August 5, 2022

Via Electronic Mail

Ms. Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Mr. James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Mr. Benjamin McDonough
Chief Counsel
Office of the Comptroller of the Currency
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Re: *Community Reinvestment Act: Joint Notice of Proposed Rulemaking; Request for Comment* (FRB Docket No. R-1769, RIN 7100–AG29; FDIC RIN 3064–AF81; OCC Docket ID OCC-2022-0002, RIN 1557–AF15)

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

Ally Bank appreciates the opportunity to comment on the Joint Notice of Proposed Rulemaking (the "Proposal") issued by the Board of Governors of the Federal Reserve System ("FRB"), the Federal Deposit Insurance Corporation ("FDIC"), and the Office of the Comptroller of Currency ("OCC" together with the FRB and the FDIC, the "Agencies").[1] We share in the Agencies' commitment to more effectively meet the needs of low- and moderate-income ("LMI") communities by modernizing the regulatory framework of the Community Reinvestment Act of 1977 ("CRA").[2]

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1 *See* Community Reinvestment Act: *Joint Notice of Proposed Rulemaking; Request for Comment* ("CRA NPR"), 87 Fed. Reg. 33884-34066 (proposed May 5, 2022; published June 3, 2022).

2 *See* CRA NPR, 87 Fed. Reg. 33885 (stating "The CRA encourages banks to help meet the credit needs of the local communities in which they are chartered, consistent with a bank's safe and sound operations, by requiring

As a leading digital financial-services provider, we applaud the Agencies' intent to update CRA regulations in a way that acknowledges the evolving nature of banking and consumer preference. Such an update, by its nature, should appropriately reflect differences in business models as the banking market has evolved in response to customer-driven needs and trends. Our experience as a digital bank—especially during the recent pandemic—confirms that communities and individuals across the country are migrating more and more to online, mobile, and other remote banking services.

Ally Bank is an award-winning digital bank that offers its financial products and services nationwide with *no branches or ATMs*. Chartered in Utah, Ally Bank is a subsidiary of Ally Financial Inc. (with its consolidated subsidiaries, "Ally"). Ally Bank is regulated at the federal level by the FRB and at the state level by the Utah Department of Financial Institutions. As of June 30, 2022, Ally Bank had $175.8 billion in total assets, $142.6 billion in total deposits, and 9968 employees.

Ally Bank has been at the forefront of digital transformation in banking and leading customer practices, as demonstrated by our premier online retail deposit business and our digital delivery of a broad array of products and services. Our core philosophy and brand are centered around the customer, with a goal of delivering a unique banking experience that is digitally led and offers strong value for consumers. Ally Bank's strategy is designed to nurture long-term customer relationships and to build on the accelerating shift toward digital banking. Ally serves over 20,000 auto dealers and 10.5 million customers through a variety of commercial and consumer lending products offered nationwide.

We embrace our obligations under the CRA as an extension of our strong LEAD[3] core values and our corporate culture of "Doing it Right" and being a trusted "Ally" to our customers and communities. Ally Bank has devoted significant effort and resources to meeting all CRA requirements. Our CRA program is overseen by the Ally Bank Board of Directors and a bank-wide CRA management committee composed of members of senior management from our business lines, finance, risk, compliance, and corporate citizenship. Our corporate culture is reflected in our drive for "Outstanding" CRA performance, as evidenced by the results of our two most recent examinations.

This deep experience in digital banking has taught us that CRA modernization must account for the branchless delivery of financial services. While some of our comments on the Proposal mirror those of banks that are primarily branch-based, the purpose of this letter is to offer the perspective of an established digital bank with no branches—physical, virtual, or otherwise.

Federal banking regulatory agencies examine banks' records of meeting the credit needs of their entire community, including low and moderate-income neighborhoods").

3 Our LEAD core values stand for **L**ook externally, **E**xecute with excellence, **A**ct with professionalism, and **D**eliver results. These core values shape our culture and drive our success.

