August 5, 2022

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; Docket ID OCC-2022-0002, RIN 1557-AF15
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E–218
Washington, DC 20219

Ann E. Misback
Secretary
Attention: Docket No. R-1769, RIN 7100-AG29
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

To Whom It May Concern:

The Consumer Bankers Association ("CBA")[1] is pleased to submit these comments to the Board of Governors of the Federal Reserve System ("Board"), the Office of the Comptroller of the Currency ("OCC"), and the Federal Deposit Insurance Corporation ("FDIC") (collectively, the "Agencies") on behalf of its members in response to the Joint Notice of Proposed Rulemaking ("NPR" or "Proposal") entitled "Community Reinvestment Act."[2] The CBA welcomes the Agencies' unified approach to Community Reinvestment Act ("CRA") regulation and their efforts to propose rules that adapt to changes in the banking industry and provide greater clarity and consistency in CRA compliance.

[1] The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, the CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.
[2] Community Reinvestment Act Notice of Proposed Rulemaking, 87 Fed. Reg. 33,884 (proposed June 3, 2022) [hereinafter "CRA"].

The CBA supports the goals of the CRA, and its members acknowledge an affirmative obligation to help meet the credit needs of their communities, including low- and moderate-income ("LMI") areas, consistent with safe and sound banking practices. As noted by a leading advocacy group, the CRA "has leveraged trillions of dollars of responsible loans, investments and services for traditionally underserved communities."[3] Through the CRA, banks across the nation invest hundreds of billions of dollars in their communities, demonstrably benefitting them. Our members remain committed to further supporting their communities and emphatically reject any notion that current CRA ratings are inflated or reflect anything other than the Agencies' recognition of that commitment.

In reviewing the proposed rulemaking, the CBA's objective was to make sure that changes to the existing 1995 regulatory structure facilitate this commitment by providing banks with a flexible yet predictable mechanism to satisfy their CRA obligations, perhaps for the next quarter century. In furtherance of this objective, our members carefully analyzed the NPR and several provided relevant data on a confidential basis.[4] We offer the following comments to facilitate the implementation of a streamlined, modernized rule that reasonably accounts for the operational realities of the banking industry.

The CBA endorses a more quantitative approach to CRA examinations, an expansion of community development categories, and a pre-clearance mechanism for activities not expressly authorized. But our analysis also shows some aspects of the NPR would be counterproductive to modernization and serving our communities. Specifically:

- **Retail Lending Assessment Areas ("RLAAs") are contrary to the plain language of the CRA and congressional intent.** In fact, RLAAs turn CRA on its head by effectively requiring banks to use deposits gathered from their local communities to make loans in places potentially thousands of miles away. We urge the Agencies to dispense with the notion of RLAAs and to instead examine each bank's facility-based assessment areas ("FBAAs") and institution-wide performance.

- **The Major Product Line ("MPL") determination process will lead to uncertainty and inaccurately depict a bank's AA lending.** MPL determinations at the AA level will make it challenging for banks to implement credit programs that meet community needs since banks will not know which products constitute MPLs until examination time. Additionally, basing MPL determinations on a dollar-volume metric creates statistical anomalies by devaluing small business loans for banks with high mortgage and/or auto lending volumes. We urge the Agencies to determine MPLs at an institution level, using a *unit*-based metric, to afford banks greater clarity, consistency, and assurance.

- **Consumer auto loans should not be evaluated under the Retail Lending Test ("RLT").** The Agencies have not substantiated their inference that LMI individuals have little or no

[3] *Principles for CRA Regulatory Reform*, NAT'L CMTY. REINVESTMENT COAL. (May 21, 2018), https://ncrc.org/principles-for-cra-regulatory-reform/.
[4] Data was submitted by individual banks to the CBA's outside counsel Buckley LLP. No individual bank data was shared with anyone outside of Buckley LLP, including third parties, other CBA member banks, or CBA staff.

access to auto loans, nor have they adequately articulated why auto loans warrant vastly different treatment than other consumer lending under the NPR. We urge the Agencies to exclude auto loans from the RLT and to refocus the CRA on mortgage loans and small business loans, which are instrumental to helping LMI individuals build wealth.

- **Banks will have less flexibility in how to serve their communities.** The NPR adopts a one-size-fits-all approach for large banks, deemphasizing performance context and adopting strict compliance thresholds. We urge the Agencies to continue to use performance context as the foundation of a bank's performance evaluation, recognizing that banks require flexibility to address different needs and issues across different markets.

- **An "Outstanding" rating will be largely out-of-reach, which may mean more banks will be content with "Satisfactory."** The NPR would require an "Outstanding" bank to perform at 125% of market, creating an unsustainable race to the top. We urge the Agencies to set this benchmark between 90% and 100% of market and supplement it with an analysis of discretionary factors that may boost ratings.

- **Rating downgrades should only be based on discriminatory or other illegal practices that have a nexus to the CRA.** The NPR proposes to expand the types of discriminatory practices that could result in a CRA rating downgrade to include any practice, not just ones related to providing financial products and services. We urge the Agencies to limit the scope of practices that could result in a downgrade to practices with a nexus to CRA, *i.e.*, related to the provision of financial products and services.

- **Banks will have less incentive to engage in community development ("CD") financing** because CD lending would no longer be eligible for consideration under the more heavily weighted lending test. Instead, lending and investments would be aggregated and assessed under a less heavily weighted CD Financing Test. We urge the Agencies to redress this imbalance by providing banks with the option of receiving qualitative consideration for CD lending under the RLT and weighting combined CD activities at 50%.

- **Limiting the strategic plan option will deprive banks of the flexibility needed** to serve their communities in ways consistent with their business orientations. The NPR raises the bar for strategic plans by requiring banks to be evaluated under the same performance tests and standards as traditional banks unless they are "*substantially engaged*" in other activities. We urge the Agencies retain strategic plans in their current form.

- **The transition period is much too short.** The 12-month period for large banks to implement the Proposal's significant new administrative and data collection requirements is insufficient because it does not give banks nearly enough time to come into compliance. We urge the Agencies provide at least a 24-month implementation period and establish all standards and benchmarks at the beginning of an examination cycle based on two years of performance.

- **Restrictions within CD financing categories will complicate banks' efforts to serve LMI communities.** The NPR's 30/60 affordable housing standard presupposes an

abundance of 30/60 projects, which the data does not support. We urge the Agencies to adopt a 30/80 affordable housing standard, if they adopt one at all, with higher thresholds in high-cost areas, to appropriately serve both low- and moderate-income neighborhoods and individuals.

- **Consideration for CD services should be based on LMI community needs and not be limited to the provision of financial services.** The NPR's focus on CD services that are related to the provision of financial services (in metropolitan but not rural areas) unduly restricts banks' efforts to prioritize the unique, varying needs of urban LMI communities. We urge the Agencies to eliminate this restriction and allow banks to receive consideration for all CD services, regardless of whether such services are related to the provision of financial services.

  We explain our positions below.

ASSESSMENT AREAS

While we understand that the Agencies seek to capture lending that occurs outside of banks' FBAAs, the NPR's suggested approach to RLAAs fundamentally misunderstands the diffuse manner in which products and services are offered. The proposed framework for delineating RLAAs is out of step with how banks actually lend and operate. Moreover, the NPR would substantially increase large banks' assessment areas ("AAs") without any regard to the bank's business model or asset size, which can vary widely even among large banks.

Based on a representative sample of the CBA's membership, banks would see an average increase in new AAs of 1,470% under the NPR. This ranges from 0% to 18,100%, with a median increase of 90%. In terms of raw numbers, large banks' number of new AAs would range from 0 to 250, with a median increase of 35, and an average increase of 71. In performing our analysis, there was no statistically significant correlation between institution size and the corresponding percentage increase in new AAs. For example, one bank with approximately $20 billion in assets would have a 20% increase in new AAs, while another like-sized bank would have a 471% increase in new AAs.

Establishing a large number of RLAAs will dilute banks' focus and limit their ability to meaningfully meet CRA needs. Additionally, the Agencies' purpose behind creating RLAAs can be achieved with other approaches, as we describe below. Given the sheer number of new AAs created by the Proposal and the burden new AAs would impose on banks regardless of their size, we strongly oppose the creation of RLAAs and recommend that the Agencies reconsider the proposed approach.

I. The Agencies Should Not Create Retail Lending Assessment Areas.

A. The CRA Does Not Authorize the Creation of Retail Lending Assessment Areas.

The plain language of the CRA does not authorize the creation of RLAAs. The law limits AAs to locations where banks are chartered and have a physical presence. According to the statute, Congress intended for regulated financial institutions to: (1) be "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*"; and (2) "have continuing and affirmative obligation to help meet the credit needs of the local communities *in which they are chartered*."[5]

Consistent with this limitation, the CRA provides that the Agencies' written evaluations cover each area "in which a regulated depository institution maintains one or more domestic *branch* offices."[6] The statute defines "domestic branch" as "any *branch* office or other *facility* of a regulated financial institution that *accepts deposits*, located in any *State*."[7] Put simply, requiring banks to serve communities where they have no physical presence goes beyond the plain language of the statute.

[5] Community Reinvestment Act, 12 U.S.C. § 2901(a)(1), (3) (emphasis added).
[6] *Id.* § 2906(b)(1)(B), (d) (emphasis added).
[7] *Id.* § 2906(e)(1) (emphasis added).

B. Retail Lending Assessment Areas Are Inconsistent with the Deposit-Based Reinvestment Approach of the CRA and Do Not Account for the Nature of Modern Banking.

As noted in the text of the statute and its legislative history,[8] the focus of the CRA is on the *reinvestment* of deposits in neighborhoods where the deposits were collected. But RLAAs turn CRA on its head by effectively requiring that banks employ deposits sourced at a neighborhood branch to make loans in communities nowhere near that branch (or often any branch). Establishing AAs based solely on where a bank extends credit, without regard to where it receives deposits, is inconsistent with the notion of community reinvestment.

Nor do RLAAs properly account for developments in modern banking. While we understand the Agencies' intent to modernize the CRA for the digital age, the NPR does not take into account that digital business models, by their nature, are not tied to any particular geography. Further, assigning RLAAs based on where customers are located when they receive a loan is not actually evaluating the ability of a bank to serve its communities, rather it is evaluating customers' ability to access bank products. Evaluating banks based on their RLAAs, therefore, misconstrues the business model of digital banking and is not an appropriate measure of assessing whether a bank is adequately serving its communities.

As noted above, our analysis revealed significant increases in new AAs under the NPR outside of where banks have deposits and beyond the communities they serve, which is a reflection of the mismatch between the proposed rule, the reinvestment focus of the CRA, and how digital banking strategies work. For this reason, we recommend against the creation of RLAAs. Rather, we argue that assessment of FBAA performance and performance at a bank-wide level are more appropriate measures to evaluate the totality of a bank's lending.

C. Instead of Retail Lending Assessment Areas, Lending Should Be Evaluated on an Aggregate Basis at a Bank-Wide Level.

We appreciate the Agencies' concern that current CRA regulation does not sufficiently capture all bank lending across the country. However, for the reasons discussed above, RLAAs would create artificial geographic areas based on flawed assumptions of digital banking and would not be an accurate measure of banks' lending activities. Instead, the CBA strongly recommends that, in lieu of RLAAs and outside retail lending areas, the Agencies assess retail lending on an aggregate basis bank-wide for all FBAA and out-of-footprint lending, in addition to the separate assessment of FBAAs. This approach would achieve the Agencies' goal of capturing more lending but does so more efficiently and in a way that accommodates different and modern banking strategies.

