Arnold&Porter

David F. Freeman, Jr.
+1 202.942.5745 Direct
David.Freeman@arnoldporter.com

August 3, 2022

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

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

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

Re: Comments on Notice of Proposed Rulemaking to Revise the Community Reinvestment Regulations of the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Board of Governors of the Federal Reserve System, FDIC RIN 3064-AF81; OCC RIN 1557-AF15, Docket ID OCC-2022-0002; Federal Reserve RIN 7100-AG29, Docket NO. R-1769

Dear Sir or Madam,

We are writing to comment on the proposed Community Reinvestment Act ("CRA") rules ("Proposed Rules") set forth in the Notice of Proposed Rulemaking ("NPR") released by the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), and the Federal Reserve Board ("Board," and, together with the OCC and the FDIC, the "Agencies"), on May 5, 2022.[1] We support the Agencies' core objectives of strengthening the achievement of the core purpose of the statute; adapting to changes in the banking industry, including mobile and online banking; providing greater clarity and consistency in the application of the regulations; and creating a consistent regulatory approach among all three Agencies. We also appreciate the Agencies taking a leadership position to advocate for the CRA modernization efforts. In addition, we share in the Agencies' goals of

[1] FDIC, OCC, Federal Reserve Proposed Rulemaking: Community Reinvestment Act Regulations, 87 Fed. Reg. 33884 (June 30, 2022).

reducing inefficiencies in the CRA evaluation process to the benefit of the communities, particularly low- to moderate-income ("LMI") communities, as defined by the CRA.

At the same time, based upon our experience with the application of the current CRA rules to covered insured depository institutions, we have identified the following seven areas of the NPR on which we wish to comment:

1. Retail Lending Assessment Area
2. Retail Lending Test
3. Considerations for High Housing-Cost Markets
4. Community Development Financing Test and Definitions of Community Development
5. Community Development Services
6. Data Collection, Maintenance, and Reporting Requirements
7. Transition Timeline

Our detailed comments on the NPR are as follows:

1. Large Banks That Lend Mostly in Their Facility-Based Assessment Areas ("FBAA") Should *Not* Be Subject to the Retail Lending Assessment Area ("RLAA") Requirement

(a) RLAA: The NPR proposes to assess branch-based retail lending in the context of facility-based assessment areas ("FBAAs"), a process similar to the existing CRA examination procedures. However, to assess retail lending *outside* of any FBAA, the NPR proposes to create a new RLAA requirement. If a large bank (a bank that had average assets of at least $2 billion in both of the prior two calendar years) funded at least 100 home mortgages or 250 small business loans in two consecutive calendar years in an MSA/combined non-MSA area of a state, it is deemed to have a lending concentration in these areas and is required to designate them as RLAAs.

We ***strongly object*** to universally applying the RLAA requirement to all large banks. The NPR's definitions for "concentrations" – at least 100 home mortgages or 250 small business loans in two consecutive calendar years in an MSA/combined non-MSA area of a state – are unreasonable and arbitrary. For a bank that funds 1,000 mortgage loans a year, 100 loans represent 10% of the total funding and could constitute a "concentration." But for a bank that funds 30,000 mortgage loans a year, 100 loans represent only 0.3% of its total funding. It's unreasonable to subject the bank to delineate a RLAA based on a 0.3% "concentration".

While one intent of the RLAA requirement may be to hold online lenders accountable for LMI lending in their undefined and potentially expansive footprint, the requirement places an unfair and undue burden on banks that originate most of their loans within their FBAA. The core premise of the CRA is that banks should meet the credit needs of the local community where they gather their deposits (i.e., branches) in a safe and sound manner. Banks that successfully meet this obligation through lending primarily in their FBAA (as measured through objective metrices and benchmarks)

should not be subject to any additional layer of evaluation, especially one based on arbitrary criteria. Imposing the RLAA requirement on these banks goes against the letter and spirit of the CRA. As the United States Supreme Court has recently held, under the "major questions doctrine," given the nature of the separation of powers and a practical understanding of legislative intent, an agency's rulemaking authority must be supported by "clear congressional authorization.".[2] Here, there is nothing in the plain language of the CRA, nor any evidence of congressional intent at the time the CRA was enacted, suggesting support for the creation of RLAAs potentially far distant from a bank's local community.

