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Via Electronic Mail

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Re: *Community Reinvestment Act: Joint Notice of Proposed Rulemaking; Request for Comment*
OCC: Docket No. ID OCC-2022-0002; RIN 1557-AF15
Board: Docket No. R-1769; RIN 7100-AG29
FDIC: RIN 3064-AF81

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

We are nine depository institutions with nontraditional business models.[1] We appreciate the opportunity to respond to the Joint Agency Notice of Proposed Rulemaking[2] (the "*Proposal*") issued by the Board of Governors of the Federal Reserve System ("*Board*"), Office of the Comptroller of the Currency ("*OCC*"), and Federal Deposit Insurance Corporation ("*FDIC*") (jointly, the "*Agencies*") to amend the Community Reinvestment Act ("*CRA*") regulatory framework. We share a commitment to helping meet the credit and financial needs of our entire communities, including low- and moderate-income ("*LMI*") communities, in furtherance of the CRA statute.[3] As demonstrated in each of our CRA performance evaluations, for which we have each most recently received "Outstanding" ratings, our institutions have been serving the needs of LMI communities in numerous, innovative ways for decades. We support the Agencies' desire to modernize the CRA's regulatory framework to reflect changes in the banking industry.

As our collective experience demonstrates, many customers in recent years have permanently changed how they access banking services and interact with their bank. Use of digital banking only increased during the Covid-19 pandemic, as many customers learned that accessing banking services through digital means was equally effective as being at teller's window in a physical facility. The final CRA rulemaking should fully reflect the evolution in the way customers interact with banks today, and the way in which banks adapt their business models to support their customers' needs.

Our institutions have varied business models and may not engage in certain business lines that the Agencies typically review for CRA, but we each meet our CRA obligations by focusing on the areas where we have expertise, such as community development investing and lending. Some of us do this through approved strategic plans that emphasize our primary activities, and some of us have wholesale or limited purpose designations. We all either employ business models that differ considerably from traditional, branch-based banks, or focus on serving customers in the digital sphere.

We do not believe that the Proposal fully modernizes the CRA regulations in a manner that meets the objective to "adapt to changes in the banking industry, including the expanded role of mobile banking."[4] We strongly believe that efforts to modernize the CRA regulations should account for current and future ranges of banking and financial services business models, which are continuing to evolve to better serve

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[1] Many, but not all, of our banks offer financial services fully or predominantly through digitally-based or indirect, third-party channels. While some of these business models are becoming more common in the banking industry today, our reference to "nontraditional," or "digitally-focused," banks throughout this letter is intended to capture business models that are not primarily based on traditional, staffed "brick-and-mortar" retail branch locations that offer customers physical access to a facility to conduct banking activities, including deposit-taking and disbursing loans. Capital One is joining these comments due to its hybrid model of digital and branch-based banking strategies, and joins in the arguments to the extent they implicate its business model. Silicon Valley Bank operates under a strategic plan and joins this letter as a non-traditional financial institution with a business model that targets a client base tied to the innovation economy.

[2] 87 Fed. Reg. 33884 (Jun. 3, 2022) Community Reinvestment Act: Joint Notice of Proposed Rulemaking; Request for Comment (OCC: Docket No. ID OCC-2022-0002; RIN 1557-AF15); (Board: Docket No. R-1769; RIN 7100-AG29); (FDIC: RIN 3064-AF81).

[3] The CRA requires the Agencies to "assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution." (12 U.S.C. §§ 2903(a)(1)).

[4] 87 Fed. Reg. at 33,885 (Jun. 30, 2022).

our customers, including those in LMI communities. We remain committed to working with the Agencies to help modify the Proposal to better address these issues.

