April 8, 2020

Joseph M. Otting
Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219
Docket ID OCC-2018-0008
RIN 1557-AE34

Jelena McWilliams, Chair
Board of Directors
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429
RIN 2064-AF22

RE: Notice of Proposed Rulemaking, Community Reinvestment Act Regulations

Dear Comptroller Otting and Chair McWilliams:

The Center for Responsible Lending (CRL) and the Center for Community Self-Help (Self-Help) strongly oppose the OCC and FDIC's proposed Community Reinvestment Act (CRA) regulations. CRL is a nonprofit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Over 40 years, Self-Help and its affiliates have provided over $8.5 billion in financing through 159,000 loans to homebuyers, small businesses, and nonprofits. It serves more than 150,000 mostly low-income members through 60 retail credit union locations in California, Florida, Illinois, North Carolina, South Carolina, Virginia, and Wisconsin.

As an initial matter, CRL and Self-Help object to your agencies going forward with the CRA rulemaking during a time of acute crisis in our nation. The CRA rulemaking is of immense importance to low- and moderate-income communities and communities of color and requires sustained attention which stakeholders cannot provide in the face of COVID-19. The COVID-19 pandemic is of staggering breadth and depth, threatening the health of millions in the United States, and demanding a comprehensive and all-encompassing response. Indeed, numerous agencies have delayed or suspended rulemaking and other requirements to ensure that stakeholders could focus their resources on assisting consumers and helping their communities through this unprecedented time. Likewise, stakeholders that care deeply about community investment and the CRA should be able to focus their resources on addressing the COVID-19 crisis. It is extremely disappointing that the OCC and FDIC have required stakeholders to divert precious resources to submit this comment.

CRL and Self-Help urge the OCC and FDIC to withdraw the current proposed rule and, after the current health crisis ends, work with the Federal Reserve to achieve an interagency proposal that adheres to the CRA's mission.

I. Background

It is imperative to acknowledge the historical context for passage of the CRA. The CRA was one in a series of landmark civil rights legislation[1] and is a critical tool to help our nation work toward overcoming the legacy of redlining. Regrettably, today's racial wealth gap and lending disparities are in large part the result of decades of government policies and practices that enabled the redlining of communities of color for most of the 20th century. In the post-Depression era, federal policies that created housing opportunities for returning veterans and their families explicitly excluded people of color from the benefits of government-supported housing programs. Among these programs were public housing, the Home Owners Loan Corporation (HOLC), and mortgage insurance through the Federal Housing Administration (FHA). Not only did this redlining segregate residential neighborhoods across the United States, but it granted whites the ability to build wealth through homeownership while denying equal opportunities for families of color to build similar home equity over the same period.

As a result, whites amassed an economic advantage in the form of home equity that has been passed on to future generations through intergenerational wealth transfers. In 2016, the median white family had more than ten times the wealth of the median Black family.[2] In fact, the racial wealth gap between Black and white families grew from about $100,000 in 1992 to $154,000 in 2016.[3] The median white family gained significantly more wealth, with the median increasing by $54,000, while median wealth for Black families did not grow in real terms over the same time period.[4] The racial wealth gap contributes to the fact that in the 46 largest housing markets in the country, a median income Black household can only afford 25 percent of homes on the market last year in comparison to the 57 percent that a median income white household could afford.[5] There is a stark disparity in the homeownership rate between whites and people of color, particularly for Black and Latino borrowers. The white homeownership rate is 73.7% while the rate is 44% and 48% for Black and Latino borrowers respectively.[6] Disparities in homeownership are a key contributor to the ongoing racial wealth gap and home equity still plays a central role in shaping family wealth for the middle class.

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[1] 42 U.S.C. § 3601 *et seq* (Fair Housing Act); 15 U.S.C. § 1691 *et seq* (Equal Credit Opportunity Act); 12 U.S.C. § 2801 *et seq* (Home Mortgage Disclosure Act).

[2] Nick Noel, Duwain Pinder, Shelley Stewart III, and Jason Wright, The Economic Impact of Closing the Racial Wealth Gap, McKinsey & Company, August 2019, Exhibit 1 at p. 5, https://www.mckinsey.com/~/media/McKinsey/Industries/Public%20Sector/Our%20Insights/The%20economic%20impact%20of%20closing%20the%20racial%20wealth%20gap/The-economic-impact-of-closing-the-racial-wealth-gap-final.ashx.

