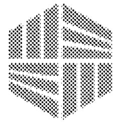

AHIC | AFFORDABLE HOUSING INVESTORS COUNCIL

5 August 2022

Office of the Comptroller of the Currency
Benjamin W. McDonough, Chief Counsel
Chief Counsel's Office
Attention: Comment Processing
400 7th Street, SW
Suite 3E-218
Washington, DC 20219

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

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

Re: Community Reinvestment Act Regulations Docket ID OCC-2022-0002 (Department of the Treasury, Office of the Comptroller of the Currency); Docket No. R-1769 and RIN 7100-AG29 (Federal Reserve System); and RIN 3064-AF81 (Federal Deposit Insurance Corporation)

Ladies and Gentlemen:

The Affordable Housing Investor's Council (AHIC) welcomes the opportunity to comment on the notice of proposed rulemaking by the Federal Deposit Insurance Corporation (FDIC), Federal Reserve Board of Governors (Federal Reserve) and Office of the Comptroller of the Currency (OCC) regarding Community Reinvestment Act (CRA) regulations.

AHIC is a non-profit organization that seeks to strengthen the low-income housing tax credit (housing credit) as an efficient and effective tool for the development of affordable housing in the United States. Our membership is comprised of 60 corporations, primarily financial institutions, that invest in rental properties that qualify for these housing credits under section 42 of the Internal Revenue Code of 1986. Our members represent 80% of the current market and have invested more than $120 billion in this unique public/private partnership.

AHIC furthers our mission by developing guidelines in underwriting and asset managing housing credit investments.

AHIC's members share your objectives to increase the consistency, transparency, and timeliness of the administration of the CRA and appreciate your outreach over the years to the banking and advocacy communities to collaboratively craft solutions to mutually recognized problems. Our responses to selected items from the questions laid out in the notice of proposed rulemaking are focused on those that we believe could have an impact on affordable housing investment, with the goal of ensuring that the new regulations support, rather than jeopardize, the robust provision of affordable housing to low and moderate income (LMI) Americans.

- **CRA and The Housing Credit**

One of the motivating factors in the creation of CRA was the impact that redlining had on diminishing the availability of decent, affordable housing in the affected communities. In establishing the housing credit, which was born of a bipartisan law signed by President Reagan in 1986, Congress recognized that the private sector is ideally suited to provide the necessary capital and discipline to address the challenges of housing production at scale.

According to the National Association of State Housing Agencies, the housing credit is now the main tool for creating and preserving affordable rental housing: it has financed more than 3.6 million homes for eight million households, serving veterans, seniors, the formerly homeless, people with special needs, and working families – from teachers and nurses to administrative employees and social workers.

Financial institutions seeking to meet their obligations to invest in underserved neighborhoods play a critical role in financing this affordable housing: **currently close to 85% of the private capital flowing to the housing credit comes from CRA-motivated financial institutions.**

Despite the successes under the program, from Alabama to Wyoming, from our largest cities to our smallest rural towns, there is a growing affordable housing crisis in the United States. In its 2022 *The State of the Nation's Housing Report,* the Joint Center for Housing Studies at Harvard University notes the following.

- *Rent increases have exploded*: After a brief dip in 2020, rent increases hit a record 11.6 percent at the end of 2021 and continued at that pace in the first quarter of 2022. This was the largest year-over-year increase in two decades and more than three times the 3.2 percent average annual rise in the five years preceding the pandemic.

- *Vacancy rates have plummeted*: Excluding high-cost areas, the rental vacancy rate in other urban neighborhoods stood at just 4.6 percent in early 2022 (0.9 percentage point below the 2015–2019 annual average) while that in suburban markets was at 4.8 percent (1.5 percentage points below the 2015–2019 average).

- *Households of color are struggling disproportionately:* Job and income losses over the past two years have left many households of color unable to cover their rents and potentially at risk of eviction. At the start of 2022, 24 percent of Black renter households were behind on rent, along with 18 percent of Hispanic households and 18 percent of Asian households. The share for white renters was 10 percent.

- *Supply continues to fall behind demand, especially for affordable housing:* Completions of new rental housing have not caught up with the record-breaking growth in absorptions. In the five years preceding the pandemic, supply and demand were in much closer balance, and new rental construction has been almost exclusively at the upper end of the market.

- *Middle income Americans are also facing challenges:* the Joint Center notes that "a growing number of lower- and middle-income renters compete for the limited supply of low-rent units available on the private market. To meet the enormous demand for affordable rental housing, federal policies must not only support expansion of the subsidized stock, but also make it possible for private developers to build affordable units."

