BANK POLICY INSTITUTE

November 19, 2018

Via Regulations.gov

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street SW
Suite 3E-218
Washington, DC 20219

Re: Advance Notice of Proposed Rulemaking - Reforming the Community Reinvestment Act Regulatory Framework [Docket ID OCC-2018-0008; RIN 1557–AE34]

Ladies and Gentlemen:

The Bank Policy Institute (**"BPI"**)[1] appreciates the opportunity to comment on the advance notice of proposed rulemaking (the **"ANPR"**)[2] issued by the Office of the Comptroller of the Currency (**"OCC"**) soliciting ideas for building a new framework to transform or modernize the regulations that implement the Community Reinvestment Act of 1977 (**"CRA"**).

BPI fully supports the longstanding goals of the CRA and believes that the act should continue to be an effective force for strengthening the development of the communities that our member banks serve. The CRA has been invaluable in encouraging banks to meet the credit needs of low- and moderate-income neighborhoods and individuals. We share with community groups the goal of continuing to promote and advance economic opportunity by building on the CRA's foundations and enhancing the framework to ensure banks can lend more to low- and moderate-income areas, small businesses, and other communities in need of financial services. We support efforts to ensure that the CRA remains an essential part of the structure for rebuilding and revitalizing communities.

The OCC has chosen an ideal moment to explore ways to make the CRA work better for banks' customers and communities. Banks are transforming how they deliver products and services in their communities, and advances in innovation and changes in customer demographics and preferences have led to more variety among bank business models than ever before. These developments require a modern and dynamic CRA framework that accounts for and reflects the many ways in which banks today serve the credit needs of their communities.

Aspects of the federal banking agencies' current approach to the CRA instead have frustrated the act's core objectives. The current framework is overly complex, and key concepts within the agencies' CRA regulations remain subjective and opaque. While the current framework measures and encourages community reinvestment, it also can distort incentives and increase compliance costs. Accordingly, there are significant opportunities to update the federal banking agencies' CRA regulations to reflect transformation in the delivery of banking products and services

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

2 Reforming the Community Reinvestment Act Regulatory Framework, 83 Fed. Reg. 45,053 (Sept. 5, 2018).

to customers and to refocus the CRA, through transparency and simplicity, on its original statutory intent of evaluating banks' record of serving the credit needs of their communities.

The OCC's ANPR is a significant step towards reform of the regulatory framework implementing the CRA, for which we applaud the OCC. We are also optimistic that the OCC will be joined by its fellow banking agencies in this important review; in that respect, we appreciate recent statements by senior officials of the Board of Governors of the Federal Reserve System and Federal Deposit Insurance Corporation affirming the importance of CRA reform. We urge all three of the federal banking agencies going forward to coordinate and formulate an interagency proposal with a set of rules that will better fulfill the CRA's purpose. Working together, the federal banking agencies can adopt thoughtful, effective, and sustainable improvements.

This letter sets forth and discusses principles that we believe should guide the agencies' work to review and improve the CRA regulatory framework. The annex to this letter then describes specific examples of how these principles might be put into concrete practice, including recommendations relating to the metrics-based approach on which the ANPR seeks comment, the geography of CRA activities, CRA-eligible activities, administration of the CRA, and existing CRA designations and tests.

I. Any regime for evaluation of a bank's CRA record should be based on the language and stated purpose of the statute and focus on an assessment of whether "the bank has served the convenience and needs of the communities in which it is chartered to do business" and of "the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution."

Regulations should support the CRA's stated purpose of assessing whether banks serve their communities, but should not serve purposes outside of the text of the statute, such as acting as a tool for enforcement of other consumer financial services laws that have their own enforcement regimes.

II. Any evaluation framework should use an assessment methodology that is objective and measurable, and that furthers the goals of simplification, transparency, and certainty.

Understanding and navigating the current CRA framework requires a significant degree of expertise and experience. Perhaps as a result of the current framework's complexity, as well as the subjective judgment often required in applying and resolving that complexity, the agencies have at times applied the CRA unevenly and inconsistently, leading to widely varying outcomes. Inconsistent application of the CRA hinders banks' ability to identify needs and develop community reinvestment programs and thus serve their communities in the most effective way possible. Agency staff, banks, consumers, and communities alike would benefit if the CRA were administered in a more objective, simple, and transparent manner.

The annex to this letter discusses how the agencies should carefully explore metrics-based approaches that could further these goals. *(See Annex Part A, Recommendations Regarding Metrics-Based Approaches.)*

III. CRA regulations should be workable for the wide variety of banks' business models, capabilities, and opportunities, as well as changing economic conditions.

As the agencies consider improvements that would standardize CRA evaluations, including any metrics-based approach, they should seek to ensure that performance evaluations continue to take into account key elements of performance context, including (i) a bank's business model and product and service offerings, and (ii) the opportunities available to make loans and investments, and provide services within the bank's communities in the relevant economic environment.

