April 8, 2020

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Attention: Comment Processing
Office of the Comptroller of the Currency
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Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street NW
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Via Email: cra.reg@occ.treas.gov
comments@fdic.gov

Re: Community Reinvestment Act Regulations
Docket ID OCC-2018-0008
FDIC RIN3064-AF22

To Whom It May Concern:

The Consumer Bankers Association (CBA)[1] is pleased to submit these comments to the Office of the Comptroller of the Currency (OCC) and Federal Deposit Insurance Corporation (FDIC) (together, the "Issuing Agencies") on behalf of its members in response to the Notice of Proposed Rulemaking (NPR) entitled "Community Reinvestment Act Regulations."[2] Buckley LLP[3] helped CBA membership review the NPR and prepared this letter.

CBA supports the goals of the Community Reinvestment Act (CRA) and believes banks have an affirmative obligation to help meet the credit needs of their communities, including low- and moderate-income (LMI) areas, consistent with safe and sound banking. Since CRA was enacted, banks have invested billions of dollars in their communities, demonstrably benefitting them, and our members remain committed to further supporting the communities we serve. At the same time, it has been decades since CRA was meaningfully reformed, and much has changed in

[1] The Consumer Bankers Association is the only national trade association focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.
[2] Community Reinvestment Act Regulations, 85 Fed. Reg. 1,204 (Jan. 9, 2020) (hereinafter, "NPR").
[3] The law firm of Buckley LLP has offices in Washington, D.C., New York, Los Angeles, San Francisco, Chicago, and London, and offers regulatory, compliance, enforcement, litigation, and transactional services to financial services institutions. This letter was principally authored by Warren Traiger and Caroline Eisner, with the assistance of Doris Yuen.

that time. Banking has undergone a radical transformation to keep pace with consumer demands, and banks need a CRA framework which responds to these changes.

CBA believes implementing dramatic changes to CRA will be a worthwhile yet monumental effort for the banking industry. Many of the changes proposed by the Issuing Agencies challenge the existing CRA framework to its core, and banks will need as much time as possible to fully implement these changes while continuing to serve their communities. We urge the Issuing Agencies to provide regulated entities with the time necessary to fully comprehend and implement any changes made to the existing CRA framework through a final rule. Further, we advocate the Issuing Agencies carefully and closely examine stakeholder data and feedback to ensure the new regime allows banks to better serve their communities while providing more objectivity, transparency, and certainty throughout.

Part of banks' commitment to communities includes serving them in their most dire times of need. The unprecedented outbreak of COVID-19 already has greatly affected the communities we serve and will continue to impact communities for years to come. As banks and the Issuing Agencies work to respond to consumer needs during this crisis, we urge the Issuing Agencies to take all the time necessary to fully consider the impacts of this emergency and others, particularly to LMI communities, before moving forward with the rulemaking process.

The banking industry's response to what will likely be overwhelming community need should not be hamstrung by a contemporaneous need to implement the tremendous changes to existing CRA programs proposed in the NPR. In times of national emergency, continuity of regulation is *essential* to ensure a bank's finite resources are directed toward what is most critical, working with impacted customers.

Should the Issuing Agencies nevertheless decide to move forward with the rulemaking process, we once again ask for as much time as possible before the new rule is implemented. For the reasons stated above, it simply is not an appropriate time to implement a new CRA regime which, as discussed throughout, would require considerable time and resources even in the best of circumstances.

Overview

CBA applauds the Issuing Agencies for paving the way to modernize CRA and for encouraging a regulatory framework that facilitates consistency and transparency in CRA performance. The current regime is often applied with great subjectivity and inconsistency between examinations and examination teams. CBA values efforts to address these issues to create a more efficient and objective process for all involved stakeholders. We further appreciate efforts to establish clearer rules of the road by providing banks with presumptive ratings of performance, increasing objectivity using a qualified activities list, and developing incentives for outstanding ratings.

However, CBA has significant concerns about several elements of the framework proposed by the NPR. In an effort to perfect the CRA framework, CBA outlines in this comment letter alternative approaches that better achieve objectivity, consistency, and transparency for all regulated entities.

CBA is especially concerned about the NPR's CRA Evaluation Measure ("Measure"), which quantifies a bank's CRA performance and record of serving communities by dividing the sum of its eligible activities by its deposits. The Measure would change the current CRA performance focus from the number of LMI loans originated by a bank to the aggregate dollar volume of LMI loans outstanding on a bank's balance sheet. As explained below, this change would impose substantial regulatory burdens, requiring the development of significant new systems to capture CRA-relevant data on outstanding loans. Further, a balance sheet-based metric would fail to provide sufficient consideration for lending activities like LMI mortgage and small business loan programs, which are crucial to many communities, but do not result in the large dollar volumes favored under the Measure.

This concern is exacerbated by another fundamental change from current performance standards proposed by the NPR—the now mandatory inclusion of consumer lending as part of a bank's CRA evaluation. If implemented, the mandatory inclusion of consumer lending would constitute a *significant* expansion of a bank's affirmative CRA obligations and further add to the regulatory burdens imposed by the Measure.

CBA respectfully submits these increased regulatory burdens are inconsistent with the policy of the Treasury Department "to develop regulations that maximize aggregate net benefits to society while minimizing the economic and paperwork burdens imposed on persons and businesses subject to those regulations."[4] In fact, the burdens in the NPR run counter to the Department's statement that the OCC planned to "revise the Community Reinvestment Act (CRA) regulation to bring clarity, transparency, flexibility, and less burden for regulated financial institutions and consumers while promoting investment in a bank's entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of the bank."[5]

Our concerns about the Measure extend to how deposits are calculated in the denominator. CBA agrees with the Issuing Agencies that brokered deposits should be excluded from the calculation and strongly feels metrics for performance evaluations should exclude corporate deposits from denominators as well. Corporate deposits, often held at a bank's headquarters, are not necessarily related to residents or businesses within a particular geography and so should not be tied to a bank's CRA obligations in a particular geography. Instead, the denominator should represent a bank's non-corporate, non-brokered, domestic retail deposits.

CBA also suggests the Issuing Agencies reconsider the notion of deposit-based assessment areas. While we appreciate the Issuing Agencies acknowledgment of online and mobile banking channels, creating this new category of assessment areas would likely inflame rather than reduce "hot spots" by adding banks with CRA responsibilities to highly populated areas already served by numerous banks with existing facility-based assessment areas. Further, implementing deposit-based assessment areas would fail to reduce the number of CRA deserts, because rural areas, distressed communities, and Indian country are unlikely to be sources of the amount of deposits necessary to be deemed a deposit-based assessment area under the proposal.

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[4] U.S. Dep't of the Treasury, Statement of Regulatory Priorities (Oct. 2019), available at https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201910/Statement_1500_TREAS.pdf (emphasis added).
[5] *Id*. (emphasis added).

To address these concerns, CBA proposes a Reinvestment Redistribution, described more fully below, which would deem Internet deposits as sourced from the broad U.S. "cyber-community" rather than from any particular geography. The Reinvestment Redistribution would also permit CRA obligations based on Internet deposits to be fulfilled with qualifying activities conducted beyond a bank's facility-based assessment areas and provide a weighted incentive for CRA qualifying activities conducted in banking deserts. We also provide alternative approaches which expand the applicable geographic boundaries to better address hot spots and rural area CRA activity.

The Reinvestment Redistribution and alternative approaches proposed by CBA would address CBA's primary areas of concern by retaining an origination-based approach, preserving *optional* consumer loan reporting, and excluding corporate deposits from denominators along with brokered deposits. Further, CBA feels the Reinvestment Redistribution would retain the important strides toward CRA modernization contained in the NPR, such as rating transparency and consistency, metrics with a presumptive rating, a list of qualifying activities, incentive for outstanding rating, clear market and demographic benchmarks, and a multiplier to incentivize certain activities.

Finally, CBA believes the Issuing Agencies should pause to set presumptive rating thresholds until *after* processing data received from banks that is specific to the data required under the NPR. Proper rating thresholds are critical to ensuring the NPR has no unintended or unanticipated effects. Particularly considering the expected but unknowable scale of the impact of COVID-19 on the economy, CBA believes the assumptions underlying the thresholds should be rigorously tested and shared with banks prior to implementation. CBA stresses the rating thresholds should be durable to ensure banks can appropriately plan their CRA activities without needing regular updates. To these ends, CBA suggests the Issuing Agencies reassess the NPR's rating thresholds after collecting two years of bank data, and notes this would also allow market data to be distributed to banks prior to the application of any market-based performance benchmarks.

I. <u>The OCC, FDIC and Federal Reserve Should Issue a Uniform CRA Rule</u>

CBA applauds the Issuing Agencies for working to reform a decades-old CRA regime. CRA is demonstrably vital to communities across the country, yet has not been properly updated in decades, leaving a regime which often fails to consider the realities of banking today.

CBA appreciates the work done by the Issuing Agencies to release the NPR yet is disappointed the Federal Reserve was absent from this proposal. To facilitate a more comprehensive CRA regime for all, we respectfully urge the OCC, FDIC, and Federal Reserve to continue to work together to promulgate substantially identical rules to modernize CRA and not implement fragmented rules that would make a bank's CRA responsibilities dependent on its charter. The three prudential regulators have always worked in tandem on CRA regulation, beginning with the initial rulemaking process in 1978, continuing with the last significant revisions of the rules in the mid-1990s, and with other regulatory amendments since.

