MORTGAGE BANKERS ASSOCIATION

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Federal Reserve System
12 CFR Part 228
Regulation BB
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Federal Deposit Insurance Corporation
12 CFR Part 345
RIN 3064-AF81

RE: Joint Agencies' Notice of Proposed Rulemaking: Changes to Update and Clarify the Regulations to Implement the Community Reinvestment Act

Ladies/Gentlemen:

The Mortgage Bankers Association (MBA)[1] appreciates the opportunity to comment on the notice of proposed rulemaking (NPR)[2] issued jointly by the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (the Fed) and the Federal Deposit Insurance Corporation (FDIC) (jointly, the Agencies) to update and clarify the regulatory framework implementing the Community Reinvestment Act (CRA). The NPR requests detailed feedback on various ways to improve CRA's regulatory and supervisory framework so that it can more effectively meet the needs of low- and moderate-income (LMI) communities and address inequities in credit access in furtherance of the CRA's core purpose.

I. EXECUTIVE SUMMARY

MBA applauds the time and efforts that the Agencies have invested in the drafting of a very detailed and extensive NPR, with the goal of ensuring that banks are lending to LMI borrowers and investing in LMI communities without compromising safety and soundness. Banks provide a significant amount of capital and liquidity to the single-family and multifamily mortgage markets which in turn

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, DC, the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership; and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,300 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

[2] Available at:https://www.federalreserve.gov/consumercommunities/files/cra-npr-fr-notice-20220505.pdf

helps support the supply of critically needed housing in this country. In 2021, banks accounted for almost 40% of the $4 trillion in single-family mortgage originations and were one of the largest sources of capital for multifamily lending totaling approximately $160 billion in originations. As holders of this debt, commercial banks account for more than $5 trillion in single- and multifamily mortgage-related debt outstanding.

MBA supports a regulatory framework that will provide greater clarity and consistency in the CRA's application, address changes in the banking industry (including the expanded role of mobile and online banking) and create a consistent regulatory approach that applies to banks regulated by all three Agencies. Furthermore, the importance of tailored data collection and reporting requirements as well as performance standards that take into account the differences in bank size and business models cannot be overstated. Therefore, while MBA strongly supports the goals listed in the NPR, we urge the Agencies to consider comments that will further align these goals and ensure that any new burdens in the rule do not outweigh the benefits to the intended beneficiaries of the rules.

We also support proposals in the NPR that are geared towards reducing the burden on small and intermediate banks by:

- allowing small banks to continue to be evaluated under the current regulatory framework;
- allowing intermediate banks to be subject only to the new Retail Lending Test while continuing to be evaluated under the current Community Development test framework;
- providing flexibility for small banks to opt into the new Retail Lending Test, and intermediate banks to opt into the new Community Development Financing Test; and
- limiting the amount of additional data collection for small and intermediate bank

Furthermore, MBA also supports the Agencies' goal of achieving a more streamlined and objective CRA examination of bank lending to LMI borrowers and communities. However, some of the proposals, while intended to promote the Agencies' goals with as little burden as possible, have unintended consequences. For example, the NPR creates a new and extremely burdensome CRA regime for large banks. Large banks already make great efforts to serve their communities through CRA and, over the years, have developed CRA programs that promote the goals and objectives of the statute and regulations. Therefore, any final rules should encourage and appropriately recognize the existing efforts made by banks to help meet the credit needs of their communities, especially LMI neighborhoods, rather than establish barriers that make compliance difficult and in effect, work against sincere efforts to achieve the stated objectives of CRA.

MBA supports the NPR's proposed general framework for evaluating large bank CRA performance using four tests: Retail Lending, Retail Services, and Products, Community Development Financing, and Community Development Services and Products. However, we strongly recommend that the Agencies give the same weight to the two Retail tests and the two Community Development tests.

In other words, the Retail and Community Development tests should get equal 50% ratings, rather than the proposed 60% for Retail and 40% for Community Development.

We also support provisions in the rule that encourage banks to engage in small-balance mortgage lending and adopt Special Purpose Credit Programs (SPCPs). MBA and our members have been actively engaged with other agencies – CFPB, HUD, and the FHFA – to expand the use of SPCPs and to make rule and guideline changes to promote small-balance mortgage lending. Furthermore, MBA supports the Agencies providing an illustrative list of qualifying community development activities, and a process for banks to obtain pre-approval for community development activities that are not on the list. However, we recommend herein further refinements to make the list more useful for financial institutions and the examiners that are tasked with evaluating community development activities under the CRA rules.

MBA appreciates the difficult task that the Agencies have in ensuring that a bank is evaluated on its CRA activities outside of areas where it has a physical presence, particularly for purely mobile or online banks. However, we strongly recommend that the Agencies re-work and refine the proposed new retail lending and outside retail lending assessment areas, as they currently result in unintended consequences and burdens, including a dramatic increase in new assessment areas for some banks, including even community banks.

By issuing an NPR rather than an advance notice of proposed rulemaking, the Agencies have provided stakeholders just one opportunity to get the final rules right. Unfortunately, the 90-day comment period did not give the industry sufficient time to run the detailed data analysis that would have been helpful to the Agencies in understanding the impact of some components of the proposed rule. Therefore, it is imperative that the Agencies give thorough consideration to the comments and recommendations provided by stakeholders to ensure the final rule reflects a balance between the burdens of implementation and compliance for banks and the goals and benefits of the rules for the intended beneficiaries.

