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Office of the Attorney General

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Via Email

Ann E. Misback, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, D.C. 20551
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RE: Comments on Advanced Notice of Proposed Rulemaking: Regulation BB, 12 CFR Part 228, RIN 7100-AF94, Docket No. R-1723

Dear Secretary Misback:

We, the Attorneys General of the States of California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington write in support of the Federal Reserve Board of Governors' (Board) above-captioned advance notice of proposed rulemaking relating to Community Reinvestment Act Regulations (ANPR). More specifically, we write to highlight three important objectives the Board should consider as it moves forward with rulemaking: (1) focusing on CRA's core purpose to serve Low- and Moderate-Income (LMI) communities and combat racially discriminatory redlining; (2) addressing the crucial housing needs of these communities; and (3) incentivizing increased credit and deposit services to LMI communities and small businesses. The Board's proposal, which is far superior to the rule adopted by the Office of the Comptroller of the Currency (OCC) last year, should be the basis for joint rulemaking by the three regulatory agencies.

CRA is a critical civil rights law responsible for creating trillions of dollars of bank investments in, and loans to, LMI communities nationwide. CRA's mandate is to prevent redlining, and to encourage banks to help meet the credit needs of all segments of their community, including LMI neighborhoods and individuals. The regulators hold banks accountable to these goals by grading their performance in providing credit and deposit services to LMI communities. If a bank fails its CRA evaluation, regulators can prevent mergers or branch openings. A robust CRA has never been more needed, as it is imperative to incentivize banks to meet the needs of LMI communities most impacted by the severe economic downturn caused by the COVID-19 pandemic.

THE BOARD MUST ENSURE THAT ONCE-IN-A-GENERATION CRA REFORM MEETS THE NEEDS OF LMI COMMUNITIES

It has been over twenty years since the Board, OCC and Federal Deposit Insurance Corporation (FDIC) last engaged in significant joint CRA rulemaking. As mentioned above, in 2020, the OCC adopted its own rule—alone, without the support of the other two regulatory agencies (OCC Rule). A group of Attorneys General opposed the OCC Rule for a number of reasons,¹ including that the Rule: (1) was inimical to CRA’s core purposes; (2) shifted CRA’s incentive structure and discarded time-tested methods of assessing banks’ performance in meeting the investment, credit and deposit needs of LMI communities in favor of a narrow, purely quantitative test to generate banks’ presumptive ratings, using arbitrary benchmarks without the support of a robust data set; (3) created a rating system that diverted the focus away from the actual needs of LMI communities and toward a myopic approach that rewarded the dollar value of activities; (4) expanded qualifying activities to include those with little or no connection to CRA’s core purposes—and virtually eliminated the service test—contrary to CRA’s explicit focus on banks meeting the needs of depositors in their assessment areas; and (5) shut the communities that CRA was intended to serve out of the evaluation process.

The Board’s ANPR stands in stark contrast to the OCC’s misguided rule, and offers a chance to return to a regulatory regime that advances CRA’s objectives. First, the ANPR appropriately acknowledges that any rulemaking must be rooted in CRA’s core purpose of meeting the credit and deposit needs of LMI communities, and cognizant of CRA’s aim to stop racial redlining.² The signatory States agree that the Board must focus on CRA’s historical context and understanding that CRA operates as a “crucial mechanism for addressing persistent systemic inequity in the financial system for LMI and minority individuals and communities.”³ Second, the States support the Board’s evaluation framework, which maintains distinct retail and community development evaluations, recognizing the value of these services to communities in addressing the CRA’s aims. Additionally, the States support the Board’s plan to assess retail services and deposit products separately under the ANPR’s Retail Services Subtest. The ANPR includes proposals that zero in on areas where credit and deposit needs are unmet, focuses on addressing needs of the smallest businesses and those in rural areas, and includes proposals to promote financial inclusion in Indian Country and other underserved areas, including investments in Minority Depository Institutions and Community Development Financial Institutions. Overall, States are encouraged that the Board’s ANPR rejects the OCC Rule’s harmful one ratio approach. For example, in the case of mortgage lending, the ANPR proposes evaluating a bank’s retail lending in its major product lines using metrics that measure the number of loans a bank makes, not the dollar value of these loans. Further, the States strongly support the Board’s data-driven approach. The Board’s use of a robust data

¹ The letters sent by the Attorneys General on November 19, 2018 and April 7, 2020 are attached hereto.

² 85 Fed. Reg. 66410, 66412 (Oct. 19, 2020).

³ *Id.*

set of 6,000 CRA evaluations from a diverse sample of 3,700 banks is a superior foundation for rulemaking than the OCC's Rule, which lacked such supporting data.

The OCC's highly divergent approach could generate significant confusion and disruption when banks and communities need clarity the most. A unified approach fosters consistency across regulators, including state agencies seeking to join or enforce related reforms. We urge the Board to engage in inter-agency consultations with an eye to encouraging the OCC and FDIC to follow its lead in this reform effort. However, the Board should proceed with its planned rulemaking even if doing so on its own.