In fact, in 2005 the OCC, FDIC and Federal Reserve joined to implicitly criticize the now defunct Office of Thrift Supervision for unilaterally implementing changes to its CRA rules:

> The [OCC, FDIC and Federal Reserve] continue to believe that it is both worthwhile and possible to improve the CRA rules in ways that reduce unnecessary burden while at the same time maintaining and improving the effective implementation of the CRA. **Moreover, we believe that it is important to take steps at this time to develop and propose rules to achieve these goals, and to work toward achieving standards that ultimately can apply on a uniform basis to all banks subject to the CRA.**[6]

Good reasons remain for maintaining consistent CRA enforcement standards among the bank regulatory agencies. CRA places the same responsibility on each prudential regulator "to use its authority when examining financial institutions, to encourage [banks] to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions."[7] Inconsistent regulatory standards would undermine this uniform responsibility and, according to comments made by then Comptroller of the Currency Robert Bloom during the 1978 rulemaking process, increase the possibility that banks might convert their charters to the regulator perceived as having a more permissive CRA policy.[8]

It is true "there are many examples where agencies act independently based on the needs of the institutions they oversee and the communities served by those institutions."[9] For example, numerous agencies are responsible for enforcing the Home Mortgage Disclosure Act (HMDA), Fair Housing Act, and Equal Credit Opportunity Act. However, unlike the CRA, those laws assign rulemaking responsibility to a single agency, resulting in one set of rules and effectively limiting the discretion available to other regulators. CBA believes Congress' directive in CRA that each prudential regulator issue its own rules is unique in banking law. To maintain a level CRA playing field and facilitate accurate comparisons in bank CRA performance, the uninterrupted history of the OCC, FDIC, and Federal Reserve acting in tandem to issue uniform rules, interpretations, and guidelines must continue.

II. The NPR Takes Important Strides Toward CRA Modernization

Notwithstanding its concerns, CBA applauds the efforts of the Issuing Agencies to pave the way for modernizing CRA for the 21st Century by issuing the NPR. As noted above, the last set of significant revisions to the CRA regulations occurred 25 years ago, and banking has changed considerably since then. Indeed, the banking regulators initiated efforts to modernize the law in 2010, when they issued a series of topics and questions "on modernizing the regulations that

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[6] Community Reinvestment Act Regulations, 70 Fed. Reg. 12,148, 12,150 (Mar. 11, 2005) (emphasis added).

[7] 12 U.S.C. § 2901(b).

[8] R. Brandel & M. Large, *A Compliance Guide for the Community Reinvestment Act: Background and Implications*, at 23 (Consumer Banker's Ass'n 1978) (citing American Banker, Aug. 14, 1978, at 40 col. 2) ("[A]ny agency taking a significantly stronger approach to CRA issues in handling applications for structure changes, would run a serious risk of losing banks through conversions. And of course, bank regulators, just as Mr. Dooley's Supreme Court, 'follow the election returns.'").

[9] *The Community Reinvestment Act: Is the OCC Undermining the Law's Purpose and Intent?: Hearing Before the U.S. H. Comm. On Financial Services*, 116th Cong. 10 (2020) (statement of Joseph M. Otting, Comptroller of the Currency).

implement the CRA" to be addressed at four public hearings.[10] Although those hearings were held, no true modernization ensued.

The Department of the Treasury resurrected the modernization effort in 2018 by issuing its own set of recommendations,[11] and the OCC manifested these ideas and more with its 2018 Advanced Notice of Proposed Rulemaking (ANPR).[12] Now, based on the approximately 1,500 comments received in response to the ANPR and the many discussions with CRA stakeholders since the November 2018 close of the ANPR comment period, the Issuing Agencies have proposed a rule to modernize CRA that includes many components CBA strongly supports.

A. Increased Rating Transparency and Consistency

CBA believes the NPR would provide a significant amount of transparency to the evaluation process. Clarity in what counts, where it counts, and how it counts all contribute to creating a new regulatory regime that can be applied consistently to all banks and will create greater objectivity throughout the entire CRA process. To that end, the NPR seeks to standardize performance evaluations to lessen the discrepancies between examinations. In so doing, the NPR seeks to provide consistency in ratings among OCC- and FDIC-supervised banks.

The NPR's approach also alleviates the existing problem wherein a bank cannot be certain whether it has achieved a specific CRA rating until its evaluation period is over. Instead, with additional clarity, banks would know what level of activities they need to achieve at the beginning of the evaluation period and could track performance on an ongoing basis.

B. Use of Metrics with Presumptive Rating

CBA appreciates the Issuing Agencies' efforts to establish a consistent set of metrics to examine a bank's CRA activity. The addition of appropriate metrics would establish clear baselines for objective performance evaluation and limit the use of subjective determinations regarding appropriate levels of consideration for various types of activities. CBA appreciates the greater transparency these efforts will afford CRA. While CBA asserts below the Issuing Agencies should refine the NPR's metrics, CBA agrees having metrics on which to base evaluation is essential to the goals of objectivity, transparency, and consistency.

C. List of Qualifying Activities

CBA members support the NPR's goal of clarifying what CRA activity should receive consideration during an evaluation period. The contemplated illustrative list, to be updated in a regular fashion, would provide clarity to banks, and encourage them to pursue opportunities that

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[10] *See* Joint Press Release, Federal Reserve Board, FDIC, OCC, OTS, "Agencies Announce Public Hearings on Community Reinvestment Act Regulations" (June 17, 2010), available at https://www.federalreserve.gov/newsevents/pressreleases/bcreg20100617b.htm (announcing four hearings to be held in July and August 2010, and encouraging "the public to provide oral or written testimony on potential changes to the CRA regulations"). *See also* Community Reinvestment Act Regulation Hearings, 75 Fed. Reg. 35,686 (June 23, 2010).

[11] U.S. Dep't of the Treasury, Press Release, "Treasury Releases Community Reinvestment Act Modernization Recommendations" (Apr. 3, 2018), available at https://home.treasury.gov/news/press-releases/sm0336.

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

may otherwise not have been pursued due to uncertainty about CRA consideration. Additionally, the list will provide consistency and objectivity across bank examinations, ensuring all banks receive CRA consideration in the same way for the same activities.

CBA also generally supports the NPR's process whereby a bank may solicit regulatory feedback regarding CRA consideration before engaging in an activity. The NPR recognizes because some activities may be particularly innovative, additional certainty may be required by a bank to undertake them. Establishing a process for banks to obtain regulatory approval before moving forward will facilitate more activities, benefitting communities across the country. As discussed further below, CBA has suggestions to enhance the proposed process.

D. Incentive for Outstanding Rating

CBA welcomes the NPR's incentive for banks to obtain an outstanding CRA rating and to do even more for their communities. Under the current system, there is too little regulatory incentive for a bank to strive for an outstanding rating, a rating which indicates an extraordinary level of commitment to the community and requires a significant amount of bank resources. This level of commitment should be incentivized. The NPR recognizes this principle and rewards a bank that achieves an outstanding rating with a longer review period—an additional two years—before its next CRA examination.

E. Clear Market and Demographic Benchmarks for Distribution Tests

CBA recognizes the NPR would implement a more transparent evaluation of a bank's CRA performance by measuring it against assessment area demographics and the performance of other local banks. Current CRA assessments often are done opaquely, using demographic and market benchmarks that are applied to the bank at the end of the evaluation period. In contrast, the NPR contemplates a system wherein the bank will be made aware of the demographic and market benchmarks at the beginning of each year, and thus would be able to monitor performance on an ongoing basis.

F. Multiplier to Incentivize Certain Activities

The NPR recognizes not all activities benefit a community equally by providing additional dollar consideration for certain community development (CD) activities in the quantitative evaluation of a bank's performance. CBA endorses the use of multipliers and presents additional ideas below to refine their application.

G. Retaining Consideration for Performance Context

CBA supports the NPR's goal of standardized, objective evaluations that also retain an element of subjectivity by allowing an examiner to consider a bank's performance context. CBA endorses the NPR's approach providing objectivity with room for adjustment warranted by market and bank-specific considerations as raised by a bank in its performance context.

III. Principal Concerns about the NPR's Approach

While CBA members sincerely appreciate the Issuing Agencies' efforts to modernize and provide objective measurements of CRA performance, there is nevertheless significant concern regarding how the proposed NPR metrics would impact a bank's CRA performance and its rating.

A. Lack of Data for Metric Calculation Outcome

Put simply, there is insufficient relevant data available for banks to fully or even mostly assess the precise impact of the NPR on their CRA programs. As more fully described in the section on data collection below, the balance sheet-based approach of the NPR's main metric would require assessment area and bank-wide monthly collection of average outstanding amounts on a bank's balance sheet and mandate geocoding of depositor addresses, neither of which is currently done. Additionally, the market comparator metrics that are the basis for the assessment area geographic and borrower distribution tests are not yet available and would not be available for the first year of implementation.