We strongly urge the Agencies to continue working with the banking industry and other community development stakeholders to calibrate the rule and consider various policy options or approaches that support the NPR's objectives and advance the goal of improving the CRA regulations.

II. BACKGROUND

Congress enacted the CRA in 1977 to encourage regulated banks to help meet the credit needs of the local communities in which they are chartered. In 1978, the Agencies promulgated the first major regulatory framework to implement the statute. These regulations have been revised over the years, including the last major revision in 1995, and a less substantive modification in 2005. Since then, the Agencies have embarked on various joint and individual efforts to modernize the regulations to align with the changing times, including mobile and online banking activities and programs. Such efforts included a joint OCC/FDIC notice of proposed rulemaking, a Fed 2021 advance notice of proposed rulemaking, and ultimately, an OCC final CRA rule in May 2020, resulting in inconsistent and unaligned rules from the banking agencies. MBA urged the OCC to rescind its final rule, and work with the other two agencies on a unified CRA regulatory framework, in order to establish a more efficient and streamlined CRA regulatory process for banks and community stakeholders alike. The OCC finally rescinded its final rule in 2021, essentially returning the rules to the current joint agencies' regulatory framework.

The MBA strongly supports the Agencies' commitment to establishing a consistent and unified set of rules for all banking institutions regardless of their primary federal regulator. It is imperative that the final rule reflects this commitment and ensures that the aligned rule appropriately balances the benefits to LMI communities with burdens imposed on the banks.

III. COMMENTS

The Agencies request comments on all topics addressed in the NPR as well as responses to 180 specific questions. MBA has worked with other industry partners (including banking trade associations and other housing partners) since the publication of the NPR, and we support many of the positions that are addressed by the banking trades in their comment letters. Our letter focuses specifically on topics in the NPR that impact mortgage lending activities, including residential and commercial mortgage loans, while also reinforcing our recommendations on the issues that we believe create undue burdens or unintentional outcomes that could make compliance especially difficult for our members, and ultimately work against the stated objectives and goals of the CRA.

1. New Retail Lending Assessment Area

In addition to evaluating a bank's CRA performance in its facility-based assessment areas (FBAAs), the Agencies are proposing to require large banks to delineate new and additional assessment areas outside their FBAAs for evaluating their retail lending activities, known as the retail lending assessment area (RLAA). An intermediate bank would also be evaluated outside its FBAA, in what is known as outside retail lending assessment area (ORLAA), if it does more than 50 percent of its lending outside its FBAA. MBA understands and appreciates that the intent of this provision is to ensure that banks are evaluated for lending performance outside their geographic footprint and to account for the evolution of online and mobile banking operations. However, the NPR's trigger for delineating RLAA's is extremely low, and this would result in an excessively large increase in the number of assessment areas for many banks. Some banks would be required under this proposal to delineate an additional 60 - 100 (and in some instances even more) assessment areas because of the extremely low proposed trigger.

MBA supports a framework that accounts for technological advancement in banking and we agree that a modernized CRA regulatory framework should not continue to strictly adhere to physical presence as the only basis for a bank's CRA evaluation. At the same time, however, the updated framework should not penalize banks that continue to devote significant time and resources to their traditional branch networks consistent with the CRA's original purpose. Therefore, we strongly oppose provisions in the NPR that would require a large bank to delineate new assessment areas in geographies where it does not have a meaningful market presence, or that are not central to the bank's broader business strategy.

As proposed, the NPR would result in such a significant increase in assessment areas for large banks that it would dilute a bank's focus on areas where its activities are much more needed. Banks would be required to divert time and resources from their branch footprint even in instances where their retail lending is predominantly within the branch-based geographies. We urge the Agencies to carefully review and re-calibrate the RLAA provisions to ensure they do not unintentionally undermine the impact and effectiveness of large banks' CRA activities in their FBAA's or even create CRA hot spots in delineated RLAA's.

MBA, therefore, recommends that the Agencies seriously consider an alternative that would achieve the same goal without the significant negative unintended consequence of the proposed new RLAA. Such an alternative should be crafted in a way that would allow banks continue to accept loan applications and manage CRA programs in geographies where they do not have a significant market share, thereby ensuring that the intended benefits of the rule are preserved. A suggested alternative would be to significantly increase the proposed trigger for delineating RLAA's

2. Retail Lending Test – Proposed Metrics and Benchmarks

a. Proposed Metrics: Under the NPR, large and intermediate banks would be evaluated separately on their lending to low-income and moderate-income borrowers (borrower distribution) and their lending in low-income and moderate-income neighborhoods (geographic distribution) in their assessment areas using distribution metrics and performance standards. These metrics are intended to provide quantitative standards that increase the clarity and transparency of retail lending evaluations. Under the metrics, the Agencies would use a series of distribution metrics and dynamic thresholds to individually evaluate each of a bank's major product lines in each assessment area.

The NPR would use the number of loans (rather than dollar amount of loans) made to LMI borrowers and in LMI geographies in calculating these distribution metrics in each assessment area. The Agencies believe that using loan counts avoids overweighting larger loans (and higher-income borrowers) and emphasizes the number of households, small businesses, and small farms served within each product line. MBA supports giving equal weight to loans that advance the goals of CRA, regardless of the dollar amount. We agree that such a provision appropriately incentivizes and rewards for CRA purposes the origination of small dollar loans that meet the credit needs of LMI borrowers.