In our view, the Proposal risks creating a one-size-fits-all approach that does not adequately reflect the increasingly digital state of banking, and appears to require many different bank business models to conform to a limited method of evaluation. Specifically, we are concerned with the following aspects of the Proposal, discussed in detail below:

I. The Proposal would establish an inflexible approach that would not adequately reflect different bank business models or support strategies employed by each bank to best leverage their unique expertise in service to LMI communities. Instead, the Proposal focuses on certain lines of business that may not be material to a bank's overall business strategy or that some banks may not offer at all;

II. The utility and availability of the strategic plan option would be significantly diminished, may not reflect actual performance of banks with nontraditional models, and may decrease the amount of impactful, innovative investments in communities by banks operating pursuant to strategic plans;

III. The imposition of Retail Lending Assessment Areas ("*RLAAs*") in the Retail Lending Test ("*RLT*") appears to be inconsistent with the CRA's policy goals. Since RLAAs will most often be delineated in the most populous areas where banking services are already broadly available to LMI populations, the Agencies should adopt a bank-wide metric, outside any facility-based assessment areas ("*FBAA*"), which would better serve a broader range of communities and be a more meaningful measure of a bank's overall lending distribution;

IV. The Retail Services and Products Test ("*RSPT*") does not adequately account for banks with relatively few or no branches, such as digitally-focused banks; and

V. The limited purpose/wholesale designations should continue to be available to banks with business models that do not fit the Proposal's geographic-based tests or where major product lines are not a material percentage of bank revenue or assets.

In addition to these points, we echo broader concerns with the Proposal articulated in letters submitted by the American Bankers Association, Bank Policy Institute, and the Consumer Bankers Association and which apply across the banking sector, regardless of whether the bank employs a digital, branch-based, or hybrid business model. These concerns include:

- Under the new framework, peer-based metrics and benchmarks that govern ratings violate due process and do not give banks fair notice because they will not be available until after examinations begin;
- Safety and soundness issues may arise as banks may be compelled to generate or purchase more lending volume overall in saturated markets with high benchmarks to meet the proposed higher CRA performance thresholds;
- New data collection and reporting requirements are substantial and will outweigh the potential benefits of collecting such data;
- Uncertainty and confusion will persist regarding how the complex tests and benchmarks will contribute to an overall rating;
- Narrowed definition of community development ("*CD*") may result in fewer meaningful and highly-impactful investments in LMI communities;

- The Proposal should be clear that CRA credit is received for the commitment amount of all loans, investments, and letters of credit, and all renewals thereof, and should not rely only on outstanding balances; doing otherwise could lead to, among other things, decreased availability of products where dollars are made available over time; and

- The proposed transition period is not long enough to effectively implement the broad scope of changes associated with the new regulatory framework and new data collection requirements.

We share many common concerns with banks that are primarily branch-based; however, we hope our collective experience executing nontraditional business models within a CRA framework designed primarily for branch-based banks can assist the Agencies in making improvements to the Proposal. We believe that the final rule should evaluate a bank's ability to serve its entire community, without basing the majority of that evaluation on geographies that do not reflect the bank's customer base or business model. We expect that the concerns shared in this letter will become more pressing for the overall banking industry as digital banking becomes more prevalent.

DISCUSSION

I. Flexibility is Necessary to Account for Different Business Models and Digital Banking.

The range of diverse business models in the industry today – including large corporate institutional banks, banks affiliated with retail broker-dealers, banks affiliated with insurance companies, issuers of credit cards, indirect lenders of auto loans, and digital lenders to small businesses, and various combinations of these models – illustrates why tailoring the evaluation method is necessary and appropriate for our CRA programs to continue to make impactful loans and investments, all while operating in a safe and sound manner.

More Flexibility Needed. The Proposal lacks the flexibility that has historically enabled banks that deliver products and services primarily through digital channels to effectively serve our communities and meet our CRA obligations. It would require all retail banks, irrespective of business model, to be evaluated on specific classifications of retail lending – small business, small farm, home mortgage, multifamily, and automobile – within discrete geographies that will primarily encompass areas where the bank has no offices, branches, or other physical facilities. Banks operating under strategic plans (as discussed below) would be required to meet standards undifferentiated from retail banks being evaluated under the Proposal's uniform tests.

Adjust Weightings. Additionally, the Proposal does not provide flexibility for the weightings of the four tests to accommodate business models that are not focused on specific types of lending. For banks that engage predominantly in institutional or consumer lending but do not qualify for wholesale or limited purpose evaluation, the weightings of the tests should be adjusted to place greater emphasis on community development financing and service.

