August 5, 2022

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street, SW,
Washington, DC 20219

James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

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

Re: OCC: Docket ID OCC-2022-0002; RIN 1557-AF15
FDIC: RIN 3064-AF81
FRB: Docket No. R-1769; RIN 7100-AG29
Community Reinvestment Act Regulations

To Whom it May Concern:

The National Fair Housing Alliance ("NFHA")[1] and the undersigned civil rights, housing, and other advocacy organizations appreciate the opportunity to comment on the joint Notice of Proposed Rulemaking ("NPR") published by the Board of Governors of the Federal Reserve ("Federal Reserve Board"), the Federal Deposit Insurance Corporation ("FDIC"), and the Office of the Comptroller of the Currency ("OCC") (collectively, the "Agencies"). The Agencies propose to amend the regulations implementing the Community Reinvestment Act of 1977 ("CRA") to

[1] Founded in 1988 and headquartered in Washington, D.C. the National Fair Housing Alliance ("NFHA") leads the fair housing movement. NFHA works to eliminate housing discrimination and ensure equitable housing opportunity for all people and communities through its education and outreach, member services, public policy, advocacy, housing and community development, tech equity, enforcement, and consulting and compliance programs.

update how CRA activities qualify for consideration, where CRA activities are considered, and how CRA activities are evaluated.[2]

Executive Summary

NFHA and the undersigned civil rights, housing, and other advocacy organizations commend the Agencies for this effort to update the CRA regulations and for undertaking this rulemaking jointly. It has been nearly three decades since substantial changes have been made to the regulations, and in that time the banking industry has undergone significant changes. In order for CRA to have its intended impact on access to credit for people in underserved communities, the CRA regulations must be amended to explicitly factor in race and account for the structural changes that have taken place. Further, it is important for there to be a single regulation for all banks, regardless of which federal agency regulates them, to ensure that all communities have access to fair and responsible banking products and services, regardless of which banks serve them. We commend the Agencies for undertaking this rulemaking on a collaborative basis.

Our comments will not address all aspects of the proposed rule. Nor will they respond to all of the questions posed in the NPR. Rather, they will focus on a set of issues that we believe are particularly important from a fair housing and fair lending perspective. These include:

1. **The scope of CRA evaluations should be expanded to include race and national origin.**
2. **Consideration of climate- and disaster-related activities is important and should be strengthened.**
3. **The Agencies should support consideration of activities that support MDIs or WDIs, impose guardrails for institutions with assets over $1 billion, and reward certain activities that help close persistent homeownership and wealth gaps.**
4. **The Agencies should encourage activities that support affordable housing in high opportunity areas**.
5. **The Agencies should use a rebuttable presumption of an illegal discriminatory practice if a bank's facility-based assessment area excludes contiguous neighborhoods of color and should apply the new retail lending assessment area to all banks.**
6. **The Agencies should consider SPCPs as examples of loan products or programs that facilitate mortgage and consumer lending and should remove language suggesting that only SPCPs designed for LMI individuals would qualify for CRA credit.**
7. **The Agencies should require that the bank's CRA rating be downgraded to "Needs to Improve" or "Substantial Noncompliance" if the bank has engaged in a pattern or practice of discrimination.**
8. **To achieve meaningful public insight into the bank's practices, the Agencies should disclose the bank's HMDA data in the format used to analyze fair lending risk factors for redlining, pricing, and underwriting.**
9. **To provide transparency regarding redlining risk, the public file should include at least five years of assessment area maps that include the majority minority census tracts and the original date of the acquisition or establishment of the branch.**

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[2] Federal Reserve Board, FDIC, OCC, *Community Reinvestment Act, Joint Notice of Proposed Rulemaking*, 87 Fed. Reg. 33884 (June 3, 2022) (hereinafter, the "NPR"), https://www.federalregister.gov/documents/2022/06/03/2022-10111/community-reinvestment-act.

10. **The Agencies should seek public comment and instruct their examiners to reach out to community-based organizations in LMI communities and communities of color who are familiar with the credit needs of their communities.**

Detailed Comments

1. The scope of CRA evaluations should be expanded to include race and national origin.

The CRA was one in a remarkable series of landmark laws passed by Congress between 1964 and 1977, intended to end racial and other forms of discrimination, expand access to opportunity for everyone in this country, and redress the harms caused by the discriminatory policies and practices of both the government and the private sector, including financial institutions. The first of these was the Civil Rights Act of 1964, a broad statute that prohibits discrimination in employment, public accommodations, and federally funded programs, among other areas, but does not have provisions specific to housing or lending. It was followed by a series of statutes that do apply to these markets, including the 1968 Fair Housing Act,[3] which bans discrimination based on race, national origin, and other characteristics in all types of housing transactions, including mortgage lending. The Fair Housing Act also imposes an obligation on all federal Agencies – including Agencies with regulatory authority over financial institutions – to administer their programs and activities in a manner "affirmatively to further" fair housing. This provision was intended to eliminate discrimination in federal programs and activities related to housing, and to spur efforts to dismantle residential segregation and overcome its deleterious effects. In 1974, Congress passed the Equal Credit Opportunity Act ("ECOA"),[4] which bans discrimination based on race and other characteristics in all credit transactions, including but not limited to credit for housing and small businesses. In 1975, Congress enacted the Home Mortgage Disclosure Act ("HMDA"),[5] requiring lenders to make public information about their mortgage lending activities. Finally, in 1977, Congress passed the Community Reinvestment Act ("CRA").[6]

Congress Intended the CRA to Address Racial Redlining

The intended role of the CRA as a tool to address racial disparities in access to credit is well-documented. In 1977, Senator William Proxmire, sponsor of the CRA legislation, clearly articulated the intent to address racial redlining in the floor debate over the bill:

> By redlining let me make it clear what I am talking about. I am talking about the fact that banks and savings and loans will take their deposits from a community and instead of reinvesting them in that community, they will actually or figuratively draw a red line on a map around the areas of their city, sometimes in the inner city, sometimes in the older neighborhoods, sometimes ethnic and sometimes black, but often encompassing a great area of their neighborhood."[7]

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[3] 42 U.S.C. §§ 3601-19
[4] 15 U.S.C. §§ 1691 *et seq.*
[5] 12 U.S.C. §§ 2801 *et seq.*
[6] 12 U.S.C. §§ 2901 *et seq.*
[7] 123 Cong. Record 17630 (June 6, 1977).

The final text of the Act as passed in 1977 reflected this understanding of both the harms caused by banks' failure to fulfill their unique public responsibilities in an equitable fashion and the need for government action to address this failure. The Act stated Congress' findings that:

> (1) Banks and savings associations (collectively, banks) are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business;
> (2) the convenience and needs of communities include the need for credit services as well as deposit services; and
> (3) **banks have a continuing and affirmative obligation** to help meet the credit needs of the local communities in which they are chartered.[8]

Further, there are explicit references to people and communities of color in the text of the Act. For example, a provision adopted in 1992 required the Agencies to report to Congress comparing banks' lending to, among others, "minority…neighborhoods," as compared to their lending in other neighborhoods.[9] Further, §2907 of the statute provides that certain kinds of support for minority-owned depository institutions are eligible for CRA consideration.[10]

As recently as 2020, the Federal Reserve Board also acknowledged the CRA's intent to address racial redlining in its Advance Notice of Proposed Rulemaking on CRA, by stating:

> Congress enacted the CRA in 1977 primarily to address economic challenges in predominantly minority urban neighborhoods that had suffered from decades of disinvestment and other inequities. Many believed systemic inequities in credit access—due in large part to a practice known as "redlining" —along with a lack of public and private investment, was at the root of these communities' economic distress. Redlining occurred when banks refused outright to make loans or extend other financial services in neighborhoods comprised largely of African American and other minority individuals, leading to discrimination in access to credit and less favorable financial outcomes even when they presented the same credit risk as others residing outside of those neighborhoods.[11]

Although the text of the CRA does not call out the credit and deposit services needs of classes protected under other landmark statutes, the CRA must be understood as a civil rights law, intended to eliminate the barriers to credit not only in LMI communities, but also in communities of color and other underserved areas; barriers that had been erected by redlining and disinvestment. As Senator Proxmire made clear, the CRA was intended as an antidote to redlining, a practice that largely denied credit on the basis of the racial and ethnic composition of the population in the affected neighborhoods.

In fact, there is nothing in the CRA statute that precludes the consideration of race or that requires an emphasis on increasing access in low-and-moderate income ("LMI") neighborhoods

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[8] 12 U.S.C. § 2901(a) (emphasis added).
[9] Public Law 102–550, 106 Stat. 3874 (Oct. 28, 1992).
[10] 12 U.S.C. § 2907.
[11] Federal Reserve Board, *Community Reinvestment Act, Advanced Notice of Proposed Rulemaking*, 71 Fed. Reg. 66410, 66412 (Oct. 19, 2020), https://www.govinfo.gov/content/pkg/FR-2020-10-19/pdf/2020-21227.pdf.

as a sole definition of underserved communities. People of color are part of broader communities and throughout the nation they live in close proximity to non-people of color. Often the communities that people of color reside in are only divided by artificial barriers created during government-sanctioned discrimination and segregation of community resources, despite people of color being taxpaying citizens. Since the statute does not explicitly prohibit the consideration of race, regulators must read the statute more inclusively and make sure financial institutions meet the credit needs of all people in underserved communities.

