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April 8, 2020

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RE: Community Reinvestment Act Regulations
RIN 3064-AF22: Notice of Proposed Rulemaking,
Docket ID OCC-2018-0008

To Whom It May Concern:

The California Reinvestment Coalition (CRC) strongly opposes the proposed changes to the Community Reinvestment Act (CRA) regulations. We agree with the assessment of FDIC Board member Martin Gruenberg that the FDIC's and OCC's Notice of Proposed Rulemaking (NPRM) on the Community Reinvestment Act (CRA) "is a deeply misconceived proposal that would fundamentally undermine and weaken the Community Reinvestment Act."[1]

The California Reinvestment Coalition is the largest statewide CRA coalition in nation.

The California Reinvestment Coalition builds an inclusive and fair economy that meets the needs of communities of color and low-income communities by ensuring that banks and other corporations invest and conduct business in our communities in a just and equitable manner.

We envision a future in which people of color and low-income people live and participate fully and equally in financially healthy and stable communities without fear of displacement, and have the tools necessary to build household and community wealth. CRC and our members have been using CRA to benefit communities for over thirty years. We have frequently and extensively commented on CRA and related regulations and guidance.

1. Statement by Martin J. Gruenberg, Member, FDIC Board of Directors; Notice of Proposed Rulemaking: Community Reinvestment Act Regulations, December 12, 2019, available at: https://www.fdic.gov/news/news/speeches/spdec1219d.html

This rulemaking process should be ended, or suspended, given the historic COVID-19 pandemic gripping the nation.

In a letter submitted on Tuesday, April 7, more than 100 organizations and individuals, all based or serving California communities, urged that the regulators end, or, at a minimum, suspend the current rulemaking process until the current and unprecedented COVID crisis abates.[1] This is especially needed as CRC members are working beyond capacity to assist clients, constituents, communities, and family members to ensure that people are safe, healthy, and able to take care of basic needs.

This letter joins similar calls to suspend or end this rulemaking from organizations such as the National Community Reinvestment Coalition, industry groups,[2] and Congressional leaders.[3] Shockingly, the Office of the Comptroller of the Currency (OCC) and Federal Deposit Insurance Corporation (FDIC) appear poised to push forward this rulemaking which is opposed by most community organizations and which will result in harm to the very communities that are being most impacted by the COVID-19 virus and that CRA is designed to benefit. As CRC ally Association of Neighborhood and Housing Development (ANHD) has noted, the absurdity of this move is highlighted by recent CRA guidance from the banking regulators encouraging banks to assist their customers in certain ways that would likely not qualify for CRA credit under the proposed rule.[4] Time will tell if this will go down as one of the greatest acts of regulatory hubris in American history.

As noted in our sign-on letter, the proposed rule, understandably but importantly, does not at all account for the needs of communities impacted by the COVID-19 crisis. The effect of COVID-19 on LMI communities and on the small businesses, first time homebuyers, affordable housing tenants and developers and all CRA stakeholders will be immense, and needs to be considered in assessing any further potential effects of the proposed rule. As such, our calls for a substantial extension of the comment period or withdrawal of the proposed rule are justified.

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[1] Request to end, suspend, CRA rulemaking: Letter to Comptroller Joseph and FDIC Chair Jelena McWilliams, signed by 100 organizations and individuals, April 7, 2020, available at: http://calreinvest.org/wp-content/uploads/2020/03/CA-orgs-urge-OCC-and-FDIC-to-end-CRA-rule-making..pdf

[2] See Brendan Pederson, "Calls to cease non-coronavirus rulemaking grow louder," American Banker, March 31, 2020; and Jon Hill, "State Groups Ask Trump For Rulemaking Halt Amid Outbreak," Law360, March 20, 2020.

[3] Melissa Angell," Sherrod Brown calls on regulators to suspend non-coronavirus rulemaking," American Banker, March 20, 2020.

[4] Kevin Dancy, "COVID-19 and CRA: Fed Issues Guidance on Helping Communities Through the Crisis," Federal Reserve Bank of Dallas newsletter, March 27, 2020, available at: https://www.dallasfed.org/cd/communities/2020/0327

The financial services landscape, and the landscape of our communities, has changed dramatically; yet the proposed rule upon which comments are based, did not. The COVID-19 crisis is likely to have persistent and ongoing impacts on low-income communities, local businesses, and the financial industry that the rulemaking does not account for or address. The proposed rule must be reevaluated to consider these developments and adjust to the changed real-world facts.

The Community Reinvestment Act is an important civil rights measure that has had a profound impact on low-income communities and communities of color that should be strengthened, not weakened.

The Community Reinvestment Act (CRA) is a federal law that was passed in 1977 as a way to address discrimination in lending based on race, known as redlining. In passing CRA, Congress found that, "regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business; the convenience and needs of communities include the need for credit services as well as deposit services; and regulated financial institutions have continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered."[5]

Further, each appropriate Federal financial supervisory agency is directed "to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions."[6] Regulators are to assess bank performance in meeting the needs of its communities, including low-and moderate-income communities, and to take these assessments into account when considering certain bank applications.[7]

As Congressman Gregory Meeks has noted, "during CRA's floor debate, Sen. William Proxmire cited redlining as the need for the financial reform. Proxmire stated: 'by redlining let me make it clear what I am talking about. I am talking about the fact that [financial institutions] will take their deposits from a community and instead of reinvesting them in that community … they will

[5] Community Reinvestment Act, 12 U.S.C. §2901(a).
[6] Community Reinvestment Act, 12 U.S.C. §2901(b).
[7] See Community Reinvestment Act, 12 U.S.C. §2903(a).

actually or figuratively draw a red line on a map around the areas of their city, sometimes in the inner city, sometimes in the older neighborhoods, sometimes ethnic and sometimes black, but often encompassing a great area of their neighborhood.' The senator understood the grave consumer harm caused by financial institutions that took deposits from certain communities and exclusively invested those deposits elsewhere. The practice resulted in whole communities being stripped of wealth, a consumer harm Proxmire recognized had a racial component to it."[8]

CRA ensures that banks meet the credit needs of all communities where they take deposits, including low-and moderate-income (LMI) neighborhoods. As a result of CRA, banks have increased their lending to small businesses and made home ownership and affordable rental housing more accessible, regardless of race. It has also resulted in banks providing financial services in more communities, such as opening branches and offering affordable bank accounts without high fees that strip earning from low-income households and drive them to predatory financial institutions.

CRA is a crucial tool that encourages banks to participate in their communities in a more responsible manner. CRA has fostered inclusive economic development and neighborhood stabilization, and has been one of the most effective federal efforts to bring investment to communities without substantial taxpayer dollars or government resources. The design of CRA process encourages banks, regulators, and community leaders to have meaningful dialogue about a community's needs and banks' roles in the communities they serve.

Advocates throughout the United States, including CRC, have negotiated CRA agreements with banks that have included trillions of dollars in reinvestment for LMI communities and communities of color.[9] According to the National Community Reinvestment Coalition, more than $6 trillion worth of CRA investments have been committed to LMI communities and communities of color nationwide since the act was passed.[10]

[8] Congressman Gregory W. Meeks, "BankThink Before modernizing CRA, consider its history," American Banker, June 19, 2018.

[9] From California Reinvestment Coalition, "Harnessing the Power of Banks," March 2018, available at: http://calreinvest.org/wp-content/uploads/2018/07/Harnessing20the20Power20of20Banks20report20FINAL20version.pdf, citing: Community Reinvestment Act (CRA). (2017, October 23). Retrieved from https://ncrc.org/communityreinvestment-act-cra-2/

[10] National Community Reinvestment Coalition, "CRA 101 Manual," available at: https://ncrc.org/wp-content/uploads/2017/11/CRA-101_b.pdf

CRC's survey of banks throughout California shows that CRA is working in California. Banks are investing in communities throughout the state in a number of impactful ways. Banks that responded to our surveys have made loans and investments in the billions in LMI communities and communities of color throughout California.[11]

CRC negotiates formal written CRA agreements with banks which benefit both communities and financial institutions. Over the past five years, CRC has worked with communities and financial institutions to secure more than $40 billion in new CRA commitments.[12] These commitments are addressing critical community needs that help to create a more just, equitable, and robust economy, uplifting low-income people and people of color. In light of California's severe housing crisis, for example, CRA investments are helping to build and preserve thousands of units of affordable housing. In population-dense urban centers, these affordable homes and apartments allow low-income residents to remain in communities where many of their families have lived for generations. Similarly, affordable bank loans for small business owners provide much-needed capital to main street businesses that are the lifeblood of local economic health. These small business loans are often coupled with technical assistance that provides entrepreneurs with the financial knowledge to grow their business and create local jobs.

A Federal Reserve study found CRA agreements increased bank lending to LMI borrowers and borrowers of color by up to 20 percent.[13] CRA loans and investments are profitable and consistent with safe and sound operations.

