State of California
Office of the Attorney General
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November 19, 2018

Submitted via eRulemaking Portal

The Honorable Joseph M. Otting
Comptroller of the Currency
Legislative and Regulatory Activities Division
400 7th Street, SW
Washington, DC 20219

Re: Comment from State Attorneys General Regarding Reforming the Community Reinvestment Act Regulatory Framework (Docket No: OCC-2018-0008-0001)

Dear Comptroller Otting:

This letter is submitted on behalf of the States of California, Illinois, Iowa, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Oregon, Virginia, and the District of Columbia, in response to the Office of the Comptroller of the Currency's (OCC) September 5, 2018 Advanced Notice of Proposed Rulemaking (ANPR)[1] regarding the agency's intentions to revise its Community Reinvestment Act regulations.

The States have a strong interest in ensuring that banks take affirmative steps to ensure robust investment in, and fair treatment of, communities which have traditionally been poorly served by the banking industry. We write to state our concern that the proposals contained within the OCC's ANPR will significantly weaken banks' obligations under the CRA. The proposed changes will lead to disinvestment in low- and moderate-income communities, undermining the very purposes of the Act. A weakened CRA could result in a loss of up to $101 billion dollars of investment and lending activity nationally over the next five years, over $25 billion in California alone.[2]

The Community Reinvestment Act of 1977 (CRA) was enacted to "prevent redlining and encourage banks and savings associations . . . to help meet the credit needs of all segments of

[1] Reforming the Community Reinvestment Act Regulatory Framework, 83 Fed. Reg. 45,053 (proposed Sept. 5, 2018).
[2] National Community Reinvestment Coalition, *Weakening the Community Reinvestment Act would reduce lending by hundreds of billions of dollars* (Sept. 2018), https://ncrc.org/wp-content/uploads/2018/09/CRA-Impact-dollar-loss-V5.pdf.

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their communities, including low- and moderate-income neighborhoods and individuals."[3] Under the Act, financial institutions have a "continuing and affirmative obligation" to meet the credit needs of the local communities in which they operate.[4]

Our Nation has a troubled history of credit and housing discrimination in working-class and lower-income communities. For decades, banks rejected lending to communities of color, preventing working-class residents from buying homes and building small businesses. This widespread practice came to be known as "redlining." Redlining prevented millions of people from building wealth through home ownership and entrepreneurship.

A landmark series of fair lending laws including the Fair Housing Act, Equal Credit Opportunity Act, and the Home Mortgage Disclosure Act aimed to stop redlining. The Community Reinvestment Act was passed as a companion to these laws. Its purpose was to remedy redlining by requiring banks to affirmatively expand credit access in local communities. The CRA has been transformative. Trillions of dollars have been reinvested in working-class neighborhoods that for years were excluded from participating in the American Dream.

Unfortunately, credit access remains a problem for communities of color. From 2001 to 2016, African-American homeownership rates fell by 5% compared to only 1% for white homeowners.[5] In 2017, African-American and Hispanic applicants experienced higher denial rates for conventional home purchase loans than comparable white applicants.[6]

Minority-owned businesses also still struggle to access credit. While African-American-owned businesses applied for credit in numbers 10% higher than white-owned companies, their approval rates are 19% lower.[7] And such disparities cannot be explained by differences in credit scores; only 40% of minority-owned businesses with good credit received the full amount they asked for compared to 68% of nonminority-owned firms.[8]

Thus, strong implementation of the CRA is still needed, and it has been effective at ameliorating some of the ongoing disparities. For example, a 2017 study found that the CRA is linked to increased small business lending in LMI communities.[9] Any measures to modernize

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[3] OCC, U.S. Dep't of Treasury, Community Developments Fact Sheet: Community Reinvestment Act (2014), https://www.occ.treas.gov/topics/community-affairs/publications/fact-sheets/fact-sheet-cra-reinvestment-act.pdf.
[4] Community Reinvestment Act of 1977, 12 U.S.C. § 2901(a)(3) (2012).
[5] Laurie Goodman, Alana McCargo, & Jun Zhu, *A closer look at the fifteen-year drop in black homeownership*, Urban Institute (Feb. 13, 2017), https://www.urban.org/urban-wire/closer-look-fifteen-year-drop-black-homeownership.
[6] Federal Financial Institutions Examination Council, *FFIEC Announces Availability of 2017 Data on Mortgage Lending* (May 7, 2018), https://www.ffiec.gov/press/pr050818.htm.
[7] Federal Reserve Bank of Cleveland & Federal Reserve Bank of Atlanta, *2016 Small Business Credit Survey, Report on Minority-Owned Firms*, iii (2017), https://www.clevelandfed.org/~/media/content/community%20development/smallbusiness/2016%20sbcs/sbcs%20minority%20owned%20report.pdf.
[8] *Id.*
[9] Raphael W. Bostic & Hyojung Lee, *Small Business Lending Under the Community Reinvestment Act*, 19 Cityscape 2, 81 (2017).

the CRA should maintain its robust role in compelling banks to meet the local housing, agriculture, or small business credit needs of the communities they serve.