By Focusing on Income, the CRA Has Failed to Improve Access to Credit for Communities of Color

Although the legislative history is clear about the intended scope of the Act, its implementation by the Agencies has focused almost exclusively on the needs of LMI people and communities. As a result, while the CRA has increased the flow of credit into some LMI communities, it has failed to facilitate the same access to credit and other banking services in other underserved communities, particularly communities of color. CRA's failure to ensure that creditworthy consumers residing in redlined neighborhoods of color received access to safe and affordable credit sanctioned predatory lending, which has pervaded entire communities. Unscrupulous lenders charge triple-digit interest rates and fees for basic banking services while denying residents of underserved communities of color an opportunity to build savings and wealth on par with residents of White communities with ample banking opportunities.

Despite the vast majority of banks receiving a "Satisfactory" or "Outstanding" CRA rating, there is considerable evidence to show that banks have failed to meet the needs of people and communities of color, and that these continue to be underserved market segments. We see this in access to small dollar and mortgage lending; the widening racial homeownership gap; in branch locations; with respect to small businesses, especially those owned by women and people of color; and persistent patterns of redlining and disproportionately high loan denials for people of color. For example, payday lenders are concentrated in Black and Latino communities throughout the nation even after controlling for income and other factors.[12] Black consumers are three times more likely and Latinos are twice as likely to borrow from a payday lender than Whites.[13]

Further, according to the U.S. Census Bureau, the current homeownership rate for White households is 74%. For Black households, that rate is 44.7%. For Latino or Hispanic households, the rate is 49.1%, and for Asian, Native, Hawaiian and Pacific Islander households, the rate is 59.4%[14] The White homeownership rate is 70% higher than the Black homeownership rate, 50% higher than the Latino homeownership rate, and 20% higher than the Asian homeownership rate.[15] That 30-percentage point gap in homeownership rates between White and Black

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[12] Center for Responsible Lending, *Payday and Vehicle Title Lending Disproportionately Harm Communities of Color, Exploiting and Perpetuating the Racial Wealth Gap*, (Nov. 2020), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-payday-cartitle-comm-of-color-nov2020.pdf.
[13] *Id.*
[14] U.S. Census Bureau, *Quarterly Residential Vacancies and Homeownership*, *First Quarter 2022*, Release Number: CB22-58 (Apr. 27, 2022), https://www.census.gov/housing/hvs/files/currenthvspress.pdf.
[15] Jung Choi, *Racial Homeownership Rates Vary across the Most Commonly Cited Datasets. When and Why Should You Use Different Ones?*, Urban Institute (Dec. 8, 2021),

households is shockingly large. It is also extremely persistent. The Black-White homeownership gap is as large today as it was in 1890.[16] The Latino-White homeownership gap also remains sizable at about 25 percentage points.[17] Whatever volume of mortgage lending CRA has spurred, it has not served to remediate the disparities caused by our country's legacy of redlining and credit discrimination, as Congress envisioned that the CRA would do.

We also see racial disparities in access to bank branches. According to research by S&P Global Market Intelligence, banks are closing more branches in Black communities, including high-income communities, than in other areas. Since 2010, the number of branches in majority-Black areas has shrunk by 14.6%, compared to 9.7% elsewhere. The research also found that disparities in access to bank branches was not explained by income: "Wealthy majority-black areas, defined as having a median household income greater than $100,000, were just as likely to lack a branch as low-income areas. Wealthy majority-black areas were actually less likely to have a branch than low-income, non-majority-black areas."[18] The CRA has failed to counter or halt the long trend of financial institutions closing branches in communities of color.

When it comes to small businesses, including those owned by women and people of color, the experience of the Paycheck Protection Program suggests that the CRA has not ensured that these companies have been able to build successful, sustained relationships with mainstream banks. Recent congressional testimony emphasized: "[S]mall businesses owned by people of color that are more likely to employ people of color were locked out of the first round of the Paycheck Protection Program ("PPP"). The design of the program, which relied on banks to originate the loans, unfairly put Black, Latino, AAPI, and Native American business owners at a distinct disadvantage in attempting to access PPP funds when so many were already on precarious financial footing. Banks prioritized customers with whom they had an existing banking relationship. Banks also tended to prioritize larger PPP loans to maximize fees, leaving out the smallest of small businesses from accessing relief."[19] As a result, between the start of the pandemic and April 2020, 41 percent of Black-owned businesses and 32 percent of Latino-owned businesses became inactive, while only 17 percent of White-owned businesses

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https://www.urban.org/urban-wire/racial-homeownership-rates-vary-across-most-commonly-cited-datasets-when-and-why-should-you-use-different-ones .

[16] Wharton Business School, University of Pennsylvania, Comments for the Federal Reserve Bank of Boston 64th Economic Conference, (Oct. 5, 2021), https://www.bostonfed.org/-/media/Documents/events/2021/racial-disparities-in-todays-economy/day-2-presentations/Discussion-Separate-and-Unequal-Race-and-the-Geography-of-the-American-Housing-Market.pdf?la=en

[17] Dana Anderson, *49% of Hispanic Americans Own Their Home, Compared with 74% of White Families - But the Gap Has Narrowed Slightly over the Last Decade*, Redfin News (June 23, 2022), https://www.redfin.com/news/homeownership-rate-hispanic-white-gap-2022/.

[18] Zach Fox, Tariq Zain, Liz Thomas, and Ciaralou Palicpic, *Bank Branch Closures Take Greatest Toll on Majority-Black Areas,* S&P Global Market Intelligence (July 25, 2019), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/bank-branch-closures-take-greatest-toll-on-majority-black-areas-52872925#:~:text=Banks%20are%20closing%20more%20of,S%26P%20Global%20Market%20Intelligence%20finds.

[19] Nikitra Bailey, EVP, National Fair Housing Alliance, *Promoting Economic Prosperity and Fair Growth through Access to Affordable and Stable Housing*, Testimony before the U.S. House Select Committee on Economic Disparity and Fairness in Growth (March 1, 2022), https://docs.house.gov/meetings/EF/EF00/20220301/114459/HHRG-117-EF00-Wstate-BaileyN-20220301.pdf.

ceased to operate.[20] The Center for Responsible Lending estimated that during the first round of the PPP program, when support for small businesses was most critical, only about 5% of Black-owned and 9% of Latinx-owned businesses would be able to access the program.[21] Its projections were borne out. One analysis revealed that a disproportionate majority of PPP loans went to businesses in majority-White communities while a disproportionately small share of loans went to businesses in majority-Black and -Latino neighborhoods.[22]

Focusing CRA on addressing LMI issues has also not made a significant dent in curtailing redlining practices. From large to small lenders, patterns of redlining and disinvestment persist. Current examples abound of lenders engaging in redlining and other practices that deny access to credit for borrowers of color.[23] Moreover, HMDA data reveal that lenders are disproportionately charging higher prices to borrowers of color.[24] Finally, NFHA's analysis of 2019 HMDA data reveals that Black applicants are denied for mortgage loans at almost twice the rate of White applicants. Latinx consumers are denied at almost 1.5 times the rate of White applicants. These trends have persisted over decades. (See chart below.)

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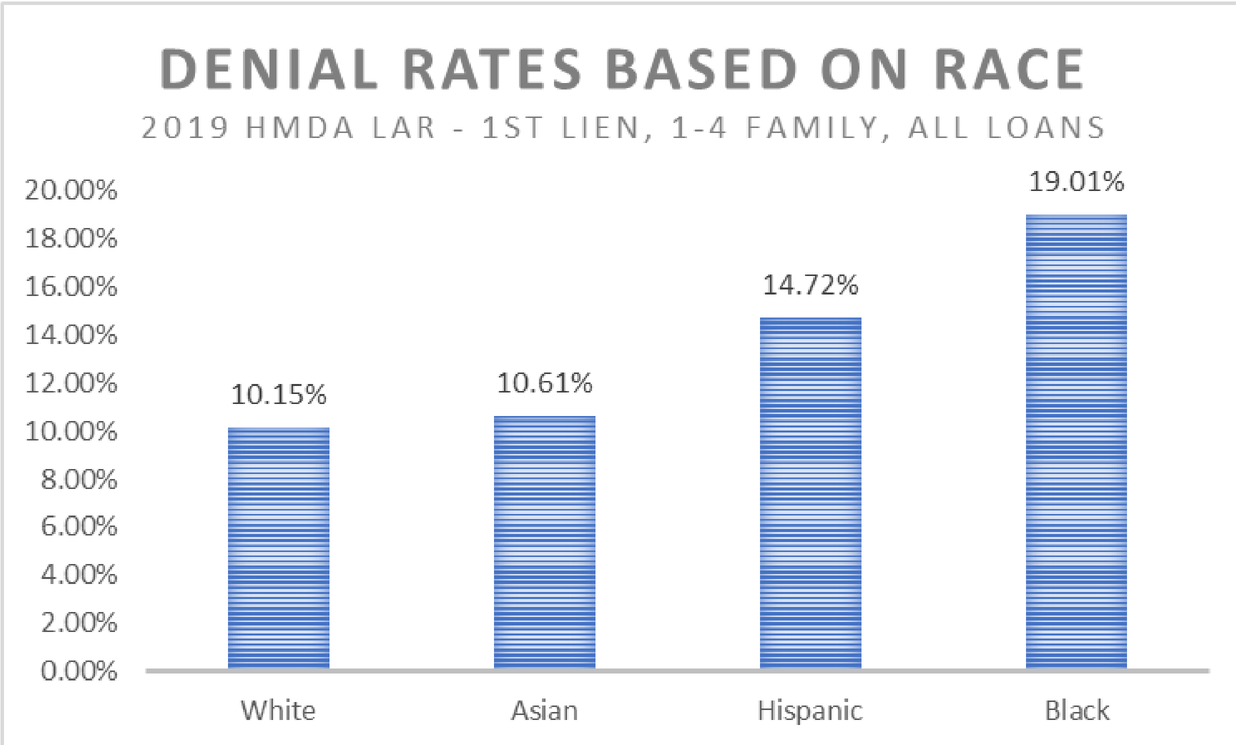
[20] Cameron Costa, *Minority Entrepreneurs at a Tipping Point as Black-Owned Banks Dwindle in the U.S.*, CNBC (Aug. 25, 2020), https://www.cnbc.com/2020/08/25/minority-entrepreneurs-at-tipping-point-as-black-owned-banks-dwindle.html.