[3] *Id.*

[4] *Id.*

[5] Paul Davidson, Black Households Can Afford Just 25% of Homes For Sale, USA Today, October 15, 2019, https://www.usatoday.com/story/money/2019/10/15/homes-sale-black-households-can-afford-just-25- percent-houses-market/3976383002/.

[6] U.S. Census, Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2019, https://www.census.gov/housing/hvs/files/currenthvspress.pdf.

A. The CRA is rooted in a statutory obligation for banks to serve the credit needs of their community.

Although the Fair Housing Act of 1968 made housing discrimination – including redlining in lending – unlawful, discrimination in the nation's lending markets persisted. Nearly a decade after the Fair Housing Act passed, Congress passed the CRA to address the urgent credit needs of low- and moderate-income (LMI) communities, many of which are majority people of color. The CRA was designed to open up access to credit for those to whom it had previously been denied. Congress recognized that many banks were serving the convenience and needs of some parts of their communities, but not others.

Indeed, the CRA statutory text clearly states that "regulated financial institutions have a continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered."[7] The Senate Banking Committee chairman and sponsor of the CRA, Senator William Proxmire, asserted on the Senate floor that the legislation was meant to "reaffirm that banks and thrifts are indeed chartered to serve the convenience and needs of their communities, and as the bill makes clear, convenience and needs does not just mean drive-in teller windows and Christmas Club accounts. It means loans."[8]

Today, the CRA plays an important role in holding financial institutions accountable for making safe and sound credit available to all borrowers. The CRA has urged banks to more actively lend in LMI areas; it has also played a key role in ensuring bank participation in community revitalization efforts across the country. As the preamble to the proposed rule acknowledges, since becoming law, the CRA has encouraged banks to invest trillions of dollars into the communities they serve, including LMI neighborhoods."[9]

B. The designation of CRA-eligible neighborhoods matters greatly in the mortgage market.

According to a working paper from the Philadelphia Federal Reserve, the designation of CRA-eligible neighborhoods still matters. The paper studied a "unique natural experiment induced by a policy shock" that occurred as a result of an OMB statistical area revision in 2013.[10] Over one-third of the census tracts in the new Philadelphia Metropolitan Division that were once eligible for CRA credit became ineligible after 2014, while the number of CRA-eligible tracts in the suburban counties tripled from 2013 to 2014.[11] The paper found evidence that "the loss of CRA eligibility status in a neighborhood leads to a decrease of about 10 percent to 20 percent (depending on the models and specifications used) in the volume of purchase mortgage originations by CRA-regulated lenders."[12] Moreover, these effects are more pronounced among borrowers of color and borrowers who used to qualify for CRA credit but became newly ineligible.[13]

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[7] Pub. Law 95-128.
[8] Statement of Senator Proxmire on Amendment 314 to S. 1523, Congressional Record 123 (1977), at 17630.
[9] Preamble to the Notice of Proposed Rulemaking: Community Reinvestment Act Regulations at 1.
[10] Lei Ding and Leonard Makamura, "Don't Know What You Got Till It's Gone – The Community Reinvestment Act in a Changing Financial Landscape, Federal Reserve Bank of Philadelphia, Working Paper 20-08 (Feb. 2020), https://philadelphiafed.org/-/media/research-and-data/publications/working-papers/2020/wp20-08.pdf.
[11] *Id.*
[12] *Id.* at 22-23.
[13] *Id.* at 4.

Additionally, without the incentive of the CRA, banks appeared to be less likely to maintain or expand their supply of mortgage credit in lower-income neighborhoods. Rather, banks tended to scale back their lending from low-income neighborhoods by reducing the supply of mortgage credit to borrowers of color and borrowers who no longer qualified for CRA credit. The paper also noted that gaining CRA coverage had little impact on relatively wealthier suburban neighborhoods that became eligible for the CRA, at least in the short term. This makes sense, as the credit needs of borrowers in these neighborhoods would be more adequately served already. The CRA is not needed as an incentive. The paper concluded that "the changed lending patterns in the newly ineligible neighborhoods are consistent with the notion that the CRA has made mortgage credit more accessible for households in lower-income communities."[14] A similar phenomenon exists for small business lending. A 2018 working paper, also issued by the Philadelphia Federal Reserve, found that the CRA promotes small business lending, particularly in terms of the number of loan originations in lower-income neighborhoods.[15]