The significance of the public participation process in CRA implementation cannot be overstated – how can banks meet community credit needs if the community does not help define those needs? According to the OCC, ".... CRA provides a framework for depository institutions and community organizations to work together to promote the availability of credit and other banking services in low- and moderate-income communities and for low- and moderate-income individuals. CRA has encouraged banks to open new branches, provide expanded services, and make a variety of community development loans and investments. In

[11] From "Harnessing the Power of Banks," California Reinvestment Coalition, March 2018, available at: http://calreinvest.org/wp-content/uploads/2018/07/Harnessing20the20Power20of20Banks20report20FINAL20version.pdf,

[12] CRC's recent community commitments with banks can be found at http://www.calreinvest.org/publications/bank-agreements.

[13] Raphael Bostic and Breck Robinson, "Do CRA Agreements Influence Lending Patterns?" 2002, retrieved from https://lusk.usc.edu/research/working-papers/do-cra-agreements-influence-lending-patterns

addition, CRA has encouraged banks to provide substantial commitments to state and local governments and community development organizations to increase lending to underserved segments of local economies and populations."[14]

The proposed rule would decrease overall reinvestment in, and responsiveness to, local low- and moderate-income communities.

The agencies would decrease the public accountability of banks to their communities by enacting performance measures on CRA exams that would not accurately account for banks' responsiveness to local needs. Public input into this obtuse evaluation framework would be limited and rendered more difficult to provide. Despite the agencies' assertions that their proposal would increase clarity and bank CRA activity, the result would be significantly fewer loans, investments and services, and certainly fewer impactful loans, investments, and financial services, to low- and moderate (LMI) people and communities.

The OCC's claims of increased reinvestment from the proposed rule are dubious, not supported, and confuse the public record. The Comptroller of the Currency has publicly stated during the open comment period that the proposal could yield an addition $500 million in reinvestment activity a year,[15] and in a television interview that the proposed rule will lead to an additional $100 billion in reinvestment activity.[16] The OCC has indicated in other contexts that the NPRM will result in "billions" more in reinvestment.[17] But neither the Comptroller nor the OCC provide any data or other information to support these claims. Such statements can only make sense if the OCC is tracking all of the reinvestment activity that currently qualifies for CRA credit and has modeled that the proposed rule will increase by $100 billion the amount that will be deemed devoted to these activities. If the OCC has conducted these calculations, it should make that

[14] Office of the Comptroller of the Currency, "Fact Sheet: Community Reinvestment Act," Community Investments, March 2014, available at: https://www.occ.gov/publications-and-resources/publications/community-affairs/community-developments-fact-sheets/pub-fact-sheet-cra-reinvestment-act-mar-2014.pdf

[15] Brendan Pederson, "OCC's Otting punches back at critics of CRA plan," American Banker, January 22, 2020 (Otting said the OCC believes its proposal to modernize CRA will increase lending by "roughly $500 million a year.")

[16] "Comptroller of the Currency Joseph Otting talks about the Community Reinvestment Act and redlining," Interview with Brian Cheung, Mar 1, 2020, available at: https://www.youtube.com/watch?v=3ddQYDoWPyM

[17] See OCC twitter post dated December 20, 2019, "#CRA has encouraged trillions of $ in loans and investments in underserved communities. Modernizing and strengthening CRA rules can send billions more to #LMI people and areas including regions targeted for revitalization," available at: https://twitter.com/usocc?lang=en

data and analysis available to the public and extend the comment period to permit public comment on that data and analysis.[18]

We believe it is more likely that the OCC has determined that by counting additional activities,[19] reinvestment totals that included newly eligible activities that banks *are already engaged in* but not currently getting credit for, will produce a higher dollar figure. This would seem to show improved CRA performance even if the banks' commitment to CRA activities that currently qualify for credit *decreases*, as we expect will occur. Such statements are like comparing apples to watermelons and are misleading the public and creating an inaccurate record. Much of what is being promised as new and increased reinvestment activity is likely merely bank activity already occurring that does not currently qualify for credit, *because it does not have a significant impact on LMI people and communities*.

In his strong dissent when the proposed rule was considered by the FDIC board, board member and former Chair Martin Gruenberg remarked, "… the NPR expands eligible and qualifying CRA activities to include some of what banks already do in the ordinary course of business, thereby diluting the effectiveness of CRA. For example, community development activities – loans, investments, and services – would no longer have to have a primary purpose of community development targeted on low- and moderate- income individuals and areas, small business or small farms, or underserved or distressed rural areas. This broadening of what counts in the proposal comes at the cost of CRA's historic focus on serving low- and moderate-income communities and individuals, while giving the appearance of expanding the overall level of CRA activity."[20]

The NPRM's focus on balance sheets over originations will likely result in decreased lending. Further, we believe the proposed rule's focus on balance sheet lending[21] will likely reduce the number of mortgages that will be originated, as most banks primarily sell the loans they

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[18] Indeed, the Administrative Procedure Act requires that agencies "give interested persons an opportunity to participate in the rule making" and justify its decision with reference to the "whole record." 5 U.S.C. §§ 553(c), 706. The agencies must provide the public a meaningful opportunity to comment upon the whole set of data and analysis that serve as the basis for the regulations. By withholding the data and analysis to support the $100 billion claim, the OCC has deprived the public of its right under the APA to meaningfully evaluate and respond to the proposal.

[19] See Qualifying Activities Criteria, 85 Fed. Reg. 1210, and Qualifying Activities Illustrative List, 85 Fed. Reg. 1228.

[20] Statement by Martin J. Gruenberg, Member, FDIC Board of Directors; Notice of Proposed Rulemaking: Community Reinvestment Act Regulations, December 12, 2019, citing, Proposed Section 345.04, discussed in the Preamble to the NPRM at 24-33.

[21] E.g., proposed 12 C.F.R. § 25.01(d)(6), 85 Fed. Reg. 1204, 1242.

originate to the Government Sponsored Enterprises (GSEs) or elsewhere, freeing up capital to allow them to originate more loans in the community. By focusing on the loans held by a bank in a given year rather than those originated in that time, the proposal will dramatically decrease mortgage lending to LMI borrowers in a way that will frustrate the affordable housing goals and obligations of CRA, the Federal Housing Administration (FHA) and the GSEs.

The proposed balance sheet approach will likely also lead to fewer loans being originated in other categories in LMI communities, as banks will merely originate or purchase a few loans and keep them on their books for a long time so as to continue to receive CRA credit, rather than originating loans and selling them to the GSEs, as the mortgage market normally operates. Moreover, if the intent of a balance sheet approach is to incentivize longer term investments, that incentive is not needed with respect to retail mortgage and other loan products which generally include longer terms, as opposed to community development activities which may benefit from an incentive for longer term loans and investments. Additionally, a balance sheet focus makes bank performance wholly opaque to the public, and perhaps to the regulators as well, as only the banks can provide access to these data.

In fact, the NPRM proposes that banks evaluated under the general performance standards would be required to collect, maintain, and use data related to qualifying activities, deposits and assessments areas in order to make the calculations necessary to determine their own ratings, based on the application of the performance standards in the proposal, subject to OCC or FDIC validation.[22] But the NPRM does not offer any analysis as to what quality control and oversight measures will be in place to ensure accurate and transparent reporting. This is just another example of how this problematic proposal will reduce transparency and accountability of bank, and regulator, performance.

It is true that CRA products that are specifically designed to serve LMI communities and communities of color that are held by banks in portfolio can dramatically help meet community needs and should be highly valued under CRA. But instead of focusing on how long an originator holds a loan, CRA credit should focus on loan quality and loan originations, rather than encouraging purchasing existing loans, which does not substantially advance the interests of LMI communities and which is the proper province of the GSEs. The only situation in which purchasing loans should count toward CRA credit is where banks purchase loans originated by

[22] See, "D. Revising Data Collection, Recordkeeping, and Reporting," 85 Fed. Reg. 1209.

mission-driven nonprofit lenders, which frees up capital for those lenders to make more loans that aid LMI communities.

Additionally, we are concerned that point in time determinations as to whether loans held on balance sheets will be eligible for CRA credit for a period of years will inevitably allow credit to be given on loans to borrowers who will have graduated to better circumstances (as we hope they all will), yet are no longer LMI. No CRA credit should be given for loans on balance sheets without a revalidation that the loan remains an eligible activity in that the borrower remains LMI.

The proposed rule deviates from the statutory focus of CRA on LMI people and communities.