We are also a signatory to the comment letter ("Nontraditional Bank Letter") of a group of depository institutions that are not tied to traditional branch networks.[4] We echo the Nontraditional Bank Letter's theme that the one-size-fits-all approach of the Proposal does not appropriately recognize the reality of branchless banking and the ability of banks like ours to positively impact LMI communities in ways that fundamentally differ from those of brick-and-mortar counterparts. By attempting to artificially confine digital banking services to discrete geographies, the Proposal not only would prevent our CRA activities from being evaluated on their actual merits but also threatens to curtail customer-driven trends for banking innovation.

With this background, we respectfully ask the Agencies to consider the following:

(1) Tailor the Proposal to different bank business models, including those more digitally based, to eliminate retail lending assessment areas ("RLAAs") under the Retail Lending Test; consider whole-bank evaluations for retail lending; and retain the flexibility of strategic plans;

(2) Adjust the Retail Lending Test to recalibrate performance standards and benchmarks; include purchased loans; and include consumer auto loans only at the bank's option;

(3) Adjust the Retail Services and Products Test to account for deposits products only as performance context;

(4) Retain proposed evaluation of community development (CD) activities in facilities-based assessment areas ("FBAAs") and nationwide area; and preserve existing jobs component of "economic development;" and

(5) Calibrate performance standards to retain performance context and current bases for potential ratings downgrades.

I. TAILORING TO DIFFERENT BANK BUSINESS MODELS

We strongly support the views captured in the Nontraditional Bank Letter that describe the need for flexibility in the Proposal to account for different business models. Specifically, the Proposal does not account for the highly diffuse nature of digital banking in a manner that comports with the CRA while it simultaneously limits existing and potential alternatives—such as strategic plans—that do. As a result, we ask the Agencies to eliminate RLAAs in favor of a whole-bank evaluation under the Retail Lending Test and retain the current flexibility of the strategic plan option.

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[4] The signatories to the Nontraditional Bank Letter are Ally Bank; American Express National Bank; Barclays Bank Delaware; Capital One; Discover Bank; Goldman Sachs Bank USA; Charles Schwab Bank, SSB; Silicon Valley Bank; and Synchrony Bank.

A. Eliminate RLAAs under the Retail Lending Test

We do not support an approach that requires banks, including digitally based banks, to delineate RLAAs under the Retail Lending Test.[5] Measuring CRA performance based on artificial connections to narrowly drawn geographies do not adequately reflect modernization and contradicts the rapidly accelerating digital transformation of lending that is not tied to physical locations. Digital lending by its nature is diffuse and conducted nationwide with no ties to any specific geography. As long as our CRA efforts are reasonably designed to satisfy the CRA's purpose—helping meet the credit needs of our entire community, including LMI neighborhoods[6]—it should not matter whether those efforts are focused on geographies where our borrowers are more or less concentrated. It is more important that banks have incentives to focus CRA activities on those areas where local community credit needs are greatest.

Mandating the inclusion of geographies where a bank engages in retail lending outside of its FBAAs does not comport with the text or purpose of the CRA. The text of the CRA requires the Agencies prepare written evaluations of CRA performance in "geographies where banks have domestic branch offices" and does not refer to areas where banks provide loans.[7] This text is consistent with the purpose of the CRA which is intended to incentivize banks to serve any community where they have branches that take deposits from that community. By requiring banks to lend in geographies where the bank has no deposit-taking branches, banks could be compelled to reallocate resources from the communities that may need it the most to geographies where the bank has little or no "on the ground" knowledge.

Further, the distribution of our products and services is not driven by the physical address of our loan borrowers. Location is irrelevant to the banking choice our customers make and, in fact, the remote availability and ease of access of our services may be what many of our customers prefer. Imposing a geography-based construct such as RLAAs on digitally based banks is not only inconsistent with consumer choice (which is agnostic to geography) but could compel us (and other nontraditional banks) to change our business model. Adding RLAAs could necessitate a digitally based bank to redirect its resources to retail lending products in certain geographies in a manner that is not consistent with the bank's business plan, potentially reducing much-needed innovation and investment to other LMI communities.

