LIHTC WORKING GROUP
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April 8, 2020

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street, SW.
Suite 3E-218
Washington, DC 20219.

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Docket ID OCC-2018-0008/RIN 3064-AF22 (Proposed Community Reinvestment Act Regulations

To Whom It May Concern:

On behalf of the members of the Low Income Housing Tax Credit (LIHTC) Working Group, we appreciate the opportunity to comment on the Office of the Comptroller of the Currency's (OCC) and the Federal Deposit Insurance Corporation (FDIC) Notice of Proposed Rulemaking (NPR) regarding the Community Reinvestment Act (CRA). The members of the LIHTC Working Group are participants in the affordable housing community who work together to help resolve technical LIHTC policy issues and provide recommendations to make the LIHTC even more efficient in delivering benefits to help build affordable housing and service low-income residents. Our group includes nonprofit and for-profit developers, syndicators, investors, lawyers and other affordable housing professionals. Moreover, we represent banks that invest in LIHTC equity annually, for which the CRA is a crucial incentive. Ever since the promulgation of the revised CRA regulations in 1995, the CRA has helped make the LIHTC the most successful affordable rental housing production incentive nationwide. Since 1987, the LIHTC has provided more than $200 billion in equity investment, produced nearly 3.5 million affordable rental

NOVOGRADAC™ 3025 North Wooster Avenue, Dover, Ohio 44622 | P 330.365.5400 | F 330.365.5401
www.taxcredithousing.com | scot.keller@novoco.com

homes, and housed more than 7.5 million low-income households, , according to data from the National Council of State Housing Agencies (NCSHA) and analysis from the National Association of Home Builders (NAHB). It has also supported the creation of more than 3.7 million jobs, generated more than $350 billion in wages & business income, and spurred more than $140 billion in tax revenue.

Despite this tremendous record of achievement, there are more than 10 million low-income renters nationwide that are severely cost-burdened, i.e., paying more than 50 percent of their income on rent, according to Harvard's Joint Center on Housing Studies 2020 Rental Housing report. While those at the bottom of the income spectrum—nearly 83 percent of renters with incomes at or below $15,000 are severely cost burdened—fare the worst, those cost burdens are increasingly affecting middle-income renters, with a 10 percent increase in the incidence of cost burdens among renters with incomes between $30,000 and $45,000. Given this rental affordability crisis, and as the premier resource for affordable rental housing production, we cannot afford to reduce LIHTC investment by reducing the CRA incentive for affordable housing investment and lending.

We are concerned that if the CRA proposed rule is finalized without significant changes, the LIHTC and affordable rental housing production could be substantially harmed, and urge you to make changes to the proposed rule to ensure that the CRA continues to robustly support the LIHTC. We believe our comments and suggestions, if incorporated into your proposal, will ensure the CRA continues to support and possibly increase LIHTC investment and the affordable rental housing production it finances to address the nation's growing rental housing crisis.

Whereas the proposed rule seeks to strengthen the CRA regulations in four key areas – by (1) clarifying which activities qualify for CRA credit; (2) updating where activities count for CRA credit; (3) creating a more transparent and objective method for measuring CRA performance; and (4) providing for more transparent, consistent, and timely CRA-related data collection, recordkeeping, and reporting – we have organized our responses accordingly.

1. Clarifying which activities qualify for CRA credit

While we appreciate and support the OCC and FDIC's efforts to add clarity in the CRA regime, publishing a list of highly specific examples of qualifying activities should be sensitive to activities that do not readily lend themselves as concrete examples of activities that help meet low- and moderate-income (LMI) community needs. A potentially questionable newly qualified activity under the proposed rule is infrastructure activities, which are likely to have benefits for the general population over a wide area. If (as proposed) it is sufficient that such activities only include *some benefit* (emphasis added) for LMI individuals, LMI census tracts, or other areas of need, it could be argued that most infrastructure projects would meet this standard (based simply on the proportion of the general population in a given area who are LMI individuals). While this may incentivize banks to put money into infrastructure projects, we don't believe that is the purpose of the CRA requirements. We recommend that, in order to qualify, infrastructure projects would need to be approved by a Federal, state, local, or tribal government plan and have the majority (more than 50 percent) of the benefit be attributable to LMI individuals and communities, rather than just "some" LMI individuals and LMI communities as a portion of the broader population. Similarly, community facilities located in LMI census tracts, such as hospitals and schools, should not be considered qualifying activities unless they can clearly demonstrate a substantial benefit to LMI individuals. Not only would this policy be consistent with qualifying activities under current regulations, but also given the explicit dollar volume targets under the performance evaluation criteria, it is crucial to ensure that qualifying CRA activities have a clear benefit to LMI individuals to qualify.