The existing large bank, intermediate small bank, small bank, limited purpose, and wholesale bank designations and strategic plan option are important examples of tailoring the evaluation of banks' CRA performance to their business models, capabilities, and opportunities. The agencies should therefore retain these existing designations and option. The agencies should also take account of consumers' increasing preference for obtaining services through non-branch delivery channels.

IV. A bank should know in advance whether its activity will receive CRA credit. CRA reform should therefore focus on providing clarity, predictability, and transparency with respect to the type and location of activities that receive CRA credit.

Banks, as well as community groups, developers, and other stakeholders with which they work, need reasonable certainty before engaging in an activity that it will receive CRA credit. Standards that are vague and/or subject to too much examiner discretion can disincentivize banks from engaging in an activity. Under the current CRA framework, the high degree of discretion exercised by examiners to deny CRA credit creates too much uncertainty. As the U.S. Department of the Treasury noted in its report earlier this year to the agencies, "[t]his lack of clarity often leads to the concentration of investments in safe, guaranteed eligible activities."[3] Put more simply, uncertainty inappropriately distorts the CRA activities that banks conduct.

Examples of standards in the current CRA regulations that are subject to interpretation include whether activities are "innovative"; lending practices are "flexible"; investments are "complex"; services are "responsive"; and a bank has "adequately addressed the needs of its assessment area(s)." These standards are subject to significant examiner discretion, which has resulted in inconsistent interpretations across banks or even at the same bank across different performance evaluations.

The agencies should prioritize establishing more objective standards for these and other key concepts in their regulations. Formal rulemaking that creates clear requirements would promote certainty and provide a structured and transparent framework for the implementation and interpretation of CRA standards.

The annex to this letter includes recommendations to clarify the geographies and types of activities that will receive CRA credit. *(See Annex Part B, Recommendations Regarding Geography of CRA-Eligible Activity, and Part C, Recommendations Regarding Types of CRA-Eligible Activity.)*

V. CRA ratings should reflect a bank's overall performance on a holistic basis. Ratings should not be unduly affected by a bank's underperformance in a limited number of geographies.

When the CRA became law in 1977, most banks were predominantly local businesses that collected deposits through a concentrated branch network and were prohibited from operating on an interstate basis. Today, many banks, including BPI members, operate nationwide or regionally. A bank with an extensive retail branch network is likely to be evaluated on the basis of a substantial number of geographies. Temporary underperformance in a small geography may unduly impact the bank's overall rating, even where the bank has performed well in the vast majority of its geographies. Conversely, performing exceedingly well in a geography does not boost a bank's overall rating.

The annex to this letter includes recommendations to refocus CRA evaluations on overall performance. *(See Annex Part B, Recommendations Regarding Geography of CRA-Eligible Activity.)*

VI. The agencies should remove barriers and disincentives to operate retail branch networks.

The current CRA framework creates several impediments and disincentives to operating branches. First, the agencies' practice of putting undue weight on a bank's performance in a small number of geographies, discussed

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[3] U.S. Department of the Treasury, Memorandum for the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, Community Reinvestment Act - Findings and Recommendations, at p. 7 (April 3, 2018) (hereinafter, the **"Treasury Report"**).

above, may disincentivize banks from maintaining large branch networks and from operating branches in underserved areas where CRA opportunities may be uneven. Second, a bank with a less than Satisfactory rating can have difficulty receiving regulatory approval to branch into low- and moderate-income neighborhoods, thereby defeating the purpose of the CRA and making it challenging for the bank to improve its rating. Third, the service test's undue focus on branch closures can penalize a bank with a legacy branch network that seeks to modernize the way it delivers services in light of changing customer preferences and technological developments, and can thereby disincentivize banks from opening branches in the first place.

CRA evaluations should reflect a bank's holistic performance rather than give undue weight to any underperformance in particular geographies. The agencies should also provide a bank more flexibility to open and close branches without its CRA rating precluding a branch opening in a low- or moderate-income neighborhood, or being overly affected by a branch closing. The agencies should adopt streamlined application procedures for a bank with a less than Satisfactory rating that submits an application to open a branch in a low- or moderate-income neighborhood.

The annex to this letter discusses specific recommendations to advance this principle. *(See Annex Part B, Recommendations Regarding Geography of CRA-Eligible Activity.)*

VII. Each of the federal banking agencies should codify through notice-and-comment rulemaking the OCC's recent PPM 5000-43, as amended by OCC Bulletin 2018-23, and clarify that a CRA rating will not be affected by matters unrelated to community reinvestment – for example, violations of consumer protection laws.

In recent years, the agencies have based their CRA evaluations in part on criteria not specified in the statute, including consumer compliance or other violations outside the scope of the CRA. This departure from the letter of the law undermines the larger objectives of the CRA itself. A bank that is satisfactorily meeting the credit needs of its community but nonetheless assigned a Needs to Improve rating by virtue of an unrelated compliance issue has little regulatory incentive to engage in additional lending or CRA-qualifying activity to raise its rating to Satisfactory or Outstanding. That result is wholly inconsistent with the CRA's underlying purpose.