Even more importantly, imposing new RLAAs could further intensify CRA "hot spots." Our experience confirms that the largest amounts of retail loans are geographically concentrated in the most populous areas—but *not* in LMI census tracts—where banking services are already broadly available to LMI populations. Because retail loans may become more heavily

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5 *See* CRA NPR, 87 Fed Reg. at 33916 (providing "in § __.17 for large banks only, the agencies propose establishing retail lending assessment areas to provide a means for evaluating lending that occurs outside of facility-based assessment areas").

6 *See* 12 U.S.C. § 2903(a)(1).

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

concentrated in large metropolitan areas where many banks are already making retail loans, competition for such loans to LMI borrowers or in LMI areas may increase beyond available supply. This could result in an increase in price and distort the marketplace for such products, resulting in potential for unsafe or unsound banking.

For all of reasons above, we propose eliminating RLAAs under the Retail Lending Test. If RLAAs remain in a final rule, we strongly believe the proposed thresholds for designating RLAAs (origination of 100 home mortgage loans or 250 small business loans in the two preceding calendar years)[8] is too low. Not only will having such a low threshold fail to account for the level of retail lending considered material to a bank, but having a threshold fixed on a static loan count will become less reliable when determining whether a bank's retail lending is material to a community over time.[9] If banks are going to be required to redirect resources to specific geographies, we believe the characterization of RLAAs should reflect a level of *materiality*. For example, an RLAA should be designated only if (1) the level of the bank's originated mortgage or small business loans in that geography constitutes at least 2% of all lending for that product in that geography *and* (2) the level of the bank's originated mortgage or small business loans in that geography constitutes at least 10% of the bank's total mortgage or small business loan volume, respectively, by loan count or dollar amount.

B. Consider Whole-Bank Evaluation for Retail Lending

Instead of RLAAs, we propose evaluating a bank's retail lending activities more holistically to take into account a bank's "entire community" which may be nationwide. Under this "whole bank" approach, a large bank would be evaluated for retail lending within its FBAAs and on a whole bank basis. This construct more closely correlates to the Proposal's evaluation of CD activities within FBAAs and at the nationwide level.[10]

The CRA supports this whole-bank evaluation by requiring the appropriate federal financial supervisory agency assess and prepare a report on "...the institution's record of meeting the credit needs of its *entire community*, including low-and moderate-income neighborhoods."[11] Although the statute does not define "entire community," it does provide precedent for evaluating a bank under CRA that is not tied to geography. Under the statute, a bank that has a business model consisting predominantly 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."[12] A digitally based bank's

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8 *See* CRA NPR, 87 Fed. Reg. at 33919 (providing "The agencies propose thresholds of 100 home mortgage loans and 250 small business loans in two consecutive years to require the delineation of retail lending assessment areas").

9 *See* CRA NPR, 87 Fed. Reg. at 33919 (describing the threshold as the median number of such retail loans within a FBAA by a large bank in 2019).

10 *See* CRA NPR, 87 Fed. Reg. 34028 – 34029.

11 *See* 12 U.S.C. § 2906(a)(1) (emphasis added).

12 *See* 12 U.S.C. § 2902(4).

business model is similar to the military personnel example in that its customers are not predominantly located within any defined geographic area.

Under the whole bank approach, a large bank's retail lending activity would be evaluated within its FBAAs and also on a whole bank basis using national comparators. Because a bank's digitally based activities are dispersed nationwide, we think it appropriate that a large bank's retail lending activities be evaluated on a holistic, whole bank basis. Under this evaluation, the bank's retail lending LMI borrower and LMI geographic distributions for each of the bank's major product lines across the bank would be compared to national benchmarks, such as the percentage of LMI households nationwide, the percentage of LMI geographies nationwide, and the nationwide aggregate of peer performance.

Evaluating digitally based banks under this more holistic "whole bank" approach is much more consistent with the CRA's "entire community" concept and in alignment with the modernization of the banking industry through increasing evaluation of digital channels that are agnostic to geography.

