February 20, 2024

*Via electronic transmission*

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United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

**Re: Comments on Request for Information on Financial Inclusion (TREAS–DO–2023–0014)**

The Bank Policy Institute, the American Bankers Association, and the Consumer Bankers Association[1] (together, "the Associations") appreciate the opportunity to comment on the Department of the Treasury's Request for Information to help inform its development of a national strategy for financial inclusion as required by The Financial Services and General Government Appropriations Act, 2023.[2] The Associations support the goal of the Act to develop a national strategy to broaden access to financial services among underserved communities and improve those communities' ability to benefit from such services. Banks and credit unions are continuously innovating to develop new ways to reach underserved communities and consumers, including by expanding access to low- and no-cost bank accounts, credit products, and digital payments products. The Federal Deposit Insurance Corporation (FDIC)'s most recent survey of the unbanked demonstrated significant progress – the lowest percentage of unbanked Americans since the survey began – but banks and credit unions remain committed to ensuring all Americans have access to safe and affordable financial products and services.

For this reason, we are concerned that recent regulations finalized or proposed by the federal banking agencies could reverse this progress. We recommend that the Treasury and other policymakers—as part of a national strategy—task the banking agencies with considering the potential effect of any regulatory proposal on low- and moderate-income (LMI) and underserved consumers' access to financial products and services, including bank accounts and credit products. Regulatory restrictions could preclude banks from expanding underserved communities' access to products that promote wealth building, small business growth and economic resilience. We make additional, targeted recommendations for policymakers to consider that could help further advance financial inclusion.

## I. Banking products and services offer significant benefits to consumers.

[1] *See* Appendix for Association descriptions.

[2] 88 Fed. Reg. 88702 (Dec. 22, 2023), *available at*: 2023-28263.pdf (govinfo.gov).

Consumers attain significant benefits from access to financial products and services. Access to a bank account, for example, goes beyond deposits – it can provide a pathway to wealth building and financial security. The largest benefit is access to a payment system that works 24 hours a day, every day of the year, around the world. Furthermore, many consumers are paid interest on the money they hold in their accounts, and they are federally insured by the FDIC or NCUA against loss on that money, with the premiums for that insurance paid not by consumers but by the bank or credit union. Similarly, consumers reap benefits from credit card accounts, such as: the ability to pay merchants anywhere in the world at a 0% rate if the balance is repaid monthly; fraud protection; and travel, cash back and other rewards. Credit cards also provide many consumers with their first and often only source of liquidity to better match timing of their income and expenses at rates that reflect the risk level of unsecured lending. Credit cards also can improve consumers' financial circumstances and habits; as demonstrated by CFPB research, they enable consumers to build credit histories, which can empower them to access mortgages and auto loans, and provide them easy access to their credit scores.

Banks provide these benefits within the safety and security of the regulated banking system, in which federally regulated banks and credit unions are subject to substantial prudential and consumer protection requirements and direct oversight. Banks have invested substantial resources in initiatives designed to drive greater financial inclusion and close racial wealth gaps and are committed to furthering these goals. As noted, data from the most recent 2021 FDIC National Survey of Unbanked and Underbanked Households showed that approximately 4.5 percent of all U.S. households were unbanked, the lowest since the survey began in 2009.[3] We describe below the myriad ways in which banks and credit unions are advancing financial inclusion, particularly among LMI and underrepresented consumers.

## II. <u>Banks are committed to increasing financial inclusion for LMI and underrepresented consumers</u>.

Banks remain committed to "going the last mile" and bringing more consumers into the regulated banking system, particularly LMI and underrepresented consumers. Data shows that 11 percent of Black households and 9 percent of Hispanic households lack bank accounts, compared to only 2 percent of white households. This commitment to bringing the unbanked into the banking sector is corroborated by the most recent Bank On data, which shows that the program is reaching and growing among the communities that need it most.

The goal of Bank On is to ensure that everyone has access to a safe and affordable bank or credit union account. The Bank On Standards allow for accounts that have limited monthly fees and opening deposit amounts in recognition of the costs of account maintenance but prohibit overdraft or insufficient fund fees. For example, the Standards include a minimum opening deposit of $25 or less, and no or low ($5 or less) monthly maintenance fees.[4] The Bank On Standards also do not permit penalty fees for low balances or account dormancy.[5] Additionally, Bank On accounts allow for negative balances without

[3] 2021 FDIC National Survey of Unbanked and Underbanked Households (last updated July 24, 2023), *available at*: 2021 FDIC National Survey of Unbanked and Underbanked Households.

[4] *See* Bank On National Account Standards, *available at* https://joinbankon.org/wp-content/uploads/2020/10/Bank-On-National-Account-Standards-2021-2022.pdf.

[5] *See* Bank On National Account Standards, *available at* https://joinbankon.org/wp-content/uploads/2020/10/Bank-On-National-Account-Standards-2021-2022.pdf.

charge to consumers.[6] Importantly, Bank On accounts have been carefully crafted by participating financial institutions to help consumers succeed while accounting for the current Interchange Fee Cap.

According to the most recent data about Bank On, over 425 nationally certified Bank On accounts are offered by banks and credit unions that represent over 60 percent of the domestic deposit market, and more than half of all U.S. branches of banks offer Bank On certified accounts.[7] As of 2021, more than 14 million Bank On certified accounts had been opened across 28 reporting institutions, a 67 percent increase from the previous reporting year, and of those, over 5.8 million accounts were open and active as of 2021.[8] Further, as of 2021, Bank On accounts had been opened in more than 35,000 ZIP codes, or 85 percent of all U.S. ZIP codes.[9] Based on 2021 data, neighborhoods with over 50 percent minority representation, which make up 13 percent of all neighborhoods, accounted for 32 percent of ever-opened accounts, underscoring the significant uptake in Bank On accounts in minority communities.[10] Similarly, the 2021 data shows that neighborhoods with over 50 percent LMI households, which make up 20 percent of all neighborhoods, represented 40 percent of ever-opened accounts.[11]

Banks also are committed to extending credit to consumers, including those across the income and credit risk spectrum. Federal Reserve data shows that 82 percent of all adults reported having a credit card.[12] Credit cards provide significant benefits to consumers and represent the primary way in which "credit invisibles" may become credit visible, which advances the goal of financial inclusion.

Banks also are deeply committed to their Community Reinvestment Act obligations. The CRA was enacted in 1977 to encourage banks to meet the credit needs of the neighborhoods in which they are located, including LMI communities. Banks take these obligations very seriously and have invested

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[6] *See* Bank On National Account Standards, *available at* https://joinbankon.org/wp-content/uploads/2020/10/Bank-On-National-Account-Standards-2021-2022.pdf.

[7] Bank On and CFE Fund Press Release, "Country's Top Banking Regulators Celebrate Growth of National Safe Banking Partnership (May 23, 2023), *available at* https://bankon.wpenginepowered.com/wp-content/uploads/2023/05/CFE-Fund_Bank-On-Conference-Press-Release-2023.pdf.

[8] Bank On and CFE Fund Press Release, "Country's Top Banking Regulators Celebrate Growth of National Safe Banking Partnership (May 23, 2023), *available at* https://bankon.wpenginepowered.com/wp-content/uploads/2023/05/CFE-Fund_Bank-On-Conference-Press-Release-2023.pdf.

[9] The Federal Reserve Bank of St. Louis, "The Bank On National Data Hub: Findings from 2021" (Dec. 13, 2022), *available at* https://www.stlouisfed.org/community-development/bank-on-national-data-hub/bank-on-report-2021.

[10] Paul Calem and Yasmeen Abdul-Razeq, BPI, "'Bank On' Transaction Accounts and Financial Inclusion: New Data Shows Continuing Success" (July 25, 2023), *available at* https://bpi.com/wp-content/uploads/2023/07/Bank-On-Transaction-Accounts-and-Financial-Inclusion-New-Data-Shows-Continuing-Success.pdf.

[11] Paul Calem and Yasmeen Abdul-Razeq, BPI, "'Bank On' Transaction Accounts and Financial Inclusion: New Data Shows Continuing Success" (July 25, 2023), *available at* https://bpi.com/wp-content/uploads/2023/07/Bank-On-Transaction-Accounts-and-Financial-Inclusion-New-Data-Shows-Continuing-Success.pdf.

[12] Federal Reserve Board "Report on the Economic Well-Being of U.S. Households in 2022" (May 2023); *available at*: The Fed - Banking and Credit (federalreserve.gov).

trillions of dollars in LMI communities since the CRA was enacted.[13] In 2022 alone, banks provided more than $227 billion in capital to LMI communities in the form of mortgages and small business loans and an additional $151 billion in community development loans.[14]

Banks also are pursuing other initiatives to drive greater financial inclusion and close racial wealth gaps. For example, in June 2021, BPI published a report featuring 30 best practices for banks as they intensify their efforts to support racial equity. The report, titled "The Time is Now: 30 Best Practices to Help Improve Outcomes in Black Communities,"[15] was the culmination of a year-long collaboration between BPI and its members to identify, study and share innovative steps banks are taking to deepen engagement within Black communities and increase financial inclusion. The report highlights various efforts of banks to improve outcomes in Black communities, including by making capital investments in community development financial institutions (CDFIs) and minority depository institutions (MDIs); supporting neighborhood revitalization efforts; investing debt and equity capital.

We describe banks' efforts to expand access to financial products and services among LMI and underrepresented consumers in greater detail below.[16]

***CDFIs + MDIs***

CDFIs play a vital role in fostering financial inclusion, addressing disparities, and supporting economic empowerment. CDFIs support underserved communities through investments, affordable lending, job creation and financial education, among other services.[17]

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[13] The National Community Reinvestment Coalition estimated in 2018 that over "the past two decades, banks have made nearly $2 trillion in small business and community development loans in working-class neighborhoods." NCRC Press Release "OCC To Review Community Reinvestment Act; Changes Could Impact Billions In Loans And Investments Annually" (Aug. 28, 2018), *available at*: OCC to review Community Reinvestment Act; Changes could impact billions in loans and investments annually » NCRC.

[14] *See* Press Release, Federal Financial Institutions Examination Council, *Federal Bank Regulatory Agencies Release 2022 Small Business, Small Farm, and Community Development Lending Data* (Dec. 20, 2023), https://www.ffiec.gov/press/pr121523.htm; *see also* Consumer Financial Protection Bureau, *2022 HMDA Data on Mortgage Lending Now Available* (Mar. 20, 2023), https://www.consumerfinance.gov/about-us/newsroom/2022-hmda-data-on-mortgage-lendingnow-available/.