THE NEED FOR A ROBUST CRA IS HEIGHTENED BY THE CRISES CREATED BY THE COVID-19 PANDEMIC

The States have benefitted from billions in CRA-driven activity and lending. CRA has fostered lending to communities of color, spurred affordable housing development, and, with the help of community development agreements, been a helpful tool to address specific community needs. A 2016 survey showed that responding banks lent over \$27 billion in LMI communities and communities of color, and over \$31 billion in total CRA activity in California alone.⁴ In 2018, New Jersey financial institutions made over \$40 billion in CRA commitments to LMI communities through the work of organizations like the New Jersey's Housing and Community Development Network and New Jersey Citizen Action.⁵

As the Board notes, CRA was enacted to tackle "economic challenges in predominately minority urban neighborhoods that had suffered from decades of disinvestment and other inequities."⁶ Today's CRA is challenged with tackling generations of disinvestment, while navigating a post-pandemic economic recovery which could last up to a decade.⁷ Americans now face unemployment numbers "not seen since the 1930s," with

⁴ Paulina Gonzalez-Brito, Executive Dir., Cal. Reinvestment Coalition, H.R. Fin'l Svcs. Comm., Subcomm. on Consumer Protection and Fin'l Institutions (Jan. 14, 2020), <http://calreinvest.org/wp-content/uploads/2020/01/PGB-Congressional-Testimony-1.14.20-with-%20Appendix.pdf>.

⁵ Letter from Housing and Community Development Network of N.J. to Vonda J. Eanes, Off. of the Comptroller of the Currency, Re: Docket ID OCC-2018-0008 (Nov. 1, 2018), <https://www.hcdnnj.org/assets/documents/cra%20anpr%20response%20letter%20ac.pdf>.

⁶ 85 Fed. Reg. 66410, 66412 (Oct. 19, 2020).

⁷ Mary C. Daly, President and CEO of the Federal Reserve Bank of San Francisco, *We Can't Afford Not To*, Speech to the National Press Club Virtual Event (June 15, 2020) https://www.frbsf.org/economic-research/publications/economic-letter/2020/october/is-federal-reserve-contributing-to-economic-inequality-speech/?utm_source=frbsf-home-refresh-feature-small-2-title&utm_medium=frbsf&utm_campaign=featured-content.

the worst yet to come, as pandemic job losses are expected to triple.⁸ A robust CRA is needed more than ever to serve LMI communities decimated by the pandemic and avoid further exacerbating existing inequities.

I. The Rule Must Maintain Fidelity to CRA's Core Purpose

The States appreciate the Board's recognition of CRA's core purpose of addressing racist lending and banking practices, like redlining, as well as ongoing racial systemic inequality.⁹ The States urge the Board to ensure that its rulemaking, unlike the OCC's, takes bold steps to meet CRA's promise.

A. CRA Rulemaking Must Focus on Systemic Inequities and Race

The most important modernization goal should be maintaining fidelity to the law's original purpose as an antidote to the pernicious practices of redlining and disinvestment that inflicted lasting harm to LMI communities, particularly communities of color.¹⁰ As noted in the ANPR, the racial wealth gap remains largely unchanged since CRA's enactment.¹¹ The COVID-19 pandemic recession has exposed the "long-lasting impact of racial segregation and redlining in shaping the enduring contours of marked inequality in American cities."¹² Just as the pandemic has raged through minority and low-income communities with higher intensity,¹³ the long-term economic fallout will also disproportionately impact communities of color. States already feel the pain. Nearly three-quarters of renter households in California affected by COVID-related job losses are households of color.¹⁴

⁸ Daniel Flaming, et al., *Locked Out: Unemployment and Homelessness in the COVID Economy*, Economic Roundtable (Jan. 2021) <https://economicrt.org/publication/locked-out/>.

⁹ 85 Fed. Reg. 66410, 66412-13 (Oct. 19, 2020).

¹⁰ Question 1, 85 Fed. Reg. 66410, 66411 (Oct. 19, 2020).

¹¹ 85 Fed. Reg. 66410, 66413 (Oct. 19, 2020).

¹² *Not Even Past: Social Vulnerability and the Legacy of Redlining*, University of Richmond's Digital Scholarship Lab and the National Community Reinvestment Coalition <https://dsl.richmond.edu/socialvulnerability/> (1930s HOLC maps overlap with near surgical precision with communities hardest hit by the pandemic).

¹³ Ruchi Avtar, Rajashri Chakrabarti, and Maxim Pinkovskiy, *Understanding the Racial and Income Gap in Covid-19: Health Insurance, Comorbidities, and Medical Facilities*, Fed. Res. Bank of N.Y. Liberty Street Economics (Jan. 12, 2021), <https://libertystreeteconomics.newyorkfed.org/2021/01/understanding-the-racial-and-income-gap-in-covid-19-health-insurance-comorbidities-and-medical-facil.html>.

¹⁴ Elizabeth Kneebone, Carolina Reid, *COVID-19 and California's Vulnerable Renters*, Turner Center for Housing Innovation (Aug. 4, 2020), <https://turnercenter.berkeley.edu/research-and-policy/covid-19-and-californias-vulnerable-renters/>.

CRA reform must employ laser-sharp focus on bank responsiveness to the lowest-income communities and underserved communities of color.¹⁵ The Board can consider embedding this core purpose in the ANPR’s proposed incentive structure as part of impact scoring for community development activities. Under the Board’s proposal, impact scores are qualitative measures that range on a scale of one to three to gauge responsiveness to community needs. A score of three should be available for projects that serve LMI communities of color or address systemic inequities. The Board could also add consideration under the service test, or identify such activity as a “particularly responsive” qualifying activity. The States encourage the Board to evaluate lending and investing in underserved LMI neighborhoods of color by adding it as a separate category, such that banks could earn CRA credit even if the activity is located outside of a bank’s CRA assessment area.