Indeed, the Issuing Agencies appear to agree there is not yet sufficient data on which to assess the impact of the NPR, particularly the proposed 11%/6%/3% rating thresholds. The NPR concedes "[s]ome expected effects of the proposed rule are difficult to assess or accurately quantify with currently available information"[13] and "[i]t is difficult to accurately quantify [the impact of deposit-based assessment areas] with the information currently available to the FDIC."[14] To this end, the day after publication of the NPR, the OCC published a request for public input seeking information (RFI) from all banks "to supplement currently-available data and to inform potential revisions to modernize and strengthen the CRA regulatory framework."[15]

The NPR indicates its empirical benchmarks and thresholds are based on currently available historical data, such as HMDA reporting, Call Report data, and credit bureau information on the outstanding balances of consumer loans, while acknowledging "these data sources have some limitations."[16] CBA respectfully submits such historical data cannot provide a reliable assessment of how banks would perform under the metrics proposed in the NPR. The vast majority of our members were unable to apply the proposed metrics to their current portfolios, and thus expressed concern with the assumptions needed to try to understand the potential impact of the NPR on their institution. Moreover, the NPR's and RFI's requests for comment and data overlapped with the data collection and scrubbing efforts required to accurately file HMDA and CRA data on March 2, 2020, further complicating efforts to assess the NPR's impact. Adding to the uncertainty, impacts of the recent COVID-19 pandemic and possible recession may have unintended impacts on these thresholds, as deposits often will greatly rise while lending activity is depressed.

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[13] NPR, 85 Fed. Reg. at 1,236.
[14] *Id.* at 1,237.
[15] OCC, OCC Bull. 2020-4, "Community Reinvestment Act: Request for Public Input" (Jan. 10, 2020), available at https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-4.html; Community Reinvestment Act Regulations, Request for Public Input, 85 Fed. Reg. 1,285 (Jan. 10, 2020).
[16] NPR, 85 Fed. Reg. at 1,221.

Accordingly, CBA submits the assumptions underlying the proposed rating thresholds should be further tested prior to their use in examinations. CBA suggests the Issuing Agencies reset thresholds after collecting two years of representative bank data in the course of implementation. CBA further urges the Issuing Agencies to institute durable rating thresholds, allowing banks to plan on how best to serve community credit needs.

B. Balance Sheet-Based Metrics Do Not Properly Assess CRA Activity

CBA believes the quantification of qualifying activities for retail lending should continue to be measured based on originations and purchases rather than on a balance sheet basis. Reporting retail activity on a balance sheet basis would impose substantial new regulatory burdens on banks, requiring the development of new systems to capture CRA-relevant data on outstanding loans. Moreover, because some of the required information may not have been historically gathered for retail loans, or may have been gathered at too remote a time to be relevant (such as addresses or income information), the retroactive application of measuring a bank's current portfolio is impossible.

In addition to significantly increasing a bank's regulatory burden under CRA, balance sheet-based reporting would fail to provide sufficient consideration for lending activities like LMI mortgages and small business loan programs, which are very important to communities but do not result in the large dollar volumes favored under the metrics set forth in the NPR. Balance sheet-based reporting would therefore be a regulatory disincentive to engage in these programs. Assessing a bank's retail lending on a dollar basis also potentially risks skewing CRA evaluation along geographic lines, in that it could favor banks located in high cost areas that make larger dollar loans, though not necessarily more loans than a bank in a lower cost area.

As a result, CBA strongly recommends qualified retail lending be reported and evaluated on a unit basis, maintaining the incentive to originate or purchase LMI mortgages and small business loans without imposing substantial new operating costs on banks. CBA notes the NPR's proposed distribution tests appear to evaluate only loan "originations," which is a significant departure from the current CRA Lending tests that explicitly consider both "originations and purchases of loans."[17] Often, many retail loans, such as small business, mortgage, and various credit card products span multiple examination periods. These loans, with impact frequently beyond a single individual or household, often require extensive time and resources, specialized underwriting and processing, and multiple funding sources. In order to encourage banks to *originate* these loans on a consistent basis and across a wide array of assessment areas, it is crucial there is a market to sell these loans to other banks with CRA responsibilities and that banks continue to have "purchased" as well as "originated" loans evaluated in all retail lending distribution tests.

CBA notes the balance sheet approach would still be manageable for CD loans and investments. Such loans and investments often span evaluation periods and using a balance sheet approach would ensure of CRA consideration for prior period investments. Thus, the only activity from a prior period that would receive CRA consideration would be CD loans and investments.

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[17] 12 CFR 25.22(a)(2) and 12 CFR 345.22(a)(2)

C. Mandatory Reporting and Evaluation of Consumer Loans Will Greatly Increase Risk at CRA-Regulated Entities Without Benefitting Communities

CBA urges the reporting and evaluation of consumer loans continue to be principally at the bank's option for three reasons: First, as a policy matter, the mandatory inclusion of consumer loans in a bank's CRA evaluation constitutes a *significant* expansion of a bank's affirmative CRA obligations, and there is no evidence or research we are aware of to indicate banks are not making enough consumer loans to LMI people or in LMI areas. It also would pull into CRA categories of loans that are wholly unconnected to neighborhood development or LMI community credit needs, such as recreational vehicle loans.

Second, subjecting banks to consumer data collection requirements will build an incomplete database of consumer lending information ripe for exploitation by potential plaintiffs. All data would be out of context of the full consumer loan market, which is increasingly crowded with nonbank lenders.[18] This could disproportionately expose banks to claims that could not be substantiated against nonbank lenders, resulting in a punitive measure against financial institutions with CRA responsibilities.

Third, as noted above in our concerns about balance sheet-based metrics, banks may not have historic data from which to assess whether existing loan recipients qualify as LMI individuals, or whether they would have done so at the time the loan was extended. Income is not required for all extensions of credit, and the data that is available may be outdated and impossible to verify from a data integrity perspective. Accordingly, banks would not be able to assess their current portfolios in a manner that would comply with the NPR's requirements.

D. Deposit-Based Assessment Areas do not Serve the Goals of CRA Modernization

CBA applauds the Issuing Agencies for working to recognize the transformative nature of banking, and consumers' increased use of online and mobile banking channels. Further, we strongly endorse the public policy goals of the NPR that CRA modernization should "reduce the number of areas where there are more banks that want to engage in CD activities than there is need for those activities (known as CD hot spots) and areas where there is a great need for CD activities but few banks that engage in those activities (known as CD deserts)."[19] Unfortunately, requiring banks to designate assessment areas based solely on where they source deposits would undermine both goals, while also imposing a full slate of CRA obligations on banks to serve areas where they have no real presence.

Deposits sourced through the Internet largely come from population centers, *e.g.*, metropolitan New York City, Los Angeles, Dallas, Chicago, and Houston, the same areas traditionally known as hot spots. Mandating the deposit-based assessment areas as outlined in the NPR will result in more banks having CRA responsibilities in the same highly populated areas which have facility-based banks competing for safe and sound CRA loans and investments. As such, deposit-based assessment areas will inflame, not reduce, hot spots. Further, CRA deserts

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[18] FDIC, *Bank and Nonbank Lending over the Past 70 Years*, FDIC Q. (Vol. 13, No. 4), available at https://www.fdic.gov/bank/analytical/quarterly/2019-vol13-4/fdic-v13n4-3q2019-article1.pdf.
[19] NPR, 85 Fed. Reg. at 1,208.

such as rural areas, distressed communities, and Indian country are not typically sources of the large volume of deposits necessary to be deemed a deposit-based assessment area under the NPR. As such, the new framework outlined in the proposal would further exacerbate hot spots, while leaving little room for more CRA activity in relative deserts.

Requiring a bank to lend and invest to reach fixed dollar thresholds in areas where it has no actual presence may promote unsound practices, running counter to CRA's mandate that regulators encourage activities consistent with safety and soundness.[20] Instead, establishing a system that promotes flexibility in the geographic areas where institutions can conduct CRA activity will serve all communities with CRA need, while ensuring banks moving to more digital means are able to properly invest in communities across the country.

To provide this flexibility, regardless of bank model, CBA suggests Internet-based deposits be viewed as sourced from the U.S. "cyber-community" rather than from traditional geographic areas, and banks with CRA obligations based on deposits from outside their facility-based assessment areas be allowed to fulfill those obligations through qualifying activities *anywhere*. This notion of "Reinvestment Redistribution" is consistent with the original and enduring basis of CRA that funds derived from a broader community, here the U.S. cyber-community, must be employed in LMI areas that are part of that community, even if LMI areas did not contribute a large portion of the community's deposits.

If, however, the Issuing Agencies proceed with the deposit-based assessment area framework, we feel it is still in need of adjustment to help alleviate hot spots and encourage activity in deserts. The proposal's requirement that banks delineating deposit-based assessment areas must identify the smallest geography where they receive 5 percent or more of their retail domestic deposits is a principal driver of many of the issues raised above. If instead, those banks were permitted to go to a broader geography, such as the entire state or multi-state area, they would have more flexibility to conduct CRA activity in the communities that most need it. Further, allowing for this flexibility would likely ensure a greater percentage of overall deposits are captured and accounted for under the new regime.

Further, if the Issuing Agencies proceed with deposit-based assessment areas, we encourage a longer phase-in period for compliance with the new framework to recognize the additional time and resources institutions will need to properly adjust their CRA portfolios to comply. We also note the Issuing Agencies should thoroughly examine the 50 percent threshold that triggers establishment of deposit-based assessment areas, as well as the 5 percent thresholds for individual assessment areas.

