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Office of the Comptroller of the Currency
Federal Deposit Insurance Corp.

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RE: Docket ID OCC-2018-0008 and FDIC RIN 3064-AF22

To Whom It May Concern:

These comments are submitted on behalf of Calvin Bradford & Associates, Ltd. in response to the Proposed Rule for the Community Reinvestment Act (hereafter "Proposed Regulation") concerning the full replacement of the current CRA regulations (hereafter "Existing Regulations").

Calvin Bradford & Associates, Ltd. is a research and consulting firm that engages in research on housing and community development policy and provides expert services to clients related to civil rights and fair housing cases. I am the principal in the firm. I assisted in the drafting of the Home Mortgage Disclosure Act of 1975 (HMDA) and the Community Reinvestment Act of 1977 (CRA). I have conducted scores of analyses of disparate impacts in mortgage lending using every version and format of the HMDA since its first release of the public data. Using data sources from the HMDA, the Census Bureau, other public records, and data responding to subpoenas and legal requests for production, the firm has provided expert services and research for range of lending discrimination cases in both state and Federal courts. I have published research on discrimination practices in the real estate and lending industry from academic journals to reports from public interest groups for over 40 years.

I worked with a range of community-based organizations, researchers, government agencies, and staff of the Senate Banking Committee on the activities that created Community Reinvestment Act (SB 406). I have assisted in the development, monitoring, and evaluation of community development programs and CRA agreements. I have worked on CRA protests. I have written guidebooks on the use of the CRA. I have testified before committees in Congress on the implementation and oversight of the CRA.

These comments cannot address all the issues and aspects of the proposed regulations. The comments focus on key aspects of how the regulations over time have undermined the dynamic relationship established in the initial regulations that was the engine for billions of dollars of reinvestment and creative development banking products paired with a focus on fair lending and nondiscrimination. In addition, these comments have a particular focus on the erosion of the original focus of the Community Reinvestment Act (CRA) to overcome racial redlining and discrimination.

What is the Context for the Proposed Regulation?

An integral part of these comments is the following background statement that supports the final comments. Understanding the history of the Community Reinvestment Act (CRA) and the devolution of serious efforts to actively engage in enforcement and comprehensive performance ratings of covered institutions in accord with the goals of the Act gives substance to the comments about the Proposed Regulation. It is also important to incorporate a summary of some of the critical changes both in the banking industry and in the lending programs and development resources that have taken place since the CRA was created.

1. The Dual Housing Finance Market and Racism in the Mortgage Markets[1]

The history of the CRA began with community-based activities to fight racial redlining and financial disinvestment from minority and racially-changing communities. Current historians have been active in tracing mortgage redlining to the neighborhood risk maps created by the Federal Home Loan Corporation during the Depression and subsequently adopted by the Federal Housing Administration for making FHA loans. These maps graded neighborhood risk categories and placed red lines round neighborhoods claimed to pose a high risk to lenders. The maps were developed by Social Darwinists in the 1920s who imposed racist interpretations onto models of neighborhood life cycles and real estate values. These models defined racial change as the critical force that caused decline in older neighborhoods.

Backed by the Federal Government, these models were incorporated in the standards of real estate appraisal, and the lending and real estate development sectors claiming that "the influx of inharmonious racial and ethnic groups" causes neighborhood economic decline and blight.[2] Up until the time of the civil rights movement in the 1960s, minority and racially changing communities were cut off from mainstream sources of mortgage lending and were left to what one historian defined as "the underworld" of real estate finance.[3]

Sadly, the passage of the Fair Housing Act and the earlier Equal Credit Equal Opportunity Act did not result in diminishing discrimination in mortgage, consumer, and business lending and investment. Passing laws that were not supported by the enforcement agencies against the discrimination by the real estate appraisal, sales, and development sectors and the banking industry led to an expansive exploitation of minority and racially changing communities. Nowhere is this exploitation more evident and more destructive than in the reversal of the racial redlining by the Federal

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[1] References for this section are generally taken from documents from this time period indicating how well known the lending patterns and issues were at the time.

[2] See, Calvin Bradford, "An Analysis of Underwriting and Appraisal Practices and Their Impact on Credit Availability", Vol. 3, No. 1, *Real Estate Issues* (Summer, 1978), pp. 1-14..

[3] See Calvin Bradford and Dennis Marino, *Redlining and Disinvestment as a Discriminatory Practice in Residential Mortgage Loans*, Office of Fair Housing and Equal Opportunity of the U.S. Department of Housing and Urban Development. Washington, D.C.: U.S. Government Printing Office (1977), citing work by Frederick Case.

Housing Administration in its FHA loan programs. Without directly addressing the racial discrimination built into the real estate and lending industries, the release of FHA lending into minority markets did not confront these racial disparities – rather it enhanced the them.

What is often misunderstood is that after the urban riots, minority and racially changing communities were no longer redlined by all mortgage lenders. The Kerner Commission report on the causes of the civil disorders of the 1960s had focused attention of the social, economic, and geographic racial divide in the United States. The report of the National Advisory Commission on Civil Disorders, (the Kerner Commission) issued its warning that "our nation is moving toward two societies, one black, one white—separate and unequal."[4] Under pressure from the civil rights movement in the 1960s, FHA had been gradually expanding access to FHA lending to minority markets. After the "urban riots", the FHA literally reversed its redlining practices and used existing and newly created mortgage programs and policies to inject FHA loans into the previously redlined communities.

On the other hand, the banking industry generally did not use FHA loans.[5] FHA lending was a specialized product controlled by mortgage bankers. These were lenders that borrowed funds from commercial lines of credit to make FHA loans and then sold the loans to other investors. Because the loans were guaranteed by the government, investors such as life insurance companies, bought the loans. If the loans defaulted and were foreclosed, then the government paid the investors for the loans, making them essentially risk free to the investors.[6] The mortgage companies made money from the origination charges and fees for the loans and on servicing the loans (collecting the monthly payments and managing the accounts) for the investors.

Most of the profit came from servicing the loans. This created a powerful economic incentive for mortgage bankers to build up as large a portfolio of loan servicing as possible while seeking to minimize the actual costs of servicing these loans. If the loan went into default, mortgage companies had to spend more time and expense responding to the default. With virtually no regulation, mortgage companies were able to turn potentially costly servicing of defaulted loans into a source of profit by foreclosing as early as possible and making a profit from fees charged to foreclose the loans.

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[4] Kerner Report. *Report of the National Advisory Commission on Civil Disorders*, The National Advisory Commission on Civil Disorders. (Washington, DC, 1968).

[5] At this time, savings and loan associations and savings banks provided the great majority of mortgage loans in the United States. Savings and loan associations and savings banks were required to place 80% of their lending into residential mortgage loans. Commercial banks provided a smaller share of the mortgage lending. These comments on the Proposed Regulation use the term "bank" as a generic category to include both the savings and loan and savings bank institutions as well as commercial banks.

[6] See, Calvin Bradford, Leonard Rubinowitz and Darel Grothaus, *The Role of Mortgage Lending Practices in Older Urban Neighborhoods: Institutional Lenders, Regulatory Agencies and Their Community Impacts*, **Center Report**, Urban-Suburban Investment Study Group, Center for Urban Affairs, Northwestern University (Fall, 1975).

Prior to the reversal of its redlining, mortgage bankers using FHA loans provided a key resource for new housing development in the middle-class white suburbs. With the banks continuing to redline minority and racially changing communities, mortgage bankers saw the minority markets as a vast new opportunity that could be exploited – not simply served. When the minority markets opened up through FHA lending, mortgage bankers were in a position to use the historical racial models to foment racial change. Working the real estate brokers who solicited sales by warning white urban homeowners of the alleged pending doom of racial change (a process known as "blockbusting"), mortgage bankers funded the racial change as well as the homes sales for the whites fleeing from the fear peddled by the real estate companies.

Without regulation or oversight from FHA, FHA lending produced massive levels of abuse, fraud, and the wholesale exploitation of the minority markets making unsound loans that led to massive levels of foreclosure. Having been excluded from mainstream mortgage lending, borrowers in minority markets were unfamiliar with mortgage lending. Therefore, it was relatively easy for mortgage companies to steer borrowers into mortgages for which they were not properly qualified and which they could not afford to maintain. FHA required that foreclosed properties be boarded up, creating blight in the wake of the foreclosures. As borrowers defaulted and as foreclosures mounted in minority and racially changing neighborhoods, the results of the fraud and abuse in FHA lending produced a self-fulfilling prophecy of decline associated with the racial change. While these communities suffered, the real estate agents and mortgage companies made huge profits.[7]

Rather than a market where white communities had access to all forms of mortgage lending and minority communities were cut off from mortgage lending, this created a dual mortgage market defined by race. There was one market supported by mortgage bankers and FHA loans concentrated the minority communities and a separate conventional lending market through the banking industry concentrated in in the white communities. These markets were not only separate, they were also unequal. The FHA market in minority and racially changing communities was driven in large measure by exploitation while the conventional market in white markets was driven by sound and even overly conservative underwriting. The minority markets were defined well by what historian Keeanga-Yamahtta Taylor terms "predatory inclusion" rather than redlining.[8]

2. The Anti-Redlining Movement and the Creation of the Community Reinvestment Act:

When minority and racially changing communities across the country began organizing against "redlining" in the 1970s, the focus was on the practices of the banking system. The organizing involved a two-pronged attack. One attack was on the exploitation and destruction of minority and racially changing communities though the abuses and fraud in the FHA program. The other attack was on the

[7] See for example, Brian Boyer, *Cities Destroyed for Cash*, Chicago: Follett Publishing Co., 1973.

[8] See Keeanga-Yamahtta Taylor, *Race for Profits: How Banks and the Real Estate Industry Undermined Black Homeownership* (Chapel Hill: University of North Carolina Press, 2019) for a clear and detailed analysis of the failure of national policies and practices to address the racial discrimination imbedded in the banking and real estate industry and the resulting destruction of black homeownership markets.

racist policies of the banking industry which cut these communities off from sound lending and investments.

The effort was not to eliminate FHA lending but to eliminate the abuses and fraud and provide sound lending to their communities. They saw the banks as a source of sound lending whether FHA or conventional (not insured by a government agency). Since banks made few FHA loans, the focus was on making the banks provide sound conventional loans in their communities. Bank redlining was seen not simply as an issue related to cutting off sound lending. The banking industry took deposits from these communities but channeled those funds into loans in white and higher-income communities. The result was massive financial support for building white suburban areas (using both FHA lending from mortgage companies and conventional lending from banks) and the massive disinvestment from minority and racially changing communities. The banks were stripping these communities of people's assets. They were disinvesting in both their lending and deposit functions. The call for reinvestment was about both lending and the provision of banking services and convenience. This was both an issue of economic discrimination and an issue of fair lending.

The center of the anti-redlining organizing activities was in Chicago. Responding to the lack of bank lending and the mounting foreclosures resulting from predatory FHA lending, these communities organized individually, then in local coalitions, and then nationally. In 1973, the first national coalition (National People's Action on Housing) was formed out of organizing efforts emanating from Chicago.[9] This community-based effort resulted in legislation that created the Home Mortgage Disclosure Act (HMDA) to make public where banks made their loans. The legislation was supported by extensive hearings that used local studies across the nation to document the cycle of disinvestment followed by exploitive lending from contract sales, FHA lending, and other forms of exploitive lending. Initially the anti-redlining movement sought disclosure for both loans and deposits so that the level of disinvestment as well as the lack of lending would be revealed. The final Act provided only loan disclosure, but it did reveal the astounding lack of bank lending in minority and racially changing areas by banks.