As the Treasury Report stated, "CRA is not a consumer protection law."[4] Laws unrelated to community reinvestment are important but have their own enforcement regimes such as section 8 of the Federal Deposit Insurance Act. When a bank violates a consumer protection law, there is no shortage of enforcement agencies and legal regimes available to seek redress and punishment. Adding the CRA to that long list thus has little marginal benefit, and risks diluting and undermining the CRA's core purpose of promoting community reinvestment.

VIII. A CRA rating should not be affected by a pending investigation, or by allegations that a bank is contesting.

Allowing a pending investigation or contested allegations to negatively affect a bank's CRA rating would amount to punishment without due process, as a less than Satisfactory rating contains automatic restrictions on the bank's expansion and activities. Any actual violation of law that is proven in court or agreed to by consent would be punished outside the CRA process and between examinations and can be considered as part of the bank's next examination.

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[4] Treasury Report at p. 19.

IX. The agencies should streamline the evaluation process issue in order to issue CRA performance evaluations on a timely basis.

Increasingly, CRA performance evaluations can take years to complete, particularly for the largest banks. As a consequence, evaluations are often outdated from the moment they are released, creating a number of significant problems for a bank and the communities it serves:

- First, by reviewing a stale performance evaluation, the public may misunderstand a bank's actual recent community reinvestment performance.

- Second, a bank with a stale evaluation can lose the ability to remediate weaknesses identified in that evaluation. By the time the agency issues a stale evaluation, the period to be evaluated in the next CRA examination might be over, or nearly over, which leaves the bank unable to address identified weaknesses in time for the next evaluation.

- Third, when a bank receives a less than Satisfactory rating in its most recent evaluation and its examiners fail to issue the subsequent evaluation on a timely basis, the bank is penalized in the applications process for far longer than is reasonable. The agency's failure to complete an examination in a timely manner is held against the bank, which may have worked hard to improve its performance since receiving its previous evaluation, but officially has a record of less than Satisfactory performance.

To address these issues, the agencies should require examiners to issue a final performance evaluation within an expedient and defined period not to exceed 12 months from the start of a CRA examination. In addition, examiners should informally review a bank's performance during the examination cycle and informally provide feedback to the bank. The agencies should also adopt a safe harbor in the context of applications such that a bank is deemed to have at least a Satisfactory rating if its last performance evaluation was issued more than four years ago.

X. A bank assigned a rating of Needs to Improve should be provided a detailed description of the reasons for the rating so that the bank is able to identify steps necessary to return to a Satisfactory rating.

The CRA regulations should also provide for an expedited process for a bank to improve its performance to Satisfactory. They could do so by allowing a bank with a Needs to Improve rating to provide an improvement plan containing specific, measurable actions to improve its performance, which would be subject to agency review within 6 months of the plan's stated completion date. Once the agency accepts the bank's improvement plan, the bank should be deemed to have a Satisfactory rating so long as it is in material compliance with the plan.

The annex to this letter includes additional recommendations to further this goal. *(See Annex Part D, Recommendations Regarding CRA Administration.)*

XI. The agencies should grant banks procedural rights to contest a proposed CRA rating downgrade in addition to the current Ombudsman appeal process.

The agencies' processes for appealing a CRA rating are administered in an inconsistent manner over time and as among the agencies. CRA regulations should provide that, prior to a proposed downgrade becoming official, a bank will have the opportunity to correct any factual misstatements, respond to any proposed adverse findings, and have its objections considered by the agency head or board. The agency should stay its release of a downgraded rating "as of right" when the bank explores these appeal processes in good faith.

XII. Consistent with the recent Interagency Statement Clarifying the Role of Supervisory Guidance, any requirements imposed through a new CRA regime should be published for public comment under the Administrative Procedure Act.

Perhaps due to the complexity of current CRA rules, the agencies have issued volumes of guidance – including examiner handbooks – that materially affect the administration of the CRA and can influence a bank's ultimate rating. This practice has deprived the public of an explanation of the agencies' important policy judgments and an opportunity to weigh in on them. A public comment process is not only a legal requirement under section 533 of the Administrative Procedure Act, but also makes for better and more transparent rulemaking. As the U.S. Court of Appeals for the D.C. Circuit has stated:

> The general policy of section 553 [of the Administrative Procedure Act] is to provide for public notice and comment procedures before the issuance of a rule. This public participation assures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions. Public rulemaking procedures increase the likelihood of administrative responsiveness to the needs and concerns of those affected. And the procedure for public participation tends to promote acquiescence in the result even when objections remain as to substance.[5]

The agencies should only issue CRA-related guidance through notice-and-comment procedures, and they should withdraw any existing guidance that they did not issue in this manner.

XIII. The agencies should establish an evaluation method for a bank the business of which is not clustered in geographical areas circumscribed by its branches.

Banks are increasingly adopting digital-based business models that do not rely on branches to generate deposits or service their customers. Indeed, as has been reported, a number of companies are pursuing new bank charters to engage in lending and deposit-taking businesses without branches, and these types of banks may proliferate in the coming years.