[15] *See* BPI Report, "The Time Is Now: 30 Best Bank Practices to Help Improve Outcomes In Black Communities," *available at*: The-Time-is-Now-30-Best-Bank-Practices-to-Help-Improve-Outcomes-in-Black-Communities.pdf (bpi.com).

[16] In addition, ABA works through its foundation to recognize and honor banks that are doing exceptional work to strengthen financial capability and inclusion. For 13 years, the Community Commitment Awards elevate banks leading successful strategies and community-centered best practices in eight categories, including economic inclusion. Recent honorees include Huntington National Bank in Columbus, Ohio for providing $70 million in loans to women- and minority-owned businesses and Wintrust Bank in Chicago, Illinois for opening a sustainable branch in a community that historically sees little investment.

[17] According to the Community Development Financial Institutions Fund (CDFI Fund), as of their last reporting, CDFIs have increased their investments and direct lending by over $280.8 million in underserved communities FY 2016 through FY 2021 utilizing the Bank Enterprise Award (BEA) program alone and created or maintained more than 800,000 jobs through the CDFI Fund New Market Tax Credit program. U.S. Department of the Treasury,

In a similar vein, MDIs promote financial inclusion by serving specific underserved communities. According to the FDIC, as of December 31, 2022, FDIC-insured MDIs totaled 147 institutions with combined total assets of over $330 billion and 35,576 employees.[18]

CDFIs and MDIs play pivotal roles in channeling needed financial resources to underserved communities. But due to the economic challenges faced by their customers and their stakeholders in general, these institutions require increased investment. Banks serve this need by making grants to and equity investments in MDIs and CDFIs to help them expand their reach.[19] Banks also have provided technical assistance, talent development and technology consultation services to MDIs/CDFIs.[20]

***Debt and Equity Capital***

Banks provide low-cost loans to and equity investments in small businesses owned by underrepresented individuals to help those owners build, grow or rebuild their businesses.[21] In addition to these efforts, during the pandemic, banks supported small businesses. BPI's research has demonstrated that BPI members' Paycheck Protection Program (PPP) activity had a significant presence in minority communities: 30 percent of the loans originated by the nine largest retail banks went to areas with greater than 50 percent minority population, compared to 23 percent of the loans of smaller banks and nonbank PPP-participating institutions. Approximately 28 percent of loans originated by all banks larger than $50 billion in assets went to racially underrepresented neighborhoods.[22]

***Partnerships***

Banks partner with a variety of entities to support underrepresented consumers and communities, including federal regulators and state and local governments, to help broaden access to banking

Community Development Financial Institutions Fund, Annual Report 2022 at 22, *available at*: https://www.cdfifund.gov/sites/cdfi/files/2023-01/CDFI_Fund_FY22_AFR_FINAL508.pdf.

[18] Preservation and Promotion of Minority Depository Institutions, FDIC 2022 Report to Congress, *available at*: https://www.fdic.gov/regulations/resources/minority/congress/report-2022/2022-complete-report.pdf.

[19] BPI Report, "The Time Is Now: 30 Best Bank Practices to Help Improve Outcomes In Black Communities." As another example, ABA and the National Bankers Association are organizing a series of Minority Depository Institution Partnership Summits, sponsored by ABA's Minority Depository Institutions Advisory Council. These summits aim to facilitate connections between midsize and regional banks and MDIs to improve services for communities of color and LMI communities nationwide. The events feature strategic discussions and networking sessions focused on identifying and implementing best practices for establishing lasting and mutually beneficial partnerships between MDIs and larger banks. On February 14, 2024, ABA and NBA hosted the third iteration of the MDI Partnership Summit, reflecting the associations' and their members' ongoing efforts to foster collaboration and drive positive change in underserved communities.

[20] BPI Report, "The Time Is Now: 30 Best Bank Practices to Help Improve Outcomes In Black Communities."

[21] BPI Report, "The Time Is Now: 30 Best Bank Practices to Help Improve Outcomes In Black Communities."

[22] https://bpi.com/underserved-small-businesses-turned-to-large-banks-for-ppp-loans-during-2020/.

services, credit and jobs.[23] They also work with national organizations to provide increased affordable housing counseling and home purchase support.

Banks have joined forces with the OCC and with various leaders from the MDI sector to promote greater financial inclusion and the reduction of impediments to capital access by underrepresented communities. This initiative, known as Project REACh, aims to improve credit underwriting processes and reduce the ranks of credit invisibles, increase the supply of affordable housing and revitalize MDIs.[24] Banks are engaged in similar efforts to expand and sustain support for MDIs with the FDIC.[25]

In addition to federal government partners, banks are also working with municipal governments and chambers of commerce to promote greater access to credit and job creation and with national civil rights groups on initiatives like affordable housing counseling.[26]

***Bank Products***

As noted previously, banks are offering more products and services and expanding credit products for underserved borrowers. They are also deepening relationships with customers by offering products like small-dollar loans, first-time homebuyer support and small business loans. Banks are also exploring how AI and alternative data could refine their understanding of credit risk to decrease the cost of credit for borrowers with challenges accessing credit.

Banks are offering tools to help customers manage unexpected expenses. Research shows that nearly 40 percent of Americans would need to borrow or sell something to cover a $400 expense.[27] This demonstrates a clear need for small-dollar credit products that would meet short-term, small-borrowing needs in a responsible manner.

Bank-provided small-dollar loans display the hallmarks of a "responsible" small-dollar loan as outlined in a May 22, 2020, No-Action Letter (NAL) Template to the Bank Policy Institute approved by the Consumer Financial Protection Bureau.[28] The NAL template establishes operating guardrails for a depository institution to offer responsible small dollar credit products for amounts of up to $2,500. These guardrails are designed to protect borrowers and include considerations for simple and transparent terms and conditions and parameters for repayment terms and underwriting requirements.

Banks' small-dollar loan programs provide temporary liquidity to consumers that are generally safer than products offered by nonbank financial entities. Bank-provided products feature simple and

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[23] BPI Report, "The Time Is Now: 30 Best Bank Practices to Help Improve Outcomes In Black Communities."

[24] Office of the Comptroller of the Currency Project REACh, *available at:* Project REACh | OCC (treas.gov).

[25] *See* Federal Deposit Insurance Corporation, "Statement of Policy Regarding Minority Depository Institutions," 86 Fed. Reg. 32728 (June 23, 2021), *available at*: 2021-06-15-notice-sum-b-fr.pdf (fdic.gov).

[26] BPI Report, "The Time Is Now: 30 Best Bank Practices to Help Improve Outcomes In Black Communities."

[27] "Economic Well-Being of U.S. Households in 2022," Board of Governors of the Federal Reserve System, May 2023, at 31, *available at*: https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf.

[28] *See* https://files.consumerfinance.gov/f/documents/cfpb_bpi_no-action-letter.pdf.

transparent terms that are easily understood by the borrower, eligibility requirements designed to keep delinquency rates low, and restrictions on loan rollover.

For consumers who do not have a credit card or other credit line, small-dollar loans are critical products, and banks, unlike nonbank fintechs, offer these products responsibly and in a supervised and regulated environment. These loan products are safer, more affordable and transparent alternatives to payday loans. BPI research has shown that these products could be highly useful in helping households deal with unexpected expenses and, in conjunction with low-fee transaction accounts, could bring more unbanked and underbanked consumers into the banking system.[29]

Unfortunately, the federal banking agencies and the CFPB have created a regulatory environment that discourages banks from offering small dollar products, mainly through attempts at creating untenable price caps and generating uncertainty in the marketplace.

The Military Lending Act's Military Annual Percent Rate (MAPR) cap and agencies' pursuit of either barring or scrutinizing loans with rates above 36 percent are price caps that inhibit banks from offering small dollar loans less than $2,500, especially to borrowers who have low or no credit.[30] Every loan and credit product has certain fixed costs that are independent from the size of the loan. Although these fixed costs typically constitute a low percentage of overall costs when the loan amount is large, fixed costs are disproportionally higher in small dollar loans.[31] Consequently, the smaller the loan size, the higher the APR must be to offset those costs to allow the bank to just break even. According to a 2020 Federal Reserve report, that break-even rate was 36 percent for a $2,530 loan, meaning that loans smaller than that require higher APRs to just break even.[32]

Apart from price caps, general scrutiny of small-dollar loans has created an unfavorable environment for that marketplace. A recent GAO report found that from 2010 through 2020, the federal banking agencies and the CFPB issued or rescinded at least 19 actions related to small-dollar loans.[33] As highlighted in the report, "market participants and observers who commented on regulatory uncertainty around small-dollar loans told [GAO] banks are hesitant to offer such loans in

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[29] Francisco Covas and Paul Calem, BPI, "A New Path to Offering Small-Dollar Loans" (May 4, 2020), *available at*: https://bpi.com/a-new-path-to-offering-small-dollar-loans/.

[30] The CDFI Fund recently finalized changes to its CDFI Certification, which now presumes that a product that has loan rates greater than 36% that also has several other characteristics, such as that the loans have an annual default rate over 5%; the loans include a leveraged payment mechanism; and any such loans of $1,000 or less have repayment timeframes that exceed 12 months, are not responsible credit products and therefore are not eligible for certification. *See* CDFI Certification Application (December 2023), *available at*: https://www.cdfifund.gov/sites/cdfi/files/2023-12/Final_508_CDFI_Certification_Application_Form_120523.pdf.

[31] Fixed costs typically include operating costs, such as processing payments, collecting delinquent payments, evaluating loan requests, soliciting customers, and servicing the loans.

[32] Lisa Chen & Gregory Elliehausen, "The Cost Structure of Consumer Finance Companies and Its Implications for Interest Rates: Evidence from the Federal Reserve Board's 2015 Survey of Finance Companies," FEDS Notes, Aug. 12, 2020. https://www.federalreserve.gov/econres/notes/feds-notes/the-cost-structure-of-consumer-finance-companies-and-its-implications-for-interest-rates-20200812.html.

[33] "Banking Services: Regulators Have Taken Actions to Increase Access, but Measurement of Actions' Effectiveness Could Be Improved," GAO-22-104468, at 30 (Feb. 2022), *available at* https://www.gao.gov/assets/gao-22-104468.pdf.

part because of changes to related rules or guidance in recent years."[34] The Treasury should encourage the banking regulators to explicitly support small-dollar lending products to help increase access to this critical product for underserved individuals.