During this same period, a local group of investors in Chicago was able to stop the bank in the South Shore community from moving out. In 1973, they were able to acquire the bank to use it as a financial vehicle to reinvest in this racially changing community. This was not simply about lending. Data from a City of Chicago public depository ordinance had revealed that the deposits from that community were much larger than experts had predicted – and that the lion's share were held by downtown banks that did not invest in South Shore. The creation of the South Shore Bank as a community economic development tool became central to the thinking that led to the Community Reinvestment Act.

Out of these redlining and community development issues, the recently-formed Woodstock Institute in Chicago played a critical role as a convener that brought together community groups, the creators of the South Shore Bank, community development researchers, state and local agencies and

[9] The organization was a voluntary coming together of local community groups from across the nation. Its name was soon changed to National People's Action and a technical assistance and organizing arm, The National Training and Information Center (NTIC), was created to provide support for the coalition and its members.

officials with emerging models for reinvestment, state housing agencies, and legislators to advance reinvestment responses to the patterns of redlining and disinvestment. Several of these meetings, conferences, and retreats included staff from the Senate Banking Committee chaired by William Proxmire. In 1977, Senate Bill 406, the Community Reinvestment Act, grew out of this process.

The idea was simple. Banks were chartered by the Federal Government and/or they received insurance that protected depositors from losses if the banks failed. They were able to collect deposits as a base of capital because the deposit insurance made them safe investments. No other private institutions are given such broad protection for their markets. They were, as Senator Proxmire stated, essentially government franchises. But while they were required to define a service area at the time they received their charters, they were free to conduct business and make loans without regard for that area once they were chartered. At the core of the Community Reinvestment Act was a basic principle that banks need to continually define their service areas based on where they receive deposits and make loans and that in return for the privileged support they receive from both regulation and deposit insurance, they should have a continuing – and affirmative - obligation to serve the banking needs of that entire service area. Because of past patterns of discrimination, the Act emphasized that these services were all inclusive and could not exclude low- and moderate-income areas.

Today, we often hear bankers and regulators and others claim that the law applied to low- and moderate-income areas, but that it does not mention race or discrimination. While that is true technically, it is clear from the history of the Act that it was a response to racial redlining. Community advocates had a larger vision for bank reinvestment than simply to serve disinvested minority and racially changing communities. They advocated for the law to include low- and moderate-income communities overall. Indeed, after the Act was passed, some of the most active and creative organizations utilizing the Act and creating reinvestment programs and partnerships with banks were from communities with relatively low levels of minorities. However, community advocates feared that the law would not eradicate racial discrimination in the banking industry unless the bill contained specific anti-redlining language.

This can be seen in the response to the original draft of the bill made by National People's Action through the National Training and Information Center. NTIC recommended language that specifically focused on the need to provide services to "underserved areas" These were defined as follows:

> *The term "underserved areas" shall be applied to all census tracts, or aggregate of census tracts within primary service areas, which are characterized by minority or racially changing populations, lower income households, or an older housing stock.*

In addition, to specifically address the practices that were used to redline minority and racially changing areas, NTIC recommended:

> *requiring no discrimination in the quoting or application of conditions and terms, or, in the case of real property, the appraisal, due to the geographic location of the applicant or the subject property, and informing all regulated institutions that whenever disclosure data or other records subject to examination by the agents of the financial regulatory agencies indicate variance of*

terms, conditions or appraisal standards from one area to another, the burden of proof falls on the officers of the institution to demonstrate in clear and compelling terms, and with objective evidence, that in that particular case, such a variation was necessary to avoid what can be demonstrated to be an unsound business practice.

Senator Proxmire held that the fair lending and civil rights intent of the act was so clear that it need not have such language added to the bill, especially since it represented a continuing line of civil rights and fair lending laws from the Equal Credit Opportunity Act, to the Fair Housing Act, and to the most recent Home Mortgage Disclosure Act. Sadly, as discussed below, the fair lending aspect of the Act has been eroded over successive changes in the implementing regulations and performance evaluation process.

The original bill identified a primary service area that was to be the focus of a bank's obligation to provide both deposit and lending services. The bill also identified the consumer deposits used to define that area. These sections of the text read:

(d) *"primary savings service area" means that area from which a deposit facility obtains or expects to obtain more than one-half of its deposit customers.*

(e) *"consumer deposit" means a time or savings deposit or demand deposit owned by one or more individuals and in an amount less than $100,000.*

The National People's Action supported the definition of deposits, but sought a more focused definition for the service area in recommending:

the term "primary service area" means:

(A) in the case of savings and loan associations, that geographic territory which includes the areas in which the institution originates 80% of its loans and all other areas which are as close as or closer to the association's facilities as such areas.

(B) in the case of banks, that geographic territory from which the institution receives 80% of its "consumer deposits" and all other areas which are as close as or closer to the bank's facilities as such areas.

While NPA sought an expansive definition of loan products, it made one caveat for a product which it did not see necessarily as a community development resource. The highlighted text in its recommended language below indicates this concern:

the term "loan" shall include all individual loans for mortgages, property improvement, land purchase, construction, and business, as well as individual consumer loans. ***It shall not include automatic extension of credit from revolving charge accounts.***

3. The Content of the Original Act:

In the legislative process that responded to lobbying efforts to weaken the bill, including opposition from the financial regulatory agencies themselves, the provisions that defined the service area were left to the implementing regulations as were the provisions that defined most of the specific requirements for compliance. There was no language in the final bill that directly referenced underserved areas or minority and racially changing areas, as the language on servicing low- and moderate-income areas was left as a silent umbrella category that covered most of these racial communities. In addition, the Act left it to the implementing regulations to define how banks defined their service areas. Some of the key provisions that were contained in the Act as passed and signed include:

SEC. 802(a) The Congress finds that--

1. *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;*

2. *the convenience and needs of communities include the need for credit services as well as deposit services; and*

3. *regulated financial institutions have continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.*

SEC. 802(b) It is the purpose of this title 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.

Another section read:

SEC. 804. In connection with its examination of a financial institution, the appropriate Federal financial supervisory agency shall –

1. *assess the institution's record of meeting the credit needs of the entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution; and*

2. *take such record into account in its evaluation of an application for a deposit facility by such institution.*

Together, these sections enshrine in law the basic purpose of the CRA . The purpose is to impose a continuing and affirmative obligation on banks to serve the convenience and needs of their local communities and to require the Federal regulatory agencies to take that record into consideration in examination and supervisory activities.

Immediately after the CRA was passed, HUD had contracted for a report on the likely impact of the CRA. The report includes sections on what the examination process should look like and what types of resources should be used in the examination process. At the beginning of the section on the examination of the institution's record is the statement, "The first almost elementary aspect of any assessment should be an evaluation of the lenders (sic) record under the Fair Housing Act, Equal Credit Opportunity Act, and related non-discrimination regulations. A lender in violation of these provisions is, *a priori*, not meeting the needs of his community" (emphasis added).[10]

4. The Content of the Original Regulations:

The implementing regulations imposed specific requirements on banks to define their local service area(s) and indicate the lending services they will make available to those areas. The CRA implementing regulations were published on October 12, 1978. The regulations contained separate sections for each of the four Federal banking regulatory agencies that existed at that time (The Federal Reserve, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision). The section of the regulations for the Comptroller of the Currency that regulates nationally chartered banks are used below as an example of the regulations. While the structure of different banks and savings institutions determined which agency regulated them for CRA purposes, the regulations were essentially the same for each agency.

The Delineation of the Communities to Be Served

Unfortunately, from the issuance of the first implementing regulations in October of 1978, there was evidence that the regulatory agencies would not require lenders to define their local community definitions in ways that would ensure the elimination of racial redlining.[11] These regulations provided for three ways of defining the local community area as indicated below:

> *§25.3 Delineation of community.*
>
> *(a) Each national bank shall prepare, and at least annually review a delineation of the local community or communities that comprise its entire community, without excluding low- and moderate-income neighborhoods. Maps shall be used to portray community delineations . The reasonableness of the delineations will be reviewed by national bank examiners .*

[10] Warren Dennis, "Working paper No. 24 - The Community Reinvestment Act of 1977 – Its Legislative History and Its Impact on Applications for Changes in Structure Made by Depository Institutions to The Four Federal Financial Supervisory Agencies", Credit Research Center, Krannert Graduate School of Management – Purdue University, 1978, under a contract with HUD, pages 80-81. In a foreshadowing of the problems that we are addressing today, the report warns that aside from the Federal Home Loan Bank Board, the bank regulatory agencies have little experience with fair lending enforcement and the understanding of the fair lending laws. The report even notes that "the Federal Reserve Board continues to contest its obligations under the Fair Housing Act."

[11] The regulations and the introductory comments are found in the *Federal Register*, Volume 43, Number 198 for Thursday, October 12, 1978, at pages 47114 to 47155.

(b) A local community consists of the contiguous areas surrounding each office or group of offices, including any low- and moderate-income neighborhoods in those areas. More than one office of a national bank may be included in the same local community. Unless the Comptroller determines otherwise, a community delineation need not take account of an off-premises electronic facility that receives deposits for more than one depository institution. In preparing its delineation, a national bank may use any one of the three bases set forth below.

> *(1) Existing boundaries such as those of standard metropolitan statistical areas (SMSA's) or counties in which the bank's office or offices are located may be used to delineate a local community. Where appropriate, portions of adjacent areas should be included. The bank may make adjustments in the case of areas divided by State borders or significant geographic barriers. or areas that are extremely large or of unusual configuration. In addition. a small bank may delineate those portions of SMSA's or counties it reasonably may be expected to serve.*
>
> *(2) A national bank may use its effective lending territory, which is defined as that loca1 area or areas around each office or group of offices where it makes a substantial portion of its loans and all other areas equidistant from its offices as those areas. Adjustments such as those indicated in paragraph (b)(1) of this section may be made.*
>
> *(3) A national bank may use any other reasonably delineated local area that meets the purposes of the Community Reinvestment Act (CRA) and does not exclude low- and moderate-income neighborhoods.*

The recommendation by NPA to define "underserved" areas was modified by the regulatory agencies to become "local community or communities". The recommendation that these areas be defined as an area where the bank received at least 80% of its consumer deposits was not simply watered down to the "majority" of its deposits as indicated in the original bill, but was eliminated by the regulatory agencies altogether. What was left were three options with only one even directly tied to any form of lending.

The first method required using existing boundaries, such as entire Metropolitan Statistical Areas (MSAs) or counties. If an institution chose this method, it would typically avoid redlining. The second method allowed for defining the local community in a manner that reflected some of the *general concepts* in the draft CRA legislation by providing for a local community defined the institution's lending patterns. In this case, the institution was to delineate an "effective lending territory" defined as "that local area or areas around each office or group of offices where it makes a substantial portion of its loans and *all other areas equidistant from its offices as those areas*" (emphasis added). On the other hand, there was also a third option where the institution could "use any other reasonably delineated local area that meets the purposes of the Community Reinvestment Act and does not exclude low- and moderate-income neighborhoods".

The regulatory agencies were left with great discretion to decide what would be interpreted as "a substantial portion" of an institution's loans. The most encouraging language was related to the lending

territory where the local community would essentially be defined by areas around the office, or offices and all other areas "equidistant" from those areas. The regulators provided for the most discretion in the third option, where an institution could define any type of area it pleased as long as it could convince the regulator that this did not unreasonably exclude low- and moderate- income areas. Although there is often a substantial overlap between low- and moderate- income areas and minority areas, they are not the same. Over the evolution of the CRA regulations, this third option has provided the most leeway for allowing institutions to gerrymander their service areas and continue redlining.

Thus, in the initial regulations, the Federal banking agencies that had not endorsed the bill to create the CRA provided the banking institutions with room for considerable gerrymandering of their service areas. The requirement that any service area needed to include some form of contiguous areas and that these areas could not exclude low- and moderate-income areas, was all that was left of the original concept that the local community or communities should extend geographically out to where the banks received the great majority of their deposits and made the vast majority of their loans and all areas equidistant from those points.

