Center for Responsible Lending

and

Center for Community Self-Help

Comment to the Board of Governors of the Federal Reserve System; Office of the Comptroller of the Currency, Treasury; Federal Deposit Insurance Corporation

on Community Reinvestment Act, Notice of Proposed Rulemaking

August 5, 2022

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The Center for Responsible Lending (CRL) and the Center for Community Self-Help ("Self-Help") appreciate this opportunity to comment on the Notice of Proposed Rulemaking (NPRM) issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency (collectively, "Agencies") to update regulations under the Community Reinvestment Act (CRA).

CRL is a nonprofit, non-partisan research and policy organization dedicated to protecting and expanding home ownership and family wealth and working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. For over 40 years Self-Help has created asset-building opportunities for lower-income individuals, rural communities, women, and families and businesses of color.

We applaud the effort of the Agencies to update and modernize the CRA regulations given the massive changes that have taken place in the financial services industry in the more than 25 years since the regulations were last amended. Likewise, we support the overall thrust of the Agencies' proposal, which provides a much more robust, transparent, and objective framework for conducting CRA evaluations than that provided by current regulations. We offer these comments to respond to some of the questions posed by the NPRM and suggest ways of strengthening the proposal to better achieve the CRA's vital objectives.

The comment is divided into four parts. Part I addresses the overall evaluation framework set forth in the NPRM given the purposes of the CRA. Part II responds to some of the questions posed by the Agencies with respect to the Retail Lending Test. Part III responds to some of the questions regarding the Retail Service and Products Test and, more specifically, with respect to the retail products component of this test. Part IV comments on the proposed treatment of bank lending, investment, and service activities pertaining to Treasury-certified Community Development Financial Institutions (CDFIs) under the Community Development Financing Test, and on the inclusion of disaster preparedness and climate resiliency activities.

By focusing on these areas, we by no means intend to denigrate the importance of topics not covered. Indeed, as discussed in Part I, it is essential that the evaluation framework the Agencies adopt create strong incentives for banks to meet the needs of underserved people and communities via robust and responsive community development financing, retail lending, and retail products.

I. The Evaluation Framework

The CRA was enacted as part of the Housing and Development Act of 1977.[1] While other parts of that Act invested public funds in housing and community development, the CRA sought to

[1] P.L. 95-128, 91 Stat. 1111.

ensure that banks did their part in meeting this challenge. When Senator William Proxmire, the CRA sponsor, opened the hearings on the bill that Congress eventually enacted, he observed, "A public charter for a bank or savings institution conveys numerous benefits and it is fair for the public to ask something in return."[2] Specifically, he stated, "banks and savings institutions are chartered to serve local convenience and needs" and, in return for the charter, they "must play the leading role" in providing the "capital required for local housing and economic development needs." That responsibility, and recognition that too many banks simply failed "to see the loan demand in their own communities" are core pillars on which the CRA stands.

On the floor of the Senate, Senator Proxmire elaborated on these points:

> [I]f we are going to rebuild our cities, it will have to be done with the private institutions. The banks and the savings and loans have the funds. They have well over a trillion dollar in assets. They get those funds from the local communities. … Unfortunately, we find many banks and many savings and loans which take money from the community and reinvest it elsewhere, in some cases abroad, in some cases in other parts of the country.[3]

Senator Proxmire went on to speak directly and emphatically about the practice of redlining as the heart of the problem the CRA addresses:

> [F]or more than two years the Banking Committee has been studying the problem of redlining and the disinvestment by banks and savings institutions in older urban communities.
>
> By redlining let me make it clear what I am talking about. I am talking about the fact that banks and savings and loans will take their deposits from a community and instead of reinvesting them in that community they will invest them elsewhere, and they will actually or figuratively draw a red line on a map around areas of their city, sometimes in the inner city, sometimes in the older neighborhoods, sometimes ethnic and black, but often encompassing a great area of their neighborhood. … The data provided by [HMDA] remove any doubt that redlining indeed exists, that many credit-worthy areas are denied loans. This denial of credit, while it is certainly not the sole cause of our urban problems, undoubtedly aggravates urban decline. …
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> … Therefore the Committee included Title IV [the Title containing the CRA] to reaffirm that banks and thrift institutions are indeed chartered to serve the convenience and needs of their communities, and … convenience and needs does not just mean drive-in teller windows and Christmas Club accounts. It means loans.[4]

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[2] *Community Credit Needs: Hearings on S. 406 Before the Sen. Comm. On Banking, Hous. & Urban Affs.*, 95th Cong. 1st Sess. At 2-3 (1977).
[3] 123 Cong. Rec. 17603 (June 6, 1977).
[4] *Id.* at 17630.