The NPR indicates that the OCC and FDIC would maintain a publicly available non-exhaustive, illustrative list of examples of qualifying activities that meet the criteria in the rule. The list would also include examples of activities that the agencies have determined, in response to specific inquiries, do not qualify. The NPR would also establish a process for a bank to submit a form through the agency's website to seek agency confirmation that an activity is a qualifying activity. In addition to updating the illustrative list on an ongoing basis, the NPR provides that the list would also be revised through a public notice and comment process, to add activities that meet the criteria and to remove activities that no longer meet the criteria. We are supportive of the agencies updating the list both on an ongoing basis to coincide with publishing the list of requested items in the Federal Register for public comment and feedback, and updating the list following this process once every three months through publication on the agency' websites.

2. Updating where activities count for CRA credit

The NPR discusses the need to expand CRA exams to assess bank lending in areas beyond bank branches to recognize the evolution of modern banking and the fact that many banks receive large portions of their deposits from outside their facilities-based assessment areas where their branch network has a physical presence. We believe the OCC and FDIC established "deposit-based" assessment areas for geographical areas outside of where the bank has its physical footprint so that those banks with an unusually high concentration of deposits generated nationwide, but booked for CRA purposes in specific facilities-based assessment areas (which are often areas where there are more banks that want to engage in CD activities than there is need for those activities, known as "CD hot spots"), are able to fulfill their CRA responsibilities outside those areas.

However, it is unclear where the sources of such outside deposits are located or concentrated, and the OCC and FDIC did not provide data on this. Consequently, there is no way to know whether, by diverting CRA demand from these CD hotspots, CRA demand would instead be directed to communities in need of CRA loans and investments. Indeed, it is possible (if not likely) that most of those booked deposits are generated from other assessment areas with plenty of CRA-motivated activity, and therefore communities outside facilities-based assessment areas, such as rural communities, will continue to suffer from a deficit of CRA activity.

We suggest instead that, if an institution has demonstrated that it has been responsive to needs in its assessment area in its prior CRA examination (e.g., a "satisfactory" or greater CRA rating), such institution could receive additional credit for a proportional amount of CRA-eligible activity that's undertaken outside the bank's assessment area, but located in the same or neighboring state, and that targets particularly highly distressed areas or targeted populations (see further discussion of this below). This approach would better incentivize banks to address local needs in traditionally underserved areas. Essentially, focusing on the demographic, economic, and financial condition of an area would be a better measure of local needs than basing the analysis merely on where a bank accepts deposits outside its facilities-based assessment areas.

However, should the OCC and FDIC proceed with implementing the concept of "deposit-based" assessment areas, we recommend that the basis for requiring banks to add "deposit-based" assessment areas would only be when a significant part of those deposits flow from low- or moderate-income census tracts outside the facility-based assessment area(s). Moreover, if "deposit-based" assessment areas are adopted, we suggest the trigger for mandating such "deposit-based" assessment areas be based on a ratio of domestic deposits obtained from low- or moderate-income census tracts outside the assessment areas compared to all domestic deposits maintained by the bank. The trigger might be 10 percent or 15 percent or more. The "deposit-based" assessment areas should encompass tracts where the deposits are concentrated and the immediately surrounding areas, similar to the requirement in facility-based assessment areas to include the tracts around a branch where a bank generates lending activity.

An alternative to "deposit-based" assessment areas for your consideration are areas where the bank has actually marketed and provided credit and where it could reasonably be expected to have marketed and provided credit. Some of those areas might be beyond or otherwise different from a bank's current CRA assessment areas, especially in the case of internet, wholesale or limited purpose banks. Taking this approach would re-focus the analysis on whether the bank is providing equal access to credit in such areas consistent with the spirt and intent of the CRA regulations.