According to the National Low Income Housing Coalition, the U.S. has a shortage of seven million affordable rental homes for extremely low-income renters. Only 36 affordable and available rental homes exist for every 100 extremely low-income renter households. **The housing credit is virtually the only resource driving the preservation and production of new, below-market rate apartments around the country.**

<u>We are concerned that some of the contemplated changes to CRA would result in disruptions to the housing credit market, diminishing the resources flowing to the program and shrinking the number of new homes it creates in a period of unprecedented need. We also have concerns about how the unsubsidized market for Preservation Funds or Naturally Occurring Affordable Housing (NOAH) could be affected.</u>

• Impact of the Proposed Regulations on Affordable Housing

AHIC is concerned about the following.

I. The **termination of the separate investment test** would likely lead to institutions shifting some of their community development activities from housing credit investing to lending. This could lead to a decrease in demand for credits, and a concomitant drop in pricing, at a time when the affordable housing crisis has never been more dire and development budgets are under extreme stress.

II. The **60/40 weighting of retail and community development activities** would have the unintended consequence of rendering community development irrelevant in the final score, a situation compounded by the high benchmark for receiving an Outstanding in the retail category.

III. The proposed regulations would **cap rents for preservation and naturally occurring affordable housing at 30% of 60% of area median incomes**. AHIC's members, many of whom also invest in other types of affordable housing, are concerned that this threshold does not recognize the challenges facing many struggling individuals and families with moderate incomes.

IV. We seek clarity on various **issues pertaining to investments in multi-investor funds**, as outlined below, and on the inclusion of **commitments to lend and invest.**

- (I). Termination of the Separate Investment Test

Housing credit investments are in many ways unique among CRA-eligible activities, due to:

- The **limited supply**, as established by Congress,
- The power of state allocating agencies in determining the **siting of developments**, which may or may not be in an institution's assessment area(s),
- Their **complexity**, which is only growing as allocating agencies increasingly direct housing credit resources to specific populations or demand mixed income and mixed-use components; one AHIC member from a financial institution recounted investing in a deal with 12 sources of financing,
- Their **duration** as a 10-year investment vehicle with a compliance period spanning 15 years, and
- **Their critical role** in driving the creation of new affordable housing in the United States.

Furthermore, under **Basel III capital requirements**, a bank's investments in housing credits are assigned a risk weight of 100% that does not diminish over time, as is the case with loans. Thus, the requirements for reserves are more stringent over the life of the investment, a further disadvantage of the housing credit that could make community development lending a more attractive activity.

Because of these factors, **in past comments we have encouraged all banking regulatory agencies to retain a separate investment test**: without the motivation of an investment test, regulated institutions could find other CRA-eligible activities that have shorter durations and/or are simpler to execute more attractive than housing credit investments and shift their resources.

AHIC, the Affordable Housing Tax Credit Coalition, and the National Association of Affordable Housing Lenders recently surveyed large banks to gain feedback on the potential impact of CRA reform. **Forty-two percent of the 24 banks that responded reported that the removal of the separate Investment Test would have a negative impact on their bank's appetite to invest in the housing credit,** potentially resulting in decreased housing credit investments in favor of eligible community development loans.

To quote one AHIC member bank: "*Under the proposed CD Financing Test, investments and lending are qualitatively equal. Consequently, structural differences such as liquidity, capital charges, and duration could influence the Bank's appetite for LIHTC investment relative to other community development loans, such as perm loans to be originated for sale to a GSE.*"

Other AHIC members have noted that their institutions are also pursuing ESG goals, and that there are pressures to divert funds to alternatives to the housing credit, such as solar and wind investments, that fit their ESG frameworks and are of shorter duration. Without the impetus of an investment test, housing credit investments by banks will erode. The consequences of this could be dire, with more scarce public funds required to replace diminished private capital.

To quote another respondent: "*Generally speaking, the elimination of the separate investment test will likely diminish equity investments in the [community development] space at a time more is needed, not less. [Housing credit] deals are dependent on this equity and there are not adequate public sector resources to fill these gaps. To attract economic investors into this space to fill this gap will require significantly higher returns (lower pricing) further exacerbating current capital stack issues and making more projects less financially feasible.*"

The proposed regulations combine the current Community Development Lending and Investment Tests into one Community Development Financing Test. We recognize that the agencies have been discussing this for some time and may be committed to this approach.