Alternative Weighting. If ratings outcomes are largely predetermined by the RLT, some banks may conduct less community development financing activity because there will be no pathway to achieve an Outstanding CRA performance rating by engaging in additional community development lending and investment as under the current rule. As an alternative, we recommend that a final rule allow banks to submit to the Agencies a different weighting construct for the four tests based on the bank's business strategy. As an additional alternative, the Agencies could assign at least equal weighting to the retail portion of the test (50% for the RLT and the RSPT) and the community development portion (50% for the Community Development Financing Test and Community Development Services Test), which would better incentivize banks to increase community development activities to achieve their desired CRA performance.

II. Maintain the Strategic Plan in its Current Form, with Enhancements.

We are concerned about the indirect impact of a requirement that strategic plans adhere closely to the general performance standards applicable to all retail banks. Specifically, the Proposal requires, without exception, a strategic plan bank to "incorporate measurable goals for all geographic areas that would be included pursuant to the performance standards and tests that would otherwise be applied in the absence of an approved plan."[5] The rigidity of this approach appears at odds with the purpose of a strategic plan as a flexible option for non-traditional banks to meet the needs of LMI communities. It is critical that the Agencies retain the strategic plan alternative largely in its current form, while enhancing the plan's flexibility regarding when banks may adjust from the otherwise applicable standards within the strategic plan framework in furtherance of the CRA's goals. Such enhancements should include permitting 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.

Increase Tailoring. Several of the undersigned have successfully operated under approved strategic plans for many years. A strategic plan and its approval process promote objectivity, transparency, and consistency, and allow a bank to focus on meeting defined community needs in predetermined, targeted areas. The current CRA regulatory framework for strategic plans provides banks with the opportunity to set specific goals to invest in and support communities in a more thoughtful and tailored manner that accounts for a bank's size, business model, and product offerings while still being consistent with safety and soundness considerations.

This latter point is a substantial benefit of the current strategic plan option. Specifically, it recognizes that institutions that principally provide consumer credit services, and do not engage in commercial lending or operate vast mortgage lending portfolios, can meet the CRA needs of their communities in a manner that is tailored to their expertise, geographic area, and business model. The current strategic plan framework has been effective because it requires banks, regulators, and communities to work together to create a customized plan that allows a bank to leverage its specific business model and expertise to best meet the unique consumer and small business needs and economic circumstances of the bank's local communities.

Reflect Performance Context. Performance context has always been a critical component of strategic plans and should remain so. We encourage the Agencies to retain and even emphasize the current performance context requirement as an integral part of the strategic plan development and approval process. Under this requirement, banks have 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.

Expand Geographic Choice. To enhance the effectiveness of strategic plans, we believe the Agencies should provide more flexibility for a bank to designate the geographies it serves beyond facility-based assessment areas, the products that are in scope, the weightings for the tests, and the institution's measurable goals. The Agencies should also give full consideration for community development activities at a bank-wide level if those activities are conducted outside facility-based assessment areas and designated geographies.

We appreciate the Agencies' comment that various stakeholders may be concerned that strategic plans should not become a mechanism by which a bank could evade its responsibilities under the CRA.[6]

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[5] 87 Fed. Reg. at 34,032 (Jun. 3, 2022).

[6] 87 Fed. Reg. at 33,985 (Jun. 3, 2022) ("[s]takeholders have expressed that the strategic plan option should not be used to lower performance expectations for any type of bank.").

The community needs assessment, public comment process, and required Agency approval are guardrails to ensure this does not occur.

III. The Agencies Should Not Adopt RLAAs as Proposed; the Agencies Should Instead Adopt a Bank-Wide Metric That Holistically Evaluates Each Institution.

For fully or predominantly digitally-based banks, deposit markets and lending markets alike have considerable cross-country reach. As long as banks effectively satisfy credit and community development needs – providing credit and investment capital in LMI communities, for LMI individuals and families, and for community development – it is unnecessary to require that a bank's efforts be focused in certain discrete geographies based on immaterial lending concentrations.

Inconsistent with Statute. Although we understand the possible concerns that have prompted the Agencies to propose RLAAs, the RLAA concept is inconsistent with the plain text of the CRA, which requires banks "to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business," thereby grounding assessment in the locations where an institution has its chartered head office and any domestic branch offices.[7]

Bank-Wide Metric. The Agencies need not create assessment areas to capture more diffuse lending outside of a bank's FBAAs. The regulatory construct of an "assessment area" is intended to represent a bank's "community," but the best way to define that community, in light of a bank's business model, may be as a whole rather than in discrete geographies. This concept is already enshrined in the CRA's statutory text that specifically permits a bank that caters predominantly to military personnel to delineate its entire deposit customer base as its community for evaluation purposes without regard to geographic proximity to such customers.[8] Therefore, an effective evaluation model need not be based on geography at all.

