. Conversely, a bank that is active in selling loans in the secondary market might have the potential to replenish its capacity to lend in a way that would not be reflected by looking at its deposit base. The screen therefore would serve as a flawed and ineffective proxy for retail lending capacity. (Below, we further explain why and how the agencies should revise the definition of "deposits" to exclude corporate deposits.)

Second, Federal Reserve Vice Chair for Supervision Michael Barr has cast significant doubt on the utility of a retail lending volume screen, emphasizing that the absence of such a screen in the CRA allows banks to "operate across wide geographic areas" and to "raise funds and make loans consistent with their nationwide (or international) business plans."[56] According to Barr, this flexibility is due to the fact that under the existing CRA regulations, "[i]nstitutions are not measured based on how the size of their lending in a particular location relates to the size of their deposits in that location . . . ."[57] If the agencies finalize the retail lending volume screen as proposed, they would curtail that flexibility and open the CRA to criticism that it is "[a]nachronistically '[l]ocalist' in its [o]peration."[58]

Third, the retail lending volume screen is premised on the assumption that every bank can and should make a certain quantum of "retail loans," as that term would be defined in the Proposal. Some banks focus on consumer loans and/or personal loans, and retail loans are an immaterial part of their overall business. The retail lending volume screen would punish banks for operating business models that deemphasize retail lending overall or in particular geographies. There is no indication that Congress intended the CRA to have such an effect, nor have the agencies claimed that the CRA compels this result – as demonstrated by the fact that the existing CRA regulations do not contain a retail lending volume screen.

Fourth, banks that operate without branches could have particular challenges meeting the retail lending volume screen. Such a bank typically only has a single facility-based assessment area, drawn in the geography around its home office, and also may have a nationwide business model that is generally agnostic to the geography of the bank's retail borrowers. With limited ability to control the geographic

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55 87 Fed. Reg. at 33,934.

56 Credit Where it Counts at 614.

57 *Id.*

58 *Id.* at 612.

distribution of its retail borrowers, such a bank may not have the practical means to ensure that it would pass the retail lending volume screen in its sole facility-based assessment area.

Finally, Congress has already established a loan volume screen in the form of the Riegle-Neal interstate loan-to-deposit ratio requirement. If the agencies adopted the proposed retail lending volume screen, they would be second-guessing Congress's carefully-crafted method for requiring banks to make a minimum amount of loans relative to their deposits, and thereby substituting the agencies' own judgment for that of Congress.

If, despite these reasons to eliminate the retail lending volume screen, the agencies include the screen in the final rule, they should revise the operation of the screen so that it serves as performance context rather than a basis to downgrade a bank's Retail Lending Test conclusion automatically. Under the Proposal, if the bank volume metric is less than 30 percent of the Retail Lending Volume Threshold, a bank would automatically receive a Substantial Noncompliance or Needs to Improve conclusion unless the evaluating agency finds an acceptable basis for the failure due to "the bank's institutional capacity and constraints, including the financial condition of a bank, the presence or lack thereof of other lenders in the geographic area, safety and soundness limitations, business strategy, and other factors that limit the bank's ability to lend in the assessment area."[59] Given the flaws of the Retail Lending Screen described above, a bank that does not pass the screen should not be subject to a presumption of a less than Satisfactory rating. Instead, the measure should simply serve as performance context that the evaluating agency could consider alongside the Retail Lending Test's distribution analyses.

5. Narrow the Definition of "Deposit" By Excluding Corporate Deposits

Corporate deposits should be excluded from the final rule's definition of "deposits" so that these deposits do not distort the calculation of the retail lending volume screen, the calculation of the Community Development Financing Metric, or the weighting of banks' conclusions across assessment areas. Banks often allocate corporate deposits to their main offices and/or branches where the depositors are located. Because banks and their corporate clients are often headquartered in major urban centers, inclusion of these deposits in the definition of "deposits" would exacerbate CRA hotspots, as: (1) banks would have a greater incentive to make retail loans in these major urban centers to avoid failing the retail lending volume screen, and (2) banks would have a greater incentive to make Community Development Loans and Community Development Investments in these major urban centers because of the outsized weighting they would receive under the Community Development Financing Test. In an effort to avoid bad scores in areas from which they attract large amounts of corporate deposits, banks may be encouraged to divert money away from rural areas, which would be less likely to have such deposits. The fact that the average dollar volume of corporate deposits tends to be significantly greater than that of retail deposits compounds this issue. This "hotspot" phenomenon is plainly in tension with the CRA's aims of expanding credit access to *underserved* communities.

Further, corporate deposits tend to fluctuate significantly based on the working capital needs of the corporate depositor. These deposits' inclusion in the definition of "deposits" would create substantial uncertainty about where the bank should allocate its resources towards CRA compliance. It would be difficult for a bank to anticipate the scope of its CRA obligations and plan its CRA activities accordingly.

Additionally, including corporate deposits in the definition of "deposits" would require the agencies to develop a framework to dictate where a bank should allocate corporate deposits when the

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59 § _.22(c)(2)(iii), 87 Fed. Reg. at 34,025.

depositor has a relationship with the bank that spans multiple geographies. As described in the Annex to this letter, the agencies have not proposed a clear framework to address this significant practical issue. For banks that collect and maintain deposits data under the Proposal, the proposed definition of the term "deposit location" would refer to the "census tract or county, as applicable, in which the business is located if it has a local account."[60] This vague definition would leave significant questions unresolved, including what it means for a business to be "located" in a place and whether a business can be "located" in multiple places.

The agencies can address these issues without imposing new data collection requirements. The agencies should define "deposits" for large banks 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 and avoid the issues that would result from including corporate deposits in the definition.[61]

6. Ensure Banks Have Advance Notice of Benchmarks

As a matter of fundamental fairness and due process, banks should know the benchmarks against which their performance will be evaluated prior to the beginning of the period being evaluated so that they can plan and structure their CRA programs to ensure satisfactory or better performance. The NPR appears to contemplate that a bank may not know the benchmarks until after the relevant performance period has begun – or even after it has concluded. We understand the agencies' desire to use recent data, but the downsides of using data that are generated contemporaneously with the evaluation period, including their lack of predictability, would far outweigh the benefits of using data that are slightly more recent than data from the prior period.

While the current CRA framework creates similar concerns about a bank being evaluated against benchmarks it does not known in advance, the Proposal's rigid system of numerical benchmarking and its expansion of the scope of products subject to evaluation would exacerbate this problem. Without advance certainty regarding the benchmarks, banks pushing to meet the extremely demanding proposed thresholds required for an Outstanding conclusion – multipliers of 125 percent of the market benchmark or 100 percent of the community benchmark[62] – could be incentivized to lower their standards of creditworthiness and ultimately experience credit quality issues.

Additionally, the proposed CRA framework would subject entirely new product lines, automobile loans and multifamily loans, to strict numerical evaluations. While banks might at least be able to estimate their obligations for other product lines (such as by using historical HMDA data to estimate mortgage loan benchmarks), a comparable foundation is entirely lacking for these proposed

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60 § _.12, 87 Fed. Reg. at 34,016.

61 If the agencies are concerned about the additional reporting requirements this approach would impose on banks with less than $1 billion in assets, which currently do not report these items, they could allow such banks with less than $1 billion in assets to instead define their 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.

62 87 Fed. Reg. at 33,945.

new retail product categories.[63] Banks acting in good faith may fall short of the CRA standards that they will not know until it is too late.

To address this issue, the agencies should pursue the alternative described in the preamble to "lock in the community benchmarks at the outset of the evaluation period, using the most recent data available at that time" with the possibility only for downward adjustment of the benchmarks should lending conditions worsen over the course of the period.[64] The agencies should take a similar approach to setting market benchmarks as well.

7. Calibrate Scores Reasonably and Consistently With Longstanding Practices

The agencies should ensure that the final rule does not lead to a dramatic downward shift in the proportion of banks that receive Satisfactory or Outstanding conclusions and ratings, assuming that banks' underlying CRA performance remains on par with current levels. In particular, the proposed thresholds to achieve an Outstanding or High Satisfactory conclusion on the Retail Lending Test, set at 125 percent and 110 percent of peer performance, respectively, would be far too high. Placing such conclusions too far out of reach could actually reduce bank's incentives to increase lending in the hopes of earning a better score.

Large banks currently make billions of dollars of retail loans each year to LMI people and in LMI communities. In the preamble to the NPR, the agencies acknowledge "the existing strong retail lending performance of many banks"[65] and describe the "industry's performance [as] broadly, although not universally, satisfactory."[66] Further, the "[t]he agencies recognize that many banks, especially large banks, frequently employ dedicated CRA teams with strong relationships to the community to ensure that the bank appropriately identifies and helps to meet community credit and community development needs."[67] With large banks by and large performing well, there is simply no reason to downgrade their performance indiscriminately, as the Proposal would effectively do.

The agencies claim that the Proposal would set the threshold for an Outstanding conclusion on the Retail Lending Test at an "attainable" level.[68] However, Table 9 of the preamble to the NPR illustrates that ***zero*** banks with more than $50 billion in assets would have achieved an Outstanding conclusion on the proposed Retail Lending Test – the most heavily weighted part of the proposed large bank framework – if the framework had been in place from 2017 to 2019.[69] A majority of banks with more than $50 billion in assets would have received a Low Satisfactory conclusion on the Retail Lending Test. In this context, it is unreasonable to expect that many banks would be able to overcome their conclusions on that test and receive Outstanding ratings based on better performance in other tests.[70]

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63 The same problem may exist with community development loans and investments, for which standardized market data are not current available, but banks could at least review the performance evaluations of their peers to estimate the amount of community development lending and investment that is occurring in the marketplace.

64 87 Fed. Reg. at 33,942.

65 87 Fed. Reg. at 33,944.

66 87 Fed. Reg. at 33,944.

67 87 Fed. Reg. at 33,945.

68 87 Fed. Reg. at 33,945.

69 87 Fed. Reg. at 33,954.

70 We are also concerned a large segment of banks – 59 institutions across the size categories – would have received Needs to Improve conclusions on the Retail Lending Test.

These punishing numbers do not even consider the potential for significant additional downgrades based on compliance violations, which the NPR would broaden the agencies' ability to pursue.

Designing any of the tests such that Outstanding conclusions are essentially unattainable not only would discourage banks from reaching for high ratings, but also would constitute a dramatic exercise in grade deflation that the agencies have not demonstrated is necessary or appropriate. There is no indication that banks' performance has declined or that Congress has authorized the agencies to make their existing standards more stringent. In this context, it would be arbitrary and capricious for the agencies to downgrade the ratings of a broad portion of the industry. The agencies should carefully recalibrate the Proposal, including its key thresholds and benchmarks, to make the overall impact of the final rule ratings-neutral for large banks.

8. Weight Products by Loan Count Rather than Dollar Volume

Some BPI members have observed that if they applied the NPR's proposed standards to their existing retail loan operations, small business loans would not constitute a major product line in many of their assessment areas, and in the assessment areas where small business loans *would* constitute a major product line, small business loans would be severely underweighted compared to home mortgages and other types of retail loans. This outcome is a result of using dollar volume, rather than loan count, to determine the scope of major product lines and the weighting of Retail Lending Test performance scores within assessment areas.