PROPOSED MITIGATION:

Impact Review Factor: It is important that qualitative distinctions be made among the types of activities banks are undertaking, with differential weightings in the CRA performance framework. This will encourage them to pursue more challenging opportunities that are most responsive to community needs and have a greater impact, not just defaulting to those easy to execute. As noted above, housing credit investments are unique among CRA-eligible activities due to their complexity, illiquidity, and duration as an investment vehicle spanning 15 years, as well as the power of state allocating agencies to determine the siting of developments based on criteria they designate in their scoring rubrics. **Because of these characteristics, investments in federal housing tax credits should be considered particularly responsive to community needs and named as an impact review factor.** In the investor survey, 83% of the banks responding supported this approach.

Appropriate Community Development Designations for Essential Infrastructure: In previous comments to the regulators, we have expressed concern that a broadening of allowable activities in an "umbrella" community development test threatens one of the key pillars of CRA and the historic underpinnings of the act: to provide rental housing opportunities to low- and moderate-income people. **Non-housing community development activities should receive CRA consideration only if a majority of the beneficiaries are LMI, similar to the treatment of affordable housing activities.** Since about 30 percent of the national population is LMI, many activities would generally achieve about that degree of LMI benefit without any targeting or

intentionality. Conferring CRA credit in these cases would dilute CRA's consideration of community development activities that primarily benefit LMI people and places.

CRA-Eligible Multi-Family Loans in Community Development Test: Multi-family loans that are eligible for CRA consideration because they serve LMI residents, regardless of location, should be included in the Community Development Test. Multi-family loans are commercial real estate, not retail, transactions; loans to multi-family affordable housing are by their nature Community Development activities.

• II. The 60/40 Weighting of Retail/Community Development Tests

Because of the unequal weighting of retail and community development activities, if a bank does not receive an Outstanding score on its Retail Test, the bank cannot receive an Outstanding rating overall. If an Outstanding is achieved on the Retail Test, an overall Outstanding rating can be earned with a High Satisfactory on the Community Development Test. Thus, there is absolutely no impetus to pursue an Outstanding on the Community Development Test – regardless of whether a bank has achieved an Outstanding rating on the Retail Test.

In addition, the NPR's market metric threshold for an Outstanding score on the Retail Test requires performance that is at least 125% of the industry median. Fewer than 2% of banking system assets would be in banks that currently meet or exceed it, so most banks would be motivated to seek only a Satisfactory retail lending score. About 60% of banking system assets would be in banks receiving a Low Satisfactory or lower rating.

This hurdle for earning an Outstanding score on the Retail Test would render it unattainable for most banks, and it could further depress their attempts to achieve an overall Outstanding rating. This could lead to a concomitant "race to the bottom" on community development activities, resulting in an overall reduction in lending and investing that is detrimental to communities in need.

PROPOSED MITIGATION:

- *Equal Weighting of Retail and Community Development Tests::* Weigh the Retail and Community Development Test equally at 50/50 to incentivize critical lending and investing activities to benefit LMI Americans and under-resourced communities.

• III. CRA Consideration for Preservation Funds and NOAH Activities

A relatively recent development in the affordable housing industry is banks investing in Preservation Funds. These investment structures are designed to serve public welfare investment criteria, including those supporting NOAH developments that typically do not benefit from a government subsidy. Financing responsible NOAH investments is a clear example of a complex and novel market solution that should receive CRA consideration.

The agencies propose that the rent for the majority of the units in a multifamily NOAH property not exceed 30% of 60% of the median area income to be considered for CRA credit, while also seeking views on an alternative 80% median area income standard.

We believe that the proposed 60% standard is unnecessarily restrictive, and that the moderate-income category captured by rents (and incomes) in **the 60% - 80% band not only addresses a critical need** in providing affordable workforce housing but is an appropriate public policy target for communities that are underserved by rental assistance programs and tax credits. Industry experts predict that a 60% cap would have the unintended consequence of decimating the Preservation Fund market.