The CRA Obligations Placed on the Banks

Among the actions that the CRA regulations required banks to take to comply with the law were the following:

> *§25.4 Community Reinvestment Act statement.*
>
> *(a) Within 90 days after the effective date of this part, the board of directors of each national bank shall adopt a Community Reinvestment Act (CRA) statement for each delineated community.*
>
> *(b) Each CRA statement shall include at least the following:*
>
> > *(1) The delineation of the local community;*
> >
> > *(2) A 1ist of specific types of credit within certain categories, such as residential loans for one to four dwelling units, residential loans for five dwelling units and over, housing rehabilitation loans, home improvement loans, small business loans, farm loans community development loans, commercial loans, and consumer loans, that the bank is prepared to extend within the local community; and*
> >
> > *3) A copy of the Community Reinvestment Act notice provided for in §25.6.*
>
> *(c) Each national bank is encouraged to include the following in each CRA statement:*
>
> > *(1) A description of how its current efforts, including special credit-related programs, help to meet community credit needs;*
> >
> > *(2) A periodic report regarding Its record of helping to meet community credit needs; and*

(3) A description of its efforts to ascertain the credit needs of its community, including efforts to communicate with members of its community regarding credit services.

In addition, each bank is required to keep a file of public comments in its CRA file and to make these comments available to the public in addition to making the bank's CRA statement available at the head office and all physical branch offices.

Therefore, while the regulations allowed banks to engage in eliminating many minority, racially changing, and low- and moderate-income areas in defining their local service areas, the regulations did provide requirements that the institutions describe their service areas, describe the efforts they made to determine the credit needs of their service areas, and list the loan products that they would provide to the full community.

Taking Account of the Bank's CRA Performance in the Original Regulations

The CRA required Federal regulators to assess the CRA performance of the banks and take account of this performance when reviewing applications for charters, branches, mergers, and acquisitions. The regulations defined twelve assessment factors to be applied to the CRA performance reviews as follows:

(1) Activities conducted by the institution to ascertain the credit needs of its community, including the extent of efforts to communicate with members of its community regarding the credit services being provided by the institution.

(2) The extent of the institution's marketing and special credit-related programs to make members of the community aware of the credit services offered by the institution.

(3) The extent of participation by the institution's board of directors in formulating the institution 's policies and reviewing its performance with respect to the purposes of the Community Reinvestment Act.

(4) Any practices intended to discourage applications for types of credit set forth in the institution's CRA statement.

(5) The geographic distribution of the institution's credit extensions, credit applications, and credit denials.

(6) Evidence of prohibited discriminatory or other illegal credit practices.

(7) The institution 's record of opening and closing offices and providing services at offices.

(8) The institution's participation, including investments, in local community development and redevelopment projects or programs.

(9) The institution's origination of residential mortgage loans, housing rehabilitation loans, home improvement loans, and small business or small farm loans within its community, or the purchase of such loans originated in its community.

(10) The institution's participation in governmentally insured, guaranteed, or subsidized loan programs for housing, small businesses, or small farms.

(11) The institution's ability to meet various community credit needs based on its financial condition and size, and legal impediments, local economic conditions, and other factors.

(12) Other factors that, in the agency's judgment, reasonably bear upon the extent to which an institution is helping to meet the credit needs of its entire community.

These assessment factors add flesh to the bare bones of the bank's obligations. They cluster around several key factors:

1. Assessment factors 1, 2, and 3 require evidence that the institution worked to determine the credit needs of its service area(s) and then marketed its services to those communities. In order to ensure that these efforts were central to the operation of the bank, the institution needed to indicate how the board of directors was involved.

2. Assessment factors 4, 5, 6, and 7 all provided a review of the extent to which the bank served all the communities in its service area – including low- and moderate-income neighborhoods.

   Assessment factor 7 on the pattern of opening and closing branches at least indirectly focuses on the provision of banking services (deposits, convenience, etc.) for all neighborhoods where such services are left out of the definition of the community in both the Act and the regulations.

   While fair lending and nondiscrimination provisions were not included specifically in the Act, these assessment factors attest to the understanding by the regulatory agencies that the CRA was, indeed, a civil rights law intended to overcome discrimination. These assessment factors provide a fundamental focus on fair lending and issues of discrimination as part of the assessment of an institution's performance and evaluation.

3. Assessment factors 8, 9, 10 and 11 all focus on the actual record of service in providing the loans defined in the CRA Statement as well as participation in a wide range of lending and community investment programs. Assessment factor 11 places this record in the context of the capacity of each institution.

In spite of the lack of enthusiasm for the Community Reinvestment Act by the enforcement agencies, the regulatory process produced performance measures that created a dynamic relationship between the banks and the communities that they serve. Assessing community needs and marketing – all to be linked to the direction of the board of directors – signaled the importance of these activities at the heart of bank operations. The general provisions for accepting community comments and creating a public file for such comments provided leverage for community members to ensure that these obligations were not ignored. Reviewing the record of lending and investment against the community

needs and the capacity of the banks provided an opportunity for both the regulators and the bank's community to assess its record – especially as additional HMDA disclosure and the disclosure of small business lending provided improved public data. Finally, the regulations plugged a hole in the Act that had failed to make explicit the fair lending and antidiscrimination goal of the law.

Before moving on, it is important to note here that while consumer groups, civil rights groups, and community-based reinvestment groups have always been concerned that low- and moderate-income individuals are not discriminated against because of their financial status, the Community Reinvestment Act is focused on low- and moderate-income **"communities" and "neighborhoods"** as geographic areas of need and not on individuals per se. Everywhere in both the language of the Act itself and in the implementing regulations, the term "low- and moderate-income" is directly linked to neighborhoods or communities.

What Has the Community Reinvestment Act Produced?

The Community Reinvestment Act created a new understanding of the relationship between banks and the communities that they are chartered to serve. The public was given a powerful role in monitoring and challenging the practices of banks that suck deposits out of older, minority, racially-changing, and low- and moderate-income communities and pump it into higher-income, predominantly white, and newly developing communities.

There were three avenues for public intervention into the practices of the banking system:

1. Regulators were supposed to assess the efforts that banks make in defining community needs and providing services that meet those needs;

2. The public could initiate its own comments and recommendations as part of a public file on the community needs and the extent to which each bank did or did not serve those needs; and

3. The most powerful tool was the right of the public to formally challenge ("protest") applications for charters, branches, mergers, and acquisitions. This created the potential for community opposition to block the most valuable business practices of banks – expansion and consolidation to increase their market share and influence.

Community-based organizations were quick in seizing these opportunities to challenge disinvestment and discrimination and draw banks back into supporting the financial welfare and development of their communities. What often began as an adversarial challenge to a bank's application for a branch, a merger, or an acquisition commonly developed into a reinvestment partnership. These programs altered the fundamental mortgage lending process and created opportunities for homeownership for those who had been excluded due to overly restrictive and discriminatory underwriting standards. These reinvestment agreements (now commonly referred to as "Community Benefit Programs") spanned the range of banking services from the creation of new branches, special

affordable lending programs, rehabilitation loans, business loans, and support for community-based organizations and institutions.

Support for the public participation in the CRA came from both community-based organizations and government agencies. For example, the National Training and Information Center that provided support for the original CRA organizing by National People's Action produced its first CRA guide in 1979. The U.S. Department of Housing and Urban Development published a CRA guide on "Neighborhood Reinvestment Strategies" in 1980. The Center for Community Change, which provided technical and support and community-building resources for community-based organizations across the nation, produced a "Citizen's Action Guide" for the CRA in 1991. The National Community Reinvestment Coalition (NCRC) [which was created in 1990 as a national membership organization to support community groups, civil rights and fair housing groups, local and national development groups, local government development agencies, consumer groups, and women- and minority-owned business organizations working on reinvestment] produced several support documents including a guidebook in 1994. The Federal Financial Institutions Examination Council even produced "A Citizens Guide to CRA" in 1985.

Early on in the history of the CRA four major reinvestment programs in Chicago in 1984 and 1985 served as examples of the dynamic nature of these programs.[12] The structure of these programs became models that were used across the country. These programs set targets and a monitoring program for the commitments. They expanded mortgage lending for underserved markets. More than this, however, they identified other underserved markets that were critical to the financial vitality and stability of local neighborhoods. Finally, they created an oversight process that included both representatives of the banks and representatives from the communities.

One important example of an identified underserved market was the need for loans for mixed-use properties. Not only in Chicago, but all across older cities and towns in America, commercial areas were defined by properties with business uses on the main floor and residential units above. Because they were neither purely commercial nor purely residential, they did not fall into existing lending programs. In many ways, these mixed-use areas were the heart of a neighborhood. At the time, however, zoning and planning favored separation of commercial and residential functions. These mixed-use programs were not only successful in these reinvestment programs, but they established a recognition of the value of mixed uses in community development. Today, if one looks at the development patterns in many metropolitan areas, we see mixed-use development (commercial and shopping surrounded by high-density residential units) on a large scale in both new growth suburban areas and in central city redevelopment.

[12] These agreements were between the Chicago Reinvestment Alliance and Harris Bank, Northern Trust, Continental Bank, and First National Bank of Chicago.

A focus on underserved markets continues in these community benefit programs today. The 2016 Key Bank community benefit program, for example, places a particular focus on serving the needs of rural areas and smaller towns and contains a provision for the bank to cease funding a payday lender.

The most important aspect of these programs, however, is the partnership that can be created between the bank and the community. Having evaluated some of these programs, including the major Chicago agreements, I have seen first hand how bank officials are drawn into the underserved communities and learn to identify sound lending opportunities that they did not see, often because bank officials had never walked those streets nor met with the local organizations and businesses. On the other side, where oversight and/or review of the program included both bank and community members, the community members become knowledgeable about banking practices, underwriting, and risk management in the programs. Adversarial beginnings would develop into working partnerships.

A Ford Foundation funded study identified 177 CRA agreements by June of 1992. The agreements spanned the nation from Massachusetts to California and from Minnesota to Louisiana. By 1994, The National Community Reinvestment Coalition reported more than 250 agreements in 34 states. These agreements and community benefit agreements have continued to the present providing billions of dollars while prior programs provide valuable models of success and additional creative opportunities for lending, investment, and community banking service activities. For example, in its 2018 Impact Report, NCRC indicated that:

> *Between 2016 and 2018 NCRC negotiated local commitments worth more than $89 billion with eight banks - including $27 billion from four new agreements confirmed in 2017 and 2018 with: First Financial Bank, First Tennessee Bank, IberiaBank Corporation and Santander Bank; an update to a 2016 agreement with Fifth Third Bancorp that increased its commitment by $2 billion, to a total of $32 billion; and a $1.6 billion commitment from Wells Fargo & Company focused on Washington, D.C.*

Over the life of the Act, CRA through specific agreements and activities related to community reinvestment banks have provided several trillion dollars in specific reinvestment commitments. Additionally, these loans, investments, and banking services produce secondary multiplier effects in the communities where they are located.

Many critical support programs and institutions have been created to support community reinvestment. While it was often clear what types of lending and investments were required, there needed to be educated borrowers and community-based developers to receive and manage these loans and investments. The CRA spawned the expansion of local non-profit housing developers, counseling, and pooled lending programs to expand homeownership opportunities. There also needed to be local business development organizations to channel funds into community ventures.

These resources were often independent and locally based. In other cases, these resources became parts of nationally based support institutions, such as the Neighborhood Housing Services of Pittsburgh that became the Neighborhood Reinvestment Corporation and now operates as NeighborWorks America in almost 250 locations across the country. What often started out as special mortgage lending programs that provided assistance to low- and moderate-income borrowers developed

over time into national models through creation of the affordable lending programs adopted by Fannie Mae and Freddie Mac.