To achieve these ends, the CRA requires prudential regulators in conducting examinations to "assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods." The CRA further requires the regulators to prepare written evaluations and ratings, to make portions of those reports public, and to take those assessments into account in evaluating applications for deposit facilities.[5]

As is apparent from the foregoing, the evaluation system that the Agencies use to generate ratings is central to achieving the vital purposes of the CRA. In general, the framework set forth in the NPRM represents a major step forward in aligning CRA evaluations with the CRA's objectives.

We are concerned, however, that by treating Community Services as a separate test, the Agencies may be overstating the importance of community service hours provided by bank employees and similar activities as a means of advancing the purposes of the CRA. In no event, do we think that such volunteer and related activities should carry two-thirds of the weight of the evaluation of a bank's retail services and products as the Agencies propose.

Beyond that, we urge the Agencies as they finalize benchmarks, weightings, and the like, to ensure that the resulting system achieves each of four key objectives.

1. **Assess whether a Bank is "meeting the credit needs of its *entire* community"**

Historically, and under the current proposal, CRA evaluations have been exclusively focused on LMI individuals and neighborhoods. But the CRA mandates that a bank must meet the "credit needs of its *entire* community, *including* low- and moderate- income neighborhoods." We emphasize the italicized words because they show that the CRA's aim is not limited to assuring that banks serve LMI individuals and communities.

It would be naïve to assume that once an individual crosses the LMI threshold – that is, once an individual's income exceeds 80% of the area median income (AMI) – their credit needs will be fairly and fully met by financial institutions without regard to the CRA. To the contrary, common sense and abundant experience make clear that many individuals are unserved or underserved by banks even though their incomes exceed 80% of AMI.

Indeed, it may well be that many low-income individuals are in such precarious financial situations that the last thing they need is another obligation (i.e. a loan) and that those with real credit needs going unmet are marginally above the LMI threshold. This is especially true for those who do not have personal or inter-generational wealth to draw on. That was, in part, why CRL recently joined with the National Fair Housing Alliance (NFHA) to propose a down payment assistance program targeted at first generation, first-time homebuyers with incomes up

[5] 12 U.S.C. §§ 2903(a), 2906(a),(b).

to 120% of AMI[6] and why, in the down payment assistance program passed by the Financial Services Committee of the U.S. House of Representatives, assistance would be available to first-generation homebuyers with up to 140% of AMI in high-cost areas.[7]

In all events, this much is clear: there are individuals and communities today that are unserved or underserved not because of their income but because of the color of their skin. The redlining that Senator Proxmire described was not aimed at LMI areas that just happened to be populated by Black residents; it was aimed expressly at areas populated by people of color who had been limited to these areas. Similarly, the restrictive covenants and other devices used in areas that fell outside the red lines were aimed expressly to keep those areas segregated and entirely white.[8] And while such intentional and invidious discrimination is, fortunately, less common today, it nonetheless remains the case that Black and Brown people continue to have credit needs that the banking system is all too ready to ignore or address in suboptimal ways. This includes Black and Latino individuals whose incomes may put them above the LMI threshold but who are victims of the enormous wealth gap that exists in our country and who thus may be shut off from opportunities to build wealth by owning a home or starting a business.

The comment we submitted in response to the Board's Advance Notice of Proposed Rulemaking, urged the Board to "incorporate consideration of race into CRA to address lending and investment gaps."[9] We continue to urge the Agencies to follow that approach. The National Community Reinvestment Coalition (NCRC) has developed a thoughtful proposal for accomplishing this objective that we wholeheartedly endorse.