PROPOSED MITIGATION:

80% Standard, with Flexibility: Unsubsidized developments that are underwritten to be affordable at 80% of area median income should qualify; future CRA credit could be predicated on maintaining affordability by certifying rent levels at the time of subsequent examinations. In areas where higher targets are consistent with a government revitalization plan, we support consideration for rents (and incomes) in excess of 80%. **We also support consideration for these activities in all geographies and for single-family rental NOAH properties as well.**

- IV. For Clarification: Multi-Investor Funds and Commitments to Lend/Invest

(a) *Allocation Letters:* Investors may currently request allocation, or "side" letters from their syndicator partners which delineate that a certain investment or investments in a multi-investor fund are connected to their investment dollars for CRA credit purposes. Appendix B, Section 14A of the NPR could be construed as giving banking regulators subjectivity on how to allocate CRA credit for such funds, which would deviate from established practice and investor intent. **We request that the final CRA rule specify that these letters may continue to be used to allocate CRA credit for housing credit investments in funds with multiple investors**.

(b) *Allocation Letters for Investments Committed but not Designated:* Section 42F says a bank must report annually certain information about its community development activities, including a "list of the geographic areas served by the activity, specifying any county, counties, state, states, or nationwide area served." It is a current common practice that multi-investor funds will close without all the developments that will be funded identified at the time. If an investor must geocode the activity to get CRA credit, this could limit the ability of funds to close in a timely manner that meets the needs of those developers whose projects are ready to commence. Section 14 of Appendix B requires all community development dollars to be geographically allocated at the county level annually. This is not possible in instances where a bank makes an equity investment for which it is legally liable for the entire amount from the date of closing, but the fund does not call all the capital in the first year. Expanding on the point above in *Allocation Letters*, **we recommend that the allocations be based upon the capital**

committed for an investment, even if the fund has not identified all its specific development sites. Because the funds are investing solely in projects that have received awards from state allocating agencies, a bank should be able to rely upon allocation letters, regardless as to whether a particular investment has been identified. Notwithstanding the above, we encourage the agencies to affirm the current Q&A guidance that does not **require** side letters for investments in national and regional funds.

(c) *Treatment of Funds as an Entity:* When considering the CRA investment activities of banks, we believe that **the banking agencies should rely on eligibility tests based on the '*fund-as-entity*' level.** This includes, for instance, affordable multifamily housing investment funds serving a majority of LMI units or where the majority of capital is directed to multifamily units serving LMI households, with the majority test being assessed on a *fund-wide* basis. The banking agencies should not create circumstances that restrict the majority-of-units tests to lower-tier investments, properties, buildings, contiguous parcels, or parcels. The matter of the entity evaluated for CRA consideration should remain neutral with respect to what entity is best suited to address non-CRA related legal, tax, and investment considerations.

(d) Treatment of Commitments to Lend/Invest: While the definitions of community development loans and investments include "a legally binding commitment," some in the industry are concerned that Appendix B of the proposal, which defines the numerator of the bank assessment area community development financing metric, creates ambiguity around this by referring to loans and investments on the bank's balance sheet. The final rule should acknowledge that the full amount of a commitment, regardless of whether it was originally generated in a prior period and/or is not fully disbursed, represents a financial obligation of the bank and is eligible for CRA credit.

In addition to these concerns, AHIC **strongly supports** the following proposals outlined by the agencies.

- I. Credit for Community Development Activities Outside Assessment Areas: As is widely noted in the literature about the housing credit market and CRA, the current system has resulted in areas colloquially known as "CRA hot spots," where there is fierce CRA-motivated competition for housing credit investments. Delaware, Salt Lake City, and the largest East and West Coast cities are among the hot spots. Rural communities, smaller Midwestern markets, and Native lands have been sardonically denominated "CRA not" locales. In prior comments regarding changes to the CRA, AHIC has encouraged the regulators to provide banks with more flexibility to pursue housing credit opportunities outside of their assessment areas once they have met the needs of their assessment areas. This will improve the flow of capital to less populous areas. We strongly support this feature of the proposed regulations. **Fully 67% of the banks responding to the survey**

agreed that they would engage in community development activities in underserved CRA areas outside of their assessment areas.

- II. Full Consideration for Housing Credit Activities: Housing credit developments are essential to addressing the affordability crisis in the US market. The existing framework of statutory and regulatory restrictions contained in Section 42 is effective at ensuring these investments are in the interest of the public welfare. Accordingly, we strongly support the decision of the banking agencies in the proposed rule to provide CRA credit for the full amount of a loan or investment for a housing credit development, regardless of the share of units that are considered affordable.

Thank you again for the opportunity to provide this feedback. If you have any questions, please contact the undersigned by phone at 347.392.9983 or by email at jhertzog@ahic.org.

Respectfully submitted,

Julie Hertzog
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Affordable Housing Investors Council