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[8] Senator William Proxmire, who authored the CRA legislation, testified when discussing its purpose: "By redlining let me make it clear what I am talking about. I am talking about the fact that banks and savings and loans will take their deposits from a community and instead of reinvesting them in that community, they will actually or figuratively draw a red line on a map around the areas of their city, sometimes in the inner city, sometimes in the older neighborhoods, sometimes ethnic and sometimes black, but often encompassing a great area of their neighborhood." 123 Cong. Rec. 17630 (June 6, 1977); CRA, 87 Fed. Reg. at 33,888.

D. If, Notwithstanding Our Arguments Above, the Final Rule Includes Retail Lending Assessment Areas, the Approach Should Change Significantly.

While we maintain that the statute does not authorize the creation of RLAAs, we strongly advocate for two essential changes if the Agencies nevertheless decide to include the concept in the final rule: (1) add a quantitative assessment of materiality based on market share and proportion of overall bank lending; and (2) only compare a bank's performance in an RLAA with other banks' RLAA performances.

1. The Agencies Should Establish a Materiality Test for RLAAs Based on Proportions of the Market Share and Bank Lending.

The Agencies propose creating RLAAs based on a threshold of 100 mortgage or 250 small business loans in an MSA with the objective "that a large bank would delineate a [RLAA] where it has a concentration of retail loan originations outside of its [FBAAs]."[9] However, these thresholds would hardly constitute a "concentration" of originations for many large banks given the breadth of their operations, thus resulting in a substantial increase in the number of new AAs as described above.

In order to better tailor RLAAs to bank operations, the CBA recommends that the Agencies supplement these thresholds with the following materiality test for banks that meet the mortgage or small business loan threshold: the MSA will not become an RLAA unless (1) the bank holds 1% of the local market share for a particular product line for two consecutive years *and* (2) at least 0.5% of the bank's lending for that particular product line comes from that MSA for two consecutive years.

2. A Bank's Performance in Its RLAAs Should Be Measured Against the RLAA Performance of Other Banks.

We recommend that the RLAA performance of a bank be measured only against the RLAA performances of other banks and not against FBAA performance. It would be unfair to evaluate a bank's RLAA performance against another bank's FBAA performance in an AA because the nature of facility-based lending can be very different from digital lending. Physical presence makes a huge difference in a bank's ability to serve LMI communities. Banks without a physical facility in an AA should not be penalized on that basis.

II. The Agencies Should Clarify Whether a Non-Proprietary ATM Would Count as a Remote Service Facility for the Purposes of Establishing Facility-Based Assessment Areas.

We appreciate that the NPR retains the notion of FBAAs, consistent with both the statute and current regulation. The NPR would change the definition of Automated Teller Machine ("ATM")/remote service facility from "an automated, unstaffed banking facility owned or

[9] CRA, 87 Fed. Reg. at 33,916.

operated by, or operated exclusively for, *__the__* bank,"[10] to "an automated, virtually staffed, or unstaffed banking facility owned or operated by, or operated exclusively for, *__a__* bank."[11] In the past, the regulators have distinguished between bank-owned (proprietary) and non-bank owned ATMs.[12] Given this change in the NPR, the Agencies should clarify whether this would include non-proprietary ATMs. ATMs that are not owned and operated exclusively by the bank should not trigger a new FBAA and, therefore, we would recommend retaining the language under the current regulation.

__RETAIL LENDING TEST__

A. The NPR's Benchmark Framework Is Ill-Conceived and Unsustainable.

1. A Lack of Benchmarking Data Creates Transparency Issues.

The CBA is concerned about the lack of relevant benchmarking data available upon rule implementation. This lack of transparency is contrary to the Agencies' objectives of clarity and certainty since banks will be unable to determine the standards against which they will be evaluated and have little certainty about how well they would perform in a given area. In fact, there is a general lack of transparency with respect to how lending metrics, ranges, and benchmarks will be determined, or when, and by whom, they will be determined, and a bank's entire CRA performance hangs in the balance. This unpredictability raises serious fair notice and due process concerns, and the Agencies should address these concerns by publishing benchmarks in advance of the rule's implementation.

Even following implementation, benchmarks will necessarily cover a period that predates the evaluation period. This lag may result in banks being measured against inaccurate benchmarks. For example, benchmarks may be set during a period where economic conditions vary greatly from those of the evaluation period. In order to address these concerns, the Agencies should also provide clear explanations for how they plan to account for this lag.

2. The NPR Establishes Unattainable Standards for Obtaining "Outstanding" and "High Satisfactory" Ratings.

The CBA is very concerned that the NPR's standards for "Outstanding" and "High Satisfactory" ratings would require a bank to perform at 125% and 110% of market, respectively, standards intended to be considerably higher than under the current rule. Indeed, the NPR shows that by these standards, *no* bank with over $50 billion in assets is expected to achieve an "Outstanding" rating, and only approximately 38% of *all* large banks (those with greater than $2 billion in assets) would earn a "High Satisfactory" rating.[13]

Instead of incentivizing banks to better meet the credit needs of LMI communities in meaningful and practical ways, the proposed ratings framework could encourage banks to make

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[10] 12 C.F.R. § ___.12(d) (emphasis added)
[11] CRA, 87 Fed. Reg. at 34,018 (emphasis added).
[12] *See, e.g.*, 12 C.F.R. § ___.24(d)(3).
[13] CRA, 87 Fed. Reg. at 33,954.

unsustainable efforts to reach the 125% market benchmark, and if a number of them do, the bar will be set even higher for each subsequent exam period. At some point, attaining an "Outstanding"—or even a "High Satisfactory"—rating will become mathematically improbable and intensify safety and soundness concerns.

This inherent flaw is exacerbated by market variability, which adds uncertainty to the attainability of an "Outstanding" rating. Some markets have a wide distribution of lending while other markets have a tight distribution: in some markets, most lenders will fall in the 95% to 105% range, while in other markets, most lenders might fall in the 80% to 120% range. Additionally, "Outstanding" ratings will be easier for some banks to reach than others. For example, it may be mathematically impossible for banks that drive market share in certain AAs to achieve an "Outstanding" rating. This result runs contrary to the Agencies' goal of "tailor[ing] performance standards to account for differences in bank size and business models and local conditions."[14]

The CBA presumes, through this framework, the Agencies are seeking to address alleged grade inflation. However, the CBA emphatically rejects any notion that our members' current CRA ratings are inflated or reflect anything other than the Agencies' recognition through their performance evaluations that the vast majority of banks understand the importance of meeting the needs of their LMI communities and dedicate substantial resources to doing so. The CBA urges the Agencies to set the "Outstanding" ratings market benchmark to between 90% and 100% and the "High Satisfactory" benchmark to between 80% and 90%, to be supplemented with performance context that may boost ratings. The CBA urges the Agencies to return to an evaluation framework that acknowledges a bank's creativity in meeting LMI community needs and strikes a balance between objectivity and creativity.

B. The Retail Lending Volume Screen Should Be Modeled After the Existing Riegle-Neal Framework.

The CBA views the NPR's retail lending volume screen as problematic for several reasons. First, the bank and market benchmarks include commercial deposits in the denominators, but exclude commercial lending in the numerators, making it more difficult for banks with significant commercial deposits to meet or exceed the 30% threshold. These metrics should be consistent with respect to the exclusion of commercial activities by omitting commercial deposits from the denominators so that they more consistently compare retail loans to corresponding deposits.

Second, as noted above, the market volume benchmark is based on data that does not currently exist and, therefore, has not been vetted as an appropriate measure. As such, there could be data anomalies that generate unintended consequences, and the fact that a bank's entire performance in an AA hinges on this potentially unreliable benchmark is extremely concerning. Additionally, the market volume benchmark is based on a limited subset of banks (large banks with a branch in that AA), while a true market volume benchmark would consider the total number of banks that are lending in that AA. In other words, under the NPR, a bank's entire RLT evaluation in a given AA depends on the arbitrary standard of how well it stacks up against *some* market participants.

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[14] *Id.* at 33,885.

Third, banks will not know what the market benchmark will be until well after the examination period has ended, which contradicts the Agencies' stated goals of "clarity and consistency."[15] Finally, the pass/fail feature is unnecessarily harsh, especially considering the foregoing obstacles banks must overcome, and may cause safety and soundness issues if banks focus their efforts on passing the screen.

A number of CBA member banks are reporting that they are likely to fail the retail lending volume screen in areas in which they have historically performed well, based on microeconomic and macroeconomic factors over which banks have no control and that are not accounted for in the metric. For example, the data from one member bank with only a sliver of its total lending operations considered retail lending for RLT purposes (less than 2%) show that this bank is likely to *always* fail the screen since the numerator will consistently be significantly smaller than the denominator, which includes deposits that support the bank's entire balance sheet. This bank would have to rely heavily on the NPR's nebulous "acceptable basis" analysis—a discretionary review of factors that limit the bank's ability to lend in an AA—in order to pass the screen in its AAs.[16]

The CBA believes adopting a retail lending screen similar to Riegle-Neal's loan-to-deposit ratio screen can help remedy some of the more troublesome aspects of the NPR's screen, especially since the Riegle-Neal framework eliminates the pass/fail component in favor of a credit needs determination. Riegle-Neal was established to ensure that banks do not seek deposits in states where their branches are located without providing credit in those states.[17] Riegle-Neal has been a tried-and-true framework since the 1990s, and banks are already familiar with its workings. Additionally, Riegle-Neal and the CRA share an alignment of purpose: to ensure that banks are meeting the credit needs of their communities.[18] As such, it seems that the Riegle-Neal framework is a more appropriate and well-tested alternative for CRA evaluation purposes.

Under the CBA's proposed Riegle-Neal adaptation, the loan-to-deposit ratio would be calculated at the statewide level, rather than AA level, such that banks would only be evaluated for the states in which they have branches. Riegle-Neal's screen requires that a bank's ratio be at least 50% of the benchmark ratio, which is the loan-to-deposit ratio for all banks that have the relevant state as their home state.[19] For RLT purposes, the NPR's 30% threshold would be maintained. As with Riegle-Neal, if a bank does not pass the screen, then the bank does not fail for that particular state; rather, a *clearly delineated* credit needs determination would be triggered in which the regulators would complete a full performance context review in the relevant state, considering a bank's business model, products, financial conditions, local economic conditions, and other factors to see if community credit needs are being met.[20]

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[15] *Id.*
[16] *Id.* at 34,025.
[17] Riegle-Neal Interstate Banking and Branch Efficiency Act of 1994, 12 U.S.C. § 1835(a), (c)(1)–(3) (implemented at 12 C.F.R. § 369.3).
[18] *Id*. § 1835a(b).
[19] 12 C.F.R. § 369.3(a); 12 C.F.R. § 369.2(e).
[20] If a bank does not pass the loan-to-deposit screen, the FDIC will make a "credit needs determination," which considers, in general, whether a bank is "reasonably helping meet the credit needs of the communities in the host state that are served by the bank." *Id.* § 369.3(b)(2); *Id.* § 369.4(a). The 'fallback' test considers a host of factors, including CRA ratings, concentrations of more specialized services, and economic conditions, including

The CBA believes that implementing a Riegle-Neal-inspired volume screen for CRA evaluations makes sense given the similarities between the two methodologies and considering Riegle-Neal's longevity. This approach creates a workable framework that streamlines the evaluation process where the screen is met but allows for additional review based on tangible parameters in areas where performance may not *look* as strong based on potentially biased screen metrics.

C. The Agencies Should Exclude Consumer Automobile Lending from the Retail Lending Test.

The NPR's inclusion of consumer auto loans as an MPL under the RLT is misguided. The Proposal unjustifiably emphasizes auto loans while, as explained below, sacrificing the importance of small business lending. The CBA believes auto loans should be treated the same as other categories of consumer loans under a strictly qualitative analysis.

The NPR differentiates auto loans from other types of consumer loans by including them in the RLT. This differentiation, apparently rooted in the role auto loans play in job stability and credit building,[21] is unsupported by available data. While auto loans may benefit LMI individuals, the Agencies have not substantiated the inference that LMI individuals currently have little or no access to such loans, nor have the Agencies adequately articulated why auto loans warrant vastly different treatment under the NPR.