We believe the agencies have proposed to use dollar volume in the Retail Lending Test in order to avoid automobile loans distorting the operation of the test. However, that choice would have the unintended consequence of undercounting small business lending, even for large banks that do not make automobile loans. The agencies should address this issue in the final rule by (1) using loan count rather than dollar volume to determine major product lines and to weight banks' performance across retail loan products within each assessment area, and (2) either eliminating or capping consideration of automobile loans in the denominator of the major product line definition and in the weighting scheme of the Retail Lending Test.

D. Retail Services and Products Test

As a general matter, we note that the Retail Services and Products Test could be construed to set forth an expectation that banks must provide particular products, product features, or services that the agencies may deem to be beneficial to LMI people. Such an approach would be inconsistent with the agencies' stated goal of tailoring the framework to different business models and with the statutory requirement that the agencies' evaluation methodologies be "consistent with the safe and sound operation" of institutions subject to the CRA. The agencies should generally clarify in the final rule that the Retail Services and Products Test is not intended to require that any bank must offer specific products, product features, or services – even if one or more of its peer banks do so. The remainder of this section provides more specific feedback on the Retail Services and Products Test, including recommendations that are consistent with this overarching principle.

1. Omit Evaluation of Deposit Products, Including Fees

The Retail Services and Products Test would stray from the purpose and mandate of the CRA by providing for evaluation of a bank's deposit products, including fees, and the agencies should remedy this deficiency by omitting the evaluation of deposit products as an element of the final rule.

The statute does not authorize the agencies to regulate the features of deposit products. The CRA instructs the federal banking agencies to "assess [an] institution's record of meeting the *credit needs* of its entire community, including low- and moderate-income neighborhoods," but does not provide a statutory grounding for the evaluation of deposit products.[71] While the "Congressional findings and statement of purpose" section of the statute notes that "the convenience and needs of communities include the need for credit services as well as deposit services,"[72] no references to deposit services appear in the operative provisions of the statute imposing criteria by which banks are to be evaluated. The statement in the "Congressional findings and statement of purpose" section is an expression of Congress's intent to incentivize banks to serve the needs of their communities for credit, as they *already had been doing* for deposits.[73]

Moreover, the CRA is not the appropriate vehicle through which to regulate fees and require banks to offer particular services or products. Congress has not granted the agencies this power directly and the agencies cannot do so indirectly through the guise of the CRA.

Finally, the agencies' proposed approach contains no apparent limiting principle, and leaves unanswered key questions about the scope of the authority that the agencies have implied that they possess:

- Can and will the agencies penalize a bank for imposing fees that are necessary for the bank to earn a reasonable profit or just to break even on each account?
- Can and will the agencies deem a deposit account to be unresponsive to the needs of LMI people if the account fails to pay a sufficiently high rate of interest?
- Can and will the agencies seek to evaluate the features of deposit accounts that are not specifically designed for LMI people?
- Can and will the agencies penalize a bank if each and every feature of an account designed for LMI people does not compare favorably to an account that is not designed for LMI people?

These questions illustrate the precariousness of the agencies' assertion of authority to regulate deposit-product features. A clearer statement from Congress is needed before the agencies can conclude that Congress intended to grant them the unbounded authority to evaluate deposit and other financial services products in this manner.[74] The agencies should not finalize the proposed elements of the Retail Services and Products Test that would impose such an evaluation.

At the very least, the final rule should clarify that the enumerated factors on which the agencies will evaluate the banks' deposit products responsiveness to LMI needs, set forth in section _.23(c)(2)(i) of the proposed rule text, will be reviewed holistically and will not serve as a checklist. Not every bank

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71 12 U.S.C. § 2903(a)(1) (emphasis added).

72 12 U.S.C. § 2901(a)(2).

73 *See, e.g.*, 123 Cong. Rec. at S8958 (daily ed. June 6, 1977) (Senator William Proxmire, the bill's sponsor in the Senate, stating in floor debate that the statute was intended to solve the problem 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 . . . .").

74 *W. Va. v. EPA*, 597 U. S. ____ at 20 (2022) ("[M]ajor questions doctrine . . . has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.").

can effectively and responsibly offer every product or service that the agencies deem to be beneficial to LMI people while remaining safe and sound. The Retail Services and Products Test should allow banks to focus on those products that align with its business plan and strategy.

The agencies also should not consider the number of deposit accounts closed as a factor in evaluating deposit products. There are multiple reasons why a bank may close a deposit account – including safety and soundness and compliance considerations. Consequently, it is not clear that account closure data would be probative of whether a bank is adequately serving LMI people.

2. Omit Evaluation of Consumer Loans

In the preamble to the NPR, the agencies evidence a possible intention to use the Retail Services and Products Test to "review the responsiveness of [credit card and other consumer loan] products by considering the number of low- and moderate-income customers using each selected product and how they use the product, including rates of successful repayment under the original loan terms. Other aspects of responsiveness could include the loan terms, underwriting, pricing, and safeguards that minimize adverse borrower outcomes."[75] However, the agencies have not proposed rule text that would implement this concept. As a result, interested members of the public and the industry are not able to understand the scope of the requirements that the agencies would seek to impose. The agencies should not finalize any requirement to evaluate consumer loans within the Retail Services and Products Test without first providing the public with a meaningful opportunity to understand and comment on it, which the NPR fails to do.

Putting aside this procedural deficiency, evaluating the responsiveness of consumer loans would be an unwarranted departure from the CRA's historical focus on home mortgage and small business loans. While consumer loans meet borrowers' specific needs, they often do not provide the type of foundational, wealth-building credit that the CRA focuses on promoting and incentivizing. For example, consumer loans can include wealth management loans, such as securities-backed loans or loans to finance the purchase of art, as well as other loan types that are not tailored to the needs of the general retail public and are thus a poor fit with the CRA's aims of addressing the unmet credit needs of LMI communities. Therefore, there would be little value in evaluating the responsiveness of these loans to the needs of LMI customers, and the Retail Services and Products Test should not require such an evaluation.

3. Tailor Evaluation of Delivery Systems

The agencies should make a number of changes to the way the Proposal would evaluate a bank's efforts to deliver banking services to LMI individuals to better align with the agencies' stated goal of "[t]ailor[ing] performance standards to account for differences in bank size and business models and local conditions."[76]

a) Adjust Methods for Evaluating Branch Availability and Services

The agencies should make some adjustments and clarifications to way the Retail Services and Products Test would evaluate a bank's branch distribution.

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[75] 87 Fed. Reg. at 33,931.

[76] 87 Fed. Reg. at 33,885.

First, the final rule should clarify that § _.23(b)(1)(iii)(A) of the proposed rule text, which refers to extended and weekend hours, would not result in a bank being expected to offer such hours at branches located in LMI census tracts if it does not do so at similarly-situated branches located in middle- and upper-income census tracts. The agencies should further clarify that examiners will consider the business model and purpose of a branch as they review branch hours. For example, a branch located within a grocery store will usually have its hours limited by the grocery store's business hours, so a bank should not be penalized for inability to offer extended or weekend hours beyond the capacity of the host store.

Second, the agencies should broaden the performance context criteria laid out in § _.23(b)(1)(i) to evaluate a bank's branch distribution for purposes of the Retail Products and Services Test so that the agencies consider the population density and amount of economic activity in a particular census tract. For example, a bank should not be penalized for deciding not to open a branch in a particular rural area where it cannot expect much traffic.

Third, the agencies should clarify how the evaluation of branch distribution would apply to a bank that does not operate through branches.

b) Reconsider Evaluation of Remote Services Facilities

The final rule should make the evaluation of the placement of remote services facilities optional, as the proposed standards for this evaluation are conceptually flawed and would be too rigid in practice. First, the agencies' proposal to evaluate the number and percentage of remote service facilities placed in LMI tracts would not consider the fact that ATMs often serve individuals who are not residents of the neighborhood where the ATM is placed. For example, an ATM located in a hospital that is situated in a middle-income census tract may in fact cater to customers across all income brackets, including hospital employees, patients, and families. Second, the agencies' proposal does not appear to recognize that many banks reimburse fees when their customers access out-of-network ATMs, which can offer consumers located in LMI census tracts convenient and free access to nearby ATMs. Third, the NPR fails to recognize that many banks join third party ATM networks, which can likewise expand their customers' access to ATMs in LMI census tracts.

As a result, the agencies should consider ATM placement in LMI geographies on an optional basis if a particular bank chooses to use ATMs as a means of outreach to LMI communities, and a bank should not be downgraded if it does not place a certain number of ATMs in LMI census tracts. If the final rule nevertheless includes mandatory evaluation of the placement of remote services facilities, it should at a minimum provide that:

(1) The agencies will favorably consider a policy to reimburse fees when customers access out-of-network ATMs; and

(2) The agencies will favorably consider a policy to partner with third-party ATM networks that have robust coverage of LMI areas.

Additionally, the agencies should clarify how this element of the Retail Services and Products Test would apply to a bank that does not operate remote services facilities.

c) Revise Evaluation of Digital and Other Delivery Systems

The proposed methodology for reviewing a bank's digital and other delivery systems would be too rigid. In § _.23(b)(3), the agencies have proposed three prongs to evaluate the "availability and responsiveness" of a bank's digital and other delivery systems, one of which would be account openings and usage rates by individuals in LMI census tracts.

The agencies should not overemphasize statistics regarding account openings and usage rates by individuals in LMI *census tracts*, as these rates are an imperfect proxy for actual rates of usage by LMI *individuals*. U.S. Census Bureau data from 2011 to 2015 show that there are actually significantly more LMI individuals living in middle- and upper-income tracts, combined, than LMI people living in LMI tracts, combined:

Figure 3: Residence of LMI Individuals Across U.S. Census Tracts[77]

<table>
<tr><th>Tract Category</th><th>LMI Percent of Total Population</th><th colspan="2">LMI Population</th><th colspan="2">Percent of Total LMI Population Residing in Each Income Level of Census Tract</th></tr>
<tr><td>Low-Income Census Tracts</td><td>78.99%</td><td>16,058,813</td><td rowspan="2">57,025,137</td><td>12.18%</td><td rowspan="2">43.26%</td></tr>
<tr><td>Moderate-Income Census Tracts</td><td>61.52%</td><td>40,966,324</td><td>31.08%</td></tr>
<tr><td>Middle-Income Census Tracts</td><td>40.29%</td><td>53,569,769</td><td rowspan="2">74,791,433</td><td>40.64%</td><td rowspan="2">56.74%</td></tr>
<tr><td>Upper-Income Census Tracts</td><td>24.11%</td><td>21,221,664</td><td>16.10%</td></tr>
</table>

More fundamentally, we disagree with the agencies' premise that account openings and usage rates will necessarily reflect the overall accessibility and responsiveness of a bank's digital and other delivery systems. In fact, there may be no barriers to LMI people using a bank's digital and other delivery systems, but the bank could still have low rates of account openings and account usage by LMI people (or people in LMI areas) for reasons out of its control. To some extent, finding LMI customers is a zero sum game among competing banks, and many customers seldom change their providers.