To that end, States support the Board’s first-ever consideration of investments in disaster recovery and climate resilience as a CRA-qualifying activity.¹⁶ Disaster relief and climate mitigation are both racial justice and equity issues that demonstrate how the need to invest in long-term resilience for LMI communities and communities of color intersect and can be incentivized in CRA evaluations.¹⁷ When disaster strikes, those without liquid assets struggle to flee, relocate, and rebuild. This past year, the United States suffered 22 separate billion-dollar-plus disaster events.¹⁸ States are beginning to take measures to address these issues,¹⁹ but climate and disaster mitigation projects are often costly multi-year projects, such as critical infrastructure

¹⁵ Stella J. Adams, *Putting Race Explicitly into the CRA, Revisiting the CRA: Perspectives on the Future of the Community Reinvestment Act*, 169 https://www.frbsf.org/community-development/files/putting_race_explicitly_cra.pdf (“CRA should explicitly reward financial institutions that aggressively engage in investments in minority wealth creation and minority neighborhood development”).

¹⁶ Question 62, 85 Fed. Reg. 66410, 66448 (Oct. 19, 2020).

¹⁷ See Laurie Schoeman, *Pre- and Post-Disaster Investments in Housing and Community Development Under the CRA*, Community Development Innovation Review, Fed. Res. of S.F., (Oct. 17, 2019), <https://www.frbsf.org/community-development/publications/community-development-investment-review/2019/october/pre-and-post-disaster-investments-in-housing-and-community-development-under-the-cra/>.

¹⁸ National Oceanographic and Atmospheric Administration, *Billion-Dollar Weather and Climate Disasters: Table of Events* (2020), <https://www.ncdc.noaa.gov/billions/events/US/2020> (disasters caused \$94 billion in damage in 2020).

¹⁹ Press Release, Governor Phil Murphy, Governor Murphy Signs Historic Environmental Justice Legislation (Sept. 18, 2020), <https://www.nj.gov/governor/news/news/562020/20200918a.shtml>. New Jersey recently enacted sweeping legislation requiring the state’s Department of Environmental Protection to evaluate the environmental and public health impacts of certain facilities on overburdened communities when reviewing certain permit applications. New Jersey is the first state in the nation to require mandatory permit denials if an environmental justice analysis determines a new facility will have a disproportionately negative impact on overburdened communities.

that require public/private partnerships. Investments in resiliency today will prevent billions in losses²⁰ and great loss of life and livelihood.²¹

B. The Board Should Strengthen the Evaluation Process and Ensure that CRA Credit Is Focused on Activities that Benefit LMI Communities

The Board can ensure that the ANPR’s evaluation process prioritizes the needs of the lowest-income communities by raising thresholds so more is expected, downgrading for harm, and only considering targeted proxies to identify harder-to-serve low-income populations.

First, the Board should adopt more aggressive thresholds and penalties, ensuring that banks’ harmful behavior is properly accounted for in their rating. At a minimum, any evidence of discrimination must result in an automatic ratings downgrade. Additionally, a bank that scores “needs to improve” should receive an immediate downgrade to “substantial non-compliance” if it does not improve by the next examination.²² Second, the Board should ensure that full CRA credit is not awarded for activities that do not directly benefit LMI communities. For example, CRA credit for financial literacy programs or community service projects without a clear nexus to LMI communities’ needs should be eliminated in favor of other activities that prioritize LMI communities’ urgent needs such as food insecurity or eviction protection.²³

The States are encouraged that the ANPR measures the number and impact of community development financing activities, rather than simply tallying a lump-sum dollar amount. States are also hopeful that measuring impact through a qualitative assessment will encourage banks to engage with community stakeholders to meet targeted needs. But this encouragement needs to be made explicit.²⁴ There is no substitute for a seat at the table, and community-benefit agreements must remain an integral component of CRA compliance work. Likewise, banks that opt to pursue a strategic plan should not be able to avoid community involvement or a potential benefit

²⁰ K. Porter, et al., *Natural Hazard Mitigation Saves 2017 Interim Report*, National Institute of Building Sciences Multihazard Mitigation Council (2017), http://www.wbdg.org/files/pdfs/MS2_2017Interim%20Report.pdf (explaining that each dollar spent in disaster preparation can save up to \$11 in subsequent costs).

²¹ Bradshaw, et al., *Underestimating the Challenges of Avoiding a Ghastly Future*, *Frontiers in Conservation Science* (Jan. 13, 2021) at 5, doi:10.3389/fcosc.2020.615419 (explaining that unless “large, additional commitments are made and fulfilled . . . the projected rise of Earth’s temperature will be catastrophic for biodiversity and humanity”).

²² Question 80, 85 Fed. Reg. 66410, 66455 (Oct. 19, 2020).

²³ Questions 51 and 56, 85 Fed. Reg. 66410, 66444 (Oct. 19, 2020). *Economic Fallout From COVID-19 Continues To Hit Lower-Income Americans the Hardest*, PEW Research Center, (Sept. 24, 2020) <https://www.pewsocialtrends.org/2020/09/24/covid-19-financial-hardships-methodology/> (poll showing Black, Native, or Latino respondents were twice as likely as white respondents to report lacking access to food. The poll also illustrated that 48% of Black adults and 40% of Latino adults have relied on charitable food resources).