Additionally, while it is accepted that mortgage loans and small business loans build wealth, auto loans are not viewed as wealth-building in the same manner. Furthermore, as discussed below, quantitative consideration of auto loans under the RLT diminishes the importance of small business loans and may cause banks to ignore small business loan opportunities in favor of auto loans. The CBA urges the Agencies to recenter the CRA's focus on wealth-building mortgage and small business loans by excluding auto loans from the RLT.

Additionally, including auto loans as an MPL may unintentionally disadvantage banks in the highly-competitive auto loan market. Currently, bank lenders constitute a relatively small percentage of the overall auto loan market—primarily through indirect channels.[22] Requiring dealers to take certain actions for the sake of a bank's CRA performance—particularly data keeping, marketing, and sales strategies—is likely to make banks less attractive to dealers than their nonbank counterparts. As a result, LMI individuals would have *less* access to auto loans from banks (which are more highly regulated relative to their nonbank counterparts), and banks with a strong presence in the indirect auto loan market may be penalized for their particular business models.

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loan demand. *Id.* § 369.4(b)(1)-(7).

[21] CRA, 87 Fed. Reg. at 33,931.

[22] Melinda Zabritski, *State of the Automotive Finance Market Q1 2022*, EXPERIAN 7, 12, 30 (May 23, 2022), https://www.experian.com/content/dam/noindex/na/us/automotive/finance-trends/2022/q1-2022-state-of-automotive-finance-market.pdf.

More generally, the indirect business model is uniquely ill-suited for influencing CRA lending distributions and banks with an indirect model will be penalized for having less control over these channels than those banks operating under a direct lending model. This outcome runs counter to the Agencies' goal of tailoring performance to banks with different business models.[23] For the foregoing reasons, auto loans should be excluded from the RLT; however, if the Agencies insist on evaluating auto loans under the RLT, the evaluation should be limited to the direct loan portion of a bank's auto portfolio.

D. Major Product Lines Should Be Determined Bank-Wide Using a Loan Unit Calculation.

The CBA believes MPL determinations should be made institution-wide, not on an AA-by-AA basis, using loan units instead of aggregate dollar volume. We propose an alternative framework to determine MPLs.

1. *MPL Determinations at the Institution Level Provide Clarity and Consistency.*

CBA member banks spend significant resources developing credit programs that effectively address LMI needs. This is often accomplished at the institution level, with modifications to account for regional demographic differences based on relationships with local community-based organizations. Under the NPR, MPLs are determined for each AA during the performance evaluation, which leads to unpredictability with respect to which product lines are MPLs for each AA. For example, in AAs with low volumes of reportable loans, MPLs are likely to change from year-to-year based on small changes in volume.

MPL determinations at the institution level are more aligned with the Agencies' goals of clarity and consistency since banks will have much more forenotice of which product lines are significant and can continue to react to changes in LMI community needs in an efficient manner.[24] Additionally, this approach promotes transparency as it will make it easier for examiners and community groups to evaluate a bank's core CRA lending.

2. *Dollar Volume-Based Determinations at the AA Level Foster Inconsistency and May Cause Statistical Inaccuracies.*

Since MPL determinations are based on dollar volume,[25] an anomaly in production can lead to unintended results. For example, a bank that makes a single, exceptional jumbo mortgage loan in an AA, but specializes in relatively low-dollar small business loans, may end up with mortgages as an MPL in this AA despite having no other mortgage activity in the area. This is contradictory to the Agencies' intent that the MPL standard "ensure that a bank's performance in RLAAs reflects performance over whichever of a bank's retail lending products *it specializes in*

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[23] CRA, 87 Fed. Reg. at 33,885.
[24] *Id.*
[25] *Id.* at 33,928. The threshold for automobile lending would be 15% based on the average of the percentage of automobile lending retail lending dollars out of total retail lending dollars and percentage of automobile loans by loan volume out of total retail lending by loan volume.

locally."[26] This result paints an inaccurate picture of a bank's lending practices in the AA and unfairly draws an aberration into the examination spotlight. Additionally, MPL determinations at the institution level still risk the same distortion if calculated using dollar volume since mortgage loans are naturally greater in amount. As such, the CBA believes that a unit-based MPL determination is more likely to achieve the Agencies' desired results.

3. Dollar Volume-Based Determinations Devalue Small Business Lending.

Along these lines, the CBA has identified a significant unintended consequence of the NPR's MPL framework: since MPLs are determined based on loan dollars, mortgage lending numbers and/or auto loan numbers will likely overshadow small business loans, thereby deemphasizing a bank's small business lending efforts. Preliminary data from select CBA members with substantial mortgage operations show that since mortgage loan amounts are naturally larger than other retail loan types, they dwarf small business loan volumes, even in AAs with significant small business loan activity. As a result, small business loans may not qualify as an MPL in certain AAs, or even at the institution level, and if they do, they are weighted less in the conclusions process. Similarly, because auto loans are measured by both loan dollars and loan units, many banks' auto loan operations result in auto loan MPLs in a large number of AAs, to the exclusion of an evaluation of small business lending in these AAs.

For example, one member bank reports that under the current rule, small business loans are considered in nearly every AA; but, under the NPR, small business loans constitute an MPL in only approximately 19% of its FBAAs. However, if small business loans are considered under a hybrid MPL analysis, like auto loans (i.e., an average of loan volume and lending units), then small business loans would be considered in approximately 92% of this bank's FBAAs under the NPR.

Another member bank reports that under the NPR, auto loans will constitute an MPL in 603 of 642 AAs, while small business loans will only constitute an MPL in 180 of the 642 AAs, even though auto loans and small business loans account for a similar share of overall retail lending dollars (9% and 8%, respectively).

Not only do these results discount the tremendous efforts banks have made to meet the needs of small businesses in their communities, but they also diminish transparency since banks will no longer be able to readily ascertain whether their small business loans will receive CRA consideration. As a result, the current framework may inadvertently discourage mortgage- and auto loan-heavy banks from focusing on small business loans—a key objective of the CRA.

The CBA acknowledges that the anticipated Section 1071[27] small business threshold increase above the current CRA thresholds, possibly up to $5 million, is likely to boost small business loan figures.[28] However, a unit-threshold for MPL determination across product lines is still a more reasonable framework since mortgages will continue to dominate under a dollar volume-based threshold and the volume of auto loans, should they be included under the RLT, for some banks may be greater than small business loans due to unit consideration, even at the

[26] *Id.* at 33,920 (emphasis added).
[27] Dodd-Frank Wall Street Reform and Consumer Protection Act § 1071, 15 U.S.C. § 1691c-2(a)—(h).
[28] CRA, 87 Fed. Reg. at 33,890.

institution level. Additionally, a unit-threshold across product lines promotes consistency and predictability for banks and incentivizes the provision of small business loans of all sizes.

4. Proposed Framework.

To remedy the foregoing issues with the NPR's MPL determination process, the CBA proposes the Agencies adopt the following standards.

- For reasons already set forth, auto loans—like other consumer loans—would be excluded from the RLT. This adjustment would focus the RLT on mortgage and small business lending as the CRA intends.

- Determine MPLs at the institution level based on a 15% *unit* threshold such that if a product line constitutes greater than 15% of a bank's portfolio by unit, it is an MPL. This approach prevents a bank from being evaluated on a small aspect of its business in comparison to a bank that predominantly focuses on the relevant retail loan products. If an MPL exceeds an established minimum unit threshold at the AA level (*e.g.*, 50 units per year), then that product would be assessed under the RLT in that particular AA. Unit thresholds should be appropriately numerous to avoid issues related to statistical significance.

- Alternatively, if the Agencies insist on MPL determinations at the AA level, then mortgage loans, small business loans, and small farm loans should be evaluated in a given AA only if a minimum unit threshold for each product line type is met (*e.g.,* 50 units per year). This approach emphasizes the loan types most beneficial to LMI communities and avoids the devaluation of small business loans described above.

- Banks should have the option to receive qualitative RLT consideration for CD lending in an RLAA, or greater statewide or regional area that includes an RLAA, to make up for the identified deficiencies in small business lending consideration and weighting. Currently, many banks use CD lending to enhance their performances under the existing Lending Test, and CD loans have proven to be a highly effective way of serving neighborhoods.

- Small business lending that does not satisfy the requirements for inclusion under the RLT should be counted in the CD Financing Test. This approach helps to remedy the diminished importance of CD lending under the NPR—particularly its absence from the proposed RLT—and incentivize CD lending in line with the CRA's objectives. The CBA makes further suggestions for enhancing the value of CD activities in its discussion of Ratings, below.

E. Small Business Loan Purchases Should Qualify Under the Retail Lending Test

The CBA is concerned about the Agencies' incorporation of the CFPB's 1071 Rulemaking into the CRA because, among other reasons discussed herein, proposed Section 1071's reporting requirements apply primarily to *originated* loans.[29] The NPR proposes that once Section 1071 is finalized and takes effect, the evaluation of a bank's small business and farm loans would be based on the loans reported on a bank's Section 1071 submission.[30] However, the NPR also proposes that *purchased* loans would generally count under the RLT.[31] If the CFPB's final rule maintains that only originated loans are to be reported, then small business and small farm loans will be the only product lines for which purchased loans would not receive credit since they will not be reported on a bank's Section 1071 annual submission.

This result would penalize certain banks that rely heavily on small business and small loan purchases for meeting community business and farm needs. For example, one bank reports that over 90% of its small business loans are commercial auto loans made through indirect auto channels, which are thus categorized as purchased loans. This bank may be penalized under the RLT for its particular business model, contrary to the Agencies' goal of tailoring performance to banks with different business models.[32] As such, if the Agencies incorporate a final Section 1071 rule that requires reporting of originated—but not purchased—small business and small farm loans, banks should still receive consideration for *purchased* small business and small farm loans and be permitted to submit evidence of these purchases.

RETAIL SERVICES AND PRODUCTS TEST

The CBA endorses the goal of the proposed RS&PT to use "the existing approach to evaluate a bank's retail services, while also updating and standardizing the evaluation criteria" to reflect changes resulting from digital banking.[33] However, the CBA has a number of recommendations to make the RS&PT more flexible and responsive to banks' differing business models as well as consistent with the operations of modern banks.

I. Delivery Systems

A. The NPR's Evaluation of Delivery Systems Is Not Appropriately Tailored to Differing Banks' Business Models and Does Not Account for the Evolving Nature of Banking.

The Agencies state that the goals of the NPR are to "[a]dapt to changes in the banking industry, including the expanded role of mobile and online banking" and to "[t]ailor performance standards to account for differences in bank size and business models and local conditions."[34] Yet,

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[29] *Id.* at 33,998; *see also id.* at 33,997 ("In the longer term, CRA's data collection and reporting requirements for small business loans and small farm loans would be eliminated and replaced by the CFPB's section 1071 data collection and reporting requirements.").
[30] *Id.* at 33,997.
[31] *Id.* at 33,930.
[32] *Id.* at 33,885.
[33] *Id.* at 33,956.
[34] *Id.* at 33,885.

the proposed RS&PT takes a one-size-fits all approach that does not offer sufficient flexibility to account for banks that employ varying levels of different delivery systems. For instance, some banks may employ a combination of branch and virtual or remote delivery channels to reach their customers, while other banks may rely almost entirely on digital channels to best service their customers. Any revamp of CRA regulations should be sufficiently adaptable to account for these nuances.