C. Retain Flexibility of Strategic Plans

The Agencies should retain the flexibility of strategic plans, which give banks the ability to more appropriately tailor the CRA evaluation framework to align with its business model. The current strategic plan framework[13] has for many years effectively enabled banks to invest in and support communities in a manner that accounts for a bank's specific business model and product offerings. Ally Bank has successfully operated on an approved strategic plan for more than eight years and we have found it to be effective in fulfilling the objectives and spirit of the CRA while promoting meaningful community engagement tailored to our business model and the communities we seek to serve.

Unfortunately, the Proposal significantly restricts the CRA strategic plan option by defaulting to the rigid one-size-fits-all assessment areas designations (including RLAAs), data collection and reporting requirements, and performance standards that would otherwise apply to the bank *unless* it provides acceptable rationale for alternative consideration such as being "substantially engaged in activities outside the scope of these tests."[14] In effect, this eliminates the strategic plan option by defaulting to standardized evaluations. This lack of flexibility seems to defeat the original purpose for strategic plans as articulated by the Agencies in 1995,[15] especially for banks with non-traditional business models. Specifically, the Agencies recognized that "the strategic plan option provides institutions an opportunity to tailor their CRA objectives to the needs of their community and their capacity and expertise,"[16] which is reaffirmed in the

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13 *See e.g.* 12 CFR § 228.27.

14 *See* CRA NPR, 87 Fed. Reg. at 33985, 34032.

15 *See* Community Reinvestment Act Regulations ("1995 CRA Rule"), 60 Fed. Reg. 22156-22223 (final May 4, 1995).

16 *See* 1995 CRA Rule, 60 Fed. Reg. at 22168.

Proposal.[17] Accordingly, the strategic plan option should permit banks to modify the applicable geographic assessment areas, in-scope products, test weights, and measurable goals within the framework of publicly reviewed, Agency-approved plans.

Performance context should also continue to remain a critical component of strategic plans. Existing CRA regulations provide that the Agencies "consider whether to approve a proposed strategic plan in the context of" the enumerated factors that comprise "performance context."[18] The enumerated factors are (1) demographic data; (2) information about lending, investment, and service opportunities in the bank's assessment area; (3) the bank's product offerings and business strategy; (4) the bank's institutional capacity and constraints; (5) the bank's past performance and the performance of similarly situated lenders; (6) the bank's public file; and (7) any other information deemed relevant by the Board.[19] We encourage the Agencies to retain these considerations as an integral part of the strategic plan evaluation with banks having the obligation to demonstrate that a proposed strategic plan (including assessment areas and measurable goals) is appropriate in light of a bank's particular performance context.

II. RETAIL LENDING TEST

A. Recalibrate Performance Standards and Benchmarks

The performance standards established under the Retail Lending Test are not sustainable over time and introduce an unnecessary level of complexity and uncertainty. Because the Retail Lending Test receives the most weight (45%) of the four large bank performance tests that factor into the overall bank CRA performance rating,[20] it is especially important to calibrate these performance standards appropriately.

To begin with, the scoring of performance under the Retail Lending Test should be recalibrated since the Proposal's dramatic increase will not be sustainable. The Proposal requires that a bank outperform the retail lending market at 125% for "outstanding," 110% for "high satisfactory" and 80% for "low satisfactory."[21] It will become more and more challenging for banks to meet such high thresholds year-over-year as banks focus increasing amounts of their retail lending in the same large markets. The Agencies themselves have recognized the significantly increased thresholds when they noted that ***zero*** banks with more than $50 billion in assets would have achieved an "outstanding" rating on the Retail Lending Test if the framework had been in place from 2017 to 2019.[22] There is no indication that banks' performance have

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[17] *See* CRA NPR, 87 Fed. Reg. at 33924 (recognizing the Agencies propose to retain the strategic plan option as an "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").

[18] *See e.g.* 12 CFR § 228.21(b).

[19] *See e.g.* 12 CFR § 228.21(b)(1)-(7).

