February 16, 2021

Via Electronic Mail

Ann E. Misback, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Re: Community Reinvestment Act (Docket No. R–1723; RIN 7100–AF94)

To Whom It May Concern:

The Bank Policy Institute[1] appreciates the opportunity to comment on the advance notice of proposed rulemaking (the "ANPR") issued by the Board of Governors of the Federal Reserve System soliciting feedback on approaches for building a new framework for the agency's Community Reinvestment Act ("CRA") regulations.[2]

BPI and its members support the longstanding goals of the CRA. This letter provides our views on how the Board should pursue CRA reform efforts that ensure the Act continues to be an effective force for strengthening our members' entire communities, including low- and moderate-income ("LMI") individuals and neighborhoods, small businesses, and communities in need of financial services to sustain economic development. Section I of this letter describes the principles that should guide CRA reform initiatives. First among these principles is the need for coordinated, interagency rules that apply evenly to banks regardless of their primary federal regulator. Section II of this letter addresses key elements of the ANPR and provides specific recommendations for the Board to consider as it moves forward in the rulemaking process toward a formal proposal.

I. Principles to Guide CRA Reform

The following principles should guide the Board's efforts to reform its CRA regulations:

- Cooperation on an interagency basis to achieve reform: In view of the Office of the Comptroller of the Currency's promulgation of revisions to its CRA regulations in May 2020 without the participation of the Board or the Federal Deposit Insurance Corporation, we are concerned that the application of different CRA standards to banks

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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 Community Reinvestment Act, 85 Fed. Reg. 66,410 (Oct. 19, 2020).

regulated by different federal banking agencies would harm the overall ability of the banking industry and the communities it serves to work together to identify and act upon meaningful community reinvestment opportunities, lead to competitive imbalance, and impede public understanding of CRA ratings.[3] These results are unnecessary, given that the federal banking agencies broadly share the same views of the purposes of the CRA and goals for CRA reform. Indeed, a close comparison of the Board's ANPR and the OCC's final rule reveals striking similarities in the agencies' approaches, such as their intended methodologies for evaluating retail loan distribution. We therefore urge the Board to invite the agencies to re-start an interagency dialogue to achieve consensus on a common set of CRA rules that apply to all banks. Our recommendations throughout this letter identify elements of the Board's ANPR and OCC final rule that should form the basis of harmonized CRA rules.

- <u>Leveraging existing data to evaluate banks' performance</u>: We commend the Board's goal of using existing data sources, such as the FDIC's Summary of Deposits ("SOD") data, to serve as inputs for evaluating banks' performance. The use of these data sources would provide the Board with clear insight into banks' performance without imposing the substantial costs and burdens of establishing new systems to comply with requirements to collect, validate, and report new data that are not significantly more probative than existing data.

- <u>Calibrating tests to recognize the unique aspects of each bank's business model and to have ratings reflect holistic performance</u>: The ANPR's hybrid approach of using quantitative and qualitative inputs in performance tests indicates the Board's recognition of the diversity and nuances of banks' business models and CRA activities. CRA reform initiatives should take this dynamic into account in a number of ways. For instance, to tailor a bank's rating to its business model and geographic focus, CRA performance standards should blend and weight performance across products, geographies, and subtests, and avoid an approach that turns the CRA into a long list of rigid pass-fail tests. This approach would also preserve an appropriate emphasis on holistic performance, e.g., by avoiding outcomes where a bank with outstanding performance overall receives a less than Satisfactory rating due to performance in product lines or geographies that are immaterial to its business. Additionally, we support the Board's proposal to maintain its current regulations' evaluation framework for limited purpose and wholesale banks, which recognizes that these banks' distinctive business models require a tailored approach to evaluating their performance. We also support the Board's apparent retention of the approach taken in its current regulations regarding consideration of affiliate activities. This approach appropriately recognizes that some banking organizations conduct meaningful community development ("CD") activities through non-bank entities due to safety and soundness, capital, tax, corporate governance, or other reasons.

- <u>Accommodating both robust retail branch networks and branchless business models</u>: The Board should adopt performance tests that work both for banks that have retail branch networks and for those that do not, without unduly disadvantaging either type

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[3] Fragmentation in the agencies' CRA rules would be particularly burdensome for banking organizations that have multiple bank subsidiaries, each regulated by a different primary federal regulator.

of business model. Additionally, performance context should take into account the opportunities and constraints resulting from a bank's business model.

- Avoiding CRA hotspots and focusing on underserved areas: Any changes to the regulatory requirements for delineating assessment areas should avoid creating or exacerbating over-concentration of CRA activities in specific geographies. The CRA has the greatest impact on a broader range of LMI communities when it focuses banks' activities on underserved communities (including indigenous peoples' lands), instead of forcing or incentivizing banks to cluster their activities tightly into a small number of geographies that are already well served in order to obtain CRA credit. Therefore, any novel approaches to delineating assessment areas should be calibrated so that they do not lead to CRA hotspots, but instead create appropriate incentives for banks to conduct activities in geographies that historically have not been major CRA activity centers.

- Continued use of performance context: While we generally support the use of objective metrics as a starting point for CRA evaluations, certain quantitative measures, on their own, may fail to capture banks' opportunities and capabilities as well as the impact of particular activities. We therefore appreciate the ANPR's proposed approach of maintaining a role for performance context throughout the CRA framework.

Given the importance of interagency reform, these principles, and the specific recommendations described below, should apply not only to the Board's future rulemaking efforts, but also those of the other federal banking agencies in coordination with the Board.

II. Specific Recommendations for CRA Reform

A. Summary of Key Recommendations

For the reasons discussed in detail in the remainder of this Section II, any proposal or final rule revising the Board's CRA regulations should include the following key features and changes to the framework contemplated in the ANPR:

Data Collection (Section II.B below)

- Leverage existing data to evaluate performance, such as by relying on the FDIC's SOD data to provide a basis for the denominator of the CD Financing Subtest and for the weighting of assessment areas and state and multistate metropolitan statistical area ("MSA") ratings.

- Permit banks to provide their CRA examiners with modified SOD data that exclude corporate and foreign deposits for use in CRA evaluations.

Assessment Areas (Section II.C below)

- Provide for large banks to delineate facility-based assessment areas at a county level (at minimum).

- Make it optional for a bank to delineate assessment areas based on the locations of its deposit-taking ATMs.

- Forego any requirement that a bank delineate lending-based assessment areas, including assessment areas based on the locations of loan production offices.

Retail Lending Subtest (Section II.D below)

- Apply the Retail Lending Subtest only to those retail product lines that comprise 15 percent of a bank's retail lending as measured at the aggregate institution level, rather than at the assessment area level.

- Limit the application of the Retail Lending Subtest to no more than two retail product lines.

- Exempt geographies in which a bank has negligible lending volumes from evaluation under the Retail Lending Subtest, rather than subjecting the bank's retail lending in these areas to the subjective discretion of examiners.

- Evaluate under the Retail Lending Subtest all categories of loans that a bank originates *and* loans that a bank purchases from third parties, including loans purchased from intermediaries as well as from the originating entity. Alternatively, the regulations should at least provide a series of objective presumptions that would enable a bank to demonstrate that loans it has purchased should be evaluated under the Retail Lending Subtest.

- Subject a consumer lending product line to the Retail Lending Subtest only at a bank's option. If consumer loans are not excluded outright, the regulations should, at the very least, continue to provide that only those product lines that constitute a "substantial majority" of a bank's business would be subject to the Retail Lending Subtest, and clarify that the "substantial majority" standard only captures a product line the dollar value of which exceeds 75 percent of a bank's total assets.

- Exclude credit card and credit card-like products from consideration under the Retail Lending Subtest.

- Evaluate a bank's performance under the Retail Lending Subtest on a blended, weighted basis across its combined retail product lines.

- Clarify that, upon a showing of discriminatory or illegal credit practices, examiners may not doubly penalize a bank by downgrading a presumption of satisfactory performance at both an assessment area level and at the institution level.

- Detail the circumstances in which consumer compliance violations may serve as a basis for downgrading a bank's presumptive rating, including by requiring a logical nexus between the assigned rating and any discriminatory or other illegal credit practice, taking into full consideration remedial actions performed by the bank, and assessing the proportionality of violations.

- Combine low-income and moderate-income categories in the context of determining whether a bank is eligible for a threshold presumption of satisfactory performance under the Retail Lending Subtest.

