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April 8, 2020

The Honorable Joseph Otting
Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219

The Honorable Jelena McWilliams
Director
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

The Honorable Lael Brainard
Governor of the Federal Reserve
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave. NW
Washington, DC 20551

RE: Community Reinvestment Act Regulations, Notice of Proposed Rulemaking [OCC Docket ID OCC-2018-0008, FDIC Docket ID RIN 3064-AF22]

To Whom It May Concern:

I am writing on behalf of the National Housing Conference (NHC) to comment on the Notice of Proposed Rulemaking (NPR) entitled Community Reinvestment Act Regulations, which was published in the Federal Register on January 9, 2020 by the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) (collectively, "the Agencies"). As we have stated in previous letters and other communications, we strongly prefer that the OCC and FDIC withdraw this NPR and resume working with the Federal Reserve Board of Governors (FRB) and the many stakeholders who have provided substantive and constructive comments to develop a proposed rule that can achieve broad support.

Of more immediate concern, is the fact that due to the COVID-19 pandemic, regulators, banks and community advocates have a shared responsibility to commit all of our resources toward supporting the nation's physical and economic health. At this time, we have no idea how severely the pandemic will impact our economy, the financial system and communities throughout the nation. Committing resources to regulatory initiatives that do not directly support our national response to the COVID-19 pandemic is a dangerous distraction. Financial institutions of all sizes are engaged in efforts to maintain stability and support the economy under the threat of historic levels of economic dislocation and unemployment. Community groups are on the front lines of the fight to reduce the rising

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mortality count and "flatten the curve" by supporting social distancing and disinfection of public spaces in millions of units of rental housing. Regulators, as well, must commit their limited resources to managing the safety and soundness of regulated entities, ensuring that we do not allow a financial crisis to follow the health and economic crisis we are already experiencing. We have learned valuable lessons from the 2008 Great Recession, as well as the Great Depression of the 1930's. First and foremost, among them is that we must commit all of our attention and resources to the task at hand. Given this unprecedented situation, prudence and responsibility demand suspending this regulatory process.

FDIC Chairman McWilliams eloquently made this case in her March 19, 2020 letter to the Financial Accounting Standards Board (FASB). She stated that the FDIC is concerned that "institutions will face unique difficulties over the coming weeks and months to adequately staff customer-facing functions; ensure that deposit, loan, and IT systems operate normally; help borrowers that are experiencing unanticipated cash flow difficulties; and address the earnings and capital implications of near zero percent interest rates and a potential surge in borrowers who are unable to meet contractual payment terms."

Chairman McWilliams went on to say that "the growing economic uncertainties stemming from the pandemic and rapidly evolving measures to confront these risks make certain allowance assessment factors potentially more speculative and less reliable at this time. As a result, I urge you to allow banks that are currently subject to CECL to have the option to postpone implementation of CECL. This will allow these institutions to better focus on supporting lending to creditworthy households and businesses, which will support the return of our economy to health." She called on the FASB "to allow these financial institutions to focus on immediate business challenges relating to the impacts of the current pandemic and its effect on the financial system." We strongly agree with this position and believe a similar approach should be taken in regard to changes in the CRA regulations at this time.

CRA modernization needs to occur, and it needs to include improved clarity, consistency and flexibility, including metrics that are transparent and fair, as the Treasury Secretary, Comptroller of the Currency and a diverse group of stakeholders have advocated. CRA modernization that improves the lives of underserved people and communities, while improving the ability of regulated financial institutions to meet their responsibilities, is worth pursuing. It is also worth waiting for. The NHC strongly recommends an immediate suspension of all regulatory processes involving housing and financial services that do not directly contribute to the war against the COVID-19 virus and its economic aftermath.

We are well aware how important the CRA modernization effort is to communities, financial institutions and regulators. We applaud the diligent work that has already been done as well as the sincere commitment by all participants to improving this important legislation. However now is not the time to divert any of our nation's resources away from the urgent task at hand.

When the agencies take up this initiative again in the hopefully not too distant future, there are several important observations that NHC members have raised, and that are highlighted below. We hope that they will be considered in the spirit that they are given; as a foundation for a new Advanced Notice of Proposed Rulemaking, issued by all three agencies, and taking into full account the new world in which it will be applied.