In calculating the distribution metrics for each retail product, the Agencies propose measuring the number of a bank's loans for each category of borrower type (low-income or moderate-income) and each category of census tract (low-income and moderate-income) relative to the total number of the bank's loans in each assessment area. The goal is to measure – by product type -- the number of loans made to low-income and moderate-income borrowers, respectively, relative to the total number of the bank's loans in the assessment area. For example, a bank would have a borrower distribution metric of 20% for closed-end mortgage lending to low-income borrowers where the total number of closed-end mortgage loans in that assessment area is 100 and the number of closed-end mortgage loans to low-income borrowers in the assessment area is 20.

While the rationale for this formula is logical, there are practical aspects of the calculation that would need to be clarified to avoid unintended negative consequences for banks that participate in certain housing activities that promote the goals of CRA. The NPR is unclear, for example, regarding the treatment of repurchases of delinquent mortgage loans from a Ginnie Mae pool, which are heavily concentrated in LMI areas and to LMI borrowers. Lenders that issue Ginnie Mae securities have the option to repurchase loans from these pools when the borrower is 90 or more days delinquent. Lenders weigh several factors when making the determination as to whether to buy a loan out of a pool, including those related to the lender's liquidity management and Ginnie Mae requirements regarding delinquency ratios. In situations in which a borrower requires a modification in order to afford their monthly obligations, the lender is required to repurchase the loan out of the pool to implement the modification.

Because borrower income is not a criterion for this Ginnie Mae purchase it is not reported on the HMDA LAR. Nevertheless, our concern is that the NPR could be read to include such repurchased loans (made to predominantly LMI borrowers) in the denominator under the bank metric calculation without clarifying that such repurchased loans should also be included in the numerator. Absent clarification, the rule would unintentionally penalize lenders for exercising an option provided by Ginnie Mae and that is necessary in some cases to keep borrowers in their homes. This would unfairly penalize banks involved with Ginnie Mae servicing for engaging in activities that are important to LMI borrowers and communities. A similar issue arises with respect to counting originations of FHA streamline refinances, for which income information is not collected, but which predominantly benefit LMI borrowers based on FHA's overall borrower profile.

To address this concern, the Agencies should consider two options. The Agencies could specify that repurchased Ginnie Mae loans should not be included in the denominator. This would eliminate any "penalty" for participating in this important market, without giving credit for it either. A better alternative would be to clarify that the repurchased loans (and FHA streamline refinances) should be included in both the numerator and the denominator, in recognition of the importance of the Ginnie Mae program to LMI borrowers and communities. In either case, the treatment of these loans should be consistent in order to avoid the unintended consequence penalizing a bank's CRA metrics for engaging in activities that represent sound risk management and that further the goals of CRA by providing appropriate loss mitigation for delinquent LMI borrowers.

Another bank activity that would be impacted under the proposed retail lending metric is the purchase of seasoned mortgage loans (particularly seasoned government loans). As proposed, the rule is unclear regarding the treatment of purchased loans that were CRA eligible at the time they were made. We urge the Agencies to clarify the rule to permit seasoned loans to be considered for CRA goals provided banks can document that the loans were CRA eligible at origination.

Deep and liquid markets for CRA loans are important for several reasons. First and foremost, they provide fresh funds for the originating lender to make more CRA-eligible loans. In addition, it is common for banks to purchase closed mortgage loans from other institutions for a variety of other reasons, including asset-liability management, portfolio diversification, or strategic growth, and in some cases, in the context of the bank's servicing of delinquent loans (as noted above regarding Ginnie Mae buyouts). Some banks have invested in more specialized capabilities to service delinquent loans, making them better equipped to both implement effective loss mitigation for borrowers and manage the financial risks associated with these loans. Without clarification, we believe that the NPR would unintentionally penalize banks for engaging in these important activities that promote some of the objectives outlined in the NPR and help meet the credit needs of LMI individuals.

In the case of seasoned purchases, the purchasing bank will not have updated information on the borrower's income or assets at the time of purchase, and more importantly, at the time of the bank's metrics calculations. Thus, we recommend that the Agencies clarify that a bank is allowed to treat loans that were CRA eligible at the time of origination as eligible loans under the bank metrics calculation, regardless of how long ago the loans were originated. If the bank is required to include its seasoned loan purchases in the denominator, the bank should be allowed to include all seasoned purchases that were LMI loans at origination in the numerator. We believe that this would reflect a truer picture of the bank's LMI lending in the assessment area. Any requirement that banks obtain updated income information in order to receive this credit would be unworkable, as it is not clear how they could require the borrower to provide this updated information (nor would a bank know this information at the time they agree to purchase the loans).

Including all purchases in the denominator without including the LMI loans in the numerator would penalize a bank that purchased seasoned loans containing LMI loans at origination, a result that is clearly in conflict with the objectives of the NPR. Without the recommended clarification, the rule would inhibit secondary market liquidity and reduce incentives for banks to engage in specialized servicing. MBA, therefore, recommends that the Agencies clarify that acquisitions of seasoned loans that were eligible for CRA credit at the time of their origination should be given similar credit at time of purchase.

In 2021, MBA supported the Federal Reserve Board's proposal in its ANPR to include originated *and purchased* loans in both the numerator and denominator in the geographic distribution metrics calculation. We also supported the ANPR's proposal to include mortgage loans to borrowers of any income level that are located within an LMI census tract in the calculation. We still believe that this approach provides appropriate incentives to amplify banking institutions' CRA activities within low-income and moderate-income communities, as intended by the CRA statute.