- Add specific, non-mandatory methods by which banks may achieve an Outstanding performance rating on the Retail Lending Subtest, such as by: demonstrating strong performance on lending to the combined LMI category; exhibiting strong performance on lending to the low-income category in particular; taking other affirmative steps to reach LMI populations; or engaging in a significant dollar volume of retail lending to LMI borrowers, in LMI neighborhoods, or to small businesses.

- Align the definition of a "small business loan" to the greatest extent possible with other regulatory definitions of the term, including the Call Report definition, while seeking ultimately to engage in interagency dialogue towards adopting a harmonized approach to measuring small business lending across regulators and regulatory contexts.

- Ensure that any changes to CRA regulations do not lead to the dramatic downward shift in the proportion of banks that receive Satisfactory or Outstanding ratings that is contemplated in the ANPR.

<u>Retail Services Subtest</u> (Section II.E below)

- Evaluate branch distribution only by providing a reward for satisfactory branch distribution, rather than by subjecting banks to a potential downgrade based on distribution.

- Treat branches located outside of LMI geographies but that serve LMI populations identically to branches located in LMI geographies for the purposes of branch distribution analysis.

- Clarify that the examples of branch-related services, non-delivery services, and deposit products listed in the ANPR are only illustrative examples of services and products that would rate favorably under the Retail Services Subtest, rather than minimum requirements necessary for banks to establish satisfactory performance under the subtest.

- Evaluate deposit products as performance context within the Retail Services Subtest, but not as a mandatory element or minimum requirement under the subtest.

- Make optional the development of a "strategic statement" outlining a bank's business strategies for offering deposit products responsive to the needs of LMI and other underserved communities. At the very least, the regulations should apply any mandatory strategic statement to banks of all sizes, rather than only to the "very largest banks," and provide that such a statement would be non-binding and non-public.

<u>CD Financing Subtest</u> (Section II.F below)

- Combine together CD loans and qualified investments under a unified CD Financing Subtest.

- Set the binding benchmarks within the CD Financing Subtest at the lower of local and national benchmarks.

- Calibrate CD Financing Subtest benchmarks based on data that span multiyear averages.

- Evaluate a bank's volumes of CD financing using data averaged over the entire evaluation period rather than imposing annual minimums.

- Include in evaluation under the CD Financing Subtest both financing initiatives originated during the evaluation period and ongoing balances of CD loans and investments made in prior evaluation periods.

<u>CD Services Subtest</u> (Section II.G below)

- Consider as part of the CD Services Subtest volunteer activities in rural areas (even if unrelated to the provision of financial services), other efforts to address community needs in rural areas, and initiatives supporting financial literacy and home ownership without consideration of income level.

- Balance the use of metrics-based evaluation of CD services with holistic, qualitative evaluation, where appropriate.

- Clarify the Board's use of service hours per employee as a metric, including by stating whether all employees of a bank would be considered equally, describing whether service hours by a bank's affiliates' employees would count, and making clear that performance context will be an important part of the CD Services Subtest.

<u>Qualifying Activities List</u> (Section II.H below)

- Establish a qualifying activities list to clarify illustrative, non-exhaustive examples of activities eligible for CRA credit.

- Adopt a process through which banks and interested parties may seek advance confirmation that an activity will receive CRA credit.

- Provide CRA credit for "unsubsidized" or "naturally occurring" affordable housing investments, sponsorship of tax credit funds that support CD projects, and investments in qualifying mortgage-backed securities ("MBS"), including MBS backed by loans to LMI borrowers.

- Broaden the types of economic development and small business-related financing activities eligible for CRA credit, including by broadening the types of activities that are presumed to promote economic development.

- Preserve and codify – if not expand upon – language of existing interagency guidance describing the provision of CRA credit for activities that "promote economic development."

- Maintain the standards and approach outlined in interagency guidance dictating that "examiners . . . employ appropriate flexibility in reviewing any information provided by a financial institution that reasonably demonstrates that the purpose, mandate, or function of the activity meets the 'purpose test'" in assessing whether the activity promotes economic development, even if the Board adopts streamlined standards and procedures for some qualifying economic development activities.

- Preserve the use of the size eligibility standards of the Small Business Administration's Development Company ("SBDC") and Small Business Investment Company ("SBIC") programs.

- Enhance incentives for banks to engage in partnerships with minority depository institutions ("MDIs"), women-owned financial institutions, and community development financial institutions ("CDFIs") including by counting these activities at the institution-level rating stage.

- Clarify that investments in MDIs, women-owned financial institutions, and CDFIs are only one means by which banks can obtain an Outstanding rating, rather than a requirement for an Outstanding rating.

- Continue to count affiliate activities at a bank's option, maintaining the standard contained in the Board's current regulations.

- Align the rules of Regulation H governing public welfare investments with the Board's CRA regulations by providing Board-regulated banks clear legal authority to make investments that meet the CRA definition of "qualified investments" without advance approval from the Board.

<u>Overall Scoring</u> (Section II.I below)

- Blend a bank's Retail Test performance across assessment areas on a weighted basis, based on the bank's relative volumes of deposits across its assessment areas.

- Provide that persistently weaker performance in multiple assessment areas only would disqualify a bank from receiving an Outstanding rating, but not a Satisfactory rating.

- Clarify that a Satisfactory rating in an assessment area would never be considered "weaker performance."

- State that any downgrade of an assessment area-level rating from Needs-to-Improve to Substantial Noncompliance based on the bank's failure to exhibit appreciable improvement in the assessment area should only be made by examiners in full consideration of performance context.

- Provide flexibility for weighting the Retail Test and the Community Development Test at the institution-level scoring stage based on a bank's product lines, its capacity for retail lending and community involvement, and the size of its retail lending product lines compared to other business lines, rather than imposing a 60 percent-40 percent split on all banks.

- Establish additional incentives for banks to achieve an Outstanding CRA rating, including by deeming a bank that has achieved an Outstanding rating to have a satisfactory record of meeting the convenience and needs of its community for purposes of the processing of regulatory applications.

<u>Treatment of Wholesale and Limited Purpose Banks</u> (Section II.J below)

- Maintain existing designations for wholesale and limited purpose banks.

- Evaluate wholesale and limited purpose banks solely on their CD activities, generally comparing such a bank's aggregated CD loans and investments against its total domestic assets.

- Maintain current supervisory practice regarding exclusions from the denominator of the Community Development Test that applies to wholesale and limited purpose banks based on business model considerations, and provide a process by which such a bank could propose to exclude additional defined classes of assets from use in the denominator based on the characteristics of the bank's business model and in discussion with its examiners.

- Continue to permit wholesale and limited purpose banks that adequately address the needs of their assessment areas to earn CRA credit for activities conducted elsewhere across the country, and clarify what wholesale and limited purpose banks must do to adequately address the needs of their assessment areas.

<u>Treatment of Banks that Provide Services Outside a Branch Network</u> (Section II.K below)

- In recognition of the variety of business models that exist today and will continue to evolve, apply a flexible CRA framework that adequately captures banks' CRA qualifying activities, avoids exacerbating CRA hotspots, encourages activities in underserved areas, and fosters predictability and stability in evaluations.

<u>Strategic Plans</u> (Section II.L below)

- Provide banks operating under strategic plans with the option to delineate new assessment areas that are important to their business, even if those geographies would not otherwise be eligible for delineation.

- Permit banks operating under strategic plans that adequately address the needs of their assessment areas to earn CRA credit for activities outside their assessment areas.

- Provide for streamlined review of amendments to and renewals of strategic plans, as compared to review of entirely new plans.

- Develop pre-approved strategic plan templates that banks can use at their option to develop measurable goals and objectives.

- Codify guidance stating that banks operating under strategic plans are not required to enter into community benefit agreements.

- Provide the option for a bank soliciting public comment on a proposed strategic plan to publish notice of the plan on its website, rather than in a newspaper or through the Board's website.

- Provide that a bank undergoing the public comment process need not make any changes to its proposed strategic plan to address a non-substantive comment that lacks factual or analytical support.

- Subject strategic plan banks to data collection and data reporting requirements only to the extent the data required to be collected have direct relevance to those banks' compliance with their plans.

The remainder of this Section II describes these recommendations in greater detail.