CRA must retain its statutory focus on LMI and local needs,[23] and not give banks credit for almost anything, almost anywhere. This point was made clear by Federal Reserve Board Governor Lael Brainard in remarks she made outlining the Fed's alternative approach: "Dividing evaluations into separate retail and community development tests is important. First, evaluating all retail banks under a stand-alone retail test is important to stay true to CRA's core focus on providing credit in underserved communities in an assessment area. In contrast, an approach that combines all activity together runs the risk of encouraging some institutions to meet expectations primarily through a few large community development loans or investments rather than meeting local needs."[24] Ultimately, "Based on the best available data, we concluded that CRA metrics tailored to local conditions and the different sizes and business models of banks would best serve the credit needs of the communities that are at the heart of the statute."[25]

The OCC and FDIC's proposed rule significantly expands the bank activities that count for CRA credit.[26] Disturbingly, the proposal moves away from CRA's statutory and historic focus on low-

[23] *See, e.g.*, Community Reinvestment Act, 12 U.S.C. §2903(a) (requiring an evaluation to "assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods").
[24] "Strengthening the Community Reinvestment Act by Staying True to Its Core Purpose," Remarks by Lael Brainard Member Board of Governors of the Federal Reserve System at the Urban Institute Washington, D.C. January 8, 2020, available at: http://www.urban.org/sites/default/files/2020/01/09/lael_brainard_speech.pdf
[25] "Strengthening the Community Reinvestment Act by Staying True to Its Core Purpose," Remarks by Lael Brainard Member Board of Governors of the Federal Reserve System at the Urban Institute Washington, D.C. January 8, 2020, available at: http://www.urban.org/sites/default/files/2020/01/09/lael_brainard_speech.pdf
[26] See Qualifying Activities Criteria, 85 Fed. Reg. 1210, and Qualifying Activities Illustrative List, 85 Fed. Reg. 1228.

and-moderate income communities and the obligation to meet local credit needs in a number of ways, promising CRA credit for things like:

- Financial literacy classes geared towards upper income people.[27]

- Loans for "affordable housing" even if rented by middle or upper income tenants benefitting from low rents.[28] Naturally Occurring Affordable Housing (NOAH) can be an important component of a community's housing stock. But as these properties do not come with affordability restrictions, they can be rented to persons of any income, and rent levels may not remain affordable. Any CRA accommodation for NOAH should be based on units rented to LMI tenants, ensure that the properties are in decent, safe and sanitary condition, and ensure that CRA credit does not continue after units become unaffordable. Care must be taken not to determine CRA credit is available for a period of years the loan is held by a bank, irrespective as to whether the rents have since been raised to unaffordable levels. Otherwise, CRA credit will once again be given for displacement financing.

- Loans for housing to tenants earning up to 120% of area median income in high cost areas. [29] This change alone could dramatically distort CRA activity and create a significant shift away from housing for LMI residents towards more lucrative middle income or workforce housing. The NPRM's proposed formula-based one ratio variation will incentivize this shift.

- Projects that only "partially" benefit LMI people and neighborhoods,[30] such as large infrastructure[31] and energy projects.[32] This change will dramatically alter the landscape of CRA, giving credit for large and lucrative projects, such as industrial parks, that don't need further federal incentives and that will only tangentially benefit LMI communities, if at all. Is it that these projects are starved for credit, or rather that big banks that do these deals are starved for CRA credit and want to start counting these projects in their CRA filings? Further, such projects which the regulators propose should get CRA credit may fuel gentrification and displacement of LMI communities, as numerous historical redevelopment examples demonstrate.

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[27] The agencies believe that financial literacy is an important issue irrespective of income level, 85 Fed. Reg. 1212.
[28] See, e.g., proposed 12 C.F.R. § 25.04(c)(1)(D), 85 Fed. Reg. 1242.
[29] See, e.g., proposed 12 C.F.R. § 25.04(c)(6), 85 Fed. Reg. 1243.
[30] See, "IV. Section-by-Section Discussion A. Qualifying Activities," 85 Fed. Reg. 1210.
[31] See, e.g., proposed 12 C.F.R. § 25.01(d)(6), 85 Fed. Reg. 1204, 1242.
[32] See, "IV. Section-by-Section Discussion A. Qualifying Activities," 85 Fed. Reg. 1210.

- Investments in Community Development Financial Institutions (CDFIs)[33] and in so-called "Indian Country"[34] even if not for the benefit of low-income people. Certainly, CDFIs and Native American communities should be supported; CRA should continue to encourage banks to support the efforts of CDFIs and Native American communities to serve the housing and community development needs of *low-and-moderate income* residents and small businesses.

- Loans for family farms with revenues up to $2 million,[35] even though nearly 96% of family farms have less than $1 million in revenue, according to USDA.[36] Banks will have every incentive to focus on lending to the less than 4% of family farms which have over $1 million in revenue, but less than $2 million in revenue. How is this helping small family farms and LMI people? Did the OCC analyze how this proposed rule will impact the 96% of family farms with less than $1 million in revenue? The public should be able review this analysis and draw its own conclusions, instead of relying on OCC promises that this NPRM will help family farms. The NPRM's list of qualifying activities includes: "Loan to a family-owned corn and wheat farm with gross annual revenues of $10 million to purchase a tractor."[37] CRA rules should focus on serving the smallest of family farms, not the largest farms that most likely do not need to take advantage of CRA in order to access credit. This change will lead to *less* support for small family farms, and merely serve to pad the CRA reporting of big banks.

- Small business loans of $2 million for businesses with revenue of $2 million.[38] One of the most disturbing aspects of the proposed rule is that even though 95% of businesses, 97% of minority owned businesses, and 98% of women owned businesses have less than $1 million in revenue,[39] and need financing under $100,000,[40] the proposal would

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[33] See, "IV. Section-by-Section Discussion A. Qualifying Activities," 85 Fed. Reg. 1212.
[34] See, "Background, Promote capital and investment in Indian country," 85 Fed. Reg. 1207.
[35] See, "Background, Increase small farm lending," 85 Fed. Reg. 1207.
[36] James M. MacDonald and Robert A. Hoppe, "Large family farms continue to dominate U.S. agricultural production," United States Department of Agriculture Economic Research Service, available at: https://www.ers.usda.gov/amber-waves/2017/march/large-family-farms-continue-to-dominate-us-agricultural-production/
[37] Qualifying Activities Illustrative List, 85 Fed. Reg. 1230.
[38] See, e.g., proposed 12 C.F.R. § 25.03 *small business*, 85 Fed. Reg. 1242
[39] Consumer Financial Protection Bureau, [Docket No.: CFPB-2017-0011] Request for Information Regarding the Small Business Lending Market, 82 Fed. Reg 22319 (May 15, 2017). citing U.S. Census Bureau, Statistics for All U.S. Firms by Industry, Gender, and Receipts Size of Firm for the U.S. and States: 2012 More Information 2012 Survey of Business Owners, American Fact Finder (last visited April 12, 2017), available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2012_00CSA05&prodType=table
[40] Federal Reserve Banks of Atlanta, Boston, Chicago, Cleveland, Dallas, Kansas City, Minneapolis, New York, Philadelphia, Richmond, St. Louis, and San Francisco, "Small Business Credit Survey: 2019 Report on Employer Firms," which found that 57% of the 6,614 employer firm small business respondents to the survey sought financing

double existing thresholds. This will be devastating for entrepreneurs, startups, and the small businesses that hire locally and serve their communities but are not currently well served by banks under the existing lower thresholds. The change will further push small businesses starved for credit into the open arms of high cost and predatory online and Merchant Cash Advance lenders.

We are also concerned that under the proposed rule, the public could lose access to critical data on small business loan sizes and business revenue sizes that show whether banks are serving truly small businesses or not. This is a dramatic departure from CRA's historic emphasis on small businesses and transparency. Ultimately, CRA evaluations should rely on the detailed and robust data that we hope will soon be available pursuant to a strong small business data collection rule from the Consumer Financial Protection Bureau.

Low-income people, entrepreneurs, small businesses and small farms stand to lose out dramatically if the proposed rule is finalized without substantial changes.

The proposed rule deviates from CRA's statutory mandate to serve local communities.

The proposed rule would give credit for activity outside of assessment areas that is not at all tied to local needs. The OCC and FDIC propose a new bank level evaluation framework that allows banks to count all eligible loans and investments made anywhere, including outside the areas where bank branches are located.[41] As required by CRA,[42] the implementation framework has always focused on banks serving the local communities where they are operating. Now, big banks could seemingly get a large amount of CRA credit for, as one example, high volume subprime credit card lending to LMI consumers anywhere. The bank level evaluation, which allows consideration of all qualified activity anywhere, runs afoul of CRA's intent, and this

of $100,000 or less. Presumably, small business owners with no employees, who were not surveyed for this report, might need small dollar small business loans to a greater extent, and they would be even more poorly served by a proposal that incentivizes banks to originate larger loans to larger businesses.

[41] See, e.g., proposed 12 C.F.R. § 25.12, 85 Fed. Reg. 1246.

[42] "Regulated financial institutions have continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered," Community Reinvestment Act, 12 U.S.C. §2901(a)(3), and "It is the purpose of this chapter to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions." Community Reinvestment Act, 12 U.S.C. §2901(b).

evaluation framework should be discarded. Banks should be assessed on their performance within their CRA assessment areas.

The NPRM's provisions expanding assessment areas for non-retail banks is limited, and dubious. CRC has long called for assessment areas to be expanded to areas where banks take deposits and conduct a significant amount of lending activity. While the proposal does seek to expand reinvestment obligations to the increasing number of banks that do not have a retail branch model (such as fintech and internet banks),[43] it does so in a way that very few fintech and Internet banks will be subject to the non-retail reinvestment obligations, failing to solve the problem that the NPRM purports to address. In fact, the OCC does not appear to know how many institutions would be subject to these provisions, but estimates that only 10 to 15 banks would see expanded assessment areas and reinvestment obligations.[44]

Additionally, the proposed rule falls short in that it only accounts for locations from where deposits are taken, not where these non-branch banks are making loans and making money. Further, CRC and the entire commenting public cannot fairly evaluate this proposal, as there is no public data analysis explaining the thresholds FDIC and OCC have chosen. The thresholds proposed (assessment areas are expanded if 50% of deposits come from outside branch areas, and reinvestment obligations are assigned where 5% of deposits are from) appear arbitrary and too narrow. The 50% threshold is probably too low, leaving few banks subject to these provisions. The 5% threshold is probably too high, meaning that non-retail banks will have expanded obligations only in highly populated areas, and not in branch or banking deserts. What level of analysis was done to arrive at these thresholds when it appears the OCC does not even know how many banks would be covered by these provisions or which communities would be served by new assessment areas?