The CBA recommends the Agencies offer flexible weighting based on a bank's business model for the three types of delivery systems (branches, remote service facilities, and digital and other) so that, for example, a bank that relies mostly on digital channels to serve its customers is not placed at a disadvantage for having fewer branches and remote service facilities. The Agencies should weight a bank's delivery systems in proportion to the bank's use of such systems, so that the RS&PT does not place too much emphasis on any one particular delivery system if it is not appropriate for the bank being evaluated. Further, if a bank does not have any branches or remote service facilities, we recommend that such a bank only be evaluated under the digital and other delivery systems portion of the RS&PT. To the extent this is already the intent behind the NPR, we respectfully request that the Agencies provide this clarification.

B. The Evaluation of Branch Openings and Closings Should Account for Mitigating Factors.

The RS&PT provides that examiners will evaluate a bank's record of branch openings and closings "to inform the degree of accessibility of banking services to low- and moderate-income individuals and low- and moderate-income census tracts."[35] To the extent it is not already the Agencies' intent, we recommend examiners take into account mitigating business-related factors behind a branch closure, such as lease-end, low usage, or decreased profitability. This also includes branch consolidation in response to customer preferences for different types of delivery systems, when done in a manner that does not disproportionately impact LMI communities. We also recommend the Agencies provide favorable consideration for branch openings in LMI communities and other areas of need. These considerations should be appropriately accounted for under the RS&PT rather than forcing a bank to rely on its performance context for explanation.

C. The Agencies Should Give Flexibility to Banks to Add Other Data Points to Usage to Accurately Capture the Nature of Digital and Other Delivery Systems.

The CBA appreciates that the Agencies seek to modernize CRA compliance by incorporating digital and other delivery systems into the evaluation of a bank's overall delivery systems under the RS&PT. As the NPR notes, the usage of online and mobile banking will continue to grow. However, accountholder usage data is multi-factorial and may not be solely related to income level. To account for this, we recommend that the Agencies provide flexibility for banks to supplement usage data with other demographic information as needed.

[35] *Id.* at 34,027.

D. Responses to Requests for Feedback.[36]

Below, we address some of the NPR's questions regarding the RS&PT.

Question 90. Should the agencies use the percentage of families and total population in an assessment area by census tract income level in addition to the other comparators listed (i.e., census tracts, households, and businesses) for the assessment of branches and remote service facilities?

- We agree that measures of population density should be included but do not think it is necessary to add the percentage of families and total population as this would be redundant with the other comparators since statistics regarding households, population, and families are often highly correlated. A single measure based on the residents within a census tract would be sufficient.

Question 91. Are there other alternative approaches or definitions the agencies should consider in designating places with limited branch access for communities, such as branch distance thresholds determined by census tract population densities, commuting patterns or some other metric? For example, should the agencies not divide geographies and use the more flexible, second alternative approach?

- When designating places with limited branch access, the Agencies should not use the second, more qualitative, alternative approach. While there are certainly other factors that could be considered, such as commuting patterns and dominant means of transportation, the ambiguity inherent in the second alternative approach would be unduly burdensome and present a risk of inconsistent application by examiners.

Question 92. How should geographies be divided to appropriately identify different distance thresholds? Should they be divided according to those in the proposed approach of urban, suburban, and rural areas; those in the alternative approach of central counties, outlying counties, and nonmetropolitan counties; or some other delineation?

- Geographies should be divided according to those in the proposed approach of urban, suburban, and rural areas. The alternative approach of central counties creates too wide of an area central to an MSA that does not appropriately reflect the differences between the urban center and the first ring suburban communities around it.

Question 93. How narrowly should designations of low branch access and very low branch access be tailored so that banks may target additional retail services appropriately?

- The Agencies should consider treating areas with limited-service facilities (but no full-service branches) as low branch access as opposed to very low branch access. With common banking transactions becoming increasingly automated and digitally available, the primary value of bank branches to LMI communities is offering credit and deposit

[36] *See id.* at 33,965.

products, as well as servicing such accounts. If a limited-service facility can provide these services as well as automated channels for transactions within an otherwise branch-less area, that may warrant a designation as low branch access as opposed to very low branch access. We would recommend, however, that the presence of at least one full-service branch in addition to limited-service facilities is required to elevate an area out of the low branch access category. We believe this would also result in an increase in investments in very low branch access areas as limited-service facilities can often be opened faster and in a wider variety of properties given their reduced operational complexity.

Question 94. *Is a fixed distance standard that allows the concentration of low and very low branch access areas to vary across regions, such as that in the proposed approach, or a locally determined distance threshold that identifies a similar concentration of low and very low branch access areas within each local area, such as that in the alternative approach, most appropriate when identifying areas with limited branch access?*

- We recommend using the proposed fixed distance approach over the alternative local approach. The local approach may have the unintended consequence of disincentivizing banks from adding branches in low branch access areas because this would result in the distance thresholds decreasing upon the next evaluation, which could in turn result in even more low branch access areas. The fixed distance approach creates a consistent framework that would incentivize banks to establish or maintain branches in low and very low branch access areas. It also utilizes a more appropriate differentiation between urban and suburban communities and the distance thresholds used within them.

Question 95. *Should the agencies take into consideration credit union locations in any of the proposed approaches, or should the analysis be based solely on the distribution of bank branches? For example, in the proposed or local approach, having a credit union within the relevant distance of a census tract population center would mean that the census tract would not be a very low branch access census tract (if there were no bank branch present).*

- The Agencies should not take credit union locations into account since they are not subject to the CRA. We recommend only considering bank locations for the purposes of determining low and very low branch access census tracts.

Question 96. *If the local approach were adopted, how frequently should the local distances be updated?*

- While we do not recommend the local approach, if it were adopted, local distances should be updated every five years. Frequent updating would only exacerbate the issues discussed above regarding distance thresholds decreasing and the resulting increase in areas being designated as low branch access.

Question 97. *What other branch-based services could be considered as responsive to low and moderate-income needs?*

- The Agencies should consider check depositing and cash access services offered via an Automated Teller Machine ("ATM"), Interactive Teller Machine ("ITM"), or other automation as these allow banks to offer check depositing and cash access services to customers during expanded hours and reduce the burden of branch hours on cash-dependent communities.

Question 98. *Should branches in distressed or underserved middle-income nonmetropolitan census tracts receive qualitative consideration, without documenting that the branch provides services to low- or moderate-income individuals?*

- Branches in distressed or underserved middle-income nonmetropolitan census tracts should receive favorable qualitative consideration without requiring documentation that the branch provides services to LMI individuals. Such qualitative evaluation should consider factors that appropriately gauge the community's need to travel for other retail services. For example, residents of a rural community without a local grocer or pharmacist likely already possess the ability to travel greater distances for retail banking services, and it would be unreasonable to expect bank branches to provide a higher level of convenience than other essential retailers in the area.

Question 99. *Should the agencies provide favorable qualitative consideration for retail branching in middle-income and upper-income census tracts if a bank can demonstrate that branch locations in these geographies deliver services to low- or moderate-income individuals? What information should banks provide to demonstrate such service to low- or moderate-income individuals?*

- The Agencies should consider proximate branches located in upper- and middle-income census tracts that serve LMI individuals in the same manner as branches located in LMI census tracts. It is not unusual for branches in middle- and upper- income census tracts near or adjacent to LMI census tracts to serve a high proportion of customers from those nearby areas. This includes both LMI individuals who reside near the branch and LMI individuals who work near the branch. We recommend two options for demonstrating the service area of a branch: (1) consider any census tract with a boundary or center point near the branch or adopt a circle methodology with a 3-mile radius; or (2) evaluate the customer population of the branch based on either (A) the accounts domiciled there, or (B) actual customer usage.

II. Credit and Deposit Products

A. The Evaluation of Credit and Deposit Products Should Not be Characterized Based on What Other Banks Are Doing.

The purpose of the CRA is not to dictate banks' business models or require that they offer particular products and services. However, the Proposal may have the unintended consequence of demonstrating a clear favorite for particular business models or product and service offerings in the evaluation of credit and deposit products. We want to ensure that the evaluation of a bank's products will not depend on a comparison to peer banks. For example, we do not believe that if

Bank A offers a certain product that there should an expectation for Bank B to offer a similar product, with Bank B being subsequently penalized in its rating for not doing so. Creating such a paradigm would likely conflict with safety and soundness concerns. Neither should the Agencies evaluate the cost and pricing of products as this is well beyond the purpose of the CRA. We respectfully request that the Agencies clarify this is not the intent of the NPR and that banks will not be compared against their peers for the purposes of determining whether a particular product should or could be offered and how it should be priced.

B. Quantitative Factors Such as Usage Are Not Appropriate for a Qualitative Assessment of Deposit Products Responsive to LMI Needs.

The NPR states that the evaluation of a bank's deposit products would "incorporate important *qualitative* factors that capture a bank's commitment to serving low- and moderate-income individuals, small businesses, and small farms."[37] Under the proposed RS&PT, examiners would evaluate a bank's deposit products by usage. However, usage is neither a qualitative factor nor an accurate measure to assess the responsiveness of deposit products. This is particularly true with regard to the percentage of responsive deposit products compared to total deposit accounts, because LMI individuals do not necessarily have the resources to open multiple accounts compared to middle- and upper-income customers, skewing the results of the comparison. Accordingly, we do not recommend the inclusion of usage in an assessment of responsive deposit products.

COMMUNITY DEVELOPMENT

A. *Pro Rata* Consideration Should Be Provided for All Community Development Activities.

The NPR defines loans, investments, or services with a "primary purpose of community development" as those "designed for the express purpose of community development."[38] Those products or services designed with such an "express purpose" would qualify for "full CRA credit," while those products or services not designed with such an "express purpose" would generally not receive any credit.[39]

The CBA appreciates that qualified affordable housing will continue to receive *pro rata* credit under the NPR, but believes partial consideration should be afforded to *all* CD activities regardless of primary purpose.[40] An all-or-nothing approach conflicts with the Agencies' stated goal of evaluating as much of banks' relevant conduct as possible,[41] and excluding loans and investments that do not meet the 50% threshold or *bona fide* intent standard from the CD Financing Test will paint a less accurate picture of a bank's overall CD activities. This approach also limits the Agencies' ability to see how banks are making a difference as an industry, and the lack of *pro*

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[37] *Id.* (emphasis added).
[38] *Id.* at 33,892.
[39] *Id.*
[40] To be clear, we are advocating for *pro rata* consideration *in addition to* proposed 12 C.F.R. §__.13(a)(1)(ii), which provides a means of receiving full consideration where a majority of funds or beneficiaries cannot be determined but primary purpose is otherwise established by express, *bona fide* intent.
[41] Martin Gruenberg, Acting Chairman, FDIC, *Remarks by FDIC Acting Chairman Martin Gruenberg to the National Community Reinvestment Coalition* (June 13, 2022), https://www.fdic.gov/news/speeches/2022/spjun1322.html ("The objective here is to subject *all* of the bank's lending activity to a CRA evaluation.") (emphasis added).

rata consideration discourages banks from taking on mixed-income projects that could make a significant impact in the community.

An all-or-nothing approach also runs counter to the Agencies' stated objective to "strengthen the achievement of the core purpose of the [CRA]," *i.e.*, increased lending and investment in LMI communities. The CBA views an inclusive CD financing framework—one in which all of a bank's efforts to engage in CD financing are recognized—as essential to driving increased lending and investment in LMI communities.

The Agencies need not be concerned that "partial consideration [could] serve to divert limited resources from projects specifically targeted to benefit low- or moderate-income people or communities" since *pro rata* consideration ensures that *only the qualified portion* of a loan or investment counts for CRA consideration.[42] The qualified portion *is* directly benefiting LMI communities. Under an all-or-nothing approach, the CD Financing Test fails to incentivize banks to engage in the broad range of CD activities beneficial to LMI communities.

B. The Expanded Community Development Definition Is Welcome but Contains Limits that would Unnecessarily Restrain Investment.