B. Data Collection

BPI strongly supports the use of existing data sources as inputs to CRA evaluations. In particular, the FDIC's SOD data would serve as an appropriate basis for a number of key aspects of the CRA regulations, including the denominator of the CD Financing Subtest and the weighting of assessment areas and state and multistate MSA ratings. These data are well-established, reliable, and predictable for banks. Perhaps most importantly, the use of SOD data avoids imposing the substantial burdens that would be associated with establishing a new source of deposits data that has a geographic component.

At the same time, banks should be permitted to provide their CRA examiners with a modified set of SOD data that excludes corporate and foreign deposits for use in CRA evaluations. Banks often allocate corporate deposits to their main offices and/or branches where the depositors are located. Because banks and their corporate clients are often headquartered in major urban centers, including these deposits in CRA evaluations would exacerbate CRA hotspots and inflate and geographically distort banks' CRA obligations. The fact that the average dollar volume of corporate deposits tends to be significantly greater than that of retail deposits compounds this issue. Making the exclusion of corporate and foreign deposits optional, however, would reduce burden on smaller banking organizations that lack the internal systems to segregate those deposits or that take relatively small amounts of these types of deposits.

C. Assessment Areas

1. Minimum Size of Facility-Based Assessment Areas for Large Banks

BPI supports the ANPR's proposed requirement for large banks to delineate their facility-based assessment areas at a county level (at minimum). This approach would allow these banks to use their resources towards lending in a broader geographic area, rather than focusing their activities into tightly packed geographies. A county-level minimum would also appropriately simplify the overall performance evaluation process, adding transparency and predictability, and would facilitate comparisons among large banks.

2. Facility-Based Assessment Areas Surrounding Deposit-Taking ATMs

We support the Board's proposal to make it optional for banks to delineate assessment areas based on the locations of their deposit-taking ATMs. This flexibility would, among other things, permit banks to deploy deposit-taking ATMs to serve customers when circumstances make a more fixed location impractical, such as doing so on a short-term basis to serve the needs of areas affected by natural disasters, or to provide pop-up depository services for events. Further, a contrary approach would impose long-term CRA obligations that would be challenging to satisfy for a bank without an office in the geography and would therefore provide a strong disincentive against the deployment of these temporary services. In addition, permitting banks to exclude deposit-taking ATMs when delineating facility-based assessment areas would align the Board's rules with the OCC's final rule, and thus would avoid a competitive imbalance that would result between Board-regulated and OCC-regulated banks if only the former were required to include geographies surrounding deposit-taking ATMs in their assessment areas.

3. Use of Lending-Based Assessment Areas

Mandatory delineation of lending-based assessment areas, including any requirement to delineate assessment areas in the geographies surrounding loan production offices, would be antithetical to the text, purposes, and longstanding practical application of the CRA[4] and should not be part of a formal proposal or final rule. The text of the CRA requires the federal banking agencies to prepare written evaluations of banks' CRA performance in geographies where banks have domestic branch offices, and does not refer to areas where banks provide loans.[5] The text is consistent with the underlying purposes of the CRA, which include ensuring that banks serve any community where they have branches that take deposits from that community.[6] Moreover, building meaningful CRA infrastructure takes time, dedication, and familiarity with the local community. If expanding retail lending into a new geography could give rise to an affirmative obligation to undergo the CRA evaluation process in a new, separate assessment area, banks would have a strong disincentive from marketing lending products in new geographies. As a result, underserved communities could suffer from a constriction in the availability of credit.

4. Use of Deposit-Based Assessment Areas

Any requirement for certain banks to designate assessment areas based on distribution of deposits not booked through branches would constitute a significant change to the CRA as it has been interpreted and implemented for over forty years. The Board should not undertake any rulemaking to impose fundamental changes in the way assessment areas are delineated in order to address the growth of remote deposits if those changes would be inconsistent with certain fundamental principles aligned with the CRA's underlying purposes. These principles include:

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4 While the Board's regulations provide that assessment areas should encompass geographies in which the bank has its main office, its branches, and its deposit-taking ATMs, "as well as the surrounding geographies in which the bank has originated or purchased a substantial portion of its loans," in practice the agencies appear to have applied the loan-based standard rarely, if at all. Regardless, the existing loan-based standard remains grounded in the areas where a bank has deposit facilities, while the ANPR appears to contemplate lending-based assessment areas that could be disconnected from facility-based assessment areas.

5 *See, e.g.*, 12 U.S.C. § 2906(b)(1)(B).

6 *See, e.g.*, 123 Cong. Reg. S8932 (daily ed. June 6, 1977) (Senator William Proxmire, the bill's sponsor in the Senate, stating in floor debate that the statute was intended to solve the problem that "banks and savings and loans will take their deposits from a community and instead of reinvesting them in that community, they will invest them elsewhere . . . .").

- Avoidance of CRA hotspots: Requirements to delineate deposit-based assessment areas would risk creating and exacerbating CRA hotspots. Assessment areas based on a percentage of a bank's total deposits would naturally arise in areas where larger populations, higher costs of living, and greater access to banking services drive greater volumes of deposits. As a result, such deposit-based assessment areas would be clustered in these areas, driving numerous banks to focus CRA activities in the same markets, many of which have been longstanding areas of focus for banks' CRA activities. This phenomenon is plainly in tension with the CRA's aims of expanding credit access to *underserved* communities, and the ANPR's stated goal of "alleviat[ing] the CRA hot spots and deserts dynamic."[7] Changes to CRA regulations should seek to avoid incentivizing the growth of hotspots and to instead guide incentives towards expanding credit access in underserved areas, consistent with the purposes of the CRA.

- Encouragement of CRA activity in underserved areas: Requirements to delineate deposit-based assessment areas could fail to drive CRA efforts to underserved areas, including rural areas. Rural areas are less likely to have the higher populations and cost of living that would inevitably correlate with the concentrated presence of deposit-based assessment areas. The Board should ensure that changes to its CRA framework recognize the immense value that investment and credit access can play in underserved communities, including rural areas.

- Predictability and stability of CRA requirements: CRA requirements should be predictable and stable to allow for the long-term planning and engagement necessary for a bank to engage in meaningful CRA activities, particularly CD activities, in an area and to align with the years-long periods over which a bank's CRA performance is examined. Requirements to delineate deposit-based assessment areas that tie a bank's CRA obligations to the geographic sources of its deposits could be volatile and unpredictable, for reasons out of a bank's control: people move from place to place and geographies experience economic growth and contraction. Pegging the delineation of assessment areas to geographic sources of deposits that could shift during the period during which a bank's performance is evaluated would therefore interfere with banks' long-term CRA planning and engagement.

D. Retail Lending Subtest

As a threshold matter, we note that the Board's Retail Lending Subtest shares many commonalities with the OCC's Retail Distribution Test. Our comments in this section II.D highlight, among other things, ways that the Board and the OCC could bridge the narrow divide between their approaches to evaluating retail loan distribution. With these changes, the Retail Lending Subtest could serve as a cornerstone of renewed interagency efforts to reform CRA regulations on a coordinated basis.

1. Retail Product Line Threshold

The Board should apply the Retail Lending Subtest to retail product lines that comprise 15 percent of a bank's retail lending as measured at the aggregate institution level, rather than at the assessment area level. Calculating the 15 percent threshold at the assessment area-level would be burdensome and lead to unpredictable results. For example, a bank could have a large number of

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[7] 85 Fed. Reg. at 66,450.

smaller assessment areas where modest shifts in consumer demand could meaningfully skew the bank's retail lending portfolio in those geographies year-over-year, leading to different product lines being evaluated each time a bank is examined under the CRA. Further, the retail loan products that would be evaluated in a particular geography might be insignificant to the bank as a whole, which could lead the bank to cease offering the product rather than risk poor performance on the Retail Lending Subtest in outlier geographies.

In contrast, calculating the 15 percent test at the institution level would mirror the approach taken by the OCC in its final rule, and provide more workable parameters that ensure retail product lines subject to the Retail Lending Subtest are actually a significant focus for the bank. A bank could therefore devote efforts to ensuring that its most important retail product lines are reaching LMI individuals and neighborhoods across all of its assessment areas, leading to a more consistent and effective approach.

Additionally, the number of retail product lines considered under the Board's Retail Lending Subtest should be limited to two, as is the case in the OCC's final rule. This approach would further focus CRA evaluations on those product lines with the greatest impact in the community and permit banks to focus on achieving excellent performance in their material retail product lines.