As proposed, the rule will likely do nothing to address the critical issue of bank deserts, and will only serve to weaken the connection between banks and local communities. Further, we find proponents' efforts to frame the NPRM as focused on modernizing an old and outdated CRA to be misplaced, misleading, and distracting to the public, when it would only apply to 10 to 15

[43] See, e.g., proposed 12 C.F.R. § 25.08(c), 85 Fed. Reg. 1244.
[44] Brendan Pederson, "CRA cheat sheet: New regime would look very different," American Banker, December 12, 2020 (In an interview, OCC officials — including Otting — could not say with certainty how many banks would see their assessment areas altered by the proposed changes. Otting said that "at most, about 10 to 15 banks" would be "required to do more in markets that they're not currently doing CRA activities today.")

banks and as this provision will produce little benefit to LMI communities and will do nothing to cancel out the other, harmful, aspects of this proposed rule.

The proposed rule acknowledges displacement concerns yet exacerbates the problem.

The proposed rule purports to address displacement, but only exacerbates it. As noted above, the definition of affordable housing would be relaxed to include middle-income housing (for people with incomes up to 120% of area median income) in high-cost areas. This change could have a profound impact on the urban landscape, as banks gravitate to more lucrative workforce housing projects, and decrease financing of truly affordable housing production and preservation. In so doing, the proposal will incentivize banks to further fuel displacement and gentrification in LMI communities and communities of color.

In addition, the NPRM would count rental housing as affordable housing if LMI people could afford to pay the rent, even if the actual tenants are not low- or moderate-income.

As another example of how the proposal prioritizes displacement over meaningful community development, nonprofit affordable housing developers may see a *decrease* in much-needed Low Income Housing Tax Credit (LIHTC) tax credit investment,[45] while the regulators will give banks CRA credit for investing in qualified Opportunity Zone funds in low income areas,[46] including investments in athletic stadiums,[47] self-storage facilities, and luxury housing that will likely result in displacement of the very low-income residents and small businesses meant to benefit from CRA. These activities should not qualify for CRA credit.

Discounting credit for mortgages to upper income borrowers in low-and moderate-income tracts is a viable approach to addressing an aspect of displacement, but the proposed rule goes too far by allowing *no* consideration of any loans to middle- and upper-income borrowers in LMI tracts, which, when combined with the rest of the proposal (a focus on balance sheet holdings, allowing banks to fail to serve some assessment areas, and prioritizing total dollars lent thru a one ratio variant) creates the danger of putting significantly fewer dollars in LMI

[45] Donna Kimura, "CRA Proposal Draws Concerns from Affordable Housing Leaders," Affordable Housing Finance, December 13, 2019.
[46] See, e.g., proposed 12 C.F.R. § 25.04(c)(11), 85 Fed. Reg. 1244.
[47] Investment in a qualified opportunity fund, established to finance improvements to an athletic stadium in an opportunity zone that is also an LMI census tract. Qualifying Activities Illustrative List, 85 Fed. Reg. 1234.

areas. Further, any benefit to LMI stability coming from the proposal to weed out mortgages to middle- and upper-income borrowers is dwarfed by the displacement pressures that will occur as a result of other aspects of the proposed rule (OZ Fund investments, middle income housing, low rent housing to upper income borrowers, etc.).

CRC has argued that the bank regulators need to better address displacement by urging banks to adopt anti-displacement policies, such as our Anti-Displacement Code of Conduct,[48] endorsed by over 100 organizations, providing greater credit for reinvestment activities that stabilize communities, and, importantly, downgrading banks for the extensive bank financing of displacement that is occurring in LMI communities and communities of color throughout California. Our report, "Disrupting Displacement Financing in Oakland and Beyond," prepared with the Anti-Eviction Mapping Project, showed that many CRA-regulated financial institutions had financed property owners identified as problematic by local, Oakland-based community organizations, originating hundreds of loans to landlords who filed hundreds of eviction petitions with the local Rent Board.[49]

Instead, the OCC and FDIC fail to require banks to adopt anti-displacement policies; propose a ratio based framework that will discourage bank support for smaller, complex and impactful deals like Community Land Trusts, cooperative and other housing preservation initiatives; and refuse to provide for downgrading of banks engaged in harmful conduct such as displacement financing. Taken as a whole this proposed rule will fuel displacement pressures.

The proposed rule deviates from CRA's statutory and historic focus on branches and deposit products.

CRA explicitly obligates banks to meet the deposit services needs of local communities[50] and CRA implementation has rightly maintained a focus on whether banks have a branch presence in LMI communities, as well as whether banks make their products accessible to all consumers. But this proposal provides almost no incentive for banks to maintain and open LMI branches,

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[48] CRC's Anti-Displacement Code of Conduct, along with 100+ endorsers, is available at: http://calreinvest.org/wp-content/uploads/2018/11/Anti-displacement-best-practices-11.1.19.pdf

[49] California Reinvestment Coalition and Anti Eviction Mapping Project, "Disrupting Displacement Financing in Oakland and Beyond, June 2018, available at http://calreinvest.org/wp-content/uploads/2018/07/Disrupting-Displacement-Financing.pdf

[50] "The convenience and needs of communities include the need for credit services as well as deposit services," Community Reinvestment Act, 12 U.S.C. §2901(a)(2).

and it would do away entirely with any consideration of whether banks are offering affordable bank account and other consumer products, such as payday alternative small-dollar loans and age friendly account products, which are needed by LMI and senior communities. The result of this proposal will be fewer bank branches in LMI and rural communities, and LMI consumers turning more frequently to predatory check cashers and payday lenders.

Branches in LMI communities have been a key feature of CRA, and bank presence in LMI neighborhoods has been shown to make a huge difference for local small businesses. According to one Federal Reserve study that analyzed small business lending using Community Reinvestment Act (CRA) disclosures, "among banks that are CRA reporters the share of loans made by lenders without a local branch presence remains quite low. This finding suggests that local branch presence is still important for small business lending."[51] Another recent study found that branch closings "led to a sharp and persistent decline in credit supply to local small businesses. Indeed, after a branch closing, annual tract-level small business loan originations fell by an average of $453,000, from $4.7 million. Loan originations remained depressed for up to six years, leading to a cumulative loss of $2.7 million in loans that those branches might have made if not for their closings."[52]

The importance of bank branches to a community extends beyond important small business lending. A December 2019 paper by the Federal Reserve found that "banking clients in communities subject to branch closures generally report increased costs and reduced convenience in accessing financial services, and that these challenges appear to be exacerbated for certain groups, such as those with lower incomes or less reliable transportation, older individuals, and small business owners.[53] CRA as currently implemented substantially reduces these closures, as a paper examining CRA's impact on branching found. Across all banking, the number of branches has declined significantly from 88,022 in 2009 to 79,872 in 2018. The decline has been steeper in LMI tracts at 11% than non-LMI tracts at 9% during this time period. But the authors found that this decline would have been even more severe without CRA, which

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[51] Anenberg, Elliot, Andrew C. Chang, Serafin Grundl, Kevin B. Moore, and Richard Windle (2018). "The Branch Puzzle: Why Are there Still Bank Branches?" FEDS Notes. Washington: Board of Governors of the Federal Reserve System, August 20, 2018, https://doi.org/10.17016/2380-7172.2206.

[52] Jacob Idlas, "In Small Business Lending, Technology Hasn't Replaced Face-to-Face Contact," Chicago Policy Review, March 2, 2019, citing Nguyen, Hoia-Luu, "Are Credit Markets Still Local? Evidence from Bank Branch Closings," American Economic Journal: Applied Economics 11(1). (2019): 1-32.

[53] Federal Reserve, "Perspectives from Main Street: Bank Branch Access in Rural Communities," December 3, 2019, available at: https://www.federalreserve.gov/publications/november-2019-bank-branch-access-in-rural-communities.htm

reduced the number of branch closures by 11% in LMI tracts. Importantly, CRA's impact is the strongest factor preventing closure in LMI tracts with just one branch, preventing banking deserts.[54]

We are particularly concerned that the treatment of branches will have a significant adverse impact on California's rural communities. A recent report on branch access in rural areas found that just over 40 percent of rural counties lost bank branches between 2012 and 2017, with 39 rural communities being "deeply affected" by the loss of more than half of their bank branches.[55]

The proposed rule would do away with the services test, which currently accounts for fully 25% of the Large Bank Examination. In its place, banks would receive minimal credit for the percentage of branches they have in LMI areas. CRC estimates that the average California bank has 30% of its branches in LMI areas. The NPRM's proposal to multiply this percentage by .01 to add to an overall bank level evaluation[56] will create almost no incentive to open new LMI branches because the bump up in a bank's ratio for adding 1 or 2 LMI branches would be negligible. It might even encourage LMI branch closings, as the lowering of a bank's ratio score for closing just a few branches would also be negligible. The system also creates the anomalous situation where a non-retail bank that opens 1 LMI branch will receive a higher score (100% of branches in LMI areas) than a bank that has a very large number and high percentage of branches in LMI areas (but less than 100%).