We also encourage the Issuing Agencies to retain the wholesale and limited purpose designations. The CD test contained within was designed to account for institutions that draw resources from beyond their physical communities.[21]

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[20] 12 U.S.C. § 2901(b).
[21] Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156, 22,160 (May 4, 1995).

CBA believes many of the issues the Issuing Agencies seek to address through the development of deposit-based assessment areas, and other provisions of the NPR can be best achieved by incorporating the Reinvestment Redistribution we detail below.

IV. <u>Reinvestment Redistribution</u>

Below, we outline a refined metric-based process that will direct more activity to deserts, not inflame hot spots, and reduce the risk of unsound banking practices. It also addresses the key concerns listed above about the NPR's increased regulatory burden, including the use of balance sheet-based metrics and mandatory inclusion of consumer loans.

A. Facility-Based Assessment Area Metrics

The Reinvestment Redistribution would maintain existing facility-based assessment areas only and apply two metrics to determine a rating for each assessment area. The first metric, applicable to all retail banks, would measure assessment area qualified retail lending on a unit basis, maintaining the incentive to originate or purchase LMI mortgages and small business loans. Each bank's performance would still be compared and need to exceed certain thresholds of market lending activity or loan demand data based on demographics, to be provided by the regulator. Inclusion of consumer lending would be at a bank's option, by specific category of consumer lending.

The metric would also adopt a slightly modified version of the NPR's calculation that quantifies a bank's LMI branch distribution by dividing the number of bank LMI branches *and branches that serve LMI communities* by the total number of assessment area branches multiplied by 1 percent. CBA agrees with the Issuing Agencies that valuing branch distribution at up to 1 percentage point of the metric "accounts for the significance of branches to these areas while placing primary emphasis on the qualifying activities that banks conduct in their communities."[22] CBA further believes, as with current examination protocol,[23] it is appropriate to include branches that serve LMI neighborhoods, such as those in an adjacent or nearby census tract, in the denominator.

The second metric, also applicable to large banks as well as wholesale and limited purpose banks, would measure the dollar volume of assessment area CD activity. The metric would aggregate the amounts of outstanding CD loan commitments, investments, and quantifiable services during the evaluation period, and compare that sum, as a percentage of non-corporate, non-brokered domestic retail deposits, to market activity to better qualify CRA performance.

Instead of attempting to monetize all CD service activities, our alternative proposal would largely defer to performance context and examiner discretion to qualitatively measure certain CD

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[22] NPR, 85 Fed. Reg. at 1,221.

[23] Community Reinvestment Act Interagency Questions and Answers Regarding Community Reinvestment, 81 Fed. Reg. 48,506, 48,542 (July 25, 2016) (hereinafter "Interagency Q&As") ("§___.24(d)—1 . . . The principal focus is on an institution's current distribution of branches and its record of opening and closing branches, particularly branches located in low- or moderate-income geographies *or primarily serving low- or moderate-income individuals*." (emphasis added)). We note that there is currently ambiguity about "primarily serving" LMI individuals and in defining what a branch in a nearby LMI census tract means, but rather than eliminate the consideration, we propose that the Issuing Agencies clarify how they apply these considerations currently.

service activities that do not readily translate into dollars. Banks should not be dissuaded from engaging in such potentially valuable activities because they might not add up to a large dollar volume, or because there would be an attendant reporting burden to quantify them at all.

B. Bank-Wide Metrics

Each bank, including a nontraditional bank that sourced Internet deposits, would then receive an overall presumptive rating. Similar to the NPR, a bank with a branch network would need to receive at least a satisfactory rating "in a significant portion of its assessment areas,"[24] while a nontraditional bank would need at least a satisfactory grade in its facility-based assessment area before having its CRA activities measured at the total bank level.

A bank's overall CRA performance would then be presumptively rated based on the results of essentially the same two assessment area metrics applied bank-wide: (1) for retail banks, a metric measuring units of qualified loans as a proportion of market lending activity amalgamated by the regulator; and (2) for large, nontraditional, wholesale and limited purpose banks, a metric measuring total qualified CD commitments as a proportion of total non-corporate, non-brokered domestic retail deposits. Any bank needing additional qualifying activities to reach an overall satisfactory or outstanding rating threshold under these bank-wide metrics could receive CRA consideration for qualifying activities engaged in anywhere, including outside its facility-based assessment areas.

We refer to this approach as "Reinvestment Redistribution," because it would encourage CRA activity in deserts (*i.e.*, distressed areas, underserved areas, disaster areas consistent with a disaster recovery plan, and Indian country), particularly if a multiplier was provided for qualifying activities in those areas. Most importantly, the flexibility afforded by Reinvestment Redistribution allows a bank to target its outside assessment area activities toward geographies in which it has identified a need and a way to serve it, rather than being required to serve hot spots which may be unfamiliar areas that already have a high level of CRA activity. This approach, agnostic to any bank business model accounts for the digital transformation of banking by recognizing the digital nature of many deposits now sourced by banks and should further help banks aid underserved areas throughout the country.

In practice, the Reinvestment Redistribution would mean CRA responsibilities based on a bank's physical facilities (headquarters, branches, and proprietary deposit-taking ATMs) would continue, much like what was stated in the NPR. However, an important part of a large, nontraditional, as well as wholesale and limited purpose bank's total CRA obligations would be set as a percentage of its overall non-brokered, non-corporate domestic retail deposits. In that way, a bank with only one location but a large volume of Internet-sourced deposits would need to provide an overall level of CRA qualifying activities that far exceeds its assessment area obligations.

[24] *See* NPR, 85 Fed. Reg. at 1,247 (to be codified at 12 C.F.R. § 25.12(c)(2)(ii)). Please note that this letter uses the codification citations to the OCC's proposed regulations for simplicity. The corresponding FDIC proposed regulations are at 12 C.F.R. Part 345.

We believe Reinvestment Redistribution would accomplish the primary goals of the NPR, including rating transparency and consistency based on a metric with a presumptive rating, while also accomplishing the following:

- Hot spots will not be further inflamed. A bank requiring or desiring additional CRA activity to enhance its overall rating can choose to direct activity to the qualifying markets of their choice. Nontraditional banks will have their performance primarily measured at a total bank level, reinvesting deposits from the cyber-community without geographic restriction;
- The dynamics of CRA investment should become more balanced by implementing a market driven approach to CRA, creating viable economic opportunities stimulating banks to invest, instead of forcing banks to invest in hot spots;
- The CRA burden will be more evenly distributed, with dollars flowing to meet needs, measured by appropriate thresholds unique to a bank's business model; and
- The substantial regulatory burden of collecting, verifying and reporting new data will be limited because data required for the metrics—namely qualified lending on a unit basis for the retail metric and dollar volume of loan commitments, investments, and quantifiable services for the CD metric—largely already exist.

The NPR assumes "the proposed evaluation method would be sufficiently flexible to account for different bank sizes and business models, it would not include different tests for different types and sizes of banks."[25] CBA submits this alternative proposal provides greater flexibility to accommodate different bank business models.

V. Detailed Concerns about the NPR's Approach

A. Too Fluid Rating Thresholds Will Create Inconsistent Examinations

The NPR states the thresholds for a bank's applicable performance standards will change "periodically," following a notice and comment period,[26] and the thresholds in place at the onset of an institution's evaluation period will apply to that evaluation period.[27] Those ratings as currently set, however, at 11%, 6%, and above or below 3%, respectively, for outstanding, satisfactory, needs to improve, and substantial noncompliance ratings, rely on a series of assumptions applied to historical information.

CBA is concerned both with establishing initial thresholds for performance standards that are not based on full bank data (which may be available later) and with the prospect of ongoing adjustments to the applicable thresholds, which could establish unlevel playing fields. For example, a bank whose evaluation period ends one month before a downward adjustment of the performance thresholds would have greater CRA responsibilities than a bank whose evaluation period starts just after such an adjustment. The ability to elect to use performance standards

[25] *Id.* at 1,218.
[26] *Id.* at 1,246 (to be codified at 12 C.F.R. § 25.12(b)).
[27] *Id.* (to be codified at 12 C.F.R. § 25.12(a)).

published later during its evaluation period would not solve for this potential issue.[28] Fluctuations in performance standards should be limited, and frequent adjustments mean different standards for banks with overlapping examination cycles. The fact that there would be a notice and comment period before adjustments would not solve for inequities in administration as banks do not control when their evaluation periods begin and end.

CBA agrees the thresholds may need periodic adjustment to account for market changes. Much can happen to change a market during a three- or five-year evaluation period. For example, few predicted in 2004 or 2005 that the 2008 mortgage crisis would occur. A threshold that may have seemed reasonable in 2005 might not be so in 2008, and certainly not in 2010. Similarly, the thresholds set in the NPR may not be appropriate following the COVID-19 pandemic.

CBA believes a better approach would be to establish a means to set a dynamic threshold that does not lag behind market behavior; or to determine durable threshold levels and adjust those thresholds as infrequently as possible but as dictated by market conditions. To achieve those ends, CBA encourages the Issuing Agencies to set the thresholds based on as much real data and as few assumptions as possible. Given a market-altering event, CBA would encourage the Issuing Agencies to issue a joint notice adjusting the thresholds downward for all banks in the midst of an evaluation period, so as not to lock them into fulfilling CRA obligations in a manner that could threaten safety and soundness, and instead assist those banks in serving credit needs in communities facing those same market conditions.