More importantly, this extra requirement means that large banks will need to allocate CRA resources to area(s) where they do not have any meaningful retail presence. To the extent that resources are limited (which is true for all banks), this diverts efforts away from the CRA programs in their FBAA, the banks' core markets.

What would work better is to apply the RLAA requirement to financial institutions that have a substantial share of retail lending *outside* their FBAA – for example, 25%. When a bank funds 25% or more of its loans outside of its FBAA, that is an indication that the bank has a much larger lending footprint than its retail network and therefore should be evaluated outside of its FBAA. This can also apply to online lenders with no FBAA.

For large banks that lend mostly within their FBAA (e.g., 75% or higher), a FBAA-based lending evaluation process should remain the core evaluation matrix. This simple and sensible approach is time-tested and proven to be effective and reasonable. It should be preserved and enhanced as part of the new rule.

(b) Outside Retail Lending Areas ("ORLA"): In addition to FBAA and RLAA, the NPR further proposes to evaluate large banks for retail lending outside the FBAA and RLAA at the institution level. Continuing with the reasoning above, if a bank is lending mostly within its FBAA, further assessing its performance in ORLA does not add much value or meaning to the evaluation process, or to the LMI community. Subjecting all large banks to this extra layer of assessment means that they will need to spread their CRA resources beyond their main markets. Universally applying the ORLA and RLAA requirements to large banks will lead to the dilution of CRA resources across geographic areas that are much wider than the banks' core CRA footprints.

(c) National/Institution-Level Lending: On top of FBAA, RLAA (if applicable), and ORLA, under the NPR banks are further evaluated at the national/institution level. While it is logical to assess financial institutions at the aggregate level, such assessment should still focus on the core geographic areas where most of their retail lending took place (i.e., similar to the existing exam process). So, for banks that focus in their FBAA, the national/institution-level assessment should be the aggregate lending in all of their FBAAs; and for online lenders (or banks that lend substantially outside of its FBAA), their aggregate in all of their RLAAs. As for banks that have substantial

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[2] *West Virginia v EPA, U.S. Slip Op. 20-1530* (June 30, 2022).

concentrations in both FBAA and RLAA, the national/institution-level assessment should be the aggregate in both categories, weighted by each region's share of the Bank's total lending. What it should not be, however, is the aggregate of all of the bank's lending. Taken together, applying all these layers -- the FBAA, RLAA, ORLA and the national layers – means that banks are basically evaluated in almost every geography where they lend, even where the level of lending activity is low. The question then becomes: how does such a process benefit the LMI community? One key objective of the NPR is to reduce inefficiency in the CRA evaluation process, so as to benefit the community. What is proposed in the NPR reduces the efficiency of the examination process without adding clear benefits to that community.

2. The Retail Lending Test ("RLT") Overemphasizes the Quantitative Measurements, Which Can Lead to an Over-Standardization of the Evaluation Process

One key objective of the CRA modernization effort is to increase objectivity and transparency in the performance evaluation process. To that end, the NPR lays out, in great detail, how the Agencies will measure and evaluate different categories of banks in terms of CRA lending activities at all levels – FBAA, RLAA (if applicable), ORLA, state and institution – properly weighted at the corresponding geographical level and aggregated to arrive at the appropriate performance scores and metrics. The NPR further defines, with great clarity, the various Market and Community Benchmarks that banks would be compared to and the thresholds they must meet or exceed in order to reach a passing performance conclusion.

We deeply appreciate the Agencies' diligence and efforts in detailing how various retail lending activities will be calculated and measured. However, while the formulas are meticulously defined and make great mathematical and logical sense, the impact created by CRA activities often go beyond the numeric. A key strength of the existing Lending Test is the balance it strikes between the quantitative and qualitative, the efforts and the results, the quantifiable and the unquantifiable. This critical perspective is missing in the RLT.