The agencies' CRA regulations, however, are not reasonably designed to address branchless or branch-light business models. A bank that offers more than a narrow product line, or that engages in some home mortgage, small business, or consumer lending, and therefore cannot qualify as a limited purpose or wholesale bank, is not eligible to be evaluated under the community development test. But a bank with thinly dispersed, nationwide business and no branches faces serious challenges in performing well on the lending, investment, and service tests. As a result, such a bank must adopt a strategic plan, which is burdensome and complex.

The CRA should include an evaluation method for these banks. While there have been legislative proposals to accomplish this goal,[6] the agencies can and should accommodate such banks through regulation. An evaluation method for a qualifying bank that originates a certain amount of deposits through non-branch channels should provide more flexibility as to the geographic areas in which such a bank can provide CRA-eligible loans, investments, and services.

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[5] *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978).

[6] *See, e.g.*, S. 3503, the American Housing and Economic Mobility Act, sponsored by U.S. Senator Elizabeth Warren.

BPI appreciates the opportunity to comment on the ANPR. If you have any questions, please contact the undersigned by phone at (202) 589-2409 or john.court@bpi.com.

Respectfully submitted,

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Annex
Specific Recommendations

A. Recommendations Regarding Metrics-Based Approaches

We support the OCC's goals of transparency, simplicity, and objectivity. We recognize the need to reduce the subjectivity and opacity of the current CRA framework. An appropriately tailored "metrics-based" approach that establishes high-level benchmarks for each of the CRA rating categories holds promise in establishing a more effective and consistent measure of CRA activities.

The agencies should nevertheless evaluate any metrics-based approach with caution, keeping in mind the following risks of such an approach:

- *Ignoring Performance Context.* The CRA needs to accommodate a wide variety of banks' business models, capabilities, and opportunities, and changing economic and social conditions. Forcing all banks to conform to a single standard could create a one-size-fits-all approach that ignores these key elements of performance context.

- *Establishing Uneven Playing Field.* A metrics-based approach could weight certain activities more favorably than others, thereby creating an unfair disadvantage for certain banks that have less capability to engage in the favored activity.

- *Arbitrarily Assigning Value.* Evaluating CRA services on a quantitative basis could involve making arbitrary value judgments. For instance, the agencies would presumably be required to decide to weigh the importance of community service hours versus a financial literacy program.

- *Creating Complexity.* A metrics-based approach could become unduly complex, which could make it challenging for banks to develop CRA engagement strategies with borrowers and other community stakeholders.

Given these risks, BPI is more supportive of a metrics-based approach that is an *option* for banks to select as the basis for evaluation, as an alternative to the existing performance evaluation framework, rather than a mandatory evaluation tool used across all banks. In assessing such a metrics-based approach, the agencies must balance the benefits (transparency, simplicity, and objectivity) with the risks discussed above. Additionally, metrics could be useful in clarifying aspects of the existing CRA assessment framework, such as defining what it means for a bank to "adequately address the credit needs of its assessment area(s)" and therefore receive credit for out-of-assessment area activities.

We support continued interagency discussion of the increased use of metrics for CRA purposes. If the agencies explore further a metrics-based approach, BPI recommends that they do so in accordance with the following principles:

- The agencies should tailor any assessment criteria by business model, and permit a wide variety of activities to count towards a bank's rating. In this regard, the increased use of metrics within the current categories of CRA assessment (*i.e.*, the large bank, intermediate small bank, small bank, limited purpose, and wholesale bank designations and strategic plan option) – as opposed to the establishment of a single metric applicable to all banks – may be a more effective mechanism to establish a tailored regulatory regime that addresses idiosyncratic factors relevant to similarly-sized banks with consistent business strategies. Such an approach would also weigh CRA-qualified activities in a manner that creates a level playing field regardless of business strategy.

- The calculation or ultimate rating that is assigned to a bank should reflect performance context. Given that key aspects of performance context are qualitative, and not easily quantifiable, a bank that does not achieve a particular rating (*e.g.*, a Satisfactory) based solely on its metrics should be allowed to submit qualitative evidence to its examiners to have its rating adjusted upwards. There is precedent for this approach in the strategic plan context, where interagency examination procedures provide that if any goals were not met, examiners are to consider whether the plan goals were "substantially met."[7]

- Any denominator of a metric used in determining a bank's performance evaluation should be based on a domestic metric. There is no indication that Congress intended for a bank's non-U.S. activities to inform its CRA obligations.

- The metrics-based approach should be subject to a pilot or trial run to determine whether outcomes reasonably reflect banks' records of CRA performance. Additionally, there should be a reasonable transition period before any mandatory metrics-based approach becomes effective, in order to give banks the opportunity to change the way they approach CRA. As an alternative to adopting a transition period, the agencies should grandfather outstanding loans and investments that currently count towards a bank's CRA performance into any new system where they would be disallowed or devalued.

- The key parameters of a metrics-based approach, including the inputs to the formula used to calculate the numerator, should be included in a regulation adopted through notice-and-comment rulemaking that is backed by cost-benefit analysis, as well as evidence and reasoning that comports with the Administrative Procedure Act's requirements. Changes should likewise be subject to notice-and-comment rulemaking and cost-benefit analysis. Notice-and-comment rulemaking would modulate ongoing adjustments to standardized metrics and prevent abrupt changes and unpredictability.