But given the CRA's objective of assuring that the needs of "the entire community" are met, we also believe there is merit to exploring additional ways of defining underserved areas and individuals. NCRC has suggested a metric that ranks census tracts based on the amount of mortgage and small business lending taking place relative to their potential lending base (i.e., number of housing units and small businesses). The Agencies could, for example, use such a methodology to publish a list of non-LMI underserved census tracts and incorporate those tracts into the CRA evaluation framework. We recognize that it may be beyond the scope of the current proposal to develop an additional measure of populations who are being underserved. If so, we encourage the Agencies to make this a research priority so that in the future such an approach could be added to the CRA evaluation framework.

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[6] CRL and NFHA, *First Generation: Criteria for a Targeted Down Payment Assistance Program* (June 3, 2021), https://www.responsiblelending.org/research-publication/first-generation-criteria-targeted-down-payment-assistance-program.
[7] H.R.4495 - Downpayment Toward Equity Act of 2021, https://financialservices.house.gov/uploadedfiles/6.14_bills-117-4495-w000187-amdt-4.pdf.
[8] *See generally* R. Rothstein, *The Color of Money*.
[9] CRL and SH, *Comment to the Board of Governors of the Federal Reserve System on Community Reinvestment Act, Advance Notice of Proposed Rulemaking* (February 16, 2021) at p. 7, https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-sh-comment-to-federal-reserve-board-cra-anpr-feb2021.pdf.

2. Ensure that Below Satisfactory Performance is so Denominated

Under the current evaluation system, it appears that almost all banks are above average or, at the very least, performing satisfactorily. Today, over 90% of banks achieve ratings of Satisfactory or Outstanding and, among the largest banks, the percentage is over 95%.[10] Yet there is abundant evidence that the banking industry is failing to serve LMI borrowers and communities of color in ways that satisfy the goals of the CRA. The racial homeownership gap would not be at its widest point for 50 years if 90% of banks were satisfactorily meeting community credit needs.[11] Thus, there is a clear disconnect between the current ratings and the reality of banks' performance. The concern is not the percentage of banks rated as Satisfactory but that they are so rated when not meeting the credit needs of their entire communities.

As stated, we believe that the CRA ratings system should incent banks towards outstanding performance and welcome a day when all banks are, in fact, doing an outstanding – or at least a satisfactory – job of serving their entire communities and rated as such. But to create that world, a robust evaluation system needs to include the realistic potential for banks to receive a below Satisfactory grade if, in fact, their performance falls short of the CRA's expectations.

Under the proposal, a bank that received a Needs to Improve conclusion on the Retail Lending Test would receive an overall Satisfactory rating so long as its other scores were at the low end of Low Satisfactory. Indeed, a bank could receive a Needs to Improve on both Retail Lending and Retail Service and Products and still be rated Satisfactory if its other scores were at the low end of High Satisfactory. And a bank could receive an overall Satisfactory rating even if it is found in Substantial Noncompliance on the Community Development Financing Test if its other scores were Low Satisfactory. These possibilities may reduce the disincentive that otherwise should exist to avoid any Needs Improvement conclusion. We thus suggest the final rule provide that a Needs to Improve or Substantial Noncompliance conclusion on any test results in an overall Needs to Improve or Substantial Noncompliance rating even if the mathematical calculations would lead to a different outcome.

3. Create Meaningful Incentives to Spur Outstanding Performance

For the CRA evaluation system to achieve the statute's aims, in addition to discouraging bad ratings it also needs to motivate Outstanding performance, especially among the largest banks that are responsible for such a large share of deposits and lending in the United States. The

[10] Comment of Urban Institute in response to the OCC and FDIC Notice of Proposed Rulemaking at Table 5 (April 8, 2020), https://www.urban.org/sites/default/files/publication/102005/community-reinvestment-act-april-8-2020-comment-letter.pdf.

[11] Alanna McCargo and Jung Hyun Choi, *Closing the Gaps: Building Black Wealth Through Homeownership*, Urban Institute (November 2020) ("*Closing the Gaps*"), at p. 4, https://www.urban.org/sites/default/files/publication/103267/closing-the-gaps-building-black-wealth-through-homeownership_1.pdf.

current CRA regime makes it too easy to achieve an Outstanding rating, and it is important to make this rating more challenging to attain. To motivate high performance, however, the evaluation system should be careful not to overcorrect, and should create a path to an Outstanding rating that is attainable, if banks strive hard to achieve it.