[21] Tommy Beer, *Minority-Owned Small Businesses Struggle to Gain Equal Access to PPP Loan Money*, Forbes (May 18, 2020), https://www.forbes.com/sites/tommybeer/2020/05/18/minority-owned-small-businesses-struggle-to-gain-equal-access-to-ppp-loan-money/?sh=1b8e86615de3.

[22] Jason Grotto, Zachary R. Midler, and Cedric Sam, *White America Got a Head Start on Small-Business Virus Relief*, Bloomberg (July 30, 2020), https://www.bloomberg.com/graphics/2020-ppp-racial-disparity/?sref=437r7DCu&utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosmarkets&stream=business.

[23] *See, e.g.*, *Consumer Financial Protection Bureau and United States and v. Trident Mortgage Company LP*, Case No. 2:22-cv-02936 (E.D.Pa. Consent Order filed July 27, 2022) https://www.justice.gov/crt/case-document/file/1522236/download; *United States and Consumer Financial Protection Bureau v. Trustmark National Bank*, Case No. 2:21-cv-02664-SHM-atc (W.D. Tenn. Consent Order approved Oct. 27, 2021), https://www.justice.gov/crt/case-document/file/1445181/download; *Fair Housing Center of Central Indiana, Inc. v. Old National Bank*, Case No. 1:21-cv-02594-JPH-MJD (S.D. Ind. Amended Complaint filed Nov. 16, 2021); *United States v. Cadence Bank, N.A.*, Case No. 1:21-cv-03586-JPB, (N.D. Ga. Consent Order approved Aug. 31, 2021), https://www.justice.gov/crt/case-document/file/1429051/download; *United States v. First Merchants Bank*, Case No. 1:19-cv-02365-JPH-MPB (S.D. Ind. Settlement Agreement approved Aug. 12, 2019), https://www.justice.gov/crt/case-document/file/1174051/download.

[24] Stephen J. Popick, *Did Minority Applicants Experience Worse Lending Outcomes in the Mortgage Market? A Study Using 2020 Expanded HMDA Data* (June 2022), https://www.fdic.gov/analysis/cfr/working-papers/2022/cfr-wp2022-05.pdf?source=govdelivery&utm_medium=email&utm_source=govdelivery.



Source: Home Mortgage Disclosure Act Data via Compliance Tech. NFHA Calculations.

<u>CRA Can Remedy Redlining by Operationalizing Banks' Affirmative Obligation to Serve Their Entire Communities</u>

The CRA underscores banks' continuing and affirmative obligation to help meet the credit needs of their entire communities. This affirmative obligation is a mechanism to ensure that banks do not merely refrain from discrimination, but that they take active steps to provide access to safe, affordable credit throughout their entire communities. The goal is to provide such access for people and communities for whom redlining previously barred it. That includes not only LMI people and neighborhoods, but also people and communities of color. The statute is clear that banks have this affirmative obligation, and that the regulators must assess banks' performance in fulfilling this obligation and take it into account when considering banks' applications to expand. If the regulators do not employ CRA as a tool to ensure that banks are taking affirmative steps to serve the banking needs of all underserved segments of their communities, including communities of color, how will they fulfill their own obligations under CRA?

To correct this deficiency and fulfill Congress' intention of ending and remediating redlining and the segregation and other inequities it engendered, the Agencies must incorporate consideration of banks' performance in serving the credit and other banking needs of people and communities of color – including people with limited English proficiency - throughout the entire regulatory and supervisory framework for CRA. This includes where banks locate their branches, how they delineate their communities, the extent to which both their suite of retail products and their community development investments serve these market segments, their actual lending performance, their record of loan servicing and the results of their fair lending and consumer compliance examinations. The Agencies must adopt an explicit requirement for banks to identify and help meet the needs of communities of color in order to fulfill their ongoing and affirmative obligations under the Act. This must include all communities of color, including but not limited to those that happen to be LMI. Research shows that people in higher income communities of color and people of color with high credit scores may also face significant barriers to obtaining safe, affordable credit.[25] Black homeowners at all income levels pay higher interest rates on their mortgages than do their White counterparts. In fact, high-income Black homeowners pay higher interest rates than low-income White homeowners.[26] Further, even within LMI communities, banks make disproportionately fewer mortgage loans in communities of color and to people of color. This disparity is particularly apparent with respect to lending to Black borrowers and in Black neighborhoods.[27]

<u>Racial Inequities Harm Our Nation and Our Economy</u>

The long-standing and on-going systemic inequity in access to credit for people and communities of color is one of the most pressing challenges currently facing our nation. This inequity imposes significant costs and burdens on our nation and our economy, as Raphael Bostic, President and CEO of the Federal Reserve Bank of Atlanta, noted in a recent blog. Reflecting on the people-led protests in response to ongoing police brutality resulting in the murders of Ms. Breonna Taylor and Mr. George Floyd then taking place throughout the country, he wrote:

> These events are yet another reminder that many of our fellow citizens endure the burden of unjust, exploitative, and abusive treatment by institutions in this country. Over the course of American history, the examples of such institutionalized racism are many, and include slavery, federal law (consider the Three-Fifths Compromise our founding fathers established to determine federal representation), sanctioned intimidation during Reconstruction, Jim Crow laws in southern states, redlining by bankers and brokers, segregation, voter suppression, and racial profiling in policing. These institutions hurt not only the African Americans they've targeted, but the systemic racism they've codified also hurt, and continues to hurt, America and its economy. By limiting economic and educational opportunities for a large number of Americans, institutionalized racism constrains this country's economic potential. The economic contributions of these Americans, in the form of work product and innovation, will be less than they otherwise could have been. Systemic racism is a yoke that drags on the American economy. This

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[25] For example, research by the Center for Responsible Lending in 2011 found that among borrowers with a FICO score of over 660, 21.4 percent of African-American borrowers and 19.3 percent of Latino borrowers received a higher-rate loan, 3.5 and 3.1 times the incidence of white borrowers. *See* Debbie Gruenstein Bocian, Wei Lee, Carolina Reid, and Roberto Quercia, *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures*, Center for Responsible Lending (Nov. 2011), https://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf

[26] Raheem Hanifa, *High-Income Black Homeowners Receive Higher Interest Rates than Low-Income Black Homeowners,* Joint Center for Housing Studies, Harvard University (Feb. 16, 2021), https://www.jchs.harvard.edu/blog/high-income-black-homeowners-receive-higher-interest-rates-low-income-white-homeowners

[27] Laurie Goodman and Ellen Seidman, *Should the Community Reinvestment Act Consider Race?,* Urban Institute (Nov. 30, 2021), https://naahl.org/wp-content/uploads/2021/12/CRA_deck_1123_final_for-NAAHL.pdf.

country has both a moral and economic imperative to end these unjust and destructive practices.[28]

The impact of that yoke of systemic racism is considerable. According to research from Citigroup, "If racial gaps for Blacks had been closed 20 years ago, U.S. GDP could have benefitted by an estimated $16 trillion. If we close gaps today, the equivalent add to the U.S. economy over the next five years could be $5 trillion of additional GDP, or an average add of 0.35 percentage points to U.S. GDP growth per year and 0.09 percentage points to global GDP growth per year." [29]

Concerns About Race-Conscious Targeting Can Be Addressed

Some may argue that the CRA confers federal benefits on banks, and that basing the receipt of those federal benefits, in part, on an assessment of banks' performance in helping to meet the banking needs of the people and communities of color within their service areas may be a form of race-conscious targeting, raising constitutional questions. Without addressing the merit of those arguments, we believe that such concerns can be addressed in a manner that would survive legal scrutiny. For example, the National Community Reinvestment Coalition ("NCRC") and the Relman civil rights law firm have examined this question in detail and have proposed a framework that would enable the regulators to expand their CRA evaluations to consider banks' performance in underserved communities of color in a manner consistent with the approach that courts have found satisfactory in other federal programs.[30] We commend this analysis to the Agencies, and encourage them to adopt its recommendations. We also recommend the Agencies look to examples of inclusion provided in the administration of the Small Business Administration's programs to include opportunities for individuals deemed as socially and economically disadvantaged.[31] We further encourage the Agencies to review the proposal for a First Generation Downpayment Assistance Program developed by the National Fair Housing Alliance and the Center for Responsible Lending. Part 2 of the proposal describes a format for adding a mechanism to enhance targeting by considering the program's impact on people of color. The Program Element to Enhance Targeting sets forth a framework for considering the racial impact of the downpayment assistance program in a manner that comports with legal precedent.[32] This approach can also offer guidance to the Agencies on how to address legal concerns about race-conscious targeting.

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[28] Raphael Bostic, *A Moral and Economic Imperative to End Racism*, Federal Reserve Bank of Atlanta (June 12, 2020), https://www.frbatlanta.org/about/feature/2020/06/12/bostic-a-moral-and-economic-imperative-to-endracism.

