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Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
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Docket No. R–1769; RIN 7100–AG29,

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Federal Deposit Insurance Corporation
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Attention: Comments RIN 3064–AF81

Chief Counsel's Office
Attention: Comment Processing
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Docket ID OCC–2022–0002

Comments to Interagency Notice of Proposed Rule Making on Community Reinvestment Act Modernization

Regional Housing Legal Services (RHLS) is a nonprofit law firm whose mission is to create housing and economic opportunity in underserved communities in Pennsylvania and to effect systemic change for the benefit of lower-income households. RHLS achieves its mission by providing free legal services and technical assistance to community-based organizations; informing, training and supporting consumers and those who serve them on housing and utility issues; and engaging in policy analysis and promoting system innovations focused on critical housing, economic development, neighborhood revitalization and utility issues.

Over RHLS's 48 years of work in areas of affordable housing and community revitalization, we have seen how important the Community Reinvestment Act (CRA) is for neighborhood revitalization, the development of affordable homes, preserving affordability and community, and helping low- and moderate-income individuals and families become homeowners. We appreciate the opportunity to comment on the Notice of Proposed Rulemaking (NPR) to update regulations for the CRA. Our comments are divided into three parts: (1) the impact of the proposed rules on low and moderate income (LMI) communities, (2) the impact of CRA on Low Income Housing Tax Credit (LIHTC) investments, and (3) the unmet needs in communities of color and among borrowers of color.

I. Impact on LMI Communities

1. The NPR makes many positive changes that will benefit LMI communities. We note a few and add several suggestions.

(A) Assessment areas

We support the regulators' proposed creation of a new retail lending assessment area designation.[1] Recognizing the large volume of lending that takes place online, this proposed rule would bring the large majority of lending within CRA's purview. However, the new approach would be strengthened if all loans made by the bank and its partners and affiliates were counted in determining whether the 100 home mortgage or 250 small business loan thresholds were met.

We also suggest that banks without a physical location but that have a retail lending assessment also be subject to community development activity review. As more and more banking moves to online platforms, virtual banks are acquiring significant assets, including the deposits and loan payments of LMI customers and from LMI communities. These banks should be investing in the communities from which they profit.

(B) Community Development Activities

List of qualifying activities – The NPR proposes a non-exclusive, illustrative list of qualifying community development activities so that banks know what types of activities will qualify before they engage in the activity.[2] We share the concern raised by some stakeholders that providing a list could limit innovation. At the same time, we see its usefulness as long as the regulators state clearly and strongly that the list is non-exclusive and provide an expedited process for approval of activities not listed. Moreover, the regulators must emphasize that any community development activity must be responsive to the needs of the community and that the activity is not acceptable simply because it is on the list.

Activities outside assessment areas - The NPR relaxes the rules concerning banks' participation in community development activities outside of their assessment areas.[3] We support this. Pennsylvania is a very diverse state, with the sixth largest city in the nation and the third largest rural population. Philadelphia, Pittsburgh, and other urban areas are blessed with large banks that have made CRA investments, loans, and contributions to community development projects for years.

On the other hand, many rural areas struggle to find institutions willing to support community development. Larger metropolitan areas have historically benefited from CRA-motivated investors, including driving LIHTC prices higher, while leaving other geographic areas out of this market. The

[1] Notice of Proposed Rulemaking (NPR), Fed. Reg. Vol. 87, No. 107, p. 33918
[2] NPR, p. 33912
[3] NPR, p. 33921

proposed rule will help underserved areas attract LIHTC investments as well as bank participation in other community development activities.

We request that the regulators track banks' actual out-of-area community development activities to see whether they make use of the new rules. If investments in underserved areas do not increase, other incentives might be required.

Non-displacement – The proposed rules for place-based revitalization state that activities that are not available to LMI individuals or that, for example, demolish affordable housing to make way for a new community facility would not qualify as eligible activities.[4] Indeed, non-displacement must be an important aspect of CRA work. However, the proposed rule, or at least the examples given, do not go far enough. An essential component of any revitalization analysis should be whether the activity will promote gentrification and displacement of existing LMI residents through increased rents. The regulators ask whether new housing for middle and upper income households as part of a revitalization plan should receive CRA credit. To this we say, "No". Any community revitalization plan or activity should include assurances (through community benefits agreements, support of community land trusts, inclusionary zoning, etc.) that LMI households will be able to remain in the neighborhood and enjoy the benefits of revitalization.