The CBA welcomes the expansion of CD categories generally. However, a few categories unduly limit a bank's capacity to meet the needs of its LMI communities, may lead to negative unintended consequences, and conflict with the Agencies' stated objectives.

1. A 30/60 Affordability Standard Is Unnecessarily Restrictive.

The CBA believes the affordable housing category, as defined, will constrain banks' capacities to meet affordable housing needs. The CBA understands the Agencies' desire "to focus the definition on housing that is more likely to benefit low- or moderate-income individuals or increase the likelihood that rents will remain affordable for low- or moderate-income individuals,"[43] but an unintended consequence of this change could be that banks will struggle to find opportunities under the NPR's restrictive multifamily rental thresholds. This could encourage investment in other projects less focused on affordable housing.

The CBA is also concerned about the NPR's proposed rental affordability standard for naturally occurring affordable housing. Opportunities for investment in unsubsidized affordable housing at the proposed income thresholds are scarce, if they exist at all. Additionally, while this standard is intended to encourage banks to shift resources toward lower-income housing development projects, it is more likely to reduce banks' incentive to meet *moderate*-income affordable housing needs, which again conflicts with the Agencies' stated objectives since the NPR defines moderate-income individuals as those with "individual income that is at least 50% and less than 80% of the area median income."[44]

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[42] CRA, 87 Fed. Reg. at 33,892.

[43] *Id.* at 33,896.

[44] *Id.* at 33,895; *see also id.* at 34,017. Multifamily housing with rents at 30% of 61% to 80% of area median income, though meeting the affordability threshold for a significant portion of moderate-income individuals, would not be included.

The NPR relies on an outdated 2019 observation that "approximately 46 percent of occupied rental units with affordability levels between 61–80 percent of area median income were occupied by middle- or upper-income households."[45] However, the NPR's 30/60 rental thresholds assume that the issue is bank financing for such projects, not a lack of demand to *build* the projects. Furthermore, the CBA considers the current inflationary environment—in which area rents have risen faster than area median income—as creating a dearth of available projects and, as a result, the NPR's lower threshold penalizes banks for unfavorable macroeconomic trends beyond their control.

In addition, the CBA shares the Agencies' concern that a 60% standard could restrict eligibility for properties with affordability levels at 80% of area median income where many, but not all, of the units are occupied by LMI households.[46] Accordingly, with respect to high-cost areas with significant affordable housing needs (*e.g.*, New York City), we urge the Agencies to increase the area median income threshold to somewhere between 120% and 140% based on available income data for a given area, as published by local agencies or the U.S. Department of Housing and Urban Development.[47]

If the Agencies' goal is for more bank investment to create more overall affordable housing targeted to LMI families, the proposed threshold misses the mark; banks will have more incentive to finance affordable housing projects under the widely accepted 30/80 standard, thereby creating more LMI affordable housing overall even if individual projects vary with respect to the proportion of middle- and high- income renters occupying eligible units.

The CBA further believes a 30/60 standard will lead to unintended consequences. For example, the NPR would provide CRA consideration to a bank that finances a project under California's low-income housing tax credit program—the Tax Credit Allocation Committee ("TCAC")—*because* the project would fall under a government program. But that same project, with the same rents, financed outside of the TCAC but still located in California, would *not* receive CRA consideration because the NPR's lower rent threshold would likely not be met.[48] If California has determined that multifamily rents above the 30% of 60% threshold still meet the state's affordable housing needs, banks should receive consideration for financing projects in that range. The Agencies should consider taking into account government-defined thresholds, when such thresholds are more inclusive than those in the NPR.

Accordingly, if the Agencies ultimately adopt affordability standards, they should adopt a 30/80 standard, with standards of 120%–140% for high-cost areas. Moreover, the same affordability standards should apply to subsidized and unsubsidized affordable housing, as any distinction between the two is arbitrary.

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[45] *Id.*
[46] *Id.*
[47] *See*, *e.g.*, N.Y.C. DEP'T. OF HOUS. PRES. AND DEV., *Area Median Income* (Aug. 2, 2022) (describing moderate income as 81–120% of AMI), https://www1.nyc.gov/site/hpd/services-and-information/area-median-income.page.
[48] California Tax Credit Allocation Committee Regulations Implementing the Federal and State Low Income Housing Tax Credit Laws, 4 C.C.R. § 10300–337 (June 16, 2021).

But instead of affordability standards, the CBA encourages the Agencies to adopt the National Association of Affordable Housing Lenders' ("NAAHL") position that affordable rental housing projects should receive CRA consideration where most renters in the community are LMI.[49] By expanding the geographic scope for affordable housing beyond LMI census tracts and into areas where the median renter is LMI, banks will have more opportunities to address the affordable housing shortage. Average renter income is easily ascertainable from U.S. Census Bureau data, so banks will be able to readily show that their investments benefit LMI individuals in areas that are not LMI census tracts but where there is a need for affordable housing.

2. *Non-Government-Related Affordable Housing Investments Should Be Encouraged.*

The CBA agrees that government-supported affordable rental housing projects are an effective means for addressing the affordable housing shortage. However, affordable housing often comes from partnerships with small developers and non-profit organizations. The Agencies acknowledge that "nonmetropolitan counties may have limited opportunities for affordable housing," but the NPR impedes banks from garnering CD financing consideration by requiring their non-government partners to have "a stated mission of, or otherwise directly support, providing affordable housing."[50] To be clear, these issues are not restricted to nonmetropolitan counties. Moreover, these barriers are placed on top of the proposed decrease in the area median income qualifier discussed above. Such limitations are likely to cause banks to withdraw from non-government-backed affordable housing projects and shift their resources elsewhere. To better meet the NPR's stated objectives, the Agencies should broaden the affordable housing category to more generally incentivize affordable housing investments.

3. *The Requirement that Certain Community Development Categories Be Completed in Conjunction with Government Programs Is Unnecessarily Restrictive.*

The CBA believes the NPR's requirement that certain CD activities be undertaken in conjunction with government programs is problematic.[51] This needless restriction may hinder investments in all communities, and especially those that have limited government capacity. The restriction may discourage worthwhile initiatives that meet identified community needs but are unlikely to be included in a government program, such as financing grocery stores in LMI areas. Therefore, the CBA urges the Agencies to do away with the strict emphasis on government programs. At the very least, we ask the Agencies to replace the "in conjunction with" phrasing in the relevant CD category definitions with "consistent with," so that government program guidelines may be considered in determining CD activity eligibility without causing banks to eschew meaningful projects simply because of lack of government involvement.

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[49] *Unsubsidized Affordable Rental Housing Under CRA*, NAT'L ASS'N OF AFFORDABLE HOUS. LENDERS (Oct. 2017), https://naahl.org/wp-content/uploads/2017/12/Unsubsidized-affordable-rental-housing-under-CRA-v3.pdf.
[50] CRA, 87 Fed. Reg. at 33,894–95.
[51] *See id.* at 34,019–21 (proposed 12 C.F.R. §___.13(b), (e), (g), (h), (l)).

4. Investments in Municipal Affordable Housing Bonds Are Consistent with CRA Objectives and Should Receive Community Development Consideration.

The CBA appreciates that the Agencies recognize the importance of mortgage-backed securities in providing affordable housing but suggests an expansion of the category to cover other affordable housing investment vehicles issued by state housing finance agencies or municipalities, including mortgage revenue bonds and multifamily housing bonds.[52] The CBA believes these financing vehicles are essential to meeting the affordable housing needs of LMI communities and that expanding this category to include state and municipal affordable housing bonds is natural and appropriate. These bonds would qualify under the substantive definition provided in the NPR—*i.e.*, they would have a primary purpose of financing housing for LMI individuals—but would not qualify as mortgage-backed securities. Government-backed housing bonds directly align with the CRA and NPR's stated objectives and should thus be included, particularly given the NPR's emphasis on government-sponsored affordable housing programs. Furthermore, in order to encourage affordable housing investments, purchases of mortgage-backed securities and other affordable housing investment vehicles should not be restricted to the first purchase.

5. Direct and Indirect Equity Investments that Promote Economic Development by Financing Small Businesses that Create, Retain, or Improve Jobs Should Be Retained as a Core Component of Community Development.

The CBA feels strongly that job creation, retention, and/or improvement is of critical importance to the concept of "promotion of economic development by financing small businesses," and should be retained as an important way for banks to support small businesses. Under current CRA guidance, banks may receive credit for direct (or indirect through intermediaries such as funds) equity investments in small businesses that qualify as economic development if they meet "both a 'size test' and 'purpose test' that clarify what economic development activities are considered under CRA."[53] The "purpose" test has two parts and includes activities that support either (1) "permanent job creation, retention, and/or improvement" or (2) Federal, state, local or tribal economic development initiatives that include provisions for creating or improving access by LMI persons to jobs or job training or workforce development programs.[54] Current regulatory guidance lists several entities that are presumed to meet the latter

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[52] *Id.* at 33,897. The NPR limits affordable housing credit to investments in "mortgage-backed securities" that "contain a majority of either loans financing housing for low- or moderate-income individuals or loans financing housing that otherwise qualifies as affordable housing."

[53] The current regulatory guidance set forth in the Community Reinvestment Act Interagency Questions and Answers Regarding Community Reinvestment, 81 Fed. Reg. 48506, 48,526 (July 25, 2016) (hereinafter "Interagency Q&As"), regarding § __.12(g)(3)—1 contains both a "size" and "purpose" test. The "purpose" test specifically includes activities that either: (1) support "permanent job creation, retention, and/or improvement" (a) for LMI persons, (b) in LMI geographies, (c) in areas targeted for redevelopment by federal, state, local, or tribal government, (d) by financing intermediaries that lend to, invest in, or provide technical assistance to start-ups or recently formed small businesses, or (e) through technical assistance or supportive services for small businesses or farms, such as shared space, technology, or administrative assistance; ***or*** (2) support Federal, state, local, or tribal economic development initiatives that include provisions for creating or improving access by LMI persons to jobs or job training or workforce development programs.

[54] *Id.*

requirement, including Small Business Development Companies (SBDC), Small Business Investment Companies (SBICs), Community Development Financial Institutions (CDFIs), and a few other government-related programs.[55]

The NPR's revised economic development category completely does away with the jobs component of "economic development" and corresponding long-standing tests and instead only gives credit for investments in SBICs (and the other entities "presumed" to promote economic development) and two other specific categories, none of which permits direct equity investments in small businesses.[56] The CBA does not support the deletion of the jobs component, and would answer the NPR's Question 13[57] with a strong "yes,"—the jobs component should be retained for a bank's direct equity investments, and also for indirect investments in (and loans to) financial intermediaries that lend to, invest in, or provide technical assistance to businesses with gross annual revenues of more than $5 million. In those two limited cases, the current "size" and "purpose" tests should continue to apply.

The CBA further believes the current size eligibility standards of the SBIC Program are sufficient, and that the "primary purpose" of an "activity that promotes economic development by financing small businesses" should continue to be established "if a majority of the dollars or beneficiaries" are identifiable to one or more of the community development purposes.[58] Several CBA members have long experience of submitting supporting documents that are acceptable to examiners in awarding full CRA credit for the investment. CBA also believes no further criteria are necessary to establish that an activity's primary purpose is job creation—the Agencies should retain all current categories of job creation, retention, and/or improvement for LMI persons, in LMI areas, and in areas targeted for redevelopment. There is no policy justification to try to impose a specific wage amount for the jobs—LMI can go up to 80% of LMI, so these are clearly not just "low-wage jobs." All jobs are important and promote the economic development that our communities desperately need.

In summary, the CBA believes that equity investments should continue to be included if they directly finance a small business. The CBA also believes that banks should continue to receive CRA credit for indirect investments through non-SBIC funds that currently qualify for CRA credit, which would provide a more complete picture of a bank's CD financing activities.