2. Retail Lending Screen

The Board should not adopt a retail lending screen to determine whether a bank is eligible for a metrics-based evaluation of retail lending. Retail lending volumes may be difficult to project over the long-term, and the increased uncertainty of subjecting retail lending to an examiner's subjective discretion when application of the screen precludes use of the metrics-based evaluation could create a perverse incentive for a bank with relatively modest levels of retail lending activity in an assessment area to cease such lending activity altogether. In turn, this result would constrict the availability of retail credit in underserved communities. Instead, we urge the Board to follow the OCC's example of simply declining to subject geographies with negligible lending volumes to evaluation under a retail lending distribution test. This approach would avoid creating harmful disincentives to lend while also ensuring that banks do not receive unduly high or low ratings on the Retail Lending Subtest based on their performance in areas in which they exhibit very low levels of lending.

3. Consideration of Purchased Loans in the Retail Lending Subtest

We support the Board's proposal to include in its retail lending metrics loans that a bank purchases as well as loans that it originates. This approach would allow banks to present a complete picture of how they meet the needs of their communities. It also would appropriately afford flexibility to diverse ranges of business models, recognizing that some banks are better equipped than others to rely solely on originations to penetrate LMI populations and to control the income distributions of credit applicants, while others may partner with third-party originating entities and retail partners and lack the same degree of control.

However, the Retail Lending Subtest should consider *all* purchased loans, rather than only those loans purchased directly from the originating entity. Consideration of all purchased loans would provide a clearer picture of a bank's retail operations and would reflect common business models. We understand that the ANPR's potential exclusion of loans purchased from non-originating parties is motivated by a desire to discourage the practice of "churning" loans, but concerns pertaining to churning are overstated in this context. Commonly, banks that purchase whole loans to fill mortgage lending gaps will in turn securitize them and sell them, which prevents another institution from repurchasing the whole loan and claiming credit on its CRA balance sheet.

Additionally, a buy-from-originator rule in the Retail Lending Subtest would be fraught with unintended consequences. Banks purchasing whole loans sometimes buy these loans from intermediaries acting as aggregators, rather than directly from the originator. This structure provides a robust secondary market that engenders liquidity throughout the broader mortgage market and provides assurances to originators that they can continue to make and sell loans to LMI individuals because aggregators will efficiently find buyers willing to purchase those loans. The CRA rules should not dampen this market liquidity. Further, it is not always apparent in a multi-party arrangement which entity is the originator, and there are multiple legal standards (e.g., in the OCC's true lender rule and related court decisions, and in HMDA reporting instructions) addressing this issue in different ways.

If the Board nevertheless remains concerned with the remote possibility of churning in retail loans, the supervisory process would be a more appropriate way to address that concern. However, the Board should at least establish a series of presumptions that enable a bank to demonstrate that its purchased loans should be counted in the Retail Lending Subtest. For instance, if a bank holds a purchased loan for thirty days or longer, the loan should be presumed to count. Additionally, a bank that sells loans extended to LMI borrowers at generally the same rate it sells loans extended to middle- and upper-income borrowers does not exhibit behaviors consistent with churning and therefore should presumptively be permitted to include the loans to LMI borrowers in the Retail Lending Subtest.[8]

Finally, while the ANPR indicates that the Board would count purchased mortgage loans along with originated mortgage loans, the Board should ultimately take a similar approach to other types of retail loans, such as small business loans. We are not aware of any reason to treat different categories of retail loans dissimilarly in this regard.

4. Consideration of Consumer Lending Product Lines

The Board should make evaluation of consumer lending in the Retail Lending Subtest optional, and never mandatory, regardless of the proportion of a bank's retail lending or its business that consumer lending comprises. While consumer loans meet borrowers' specific needs, they often do not provide the type of foundational, wealth-building credit that the CRA focuses on promoting and incentivizing.[9] Subjecting consumer lending to mandatory evaluation under the Retail Lending Subtest could encourage banks engaged in certain types of consumer lending, including unsecured loans, to expand into riskier subprime segments at scale in order to achieve the volume of loans to LMI borrowers required to receive a Satisfactory or better rating. This result would be inconsistent with the stated purpose of the CRA, which requires community reinvestment to be consistent with the safe and sound operation of the bank. The Retail Lending Subtest should therefore focus instead on mortgages, small business loans, and small farm loans.

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8 Similar treatment should apply to a bank that sells loans extended to borrowers in LMI neighborhoods at generally the same rate it sells loans extended to middle- and upper-income neighborhoods.

9 For example, consumer loans can include wealth management loans, such as securities-backed loans or loans to finance the purchase of art, as well as other loan types that are a poor fit with the CRA's aims of addressing the unmet credit needs of LMI communities.

While we believe a consumer lending product line should be subject to the Retail Lending Subtest only at a bank's option, subjecting a consumer lending product line to the subtest only when it constitutes a "substantial majority" of a bank's business, as the Board has historically done and proposes to do, would be far more appropriate than applying the Board's proposed 15 percent test to consumer loans.

If the bank retains the "substantial majority" standard, the Board should clarify what would constitute a "substantial majority" in order to provide greater certainty for banks' long-term business planning across CRA evaluation cycles. BPI's understanding is that examiners apply the current CRA regulations' "substantial majority" standard unevenly. The threshold for a product line to constitute a "substantial majority" of a bank's business should be set by measuring the dollar amount of a bank's loans within a consumer lending product line against the bank's total assets, requiring evaluation of consumer lending only when this ratio exceeds 75 percent at the institution level. This approach would be consistent with the Board's use of the term "substantial majority" in the ANPR, which indicates that the term means 75 percent.[10] More importantly, this approach would subject to evaluation only those consumer product lines without which a meaningful evaluation of the bank's performance would not be possible.[11]

The Board should also, at a minimum, exclude credit card products entirely from potential consideration under the Retail Lending Subtest, as the OCC has done in its final rule. The OCC offered a number of reasons for excluding credit card products from consideration under its final rule's Retail Lending Distribution Test, including that credit card loans do not play as significant a part in building consumer wealth as other consumer loan types such as mortgages.[12] Additionally, the inclusion of credit card products in the Retail Lending Subtest could lead to the creation of benchmarks that some banks could not meet without expanding credit card lending into risky subprime sectors of the market. For these same reasons, the Board should exclude products that share the characteristics and purposes of credit cards, such as point-of-sale financing.

Finally, the Retail Lending Subtest should evaluate a bank's performance on a blended, weighted basis across its combined retail lending product lines, just as the Board would do within product line categories (e.g., combining all home mortgage types into a single category). This approach would avoid according undue weight to a retail product line that is immaterial for the bank, and would reduce the number of pass-fail tests that could lead to ratings that obscure a bank's holistic performance.[13]

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10 *See* 85 Fed. Reg. at 66,418 ("The Board analyzed how lending-based assessment areas might work for large banks that conduct a substantial majority (75 percent or greater) of their lending outside of their facility-based assessment areas.").

11 *See* Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance, 81 Fed. Reg. 48,506, 48,536 (July 25, 2016).

12 OCC, Community Reinvestment Act Regulations, 85 Fed. Reg. 34,734, 34,740 (June 5, 2020) ("The agency . . . is cognizant of the challenges to capturing the information needed to evaluate credit card lending and believes that, given the nature of the lending and the impact it has on LMI individuals and communities, it may not be appropriate for the CRA to be used to incentivize banks' credit card lending. . . . [T]he final rule . . . removes credit cards . . . from the definition of consumer loan to reduce the burden associated with information gathering and to ensure that banks have an incentive to engage in a variety of CRA activities that benefit LMI individuals.").

13 For a practical example of how this blended, weighted calculation would work, see page 24 of BPI's comment letter on the 2019 Notice of Proposed Rulemaking by the OCC and FDIC, which is available at

5. Role of Examiner Discretion in Assessing Retail Performance and Imposing CRA "Double Jeopardy"

We support the ANPR's proposed approach of permitting examiners to rebut a presumption of satisfactory performance in an assessment area only upon a showing of discriminatory or other illegal credit practices. However, we do not believe it would be appropriate for a bank to receive a downgrade at both an assessment area level and the overall institution level, as such an approach would amount to a double-penalty for the same underlying conduct.