And yet, the OCC has argued during the public comment period that the NPRM recognizes the importance of branches. More specifically it states that "Bank branches are still important! The proposed #CRA rules would help preserve branches, particularly in LMI areas, by providing more credit for branches and evaluate CRA activity around branches."[57] Every other comment

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[54] Josh Silver, "New Penn Institute CRA Research Compendium Suggests Incremental Change Is Best Path For CRA Reform," National Community Reinvestment Coalition blog, November 19, 2019, available at: https://ncrc.org/new-penn-institute-cra-research-compendium-suggests-incremental-change-is-best-path-for-cra-reform/ (reviewing, Lei Ding and Carolina K. Reid, "The Community Reinvestment Act (CRA) and Bank Branching Patterns," Federal Reserve Bank of Philadelphia, Working Papers Research Department, WP 19-36, September 2019).

[55] Governor Lael Brainard, "Strengthening the Community Reinvestment Act by Staying True to Its Core Purposes," speech delivered at the Urban Institute, January 8, 2020, citing Federal Reserve, "Perspectives from Main Street: Bank Branch Access in Rural Communities," December 3, 2019, available at: https://www.federalreserve.gov/publications/november-2019-bank-branch-access-in-rural-communities.htm

[56] See, e.g., proposed 12 C.F.R. § 25.10(b)(2), 85 Fed. Reg. 1245.

[57] OCC, Twitter posting, January 13, 2020, available at: https://twitter.com/usocc?lang=en

of which we are aware, besides the opinion of the OCC, is that the NPRM devalues bank branches and will provide less credit. This is yet another example of how the OCC's over the top lobbying in favor its own proposal during an open public comment period is likely to confuse and mislead the public and, in so doing, impact public comments and distort the record.

Further, affordable and accessible bank account products, such as national Bank On standards,[58] can help low-income consumers join and remain in the financial mainstream and build assets by keeping them away from predatory check cashers and payday lenders. But in the current proposal, there is apparently no consideration for whether banks are meeting the bank account needs of LMI residents such as through low or no fee accounts, accounts accessible to those with special needs such as seniors and survivors of domestic abuse, acceptance of alternative forms of identification, or provision of language access services for Limited English Proficient consumers. CRA requires banks to serve the convenience and needs of the communities where they are chartered to do business, including both the need for credit *and deposit services*. By drastically reducing or eliminating CRA credit for branches and account services, the proposal substantially departs from this core CRA requirement.[59]

This profound proposed change is both alarming and baffling, given the FDIC's leadership role in highlighting the importance of branches and account products to LMI communities.[60]

The proposed rule fails to downgrade banks for harming communities and community credit needs.

Sadly, redlining and discrimination are still with us, and regulatory responses to these evils are woefully inadequate. A recent extensive analysis of over 31 million HMDA records found

[58] See, http://joinbankon.org/wp-content/uploads/2017/05/Bank-On-National-Account-Standards-2017-2018-final.pdf
[59] Community Reinvestment Act, 12 U.S.C. §2901(a).
[60] "This would undermine the FDIC's long-term effort to address this issue. Low-cost transaction and savings accounts, which the FDIC has helped to promote, will no longer be considered for CRA credit simply because these accounts cannot be quantified under the single metric system that would be set up under the NPR," from Statement by Martin J. Gruenberg, Member, FDIC Board of Directors; Notice of Proposed Rulemaking: Community Reinvestment Act Regulations, December 12, 2019, citing, Proposed Section 345.04, discussed in the Preamble to the NPRM at 24-33.

evidence of redlining in 61 communities throughout the nation, after accounting for income, loan amount and certain neighborhood characteristics.[61]

As one example, CRC filed a redlining and discrimination complaint against OneWest Bank with the Department of Housing and Urban Development in 2016. We settled our complaint with OneWest Bank's purchaser/successor CIT in July of 2019.[62] Yet, despite our complaint and the evidence presented, it is not apparent to us that the OCC ever took any action against OneWest Bank in response to redlining concerns.

This proposal does nothing to address bank discrimination and displacement financing, and may very well lead to more redlining as banks would be allowed to fail to serve half of their assessment areas and still pass their CRA exams. Currently, fair lending examinations of banks are notoriously weak, providing almost no analysis and rarely resulting in any public enforcement action being taken against banks for discriminating against customers and communities.

The proposal, as it must, allows for a possible downgrade of a CRA rating if there is evidence of discrimination or illegal credit practices. But the OCC has previously taken two harmful stances that have given banks greater latitude to engage in wrongdoing: 1) the OCC has suggested that generally, double downgrades in CRA ratings for discriminatory or illegal credit practices will not be delivered;[63] and 2) the OCC has narrowed the circumstances under which evidence of discrimination will result in CRA downgrades.[64] Taken together, these policies and the proposed rule suggest that actual and accepted evidence of discrimination can still result in a Satisfactory

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[61] Aaron Glantz and Emmanuel Martinez, "Kept Out: For people of color, banks are shutting the door to homeownership," Reveal, February 15, 2018, available at: https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/

[62] Conciliation Agreement between California Reinvestment Coalition, and CIT Group, Inc., and CIT Bank, N.A., dba OneWest Bank, FHEO CASE NUMBER: 09-17-7199-8, available at: http://calreinvest.org/wp-content/uploads/2019/07/CRC-v-CIT-CONCILIATION-AGREEMENT-07.26.19.pdf

[63] OCC Bulletin 2018-23, August 15, 2018 and Policies and Procedures Manual, PPM 5000-43, "Impact of Evidence of Discriminatory or Other Illegal Credit Practices on Community Reinvestment Act Ratings," August 15, 2018, wherein the OCC clarifies that the general policy of the OCC is to downgrade a rating by only one rating level unless such illegal practices are found to be "particularly egregious."

[64] OCC Bulletin 2018-23, August 15, 2018, and Policies and Procedures Manual, PPM 5000-43, "Impact of Evidence of Discriminatory or Other Illegal Credit Practices on Community Reinvestment Act Ratings," August 15, 2018, wherein the OCC clarifies that it will consider lowering a CRA rating only if the evidence of discriminatory or illegal credit practices directly relates to the institution's CRA lending activities, and that full consideration is given to remedial measures taken by the bank. So, CRA ratings may not be lowered if discrimination occurs outside of the lending context, or even if there is evidence of discriminatory lending but the institution has taken what are deemed to be sufficient remedial measures.

or Outstanding CRA rating, and that under one reading of the OCC's deeply flawed policies, even potentially criminal conduct such as the Wells Fargo Bank account opening scandal may not necessarily result in a "failing" CRA rating if the Bank otherwise is an Outstanding CRA performer.

We object to OCC and FDIC policies such as these that, in combination with the proposed rule, provide more excuses for banks that show evidence of discrimination; discourage double CRA rating downgrades for serious violations of anti-discrimination and certain consumer protection laws; and allow banks that discriminate and redline to still pass their CRA examinations.

CRA rules should provide greater scrutiny of, and punishment for, evidence of discrimination, and provide CRA rating downgrades for other forms of harm to the community, such as the financing of displacement by banks. In particular, CRA should address banks' displacement mortgages which finance rental housing that will foreseeably lead to displacement and eviction of low- and moderate-income people and people of color by, for example, underwriting loans to higher rents than what tenants are currently paying, or financing problematic landlords that displace or harass their tenants. While CRA creates an affirmative duty for financial institutions to help meet community credit needs,[65] displacement financing clearly harms community credit needs by fostering evictions, housing instability, impaired credit which will impact job and housing opportunities, reduced savings to deal with life's expenses, and decreased eligibility to qualify for mortgages or small businesses loans or other wealth creating opportunities.

Further, the proposal seeks to give credit for lending and investing activities of bank affiliates,[66] but it is not clear that potential wrongdoing by such affiliates will be scrutinized or result in CRA downgrades. The financial crisis was a result, in part, of bank affiliates making subprime and nontraditional loans that were not sufficiently regulated by the banking agencies, much to our collective detriment. The proposed rule could well incentivize banks to engage in such reckless and harmful activities in the future. If regulators are to consider giving banks positive credit for the activities of their affiliated companies, they must scrutinize the affiliated companies for evidence of discrimination, displacement and harm, and downgrade CRA ratings accordingly.

[65] 12 U.S.C. § 2901(a)(3).
[66] Banks also have the option of receiving consideration for retail and CD activities conducted by an affiliate, third party, or consortium. "IV. Section-by-Section Discussion A. Qualifying Activities," 85 Fed. Reg. 1209.

The proposed rule creates a complicated and weaker evaluation system.