²⁴ Questions 73 and 74, 85 Fed. Reg. 66444, 66453-4 (Oct. 19, 2020).

agreement. The States support additional measures to ensure community engagement at every step, such as increasing the minimum time for public comment during mergers from the current 30 days.

II. The Rule Must Incentivize Keeping LMI Communities Housed and Incentivize Affordable Housing Development

CRA is a critical tool to address the ever-worsening affordable housing and homelessness crises.²⁵ Among the myriad challenges already facing low-income communities, pandemic-related job losses have threatened the housing stability of communities hit hardest by the virus. In California alone, 903,000 renter households are on the precipice of eviction due to COVID-19 related job losses.²⁶ At a macro level, states face complex competing crises. Take, for example, California's tripartite housing crisis: over 150,000 Californians are homeless, 7.1 million live in poverty when accounting for housing costs, and homes cost seven times the average household income.²⁷ With nearly a million households on the precipice of housing insecurity in a single state, it is unsurprising that pandemic-related unemployment is predicted to spur a "brutal cycle of homelessness" over the next few years. Some estimates project that Los Angeles County, with the second-largest population of unhoused persons in the country, will see its unhoused population double and chronic homelessness increase by 86%.²⁸ And this crisis only stands to

²⁵ U.S. Conf. of Mayors, *Letter to Chairman Powell, Comptroller Otting, and Chairman McWilliams* (Nov. 16, 2018), <https://greenlining.org/wp-content/uploads/2019/02/US-Conference-of-Mayors-Community-Reinvestment-Act-Support.pdf> (describing CRA as a "key policy lever" in "expanding the supply of affordable housing," noting that "38 percent of renters in the United States are spending more than 30 percent of their incomes on housing").

²⁶ Elizabeth Kneebone, Carolina Reid, *COVID-19 and California's Vulnerable Renters*, Terner Center for Housing Innovation (Aug. 4, 2020), <https://ternercenter.berkeley.edu/research-and-policy/covid-19-and-californias-vulnerable-renters/>. This is more than the typical total number of renter households that experience a judicial eviction, nationwide, annually. Eviction Lab, *National Estimates: Eviction in America*, Princeton University (May 11, 2018), <https://evictionlab.org/national-estimates> (explaining in a typical year, approximately 900,000 U.S. renter-occupied households experienced a judicial eviction).

²⁷ Matt Levin, *Commentary: Five things I've learned covering California's housing crisis that you should know*, CalMatters (Jan. 6, 2021), <https://calmatters.org/housing/2021/01/california-housing-crisis-lessons/>.

²⁸ Daniel Flaming, et al., *Locked Out: Unemployment and Homelessness in the COVID Economy*, Economic Roundtable (Jan. 2021) <https://economicrt.org/publication/locked-out/> (also projecting chronic homelessness to increase 49 percent in the United States and 68 percent in California over next four years due to the COVID-caused recession).

worsen once eviction protections expire.²⁹ Many other states are facing the same crisis.³⁰ The ANPR must incentivize keeping LMI communities housed and encourage affordable housing development.

A. The Board’s Rule Must Prioritize Keeping LMI Communities Housed

The States applaud the Board’s consideration of housing for very low-income, homeless, or other harder-to-serve populations as particularly responsive in CRA evaluations.³¹ To keep low-income families housed, the Rule should employ every incentive available in the evaluation structure: if the Board creates a list of pre-approved CRA qualifying activities, the States encourage the inclusion of groups facing housing insecurity. Additionally, LMI communities facing housing insecurity and eviction should also be included in the groups designated as “particularly responsive” for community development activity.³² The Board should also consider consequences in conjunction with incentives, such as automatic score downgrades for displacement. At the same time, community service activities should include eviction protection, foreclosure prevention, and assist with pandemic aid distribution in LMI communities.³³

B. The Board’s Rule Must Encourage Inclusive Affordable Housing Development

CRA has been undeniably effective in directing investment into affordable housing projects because banks are incentivized to provide flexible debt and equity generated through the sale of Low Income Housing Tax Credits (LIHTC).³⁴ LIHTC investments are the primary source

²⁹ Liam Dillon, *Eviction Cases in California Projected to Double*, L.A. Times (Jan. 20, 2021), <https://www.latimes.com/homeless-housing/story/2021-01-20/california-eviction-cases-slated-to-double-covid-19>.

³⁰ Harvard Joint Center for Housing Studies, *America’s Rental Housing 2020*, <https://www.jchs.harvard.edu/americas-rental-housing-2020> (follow “Excel Data” hyperlink; then follow “Table W-7” link in spreadsheet). In New Jersey, before the pandemic, over 322,000 families paid more than half of their monthly income towards rent.

³¹ Question 54, 85 Fed. Reg. 66410, 66445 (Oct. 19, 2020).

³² *Id.*

³³ Question 54 Fed. Reg. 66410, 66445 (Oct. 19, 2020).