B. Increased Data Collection, Recordkeeping, and Reporting Will Not Lead to the Important Clarity in CRA Examinations as Contemplated by the Issuing Agencies

The regulatory burden of the NPR is significant. CBA believes the new data collection, recordkeeping, and reporting requirements should be balanced against the benefit to LMI communities and the shared goal of transparency, and further, should not be imposed without a full appreciation of the extent of the burden placed on banks.

Specifically, the NPR contemplates that banks will collect substantial amounts of data they have not had to collect for CRA reporting in the past, including deposit account data, consumer lending data, and balance sheet data. For many banks, this data is housed on multiple computer systems. Interfaces must be built to collect the data from these systems and move it into an environment where it can be geocoded and organized for CRA reporting and analysis. New data storage environments will need to be built or expanded for this data. Additionally, banks will not be able to use existing HMDA data collection and reporting systems. Instead, they will have to build data interfaces and storage systems for collecting mortgage lending based on specific lines of the Call Report, even though Call Report data pulls are complex and incompatible with CRA data, as discussed further below.

Further, CBA notes a significant number of institutions will be excluded from the proposed data requirements, either because they have assets under the $500 million small bank threshold, or because they are Federal Reserve member institutions. Accordingly, the database the Issuing Agencies seek to build and use as a basis for determining benchmarks and thresholds will

[28] *Id.*

necessarily be incomplete even with respect to only bank data, notwithstanding the NPR's intention.

CBA details below additional issues with the increased data collection, recordkeeping, and reporting burdens, beyond the initial and significant burden of new data collection.

1. Enforcement of Current Data Integrity Standards for New Data Collection

The NPR is unclear whether the data reporting requirements carry penalties for under- or over-reporting of information. CBA submits penalties would not be productive or appropriate and seeks clarity that none are contemplated. In fact, CBA notes when the additional HMDA data fields were implemented in 2018, the CFPB provided a year-long grace period for ironing out any data irregularities.[29] CBA believes a similar safe harbor would be appropriate while banks finalize their systems to be compliant with the new regulations. The provisions of the current rule which do not contemplate penalties regarding CRA data should be maintained.

2. Use of Call Reports

The NPR cites to data from the Call Reports eight times: seven instances in the definitions,[30] including for a CD investment, consumer loan, home mortgage loan, retail domestic deposit, and small loans to businesses or farms, and once concerning the allowance for losses on off-balance sheet credit exposures for contingent commitments to lend.[31]

CBA appreciates the Issuing Agencies attempted to minimize the impact of the NPR on banks, but submits the information required for collection, record-keeping, and reporting is not, in fact, easily obtainable from the Call Reports. For example, the majority of information required to calculate the proposed Measure is not reflected in the Call Report. The Call Report does not report on balances for loans with original credit limits between $1 million to $2 million made to small businesses, it does not identify balances for loans between $500,000 to $2 million made to small farms, it does not identify balances for loans made to business or farms located in LMI census tracts, it does not identify loan balances for mortgage and consumer loans made to LMI borrowers, and it does not contain information on balances by geographic location of borrowers or depositors.

There are logistical concerns with pulling data from the Call Reports as well. It involves identifying the general ledger numbers assigned to each line of the Call Report that will be used for CRA data collection. For example, at one bank, one Call Report line item aggregates more than 30 general ledger accounts across five bank systems. The bank will have to pull all loans tagged with these general ledger account numbers on all five systems on a monthly basis to comply with the NPR. Additionally, general ledger numbers can change frequently; new numbers are added, and existing numbers are retired.

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[29] *See* CFPB, Statement With Respect to HMDA Implementation (Dec. 21, 2017), https://files.consumerfinance.gov/f/documents/cfpb_statement-with-respect-to-hmda-implementation_122017.pdf.
[30] NPR, 85 Fed. Reg. at 1,240–42 (to be codified at 12 C.F.R. § 25.03).
[31] *Id.* at 1,244 (to be codified at 12 C.F.R. § 25.06(d)(1)(iii)).

Banks will have to review for such changes monthly and update reporting environments as appropriate. Then, if the loan size threshold for reporting small business and small farm loans changes, the Call Report will also need to be changed to reflect the new thresholds. And finally, business lines will need to design and implement data integrity procedures and controls for "new" CRA data such as mortgage lending pulled using the Call Report, consumer lending, and balance sheet values. Put simply, Call Reports were not designed to be used for the CRA information gathering contemplated by the NPR.

Moreover, the Call Reports should not be adapted to become CRA reporting instruments and in particular should not replace HMDA as the primary source of mortgage lending data for CRA. HMDA data is widely used and understood by the banking community, as well as transparent, objective and publicly available. The Call Report definition of mortgage, by contrast, is more narrow, cumbersome, and not widely used. Instead, CBA submits HMDA data is the most appropriate basis for assessing a bank's mortgage lending.

3. Data Integrity, Geocoding, and Ongoing Adjustments to Monthly Balances

CBA understands the Issuing Agencies intended to facilitate collection of quarterly deposit data through the use of Call Report data less brokered deposits, but banks will still need to geocode depositor addresses to comply with the proposed rule, making for a new, expensive regulatory burden.

CBA believes necessary geocoding of addresses for deposit accounts should be undertaken on an as-needed, annual, rather than quarterly, basis, given certain triggering events.[32] To help facilitate a more efficient process, geocoding should only be done annually for new accounts, or known address changes, and otherwise when census data changes.

One bank determined it would require five to seven days of continually running processes to geocode all its addresses. Because depositor addresses should be relatively stable, CBA urges the Issuing Agencies to permit annual geocoding as described above, while allowing institutions that would prefer to geocode more frequently the flexibility to do so.

CBA notes also the lags inherent in identifying certain qualifying activities, as well as data integrity reviews, may require recalculation of monthly and quarterly balances.

4. Time for Implementation

The proposed changes to the CRA regulations are significant and will require both substantial time and bank resources to operationalize. As noted above, given the recent COVID-19 pandemic, banks are focusing their resources on providing critical services to communities. The regime proposed by the NPR will force banks to record and retain data in new ways and therefore require new systems to be built. Attempting to implement these new systems during this critical time will take vital resources away from serving customers amid the COVID-19 crisis. While the NPR contemplates an implementation schedule for large banks that allots one year from the date of the final rule for data collection and recordkeeping, and an additional year for

[32] We note that this is similar to the FDIC's Summary of Deposit data, which is submitted annually.

reporting,[33] such a schedule is likely unworkable for most banks. The Reinvestment Redistribution proposed above in Section IV, by contrast, would not require such a significant undertaking.

In order to create the systems to collect the newly required data, banks will need to reserve both information technology and product design teams and will need to allocate budget resourcing accordingly. Once a bank budgets to reserve the required resources, additional time will be required for it to test those systems for quality control issues. CBA members estimate this process will take approximately two to three years, depending on the institution. Thereafter, the reporting functionality could likely be implemented within one year.

As noted at the outset of this comment letter, in light of COVID-19, CBA urges the Issuing Agencies to take the time necessary to fully consider the impacts of this crisis and others before moving forward with the rulemaking process. Once the Issuing Agencies have had the opportunity to assess the effect of the pandemic on banks and communities, CBA recommends revisiting the implementation timeline to permit banks to set their budgets at the earliest opportunity following the final rule. Then, banks should have three years for construction of data collection and recordkeeping infrastructure, and a fourth year for reporting, such that the first exams under the final rule would take place after approximately four years, beginning January 1 following the final rule's issuance.

Note, however, if the Issuing Agencies were to adopt Reinvestment Redistribution, which uses origination-based data for loan metrics, the long transition timeline issues outlined above would be largely mitigated.

5. Limits of Historical Data for Portfolio Loans

CBA notes much of the balance sheet approach to CRA evaluation requires a full understanding of the loans currently in a bank's portfolio. But, as noted above, much of the information required by the NPR may not have been gathered for those loans or may have been gathered at too remote a time to be relevant, such as addresses or income information. Accordingly, the retroactive application of measuring a bank's current portfolio is impossible. For example, a credit card issued by a bank ten years ago could still be active, but any income information requested from the card holder would likely be unreliable ten years later.

Again, if the Issuing Agencies were to adopt Reinvestment Redistribution and revert to the origination-based, not balance-sheet based, data for metrics, this issue would be eliminated.

6. Lagging Market Data

The NPR indicates the Issuing Agencies plan to build databases of bank activity to establish market data for the distribution tests in its metrics. CBA notes the market data would not be available for the first year of application of the distribution tests, so banks would be unaware of the benchmarks by which to measure their performance. CBA seeks clarification on what basis would be used for the first year of application of the distribution tests.

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[33] NPR, 85 Fed. Reg. at 1,239 (to be codified at 12 C.F.R. § 25.01(c)(4)(i)).

7. Ongoing Maintenance

CBA is not only concerned with the burden on banks of developing new systems for tracking CRA data going forward, but also with the various ongoing monthly, quarterly, and annual record retention and reporting requirements that will continue beyond the initial system creation. For example, a small bank is subject to data collection requirements under the NPR, even if it opts to continue to be evaluated under the current regulations. The burden on small banks could far outweigh any benefit derived from this data. Similarly, for large banks, the burden of continued data collection, recordkeeping, and reporting of business lines that may not even be deemed qualifying activities is superfluous.