However, MBA recommends that the final rule clarify that the denominator and numerator either (i) both include purchased or repurchased loans that were LMI qualifying loans at the time of origination or purchase; or (ii) both exclude such loans. Including such loans in one and not the other will present an inaccurate picture of a bank's support for financing to LMI borrowers and LMI census tracts, which will result in unfairly low CRA ratings, despite the bank's efforts to promote the goals of CRA.

b. <u>Proposed Performance Scores</u>: To determine a large bank's CRA rating, the Agencies propose to aggregate the bank's performance scores for each of the four tests, where specific weights are assigned to each test. Under the NPR, the Retail Lending Test is weighted at 45%; Retail Services and Products test is weighted at 15% (for a total of 60%). The Community Development Financing Test is weighted at 30% and Community Development Services and Products test is weighted at 10% (for a total of 40%).

Similar to the current framework, the Agencies propose to assign a weight of 45% to the Retail Lending Test, reflecting the Agencies' longstanding emphasis on retail lending to LMI individuals and communities. We believe that this weight is excessive, considering that the NPR itself notes how difficult it would be for large banks to achieve an overall rating of Outstanding. For CRA to be effective in providing incentives for institutions to "stretch," all banks should have a reasonable opportunity to achieve an "Outstanding," otherwise they will simply settle for a satisfactory rating.

An unintended consequence of this skewed approach is that large banks will be discouraged from making efforts in their community development activities because even an Outstanding rating on the Community Development test will not result in an overall rating above Satisfactory. In effect, unless a large bank achieves an Outstanding rating on its Retail Lending Test – something the Agencies acknowledge will be extremely difficult -- the bank will not be able to achieve anything higher than an overall Satisfactory rating, regardless of its Community Development rating. The result is that a large bank would not be incentivized to pursue an Outstanding rating on the Community Development test since it will not lift the overall rating. With this proposed weighting structure, the NPR would unfairly consign many banks to a Satisfactory rating as the highest possible. This result is clearly counter-productive to the objectives the agencies intend to achieve.

MBA strongly recommends that the Agencies revise the test weightings to achieve a 50-50 balance between the combined Retail and combined Community Development tests. We would suggest reallocating 10 percentage points from Retail – either by reducing Retail Lending by 10%, or by taking 5% each from Retail Lending and Retail Products/Services – and increasing the Community Development Lending test by 10 percentage points (to 40%). This would encourage large banks to aim for higher performance scores on *both tests* in order to achieve an overall Outstanding rating.

<u>c. Proposed Benchmarks</u>: The Agencies propose calculating Retail Lending performance ranges using benchmarks that include both community and market benchmarks. The community benchmarks reflect the demographics of an assessment area, whereas the market benchmarks reflect aggregate lending to targeted areas or targeted borrowers in an assessment area by all reporting lenders. The Agencies believe that these benchmarks and the data sources used to measure them would provide a bank with greater certainty about CRA performance expectations in an assessment area because the performance ranges are based on a consistent formula and set of data points. While MBA agrees that banks need greater certainty and consistent results on their CRA performance, we also believe that these benchmarks may be unrealistic and could encourage unsafe and unsound risk-taking.

In determining the threshold for defining performance ranges, a bank would need to meet 110% of the market benchmark or 90% of the community benchmark to obtain just a High Satisfactory threshold. To obtain an Outstanding, the bank would need to meet 125% of the market benchmark or 100% of the community benchmark. In effect, obtaining 100% of the market benchmark would only result in a Low Satisfactory threshold. MBA is concerned that these proposed benchmarks, although based on a consistent formula and set of data points, could create an unachievable target for many banks because it will be mathematically impossible for all the banks in an assessment area to meet the proposed thresholds. In fact, the Agencies noted in the NPR preamble that 34% of banks would fail the Retail Lending Test in their RLAAs and 39% would only receive a Low Satisfactory rating. The proposal automatically creates a ratings distribution within the Retail Lending Test that more than one-third of banks will fail.

MBA opposes an approach that sets up banks to fail by establishing unattainable benchmarks for so many institutions. While we agree with the Agencies that CRA performance benchmarks should be rigorous and objective, the benchmarks should be achievable so that banks are encouraged to work towards meeting or exceeding the established standard while operating within the boundaries of safety and soundness. The provision, as proposed, is counter-productive and encourages banks to take unnecessary risks that could compromise safety and soundness. MBA strongly suggests that the Agencies revise and re-calibrate the benchmarks to remove the unnecessarily high bar that would work against large banks attaining results that are commensurate with their efforts and actions.

3. Purchased Loans

The Agencies propose to evaluate a bank's CRA performance by counting in the Retail Lending Test the bank's purchased retail loans as equivalent to its retail loan originations. MBA supports providing a level playing field for both purchases and originations, and cannot stress enough the importance of encouraging a deep and liquid secondary market for CRA loans, which allows originators that specialize in serving LMI individuals and communities to help banks meet their CRA objectives. This approach also rewards banks that purchase loans to develop business opportunities in markets where they otherwise lack the on-the-ground ability to originate such loans.

To address concerns about "churning," the Agencies specifically request feedback on whether only loans purchased from the loan originator should be eligible for CRA consideration. While MBA appreciates and understands the Agencies' concerns about churning, MBA strongly urges the Agencies to be mindful of enacting any rule that would unduly impede the sale or purchase of mortgage loans, which would disrupt secondary market activities and create unnecessary or unintended complications for the mortgage finance market. Rather than crafting rules that would have a chilling effect on valid secondary market activities, concerns about churning should be addressed during the examination process. As suggested in the NPR, an examiner could adjust a retail lending assessment where there's a determination that loans to CRA-eligible borrowers or census tracts were purchased and sold repeatedly and within very short periods (such as 30 days) by different banks, with the possibility of each bank receiving CRA credit equivalent to the banks that originated the loans. However, such determination should include an analysis of why the loans were re-sold, including whether the activity was intended to support legitimate business objectives related asset-liability management, liquidity positioning, management of mortgage servicing risks, etc.