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Background

The Community Reinvestment Act of 1977 (CRA)[1] was enacted in response to concerns over disinvestment in low-income communities and persistent allegations of "redlining," the practice of avoiding investment in minority neighborhoods codified by the Home Owners' Loan Corporation (HOLC) in 1933 and the Federal Housing Administration in 1934.[2] While the Fair Housing Act of 1968 prohibited redlining and other forms of housing discrimination, these practices proved difficult to reverse. Even as lenders abandoned the formal practice of redlining, the long-term legacy of its impact on communities as well as underwriting culture persisted. Research by economists at the Federal Reserve Bank of Chicago as recently as 2018 demonstrates that areas denied credit in the aftermath of the Great Depression of the 1930s continue to have lower property values, lower homeownership rates, and lower credit scores nearly 90 years later.[3] As Americans left cities for new suburban bedroom communities in the 1960s and 1970s, there was a growing disparity between where banks raised their deposits and where they invested, particularly in housing and mortgage finance. Congress sought to incent banks to invest in the communities where their branches were located. A high CRA rating was intended to provide that incentive.

When he introduced the CRA in 1977, Senate Finance Committee Chairman William Proxmire expressed hope that by incenting banks to rebuild and revitalize communities threatened by decline, the bill would ultimately prove good for the banking industry. This vision proved prescient beyond anyone's expectations.[4] Today, there is broad support for CRA among banks of all sizes, and throughout the housing industry as well as among civil rights and community advocates. To understand why the CRA remains so important, one need only look at the numbers of minority homeownership in the 50 years since the passage of the Fair Housing Act. Overall, minority homeownership plummeted during the Great Recession, falling from 52% in 2004 to 46% in 2016.[5] The homeownership rate for African Americans in 2019 was lower than it was when the Fair Housing Act was passed in 1968. That is a national tragedy and serves as a clarion call for us to get this effort to modernize and improve CRA done right.

CRA requires federal banking regulators to examine covered financial institutions and determine how well they meet the needs of the communities where they are located. Banks receive ratings from Outstanding to Needs to Improve or Substantial Noncompliance. The vast majority are rated as Satisfactory.[6] CRA only applies to depository institutions insured by the FDIC. CRA does not apply

[1] Pub. L. 95–128, title VIII, § 807, as added Pub. L. 101–73, title XII, § 1212(b), Aug. 9, 1989, 103 Stat. 527; amended Pub. L. 102–242, title II, § 222, Dec. 19, 1991, 105 Stat. 2306; Pub. L. 103–328, title I, § 110, Sept. 29, 1994, 108 Stat. 2364.

[2] Remarks by Martin J. Gruenberg, Member, Board of Directors, Federal Deposit Insurance Corporation on The Community Reinvestment Act: Its Origins, Evolution, and Future at Fordham University, Lincoln Center Campus; New York, New York, October 29, 2018

[3] The Effects of the 1930s HOLC "Redlining" Maps (Revised August 2018) by Daniel Aaronson , Daniel Hartley , Bhash Mazumder. Federal Reserve Bank of Chicago Working Paper, No. 2017-12, 2017.

[4] Congressional Record, daily ed., June 6, 1977, S.8958

[5] Housing Vacancies and Homeownership (CPS/HVS), Homeownership Rates, US Census Bureau.

[6] The Effectiveness of the Community Reinvestment Act, Congressional Research Service (January 7, 2015) with data provided by the FFIEC.

to trust banks, credit unions, and other nonbank entities. While these institutions play a growing role in banking and lending, they are not covered by the statute and we are not recommending reopening the CRA statute at this time. Instead, we believe that significant improvements in the effectiveness of CRA can be achieved through a unified regulatory process undertaken by the three prudential bank regulators: the OCC, the Federal Reserve Board, and the Federal Deposit Insurance Corporation, which together administer CRA for the insured depository institutions that they supervise.

Regulators must address where the CRA has fallen behind major changes in the banking industry over the past 20 years. The definition of what constitutes an Assessment Area (AA) presents unique challenges today because banks have alternate channels for accepting deposits that did not exist in 1977 like mobile and online banking. Additionally, customers with deposits are more mobile, and rural areas have experienced a disproportionate number of bank branch closures. Corporate deposits stemming from commercial banking relationships may also distort assessments based on deposits, as these can be allocated to the office in which they are credited, even if they originate in other jurisdictions. These factors have contributed to a condition known as "CRA hotspots," where CRA investment incentives are concentrated in a few states, like Utah, South Dakota and Delaware, while other states, where banks are less likely to be chartered, have become "CRA deserts."[7]