Additionally, the Board should not allow non-CRA-related consumer compliance violations to serve as a basis for downgrading a bank's presumptive rating. Instead, the Board should codify a requirement that there be a logical nexus between the assigned rating and any discriminatory or other illegal credit practice, and that full consideration will be given to remedial actions taken by the bank.[14] At times, the federal banking 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. A bank that is successfully meeting the credit needs of its community but nonetheless is assigned an unsatisfactory 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.

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 are a number 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.

Even where there is a clear nexus between a compliance violation and a bank's CRA obligations, the Board should also take the proportionality of the violation into account when determining whether a downgrade to a bank's rating is warranted. For example, single, isolated violations, or violations where there has been no tangible harm to LMI consumers or communities, should not serve as a basis for a downgrade.

6. Combination of Low-Income and Moderate-Income Categories and Ways to Receive an Outstanding Rating on the Retail Lending Subtest

We support the combination of low-income and moderate-income categories in the context of determining whether a bank is eligible for a threshold presumption of Satisfactory under the Retail Lending Subtest, and the Board should keep these categories combined for purposes of setting performance ranges. The Board should not, however, make strong lending performance specifically with low-income borrowers as a necessary prerequisite to an Outstanding rating.

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https://www.fdic.gov/regulations/laws/federal/2020/2020-community-reinvestment-act-regulations-3064-af22-c-456.pdf.

14 *See, e.g.*, OCC PPM 5000-43, as amended by OCC Bulletin 2018-23.

Should the Board seek to add incentives for banks to achieve an Outstanding performance rating on the subtest, it could consider a number of alternative options. For instance, banks should be able to earn an Outstanding subtest rating through any of the following methods:

(1) demonstrating strong performance on lending to the combined LMI category;

(2) exhibiting strong performance on lending to the low-income category specifically;

(3) taking other affirmative steps to reach LMI populations, such as forming lending consortia with, or purchasing loans originated by, MDIs; ***or***

(4) engaging in a significant amount of retail lending to LMI borrowers, in LMI neighborhoods, or to small businesses as measured on a dollar basis.

In particular, the fourth method above would reward banks incrementally for the volume of retail credit they provide to the populations the CRA was intended to address. Under the performance standards outlined in the ANPR, there would be no incentive for banks to increase the *volume* of loans they provide to LMI individuals and small businesses, so long as the *proportions* of the loans they provide to LMI borrowers and small businesses are adequate. In contrast, the CRA Evaluation Method in the OCC's final rule provides dollar-for-dollar credit for the amount of a bank's mortgage loans to LMI individuals and loans to small businesses. Including significant retail lending volumes as one method for a bank to earn an Outstanding rating under the Retail Lending Subtest would be a way for the Board to bridge its differences with the OCC's final rule and incentivize the provision of credit to communities that need it.

7. Definition of "Small Business Loan"

The Board's approach to defining a small business loan for CRA purposes should minimize regulatory burden by aligning the Board's definition to the greatest extent possible with other regulatory definitions of this term, including, in the immediate future, the Call Report definition. The ANPR indicates that the Board is considering adopting a gross annual revenue threshold of $1.65 million as a means of capturing inflation. As the Board recognizes, doing so "would decouple [the definition] from Call Report data."[15] However, the incremental benefit to banks and their customers of capturing a moderately greater number of small business loans within the definition is likely to be outweighed by the costs of establishing systems to separately capture and report loans to small businesses based on a different gross annual revenue threshold than the Call Report threshold.

The approach outlined in the ANPR would also differ from the definition of a "CRA-eligible business" set forth in the OCC's final rule, which includes a gross annual revenue threshold of $1.6 million,[16] and may also deviate from the definition that the Consumer Financial Protection Bureau will adopt to implement the small business lending reporting requirements under Section 1071 of the Dodd-Frank Act. Given these divergent conceptions of small business loans, the Board should engage in interagency dialogue with the goal of ultimately adopting a harmonized approach with other federal financial regulators and with the Call Report instructions, which would allow banks to rely on

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15 85 Fed. Reg. at 66,435 n.99.

16 85 Fed. Reg. at 34,795.

overlapping data sources for multiple reporting obligations, and would increase clarity and public understanding of small business lending reporting.

8. Percentage of Banks That Receive Passing Ratings Within an Assessment Area

The Board should ensure that any rule that it ultimately adopts to revise its CRA regulations should not lead to a dramatic downward shift in the proportion of banks that receive Satisfactory or Outstanding ratings, assuming that banks' underlying CRA performance remains on par with current levels. In this regard, we have serious concerns regarding the ANPR's projections of banks' performances on the Retail Lending Subtest across assessment areas, taking into account market cycles, assessment area characteristics, and institution asset size categories.[17] These projections appear to imply that banks would, on average, obtain a passing rating only in approximately two-thirds of their assessment areas. This rate is strikingly low: assuming this rate holds across an institution, a bank with many assessment areas would be almost certain to receive an overall score of less than Satisfactory under the proposed framework. Such a result would be punitive and should be avoided. Additionally, this issue highlights the need for the Board to adopt a methodology that calculates a bank's Retail Test rating based on its blended, weighted performance across assessment areas, rather than one that penalizes banks for substandard performance in a small number of assessment areas that are immaterial in the context of a bank's holistic activities.

E. Retail Services Subtest

1. Branch Distribution Analysis

The branch distribution component of the Retail Services Subtest only should reward banks for maintaining branches in LMI geographies, rather than serve as a mechanism for punishing banks that maintain robust branch networks for their branch distribution performance. As outlined in the ANPR, the Board's proposed approach to evaluating branch distribution could disfavor business models that include robust branch networks, since being subject to that evaluation could only hurt a bank's overall CRA rating. In contrast, providing only a reward for satisfactory branch distribution would be consistent with the OCC final rule's CRA Evaluation Measure, which provides a modest upward adjustment to a bank's score based on the proportion of the bank's branches that are located in or serve LMI geographies.[18]

Additionally, the branch distribution analysis should treat branches that are located outside of LMI geographies but that serve LMI populations the same as branches that are located in LMI geographies for these purposes. Some branches located outside of LMI geographies, such as branches that are in close proximity to the border of an LMI census tract, may play a meaningful role in providing services for LMI populations. Additionally, counting LMI-serving branches as equivalent to branches located in LMI geographies would further align the Board's approach with the OCC's final rule, which takes this approach.

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17 *See* 85 Fed. Reg. at 66,427 tbl.2.

18 *See* 85 Fed. Reg. at 34,799.

2. Examples of Branch-Related Services, Non-Branch Delivery Services, and Deposit Products

The ANPR enumerates a series of examples of branch-related services, non-branch delivery services, and deposit products upon which Board examiners may focus in performing qualitative evaluations of retail services under the Retail Services Subtest. We support the Board's adoption of an illustrative list of services and products that provide examples and clarity for banks. However, the Board should make clear that the examples are not "checklists" of minimum requirements that a bank must meet in order to receive a Satisfactory or Outstanding rating on the subtest. Evaluating retail services in "checklist" form would amount to requiring that banks offer specific types of products and services, which would be far beyond the scope and mandate of the CRA. A bank's approach to providing retail services should be considered holistically, rather than through any check-the-box exercise.

3. Evaluation of Retail Deposit Products

The Retail Services Subtest's evaluation of deposit products should serve as performance context, but not as a mandatory element or minimum requirement of the evaluation framework. The CRA instructs the federal banking agencies to "assess [an] institution's record of meeting the *credit needs* of its entire community, including low- and moderate-income neighborhoods," but does not provide a statutory grounding for the evaluation of deposit products.[19] Likewise, no affirmative obligation regarding the provision of deposit products appears in the federal banking agencies' current CRA regulations. Imposing a formal evaluation of deposit products would also represent a departure from current practices, under which examiners may or may not evaluate deposit products at all, but if they do, it is only to consider the broader performance context in which a bank operates.

Importantly, many banks do not currently collect and/or update income information on their depositors. Evaluating the income distribution of deposit accounts would effectively require them to do so, which would impose a substantial ongoing data collection burden that would be contrary to the Board's general approach in the ANPR of minimizing these burdens. Any final version of the subtest should therefore not require consideration of deposit products as a mandatory element, and should include such an evaluation only as one possible avenue for banks to demonstrate their performance in providing retail services.