The Agencies also request specific feedback on whether there should be certain limitations on consideration given to purchased loans that are not purchased directly from the originator or a CDFI. As stated above, MBA recommends that loan purchases should be treated the same as originations, and further recommends that the consideration for such loans should not be limited in any way, regardless of whether the purchase is from the originator or a CDFI. All purchases (including purchases from non-bank mortgage lenders) or other entities qualified to originate and sell retail loans should qualify under the rules, subject to the proposed examiner analysis for churning.

As noted previously, a robust secondary market is essential to healthy market for CRA-eligible mortgage lending. MBA strongly believes that selling and purchasing securitized or un-securitized mortgage loans promotes liquidity, which helps to free up the necessary capital for making more home mortgage loans to LMI individuals. Therefore, we support rules that would provide equivalent CRA consideration for the origination or purchase of home mortgage loans.

4. Mortgage-Backed Securities (MBS)

The Agencies propose to give CRA qualification for investments in MBS that contain a majority of single-family home mortgages to LMI borrowers. According to the Agencies, this approach reflects the fact that purchases of qualifying MBS that contain home mortgage loans to LMI individuals are investments in affordable housing, which promote the goals of CRA. MBA agrees with the Agencies' proposal to provide CRA credit for investments in MBS that contain single-family home mortgages to LMI borrowers and recommends that where the MBS contains more than 50% of single-family mortgages to LMI borrowers, 100% CRA qualification be given for such MBS.

MBA disagrees with the assertion that qualifying purchases of MBS are not as impactful or responsive to community credit needs as other qualifying affordable housing activities that may directly support housing for LMI individuals. MBA believes that investments in MBS that contain loans to LMI individuals are just as impactful by providing depth, stability, and a source of fresh capital for additional CRA mortgage lending activities.

The Agencies are considering limiting CRA consideration for MBS in a way that would ensure that only LMI loans in the security are evaluated. Under this approach, CRA consideration for qualifying MBS that consists of mixed mortgage loans would apply only for the loans that represent purchase of LMI loans, and not for the loans that represent purchase of loans that may not meet the definition of affordable housing or have a primary purpose of community development. For instance, if 60 percent of a qualifying MBS consists of single-family home mortgage loans to LMI borrowers, and 40 percent consists of loans to middle- or upper-income borrowers, the MBS would receive CRA consideration only for the dollar value of the loans to LMI borrowers. This approach creates unnecessary complexities that could skew pooling practices in ways that could have unintended consequences for overall market liquidity. We believe the 50% LMI threshold should be sufficient to identify CRA-eligible MBS investments.

Furthermore, the Agencies are considering whether to limit CRA consideration only for initial purchase of MBS. Under this approach, a bank would obtain CRA consideration for the initial purchase of MBS from the issuer, but not for any subsequent purchases of seasoned (non-new issue) MBS. According to the Agencies, the goal of this approach is to emphasize activities that more directly serve LMI individuals and communities and to reduce the possibility of multiple banks receiving CRA credit for purchasing the same MBS. While we understand appreciate the concern of having multiple banks receive CRA credit for the same MBS, the final rule should reflect that the secondary market functions best when there are few artificial impediments to issuance, purchase and trading of these securities. Market depth is impaired if banks are forced to limit or curtail their MBS purchases or made to engage only in initial purchases from the issuer, while shunning subsequent purchases.

5. **Published list of CD qualifying Activities/Pre-approval Process**

The Agencies propose to maintain a publicly available list of CRA-eligible activities. This list would be non-exhaustive and provide illustrative examples that help clarify the regulatory meaning of key community development terms. The goal is to provide clarity and certainty (for all stakeholders) in determining what community development activities qualify for CRA, while allowing room for new activities to qualify that are similar to, or derivative of, activities on the list. Such a list would ensure more flexibility in engaging in new and innovative activities that benefit the community. However, we believe that the proposed process for modifying or updating the list remains unclear. MBA recommends that the Agencies include in the final rules a clear process for the frequency of updates, the factors considered in adding new activities, and the process for alerting banks to any modifications.

One specific activity that MBA recommends be included in the illustrative list of Community Development Services and Products is bank-paid housing counseling. Banks and mortgage lenders are increasingly engaging in partnerships with local HUD approved counseling agencies on both the origination and servicing sides of the business. Lender paid counseling with HUD-approved agencies can often help lenders turn a credit decision from a "no," to a "not yet," and eventually into a "yes." On the servicing side, counseling can be an effective loss mitigation tool, helping servicers work with struggling borrowers on budgeting and planning to avoid more serious delinquency and get them back on track. These services are predominantly used by LMI borrowers and MBA urges that the initial list of CRA-eligible community development activities include lender- and servicer-paid counseling activities.

The NPR also proposes to establish a process for banks to obtain pre-approval for activities that are not on the illustrative list. Under this proposal, banks would be able to confirm CRA eligibility for an activity prior to engaging in such activity. MBA supports a pre-approval process that would allow banks to submit proposed activities and obtain a determination about CRA eligibility prior to engaging in the activity. Allowing banks to receive a confirmation on whether an activity qualifies for CRA credit prior to engaging in such activity promotes innovation and removes much of the uncertainty under the current rules that potentially limits the type and scope of beneficial CRA activities the bank could engage in. A pre-approval process would be a welcome improvement on current rules.