To illustrate the point, Appendix A of the proposed rule, which stipulates the mathematical formulas for the RLT covers 40 pages of the NPR. In comparison, there is less than one page of contents on Section_.21(e) "Performance context information considered", which is applicable not just to retail lending but all performance tests. There is little detail on how performance contexts will be used to adjust a bank's performance.

When the quantitative process is defined in such extensive detail and length, much of the institution's attention, time, resources, and efforts will be spent on reaching these numerical goals – this is especially true since the Retail Lending Test carries the most weight (45%) of all four performance tests. One unintended but predictable outcome of this focus on the quantitative is that what does not get counted probably will not get done – to the detriment of the LMI community. A perfect example is the income-restricted mortgage assistance ("IRMA") programs that have income limits over 80% AMI. Currently, these mortgage loans are counted under the "*Flexible and Innovative Lending*

Practices" category of the Lending Test. But there is no such category in the RLT. And these loans aren't included in the formula calculations toward a bank's retail lending performance metrics. This means these banks will not receive any quantitative credit under the new rule. This will greatly reduce the incentives for banks to continue to participate in these programs (see Section 2 below for further details).

In addition, qualitative assessment is important because banks have different business models. Over-reliance on quantitative measurements can lead to the over-standardization of the evaluation process, which fails to recognize the merits of these different models and stifles creativity and diversity in the CRA market.

Lastly, deposits play a very important role in weighing the lending and investment performances in the NPR. While this is a good gauge for performance assessment, it should be noted that the deposit market is very different from the CRA market – the former is primarily rate driven and largely transactional, while the latter is deeply relationship-driven and takes time and resources to build. The barrier to entry is exceedingly high for LMI lending and CD financing. As a result, when a bank maintains a deposit presence in a geographic area, such presence does not necessarily mean the bank has equal or even proportional access to the LMI and CD lending opportunities there, when compared with other lenders. In addition, special lending programs and initiatives can take years to develop, test, fine-tune before they yield meaningful results, and not every program or initiative reaches that point. It is important to take these nuances into account in a qualitative context.

What We Propose: Instead of the formula-focused RLT, we propose to model the test after the existing Lending Test but fine-tune it by making it product specific, weighing it appropriately for each CRA assessment area ("AA"), and aggregate the AA lending performances at the state and institution level. Importantly, the RLT should retain the existing "*Flexible and Innovative Lending Practices*" component to maintain a sensible balance between the quantitative and qualitative aspects of CRA lending evaluation.

3. Lack of Consideration for High-Cost Markets in the RLT and Community Development Financing Test ("CDFT")

Affordable housing – both in terms of homeownership and rental housing – has become a pressing issue in many parts of the country. The crisis is especially acute in high-cost areas. According to the California Association of Realtors, the Q2 2022 median home price reached $1,900,000 in San Francisco, $860,230 in Los Angeles, and $1,265,000 in Orange County. The median home price rose to $815,000 in Boston and $760,000 in New York City (source: PropertyShark.com). In Lahaina, HI, the median price reached $975,000, while in Washington D.C., it climbed to $725,000 (source: redfin.com). In comparison, the median home price in the U.S. as a whole was $416,000 in June 2022 (source: www.nar.realtor/blog/economist-outlook.com).

In addition, according to the Q1 2022 "***Housing Opportunity Index***" ("HOI") published by the National Association of Home Builders, 68 out of the 240 metro areas in the US – almost one-third – have median-priced homes that are unaffordable to median-income households. In the Los Angeles-Long Beach-Glendale, CA metro area – the least affordable metro area in the country – only 8.3% of the homes sold are affordable to median-income families; in the San Francisco-San Mateo-Redwood City, CA metro area, 14.4%; the Kahulu-Wailuku-Lahaina, HI metro area, 21.6%; the New York-Jersey City-White Plains NY-NJ metro area, 22.3%; the St. George, UT metro area, 32.3%; the Seattle-Bellevue-Kent metro area, 32.5%, … the list goes on and on. The quarterly published HOI has consistently demonstrated that in high-cost areas, even middle-income households struggle to achieve homeownership, not to mention LMI households. Local governments recognized this years ago and started increasing the income limits for local first-time homebuyer mortgage assistance programs. But the impact of high-cost housing market is not addressed in the Retail Lending Test in the NPR.