³⁴ Letter from Cal. Housing Consortium to Comptroller Otting Re: Docket ID OCC- 2018-0008, “Reforming the Community Reinvestment Act Regulatory Framework” (Nov. 14, 2018), <https://www.regulations.gov/document?D=OCC-2018-0008-1423> (the California Housing Consortium—whose members have helped develop over 350,000 affordable homes serving LMI households throughout California over the past 35 years—explains “CRA-motivated banks have been critical partners in this work by providing not only lower cost more flexible debt but, even more critically, equity generated through the sale of Low Income Housing Tax Credits (LIHTCs).”); *see also* Steve Dubb, *Community Reinvestment Act at Risk: What’s at Stake?* Non Profit Quarterly (Mar. 11, 2020), <https://nonprofitquarterly.org/community-reinvestment-act-at-risk-whats-at-stake/> (quoting Priscilla Almodovar, CEO of Enterprise Community Partners: “The most efficient, easiest,

of affordable housing financing.³⁵ Even so, across the Nation, affordable housing production and supply does not meet demand. One report estimates that nationwide there is a 7 million rental home shortage for extremely low-income residents.³⁶ In California, the gap is over 1 million rental homes.³⁷

1. *The Board's Rule must do no harm to LIHTC, the lifeblood of affordable housing development*

Protecting LIHTC, the “nation’s most effective tool for financing the development of rental housing affordable to low-income Americans,” is imperative.³⁸ The vast majority—roughly 85 percent—of the equity for all LIHTC investments comes from banks subject to CRA.³⁹ Indeed, the relationship between CRA incentives and housing is so clear “the largest single determination of housing tax credit pricing” is whether the property is in a bank’s CRA assessment area.⁴⁰

While the Board’s proposal rejects the OCC Rule’s one ratio approach in favor of evaluating the number of loans—thus avoiding the direct blow to the LIHTC market expected from the OCC Rule—the States remain concerned that LIHTC investments are at risk. Because

[most] impactful ways to meet the investment test are LIHTC (Low-Income Housing Tax Credit) and NMTC (New Markets Tax Credit”).

³⁵ Letter from Tia Boatman Patterson, Executive Director, CalHFA, re OCC Docket ID OCC-2018-0008 (Apr. 8, 2020), https://downloads.regulations.gov/OCC-2018-0008-3348/attachment_1.pdf. See also CohnReznick, *The Community Reinvestment Act and Its Effect on Housing Tax Credit Pricing*, https://ahic.org/images/downloads/Research_and_Education/the_community_reinvestment_act_and_its_effect_on_housing_tax.pdf (estimating that \$10 billion of capital is committed to housing tax credit investments annually, and that over three-quarters of the surveyed LIHTC properties are located in areas where at least one of the top 20 U.S. commercial banks has CRA responsibility).

³⁶ *The Gap: A Shortage of Affordable Rental Homes*, National Low Income Housing Coalition (accessed Jan. 31, 2021) <https://reports.nlihc.org/gap/2017/caFor> (explaining that no state has an adequate supply of affordable rental housing for the lowest-income residents).

³⁷ California Housing Partnership, *Affordable Homes Shortfall* (accessed Jan. 31, 2021), <https://chpc.net/housingneeds/>.

³⁸ Letter from Nat’l Council of St. Housing Agencies to Off. of the Comptroller of the Currency RE: Docket ID OCC-2018-0008, Reforming the Community Reinvestment Act Regulatory Framework (Nov. 19, 2018), <https://www.regulations.gov/contentStreamer?documentId=OCC-2018-0008-1124&attachmentNumber=1&contentType=pdf>.

³⁹ *Id.* at 2 (citing Fred Copeman, *What Do Higher LIHTC Prices Mean for Syndicators?*, Affordable Housing News & Views (June 1, 2014), <https://www.cohnreznick.com/insights-and-events/insights/what-do-higher-lihtc-prices-mean-syndicators>).

⁴⁰ *Id.* at 5, 6-8.

the ANPR combines community development (“CD”) lending and CD investments, this could disfavor LIHTC investments, which can be complex and expensive for banks to transact and may provide a lower return than CD lending. To that end, the States echo the concerns of state housing agencies and encourage the Board to take care to protect crucial LIHTC investments. Additionally, the States encourage the three regulators to coalesce around the Board’s proposal in order to avoid splitting the LIHTC market.

2. *Ensure LMI access to, and occupancy of, affordable housing development*

The States encourage the Board to consider additional means to ensure LMI households are the direct beneficiaries of affordable housing development and propose a measurement of both LMI access and occupancy to ensure that low-income households actually live in developments favorably considered in CRA evaluations.⁴¹ Development in an LMI census tract and promises of affordability alone cannot ensure that LMI households will be the majority of renters. This should also extend to any pro-rata approach to mixed development.⁴² The ANPR references LMI occupancy pledges;⁴³ while this may be one measure of accountability, at a minimum, the States encourage requiring that such pledges be made public to community stakeholders, and encourage the Board to consider an accountability mechanism if a project falls short on its promise. The States encourage the Board to consider all available incentives to keep housing insecure LMI communities housed and spur affordable housing production.

Additionally, the States encourage the Board to use the CRA to ensure affordable and accessible housing for people with disabilities. In particular, the Board should consider incentivizing smaller investment projects for both affordable homeownership loans for LMI rural individuals in need of accessible housing and the construction of smaller dollar investment multi-unit accessible affordable rental housing.⁴⁴

III. The Rule Must Incentivize Credit and Deposit Services for LMI Communities and Small and Minority-owned Businesses

LMI communities continue to suffer from inadequate access to credit and financial services. States support the ANPR’s consideration of adding a second prong to the Retail Services Subtest to measure the degree to which deposit products are responsive to the needs of LMI consumers.⁴⁵ Both LMI communities and small and minority-owned businesses tend to lack

⁴¹ Questions 52, 53, 54, 85 Fed. Reg. 66410, 66445 (Oct. 19, 2020).