[20] *See* CRA NPR, 87 Fed. Reg. at 33988 (stating "In combining these raw performance scores, the Retail Lending Test would be given a weight of 45 percent").

[21] CRA NPR, 87 Fed. Reg. at 33943.

[22] *See* CRA NPR, 87 Fed. Reg. at 33954.

declined, and certainly not to an extent that would warrant such a substantial downward rating adjustment of a broad portion of the industry. Imposing such unrealistically high benchmarks could not only disincentivize banks to devote resources toward what they determine to be unattainable but could also be considered inconsistent with safe and sound banking.

Additionally, all applicable benchmarks should be made known to banks *in advance* of any evaluation period (including calendar years) such that community and market benchmarks are fixed at the beginning of an evaluation period. For example, if a bank is being evaluated for its retail lending performance from years 2024 to 2026, the community and market benchmarks should utilize 2023 metrics or data. To the extent that retail lending conditions worsen, the Agencies should account for the possibility of a downward adjustment over the course of the evaluation period. Advance notice is core to the Proposal's stated goals of "certainty" and "transparency,"[23] especially considering the dramatically increased performance standards. It is a fundamental matter of fairness and due process for banks to know the benchmarks against which their performance will be evaluated prior to beginning the evaluation period so they can plan and structure CRA programs to meet performance standards. While we understand the Agencies' desire to potentially use more recent data, the increased uncertainty far outweighs any benefit of using more contemporaneous information.

B. Include Purchased Loans

We support maintaining the current regulatory consideration of loan originations and purchases in which the Retail Lending Test considers *all* purchased loans. This approach presents a more holistic picture of how a bank meets the needs of its communities and affords greater flexibility to a diverse range of business models. Some banks are better equipped than others to rely solely on originations to penetrate LMI populations and to control the income distributions of credit applicants.

While we recognize that the Retail Lending Test generally considers both originations and purchases, we are concerned that it also permits an examiner to downgrade a bank's Retail Lending Test rating based on "information indicating that a bank has purchased retail loans for the sole or primary purpose of inappropriately influencing its retail lending performance evaluation."[24] Although this provision may be aimed at discouraging a practice of "churning" loans, this standard is too ambiguous and discretionary. Instead of the Proposal's approach, we request the Agencies provide presumptions that enable a bank to demonstrate that its purchased loans should be counted, such as if the bank holds a purchased loan for 30 days or longer. At a minimum, the Agencies should revise the Proposal to provide that Retail Lending Test ratings will not be downgraded by an examiner due to purchased loan activity unless there is clear evidence of loan churning.

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[23] *See* CRA NPR, 87 Fed. Reg. at 33885 (stating, "This NPR seeks to update the CRA regulations in adherence with objectives that include the following:" among other objectives, "Provide greater clarity and consistency in the application of the regulations" and "Promote transparency and public engagement").

[24] *See* CRA NPR, 87 Fed. Reg. at 34026.

A rule that discourages loan purchases in this manner may result in negative unintended consequences. For example, it could significantly dampen market liquidity. A robust secondary market engenders liquidity throughout the broader market and providers 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.

Additionally, we note it is unclear how the alignment of the CRA definition of "small business" to the Section 1071 proposed rulemaking by the Consumer Financial Protection Bureau ("CFPB") will impact how purchased small business loans are considered.[25] The Proposal appears to provide that a bank's small business loans will be evaluated based upon the small business loans reported on a bank's Section 1071 report. As a result, it is ambiguous how a bank could count purchases of small business loans in the Retail Lending Test if that test becomes based on Section 1071 data that may exclude loan purchases. We request the Agencies clarify this point to permit the inclusion of purchased small business loans even if not accounted for in a bank's Section 1071 reporting obligations.