C. Changes are Needed for Qualifying Activities

1. Retain Origination-Based Approach to Retail Metrics

As noted above, CBA recommends the quantification of qualifying retail lending activities should continue to be measured on an origination/purchase unit-based approach rather than on a balance sheet basis. The balance sheet approach is unnecessarily burdensome and CBA believes originations and purchases are a better, time-tested, and more efficient means to "encourage stable commitments to communities and disincentivize churning of activities that may not provide long-term stability,"[34] as outlined in the NPR.

So-called "churning" can be avoided in a number of other, less burdensome ways, such as excluding purchases of loans that are not originations, but in fact, loans that have been purchased before as is prohibited in current Interagency Q&A guidance.

Basing metrics on a unit basis would eliminate several CBA's concerns about data collection and recordkeeping, as far fewer systems would need to be created, and current systems could be adjusted more easily. It would also eliminate CBA's concern about the 75 percent reduction in the value of loans not held in portfolio, but rather sold to the secondary mortgage market, described further below in Section V.E.1.

Additionally, if the Issuing Agencies were to maintain an origination/purchase unit-based approach for retail lending, banks would likely be able to abide by the implementation timeframe contemplated by the NPR for large banks: one year for data collection and record-keeping, and another year for reporting, beginning on January 1 following the issuance of the final rule.[35]

CBA reiterates the balance sheet approach would still be manageable for CD loans and investments. Such loans and investments often span evaluation periods and using a balance sheet approach would eliminate issues of CRA consideration for prior period CD loans and investments.

2. Consumer Loans Should Continue to Be Optional

For the reasons stated in Section III.C above, CBA strongly urges consumer loans should essentially continue to be optional for inclusion in a bank's CRA evaluation. However, should the

[34] *Id.* at 1,224.
[35] *Id.* at 1,239 (to be codified at 12 C.F.R. § 25.01(c)(4)(i)).

Issuing Agencies nonetheless require consumer loan inclusion as contemplated in the NPR, CBA advocates the borrower distribution test thresholds increase to *at least 30 percent* of a bank's loan portfolio dollar value, instead of 15 percent, and to require *at least 100* originations to trigger a distribution test in an assessment area, instead of 20 originations. The larger sample sizes will ensure the obligations and associated data burden are allocated to those institutions that are doing a more substantial amount of consumer lending, and institutions doing consumer lending in more incidental circumstances are not motivated to change their business models or serve customers to a lesser extent. As for the increase from 20 originations to 100, distribution analysis is not statistically valid for small populations. That is, in the instance of 20 loans, each loan represents a full 5 percent of the total, and the difference of only one such loan moving from an LMI category to a non-LMI category is substantial. The Issuing Agencies should take care to ensure such circumstances are avoided by increasing the threshold in a manner that will more accurately reflect an institution's performance, such as 100.

Additionally, CBA notes the NPR is unclear in whether the current 15 percent and 20 origination thresholds, which we recommend increasing to 30 percent and 100 originations, respectively, are based on the sum of all types of consumer lending, or for individual categories of consumer lending. CBA proposes credit card lending should not be considered together with auto loans, for example, and strongly urges the Issuing Agencies to consider the consumer loan thresholds by *type* of consumer loan, and not in aggregate.

3. Activities that Promote Economic Development by Financing Small Businesses Should Be Retained as Qualified CD Activities

CBA believes activities that currently qualify for CRA consideration by "promoting economic development by financing small businesses" are important from a policy perspective and should continue to receive CRA consideration. Small businesses have historically played a critical role in job creation, with banks providing essential financing through many types of loans and investments. In light of the current COVID-19 pandemic, which is currently causing immeasurable damage to our country's small businesses, it is more important than ever for banks to continue to provide financing to small businesses that help create jobs, and to continue receiving CRA consideration for doing so. The NPR states the general intent of the Issuing Agencies is to expand the types of activities that qualify for CRA credit."[36] However, in contrast to the declared intent, the NPR states it:

> does not include the more general aspect of economic development that involved a bank having to demonstrate that its activities that finance businesses or farms that met the size test support job creation, retention, and improvement for LMI individuals, LMI census tracts, and other areas targeted for redevelopment by Federal, state, local, or tribal governments . . . because the agencies could not identify an objective method for demonstrating job creation, retention, or improvement for LMI individuals or census tracts or other targeted geographies, *other than by determining if the activity would create additional low-wage jobs*.[37]

[36] *Id*. at 1,213.
[37] *Id*. (emphasis added).

CBA does not believe this stated reason is sufficient to eliminate an entire category of activities that currently qualify for CRA consideration. First, the NPR implies the applicable standard is "low-wage" jobs, while the regulatory standard is based in LMI, which can be up to 80% of area median income. CBA believes jobs for LMI individuals are extremely important and should continue to receive CRA consideration. Second, the Interagency Q&A outline *five* categories of activities that promote economic development by supporting "job creation, retention, and/or improvement": (1) for LMI individuals, (2) in LMI geographies; (3) in areas targeted for redevelopment by Federal, state, local, or tribal governments; (4) for financing intermediaries that lend to, invest in, or provide technical assistance to start-ups or recently formed small businesses or small farms, and (5) through technical assistance, supportive services for small businesses or farms; such as shared space, technology, or administrative assistance.[38] CBA believes banks should continue to receive CRA consideration for activities that promote economic development by financing small businesses, including job creation, retention, and/or improvement in all of the five categories currently contained in the Interagency Q&As.

D. Exclude Corporate Deposits from all Denominators

CBA believes corporate deposits should be excluded from the retail domestic deposit-based denominators in all metrics. These large deposit accounts are not representative of money associated with a specific geography and therefore do not demonstrate the kind of nexus that CRA seeks between a bank's deposits and its service to a community. For example, corporate deposits may be held in headquarters locations, even if they are in fact sourced from other geographic areas. Corporate deposits are thus wholly unconnected to the provision of small business, small farm, consumer, or home mortgage loans, or to CD loans or investments. Accordingly, the inclusion of corporate deposits should not artificially inflate a bank's quantitative CRA obligations in a particular geography, and the overall rating thresholds should be adjusted to remove their influence on the level of CRA responsibility for banks. The Reinvestment Redistribution, outlined above in Section IV, removes corporate deposits. CBA further notes reconsideration of inclusion in the denominator of other types of deposits would be appropriate as well. Specifically, sweep deposit account deposits, which are a type of broker account, and Health Savings Account deposits, akin to broker accounts, may also warrant exclusion.

CBA is not recommending banks do less for their communities, only that the proportion of their responsibilities be properly tied to appropriate geographies to optimize service to LMI communities. CBA believes the level of commitment expected of banks should not be affected by this proposed adjustment to the denominators.

Accordingly, CBA recommends corporate deposits be omitted from metric denominators.[39]

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[38] *See* Interagency Q&As, §___.12(g)(3) 1.

[39] CBA's members believe that there may be other lines on the Call Report that could serve as a proxy for deposit figures that exclude corporate deposits. Without advocating for one manner or another, we point out for consideration the use of FDIC-insured deposits, or for banks with less than $1 billion in consolidated total assets, the reporting amounts of deposit accounts of $250,000 or less (as corporate deposits tend to exceed that threshold), or for larger banks, aggregating deposits maintained primarily for personal, household, or family use.

E. Concerns with the Revaluing of Qualifying Activities

1. *Insufficient Credit for Originated and Sold Loans*

CBA strongly urges the Issuing Agencies to reconsider reducing a bank's CRA consideration for loans they originate and sell within 90 days to 25 percent of the value of the origination.[40] The value of a loan made to an LMI individual is significant, and a bank should be rewarded for the efforts undertaken to originate such loans.

Twenty-five percent of a loan's value is insufficient CRA consideration, particularly in light of the effort required to originate such loans. Banks often work with nonprofit organizations to deliver homebuyer education and counseling to enable LMI individuals and families to purchase homes. Banks actively seek lending opportunities in LMI neighborhoods. Banks offer a number of down payment assistance programs, as well as special loan programs designed for LMI home buyers in an effort to originate more loans. Each program has its own requirements, which makes offering them more complex. Further, many such programs, especially in partnership with nonprofits or government agencies, require the loans be sold.

Most importantly, as a policy matter, incentivizing the retention of LMI loans in portfolio could threaten safety and soundness, and CRA requires consistency with safe and sound banking practices. There are in fact myriad reasons to originate and sell loans, even beyond safety and soundness concerns. In addition, the entire banking industry benefits from the liquidity created by an efficient secondary loan market.

Accordingly, CBA encourages the Issuing Agencies to recognize the benefits of originations and not penalize banks that originate then sell their loans.

2. *Targeted Multipliers*

The NPR provides almost all CD investments, along with affordable housing-related CD loans, be valued at double their outstanding amounts for purposes of the NPR's metric calculations. This system essentially provides most CD investments with four times the amount of consideration currently provided, because under existing regulations, a bank's lending test performance counts for 50 percent of its rating, and investment test performance counts for 25 percent.

There are two exceptions: investments in mortgage-backed securities (MBS) and municipal bonds only count once.[41] But CBA believes these are inappropriate distinctions for the following reasons.