C. CRA has not lived up to its promise and requires strengthening and clarification.

Despite the importance of CRA and the community investment it has spurred, CRA rules must be strengthened. Over 40 years after passage of the CRA, the effects of redlining can be seen in communities across the nation. The CRA as applied has not done nearly enough to revitalize previously redlined areas and has not made a substantial dent in the previously-mentioned lagging black homeownership rate.[16] Additionally, bank lending in LMI communities and communities of color has declined dramatically since the Great Recession.[17] And sadly, existing disparities will be further perpetuated in the face of the COVID-19 global public health and economic crisis.

Moreover, grade inflation under the current rules is of great concern and there is a need for regulators to more robustly enforce the law. Fully 98% of banks currently pass their CRA exams. According to the National Community Reinvestment Coalition's review of FFIEC data, in 2019, 7% of banks received a CRA rating of Outstanding; 91% received a rating of Satisfactory; 2% received a rating of Needs to Improve; and zero received a rating of Substantial Noncompliance. Similarly, in 2018, 10% received a CRA rating of Outstanding; 89% received a rating of Satisfactory; 1% received a rating of Needs to Improve; and zero received a rating of Substantial Noncompliance.[18] Even banks that have pending fair lending cases have received outstanding or satisfactory ratings. Also, after multiple shocking and egregious violations, Wells Fargo was not downgraded to a Substantial Noncompliance. Rather, it received a Needs to Improve rating on only one component of the CRA exam.[19]

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[14] *Id.*

[15] Lei Ding, Hyojung Lee, and Raphael W. Bostic, Effects of the Community Reinvestment Act (CRA) on Small Business Lending, Federal Reserve Bank of Philadelphia, Working Paper 18-27 (Dec. 2018), https://www.philadelphiafed.org/-/media/community-development/publications/discussion-papers/discussion-paper-effects-of-the-cra-on-small-business-lending.pdf?la=en.

[16] U.S. Census, Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2019, https://www.census.gov/housing/hvs/files/currenthvspress.pdf.

[17] See discussion on pp. 4-6 in Testimony of Nikitra Bailey before the House Committee on Financial Services, House, May 8, 2019, https://www.congress.gov/116/meeting/house/109438/witnesses/HHRG-116-BA04-Wstate-BaileyN-20190508.pdf.

[18] See also NCRC's Grade Inflation Infographic: How Well are Regulators Evaluating Banks Under the Community Reinvestment Act?

[19] Ben Lane, Housing Wire, Wells Fargo Fails Fair Lending Test Due to "Discriminatory and Illegal" Credit Practices, March, 28, 2017, https://www.housingwire.com/articles/39693-wells-fargo-fails-fair-lending-test-due-to-discriminatory-and-illegal-credit-practices/.

In addition, the CRA requires modernization to account for changing technology and new ways of doing business as well as *bolstered* to adhere to the intent and purpose of the law. For example, with the advent of the internet and online banking, the CRA needs updating for how many people access banking services today, including families in rural communities where there is a lack of consistent broadband service. Additionally, we agree that it would be valuable to find methods to ensure more consistency and uniformity in CRA evaluations and ratings. However, the agencies must not provide certainty to banks at the expense of communities and the CRA's statutory mandate.

The OCC and FDIC's proposed rule would fundamentally rewrite and weaken the CRA framework. As described below, the proposed rule is unlikely to encourage the investment in divested areas that Congress intended – and will in fact have harmful effects.

II. The proposed CRA evaluation framework would reauthorize redlining.

The most troubling outcome of the proposed rule is that it would unwittingly sanction redlining. The proposal relies on an overly simplistic evaluation measure that focuses on the total dollar value of CRA qualifying activity. We strongly oppose this approach, which we believe would fail to hold banks accountable for meeting the convenience and needs of all of their communities, as required by statute.