In addition, the Retail Services and Products Test, which assesses the responsiveness of credit products and programs to the needs of LMI individuals, small businesses, and small farms, also does not take into account the impact of high-cost housing markets on CRA. We would like to highlight two specific lending categories to illustrate why this should be addressed:

(a) ***IRMA Home Loans in High-Cost Areas:*** Under the existing CRA Large BankExamination Procedures, home loans funded through IRMA programs receive qualitative and quantitative consideration under the "***Innovative or Flexible Lending Practices*"** category in the CRA Performance Evaluation. However, unless the subject property is located in an LMI tract, or the borrower is LMI by income, these loans are not counted as "LMI home loans" in the quantitative analysis of HMDA data.

IRMA programs such as down payment assistance, silent second loans and below-market-rate programs offered by states, municipalities, Community Development Financial Institutions ("CDFIs"), or other nonprofit and for-profit developers/lenders are critical in helping LMI and non-LMI workforce families to achieve first-time homeownership, especially in high-cost areas where these homebuyers must rely heavily on layered financing. IRMA programs offer substantial *subsidies* and are implemented specifically to promote affordable first-time homeownership. They have strict and specific qualifying guidelines, including income and asset limits, resale/refinance restrictions, and household size requirements. Homeownership counseling is also required in order to qualify. In addition, financial institutions often have to apply and be approved in order to become participating lenders. The missions of IRMA programs align perfectly with the goals of the CRA.

Due to soaring home prices in recent years, many IRMA programs in high-cost areas have increased their income limit to 120% or higher of "AMI. For example, the City of San Francisco's Below Market Rate program has an income limit of up to 120% of AMI. In addition, San Francisco's Down Payment Assistance Loan Program is offered to qualified households with income up to 175% of AMI. The New York City Department of Housing Preservation and Development offers

down payment assistance to households with incomes up to 120% of AMI. These guidelines reflect the local market reality that even families earning up to 120% of AMI are priced out of the housing market and need substantial financial assistance to afford a home. This reality needs to be reflected in the Retail Lending Test.

In addition, underwriting IRMA loans is time- and labor-intensive – first time homebuyers often require considerable assistance from the beginning to the end of the loan process. Since these loans often have multiple layers of subsidies, a high degree of coordination between different funding agencies is required. In our experience, banks that choose to participate in these special programs need to build infrastructure and designate resources specifically to handle the programs. Not counting these loans in the Retail Lending Test for closed end mortgages would create a strong disincentive for banks to continue their participation, to the detriment of workforce first-time homebuyers, especially in high-cost areas.

(b) Naturally Occurring Affordable Housing ("NOAH") in High-Cost Areas: On the rental side, rents have also escalated dramatically over recent years in high-cost markets – to the point that housing costs now significantly exceed 30% of the household income. According to the Bay Area Equity Atlas, 55% of Californians are rent-burdened (i.e., paying more than 30% of their income on rent). Low-income individuals, minorities and female head of households are particularly hard hit.

According to the 2022 "***Out of Reach – The High Cost of Housing"*** report published by The National Low Income Housing Coalition, a tenant must earn an hourly wage of $61.50 in order to afford a two-bedroom home in the San Francisco HUD Metro Fair Market Rent Area (HMFA), the least affordable rental market in the country. That wage is $46.13 in the Boston-Cambridge-Quincey HMDA, $45.00 in the New York HMFA, and $43.08 in the Honolulu MSA. The national housing wage for a two-bedroom home is $25.85. Eleven out of the twenty-five largest occupations in the U.S. pay less than the housing wage.