C. Include Consumer Auto Loans Only at a Bank's Option

We urge the Agencies to include consumer auto loans in the Retail Lending Test only at the bank's option, as is currently the case.[26] The Proposal's mandatory inclusion of consumer auto loans[27] would be a sweeping expansion of affirmative CRA obligations far beyond the home mortgages, small business/farm loans, and community development loans[28] currently covered without any relevant data that suggests such an expansion is warranted. While automobile loans can be helpful to LMI people, we don't believe CRA was ever intended to be used to facilitate access to a certain type of transportation. Given the availability of consumer auto financing through highly competitive dealership channels, there is no substantial evidence of unmet credit needs to LMI individuals and borrowers that additional CRA obligations would satisfy.

Additionally, requiring the evaluation of consumer auto lending as a major product line will do little to increase lending in LMI communities given the banking industry's limited role in the auto lending market. Our experience confirms that the auto lending marketing is significantly composed of many nonbanks and captive finance companies that are not subject to CRA.[29]

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[25] *See* CRA NPR, 87 Fed. Reg. at 33890 (aligning the Proposal's defined terms "small business" and "small farm" with the CFPB's Section 1071 proposal once effective).

[26] *See* Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance ("Interagency Q&A"), 81 Fed. Reg. 48506, 48536 (responding to §___.22(a)(1)–2).

[27] *See* CRA NPR, 87 Fed. Reg. at 33931 (stating "The agencies propose to evaluate automobile lending under the Retail Lending Test. Under proposed § __.12, the agencies propose defining an automobile loan as a consumer loan extended for the purchase of and secured by a new or used passenger car or other vehicle, for personal use, as defined in Schedule RC–C of the Call Report").

[28] *See* 12 C.F.R. § 228.12(h) for current definition of "community development loans."

[29] *See also* Experian, *State of the Automotive Finance Market Q1 2022* at slide 12 (providing that, as of first quarter 2022, banks only have 29.11% of the market share of new automobile loans or leases).

Furthermore, most banks typically engage in consumer auto through indirect financing arrangements where they buy consumer auto loans originated, and marketed by, dealers. Consequently, banks have limited ability to influence the percentage of LMI customers that engage with a particular dealer, which is a significant departure from the bank's role in other major product lines under the Retail Lending Test. Any minimal additional benefits to LMI communities received, especially given a bank's lack of market share and control, will be far outweighed by the data maintenance, collection, and reporting requirements of adding consumer auto to the Retail Lending Test. The financial and operational resources required to build out the infrastructure necessary in a consumer asset class that has not historically been covered will be significant both initially and on an on-going basis.

As a result, there appears to be no clear policy justification for requiring banks to meet significantly increased performance requirements for such little benefit. Should mandatory evaluation of consumer auto loans be retained, large banks should be given at least an additional two years to analyze the borrower and geographic benchmarks following the availability of such data before being evaluated under such metrics.

III. RETAIL SERVICES AND PRODUCTS TEST

The Proposal's evaluation of deposit products under the Retail Services and Products Test ("RSPT") should serve only as performance context, but not as a mandatory element or minimum requirement of the evaluation, whether the evaluation relates to delivery systems or retail products.[30] 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" without also providing a statutory basis for the evaluation of deposit products.[31]

Additionally, the Proposal's RSPT places far too much emphasis on the digital deposit account activity (including account openings and usage rates) by customers with addresses in LMI areas.[32] First, under the delivery systems component, "the availability and responsiveness" of a bank's digital and other delivery systems cannot be completely or accurately measured by usage of customers only in LMI census tracts.[33] Similarly, under the credit and deposit products component, *usage* of deposit products in LMI areas cannot accurately reflect the overall

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30 *See* CRA NPR, 87 Fed. Reg. 33957-33958.

31 *See* 12 U.S.C. § 2903(a)(1) (emphasis added).

32 *See* CRA NPR, 87 Fed. Reg. 34026-34029.

33 *See* CRA NPR, 87 Fed. Reg. at 33964 (providing "With respect to the first factor, the agencies would measure digital activity by individuals in low-, moderate-, middle-, and upper-income census tracts, and proposed § __.23 provides examples of data that could be used to inform this analysis. Specifically, the examples in proposed § __.23 include the number of checking and savings accounts opened digitally, and accountholder usage data by type of digital and other delivery system. The agencies propose evaluating this data using census tract income level, which is an approach sometimes used in current practice, since banks have stated that they do not routinely collect customer income data at account opening").