(C) Definition of Affordable Housing - Unsubsidized housing

The regulators take an important step forward in defining community development activities to include support of unsubsidized housing acquisition and preservation.[5] Unsubsidized housing, also known as naturally occurring affordable housing (NOAH), accounts for the majority of homes for LMI households. However, a home that is affordable today might not be tomorrow.

The NPR proposes four criteria, any one of which can be used to determine whether multi-family housing to be financed qualifies as NOAH: (1) it is in a LMI census tract, (2) the property is controlled by a nonprofit housing organization, (3) the owner pledges to keep rents affordable for the lesser of five years or the length of the loan, or (4) the majority of tenants are LMI.[6] We submit that numbers 1 and 4 provide no protection to residents in gentrifying areas. Ownership by a nonprofit housing organization offers some comfort, but the organization may succumb to financial pressures that necessitate the raising of rents or sale of the property. A rent restriction such as that described in #3 is best, but five years or less is too short a time period to offer protection to the tenants. We suggest affordability restrictions of at least fifteen years that are secured by deed restrictions, loan agreements, or other enforceable documents. Better yet, the regulators should encourage bank support of community land trusts, limited equity cooperatives, properties subject to inclusionary zoning restrictions, and projects that are part of community benefits agreements to protect affordable housing.

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[4] NPR, p. 33903 et seq.

[5] NPR, p. 33893 et seq.

[6] NPR, p. 33895

To the regulators' question as to whether single-family rental housing should be included as NOAH, we offer a definite "yes". Seventy percent of renters in Pennsylvania live in 1-4 unit buildings, with the majority of them in single-unit houses.[7]

2. The NPR also proposes rules or raises questions that we see as detrimental to LMI communities.

(A) Bank Size

The NPR would reclassify banks by increasing the asset level for each category.[8] This change would result in 779 intermediate banks being classified as small banks, which means they would no longer be subject to the Community Development Finance Test. In addition, 217 large banks would be reclassified as intermediate banks, eliminating their Community Development Service Test and accountability for maintaining branches in LMI communities. There is no reason to reclassify these banks since they are currently performing these activities well. Under the proposed classifications, a significant share of community development activities would go unfunded.

(B) Middle-income Housing

The regulators ask, in Question 4, whether "provid[ing] affordable housing to middle-income individuals in *high opportunity areas*, in nonmetropolitan counties, or in other geographies" should be credited for CRA purposes. We believe this is not an appropriate CRA activity and would dilute support for LMI developments. Because housing developments for middle-income households are generally seen as less financially risky than those for moderate- and especially low-income households, we fear that banks will gravitate toward middle-income developments. We recognize that middle America is caught in an affordability crunch, too, but it does not begin to equate with the crisis low-income households face. Whether or not the bank views low-income housing as risky, any diversion of funds to middle-income projects means less financing for, or investments in, LMI developments.

II. Low Income Housing Tax Credit Investments

CRA's Community Investment Test incentivizes large banks to invest in Low Income Housing Tax Credits. LIHTC is the largest driver of affordable rental housing in the country, and over the last three decades, banks have become major investors in LIHTC. Any changes to CRA rules can impact those investments, either positively or negatively.

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[7] American Community Survey (ACS), Table B25033: Total Population in Occupied Housing Units by Tenure by Units in Structure, https://data.census.gov/cedsci/table?q=tenant%20occupied%20units%20in%20building&t=Housing&g=0400000US42&tid=ACSDT5Y2020.B25033

[88] NPR, p. 33924

1. We support the following proposed rules that impact LIHTC.

(A) Consider total number of units

We support the NPR's proposal that a bank receive consideration for the full amount of a loan or investment in a development financed with LIHTC regardless of the percentage of LMI units.[9] The NPR distinguishes between LIHTC developments and other affordable housing in this regard. Given the strong framework of regulation behind LIHTC and the amount of monitoring on the affordability of projects that include LIHTC, allowing this achieves the goals of CRA without additional regulations for banks and evaluators. We appreciate and support the distinction the NPR makes between non-LIHTC affordable housing, where investments or loans are credited in proportion to the number of affordable units, and the NPR takes for LIHTC-financed property. While we would like to see incentives for as many affordable units as possible, the proposed rule (based on current guidance) is a more efficient use of an examiner's time.