Finally, BPI believes strongly that any metrics-based approach should not be the sole focus of CRA reform. As described throughout this letter, the current CRA regulations require improvement in a number of areas, and the agencies have the opportunity to make many of these improvements regardless of whether and how they decide to adopt a metrics-based approach.

B. Recommendations Regarding Geography of CRA-Eligible Activity

Out-of-Assessment-Area Activity

Banks currently have limited incentives to conduct CRA activities outside of their assessment areas. The current standard for receiving credit for out-of-assessment-area activity – that a bank first "adequately address the credit needs of its assessment area(s)" – is subject to too much examiner discretion, makes it extremely difficult for a bank to know in advance whether it will receive credit for such activity, and in practice has become too high a bar to meet. As a result of these deficiencies, banks tend to under-invest in rural and other underserved areas where they do not have branches. This problem is particularly acute for banks that do not have branch networks, including internet-focused banks and limited purpose and wholesale banks. Such banks tend to have physical locations that are clustered in the same metropolitan areas, and finding CRA opportunities within those areas has become difficult and expensive.

The agencies should not make it obligatory for banks to engage in CRA activity outside their assessment areas. It would be unrealistic to expect banks to lend uniformly on a nationwide basis. The CRA was not intended to prescribe credit distribution in such a manner, and nothing in the statute compels this outcome. Nevertheless, the

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7 *See* OCC, FRB, FDIC Strategic Plan CRA Examination Procedures, at p. 3 (Feb. 2006). In considering whether the plan goals were "substantially met" examiners are directed to consider the "number of unmet goals, the degree to which the goals were not met, the importance of those goals to the plan as a whole, and the reasons why the goals were not met (e.g., economic factors beyond the institution's control)."

agencies could take several steps to alleviate the problems associated with concentrations of CRA activity in certain metropolitan areas, including the following:

- The agencies should make the standard – "adequately address the credit needs of its assessment area(s)" – more objective, transparent, and predictable. The agencies could do so, for instance, by providing specific, measurable guidance to a bank at the end of its CRA examination regarding the level of in-assessment area activity that would qualify the bank as having adequately addressed the credit needs of its assessment area(s) in its next examination. Such guidance could be expressed by reference to the amount of in-assessment area activity that the bank conducted in the examination period that is ending.

- The agencies should allow a bank to demonstrate through evidence of performance context that there are limited credit needs and/or significant competition in its assessment areas. A bank that has made such a showing should be allowed to count activities conducted on a broader geographic basis.

- The CRA regulations could allow for a bank to establish appropriate ratios and/or caps and types of activities both within and outside the traditional assessment areas based on its banking model and business strategies.

- Alternatively, the agencies could count all out-of-assessment area activity or, at a minimum, all out-of-assessment area community development activity, and simply put more weight on activity conducted inside assessment areas. Additionally, a bank should be given the option to choose where in its assessment areas to receive credit for out-of-assessment area activity.

Relatedly, examiners currently disallow credit for out-of-assessment area activity unless it is within the bank's "broader statewide or regional area" (**"BSRA"**). A bank should be eligible to receive credit for out-of-assessment area activity in any area, even outside a BSRA, if it adequately addresses the credit needs of its assessment areas. If the agencies do not adopt this suggestion, however, they should at least require examiners to define BSRAs prior to a bank's evaluation period so that the bank understands in advance where outside of its assessment areas it will receive CRA credit.

Treatment of Retail Branch Networks

To address the current CRA framework's narrow focus on a bank's performance in one or more geographies, the agencies should provide banks with several options:

- A bank's "overperformance" in one geography could offset any underperformance in another geography (but not a more general failure to meet CRA standards).

- The agencies could allow banks to set larger assessment areas that cover more expansive geographies, and thus have fewer assessment areas. For the banks with the largest retail branch networks, assessment areas could consist of entire regions of the country. We note that the CRA does not require a bank's overall rating to be based on the bank's performance in particular geographic areas. Instead, it only requires that the public section of a written evaluation include a discussion of the bank's performance in each metropolitan area in which the bank operates a branch, and in the case of a bank with interstate branches, in each state in which it operates a branch. Under the statute, the agencies are free to base overall ratings on other geographic segments.

- The agencies could give banks a menu of approaches for designating assessment areas and require them to select one for some period of time, including an approach that reflects the agencies' current methodology for designating a bank's assessment area, an approach that is based on the location of a certain critical mass of the bank's customers, and an approach based on the location of both the bank's branches and non-deposit taking offices such as loan production offices.

- Based on the geographic concentration of its deposits, a bank could designate "core" assessment areas that are weighted higher than others in its overall score.

- A bank that originates loans using branches could elect for branch-based CRA activity to receive greater weighting than non-branch-based CRA activity.

In any event, the agencies should instruct their examiners to evaluate performance holistically, rather than allow one weaker aspect of a bank's performance to dictate its overall rating.