[29] Dana M. Peterson and Catherine L. Mann, C*losing the Racial Inequality Gaps: The Economic Cost of Black Inequality in the U.S.*, Citi GPS: Global Perspectives and Solutions (Sept. 2020), https://www.citivelocity.com/citigps/closing-the-racial-inequality-gaps/.

[30] Brad Blower, et. al., A*dding Robust Consideration of Race to Community Reinvestment Act Regulations*, Relman, Colfax PLLC and National Community Reinvestment Coalition (Sept. 16, 2021) https://ncrc.org/adding-robust-consideration-of-race-to-community-reinvestment-act-regulations-an-essential-and-constitutional-proposal/.

[31] 13 C.F.R. § 124.104.

[32] NFHA and Center for Responsible Lending, *First Generation: Criteria for a Targeted Downpayment Assistance Program* (May 21, 2021), https://nationalfairhousing.org/wp-content/uploads/2021/06/crl-nfha-first-generation-jun21.pdf.

With changes to the CRA's implementing regulations to more effectively address banks' unique public responsibilities, including their responsibilities to people and communities of color, the CRA has the potential to be a tool both for redressing past harms and fueling future growth in all communities, to the benefit of our entire nation.

Our Recommendations

The Agencies should incorporate consideration of a bank's record of performance in helping to meet the credit and other banking needs of underserved communities of color into the revised CRA regulations and accompanying examination procedures.

Note: The following sections are organized in the order that the topics are listed in the NPR. For convenience, we have designated the Part of the NPR where the topic is found.

Part III of NPR - Community Development Definitions

2. Consideration of climate- and disaster-related activities is important and should be strengthened.

The Agencies' Proposal

The Agencies propose to replace the current revitalization and stabilization activities component of the community development definitions currently found in §__.12(g) with a new §__.13 that will have six new categories of activities. The Agencies intend for this new category of definitions to provide more clarity on the types of activities that qualify, and to better tailor the types of activities that qualify in different targeted geographies. Each of the categories focuses on place-based activities that benefit residents of targeted geographic areas: (i) Revitalization; (ii) essential community facilities; (iii) essential community infrastructure; (iv) recovery activities in designated disaster areas; (v) disaster preparedness and climate resiliency activities; and (vi) qualifying activities in Native Land Areas.[33]

The six proposed place-based definitions share four common elements.[34] First, each definition has a geographic focus (e.g., low- or moderate-income census tracts) where the activities must occur. Second, each definition has standardized eligibility criteria that require the activity to benefit local residents, including low- or moderate-income residents, of the targeted geographies. Third, each definition has the eligibility requirement that the activity must not displace or exclude low- or moderate-income residents in the targeted geography. Finally, each definition provides that the activity must be conducted in conjunction with a government plan, program, or initiative that includes an explicit focus on benefitting the targeted geography. Together, these four common elements are intended to provide necessary clarity regarding the activities that may qualify for CRA consideration, while maintaining sufficient flexibility. In addition, these four common elements are intended to ensure a strong connection between the activities and community needs.

[33] NPR at 33901.
[34] *Id.*

The Agencies' Questions

Our comment includes information that is responsive to the following questions:

- *Question 18.* Should the Agencies consider any additional criteria to ensure that recovery of disaster areas benefits low- or moderate-income individuals and communities?
- *Question 19.* Does the disaster preparedness and climate resiliency definition appropriately define qualifying activities as those that assist individuals and communities to prepare for, adapt to, and withstand natural disasters, weather-related disasters, or climate-related risks? How should these activities be tailored to directly benefit low- or moderate-income communities and distressed or underserved nonmetropolitan middle-income areas? Are other criteria needed to ensure these activities benefit low- or moderate-income individuals and communities?
- *Question 20.* Should the Agencies include activities that promote energy efficiency as a component of the disaster preparedness and climate resiliency definition? Or should these activities be considered under other definitions, such as affordable housing and community facilities?
- *Question 21.* Should the Agencies include other energy-related activities that are distinct from energy-efficiency improvements in the disaster preparedness and climate resiliency definition? If so, what would this category of activities include and what criteria is needed to ensure a direct benefit to the targeted geographies?
- *Question 22.* Should the Agencies consider utility-scale projects, such as certain solar projects, that would benefit residents in targeted census tracts as part of a disaster preparedness and climate resiliency definition?
- *Question 23.* Should the Agencies include a prong of the disaster preparedness and climate resiliency definition for activities that benefit low- or moderate-income individuals, regardless of whether they reside in one of the targeted geographies? If so, what types of activities should be included under this prong?
- *Question 24.* Should the Agencies qualify activities related to disaster preparedness and climate resiliency in designated disaster areas? If so, are there additional criteria needed to ensure that these activities benefit communities with the fewest resources to address the impacts of future disasters and climate-related risks?

Our Recommendations

NFHA commends the Agencies for incorporating into the definition of community development activities eligible for credit under CRA explicit consideration of disaster recovery, disaster preparedness and climate resiliency activities, and for acknowledging that these activities must benefit targeted communities in order to be considered as part of a bank's CRA performance. However, the proposed rule's focus on disaster and climate-related activities that benefit LMI areas is too narrow, and should be expanded to include communities of color, as well. Additionally, including communities of color will help ensure the Agencies are fulfilling their obligation under the Fair Housing Act's Affirmatively Furthering Fair Housing provision.

There is considerable evidence that, along with LMI communities, people and communities of color are especially vulnerable to disasters and the impacts of climate change, many of which flow directly from policies and practices - past and present - of the federal government, the banking sector and others.[35] They are also least likely to have access to the resources needed to recover from disasters or mitigate the harmful effects of climate change.[36] Race is the most significant predictor of whether a person will live next to hazardous waste or contaminated land, air, or water.[37] And in many communities throughout the nation, people of color are more likely to live in areas with substandard infrastructure that cannot adequately withstand the impacts of disasters and climate-related activity.[38] Research also reveals that Black people are most likely to be impacted by energy insecurity and would most benefit from solutions that promote energy efficiency.[39]

Banks have an important role to play in helping communities prepare for disasters, recover from disasters, and improve their resilience to the harmful impacts of climate change. Only by taking a more expansive approach that incorporates consideration of race can the Agencies fulfill Congress' intention for CRA as a tool to redress the harms of redlining, and ensure that banks are helping to meet the needs of their entire communities. It is imperative that banks support and invest in equitable remediation projects that do not exacerbate segregation or foster unfair disparities after a disaster or major climate event. It is equally important that banks invest in projects that will help ameliorate existing infrastructure, energy, and other inequities so that people and communities of color do not continue to be disproportionately impacted by environmental and climate injustice. Failure to take this approach will perpetuate the inequities caused by redlining and impede the ability of people and communities of color to access the disaster and climate-related resources that banks can provide.

In addition, NFHA recommends that the Agencies expand the list of climate-related activities eligible for consideration under the CRA. The proposed rule includes a helpful, non-exhaustive list of activities that might be eligible for such consideration. That list should be expanded to include such things as community solar and microgrids, operational support for environmental and climate justice organizations, and electrification and water efficiency measures for residential homes, including multifamily properties.

The Agencies can help ensure that banks' disaster- and climate-related efforts address the needs of LMI communities and communities of color by encouraging institutions to engage and build relationships with community-based organizations working on climate and environmental justice. Those organizations have crucial knowledge of local needs related to disasters and climate and can be vital partners in helping banks respond most effectively.

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[35] *See* Rachel Morello-Frosch and Manuel Pastor, James Sadd, Seth Shonkoff. *The Climate Gap: How Climate Change Hurts Americans & How to Close the Gap*, University of Southern California (May 2009), https://dornsife.usc.edu/pere/climategap/; Brad Plumer and Nadja Popovich, *How Decades of Racist Housing Policy Left Neighborhoods Sweltering*, The New York Times (Aug. 24, 2020), https://www.nytimes.com/interactive/2020/08/24/climate/racism-redlining-cities-global-warming.html.
[36] Christopher Flavelle, *Why Does Disaster Aid Often Favor White People?*, The New York Times (Oct. 27, 2021), https://www.nytimes.com/2021/06/07/climate/FEMA-race-climate.html.
[37] Bryce Covert, *Race Best Predicts Whether You Live Near Pollution*, The Nation (Feb. 18, 2016), https://www.thenation.com/article/archive/race-best-predicts-whether-you-live-near-pollution/.
[38] Candice Norwood, *How Infrastructure has Historically Promoted Inequality*, PBS, (Apr. 23, 2021), https://www.pbs.org/newshour/politics/how-infrastructure-has-historically-promoted-inequality.
[39] Jamal Lewis, Diana Hernandez, and Arline Geronimus, *Energy Efficiency as Energy Justice: Addressing Racial Inequities through Investments in People and Places*, Energy Efficiency 13, 419–432 (2020). https://link.springer.com/article/10.1007/s12053-019-09820-z.

When evaluating activities that banks undertake under CRA to address the disaster and climate-related needs of LMI communities and communities of color, the Agencies should also consider activities that banks support that cause disproportionate disaster and/or climate-related harms to those communities, or that contribute to further climate change. An example of this would be activities that exacerbate greenhouse gas emissions whose impact on individuals, businesses and communities undermines their ability to access credit. On this matter, as with other aspects of banks' CRA performance, positive consideration of activities for which banks may claim CRA credit must be balanced with negative consideration of activities that cause harm to underserved communities.

On the retail level, it is also important for the Agencies to ensure that any products offered to address disaster- or climate-related needs are safe and affordable. One product that is offered in some markets is the PACE (Property Assessed Clean Energy) loan, which can be used to finance energy-efficiency measures for individual homes. PACE loans are often sold door-to-door, using high pressure sales tactics, and without providing the homeowner with any assessment of their energy efficiency needs or their eligibility for lower-cost loans or even grants to pay for any energy efficiency upgrades. There are a host of other concerns about the negative impacts of PACE loans, particularly on LMI homeowners.[40] This kind of product may do more harm than good, and where that is the case, should have a negative impact on a bank's CRA rating.