The agencies propose an evaluation system that would further inflate CRA ratings while decreasing the responsiveness of banks to local needs. Currently, 98% of banks pass CRA exams; the proposal may push this higher, even if bank activity is *less* impactful in LMI communities. The agencies propose a version of the one ratio measure that consists of the dollar amount of CRA activities divided by deposits.[67] This approach is made even more bank-friendly by not only dramatically increasing the activities and the places for and in which banks can receive credit (increasing the numerator), but at the same time also decreasing what are considered deposits by excluding brokered and municipal deposits (shrinking the denominator). As one example, CRC analyzed one bank that reported nearly 50% of its deposits to be "non-core" deposits, with much of its deposits coming from brokers. In other words, under the OCC's formula, a bank such as this bank that could report contributing 15% of qualified deposits for CRA activity, would in reality only have contributed 7.5%, and the 7.5% would likely consist of many activities that do not benefit LMI communities and are not impactful. We oppose the expansion of eligible activities, see no reason why banks cannot be expected to lend against all deposits no matter the source, and urge the OCC and FDIC to abandon this approach.

This ratio measure would likely encourage banks to find the largest and easiest deals anywhere in the country as opposed to focusing on local needs, which are often best addressed with smaller dollar financing for small businesses, homeowners and projects. Impact, innovation and responsiveness to local needs will most certainly suffer from this proposal.

Banks, for example, may move away from important Low Income Housing Tax Credit (LIHTC) investments in favor of simpler and easier investments, and the value of LIHTC may decrease in light of less competition, which will result in less subsidy and bang for the buck for affordable housing development. As LIHTC practitioners have noted, "There has been concern that emphasizing the dollar amount could result in deemphasizing LIHTC and NMTC equity investment as compared to lending, because it is much easier for banks to make loans, especially in high-cost areas, than it is to underwrite equity investments. The ratio would take into account the dollar volume and number of investments under CRA, including a proposal to give double weight to certain activities that include affordable housing and community

[67] Banks would be evaluated by a geographic distribution test, as well as by the impact of a bank's qualifying activities, measured by a bank's CRA evaluation measure, which includes the quantified value of a bank's activities divided by a bank's retail domestic deposits plus a measure of branch distribution in specified areas of need. See, "VI. Regulatory Analysis, Description of the Rule," 85 Fed. Reg. 1236, 1237.

development investments. The proposed regulations say that double weighting would be used 'to provide an incentive for banks to engage in these activities,' but a reasonable question is whether doubling the effect of affordable housing or community development investments would be enough of an incentive to sustain LIHTC and NMTC equity investment at current volumes."[68] And, can double CRA credit be awarded for financing middle-income housing to the detriment of low-income housing?

Further, the proposal would actually allow banks to *fail* in up to half of the areas on their exams and still get a passing grade,[69] contrary to the CRA requirement that banks be evaluated based on their service to their "entire community."[70] So, under the new proposal, banks can "pass" by failing. Rural areas and low income neighborhoods of color that are perceived of as harder to serve will no doubt be more likely to be ignored by banks that can meet their CRA obligations elsewhere. It doesn't matter if the percentage of communities that can be ignored is 50% or less than 50%; in any event it represents a serious threat to communities. This aspect of the proposal is among the most distressing of the problematic proposed rule. What the proposal would allow is the very problem that CRA was meant to address. Despite OCC protestations to the contrary, this approach is an invitation to redline.[71]

We also object to the OCC's mischaracterization of this proposal, dismissing and bristling at the significant concerns commenters have that a bank evaluated under the general performance standards could receive a satisfactory or an outstanding presumptive bank-level rating even if it failed to also receive that passing rating in up to 50% of the assessment areas and in those assessment areas where it holds a significant amount of deposit. That figure comes directly from the proposal.[72] Critical comments by the Comptroller and OCC about these legitimate concerns may compromise or chill public comment.

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[68] Michael Novogradac and Peter Lawrence, "Understanding OCC, FDIC Proposed Rule Reforming CRA Regulations," Novogradac CRA Resource Center, December 30, 2019, available at: https://www.novoco.com/notes-from-novogradac/understanding-occ-fdic-proposed-rule-reforming-cra-regulations

[69] The bank-level presumptive rating under the general performance standards would be determined by comparing the average of a bank's average bank-level annual CRA evaluation measures to the established empirical benchmarks for the statutory rating categories and determining if the bank had a satisfactory or outstanding in a significant portion, such as more than 50 percent, of its assessment areas, and in those assessment areas where it holds a significant amount of deposits, such as more than 50 percent. The NPRM seeks input on whether the threshold should be higher than 50% (it should). See, "IV. Section-By-Section-Discussion, C. Objective Method To Measure CRA Performance," 85 Fed. Reg. 1218.

[70] 12 U.S.C. § 2903(a)(1).

[71] Frank Woodruff, NACEDA, "Redlining Would Be Relegalized by CRA Reform Proposal," Shelterforce, January 9, 2020, available at: https://shelterforce.org/2020/01/09/redlining-would-be-relegalized-by-cra-reform-proposal/

[72] 85 Fed. Reg. 1226, question 17.

Also confusing and confounding is that the OCC has been saying that banks are only examined now in 15% of their assessment areas now[73]. In saying this, is the OCC excluding limited scope assessment areas? If so, why? That is a measure of review, if not perfect. If OCC comments are ignoring limited scope areas, those comments are misleading to the public as those areas are reviewed. Statements such as these no doubt affect public comment and impair the public record.

The proposal would retain a retail test that examines home, small business and consumer lending to LMI borrowers and communities, but this retail test would be only pass or fail.[74] In contrast, the retail lending test now has ratings and counts for much more of the overall rating. Banks should be required to exceed benchmarks in lending compared to both area demographics and their peers, not either/or, and the goals should be stronger. Importantly, analysis by the National Community Reinvestment Coalition found that under the proposed retail lending test, banks that had received a Satisfactory or Outstanding rating from the OCC or the FDIC would be able to lend less to LMI borrowers and still pass their CRA exams. This is precisely the kind of analysis the OCC should have done, and that the regulators should have shared with the public in releasing the proposed rule. These findings by NCRC also run counter to the statutory purposes of CRA, and the statements of the agencies in supporting their proposals.[75]

The agencies establish numerical targets under the one ratio based evaluation for banks to hit in order to achieve Outstanding or Satisfactory ratings.[76] These targets appear both arbitrary and low, and are not responsive to local needs. Banks may be able to achieve Outstanding ratings in reliance on large subprime credit card lending, even if that does not well serve LMI consumes. The OCC bases the targets on its research, which the OCC does not share. The public, therefore, cannot make informed judgements about whether the numerical targets would result in increases in activity, stagnant levels, or decreases. The OCC references that it has reviewed approximately 200 or so CRA Performance Evaluations; the Federal Reserve for its part has reviewed approximately 6,000. The OCC refuses to release any of its data or analysis. The Federal Reserve has released its data publicly.[77] Note that the release of the Fed data is

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[73] Joseph Otting, Comptroller, Office of the Comptroller of the Currency, H.R. Fin'l Svcs. Comm., January 29, 2020 (in response to questioning).
[74] See, e.g., proposed 12 C.F.R. § 25.11(b), 85 Fed. Reg. 1245, 1246.
[75] Jacob Wolinsky, "CRA changes will impact LMI borrowers and communities," ValueWalk, March 9, 2020.
[76] See, e.g., proposed 12 C.F.R. § 25.12©, 85 Fed. Reg. 1246.
[77] Federal Reserve, "Federal Reserve Board publishes Community Reinvestment Act Analytics Data Tables, March 6, 2020, available at: https://californiareinvestmentcoalitio.app.box.com/file/646408299352

significant, but that CRC has not had the opportunity to fully review and analyze it. It is likely that few have. This further supports a call for a suspension of the rulemaking, at a minimum. But in the event that the regulations are finalized, the analysis supporting them should contend with the data provided by the Federal Reserve.

Even the proposed rule's provisions ostensibly meant to reward community development activity are problematic. Providing double credit for much of the community development activity and then proposing that 2% of deposits should be devoted to community development[78] is really saying that community development activity should represent 1% of deposits. And if banks are given twice the credit for community development activity, we believe many of them will merely do half of what they were doing before and expect the same level of credit. The regulators should also require detailed reporting on community development activity by census tract and make that data publicly available.

The agencies also propose to allow banks that receive Outstanding ratings to be subject to exams every five years[79] instead of the current two to three years. This aspect of the proposal deviates from the agencies' statutory duties to ensure banks are continuing to respond to community needs.[80] Banks with a five-year exam cycle would likely relax their efforts in the early years of the cycle. Banks would also have less accountability to maintaining acceptable CRA performance when they seek permission to merge with other banks.

As noted, the various thresholds in the proposal appear arbitrary and are not based on data made available to the public. If the OCC was relying on certain data, it should have made that data and methodology available in the proposal or on the public docket for public evaluation and response. If there in fact are no such supporting data, then that raises perhaps an even more troubling question: what is the foundation upon which the OCC proposes to make such sweeping and damaging changes to CRA? Federal Reserve Board Governor Lael Brainard, in her recent remarks before the Urban Institute, noted that it was more important to get CRA rule

[78] See, e.g., proposed 12 C.F.R. § 25.10(c)(3), 85 Fed. Reg. 1247.
[79] Moreover, banks that receive a bank-level outstanding CRA rating would be subject to a five-year CRA evaluation period unless the data reported indicates that an earlier evaluation is warranted. See, "D. Data Collection, Recordkeeping and Reporting," 85 Fed. Reg. 1227.
[80] "Regulated financial institutions have *continuing* and affirmative obligation to help meet the credit needs of the local communities in which they are chartered," Community Reinvestment Act, 12 U.S.C. §2901(a)(3)

changes done right than done quickly, that any rule should be based on rigorous data analysis that is made available to the public, and that the rule adhere to CRA's core principles.[81]

The point about the OCC not having or sharing the data that provide the foundational support for the proposal is further highlighted by the OCC itself, which recently issued a Request for Information of financial institutions. The OCC sought public input from banks with this request for information to assist in determining how the proposed rule might be revised to ensure that the final rule better achieves the statute's purpose of encouraging banks to help serve their communities by making the framework more objective, transparent, consistent, and easy to understand. Banks were asked by the OCC to respond to the RFI by March 10, 2020, the same time frame for the original NPRM comment period. The information gleaned from the RFI, which the OCC intends to use to potentially refine the propose rule,[82] will not be made available to the public for review and analysis before public comments are due under the NPRM. This is not a fair, transparent and thoughtful process. In order to provide the public with the opportunity to comment on the full record, after the OCC collects this information from financial institutions, it should make the data available to public comment and re-open the comment period.