Given the weight assigned to the Retail Lending Test, it would be challenging for any large bank to achieve an overall Outstanding rating today unless it achieves an Outstanding conclusion on Retail Lending. As the Agencies note, under the proposal, no bank with over $50 billion in assets would currently achieve an Outstanding conclusion on the Retail Lending Test.[12] We suggest two alternatives to consider in striking the proper balance. One approach would be to ensure that a large bank whose performance is Outstanding on Community Development Financing, Community Development Services, and Retail Service and Products would achieve an overall Outstanding rating so long as its Retail Lending conclusion is High Satisfactory. A second, not mutually exclusive, possibility would be to ensure that a bank receiving an Outstanding conclusion on Community Development Financing *or* on Retail Lending, and High Satisfactory on the other tests, will receive an overall Outstanding rating.

We also encourage the Agencies, apart from this rulemaking, to create incentives for banks to achieve an Outstanding CRA rating. For example, priority treatment could be given to more quickly consider applications received from banks with Outstanding ratings.

4. Align Expectations and Scrutiny with Banks' Levels of Lending

Like the current regulation, the proposal places banks into three tiers for purposes of CRA evaluation, with the tiers defined by asset size and with different tests applied to the different tiers. Asset size is, of course, a familiar metric for classifying financial institutions. However, in recent years a number of small community banks have established what they term "partnerships" with so-called technology companies, whereby the banks originate unsecured consumer loans in their own name and then immediately sell substantially all of the receivables to their "partner." In the case of such banks, their assets are not at all indicative of the role they play in various lending markets.

The banks engaged in these businesses profess to be the "true lender" with respect to the loans that they originate through these partnerships despite substantially all of the risk being borne by the fintech partner. Although that claim is at the very least debatable, so long as banks make such claims they should be subject to CRA expectations and examinations in line with their level of lending activity. The Agencies should thus add to the "large bank" definition an alternate prong that denominates a bank as large if it originates more than a certain number of loans in an assessment period, even if the bank's assets would otherwise place it in a lower tier.

[12] NPRM, Table 9 at p. 71/183.

II. The Retail Lending Test

As discussed above, the CRA text and legislative history make clear that the central goal of the CRA is to advance urban and community development by assuring that banks are meeting the credit needs of their "entire community," including LMI individuals and communities. Credit, of course, can serve a range of purposes in the lives of consumers and there are myriad credit products that may be offered. But given the overall purposes of the CRA, we believe that the Retail Lending Test, which measures the volume of a bank's lending to underserved individuals and communities, should focus on those credit needs that, when met, lead to wealth building, namely, home mortgages and small business loans.

Homeownership and entrepreneurship are core parts of the American dream. They are central to building stable communities and enabling those who have been historically discriminated against and disadvantaged to move up the economic ladder. And they are areas in which the lending performance of banks to underserved communities is sorely lacking even today.

Lack of lending to underserved communities is seen in consistently large racial homeownership gaps, with Black households over 30 percentage points behind whites and Latino households 24 points behind.[13] Those disparities mean fewer Black and Latino families enjoy the benefits of any house price appreciation. Even Black and Latino families who are homeowners attain far less home equity growth on average than whites due to owning less valuable houses.[14] Homeownership also plays a bigger role in creating wealth for Black families than it does for whites, as home equity forms nearly 60% of total net worth for Black homeowners compared with 43% for white homeowners.[15]

On the credit needs of small businesses, the Federal Reserve found that only 23% of Black-owned small businesses had all or most of their financing needs met compared to 56% of white-owned firms. Conversely, Black-owned small businesses were far more likely than white-owned ones to report: denial of all financing applications (21% to 9%); receiving some but not all financing requested (14% to 8%); discouraged from applying for financing due to concern of being rejected (19% to 7%); and not applying for financing due to high credit costs, confusing or difficult applications or other reasons (9% to 6%).[16]

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[13] *Closing the Gaps*, Figure 3 at p. 4.
[14] *Closing the Gaps*, at p. 12.
[15] Alanna McCargo and Jung Hyun Choi, *Closing the Gaps: Building Black Wealth through Homeownership*, Urban Institute (November 2020, updated December 2020), pp. 1-2, https://www.urban.org/sites/default/files/publication/103267/closing-the-gaps-building-black-wealth-through-homeownership_1.pdf.
[16] The Federal Reserve Banks, *The Small Business Credit Survey - 2021 Report on Firms Owned by People of Color*, at p. 27, https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/sbcs-report-on-firms-owned-by-people-of-color.