⁴² Question 55, 85 Fed. Reg. 66410, 66445 (Oct. 19, 2020).

⁴³ Question 52, 85 Fed. Reg. 66410, 66445 (Oct. 19, 2020).

⁴⁴ See, e.g., National Disability Institute, *Reforming the Community Reinvestment Act Regulatory Framework*, <https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/01/cra-remarks.pdf> (stating that “[h]ousing development for LMI often critically miss the unique challenges of providing housing that is both accessible and affordable”).

⁴⁵ 85 Fed. Reg. 66410, 66432 (Oct. 19, 2020).

lender relationships and access to deposit products. CRA reform presents an opportunity to incentivize broadening deposit products to meet the needs of the underserved while closing the gap of the underbanked.

A. The States Encourage the Board to Examine Whether Deposit Products Meet Service Gaps

The ANPR seeks input on the type of data needed to determine whether banks' deposit services are meeting LMI community needs.⁴⁶ Given the drastic need created by the pandemic recession, the best measure of responsiveness must be tied to maintaining or strengthening community resiliency, through accessing deposits in no-cost or low-cost accounts and other products that can on-ramp previously unbanked and underbanked communities.⁴⁷

Addressing the needs of unbanked households also helps promote racial justice; nationwide, about 3% of white households are unbanked, while Black, Latino, and Native American households are unbanked at rates of 13.8%, 12.2%, and 16.3%, respectively.⁴⁸ Deposit services protect against unscrupulous check cashers and other fringe-financial services providers.⁴⁹ In 2017 alone, unbanked Americans paid \$173 billion in fees.⁵⁰

As a starting point, the States support suggestions made by community advocates that banks be encouraged to participate in the Bank On program, offering no- and low-cost accounts, waiving bank fees for products, providing low-cost remittance and money order services, providing ATM surcharge-free access (including for public assistance delivered on debit cards), and equitably providing services meant to assist customers with the receipt of direct payments and pandemic economic relief, as well as other state or private/public assistance programs.⁵¹

⁴⁶ 85 Fed. Reg. 66410, 66433 (Oct. 19, 2020).

⁴⁷ Questions 29, 49, 85 Fed. Reg. 66410, 66433, 66443 (Oct. 19, 2020). And specifically, a bank's strategic statement could include information on how it plans to engage unbanked or underbanked communities. Question 31, 85 Fed. Reg. 66410, 66433 (Oct. 19, 2020).

⁴⁸ *The 2019 FDIC Survey of Household Use of Banking and Financial Services*, F.D.I.C., <https://economicinclusion.gov/surveys/2019household/>; see also Ellen Rosen, *Trying to Correct Banking's Racial Imbalance*, N.Y. Times (June 30, 2020), <https://www.nytimes.com/2020/06/30/business/banking-race-black-inequality.html>.

⁴⁹ Hoai-Luu Q. Nguyen, *Do Bank Branches Still Matter? The Effect of Closings on Local Economic Outcomes* (Oct. 2015), <https://economics.mit.edu/files/10143> ("The impact of branch closures were found to be more severe in tracts with lower median income, a higher fraction of minority households, and where firms were, on average, closer to their lending").

⁵⁰ Christopher Brown et al., *The Future of Banking: Overcoming Barriers to Financial Inclusion for Communities of Color*, Unidos US & PolicyLink 3, https://www.policylink.org/sites/default/files/future_of_banking_52419_v3.pdf.

⁵¹ Josh Silver, *NCRC Initial Analysis of Federal Reserve's ANPR on the Community Reinvestment Act: A Step Forward but Needs to be More Rigorous*, National Community

Inclusive bank services are more important than ever as government aid programs need to reach hard-hit residents quickly.

The States also encourage including deposit products responsive to needs of immigrant communities, who are largely unbanked. Inclusive bank services for immigrant communities may help lower the number of unbanked persons and help state and federal governments respond to the pandemic recession. For example, the State of California distributed \$75 million in aid to immigrant families through debit cards.⁵² Inclusion of non-citizens in mortgage services and loans is critical; for example, DACA recipients recently became eligible for federally insured mortgage loans.⁵³

The States are encouraged that the ANPR considers the positive impact of physical branch presence along with availability of responsive products. A bank's presence in the community corresponds to increased credit opportunities,⁵⁴ including mortgage lending and other financial services.⁵⁵ Conversely, such opportunities diminish with distance from a branch location, including reduced access to small business lending.⁵⁶ The ANPR should evaluate the

Reinvestment Coalition (Oct. 16, 2020), <https://ncrc.org/ncrc-initial-analysis-of-federal-reserves-anpr-on-the-community-reinvestment-act-a-step-forward-but-needs-to-be-more-rigorous/>.

⁵² Miriam Jordan, *California Offers \$500 in Covid-19 Aid to Undocumented Immigrants*, N.Y. Times (May 18, 2020), <https://www.nytimes.com/2020/05/18/us/coronavirus-undocumented-california.html>.

⁵³ See Dep't of Housing and Urban Devel. (Jan. 20, 2021), *FHA to Permit DACA Status Recipients to Apply for FHA Insured Mortgages*, https://www.hud.gov/sites/dfiles/SFH/documents/SFH_FHA_INFO_21-04.pdf.