***Real Estate Investment and Support***

Banks have long supported affordable housing development and neighborhood revitalization, and over the past few years, banks have reinforced their existing efforts with fresh commitments to accelerate the impact.[35] Banks are helping first-time homeowners in traditionally underserved communities purchase their homes with down payment grants, low-interest loans and a helpful array of related programming, such as housing counseling efforts, to make the home-buying process less onerous and costly.[36] Banks' partnerships with CDFIs also help to increase access to affordable housing supply and financing for underserved borrowers.[37]

***Innovation***

Banks are also continuously innovating to meet consumer demand, improve the speed and security and reduce the cost of financial products and services, and advance financial inclusion. Payment system improvements, including payments in real time and faster settlement and funds availability, have grown substantially in recent years, providing numerous benefits. One example of payments innovation is the Clearing House's launch of RTP in November 2017. Over 350 financial institutions are providing real-time payments on the RTP network to their customers and members, and the RTP network surpassed the 500 million payment milestone in July 2023.[38] Banks of all sizes use RTP; indeed, 90 percent of the financial institutions on the RTP network are community banks and credit unions with less than $10 billion in assets, and the RTP network currently reaches 65 percent of US demand deposit accounts.[39]

Another example of bank-led innovation is Zelle, a bank-owned, peer-to-peer payments service offered by participating banks and credit unions through the financial institution's mobile banking apps. The Zelle Network provides messaging between the sender's bank and the recipient's bank to facilitate payments between the sender/recipient's respective bank accounts. Furthermore, BPI research has shown that Zelle has a lower share of disputed transactions, including alleged fraud, compared to other P2P payment apps.[40]

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[34] *Id*.

[35] BPI Report, "The Time Is Now: 30 Best Bank Practices to Help Improve Outcomes In Black Communities."

[36] *Id*. Banks also work with diverse developers to ensure that new real estate developments benefit future residents but also help recycle capital through underserved communities.

[37] *Id*.

[38] TCH Press Release: "RTP Network Surpasses Half a Billion Instant Payments" (July 24, 2023) (link). 150,000 businesses are sending payments over the RTP network, and over 3 million consumers each month are sending account-to-account and Zelle payments that clear and settle over the RTP network.

[39] *Id*.

[40] Tara Payne, BPI, "The Data Shows that Zelle Is the Safest Way for Consumers to Move Their Money" (Sept. 19, 2022), *available at*: The Data Shows that Zelle Is the Safest Way for Consumers to Move Their Money - Bank Policy Institute (bpi.com).

Real time payments and faster settlement and funds availability can provide customers immediate access to funds from cash advances, loan proceeds, or in emergency situations, such as payments from an insurance company to cover initial expenses arising from a home fire, auto accident or other disaster anytime, regardless of the time of day or whether it is a weekend or holiday. Faster payments also allow consumers to better manage their finances and cash flows, as with many real time payment systems, settlement is immediate and the payments are irrevocable, and consumers can obtain an accurate, up-to-date account summary immediately after sending a payment, which enables them to avoid problems that can arise from lags between payment. LMI consumers may be more sensitive to these lags given their lower monthly income stream and the need to budget and plan accordingly. In addition, since payments are not restricted to normal business hours, consumers have more flexibility in making payments close to when they are due, and thereby avoid late fees, which benefits consumers, including LMI consumers. Faster payments also allow small businesses to send funds to other businesses, vendors, or other counterparties, as well as to pay employees, with immediate funds availability and without limitation as to when those payments can be sent. This immediate availability benefits employees, particularly those with lower incomes for whom immediate availability of funds can enable them to pay bills on time and manage other time-sensitive financial obligations and avoid late fees or other consequences of missing payments that may occur if funds availability is delayed.

Banks also have been key participants in the private sector-led development of secure consumer financial data sharing in the U.S. that has enhanced competition in the consumer financial services marketplace and allowed consumers to connect to the financial services applications of their choice, expanding access to financial products and services, including among LMI and underserved populations. Critically, the private sector has led this innovation while also developing more sophisticated data protection capabilities, enabling consumers to ***safely*** share their data. This work has primarily occurred through the Financial Data Exchange, a nonprofit organization established in 2018 and operating in the United States and Canada.[41] Through FDX, stakeholders have adopted standards that empower consumers to exercise control over their information and ensure that information is shared safely and securely, prioritizing consumer protection and privacy.

## III. Recent regulatory measures risk harming lower-income consumers and reversing progress in financial inclusion.

Recently proposed or finalized rules from the banking agencies and CFPB could threaten banks' and credit unions' significant progress in increasing financial inclusion. These rules, both individually and collectively, raise serious risks of negative impacts on underserved consumers and their ability to access essential financial products and services. We describe these rules below and recommend ways in which regulators and policymakers more broadly can advance, rather than hinder, the goal of financial inclusion.

### *Banking Agencies' Proposed Revisions to the Capital Rules*

In the summer of 2023, the prudential bank regulators proposed a sweeping set of new bank capital regulations, which would purport to implement an international agreement colloquially known as "Basel

[41] *See* FDX (link).

III Endgame" (the "Capital Proposal").[42] Among other changes, the Capital Proposal would substantially revise the "risk-based capital framework" for all banks with $100 billion or more in assets. Among other issues, the Capital Proposal would impose severely overcalibrated capital requirements on mortgage and retail exposures. Regulators acknowledge multiple times in the Capital Proposal that its changes may have harm consumers. Yet, despite the Capital Proposal's hundreds of pages, it contains no analysis of the specific impacts its regulatory changes will have on consumers, much less different groups of consumers.

*The Capital Proposal may impose lifelong harm on consumer financial health and those harms could widen and ossify important gaps in our financial system.*[43]

The Capital Proposal includes several regulatory changes that would make it more expensive for banks to lend to retail consumers.[44] By making it comparatively cheaper for consumers to obtain credit with non-bank financial institutions, rather than with banks, the Capital Proposal could ultimately harm consumers' long-term financial health. In particular, increased reliance on nonbank financial products resulting from the costs of this proposal may damage consumers' ability to increase their credit scores – consequences that follow consumers throughout their financial lifespans. Additionally, nonbanks maintain less access to credit during market stress,[45] which could exacerbate the effects of a recession on consumers' credit availability.

*The Capital Proposal would disproportionately disadvantage low-and moderate-income, disabled, and Black and Hispanic borrowers*.

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[42] *See* Regulatory Capital Rule: Large Banking Organizations and Banking Organizations With Significant Trading Activity, 88 Fed. Reg. 64028 (Sept. 18, 2023).

[43] Press Release, Consumer Bankers Association, CBA Releases White Paper Detailing The Impact of Basel Regulations on Consumers On The Margins Of The Financial System (Jan. 16, 2024) https://www.consumerbankers.com/cba-media-center/media-releases/cba-releases-white-paper-detailing-impact-basel-regulations.

[44] White Paper, Consumer Bankers Association, The Impact of the Basel III Endgame Proposal on Consumers on the Margins of the U.S. Financial System (Jan. 16, 2024) https://www.consumerbankers.com/sites/default/files/CBA%20Comment%20and%20White%20Paper%20on%20Regulatory%20Capital%20Proposal.pdf.

[45] *See* Fleckenstein, Q., et al., *Nonbank Lending and Credit Cyclicality*, NYU Stern School of Business (Dec. 23, 2023) *available at* https://ssrn.com/abstract=3629232 (finding that non-banks were responsible for the majority of the decline in lending during the Global Financial Crisis); *see also* Aldasoro, Iñaki, Sebastian Doerr and Haonan Zhou, *Non-Bank Lending during Crises*, BIS Working Papers No. 1074 (Feb. 16, 2023), *available at* https://www.bis.org/publ/work1074.htm ("We find that non-banks cut their syndicated credit by significantly more than banks during crises, even after accounting for time-varying lender and borrower characteristics."); Ben-David, Itzhak, Mark Johnson, and René Stulz, *Why Did Small Business FinTech Lending Dry Up During the COVID-19 Crisis?*, Nat'l Bureau of Econ. Rsch. Working Paper No. 29205 (Sept. 2021), *available at* https://www.nber.org/papers/w29205. For a discussion regarding the role of nonbank mortgage lenders and servicers in particular, see Kim, You Suk, et al., "Mapping the boom in nonbank mortgage lending – and understanding the risks," Brookings Institution Commentary (Sept. 10, 2018), *available at* https://www.brookings.edu/articles/mapping-the-boom-in-nonbank-mortgage-lending-and-understanding-the-risks/; *see also* Kim, You Suk, et al., "Liquidity Crises in the Mortgage Market," Brookings Papers on Econ. Act. 347 – 428 (Mar. 8, 2018), *available at* https://www.brookings.edu/articles/liquidity-crises-in-the-mortgage-market/.

The proposal would raise the costs of providing credit card loans and limit their availability. Ultimately, its costs could exacerbate effects that make underserved customers "credit invisible" and limit their economic mobility. Because credit cards serve as an important conduit for consumers, this effect would likely disproportionately hurt low-income, Black, and Hispanic consumers that are trying to get their first footholds in the credit system. The CFPB has established that "[a]cross all age groups and income levels, credit cards trigger the creation of consumer credit records more frequently than any other product." [46] Yet the Capital Proposal would make it harder for banks to offer credit card loans: proposed retail risk weights exceed international standards by 10 percentage points; the new Credit Conversion Factor for unconditionally cancelable undrawn lines would require banks to capitalize unused portions of a customer's credit limit; new standardized operational risk capital charges, including the excessively high capital charge for fee income, would require banks to hold capital based on any income associated with credit card activities.[47]

The Capital Proposal's impact on credit card access is felt very differently by low- and moderate-income consumers, as compared to high-income consumers. For instance, recent research by the Federal Reserve Bank of Boston shows that access to credit cards is a key factor for college students' ability to stay in school; but the impact is limited to students that work part-time to pay for tuition or rely on need-based financial aid.[48] Similarly, the CFPB has found that 45 percent of consumers in low-income neighborhoods lacked credit scores, compared to just 9 percent in upper-income neighborhoods.[49] Likewise, Black and Hispanic consumers are considerably more likely to be credit invisible or have unscored credit records (27-28 percent) than White or Asian consumers (16 percent).[50] These disparities

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[46] Consumer Financial Protection Bureau Office of Research, CFPB Data Point: Becoming Credit Visible (June 2017) https://files.consumerfinance.gov/f/documents/BecomingCreditVisible_Data_Point_Final.pdf. Student loans were a distant second, but that was driven almost entirely by consumers under the age of 25. Debt collection for unpaid medical and cell phone bills were third – but as the CFPB points out, any credit visibility caused by such reporting was likely to only diminish a consumers' future access to credit.