One of the most frustrating aspects of the current CRA regulatory regime are variations in application of the rules by different regulators, and by different examiners within the same regulatory agency. This is as problematic for advocates as it is for banks and it must be resolved. There are simply far too many credible reports of inadequately trained and inexperienced examiners who have a limited knowledge of community development and assisted housing programs to not address this issue. Another challenging area for banks as well as community advocates are the timing inconsistencies for when reviews are conducted and when a final rating is issued. By the time banks receive their rating, many of the issues identified in their examination will have been addressed, or conditions will have changed, or concerns that could have been addressed in a timely fashion have been left to fester. Examination and rating schedules must be adhered to, so they can be promptly explained or remediated. Similarly, providing a greater degree of certainty over what activities will be considered positive contributors to a CRA rating would be a positive step and help financial institutions better incorporate their CRA investment efforts in their planning processes.

Fundamentally, the NHC believes that for CRA modernization effort to be effective and sustainable, it must meet four basic tests. Any new CRA regulatory regimen must:

1. Increase investment in communities that are currently underserved;
2. Benefit more low- and moderate-income (LMI) people, particularly people of color, who live in those communities;
3. Ensure that CRA lending and investment does not lead to displacement of the very people it is meant to help; and
4. Make both bank performance and government enforcement more transparent and predictable.

Unfortunately, the proposed rule fails to adequately address any of these four objectives. Instead, it

[7] The Community Reinvestment Act and Its Effect on Housing Tax Credit Policy, Cohn Reznick, http://ahic.org/images/downloads/Research_and_Education/the_community_reinvestment_act_and_its_effect_on_housing_tax.pdf

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will likely reduce the number of investments in underserved communities, harm low and moderate-income people, and make both bank performance and government enforcement less transparent and predictable, the exact opposite of the regulators stated intention. As a result, NHC regretfully believes that no amount of adjustment can resolve the fundamental flaws in the regulation that undercut the regulators' stated intention. Nonetheless, NHC would like to take this opportunity to highlight five key areas which should guide future efforts to modernize CRA regulations.

<u>Assessment Areas</u>

As noted earlier, the Assessment Area definition and application present unique challenges today because the financial world we lived in when the definition was created in 1977 looks nothing like the one we live in today. The application of AAs depends largely on the business model of the bank. For facility-based banks, like traditional banks with branches, we agree that they should be able to designate a non-metropolitan statewide AA to improve their ability to respond to needs in their broader community. However, we oppose the establishment of deposit-based AAs for "internet" banks and agree with the proposal made by the National Association of Affordable Housing Lenders (NAAHL) that more accurately and completely reflects these institutions' business model. Because internet banks have no local presence, it will be very hard for them to have specific and multifaceted responsibilities within specific markets. This is not to suggest that internet banks should not be expected to meet their full, fair share of responsibility under CRA. Rather, internet banks that operate nationwide should have nationwide responsibilities. NAAHL has proposed a different way to evaluate internet banks, which could be defined as those deriving less than 20 percent of their deposits from facility-based AAs. It would treat internet banks as essentially nationwide institutions, fully accountable without establishing deposit-based AAs, and would be simpler and more flexible than deposit-based AAs.

Under this alternative, retail loan distribution would be compared with national distribution benchmarks. For example, if LMI households receive 20% of all home mortgages made by banks nationwide, an internet bank would be compared against that benchmark. If a mortgage is LMI in its local market, it would count as such for this purpose. Although median incomes and the LMI share of mortgages will vary across markets, national benchmarks should work well because the preponderance of an internet bank's activity occurs outside its facility-based AA. This approach would treat internet banks differently from more traditional banks, which would have a retail distribution test only for their facility-based AAs but not at the bank level. Community development activity outside an internet bank's facility-based AA would be considered on a nationwide basis. In this regard, internet banks would be treated the same as other banks under the NPR, since in either case CD activity nationwide would be measured at the bank level (assuming the bank performs satisfactorily in most of its AAs and in AAs where a bank receives most of its deposits).

We also agree that activities outside AAs would count for evaluation of bank-level performance. It will encourage and reward banks that serve LMI people and places nationwide, including underserved markets. It will also reduce administrative burdens, not just for banks but also for their partners. Like NAAHL and others, we support retaining "broader statewide and regional areas" (BSRAs), with modifications provided below, because they give provide additional flexibility to address regional needs. To improve their effectiveness, the Agencies should provide that:

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- BSRA boundaries should follow the U.S. Census regional definition plus any state adjacent to a state that includes an AA.
- Use of BSRAs should be available only to banks whose most recent published rating was Satisfactory or Outstanding. The current policy creates confusion because it recognizes BSRAs only if a bank is adequately responsive to its AA's needs, but that determination is not helpful since it is made during an examination that is years after financing decisions must be made.
- If more than one AA is located within a BSRA, credit for an activity should be assigned based on the activity's location within an AA or otherwise, among AAs based on their relative share of the bank's deposits.