Finally, it is important for banks of all sizes to play an active role in helping to meet the disaster- and climate-related needs of the communities they are chartered to serve. To ensure that they do so, NFHA urges the Agencies not to change the asset size calculations for small and intermediate-size banks. The proposed rule would raise the upper limit for small banks from $346 million to $600 million, raise the threshold for intermediate-sized banks from $346 million to $600 million, and raise the upper limit for those banks from $1.384 billion to $2 billion. These changes would reduce the CRA obligations for 20% of all banks.[41] The harmful impact of these changes would be felt most in rural areas and small metropolitan areas, which rely on smaller institutions to meet their community development financing needs.[42] This includes rural communities dealing with flooding, wildfires and other impacts of disasters and climate change.[43] To avoid these negative impacts, we recommend that the Agencies leave the definitions of small and intermediate-sized banks unchanged.

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[40] National Consumer Law Center, "Residential Property Assessed Clean Energy (PACE) Loans: The Perils of Easy Money for Clean Energy Improvements." September, 2017. https://www.nclc.org/images/pdf/energy_utility_telecom/pace/ib-pace-stories.pdf

[41] Silver, Josh. "Here's Where Changes To CRA Asset Thresholds Will Undermine Community Reinvestment." National Community Reinvestment Coalition. June 30, 2022.

[42] "Data Spotlight: Challenges in Rural Banking Access." Consumer Financial Protection Bureau. April 2022. https://files.consumerfinance.gov/f/documents/cfpb_data-spotlight_challenges-in-rural-banking_2022-04.pdf

[43] "Third National Climate Assessment: Rural Communities." U.S. Global Change Research Program. 2014. https://nca2014.globalchange.gov/highlights/regions/rural-communities

3. **The Agencies should support consideration of activities that support MDIs or WDIs, impose guardrails for institutions with assets over $1 billion, and reward certain activities that help close persistent homeownership and wealth gaps.**

The Agencies' Proposal

Under the CRA, non-minority or non-women-owned financial institutions can receive CRA consideration for capital investment, loan participation, and other ventures in cooperation with MDIs, WDIs, and LICUs, provided that these activities help meet the credit needs of local communities in which such institutions and credit unions are chartered.[44] These activities need not also benefit a bank's assessment areas or the broader statewide or regional area that includes the bank's assessment areas.

The Agencies are seeking ways to strengthen CRA provisions to support MDIs, WDIs, LICUs, and Treasury Department-certified CDFIs. For example, the Agencies propose a definition in §__.13 specific to MDIs, WDIs, LICUs, and Treasury Department-certified CDFIs. Also, investments, loan participations, and other ventures undertaken by any bank, including by MDIs and WDIs, in cooperation with other MDIs, other WDIs, or LICUs, would be considered. Similarly, regarding CDFIs, the Agencies propose that all activities with Treasury Department-certified CDFIs would be eligible CRA activities. The Agencies propose that activities undertaken by any bank in connection with a <u>non</u>-Treasury Department-certified CDFI could also qualify for CRA consideration if the activity separately met the defined eligibility criteria of a different prong of the community development definition. For example, a bank activity with a non-Treasury Department-certified CDFI to finance a rental housing project that serves low- or moderate-income individuals using a state subsidy program would qualify by meeting a prong of the affordable housing definition.

The Agencies' Questions

Our comment includes information that is responsive to the following questions:

- *Question 25.* Should the Agencies also include in the MDI definition insured credit unions considered to be MDIs by the National Credit Union Administration?
- *Question 26.* Should the Agencies consider activities undertaken by an MDI or WDI to promote its own sustainability and profitability? If so, should additional eligibility criteria be considered to ensure investments will more directly benefit LMI and other underserved communities?

Our Recommendations

NFHA supports including in the MDI definition insured credit unions considered to be MDIs by the National Credit Union Administration, and we recommend guardrails for MDIs with assets over $1 billion requiring data transparency and disaggregation on deposit and lending activity to Black, Latino, Asian American and Pacific Islander and Native communities. Generally, MDIs have long histories of meeting the credit needs of underserved communities of color. In many communities of color, MDIs are the only place where consumers of color can access safe and affordable banking services. Most MDIs provide vital deposit and credit access services in communities that large financial institutions avoid. Like the communities they serve, most of

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[44] NPR at 33907.

these institutions themselves have also had to tackle a history of discrimination and lack of investment in the communities in which they operate. Many are also struggling with smaller asset sizes despite large banks being incentivized to make equity-like investment in CDFIs through Treasury's CDFI fund. As of 2017, only two to six percent of CDFI funds have been used to support the activities of MDIs.[45] Some MDIs also face obstacles in their examinations by federal regulators who fail to understand the unique credit needs of the underserved communities they serve, despite most MDIs having strong track records of providing quality credit in communities of color. While CRA grants large financial institutions consideration for CRA activities when they have collaborations with MDIs, there are few examples of these collaborations and a concentration of projects with MDIs with larger asset sizes. Increasing collaborations between large financial institutions and MDIs with assets less than $1 billion should be a priority as these institutions are leaders in providing banking opportunities in underserved communities of color. Further, additional consideration should be given to MDIs who collaborate with large financial institutions in creating Special Purpose Credit Programs.

NFHA supports the Agencies considering activities undertaken by an MDI or WDI to promote its own sustainability and profitability, and advocates that guardrails are put in place for institutions with assets over $1 billion requiring data transparency and disaggregation on deposits and lending to Black, Latino, Asian American and Pacific Islander, and Native communities. For MDIs and WDIs that have assets greater than $1 billion, activities that facilitate gentrification and displacement of residents of color from communities of color should not count. MDIs and WDIs with assets greater than $1 billion must be required to provide community benefits agreements to allow their activities to be taken into consideration. Further, mergers of MDIs and WDIs with assets greater than $1 billion with MDIs and WDIs with less than $1 billion in assets must also be supported by a community benefits agreement to ensure that underserved communities of color continue to have access to the institution's deposit and lending services. Underserved communities need strong community pillars to sustain business development and the jobs they generate. Most MDIs and WDIs provide those strong pillars and actions to sustain themselves and to fill the voids of underserved communities of color being ignored by mainstream financial institutions. However, every effort should be taken to ensure that CDFIs, MDIs and WDIs with assets greater than $1 billion are not absorbing smaller MDIs and WDIs to gain access to their deposits without facilitating safe and responsible credit access in underserved communities of color, especially Black borrowers and neighborhoods.

Additionally, NFHA recommends that mainstream lenders who collaborate with MDIs, WDIs, and minority-led CDFIs with assets less than $1 billion are given additional consideration for receiving an Outstanding rating for targeted CRA activities. Also, additional consideration should be provided for CDFIs with assets greater than $1 billion who collaborate with large banks in creating Special Purpose Credit Programs without credit and underwriting overlays that increase the cost of credit for consumers. MDIs, WDIs, and minority-led CDFIs with assets less than $1 billion have a strong track record of serving the credit needs of Black, Latino, Asian American and Pacific Islander, and Native communities.

While some CDFIs have a strong history of providing credit accessibility in LMI communities, others have failed to well serve communities of color. In some instances, their lending investments have fueled gentrification and displacement in neighborhoods of color pushing out

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[45] Closing the CDFI Asset Gap, Hope Policy Institute, April 21, 2020, http://hopepolicy.org/blog/closing-the-cdfiasset-gap/.

longtime residents. In these neighborhoods, CDFIs provide low levels of mortgage loans to residents of color, particularly Black consumers, while serving younger and White new residents with loans. CDFIs should have a responsibility to provide credit accessibility to LMI borrowers and consumers of color. CRA credit should not be given to banks who partner with CDFIs that exclude lending to borrowers and communities of color or that offer products that are not sustainable. Moreover, the Agencies should exercise extreme care in giving CRA credit to banks that require CDFIs, MDIs, or WDIs to apply credit overlays for underserved borrowers. The Agencies must ensure that CRA consideration is given in instances where credit opportunities facilitate the ability to purchase and sustain mortgages to help close persistent homeownership and wealth gaps.

Part V of NPR - Impact Review of Community Development Activities

4. The Agencies should encourage activities that support affordable housing in high opportunity areas.

The Agencies' Proposal

In § __.15, the Agencies propose several impact review factors for the qualitative evaluation of community development activities under the Community Development Financing Test, the Community Development Financing Test for Wholesale or Limited Purpose Banks, and the Community Development Services Test.[46] Among others, the Agencies propose an impact review factor for activities that support the acquisition, development, construction, preservation, or improvement of affordable housing in high opportunity areas. The Agencies would define high opportunity areas to align with the Federal Housing Finance Agency ("FHFA") definition of High Opportunity Areas, including: (i) Areas designated by HUD as a "Difficult Development Area" (DDA); or (ii) areas designated by a state or local Qualified Allocation Plan as a high opportunity area, and where the poverty rate falls below 10 percent (for metropolitan areas) or 15 percent (for nonmetropolitan areas).

The Agencies' Question

Our comment includes information that is responsive to the following question:

- *Question 37.* For the proposed factor of activities that support affordable housing in *high opportunity areas*, is the proposed approach to use the FHFA definition of *high opportunity areas* appropriate? Are there other options for defining *high opportunity areas*?