We recommend that the Agencies establish a presumptive approval method. The Agencies should establish a 60-day review period for submissions, after which there is a presumption of approval. A short review period is necessary to ensure that the process itself does not become an obstacle to banks being able to quickly engage in impactful and innovative activities, and more importantly, a hindrance to the receipt of the benefits of these activities by the intended beneficiaries. Hence, unless the response time is kept to a short time frame (no more than 60 days) with a presumption of approval after the 60 days, this process would be of little use for banks because a protracted review and approval process would unnecessarily delay market sensitive activities. Furthermore, in order to simplify and make this process more useful, the Agencies should clarify in the final rules that approval by one Agency is binding on all three Agencies.

6. Credit for Affiliate Activities

Under current rules, banks may, but are not required to, include certain activities of affiliates in their CRA performance evaluation. Pursuant to this provision, CRA consideration is available for both the origination of a loan by an affiliate and subsequent purchase of the loan by the bank. In addition, CRA credit is available for both origination by a bank and purchase of the loan by an affiliate (as long as the same loans are not sold several times to inflate their value for CRA purposes). A bank can elect to have a particular category of affiliate lending (e.g., loans of a particular type) in a specific assessment area be considered. In this type of situation, the bank must include all such loans. For instance, if the bank elects to have mortgage loans made by its affiliates in an assessment area considered, the bank cannot elect to include only home mortgage loans to low- or moderate-income individuals or in low- or moderate-income areas. It must also include home mortgage loans to middle- and upper-income individuals or in middle- and upper-income areas in its lending metrics.

The NPR would categorize affiliate as either:

- "bank subsidiaries", which would cover entities for which banks exercise a high level of ownership, control, and management, such as state member bank and non-member bank operating subsidiaries, or
- "other affiliates", which would cover third party affiliate entities over which the bank does not exercise a high level of control or management.

The Agencies propose to require a bank to include the relevant activities of its bank subsidiaries in the evaluation because such activities would be considered a component of the bank's operation.

On the other hand, the Agencies propose to retain the current flexibility that would allow a bank to elect to include or exclude the relevant activities of other affiliates. A bank would be able to choose to have the examiners consider mortgage loans that are made or purchased by one or more of the bank's affiliates in a particular assessment area (as long as those loans are not claimed for purposes of CRA by any other bank).

MBA supports providing banks the option of having CRA activities of its other affiliates considered. MBA recommends that when a bank elects to have the Agencies consider retail loans within a retail loan category that are made or purchased by an affiliate in a particular assessment area, the Agencies should consider all the retail loans within that retail loan category by that affiliate only in that particular assessment area, unless the bank elects to include all of the bank's assessment areas.

7. Special Purpose Credit Programs and Small Dollar Mortgage Lending

Under the NPR, credit products and programs that facilitate mortgage and consumer lending targeted to LMI borrowers would be considered for CRA qualification (under the Retail Services and Products test) in evaluating a bank's responsiveness to the needs of LMI individuals and communities. Examples of these include small-dollar mortgages (considered to be in the amount of $100,000 or less) and consumer lending programs that utilize alternative credit histories in a manner that would benefit LMI individuals, consistent with safe and sound underwriting practices. MBA supports the inclusion of small dollar mortgages in this proposal and agrees with the Agencies that these types of mortgages, are especially important for LMI first-time homebuyers, and in areas where housing prices are generally lower (e.g., rural communities).

The Agencies specifically request feedback on whether Special Purpose Credit Programs (SPCPs) should be added to the list. MBA supports the inclusion of SPCPs -- regardless of whether the program is race or geographically targeted – that are compliant with ECOA to facilitate mortgage or consumer lending to economically disadvantaged borrowers. These borrowers -- and communities they reside in – are disproportionately low- and moderate-income. Consequently, and we urge the Agencies to provide CRA credit for all loans originated through a properly designed SPCP.

Though not included in the proposal, MBA recommends that the Agencies consider including other programs that are focused on LMI borrowers as well as first time homebuyers. For instance, FHA loans, VA loans, and other Agency products such as the HomeReady and Home Possible loan programs are, like SPCPs and small-dollar mortgage loans, programs that facilitate mortgage lending to LMI borrowers and first-time homebuyers. These programs help promote CRA objectives and homeownership goals for many first-time homeowners, and in effect, help move the ball on closing the homeownership gap. MBA believes that qualifying these products for CRA would encourage more banks to engage in these programs and activities, thereby helping to increase the availability of these loans, which are vital to first-time homebuyers and LMI individuals.

IV. Comments Specific to Multifamily Lending

1. Retail Lending Test

Multifamily Loans

The Agencies propose to establish a major product line threshold of 15 percent of the dollar value of a bank's retail lending in each assessment area to determine whether to evaluate certain loan products under the Retail Lending Test, including multifamily lending. The Agencies also seek feedback on whether an alternative measure of geographic loan distribution for multifamily lending under the Retail Lending Test would be preferable and whether multifamily lending should only be evaluated under the Community Development Financing Test.

It is noted in the NPR that multifamily lending is fundamentally different from other bank lending activities that involve direct lending to LMI individuals. This fundamental difference creates challenges in evaluating multifamily lending under a Retail Lending Test. MBA appreciates the Agencies recognition that multifamily lending is separate and unique from other qualifying activities, and the important role it plays in meeting the credit needs of communities, while providing housing and support to LMI tenants at different income levels.