Performance Metrics

The CRA Evaluation Measure (CRA-EM) proposed in the NPR would be the predominate basis for a bank's presumptive CRA rating. It is a ratio in which the numerator is the annual dollar volume of a bank's total CRA qualified activity on the bank's balance sheet and the denominator is the bank's domestic retail deposits with certain adjustments. Adoption of the NPR's CRA-EM would lead to a wide range of unintended consequences that would have the collective impact of gutting the CRA. Furthermore, building and maintaining complex new systems to identify which retail loan assets will qualify for CRA credit and tracking them on a monthly basis will add substantial administrative disruption and cost and create an ongoing burden for banks. It is an approach that succeeds in harming all parties it seeks to help and must be rejected.

The focus on dollar volume strongly discourages small loans and investments. The fastest and easiest way for a national bank to meet its CRA-EM targets will be to make the largest loans and investments possible. However, this incentive structure disadvantages not only LMI families who need low-balance home mortgages but also small businesses, entrepreneurs and family farms that need low-balance loans, not to mention the communities where the size of a CD loan or investment may not reflect its significance. Rural communities and metropolitan markets with low housing prices would be especially disadvantaged. Obtaining smaller loans and investments is a serious and chronic challenge for communities because making them is inherently less profitable for banks. CRA policy should offset this disincentive, not magnify it.

Performance Context

We are concerned that the NPR's framing of performance context appears to significantly diminish its significance. Consideration only once a presumptive rating is set relegates performance context to a distinction without a difference. Further, the "innovativeness, complexity, and flexibility of the bank's qualifying activities"[8] are significant for reasons beyond their effect on a bank's capacity to meet performance standards. Responsibly assessing a bank's CD activities requires a detailed understanding of community needs and opportunities, as well as knowledge of how the bank uses its capacities to respond to them within its competitive context. Unfortunately, the NPR's framing

[8] NPR §25.14(b)(1) and §345.14(b)(1).

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suggests that the primary use of performance context in the future will be to excuse a bank that performs below normal expectations.

Alternatively, the Federal Reserve Board has done important work creating a data-driven performance context dashboard, which hold much promise in addressing the need for greater clarity and consistency, while allowing banks to be flexible in meeting their performance context benchmarks. We strongly recommend that the Agencies work with the Federal Reserve Board on refining this approach and incorporating it into a renewed effort to modernize CRA.

Qualifying Activities Criteria

The lack of adequate clarity has been a significant obstacle to the evaluation of community development lending and investment in the past. Addressing these uncertainties is a major reason NHC has supported additional policy guidance. Banks will provide more financing for activities they are confident will receive CRA credit, supporting the ability of CRA to be the "thumb on the scale" of investment decisions. In addition to listing many of the activities eligible under the NPR, we also recommend retaining three current CD activities that the NPR would disqualify: letters of credit, neighborhood stabilization and revitalization, and economic development.

As others have raised in their comment letters, we are especially concerned about granting full CRA credit for infrastructure projects and projects supported by Opportunity Zone funds. Infrastructure improvements are highly profitable and do not need the added incentive of CRA treatment. Further, there is a legacy of infrastructure improvement harming low- and moderate-income communities. This is of particular concern to the National Housing Conference, which was a primary author and advocate of the American Housing Act of 1949[9]. Funding for slum clearance, an important part of the 1949 Act was fully funded, while building affordable housing in its place was not. When the Federal Highway Act of 1956[10] was passed, many municipalities used the funding to destroy African American and Latino neighborhoods, creating permanent economic and social damage that persist to this day. The definition of an unintended consequence is that the negative result was unforeseen and, in retrospect, unavoidable. While a similar impact is certainly not the intention of the Agencies, it is critical that we learn from past mistakes and remember that the law of unintended consequences is never repealed.

Opportunity Zone incentives strongly favor activities unlikely to substantially benefit the people and communities the CRA is meant to help, such as high-income housing, land speculation, downtown office buildings, and high-tech business relocations. Unlike other targeted tax incentives, Opportunity Zones do not require any LMI benefit or even the reporting of expected or actual LMI benefit. Further, the incentive amount depends on capital appreciation, which in turn favors areas undergoing the kind of rapid property value appreciation associated with the displacement of LMI residents and small businesses. This creates a strong imperative that for Qualified Opportunity Funds to count in a CRA evaluation, they be strictly limited to activities that serve another identified CD purpose, such as affordable housing or neighborhood stabilization or revitalization.