To reduce disincentives for a bank to offer services in new areas, the agencies should provide more flexibility in the designation of assessment areas. Under the current CRA framework, a bank that seeks to branch into a new geography must consider whether the branching will necessitate an expansion of the bank's assessment areas, and how quickly the bank will be able to lend and invest in the geography at satisfactory levels. The agencies should provide a bank with a reasonable transition period, such as two years, before evaluating its performance in a new community into which it has branched de novo.

Similarly, the requirement that assessment areas include locations of a bank's deposit-taking ATMs can disincentivize a bank from installing such ATMs in areas in which the bank does not have substantial lending. Customers use ATMs to make withdrawals more than to make deposits, particularly in light of the widespread adoption of mobile deposit capture technology. Given this reality, any concern that a bank would use ATMs to collect deposits in a geography without lending there would be unfounded. Moreover, the CRA only requires evaluation of the community in which a bank is "chartered" to do business. Because an ATM is not a "branch" that requires regulatory approval to open or close, an ATM has no bearing on where the bank is "chartered" to do business. A bank should therefore have the option to exclude ATMs when setting its assessment areas.

The agencies should also provide a bank more flexibility to close branches without its CRA rating being unduly affected by a branch closing. The service test's undue focus on branch closures can penalize banks with legacy branch networks that seek to modernize the way they deliver services and adjust to evolving consumer preferences and technological changes, and can disincentivize banks from opening branches in the first place.

Branching into Low- and Moderate-Income Neighborhoods

The agencies should adopt streamlined application procedures for a bank with a less than Satisfactory rating that submits an application to open a branch in a low- or moderate-income neighborhood. The agencies should presumptively approve all such expansions.

C. Recommendations Regarding Types of CRA-Eligible Activity

Providing Clarity in Advance Regarding Eligibility of CRA Activity

A bank should be able to know at the time it makes a loan or an investment whether the activity qualifies for CRA credit. The agencies could provide this advance clarity in the following ways:

- *Preclearance.* The agencies should allow banks to "preclear" activities by submitting requests for activity to receive CRA credit. A bank would submit such a request to its primary federal regulator. The request should be deemed approved for CRA credit if the reviewing agency does not object or extend the time period for the request within 60 days.

- *Eligible Activity Lists.* The agencies should maintain detailed and binding lists of eligible activities, so that an activity recognized for credit by one bank also is recognized for credit in future exams for all banks.

- *Clarifying Vague Standards.* The agencies should establish more transparent and objective standards in their regulations and guidance. For instance, the agencies should clarify the terms "innovative," "complex," and "flexible." Moreover, a project that is "innovative" or "complex" at its outset should be counted as such throughout the life of the project.

- *Transparent Weighting and Scoring.* Performance evaluations should use clear and transparent descriptions and parameters for weighting and scoring CRA activities.

Activities That Should Receive CRA Credit

Banks should receive credit under the CRA for engaging in the following types of activities in qualifying geographies such as their assessment areas, in addition to those activities that currently receive credit:

- Infrastructure lending and investment that directly or indirectly benefits low- or moderate-income households and communities, regardless of whether the "primary purpose" of the activity is to directly benefit such households and communities. Infrastructure generally benefits entire communities.

- Activity in distressed geographies, including:

    - Opportunity zones;

    - Federally designated disaster areas;

    - Underserved areas, as designated by the Federal Financial Institutions Examination Council ("FFIEC") or state governments, or as indicated by the area's income level set forth in census data;

    - Persistent poverty counties, as defined under federal law;[8] and

    - Tribal lands.[9]

- Community assets (*e.g.*, community solar projects) and renewables lending and investment, regardless of whether the "primary purpose" of the activity is to directly benefit low- and moderate-households and communities.

- Lending and investing to finance construction and operation of naturally occurring affordable housing, *i.e.*, housing with rent that is affordable for the geography but is not publicly subsidized.

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8 Public Law No. 115-31 (enacted May 5, 2017) defines a "persistent poverty county" as any county that has had 20 percent or more of its population living in poverty over the past 30 years, as measured by the 1980, 1990, and 2000 decennial censuses, and most recent American Community Survey 5-year average.

9 If, during the life of a loan or investment, the geography of the loan or investment ceases to be designated as distressed using the parameters described above, the loan or investment should continue to receive CRA credit for the remainder of the life of the project as though the geography continued to be designated.

- Full credit for lending and investing to finance construction and operation of mixed-income housing, if at least 20 percent of the units in the property are affordable units to be occupied by low- or moderate-income households, established in conjunction with a government policy or program.

- Healthcare financing, such as lending to or investing in medical facilities that serve low- or moderate-income individuals.

- Providing a lease or a letter of credit that would otherwise qualify for CRA credit if structured as a loan (*e.g.*, a lease with a community development purpose), to the same extent as if it were a loan.

- Supporting financial education or literacy programs, including digital literacy.

- Lending to small business borrowers with gross annual revenues of up to $5 million (without changing the $1 million loan amount threshold for reporting). The agencies should also create alternative eligibility requirements for small business loans for banks that do not collect revenue figures from their borrowers.