Similarly, the development of a "strategic statement" outlining a bank's business strategies for offering deposit products responsive to the needs of LMI and other underserved communities should only be at a bank's option, and as a tool for the bank to provide its examiners with performance context for the examination. If, however, the Board does adopt a mandatory strategic statement requirement, that requirement should apply to banks of all sizes and not just to the "very largest banks." To the extent the Board believes there are any benefits from requiring formal plans to offer responsive deposit

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19 12 U.S.C. § 2903 (emphasis added). While the CRA statute separately notes in its "Congressional findings and statement of purpose" section that "the convenience and needs of communities include the need for credit services as well as deposit services," 12 U.S.C. § 2901, no references to deposit services appear in the operative provisions of the statute imposing criteria by which banks are to be evaluated. Additionally, the statement in the "Congressional findings and statement of purpose" section appears to be an expression of Congress's intent to incentivize banks to serve the needs of their communities for credit, as they *already had been doing* for deposits. *See, e.g.*, 123 Cong. Rec. S8932 (daily ed. June 6, 1977) (Senator William Proxmire, the bill's sponsor in the Senate, stating in floor debate that the statute was intended to solve the problem that "banks and savings and loans will take their deposits from a community and instead of reinvesting them in that community, they will invest them elsewhere . . . .").

products, the customers of smaller banks should share in those benefits. Finally, in all events, a strategic statement should not be a public document, nor one that is understood to create binding commitments.

F. CD Financing Subtest

We support the Board's proposed approach of evaluating CD loans and qualified investments together under a unified CD Financing Subtest. Combining the categories would provide banks greater flexibility to play to their relative strengths rather than attempt to excel in both categories, and also would allow banks to better tailor their CD activities to their communities' needs. To the extent the Board is concerned that combining loans and investments could reduce direct incentives to make Low-Income Housing Tax Credit ("LIHTC") or other types of investments, the Board could address these concerns by implementing impact scores that are calibrated to provide banks with appropriate incentives to engage in such activities.

The CD Financing Subtest should also include elements designed to address the unique characteristics of CD financing. CD financing capabilities may vary widely from bank to bank. Unlike retail lending to LMI individuals, which occurs naturally in the course of a retail bank's business, CD financing can require dedicated personnel with specialized experience and skillsets. Additionally, CD financing opportunities are fundamentally less predictable and less steadily available from year-to-year than many other activities eligible for CRA credit. This is particularly true at finer levels of geographic granularity, including at the assessment area-level. For instance, there may be only one LIHTC opportunity, if any, available within an assessment area in a given year.

The CD Financing Subtest should reflect these characteristics in several ways. First, component benchmarks should be set at the lower of local and national benchmarks, in recognition of the scarcity of CD financing opportunities in some assessment areas. Second, the data from which the benchmarks are drawn should consist of multiyear averages, rather than annual averages that may be subject to large year-over-year fluctuations. Third, the subtest should impose no annual minimum for CD financing, and instead should evaluate a bank's activities averaged over the course of the entire evaluation period. Fourth, to reflect the long-term attributes of CD financing arrangements, the subtest should take into account both financing initiatives originated during the evaluation period and ongoing balances of CD loans and investments made in prior evaluation periods.

G. CD Services Subtest

We support the Board's recognition that a broader set of CD services should warrant CRA credit than current regulations permit. The Board's proposed consideration of volunteer activities in rural areas (even if unrelated to the provision of financial services), other efforts to address community needs in rural areas, and initiatives supporting financial literacy and home ownership without consideration of income level would be a substantial improvement over the current rules.

However, some aspects of CD services are simply ill-suited to evaluation on a quantitative basis. For this reason, placing an outsized emphasis on quantitative analysis in this subtest could present an inadequate picture of a bank's provision of CD services. For example, a bank officer's service on the board of a community group in an LMI area can give that group the benefit of financial expertise and experience that might not otherwise be readily available to the group. At the same time, the bank officer's service on the community group's board can provide the bank insights into the credit and community development needs of the community, better enabling the bank to meet those needs.

Although the true value of this service to the community is difficult to quantify, it likely surpasses the value of many other kinds of CD service activities that bank employees might perform. Therefore, numeric metrics should be only one part of a more holistic evaluation of a bank's ability to use CD services to meet the needs of its communities.

In the discrete instances that metrics would provide an appropriate basis for evaluation, a number of possible avenues to quantifying CD services exist. The use of a metric measuring service hours per employee may be an appropriate consideration for some banks that, in principle, avoids equity concerns in comparing banks of different sizes. However, the Board should clarify further how it would intend to use this metric in context. First, the Board should clarify whether all employees of a bank would be considered equally, or whether certain classes of employees would be weighted differently (or excluded from the calculation entirely). Second, the Board should clarify the role of affiliates in an hours-per-employee metric. Whether service activities by an affiliate's employees would count toward the bank's numerator, and whether the number of employees of the affiliate would count towards the bank's denominator, will be important questions to consider as the Board develops a formal rulemaking proposal. Third, the Board should make clear that performance context will nevertheless be an important part of the CD Services Subtest, because banks have widely divergent staffing models, even after controlling for bank size.

H. Qualifying Activities List

1. List of Qualifying Activities and Process for Confirmation

We support the Board's proposed establishment of a qualifying activities list to clarify in advance an illustrative list of activities that are eligible for CRA credit. This approach, mirroring that taken by the OCC in its final rule, would facilitate banks' ability to engage in long-term CRA planning by reducing uncertainty as to whether an initiative will ultimately receive credit. In any rulemaking to implement the qualifying activities list, the Board should continue to emphasize that the list is merely illustrative and that activities not appearing on the list can still qualify for CRA credit.

We also support the Board's proposal to adopt a process through which banks and interested parties may seek advance confirmation that an activity is eligible for CRA credit, which would align with the process that the OCC has adopted in its final rule.[20] This process would ensure that banks and involved stakeholders can obtain certainty before committing to undertake potential CRA activities, rather than face the risk of an activity being deemed not to qualify years after it is underway.

The OCC's final rule included certain items on its list of qualifying activities that the Board should include in its own list. First, the Board should adopt the OCC's approach to providing credit for "unsubsidized" (or "naturally occurring") affordable housing investments.[21] The ANPR indicates that the Board is considering requiring qualifying unsubsidized affordable housing to be located in either an LMI geography or a geography where the median renter is LMI, whereas the OCC's final rule does not contain such a geographic limitation. The Board's approach, unlike the OCC's approach, would fail to provide incentives for banks to finance LMI housing in many areas with a high cost of living, which is precisely where unsubsidized affordable housing can have the greatest impact. Second, the Board

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20 *See* 85 Fed. Reg. at 34,797.

21 *See id.* at 34,742.

should align with the OCC final rule's provision of credit for sponsorship of tax credit funds that support CD projects.[22]

Finally, the Board should continue to treat investments in qualifying MBS, including those backed by loans to LMI borrowers, as a CRA-qualifying activity. These investments play a key role in facilitating secondary market liquidity that, as the Board has observed, ultimately benefits LMI communities by fostering increased loan originations to LMI borrowers.[23]

2. Qualifying Economic Development Activities

The harsh economic conditions that small businesses, small farms, minority-owned businesses, and their employees have faced during the COVID-19 pandemic underscore these businesses' critical need for financing. The ongoing pandemic and severe economic downturn have resulted in the closure of more than 100,000 businesses.[24] In this context, the Board should consider *broadening* the types of economic development and small business-related financing activities that receive credit to create additional incentives for banks to provide this type of financing, not *narrowing* those activities as the ANPR suggests is under consideration. Reducing the availability of credit for activities that promote economic development and small business financing would be exactly the wrong policy response to current economic conditions.

The Board's current CRA regulations describe activities that "promote economic development" to include "activities that promote economic development by financing business or farms that meet the size eligibility standards of the Small Business Administration's Development Company (SBDC) or Small Business Investment Company (SBIC) programs or have gross annual revenues of $1 million or less."[25] Interagency Questions and Answers ("Q&As") interpreting the regulations state that two broad categories of activities may "promote economic development": first, activities supporting permanent job creation, retention, and/or improvement for LMI persons or in LMI geographies or certain other geographies, or by financing intermediaries supporting start-ups or recently formed small businesses or small farms; and second, economic development initiatives focused on LMI job access, job training, or workforce development.[26]

While the ANPR signals interest in simplifying the definition of "economic development" by looking only to whether an initiative is aimed at community development, the Board should maintain credit for an activity qualifying under any prong of the current interagency Q&As, so as to encourage a broader range of activities supporting community initiatives. The Board could do so by preserving and codifying the language of the existing interagency Q&As, if not expanding upon that language. By way of comparison, the OCC's final rule uses different language than the interagency Q&As to count economic development activities, and while we believe that the OCC's final rule continues to provide credit for

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22 *See id* at 34,754.