Instead of establishing RLAAs, we recommend the Agencies utilize a bank-wide metric to assess how the bank serves its LMI communities and consumers. A bank-wide metric is more appropriate to measure the performance of national, digital lenders. Such a metric would also avoid the problem that RLAAs will likely be concentrated in larger, metropolitan markets. A digitally-based bank's "entire community" may reflect broad regional geographies or even a cross-country community; accordingly, a digitally-based bank with a majority of deposits and lending outside of its branch-based assessment areas should be evaluated on a bank-wide basis. Recognizing that banks have different scopes, a digitally-based bank should have use of performance context to the extent its lending is more regional and not fully national. This framework would better evaluate LMI penetration across the bank, while also taking into consideration the bank's business model and performance context.

Concentrations Reflect Population. The Proposal's approach to establishing RLAAs would not effectively modernize the CRA because it ties digital lending to geographic regions that have neither a geographic link to the institution nor significance to the bank's overall business strategy. Moreover, the overall approach rests on a flawed premise that having a certain concentration of loans is the equivalent of having a physical presence in a particular geography. In most instances, the concentrations of deposits and lending for national digital channels will be reflective of the population (in other words, there will be more customers in highly populated areas, and fewer customers in less populated areas) and are agnostic to

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[7] 12 U.S.C. § 2901(a)(1); see also 12 U.S.C. § 2906(b)(1)(B).

[8] See 12 U.S.C. § 2902(4) ("[a] financial institution whose business predominately 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"). Banks that cater to military personnel do not operate in defined geographic areas. Like military banks, digital banks serve customers without respect to defined geographic areas; accordingly, the evaluation of a digital bank's record of meeting CRA obligations should reflect its "entire community" at a bank-wide level, to supplement any appropriate evaluation of facility-based assessment areas.

geography. On the other hand, when banks establish or maintain a physical branch, they are deploying a geographically-oriented business strategy that carves out a particular geographic area as a focus for their banking and lending. It is critical that any final rule truly reflects this distinction and recognizes how the industry-wide shift to digital banking does not warrant creating evaluation geographies that treat immaterial lending concentrations as the equivalent of a bank establishing an office or branch.

Thresholds Too Low. We also believe that the thresholds establishing RLAAs are too low, ignore whether that level of lending is material to the bank, and are not proposed to be updated. As a result, they will become less relevant and more unreliable over time with respect to determining whether a bank's lending is material to a community. One bank represented in this letter noted that small business loans are its only retail lending product and that it constitutes less than 1.7% of the bank's assets; and that the 250 small business loan threshold is just 0.12% of the institution-wide small business loan count; further, from the perspective of a percentage of bank assets, the average dollar volume of 250 small business loans represents approximately 0.0012% of bank assets. Whether considering the 250-loan-count in isolation or the percentage of the bank's assets it represents, either is objectively immaterial and not large enough to warrant a separate geographic obligation and CRA evaluation. For another bank, the RLAAs would be centered on a business line that is less than 2% of its entire business, which is not a meaningful measurement of lending activity by the bank to represent how the bank provides credit services to its communities. Building more flexibility for the banking industry to further evolve to effectively meet all customer needs will be critical to ensuring a durable and modernized CRA framework.

IV. The RSPT Should Adequately Account for Banks with Limited or No Branches.

The Proposal does not adequately address the ways in which large banks with few or no branches can pass the RSPT, introducing significant uncertainty for such banks. We recommend that banks with few or no physical branches or remote service facilities be evaluated on their primary delivery channels, e.g., their digital delivery systems. The RSPT should be agnostic to delivery channels, and should evaluate whether a bank's chosen delivery methods make products reasonably available to LMI consumers.