"responsiveness" and "availability" of a bank's deposit products to LMI individuals.[34] There is no data that suggests LMI individuals live only—or even primarily—in LMI census tracts, and the Proposal could potentially require the production of millions of records that would still not accurately reflect availability or responsiveness of a bank's deposit products to LMI individuals. That would be akin to evaluating a bank's entire mortgage lending program only by examining the mortgage loans made in the very limited number of LMI census tracts, which would exclude the vast majority of people in the bank's FBAA, state, and nation who do not live in LMI tracts.

As a result, we believe it is appropriate to remove these elements of the RSPT and, instead, permit the evaluation of deposit products only as a performance context measure.

IV. COMMUNITY DEVELOPMENT (CD) ACTIVITIES

A. Retain Proposed Evaluation of CD Activities in FBAAs and Nationwide Area

We appreciate the Agencies' willingness to consider evaluation of CD activities in a nationwide area (in addition to FBAAs) under both the CD Financing Test and the CD Services Test.[35] This will go a long way towards ameliorating longstanding CRA "hot spots" by permitting CD loans, investments, and services to flow more readily to those areas that have greater need as opposed to the current restriction to "broader statewide or regional area" that includes the assessment area. Instead of focusing CD activities in heavily concentrated large metropolitan areas where many banks are already investing, the nationwide area evaluation will permit banks with digital delivery of products and services like ours to include qualifying activities that are nationwide in scope.

B. Preserve Job Component of Economic Development

The Agencies should preserve all currently qualifying CD activities instead of restricting certain activities.[36] Specifically, the Agencies should not delete the current "job creation, retention, and/or improvement" provisions of "economic development" without discussing the policies that prompted them to expand those very provisions in the 2016 revision of the Interagency Q&A.[37] This proposed elimination of the jobs element is contrary to the traditional foundation of economic development in this country. Further, it would eliminate CRA credit for bank investments in an entire category of financial intermediaries that are not small business investment companies ("SBICs") but currently qualify by meeting the "size" and "purpose"

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34 *See* CRA NPR, 87 Fed. Reg. at 33967 (providing "The agencies also propose evaluating usage of responsive deposit products by considering, for example: (i) The number of responsive accounts opened and closed during each year of the evaluation period in low-, moderate-, middle-, and upper-income census tracts, respectively").

35 *See* CRA NPR, 87 Fed. Reg. at 34028 (proposing §_.24(a) to include applying CD Financing Test in a nationwide area). *See also* 87 Fed. Reg. at 34030 (proposing §_.25(a) to include applying CD Services Test in a nationwide area).

36 For example, the definition of "affordable housing" needs to include not just mortgage-backed securities ("MBS") but also other types of qualifying housing bonds, such as municipal bonds issued by a state housing finance agency.

37 *See* Interagency Q&A, 81 Fed. Reg. at 48507-48508.

tests.[38] Ally has invested in several such non-SBIC funds over the years and has found them to be innovative and uniquely impactful in many ways.[39] These investments are also critical for first time fund managers, especially fund managers who may not have the resources for the long and costly SBIC licensure process.

To acknowledge the vital role played by financial intermediaries that often provide crucial financing to small businesses that may not qualify for traditional bank funding and to avoid the unnecessary harm to non-SBIC funds, the Agencies should define "economic development" to include such financial intermediaries. Specifically, banks should receive CRA credit for their loans to, or investments in, financial intermediaries that lend to, invest in, or provide technical assistance to business or farms (1) with gross annual revenues in excess of $5 million but still meet the size eligibility standards of the Small Business Administration's SBIC or small business development company ("SBDC") programs[40] and (2) that support permanent creation, retention, and/or improvement (a) for LMI persons, (b) in LMI geographies, or (c) in areas targeted for redevelopment by Federal, state local, or tribal governments.