For these reasons, we urge the Agencies to focus the Retail Lending Test on loans financing the acquisition or refinancing of owner-occupied properties and small business loans.[17] Mortgages to acquire rental properties are, at best, commercial loans and may actually reduce the housing stock for would-be-homeowners. We also recommend disaggregating home purchase loans and refinancing loans as they serve distinct credit needs and therefore merit separate evaluation rather than being conflated in evaluating bank lending.[18]

That would mean considering open-end home mortgage loans (HELOCs), purchase loans for rental and investment properties, and automobile loans under the Retail Service and Products Test, and considering multifamily loans under the Community Development Financing Test. Removing those product lines from the Retail Lending Test will provide greater focus, simplicity, and clarity to the Retail Lending Test's results, better evaluate bank lending by assessment area, and put the emphasis on those loans most important for borrower development and advancement. HELOCs are something of a niche product designed to meet credit needs quite different from those that the CRA advances. And while automobile loans undeniably play an important role in the lives of consumers, most bank automobile lending is indirect lending through automobile dealers and, we think, better evaluated under the Retail Product and Services Test.[19]

III. The Retail Service and Products Test

We support the Agencies' proposal to qualitatively evaluate whether a financial institution's credit and deposit products are responsive to the needs of LMI individuals. However, in line with Part I, we suggest framing the question in terms of whether the products are responsive to the

[17] A number of lenders support the government loan programs by purchasing seasoned delinquent loans from other lenders and acting as special servicers, which helps borrowers maintain homeownership. To avoid penalizing these lenders, if the agencies continue to count loan purchases under the retail lending test, the lender should use the income of the borrower at origination of the loan and the area median income levels in use at that time to determine the borrower's LMI status. Similarly, if these lenders purchase mortgage servicing rights and subsequently buy delinquent loans out of Ginnie Mae securities, these loan purchases should be evaluated using the borrower and area incomes in effect at origination.

[18] If the Agencies disaggregate purchase mortgages from refinances, they may want to consider limiting the evaluation of refinancing loans to rate-term refinances or, alternatively, to separately consider rate-term refinancing from cash-out refinancing. The former is a means of wealth building by enabling borrowers to reduce their interest payments and/or accelerate their principal repayment. Cash out refinances, in contrast, are at best a means of enabling homeowners to access equity and, at worst, a form of equity stripping. Lenders are already required to report separately on rate-term and cash-out refinances under HMDA, although the regulations are unclear as to whether a refinance in which the costs of the new mortgage are rolled into the unpaid principal balance is to be treated as a rate-term refinance or cash-out refinance. *See* 12 CFR Part 1003 - Home Mortgage Disclosure (Regulation C), § 1003.4(a)(3) and Official Interpretation, https://www.consumerfinance.gov/rules-policy/regulations/1003/4/#4-a-3-Interp-1.

[19] If the Agencies retain automobile lending as part of the Retail Lending Test, we urge that direct and indirect automobile lending be assessed separately or that the analysis be limited to direct automobile lending.

needs of the entire community, including LMI individuals, as doing so better reflects the CRA mandate.

Further, the final rule should make clear that the examination's focus will not be on whether a bank has responsive products "on the shelf," but the extent to which such products are marketed to and used by LMI and underserved individuals and communities. Banks should not get credit for having responsive products if, for example, most of their LMI and underserved consumers are locked into or steered towards other, less-responsive, products that are not designed for their needs. This is particularly important in evaluating deposit products, as some banks seem content to add a Bank-On product to their offerings rather than reform the abusive features of their existing and dominant products.

We support the final rule including examples of responsive products for qualitative assessment and weighting, and specifically recommend that the rule include the illustrative examples below.