In this highly unaffordable rental environment, NOAH units are particularly critical for LMI tenants in high-cost markets such as San Francisco – where deep-pocket private equity funds are bidding for NOAH properties with cash at an alarming rate and converting them to market rate units or condos for sale. The crisis became so dire that it prompted innovative solutions such as the San Francisco Housing Accelerator Fund ("SFHAF"), which pools private capital to enable nonprofit developers to bid for at-risk multifamily properties with cash – and compete with market-rate developers. Since inception in February 2020, SFHAF has helped to preserve 33 NOAH properties totaling 1,448 units as perpetual affordable housing units for 2,399 residents. However, funds like SFHAF are an exception rather than the norm. Most NOAH properties still rely on traditional financing from banks, and a big reason why banks are actively engaged is because these loans qualify for community development lending ("CDL") treatment under CRA.

Based on the above market reality, we ***strongly object*** to the NPR's proposal to lower the NOAH affordability threshold to 30% of 60% AMI, instead of 80% AMI. Such an unwarranted change

will adversely disrupt the NOAH market, remove CRA incentives for banks to provide financing, and therefore make these units more susceptible to being converted to market rate units (also see comments on Section 4 "Community Development Definitions" below).

What We Propose: (i) On the ***homeownership*** side, we strongly urge the Agencies to include, for closed-end mortgages in the Retail Lending Test, IRMA loans for borrowers with income limits above 80% AMI in the calculation of the *Borrowers Bank Metric* for high-cost areas. This inclusion acknowledges the additional lending efforts undertaken by banks in high-cost markets and will provide a very strong incentive for them to continue to participate in these special programs, and therefore ensure the programs' success.

It should be noted that under the CD Financing Test in the NPR, lending in conjunction with a government affordable housing plan, program, initiative, tax credit, or *subsidy* would qualify a loan for community development lending (under the "affordable housing" category). The same treatment should be afforded to mortgage loans that are part of government-administered IRMA programs on the home mortgage side.

As noted in Section 2, we further urge the Agencies to retain the "*Flexible and Innovative Lending Practices*" component as part of the Retail Lending Test in order to maintain a critical balance between the quantitative and qualitative aspects of the lending evaluation process.

(ii) On the ***rental*** side, we ***strongly oppose*** the proposal to lower the affordable housing affordability gauge for NOAH units to 30% of 60% AMI. We firmly believe that the affordability threshold should be left largely as-is – provided that there is no unwarranted displacement of LMI tenants, if a majority of the NOAH units in an LMI census tract is below the Fair Market Rent ("FMR"), the loan should qualify for affordable housing. This is particularly important for high-cost rental markets (also see Section 4(f) below).

We also urge the Agencies to include in "impact review factors" in the Community Development Financing Test activities that promote or support affordable housing in high-cost markets that target households earning *higher than* 80% of Area Median Income ("AMI"), as deemed appropriate by local government guidelines for housing plans and programs.

4. Community Development Financing Test and Community Development Definitions

(a) CDFT: We ***support*** the NPR's proposal to combine CDL and community development investments ("CDI") into one test. We further ***support*** the proposal to consider both new originations and existing CDLs on a bank's balance sheet in determining the total volume of community development financing ("CDF") activities. This approach effectively addresses the existing inconsistency in how CDIs and CDLs are treated during an examination and provides a strong incentive for banks to provide long-term debt financing for community development activities, to the benefit of the LMI community.

(b) Illustrative List of Qualified Community Development ("CD") Activities: In addition, we ***support*** the proposal that the Agencies maintains a publicly available illustrative, non-exhaustive list of qualified community development activities that's updated periodically. We also ***support*** the proposal that the Agencies develop a process for banks to request confirmation of an activity's eligibility. These efforts would go a long way in establishing clarity and objectivity for CD activities.

(c) Mission Driven Financial Institutions: We further ***support*** the inclusion of minority depository institutions ("MDIs"), women's depository institutions ("WDIs"), low-income credit unions ("LICUs"), and Treasury Department-certified CDFIs. The proposed expansion is consistent with the increased focus on DEI efforts in the financial industry.

(d) Financial Literacy: We are ***very supportive*** of the Agencies' proposal to expand CRA eligibility to financial literacy activities for ***all*** income levels. Such a change will facilitate the promotion of financial education across the income spectrum in the community.