Additionally, activities conducted in partnership with a local government or community group should count as "innovative" and "complex." Below-market rate loans and loan extensions that a bank would not otherwise grant should count as types of "flexible lending practices."

Some of the activities and practices described above receive credit under the current CRA framework at an examiner's discretion; others do not currently receive credit under any circumstance. While not all banks are capable of engaging in the activities described above, each of these activities benefits consumers and communities.

Consumer Lending

The current CRA regulations allow a bank subject to the lending test to elect to have its examiners evaluate its consumer lending in one of four categories: motor vehicle, credit card, other secured, and other unsecured loans. However, if a bank elects to have one product within a consumer loan category evaluated, all of its loans within the same category must be evaluated. If this constraint did not exist, and a bank could have a particular product evaluated on its own merits, banks would be more likely to design innovative products specifically for low- and moderate-income consumers. Therefore, the CRA regulations should allow for a bank to count a consumer lending product designed specifically for low- or moderate-income borrowers without all of its consumer loans in the same category being evaluated.

In addition, the current CRA regulations require evaluation of the consumer lending of a bank subject to the lending test in one or more of the four categories when consumer lending constitutes a "substantial majority" of a bank's "business." Evaluation of a bank's consumer lending should always be optional, at the bank's election. If, however, the agencies keep the requirement to evaluate certain banks' consumer lending in their regulations, they should clarify it.[10]

Loan-Backed Securities and Purchased Loans

The agencies should not change the treatment of loan-backed securities or purchased loans. Investing in loan-backed securities provides capital for a loan originator to make more loans. Purchasing a loan likewise frees up the originator's balance sheet for further lending. Both mechanisms are important tools for banks that do not have

10 Examiners have sometimes interpreted "substantial majority" to mean more than 50 percent, which reads the term "substantial" out of the regulation. Examiners have sometimes also interpreted "business" to mean loans, which ignores that some banks have non-lending businesses. The CRA regulations should clarify that consideration of a bank's consumer lending is only required when more than 75 percent of a bank's total assets are consumer loans.

on-the-ground capabilities to originate loans in particular markets, but wish to lend or invest there. Therefore, the agencies should continue to count loan-backed securities as eligible community development investments, and count loan purchases on par with loan originations.

D. Recommendations Regarding CRA Administration

Improving the Process for Downgrading a Bank's Rating

The federal banking agencies should revise their procedures for downgrading a bank's rating based on consumer compliance violations, in two respects:

- *Adoption of OCC PPM 5000-43 in CRA Regulations.* Each of the agencies should codify the policies set forth in OCC PPM 5000-43 so that the determination of how evidence of discriminatory or other illegal credit practices should affect a bank's CRA rating(s) is guided by the following two principles: (1) there must be a logical nexus between the assigned rating(s) and evidence of discriminatory or other illegal credit practices in the bank's CRA lending activities to ensure alignment between the rating(s) and the bank's actual CRA performance; and (2) full consideration is to be given to the remedial actions taken by the bank. While we appreciate the OCC's adoption of these principles through guidance, guidance can be changed without public notice or comment, and these principles are too important to the integrity of CRA ratings to allow for changes with such ease. The OCC should codify the policy in its CRA regulations, and the Federal Reserve and FDIC should do so as well.

- *Procedural Rights for Downgraded Banks.* The agencies should grant banks procedural rights to contest a potential CRA rating downgrade in addition to the current Ombudsman appeal process. Under such a review process, before receiving a downgrade, a bank would be given notice and an explanation of the reasons for the potential downgrade. The bank should have an opportunity to correct any factual misstatements and respond to any proposed adverse findings and the opportunity to have its objections considered by the agency head or board. During the pendency of such a review, the agency should grant the bank a stay of the release of the pending performance evaluation "as of right." A ratings downgrade should become final only after such a review is completed and the agency head or board has determined that a downgrade is warranted based on the above principles.

Improving Timely Issuance of CRA Performance Evaluations

The agencies should take the following steps to improve the timely issuance of performance evaluations:

- *Deadline for Final Evaluations.* The agencies should require examiners to issue a final performance evaluation within a reasonable and defined period not to exceed 12 months from the start of a CRA examination. Examinations should occur at regular intervals and cover standardized evaluation periods.

- *Pending Enforcement Actions.* The agencies should not delay finalizing a bank's CRA examination report to wait for the completion of another pending examination or investigation by the agency or another enforcement authority, such as the Bureau of Consumer Financial Protection or Department of Justice. Rather, the agencies should consider an enforcement action in the performance evaluation of the examination period in which the action is finalized, and a bank's CRA rating should not be downgraded retroactively.

- *Application Safe Harbor.* The agencies should adopt a safe harbor in the applications process such that an applicant bank is presumed to have at least a Satisfactory rating if its last performance evaluation was issued more than four years ago.[11]

Facilitating Improved Performance

A bank with a less than Satisfactory rating should have a clearer path to earning its way back to a Satisfactory or better rating. CRA regulations should be designed to encourage and facilitate a bank improving its performance, including in the following respects:

- *Improvement Plans.* When a bank receives a less than Satisfactory rating, it should have the ability to submit an improvement plan. Once the plan is accepted by the agency, the bank should be deemed to have a Satisfactory rating so long as it is not determined to have materially breached the plan.