(B) Investment Outside Assessment Area

As noted above, we are supportive of allowing banks to invest in community development projects, including LIHTC developments, outside of their investment areas. This will be a step toward leveling the playing field between larger metropolitan areas and smaller, rural communities.

2. Several proposed rules will have a negative impact on communities' ability to use LIHTC to develop desperately needed affordable housing.

(A) Investment Test

The NPR proposes the removal of the separate Investment Test,[10] which will disincentivize investment in LIHTC housing. The current Investment Test and related regulations constitute 25% of the overall CRA score. The Investment Test and its weight in the CRA score is a primary driver of LIHTC pricing and investment. Replacing this with a test that measures both investments and loans together will change, and likely decrease, the motivation of banks to make equity investments, including investments in LIHTC. To avoid the potential effects on LIHTC investments and the LIHTC market, it is our recommendation that the separate Investment Test be maintained.

(B) Imbalance between Retail and Community Development Activities

The NPR would assign new weights to the different tests, with Retail Lending weighted at 45%, Retail Services and Products at 15%, Community Development Activities at 30% and Community Development Services at 10%.[11] This would make a Satisfactory rating possible for a bank with an Outstanding, High Satisfactory, or Low Satisfactory conclusion on the Retail Tests along with a

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[9] NPR, P. 33892
[10] NPR, p. 33971
[11] NPR, p. 33988 and Appendix D, p. 34057

Needs to Improve conclusion on the Community Development Activities Test. We are concerned about the effect that this could have on banks' desire to meaningfully use their resources to fulfill their community development obligations. We strongly recommend that banks should not be issued an overall Satisfactory rating without achieving at least a Low Satisfactory on the Community Development Activities Test.

III. CRA and Racial Equity

The NPR states that "CRA was one of several laws enacted in the 1960s and 1970s to address fairness and financial inclusion in access to housing and credit."[12] The NPR goes on to document the role the federal government played in redlining and disinvestment prior to enactment of those laws, and the intent of CRA's prime sponsor, Sen. Proxmire, to counter that destructive history.[13] Nevertheless, CRA has rarely made mention of race. It is time to change that. We urge the regulators to include "communities of color" in all aspects of CRA regulations.

(A) Statutory Language

While the statutory language does not emphasize considerations of race, neither does it preclude it. The key phrase, repeated frequently in subsequent regulations, is "meeting the credit needs of [the institution's] entire community, including low- and moderate-income neighborhoods".[14] We emphasize the word "including". By its definition "including" refers to a part of the whole. Items *included* in a list do not equate with the *whole* of the list. A bank's community includes low- and moderate-income (LMI) neighborhoods and individuals, but also includes other groups, such as small businesses, homebuyers, and renters. Another important part of the institution's community is communities of color, both neighborhoods and individuals.

Moreover, there are explicit references to "minorities" in the statutory language, indicating congressional intent to consider the needs of non-white borrowers and neighborhoods. Majority owned institutions are encouraged to enter into business relationships with minority-and women-owned financial institutions.[15] Donations (in whole or in part) of branch offices in minority neighborhoods to women- or minority-owned institutions are given favorable treatment.[16]

Perhaps most telling is the 1992 amendment to CRA that required the regulators to "submit a report to Congress comparing residential, small business, and commercial lending ... in low-income, minority, and distressed neighborhoods to such lending in other neighborhoods".[17] Congress used clear language to express its desire to see lending institutions take steps to address needs in communities of color.

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[12] NPR, p. 33888.
[13] Ibid.
[14] 12 U.S.C. §2903(a)(1) and §2906(a)(1)
[15] 12 U.S.C. §2903(b)
[16] 12 U.S.C §2907
[17] Pub. L. 106–102, title VII, § 715, Nov. 12, 1999, 113 Stat. 1470 §(a)

(B) Affirmatively Furthering Fair Housing

Separate from the CRA statutory language but equally important is the Fair Housing Act (FHA). The NPR refers to the FHA's nondiscrimination language, but the FHA does more. It states,

> All executive departments and agencies shall administer their programs and activities relating to housing and urban development (*including any Federal agency having regulatory or supervisory authority over financial institutions*) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.[18] (Emphasis added.)