For these reasons, the final rule should make the evaluation of usage rates and account openings by people in LMI census tracts merely an optional means for banks to show they are reaching LMI individuals. Such an approach would allow agencies to focus instead on the actual ***accessibility*** of a bank's digital and other delivery systems over uptake in particular geographies, as well as the bank's strategy and initiatives for reaching LMI customers with digital and other delivery systems.

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77 United States Department of Housing and Urban Development, *FY 2021 ACS 5-Year 2011-2015 Low- and Moderate-Income Summary Data*, https://www.hudexchange.info/programs/acs-low-mod-summary-data/.

E. Community Development Financing Test

BPI supports the Proposal's approach of combining evaluation of community development loans and investments under a single test through the proposed Community Development Financing Test, but we offer suggestions below to more effectively tailor the test according to a bank's business model.

1. Ensure Flexible Weighting of Assessment Area and Nationwide Scores

The Community Development Financing Test should afford more flexibility for a bank to place greater weight on its performance nationwide, relative to its performance at the assessment-area level. BPI agrees that considering activities nationwide allows banks "the opportunity to conduct impactful and responsive activities in areas that may have few assessment areas."[78] The Proposal includes a sliding-scale weighting framework that would place a greater emphasis on nationwide performance as banks have a lower percent of retail loans and deposits attributed to their facility-based assessment areas.[79]

While this format would help cater to differences in bank business model, a final rule should go further and permit banks flexibility to place, at their option, even greater weight to their nationwide score. After all, certain CRA hotspot regions simply attract more bank attention and assistance by virtue of banks' overlapping facility-based assessment areas. Supporting a bank's choice to redirect more support to other underserved geographies such as low population density rural areas – through optional greater nationwide weighting – could help maximize support for LMI individuals and communities across the country.[80]

2. Fully Consider Commitments to Lend and Invest

A final rule should include a number of clarifications of the mechanics of the Community Development Financing Test to support the continued role of commitments to lend and invest as means to satisfy CRA obligations. Appendix B of the Proposal would count: (a) The dollar amount of all community development loans originated and community development investments made in that year; (b) The dollar amount of any increase in an existing community development loan that is renewed or modified in that year; and (c) The outstanding value of community development loans originated or purchased and community development investments made in previous years that remain on the bank's balance sheet on the last day of each quarter of the year, averaged across the four quarters of the year. By referring to loans and investments on the bank's balance sheet, the third prong would create uncertainty regarding whether commitments to lend or invest would continue to count.

The final rule should specify that commitments to lend and commitments to invest that remain in effect from prior periods will continue to qualify for CRA credit in the current period. The rule should also clarify that the total amount of a commitment, rather than simply the amount drawn by the customer, will qualify. Finally, the rule should clarify that a renewed line of credit from a prior period will count in the same way that new line of credit counts for a given period. In doing so, the final rule would acknowledge that the full amount of a commitment, regardless of whether it was originally

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78 87 Fed. Reg. at 33,971.

79 87 Fed. Reg. at 33,980.

80 See footnote 29 for a discussion of why the agencies have statutory authority to consider community development activity on a nationwide basis, even though they lack the authority to impose retail lending assessment areas and the outside retail lending area for purposes of the Retail Lending Test.

generated in another prior period or not fully drawn upon by the customer, represents a financial obligation of the bank and a benefit to the customer deserving of commensurate credit under the CRA.

3. Confirm Full Qualification of Purchased Loans and Investments

The agencies should revise Appendix B, paragraph 1.a. to expressly provide that purchased community development loans and community development investments will receive full and equal credit as originated transactions for purposes of the Community Development Financing Test. As proposed, paragraph 1.a. of Appendix B would refer to "loans originated" and "investments made."[81] Absent a revision to paragraph 1.a., it would be unclear that purchases of community development loans and community development investments would qualify in the period of purchase, which seems unlikely to be the agencies' intent.

4. Provide Extra Credit for Sponsorship of Community Development Funds

The rule final should grant extra credit to banks that syndicate and/or sponsor funds supporting Low Income Housing Tax Credit (LIHTC) or New Markets Tax Credit (NMTC) projects, consistent with the now-rescinded OCC CRA rule from June 2020.[82] Syndicating and/or sponsoring such a fund generally is a more time- and resource-intensive venture for a bank as compared to a passive investment in the fund, but these efforts generally do not appear on the balance sheet of the syndicating or sponsoring bank. Because these efforts greatly benefit LMI individuals and communities beyond their dollar value, the final CRA rule should incentivize them accordingly. As an alternative to extra credit or a multiplier, the final rule should at least specify that such efforts will be rewarded during the impact review process.

5. Confirm the Qualitative Role of the Impact Review Process

The agencies should clarify that the "impact review" process proposed at § __.15 will operate as a ***qualitative*** and not quantitative evaluation tool – and as a tool with the potential to increase a bank's score based on positive performance, but without the potential to decrease a bank's score based on an insufficient showing of one or more of the delineated factors. The Proposal explains that "[t]he impact review would qualitatively evaluate the impact and responsiveness of qualifying activities with respect to community credit needs and opportunities" and that "[a] greater volume of activities aligning with the impact review factors would positively impact conclusions for each test."[83] However, it is unclear based on the proposed text how this described qualitative evaluation will work.[84] The final rule text should expand on and clarify this mechanism of qualitative review. For example, the agencies could clearly designate the impact review factors as being component of the test's larger performance context

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81 87 Fed. Reg. at 34,050.

82 The OCC rule had provided credit for "(i) The total dollar value of the fund in the year of origination; and (ii) One half of the total dollar value of the portion of the fund that is sold in the year that it is sold." 85 Fed. Reg. at 34754.

83 87 Fed. Reg. at 33,912.

84 The "Impact review, in general" section does not provide practical guidance as how the factors will be considered. *See* § __.15(a), 87 Fed. Reg. 34,021 ("*Impact review, in general*. Under the Community Development Financing Test in § __.24, the Community Development Services Test in § __.25, and the Community Development Financing Test for Wholesale or Limited Purpose Banks in § __.26, the [Agency] evaluates the impact and responsiveness of a bank's community development activities in each facility-based assessment area and, as applicable, each state, multistate MSA, and nationwide area. In evaluating the impact and responsiveness of a bank's qualifying activities, the [Agency] may take into account performance context information set out in § __.21(e), as applicable."). The section listing the factors also does not provide practical guidance. *See* § __.15(b), at 87 Fed. Reg. 34,022 (providing that "[f]actors considered in evaluating the impact and responsiveness of a bank's qualifying activities include, but are not limited to, whether the activities," followed by a list of ten factors.).

framework, with only the potential to increase rather than decrease a bank's score depending on the outcome of the review.

The final rule text should also foreclose the possibility that the agencies will shift to a quantitative impact review without engaging in additional notice-and-comment rulemaking. The Proposal explains how "[g]iven the current lack of data, the agencies propose that this [impact review] process would initially be primarily qualitative in nature. The agencies would consider the percentage of the bank's qualifying activities that meet each impact factor but would not use multipliers or specific thresholds to directly tie the impact review factors to specific conclusions."[85] However, the agencies further note that "[i]n the future, when additional community development data is reported and analyzed, the agencies would consider quantitative approaches to evaluate impact and responsiveness."[86] Such a change would constitute a "rule" that is subject to the notice-and-comment rulemaking procedures of the Administrative Procedure Act. The NPR's description of the change is not adequately specific for members of the public to understand and meaningfully comment on it, and therefore additional rulemaking would be required should the agencies seek to make the impact review quantitative.

6. Eliminate Language Excluding Retail Loans from Consideration Under Community Development Financing Test

The final rule should omit the exclusion set forth in section _.24(a)(2)(i) of the proposed rule text, which would provide that "[i]n general, a retail loan may only be considered under the Retail Lending Test in § __.22 and is not eligible for consideration under the Community Development Financing Test." This proposed exclusion would produce unintended results once the section 1071 rule is finalized and the agencies replace the CRA definition of "small business loan," which currently uses loan size to determine whether a business loan is considered in the retail lending distribution analysis, with a definition that is based on gross annual revenues of the borrower. Many community development loans are made to special purpose, startup, or non-profit entities that do not have gross annual revenues of more than $5 million, let alone gross annual revenues of more than $1 million. It appears that such community development loans would be "considered" under the Retail Lending Test, and therefore excluded from consideration under the Community Development Financing Test, if section _.24(a)(2)(i) were finalized as proposed.

Even putting aside the anomalies that the exclusion of section _.24(a)(2)(i) would produce, the exclusion is entirely unnecessary. The preamble to the Proposal suggests that the agencies believe evaluating the distribution of small business loans under the Retail Lending Test would make it unnecessary or inappropriate to count a subset of small business loans as a qualifying community development activity. There is no reason why that should be the case. The Retail Lending Test would incentivize banks to distribute their small business loans in a particular way, but would not provide incentives for banks to make small business loans that satisfy the community development definition, which can be especially impactful loans. There would be no "double counting" of small business loans if the Community Development Financing Test allowed for certain small business loans to qualify as community development loans, since the Retail Lending Test and the Community Development Financing Test would evaluate different aspects of the same qualifying small business loan. The agencies' existing CRA regulations evaluate the distribution of small business loans while also counting

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[85] 87 Fed. Reg. at 33,975.

[86] 87 Fed. Reg. at 33,975.

certain small business loans as community development loans, and this system has proven to benefit the communities that the CRA seeks to serve.

If the agencies nevertheless finalize a version of the section _.24(a)(2)(i) exclusion to avoid a "double count," the final rule should at least permit a small business loan that qualifies as having a community development purpose to count under the Community Development Financing Test and *not* the Retail Lending Test.

7. Clarify the Limitations on Qualifying Consortium and Third Party Loan or Investment Loans

The final rule should clarify that the limitation in relation to consortium and third party relationships set forth in section _.21(d)(ii) of the proposed rule text – which would note that "[i]f the participants or investors choose to allocate qualifying loans or investments among themselves for consideration under this section, no participant or investor may claim a loan origination, loan purchase, or investment if another participant or investor claims the same loan origination, loan purchase, or investment"[87] – does not prevent two institutions from getting credit for the same asset if the asset is sold from one institution to the other. The agencies have generally proposed to permit purchasers of loans and investments to claim credit for those activities even if the prior holder also claimed credit for the period in which it held the loan or investment, and there is no reason to deviate from this approach in the case of a loan or investment that is originated through a consortium.

F. Community Development Services Test

The Community Development Service Hours Metric should be excluded from a final rule. The NPR solicits input as to whether "[f]or large banks with average assets of over $10 billion . . . the benefit of using a metric of community development service hours per full time employee outweigh[s] the burden of collecting and reporting additional data points,"[88] and we believe that it does not. The Metric is not necessary, given that the Community Development Services Test ultimately provides for examiners to issue ratings on a discretionary and non-quantitative basis.