Those involved in the creation of the CRA had hoped that it would lead to a development banking industry. Clearly, the individual agreements and programs and the local and national support organizations embody this goal. While the banking industry as a whole did not create in-house reinvestment and development skills at a scale needed to plan and implement complex investments, an industry of financial development institutions did evolve out of the reinvestment movement and activities, in significant part from the model of the South Shore bank. Today there are hundreds of Community Development Finance Institutions (CDFIs) that are both depository institutions and non-depository financial institutions. Collectively, they provide complex planning, development, and management resources.

Enforcement Issues that Have Undermined Effective Enforcement of the CRA

The CRA opened avenues for the public to engage the banking industry in reinvesting in redlined and underserved areas. This was especially true for organizations that represented the redlined and underserved communities themselves. As indicated above, the public has taken effective advantage of these opportunities. Many banks have also engaged in lending, investments, and the delivery of banking services to the communities that had been redlined and to communities with lagging and underdeveloped local economies. On balance, however, it has been the community-based organizations, civil rights groups, consumer groups, affordable housing developers, and the eventual creation of CDFIs that have driven the success of reinvestment activities. Many of what are now seen as routine forms of lending and investment are the result of initial reinvestment agreements and activities. While they are not counted in tolling up the value of specific reinvestment agreements, they are responsible for billions of dollars in lending and investments.

The regulatory enforcement efforts, however, have often worked to undermine the reinvestment process and the original goals of the CRA. While there are many changes and oversight issues that could be reviewed, the comments below are aimed at several issues that provide examples of serious failures in the enforcement area. While they are important in themselves, they also provide an additional context for a critique of the Proposed Regulation.

1. Key Factors that Have Been Lost in the Current Regulatory and Enforcement Process

The Existing Regulations and examination and performance evaluations that were created in 1995 are based on a much-reduced set of assessment factors instead of the twelve original assessment factors. These are a lending test, an investment test, and a service test. The comments below focus on some of the important limitations of these assessment factors.

Original Assessment Factors Incorporated into the Current Regulations

The lending test incorporates all or significant parts of several of the original assessment factors. These original factors are:

> (*5) The geographic distribution of the institution's credit extensions, credit applications, and credit denials.*
>
> *(9) The institution's origination of residential mortgage loans, housing rehabilitation loans, home improvement loans, and small business or small farm loans within its community, or the purchase of such loans originated in its community.*
>
> *(10) The institution's participation in governmentally insured, guaranteed, or subsidized loan programs for housing, small businesses, or small farms.*

In incorporating these assessment factors, the regulations allowed banks to decide if mortgage loans from its affiliates should be included. The regulations also allowed a bank to decide if it wanted other consumer loans to be counted. The regulations continued the practice of including loans that the banks bought from other lenders and counting them as part of the bank's CRA performance. Otherwise, aside from housing loans, small business loans, and small farm loans, the lending activities of the banks were essentially ignored. This allowed the banks to "game" the assessment system by deciding what to include and being able to purchase loans that counted as CRA lending in their service areas.

The lending test is the most important assessment factor. For small banks, a version of the lending test is the primary assessment factor. Under the section of the regulations for assigning the CRA rating, the regulations read:

> *(1) A bank that receives an "outstanding" rating on the lending test receives an assigned rating of at least "satisfactory";*
>
> *(2) A bank that receives an "outstanding" rating on both the service test and the investment test and a rating of at least "high satisfactory" on the lending test receives an assigned rating of "outstanding"; and*
>
> *(3) No bank may receive an assigned rating of "satisfactory" or higher unless it receives a rating of at least "low satisfactory" on the lending test.*

The service test incorporates in some fashion the single original assessment factor that read:

> *(7) The institution 's record of opening and closing offices and providing services at offices.*

This assessment reviews the distribution of these offices, banking services provided through such means as ATMs, and the range of services provided in the branches.

The investment test incorporates in some fashion the single original assessment factor that read:

(8) The institution's participation, including investments, in local community development and redevelopment projects or programs.

Recognizing that some investment activities may be in the form of actual loans, the regulations note that they may be counted under the investment test or the lending test, but not both. Also recognizing that some investment activities may provide support for loans or investments or development organizations, the regulations indicate that if such services are counted under the lending or investment test, they cannot be counted again under the service test.

Original Assessment Factors Eliminated from the Current Regulations

The two original assessment factors that directly focused on fair lending and discrimination are eliminated from the three-part assessment tests in the current regulation. These original assessment factors read:

(4) Any practices intended to discourage applications for types of credit set forth in the institution's CRA statement; and

(6) Evidence of prohibited discriminatory or other illegal credit practices.

In place of an actual assessment factor related to discrimination, the current regulations indicate that after the CRA rating has been assigned from the three tests, the regulator will consider the, "effect of evidence of discriminatory or other illegal credit practices" [§228.28(c)]." The regulations state:

(1) The Board's evaluation of a bank's CRA performance is adversely affected by evidence of discriminatory or other illegal credit practices in any geography by the bank or in any assessment area by any affiliate whose loans have been considered as part of the bank's lending performance. In connection with any type of lending activity described in Sec. 228.22(a), evidence of discriminatory or other credit practices that violate an applicable law, rule, or regulation includes, but is not limited to:

(i) Discrimination against applicants on a prohibited basis in violation, for example, of the Equal Credit Opportunity Act or the Fair Housing Act;
(ii) Violations of the Home Ownership and Equity Protection Act;
(iii) Violations of section 5 of the Federal Trade Commission Act;
(iv) Violations of section 8 of the Real Estate Settlement Procedures Act; and
(v) Violations of the Truth in Lending Act provisions regarding a consumer's right of rescission.

(2) In determining the effect of evidence of practices described in paragraph (c)(1) of this section on the bank's assigned rating, the Board considers the nature, extent, and strength of the evidence of the practices; the policies and procedures that the bank (or affiliate, as applicable) has in place to prevent the practices; any corrective action that the bank (or affiliate, as applicable) has taken or has committed to take, including voluntary corrective action resulting from self-assessment; and any other relevant information.

The regulations do not assign any actual value to this consideration or what "evidence" is used to consider these issues. Moreover, because the CRA was created as an anti-redlining civil rights law, the elimination of these nondiscrimination provisions needs to be taken in the context the requirements for the delineation of the assessment area.

The section of the regulation related to the delineation of the assessment area remains essentially the same as in the original regulations as discussed above. The regulation indicates limitations on the definition of the service area including:

§228.41(e) Limitations on the delineation of an assessment area. Each bank's assessment area(s):

(1) Must consist only of whole geographies;
(2) May not reflect illegal discrimination;
(3) May not arbitrarily exclude low- or moderate-income geographies, taking into account the bank's size and financial condition;

On the other hand, §228.41(a) reads:

In general. A bank shall delineate one or more assessment areas within which the Board evaluates the bank's record of helping to meet the credit needs of its community. The Board does not evaluate the bank's delineation of its assessment area(s) as a separate performance criterion, but the Board reviews the delineation for compliance with the requirements of this section.

Therefore, to the extent that the definition of an assessment area does involve evidence of discrimination, it falls outside of the three performance evaluation tests and into the amorphous area set aside for "evidence" of discrimination that **might** be used to adjust a rating.

All three of the provisions in the original regulation that related to the assessment of the credit needs of the community, the marketing of bank loans and services, and the involvement of the board of directors were eliminated wholesale in the current regulations. These assessment factors are:

1. *Activities conducted by the institution to ascertain the credit needs of its community, including the extent of efforts to communicate with members of its community regarding the credit services being provided by the institution.*

(2) The extent of the institution's marketing and special credit-related programs to make members of the community aware of the credit services offered by the institution.

(3) The extent of participation by the institution's board of directors in formulating the institution 's policies and reviewing its performance with respect to the purposes of the Community Reinvestment Act.

This eliminates entirely the original assessment factors that created a dynamic relationship between the banks and their communities. It was these assessment factors that created a link between the policies, practices, and products of the bank and the credit needs of the communities it served. These assessment factors created standing for people and organizations representing the bank's communities to participate in the development of activities to serve their credit needs. This strikes at the heart of the relationship between the citizens and organizations representing the communities and the banks. This relationship, both in ensuring that the banks made serious efforts to define the critical credit needs of their communities and in the partnerships that resulted in reinvestment agreements is what drove the reinvestment process. The lone role of the public was simply to write comments to be placed in the CRA file.

Taken as a whole, the assessment factors eliminated from the current regulations sever the relationship created between the banks and their communities and undermine the use of the CRA to eliminate redlining and discrimination. As stated in §228.11(b):

In enacting the CRA, the Congress required each appropriate Federal financial supervisory agency to ***assess an institution's record of helping to meet the credit needs of the local communities in which the institution is chartered****, consistent with the safe and sound operation of the institution, and to take this record into account in the agency's evaluation of an application for a deposit facility by the institution. (emphasis added)*

The assessment of lending, investment, and services to meet local credit needs is rendered meaningless when there is no definition of what constitutes the credit needs of the particular communities served by a bank. Moreover, in the lending test, for example, a bank's record is compared to it "peers" – banks of similar size servicing similar areas. But the history of disinvestment practices like redlining is such that it pervaded the entire industry. **If all the "peers" fail to provide critical loans, investments and services to certain communities, then the assessment process actually rewards them for these collective abuses.**

There are clearly some basic forms of lending, such as mortgage loans or small business loans, that are essential for all communities. But the need for differences in the conditions and scale of such products varies from one community and from one market to another. If all communities had exactly the same needs, then there would have been no need in the first place to have a community reinvestment act; there would simply have been a need to require all banks to do the same things. **By eliminating**

any definition of local community needs, the assessment factors become separated from precisely the needs the Act was created to serve.

2. Examples of the Failure to Enforce Fair Lending and Prohibit Redlining

Fair Lending Issues

Even when there were two assessment factors in the original regulations that focused on eliminating redlining and discrimination, the regulatory agencies failed to enforce these provisions of the Act. Today, Wells Fargo may represent the poster child of banking abuses and discrimination that was not detected and sanctioned by its regulator until its abuses became a public scandal. In the subprime market, the levels of discrimination were so high that Wells Fargo was sued – and continues to be sued - by several cities who suffered the impacts of the subprime foreclosures. These cities include Baltimore, Memphis, Miami, and Oakland. The practices at issue go back to lending in the mid to late 2000s. In 2012, The department of Justice settled its discrimination suit against Wells Fargo. All through this period covered by these claims, Wells Fargo received Outstanding ratings with the note that the regulator (the Comptroller of the Currency) found no evidence of discriminatory practices.

But its discriminatory practices in mortgage lending go well back into the time before Norwest Bank acquired Wells Fargo and took over its name in 1998. Before Wells Fargo become one of the top 25 subprime lenders in the country, it was one of the top FHA lenders. But its patterns of FHA lending reflected the dual racial market with conventional lending concentrated in white markets and FHA highly concentrated in minority markets. It essentially reflected the pattern of redlining African-American markets for conventional lending.

For example, in a study conducted for the Chicago Fair Housing Alliance related to mortgage lending in 1994, Norwest stood out for its racial disparities in lending. The Chicago area was the largest African-American homeownership market in the nation. Norwest served all of the minority Chicago suburban areas and the entire city of Chicago, and made over 2,000 conventional and FHA loans. Norwest's mortgages were split about equally between FHA and conventional lending. However, Norwest made only 31 conventional home purchase loans to African-Americans. Eighty-five percent of the loans it made to African-Americans were FHA loans. This pattern of FHA was closely related to race and ethnicity rather than income.[13]

The case of Flagstar Bank represents that rare exception where we actually have proof of fair lending violations that we can compare to the public comments of the institution's regulator and to the CRA ratings given to the bank before and after the violations occurred. This case illustrates how even multiple legal findings of discrimination can lead a lender to an Outstanding CRA rating.