(e) Placed-Based Activities: We further ***support*** expanding CD definitions to 11 categories (from the current four). We view the inclusion of disaster preparedness and climate resiliency as particularly timely and relevant, and the inclusion of Native Land Areas very responsive to the struggles of the Native American community.

(f) Revised Definition for Affordable Housing: However, as noted in Section 3, we ***strongly object*** to the revised definitions for affordable housing in the NPR, which include only (1) rental housing in conjunction with a government affordable housing plan, program, initiative, tax credit, or subsidy; or (2) multifamily rental units affordable at 30% of 60% of AMI that are located in LMI census tracts, substantiated either through a partnership with an affordable-housing focused nonprofit organization, an explicit written pledge from the borrower to maintain the units as affordable housing for at least five years, or bank-provided documentation that a majority of the housing units are occupied by LMI individuals or families.

<u>NOAH Properties</u>: First, these affordable housing definitions are too narrow and add an unreasonable burden for banks. NOAH properties are an *unsubsidized* source of affordable rental units and play an important role in sustaining affordable housing supply in many parts of the country, especially high-cost markets. As noted in Section 2(b) above, many banks are actively engaged in financing NOAH properties largely because these loans qualify as CDL. The proposed, highly restrictive qualifying criteria and documentation requirements would strongly dissuade banks from financing NOAH units. This would further put these units at risk of being acquired and converted to market-rate housing – to the detriment of the LMI community.

Second, it should be noted that many high-cost cities such as San Francisco and New York have ***strict rent control*** and ***tenant protection laws*** in place, which serve as effective tools to maintain

and preserve NOAH as a reliable source of affordable rental units. Superimposing additional restriction/documentation requirements on top of rent control and tenant protection ordinances is unnecessary and unproductive. More importantly, banks do not have the authority to collect tenant income information. Doing so encroaches on their privacy.

Affordability Threshold for NOAH: The proposal to lower the NOAH rental affordability threshold to 30% of 60% AMI (instead of 80% AMI) is inconsistent with current market reality, especially for high-cost markets. The NPR cited that in 2019, about 46% of occupied rental units with affordability levels between 61-80% of AMI were occupied by middle- or upper-income households, compared to 24% of occupied units with affordability levels under 60% of AMI. It appears that the Agencies believe that limiting CDL eligibility to units with affordability levels under 60% AMI may help to ensure the households served by NOAH are in fact LMI. In response to this reasoning, we would like to share the following analysis based on current data: the 2021 AMI for a household of four people in San Francisco County is $145,400 per year, which translates into $12,117 per month. A household earning 60% of AMI has a monthly income of $7,270 (i.e., $12,117 x 60%). Assuming housing cost accounts for 30% of the household income (as the NPR proposes), the household in the example has a housing budget of $7,270 x 30% = $2,181 per month.

According to the 2021 Fair Market Rent (FMR) published by HUD, a *studio* in San Francisco County has a market rent of $2,350. In other words, if the household of four earning 60% AMI were to budget 30% of its income for housing, it won't be able to afford even a studio in San Francisco. A two-bedroom apartment – a reasonable accommodation for a household of four, costs $3,553 per month, which means the rent for the 60% AMI household will have to be discounted by almost 40% in order for the unit to be considered affordable under the NPR. Since rents for NOAH units are *unsubsidized*, it is not realistic or sustainable to expect these properties to have such deeply discounted rents. Further, it is not likely safe and sound from a credit/cashflow perspective.

What's presented above is the market reality in high-cost areas. Making it more difficult or burdensome to qualify NOAH for CDL will not change these facts. It will only make it worse for LMI tenants: if the bar is set too high or the requirement becomes too burdensome (as proposed in the NPR) to qualify a loan for CDL, banks would be strongly disincentivized to finance these properties. Without bank financing, NOAH properties that are already at great risk of being converted to market rate units will be even more susceptible to such conversion. As we start to lose more NOAH properties to market rate developments, fewer affordable units will remain for LMI households. This could trigger a vicious cycle.