- *Scheduling Subsequent Examination.* A bank with a less than Satisfactory rating should have the ability to schedule its next examination for immediately after the bank has had sufficient opportunity to remediate the areas of concern.

- *Branching into LMI Neighborhoods.* A bank with a less than Satisfactory rating should be able to branch into a low- or moderate-income neighborhood using streamlined procedures.

Offering Incentives for Outstanding Performance

The agencies should offer incentives to achieve an Outstanding rating, which do not exist in the current CRA framework. The agencies should determine that, if a bank submits a licensing application that requires consideration of the bank's record of meeting the convenience and needs of its communities and the bank has received an Outstanding rating on its most recent examination, which has been published within the last 12 months, then the bank will be deemed to have a satisfactory record of meeting the convenience and needs of its community, consistent with the statutory criterion for approval.

Other Recommendations

BPI members have reported that their examiners have recently begun to compare their lending performance to peer groups that include lenders that are not subject to the CRA. Such comparisons are inappropriate and have limited value. Non-bank entities are subject to entirely different legal regimes that create opportunities not available to banks. For instance, a non-bank entity is not subject to any requirement that it lend in a safe and sound manner, and has no obligation to lend in its community. The agencies should revise their regulations to allow comparisons only to institutions that are subject to the CRA, and should communicate a similar message to their examiners in the interim.

The agencies should explore ways to streamline CRA examinations, which have become sprawling, time- and resource-intensive events for the largest banks and their examiners.

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11 The OCC's website states that "[i]n general, the OCC conducts a CRA examination of a national bank every three years," but banks with aggregate assets of $250 million or less are eligible for a four- or five-year examination cycle. *See* OCC Community Reinvestment Act (CRA) Questions and Answers, https://www.occ.treas.gov/topics/compliance-bsa/cra/questions-and-answers.html. Banks that are subject to a four-year examination cycle could be made eligible for the safe harbor after five years, and those that are subject to a five-year examination cycle could be made eligible for the safe harbor after six years.

The agencies should only adopt CRA guidance, including examiner handbooks that have a material bearing on interpretive questions and ultimate ratings, through notice-and-comment rulemaking procedures, and should rescind guidance not already adopted through such procedures.

The FFIEC should be empowered to resolve proactively any inconsistencies between agency practices in administering the CRA, and should create a process for banks to notify the FFIEC of such inconsistencies.

E. Recommendations Regarding Existing CRA Tests

Weighting of Lending, Investment, and Service Tests

The current CRA regulations assign a fixed and standard weighting to the lending, investment, and service tests. This one-size-fits-all approach fails to accommodate the diversity of business models and capabilities in the banking system. Any bank should have the option to propose that different weightings be assigned to each of the lending, investment, and service tests to more accurately reflect its particular business model, products, and services.

Service Test

The agencies should address the service test's narrow focus on branches, including branch closures, by broadening their assessment of service delivery in the following respects:

- The agencies should evaluate how a bank's branch network is distributed across geographies with different income levels, even if the branch network is not as extensive as other banks' networks or the bank has closed branches as part of its business strategy.

- The agencies should also take into account *how* a bank is delivering services when evaluating the effectiveness of the bank in providing services to its communities. Given consumers' increasing preference to access banking products and services through digital channels, alternative delivery systems should be assigned equal weight as branches if the former are effective in providing needed services to low- and moderate-income individuals and communities.

Limited Purpose and Wholesale Designations

The limited purpose and wholesale designations should remain available designations and in effect. In fact, the agencies should make the criteria for obtaining and maintaining a limited purpose or wholesale designation more flexible. For instance, a limited purpose bank should have the ability to offer more than one narrow product line, or multiple product lines within a narrow segment (*e.g.*, small dollar consumer loans in multiple forms). A limited purpose bank should continue to meet the narrow product line requirement if it provides other types of loans on an infrequent or immaterial basis.

The agencies should also adopt more procedural protections within their regulations for a bank that is in danger of losing its limited purpose or wholesale designation. An agency should only be able to revoke the designation after providing the bank notice and an opportunity to be heard before the agency head or board.

Strategic Plans

Strategic plans will become increasingly important as banks that focus on digital delivery, but do not qualify for a limited purpose or wholesale designation, increase in size and number. The agencies should make the strategic plan option more attractive. The agencies should find ways to improve the public comment process, including by requiring public comment less frequently. To ease the adoption of strategic plans and make them more attractive, the first time that a bank is graded on a strategic plan, it could be provided the option to be graded on the performance test that would otherwise apply, even if it would receive a Satisfactory rating according to its plan.[12]

12 The current CRA regulations permit a strategic plan bank to be evaluated under the lending, investment, and service tests, but only if it would receive a less than Satisfactory rating under its plan.