[47] Some customers may find ways to mitigate the impact of the Proposal on the supply and cost of retail credit – for example, by getting a first loan with a co-borrower or by building an initial credit history by becoming an authorized user on someone else's credit card. But the CFPB found in 2017 that these avenues are disproportionately available to consumers in upper income neighborhoods, where consumers were twice as likely as consumers from low-income neighborhoods to transition out of credit invisibility by relying in whole or in part on the credit worthiness of others (30.3 percent vs. 14.9 percent).

[48] Pinghui Wu and Lucy McMillan, Federal Reserve Bank of Boston, Job Loss, Credit Card Loans, and the College-persistence Decision of US Working Students (Oct. 2023), https://www.bostonfed.org/publications/research-department-working-paper/2023/job-loss-credit-card-loans-and-the-college-persistence-decision-of-us-working-students.aspx ("These working college students represent 57 percent of the 18- to 24-year old US undergraduate population. On average, compared with their non-working peers, they have lower family income and receive less parental support, and more than half depend on their own earned income to pay for their college education.").

[49] Consumer Financial Protection Bureau Office of Research, Data Point: Credit Invisibles (May 2015), at 24-5, https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf.

[50] Setting aside credit invisibility, the Proposal may disproportionately impact non-White households because they may be more likely to need access to credit to begin with. For instance, 34.3 percent of non-Hispanic White respondents to the CFPB's 2023 Making Ends Meet survey reported that they had difficulty paying all of their bills and expenses from time to time. In contrast, 54.6 percent and 46.0 percent of Black and Hispanic respondents reported that they had experienced such issues, respectively. Consumer Financial Protection Bureau Office of Research, Making Ends Meet in 2023 Publication No. 2023-8 (Dec. 2023) https://files.consumerfinance.gov/f/documents/cfpb_making-ends-meet-in-2023_report_2023-12.pdf.

tend to stick: The CFPB explained that its "analysis suggests that these differences across racial and ethnic groups materialize early in the adult lives of these consumers and persist thereafter."[51]

Increasing the cost of or limiting access to bank borrowing would likely push more consumers to nonbank lenders. Already, the Federal Reserve Board has found that Black and Latino consumers are three times more likely than White consumers to use nonbank payday, pawn, auto title, and refund anticipation loans.[52] The Capital Proposal will deepen these differences, increasing consumer use of non-bank financial products by consumers, and damaging their ability to build credit and grow their credit scores.

*The Capital Proposal affects low-and moderate-income consumers in several ways.*

The Capital Proposal would significantly increase the capital charge for low down payment mortgages -- as much as 80 percent in some cases, due to the Capital Proposal's 20 percentage point add-on to the risk weights under the internationally agreed-upon standards.[53] As a result, consumers who are unable to afford significant cash down payments of 20 percent, including many first-time homebuyers will find reduced availability of mortgages and higher costs for the mortgages that are available. Home Mortgage Disclosure Act data from 2022 show that median combined loan-to-value ratios for African American; American Indian or Alaska Native; and Hispanic borrowers are higher than the median ratios for non-Hispanic White, Asian, or Hawaiian and Pacific-Islander borrowers.[54]

Similarly, the Capital Proposal could discourage banks from working with borrowers struggling to make mortgage payments. The proposal would not recognize banks' restructuring agreements with consumers that default on their mortgages. The proposal's definition of "defaulted real estate exposure" would not align with that of "defaulted exposure," producing a perverse outcome for residential real estate exposures for which there has been an agreed-upon distressed restructuring.[55] A distressed restructuring occurs when a borrower has insufficient income and other resources to repay his debts and, as a result, the creditor agrees to change the terms of the loan in order to enable the borrower to continue to pay off the loan. For example, a creditor offering a distressed restructuring may reduce the interest rate, extend the term of the loan, or forgive part of the principal owed by a borrower.

Unlike with other defaulted exposures, defaulted residential real estate exposures have no possibility of reclassification and would always be considered to be in default, regardless of future performance.

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[51] Consumer Financial Protection Bureau Office of Research, Data Point: Credit Invisibles (May 2015), at 25, https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf.

[52] Board of Governors of the Federal Reserve System, Report on the Economic Well-Being of U.S. Households in 2022 (May 2023), https://www.federalreserve.gov/publications/2023-economic-well-being-of-us-households-in-2022-banking-credit.htm. The ratios were even more pronounced when comparing disabled to non-disabled respondents (10 percent vs. three percent).

[53] 88 Fed. Reg. at 64048.

[54] Federal Financial Institutions Examination Council, Home Mortgage Disclosure Act Snapshot Loan Level Dataset (2022), https://ffiec.cfpb.gov/data-publication/snapshot-national-loan-level-dataset/2022 (last visited Jan. 5, 2024).

[55] 88 Fed. Reg. at 64049-64050.

The Agencies do not explain the purpose for this deviation, and there is no apparent justification for why modifications of residential real estate exposures should be regarded as permanently in default. That being said, not allowing residential mortgage loan modifications to be "cured" may discourage banks from working with borrowers to equitably resolve issues, and instead encourage banks to move directly to foreclosing on homeowners.

In addition, if banks are pushed to reduce credit limits or close low-utilization accounts, the credit scores of the affected consumers will immediately suffer, impeding their access to credit. Reducing credit limits could have a variety of other implications for consumers across the credit spectrum. For example, credit utilization rates are among the factors that determine a consumer's credit score. Reduced credit limits would likely result in higher utilization rates, which could, in turn, cause credit scores to go down and credit to become more expensive.

Finally, as noted above, increasing the cost of or limiting access to bank borrowing would likely push more consumers to nonbank lenders. This would not only make it more likely that they would suffer reduced access to credit in periods of macroeconomic stress, but would also present financial inclusion concerns in normal times. This is particularly true for small-dollar personal loans; unnecessarily high capital requirements would impede banks' efforts to offer these products.[56]

***Federal Reserve Board's proposal to lower the debit interchange fee cap***

The Federal Reserve's recent proposal to lower the current debit interchange fee cap that was established through regulation in 2011 is another example of a regulatory effort that could undermine financial inclusion. The proposal would reduce the interchange income that helps cover the costs of providing bank accounts, including free checking accounts and other low-cost products. Empirical data collected and analyzed over the past 12 years demonstrates that the Interchange Fee Cap has resulted in significant and widespread increases in the costs of basic deposit accounts, while reductions in retail prices for consumers have been non-existent.

Further decreasing merchant interchange fees by more than 32 percent will only exacerbate the real harm that consumers, especially LMI consumers, have experienced following the imposition of the Interchange Fee Cap and will imperil the goal of promoting financial inclusion.

Prior to the Board's imposition of the Interchange Fee Cap in 2011, nearly 60 percent of large financial institutions offered free deposit account options to consumers, in part supported by interchange fees.[57] After the creation of the Interchange Fee Cap, free deposit accounts have become increasingly unavailable to consumers.[58] Indeed, data from the first few years following the imposition

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[56] However, as we noted previously, a 2022 GAO report found that "banks are hesitant to offer [small dollar] loans in part because of changes to related rules or guidance in recent years" and the uncertainty around regulatory expectations regarding such loans.

[57] Sarin, Natasha, "Making Consumer Finance Work," Faculty Scholarship at Penn Carey Law, 2047 (2019), at 1537, *available at* https://scholarship.law.upenn.edu/faculty_scholarship/2047.

[58] Manassas, Mark D. and Krzysztof Wozniak, "The Impact of Price Controls in Two-sided Markets: Evidence from US Debit Card Interchange Fee Regulation," Finance and Economics Discussion Series 2017-074, Washington: Board of Governors of the Federal Reserve System (2017), *available at* https://doi.org/10.17016/FEDS.2017.074.

of the Interchange Fee Cap reveals that the number of large financial institutions offering free deposit accounts to consumers fell from nearly 60 percent to below 20 percent.[59]

Even community banks with less than $10 billion in assets, which are technically exempt from the Interchange Fee Cap, have been affected by the 2011 rule. The availability of free, non-interest-bearing deposit accounts offered by exempt financial institutions declined by 15.5 percent following imposition of the Interchange Fee Cap.[60] Notably, a Federal Reserve Bank of Richmond study found that both large and small debit card issuers have substantially reduced free deposit account products and services in the aftermath of Regulation II's Interchange Fee Cap.[61]

Furthermore, following the imposition of the Interchange Fee Cap in 2011, consumers experienced substantial cost increases for basic deposit accounts that provide them access to the debit card networks. Within the first few years after 2011, average account fees for consumers nearly doubled, from roughly $4 per month to more than $7 per month.[62] In the year following the imposition of the Interchange Fee Cap, the average monthly fee associated with non-interest-bearing deposit accounts at covered financial institutions rose by 25 percent,[63] and the average monthly fees on interest-bearing deposit accounts at covered financial institutions increased by nearly 13 percent.[64]

Put another way, economists linked the drop in bank interchange revenue and an increase in fees consumers pay for bank accounts due to the Interchange Fee Cap in 2011. Monthly maintenance fees increased in an amount equal to 42 percent of the overall reduction in interchange revenue.[65] Evidence suggests an additional, related increase in other service fees. Consumers experienced these price

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[59] Sarin, Natasha, "Making Consumer Finance Work," Faculty Scholarship at Penn Carey Law, 2047 (2019), at 1537, *available at* https://scholarship.law.upenn.edu/faculty_scholarship/2047.

[60] Manuszak, Mark D. and Krzysztof Wozniak, "The Impact of Price Controls in Two-sided Markets: Evidence from US Debit Card Interchange Fee Regulation," Finance and Economics Discussion Series 2017-074, Washington: Board of Governors of the Federal Reserve System (2017), at 5-6, *available at* https://doi.org/10.17016/FEDS.2017.074.

[61] *See* Wang, Zuh, "Price Cap Regulation in a Two-sided Market: Intended and Unintended Consequences," Working Paper No. 13-06R, The Federal Reserve Bank of Richmond (2015), *available at* https://www.richmondfed.org/-/media/RichmondFedOrg/publications/research/working_papers/2013/pdf/wp13-06r.pdf.

[62] Mukharlyamov, Vladimir and Sarin, Natasha, "The Impact of the Durbin Amendment on Banks, Merchants, and Consumers," Faculty Scholarship at Penn Carey Law, 2046 (2019), at 4, *available at* https://scholarship.law.upenn.edu/faculty_scholarship/2046.