We therefore ***strongly oppose*** the restrictive definitions for affordable housing as proposed by the NPR. We urge the Agencies to retain the existing definitions, which are sensible and have proven to be effective over the last 27 years. Efforts to modernize the regulation should facilitate affordable housing activities, not make it more difficult – to the detriment of the LMI tenants.

5. Community Development Services ("CDS")

(a) Financial Related Activities: We ***support*** the NPR's proposal to expand CDS to include all financial literacy activities, regardless of the income level of participants. Such a change will promote the financial well-being of all residents and benefit the community as a whole. However, we ***object*** to the NPR's proposal to limit qualified volunteering activities to those that are financial services related. We urge the Agencies to expand CDS eligibility to include *all* activities that are targeted to, or primarily benefit, LMI individuals/communities in an AA or statewide/regional area, regardless of their connection to financial services.

For example, volunteering to build homes for Habitat for Humanity families clearly meets a pressing community need (i.e., affordable homeownership) and in our view should qualify for CDS. Yet the NPR proposes that such activities should qualify only if they were in a non-metro area. This arbitrary restriction is misguided and unproductive: requiring volunteering activities to be financial services related often distorts a nonprofit's true priorities, as it forces the organization to pivot away from its real mission in order to satisfy the CRA needs of the bank volunteers. To illustrate this point, consider that the most pressing need for a nonprofit that serves homeless individuals is not providing them with financial education, but helping them stay off the street, fight substance abuse, and survive. Nonprofits should be given the trust and opportunity to direct volunteering services to where they are needed the most, instead of spending extra efforts to create activities that do not further the organizations' core purposes just to help banks fulfill their CRA obligations.

In addition, it is our understanding that many LMI-focused community partners are still struggling to recruit volunteers as a result of the pandemic. Further raising the bar – a bar that doesn't truly add value to their cause – will make things worse for them.

Lastly, while grant-making and volunteerism often go hand in hand in CRA, there is clear inconsistency in how CRA grants and CRA service hours are treated. Being financial services-related is not a requirement for a grant to be eligible for CRA treatment – for example, a grant to a homeless shelter within an AA qualifies as a CRA investment regardless of what program the grant supports. Yet volunteering at the same homeless shelter does not qualify as a CRA service unless the volunteer activity is financial services related. There does not appear to be a rational justification for this inconsistency.

(b) Volunteering Activities: We ***support*** the Agencies' proposal to measure a bank's qualified volunteer service hours as a ratio of its total number of full-time employees. This approach effectively addresses the different levels of available human resources between financial institutions and allows for meaningful comparisons between them, both at the local and institution levels. What we further propose is that, to make this ratio truly comparable for same category banks, it should be ***further divided by the number of months in the evaluation period***, which can vary from bank to bank.

6. The Proposed Data Collection, Maintenance and Reporting Requirements Are Excessive and Burdensome, Especially for Banks with Total Assets Over $10 Billion

The NPR proposes massive new data collection, maintenance and reporting requirements that are excessively burdensome to financial institutions, especially large banks with total assets of over $10 billion. While we understand that additional data collection/maintenance/reporting is necessary for some proposed changes – for example, collecting and reporting CDL and CDI data for the new CDFT is needed for the CDFT to work – the unnecessarily granular nature of some of these requirements is punitive to banks that are subject to it. It adds little value, and will make the CRA evaluation process less, not more, efficient:

(a) Deposit Data: In line with our objection to require large banks that lend mostly in their FBAA to delineate RLAA, we ***strongly object*** to the NPR's proposal that large banks with total assets ("TA") over $10 billion to collect the dollar amount of its deposits at county level, based upon the *address* associated with the individual account, calculated based on average daily balances provided in bank statements (monthly or quarterly). The NPR allows banks with TA of $10 billion or less, intermediate banks, and small banks to use the FDIC Summary of Deposit data. There is no logical reason why banks with TA over $10 billion can't do the same, especially if the goal is to achieve efficiency. The proposed requirement for banks with TA over $10 billion may help to achieve higher mathematical accuracy. But such a granular approach would impose substantial burdens on the banks. If the FDIC Summary of Deposit data is good enough to be used in the CRA exam for all other banks, it should be good enough for banks over $10 billion.