23 *Id.* at 66,445 ("Issuance of qualifying MBS can improve liquidity for lenders that make home mortgage loans to LMI borrowers, increasing the capacity of these lenders to make more loans that are needed in the community.").

24 *See Yelp: Local Economic Impact Report*, Yelp Economic Average (Sept. 2020), https://www.yelpeconomicaverage.com/business-closures-update-sep-2020.html.

25 12 C.F.R. § 228.12(g)(3).

26 *See* Interagency Questions and Answers, 81 Fed. Reg. at 48,526.

most, if not all of the activities addressed in the interagency Q&As, its use of different language has created confusion and uncertainty that the Board should avoid.

Relatedly, the ANPR seeks input regarding measures to establish clearer standards for economic development activities that "demonstrate LMI job creation, retention, or improvement."[27] If the Board establishes clearer standards and streamlined procedures for some of these activities, it should still maintain the standards and approach outlined in the interagency Q&As, which dictate that "examiners . . . employ appropriate flexibility in reviewing any information provided by a financial institution that reasonably demonstrates that the purpose, mandate, or function of the activity meets the 'purpose test.'"[28] Banks are equipped to demonstrate compliance with existing standards by providing objective data and documentation relevant to the existing "size" test and "purpose" test. Indeed, some banks have been routinely providing their examiners with documentation to this effect for many years. It is not necessary for the Board to disrupt this process for banks that understand and rely on the existing standards and procedures in order for it to establish clearer standards and streamlined procedures for a subset of LMI job creation, retention, or improvement activities.

The ANPR also signals the Board's interest in "revising the economic development definition to provide incentives for engaging in activity with smaller businesses and farms and/or minority-owned businesses."[29] Altering this definition to narrow its reach would constitute a misstep, particularly in light of the difficult economic conditions that small businesses (including 'larger' small businesses) face. Instead, the Board should *expand* the list of activities that are presumed to promote economic development, so as to broaden the opportunities and incentives for banks to engage in activities that promote economic development in their communities.

Relatedly, the Board should also preserve its CRA regulations' reliance on SBDC and SBIC size standards, rather than set lower size caps for eligible small businesses, as the ANPR suggests is under consideration. The SBDC and SBIC standards are well-recognized thresholds for defining small businesses and apply in multiple regulatory settings. The continued use of these standards as presumptions for identifying eligible small businesses would reduce regulatory burden and encourage banks to serve a wide variety of small businesses.

3. Coordination with Minority Depository Institutions, Women-Owned Financial Institutions, and Community Development Financial Institutions

We support enhanced incentives for banks to engage in partnerships with MDIs, women-owned financial institutions, and CDFIs, including by counting these activities at the institution-level rating stage of the performance evaluation. The Board should, however, clarify that investments in MDIs, women-owned financial institutions, and CDFIs are only one means by which banks can obtain an Outstanding rating, rather than a requirement for an Outstanding rating.[30] Such clarification would be appropriate in

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27 85 Fed. Reg. at 66,447 (Question 58).

28 Interagency Questions and Answers, 81 Fed. Reg. at 48,526.

29 85 Fed. Reg. at 66,447 (Question 57).

30 The ANPR states that the Board is "considering that substantive and meaningful engagement with MDIs, women-owned financial institutions, and low-income credit unions would be explicitly designated as criteria for an 'outstanding' overall rating in order to elevate the profile and importance of investments in these mission-oriented institutions." *See id.* at 66,459.

light of the relative scarcity of these institutions in particular assessment areas and regions of the country.

4. Consideration of Activities by Affiliate Entities

We commend the Board's apparent approach of maintaining the standard contained in current regulations regarding the treatment of affiliate activities, rather than considering disallowing credit for some of that activity as the OCC's final rule has done. Under the Board's current regulations, any affiliate activity is eligible for consideration as a qualifying activity, but such consideration is optional, and may only count toward the performance of a single affiliated bank. This approach makes ample sense and has broad support.[31] The activities of a non-bank affiliate entity can play a meaningful role in a banking organization's strategy for reinvesting in its communities. Counting qualifying activities performed by a bank's affiliates allows the bank to coordinate its CRA strategy with the corporate social responsibility function within the broader banking organization. Such coordination can create broader support and visibility for CRA activities within a banking organization. Additionally, depository institution holding companies have a vested interest in assisting the CRA efforts of their subsidiary banks because a holding company's ability to merge and engage in non-banking activities depends on the CRA performance of its subsidiary bank(s).

Banking organizations sometimes conduct activities from non-bank entities in order to manage safety and soundness issues, tax implications, capital requirements, and questions of legal permissibility (including those under Regulation H, as discussed below). We do not believe there is any compelling policy reason for the federal banking agencies to effectively force banking organizations to restructure their operations and undermine these other important considerations by disallowing some or all affiliate activity in CRA evaluations.

5. Permissibility of Qualified Investments Under Regulation H

The Board should use the present rulemaking as an opportunity to align the rules of Regulation H governing permissible public welfare investments with its CRA regulations. Currently, state member banks seeking to make investments that meet the CRA definition of "qualified investments" may have authority to do so under Regulation H only if the recipient of the investment "engages solely in or makes loans solely for the purposes of" certain enumerated CD activities or if other narrow conditions are satisfied, unless the Board has separately approved of the investment.[32] The criteria for a permissible investment under Regulation H are therefore narrower than the criteria for a qualified investment under the Board's CRA regulations, with the result that a range of qualified investments under the CRA are legally impermissible for state member banks, or are subject to a burdensome regulatory approval requirement that strongly discourages these banks from making the investments.

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31 *See, e.g.*, Michael S. Barr, *Credit Where it Counts: The Community Reinvestment Act and its Critics*, 80 N.Y.U. L. Rev. 514, 622 (2005) ("Permitting banks, at their option, to include activities of affiliates in meeting the credit needs of their community, with current safeguards against gerrymandering . . . [is] critical to an accurate measure of CRA performance.").

32 12 C.F.R. § 208.22(b)(1)(iv).

This provision of Regulation H, which the Board enacted before the federal banking agencies adopted the current definition of "qualified investments" in their CRA regulations in 1995,[33] is also inconsistent with other provisions of federal banking law that permit state-chartered member banks to engage in the same activities as national banks, subject to state law restrictions.[34] Under OCC regulations, national banks are generally authorized to make any investment that is a qualified investment under the CRA.[35]

To address this issue, the Board should revise Regulation H or otherwise issue interpretive guidance making clear that *all* CRA-qualifying investments are permissible investments for state member banks. Doing so would facilitate more CRA investments, create parity between state member banks and national banks, and reduce burdens both for member banks and the Board itself.

I. Overall Scoring

1. Blending of Retail Test Performance Across Assessment Areas

We support the ANPR's proposed approach of blending a bank's Retail Test performance across assessment areas on a weighted basis. The Board should weight the importance of assessment areas to a bank based on the bank's relative volumes of deposits across its assessment areas, rather than weighting geographies using loan volumes or a hybrid approach. Using deposits would maintain the approach in current CRA regulations and would provide greater *ex ante* certainty because volumes of branch-based deposits (excluding corporate deposits) across assessment areas are relatively stable for retail banks. Additionally, a weighted blending of performance across assessment areas would create a more level playing field for banks with many assessment areas if the Board ultimately adopts nationwide assessment areas for internet banks, as the ANPR contemplates.

As such, the Board should modify the approach outlined in the ANPR so as to reduce impediments to a weighted blending of assessment area performance, and not accord undue weight to performance in a small number of geographies that are not material to a bank's overall business. For instance:

- The Board is considering limiting how high a rating can be for a state or multistate MSA if there is a pattern of persistently weaker performance in multiple assessment areas. However, persistently weaker performance in multiple assessment areas should only disqualify a bank from an Outstanding rating, and not from a Satisfactory rating. Additionally, the Board should clarify that a Satisfactory rating in an assessment area would never be considered "weaker performance."

- The Board is considering providing for a downgrade of an assessment area-level rating from Needs-to-Improve to Substantial Noncompliance if the assessment area-level rating was Needs-to-Improve in the prior evaluation, with no appreciable improvement. However,

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33 *See* Board of Governors of the Federal Reserve System, Membership of State Banking Institution in the Federal Reserve System, 59 Fed. Reg. 63,706 (Dec. 9, 1994).