Between February of 1994 and November of 2005, during which time the OTS gave Flagstar Bank "Satisfactory" and "Outstanding" CRA ratings, this lender was sued several times in federal court

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[13] See CAFHA report.

for issues related to discrimination in lending. Flagstar, in contrast, was found liable for discrimination at trial or by the court in at least two of these cases.

In 1999, a jury in Detroit found Flagstar liable for discrimination against minority borrowers, and plaintiffs were awarded damages. Later the Sixth Circuit Court of Appeals upheld one of these findings. In 2003, in a national class action suit, a federal court in Indianapolis found a written pricing policy developed by Flagstar management in 2001 so overtly discriminatory that the court ruled against Flagstar on summary judgment. The policy explicitly stated that pricing would be different for minority and non-minority borrowers. It appears that the discriminatory pricing policy was developed and implemented by Flagstar *while* the OTS was conducting its consumer compliance examination.

The OTS conducted five CRA examinations and never found Flagstar in violation of discrimination laws. During this time period, Flagstar was given a "Satisfactory" CRA rating four times and was elevated to an "Outstanding" rating after the summary judgment finding in 2003.

These patterns of ignoring fair housing violations under both the Fair Housing Act and the Equal Credit Opportunity Act have continued. For example, in 2017, JPMorgan Chase settled a discrimination case with the Department of Justice. The case was based on claims that Chase charged higher fees on loans to minorities. Nonetheless, Chase had continued to receive passing CRA ratings throughout the periods covered by the suit. One of the evaluations that covered the period of the claims indicated that "We found no evidence of discriminatory or other illegal credit practices inconsistent with helping to meet community credit needs." The other evaluation that covered the period after the mortgage meltdown and the servicing abuses of the major financial lenders nonetheless gave the bank a Satisfactory rating and did not indicate finding any fair lending violations.

Redlining Practices

The most blatant examples of the failure of regulators to enforce fair lending through the CRA is reflected in the number of cases where a regulated bank was sued by the Department of Justice, and more recently by the Consumer Financial Protection Bureau, for specifically defining its service areas to exclude minority communities – that is, redlining.

The Example of Centier Bank:

In 2006, the Department of Justice filed suit against Centier Bank in Indiana for violating the Fair Housing Act and the Equal Credit Opportunity Act. In specifically citing Section 228 of the CRA regulations (Reg BB), the suits stated that, "Instead of defining its assessment area in accordance with Reg BB, Centier long circumscribed its lending area in the Gary PMSA to exclude most majority-minority neighborhoods, including having two geographically separate assessment areas for many years.

According to the 2000 census, 93% of the low- and moderate-income tracts in Gary, Indiana, are also minority census tracts. Looked at from another perspective, 87% of all the minority census tracts in Gary are also low- or moderate-income census tracts. Thus, for many years, the FDIC had allowed this major Northwest Indiana lender to exclude both low- and moderate-income and minority areas from its

defined service area. In allowing the institution to continue to open branches in the areas outside of Gary, the FDIC was actually rewarding Centier for its discrimination.

While Centier's delineated service area literally surrounded the City of Gary (a predominantly African-American city), through at least most of 1999, almost all of the City of Gary, and all of Gary's predominantly minority census tracts, were excluded from the delineated community. In this year (according to the DOJ complaint), "the FDIC informed the Bank that its assessment area violated the CRA and its regulations." Even at this point, the FDIC continued to give the bank a Satisfactory rating.

The Example of Mid America Federal Savings Bank:

Since 1994, the OTS had given Mid America four Outstanding ratings and one Satisfactory rating. In 2002, DOJ filed suit against Mid America for violating the Fair Housing Act and the Equal Credit Opportunity Act.[14] In specifically citing Section 228 of the CRA regulations (Reg BB), the suit stated that, "In establishing its assessment area, also known as its community service area, boundaries under the Community Reinvestment Act of 1977, 12 U.S.C. §§2901-2906 ("CRA"), Mid America has, since at least 1996, excluded nearly all predominantly African American and African American/Hispanic neighborhoods in the Chicago MSA, even those located in close proximity to its branch offices."

Looked at from another perspective, 86% of all the minority census tracts in Chicago are also low- or moderate-income census tracts.

The complaint states that, "Mid America has engaged in a race-based pattern of locating or acquiring new offices. It has located or acquired new branch and other offices to serve the residential lending and credit needs of predominantly white areas but not those of predominantly African American or African American/Hispanic neighborhoods. Mid America has never opened any new full-service branch office in a majority African American or African American/ Hispanic neighborhood. The OTS still gave the lender a rating of Satisfactory after noting the lawsuit (the only rating below Outstanding that the OTS gave this lender since 1992).

The Example of Old Kent:

Between 1997 and 2001, the Federal Reserve Board had given three Satisfactory CRA ratings to Old Kent Bank, a major lender in the Detroit metropolitan area.[15] During this period, Old Kent defined its assessment area in terms of several counties and parts of counties that encircled the City of Detroit, but excluded the City of Detroit itself. A review of the Public CRA Evaluation reports indicates that the Federal Reserve Board was clearly aware of this exclusion and that it accepted this exclusion of Detroit and evaluated Old Kent based on the service it provided to the predominantly white suburban areas only.

In 2006, DOJ filed suit against Old Kent for violating the Fair Housing Act and the Equal Credit Opportunity Act. In specifically citing Section 228 of the CRA regulations (Reg BB), the suit stated that, "Instead of defining its assessment area in accordance with Regulation BB, Old Kent Bank

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[14] Copies of the complaints and consent decrees for this and the other DOJ cases cited in this statement can be found on the DOJ website at http://www.usdoj.gov/crt/housing/caselist.htm#lending.

[15] The 2001 rating was given after the FRB had approved the merger of Old Kent into First Third Bank.

circumscribed its lending area in the Detroit MSA to exclude most of the majority African American neighborhoods by excluding the City of Detroit." The complaint also indicates that "As of March 2000, Old Kent Bank still did not have a single branch in the City of Detroit, where the population is more than 81% African American."

Even if the Federal Reserve ignored the racial composition of Detroit, the regulations require lenders not to exclude low- and moderate- income census tracts from their CRA communities. According to the 2000 census, 93% of the low- and moderate-income tracts in Detroit, are also minority census tracts.

<u>The Example of KleinBank in Minnesota:</u>

The examples above show an historical pattern of failing to address racial redlining. Yet, this issue continues to exist as can be shown in the case of Klein Bank.

The Public CRA Evaluation reports consistently failed to indicate any forms of discrimination with statements such as:

> *The examiners identified no violations of anti-discrimination laws and regulations. The bank's fair lending policies, procedures, training programs are adequate.*
>
> *The examiners did not identify any evidence of discriminatory or other illegal credit practices inconsistent with helping to meet community credit needs during the examination.*
>
> *No evidence of discriminatory or other illegal credit practices inconsistent with helping to meet community credit needs was identified.*
>
> *Examiners did not identify any evidence of discriminatory or other illegal credit practices. As such, this consideration did not affect the institution's overall CRA rating.*

In January of 2017, the Department of Justice filed suit against KleinBank. The complaint reads:

> *The United States brings this action against KleinBank for engaging in a pattern or practice of unlawful redlining by structuring its residential mortgage lending business so as to avoid serving the credit needs of neighborhoods where a majority of residents are individuals of racial and ethnic minorities, in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f ("ECOA"), and the Fair Housing Act, 42 U.S.C. §§ 3601-3619 ("FHA").*

The complaint summarized the charges by stating:

> *KleinBank's practices that denied or discouraged an equal opportunity to residents of majority-minority census tracts from applying for or obtaining a residential mortgage loan from KleinBank include, but are not necessarily limited to: excluding most majority-minority census tracts in the MSA from the geographic area that KleinBank delineated as its market area pursuant to the Community Reinvestment Act (its "CRA assessment area"); locating branch offices and mortgage loan officers in majority-white census tracts, but not in majority-minority*

census tracts; and targeting marketing and advertising toward residents of majority-white census tracts, excluding majority-minority neighborhoods.

Klein Bank had drawn its service area in a horseshoe shape that surrounded the cities of Minneapolis and St. Paul where the minority populations are concentrated in the metropolitan area. The FDIC's CRA Evaluation Report in 2016 gave KleinBank a Satisfactory rating overall and a High Satisfactory rating for its lending. In 2015, the last year of data before this evaluation, KleinBank made 738 home purchase or refinance loans in the Minneapolis-St. Paul MSA. Only one of those loans was to a Black borrower and only one was in a predominantly minority census tract.

It did not take a rocket scientist to look at KleinBank's map of its assessment area and see that it had excluded the two largest cities in the state while including the white suburban and rural areas around these cities. Indeed, the bank made loans all the way past Minnesota across the St. Croix River into white areas in Wisconsin. Yet, as indicated above, the FDIC never raised a single issue about this delineation of the community or its exclusion of minority markets.

Additional Policies that Affect Fair Lending

HUD's pending proposed rewriting of the fair lending disparate impact regulations would have a special effect on limiting any evidence of lending discrimination even if the bank regulators wanted to enforce the Fair Housing Act. HUD's proposed new rule would require those filing complaints not only to show a disparate impact related to a lending policy, but would essentially require them to prove that there was no business justification for the policy even before discovery from the defendant.

In the case of lending, HUD's proposed rule has an additional impact on undermining lending cases. Most cases of lending discrimination assert that some underwriting policy or practice has the effect of discriminating against a protected class even though those underwriting processes do not mention race (or other protected classes). HUD's proposed regulation, however, provides "a complete defense" for defendants that rely on algorithms to justify their policies. **Literally every underwriting system is some kind of algorithm – that is, a set of rules defined by fixed calculations, formulas, or a series of threshold tests. Therefore, if HUD implements these regulations, it would be almost impossible for anyone to bring a case of discrimination against a lender.**

The OCC Policy Statement on CRA evaluations contains the following language related to the consideration of illegal or discriminatory evidence:

In some cases, the processes used by the OCC or other federal agencies to identify, evaluate, validate, and resolve findings based on evidence of potential discriminatory or other illegal credit practices can be protracted. When a CRA PE is ready for issuance, the OCC will assess the time frame within which any pending matters involving potential discriminatory or other illegal credit practices are likely to be determined or resolved by the OCC or another federal agency.

Generally, a PE [Performance Evaluation] will not be delayed if such matters cannot be resolved within 90 days after a PE is considered final for issuance to the bank. Any findings of

discriminatory or illegal credit practices after the issuance of a PE generally will be considered in the subsequent CRA PE and a statement to that effect is included in each PE.[16]

This statement essentially uses the different sequencing for CRA evaluations and reviews for compliance with consumer protection and fair lending laws as a waiver for consideration of illegal or discriminatory practices unless the investigations have been completed before the preparation of the PE. This means that many investigations that span different evaluation periods or that relate to activities no longer taking place in a subsequent evaluation period are likely to be ignored. See additional comments on this issue and the OCC policies in the section of "Servicing Accounts and Loans" below.

3. Policies that Give CRA Credit for Activities that Undermine Minority and Low- and Moderate-Income Communities

Supporting the Predatory Inclusion of Subprime Lending in Minority Areas

In March of 2000, the HUD-Treasury National Predatory Lending Task Force was formed to respond to predatory practices in the subprime markets. Later that year, the Task Force issued its report.[17] The report defined predatory lending with the following statement:

Predatory lending -- whether undertaken by creditors, brokers, or even home improvement contractors -- involves engaging in deception or fraud, manipulating the borrower through aggressive sales tactics, or taking unfair advantage of a borrower's lack of understanding about loan terms. These practices are often combined with loan terms that, alone or in combination, are abusive or make the borrower more vulnerable to abusive practices.