[63] Wang, Zuh, "Price Cap Regulation in a Two-sided Market: Intended and Unintended Consequences," Working Paper No. 13-06R, The Federal Reserve Bank of Richmond (2015), at 7, *available at* https://www.richmondfed.org/-/media/RichmondFedOrg/publications/research/working_papers/2013/pdf/wp13-06r.pdf.

[64] Mukharlyamov, Vladimir and Sarin, Natasha, "The Impact of the Durbin Amendment on Banks, Merchants, and Consumers," Faculty Scholarship at Penn Carey Law, 2046 (2019), at 4, *available at* https://scholarship.law.upenn.edu/faculty_scholarship/2046.

[65] Bourke, Nick, "How Proposed Interchange Caps Will Affect Consumer Costs" (January 24, 2024), at 9, *citing* Mukharlyamov and Sarin (2022) at p. 19-20, *available at* Microsoft Word - BourkeN_Durbin_Analysis_24Jan2024 (ssrn.com).

increases because, after the Interchange Fee Cap in 2011, monthly fees rose substantially, "free" accounts with no monthly fees became less common, and it became harder to qualify for fee waivers because required minimum balances rose.[66] Research on the effects of the Interchange Fee Cap in 2011 strongly suggests the following scenario, if the current proposal to reduce the debit interchange cap is finalized: Bank debit interchange revenue reduces by $3 billion annually. The proposal to reduce the average transaction fee by 5.4 cents affects 56.19 billion covered transactions.[67] Lower-income consumers are disproportionately affected because their account balances are likely to be below the minimum needed to avoid monthly fees.[68] Consumers at smaller, exempt banks would also expect to pay higher costs as their banks follow larger competitors to raise prices in some markets, just as they did after the Interchange Fee Cap in 2011.

Thus, the merchant-led price control of the Interchange Fee Cap makes it more difficult for institutions to offer free or low-cost accounts.[69]

Similarly, since the interchange fee cap was imposed in 2011, opportunities for consumers to avoid bank account costs have also declined. For example, the average minimum balance requirement to avoid deposit account fees at covered financial institutions for non-interest-bearing deposit accounts increased by $400, or 50 percent, in the wake of Regulation II.[70] For interest-bearing deposit accounts, the consequences were more pronounced, as minimum balance requirements at covered financial institutions rose by $1,700, which reflects a 55 percent increase.[71] Financially vulnerable consumers, for whom it is more difficult to meet minimum balance requirements, have disproportionately borne the brunt of increased deposit account fees that have resulted from the imposition of the Interchange Fee Cap.

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[66] Bourke, Nick, "How Proposed Interchange Caps Will Affect Consumer Costs"(January 24, 2024), at 2, *available at* Microsoft Word - BourkeN_Durbin_Analysis_24Jan2024 (ssrn.com).

[67] Federal Reserve Board data (2021), at Table 3: https://www.federalreserve.gov/paymentsystems/regii-datacollections.

[68] Bourke, Nick, "How Proposed Interchange Caps Will Affect Consumer Costs"(January 24, 2024) at 12, *available at* Microsoft Word - BourkeN_Durbin_Analysis_24Jan2024 (ssrn.com).

[69] Sarin, Natasha, "Making Consumer Finance Work," Faculty Scholarship at Penn Carey Law, 2047 (2019), at 1537, *available at* https://scholarship.law.upenn.edu/faculty_scholarship/2047. As of 2019, growth in the population of recently unbanked consumers (i.e., consumers who previously had access to deposit accounts but have closed those accounts within the last year) was at its peak in states with the highest number of financial institutions subject to the Interchange Fee Cap, where the increase in deposit account fees has been the most pronounced. Mukharlyamov, Vladimir and Sarin, Natasha, "The Impact of the Durbin Amendment on Banks, Merchants, and Consumers," Faculty Scholarship at Penn Carey Law, 2046 (2019), at 36, *available at* https://scholarship.law.upenn.edu/faculty_scholarship/2046.

[70] Manuszak, Mark D. and Krzysztof Wozniak, "The Impact of Price Controls in Two-sided Markets: Evidence from US Debit Card Interchange Fee Regulation," Finance and Economics Discussion Series, 2017-074, Washington: Board of Governors of the Federal Reserve System (2017), at 5, *available at* https://doi.org/10.17016/FEDS.2017.074.

[71] Manuszak, Mark D. and Krzysztof Wozniak, "The Impact of Price Controls in Two-sided Markets: Evidence from US Debit Card Interchange Fee Regulation," Finance and Economics Discussion Series, 2017-074, Washington: Board of Governors of the Federal Reserve System (2017), at 5, *available at* https://doi.org/10.17016/FEDS.2017.074.

If the NPRM is finalized, the research suggests that consumers will pay an extra $1.3 billion to $2 billion annually in higher bank account fees.[72] In this scenario, interchange fee revenue for banks drops by $3 billion annually.[73] Forty-two percent ($1.3 billion) of this is offset by higher monthly maintenance fees for consumers, while other service fees increase by $250 million to $700 million.[74] As with the original implementation of the Durbin Amendment, these fee increases result from a variety of changes to account terms that make it harder to avoid fees, as "free" bank accounts with no maintenance fees become less common and the average minimum deposit required to qualify for fee waivers increases—which may disproportionately affect lower-income consumers.[75] On the merchant side, debit processing costs dropped on average, but net savings is once again debatable; a further shift in favor of higher-cost payment mechanisms is possible. Any pass-through savings to consumers remain unmeasurable and cannot be estimated.

The evidence from the past 13 years makes clear that further decreasing the Interchange Fee Cap will result in bank account products and services that are more expensive and less attractive to LMI consumers, driving more of them out of the regulated banking industry, which is at direct odds with the stated objectives of federal banking regulators of promoting financial inclusion.[76]

When merchants pay market-based debit card interchange fees, financial institutions have a greater ability to offer free and low-cost deposit account and other financial products to consumers, particularly "Bank On"[77] and similar financial-inclusion products targeted at unbanked consumers. The Cities for Financial Empowerment Fund ("CFE Fund"), which leads the national Bank On initiative, has noted the importance of interchange revenue in the economic sustainability of Bank On accounts, commenting to the Board about the NPRM:

> At the same time the [Bank On] Standards' designated features, guardrails, and fee limitations are designed to meet those critical consumer needs, we also designed them to be economically sustainable for partner financial institutions, if not even somewhat profitable, rather than

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[72] Bourke, Nick, "How Proposed Interchange Caps Will Affect Consumer Costs"(January 24, 2024), at 12, *available at* Microsoft Word - BourkeN_Durbin_Analysis_24Jan2024 (ssrn.com).

[73] Bourke, Nick, "How Proposed Interchange Caps Will Affect Consumer Costs"(January 24, 2024), at 12, *available at* Microsoft Word - BourkeN_Durbin_Analysis_24Jan2024 (ssrn.com).

[74] Bourke, Nick, "How Proposed Interchange Caps Will Affect Consumer Costs"(January 24, 2024), at 2, *available at* Microsoft Word - BourkeN_Durbin_Analysis_24Jan2024 (ssrn.com).

[75] Bourke, Nick, "How Proposed Interchange Caps Will Affect Consumer Costs"(January 24, 2024), at 2, *available at* Microsoft Word - BourkeN_Durbin_Analysis_24Jan2024 (ssrn.com).

[76] *See, e.g.,* Federal Deposit Insurance Corporation, Economic Inclusion Strategic Plan (2019), *available at*: Economic Inclusion Strategic Plan—June 2019 (fdic.gov); *see also* Office of the Comptroller of the Currency Project REACh, *available at:* Project REACh | OCC (treas.gov).

[77] The aim of "Bank On" products (i.e., low-cost, basic accounts) is to help reduce the number of unbanked people in the country. American Bankers Association, "Bank On: ABA encourages banks of all sizes to take part in this industry-wide financial inclusion initiative," *available at* https://www.aba.com/banking-topics/consumer-banking/inclusive-banking/bank-on.

dependent upon more ephemeral charitable motivations. We note to the Board that interchange fees are a relevant component of that market sustainability.[78]

Exempt community banks also understand that the NPRM could greatly affect unbanked and underbanked populations and the neighborhoods where they reside.[79] Member of the Federal Reserve's Community Depository Institutions Advisory Council ("CDIAC") have "voiced concerns about pending restrictions on their fee income," which these financial institutions rely on to support the cost of services, such as no-cost deposit accounts, and to cover increases in operating expenses to implement fraud prevention and mitigation measures.[80] Curtailment of low and no-cost services for consumers by community banks could greatly affect the unbanked and underbanked communities they serve.[81] CDIAC members, all community financial institutions, "suggested that the Federal Reserve withdraw the proposal and re-introduce it once an appropriate cost-benefit analysis has been conducted."[82]

***CFPB's proposal to lower the credit card late fee safe harbor***

The CFPB has proposed to significantly reduce the safe harbor for credit card late fee payments to $8 from its current levels of $30 for a first violation and $41 for a subsequent violation within the next six billing cycles. Late fees serve as an important deterrent to missing payments and reduce banks' exposure to delinquency risk, and thereby allow banks to offer credit to a broader range of consumers across the credit risk spectrum, including LMI consumers. The Bureau's proposal to substantially reduce the late fee safe harbor to $8 would ultimately harm consumers, including underrepresented consumers, which the Bureau acknowledges but arbitrarily disregards as a concern.

Indeed, the CFPB acknowledges that the proposed $8 safe harbor, if adopted widely in the industry, would likely result in consumer harm, as banks may cease offering certain products or services or charge more to consumers for other services, which may be concentrated among subprime accountholders, including LMI consumers. The CFPB notes that "interest rates or other charges of subprime credit cards might increase more than for other cards, and some consumers might find these cards too expensive due to higher interest rate offers."[83] The Bureau also recognizes that "it is also possible that some consumers' access to credit could fall if issuers could adequately offset lost fee revenue expected from them only by increasing APRs to a point at which a particular card is not viable, for example, because the APR exceeds applicable legal limits."[84] Indeed, lower-income consumers would likely suffer these effects to a greater degree than higher-income consumers, as "increasing lending interest rates

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[78] *See* letter from Jonathan Mintz, President and Chief Executive Officer, Cities for Financial Empowerment Fund, to the Board of Governors of the Federal Reserve System re: Docket No. R-1818 (proposed amendments to the Board's debit interchange rules), *available at*: FRB-Reg-II-Comment-Letter-final.pdf (cfefund.org).