34 *See*, *e.g.*, 12 U.S.C. § 1831a(a)(1) & (c)(1); 12 C.F.R. §§ 208.21(b) & 208.6(a)(1).

35 *See* 12 C.F.R. § 24.3.

such a downgrade should only be made by an examiner and in full consideration of performance context, and should not be automatic.

2. Weighting of Retail Test and Community Development Test

The Board's proposal of unequal weighting of the Retail Test (at 60 percent) and the Community Development Test (at 40 percent) at the institution-level scoring stage indicates its recognition that different categories of activities may create different impacts in the community. However, the proposed 60 percent-40 percent split imposes a one-size-fits-all calibration of CRA obligations that may be a poor fit for some banks' business models. To account for variations among banks, the Board should provide more flexibility for weighting the tests based on a bank's product lines, its capacity for retail lending and community involvement, and the size of its retail lending product lines compared to other business lines. The Board should also provide an explanation for its approach to calibration, which is absent from the ANPR.

3. Additional Incentives for Outstanding Ratings

The Board should offer additional incentives for banks to achieve an Outstanding rating. The Board could provide that if a bank that has achieved an Outstanding rating in its most recent examination submits an application that requires consideration of the bank's record of meeting the convenience and needs of its communities, then the Board will deem the bank to have a satisfactory record of meeting the convenience and needs of its community, consistent with the statutory criterion for approval. Additionally, the Board should award a certificate or seal of achievement to banks achieving an Outstanding rating.[36]

J. Treatment of Wholesale and Limited Purpose Banks

It is critical that the Board maintain the wholesale and limited purpose designations when making any revisions to its CRA regulations, as the ANPR indicates the Board intends to do. These banks occupy distinct corners of the financial sector by virtue of their business models, and can serve the needs of their communities in unique ways. The Board's CRA regulations should therefore continue to evaluate these banks' performance by reflecting the manner in which they are best positioned to carry out CRA activities.

1. Evaluation Under the Community Development Test

As is done under the current Community Development Test, wholesale and limited purpose banks should be evaluated solely on their CD activities. Furthermore, the framework should generally compare a wholesale or limited purpose bank's aggregate CD loans and investments against its total domestic assets. The use of a single numerator that combines loans and investments would provide a clear, comprehensive picture of wholesale and limited purpose banks' CRA financing activities.

The amount of a bank's domestic assets is an appropriate starting place for a denominator for a number of reasons. First, wholesale and limited purpose banks are already assessed through the supervisory process using a framework that looks to their assets – total assets or some combination of classes of assets – and have been for some time. Second, a measure based on total domestic assets

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36 The OCC will award such a certificate for Outstanding ratings under its final rule. 85 Fed. Reg. at 34,807.

would provide a more suitable basis for evaluation than alternatives such as Tier 1 capital, the use of which would perversely make the CRA more challenging for the best-capitalized banks.

However, for some banks, not all domestic assets may be appropriate for inclusion in the denominator of the Community Development Test. Indeed, current supervisory practice for some banks has been to exclude certain assets from the denominator used to determine their CRA obligations under the current Community Development Test. These assets include central bank deposits, which for some banks serve as a safe store for value for excess deposits, including in periods of financial market stress or as a result of monetary policy activities and other considerations not under the control of the bank. The Board should therefore continue these exclusions as appropriate, and also provide a process by which a bank could propose to exclude additional defined classes of assets from the denominator based on the characteristics of the bank's business model and in discussion with its examiners.

2. Assessment Areas for Wholesale and Limited Purpose Banks

Much of the current regulatory structure for wholesale and limited purpose banks works well for these banks and their communities. The Board should generally maintain the standards for these banks to delineate assessment areas. However, wholesale and limited purpose banks often are located in CRA hotspots, and opportunities for impactful CD activities in those geographies can be challenging to find. Wholesale and limited purpose banks that are able to adequately address the needs of their assessment areas should continue to be permitted to earn CRA credit for the activities they conduct elsewhere across the country. The Board should clarify what wholesale and limited purpose banks must do to adequately address the needs of their assessment areas, so that they may discharge their local obligations under the Community Development Test and focus on serving financing and investment needs in other, underserved geographies.

K. Treatment of Banks that Provide Services Outside a Branch Network

BPI supports the Board's stated desire to "tailor CRA supervision of financial institutions (banks) to reflect differences in bank . . . business models" and to "update standards in light of changes to banking over time, particularly the increased use of mobile and internet delivery channels."[37] Many banks provide financial services to customers outside of a traditional branch network, and any CRA modernization should take into account the variety of different business models that exist in banking and financial services today and that will continue to evolve over time. While the CRA performance of banks is currently evaluated in connection with their physical locations – main offices and branches – the business of banking is migrating from ties to particular geographies or local communities. BPI supports application of a flexible framework that adequately captures banks' CRA qualifying activities, avoids exacerbating CRA hotspots, encourages activities in underserved areas, and fosters predictability and stability in evaluations.

L. Strategic Plans

The Board's current regulatory framework for strategic plans also does not require a fundamental overhaul. Instead, the Board should make a small number of common-sense changes to improve the framework:

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[37] 85 Fed. Reg. at 66,410.

- Banks operating under strategic plans have many of the same issues with current and contemplated standards for delineating assessment areas that are discussed above, including that assessment area delineation requirements could lead them to focus their activities in CRA hotspots. Strategic plan banks should have added flexibility in the delineation of assessment areas. For instance, strategic plan banks should have the option to delineate new assessment areas in geographies that are important to their business, even if those geographies would not otherwise be eligible for delineation.[38] These banks should also have the option, after adequately addressing the needs of their assessment areas, to earn CRA credit for activities outside their assessment areas, just as wholesale and limited purpose banks are able to do.

- The Board should provide for streamlined review of amendments to and renewals of strategic plans, as compared to its review of entirely new plans.[39] This streamlined review could come in the form of an abbreviated review process, with an appropriately tailored standard of review. Such a change would reduce regulatory burden and reflect the reduced need for a full-scope review of strategic plan amendments or renewals by banks with plans that are already established and proven to be effective.

- The Board should develop pre-approved strategic plan templates that banks can use at their option to assist in the development of a plan. These templates would reduce the costs of CRA planning.

- The regulations should codify guidance stating that banks operating under strategic plans are not required to enter into community benefit agreements.[40]

- When soliciting public comment on a proposed strategic plan, a bank should have the option to publish notice of the plan on its website rather than in a newspaper or through the Board's website. Members of a bank's local community with a true stake in the community and close knowledge of its particular needs – including, but not limited to, the bank's customers and prospective customers – may be more likely to see and react to a notice on the bank's website.

- In the public comment process, a bank should not be required to make any changes to its proposed strategic plan to address a non-substantive comment that lacks factual or analytical support. There is recent precedent for this approach in other agency rulemakings.[41]

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38 The Board hints at this possibility in the ANPR, inquiring whether "substantial activity beyond [an bank's] branch-based assessment areas" should permit delineation of additional assessment areas. 85 Fed. Reg. at 66,418.

39 Streamlined review should be available, for instance, when a bank is amending a plan only to reflect the addition of a new branch.

40 *See* Interagency Questions and Answers, 81 Fed. Reg. at 48,548.

41 The OCC's recent final rule amending its licensing requirements provides that the OCC's decision of whether to keep a filing on expedited processing will not be affected by a comment that is "non-substantive," meaning that the comment is a "generalized opinion that a filing should or should not be approved or a conclusory statement, lacking factual or analytical support." *See* Licensing Amendments, 85 Fed. Reg. 80,404, 80,436 (Dec. 11, 2020).

Finally, strategic plans often contain unique and separate evaluation standards that a bank has developed in consultation with its community and the bank's primary federal regulator. The Board should take care not to impose requirements on strategic plan banks that are unnecessary in light of the bespoke nature of strategic plans and the careful process by which they are developed. For example, any data collection and reporting requirements that apply to large banks should only apply to strategic plan banks to the extent the data that is required to be collected have direct relevance to those banks' compliance with their plans.

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BPI appreciates the Board's consideration of our comments. If you have any questions, please contact the undersigned by phone at (202) 589-2424 or by email at dafina.stewart@bpi.com.

Respectfully submitted,

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