(b) CDS Data: We also ***object*** to the NPR's proposal to require large banks with TA over $10 billion to collect, maintain, and report CDS data, while not requiring the same of all other banks. Under the NPR, all large banks will be measured based on their share of deposits in any given geography. There is no logical reason for the different treatment.

We strongly urge the Agencies ***not*** to impose these sweeping, burdensome and inefficient data collection requirements referenced above. If such a substantial data burden is required to make the proposed rule work, then perhaps it is an indication that what is proposed is not the most effective approach . More importantly, there are unintended but adverse effects on the LMI community that need to be taken into account: –the time and resources required to comply with these granular and complex requirements are time and resources that could be better spent on the LMI community.

7. Proposed Transition Timeline Is Too Short for Such Complex and Sweeping Regulatory Changes

Our last comment is on the proposed transition timeline. The NPR proposes that (i) banks comply with requirements with the final rule beginning on the first day of first calendar quarter that begins at least 60 days after publication date of the final rule; (ii) one year after the publication date of the final rule, all definitions (except small business loan ("SBL") and small farm loan ("SFL")), geographic considerations, areas for eligible CD activities, performance tests, assessment standards and ratings,

all examination tests, assigned conclusions and ratings, and most data collection requirements will go into effect; (iii) two years after the publication date of the final rule, the definitions of SBL and SFL, and related data collection will go into effect; and (iv) the start date for CRA examinations under the new tests will be two years after the publication of the final rule.

In our opinion, the above proposed timeline is ***inadequate*** for regulatory changes of this magnitude and complexity. Banks need to develop policies and procedures, set up infrastructure, reconfigure computer systems to collect, maintain and report data, and conduct comprehensive training to ensure they are properly positioned to comply with the new rule. These changes will take a substantial amount of time and planning to complete.

In addition, as banks gear up to comply with the new regulation, they must still maintain full compliance with the *existing* regulation. This means that during the transition period, banks are required to juggle with *two* sets of CRA rules. Had the NPR been a simple tweaking of the existing CRA regulations, this may have been manageable. But what the NPR sets forth is a wholesale revision and replacement of the current regulations. As such, banks need to be given sufficient time to implement it.

The CRA modernization process went through three iterations of the Agency proposals over the last three years. The whole process has taken the Agencies almost five years. Whatever comes out as the final rule deserves the time and patience from all involved to get it right.

To that end, we propose that (i) the final rule to go into effect ***two years*** after the publication date (instead of first day of first calendar quarter that begins at least 60 days after publication date); (ii) all definitions (except SBL and SFL), geographic considerations, areas for eligible CD activities, performance tests, assessment standards and ratings, all examination tests, assigned conclusions and ratings, and most data collection requirements to go into effect ***two years*** after the publication date of the final rule (instead of one year); and (iii) The SBL/SFL definitions and related data reporting timeline to align with that of the pending rulemaking by the Consumer Financial Protection Bureau ("CFPB") to implement the small business data collection requirements of , Section 1071 of the Wall Street Reform and Consumer Protection Act. At the time of this comment letter, the CFPB has committed to issuing a final rule by March 31, 2023. It would make sense to align the new CRA rule with that rule to achieve efficiency. Lastly, we propose that CRA examinations under the new CRA rule commence when the bank being examined has gone through the data collection and reporting cycle for the ***entire*** evaluation period (instead of two years). It does not make sense to conduct an examination under the new rule when the data collected for the exam is based on different regulatory requirements.

Conclusion:

The comments in this letter reflect considerable thought and consideration and years of practical experience with the CRA since its enactment and, particularly, since the promulgation of the

current CRA regulations. We thank the Agencies for taking them into account in formulating the final rule and look forward to a sensible, objective, and efficient new CRA regulation.

Please address any questions with respect to these comments to the undersigned at the address above, or to Howard Hyde of this firm at Howard.Hyde@arnoldporter.com or 202-942-5353.

Sincerely,

David F. Freeman, Jr.