First, CBA believes MBS should not be treated as a disfavored investment. Not only do MBS provide significant liquidity to the mortgage market, allowing additional loans to be made, but state housing finance agencies (HFAs) also use MBS as an important tool to provide opportunities for LMI borrowers to purchase their first home. Specifically, the state HFAs "utilize their authority to issue bonds to generate financing to support affordable homeownership opportunity and rental housing development and preservation. In many cases, these bonds are

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[40] NPR, 85 Fed. Reg. at 1,244 (to be codified at 12 C.F.R. § 25.06(d)(2)).
[41] *Id.* at 1,244 (to be codified at 12 C.F.R. § 25.07(b)).

exempt from federal income taxes, so the investors in them are willing to accept a lower rate of return, which HFAs pass along to their borrowers in the form of lower loan interest rates."[42]

Second, CBA believes municipal bonds should not be disfavored. The NPR explicitly endorses financing for infrastructure that benefits or serves LMI individuals or areas,[43] yet such financing is often made possible by municipal bonds. Consider three such examples provided by one CBA member:

- Municipal bonds from the Beloit School District in Wisconsin, of which the proceeds will be used to construct a new welcome center, parking lot, front entrance, as well as purchase school fixtures and equipment at Beloit Memorial High School. Approximately 64 percent of the students at Beloit Memorial High School qualify for free and reduced lunch. The campus improvements will create more space to host events, address several safety issues, and reinvest pride for a flagship institution in the community. The project is part of a comprehensive plan of Beloit 2020 to redevelop the Fourth Street area, which is in a moderate-income census tract.

- Anticipation notes from the Village of Howard, Wisconsin were used to provide interim financing to fund a grant to the Village's community development authority (the "CDA") to provide for the construction of the final phase of a multifamily housing facility owned by the CDA. The third building in Howard Commons will have 45 units of naturally occurring affordable housing.[44]

- Skokie, Illinois General Obligation Bonds, Series 2013A will reimburse funds advanced for the construction of a commuter rail station (Oakton-Skokie Station) and related improvements. This commuter station is located in a moderate-income census tract, and provides easy, rapid transit to downtown Skokie and the Illinois Science + Technology Park. It also has a taxi and bus connection area.

Third, CBA believes small dollar loan programs and mortgage loans to LMI borrowers should be incentivized. Such programs provide a significant service to LMI individuals, though the loans themselves tend to be of very small dollar values.

Fourth, CBA believes banks should receive a multiplier for qualifying activities undertaken in CRA deserts, defined as distressed areas, underserved areas, disaster areas consistent with a disaster recovery plan, and Indian country. Such areas are often sparsely populated, sometimes

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[42] National Council of State Housing Agencies, "State Housing Finance Agencies: At the Center of the Affordable Housing System" (Sept. 7, 2018), available at https://www.ncsha.org/resource/hfas-at-the-center/ ("HFAs provide financing for affordable homeownership through several primary means, including tax-exempt mortgage revenue bonds (MRbs), and alternative financing executions through the secondary mortgage market, such as mortgage-backed securities. . . . In 2016, HFAs issued more than $6 billion in MRbs and leveraged nearly $16 billion in alternative funding sources to finance nearly 126,000 home loans. HFAs have financed more than 3.2 million home purchase loans over time. HFAs also issued more than $7 billion in multifamily housing bonds in 2016, to support nearly 49,000 affordable apartments. HFAs' multifamily portfolios, as of the end of 2016, consisted of more than 16,000 properties containing more than 1.2 million apartments.").

[43] *See* NPR, 85 Fed. Reg. at 1,243 (to be codified at 12 C.F.R. § 25.04(c)(6)).

[44] *See* Kevin Boneske, *Bond Sale Authorized for Third Howard Commons Apartment*, Go Press Times, June 19. 2019, https://gopresstimes.com/2019/06/19/bond-sale-authorized-for-third-howard-commons-apartment.

lack experienced community development resources, and necessarily require greater bank investment to be able to extend credit and make investments consistent with safety and soundness. Accordingly, CBA believes all qualifying activities in CRA deserts should receive a multiplier for quantification as part of metric evaluations.

3. Credit for Activity in LMI Areas

The NPR eliminates consideration for retail loans made in LMI neighborhoods to non-LMI individuals, stating: "home mortgage and consumer loans to middle- or upper-income individuals and families in LMI areas are generally not as beneficial to LMI communities and may result in displacement."[45] But the very nexus of the CRA regulation is based upon the concept of encouraging banks to lend in communities from which deposits are collected and eliminating geographic redlining. The exclusion from CRA consideration of mortgage lending in LMI tracts seems counter to those ideals.

While understanding loans in LMI communities to upper-income individuals can cause displacement, eliminating CRA consideration for loans in these areas would be an overcorrection. CBA believes banks should receive CRA consideration for extending credit in LMI neighborhoods to middle-income people certainly, but also to affluent people, who can help to stabilize an LMI community. Banks dedicate a significant amount of time and resources to work with municipalities and community organizations and develop special loan programs and product enhancements to facilitate lending in these markets. Eliminating CRA credit for mortgage lending in LMI tracts can significantly undermine community revitalization efforts and lead to decay and disinvestment. Any new CRA framework should not establish an explicit mandate to keep LMI communities LMI. Such a new framework is completely counter to a core historic objective of CRA, that is, economic integration which brings greater opportunity to LMI families and areas.

4. Properly Assessing Volunteerism

CBA appreciates the challenges of assigning appropriate values for CRA-qualified volunteerism in the proposed framework. We believe the monetization of such activities may dissuade banks from engaging in potentially valuable efforts because these activities, as proposed, would have immaterial consequences with regard to the Performance Measure. For example, a singular multi-million-dollar loan or investment would equate to thousands of hours of impactful CRA-qualified volunteerism. For many banks, a large dollar loan or investment would be equal to all their CRA-qualified volunteerism if monetized as proposed. While CBA feels the Reinvestment Redistribution will better assess most activities, CBA has also developed an alternative approach to more appropriately quantify volunteerism that functions similarly to the NPR's quantification of LMI branches.

CBA proposes a system where banks calculate the number of employees who have volunteered in CRA-qualified activities divided by the total number of employees. The resulting ratio, which can never be greater than 1%, is then added to the CRA Performance Measure just as it is with bank branches. Banks would make this calculation on an annual basis, and the result would be applied to the CRA Performance Measure at both the assessment area and bank-level

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[45] NPR, 85 Fed. Reg. at 1,219.

measures. For purposes of applying this component of the Performance Measure over an exam period, the annual calculations would simply be averaged at both the assessment area and bank levels. CBA believes this enhancement more appropriately recognizes and incents the impacts of these activities to LMI people and places.

F. Permit Flexibility with Characterization of Small Business and Small Farm Thresholds

CBA supports the increased thresholds from $1 million to $2 million for: (a) the size of small loans to businesses and farms; and (b) loans made to small businesses and small farms with $2 million or less in gross annual revenues. Increasing the thresholds better accounts for today's economic environment, as the $1 million thresholds were last set in 1995.[46]

However, one unintended consequence would be that certain loans a bank might prefer to categorize as CD loans might now necessarily be categorized as small business/farm loans, which would affect the banks' performance on new CD and distribution tests. Requiring this new designation for those loans may cost banks in both regulatory burden and CRA performance.

Accordingly, CBA proposes banks should have the option to characterize loans greater than $1 million but less than $2 million, or loans to small business/farms with gross annual revenues in the $1 to $2 million range, as either CD loans, if they do indeed meet the definition of community development, or small business/farm loans, as needed for their metric assessment. This solution would allow banks to adapt their portfolios as needed for purposes of fulfilling their CRA responsibilities under the NPR.[47]

Another aspect of the NPR's proposal concerning the increase from $1 million to $2 million would tie that threshold to inflation, permitting it to increase accordingly.[48] CBA notes, however, this would be operationally unworkable for bank systems in data capture and system logic, where a 2 percent inflation rate, for example, would result in very small annual adjustments, making any impact minimal. Additionally, if the threshold changes every year, then the Call Report definitions have to change as the proposed source of the data. Instead, CBA proposes the Issuing Agencies adjust the thresholds every ten years, coinciding with the decennial census data adjustments. This would reduce regulatory costs and burden, permit limits to remain relevant over longer periods of time, and hopefully result in thresholds of reasonably rounded values.

G. Operationalizing the List of Qualifying Activities

1. Pre-Notice for Qualifying Activities

CBA strongly supports the NPR's establishment of a publicly available, illustrative, and non-exhaustive list of qualifying activities.[49] Such a list will help banks ascertain which activities

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[46] *Id.* at 1,211.
[47] While the differing treatments by different banks could affect the market data, we believe the benefit to banks of this flexibility would far outweigh any cost of impact on market data, which would already be imperfect without inclusion of data from Federal Reserve-supervised banks.
[48] *See id.* at 1,242 (to be codified at 12 C.F.R § 25.03).
[49] *See id.* at 1,243 (to be codified at 12 C.F.R. § 25.05).

will receive CRA consideration, provide greater transparency, and enable improved consistency across banks being evaluated.

The NPR proposes a process pursuant to which a bank may request confirmation that an activity will receive CRA consideration.[50] This process anticipates the Issuing Agencies will review and respond to the submission, approvingly or not, within six months. This is a significant improvement over the current method of evaluation, which can occur at the end of an evaluation period and fails to provide banks with any insight into how much CRA-eligible activity they have in fact provided to their communities.

Nevertheless, six months is not a workable amount of time for banks, which often must move more quickly to take advantage of opportunities to serve their communities as they arise. Accordingly, CBA urges the Issuing Agencies to revise the process to resolve such requests for confirmation within 30 days.