Consistent with recognizing the challenges in evaluating multifamily lending, while also recognizing the critical role banks play in providing desperately needed rental housing for LMI individuals, MBA encourages the Agencies to (i) consider a lower threshold for multifamily lending activities to qualify as a major product line under the Retail Lending Test, (ii) use metrics similar to the Community Development Financing Test to evaluate multifamily lending rather than using an alternative geographic loan distribution metric, and (iii) to continue to evaluate multifamily lending under both the Retail Lending Test and the Community Development Financing Test.

Product Line Threshold for Multifamily Lending. While MBA supports the concept of designating a major product threshold, the Agencies should consider a lower threshold for multifamily lending activities. Due to the specialized and unique nature of multifamily lending, it will be extremely difficult for any bank to meet the 15 percent major product line test for any one geographic area for their multifamily lending activities. Based on feedback from industry participants, few banks will be able to meet the major product line test for multifamily lending as even very large banks do not have 15 percent or more of their retail activities in any one assessment area dedicated to multifamily lending. However, there are banks that have substantial multifamily lending activities that serve LMI communities, and they should be evaluated for these efforts. MBA strongly encourages the Agencies to continue to seek industry feedback to help determine a percentage threshold that is lower than 15 percent and will help promote and support multifamily lending that serves more LMI individuals.

Geographic Loan Distribution Metric. MBA encourages the Agencies to use metrics similar to the Community Development Financing Test to evaluate multifamily lending. The proposed geographic distribution evaluation of multifamily loans does not effectively measure whether LMI individuals benefit from the loan because it does not appropriately measure how LMI individuals are served in multifamily properties. The geographic distribution test evaluates multifamily properties based on their geographic location but fails to evaluate them based on the LMI tenants the property serves. A geographic distribution evaluation of multifamily properties fails to capture the rents and incomes of LMI renters in affordable multifamily properties. Evaluating multifamily lending based on the number of multifamily units or rent affordability would be a more effective measure.

Evaluation of Multifamily Under Only Community Development Financing Test. MBA encourages the Agencies to continue to evaluate multifamily lending under both the Retail Lending Test and the Community Development Financing Test. Evaluation under only the Community Development Financing Test, which is 40% of a bank's assessment, could cause banks to limit their multifamily lending activity as banks can achieve high CRA ratings by focusing all of their efforts on individual retail lending that is evaluated under the Retail Lending Test, such as auto loans, home mortgages and credit card loans. This result would be an undesired outcome for many LMI communities that need significantly more affordable rental housing.

Purchased Multifamily Loans

As the Agencies note, the market for purchased multifamily loans provides liquidity to banks and other lenders and develops business in markets that help to serve LMI individuals and communities. We encourage the Agencies to preserve the current treatment for multifamily purchased loans and not limit CRA credit to only loan originators as raised as a question in the NPR. As noted above in this letter under "Purchased Loans," a well-functioning secondary market that provides liquidity to banks and other lenders can extend a bank's ability to originate multifamily loans that serve LMI communities.

2. **Community Development Financing Test**

Pro Rata Credit for Qualified Affordable Housing

The Agencies ask if any other community development activities outside of affordable housing should receive partial consideration (for example, financing broadband infrastructure, health care facilities, or other essential infrastructure and community facilities). MBA encourages the Agencies to limit pro rata consideration to affordable multifamily housing. Partial consideration for affordable housing encourages mixed-income property development and mixed-income multifamily properties play an important role in promoting income diversity in neighborhoods and offering LMI individuals' opportunities to live near better jobs, schools, and health services. Also, in many communities, mixed-income housing is preferred by the community and helps to make many developments economically feasible.

Definitions Related to Naturally Occurring Multifamily Affordable Housing

The Community Development Financing Test establishes two separate affordable multifamily housing definitions for government assisted and naturally occurring affordable multifamily housing. MBA supports the expansion of CRA qualifications to naturally occurring multifamily affordable housing and, the certainty that definition can provide banks.

The NPR proposes an expansion of CRA credit to naturally occurring affordable multifamily housing and proposes the following definition for naturally occurring affordable multifamily housing: a multifamily project where 50 percent of renters are paying rents targeted at 30 percent or below monthly incomes of 60 percent or lower of area medium income (AMI).

However, we believe to better serve a greater number of LMI renters and conform with current industry definitions, a more appropriate definition of naturally occurring affordable multifamily housing should be defined as a multifamily property where 50 percent of renters are paying rents targeted at 30 percent or below monthly incomes of 80 percent or lower of area medium income (AMI**).** A significant part of the industry has accepted the 80 percent AMI threshold as a definition for low-income tenants.[3] Fannie Mae and Freddie Mac (the "Enterprises") provide a large portion of capital and liquidity to the multifamily market and the Multifamily Housing Goals for the Enterprises, which are prescribed by law, define "Low-Income" as "in the case of rental units, income not in excess of 80 percent of area median income, with adjustments for smaller and larger families . . ."[4] Also, the Conservatorship Scorecard for the Enterprises requires that 50 percent of their multifamily business be "mission driven" which is described as transactions with rents that are affordable to tenants at 80 percent of AMI in standard markets (versus cost-burdened markets).[5]

[3] We note that LIHTC properties – which do limit rents to 60 percent of AMI – are fundamentally different because the tax credits support equity investments that typically cover 50-75% of development costs without requiring returns from cash flow; because LIHTC properties tend to have significant scale; because a bank may achieve efficiencies by combining permanent mortgages with equity investments or construction loans; and because many LIHTC projects do not need permanent mortgages from banks because borrowers can obtain permanent loans through tax-exempt bonds or Fannie Mae, Freddie Mac, and FHA.
[4] See 12 U.S.C. Chapter 46, Section 4563 Multifamily Special Affordable Housing Goal

[5] See 2022 Scorecard for Fannie Mae, Freddie Mac, and Common Securitization Solutions, Appendix A. Available here.