[79] FedRecord of Meeting, Community Depository Institutions Advisory Council, Nov. 16, 2023, *available at* https://www.federalreserve.gov/aboutthefed/files/CDIAC-meeting-20231116.pdf.

[80] FedRecord of Meeting, Community Depository Institutions Advisory Council, Nov. 16, 2023, *available at* https://www.federalreserve.gov/aboutthefed/files/CDIAC-meeting-20231116.pdf.

[81] *Id*.

[82] *Id*.

[83] 88 Fed. Reg. 18934.

[84] *Id.*

disproportionately harms lower-income borrowers who may no longer qualify for loans that require a higher income to carry a higher monthly payment."[85]

Additionally, if banks were to cease offering certain types of credit cards or cease offering credit cards to consumers presenting higher credit risk in response to sharply restricted late fees, consumers may have to turn to non-bank providers of certain products and services that, as the CFPB has acknowledged, may "charge higher fees and interest rates."[86] As noted previously, this result could disproportionately affect underrepresented consumers, as the Federal Reserve Board has found that Black and Latino consumers are three times more likely than White consumers to use nonbank payday, pawn, auto title, and refund anticipation loans.

Moreover, by removing the deterrent effect of higher late fees, the CFPB may in fact be disadvantaging consumers, as late payments may trigger other negative consequences, as acknowledged by the CFPB, such as additional finance charges, a lost grace period, penalty rates, and reporting of the late payment to a credit bureau. These consequences could negatively affect consumers' credit scores and longer-term financial health, particularly for vulnerable lower-income consumers.

Finally, late fees can help minimize adverse incentive effects associated with repayment plans and renegotiations.[87] A late fee that lacks a sufficient deterrent effect likely will incentivize customers to miss more payments—and this effect could be amplified if consumers believe they can simply reschedule past due amounts.[88] This effect would disincentivize banks from offering renegotiation opportunities in the first place—even to borrowers experiencing unavoidable, unexpected expenses or drops in income.[89] Thus, reducing late fees potentially could harm consumers' long-term financial health, by curtailing the ability of banks to offer renegotiation options. This result could limit banks' willingness to offer credit cards to consumers who may pose a greater risk of defaulting, including LMI consumers.

As noted previously regarding the capital proposal's impact on underrepresented consumers, reduced access to credit cards, which serve as on-ramps to credit visibility for consumers, would likely disproportionately affect low-income consumers' ability to build credit and become "credit visible."[90]

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[85] Thomas P. Vartanian and William M. Isaac "Biden Plays the Junk Card," The Wall Street Journal (Feb. 10, 2023), *available at*: Biden Plays the Junk Card - WSJ.

[86] CFPB, Shawn Sebastian, *New effort focused on financial issues facing rural communities*, (Mar 10, 2022), *available at* https://www.consumerfinance.gov/about-us/blog/new-effort-focused-on-financial-issues-facing-rural-communities/.

[87] BPI, Paul Calem, *The Role of Credit Card Late Fees in Encouraging Timely Repayment Is Essential to Efficient Functioning of the Market* (January 18, 2023), *available at* https://bpi.com/the-role-of-credit-card-late-fees-in-encouraging-timely-repayment-is-essential-to-efficient-functioning-of-the-market/.

[88] *Id.*

[89] *Id.*

[90] As noted previously, the CFPB has found that 45 percent of consumers in low-income neighborhoods lacked credit scores, compared to just nine percent in upper-income neighborhoods. Likewise, Black and Hispanic consumers are considerably more likely to be credit invisible or have unscored credit records (27-28 percent) than White or Asian consumers (16 percent). Setting aside credit invisibility, the Proposal may disproportionately impact non-White households because they may be more likely to need access to credit to begin with. For instance, 34.3 percent of non-Hispanic White respondents to the CFPB's 2023 Making Ends Meet survey reported

Thus, the proposed substantial reduction in credit card late fees would likely have a negative impact on consumers, particularly LMI and underrepresented consumers, as they may have reduced ability to obtain credit cards or face increased costs of using credit cards, which could trigger a series of additional negative effects.

***Community Reinvestment Act***

As noted previously, the associations fully support the longstanding goals of the CRA and believe that the Act has been an effective force for strengthening the development of the communities that our member banks serve. In section IV, below, we recommend expanding the CRA to cover credit unions and certain nonbank financial services entities. We share with community advocates and other stakeholders the goal of continuing to promote and advance economic opportunity by building on the CRA's foundations to ensure banks continue to provide loans, investments, and services broadly across the communities they serve, including LMI areas, small businesses, and communities in need of financial services to sustain economic development. We support efforts to ensure that the CRA remains an essential part of the framework for sustaining and revitalizing communities.

Unfortunately, the federal banking agencies have recently finalized amendments to the CRA regulations that would stray from these core values and from the agencies' statutory mandate, resulting in a framework that will disincentivize banks from investing in certain communities and from striving to go above and beyond in meeting the credit needs of the communities in which they are located.

Under the final rules, for the first time in the CRA's history, "large" banks (defined as banks with $2B or more in assets) would be evaluated outside their facility-based assessment areas, which is inconsistent with the agencies' statutory authority as evinced in the text, history, and purposes of the CRA. The rule would require any large bank that does not conduct more than 80% of its retail lending inside of its facility-based assessment areas to establish Retail Lending Assessment Areas (RLAAs). An RLAA consists of any metropolitan statistical area (MSA) or the combined non-MSA areas of a state in which the bank originated at least 150 closed-end home mortgage loans or at least 400 small business loans in each of the two preceding calendar years. These RLAAs exist outside a bank's physical footprint. Likewise, large banks and certain intermediate banks would be evaluated in an Outside Retail Lending Area (ORLA), which is the nationwide area outside of a bank's FBAAs and RLAAs that measures retail lending that occurs anywhere else.[91]

However, the rule's evaluation of lending that is far outside of a bank's community where it does not have CRA infrastructure may disincentivize a bank from making loans outside of its branch footprint. Standing up a CRA program in a new geography takes time—sometimes years—to develop. This is

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that they had difficulty paying all of their bills and expenses from time to time. In contrast, 54.6 percent and 46.0 percent of Black and Hispanic respondents reported that they had experienced such issues, respectively. Consumer Financial Protection Bureau Office of Research, Making Ends Meet in 2023 Publication No. 2023-8 (Dec. 2023) https://files.consumerfinance.gov/f/documents/cfpb_making-ends-meet-in-2023_report_2023-12.pdf.

[91] These new assessment areas are inconsistent with the agencies' authority under the CRA statute. When Congress enacted the CRA, it focused on areas where banks have a physical presence and accept deposits, and it instructed agencies to assess a bank's "record of meeting the credit needs of its entire *community*, including low- and moderate-income neighborhoods...."

particularly the case where a bank would need to hire more personnel, conduct program planning and analysis, and invest in marketing. Further, banks may conclude that the loan volume in these locations would not offset significantly increased CRA costs and therefore, it would not make business sense to continue lending in geographic locations that are far removed from the bank's physical footprint. Banks may also conclude that they are unlikely to meet the rule's stringent benchmarks and metrics outside of their branch network. As a result, underserved communities could suffer from a constriction in the availability of credit in these locations.

In addition, as noted, the proposed significant changes to the regulatory capital framework would profoundly affect banks' business strategies, including how they structure and operate their CRA programs. Under the capital proposal, regulators would apply risk weights of 40 to 90 percent, depending on a loan's LTV ratio. Loans with higher LTV ratios would receive higher risk weights. Many banks offer low down payment mortgages as a means of meeting the credit needs of low- and moderate-income families. A proposed reduced cap on mortgage servicing assets that can be deducted from larger banks' regulatory capital also is likely to have second-order effects in the overall mortgage market and banks' roles therein. These proposed changes, if finalized, will significantly affect the regulatory capital treatment of banks' CRA-related activities. We do not believe that the agencies, when developing the CRA proposal, took account of the higher capital costs of mortgage lending and servicing that would result from the regulatory capital proposal and the resulting effects on banks' CRA programs.

The capital rules also could affect other CRA lending activities, such as multifamily, community development, and small business lending.[92] In addition, further study is needed to determine whether and to what extent the capital proposal might impact bank partnerships, such as loan participations and correspondent lending, which are central to CRA lending by *all* banks, not just those that would be subject to the capital proposal. For example, many community banks sell their mortgage loans to larger banks. If the capital rules reduce the risk appetite of larger banks to purchase these loans, mortgage lending by smaller banks could be impacted. In addition, banks of all sizes pool their resources to finance community development projects and provide credit to businesses. To the extent that larger banks reduce certain credit activities in response to the capital proposal, this dynamic will affect community banks as well as businesses and communities seeking financing. All of these proposed changes, like the proposed changes to the regulatory capital treatment of mortgage activities, change the assumptions on which the CRA proposal had rested, about which the public must be able to comment, and the agencies must consider, before the CRA rules are finalized.

Thus, the recently revised CRA rules alone may give banks an incentive to reduce lending or pull out of communities altogether where they have a small presence that would trigger the creation of a new lending assessment area. The issuance of the proposed capital rules could exacerbate this incentive, a result that would harm underserved customers and communities.

***Other regulatory proposals that could affect banks' ability to serve LMI and underserved consumers***.

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[92] The risk weight for small business loans would remain 100 percent under the proposal. Nevertheless, due to the allocation of a portion of the new operational risk charge to small business loans, the proposal effectively results in higher capital requirements for small and medium-sized enterprises. Furthermore, banks approach capital allocation with a focus on overall risk weights. This means that when capital requirements increase, their aim is to decrease their overall risk-weighted assets, and since small businesses carry an elevated risk weight, they would likely be prioritized as a primary target for exposure reduction.

On January 17, 2024, the CFPB issued a proposal to impose additional restrictions on overdraft protection services.[93] In sum, the proposal applies the Truth in Lending Act and Regulation Z requirements to overdraft protection services offered by banks and credit unions with assets in excess of $10 billion (collectively, Large Banks) that charge an overdraft fee above a certain point. An institution would be exempt from this application of Regulation Z—and could continue to offer overdraft outside of Regulation Z—only if its fee was below either of the following two price points: (1) a price that is equivalent to the institution's costs, including charge-off losses, to operate its overdraft program (the institution's "breakeven" point); or (2) at an established benchmark. The Bureau has proposed $3, $6, $7, or $14 as potential benchmarks and is seeking comment on those figures.