Our Recommendations

NFHA supports the proposal to include as an impact review factor for community development activities that support the acquisition, development, construction, preservation, or improvement of affordable housing in *high opportunity areas* using HUD's definition of a difficult development area ("DDA") or areas defined in state QAP (with some income limitations). As the NPR notes, this is the definition that the Federal Housing Finance Agency has adopted in conjunction with

[46] NPR at 33913.

its Duty to Serve ("DTS") rule, and aligning the CRA regulation with the DTS rule will provide some consistency between the primary and secondary mortgage markets.

We also note that this aspect of the DTS rule relates to the extra credit the Enterprises may receive for activities that promote residential economic diversity, a provision that was adopted to expand the Enterprises' activities that affirmatively further fair housing. By including this impact review factor in the CRA regulation, the Agencies would take a modest but important step toward implementing CRA in a manner that affirmatively furthers fair housing. In this regard, it is imperative that the affordable housing that is developed in *high opportunity* areas is realistically accessible to people with low-incomes and underserved groups, like people of color. Affordable housing developments in *high opportunity* areas should not allow prohibitions against people who use housing vouchers. Nor should they promote the use of criteria that would unnecessarily disproportionately exclude protected classes under the Fair Housing Act, including people with disabilities and people of color. Moreover, affordable housing developments in *high opportunity* areas should be built in compliance with the accessibility provisions of the Fair Housing Act, which have been required since 1991. Affordable housing developments in *high opportunity* areas should receive special consideration if they are located near public transportation and the final CRA Rule should strongly encourage this provision. Finally, affordable housing developments in *high opportunity* areas that fulfill the goals and objectives of a jurisdiction's Assessment of Fair Housing or Analysis of Impediments to Fair Housing should also be given special consideration.[47]

We also note that the Agencies should not design the CRA Rule in a way that would diminish support for housing developments in areas that are not designated as *high opportunity* as such areas are typically in dire need of investments. These investments should be coupled with measures that promote revitalization and economic stimulation while simultaneously prohibiting the displacement that often comes with gentrification.

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[47] The federal Fair Housing Act requires all entities that receive federal support for a housing or community development purpose to carry out all of their programs in a manner that affirmatively furthers fair housing. 42 U.S.C. § 3608(d). This includes the Agencies as well as jurisdictions who receive federal funding. HUD requires jurisdictions that receive federal funding to conduct an analysis to identify impediments to fair housing and to develop solutions to overcome those barriers. *See* HUD, *Rule Restoring Affirmatively Furthering Fair Housing Definitions and Certifications*, 86 Fed. Reg. 30779 (June 10, 2021), https://www.federalregister.gov/documents/2021/06/10/2021-12114/restoring-affirmatively-furthering-fair-housing-definitions-and-certifications.

Part VI of NPR - Assessment Areas and Areas for Eligible Community Development Activity

5. The Agencies should use a rebuttable presumption of an illegal discriminatory practice if a bank's facility-based assessment area excludes contiguous neighborhoods of color and should apply the new retail lending assessment area to all banks.

The Agencies' Proposal

The Agencies propose to update the CRA assessment area approach to evaluate performance in "facility-based assessment areas" for all banks, and in "retail lending assessment areas" for large banks.[48]

Facility-based assessment areas. First, in § __.16, the Agencies propose that facility-based assessment areas would remain a cornerstone of the proposed evaluation framework. The Agencies propose to maintain assessment where a bank has its main office and branches, and to expand to include "deposit-taking remote service facilities" rather than the more limited category of "deposit-taking ATMs." The Agencies considered, but are not proposing, that a bank's loan production offices ("LPOs") should automatically constitute a facility-based assessment area.

With respect to the geographic delineation, the Agencies propose that, for large banks, facility-based assessment areas would be required to consist of one or more Metropolitan Statistical Areas ("MSAs") or metropolitan divisions or one or more contiguous counties within an MSA, a metropolitan division, or the nonmetropolitan area of a state. For small and intermediate banks, the Agencies propose continuing to allow a facility-based assessment areas that includes a partial county. The Agencies believe this flexibility would be appropriate because it reflects these banks' lower asset levels and capacities. The Agencies propose retaining the prohibition that assessment areas may not reflect illegal discrimination or arbitrarily exclude low- or moderateincome census tracts.

Retail lending assessment areas. Second, in § __.17, for large banks only, the Agencies propose establishing a new "retail lending assessment area" to provide a means for evaluating lending that occurs outside of the traditional facility-based assessment areas. The Agencies state that designating new retail lending assessment areas would ensure that, regardless of delivery channel, large banks would have evaluations of their retail lending in the local markets where they conduct significant retail lending business. A large bank would only be required to delineate a retail lending assessment area in any MSA or the combined non-MSA areas of a state, respectively, in which it originated in that geographic area, as of December 31 of each of the two preceding calendar years: (i) At least 100 home mortgage loans outside of its facility-based assessment areas; or (ii) at least 250 small business loans outside of its facility-based assessment areas. With respect to geography, large banks would be required to designate retail lending assessment areas that would consist of either: (i) The entirety of a single MSA excluding counties inside their facility-based assessment areas; or (ii) all of the nonmetropolitan counties in a single state, excluding counties inside their facility-based assessment areas, aggregated into a single retail lending assessment area.

[48] NPR at 33916.

The Agencies' Questions

Our comment includes information that is responsive to the following questions:

- *Question 39*. Should both small and intermediate banks continue to have the option of delineating partial counties, or should they be required to delineate whole counties as facility-based assessment areas to increase consistency across banks?
- *Question 43*. If a bank's retail lending assessment area is located in the same MSA (or state non-MSA area) where a smaller facility-based assessment area is located, should the bank be required to expand its facility-based assessment area to the whole MSA (or non-MSA area) or should it have the option to designate the portion of the MSA that excludes the facility-based assessment area as a new retail lending assessment area?
- *Question 45*. The Agencies' proposals for delineating retail lending assessment areas and evaluating remaining outside lending at the institution level for large banks are intended to meet the objectives of reflecting changes in banking over time while retaining a local focus to CRA evaluations. What alternative methods should the Agencies consider for evaluating outside lending that would preserve a bank's obligation to meet the needs of its local communities?
- *Question 46*. The proposed approach for delineating retail lending assessment areas would apply to all large banks with the goal of providing an equitable framework for banks with different business models. Should a large bank with a significant majority of its retail loans inside of its facility-based assessment areas be exempted from delineating retail lending assessment areas? If so, how should an exemption be defined for a large bank that lends primarily inside its facility-based assessment area?

Our Recommendations

Facility-based assessment areas. For banks of all asset sizes, the Agencies should use a rebuttable presumption that a bank's facility-based assessment area reflects illegal discrimination in violation of proposed __.16(c)(1) if the assessment area consists of a partial political subdivision that excludes contiguous neighborhoods of color.

First, industry, advocates, and examiners have long been confused about when an assessment area "reflects illegal discrimination" (currently found at __.41(e)(2)). To remedy this confusion, the Agencies' should use a rebuttable presumption that a bank's facility-based assessment area reflects illegal discrimination in violation of proposed __.16(c)(1) if the assessment area consists of a partial political subdivision that excludes neighborhoods of color that are in contiguous census tracts or counties. The bank would then need to provide a legitimate, non-discriminatory reason as to why it cannot serve the neighborhoods of color. That reason should be documented in the public section of the CRA Performance Evaluation.

This approach would avoid the extensive consumer harm we have seen in numerous redlining cases where the Agencies failed to identify an illegal assessment area. For example, in the BancorpSouth Bank case, the FDIC approved an assessment area that clearly excluded the majority minority census tracts in the Memphis MSA.[49] In that case, the bank's original assessment area excluded 123 of the 126 majority minority census tracts that were in the

[49] *United States of America and Consumer Financial Protection Bureau v. BancorpSouth Bank*, Case No. 1:16cv118-GHD-DAS (N.D. Miss. Complaint filed June 29, 2016), https://www.justice.gov/crt/file/873196/download.

appropriate assessment area (which would have included all of Shelby County), which meant that the bank's assessment area excluded 96% of the majority minority census tracts. While there is no exact percentage threshold to show risk, in this case, the census tract analysis clearly showed high redlining risk. The DOJ and CFPB complaint stated: "The Bank's exclusion of nearly all majority minority neighborhoods from its CRA assessment area reduced credit availability and investment in those neighborhoods and discouraged prospective applicants and lending in those neighborhoods." The Agencies should learn from prior redlining cases and promulgate a rule with a clear bright line and extremely high standards for a bank assessment area that consists of a partial political subdivision that excludes contiguous neighborhoods of color.

Second, the Agencies should extend this rebuttable presumption to banks of all sizes. It seems reasonable to require small and intermediate size banks to provide a legitimate, non-discriminatory reason for why its assessment area consists of a partial political subdivision that excludes contiguous neighborhoods of color. Regardless of asset size, the bank should already have documented that explanation as part of a basic fair lending Compliance Management System.

Retail lending assessment areas. The Agencies should apply the new retail lending assessment area to all banks that meet the origination test, regardless of asset size. To achieve the goal of modernizing the CRA, the Agencies should adopt more realistic thresholds based on loan volume, rather than asset size. Indeed, the proposed regulation imposes a second test based on origination volume (in addition to asset size), which seems to acknowledge that asset size alone is not an accurate measure of the bank's business model and loan activity. Asset size is an outdated threshold generally based on a business model where a bank holds loans in portfolio.[50] The asset size threshold fails to reflect the modern realities where banks sell loans rather than hold them in portfolio, or originate loans through subsidiaries or collaborations, such as with fintech partners. Moreover, a test based on originations (instead of asset size) becomes imperative as the Agencies failed to include LPOs in the facility-based assessment areas. Therefore, the Agencies need a way to account for the common business model of originating loans through non-deposit-taking LPOs, regardless of asset size.