The proposed rule states there would be a "bank-level CRA evaluation measure" and an "assessment area CRA evaluation measure." Both measures would be the sum of the value of all of the CRA qualifying activities divided by the value of retail domestic deposits at the bank and assessment area levels respectively. Furthermore, the proposed rule sets out presumptive measures to determine the CRA rating. At the bank and assessment area level, a CRA evaluation measure of 11 percent would be required for an outstanding rating, 6 percent for a satisfactory rating, 3 percent for a needs to improve rating, and less than 3 percent for a substantial noncompliance rating.[20] The presumptive evaluation measure dominates the CRA rating determination. Moreover, a bank need only obtain an outstanding or satisfactory rating in a "significant portion" of its assessment areas to receive an overall outstanding or satisfactory rating. The preamble suggests this would be "more than 50 percent."[21] This permits banks to disinvest in and avoid certain parts of their assessment area, *i.e.*, engage in redlining, with regulators consenting to the practice.

This approach overvalues activity that may cost a lot in dollars but does not provide access to credit in LMI communities (see also discussion in section III). Furthermore, the structure sets up a system where a bank can concentrate its CRA activity in easier to serve areas, fail in nearly 50% of its assessment areas, and still receive a satisfactory or outstanding rating. This is especially troublesome as many large banks have retreated from making investments in home mortgage loans. Today, nonbank lenders supply a large amount of the nation's mortgage credit, particularly for FHA loans, and are not subject to the CRA.[22] Also, depository institutions have access to Federal Reserve loans at almost zero percent interest and their deposits are federally insured. Thus, banking profits are being subsidized by taxpayers without ensuring meaningful public benefits. Additionally, a report by the Center for Investigative Reporting

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[20] 85 Fed. Reg. at 1218.
[21] 85 Fed. Reg. at 1217.
[22] The Conference of State Bank Supervisors, Reengineering Nonbank Supervision, Chapter Three: Overview of Nonbank Mortgage, September 2019, https://www.csbs.org/sites/default/files/chapter_three_-_overview_of_nonbank_mortgage_1.pdf.

conducted an analysis of CRA lending activity and found that in 61 metros across the nation families of color were denied mortgage loans at significantly higher rates than whites even after controlling for nine social and economic factors, including the borrowers' income.[23] In these neighborhoods, white families were able to access credit while long term residents of color were denied access to mortgages, spurring gentrification and community displacement, which are now a national challenge.

Moreover, while the OCC and FDIC preserve a retail lending test, its weight on the exam has been dramatically reduced to a pass-fail analysis. A recent NCRC study reviewed the proposed pass-fail retail lending test, finding that while it may appear rigorous, this is illusory. Because the proposal permits banks to fail in close to half their assessment areas, this would invite gaming by the largest banks with the most assessment areas. They could choose to concentrate their lending in some markets while ignoring others. Banks would have considerable discretion in how mortgage and small business lending to LMI families would be distributed.

> The [proposal] would encourage the neglect of entire markets by the largest banks, who could then focus their CRA compliance activities on cities where smaller gaps in housing prices and incomes make LMI lending easier. Our analysis exposed the vagueness of the proposed tests and described a scenario under which the largest banks could exploit their large market footprints to achieve a substantial competitive advantage over smaller regional banks.[24]

If some less committed banks take advantage of regulatory loopholes, more committed banks may be pressured to take similar actions in order to remain competitive.

The current CRA rule provides some level of review to *all areas* in which banks have a branch presence. The proposed rule provides too much geographic flexibility, resulting in banks concentrating large investments – such as sport stadiums and infrastructure projects – in higher-cost areas where they can maximize credit. Banks may also cherry pick where they engage in LMI retail lending, focusing on assessment areas that are easiest to serve.

We acknowledge that many financial institutions care deeply about their communities and want to serve them fairly and comprehensively. However, incentives matter and have consequences. The proposed rule sets up banks to fail their communities while receiving passing CRA ratings.

III. The proposal overly broadens what counts for CRA credit, diluting the law's impact on LMI communities.

Adding up the dollar value of qualifying activities (lending, community development investments, and community development services) into one metric discounts the bank's activities in each discrete area. The approach does not weigh the quality of the bank's activities and whether it responds to local needs.

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[23] Aaron Glantz and Emmanuel Martinez, Center for Investigative Reporting, Kept Out, February 15, 2018, https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/.