As the NPR notes, permitting banks to receive CRA credit for qualifying activities conducted outside of their assessment areas at the bank level could reduce the number of CD hot spots and help to redirect investments to areas where there is a great need for CD activities but few banks that engage in those activities (known as CD deserts). In an effort to provide more clarity around what areas outside a bank's assessment areas should be considered, we offer the following examples that the Department of the Treasury's Community Development Financial Institutions Fund (CDFI Fund) has incorporated into their application review process that target highly distressed areas or certain populations:

1. ECONOMICALLY DISTRISSED COMMUNITIES - Census tracts with poverty rates greater than 30 percent; OR Census tracts with, if located within a non-Metropolitan Area, have a median family income that does not exceed 60 percent of statewide median family income, or, if located within a Metropolitan Area, have a median family income that does not exceed 60 percent of the greater of the statewide median family income or the Metropolitan Area median family income; OR Census tracts with unemployment rates at least 1.5 times the national average.
2. NON-METROPOLITAN COUNTIES - Qualifying census tracts that are located in counties not contained within a Metropolitan Statistical Area (MSA), as defined in OMB Bulletin No. 15–01 (Update of Statistical Area Definitions and Guidance on Their Uses) and applied to the 2010 census tracts.
3. HOPE VI/CHOICE NEIGHBORHOODS INITIATIVE REDEVELOPMENT - Areas encompassed by a HOPE VI or Choice Neighborhoods Initiative redevelopment plan.
4. FEDERAL NATIVE AREAS - Federally Designated Indian Reservations, Off Reservation Trust Lands or Alaskan Native Village Statistical Areas, or Hawaiian Home Lands.
5. ARC/DRA AREAS - Areas designated as distressed by the Appalachian Regional Commission or Delta Regional Authority.

6. COLONIAS AREAS – low-income communities on the U.S.-Mexico border as designated by the U.S. Department of Housing and Urban Development.
7. FEDERAL/STATE/LOCAL ZONES - Federally designated Opportunity Zones, Enterprise Zones, Promise Zones, Base Realignment and Closure areas, State Enterprise zone programs, or other similar state/local programs targeted towards particularly economically distressed communities.
8. FEMA DISASTER AREAS - Counties for which the Federal Emergency Management Agency (FEMA) has: issued a "major disaster declaration" and made a determination that such County is eligible for both "individual and public assistance"; provided that the initial investment will be made within 36 months of the disaster declaration.

3. Creating a more transparent and objective method for measuring CRA performance

The NPR describes a methodology for measuring CRA performance based on assessing three fundamental components: (1) CRA Evaluation Measure (2) Retail Lending Distribution Test and (3) Community Development Minimum. We recognize that the CRA Evaluation Measure's focus on the value of on-balance sheet loans and investments would likely encourage longer term loans and investments in LMI communities and we understand the desire of the OCC and FDIC to address timing issues around CRA examinations by shifting the evaluation from being based on originations to a bank's balance sheet activity. However, such an approach would also have a detrimental effect on investments in real estate (e.g., reductions in value, such as depreciation), and lead to banks with existing large balance activity to significantly limit or stop investing. Therefore, we urge the OCC and FDIC to consider originations of equity investments, in addition to balance sheet activity, when evaluating CRA performance. Alternatively, the OCC and FDIC should factor into ratings whether banks have decreased originations of equity investments significantly at the bank level relative to the prior assessment period.

We are concerned that the proposed percentages for presumptive ratings (11 percent for an Outstanding rating, 6 percent for a Satisfactory rating, and 3 percent for a Needs to Improve rating) are based on data which was not disclosed in the NPR. Therefore, it is impossible to comment about the reasonableness of the published benchmarks and request the agencies take the time to further test and explain, with examples, how banks of varying asset size and localities will be affected by the proposed CRA performance measure, especially rural areas with minimal CD opportunity, and obtain feedback on these examples before finalizing the proposal. While not ideal, if the agencies choose to move forward with the data collection as proposed, before implementing such a performance measure, it would be advantageous to use other temporary, albeit more subjective, assessments similar to the format used today until banks have collected sufficient data and can be assured the metric works as designed and meets the goals of the CRA.

With respect to the Community Development minimum (3), we are particularly concerned about the proposed approach that to obtain an Outstanding or Satisfactory rating, banks would be required to make a minimum amount of community development loans *or investments (emphasis added)* in each assessment area and bank-wide. We acknowledge that it is a desirable goal to provide a method of assessing CRA performance that would be more objective, clear, and consistent and facilitate banks' ability to engage in qualifying activities in communities that need it the most. However, the proposed rule does not provide sufficient assurances that banks would in fact be achieving this goal in communities that need investments. By eliminating a separate Investment Test, the proposed approach could result in substantially reducing the incentive for banks to make equity investments. We are concerned that enabling a bank to obtain an Outstanding or Satisfactory rating without making *any* equity investments would impair investments that are needed to meet the needs of LMI communities throughout its assessment areas or bank-wide.