Also, in most markets, rents below 60 percent of AMI generate insufficient net operating income to support significant mortgage amounts which makes these projects economically infeasible. Furthermore, with rents continuing to rise, the number of households with incomes of 60-80 percent AMI that are rent burdened is growing and apartments with rents affordable at 60-80 percent of AMI are therefore an important source of affordable housing, particularly in high-cost markets such as New York, Miami, and Los Angeles. CRA should encourage and recognize bank financing for this desperately needed housing.

Multifamily Mortgage-Backed Securities

The Agencies ask if Multifamily Mortgage-Backed Securities (MBS) should be subject to holding periods or only qualify for CRA credit at origination. MBA urges the Agencies to move forward with careful consideration when contemplating changes to how multifamily MBS qualify for CRA credit. The MBS market is comprised of Fannie Mae, Freddie Mac, and Ginnie Mae securities and serves an important purpose in terms of liquidity and the availability of capital. We encourage careful examination of any proposals to establish purchase or holding requirements for multifamily MBS. As stated above, if CRA consideration is given only for the initial purchase of MBS, this will stifle the MBS secondary market, which is vital to ensuring LMI individuals and communities continue to be served.

Treatment of Low-Income Housing Tax Credits (LIHTC)

MBA applauds the Agencies for preserving the current treatment of the Low-Income Housing Tax Credit (LIHTC) which allows banks to receive consideration for the full amount of the loan for or investment in a LIHTC-financed project, regardless of the share of units that are considered affordable. LIHTC plays a significant role in the construction, rehabilitation, and preservation of affordable housing and we commend the Agencies in the NPR for codifying the 2010 guidance which establishes projects developed with LIHTC as having a bona fide intent of providing affordable housing.

Disaster Preparedness, Recovery, and Climate Resiliency

MBA applauds the NPR's expansion of CRA-eligible activities that assist LMI individuals and communities in the preparedness for, and ability to withstand natural disasters, weather-related disasters, or climate risks. Banks can play an important role in financing the retrofitting of commercial and multifamily properties where LMI individuals live and work to make them more climate resilient and to assist LMI individuals and communities in disaster preparedness and recovery. MBA also encourages the Agencies to consider allowing banks to receive CRA credit for investments in green bonds to help finance these activities. Green bonds help finance projects that offer a positive environmental impact, including projects that retrofit commercial and multifamily properties to make them more energy efficient, climate resilient, and sustainable.

V. Implementation Period

The Agencies propose a one-year transition period (comprised of multiple applicability dates) following the publication of a final rule. Given the complexity of the proposals in the NPR and the depth of issues addressed therein, MBA believes that this proposed timeline is too short and should be significantly extended. The final rule is likely to be a substantial rewrite -- essentially an entirely new CRA regime for banks. As noted above, the NPR would require banks to delineate dozens of additional assessment areas under the new RLAA provision, which would require ensuring that these new areas are properly incorporated into the bank's CRA program. In order to be fully prepared to comply with the rule's provisions and requirements, banks would need adequate time to update systems and policies, collect required data (and ensure the integrity or reliability of such data), as well as apply the new complicated rating formulas to their current CRA programs to identify gaps and improvements needed.

In addition, implementation of the final CRA rule will overlap with the implementation of the CFPB's anticipated final small business lending data collection rule (Dodd-Frank Act section 1071). Implementing these two rules at the same time, which will involve overhauling technology systems, establishing new data collection and reporting processes, and establishing other operational processes, will put a significant amount of strain on employees and resources and impose significant costs on the institutions. In many cases, the availability and capacity for third party vendors to support compliance and implementation of both rules could limited.

MBA urges the Agencies to carefully review stakeholder comments, revise the rule as appropriate, and provide a longer implementation period. A transition period of no less than 24 months after the issuance of the final rule should be sufficient to mitigate burdens, reduce excessive costs, and facilitate access to third party resources needed to ensure compliance.

* * *

VI. Conclusion

MBA appreciates efforts by the Agencies to modernize the CRA rules to reflect changes that have occurred in the banking industry over time. We support the goal of making the regulations more reflective of the original intent of the legislation and share the Agencies' objectives of better targeting and delivery of community reinvestment activities based on the changing needs of communities across the country, particularly those that are historically underserved. We also support the attempts to provide additional transparency, predictability, and clarity by using metrics and benchmarks that narrow examiner discretion in the evaluation process, thereby making compliance more objective and predictable.

We appreciate the Agencies' diligence in reviewing the comments provided by stakeholders and urge consideration of the recommendations herein intended to mitigate unintended outcomes, provide appropriate incentives, and balance the costs and burdens of this significant reform of the CRA. We look forward to continuing constructive engagement with the Agencies as we all work towards the important goal of developing a modernized CRA regulatory framework that banks can comply with, regulators are able to consistently implement, and benefits communities and LMI individuals. If you have questions, require any additional information, or wish to discuss these comments, please contact Fran Mordi at fmordi@mba.org or Grant Carlson at gcarlson@mba.org.

Sincerely,

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