[24] Bruce C. Mitchell, Josh Silver, and Jason Richardson, Proposed OCC and FDIC Geographic Analysis of Home Mortgage and Small Business Lending: Permission to Decrease Lending for the Largest Banks?, National Community Reinvestment Coalition, March 24, 2020, https://ncrc.org/proposed-occ-and-fdic-geographic-analysis-of-home-mortgage-and-small-business-lending-permission-to-decrease-lending-for-the-largest-banks/.

The proposal would undermine existing incentives to invest in low-income communities, as well as permit banks to receive CRA credit for investments that have little to do with homeownership or economic development. The proposal would provide credit for massive infrastructure projects that benefit the community at large but do not respond to local needs or primarily benefit LMI communities. It is difficult to estimate the benefit to LMI populations of large-scale projects, such as bridges, mass transit, or water supply and distribution. The proposal would also reward high dollar projects that may not abide by the CRA's purpose. For example, an investment in a qualified opportunity fund to finance improvements to an athletic stadium in an opportunity zone would automatically qualify for CRA credit.[25] Investments in opportunity zones are already eligible for massive tax breaks, which means that support for education and other community needs is diminished. It is difficult to understand why additional incentives are needed.

Also, the proposed rule disincentivizes activity that is of great benefit to LMI consumers, but no longer carries weight in the evaluation measure. The proposed rule would virtually eliminate the retail services test – this decision minimizes the value of branches in LMI areas as well as bank's efforts to provide affordable financial services and products to LMI individuals who are unbanked. For many years, the FDIC has piloted and promoted low-cost transaction and savings accounts. But banks offering these accounts would no longer have these activities be considered for CRA credit. Unfortunately, these accounts are not capable of quantification under the proposed rule's evaluation approach.

Overall, the proposed rule disincentivizes impactful, yet smaller scale, lending and community development projects. It fails to recognize the value of loan originations and other banking services that are at the heart of the CRA. Quantifying all CRA activity in a dollar value also encourages banks to meet their CRA obligations with activities that generate a large dollar amount but require the least amount of effort. As discussed in section II, incentives matter. The CRA framework and evaluation measure will determine what banks do to fulfill their CRA obligations. If the framework favors high dollar transactions that do not adequately respond to local needs, then that is what many banks will likely pursue.

A. The illustrative list of qualifying activities invites manipulation as well as permits ineffectual activities.

The proposed rule requires the agencies to publish periodically a non-exhaustive, illustrative list of examples of qualifying activities for CRA credit. It also establishes a process for banks to seek confirmation that an activity is a qualifying activity, and the activity is deemed approved if the agencies do not object within six months.[26] While we sympathize with the agencies' quest for transparency and clarity on what activities qualify for credit, the illustrative list is misguided and invites manipulation.

The list of qualified activities spans six pages in small, single-spaced print.[27] The choices are vast, resulting in CRA credit for activities and investments banks would have made anyway. In addition, because of the per se qualification of activities, no data will be collected to understand how well the various activities, and the proposed rule overall, impact LMI households.

[25] 85 Fed. Reg. at 1234.
[26] 85 Fed. Reg. at 1243.
[27] 85 Fed. Reg. at 1229-1234.

Additionally, the framework invites manipulation and meager results. The proposed rule expands the circumstances under which banks could receive pro rata credit for qualifying activities; all community development activities that provide some benefit to, but do not primarily benefit LMI communities, could receive pro rata credit equal to the partial benefit provided.[28] The procedure for determining pro rata credit is also unclear and could provide credit for projects that only have a theoretical benefit to LMI communities. "Partially benefits" means 50% or less of the dollar value of activity or of the individuals or census tracts is served by the activity.[29] Consequently, if any LMI individual, *i.e., greater than zero*, benefits from an activity on the list, the activity meets the test and is eligible for at least partial CRA credit. This is likely to incentivize lackluster projects that are not targeted to LMI communities.

"Primarily benefits" means (1) greater than 50% of the dollar value of the activity or of the individuals or census tracts served by the activity, or (2) the express, bona fide intent, purpose, or mandate of the activity as stated, for example, in a prospectus, loan proposal, or community action plan.[30] Under the second prong, it appears that a well-intentioned but poorly designed proposal or plan could still meet the "primarily benefits" test, even if the benefit does not actually reach more than 50% of the dollar value, individuals, or census tracts served by the activity. Intent to primarily benefit LMI families is not equivalent to demonstrated results.