Some may argue that a retail lending assessment area is too burdensome for small and intermediate size banks, but this assessment area would only be required if the bank met the origination test ((i) At least 100 home mortgage loans outside of its facility-based assessment areas; or (ii) at least 250 small business loans outside of its facility-based assessment areas). Thus, the requirement would be more clearly tied to the bank's business model, rather than the more arbitrary threshold of asset size. Moreover, the role and influence of community banks should not be understated for smaller communities, particularly communities of color. As key providers of funding for small business and mortgage credit,[51] community banks are critical resources for the communities in which they operate. Therefore, failing to apply the same

[50] *See, e.g.,* Congressional Research Service, *Over the Line: Asset Thresholds in Bank Regulation*, R46779 (May 3, 2021), https://sgp.fas.org/crs/misc/R46779.pdf ("Another issue with using asset size as a tailoring criterion is that, while correlated with certain bank characteristics, it often does not directly measure the aspect or aspects of a bank's operations that are the basis for providing regulatory relief.").
[51] FDIC, Community Bank Study (Dec. 2020), https://www.fdic.gov/resources/community-banking/report/2020/2020-cbi-study-full.pdf.

assessment area requirements equally to all banks may result in the exclusion of significant financial resources to communities of color.

Part XI of NPR - Retail Services and Products Tests

6. **The Agencies should consider SPCPs as examples of loan products or programs that facilitate mortgage and consumer lending and should remove language suggesting that only SPCPs designed for LMI individuals would qualify for CRA credit.**

The Agencies' Proposal

The Agencies propose a second part of the Retail Services and Products Test that would focus on the availability of credit and deposit products and the extent to which these products are responsive to the needs of LMI individuals, small businesses, and small farms, as applicable.[52] The proposal focuses on evaluating the responsiveness of a bank's retail lending products and programs, rather than whether they are innovative and flexible. The Agencies seek feedback on whether the regulation should list Special Purpose Credit Programs ("SPCPs") as an example of a responsive credit product or program that facilitates mortgage and consumer lending targeted to LMI borrowers.

The Agencies' Question

Our comment includes information that is responsive to the following question:

- *Question 106:* Should special purpose credit programs meeting the credit needs of a bank's assessment areas be included in the regulation as an example of loan product or program that facilitates home mortgage and consumer lending for LMI individuals?

Our Recommendations

In the final regulation, the Agencies should consider SPCPs as examples of loan products or programs that facilitate mortgage and consumer lending and should remove language suggesting that only SPCPs designed for LMI individuals would qualify for CRA credit. This approach is necessary for several reasons. First, in the NPR, the Agencies' language focused on SPCPs that facilitate lending for LMI individuals. This is confusing because there is no need to create an SPCP to facilitate lending for LMI individuals. That is, SPCPs can be thought of as an exception to the ECOA's and Regulation B's prohibition on credit discrimination on a prohibited basis, such as race and national origin.[53] Under the SPCP provision of Regulation B, for-profit institutions may develop tailored programs that meet the special social needs and benefit economically disadvantaged groups, including groups that share a common attribute such as race or national origin.[54] Providing a legal means for banks to offer race-conscious remedies is the main purpose of the SPCP provision of Regulation B.

[52] NPR at 33965.
[53] 12 C.F.R. § 1002.4.
[54] *Id.* at § 1002.8. For an in-depth discussion of how for-profit institutions can offer SPCPs pursuant to Regulation B, *see* NFHA and Mortgage Bankers Association, *SPCP Toolkit for Mortgage Lenders*, https://spcptoolkit.com/.

Second, the CRA requires lenders to meet the needs of their entire delineated communities, which includes communities of color. Phrased another way, banks who are not providing quality, sustainable credit to consumers and communities of color are not meeting the needs of their entire delineated communities/assessment areas. Moreover, the Fair Housing Act, ECOA and CRA are meant to work together to stop lending discrimination, redlining, and the disinvestment of underserved areas, including communities of color. As such, the laws should reinforce one another. In keeping with this principle, the CRA regulations should provide favorable consideration when a bank has established an SPCP that furthers the goals of the CRA, as well as the goals of the Fair Housing Act and the ECOA.

Third, the Agencies issued a statement supporting the use of SPCPs reminding creditors of the ability to develop SPCPs and noting the importance of these programs to meet the credit needs of “specified classes of persons”.[55] The Agencies stated:

> As creditors consider how they may expand access to credit to better address special social needs, the agencies encourage creditors to explore opportunities to develop special purpose credit programs consistent with ECOA and Regulation B requirements as well as applicable safe and sound lending principles.

Allowing banks to receive CRA credit for SPCPs that comport with ECOA and the Fair Housing Act would be in keeping with the Agencies strong support for SPCPs as indicated by the Agencies’ statement.

Finally, the Agencies must adopt this approach to meaningfully modernize the CRA and provide a mechanism to address the large and persistent homeownership and wealth gaps between White borrowers and people and communities of color. At this time, the vast majority of banks receive a “Satisfactory” or “Outstanding” CRA ratings despite the fact that large and persistent homeownership and wealth gaps remain. Indeed, focusing the CRA for decades on LMI individuals and communities has done little to close the gaps. Thus, the Agencies must do more to ensure that the promise of the CRA is fulfilled and that banks are encouraged to use all the tools at their disposal to ensure fair and equitable access to credit, particularly for individuals and communities of color. Regulation B provides a powerful tool to close the gaps by tailoring credit on the basis of race or national origin. The Agencies should do their part to remedy redlining and systemic discrimination by encouraging banks to make full use of race-conscious SPCPs.

[55] *See*, *Interagency Statement on Special Purpose Credit Programs Under the Equal Credit Opportunity Act and Regulation B* (Feb. 22, 2022) https://files.consumerfinance.gov/f/documents/cfpb_spcp_interagency-statement_2022-02.pdf.

Part VI of NPR - Assigned Conclusions and Ratings

7. The Agencies should require that the bank's CRA rating be downgraded to "Needs to Improve" or "Substantial Noncompliance" if the bank has engaged in a pattern or practice of discrimination.

The Agencies' Proposal

Section __.28 currently states that: "The [Agency's] evaluation of a bank's CRA performance is adversely affected by evidence of discriminatory or other illegal credit practices in any geography by the bank or in any assessment area by any affiliate whose loans have been considered as part of the bank's lending performance." The Agencies propose to expand § __.28(d)(1) to include any discriminatory or illegal practice, not just credit practices.[56] In addition, the Agencies propose revising the current CRA regulations to clarify in § __.28(d)(1)(i) that discriminatory or other illegal practices by a bank subsidiary could also result in a downgrade to the bank's CRA rating. The proposal would further state in § __.28(d)(1)(ii) that discriminatory or other illegal practices in any facility-based assessment area, retail lending assessment area, or outside retail lending area by any affiliate whose retail loans are considered as part of the bank's lending performance could adversely affect a bank's CRA performance. The Agencies did pose any questions related to this section.

The Agencies' Question

Our comment includes information that is responsive to Section D regarding "Discriminatory and Other Illegal Practices." The Agencies did not pose any questions for this section.

Our Recommendations

While we applaud the Agencies' proposal to expand "illegal practices" to explicitly include non-credit practices and to clarify the impact of bank subsidiary practices, we think the Agencies missed an opportunity to clarify the impact of the illegal practice on the CRA rating. While the NPR strives for greater transparency and consistency, the Agencies have not addressed this critical question that has long been a source of confusion for banks, advocates, and bank examiners. The Agencies failed to even pose a question about this part of the regulation.

We recommend that the Agencies update the rule to require that the bank's CRA rating be downgraded to "Needs to Improve" or "Substantial Noncompliance" if the Agency has determined that there is reason to believe that the bank engaged in a pattern or practice of discrimination during the CRA evaluation period, regardless of the asset size of the bank or the amount of restitution. Given the legislative history and statutory purposes of the CRA, a pattern or practice violation is simply not compatible with a "Satisfactory" or "Outstanding" rating. Consistent with the intent of the CRA, this approach provides transparency to the public regarding the state of the bank's practices and Compliance Management System ("CMS") as well as provides a red flag to the public and the Agencies if the bank is considering involvement in expansionary activities. Some may argue that the rating should be relative to the bank's asset size or the size of the restitution, but the more relevant issue is whether the Agencies should

[56] NPR at 33989.

impose a consequence to deter bad behavior and whether the Agencies should allow a bank's weak CMS to proliferate through expansionary activities (including being acquired) when that weak CMS resulted in a pattern or practice of consumer harm on a prohibited basis. Anything better than a rating of "Needs to Improve" would undermine the correlating purposes of the CRA, the ECOA, and the Fair Housing Act.

Part XIX - Data Collection, Reporting, and Disclosure

8. To achieve meaningful public insight into the bank's practices, the Agencies should disclose the bank's HMDA data in the format used to analyze fair lending risk factors for redlining, pricing, and underwriting.