Difficult Application. To illustrate the difficulty of applying the RSPT to digital banks, consider that the Proposal would evaluate each bank on the number of checking accounts owned by people in LMI census tracts. The availability and utilization of a bank's digital delivery system cannot be accurately measured only by usage of products by customers who live in LMI areas, since availability does not always translate into usage, and LMI individuals do not reside only in LMI census tracts. Regarding lending, a CRA evaluation of retail lending for such an institution would either force it to lend in areas where it otherwise has no presence or cause it to withdraw banking services to clients in some geographies entirely. The undersigned banks have been successfully delivering digital account opening and retail lending products for many years under the current CRA framework. Yet the Proposal would require such an institution to potentially make major modifications to its services and business model to conform to the CRA, which would be inconsistent with the purpose of the rule.

More Uncertainty. The RSPT is a multi-part test, with a number of subtests. The Proposal provides a great deal of examiner discretion in how the subtests roll-up to determine a final score, including examiner judgment in determining how to weight the subtests. According to the Proposal, this is intended "to allow for the Agencies to take into account the unique business models and strategies of different institutions," but instead of providing flexibility in assessing a bank's performance, examiner discretion adds significant uncertainty for the assessed institution. In addition, there are a number of subtests where the banks would not have data or product offerings to be considered, including all of the tests related to branches and branch-based services. It is unknown whether an examiner would disregard those tests or give digital banks low scores for them, or if the approach may vary among peer institutions. While one of the stated objectives of modernizing the CRA regulation is to create more certainty, this particular discretionary component of the Proposal does not appear to align with such an objective.

Add a Presumption. We suggest that the Agencies consider whether banks deemed to be performing at a High Satisfactory or Outstanding level on the RLT should receive a presumption that their distribution channels are sufficiently serving LMI communities, or at least receive a relatively perfunctory evaluation of their channels of distribution. If channels are evaluated, we recommend this test be modified to accommodate digital banks and banks with substantially digital business models.

V. Wholesale/ Limited Purpose Designation Should Be Retained.

Reevaluate Definitions. We support the Agencies' proposed retention of a separate evaluation framework for wholesale and limited purpose banks based on such institutions' CD investments, lending and services. However, we advocate for the definitions of "limited purpose" and "wholesale" bank to be reevaluated so that a bank without a material amount of its balance sheet loan originations or loan volume subject to the Proposal's Major Product Lines would be able to qualify for this designation. Such reconsideration is in keeping with the purpose of the limited purpose and wholesale bank designations, because Banks that lack material origination or participation in the markets subject to evaluation through the RLT will find it difficult or impossible to meet the tests. Banks currently utilizing the wholesale or limited purpose designation employ business models that are not predominantly focused on providing retail banking products. As a result, such banks' retail product lines do not constitute a material percentage of bank revenue or assets and/or are incidental to the primary financial services offered by the bank. The complex method proposed to calculate balances quarterly to achieve additional credit could also be simplified and still materially represent CRA performance of these banks.

Compare True Peers. As noted in our comments to the Board's ANPR, with respect to performance benchmarks within the Agencies' proposed CD tests, wholesale and limited purpose banks should be compared against other wholesale or limited purpose banks, with a bank's performance context considered to evaluate the similarities and differences of such banks. There are broad differences across the corporate resources of the banks that fall within these designations. Ensuring a more representative peer comparison would provide a more accurate evaluation of a wholesale or limited purpose bank's CRA activities than a method that compares the performance of these banks with banks predominantly focused on providing retail banking products.[9]

Retain Current Guidance. We recommend that the Agencies retain the existing guidance in the current CRA FAQs which reflects three decades of learning and refinement, including guidance addressing the amount of unrelated lending in which a bank may engage while retaining its designation.[10] This approach would assist both banks and the Agencies in applying these key principles. The Agencies should also confirm that banks currently qualifying for these designations will not be required to reapply for them when the final rule becomes effective.

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[9] 85 Fed. Reg. at 66,410 (Oct. 19, 2020)

[10] 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").

CONCLUSION

We thank the Agencies for the opportunity to comment on the Proposal and welcome the opportunity to discuss how the CRA can be crafted to best meet our common goal – serving LMI consumers and communities to meet their credit needs.

Sincerely,

Ally Bank
American Express National Bank
Barclays Bank Delaware
Capital One
Charles Schwab Bank, SSB
Discover Bank
Goldman Sachs Bank USA
Silicon Valley Bank
Synchrony Bank