B. The proposal mostly disregards community voices.

Not only does the proposed rule incentivize high dollar value projects and disincentive smaller-scale projects that positively impact local communities, the proposal also disregards community input. The proposed rule states that it retains a means for community stakeholders to share comments and concerns with examiners about assessment area needs and opportunities.[31] However, it is unclear whether or how the agencies will consider public comments on bank performance. The proposed rule does not specify how regulatory agencies would obtain, review, or evaluate public comments from community organizations or individuals about the performance of banks. Removing the emphasis on local voices and local needs violates the intent and purpose of CRA.

IV. The proposed rule should provide full credit under the retail lending test for banks originating CRA-eligible loans, no matter whether or when the loan is sold.

CRL and Self-Help disagree with the proposed rule provision providing only 25% credit for CRA-eligible home loans that a bank sells rather than holds on portfolio. We strongly urge the agencies to amend this provision. When a bank makes a CRA-eligible mortgage, the loan should receive full credit as a qualifying loan under the retail lending test – no matter if the bank sells it less than 90 days from the loan origination date.

[28] 85 Fed. Reg. at 1213.
[29] 85 Fed. Reg. 1241 (proposed § 25.03).
[30] *Id*.
[31] 85 Fed. Reg. at 1207.

As stated in the proposal:

> Qualifying loans and CD investments would be valued based on their average month-end on-balance sheet dollar value, except that qualifying retail loans originated and sold within 90 days of their origination date would be valued at 25 percent of their origination value.[32]

The 25% credit provision is detrimental to safety and soundness of banks and hurts access to credit for communities. When banks hold loans on portfolio, they take on significant risks – liquidity risk, interest rate risk, and credit risk. Unfortunately, due to this increased risk, banks have strict limits on the amount of CRA loans they can hold, despite making sustainable and responsible loans. This has negative repercussions for the community, as banks are unable to free up capital to continue originating good loans and promoting sustainable access to credit. For example, Self-Help created its secondary market program to provide banks with a liquid market for CRA loans. Our lending partners are able to make more loans to LMI borrowers and meet their CRA obligations. The secondary market program purchases the loans, enabling our bank partners to make additional loans and increase their impact. To date, the Self-Help program has provided over $6 billion in financing from 46 lenders to 66,462 borrowers around the country.

Thus, consistent with the statutory goals of the CRA, the agencies should incentivize responsible mortgage lending to LMI families. It is more valuable for banks to recycle their funds and magnify their impact than to be incentivized to hold loans and arbitrarily limit their positive impact. This also reduces risk in the overall banking system.

Separately, CRL and Self-Help concur with the agencies' decision to provide less CRA credit for frequently-traded CRA loans or mortgage-backed securities (MBS). This is distinguishable from the above-described situation where the bank originates the CRA-eligible loan. The proposal states:

> [B]anks evaluated under the proposed general performance standards would only receive credit in the calculation of their CRA evaluation measure…for the dollar value of MBS for the period that the investment remains on-balance sheet. For example, if a bank purchased a qualifying MBS on January 1, 2019 and sold the MBS on February 1, 2019, the bank would receive one twelfth of the value of the MBS when it calculated its annual qualifying activities value.[33]

This decision will help quell the CRA grade inflation that occurs when banks purchase loans or MBS investments right before a CRA exam and then sell those loans or investments when the exam is complete. Although CRL and Self-Help object to the overall evaluation measure, as described in section II, we agree that, to obtain CRA credit, the bank should be required to hold the loan or security for an extended period of time. Our recommendation would be for the bank to hold the purchased loan or security for three years, as this requirement would help prevent manipulation and evasion.

V. The proposed rule makes consequential changes to the law based on deficient data.

The agencies propose an expansion of assessment areas to include deposit-based assessment areas. Although the approach may appear to capture more bank activity, it relies on data that is not yet

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[32] 85 Fed. Reg. at 1214.
[33] *Id.*

collected. Under the proposal, a bank that receives 50% or more of its domestic deposits from outside of its current branch-based assessment areas would be required to delineate deposit-based assessment areas where it receives five percent or more of its total retail-based deposits.[34] However, deposit data needed to implement this is deficient. As stated in the preamble:

> Deposit data ...have limitations because the current reporting framework records deposits by attributing them to a branch location, rather than the account holder's address and uses a different definition of deposits than the proposed rule.[35]

The agencies state that the proposed rule would remedy these deficiencies by leveraging data that is available but not currently reported in an accessible manner, and over time, the data situation would improve.[36] However, assuming data may improve in the future is not a sound basis for proposing changes that are grounded in currently available data that has known deficiencies.