If finalized, banks are likely to reduce their overdraft fee to this government price cap, rather than assume the compliance risks associated with calculating the APR on each overdraft fee or calculating the bank's breakeven fee, to the detriment of consumers.[94] Many Americans continue to need ready access to short-term liquidity. Only 44 percent of U.S. adults say they would pay an emergency expense of $1,000 or more from their savings, according to Bankrate survey results published last month.[95] But if overdraft fees are capped—as the CFPB has effectively proposed—banks are likely to pull back their overdraft service offerings, significantly limiting low-income consumers' access to liquidity and leading fewer low-income consumers to open deposit accounts, as a 2021 Federal Reserve Bank of New York staff report found.[96] "[O]verdraft fee caps hamper, rather than foster, financial inclusion," the researchers found.[97] This reality is underscored by surveys finding that Americans value overdraft. A survey conducted by Morning Consult for ABA found that 9 in 10 consumers (88%) find their bank's overdraft protection valuable, and nearly 8 in 10 consumers (77%) who have paid an overdraft fee in the past year were glad their bank covered their overdraft payment, rather than returning or declining payment.[98] Separate polling has demonstrated that frequent users of overdraft overwhelmingly prefer to incur a fee in exchange for having their transaction paid, rather than have their transaction declined.[99]

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[93] Overdraft Lending: Very Large Financial Institutions, Docket No. CFPB-2024-0002, RIN 3170-AA42 (Jan. 17, 2024).

[94] See e.g., Consumer Bankers Assn. *By The Numbers: How Consumers May Be Harmed By CFPB Regulatory Action Limiting Access To Overdraft* (Dec. 20, 2023), https://www.consumerbankers.com/cba-media-center/media-releases/numbers-how-consumers-may-be-harmed-cfpb-regulatory-action-limiting (Identifying that as a result of CFPB requiring overdraft to be treated as credit, financial institutions will have difficulty underwriting as many as 2.4 million Americans).

[95] Bankrate, *Bankrate's 2024 Annual Emergency Savings Report* (Jan. 24, 2024), https://www.bankrate.com/banking/savings/emergency-savings-report/?utm_source=MarketingCloud&utm_medium=email&utm_campaign=newsbytes&utm_content=NEWSBYTES-20240126.html.

[96] Jennifer L. Dlugosz et al., Fed. Reserve Bank of N.Y., Staff Reports, Who Pays the Price? Overdraft Fee Ceilings and the Unbanked (revised July 2023), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr973.pdf?sc_lang=en.

[97] *Id.* at i.

[98] Am. Banker Ass'n, Press Release, National Survey: U.S. Consumers Remain Happy with Their Bank, Competitive Financial Services Marketplace (Oct. 9, 2023), https://www.aba.com/about-us/press-room/press-releases/consumer-survey-consumers-happy-and-competitive.

[99] Fin. Health Network, *Overdraft Trends Amid Historic Policy Shifts* (June 1, 2023), https://finhealthnetwork.org/research/overdraft-trends-amid-historic-policy-shifts/ ("When looking specifically at respondents from households that overdrafted more than 10 times, the vast majority (81%) indicated that they

No access to overdraft could mean important bills are not paid—like rent checks and utility payments—with devastating results for consumers.[100] Furthermore, consumers may be forced to seek credit from significantly less regulated entities such as payday lenders, which could increase the risk of consumer harm.[101]

Finally, the CFPB recently proposed a rule implementing Section 1033 of the Consumer Financial Protection Act, which proposes to require financial institutions to develop and make available to third parties, such as data aggregators, access to and use of technology and data in order for those third parties to enhance their monetized products and services for consumers.[102] However, the proposal would prohibit financial institutions from charging any fee to such third parties to defray the costs incurred by financial institutions in developing and maintaining these offerings on an ongoing basis.[103] Once again, this proposed prohibition could exacerbate the pressure on banks' fee revenues, which could ultimately end up harming consumers by limiting banks' ability to provide a variety of products and services with different features for consumers across the income and credit risk spectrum.

***Nonbank financial services providers should be subject to the laws and regulations that apply to banks.***

As described previously, these regulatory actions that could limit banks' ability to provide products and services to LMI individuals could lead consumers to seek financial services from significantly less regulated fintechs, payday lenders, or other nonbanks, with a greater possibility of consumer harm. Nonbanks, especially technology companies, have been continuously looking to increase their presence in the financial services ecosystem.[104] As the 2023 Financial Stability Oversight Council (FSOC) Annual Report highlights, the nonbank sector has grown significantly in recent years due, in part, to regulatory

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would have preferred to incur a fee on their most recent overdraft transaction rather than have the purchase or payment declined."), Consumer Bankers Assn., "The Value of Overdraft Services," (Jan. 2024), https://overdraftfacts.com/.

[100] See e.g., *Consumer Bankers Assn. Statement on CFPB's Misleading Overdraft Press Release* (Dec. 19, 2023), https://www.consumerbankers.com/cba-media-center/media-releases/cba-statement-cfpb%E2%80%99s-misleading-overdraft-press-release (Noting CFPB's failure to consider credit invisibles when estimating the demographics of the consumers who use overdraft).

[101] See e.g., Megan McCardle, *Opinion | Capping overdraft fees could actually hurt poor families*, Washington Post, (Jan. 24, 2024) https://www.washingtonpost.com/opinions/2024/01/24/cap-overdraft-fees-hurt-poor-families/.

[102] Consumer Financial Protection Bureau, Proposed Rule, Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74796 (Oct. 31, 2023), *available at*: 2023-23576.pdf (govinfo.gov).

[103] *See* Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74796 (Oct. 31, 2023).

[104] *See*, e.g., CFPB Press Release regarding its Proposed Rule "Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications" ("Driven largely by Big Tech and other large technology firms, digital payment apps and wallets continue to grow in popularity" with the "larger [nonbank] companies handling more than 5 million transactions per year . . . "), *available at*: CFPB Proposes New Federal Oversight of Big Tech Companies and Other Providers of Digital Wallets and Payment Apps | Consumer Financial Protection Bureau (consumerfinance.gov); *see also* Consumer Financial Protection Bureau, Proposed Rule, Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. at 74798 (internal citations omitted) ("The open banking system also engages a large number of entities . . . there are more than nine thousand banks and credit unions across the country, most of which serve as data providers, as do numerous nondepository financial institutions. The number of third parties may total as many as ten thousand, driven by a large financial technology sector.")

arbitrage.[105] For example, nonbanks service over half of all mortgages, with a servicing share of 54 percent as of the second quarter of 2023, compared with 20 percent in 2013.[106] Nonbank mortgage originations have increased so significantly that they account for 72 percent of all mortgage originations, as of 2022.[107]

However, despite their growing presence and power in the financial services market, these entities are not subject to the same comprehensive, robust regulatory and supervisory framework to which banking organizations are subject for compliance with prudential and consumer protection laws. Nor are these entities required to comply with data security and privacy standards, such as the Gramm-Leach Bliley Act, with which banks are required to comply. Moreover, tech companies are not subject to examination by federal banking supervisors as banking organizations are.

Under current federal law, technology companies and other parties that process or store consumer financial data are not subject to the same federal data security standards and oversight as banks. More troubling, certain nonbank technology companies might use loss-leader products to generate and harvest consumer data to be used for other purposes, unbeknownst to the consumer. The CFPB has proposed rules pursuant to section 1033 of the Dodd-Frank Act that would help address some of these concerns, although the CFPB has not proposed to subject third party data recipients, such as fintechs or data aggregators, to direct CFPB supervision or examination.[108] The CFPB also recently proposed to define larger participants of a market for general-use digital consumer payment applications, which would bring larger participants in such a market under CFPB oversight.[109] The CFPB estimates that approximately 17 entities would come under CFPB supervision should the rule be finalized largely as proposed.[110] While this proposal would help to bring nonbank digital payment applications within the supervisory oversight of the CFPB, many nonbank financial companies would remain outside the direct supervision of any federal banking regulator.

These supervisory gaps have consequences -- the House Select Subcommittee on the Coronavirus Crisis found that nonbank fintechs "failed to stop obvious and preventable fraud" due, in part, to the fact that they did not have prevention measures in place.[111] Apart from the obvious harm that this caused

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[105] Financial Stability Oversight Council Annual Report 2022, Dec. 2023, at 61, *available at*: https://home.treasury.gov/system/files/261/FSOC2023AnnualReport.pdf.

[106] *Id.* at 24.

[107] Summary of 2021 Data on Mortgage Lending, CFPB (June 16, 2022), *available at*: https://www.consumerfinance.gov/data-research/hmda/summary-of-2022-data-on-mortgage-lending/#:~:text=The%202022%20data%20include%20information,%2Dend%20or%20open%2Dend.

[108] Consumer Financial Protection Bureau, Proposed Rule, Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74796 (Oct. 31, 2023), *available at*: 2023-23576.pdf (govinfo.gov)

[109] Consumer Financial Protection Bureau, Proposed Rule, Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications, 88 Fed. Reg. 80197 (Nov. 17, 2023), *available at*: 2023-24978.pdf (govinfo.gov).

[110] 88 Fed. Reg. at 80210.

[111] Select Subcommittee on the Coronavirus Crisis, "We Are Not the Fraud Police: How Fintechs Facilitated Fraud in the Paycheck Protection Program," Staff Report, December 2022, at 1. https://coronavirus-democrats-oversight.house.gov/sites/democrats.coronavirus.house.gov/files/2022.12.01%20How%20Fintechs%20Facilitated%20Fraud%20in%20the%20Paycheck%20Protection%20Program.pdf.

for the taxpayers, the lack of safety measures strongly implies that nonbank fintechs, in general, may not prioritize compliance systems that could mitigate harm, including adherence to consumer protection laws. Acknowledging this implication, the Select Committee rightly recommended, "[C]ongress must thoughtfully regulate the industry (nonbank fintechs) to better protect consumers and prevent financial crime.[112]

The Select Committee's recommendation is supported by a similar recommendation made in a 2022 Treasury report on nonbank competition and risk. That report recommended that the banking regulators, CFPB, HUD, and the Federal Trade Commission:

> [C]an help maintain a level regulatory playing field among IDI and non-bank lenders by supporting a coordinated approach to supervisory expectations regarding the risk that available credit underwriting approaches violate any applicable laws and regulations, including those related to consumer protection statutes. Doing so would help enhance competition by allowing regulated institutions to engage with innovations that can benefit consumers, while operating on a level playing field with proper supervision for safety and soundness and consistency with consumer protection statutes.[113]

Put simply, a national financial inclusion strategy must acknowledge that financial inclusion cannot come at the expense of consumer protections and should seek to subject firms providing financial products and services to the same requirements and oversight, as products and services offered in regulated and supervised environment pose less risk of consumer harm than those products offered by unsupervised nonbanks.[114]

## IV. The banking regulators and the CFPB should consider the negative effects of regulatory actions on low- and moderate-income consumers.