Predatory lending generally occurs in the subprime mortgage market, where most borrowers use the collateral in their homes for debt consolidation or other consumer credit purposes.

The report reviewed lending patterns from 1993 through 1998. The summary of the use of subprime loans in low- and moderate-income and Black communities read:

***Low-Income Neighborhoods**. Subprime loans are three times more likely in low-income neighborhoods than in high-income neighborhoods. Nationwide, 11 percent of refinance mortgages in 1998 were subprime, but in low-income neighborhoods, the percentage was more than double at 26 percent. In upper-income neighborhoods, only 7 percent of borrowers refinanced in the subprime market in 1998.*

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[16] OCC Bulletin 2018-17, "Description: Supervisory Policy and Processes for Community Reinvestment Act Performance Evaluations", June 15, 2018. The citations are from the section titled "Finalizing CRA PEs With Open Investigations Involving Potential Discriminatory or Other Illegal Credit Practices".

[17] U. S. Department of Housing and Urban Development and U.S. Department of Treasury, *Curbing Predatory Home Mortgage Lending: A Joint Report* (June 2000).

In 1993, only 3 percent of subprime mortgages in low-income neighborhoods and 1 percent in moderate- and upper-income neighborhoods were subprime. In the poorest communities, where families make only 50 percent of the median income, fully 44 percent of borrowers refinanced in the subprime market in 1998.

Looking at individual borrower income rather than neighborhood income, the findings are similar. Low-income borrowers were almost 3 times as likely as upper-income borrowers to rely upon subprime refinancing (21 percent of low-income borrowers versus 8 percent of upper-income borrowers.)

***Black Neighborhoods**. The HMDA data indicate that borrowers in black neighborhoods are five times as likely to refinance in the subprime market than borrowers in white neighborhoods. In predominantly black neighborhoods, subprime lending accounted for 51 percent of refinance loans in 1998 – compared with only 9 percent in predominately white areas. Comparable 1993 figures were 8 percent in black neighborhoods and 1 percent in white neighborhoods.*

Most notably, these disparities still exist if homeowners in black and white neighborhoods are compared while controlling for the income of the neighborhood. Among borrowers living in upper- income white neighborhoods, only 6 percent turned to subprime lenders for refinancing in 1998. In contrast, 39 percent of borrowers living in upper-income black neighborhoods refinanced in the subprime market (i.e., borrowers in black neighborhoods were six times as likely to refinance with a subprime loan). ***In fact, borrowers in upper-income black neighborhoods were twice as likely as homeowners in low-income white neighborhoods to refinance with a subprime loan.*** *(emphasis added) In 1998, 18 percent of borrowers living in low-income white neighborhoods relied upon a subprime loan, compared with 39 percent of borrowers living in upper-income black neighborhoods.*

The Task Force engaged in in-depth studies of foreclosure in three metropolitan areas (Atlanta, Baltimore, and Chicago). The separate reports for each city were titled "The Unequal Burden" and documented the disparate concentrations of subprime lending and foreclosures in minority communities compared to white communities. These studies were modeled after a study by the National Training and Information Center in Chicago.[18]

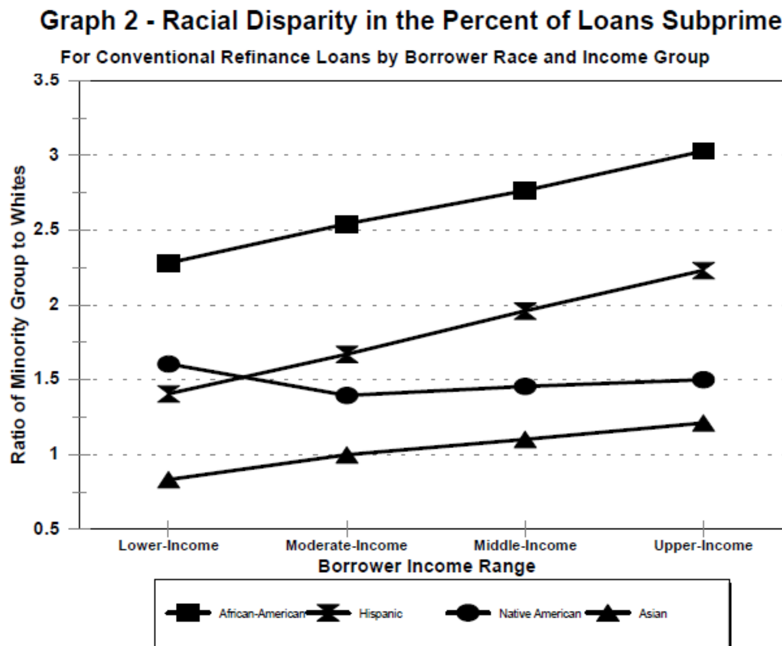
The Task Force report concluded that, "Like originations, foreclosures on subprime loans are concentrated in low-income and minority neighborhoods." Not only were foreclosures more common in minority neighborhoods, but the trend was for these foreclosures to take place relatively soon after the

[18] The National Training and Information Center is the research and technical assistance arm of National People's Action. That study (NTIC, *Preying on Neighborhoods: Subprime Mortgage Lenders and Chicagoland Foreclosures*, September 1999) covered the period from 1993 to 1999.

loans had been made. This "fast foreclosure" process is generally an indication of unsound, improper, or illegal underwriting when the loan was originated.

This report indicates that there was a clear understanding of the predatory aspects of subprime lending by both the Treasury Department and HUD many years before the meltdown of the subprime market precipitated the Great Recession. Notably, however, while the Task Force report reviews recommendations to overcome subprime lending and reviews several Federal lending and consumer protection laws, is fails to even mention the Fair Housing Act.

The fact that subprime loans were disproportionately concentrated in minority communities was confirmed in a study of the 2000 HMDA data that covered all 331 metropolitan areas in the nation.[19] This study found racial disparities across all metropolitan areas. This study also found that the levels of subprime lending for higher-income Blacks and Hispanics were greater than the levels for low-income whites, as indicated in the chart from that report below:



The Citibank Example:

Meanwhile, during this same time period, the Federal Reserve Board was responding to a challenge against the application by CitiGroup to acquire The Associates, one of the nation's largest subprime lenders. This challenge involved the broadest range of community groups, civil rights organizations, fair housing groups, and consumer advocates ever involved in opposing an acquisition.

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[19] Calvin Bradford, *Risk or Race: Racial Disparities and the Subprime Refinance Market*, Center for Community Change, 2002.

Simultaneously public interest groups from National People's Action, the National Community Reinvestment Coalition, the National Consumer Law Center, the National Fair Housing Alliance, and the Leadership Council on Civil Rights – to name a few – were providing evidence of the harm done by abusive subprime lending. Still the Federal Reserve allowed the acquisition and the harm resulted. The Associates was merged into CitiFinancial and became one of the major subprime lenders whose lending was counted as part of Citibank in its assessment areas.

The use of this example provides a view of how the Comptroller dealt with a specific past issue of challenges to the lending practices of an institution acquired by Citigroup. Generally, the CRA evaluations rely simply on the aggregate lending patterns of the institution and all affiliates combined. The Comptroller's subsequent evaluation for Citibank is somewhat unique in this regard as it does comment on the separate impact of some of the subprime affiliate lending on the overall pattern as part of a special consideration related to recent CRA challenges and lawsuits against Citigroup in relation to the acquisition of The Associates.

This evaluation covered a period from October of 2000 through June of 2003. This included the time right after Citigroup's acquisition of Associates First Capital Corporation when the nationwide coalition of groups mounted a CRA challenge based on the claimed discriminatory and predatory lending practices of The Associates (including such issues as packing credit life insurance into the loans). The challenge was denied and the acquisition took place. The Associates was generally merged into "CitiFinancial" affiliates.

Additionally, the Federal Trade Commission had sued Citigroup (as the successor parent company) for Violating the Federal Trade Commission Act (which prohibits unfair or deceptive acts and practices) and violations of ECOA by The Associates. The initial settlement for that case was filed in February of 2003 and included a $215 million fund for restitution.

Nonetheless, the "Fair Lending Review" section of the Comptroller's evaluation reads, "We found no evidence of illegal discrimination or other credit practices."

In 2002, NTIC studied the distribution of prime and subprime loans between Citigroup's affiliates in 13 markets around the country from the 2000 HMDA data.[20] In Baltimore, 85% of the loans were made by the subprime affiliates. In Cleveland it was 93%. In Cincinnati, it was 94%. In Pittsburgh, it was 95%. In Syracuse it was 90%. Outside of the larger urban areas, the percentage of subprime loans was 94% in Des Moines, 96% in Wichita, and 96% in Central Illinois. These loans were disproportionately concentrated in minority areas.

By blindly counting all loans made in low- and moderate-income communities as CRA lending that was credited to the bank's performance, the CRA evaluation process literally rewarded banks for lending that

[20] See NTIC, *Citigroup: Reinventing Redlining – An Analysis of Lending and Branch Disparities for Citigroup's Prime and Subprime Lending Affiliates*, June 2002. The percentages are taken from the summary table at page 13.

led to high rates of foreclosure and blight. Loans that came from direct CRA programs, however, did not create high risks. A study of CRA lending by the Federal Reserve Board as part of the Gramm-Leach-Bliley Act of 1999 surveyed banks on the performance of their special CRA programs. One part of the conclusion of that study stated:

> *Regarding performance, on a per program basis, respondents report that a majority of CRA special lending programs have low delinquency and charge-off rates. For example, the median charge-off rate is reported to be zero.*[21]

Even during the Great Recession, CRA loans generally performed as well or better than conventional prime loans.

The Failure to Account for Investments and Servicing Practices that Undermine Minority and Low- and Moderate-Income Communities.

Investments

While Banks like Citibank and Wells Fargo were among some of the largest direct subprime lenders, the other major banks either made subprime loans themselves or financed the subprime market through commercial lines of credit to the independent subprime lenders and through the purchase of mortgage-backed securities containing pools of subprime loans.

Another area of concern has been the exploitation of minorities and low- and moderate-income communities through various forms of payday and title loans. While the regulators have taken some actions to eliminate direct payday lending by banks, some institutions continue to use high interest cash advance programs that are essentially payday loans. Moreover, as with subprime lending, while the largest banks may not engage directly in payday or cash advance programs, they do provide lines of credit to payday lenders.

Servicing Accounts and Loans

Aside from making loans or investing in institutions that engage in predatory lending, the existing CRA process does not account for servicing abuses. After the CFPB was established, it spent a considerable amount of effort on creating transparency and eliminating unfair and deceptive practices in credit card and savings and checking. These included compounding late fees and escalating interest rates on past due accounts. It also included abuses in fees assessed for overdrafts, including practices that managed automatic payments from accounts in ways that forced the account into overdraft fees.

[21] "The Performance and Profitability of CRA-Related Lending", Report by the Board of Governors of the Federal Reserve System, submitted to the Congress pursuant to section 713 of the Gramm-Leach-Bliley Act of 1999, July 17, 2000, at 70.

As with fair lending violations, abuses of the consumer protection and other laws that relate to opening and closing accounts and applying late fees and charges, violations of these laws and regulations are not included in the three evaluation tests. Considerations of abusive account management practices are, like all discrimination practices, allocated to the vague section making some unspecified adjustment in the rating after the score has been assigned. In the case of fair lending, we have documented above how this has been ignored, even in cases where there are clear violations.