Furthermore, with respect to nearly all areas of the proposal, including the ratios and numerical targets, the agencies fail to release the data or results they used to model the proposed changes. In fact, a day after publishing the proposed rule, the OCC issued a Request for Information asking banks to voluntarily provide data that is necessary to evaluate the proposed rule's impact.[37] Yet, many banks have shared that they do not have the data easily available to analyze.

Data is central to any major regulatory overhaul. Without the necessary data, stakeholders will be unable to determine how the CRA rule would affect their community and promote fair access to sustainable credit. Additionally, it will be challenging for the banking industry to understand the impact of the rule on its business, compliance efforts, and operations. We call on the agencies to collect and release critical data prior to pursuing a once-in-a-generation rulemaking.

VI. Additional Recommendations

First, the rule should abandon the proposed evaluation measure and the over-reliance on the total dollar value of qualifying activity. Instead, the evaluation should focus on units/loans, impact on LMI communities, and responsiveness to local needs. Retail lending and retail services should count for much more of the overall rating.

Furthermore, the agencies do not adequately address enduring racial disparities in lending. The evaluation framework does not strengthen fair lending reviews on CRA exams. Yet, a bank's fair lending record should be an explicit and valued component of the CRA exam. While the proposed rule states that evidence of discriminatory or other illegal credit practices will adversely affect a bank's CRA performance, it is unclear how the agencies will assess this, what will be considered as evidence, and the precise impact on a bank's CRA rating. We urge the agencies to ensure that *all* of a bank's lending activities – mortgage, consumer, small business and community development lending – meet vigorous fair lending tests in order to be CRA-eligible. Additionally, currently data is lacking to know how well CRA investments are serving borrowers by race, national origin, and other legally protected classes. The proposed rule should require data collection on who benefits from various CRA activities. Small business

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[34] 85 Fed. Reg. at 1208.
[35] 85 Fed. Reg. at 1222.
[36] *Id.*
[37] 85 Fed. Reg. 1285 (Jan. 10, 2020).

lending also suffers from data deficiencies. We recommend that the proposed rule include HMDA-like reporting requirements for small business lending receiving CRA credit, including the race of all small business loan applicants and originations.

The proposed rule also permits consumer lending to count for CRA credit. But the proposed rule should make clear that only safe, sound and sustainable consumer lending, made at reasonable rates and based on a borrower's ability to repay, may be considered as a CRA qualifying activity. CRA guidelines should make clear that no discriminatory, abusive or predatory loan will qualify for CRA consideration. Strong standards must be developed to guide the expansion of consumers' access to quality credit for the products and services that they need.

Ensuring that consumers have an ability to repay a consumer loan based on an underwriting of income and expenses is of paramount importance. Unfortunately, many non-traditional credit or alternative financial service providers only offer small-dollar loans at predatory rates or with other terms that drive consumers into delinquency and default. We encourage CRA guidelines that allow small dollar loan qualifications when a covered lender offers such products with low-risk terms and in a way that inures to the benefit of the consumer. The data are clear that poorly designed loans, like those with balloon payments or high-cost installment loans, only worsen consumers' financial distress.

For example, small dollar loans qualifying for CRA credit must include protections against loan flipping, a practice which creates a cycle of repeat loans – a debt trap. And excessively high fees, including high APR loans, should not qualify for CRA credit. Loans that exceed a 36% APR should not qualify for CRA-eligible activities. A 36% rate threshold for small-dollar loans is a long-standing principle found in the laws of many states, the federal Military Lending Act, and guidance from federal regulators, and it is widely supported by civil rights groups, faith-based organizations, and consumer protection organizations as a standard for responsible loans. On larger consumer loans, rates should be much lower than 36%.

VII. Conclusion

The agencies' proposed rule will not fulfill the statutory purpose of the CRA and should be withdrawn. After the current health crisis ends, CRL and Self-Help urge the OCC and FDIC to work with the Federal Reserve to achieve an interagency proposal that adheres to the CRA's mission.