The Agencies' Proposal

For large banks, the Agencies propose to disclose in the CRA performance evaluation the distribution of race and ethnicity of the bank's home mortgage loan originations and applications in each of the bank's facility-based assessment areas, and as applicable, in its retail lending assessment areas.[57] The proposed rule reads as follows:

> Section __.42(j) Race and ethnicity disclosure.
> (1) In general. The [Agency] includes in a large bank's CRA performance evaluation the information in paragraph (j)(2) of this section concerning the distribution of a bank's originations and applications of home mortgage loans by race and ethnicity in each of the bank's assessment areas. This information is disclosed for each year of the evaluation period based on data reported under the Home Mortgage Disclosure Act (HMDA).
> (2) Data disclosed in CRA performance evaluations. For each of the bank's facility-based assessment areas, and as applicable, its retail lending assessment areas, the [Agency] discloses the number and percentage of originations and applications of a bank's home mortgage loans by borrower race and ethnicity, and compares such data to the aggregate mortgage lending of all lenders in the assessment area and the demographic data in that assessment area.
> (3) Effect on CRA conclusions and ratings. The disclosures made under paragraphs (j)(1) and (j)(2) of this section do not impact the conclusions or ratings of the bank.

The Agencies' Questions

Our comment includes information that is responsive to the following question:

- *Question 173.* Should the Agencies disclose HMDA data by race and ethnicity in large bank CRA performance evaluations?

Our Recommendations

The Agencies' current proposal falls far short of the Agencies' goals of providing meaningful transparency and confirming that a bank's CRA and fair lending responsibilities are mutually reinforcing.[58] The current proposal would simply reiterate what is already available on the

[57] NPR at 34003.

CFPB's HMDA website and is inexplicably limited to large banks by asset size even though each bank that is a HMDA reporter already maintains these data in the ordinary course of business.

To achieve any meaningful public insight into the bank's practice, the Agencies should disclose each bank's HMDA data in the format used to analyze fair lending risk factors for redlining, pricing, and underwriting. This means that for each bank that is a HMDA reporter, the Agency would disclose an analysis of the HMDA data as follows:

- Redlining risk:[59]
    - CRA assessment area (both the bank's delineated assessment area and any revised assessment area recommended by the regulator):
        - Map of the assessment area and immediate surrounding area, showing political subdivisions and majority minority census tracts
        - The total number of census tracts and the number and percent of majority minority census tracts
    - Branches and loan production offices:
        - Map of the assessment area and immediate surrounding area, the political subdivisions, majority minority census tracts, the main office, branches, and LPOs
        - The total number of branches and LPOs and the number and percent of branches and LPOs in majority minority census tracts
    - HMDA Applications and HMDA Originations (for each):
        - Map of the assessment area and immediate surrounding area, the political subdivisions, majority minority census tracts, and applications/originations
        - The total number of applications/originations and the number and percent of applications/originations in majority minority census tracts
        - The difference between the bank's percentage of applications/originations in majority minority census tracts and the adjusted aggregate of the bank's peers (50% - 200% of the bank's application volume); and whether any disparity is statistically significant
- Pricing risk, for each major loan product and for each race/ethnicity/gender, the results of a regression analysis using the bank's HMDA data (including nonpublic fields), and whether any disparities are statistically significant
- Underwriting risk, for each major loan product and for each race/ethnicity/gender, the results of a regression analysis using the bank's HMDA data (including nonpublic fields), and whether any disparities are statistically significant

If any statistically significant disparities are present, the bank would be allowed to provide an explanation in the CRA Performance Evaluation to explain the disparities.

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[58] Board, FDIC, OCC, *CRA Reform Update: Overview of the Interagency Notice of Proposed Rulemaking* (May 11, 2022), https://bsr.stlouisfed.org/connectingCommunities#104/ask-the-regulators-cra-reform-update-overview-of-the-interagency-cra-notice-of-proposed-rulemaking.

[59] For a summary of the redlining risk factors, *see* National Fair Housing Alliance, Redlining Toolkit (April 2022), https://nationalfairhousing.org/wp-content/uploads/2022/03/NFHA-Redlining-Toolkit-April-2022.pdf.

The Agencies should disclose each bank's HMDA data in this format for the following reasons:

- There is no regulatory burden for the bank because:
  - The Agency - not the bank - would provide the disclosure.
  - The banks should be well aware of the fair lending risk factors; they are not new and have been in place for decades.[60]
  - The bank should be maintaining this analysis in the ordinary course of business as part of a basic fair lending Compliance Management System.
- There is no legal reason to prevent the Agencies from disclosing this information.
- The Agencies should want to disclose this information if they are serious about closing the homeownership and wealth gaps for individuals and communities of color.
- This should not even be an additional burden for the Agency because most Agencies conduct the CRA exam simultaneously with the fair lending component of the consumer compliance exam, so the Agency should already have this information readily available.

Finally, we note that making this information available to the public in the bank's CRA Performance Evaluation is not a substitute for:

- Incorporating into the CRA evaluation explicit consideration of the extent to which banks are serving the credit needs of consumers and communities of color,
- Conducting more rigorous fair lending exams, or
- Downgrading CRA ratings when an Agency has reason to believe that a bank has engaged in a pattern or practice of discrimination.

<u>Part XX - Content and Availability of Public File, Public Notice by Banks, Publication of Planned Examination Schedule, and Public Engagement</u>

9. To provide transparency regarding redlining risk, the public file should include at least five years of assessment area maps that include the majority minority census tracts and the original date of the acquisition or establishment of the branch.

The Agencies' Proposal

<u>Content of public file</u>. Generally, under the current CRA regulations found at §__.43, a bank is required to maintain a public file that includes:

- All written comments received from the public for the current year and each of the two prior calendar years that specifically relate to the bank's performance in helping to meet community credit needs, along with any responses by the bank
- The bank's most recent performance evaluation
- A list of the bank's current branches, their street addresses, and geographies, noting branches that have opened or closed during the evaluation period
- A list of services (including hours of operation, available loan and deposit products, and transaction fees)
- A map of each assessment area showing the boundaries of the area and identifying the geographies contained within the area, either on the map or in a separate list

[60] *See, e.g.,* Interagency Fair Lending Examination Procedures (2009), https://www.ffiec.gov/pdf/fairlend.pdf.

At proposed §__.43(a)(6), the Agencies would require a map of each facility-based assessment area and retail lending assessment area showing the boundaries of the area and identifying the census tracts contained within the area, either on the map or in a separate list.[61]

Location of public file. The CRA regulations currently require the bank to make the public file available for inspection at certain physical locations, and to provide copies of the public file upon request (for a reasonable fee). At proposed §__.43(c)(1), the Agencies would require all information required for the bank's public file to be maintained on the bank's website, if the bank maintains a website. A bank would still be required to provide, upon request, copies of its public file to members of the public, either in paper or in digital form, and may continue to charge a reasonable fee for copying and mailing costs.

The Agencies' Questions

Our comment includes information that is responsive to the following question:
- *Question 175.* Is there additional data the Agencies should provide the public and what would that be?

Our Recommendations

We support the Agencies' proposals with respect to maps and website access. In addition, we recommend the following additional data points be required in the public file:

- Assessment area maps for the past five years showing the applicable dates, the political subdivisions, and the majority-minority census tracts on the map. Because the assessment area can be a key redlining risk factor, banks should be required to publish current and past assessment area maps online on or linked to their websites with plain language in an accessible font size and style. Additionally, color images of assessment area maps—not just a description of the assessment area or list of census tract coverage—should be included in each bank's CRA public file. This should not be a burden as the bank should be maintaining this information as part of a basic fair lending Compliance Management System.
- The original date of the branch (acquisition or de novo). This information would help provide transparency regarding potential redlining risk. A branch may currently be located in a majority minority tract. But if the branch was originally established or acquired in an area that was not in a majority-minority census tract, then the redlining risk is higher.

10. The Agencies should seek public comment and instruct their examiners to reach out to community-based organizations in LMI communities and communities of color who are familiar with the credit needs of their communities.

The Agencies' Proposal

To advance public engagement, the Agencies propose a new §__.46 to establish a way for the public to provide feedback on community credit needs and opportunities in specific geographies, as a complement to, but distinct from, feedback on individual bank performance.

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[61] NPR at 34003.

In addition, such an approach would be a complement to, not a substitute for, examiners seeking feedback on bank performance from members of a bank's community as part of the CRA evaluation.

The Agencies' Questions

Our comment includes information that is responsive to the following questions:

- *Question 174.* Are there other ways the Agencies could encourage public comments related to CRA examinations, including any suggested changes to proposed § __.46?
- *Question 177.* Should the Agencies ask for public comment about community credit needs and opportunities in specific geographies?

Our Recommendations

NFHA recommends that the Agencies instruct their examiners to reach out to community-based organizations in LMI communities and communities of color as a routine part of the CRA examination process, and also provide examiners with guidance about how to identify organizations that may have such information to share. Community-based organizations in LMI communities and communities of color are important sources of relevant information about the credit needs of their communities, and about the record of particular institutions in helping to meet those needs. Groups to be contacted should include local, private, non-profit fair housing groups (such as NFHA member organizations) who interact with a wide range of individuals; affiliates of national civil rights organizations like UnidosUS, National Urban League, NAACP, and members of National CAPACD; housing counseling organizations; community development corporations; community land trusts; land banks; local officials; groups representing various segments of the housing industry; and groups whose deep knowledge of the challenges and opportunities for people of color and members of other protected classes under fair housing laws would provide valuable context and direction for examiners.

We also strongly support the Agencies seeking additional important information by asking for public comment about how banks can meet communities' credit needs and opportunities that may exist in certain geographies.

Thank you for considering our views.

Sincerely,

Americans for Financial Reform Education Fund
Asian American Real Estate Association of America (AREAA)
Center for Community Progress
Grounded Solutions Network
The Leadership Conference on Civil and Human Rights
NAACP Legal Defense and Education Fund, Inc. (LDF)
National Association of Hispanic Real Estate Professionals
National CAPACD
National Consumer Law Center (on behalf of its low-income clients)
National Fair Housing Alliance
National Urban League