⁵⁴ See Lei Ding and Carolina K. Reid, *The Community Reinvestment Act (CRA) and Bank Branching Patterns*, Fed. Res. Bank of Phila. 20 (Sept. 2019) 9, <https://philadelphiafed.org/-/media/research-and-data/publications/working-papers/2019/wp19-36.pdf> (noting a direct correlation between the number of bank branches and ATMs located in a neighborhood and the credit opportunities available to the surrounding community).

⁵⁵ Kristin F. Butcher & Ana Patricia Muñoz, *Using Credit Reporting Agency Data to Assess the Link Between the Community Reinvestment Act and Consumer Credit Outcomes*, 19 *Cityscape: A Journal of Policy Development and Research* 2 (2017), <https://www.huduser.gov/portal/periodicals/cityscpe/vol19num2/ch7.pdf>.

⁵⁶ Donald Morgan et al., *Banking Deserts, Branch Closings and Soft Information*, Liberty Street Economics blog (Mar. 7, 2015), <http://libertystreeteconomics.newyorkfed.org/2016/03/banking-deserts-branch-closings-and-soft-information.html>; Fed. Res., *Perspectives from Main Street: Bank Branch Access in Rural Communities* (Nov. 2019), <https://www.federalreserve.gov/publications/november-2019-bank-branch-access-in-rural-communities.htm> (noting branch closures cause “increased costs and reduced convenience in accessing financial services,” particularly for “those with lower incomes or less reliable transportation, older individuals, and small business owners”).

breadth of deposit services offered, responsiveness to community need, and impact such as the number of no-/low-cost accounts opened, or aid funds dispersed.⁵⁷

B. Supporting Smaller and Minority-Owned Businesses

Small business activity creates jobs and uplifts local economies. Before the pandemic, California's small businesses created two-thirds of new jobs, employed almost half of all private sector workers, and represented 98.9% of businesses in the state.⁵⁸ Now small businesses are shuttering at an alarming rate—many states report nearly 40% of their small businesses closed.⁵⁹ These effects are even more pronounced in communities of color⁶⁰ where businesses are more cash-constrained and lack existing relationships with large banks, which had the additional consequence of sidelining them from the first rounds of government relief programs.⁶¹

Small businesses desperately need access to capital and deposit services to stay afloat. As the ANPR notes, the smallest businesses face the most difficulty obtaining credit.⁶² Less than a quarter of small business loans are made within LMI census tracts.⁶³ We know CRA can unlock funding; between 2010 and 2016, CRA expanded the number of small business loans in LMI

⁵⁷ Question 29, 85 Fed. Reg. 66410, 66433 (Oct. 19, 2020).

⁵⁸ *Governor Newsom Signs Bills to Support Small Businesses Grappling with Impact of COVID-19 Pandemic, Bolster Economic Recovery*, Office of the Gov. (Sept. 9, 2020), <https://www.gov.ca.gov/2020/09/09/governor-newsom-signs-bills-to-support-small-businesses-grappling-with-impact-of-covid-19-pandemic-bolster-economic-recovery/>.

⁵⁹ *Percent Change in Number of Small Businesses Open*, Opportunity Insights (Jan. 19, 2021), <https://tracktherecovery.org/?ehgvc> (District of Columbia -43%, New Mexico -37.9%, Michigan -37.8%, Massachusetts -36.9%, California -36.7%, Connecticut -36.4%, Maine -36.3%).

⁶⁰ Fairlie, *The impact of COVID-19 on small business owners: Evidence from the first 3 months after widespread social-distancing restriction*, J. Econ. Mgt. Strategy (Aug. 27, 2020), <https://pubmed.ncbi.nlm.nih.gov/32904856/> (showing 41% drop in activity for African-American-owned businesses, a 32% drop for Latino-owned businesses, and 26% drop for Asian-owned businesses).

⁶¹ *Id.*

⁶² 85 Fed. Reg. 66410, 66446 (Oct. 19, 2020).

⁶³ Laurie Goodman, John Walsh, Jun Zhu, *Small business and community development lending are key to CRA compliance for most banks*, Urban Wire: Economic Growth and Productivity, a blog of the Urban Institute (Feb. 7, 2019), <https://www.urban.org/urban-wire/small-business-and-community-development-lending-are-key-cra-compliance-most-banks>.

neighborhoods by 38%.⁶⁴ The States support designating lending to very small businesses and minority-small businesses as an impactful and responsive CRA qualifying activity.⁶⁵

The States also support evaluating banks' responsiveness to small business lending needs separately from other products through lending-based assessment areas. This separate analysis may prevent small-dollar loans to smaller businesses from being crowded out. Further, the States support the use of borrower-distribution metrics to better evaluate banks' service to small businesses and farms. This should include a geographic-distribution analysis, evaluating a bank's loans in low-income, moderate-income, middle-income, and upper-income census tracts to measure responsiveness to low-income communities. Finally, the States support the use of transparent benchmarks and binding performance expectations to encourage loans to small businesses, particularly in predominantly minority neighborhoods.⁶⁶

The States oppose increasing small business revenue size thresholds, as the majority of the smallest businesses operate with under \$1 million in revenue.⁶⁷ This threshold is already over inclusive in a sense as the smallest businesses, the most in need of credit, have smaller revenues and seek smaller loans. Of the CRA-originated small business loans made in 2018, 94% were under \$100,000.⁶⁸ Adjusting the revenue ceiling could result in banks avoiding origination of the smaller, more challenging, less lucrative loans most meaningful to the neediest and smallest businesses.