The proposed rule invites regulatory arbitrage.

In pressing ahead without fair consideration of prior input, and without providing sufficient time for public comment now, the OCC and the FDIC are creating a two (or three) tiered system of oversight. Banks will be able to choose their regulator based on which provides a friendlier CRA framework. Even under the proposal, small banks under $500 million in assets can opt out of the new rules[83] and yet lower their current reinvestment obligations. All banks, especially large banks, should have the same, strong, reinvestment obligations. When regulators choose different rules, and banks can choose their regulators, communities lose.

[81] Governor Lael Brainard, "Strengthening the Community Reinvestment Act by Staying True to Its Core Purposes," speech delivered at the Urban Institute, January 8, 2020, available at: https://www.federalreserve.gov/newsevents/speech/brainard20200108a.htm
[82] See OCC Bulletin 2020-4, "Community Reinvestment Act: Request for Public Input," January 9, 2020, available at: https://www.occ.gov/news-issuances/federal-register/2019/nr-ia-2019-147-federal-register.pdf.
[83] The proposed rule also would provide an opt in for small banks with assets of $500 million or less to allow the bank to determine whether to be evaluated under existing performance standards or the revised framework based on their unique business models. See, "II. Background," 85 Fed. Reg. 1208.

The federal banking regulators have traditionally proceeded through joint rulemakings, including for CRA regulations, seeking consistency and uniformity across institutions. The OCC proposal has not grappled with the important and difficult questions of how breaking from these precedents is in the public interest in this case. A final rule from only the OCC and the FDIC will need to contend with the fact that the Federal Reserve chose not to participate, provide the basis for that decision, and explain how the proposal nevertheless makes sense for regulated entities and affected communities. The current proposal makes no attempt to do so.

Here, the OCC and the FDIC may be creating an opportunity for regulatory arbitrage by going forward without the Federal Reserve. Banks may attempt to switch their regulator in order to lessen their CRA obligations. Such perverse incentives helped fuel the financial crisis, with the largest federally chartered thrifts failing, begetting the foreclosure crisis and ultimately, the end of the Office of Thrift Supervision (OTS). Before the crisis, the OTS sought to attract institutions to the OTS thrift charter by touting the strong preemption protection and other benefits a thrift charter might provide. The failure of OTS regulated institutions such as Washington Mutual, Downey Savings and Loan, Wachovia, World Savings, and, forebodingly, Indymac Bank, expedited the nation's financial crisis.

Already, community banks are urging that the proposed rule's thresholds be raised so that even more banks will be exempt from the new framework.[84] Why is the FDIC signing on to a proposal that most of its banks might opt out of?

The proposed rule undermines community input and participation.

Historically, the regulators have provided opportunity for the public to inform regulatory decisions by providing input on bank performance. "The OCC publishes an advance notice of scheduled CRA evaluations to inform and allow community and civic organizations, government, and other members of the public to express their views about CRA performance of banks. The OCC gives banks the opportunity to address any community concerns and takes the

[84] Brendan Pederson, "Community banks seek broader exemption from CRA changes," American Banker, March 12, 2020.

public's concerns into account when evaluating CRA records of banks and reaching conclusions about their performance ratings."[85]

This proposal appears designed to weaken community input and participation. Why else would such a complicated and substantial change to the rules implementing the nation's redlining law be initially filed with a mere 60 days for public comment? We appreciate that the regulators agreed to extend the comment period an additional 30 days, but this extended period began with the onslaught of the current COVID-19 crisis. As community groups struggle to continue to their serve their economically and health ravaged communities, the OCC and the FDIC have shockingly refused to suspend the rulemaking which promises to further devastate these same communities and frustrate future efforts to stabilize and recover. Community groups, industry groups, and Congressional leaders have all called for an extension or suspension of the rulemaking. As mentioned above, regulators need to consider the effects of COVID-19 on LMI communities and the lending, investment and financial services landscape, and commenters need adequate time to evaluate the potential effects of the proposed rule on these changed facts. We have not had sufficient time to do that.

Statements and actions by OCC officials also suggest that the OCC does not like to hear from people with whom it disagrees. This is not acceptable for a public rulemaking process. This reaction against community input is evident in the proposal itself, which includes arbitrary thresholds that are not justified, references data not shared, creates a formula-driven process that will make community input and partnerships less relevant, treats performance context as an afterthought, appears to propose that public input not be welcome on bank performance, and precedes an effort to collect data from banks in order to validate the rulemaking after the fact (without, presumably, making that data publicly available).

The proposal would likely lead to far less meaningful community input as CRA implementation would move to formula-based approaches and rely on bank performance data that is less transparent and available to the public than is the case today. In focusing on bank balance sheets, the regulators move away from public and transparent data sources on home lending, CRA small business lending, and deposit and branch data. Similarly, the public does not have access to data regarding where bank depositors live, so cannot meaningfully analyze whether

[85] Office of the Comptroller of the Currency, "Fact Sheet: Community Reinvestment Act," Community Investments, March 2014, available at: https://www.occ.gov/publications-and-resources/publications/community-affairs/community-developments-fact-sheets/pub-fact-sheet-cra-reinvestment-act-mar-2014.pdf

banks are reinvesting where their depositors live, let alone where they are conducting lending and investment activities.

And in establishing presumptive ratings based on (arbitrary) thresholds, banks will have no incentive to engage with community stakeholders to better understand local credit needs, or work with community-based organizations to help meet those needs. As Martin Gruenberg, former Chair of the FDIC, noted in his dissent to this Proposal, "These presumptive standards undermine one of the most important benefits of CRA - the incentive for banks to develop partnerships with local community organizations and other stakeholders to address community needs - because the banks can satisfy their CRA obligations by simply hitting the metric… The proposal undermines what has been a core strength of CRA for forty years – the encouragement of bank engagement and dialogue with stakeholders in local communities to understand and better serve historically underserved areas."[86]

The proposal contains no apparent and meaningful way to incorporate community comments on local credit needs or on bank performance; community input comes second to target dollar goals. In particular, the proposed rule changes seem to dilute if not negate the impact of community group comments on bank performance during CRA exams. Performance context is used to assess how certain factors affect a bank's capacity and opportunity to meet performance standards. Performance context under the new regime does not appear to allow for any consideration of community comments on bank performance. This is a significant change that appears intended to ensure *less* accountability for banks to their communities. In contrast, the Federal Reserve's proposal appears to maintain an important role for community input.[87]

Of note, the OCC has also put out a separate request for comment on changes to its business licensing manual, including provisions meant to allow banks greater ability to fast track bank merger applications despite the submission of public comments. This comment period, of

[86] Statement by Martin J. Gruenberg, Member, FDIC Board of Directors; Notice of Proposed Rulemaking: Community Reinvestment Act Regulations, December 12, 2019.
[87] "The specific thresholds that would establish a presumption of satisfactory performance could be informed by examiner. The minimum activity threshold would be calibrated for geographies and different market conditions over time. current evaluation procedures but need not be set at the same level, and public input will be important," from Strengthening the Community Reinvestment Act by Staying True to Its Core Purpose," Remarks by Lael Brainard Member Board of Governors of the Federal Reserve System at the Urban Institute Washington, D.C. January 8, 2020,

course, will close during the current pandemic so no doubt few groups will be able to comment to oppose this effort by the OCC to further remove public input from bank oversight.[88]

The regulators even go so far as to propose taking away the unique and historic right of community members and the public to walk into a branch to access and review a bank's CRA Public File. Under the proposed rule, banks can now charge the public the cost of copying the file,[89] which could be prohibitive for many. In some ways, access to the CRA Public File is the main way CRA is known to the broader public that is not directly engaged in community development or CRA advocacy. CRA is meant to be a law for communities. The proposed rule eviscerates this principle.

CRC has serious concerns about this regulatory process, and the willingness of the OCC to fairly consider all public comments.

There are a large number of concerns regarding aspects of this NPRM process, namely:

- The proposed rule deviates from statutory purposes of CRA. This is true in its move away from a focus on low- and moderate-income individuals and communities, deposit services as well as credit services, meeting the needs of local communities, and ensuring that banks affirmatively and continually and address community credit needs.