Not only are the regulators permitted to consider race in CRA evaluations, they are statutorily obligated to do so under the FHA. Nondiscrimination is a floor, not a ceiling.

To affirmatively further fair housing, the regulators must do more than penalize discrimination and disclose lending and other banking business by race and ethnicity. The regulators must affirmatively encourage banks to increase activities in communities of color. This includes individual lending as well as community development lending. It means maintaining or opening branch banks in underserved areas for customers who cannot easily access online banking services.

Affirmatively furthering fair housing also means doing business in a way that recognizes the toll that systemic racism has taken over the years and continues to take. Banks should be encouraged to use Special Purpose Credit Programs[19] (SPCP) that recognize how the history of racism has pushed Black households and other people of color into higher cost, lower value homes or kept them out of homeownership altogether. Those effects of racism are still at work today. Financial institutions must also do more to bring potential customers of color into the banking community. Banks need to rely less on credit scores, which do not fairly predict future payments, and look more at individual circumstances. (Will the borrower be lowering their monthly payments with a new mortgage? If so, their difficulty with meeting financial obligations in the past should be discounted.) We support the NPR's encouragement of small dollar mortgages and alternative credit products, but maintain that these do not go far enough to overcome systemic racism, especially if only targeted to LMI borrowers rather than to individuals of color.

(C) Reporting Racial Data

The NPR calls for the reporting of racial data, but as proposed its impact will be very limited. The regulators would provide Home Mortgage Disclosure Act (HMDA) data for large banks as part of their CRA evaluation report. However, the data would not be used in "the conclusions or ratings of

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[18] 42 U.S.C. §3608(d)

[19] See 12 C.F.R. Part 1002.8, and Department of Housing Urban Development Office of General Counsel Guidance, December 6, 2021

the bank and would not on its own reflect any fair lending finding or violation".[20] Providing data without consequences will have little impact. HMDA data is already publicly available, albeit not in a user-friendly format. Nevertheless, as the NPR states, "Even with the implementation of the CRA and other complimentary laws, the wealth gap and disparities in other financial outcomes remain persistent."[21] Stronger action is needed. There is nothing in the statute to prohibit the inclusion of racial data in the CRA evaluation report. Moreover, the FHA may *require* consideration of racial data in the bank's CRA rating.

Evaluations need to go beyond the quantity of loans to people of color and consider the quality of the financing. Are loans and retail products affordable? Are appraisals fair? Is the loan-to-value ratio appropriate? While discrimination is illegal and already a factor in CRA ratings, research shows that differences still exist.[22] We do appreciate the NPR's expansion of the scope of discriminatory practices to look beyond just credit products.[23] Evaluating and reporting discriminatory conduct along with detailed data on retail products and community development lending by race may change the business practices of some banks.

Unfortunately, the NPR only requires disclosure of HMDA data by large banks (of which there would be fewer). There is no reason to limit such disclosure to large banks since HMDA itself requires every bank that makes more than 100 home mortgages a year for the previous two years to collect and report data by race. At the very least, CRA evaluation reports should include HMDA data for every bank that is required to report under HMDA.

We very much appreciate the extensive review of the CRA rules that the regulators undertook and the positive steps proposed to enhance bank support for LMI communities and community development. We offer these comments in the spirit of furthering strong partnerships between banks and LMI communities/communities of color to continue improving the health and vibrancy of those communities.

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[20] NPR, p. 33889

[21] NPR, p. 33888

[22] See, e. g., Racial and Ethnic Valuation Gaps In Home Purchase Appraisals, Freddie Mac, https://www.freddiemac.com/research/insight/20210920-home-appraisals, and Aronowitz, M., et al., The Unequal Costs of Back Homeownership, MIT Golub Center for Finance and Policy, https://gcfp.mit.edu/mortgage-cost-for-black-homeowners/

[23] NPR, p. 33989