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[55] *Id.*

[56] *See* CRA, 87 Fed. Reg. at 34,019–20. The two other categories relate to activities undertaken consistent with government plans and the provision of technical assistance.

[57] *Id.* at 33,900 ("Question 13. Should the agencies retain a separate component for job creation, retention, and improvement for low- and moderate-income individuals under the economic development definition? If so, should activities conducted with businesses or farms of any size and that create or retain jobs for low- or moderate-income individuals be considered? Are there criteria that can be included to demonstrate that the primary purpose of an activity is job creation, retention, or improvement for low- or moderate-income individuals and that ensure activities are not qualified simply because they offer low wage jobs?").

[58] *See* Interagency Q&A § __.12(h)—8, which describes two approaches, one of which is if a majority of the dollars or beneficiaries of the activity are identifiable to one or more the enumerated community development purposes, then the activity will be considered to possess the requisite "primary purpose"; *see also* CRA, 87 Fed Reg. at 34,019 (proposed § __.13(a)(1) and (2)).

6. *The Definition of Community Support Services Is Needlessly Complex.*

The CBA believes the NPR's definition of "community supportive services" creates unnecessary confusion and adds needless complexity.[59] The CRA regulation currently defines CD as including "community services targeted to low- or moderate-income individuals," which allows banks to tailor the provision of services to the specific needs of each community.[60] Rather than maintain this flexible approach, the NPR adds eight unique, defined categories of activities that qualify.[61] The CBA proposes retaining the current definition of community supportive services so banks can continue to creatively meet the needs of their communities.

7. *The Agencies Should Clarify Consideration for Mixed-Use Projects.*

The CBA believes that limiting the neighborhood revitalization category by excluding "housing-related activities"—in part because these activities are covered by the affordable housing category—creates unnecessary uncertainty for banks considering mixed-use revitalization projects[62] that include both affordable housing and commercial revitalization. As such, it is imperative that the Agencies explicitly address investments in mixed-use projects. Otherwise, the NPR's lack of clarity may serve as a limitation on banks seeking to help their LMI communities by financing mixed-use endeavors.

8. *The Displacement Standard for Place-Based Activities Is Vague and Likely to Discourage Revitalization Financing.*

The CBA believes the revised revitalization category's general restriction on activities that "lead to the displacement or exclusion of low- or moderate-income residents" creates a vague and overbroad standard.[63] The NPR does not define "displacement" and provides limited guidance on what displacement looks like. For example, in describing displacement, the NPR notes that "if a project to build commercial development to revitalize an area involved demolishing housing occupied by low- or moderate-income individuals, then the activity . . . would be ineligible for CRA credit."[64] But what if the commercial development were a mixed-use project that included LMI housing such as discussed above? Would that project qualify as a "displacement" of the residents?

Does the answer depend on whether the activity is completed in conjunction with a government plan? The prohibition on displacement conflicts with the NPR's focus on government projects to the extent such projects result in some displacement. For example, it is not uncommon for government revitalization plans in metropolitan markets to call for the removal of blighted apartment buildings that have sub-standard but affordable units.

This lack of clarity is directly counter to the NPR's objective of "increasing clarity and consistency" and could disincentivize banks from engaging in projects in LMI areas for fear of

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[59] CRA, 87 Fed. Reg. at 33,901.
[60] 12 C.F.R. § 25.12(g)(2).
[61] *Id.*
[62] CRA, 87 Fed. Reg. at 33,904.
[63] *Id.* at 33,903.
[64] *Id.*

falling afoul of these displacement provisions. As such, the CBA requests that the Agencies remove the fraught displacement standard from the relevant place-based definitions.

9. The Agencies Should Expand Credit for Renewable Energy Investments.

LMI communities are particularly vulnerable to the effects of climate change, including extreme heat and weather events, and expanding the use of renewable energy is a critical part of combatting climate change and the challenges it brings.[65] The final rule should clarify that disaster preparedness and climate resiliency activities include energy-related activities—such as projects that provide access to renewable energy, including utility-scale projects—that benefit residents in targeted census tracts. The final rule also should make clear that renewable energy activities (*e.g.*, construction of a wind or solar power plant) can benefit residents in targeted census tracts even if the power plant is developed outside of the targeted census tract. Some sources of renewable energy, such as solar and wind farms, may be located outside of the population centers to which energy is transported.

Furthermore, as noted above in section II.F.5 of this letter, the proposed requirement that certain qualifying community development activities, including climate resiliency activities, be conducted "in conjunction with" a government plan, program, or initiative would unnecessarily limit the types of activities for which banks may receive CRA credit. Although the final rule should omit this proposed requirement for the reasons described above, if the agencies keep it, they should at least provide that, in the climate resiliency context, such a plan, program, or initiative may be developed by a local utility.

10. Financial Literacy Consideration Should Extend to Activities That Benefit Individuals of All Income Levels.

The CBA agrees with the NPR's approach to consideration for financial literacy activities and, as such, answers Question 27[66] affirmatively: financial literacy activities should be considered regardless of the income level of the beneficiaries. As noted in the NPR's preamble, banks find it challenging to accurately track the income levels of financial literacy program participants.[67] Additionally, there is a broader societal need for financial literacy education and banks are positioned to make greater contributions in this regard if they are not saddled with monitoring beneficiary income.

[65] *See*, *e.g.*, Connor Maxwell, *America's Sordid Legacy on Race and Disaster Recovery*, CTR. FOR AM. PROGRESS (Apr. 5, 2018), https://americanprogress.org/issues/race/news/2018/04/05/448999/americas-sordid-legacy-race-disaster-recovery/.

[66] CRA, 87 Fed. Reg. at 33,909. ("Question 27. Should consideration of financial literacy activities expand to include activities that benefit individuals and families of all income levels, including low- and moderate-income, or should consideration be limited to activities that have a primary purpose of benefiting low- or moderate-income individuals or families?")

[67] *Id.*

C. Community Development Financing Test.

1. The Community Development Financing Test Metric Is an Inaccurate Measure of Bank Community Development Financing.

a. Corporate and Other Deposits Skew the Community Development Financing Test Metric.

The CBA urges corporate deposits be excluded from the CD financing metric denominator. These large deposit accounts are often not derived from the location where they are held and therefore do not demonstrate the kind of nexus that the CRA seeks between a bank's deposits and its service to a community. For example, corporate deposits may be held at a bank's headquarters even if they are sourced from other geographic areas. Additionally, with respect to large banks with assets over $10 billion, one such bank may hold the deposits of a large company that is headquartered in a relatively small AA, which could skew the AA's deposit concentration.

Accordingly, the inclusion of corporate deposits should not artificially inflate a bank's quantitative CRA obligations in a particular geography, and the overall rating thresholds should be adjusted to remove their influence on the level of CRA responsibility for banks. Other non-local deposit types should also be excluded. Specifically, sweep deposit account deposits, which are a type of broker account, also warrant exclusion.[68]

b. The CD Financing Metric Numerator Should Account for the Full Value of Loans and Investments Made During the Current Evaluation Period.

The CBA supports the Agencies' initiative to include in the CD financing metric numerator CD loans and CD investments originated or purchased in a prior year that remain on a bank's balance sheet. However, as proposed, this approach devalues the dollar amount of loans and investments originated during the current evaluation period. The balance of a loan made in year one is presumably going to decrease over the next two years, meaning the three-year average value of that loan will be less than the origination amount. While the CBA understands the Agencies' desire to encourage the provision of long-term capital, this focus should not be to the detriment of a bank's current evaluation period lending totals.

Additionally, employing a three-year average balance approach means that a bank that made its CD loans and investments in year one of an evaluation period will receive significantly more CRA consideration than a bank that made those same loans in year three of its evaluation period, even though each bank provided the same level of credit.

The CBA urges the Agencies to consider an approach whereby the numerator is the sum of: (i) the annual average of CD loans and CD investments originated or purchased in a prior *evaluation period* that remain on a bank's balance sheet; and (ii) the total of all of CD loans and

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[68] The CBA's members believe that there may be other lines on the Call Report that could serve as a proxy for deposit figures that exclude corporate deposits. Without advocating for one manner or another, we point out for consideration the use of FDIC-insured deposits or, for banks with less than $1 billion in consolidated total assets, the reporting amounts of deposit accounts of $250,000 or less (as corporate deposits tend to exceed that threshold), or for larger banks, aggregating deposits maintained primarily for personal, household, or family use.

investments originated or purchased during the current evaluation period, without annual averaging. This approach promotes the provision of long-term capital since banks will still receive credit for remaining balances in the next evaluation period, while encouraging CD financing generally by allowing banks to realize the full value of their CD loans and investments in the current evaluation period. The Agencies recognize that multiyear evaluations are the most appropriate way to measure a bank's CRA performance, and this proposed approach to CD loans and investments reinforces that exam methodology.

c. Banks Should Have Flexibility in the Geographic Allocation of CD Loan and Investment Dollars.

The CBA also considers the NPR's forced geographic allocation of every CD financing dollar to be problematic, especially with respect to CD loans or investments that benefit more than one county as is often the case with regional or national funds or other vehicles. The NPR requires these funds to provide accounting documentation "that indicates the specific dollar amount of the activity that benefitted each county" in order for the investing bank to receive credit for providing CD financing in a particular AA; otherwise, investments are allocated by LMI demography.[69]

Another problem is that Section 14 of Appendix B does not look "prospectively" to provide how to allocate dollars during the time period that a bank is legally obligated to advance capital when called, but the Fund has not yet called and/or deployed 100% of the Bank's total investment amount. This is almost always the case for SBICs and similar funds that deploy capital over a period of several years. CBA makes the following recommendations:

- For multi-investor LIHTC funds, banks should be allowed to continue to use the widely accepted current practice of allowing side letters to geographically allocate to specific projects the full amount of a bank's investment from the date the investment closes irrespective of when capital is called (Appendix B Section 14.a. should be revised correspondingly).

- For other types of regional or national funds such as SBICs and other small business loan or equity funds for which there is not as clear a method to identify the locations of future investments, banks and fund managers should be allowed maximum flexibility in determining geographic allocations pursuant to Section 14a:

    - In that regard, the Agencies could incorporate current regulatory guidance regarding the "purpose, mandate, or function" of the organization or activity including serving geographies of individual located within the institution's assessment area(s)."[70]

    - For example, in the first year that a bank closes an investment in a fund, the bank would receive credit for the full amount of its

[69] CRA, 87 Fed. Reg. at 34,053 (Appendix B Section 14).
[70] *See* Interagency Q&A § __.12(h)—6 (pertaining to bank investments in statewide or regional funds); *id.* § __.23(a)—2 (pertaining to bank investments in nationwide funds).

investment reflected in the fund's legal documents, and the fund manager could work with its bank investors pursuant to section 14.a to provide documentation, including side letters, to reflect the geography in which the fund reasonably expects to invest.

- Each year thereafter, the bank would receive CRA credit for the outstanding balance of that investment on the bank's balance sheet that year, and fund managers could provide updated information with the location and amounts invested in each small business that year, which each bank investor would use to update its geographic allocations for that year.

The CBA believes these recommendations would avoid the imposition of new and onerous documentation burdens by preserving current practice where multi-investors funds such as LIHTCs use side letters to establish geography. They also provide a practical solution for funds that aren't able to identify the geographic location of investments to be made in future years.

2. *The Community Development Financing Test Multi-Benchmark Framework Is Deeply Flawed.*

a. The National Benchmarks Water Down Investments and Detract from Local Communities.

The CBA believes the NPR's multi-benchmark system, which creates a local benchmark and a national benchmark, is an inappropriate framework for judging bank CD financing.[71] The CBA supports the concept of a local benchmark; however, the proposed national benchmarks would compare regional bank performance against that of much larger national banks, thereby requiring regional banks to attempt to make up for quantitative deficiencies via the qualitative component. As a result, regional banks would have to rely more heavily on less tangible factors for their performance evaluations than banks with a bigger footprint.