While the NPR introduces the concept of a "multiplier" as a vehicle to further incentivize banks to engage in activities that are scarce but highly needed, such as community development investments in low-income housing tax credit (LIHTC) investments, we do not believe that the multiplier would be a sufficient incentive to encourage banks to make community development investments as opposed to lending. Banks typically must reserve more than twice the capital for equity investments than for loans, which imposes a much higher cost on banks for making equity investments than for making loans. This could result in banks choosing to meet their CRA requirements entirely through debt products, especially mortgage debt, which is typically more liquid than equity investments such as those in LIHTCs.

In the case of LIHTC investments, multiplying the dollar amount by a factor of two could inadvertently reduce the number of LIHTC equity investments since some banks may conclude they can earn the same amount of credit on a CRA exam if they reduce their investments by half. We believe the objectives of increasing certain types of activities would be better addressed by not counting certain CRA activity for purposes of meeting the community development minimum. For example, mortgage backed securities (MBS), even if they are generated from pool of mortgages originated for low- and moderate income households, are a highly liquid and attractive investment for most banks, and the 200 percent multiplier is an insufficient incentive to encourage banks to invest in other CD qualifying activity. Even if there is a discount for such MBS investments not held on a bank's balance sheet for a sufficient period of time, that is not likely to prove much of a disincentive to purchase MBS. Indeed, focusing on balance sheet investments as compared to originations may inadvertently reduce demand for LIHTC equity among banks with substantial LIHTC investments already on their balance sheets.

Instead of awarding double credit to the three types of activities identified - equity investments, loans to CDFIs, and affordable housing loans, we recommend that the OCC and FDIC require that, in order to receive a Satisfactory or Outstanding rating, a minimum level of community development activity (e.g., 1 percent of deposits, under the current 2 percent test) at the bank level should be in these favored CD activities.

The LIHTC was designed by Congress to foster long-term investments in low-income communities through the investment of equity, and it depends greatly on equity investments by banks that are driven largely by CRA requirements. Without CRA motivation, a significant amount of LIHTC investment demand would disappear. We do not believe that the OCC and FDIC should adopt an approach to measuring CRA performance that could seriously impair important community development programs.

We feel the objectives of increasing certain types of activities would be better addressed through adjusting the weights assigned to the various component tests. For example, we believe a more equitable method to measuring CRA performance should be grounded in the current "large bank" three-test evaluation regime. Retaining an Investment Test (as well as a Lending Test and a Service Test) in the CRA regulations would ensure that banks continue to have a focused incentive to meet the needs of LMI communities from all three critically important perspectives. Our review of the NPR and a significant number of comment letters in response to the ANPR do not point to criticisms of the *design* of three-test evaluation. Rather, the issues appear to be primarily systemic in nature, including the lack of concrete definitions for key concepts in the original statute as well as the difficulty of setting objective benchmarks that could equally apply to banks with different asset levels and business models, and in diverse communities with distinct investment needs.

With respect to LIHTC investments, as noted above, a shift away from the current "large bank" three-test evaluation regime towards evaluating together all of a bank's CRA activity (lending, investment, and services) would enable banks to shift towards an increased (and perhaps exclusive) reliance on debt products, reducing and perhaps eliminating equity investments such as those in LIHTCs. Such equity investments must be committed for an extended period of time (15 years in the case of LIHTCs), and such long-term commitments were designed to be, and surely are, more transformative for the communities that CRA is intended to support than traditional debt products, with far-ranging impacts for LMI residents as well as the surrounding neighborhoods.

Without CRA motivation, LIHTC investment would likely be substantially reduced. We encourage the OCC and FDIC to continue to support the CRA's current role in incentivizing these types of investments, thereby avoiding the potentially unintended consequence of incentivizing banks to limit (or eliminate) their LIHTC investments that otherwise may best meet the needs of their LMI communities.

However, if the OCC and FDIC do not reinstate a separate Investment Test, we strongly recommend an increase to the two percent community development minimum requirement solely at the bank-level, and for "large banks" as defined under current CRA regulations, the community development minimum must include a minimum percentage of equity investments. As noted above, the OCC and FDIC did not provide data to demonstrate that the ratios established in the performance evaluation, including the community development minimum percentage, represent a meaningful amount of CRA activity. However, given that there are $13 trillion in domestic deposits held by covered financial institutions according to the FDIC, the facts that (i) most community development activities are eligible for the 200 percent multiplier and (ii) community development activities typically remain on the balance sheet for an average of five years according to the Urban Institute, the community development minimum represents about $26 billion in annual activity. As the LIHTC equity market alone (not accounting for any of the other qualifying activities for community development) is estimated to be about $18 billion for 2020, such a minimum is clearly insufficient to support the current and expected future investment levels for all such activities.