1. **Special Purpose Credit Programs (SPCPs)**

SPCPs, as defined in the Equal Credit Opportunity Act, are programs designed "to meet special social needs."[20] Regulation B, in turn, provides that a SPCP must be designed to serve "a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit."[21] It is thus necessarily true that SPCPs are programs responsive to the needs of those who would otherwise be unserved or underserved and should be included in the Agencies' list. This is especially true given that the Agencies, along with a number of other administrative agencies, have recently "encourage[d]" creditors, "as they consider how they may expand access to credit to better address special social needs, … to explore opportunities to develop special purpose credit programs consistent with ECOA and Regulation B requirements as well as applicable safe and sound lending principles."[22]

2. **Mortgages**

We agree with the Agencies that small dollar mortgages are an example of a responsive home mortgage product that meet the credit needs of LMI borrowers and particularly those who are first-time homebuyers. Mortgage loans between $10,000 and $70,000 dropped by more than 53% from 2011 to 2021, while those between $70,000 and $150,000 fell more than 21% over the

[20] 15 U.S.C. § 1691(c)(3)
[21] 12 C.F.R. 1002.8(a)(3)(ii).
[22] https://files.consumerfinance.gov/f/documents/cfpb_spcp_interagency-statement_2022-02.pdf.

same period.[23] We therefore encourage the Agencies to include such loans in a listing of responsive products.

We also agree with the Agencies that lending programs that use alternative data - including rent, utilities, and telecom payments - can be responsive to the needs of LMI and other underserved individuals at least so long as those programs operate as a second look for those who cannot qualify for a mortgage based on traditional credit scores. We therefore believe that such programs should be listed as illustrative of responsive products.

We agree with the Agencies that mortgage loans made by Treasury-certified CDFIs, Minority Depository Institutions (MDIs), Women Depository Institutions (WDIs), and Low-Income Credit Unions (LICUs) are ordinarily responsive to the needs of underserved borrowers and that purchases of such loans, which enable these lenders to make more loans to LMI and other underserved communities, are therefore ordinarily worthy of CRA credit. However, this is not universally true. Accordingly, rather than treating purchases of such loans as per se examples of responsive products, we recommend that such purchases be presumptively considered as a category of responsive credit products. This presumption could be rebutted by evidence showing the loans are unresponsive to the credit needs of, or even harmful to, LMI and underserved communities.

In addition, we recommend a list of responsive mortgage products that include the following:

- Lender-funded housing counseling through HUD-certified counselors.

- Down payment assistance programs.

- Loans with low down payment requirements (e.g. 97% LTV or higher loans), including loans that look to borrowers' reserves as an alternative to down payments.

- Government loan programs. Congress established the Federal Housing Agency (FHA), U.S. Department of Veterans Affairs (VA), and United States Department of Agriculture (USDA) loan programs to encourage lenders to serve creditworthy borrowers who would otherwise have difficulty getting reasonably priced loans on the private market because of their lack of wealth, veteran status, or rural location, respectively. Borrowers with FHA and VA loans both have lower median and mean credit scores than borrowers of conventional conforming mortgage loans. For FHA-originated loans, the peak of the credit score distribution is near 640, while "a not-insignificant percentage of FHA

[23] Nathaniel Lee, *The lack of small-dollar mortgages is preventing Americans from purchasing affordable homes* (May 25, 2022), CNBC, https://www.cnbc.com/2022/05/25/how-the-lack-of-small-dollar-mortgages-hurts-homeownership-in-the-us.html.

borrowers have credit scores below 620."[24] The Agencies should treat these programs consistently with Congress' determination of their importance by including them in the final rule's examples of responsive products.

- Loans with built-in features to protect borrowers facing challenges in making their monthly payments. This could include, for example, loans that provide income interruption insurance for borrowers who lose their job, like MassHousing's Mortgage Insurance with MI Plus,[25] or loans that, building on the experience during the pandemic, provide for forbearance and deferral of forborne amounts or a mortgage modification for borrowers facing temporary hardship.

3. Small Business Loans

Recent survey data has shown that the majority of small business owners of color are not confident that they could fund a $5,000 emergency business expense.[26] To ensure that lending activity helps entrepreneurs of color receive the working capital they need to develop and grow, we agree with the proposal that small business credit products that meet the credit needs of the smallest businesses, such as microloans of $50,000 or less, should be designated as a category of responsive credit products.

As with mortgage loans, we support small business loans that banks buy from Treasury-certified CDFIs, MDIs, WDIs, and LICUs being presumptively considered as a category of responsive credit products.