Additionally, unlike local benchmarks, a national benchmark fails to account for peculiarities or limitations in an AA or factors beyond a bank's control. This effectively pits a bank's performance in one metropolitan area against scores of banks' performances in all metropolitan areas.

Furthermore, the national benchmark framework does not align with the Agencies' stated objective to "provide Agencies, banks, and the public with *additional context about the local level of community development activity* that can help to interpret and set goals for performance."[72] Banks' efforts to meet CD financing benchmarks should be considered within the context of individual AAs, particularly because banks make genuine efforts to meet these CD financing goals, and banks should not be penalized for local barriers or their individual business strategies.

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[71] CRA, 87 Fed. Reg. at 33,973.
[72] *Id.* (emphasis added).

As such, the CBA believes the national benchmark is an inappropriate measure of a bank's CD financing in comparison to its peers and urges the Agencies to eliminate the national benchmarks as proposed because they are not relevant to the local markets or, in the alternative, to allow banks the option of a nationwide review.

b. State Ratings Should Not Automatically Incorporate Areas Outside Assessment Areas.

The CBA believes state ratings should only incorporate activities outside of the AAs in a given state at the bank's discretion. The NPR provides that, for state ratings, CD financing outside of an AA, but within a state's border, should be considered in the final state rating. This would create challenges for banks that do not have a presence in certain areas of a state. Banks work hard to meet the CD financing needs of the LMI communities within their AAs. Measuring banks' performance outside of these areas, where a bank may not conduct any activity at all, challenges the very purpose of AAs. This approach also runs counter to the Agencies' stated goal of emphasizing CD activities within FBAA's and *considering* CD activity outside of AAs to upgrade bank performance.[73] As such, the CBA proposes that state ratings only incorporate activity conducted within each AA, unless a bank chooses to be subject to an expanded review.

3. The Community Development Financing Test Is Unclear Regarding Consideration for Purchased and Renewed Loans.

The CBA believes the NPR is ambiguous with respect to consideration for purchased and renewed CD loans and investments under the CD Financing Test. It is important that the Agencies clearly state that: (i) "purchased" CD loans and investments will be treated the same as "originated" CD loans and investments; and (ii) renewals (with full underwriting) of lines of credit will receive consideration as "originated" loans. We propose that the Agencies do this by making simple edits to Appendix B Section 1. These minor edits will further the Agencies' goal to "provide greater clarity and consistency in the application of the regulations."[74]

4. The Federal Reserve Board Should Enforce CRA's "Primary Purpose" Through Updates to Regulation H.

Updates to the CRA regulation should better harmonize aspects of the Board's Regulation H,[75] including aligning CRA-covered CD investments with investments not requiring prior approval from the Board. Under Regulation H, certain qualified investments must meet a standard of being engaged in "solely" for one of six purposes, which is a significantly higher standard than the NPR's CD "primary purpose" test.[76] Regulation H requires prior approval from the Board for investments that are not made entirely and exclusively for one of the community development purposes outlined in Regulation H.[77] Such a standard makes the qualification of many investments impossible for regulated institutions. The CBA's Board-regulated members urge the Board to

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[73] *Id.* at 33,971.
[74] *Id.* at 33,885.
[75] 12 U.S.C. § 24.1–7; 12 C.F.R. § 208.22.
[76] 12 C.F.R. § 208.22(b)(1)(iv).
[77] *Id.* § 208.22(d).

address this discrepancy in any future rulemaking to modernize the CRA framework by adopting provisions that explicitly state that if an investment qualifies as a CD investment under the CRA, then the bank automatically has the legal authority to make the investment under Regulation H.

D. Community Development Services Test

1. The Community Development Services Test Should Not Focus on Financial Services-Based Volunteering.

The definition of "CD services" is too narrow and will discourage banks from engaging in volunteer efforts beneficial to LMI communities. The NPR's definition of "CD services" requires, among other things, that all activities have a "primary purpose" of community development and be "related to the provision of financial services."[78] This directly contradicts the CD Services Test evaluation method, which considers the "impact and responsiveness of these [community development] services to *community* needs."[79] The focus should be on what each LMI community needs, rather than just that community's financial services-focused needs.

For example, volunteering for a non-profit homebuilding organization might provide the most impact for a community in need of affordable housing, but the NPR's requirement that banks must tie their volunteering efforts to the provision of financial services may force a bank to avoid volunteering for that organization. Banks should receive credit for all CD services, including those completed on behalf of a CRA-qualified organization, regardless of whether those volunteer services involve the provision of financial services.

Indeed, the NPR recognizes this by relaxing the "related to the provision of financial services" element for banks operating in nonmetropolitan areas.[80] The proffered reason for relaxing that requirement is that banks operating in nonmetropolitan areas have "fewer opportunities to provide community development services related to the provision of financial services."[81] This assumes, however, that the issue is *availability* and not *skill*. We note that not all bank employees necessarily have the knowledge and skill required to effectively serve LMI communities through the provision of financial services, but bank employees often have the skills and desire to serve LMI needs in other ways.

2. The Community Development Services Test Should Consider the Type of Volunteering Activity Performed.

We are also concerned about the CD services metric which counts hours but does not account for activities that might have special value to a community. The CBA believes it is appropriate to provide additional qualitative consideration for volunteer activities such as serving on a local community development organization's board or otherwise in a leadership capacity. Hours involved in such volunteer activities should be weighted more heavily than activities requiring less of a commitment.

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[78] CRA, 87 Fed. Reg. at 33,981.
[79] *Id.* (emphasis added).
[80] *Id.*
[81] *Id.*

STRATEGIC PLANS

We commend the Agencies for retaining Strategic Plans as an alternative method of evaluation but have significant concerns that the proposed revisions to the Strategic Plan option are unnecessarily rigid, suggesting that this method of evaluation may no longer be favored by the Agencies. The NPR's approach to Strategic Plans is at odds with the Agencies' broader goal of modernization by trying to fit all banks into the same box without allowing for innovative and flexible ways to meet community needs consistent with differing business models. The CBA urges that the Strategic Plan option maintain the flexibility provided by current regulation.

I. The NPR Would Inhibit the Flexibility of Strategic Plans, Which Is an Essential Feature Under Current Regulation.

Historically, Strategic Plans have been a favored option for banks with non-traditional business models that were unable to conventionally meet the requirements of the Lending, Investment, and Service tests. But the NPR would require Strategic Plan banks to be subject to the same performance tests and standards as other banks without the ability to place "a different emphasis, including a focus on one or more performance categories . . . if responsive to the characteristics and credit needs of its assessment areas, considering public comment and the bank's or savings association's capacity and constraints, product offerings, and business strategy," as permitted under the current regulation.[82]

The NPR contains no comparable language. Instead, it requires a bank to demonstrate that the performance tests and standards that would otherwise apply are inapplicable because the bank is "*substantially engaged*" in other activities, thus raising the bar for what a bank must show to avail itself of the Strategic Plan option. Strategic Plans provide banks with needed flexibility given the wide variances in business models and rapidly changing market conditions, and the Strategic Plan option should be flexible with respect to which products are in scope and how activities are weighted. We recommend that the Agencies retain Strategic Plans in their current form.

The CBA is also concerned that the Agencies are considering limiting the Strategic Plan option to only certain banks.[83] We strongly recommend retaining Strategic Plans as an available option to *all* banks. The metrics-based approach under the NPR does not provide nearly enough flexibility and, for many banks that rely on Strategic Plans, does not resolve the issue that certain performance tests and standards may be wholly inapplicable to a bank's business model.

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[82] 12 C.F.R. § __.27(f)(1)(ii).
[83] CRA, 87 Fed, Reg. at 33,986 ("Question 134. Should the strategic plan option continue to be available to all banks, or do changes in the proposed regulation's assessment area provisions and the metrics approach reduce the need for the strategic plan option for banks with specialized business strategies?").

II. There Should Be No Concern that Communities Will Not Be Properly Served by a Bank Under a Strategic Plan.

Any notion that Strategic Plans somehow circumvent CRA compliance or are a form of "CRA compliance-lite" are dispelled by the Proposal's expanded opportunities for community involvement in developing and commenting on a draft plan. The NPR supplements the existing requirements for public participation by requiring that draft Strategic Plans be published on the bank's and relevant Agency website for public comment.[84] This would enable draft plans to go through more public vetting than exists under current regulation.

Moreover, it is the Agency that makes the ultimate determination of whether a Strategic Plan should be approved, which should eliminate any concern that communities will not be properly served by a bank operating under a Strategic Plan. Indeed, in many cases, we expect that communities will be better served by a bank operating under a plan that provides for innovative and flexible ways to meet community needs than if that same bank was forced to fit into a compliance scheme inconsistent with its business model.

III. The Agencies Should Clarify Whether Banks Can Continue to Rely on Self-Executing Amendments.

Under the current regulations, banks *may* request to amend a Strategic Plan if there has been a material change in circumstances.[85] The NPR would change this to *require* amendment when there is a material change in circumstances. Many banks include in their Strategic Plans a self-executing provision that allows certain changes to take effect upon the occurrence of a particular event. Given the new mandatory language under the NPR, the Agencies should clarify whether banks will be able to continue to rely on such provisions.

IV. Allowing Banks to Continue with Their Current Strategic Plans Provides Certainty and Predictability, But the Agencies Should Clarify the Transition to the New Regulations.

We agree with the Agencies' proposal to allow Strategic Plans that were in effect before the effective date of the rule—or that are new and replacing expired plans during the transition period—to remain in effect until the plan's expiration ("pre-existing Strategic Plans"). However, there are still some ambiguities in the NPR regarding application of the new regulations to pre-existing Strategic Plans; accordingly, we ask for clarification through the following questions:

- Would a material change in circumstances leading to plan amendment be determined by the current regulations or the new regulations for a pre-existing Strategic Plan?
- For determining what qualifies as a CD loan, service, or investment, would the agencies apply the current definitions (upon which the pre-existing Strategic Plan relied) or the new definitions?

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[84] *Id.* at 34,032.

[85] 12 C.F.R. § __.27(h).

- Would banks with a pre-existing Strategic Plan be required to delineate RLAAs before the plan's expiration?
- Would the new data collection and reporting requirements apply to a bank with a pre-existing Strategic Plan?
- Could a bank opt to have an application for a new Strategic Plan considered under the final rule within 12 months of the final rule's publication in the Federal Register?

RATINGS

The CBA endorses the NPR's goal to "increase transparency and provide clarity" in ratings overall and on the various tests and performance standards.[86] However, there are three main areas of concern that should be addressed to ensure that this goal is fulfilled: (1) the appropriate weighting of activities, both quantitatively and qualitatively; (2) the influence of performance context; and (3) the impact of discriminatory and other illegal practices. We hope that by addressing these concerns, CRA regulation will remain flexible and ensure that banks are receiving ratings commensurate with their actual performances.

I. Retail Activity Should Not Be Weighted More Than Community Development.

For a large bank, the RLT and the RS&PT make up 60% of its overall rating, while the CD Services Test and the CD Financing Test only make up 40%. Weighting retail activity at 60% and CD activity at 40% would shortchange communities that would be better served by a bank that focused on CD due to its business orientation. CD activities are often the most responsive and highly impactful way a bank can reinvest in its communities.