Another area of concern is that the proposal in the NPR would disallow consideration of letters of

[9] P.L. 81-171
[10] P.L. 84-627

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credit that support CD activities. Letters of credit are an important element of affordable housing finance and essential to tax-exempt affordable housing bonds issued by state and local housing finance agencies. Letters of credit expose banks to the same credit risk as direct loans and should be treated as equally valuable to LMI people and communities. CRA policies should accommodate efficient market executions that minimize costs and maximize LMI benefits. While grocery stores, pharmacies, and other retail outlets provide essential goods and services as well as jobs, they should only be eligible if they meet the small business loan or revenue standards, receive public program support, or are deemed consistent with a government revitalization plan.

Lending

The NPR establishes a CRA Evaluation Measure based on the number of months a loan is held on a bank's balance sheet. A retail loan that is originated and sold within 90 days is treated as if it were on the balance sheet for 90 days. However, this approach is seriously flawed and will have adverse unintended consequences for consumers, communities, and banks.

The primary business execution for home mortgages (as well as a common and growing practice for multifamily rental housing mortgages) is for the originating lender to sell the loan into the secondary market, typically through Fannie Mae, Freddie Mac, or Ginnie Mae. (A similar practice also applies to SBA Section 7(a) guaranteed small business loans, although not through the same intermediaries.) This execution is advantageous to originators because it: provides liquidity to lenders so they can use the proceeds from the loan sale to make additional loans; transfers credit risk; transfers interest-rate risk; and releases capital reserve requirements. It also provides important advantages to communities because it enables long-term, fixed-rate mortgage structures that borrowers strongly prefer; reduces interest rates, thereby reducing monthly payments; and enables LMI people and communities to participate in and benefit from the American mainstream financial system. Since the expected life of a 30-year home mortgage loan is seven to eight years a bank would have to originate and sell about 30 home mortgages to get the same CRA credit as for holding a single home mortgage it originates for its expected life. This perverse reward structure pits maximizing CRA credit against the shared interests of banks, borrowers, and communities in accessing the secondary market.

Community Development Investment

As written, the NPR would significantly reduce investments and benefits to the very people and communities it seeks to help, falling far short of the NPR's stated goal of encouraging banks to "serve more of their communities, including those areas with the greatest need for economic development, investment, and financing needs, such as urban and rural areas and opportunity zones, that may be underserved by the current regulations." Community development investments count for 25% of the grade and CD and AFHS loans count significantly on lending test. In the proposed rule, these tests are eliminated and replaced with a ratio-driven approach. NHC strongly opposes this approach because it prioritizes the financial size of an investment over its impact on the community. The proposed rule creates a significant incentive to focus on high dollar investments that may undercut the impact of the CRA once the assigned target is reached. NHC prefers measuring the number of loans, rather than the dollar value of a bank's lending. This is preferable because it accords greater weight to the

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geographic disbursement of CRA activity. It also recognizes that a relatively small loan can have a very positive impact on the LMI individual and community. It is vital to reject the measurement of dollars and embrace the measurement of units. The proposed rule could also significantly shift incentives away from much needed investment in affordable housing, including the Low-Income Housing Tax Credit and housing bonds. This impact would set back vitally needed efforts to address the growing shortage of affordable housing units, worsening an existing crisis in affordable housing supply by undercutting support for highly effective government policies that have strong bipartisan support.

CRA modernization is a once-in-a-generation opportunity. Unfortunately, this proposal will undercut efforts to help millions of low- and moderate-income people in communities that need CRA the most. Ironically, the proposed rule also harms banks as well as the communities they serve. Without broad support across the political spectrum, it will cost banks hundreds of millions of dollars to retool their compliance systems, and hundreds of millions more when the pendulum inevitably swings back, and they have to retool again. It is also susceptible to the threat of government credit allocation that was carefully avoided in 1977.

Even more importantly, no regulatory initiative should be undertaken at the expense of the health and economic security of the American public. While this was never the intent of the agencies, an unforeseeable and unprecedented national crisis has been thrust upon all of us. As a result, it is imperative that this regulatory process be suspended until our national emergency is safely behind us.

Sincerely,

David M. Dworkin

David M. Dworkin
President & CEO