4. Affordable Small-Dollar Credit Products

Many LMI households – and, indeed, many households with higher incomes – live paycheck to paycheck without either a savings buffer or an unutilized line of credit. When these households experience a financial shock – due to a drop in income or unexpected expense – they need liquidity. Unfortunately, the primary answer of the financial services industry has been to provide short-term, high-cost, balloon-payment credit either in the form of payday loans (from non-depositories) or overdraft programs from depositories. Such products are patently unresponsive to the borrowers' needs since they presuppose that these consumers will have the

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[24] Consumer Financial Protection Bureau, *Introducing New and Revised Data Points in HMDA: Initial Observations from New and Revised Data Points in 2018 HMDA* (August 2019), at p. 49/281, https://files.consumerfinance.gov/f/documents/cfpb_new-revised-data-points-in-hmda_report.pdf.
[25] MassHousing, *MI Plus Offers Peace of Mind in Uncertain Times*, https://www.masshousing.com/en/home-ownership/homeownership-articles/miplus-peace-of-mind-0420.
[26] Reimagine Main Street, *Trust and Access to Capital* (May 19, 2022), https://www.reimaginemainstreet.org/trust-and-access-to-capitals.

ability to repay the credit within a very short time even though abundant evidence demonstrates that it takes much longer to recover from financial shocks.[27]

In 2020, the Agencies issued guidance encouraging banks to offer responsible, small-dollar credit products.[28] Recently, a few large banks have offered affordable, 90-day installment loans, most notably Bank of America's Balance Assist loan program. Huntington Bank has introduced a no- or low- cost line of credit in which draws can be repaid in three months. Products of this type should be included within the list of responsive products in accordance with the inter-agency guidance.

5. Automobile Loans

As suggested above, automobile loans should be evaluated under the Retail Service and Products Test, to focus the Retail Lending Test on mortgage loans to homeowners and small-business loans to entrepreneurs. This does not in any way minimize the importance of automobiles – and thus of automobile loans – in the lives of LMI consumers whose lives and livelihood may depend on commuting to and from work and driving to providers of healthcare, daycare or other essential services.

The bulk of banks' automobile lending consists of indirect lending, i.e. originating loans through automobile dealers and purchasing the paper after the loan is consummated.[29] Indirect automobile loans can be responsive to the needs of LMI and underserved borrowers. However, the standard practice in the industry is for indirect automobile lenders to permit dealers to mark up the interest rate on the loan above the risk-based price and to compensate dealers who engage in such activity based on the size of the markup. There is abundant evidence that where indirect automobile lenders permit dealers to mark-up the risk-based price and to profit from so doing, lower-income, more vulnerable consumers end up paying higher prices and effectively subsidizing more affluent consumers.[30] We therefore urge the Agencies to make clear that a responsive, indirect automobile lending product must not compensate dealers based upon the interest rate of the loan.

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[27] JP Morgan Chase Institute, *Weathering Volatility 2.0* (2019)
[28] *Interagency Lending Principles for Offering Responsible Small-Dollar Loans* (May 2020), https://www.ncua.gov/newsroom/press-release/2020/federal-agencies-share-principles-offering-responsible-small-dollar-loans/interagency-lending-principles-offering-responsible-small-dollar-loans.
[29] *See* Gruenweld *et al., Auto Dealer Loan Intermediation: Consumer Behavior and Competitive Effects* (2020)
[30] CFPB, *Supervisory Highlights* (Summer 2014), https://files.consumerfinance.gov/f/201409_cfpb_supervisory-highlights_auto-lending_summer-2014.pdf

6. Deposit Products

We agree with the NPRM that the Retail Service and Products Test should consider whether a financial institution is offering deposit products that are low cost, inclusive, and facilitate broad functionality and accessibility. But the NPRM proceeds to list a number of relevant features and potentially implies that any one feature such as, for example, low- or no-minimum balance requirements would make a product responsive to the needs of LMI and other underserved individuals. The Agencies should clarify that to be responsive to the needs of underserved consumers, deposit products must be both low cost *and* accessible, and further clarify that low cost refers both to front-end fees and also – indeed especially – to back-end fees. Overdraft and NSF fees have accounted for the bulk of back-end fees that fall disproportionately on LMI consumers and people of color.[31]

A few banks, including notably Capital One, have recently eliminated all overdraft and NSF fees while still providing some liquidity to consumers who need it at no cost. Bank of America, which has not charged overdraft fees on debit card transactions since at least 2009, has eliminated its NSF fee and overdraft fees on ATM transactions and reduced its overdraft fee on checks and ACH transactions to just $10 per overdraft. Bank of America has also imposed a daily and annual fee cap that, without removing any liquidity that was previously provided, assures no consumer will pay more than $200 in fees over one year. Especially at a time when some institutions have provided more window dressing than substantive relief from oppressive overdraft fees, it is critical that the CRA rule encourage meaningful reform.