- The regulators have ignored comments made during the Advanced Notice of Proposed Rulemaking, as well as most of the comments that have been made over the years as part of CRA modernizing efforts. With regard to public comments on the ANPR, "the majority support objective measurement of CRA performance, although they oppose a single metric."[90] Yet, here we are.

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[88] Brendan Pederson, "Will OCC plan silence some critics of bank M&A?" American Banker, March 19, 2020.

[89] However, banks would not have to provide data reported through HMDA in the public file because the proposal would collect home mortgage data directly instead of relying on HMDA data.62 Additionally, recognizing the advances in technology over the past couple of decades, banks would no longer be limited to providing public notice or making available the CRA information through physical means. Instead, banks would have the option to provide public notice or make available CRA-related information on their websites. If a community member who has requested CRA-related information does not have access to the internet, banks could offer to print out the information at that person's expense, instead of copying the information from a physical file. See, "D. Data Collection, Recordkeeping and Reporting," 85 Fed. Reg. 1227, 1228.

[90] Statement by Martin J. Gruenberg, Member, FDIC Board of Directors; Notice of Proposed Rulemaking: Community Reinvestment Act Regulations, December 12, 2019, citing Preamble to the NPRM at 13.

- The OCC has been shamelessly promoting and cheerleading for the proposal during this comment period, instead of listening to public comments. We further believe that the OCC has been providing misleading information to the public in the form of statements and comments expressed in interviews, testimony, public relations materials, and responses to individual inquiries. Misrepresentations concerning the content of the proposed rule will drive some members of the public to refrain from commenting because the OCC mischaracterization of the proposed rule makes the rule sound fine, or to offer comments that are impaired by a misunderstanding of the proposed rule's weaknesses in light of OCC comments.

- The NPRM fails to provide adequate data to support its approach and makes impossible any helpful analysis by the public as to the precise impacts this proposal will have on communities. As such, the proposed rule established thresholds and benchmarks that are arbitrary and capricious and entirely unsupported by the existing record. Relatedly, the proposal does not address the impacts it will have on various CRA stakeholders or activities. The National Community Reinvestment Coalition has filed a Freedom of Information Act (FOIA) request to obtain some of this information. The rulemaking should not be allowed to proceed until commenters have the ability to review this critical information to inform comments. Additionally, the OCC issued a Request for Information from banks almost at the same time as this proposal, apparently in the hopes of receiving data from the banks that would validate the proposed rule after the comment period closed. The Comptroller has stated that the results of this RFI will inform the Final Rule, presumably with no ability of the public to view and comment on those data points.

- The Comptroller has shown himself hostile to CRA in running a bank that did a poor job reinvesting in the community, in overseeing a lending program that CRC believed redlined communities of color, in foreclosing on homeowners to a much greater degree than making home loans in neighborhoods of color, and in astroturfing a public comment process where CRA was a consideration. Further, the OCC acknowledged that "fabricated comments" were submitted in favor of Mr. Otting's bank merger, yet there is no indication that the OCC ever investigated who was responsible, imposed any penalties on wrongdoers, or reformed their processes to ensure that this does not happen again.

- The Comptroller has shown his hostility to community groups and other critics in his comments, describing bank accountability as hostage taking[91] and making misleading

[91] According to the Wall Street Journal, Comptroller Otting explained at a 2018 banking conference, describing his experience with community groups holding OneWest accountable during the merger with CIT, "I went through a very difficult period with some community groups that…tried to change the direction of our merger. And so I have

statements about groups such as ours during a Congressional hearing.[92] The OCC staff also apparently called groups that signed a nonprofit coalition letter during the comment period, in a manner that would reasonably intimidate or chill further public participation in the comment process. There is no evidence that supporters of the proposed rule were subject to the same treatment. Moreover, the Comptroller appeared to have promised in advance not to consider the views of groups that did not themselves provide credit or services.[93] This preemptive rejection of unwanted comments prejudges the rulemaking process and irrevocably taints the final rule.

While CRA can be improved to better target access to credit and deposit products to low- and moderate-income families and families of color that need it the most, the proposal by the OCC and FDIC will do the opposite: weakening CRA rules, undermining the purpose of the statute, and harming low-income communities and communities of color in California and throughout the nation.

We need real CRA reform that will strengthen the law and the communities it was meant to benefit.

CRC urges the following:

- A retained focus on low- and moderate- income people and communities.

- A focus on lending that meets community needs, prioritizing loan originations, not purchases of loans that were made by other banks or for-profit companies. Mortgage lending should focus on owner occupants (not investors), and small business lending

very strong viewpoints. He has said that community groups should not be able to use the public comment process to "pole vault in and hold [bankers] hostage" during mergers. See David Dayen, "The Fake Public Comments Supporting a Bank Merger Are Coming from Inside The House," The Intercept, September 29, 2018. Later, Comptroller Otting was quoted in the American Banker as saying, "During an exam cycle, if a bank wants "to open a branch, close a branch or make an acquisition, certain community groups know how to . . . hold you hostage during that process and they use your lack of compliance in between the reviews in order to be able to do that." Rachel Witkowski, "5 items on the OCC chief's reg relief to-do list," American Banker, April 9, 2019.

[92] See Paulina Gonzalez-Brito, "The Community Reinvestment Act: Reviewing Who Wins and Who Loses with Comptroller Otting's Proposal," Written Testimony Before the United States House of Representatives Financial Service Committee, Subcommittee on Consumer Protection and Financial Institutions, January 14, 2020, pp. 14, 15, available at: http://calreinvest.org/wp-content/uploads/2020/01/PGB-Congressional-Testimony-1.14.20-with-Appendix.pdf

[93] Perhaps most alarmingly, Comptroller Otting was quoted as saying "…We won't tolerate groups that do not provide services to these communities to disrupt the process and affect our decisions." "Q&A with Comptroller Joseph Otting," available at: https://www.cbaofga.com/uploads/1/2/3/8/123887871/qa_comptroller_otting.pdf

should focus on smaller loans (under $100,000) and smaller businesses (no higher than $1 million in gross revenue). The Consumer Financial Protection Bureau should finalize a strong small business data collection rule so that the bank regulators and the public can clearly see which banks are serving, which banks are harming, and which banks are ignoring LMI communities and communities of color. Consumer loans should only count if they are beneficial to LMI communities, not subprime credit card loans or bank payday loan products over 36% APR or other thresholds established by states.

- A hybrid approach to assessment areas that ensures that traditional banks and modern branchless banks are actually serving communities. Banks with retail branch presence should service those areas where they operate. Banks without retail branch presence should have reinvestment obligations that consider where deposits are from, and where loans and profits are made. Non-retail bank reinvestment obligations should be developed with an eye towards increasing reinvestment in bank deserts, which this proposal does not do.

- A qualitative and quantitative analysis. Homeowners, small businesses, and impactful community development projects often require smaller loans and investment. Innovation and impact should be valued under CRA. A proposal that only considers what is easily monetized does not have community needs at its center.

- An end to CRA grade inflation. 98% of banks do not deserve to pass their CRA exams. This proposal will only make the problem worse. The goal should be to increase LMI lending and investment from current, inadequate levels, not to devise a system that counts more things in more places and will lead to larger numbers while actually resulting in less impactful LMI lending and investment, and less community benefit.

- More scrutiny of reinvestment in rural areas. More rural counties should be designated as “full scope review” areas subject to greater oversight and scrutiny as is generally the case for urban counties. This will immediately result in rural areas being better served, which will otherwise not occur under this proposal.

- A greater emphasis on the service test, not the elimination of it, so that branches in LMI communities retain their importance in CRA, as they have retained their importance to communities. The CRA statute references deposit products, and banks should ensure that affordable and accessible bank accounts and consumer products are available to LMI communities, communities of color, and immigrant communities (including language translation and interpretation services) so that everyone can build wealth and avoid predatory alternative financial service providers.

- Downgrade CRA ratings for discrimination and harm. Evidence of redlining or discrimination should result in a Needs to Improve or Substantial Noncompliance rating. The agencies should bolster fair lending exams which currently can consist of a mere one or two sentences in a performance evaluation. CRA should focus on race as well as income. CRA grades should also be lowered for violations of consumer protection laws, and for other harm to LMI people and communities. This includes downgrades for bank financing of displacement, which clearly worsens households' community credit needs by creating economic destabilization, evictions, ruined credit histories and decreased ability to be able to qualify for home and small business loans and build wealth.

- Greater community input, not less. CRA requires that the starting point for reinvestment decisions should be community needs, not a list from a federal banking regulator or the desires of big banks. Performance context, transparency of data regarding bank performance to enable better community input, public hearings during mergers, and the development of Community Benefits Agreements should all be encouraged and bolstered.

This deeply flawed proposal would result in *less* impactful lending and investment in the very communities that were the focus of CRA when passed by Congress in 1977. This proposal will make it easier for banks to obtain CRA credit without actually helping LMI communities, all the while retreating from key statutory and regulatory core principles of CRA, such as a focus on low-and-moderate income people and communities, a focus on banks meeting local community credit needs, and active community participation to ensure that communities, not big banks, benefit.

The OCC should share the data behind its assumptions and analysis, suspend this rulemaking process, and ultimately, pull this proposal so that CRA reform can proceed in a more transparent and thoughtful way that will actually benefit the communities CRA was designed to build up.

Thank you for your consideration of our views.

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