As it is conceivable that a percentage threshold could be meaningful for any one particular assessment area, we recommend that in order to obtain a Satisfactory rating, a bank must make community development loans and equity investments representing a minimum of at least 3 percent bank-wide. To obtain, an Outstanding rating, a bank should meet a community development minimum of at least 4 percent bank-wide.

We strongly recommend that, if the three-test evaluation regime is to be eliminated, the minimum percentage of equity investments for large banks necessary to satisfy the community development minimum test should be set by the percentage of equity investments as compared to their community development loans the bank currently holds on its balance sheet. No bank should be able to obtain a Satisfactory or Outstanding rating while reducing the percentage of its community development equity investments.

The NPR indicates that the OCC and FDIC do not believe that a single transaction limit is necessary and that a single transaction limit could have unintended consequences and discourage banks from conducting activities that would help meet the needs of a specific community. We do not agree with that view.

Eliminating single-transaction limits would be inconsistent with the goal of encouraging CRA investments in a wider range of LMI communities. Absent such limits, banks would be able to engage in a small number of large-dollar transactions, which might be located in areas (such as large urban centers) already receiving ample CRA investments. Instead, we recommend that caps be established on the total dollar value of every type of eligible loan or investment, and that banks should not report eligible loans or investments that exceed this amount unless an exception to the cap is granted by examiners based on discussion of the specific facts and circumstances of a potential loan or investment. To ensure large, catalytic impact projects are not delayed due to examiner review, we recommend that a 30-day timeframe be established for rendering such decisions

4. Providing for more transparent, consistent, and timely CRA-related data collection, recordkeeping, and reporting

The NPR makes it clear that the current framework does not collect data on all CRA activity including CD investments or CD services, and we appreciate the need to collect such information going forward. The question is, what degree or level of specificity is appropriate and necessary from a cost/benefit analysis perspective to ensure effective CRA evaluations and public disclosure of those results. Given the myriad of systems currently employed by banks to collect and report on their CRA activities and the need for banks to maintain voluminous records and report new data under the NPR, we recommend a policy that provides sufficient flexibility to enable a bank to successfully transition to the new requirements without adversely impacting their overall CRA rating. For example, allowing for “good faith efforts” during the first exam period following the mandatory effective date of this rule. This would include not issuing a Needs to Improve rating based on inaccuracies or deficiencies in data collection or calculations if the bank demonstrates their program was developed and administered in good faith, giving the bank a reasonable amount of time to correct those deficiencies prior to issuing the final Performance Evaluation rating.

In conclusion, meaningful CRA reform could boost lending, investments, and access to banking for traditionally underserved communities and populations. Clarifying and expanding the types of activities that qualify for CRA credit is a welcomed enhancement to the current regulations but the approach to expanding the areas in which qualifying activities receive credit based on deposits does not adequately ensure the needs of severely distressed low-income communities and populations will be met. Fortunately, there's an abundance of demographic, economic, and financial data readily available to identify and confirm such areas.

While the NPR endeavors to set forth many new ideas to the examination approach, the OCC and FDIC should proceed with caution in attempting to implement too many reforms simultaneously, as it may lead to unintended consequences that cannot be quickly and easily rectified, including impairment of other community development programs and incentivizing activities that do not serve the purposes of the CRA requirements. Retaining the current "large bank" three-test evaluation regime is one way to avoid such outcomes. Overall, we believe that many, if not most, of the NPR's stated objectives could be achieved by modifying the existing model in the various ways described above. This would have the benefit of reducing substantially the cost to implement the revised requirements, while still making significant improvements to the regulations.

Should the agencies decide to continue to move forward, we suggest the agencies thoughtfully review the comments, make the necessary changes for clarity and reduction of undue burden, and issue a revised notice of proposed rulemaking so the industry has time to comment on those changes before the rule is finalized, especially if the performance measures include the needed revisions based on full data analysis.

Finally, we urge all three banking agencies – the OCC, FDIC and the Federal Reserve – to develop a CRA rule that is issued on an interagency basis. This rule should not be finalized without interagency coordination. Some member banks have multiple charters and are examined by both the FDIC and the Federal Reserve. Having two different methods of evaluation would create significant regulatory burden on these banks and result in confusion for community groups attempting to develop community projects using two different CRA qualification definitions, as well as reviewing Performance Evaluations.

We hope that you find these comments, considerations and recommendations helpful as you update the CRA regulations. Thank you in advance for your time and consideration. Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance.

Yours very truly,

Novogradac and Company LLP

By

Dirk A. Wallace, Partner