Further, the Community Development Service Hours Metric would be duplicative of other parts of the proposed Community Development Services Test. For example, the qualitative review would already consider "[t]he total number of hours for all community development services performed by a bank" and "[t]he number and proportion of community development service hours completed by, respectively, executive and other employees of the bank."[89] Moreover, we echo the stakeholder sentiment articulated in the NPR that "quantitative metrics alone cannot adequately capture the impact and importance of community development services, and the impact of these services on a community is often more than the value of the employee's time."[90] While employee volunteer hours are a valid and important input into the Community Development Services score, the same measure need not feature multiple times in the same test.

The Community Development Service Hours Metric's proposed denominator – the total number of full-time equivalent bank employees" – is fraught with issues. For example, given the increasing

87 87 Fed. Reg. at 34,023-24.

88 *See* Question 128, 87 Fed. Reg. at 33,982.

89 § __.25(b)(1)(i),(iv), 87 Fed. Reg. at 34,030.

90 87 Fed. Reg. at 33,981.

prevalence of remote working arrangements and back office locations at many large banks, allocating full-time equivalent bank employees to particular geographic areas would present interpretive challenges and could lead to anomalous results. Additionally, many community service hours take place after ordinary working hours. Some banks rely on non-exempt employees to a greater degree than others, and it can be more challenging or costly to generate service hours through such employees.

Since the Community Development Service Hours Metric would only add administrative complexity while yielding little new beneficial information, it should be omitted from the final rule.

G. Qualifying Community Development Activities and Impact Review

1. Reverse the Proposed Narrowing of the Economic Development Prong

The NPR would alter the economic development prong of the community development definition in a way that the agencies believe "would afford broader consideration of loans to small businesses and small farms than the current CRA approach taken as a whole across the status quo lending and community development tests."[91] While we are encouraged by the agencies' apparent desire to broaden the economic development prong, the NPR would actually narrow this prong in ways that are not warranted.

a) Allow Support Directly to a Small Business Meeting the "Size" and "Purpose" Tests to Qualify as Economic Development

The Proposal would eliminate language from existing interagency Q&As that grants credit when a bank conducts activities (including loans, investments, and services) *directly* with small businesses when those activities support permanent job creation, retention, and/or improvement for LMI individuals or in LMI or other targeted geographies. These longstanding standards reflect the fact that providing CRA credit for these activities represents a useful means to incentivize and reward banks for supporting LMI individuals and communities and other underserved geographies. The agencies should preserve these incentives by codifying the language of the existing interagency Q&As that provides for credit for activities conducted directly with small businesses when the existing "size" and "purpose" tests are satisfied.

There are compelling policy reasons to broaden, rather than narrow, banks' incentives to make small business loans. The harsh economic conditions that small businesses, small farms, minority-owned businesses, and their employees have faced in recent years underscore these businesses' critical need for financing. The COVID-19 pandemic and recent economic instability, including as a result of inflation, have created sometimes insurmountable challenges for small businesses. Reducing the availability of credit for certain activities that promote economic development and small business financing would be exactly the wrong policy response to current economic conditions.

Additionally, the agencies' stated reasons for narrowing the economic development prong are unreasonable, especially in light of the agencies' expansion of this very prong in their 2016 revisions to the Interagency Questions & Answers. The preamble to the NPR appears to suggest that the agencies have proposed to narrow the economic development prong because they prefer not to rely on SBIC and SBDC size standards when other elements of the CRA framework become aligned with the small business size standards set forth in the section 1071 rule.[92] We do not believe the use of different

[91] 87 Fed. Reg. at 33,898.

[92] 87 Fed. Reg. at 33,899.

thresholds would present substantial issues in practice. Banks are equipped to demonstrate compliance with existing standards by providing objective data and documentation relevant to the existing "size" test and "purpose" test. Indeed, some banks have been routinely providing their examiners with documentation to this effect for many years.[93] It is not necessary for the Proposal to disrupt this process for banks that understand and rely on the existing standards and procedures in order to "improve the overall transparency of the [economic development] definition" and "simplify the way that small business and small farm lending is considered under CRA evaluations."[94] Nevertheless, if the agencies remained concerned with using the size standards set forth in the existing CRA regulations and interagency Q&As, the solution would be to adopt the size standards of the section 1071 rule once it is finalized, not to jettison the concept of size standards entirely. The section 1071 rule's size standards could serve as a *presumption* in favor of the activity satisfying the "size" test, but banks should continue to be able to use the existing CRA regulations' size standards to otherwise demonstrate that the activity meets the "size" test.

The preamble to the Proposal further suggests that the agencies believe evaluating the distribution of small business loans under the Retail Lending Test would make it unnecessary or inappropriate to count a subset of small business loans as a qualifying community development activity. There is no reason why that should be the case. The Retail Lending Test would incentivize banks to distribute their small business loans in a particular way, but would not provide incentives for banks to (1) make more small business loans on an absolute basis, or (2) make small business loans that specifically support job creation, retention, or improvement for LMI people or in LMI communities or other underserved communities. Moreover, as discussed above,[95] there would be no "double counting" of small business loans if the economic development prong allowed for certain small business loans to qualify as community development loans, since the Retail Lending Test and the Community Development Financing Test would evaluate different aspects of the same qualifying small business loan. In fact, the agencies' existing CRA regulations evaluate the distribution of small business loans while also counting certain small business loans as community development loans, and this system has proven to benefit the communities that the CRA seeks to serve.

Additionally, the NPR's narrowed economic prong would disqualify many *services* that directly support small businesses from being counted under the Community Development Services Test, because the community development definition would be used in that test as well as in the Community Development Financing Test. As a result, if the NPR is finalized as proposed, such services may not be counted (or rewarded) *anywhere* under the proposed CRA framework.

Finally, the NPR's narrowed economic development prong would create a significant difference between the scope of CRA-qualifying community development investments and the scope of permissible public welfare investments. Under OCC regulations, public welfare investments include investments that finance small businesses and create jobs for LMI people or in LMI or other targeted census tracts, which is consistent with the standards set forth in the existing CRA regulations and interagency Q&As.[96]

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93 The agencies have encouraged this process, stating in guidance that "[e]xaminers [should] employ appropriate flexibility in reviewing any information provided by a financial institution that reasonably demonstrates that the purpose, mandate, or function of the activity meets the 'purpose test.'" 81 Fed. Reg. at 48,526.

94 87 Fed. Reg. at 33,898.

95 See section II.E.6 of this letter.

96 *See* 12 C.F.R. § 24.6(b).

For each of these reasons, the final rule should not narrow the category of eligible small business and farm loans in the manner proposed.

b) Allow Support to a Non-Licensed Fund Meeting the "Size" and "Purpose" Tests to Qualify as Economic Development

The final rule should also preserve the "size" and "purpose" tests for activities that support intermediaries. Under the existing CRA regulations and Q&As, banks have been incentivized to make investments in intermediaries that do not have an SBA license but that support small businesses that satisfy the SBIC size standards and operate in LMI areas. These investments have served as a critical source of capital to many first-time fund managers who lack the resources to apply for an SBA license, including women and minority entrepreneurs, but would be eligible to obtain such a license if they applied. The Proposal could disqualify such investments in intermediaries from receiving credit as community development financing activities, which could cut off the flow of capital to these intermediaries. Specifically, the NPR would grant credit for investments in non-licensed intermediaries only when those intermediaries lend to, invest in, or provide technical assistance to businesses or farms with gross annual revenues of $5 million or less. Many non-licensed intermediaries support businesses that have more than $5 million in gross annual revenues, but otherwise satisfy the SBIC size standards.

Rather than use the $5 million gross annual revenue threshold as the exclusive basis for support to a non-licensed intermediary to qualify as economic development, the agencies should also allow banks to use the existing "size" and "purpose" tests to demonstrate that support to non-licensed intermediaries qualifies.

2. Eliminate "Displace or Exclude" Language

The final rule should not include language in various prongs of the community development definition that would require activities not to "displace or exclude" LMI residents,[97] as this language sets forth an undefined and overly subjective standard.

As justification for proposing this language, the NPR only offers the general explanation that a community development activity cannot qualify for credit "if low- or moderate-income individuals were not able to have access to or benefit from an activity," and presents the very specific and extreme example of funding a project that involves demolishing housing occupied by LMI individuals.[98] But the rule text that the agencies have proposed is far more general and unclear than this extreme example, and could be understood to address the complicated and hotly-debated topic of gentrification.

Banks and their examiners are not well-equipped to judge whether a given loan, investment, or service would "displace or exclude" LMI people in this sense, much less to do so in advance of, or shortly

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97 The requirement appears under a number of places in the proposed rule text. *See* § __.13(e)(2) (Revitalization activities undertaken in conjunction with a government plan, program, or initiative), § __.13(f)(2) (Essential community facilities activities), § __.13(g)(2) (Essential community infrastructure activities), §__.13(h)(2) (Recovery activities in designated disaster areas), § __.13(i)(2) (Disaster preparedness and climate resiliency activities), § __.13(l)(1)(i)(B) ("Revitalization activities in Native Land Areas . . . undertaken in conjunction with a Federal, state, local, or tribal government plan, program, or initiative that includes an explicit focus on revitalizing or stabilizing Native Land Areas and a particular focus on low- or moderate-income households"), § __.13(l)(2)(i) (Essential community facilities and Eligible community infrastructure), § __.13(l)(3)(i)(Disaster preparedness and climate resiliency activities in Native Land Areas).

98 87 Fed. Reg. at 33,903.

after the completion of, the activity.[99] The many societal factors that affect changes in housing patterns over time may confound any attempted inquiry into whether a particular, single loan or project directly catalyzed a particular shift in the demographics of a neighborhood. Further, banks cannot predict or control the long-term demographic effects of projects that their borrowers carry out, particularly because borrowers are responsible for site selection. Finally, the proposed language would require banks to prove a negative, which would be unrealistic if not impossible in this context.

While the goal of promoting stable housing for LMI individuals is consistent with the objectives of the CRA, this particular well-intentioned but fraught proposed language would only add inconsistency and uncertainty to CRA evaluations, and potentially chill beneficial community development projects in LMI communities.

3. Naturally Occurring Affordable Housing

a) Remove Factors Beyond Affordability

We support the inclusion of activities supporting naturally occurring affordable housing in the community development definition, but such activities should qualify for CRA credit in the absence of satisfying the extra requirements laid out in section _.13(b)(2)(i)-(iv) of the proposed rule text.

Under that section of the proposed rule, "multifamily rental housing with affordable rents" would, beyond the affordability requirement, need to meet one of the following factors:

- The housing is located in a LMI census tract;
- The housing is purchased, developed, financed, rehabilitated, improved, or preserved by any non-profit organization with a stated mission of, or that otherwise directly supports, providing affordable housing;
- The property owner has made an explicit written pledge to maintain affordable rents for LMI individuals for at least five years or the length of the financing, whichever is shorter; or
- The bank provides documentation that a majority of the housing units are occupied by LMI individuals or families.[100]

These factors would present conceptual and/or practical issues. For example, it is far from clear why affordable housing located in an LMI census tract should be preferable from a policy perspective to affordable housing located in a middle- or upper-income census tract. Many policymakers today believe the opposite is the case. Yet, the agencies have effectively proposed to impose additional requirements on affordable housing located in middle- and upper-income census tracts.