We recommend, instead, a weighting of 50% for retail activity and 50% for CD activity, allowing a bank to achieve an overall rating of "Outstanding" by receiving an "Outstanding" in one category and at least a "High Satisfactory" in the other. This is consistent with current regulations under which CD lending and retail lending are co-equal components under the Lending Test and "strong performance in retail lending may compensate for weak performance in community development lending, and conversely, strong community development lending may compensate for weak retail lending performance."[87] This would also make the retail and CD weightings for large banks congruous with the weightings for intermediate banks, in which retail lending activity and CD activity would be weighted equally.[88]

As discussed in the Retail Lending Test section above, the NPR makes it much more difficult for banks to receive an "Outstanding" or "High Satisfactory" rating. The amount of data and performance points would increase substantially, and there would be a significant increase in complexity of compliance. The NPR's revised performance tests and standards alone would impose significant compliance costs on banks, which do not need to be exacerbated by an unduly burdensome ratings framework. By ensuring parity between CD and retail activity, the Agencies

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[86] CRA, 87 Fed. Reg. at 33,987.
[87] Interagency Q&A § __.22(b)(4)—2; *see also* 12 C.F.R. § __.22(a)(1).
[88] CRA, 87 Fed. Reg. at 34,058.

would avoid imposing an unjust burden on banks while maintaining continuity with the existing regulations and proposed regulations for intermediate banks.

II. The Agencies Should Not Deemphasize Performance Context, Which Is an Important Component for Enabling Flexibility.

Performance context must remain an important aspect of CRA compliance. The Agencies should continue to routinely consider a broad range of economic, demographic, and bank- and community-specific information to calibrate a bank's CRA evaluation to its local community.

Yet, the NPR would direct examiners to consider performance context information only "to the extent it is not otherwise considered as part of a proposed performance test."[89] This language appears to deemphasize performance context by implying that this broad range of information and circumstances are already baked into the applicable performance tests and standards. We do not believe this is so.

Even with a metric-based approach, performance context should continue to be the foundation of a bank's performance evaluation, recognizing that banks require flexibility to address different needs and issues across different markets. Individual bank performance is obviously affected by local market considerations and business strategy, and the smaller the market involved, the greater the need for performance context.

Deemphasizing performance context would undermine the accuracy of ratings for banks where the performance tests and standards do not offer an adequate opportunity for explanation. In addition, any substantial rulemaking effort will inevitably result in some unintended consequences. Maintaining robust performance context will allow banks and the Agencies to offset these outcomes where appropriate. For these reasons, we recommend removing the above language from the proposal and clarifying that the performance context factors are considered in addition to the proposed performance tests and standards, consistent with the current regulation.[90]

III. The Agencies Should Clarify that the Scope of Rating Downgrades Due to Discriminatory or Other Illegal Practices Are Limited to Those with a Nexus to the CRA.

The NPR proposes to expand the practices that would result in a downgrade of a bank's CRA rating. By broadening discriminatory or illegal practices to include essentially any practice, not just credit-related practices, the NPR creates unnecessary uncertainty because it is not clear what types of practices would result in a CRA rating downgrade. For example, under the NPR as currently written, there does not appear to be any language precluding a downgrade due to, for example, employment discrimination claims or alleged violations of consumer protection laws unrelated to finance. This conflicts with current guidance, which advises: "[v]iolations of other provisions of the consumer protection laws generally will not adversely affect an institution's CRA rating."[91] Because the proposed language is over-inclusive and does not have a nexus to CRA, we

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[89] *Id.* at 33,927.
[90] 12 C.F.R. § __.21(b).
[91] Interagency Q&A § __.28(c)—1.

recommend that the Agencies limit the scope of practices that could result in a downgrade to practices that must be related to the provision of financial products and services.

DATA COLLECTION AND REPORTING

I. The Scope of Data Requested Is Too Broad.

The CBA is concerned about the dramatic expansion of data the Proposal requires banks to collect, maintain, and report.[92] Banks want to present an accurate representation of their involvement in LMI communities, but the data required by the NPR will often fail to accurately capture a bank's CRA performance.[93] For this reason, even before analyzing the *conclusions* drawn from the data set, or the application of those data sets to metrics or benchmarks, the Agencies should ensure that each level of the data collection and analysis pyramid supports valid and defensible conclusions.

A. Deposits Data.

The CBA believes the NPR's definition of deposits data—and the reporting of that data—will obscure banks' actual contributions to LMI communities. The NPR requires banks with over $10 billion in assets to "collect and maintain county-level deposits data" based on the "depositor's address . . . rather than on the location of the bank branch to which the deposits are assigned."[94] Putting aside the concerns of multi-address accounts (accounts with two or more signers, each with a separate address), accounts in which signers move during the course of the year, or partnership and corporate accounts with non-residential addresses (accounts which may be registered to an office complex rather than the actual place of business), we note the NPR fails to address *why* such micro-location data is relevant to recognizing banks' support of LMI communities.

The CBA acknowledges that a branch assignment method of determining depositor location is imperfect, but so is the NPR's approach. Absent a reliable means of determining which approach is more accurate, the compliance costs associated with gathering micro-location data are unwarranted. As such, the CBA suggests that the Agencies maintain the branch assignment method, make address-based reporting optional, and place more importance on data that provide a better picture of a community's needs.

In addition, the CBA has serious concerns about the value of requiring banks to report on average annual deposits based on the "average daily balances as provided in . . . monthly or quarterly statements."[95] This standard is not necessary to accurately measure deposits for the CRA's purposes, because banks have not historically seen significant changes in deposit distributions year-to-year. The CBA believes a more effective approach would be to collect deposit data as of the beginning of the exam period and allow banks to provide performance context

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[92] *See generally* CRA, 87 Fed. Reg. at 33,993–34,003 (Data Collection, Reporting, and Disclosure).
[93] Consider the Community Development Financing Test's selective inclusion of *pro rata* CRA credit for only a limited portion of affordable housing projects. Reviewing a bank's CRA credit under this test might present an inaccurate picture of the extent to which a bank is actually supporting affordable housing.
[94] CRA, 87 Fed. Reg. at 33,995.
[95] *Id.* at 33,996.

information to the extent there are significant changes to deposit distribution during the exam period. This approach would also reduce the need for banks to divert CRA resources from other more worthwhile causes to capture such deposit balance information.

Finally, the CBA reiterates that for the reasons expressed above in our comments on the RLT, corporate deposits and deposits held for other banks should not be included in the definition of deposits under the CRA.[96]

B. Additional Data.

The CBA appreciates that the Agencies are soliciting feedback on how best to integrate components of the CFPB's 1071 Rulemaking into the CRA small business and small farm data requirements.[97] However, any such discussion is premature considering that the rulemaking process is fluid and the CFPB has yet to settle on a rule.[98] Our member banks cannot comment with confidence on a standard that has not been finalized but could have major implications on their CRA performance. Considering these unknowns, the CBA believes that it is inappropriate for the Agencies to implement any portions of the NPR related to the 1071 Rulemaking prior to *implementation* of the CFPB's final rule.

The CBA also urges the Agencies to reconsider the NPR's sweeping requirement that banks collect and maintain data on *all* CD activities.[99] Banks have historically had the flexibility to allocate their finite resources to collect and report on activities that are most impactful and, to the extent necessary, that demonstrate the bank's CRA performance. The requirement to report all CD qualifying activities is unduly burdensome and may be practically impossible, such as with collecting all volunteer hours for every employee across an enterprise, and would require extensive resources that could otherwise be expended on more impactful CRA investment.

Similarly, the requirement to collect volunteer hours unreasonably expects banks to take account of all employee volunteer activities even though data collection would often depend on individual employee reporting. As such, this requirement sets banks up to make certain assertions about the breadth of their data, when they know that not all volunteer activities have been captured. Instead, if the Agencies insist on keeping this requirement, they should be satisfied with an affirmation that the data collected and reported is accurate to the best of the bank's knowledge.

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[96] *See supra* Retail Lending Test section.

[97] CRA, 87 Fed. Reg. at 33,998; *see also id.* at 33,997 ("In the longer term, CRA's data collection and reporting requirements for small business loans and small farm loans would be eliminated and replaced by the CFPB's section 1071 data collection and reporting requirements.").

[98] A District Court for the Northern District of California has ruled that the CFPB must issue a final rule by March 31, 2023. *See California Reinvestment Coalition v. CFPB*, No. 4:19-cv-02572 (N.D. Cal. July 11, 2022).

[99] CRA, 87 Fed. Reg. at 34,036; 12 C.F.R. § __.42(a)(5), (a)(6).

IMPLEMENTATION

I. THE 12-MONTH TRANSITION PERIOD IS TOO SHORT.

The CBA believes the 12-month transition period is insufficient.[100] As detailed in this letter, the Proposal sets forth a host of new requirements for new lines of business in new geographies: new tests, new data reporting standards, new thresholds, etc. All of these would require banks to undertake extraordinary efforts to marshal financial, technological, compliance, and personnel resources inside and outside the bank to establish new processes and controls during what will likely be the middle of a budget cycle for many banks. This implementation effort cannot be reasonably accomplished in a 12-month timeline. Thus, the CBA urges the Agencies to adopt, at a minimum, a 24-month implementation period to allow banks a reasonable opportunity to comply with the NPR.[101]

Specifically with respect to data collection and reporting obligations, a 12-month timeline would not allow banks the time necessary to ensure accurate and complete reporting.[102] A rushed data collection and reporting framework runs counter to the Agencies' desire to "increase the clarity, consistency, and transparency of the evaluation process through the use of standard metrics and benchmarks,"[103] as a rushed effort may adversely impact the quality of the metrics and benchmarks it supports. The CBA believes a longer rollout period is needed to help ensure high-quality data, drawn from properly tested, vetted, and reliable sources.

A 24-month implementation period would be reasonable, appropriate, and in sync with other joint-rulemakings. For example, the Regulatory Capital Rule provides for a three-to-five-year transition period.[104] Additionally, a two-year implementation period is consistent with the timeline the Agencies propose for their own data reporting requirement under the Proposal.[105]

II. EXAMINATION PERIODS SHOULD START ON THE FIRST DAY OF THE CALENDAR YEAR FOLLOWING ADEQUATE DATA COLLECTION.

The CBA also encourages the Agencies to set examination period start-dates on the first day of the calendar year. The NPR notes that the Agencies would "set an applicability date that is appropriate based on the time of year a final rule is issued," and would consider "whether the beginning of a quarter or of a calendar year is appropriate."[106] Reporting partial-year data, or undergoing an examination that straddles the transition period, creates unnecessary confusion. Running examinations from the start of the calendar year promotes consistency.

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[100] The NPR proposes an applicability date for most substantive provisions of "approximately 12 months after publication of a final rule for bank activities conducted on that date and forward." CRA, 87 Fed. Reg. at 34,005.
[101] Strategic plans should follow this same 24-month implementation period for the same reasons.
[102] *See* CRA, 87 Fed. Reg. at 34,005.
[103] *Id.* at 33,993.
[104] Regulatory Capital Rule: Revised Transition of the Current Expected Credit Losses Methodology for Allowances, 85 Fed. Reg. 61,577, 61,578 (Sept. 30, 2020) ("This transition provision provides banking organizations…the option to delay for up to two years an estimate of CECL's effect on regulatory capital, followed by a three-year transition period (*i.e.*, a *five-year transition period* in total)) (emphasis added).
[105] *See* 87 Fed. Reg. at 34,006.
[106] *Id.* at 34,005.

Additionally, the CBA believes the Agencies should collect data for several years before using that data in examinations. The NPR provides for a host of benchmarks and metrics, and banks are concerned that the lack of existing data for many of the components of the proposed framework—at least for the first year or two of examinations—significantly hinders CRA planning, specifically how best to serve LMI communities. Put simply, if a bank does not know *what* its benchmarks might be, it will struggle to craft programs or engage in conduct necessary to *meet* those goals. Providing banks with a longer implementation period and sharing benchmarks based on historic data *before* examinations begin would provide banks with a roadmap to success and help catalyze support for LMI communities.

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Thank you for the opportunity to share our comments to the NPR. CBA would be pleased to answer any questions and to participate in any further efforts to improve and modernize the CRA.

Sincerely,

Lindsey Johnson
President and CEO

David Pommerehn
General Counsel & Senior Vice President