Additionally, CBA believes this pre-approval mechanism can be leveraged beyond confirmation of qualifying activities, to allow banks to obtain certainty concerning other bank-specific nuances during an evaluation period, such as confirmation that a branch located near to and serving an LMI population will be considered LMI for the branching calculation. Such conversations that may currently occur in the course of a performance evaluation could be resolved earlier and further foster the goals of examination clarity and transparency.

2. Revisions to List Every Three Years

CBA appreciates the Issuing Agencies propose to revise this list every three years but believes a five-year revision cycle would be more prudent. Activities often take a number of years to phase in or out of development, and frequent adjustment to which activities qualify for CRA consideration could impede a bank's ability to truly rely on the list. Moreover, frequent revision could make the list susceptible to changes based on political pressure, rather than public policy rationales. Permitting activities removed from the list to still automatically qualify for credit for two years will further help ensure consistency for institutions looking to rely on the list. Accordingly, CBA encourages the list of qualifying activities be revised on a five-year basis, and further provide a two-year grace period for removed activities to better modulate product development and political headwinds.

H. Clarity Needed on Treatment of Branches Near LMI Areas

CBA supports the NPR's consideration of LMI branch impact and seeks clarity on the treatment of branches located near to, though not in, LMI areas. Under the current regulations, in addition to proximity, examiners typically consider branches in instances where the banks can demonstrate usage of those branches by individuals living in LMI areas. For example, OCC guidance from 2018 states service of the needs of residents in an LMI neighborhood by a branch outside that LMI geography can receive CRA consideration when "supported by evidence showing that the branch actually serves customers in the LMI area," meaning, for example, "bank marketing practices that target LMI areas—such as bank lending distributions that indicate the bank is serving credit needs of the LMI area, evidence that bank customers reside in LMI geographies, or relevant

[50] *Id.* (to be codified at 12 C.F.R. § 25.05(c)).

demographic changes during branch tenure in a particular location."[51] CBA encourages the Issuing Agencies to continue to consider these branches as LMI in the assessment area metric calculation.

I. Additional Issues for Consideration

1. Retain Wholesale/Limited Purpose Designations

CBA encourages the Issuing Agencies to reconsider eliminating wholesale and limited purpose designations. For those banks that are not traditional retail banks, that may not extend home mortgages, small business/farm loans, or consumer loans to retail customers, or that offer a narrow product line only, such as credit cards, the current rules provide an alternative means of evaluating those banks' service to their communities—the Community Development Test—which is not based on retail lending and only focuses on CD-related performance. That test, adopted by the prudential CRA regulators in 1995, accounts for the operational differences of such institutions, which "draw their resources from, and serve areas well beyond, their immediate communities."[52] CBA believes removing these designations would be a step backward in the evolution of CRA. The CD test that would be part of the Reinvestment Redistribution, however, provides an appropriate way of assessing such banks' CRA responsibilities.

2. Certification Process

The NPR's certification process for qualifying activities substantively carried out on behalf of the bank through another party, such as an affiliate, is unclear and unnecessary. First, the scope of applicability to any party acting "on behalf of the bank" is unclear.[53] CBA seeks clarification on whether this would apply to, for example, a grant recipient through a program funded by a bank through a Community Development Financial Institution (CDFI). If banks needed to obtain certifications from each grant recipient, for example, the burden would be significant and could curb some applicants from applying for such grants, in an effort not to have to comply with additional hurdles to obtain funding. This could have the unintended consequence of impeding a bank's ability to dispense such funds. Additionally, such a certification appears unnecessary, absent a basis to justify the costs and burden imposed upon the grant recipient and the bank. CBA seeks clarification as to the scope of, and the rationale for, the certification process. Further, as the current affiliate rules have been simple, effective, and without controversy, CBA strongly recommends the current affiliate rules be maintained.

3. Outstanding Rating Incentives

The NPR provides that, as an incentive to obtain an outstanding rating and provide the corresponding high level of commitment to CRA, banks will receive a five-year evaluation period for their examination.[54] CBA greatly appreciates the regulatory relief this incentive provides, and

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[51] OCC, OCC Bull. 2018-17, Community Reinvestment Act: Supervisory Policy and Processes for Community Reinvestment Act Performance Evaluations (June 15, 2018), https://www.occ.gov/news-issuances/bulletins/2018/bulletin-2018-17.html.
[52] Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156, 22,160 (May 4, 1995).
[53] NPR, 85 Fed. Reg. at 1,250 (to be codified at 12 C.F.R. § 25.19(d)).
[54] *Id.* at 1,227.

encourages the Issuing Agencies to consider other incentives as well. Different bank models and CRA portfolios may be incentivized by different forms of relief such as expedited review of certain applications. While greatly appreciated, the five-year evaluation period may not be universally the right incentive for banks to strive for an outstanding rating, and CBA encourages the Issuing Agencies to consider additional options to encourage as many banks as possible.

J. Inconsistencies or Items Missing from the NPR, for Which CBA Seeks Clarification

1. Loan Purchases

CBA notes under the NPR, loan purchases are not considered similarly to originations insofar as they are not subject to the 75 percent reduction in value if not held in portfolio for 90 days or more.[55] CBA believes it is the intent of the Issuing Agencies to continue to treat loan originations and loan purchases similarly, as under the current regulations, and therefore seeks clarity on the treatment of loans purchased and held in portfolio for fewer than 90 days.

2. Equity Equivalent Investments

Equity equivalent investments ("EQ2s") provide a flexible way of investing in CDFIs, as they often enable CDFIs to "offer more responsive financing products with longer loan terms"[56] than otherwise available on the market. While EQ2s are currently CRA-eligible under the Interagency Q&As,[57] the NPR is silent as to their treatment. CBA encourages the Issuing Agencies to specifically include EQ2s in their list of CRA qualifying activities.

3. Strategic Plans

CBA seeks clarity on the strategic plan options under the NPR. The NPR specifies banks with no retail deposits or small banks without retail loans must adopt a strategic plan, and strategic plans remain an option for all banks.[58] Nevertheless, there does not appear to be any incentive to institute a strategic plan, because banks must still incorporate significant regulatory requirements. For example, the NPR provides a bank must still designate deposit-based assessment areas and must also still comply with all data collection and reporting obligations.[59] Furthermore, the Issuing Agencies will have six months to approve a strategic plan under the NPR,[60] which is *three times* as long as currently provided.[61] Accordingly, if the Issuing Agencies seek to incentivize more banks to pursue strategic plans, they should consider reducing the regulatory burden or provide other options to do so. Otherwise, the strategic plan option in the NPR does not appear to change significantly from the current rules.

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[55] *See id.* at 1,244 (to be codified at 12 C.F.R. § 25.06(d)(2)).
[56] FDIC, Strategies for Community Banks to Develop Partnerships with Community Development Financial Institutions 3 (Mar. 2014), available at https://www.newyorkfed.org/medialibrary/media/outreach-and-education/cra/reports/FDIC-Strategies-for-Community-Banks.pdf.
[57] Interagency Q&As, 81 Fed. Reg. at 48,540, §___.22(d)—1.
[58] NPR, 85 Fed. Reg. at 1,248 (to be codified at 12 C.F.R. § 25.16(b)).
[59] *Id.* (to be codified at 12 C.F.R. § 25.16(c), (g)).
[60] *Id.* (to be codified at 12 C.F.R. § 25.16(h)).
[61] *See* 12 C.F.R. § 25.27(g).

4. Length of Evaluation Period

The NPR suggests a typical evaluation period for a bank will be three to five years depending on its prior bank-level CRA rating.[62] However, CBA was unable to locate the regulatory text to support these points and seeks clarification accordingly.

5. Lines of Credit Clarification

The NPR appears to treat lines of credit inconsistently. In the preamble to the NPR, the Issuing Agencies footnoted "[b]anks would continue to receive CRA credit for the funded portions of lines of credit but generally would not receive CRA credit for other legally-binding commitments to lend, such as revolving credit lines and letters of credit."[63] Yet, § 25.06(d)(1)(ii) and (iii) provide credit for the dollar value of "[a]ny legally-binding commitment to invest" and "[t]he allowance for credit losses on off balance sheet credit exposures for contingent commitments to lend."[64]

Banks often provide lines of credit to nonprofits and businesses on which the entity can draw at any time, and thus banks currently receive CRA consideration for the entire credit line. This provides enormous value to nonprofits and small businesses and is likely to make them more successful. In addition, banks receive consideration for the full amounts of letters of credit as "Other Loans". Accordingly, CBA strongly believes a bank should receive CRA consideration for the full extent of its credit commitment. While the proposed regulatory text recognizes this, CBA's concern is the recognition is not apparent in the text of the preamble. CBA seeks confirmation that the text of the regulation ensures the Issuing Agencies will continue to provide CRA consideration to banks for the full value of the credit lines they extend, as such lines of credit are legally binding commitments even if they are not drawn upon for the purposes of a bank's month-end balance sheet.

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Thank you for the opportunity to share our comments to the NPR. We would be pleased to answer any questions and to participate in any further efforts to improve and modernize CRA.

Sincerely,

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[62] NPR, 85 Fed. Reg. at 1,227.
[63] *Id.* at 1,212 n.28.
[64] *Id.* at 1,244.