We have seen evaluations, such as in the case of the recent evaluations of JPMorgan and Wells Fargo where such abuses in servicing account holders and generating new accounts have resulted in an adjustment, though these adjustments seem to take place only after the abuses have received substantial media coverage or have been the subject of litigation. In April of 2018, the Treasury Department sent a memorandum to the banking regulatory agencies under the title "Community Reinvestment Act – Findings and Recommendations".[22]

Under a section headed "Downgrades for Violations of Consumer Protection Laws", the memorandum cited the CRA regulations that an "evaluation of a bank's CRA performance is adversely affected by evidence of discriminatory or other illegal credit practices in any geography by the bank or in any assessment area by an affiliate whose loans have been considered as part of the bank's lending performance." However, this section began with a statement that the "CRA is not a consumer protection law". With that view, the "overlap" between the CRA and consumer protection laws is seen more as a happenstance than a serious enforcement obligation.

The section continues with the lament that:

> *In recent years, an increasing number of large banks have received downgrades of CRA ratings due to violations of consumer protection laws. In some cases, banks have been downgraded or double downgraded for violations related to products that were not part of their CRA performance evaluations (e.g., indirect auto lending).*

The memorandum continues:

> *In an effort to address the lack of clarity on these topics, on October 12, 2017, the OCC issued an update to its Policies and Procedures Manual to clarify the impact evidence of discriminatory or other illegal credit practices can have on CRA ratings. According to the OCC, a determination of how evidence of illegal credit practices in a bank's CRA lending activities affects a bank's CRA rating is guided by two principles.*[23]

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[22] U.S. Department of the Treasury, "Memorandum for the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, The Federal Deposit Insurance Corporation", April 3, 2018.

[23] The principles cited in the memorandum quote sections of the update to the Policies and Procedures Manual cited as "OCC, Policy and Procedures Manual, PPM 5000-43 (Accessed January 2018)".

The first principle is that, "there must be a logical nexus between the bank's CRA rating and evidence of discriminatory or other illegal credit practices in the bank's CRA lending activity." The violations must be "directly related to CRA lending activities that resulted in material harm to customers". The memorandum states:

> *The goal of the OCC principle is to ensure that banks are not penalized in their CRA assessments for minor violations or practices unrelated to CRA lending activities. The OCC also clarified that it is not its policy to lower a bank's CRA rating by more than one level.*

There are at least two clear problems with this view. First, it only applies to CRA lending – not to investment or banking services. Second, no matter how serious the violation (such as redlining, predatory subprime lending, or loan discrimination) a bank with an Outstanding rating cannot have that rating reduced below a Satisfactory rating. This makes violations of fair lending laws a relatively minor issue. The second principle actually encourages treating such violations even less seriously, stating:

> *Second, the OCC considers any remedial action taken by the bank. The remediation principle states that "if a bank has remediated or taken appropriate corrective actions to address the evidence of discriminatory or other illegal credit practices, the ratings of the bank should not be lowered solely based on the existence of the practice prior to the commencement of the CRA evaluation."*

This means, for example, that if a bank was found liable for a fair lending violation and ordered to engaged in corrective activities or to provide remuneration of for those harmed, the violation would likely not ever result in any action to reduce the CRA taking. This is the policy that would allow giving Flagstar an Outstanding rating after it was twice found liable by the courts for fair housing act violations – one such violation related to a national underwriting policy. In addition, another report from the OCC indicates that if a claim is pending but has not been resolved by the time of the Performance Evaluation, then it has no bearing on that evaluation (see these comments in the section on "*Additional Policies that Affect Fair Lending*" above). Taken together, this seems to exempt the evaluation process from almost all consideration of lending discrimination as more than a minor issue.

<u>*Servicing Issues*</u>

The CRA examination process focuses on the distribution of bank branches and the opening and closing of bank branches under the servicing test. The continuing revelations in the media of Wells Fargo and other banks opening false accounts, adding insurance products to accounts without permission, and managing deposit accounts to increase overdraft fees and other charges raise questions about how the CRA examination process treats abuses of the deposit and loan accounts themselves.

The elephant in the room for this issue is the robo-signing scandals and the servicing of mortgage loans after the collapse of the subprime market. Again, these abuses were largely ignored by the bank regulators. All of the largest banks received Outstanding or Satisfactory ratings for the period of the meltdown. When the government responded to the mortgage meltdown with a series of mortgage relief programs, the result was widespread loan servicing abuses and signing false foreclosure and relief documents (robo-signing). This contributed to the foreclosure crisis when the programs were designed to provide relief.

In 2008, representatives of National People's Action met with Chairman Bernanke at the Federal Reserve Board in DC to explain the dire community consequences of the foreclosure crisis. They brought maps that showed the concentrations of foreclosures in minority communities. Because they had already developed their own program to create relief and workouts for borrowers in default, they were painfully aware of the lack of fair and reasonable servicing for troubled borrowers. Legal assistance attorneys all across the country were swamped with cases charging mortgage servicers with illegal, deceptive, and unfair practices.

At the end of the meeting, they asked Chairman Bernanke for only one commitment. They asked that at least for the banks that he regulated he should require that no loan would be foreclosed unless there had been a complete review of the legitimacy of the documents and the fairness of the relief efforts and foreclosure process. His response was that "it is not possible".

Of course, after the servicing abuses became a national scandal and involved not only the Federal enforcement agencies but the Attorneys General of virtually every state and the District of Columbia, litigation produced exactly what Chairman Bernanke said could not be done. In February of 2012, 49 states, the District of Columbia, the Department of Justice, the Treasury Department, the Federal Trade Commission, and HUD reached a $26 billion settlement with the largest loan servicers (the National Mortgage Settlement). This litigation and settlement included the nation's largest banks (Bank of America, Citibank, JPMorgan Chase, and Wells Fargo) for engaging in illegal robo-signing and other servicing abuses. The litany of laws included in the settlement included Unfair and Deceptive Acts and Practices laws of the Plaintiff States, the False Claims Act, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, the Servicemembers Civil Relief Act, and the Bankruptcy Code and Federal Rules of Bankruptcy Procedure.

This settlement addressed the servicing of delinquent loans. Another issue that impacted communities was the management of the properties that were already foreclosed. These are the Real Estate Owned (REO) properties that were acquired after the foreclosures by the investors who owned the mortgages. The investors hired servicers to maintain and prepare these properties for sale. These activities are essential to protect the communities from the blight of abandoned and deteriorating foreclosed homes. Like the subprime loans themselves, these REOs were concentrated disproportionately in minority communities.

The National Fair Housing Alliance (NFHA) sent testers across the nation into communities with concentrations of REOs. They developed samples of homes in both minority and predominantly white areas and compared the level of maintenance of the REOs. They found many areas where there were significant disparities in the level of maintenance of the REOS by the companies servicing these properties. NFHA filed suit against servicers with racial disparities in maintaining these REOs. Several of these sevicers were also major banks, including Bank of America, Wells Fargo and Deutsche Bank. Some cases have settled and others are still in litigation.

The range of illegal and abusive treatment of bank deposit customers, the National Mortgage Settlement, and the REO cases from NFHA point to fair housing and consumer account servicing violations that are not only serious but that impact low- and moderate-income communities served by the banks against whom the claims were filed. Yet, these may not be considered as direct lending issues, especially under the policies issued by the Comptroller of the Currency. They are essentially issues related to the servicing of accounts and loans and not directly about the origination of loans. Yet there is no provision in the service test in the CRA examination process to take account of such illegal and abusive activities.

The Proposed Regulation in the Context of the History of the CRA and Its Enforcement

The background sections above are critical to understanding the comments on the Proposed Regulation. The specific comments on the Proposed Regulation focus on a single set of issues linked to the sections of the historical development and implementation of the CRA. Therefore, there are many issues with the Proposed Regulation that are not included in these comments. There is no doubt that my colleagues and other representatives of the public and banking industry will address those issues.

Originally the movement to create the CRA was a civil rights effort opposing racial redlining by the banking industry. The movement attacked banks for taking their deposits but refusing to lend in minority, racially changing, and low- and moderate-income communities. That is, the movement was opposed to the banks disinvesting in their communities but wanted the banks to use their skills and resources to become part of their communities. Reinvestment cannot exist without prior disinvestment - and the disinvestment was racial as much as it was economic.

The background sections of these comments indicate key issues that have either strengthened or weakened the enforcement of the CRA over time. These include (1) defining the assessment area; (2) assessing the local credit, investment, and banking service needs; (3) establishing a meaningful dialogue between the bank and the community it serves; (4) the enforcement of fair housing, fair lending, and other consumer protection laws: and, (5) applying a performance evaluation process that provides credit for lending, investment, and banking service activities but holds banks accountable for activities that abuse their obligations to serve the needs of their communities and customers. These issues are discussed below.

1. Definition of the Community or Communities to Be Served

The Proposed Regulation makes several significant changes to the definition of the assessment area. Two of these changes are worthy of concern.

For assessment areas defined around existing facilities, the regulation restructures the language on the options for using different geographic areas, but it leaves the options essentially the same. The regulation changes the language about defining the area by the location where the bank receives a "substantial portion of its loans and all other areas equidistant from its office as those areas". The proposed language reads:

> *A bank must delineate an assessment area encompassing each location where the bank maintains a main office, a branch, or a non-branch deposit-taking facility as well as the surrounding locations in which the bank has* ***originated or purchased a substantial portion of its qualifying retail loans.*** (emphasis added)

This changes the general term "loans" to "qualifying retail loans". In the proposed regulation, these include credit card lending as well as other consumer loans that are not included in the original definition. This might appear to make the area larger, but the word "substantial" remains undefined and at the bank's discretion. Moreover, this definition leaves out the original language requiring the assessment areas to include all areas equidistant from the banks facilities and lending.

As with the original regulations, this definition relates only to loans and allows banks to exclude areas that they determine do not include a "substantial" number of their retail loans. To ensure that such assessment areas do not exclude minority and low- and moderate-income communities, the regulations need to incorporate a more inclusive definition such as the areas where the bank receives the majority (or as in the recommendation for the original Act, 80%) of its deposits or its retail loans (whichever is most expansive) and all areas equidistant from those areas. **A definition that excludes deposits allows banks to use a limited lending area alone and creates the scenario where the banks can secure deposits from one area and then make loans in another. This defines the kind of vacuum cleaner process of disinvestment that the anti-redlining movement sought to eliminate.**

The regulations provide a second option based solely on deposits. This proposal reads:

> *A bank that receives 50 percent or more of its retail domestic deposits from geographic areas outside of its facility-based assessment areas must delineate separate, non-overlapping assessment areas in the smallest geographic area where it receives 5 percent or more of its retail domestic deposits.*

This definition excludes lending, which is not appropriate for banks that do have a main office and branches but also solicit and receive deposits across a much wider area. In that case, the area should be similar to the recommendation made above. For banks with no facilities, there is also a need to define the area based on both deposits and loans (if the bank engages in both services).

The allowance for using the smallest area to define multiple assessment areas makes no sense. If a bank chose to use counties and solicited and received deposits from across the country, it is unlikely

that it would receive 5% of its deposits from more than a few counties, or even a few metropolitan areas. If a bank chose to use counties, then mathematically there could be no more than 20 counties defined as the service area across the entire country. Moreover, such banks are likely to solicit deposits from areas with higher incomes and larger deposits eliminating adjacent areas from their assessment areas.

2. **Assessing Local Community Lending, Investment, and Banking Service Needs**

While the regulations continually refer to serving community credit needs, as with the 1995 revision of the regulations, there is nothing remotely suggesting any effort to define those needs. The history of the CRA shows that those needs are not simply self-evident nor are the products and programs that respond to those needs. How can the "qualified" activities be assessed for serving the local needs when the assessment areas allow for such continued gerrymandering and there is no definition of what the local needs are?