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99 The agencies have acknowledged the amorphous nature of the "displace or exclude" language by asking for input as to "[h]ow . . . considerations about whether an activity would displace or exclude low or moderate-income residents [should] be reflected in the proposed [place-based] definitions." *See* Question 15, 87 Fed. Reg. at 33,907.

100 §_.13(b)(2), at 87 Fed. Reg. at 34,019.

With respect to the requirement to document that a majority of the units are occupied by LMI residents, such documentation could be impossible to obtain if units remain vacant after the project is completed.[101]

With respect to the written pledge requirement, it is unrealistic to expect that many private property owners would commit to maintain rents at the proposed cap of 30 percent of 60 percent of area median income – which would lock in a rate of rent that is significantly lower than market rents and substantially lower than even government-subsidized rents. If the agencies are concerned that a naturally occurring affordable housing project will cease being affordable after origination of the loan or investment, the solution would be to cease providing the bank with ongoing CRA credit for such activities once that happens.

Housing falling outside of the requirements outlined in the NPR could still fulfill a crucial need for affordable housing. Instead of adopting stringent standards that would significantly limit the practical application of this avenue for banks, the final rule should maintain only one simple requirement: the housing must be *affordable*. Simplifying the naturally occurring affordable housing standards in this way would broadly encourage banks to finance the construction and rehabilitation of affordable housing.

b) Adjust the Affordability Threshold up to 80 Percent

The affordability standard for naturally-occurring affordable housing should be raised from 60 to 80 percent of area median income to align with the standard for government-sponsored affordable housing. The Proposal would require that multifamily rental housing have affordable rents set at 30 percent of 60 percent of area median income, but there is no good reason to deviate from the longstanding CRA standard of less than 80 percent of area median income.[102] The statute specifically considers both low and *moderate* income individuals,[103] and the lower affordability threshold would be needlessly restrictive and render the affordable housing prong unusable in practice. In fact, in some markets, rent could be considered below market at rates far greater than 30 percent of 80 percent of area median income.

4. Remove Potential Limits on the "Primary Purpose" Determination

The agencies should eliminate the second prong of section _.13(a)(1)(ii) of the proposed definition of a "Primary purpose of community development" to avoid causing confusion and chilling potential innovation that is worthy of pro rata credit. The description currently encompasses activities where "[1] the express, bona fide intent of the activity is one or more of the community development purposes in paragraph (a)(2) of this section and [2] the activity is specifically structured to achieve, or is reasonably certain to accomplish, the community development purpose."[104] However, the "specifically structured to achieve" language seems duplicative of the "intent" language of the first requirement, while the "reasonably certain to accomplish" language would invite speculation on the part of the bank and its CRA examiner to determine likelihood of success for new products and plans. Since the second

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101 At the very least, the agencies should change the standard so that it refers to a majority of the *occupied* housing units.

102 *See* 87 Fed. Reg. at 33,895 ("This would establish a higher bar than what is often used today to determine whether rents are affordable for low- or moderate-income individuals, which is 30 percent of 80 percent of area median income."); https://www.federalreserve.gov/consumerscommunities/cra_resources.htm (benchmarking moderate-income as between 50 and 80 percent of area median income).

103 *See* 12 C.F.R. § 228.11(b)(1).

104 § _.13(a)(1)(ii), at 87 Fed. Reg. at 34,019.

prong could only serve to needlessly complicate the analysis or limit incentives for banks to approach problems with innovative solutions, section _.13(a)(1)(ii) should be revised to state only: "If the express, bona fide intent of the activity is one or more of the community development purposes in paragraph (a)(2) of this section."

5. Eliminate or Limit the Requisite Connection to Government Plan, Program, or Initiative

A final rule should omit the proposed requirements that various forms of qualifying community development activities be conducted "in conjunction with" a government plan, program, or initiative. A number of prongs of the proposed community development definition would incorporate some connection to government plans, programs, or initiatives, such as the following:

- "Revitalization activities . . . undertaken ***in conjunction with*** a federal, state, local, or tribal government plan, program, or initiative"[105]
- Essential community facilities activities, which are "conducted ***in conjunction with*** a federal, state, local, or tribal government plan, program, or initiative"[106]
- Essential community infrastructure activities, which are "conducted ***in conjunction with*** a federal, state, local, or tribal government plan, program, or initiative"[107]
- Activities that promote recovery from a designated disaster, which are "conducted ***in conjunction with*** a federal, state, local, or tribal government disaster plan"[108]
- Disaster preparedness and climate resiliency activities, which are "conducted ***in conjunction with*** a federal, state, local, or tribal government plan, program, or initiative"[109]
- Activities in Native Land Areas, which are performed "***in conjunction with*** a Federal, state, local, or tribal government plan, program, or initiative"[110]
- Economic development activities "undertaken ***consistent with*** federal, state, local, or tribal government plans, programs, or initiatives that support small businesses or small farms"[111]

Some of these activities would qualify for CRA credit for the first time under the Proposal. But others, like economic development, revitalization, and recovery in designated disaster areas, are existing qualifying activities, and the proposed requirement that the activity be conducted "in conjunction with" or "consistent with" a government plan, program, or initiative would impose a new constraint that could narrow the scope of the activities that qualify compared to the existing CRA rules.

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105 § _.13(e) (emphasis added).

106 § _.13(f)(3) (emphasis added).

107 § _.13(g)(3) (emphasis added).

108 § _.13(h)(3) (emphasis added).

109 § _.13(i)(3) (emphasis added).

110 § _.13(l) (emphasis added).

111 § _.13(c)(1) (emphasis added).

The agencies claim that the new standard would provide greater clarity. They say that "the standard of 'in conjunction with' would provide greater clarity than provided under current guidance by expressly stating that an eligible activity must be included as part of a government plan, program, or initiative."[112] However, this clarity would come as a direct result of excluding several types of activities that help LMI people and communities and are currently recognized as qualifying activities for CRA purposes. For example, one BPI member has provided financing that supported the opening of grocery stores located in "food deserts" within LMI census tracts. While such projects met critical needs of LMI communities – access to food and jobs – the NPR would disqualify them from receiving credit. As this example demonstrates, it simply is not true that an activity must be done "in conjunction with" a government plan, program, or initiative to be helpful to LMI people and communities.

The proposed standard would also lead to uneven application of credit based on the jurisdiction in which the activities occur. Banks should not be penalized for helping LMI communities in geographies where the state or local government has not established any plan, program, or initiative, or has not recognized the bank's activity as being part of its plan, program, or initiative. State and local governments have vastly divergent capabilities, resources, and approaches to community development, and the CRA rules should not depend on these capabilities, resources, or approaches. In fact, it would be counterintuitive for a bank to lose the ability to claim CRA credit when it has stepped in to satisfy an LMI community need because governmental entities have failed to address that need. Such an approach would penalize not only the banks that operate in communities that lack governmental support, but also the people who live in those communities, as banks would be incentivized to spend their CRA dollars elsewhere. Moreover, CRA credit should not depend on the state or local government's willingness to work with the bank.

At a minimum, the final rule should change all the proposed requirements for qualifying community development activities to be done "in conjunction" with a government plan, program, or initiative to a standard whereby the activities must be conducted "consistent with" such a government action. While this more limited change would still leave a standard that is uneven in practice, it would at least not subject banks' activities to the approval or imprimatur of state or local governments in order to get CRA credit.

6. Expand Credit for Renewable Energy Investments

LMI communities are particularly vulnerable to the effects of climate change, including extreme heat and weather events, and expanding the use of renewable energy is a critical part of combatting climate change and the challenges it brings.[113] The final rule should clarify that disaster preparedness and climate resiliency activities include energy-related activities – such as projects that provide access to renewable energy, including utility-scale projects – that benefit residents in targeted census tracts. The final rule also should make clear that renewable energy activities (*e.g.*, construction of a wind or solar power plant) can benefit residents in targeted census tracts even if the plant where the renewable energy is generated is developed outside of the targeted census tract. Some sources of renewable energy, such as solar and wind farms, may be located outside of the population centers to which energy is transported.

Furthermore, as noted above in section II.G.5 of this letter, the proposed requirement that certain qualifying community development activities, including climate resiliency activities, be

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112 87 Fed. Reg. at 33,903.

113 *See, e.g.*, Connor Maxwell, Blog Post for Center for American Progress (Apr. 5, 2018), available at https://americanprogress.org/issues/race/news/2018/04/05/448999/americas-sordid-legacy-race-disaster-recovery/.

conducted "in conjunction with" a government plan, program, or initiative would unnecessarily limit the types of activities for which banks may receive CRA credit. Although the final rule should omit this proposed requirement for the reasons described above, if the agencies keep the requirement they should at least provide that, in the climate resiliency context, such a plan, program, or initiative may be developed by a local utility.

7. Finalize Mortgage-Backed Securities Provisions as Proposed, Without Additional Limitations

The final rule should not limit credit for purchases of mortgage-backed securities that are majority-backed by loans to LMI individuals or to finance affordable housing to the first purchaser or by providing only pro rata credit. The secondary market provides important financing tools for critical actors in the housing market, such as government-sponsored entities and private lenders. As the Federal Reserve has recognized, when banks purchase mortgage-backed securities, they provide liquidity that increases originators' capacity to make more loans to LMI borrowers.[114] Moreover, limiting credit to the first purchaser or providing only pro rata credit could create unintended consequences and needless complexity. The agencies have not provided any data demonstrating that the benefits of such limitations would outweigh their costs.

H. Limited Purpose and Wholesale Banks

1. Confirm the Scope of Limited Purpose and Wholesale Bank Definitions

We support the agencies' decision to preserve a separate CRA evaluation framework for wholesale and limited purpose banks, an approach that properly recognizes the unique yet important ways in which these banks support the needs of the LMI communities in which they operate.

The final rule should confirm the continued validity of existing guidance regarding the scope of the regulatory definitions of a limited purpose bank and a wholesale bank, including guidance addressing the amount of unrelated lending that a bank can do and keep the designation.[115] The agencies have not proposed substantive changes to the scope of the regulatory definitions of those terms, and as a result, the existing guidance should remain valid interpretations of those definitions.

Likewise, since the definitions of a limited purpose bank and wholesale bank would not change in any meaningful way, the agencies should confirm that banks that currently have these designations do not need to re-apply for them.

These clarifications are important to currently-designated limited purpose and wholesale banks because, as discussed below, the strategic plan provisions in the NPR would be far too rigid and ultimately unworkable for these institutions.

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114 85 Fed. Reg. at 66,445 ("Issuance of qualifying MBS can improve liquidity for lenders that make home mortgage loans to LMI borrowers, increasing the capacity of these lenders to make more loans that are needed in the community.").

115 *See, e.g.*, Interagency Questions and Answers, 81 Fed. Reg. at 48532 ("Wholesale institutions may engage in some retail lending without losing their designation if this activity is incidental and done on an accommodation basis. Similarly, limited purpose institutions continue to meet the narrow product line requirement if they provide other types of loans on an infrequent basis. . . .").