IV. The Community Development Financing Test

We comment on two aspects of the new Community Development Financing Test. First, we discuss bank activities pertaining to Treasury-certified CDFIs. Second, we address the Agencies' inclusion of disaster preparedness and climate resiliency activities for community development credit.

1. Treatment of Bank Activities Pertaining to CDFIs

Under the proposal, a bank's "lending, investment and service activities undertaken in connection with a Treasury Department-certified CDFI at the time of the activity will be presumed to qualify for favorable community development consideration." It is unclear, however, from the proposal the weight to be given to such presumption. We urge the Agencies to make clear that the presumption is rebuttable and can be overcome by evidence showing that

[31] Financial Health Network, *Among Resurgence of Overdraft New Research Shows How Inequitable It Can Be, https://finhealthnetwork.org/amid-resurgence-of-interest-in-overdraft-new-data-reveal-how-inequitable-it-can-be/*

particular lending, investment or service activities are not furthering the development of LMI or other underserved communities.

While the vast majority of Treasury-certified CDFIs well serve their communities, there are outliers that do not. We know of one lender, for example, that charges extremely high interest rates on automobile loans and trumpets its status as a CDFI. Another CDFI boasts of an "unfair advantage" in advertisements touting their ability to "close loans with page one of the bank statement," and without "income, employment, or DTI documentation."[32] The company also uses its CDFI status in marketing the private label securities it issues backed by these loans. Banks should not receive CRA credit from investing in such securities.

2. Disaster Preparedness and Climate Resiliency Activities Eligible for Credit

We welcome the added definition of "disaster preparedness and climate resiliency" as activities that can count towards the Community Development Financing Test. We offer the following additional recommendations.

First, we encourage the Agencies to expand the proposed non-exhaustive list of climate-related eligible activities[33] under the CRA. Microgrids and battery storage can provide both disaster preparedness and climate resiliency functions and should be included.[34] Residential electrification, energy efficiency, and community solar all enable low-income communities to participate in, and benefit from, the transition to a clean energy, low-carbon economy, and therefore should be included in the expanded CRA definitions.[35] Water efficiency measures for single family and multifamily properties are activities that likewise should be included, since they advance climate resiliency.[36]

Second, we urge the Agencies to avoid awarding CRA credit to programs which, in the name of "disaster preparedness and climate resiliency," actually deceive or otherwise take advantage of LMI or other underserved consumers, as happened with PACE loans and in the residential solar industry. To achieve the intended positive impact and qualify for CRA credit, new climate resiliency and disaster preparedness financial products that are offered to individual consumers must not be predatory in nature. For instance, when loans are made to consumers for residential

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[32] Change Wholesale, see advertisements, including at https://changewholesale.com/.
[33] NPRM, p. 33905.
[34] See, e.g., pilot projects such as the Chicago, Illinois microgrid in an underserved neighborhood and a battery storage installation for emergency response services.
https://www.adaptationclearinghouse.org/resources/bronzeville-microgrid-chicago-illinois.html and https://www.cleanegroup.org/ceg-resources/resource/energy-storage-for-winter-grid-reliability/.
[35] Further detail on the connections between these activities and climate resilience is provided by the Sierra Club at https://www.sierraclub.org/articles/2019/10/electrification-for-climate-resiliency.
[36] The connection between water conservation and drought resilience is highlighted in several programs of the U.S. Environmental Protection Agency. https://www.epa.gov/sites/default/files/2016-06/documents/epa_drought_technical_brief_may_2016.pdf.

solar installations, it is essential that the lender consider the estimated energy production of the solar system and ensure that the value of that energy is consistent with borrower ability to repay.

Conclusion

We commend the Agencies for their work on this proposal and for the opportunity to comment. We are available to provide additional information that may be useful and look forward to working with the Agencies as they proceed to issue a final rule.