Finally, the Agencies should retain the current regulatory instruction that "examiners will employ appropriate flexibility in reviewing in any information provided by a financial institution that reasonably demonstrates that the purpose, mandate, or function of the activity meets the "purpose test." [41] To reasonably demonstrate the "purpose" test has been met, banks could continue to provide lists of the number of jobs created, retained, and/or improved for LMI people or in LMI areas, relevant income data, the date the small business was incorporated, and other pertinent information which banks have successfully used for several years to receive CRA credit.

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38 Current regulations account for a "size" and "purpose" test as set forth in Interagency Q&A at Section ____.12(g)(3)-(1). The "purpose" test specifically includes activities that either:
(1) support permanent job creation, retention, and/or improvement (a) for LMI persons, (b) in LMI geographies, (c) in areas targeted for redevelopment by federal, state, local, or tribal government, (d) by financing intermediaries that lend to, invest in, or provide technical assistance to start-ups or recently formed small businesses, or (e) through technical assistance or supportive services for small businesses or farms, such as shared space, technology, or administrative assistance; *or*
(2) support Federal, state, local, or tribal economic development initiatives that include provisions for creating or improving access by LMI persons to jobs or job training or workforce development programs. The Agencies will presume that any loan or service
Interagency Q&A, 81 Fed. Reg. at 48526.

39 *See* Ally Bank CRA Performance Evaluation dated February 21, 2017, and Ally Bank CRA Performance Evaluation dated September 28, 2020 (both may be *found at* https://www.federalreserve.gov/apps/CRAPubWeb/CRA/BankRatingResult)

40 We acknowledge the Agencies' desire to align the CRA definition of "small business" to the CFPB's proposed Section 1071 to capture businesses with gross annual revenues of $5 million or less. *See* CRA NPR, 87 Fed. Reg. 33899. We note it is challenging to provide comments on this point when the final Section 1071 definition is not yet final.

41 *See* Interagency Q&A §____.12(g)(3)– 1, 81 Fed. Reg. 48506.

V. PERFORMANCE CALIBRATION

We support more flexible weightings given to the four main performance tests at the institution-level. A more flexible approach would more effectively and durably account for differences in bank business models while still encouraging CRA-qualifying activity suited to a bank's strategies, capabilities, and opportunities. Even if more flexibility in the weighting allocation cannot be accommodated, we propose that such flexibility be afforded to strategic plan banks at a minimum. The Agencies already recognize that the strategic plan is an "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."[42]

Additionally, 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[43] and forgo expanding that language to cover "any discriminatory or illegal practice."[44] CRA was intended to incentivize banks to serve the needs of LMI communities for credit and therefore any downgrades based on compliance violations should remain connected to credit practices. At the very least, the Agencies should clarify that a compliance violation must apply to consumer treatment and relate to the banking products that are subject to CRA evaluation since any "illegal practice" is overly broad to sweep in compliance that has no connection to CRA.

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We appreciate the care and thought that went into constructing the Proposal. We share the Agencies' views to modernize CRA but believe more tailoring and flexibility are required to account for various bank business models with nationwide digital delivery such as ours. Tailoring will allow banks to more effectively achieve our shared CRA goals to further meet the credit needs of our communities in a safe and sound manner while also recognizing the need to address an ever-evolving banking industry that is becoming more digital. Thank you for your consideration of our feedback. If you have any questions, please feel free to contact our CRA officer, Jan Bergeson, at Jan.Bergeson@Ally.com.

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42 *See* CRA NPR, 87 Fed. Reg. at 33924.

43 *See e.g.* 12 C.F.R. § 228.28(c)(1).

44 *See* CRA NPR, 87 Fed. Reg. at 33989 (stating "Under the proposal, the practices that could adversely affect a bank's CRA performance would no longer be limited to discriminatory or other illegal credit practices but would include any discriminatory or illegal practice").

Respectfully submitted,

[redacted]

Diane Morais
President, Consumer & Commercial Banking Products
Ally Bank