2. Clarify that Community Development Services Test Not Required for Outstanding Rating

The final rule should clarify that evaluation of a limited purpose or wholesale bank under the Community Development Services Test is not required for the bank to receive an overall Outstanding rating if it otherwise demonstrates outstanding levels and impact of community development financing activities under the Community Development Financing Test. The proposed rule text provides that performance under Community Development Services test may be used to increase a Bank's overall rating from Satisfactory to Outstanding.[116] The agencies have not expressed any intent to require limited purpose banks and wholesale banks to be evaluated under the Community Development Services Test to receive an Outstanding rating, or articulated any reason why a limited purpose or wholesale bank – which may have different capabilities and expertise than full-service institutions – should be subjected to that Test.

3. Rationalize the Assets Denominator

Foreign assets and central bank deposits should be excluded from the denominator of the Wholesale or Limited Purpose Bank Community Development Financing Metric because they do not increase a bank's capacity to provide community development financing.

By excluding foreign deposits from the denominator of the Community Development Financing Metric for large banks, the agencies have recognized that CRA obligations should not be tied to a bank's foreign business activities. That same principle applies to wholesale and limited purpose banks, many of which have material amounts of foreign assets arising from their non-U.S. businesses.

For some banks, a subset of domestic assets also may not be appropriate for inclusion in the denominator of the Community Development Test. Indeed, current supervisory practice for some banks has been to exclude certain assets from the denominator used to determine their CRA obligations under the current Community Development Test. These assets include central bank deposits, which for some banks serve as a safe store for value for excess deposits, including in periods of financial market stress or as a result of monetary policy activities and other considerations not under the control of the bank. The agencies should therefore continue these exclusions as appropriate, and also provide a process by which a bank could propose to exclude additional defined classes of assets from the denominator based on the characteristics of the bank's business model and in discussion with its examiners.

4. Compare Banks of Like Business Models

The final rule should acknowledge the significant variation among the business models of limited purpose and wholesale banks by comparing each limited purpose and wholesale bank against other similar institutions, and not treating limited purpose and wholesale banks as similar to other large banks or as a monolithic separate category to themselves. As such, we oppose any notion of the agencies using the nationwide community development financing test developed for large banks generally to assess the CRA performance of limited purposes and wholesale banks.

Similarly, to the extent that the agencies begin to use benchmarks to determine the ratings of limited purpose and wholesale banks' ratings, each limited purpose or wholesale bank should be evaluated against a benchmark specific to its business model – *e.g.*, with credit card banks benchmarked against other credit card banks, and custody banks benchmarked against other custody banks. By

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116 § __.26(b)(2), at 87 Fed. Reg. at 34,031.

nature of their business models or location of their assessment areas, a credit card bank and a custody bank of similar asset size may actually possess a very different CRA capabilities and opportunities.

Differences among the business models and capabilities of limited purpose and wholesale banks also underscore the importance of performance context for these banks. The agencies should ensure that the final rule does not look to the Wholesale or Limited Purpose Bank Community Development Financing Metric in isolation, ignoring the broader context in which these banks operate.

I. Strategic Plans

The final rule should preserve the existing CRA regulations' standards for strategic plans, which give banks the flexibility to tailor evaluations to their business models. The agencies' 1994 CRA proposal explained the strategic plan concept as presenting "a real alternative" to the general performance standards, while also "preserving substantial flexibility for institutions to tailor their CRA programs . . . The purpose of the plan is not to provide institutions operating under a plan with a different or lesser obligation to help meet the needs of their community; it is to provide more certainty and flexibility for those institutions that wish to meet their obligation in a fashion that they believe may not be appropriately assessed by the standard performance tests."[117] The agencies made clear that they intended to allow banks operating under a strategic plan to avoid application of the general performance standards, stating that "[s]ome commenters believed that the possibility of being considered under the standard tests, as contemplated by the December proposal, made the [strategic] plan a less attractive alternative to the standard tests. . . . The agencies intend that an institution operating under an approved plan would, during the period of the plan, never be subject to assessment under the standard tests, unless the institution so chose."[118]

We agree with the reasoning set forth in the 1994 proposal, and the agencies appear to do so too. The current NPR purports to maintain the agencies' longstanding perspective that a strategic plan should operate as an tailored alternative to general performance standards, stating that "[t]he agencies propose to retain this alternative evaluation method to give banks flexibility to meet their CRA obligations in a manner that is tailored to community needs and opportunities as well as their own capacities, business strategies, and expertise."[119]

However, the strategic plan provisions of the NPR, as proposed, may no longer serve as a "real alternative" to the general performance standards, as these provisions could be read permit strategic plans to deviate very little from the general performance standards that would otherwise apply:

- One part of the proposed rule text setting forth standards for strategic plans would provide that banks approved to be evaluated under a CRA strategic plan option would have the same assessment area requirements as other banks and would submit plans that include the same performance tests and standards that would otherwise apply unless the bank is substantially engaged in activities outside the scope of these tests.

- The very next provision of the proposed rule text would contradict the exception for banks substantially engaged in activities outside the scope of the tests, by requiring, with no exceptions, a strategic plan to incorporate measurable goals for all geographic areas that would

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117 59 Fed. Reg. 51,232, 51,242-43 (Oct. 7, 1994).

118 59 Fed. Reg. at 51,243.

119 87 Fed. Reg. at 33,924.

be included pursuant to the performance tests and standards that would otherwise be applied in the absence of a plan.

- Finally, the proposed rule text would enumerate the four performance tests that would otherwise apply and state that a bank must include measurable goals pursuant to each of these tests, again with no apparent exception for a bank engaged in activities outside the scope of the tests.

This seemingly rigid approach would upend the very purpose and fundamental utility of strategic plans, especially to banks with non-traditional business models.[120] The agencies should address this issue by aligning the final rule with the existing CRA regulations' requirements for strategic plans so that the strategic plan serves an alternative evaluation method in more than name only.

J. Affiliate Activities

1. Limit Data Collection

The final rule should clarify that an affiliate's activities need to be included in the bank's data collection and reporting only to the extent that the category of lending or investment is actually included in the bank's evaluation. For example, if a bank is considering only an affiliate's community development loans in its evaluation, the affiliate's *retail* loans should not need to be included in the bank's data collection and reporting requirements. The proposed rule text describes how:

> A bank that elects to have loans by an affiliate considered for purposes of this part would be required to collect, maintain, and report the lending and investments data they would have collected, maintained, and reported under § __.42(a) or (b) had the loans or investments been originated or purchased by the bank. For home mortgage loans, it would also need to identify the home mortgage loans reported by its affiliate under 12 CFR part 1003, if applicable, or collect and maintain home mortgage loans by the affiliate that the bank would have collected and maintained under § __ .42(a)(3) had the loans been originated or purchased by the bank.[121]

The final rule should include language to clarify that its new data requirements will not sweep in categories of activities that will bear no relation to the bank's CRA evaluation.

2. Exempt Functionally Regulated Operating Subsidiaries

Functionally regulated subsidiaries should be exempted from the general rule that operating subsidiaries' activities must be included within a bank's performance evaluation and data collection and reporting requirements, as the mandatory inclusion of these subsidiaries within CRA examinations would exceed the agencies' statutory authority under the Gramm-Leach-Bliley Act. Specifically, 12 U.S.C. § 1831v stipulates that:

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120 Strategic plans also serve as an important "safety valve" for banks with more traditional business models but more unique CRA challenges.

121 § __.42(d), at 87 Fed. Reg. at 34,013.

> the provisions of—(1) section 1844(c) of this title that limit the authority of the Board of Governors of the Federal Reserve System to require reports from, to make examinations of, or to impose capital requirements on holding companies and their functionally regulated subsidiaries or that require deference to other regulators. . . . shall also limit whatever authority that a Federal banking agency might otherwise have under any statute or regulation to require reports, make examinations, impose capital requirements, or take any other direct or indirect action with respect to any functionally regulated affiliate of a depository institution, subject to the same standards and requirements as are applicable to the Board under those provisions.[122]

The CRA does not provide the agencies express, overriding authority to examine or take direct or indirect action with respect to functionally regulated subsidiaries. As a result, the Gramm-Leach-Bliley Act's specific prohibition on such examination and action prevails, and the agencies must exclude functionally regulated operating subsidiaries from mandatory coverage of subsidiaries in the final rule to avoid exceeding their statutory authority.

K. Data Collection, Reporting, and Disclosure

1. Permit Summary of Deposits Data for All Sizes

Banks of all sizes, including those with assets over $10 billion, should be permitted to use FDIC Summary of Deposit ("SOD") data in their CRA calculations rather than geocode, collect, report deposits data based on the residence of their depositors. SOD data are well-established, reliable, and predictable for banks. Perhaps most importantly, the use of SOD data would avoid imposing the substantial costs and burdens that would be associated with establishing a new source of deposits data based on depositors' addresses. Large banks therefore should be able to use SOD data or opt in to the more granular data collection methods described in the Proposal.

2. Focus Data Collection

The final rule should exclude banks from reporting data that do not pertain to the tests and goals under which they are being evaluated. Such exclusions would eliminate data collection and reporting burdens where the data would serve no purpose to the bank's evaluation under the CRA. This principle is not only good regulatory policy, it is a requirement of the Paperwork Reduction Act.[123]

As one example, when it comes to qualifying activities like community development 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 Community Development Financing Test or Community Development Services Test scores. If the agencies required banks to report all qualifying activities regardless of whether those activities are counted, banks would be in violation of such a 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

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122 12 U.S.C. § 1831v(a).

123 *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").

of counting it in their CRA evaluations. In other words, the community development activities that banks report should be required to be *accurate*, but the report should not be required to be *complete*.

As another example, banks that do not have their retail loans evaluated under the relevant framework that applies to them should not need to collect and report data regarding their retail loans.

Finally, if the final rule does not evaluate automobile loans and multifamily loans in the Retail Lending Test, as we recommend above in sections II.C.1.b) and II.C.1.c) of this letter, there would be no reason to require banks to collect and report data associated with such an evaluation.

3. Exclude Race and Ethnicity Data

The final rule should not require CRA evaluations to include race and ethnicity data disclosures. Under the Proposal, race and ethnicity data generally would not impact the performance evaluation calculations (except to the extent the data have led to a fair lending violation that serves as a basis for a downgrade to the banks rating). The inclusion of this data could therefore be confusing to members of the public that seek to understand a bank's CRA evaluation. Further, since HMDA information is already publicly available, and section 1071 data will become available shortly after the CFPB finalizes a rule to implement section 1071, there is no reason to require a duplicative disclosure through the CRA regulations. In fact, requiring duplicative disclosures would be inconsistent with the Paperwork Reduction Act.[124]

4. Reassess Faulty Estimates of Compliance Burdens

The APA and related administrative-law statutes require the agencies to estimate, account for, and mitigate the compliance costs and paperwork burdens associated with the Proposal. Based on preliminary estimates from BPI's members, the agencies' estimate of the costs and compliance burdens associated with the Proposal fall grossly short of reality. The agencies estimate an initial, industry-wide cost of $42.8 million for the first 12 months of complying with the Proposal.[125] But individual BPI members that BPI polled anticipate incurring, on average, a cost of $4,834,424 for the first 12 months of compliance.[126]

This informal poll suggests that the actual costs of implementation will be *orders of magnitude* greater than the agencies' estimate. If each bank with more than $10 billion in assets incurred the same costs as our poll average, the total implementation costs just among this subset of banks – ignoring the thousands of banks that are classified as a large bank with no more than $10 billion in assets, intermediate bank, or small bank – would be over $744 million, or *17 times greater* than the agencies' estimate of $42.8 million across the entire industry.[127] Even applying the average BPI member cost estimate only to banks with more than *$100* billion in assets – and ignoring the thousands of banks that

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[124] *Id.*

[125] 87 Fed. Reg. at 34,011.