The ANPR should also incentivize bank assistance with accessing government relief, regardless of whether the business had a pre-existing banking relationship.⁶⁹ For example, minority-owned businesses had the most difficulty accessing Paycheck Protection Program (PPP) funds.⁷⁰ One survey reported only 12% of Black-and Latino-owned businesses successfully obtained all requested funding, and 41% received no assistance whatsoever.⁷¹

⁶⁴ Eric Rodriguez, *Why Latinos Will Lose Under the OCC and FDIC's Proposal to Modernize the Community Reinvestment Act* 3, Unidos US (Jan. 2020), <http://publications.nclr.org/handle/123456789/2012>.

⁶⁵ 85 Fed. Reg. 66410, 66446-7 (Oct. 19, 2020).

⁶⁶ Question 57, 85 Fed. Reg. 66410, 66447 (Oct. 19, 2020).

⁶⁷ Question 37, 85 Fed. Reg. 66410, 66436 (Oct. 19, 2020).

⁶⁸ Fed. Fin. Institutions Examination Council, *Findings from Analysis of Nationwide Summary Statistics for 2018 Community Reinvestment Act Data Fact Sheet* (last modified Dec. 2019), https://www.ffiec.gov/hmcrpr/cra_fs19.htm.

⁶⁹ Questions 57 and 61, 85 Fed. Reg. 66410, 66447-8 (Oct. 19, 2020).

⁷⁰ *Minority-owned businesses were last in line to receive loans, latest PPP data show*, CBS News (Jan. 4, 2021) <https://www.cbsnews.com/news/minority-owned-businesses-were-last-to-receive-ppp-loans-adding-to-their-despair/>.

⁷¹ Anneliese Lederer and Sara Oros, et al., *Lending Discrimination Within the Paycheck Protection Program*, National Community Reinvestment Coalition, (July 2020), www.ncrc.org/lending-discrimination-within-the-paycheck-protection-program/.

Another survey found 90% of minority-owned small businesses were shut out of this program, which was intended to be a lifeline for small businesses.⁷²

The lessons learned from the PPP loan debacle show the importance of addressing existing inequities in deposit services *now* and offering deposit products and services even if the community does not traditionally use them. In the case of the PPP loans, initial applications for these funds could only be submitted through SBA lenders, many of whom required an account or loan before they would process applications.⁷³ Many minority-owned businesses lacked these lender relationships.⁷⁴ And even when minority-owned businesses were successful in securing a loan, “on average, it took 31 days for small businesses with paid employees in majority-Black ZIP codes to receive PPP loans, seven days longer than those in majority-white communities.”⁷⁵

The ANPR is a solid start as it designates economic development activities that prioritize smaller businesses and minority-owned small businesses particularly impactful and measures retail deposits and services separately. However, the States encourage the Board to further strengthen provisions of the ANPR to meet current deposit and service gaps to LMI communities and small and minority-owned businesses.

CONCLUSION

Low-income communities and communities of color continue to face inequities and discrimination like those that prompted Congress to pass the CRA. As the OCC rule change demonstrated, regulations implementing the CRA’s requirements can be used to subvert the explicit purpose of the Act. Therefore, the most pressing objective must be maintaining fidelity to CRA’s core purpose of remedying disinvestment in low-income communities and the lingering impact of racially-driven redlining. The States agree that the Board’s ANPR is an “important step forward in laying a foundation for the [regulatory] agencies to build a shared, modernized CRA framework that has broad support.”⁷⁶ To meet CRA’s mandate during a

⁷² Megan Cerullo, *Up to 90% of minority and women owners shut out of Paycheck Protection Program, experts fear*, CBS News (Apr. 22, 2020), <https://www.cbsnews.com/news/women-minority-business-owners-paycheck-protection-program-loans/>.

⁷³ Lucas Misera, *An Uphill Battle: Covid-19’s Outsized Toll on Minority-Owned Firms*, Fed. Res. Bank of Cleveland (Oct. 8, 2020), at 1 <https://www.clevelandfed.org/en/newsroom-and-events/publications/community-development-briefs/db-20201008-misera-report.aspx>.

⁷⁴ *Id.*

⁷⁵ Sifan Liu and Joseph Parilla, *New data shows small businesses in communities of color had unequal access to federal COVID-19 relief*, Brookings Inst. (Sept. 17, 2020), <https://www.brookings.edu/research/new-data-shows-small-businesses-in-communities-of-color-had-unequal-access-to-federal-covid-19-relief/>.

⁷⁶ Statement by Federal Reserve Board of Governors Chair Jerome H. Powell (Sept. 21, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/powell-statement-20200921.htm>.

pandemic, the ANPR must keep focused on addressing racial and systemic inequities; incentivizing banks to serve housing insecure communities and encouraging affordable housing production; and supporting small and minority owned-businesses. For the foregoing reasons, the undersigned state attorneys general support the ANPR and urge the Board to consider strengthening it further as discussed above and work with the OCC and FDIC to encourage them to join the Board's worthy effort.

Sincerely,



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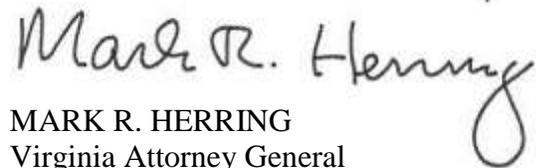
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A handwritten signature in blue ink that reads "Bob Ferguson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

BOB FERGUSON
Washington Attorney General

cc: Office of the Comptroller of the Currency
Federal Deposit Insurance Corporation