The aforementioned regulatory proposals do not, on an individual or aggregate basis, give due consideration to the possible costs and negative impact on consumers, particularly LMI consumers, or financial inclusion and access to financial products and services more broadly.

At most, these rules and proposals provide only a superficial analysis of the possible impact on consumers, particularly LMI individuals. If financial inclusion and access to financial products and services are a priority, then regulators must be required to engage in a specific, robust analysis of the possible impact of any particular proposal or action on financial inclusions and/or LMI consumers' access to credit and banking and financial services. Moreover, the impact on consumers of financial institutions' no longer providing a particular service (such as low- and no-cost bank accounts or overdraft services, for example) must also be assessed. The regulatory agencies also must grapple with the aggregate requirements and proposals to which banks are subject and how the additional incremental

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[112] *Id.* at 86.

[113] U.S. Department of the Treasury, "Report to the White House Competition Council: Assessing the Impact of New Entrant Non-bank Firms on Competition in Consumer Finance Markets" (November 2022), *available at*: Assessing the Impact of New Entrant Non-bank Firms on Competition in Consumer Finance Markets (treasury.gov).

[114] See e.g., Letter from Consumer Bankers Assn. and Center for Responsible Lending, *Petition for rulemaking defining larger participants for personal loans*, Sept. 15, 2022, https://www.regulations.gov/docket/CFPB-2022-0064/document.

effects of a particular proposal would impact financial institutions and consumers in light of that macro view; new requirements or limitations cannot be viewed in a vacuum.

We also recommend that the public sector pursue public/private partnerships to engage in further research to explore how more nuanced and targeted changes to certain products or services that the regulators believe should be reduced or eliminated, such as late fees or overdraft services, could be considered.

## V. Policymakers should consider additional measures to advance financial inclusion.

***CRA requirements for credit unions and nonbank financial companies***

Banks should not be the only financial institutions with an affirmative obligation to ensure that their loans, investments, products and services equitably serve the entire market, including lower-income and lower-wealth communities and families and communities of color. The duty to serve all, and the imperative to do so equitably, should be shared and enforced across the financial services sector, including with respect to credit unions and nonbank entities that provide financial products and services.

One of the arguments proponents of the CRA made in support of its passage was that banks were given significant public benefits, such as federal deposit insurance and "ready access to low-cost credit" through the Federal Reserve Banks and the Federal Home Loan Banks, and thus had an obligation to extend credit within the communities from which they received deposits.[115] Yet, many nonbanks take advantage of federal programs that reduce the risk to their institutions and investors and are seeking new federal benefits, and yet, unlike banks, do not have an affirmative duty to serve LMI families and communities equitably.[116]

Nonbank mortgage lenders routinely sell their loans to government-sponsored enterprises Fannie Mae and Freddie Mac. They thereby gain the profits from originating a mortgage but shift the risk to GSEs that are supported by taxpayers and hold significantly less capital against that risk than banks. Without those sales to Fannie Mae and Freddie Mac, nonbank mortgage companies would be unable to lend at the volumes they achieve today.[117] In addition, nonbank mortgage companies also make high volumes of government-backed Federal Housing Administration and Veterans Affairs loans.

Fintech companies also profit from other government-conferred benefits. For example, some of these companies issue debit cards and then intentionally route the customers' transactions through

[115] Community Credit Needs: Hearings on S. 406, Senate Committee on Banking, Housing, and Urban Affairs, 95th Cong. (Jan. 24, 1977) (statement of William Proxmire) p. 1958, *available at*: GPO-CRECB-1977-pt2-4-2.pdf (govinfo.gov).

[116] *See*, *e.g.*, Jesse Van Tol and Greg Baer, "Equity Should Be Required of the Entire Financial Sector, Not Just Banks," Morning Consult (Sept. 10, 2021), *available at*: Equity Should Be Required of the Entire Financial Sector, Not Just Banks - Morning Consult; *see also* BPI "FinTechs and Big Tech Should Honor Obligations to Meet the Finance Needs of All Americans, Not Just the Rich, Privileged and Digitally Connected" (June 2021), *available at*: FinTechs-and-Big-Tech-Should-Honor-Obligations-to-Meet-the-Finance-Needs-of-All-Americans.pdf (bpi.com).

[117] *See* Francisco Covas and Paul Calem, "Ways To Expand the Availability of Mortgage Loans to Low- and Moderate-Income Borrowers," BPI (July 15, 2021), *available at*: https://bpi.com/ways-to-expand-the-availability-of-mortgage-loans-to-low-and-moderate-income-borrowers/.

smaller banks that aren't subject to federal price restrictions on interchange (which is the "processing fee"), thereby allowing the fintechs to collect higher fees through a classic regulatory arbitrage scheme. Lastly, fintechs have benefited from government-guaranteed loans backed by the Small Business Administration and the U.S. Treasury.

Finally, while large credit unions provide many banking products and services, including deposit accounts, and benefit from federal deposit insurance protection (as well as special exemptions from paying any taxes on their income), they are inexplicably exempt from CRA. The United States Congress formally recognized credit unions in 1934 with the enactment of the Federal Credit Union Act. At that time, these not-for-profit financial cooperatives provided basic consumer financial services to low- and moderate-income individuals in local areas connected by a common bond. As a result of their statutory mission and limited membership, credit unions were exempt from the CRA. While credit union activities have expanded and membership has become available to most Americans, neither Congress nor federal regulators have addressed this regulatory gap.

A financial inclusion strategy should recognize that Congress should act to extend the obligation to meet the credit needs of the communities in which they are located to credit unions and certain nonbank financial companies. Chairman Jerome Powell in 2021 expressed support for application of the CRA or CRA-like requirements to nonbank financial institutions. He argued that "low- and moderate-income communities require credit support, regardless of the nature of the institution."[118]

Legislators and regulators in five states and the District of Columbia have created state community reinvestment requirements for state-chartered financial institutions, including credit unions, that can serve as guides for designing federal requirements. While states like Illinois have recently instituted such policies, others with decades-old laws—like Massachusetts—have publicized data demonstrating that banks outperform credit unions as it relates to their obligations under the state CRA.[119] Massachusetts applies CRA obligations to credit unions and mortgage lenders. To that end, the Consumer Financial Protection Bureau released a summary of state community reinvestment laws last year.[120] As credit unions pursue growth by acquiring banks, fewer communities will benefit from the CRA. And although credit unions have a mission to serve those of "modest means," there are no mechanisms to measure whether they do so.

As such, to help ensure that all consumers, particularly LMI individuals, have access to affordable financial products and services, the obligations to which banks are subject under the CRA should apply

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[118] Paul Kiernan and Andrew Ackerman, "Powell Says Low-Income Lending Rules Should Apply to All Firms Offering Consumer Credit," Wall Street Journal (May 3, 2021), available here: Powell Says Low-Income Lending Rules Should Apply to All Firms Offering Consumer Credit - WSJ.

[119] *See* Report prepared for the Massachusetts Affordable Housing Alliance by Jim Campen, Professor Emeritus of Economics, University of Massachusetts/Boston, "CRA Ratings of Massachusetts Banks, Credit Unions, and Licensed Mortgage Lenders In 2022, MAHA's Thirty-Second Annual Report on How Well Lenders and Regulators Are Meeting Their Obligations Under the Community Reinvestment Act" (Jan. 2023), *available at*: https://mahahome.org/sites/MAHA-PR1/files/civicrm/CRA%20Ratings%202022%20-%20Jan%2023%20.pdf.

[120] Consumer Financial Protection Bureau, "State Community Reinvestment Acts: Summary of state laws" (Nov. 2023), available here: https://files.consumerfinance.gov/f/documents/cfpb_state_community_reinvestment_acts_2023-11.pdf.

not just to banks, but should be extended to cover credit unions and certain nonbank financial companies.

*Additional recommendations*

Policymakers should reconsider the role that real estate appraisals play in community development lending. Banks face challenges supporting commercial neighborhood renewal efforts due, in part, to current regulatory standards that may be making it prohibitively difficult to lend to community developers that face low appraisal values for the properties they seek to use as collateral for loans. As a result, large-scale renewal and reinvestment efforts are hampered, as the costs of improvements exceed the appraised value. This situation also creates a disconnect and tension between potential expanded CRA activity and safety and soundness requirements. Policymakers and regulators should seek to resolve this in a way that addresses risk but permits needed investment in communities that have been left behind.

Policymakers also should further clarify and continue providing guidance on the Equal Credit Opportunity Act's (ECOA) and Regulation B's "special purpose credit program." Banks need to know whether their regulators still support these programs in the wake of the Supreme Court's decision on affirmative action and need clearer regulatory guidance on how best to design special purpose credit programs, both to enable banks to increase use of these programs and to ensure that banks can design their programs to be ECOA compliant. Currently, while special purpose credit programs are permitted, clearer guidelines for how they may be used (including incorporating innovative technology, such as the use of alternative data to inform credit decisions) would be helpful. Further, streamlining how these programs are viewed by examiners across regulating agencies would be useful to mitigate varying views and interpretations regarding safety and soundness and consumer protection considerations. It may also be useful to have regulators look holistically at CRA lending and Fair Lending obligations to ensure that banks are better able to support expanded economic development in underserved communities. Policymakers should facilitate targeted and meaningful programs (such as the special credit programs) to optimize access to capital for underrepresented businesses and communities.

## VI. Conclusion

The Associations and their members appreciate your attention to this important topic and look forward to engaging with you further. If you have any questions, please contact Paige Pidano Paridon at paige.paridon@bpi.com or 703-887-5229.

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## Appendix A

The **American Bankers Association** is the voice of the nation's $23.4 trillion banking industry, which is composed of small, regional and large banks that together employ approximately 2.1 million people, safeguard $18.6 trillion in deposits and extend $12.3 trillion in loans.

The **Bank Policy Institute** is a nonpartisan public policy, research, and advocacy group, representing the nation's leading banks. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ nearly 2 million Americans, make nearly half of the nation's bank-originated small business loans and are an engine for financial innovation and economic growth.

The **Consumer Bankers Association** (CBA) is the only national trade association focused exclusively on retail banking. Established in 1919, the association is a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.