[126] Five members provided estimates. Respondents range in size from mid-sized regional banks to U.S. G-SIBs and have a variety of business models.

[127] According to National Information Center data as of March 31, 2022, there are 154 depository institution holding companies with over $10 billion in assets.

are smaller – would produce total implementation costs for these banks of over $178 million, or *four times greater* than the agencies' industry-wide estimate.[128]

Implementation costs could include hiring several additional full-time employees, whose roles would range from data collection, validation, and reporting, to data analytics for the calculation and ongoing monitoring of performance metrics, to the identification of community development opportunities. Implementation costs also are likely to include significant systems and technology investments, the reallocation of internal experts, and the procurement of external support from a limited number of qualified vendors. It is not clear from the NPR that the agencies' estimate of the burdens of implementation has taken account of these various types of costs.

The mismatch between the agencies' and BPI's accounting of the compliance burdens raises questions about the validity of the agencies' analysis. Yet all the agencies have provided are cursory estimates of banks' aggregate compliance hours and costs, creating questions about how they derived those figures.[129] The agencies should give a more fulsome explanation of their cost estimate when issuing the final rule, and ensure that they account for key components of the industry's implementation costs. With a more accurate cost estimate in place, we believe the agencies would reconsider several elements of the NPR that would impose costs without commensurate benefits.

L. Other Scoring Issues

1. Reassess New Approach to Rating Downgrades

The agencies should maintain the existing regulatory standard whereby a bank's rating may only be downgraded due to evidence of discriminatory or other illegal *credit* practices[130] and forgo expanding that language to cover "any discriminatory or illegal practice." The agencies explain their proposed expansion of the standard by noting that "the CRA statute indicates that banks are required by law to meet the convenience and needs of their communities, which includes the need for credit services as well as deposit services."[131] However, as mentioned above, this part of the statute communicates that the CRA was meant to incentivize banks to serve the needs of LMI communities for credit, as they had been doing for deposits. And in fact, the operative provisions of the statute authorize the agencies to evaluate a bank's record of meeting "credit needs," not matters that are wholly unrelated to credit.[132] The institution ratings described in the statute refer only to the institution's performance "meeting community credit needs," such as "Outstanding record of meeting community credit needs," and do not mention deposit services.[133] Given the statutory focus on credit, downgrades based on compliance

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128 According to National Information Center data as of March 31, 2022, there are 37 depository institution holding companies with over $100 billion in assets.

129 As just one example, the agencies' estimate of hours needed to comply with section _.26's reporting requirements indicates that the number of wholesale and limited purpose bank respondents would be 12 OCC-regulated institutions, one Federal Reserve-regulated institution, and one FDIC-regulated institution. The current number of wholesale and limited purpose banks far exceeds those figures, and the agencies do not explain why only a subset of wholesale and limited purpose banks would be respondents.

130 12 C.F.R. § 228.28(c).

131 87 Fed. Reg. at 33,989.

132 *See, e.g.,* 12 U.S.C. § 2906(a)(1) ("Upon the conclusion of each examination of an insured depository institution under section 2903 of this title, the appropriate Federal financial supervisory agency shall prepare a written evaluation of the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods.").

133 12 U.S.C. § 2906(b)(2).

violations must remain connected to credit practices to be a valid exercise of the agencies' legal authority.

At the very least, the agencies should specify that if they bring a CRA downgrade based on a compliance violation, the violation must directly pertain to (1) the treatment of consumers, and (2) a banking product subject to evaluation under the CRA. Otherwise, the proposed language in the NPR, which refers to any "illegal practice," would appear to allow examiners to downgrade a bank's CRA rating based on practices that are wholly unrelated to the CRA and its underlying objectives, such as an AML program violation or a safety and soundness violation. We do not believe the agencies intended for such an absurd result, or that the statute would authorize it.

The final rule should also 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 be a logical nexus between the bank's assigned rating and the practices, and (2) full consideration to be provided to remedial actions taken by the bank. A bank that is satisfactorily meeting the credit needs of its community but nonetheless will be 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 inconsistent with the CRA's underlying purpose.

2. Adopt Flexible Weighting of Four Main Tests, or At Least Increase the Importance of Community Development Financing

The final rule should provide flexibility for weighting the four main tests at the institution-level rating stage, rather than imposing a rigid weighting scheme on all banks. Flexibility should be afforded based on variation in a bank's product lines, its capacity for retail lending and community involvement, and the size of its retail lending product lines compared to other business lines. The agencies state that the "proposed weighting reflects the CRA's traditional emphasis on retail lending as well as the importance of community development activities in meeting community credit needs. . . ."[134] However, such weighting could place a disproportionate emphasis on retail loans for banks that focus on other business lines and primarily serve LMI people through their community development activities. A more flexible approach would embrace the realities of differences in bank business models while still encouraging CRA-qualifying activity that may be more suited to banks' individual strategies, capabilities, and opportunities.

If flexible weighting of the four performance tests is not permitted in the general evaluation framework for large banks, then it should at a minimum be permitted within a strategic plan. Given the past and present regulatory position that the entire purpose of a strategic plan is its capacity to provide necessary flexibility, flexible weighting of performance tests seems only logical and appropriate.[135]

Additionally, if the final rule does not provide for more flexible weighting of the four tests, the agencies should increase the weight accorded to community development financing activities. The agencies could do so by combining the Community Development Financing Test with the Community Development Services Test and allocating this combined community development Test a 50 percent weight, and combining the Retail Lending Test with the Retail Services and Products test and allocating this combined retail test a 50 percent weight. Such a shift in weighting would address the NPR's general

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134 87 Fed. Reg. at 33,988.

135 *See* section II.I of this letter, above.

overweighting of retail lending distribution performance and its general underweighting of community development financing activities.

3. Omit the 60 Percent Low-Satisfactory Rule

The proposed requirement that a large bank with at least 10 facility-based or retail lending assessment areas must receive at least a low satisfactory rating in 60 percent or more of its assessment areas, by number,[136] in order to receive a Satisfactory rating or higher overall, would create a disincentive to operate retail branches compared to a branchless business model. We believe the agencies should omit such a requirement from the final rule, as the negative publicity resulting from poor performance in a significant number of assessment areas would otherwise provide banks with appropriate incentives to perform satisfactorily in as many of their assessment areas as possible. Indeed, the existing CRA regulations do not contain any requirement that is comparable to the proposed 60 percent rule, and we are not aware of any widespread incidence of banks ignoring the needs of a substantial portion of their assessment areas.

4. Limit Downgrades Based on Performance Context

The final rule should limit examiner discretion to adjust scores downward based on performance context factors, such as by requiring the agencies to provide a bank with prior notice and the opportunity to be heard if such downward adjustments would adversely affect the bank's institution-level rating. Such a change would promote both the stated agency goal to "[p]rovide greater clarity and consistency in the application of the regulations" and goal to "[p]romote transparency. . . ."[137]

5. Consider Innovative Products and Programs as Performance Context Across All Four Tests

BPI members help their borrowers through a wide variety of innovative and responsive credit products and programs, including but not limited to down-payment assistance programs and closing cost credits. While the NPR would provide for the evaluation of these products and programs within the Retail Services and Products Test, the final rule should allow examiners to consider these products and programs as beneficial performance context across any of the four tests to which they are relevant, such as the Retail Lending Test in the case of programs that are designed to increase the pool of potential LMI borrowers.

6. Restrict Downgrades Based on Failure to Exhibit Improvement

The final rule should clarify that any downgrade of an assessment area-level rating from Needs-to-Improve to Substantial Noncompliance based on the bank's failure to exhibit improvement[138] should only be made by examiners in full consideration of performance context, and should not be automatic.

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136 Appendix D g.2, at 87 Fed. Reg. at 34,059.

137 87 Fed. Reg. at 33,885.

138 *See* § __.28(e), 87 Fed. Reg. at 34,034 ("When assigning ratings, the [Agency] considers a bank's past performance. If a bank's prior rating was 'Needs to Improve,' the [Agency] may determine that a 'Substantial Noncompliance' rating is appropriate where the bank failed to improve its performance since the previous evaluation period, with no acceptable basis for such failure.").

M. Compliance Period

1. Extend the Compliance Periods

The proposed one-year compliance period for the regulation's data collection and reporting requirements would be far too short, and should be extended to at least 24 months to allow banks to develop the internal infrastructure and strategy necessary to carry out extended data collection requirements and achieve the new goals embodied by the amendments. CRA performance periods under the new performance tests and standards should not begin until 48 months after the effective date of the final rule, with examinations to begin after the completion of the performance period.

a) Extend Compliance Period for Data Collection and Reporting Requirements to 24 Months Following Effective Date

In the preamble, the agencies state that they "are cognizant that banks would need to adjust systems and train personnel to prepare for the implementation of a final CRA rule."[139] However, we strongly disagree that "the applicability dates for [the data collection, reporting, and disclosure] provisions would give banks sufficient time from the date the final rule would be published in the Federal Register to revise their systems for data collection and develop new procedures for implementation of the proposed regulatory framework." Twenty-four months would provide banks with more time to carefully and thoughtfully develop effective systems and comply properly with these and other provisions in the rule.

Moreover, the agencies and the industry will undoubtedly identify a number of ambiguities in the final rule that the agencies will need to clarify during the transition period. Based on the history of CRA rulemakings, we are doubtful that the agencies will be able to identify and clarify the key ambiguities in just 12 months:

- The agencies have published a body of Q&As interpreting the existing CRA regulations over the course of *twenty years*. The Q&As supplement official examination manuals and other guidance documents that have clarified key ambiguities in the existing rules.

- In September 2020, shortly after the OCC finalized its June 2020 CRA rule, BPI submitted a list of 44 interpretive questions that the final rule left unanswered. The OCC never clarified these key ambiguities despite having more than a year to do so between the time it finalized the rule and the time it proposed to rescind the rule.

- The current NPR would create a significant number of interpretive ambiguities, at least some of which we have identified in the Annex to this letter. Given the length and complexity of the Proposal, our members expect to continue identifying ambiguities well after the comment period ends, and we hope the agencies will not rush to finalize a rule that fails to address these yet-unidentified issues.