Local economies vary greatly across the nation. Rural and urban markets differ in size and complexity. The distribution of commercial and housing structures differs from one area to another. The economic, racial, and ethnic distribution of populations differ from one area to another. Without defining the particular needs of each local market area, the regulations assume that all needs for lending, investment, and banking services are somehow essentially the same.

3. **Establishing a Meaningful Dialogue between the Bank and the Community It Serves**

The history of successful and creative reinvestment indicates the value of a meaningful and ongoing dialogue between the policymakers at the banks and the members of the public and development institutions in the communities served by the banks. This dialogue was built into the original regulations but eliminated in the 1995 revision. There is not the slightest indication of even a concern for this dialogue in the Proposed Regulation.

4. **The enforcement of Fair Housing, Fair Lending, and Other Consumer Protection Laws**

With each new set of regulations, the enforcement of the CRA has become weaker, especially in terms of discrimination and abusive practices. Over time, the fair lending aspect of CRA enforcement has become virtually ignored by regulators. It has become a passing note in the evaluation report. Then statements by the OCC that no matter how serious the fair housing and fair lending violations are, they can only reduce a rating by one level demonstrate the lack of seriousness with which racial discrimination is considered by the regulator of the nation's largest and most powerful banks.

5. **<u>Applying a Performance Evaluation Process that Provides Credit for Lending, Investment, and Banking Service Activities but Holds Banks Accountable for Activities that Abuse Their Obligations to Serve the Needs of Their Communities and Customers</u>**

Since the creation of the CRA, there have been fundamental changes in the banking industry, decades of the expansive history of reinvestment experiences, and the growth and maturing of community development institutions and resources. Any serious effort to restructure the CRA performance evaluation regulations requires extensive and transparent research and analysis of these experiences and changes. In addition, there need to be in-depth hearings that clearly focus on specific elements of the Act necessary for effective enforcement in the current state of the industry and reinvestment capacities.

The extensive hearings that the Federal Reserve has held in the past are surely helpful, and the fact that the Proposed Regulation makes no valuable use of the detailed information from these hearings undermines any claim that the Proposed Regulations are seriously meant to address the goals of the Act. But even given the important contribution of these hearings, they tended to focus on rather general questions of what varied entities are currently doing and what they like and do not like about the current CRA enforcement process. In that context, they captured valuable, but often random, thoughts from those currently involved in reinvestment and community development activities and garnered rather ritualized industry responses to the burden of regulation. What we need is a process that draws in the best experience and research linked to critical individual elements to ensure effective CRA enforcement.

Additional research and hearings need to focus on such elements as:

- The most effective means for delineating service areas to fully encompass both the range of each institution's lending, deposit, and other banking services;

- The requirements and enforcement mechanisms necessary to ensure that service areas do not exclude minority, racially diverse, and low- and moderate-income communities;

- Mechanisms for defining the local lending, investment, credit, and other banking related needs of local communities in ways that provide the affected communities with a voice in the development of policies and programs to meet those needs;

- Mechanisms for identifying in the performance evaluation process evidence of discrimination, violations of other consumer and lending laws, and other abusive and harmful activities related to a bank's lending, investment, and banking services and identifying them in the Public Disclosure of the evaluation;

- The development of required and transparent penalties and grade adjustments commensurate with the harm created by discriminatory, illegal, abusive activities;

- The identification and review of successful lending, investment, deposit, and other reinvestment activities and programs – across both urban and rural areas and across different populations and types of communities (including Native American lands);

- The application of a rating system that matches a bank's activities with the lending, investment, and banking service needs of its communities while incorporating flexibility for the creation of reinvestment activities and consideration of the institutions capacity and form of banking services.

The Failure of the Proposed Algorithm to Assess or Encourage Reinvestment

The Proposed Regulation is part of a continuing regulatory history that has turned a once dynamic set of ongoing relationships between banks and the communities they serve into nothing more than a multi-stage algorithm. Substantive consideration of the variations in the actual local community credit and banking needs and the response to those needs by regulated institutions are replaced with a set of fixed mathematical calculations. In this multi-stage algorithm, the individual elements of human and financial behavior are digitized and become numbers rather than relationships.

Questions on the Data Elements Included in the Algorithms

In a purely mathematical model, understanding the impacts of applying an algorithm requires understanding the definition and scope of the elements, the reliability and validity of the elements, and the weight given to each element in the mathematical processes that combine and process them. For the different demographic and peer group distribution tests and the CRA evaluation measures, specific qualified activities (loans, investment, and banking services) define the basic elements entered into the algorithms. Several of these elements – or the treatment or weight given to these elements – is questionable. Some examples include:

- Home mortgage loans are discounted as only loans held in portfolio for 90 days are counted. This creates an incentive for banks to hold loans – especially loans to low- and moderate-income communities rather than sell them in the secondary market. This is an affront to the years of effort by community groups, civil rights fair housing groups, and consumer advocates to increase the level of conventional mortgage lending in minority, racially diverse, and low- and moderate-income communities by expanding the ability of banks to sell these loans in the secondary market. This is especially true for loans from affordable loan programs. Selling loans in the secondary market expands the ability of banks to engage in these critical loans. **Therefore, this discounting runs directly counter to the major focus that drove the anti-redlining movement that created the CRA.**

- The elimination of the test for the geographic distribution of consumer loans is justified by a claim that it counters gentrification by eliminating loans in low- and moderate-income communities to higher-income borrowers. This is a short-sighted claim that, in the long run, undermines the ability of existing lower-income communities to achieve a sound mix of income groups. While affordable housing opportunities do need to be

protected, low-income communities cannot thrive economically unless they eventually attain a mix of income groups.

- The provision of banking services to low- and moderate-income communities is incorporated into the CRA evaluation measure by multiplying the number of such branches buy a factor of 0.01. This provides a virtually insignificant weight to one of the most important aspects of the CRA.

- Once a bank has passed the threshold tests, the CRA evaluation measure is basically a ratio of the value of the qualified activities to the value of consumer deposits. One issue with this measure is that the deposit base is subject to the gerrymandering in defining the assessment area in ways that diminish the inclusion of deposits from minority, racially diverse, and low- and moderate income communities.

- A second issue with the CRA evaluation measure is that it is a pure dollar value measure. In order to increase the value of the qualified activities in the numerator, this incentivizes banks to seek out the largest investment projects. Since the list of qualified investments includes such things as sports arenas and highway construction, this diminishes the impact of basic banking and lending services to communities in the assessment areas.

- For banks with multiple assessment areas, the final CRA evaluation measure is based on an averaging of the individual assessment evaluation scores, thus allowing banks to avoid providing adequate reinvestment activities to some areas.

- The threshold tests for retail lending combine all forms of retail lending into a single value. Given that different communities have different needs (though these needs are nowhere required to be defined in the regulations), serving these credit needs would require different mixes of loan products, but the process treats every dollar of every product as equally serving the local needs.

- **The one positive aspect of the elements is that investment in CDFIs are given a double weight in the final calculations for the CRA evaluation measure.**

Aside from these limited examples, a special note needs to be made that all the measures and calculations (aside from the dubious effort to eliminate mortgage loans to higher -income individuals in low- and moderate-income communities) blindly assume that all the loan products, investments, and banking services have a positive effect on communities in the assessment area(s). The history of the CRA makes clear that both the lack of some loans, investments and banking services as well as the inclusion of predatory and abusive loan, investment, and banking services have harmful effects on minority, racially diverse, and low- and moderate-income communities.

Subprime mortgages, payday loans (or investments in payday lenders), and abusive bank account servicing practices (i.e., fees, penalties, false accounts, etc.) harm rather than support communities and

customers. The conditions that created these illegal and abusive practices are not something limited to the past. The Covid-19 pandemic is creating a new recession with massive issues of impending mortgage defaults and foreclosures where the banks are already being overwhelmed with the volume of borrowers seeking some forms of relief and forbearance. The inability of banks to handle the servicing needs of borrowers in the mortgage meltdown is being repeated as a consequence of the pandemic. The pandemic has already created staffing shortages. Pressure to process borrower servicing needs during the Great recession produced the robo-singing and other servicing abuses and we should expect some of the same outcomes now.

The predatory practices of payday and title loan companies, financed to a great extent by the major banks, preyed on the people who were already suffering during the recession. Driven by the profits to be made by these loans, we should expect a rise in these industries and demands on the banks to either provide such lending themselves or finance the payday and auto title loan industries.

The abusive and illegal account servicing practices for which Wells Fargo has become the poster child, result from changes in the banking industry as pressure has been placed on each individual unit and division to become profitable rather than measuring profits in the overall activities of the banks. The pandemic places a new pressure on banks to find sources of profits to remain viable and to replace lost income as the recession becomes deeper and deeper.

For community reinvestment, the point is that the regulatory process rewarded banks for illegal, predatory, and abusive lending, investment, and service practices in the past and there is reason to believe that such practices are likely to arise again. Therefore, one of the major weaknesses of the CRA evaluation process is that it does not provide any penalties or even discounting of the value of any of the lending, investment, or banking services that are incorporated into the CRA evaluations. This goes well beyond the issue discussed above concerning the actual legal violations of fair lending and consumer protection laws.

In addition to the serious questions about the soundness, and validity of the proposed data elements, no real data, only hypothetical and speculative data, are given to support the efficacy of the Proposed Regulation for achieving the goals of the CRA. Some of the data required to apply the algorithm do not even exist at this point. Adding to this issue is the fact that the proposal indicates that other, unspecified, data may be used in the actual algorithms when they are used. This makes the claims that they can fairly be used to evaluate CRA performance purely speculative.

Late in the comment period, the Federal Reserve released a set of data on historical evaluations, lending patterns and geographic areas. This provided a massive amount of data down to the level of individual banks and areas, but still does not fill the gaps in the data necessary to review the outcomes of the proposed algorithms. It would require considerable advanced research and analysis capabilities by commenters to incorporate these data into even a version of testing the proposed algorithms across different banks and local communities. It required scores of pages for the data dictionaries that simply list the individual data fields. Any comprehensive analysis by individual members of the public trying

to use these data, even taking into account the limitations of the data, would require weeks or months of additional time well beyond the close of the comment period.

Nonetheless, serious efforts to test parts of the prosed algorithms using admittedly limited data have been done by the National Community Reinvestment Coalition (NCRC) – and the results are not good.[24] NCRC created several simulations of the threshold and final CRA evaluation measures in the Proposed Regulation. Because some data used in the proposed algorithms was not available or did not exist, the simulations made adjustments and provided consideration for the impacts of the missing data. In spite of these caveats, each of the simulations found that the measures and thresholds were unlikely to encourage banks to increase their CRA lending or investments and that they would likely allow banks to reduce their retail lending to low- and moderate-income borrowers and communities. In addition, the studies indicate that the measures produced somewhat different results for banks of different sizes and structures, indicating that such a fixed mathematical set of calculations does not apply evenly to all banks and markets.

Once such an algorithm is used, it can be dissected into its component parts and used to game the system. It would likely become like the national tests used in schools where rather than stimulating creative thinking and expanding knowledge the banks would "teach to the test" to achieve the highest ratings with the least effort.

In sum, there is no reason to accept the Proposed Regulation that creates a fixed and universal algorithm for ratings based on what are essentially secret, speculative, or questionable elements and calculations. Given the history of the CRA and the past successes of many reinvestment activities and partnership between communities and their banks, this proposal moves in entirely the wrong direction and needs to be rejected wholesale.

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[24] See. NCRC, "NCRC Research Memo – Impact of Proposed Rule-Making on Major Credit Card Lending Banks", February 3, 2020; NCRC, "The CRA Evaluation Measures Would Allow Banks to Relax their Retail Lending to LMI Borrowers and Communities", February 26, 2020; and NCRC, "Proposed OCC and FDIC Geographic Analysis of Home and Small Business Lending: Permission to Decrease Lending for the Big Banks", March 24, 2020.