The agencies should build additional time into the compliance period so that they can address the interpretive questions that the final rule will inevitably create. More generally, we would hope that the agencies will learn from the experiences of prior CRA reform efforts and finalize a rule that provides for a sustainable path to implementation. We believe that the final rule will ultimately prove to be more

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139 87 Fed. Reg. at 34,005.

durable if the agencies take care to make the final rule straightforward and clear and give banks the time they need to implement the final rule without mistakes or shortcuts.

b) Begin First Performance Periods No Less Than 24 Months Following Compliance Period for Data Collection and Reporting Requirements (48 Months Following Effective Date)

Performance periods should not begin until 24 months after data collection begins, *i.e.*, 48 months after the compliance date for data collection requirements. As a matter of basic fairness and to encourage safety and soundness, banks at least should be able to estimate the data to which their performance will be compared prior to the beginning of the first performance period. While banks can estimate market performance on home mortgage distribution based on historical HMDA data, no such market data currently exist for the following key elements of the proposed framework:

- Retail lending volume screen data
- Small business and small farm loan data;
- Automobile loan data;
- Multifamily loan data for multifamily loans exempt from HMDA reporting;
- Community development financing data; and
- Community development services data

Such data will only become available after banks begin to report it. Reporting would be done on an annual basis on April 1st of the year following data collection, which is 15 months *after* the compliance date for data collection requirements.[140] Until such time, banks would not have any basis to be able to estimate the market data to which their performance will be compared. Therefore, performance periods under the new standards should not begin until 24 months after the compliance data for data collection requirements.

2. Permit Initial Rating under the Framework to be Indicative

The NPR proposes transformative changes to the CRA framework, and the vast sweep of these changes would create significant unintended consequences. These consequences include underweighting of small business loans in the Retail Lending Test, as described above in sections II.C.8 and II.C.1.b) of this letter, but could also include anomalous results that BPI and the agencies have not yet identified, due to the lack of available data on a number of key issues. Given the vast changes that the agencies have proposed, 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.

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140 BPI supports the NPR's proposed approach of conducting data collection on a calendar year basis, beginning on January 1st.

N. Other Issues

1. Align Other Agency Rules

In connection with the final rule, the agencies should amend their rules concerning permissible public welfare investments (*e.g.*, Regulation H and Part 24) as needed to provide banks with clear legal authority to make investments that meet the CRA definition of "community development investments" without advance approval from their regulators. Currently, state member banks seeking to make investments that meet the CRA definition of "qualified investments" may have authority to do so under Regulation H only if the recipient of the investment "engages solely in or makes loans solely for the purposes of" certain enumerated CD activities or if other narrow conditions are satisfied, unless the Federal Reserve has separately approved of the investment.[141] The criteria for a permissible investment under Regulation H are therefore narrower than the criteria for a qualified investment under the Federal Reserve's existing CRA regulations, with the result that a range of qualified investments under the CRA are legally impermissible for state member banks, or are subject to a burdensome regulatory approval requirement that strongly discourages these banks from making the investments.

This provision of Regulation H, which the Federal Reserve enacted before the federal banking agencies adopted the current definition of "qualified investments" in their CRA regulations in 1995,[142] is also inconsistent with other provisions of federal banking law that permit state-chartered member banks to engage in the same activities as national banks, subject to state law restrictions.[143] Under OCC regulations, national banks are generally authorized to make any investment that is a qualified investment under the CRA.[144]

To address this issue, the Federal Reserve should revise Regulation H or otherwise issue interpretive guidance making clear that *all* CRA-qualifying investments are permissible investments for state member banks. Doing so would facilitate more CRA investments, create parity between state member banks and national banks, and reduce burdens both for member banks and the Federal Reserve itself.

Relatedly, the agencies should consider counting any investment that is permissible under public welfare investment authority as a qualifying community development investment for purposes of the CRA. Such an approach would create additional consistency across the agencies' regulations.

2. Incentivize Outstanding Ratings

The agencies should establish additional incentives for banks to achieve an Outstanding CRA rating, including by deeming a bank that has achieved an Outstanding rating to have a satisfactory record of meeting the convenience and needs of its community for purposes of the processing of a licensing application that requires consideration of that factor. Creating these incentives would be particularly important under the proposed calibration of the NPR, which would make Outstanding ratings much more difficult to achieve than they are today.

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141 12 C.F.R. § 208.22(b)(1)(iv).

142 *See* Board of Governors of the Federal Reserve System, Membership of State Banking Institutions in the Federal Reserve System, 59 Fed. Reg. 63,706 (Dec. 9, 1994).

143 *See*, *e.g.*, 12 U.S.C. § 1831a(a)(1) & (c)(1); 12 C.F.R. §§ 208.21(b) & 208.6(a)(1).

144 *See* 12 C.F.R. § 24.3.

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BPI appreciates the agencies' consideration of our comments. If you have any questions, please contact the undersigned by phone at (703) 887-5229 or by email at paige.paridon@bpi.com.

Respectfully submitted,

[redacted]

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Annex

Key Ambiguities in the Proposal

The NPR contains a number of key ambiguities that the agencies will need to address in the final rule. While there may be additional open questions not listed below, at this time we have identified that the agencies should clarify:

- Whether the 15 percent test for a retail loan to be considered a major product line considers originated loans, both originated and purchased loans, or the balance sheet value of loans.

- Whether the numerator of the "Bank Volume Metric" (which is used to calculate the retail lending volume screen) would count retail loans that the bank originated and sold prior to year-end, with the present numerator description covering "the annual average of the *year-end total dollar amount* of the bank's originated and purchased automobile, closed-end home mortgage, open-end home mortgage, multifamily, small business, and small farm loans in the facility-based assessment area."

- Whether, in the context of a purchased loan, the income or gross annual revenues (as appropriate) of the borrower for CRA purposes is determined as of the time of origination or the time of purchase.

- How a bank should treat a loan under the Retail Lending Test if the bank does not have income or gross annual revenue information for the borrower, or if the income or gross annual revenue information is not reportable under HMDA or the section 1071 rule.

- Whether a bank's own branches are excluded from the definitions of "low branch access census tract" and "very low branch access census tract."

- That the services listed in proposed section _.23(b)(1)(iii)(B) of the Retail Products and Services Test (bilingual and translation services, free or low-cost check cashing services, reasonably priced international remittance services, and electronic benefit transfer accounts) are illustrative and do not comprise a set of minimum requirements or expectations.

- How provisions of the Retail Services and Products Test that would evaluate the distribution of a bank's branches and remote services facilities would apply to a bank that does not operate branches or remote services facilities.

- That the two prongs of the proposed description of a "primary purpose of community development" – section _.13(a)(1)(i) and section _.13(a)(1)(ii) of the proposed rule text – are *disjunctive*, as explained in the preamble to the NPR,[145] rather than *conjunctive* as potentially implied by the language of section _.13(a), which refers to "paragraphs (a)(1)(i) *and* (a)(1)(ii)" rather than "paragraphs (a)(1)(i) *or* (a)(1)(ii)."

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[145] *See* 87 Fed. Reg. at 33,903.

- That proposed section _.24(a)(2)(i), which would exclude a loan from consideration in the Community Development Financing Test if the loan is "considered" in the Retail Lending Test, would exclude only the small business loans that count in the numerator of the Retail Lending Test's distribution metrics, and not the small business loans that only count in the denominator of the distribution metrics.

- That the impact review will not discount the value of any qualifying activities that do not implicate multiple (or any) impact review factors.

- That activities currently considered to be "innovative," "complex," or "flexible" under the existing CRA regulations will receive a greater impact score even though the Proposal would use different terminology.

- That when evaluating assessment area-level performance and the numerator of the nationwide "Wholesale or Limited Purpose Bank Community Development Financing Metric," the total dollar value of community development financing provided by a limited purpose or wholesale bank will be counted in the same way as for non-limited purpose and wholesale banks, as set forth in paragraph 1 of Appendix B.

- That purchased community development loans and community development investments will receive full and equal credit as originated transactions for purposes of the Community Development Financing Test, despite the fact that proposed paragraph 1.a. of Appendix B would refer to "loans originated" and "investments made."

- That "[s]upport for financial intermediaries that lend to, invest in, or provide technical assistance to businesses or farms with gross annual revenues of $5 million or less" includes a bank making loans to, making investments in, or providing services to, such a financial intermediary.

- That a financial intermediary qualifies as one that "lend to, invest in, or provide technical assistance to businesses or farms with gross annual revenues of $5 million or less" if the supported businesses have gross annual revenues of $5 million or less *at the time of the intermediary's loan, investment, or technical assistance*, and that the subsequent growth of such businesses does not disqualify the financial intermediary for purposes of the CRA economic development standard.

- That section _.25(d)(2) of the proposed rule text, which would disqualify as community development services "volunteer activities by bank board members or employees of the bank who are not acting in their capacity as representatives of the bank," does not require such a person to act as an agent of the bank when serving on a community organization's board of directors, which could create a conflict of interest.

- Assuming that the final rule includes language requiring certain community development activities to be conducted "in conjunction with" governmental entities, and that such activities do not displace LMI residents, how a bank would be expected to document compliance with these requirements.

- How a bank should record the location of community development services when they are provided virtually or remotely.

- Whether employee location for purposes of community development services reporting should be based on the employee's work address or home address, and whether that determination depends on the extent to which the employee works remotely.
- That existing limited purpose and wholesale banks will not need to recalculate and requalify upon the effectiveness of a new final CRA rulemaking and will maintain their current status if they continue to meet the qualifications going forward.
- That limited purpose and wholesale banks are not required to be evaluated under the Retail Services Test to receive an Outstanding rating overall.
- That the language disallowing credit for certain affiliate activities ("no other bank, other [operations subsidiaries or operating subsidiaries], or other affiliates of the bank claim the activity for purposes of this part") does not disqualify counting a loan that an affiliate originates and a third party purchases, or vice versa, consistent with the treatment of activities conducted directly by the bank.
- How the geographic allocation of corporate deposits will function when a business customer operates and has relationships with the bank across multiple geographies (the proposed standard that lacks clarity reads: "census tract or county, as applicable, in which the business is located if it has a local account").
- That in the context of an omnibus 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.
- That a bank can rely on a depositor's address that is in its system of record, which is typically collected at account opening, and that the CRA rule's data collection requirements do not impose a new obligation on banks to request address updates from customers periodically.
- That in the case of a small business loan, a bank can rely on gross annual revenue information provided by third party sources if the bank does not (and is not otherwise required to) collect that information directly from the borrower.
- That a bank does not have an obligation to obtain from a borrower updated information regarding the borrower's income or gross annual revenues.
- That community development data can be incomplete. For example, if the bank or its employees are doing an activity that would get credit but the bank has not tracked that activity, the bank will not be in violation of the data collection and reporting requirements.
- That references to a "large bank" in the data collection section of the proposed rule text, § _.42, are intended to exclude banks that are designated as wholesale and limited purpose banks notwithstanding the fact that the rule's definition of "large bank" would not expressly exclude such banks.
- That the language allowing the agencies to downgrade a bank's rating to Substantial Noncompliance if the bank previously received Needs to Improve and did not improve its performance applies only at the assessment area level.

The number and significance of these open issues underscore why the agencies should take the time needed to ensure a clear and coherent final rule and not rush to finalize a rule as sweeping as the Proposal.