There is broad agreement among financial institutions,[10] advocates,[11] and elected officials[12] that the CRA should be modernized to reflect new consumer banking habits and changes in technology. However, many of the OCC proposals would weaken, rather than modernize, CRA enforcement. They will undermine the core purposes of the CRA—namely, ending redlining and requiring banks to be responsive to the needs of LMI individuals and communities. Thus, we urge the OCC to withdraw the proposed regulations. If the OCC decides to go forward with rulemaking, we recommend the following:

I. Engage in Joint Rulemaking to Provide Uniformity and Effective Implementation.

The OCC has issued this ANPR on its own, without the participation of the Federal Reserve and the Federal Deposit Insurance Corporation (FDIC), despite these regulators' shared responsibility for implementing the CRA. This is a break from the practice in prior CRA rulemaking efforts, where the regulators issued joint rules.[13] These agencies often work together to promulgate joint rules involving their overlapping responsibilities in financial regulation.[14] The Administrative Conference of the United States (ACUS) adopted recommendations stating that agencies that have "shared, overlapping or closely related jurisdiction" can benefit from interagency coordination, such as joint rulemaking.[15] Where, as here, the OCC has overlapping responsibilities with the Federal Reserve and the FDIC to regulate financial institutions, joint rulemaking is best practice.

Federal Reserve Board Governor Lael Brainard recently affirmed the "importance of having the agencies work toward one set of CRA regulations," so that any new regulations are "clear and consistently applied."[16] We encourage the OCC to join with the Federal Reserve and the

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[10] American Bankers Association, *CRA Modernization: Meeting Community Needs and Increasing Transparency* (Dec. 2017), https://www.aba.com/Advocacy/Documents/CRA-WhitePaper2017.pdf.

[11] Federal Reserve Board Community Advisory Council, Record of Meeting, CAC and Board of Governors (Oct. 5, 2018), https://www.federalreserve.gov/aboutthefed/files/cac-20181005.pdf.

[12] Office of U.S. Sen. Mark Warner, Warner Leads Effort to Urge Banking Regulators to Strengthen Credit Access for Low-Income Communities (May 2018), https://www.warner.senate.gov/public/index.cfm/2018/5/warner-leads-effort-to-urge-banking-regulators-to-strengthen-credit-access-for-low-income-communities.

[13] *See, e.g.,* Community Reinvestment Act Regulations, 74 Fed. Reg. 31,209, 31,209 (June 30, 2009) (notice of proposed rulemaking by OCC, Federal Reserve, and Office of Thrift Supervision to implement CRA); Richard D. Marsico, *The 2004–2005 Amendments to the Community Reinvestment Act Regulations: For Communities, One Step Forward and Three Steps Back*, 2006 Clearinghouse Rev. J. Poverty L. & Pol'y, 534 n.2 (2006) (noting several instances of proposed joint rulemaking by the regulatory agencies involved).

[14] Jody Freeman and Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131, 1166 n.164 (2012).

[15] Admin. Conference of the U.S., Recommendation 2012-5, Improving Coordination of Related Agency Responsibilities, 77 Fed. Reg. 47,800, 47,810 (2012).

[16] Federal Reserve Board, Remarks by Governor Lael Brainard, Community Investment in Denver, 2 (Oct. 15, 2018) https://www.federalreserve.gov/newsevents/speech/files/brainard20181015a.pdf.

FDIC to work collaboratively on any joint rulemaking, which will provide uniformity and clarity in CRA implementation to the benefit of both financial institutions and the communities they serve.

II. Rescind Lenient Guidance on Credit Discrimination.

We urge the OCC to rescind recently issued guidance that will weaken enforcement of credit discrimination and consumer protection laws through the CRA. OCC Bulletin 2018-23 unnecessarily limits the impact that credit discrimination or consumer protection violations will have on CRA exams in two ways. First, the OCC will only consider those violations that are "directly relate[d]" or have a "logical nexus" to a bank's CRA lending activity.[17] This means that even significant violations of consumer protection or credit discrimination laws will not affect a bank's CRA rating unless they fall within this narrow definition. This guidance ignores the clearly negative implications that such violations have for the bank's entire operations as they relate to consumers and members of protected classes.

Second, the OCC's guidance adopts a "general policy" that downgrades for violations of credit discrimination and consumer protection laws will only be by "one rating level unless illegal practices are found to be particularly egregious."[18] This means that a bank with substantial, non-technical violations that are not "egregious" could be, for example, only downgraded from "Outstanding" to "Satisfactory." Such a minor downgrade will not impact regulators' review of their mergers and acquisitions—the only real "stick" for CRA compliance.[19] Bank examiners should be able to levy meaningful consequences on banks who not only fail to take the affirmative steps required to assist communities and consumers, but have actively harmed them.

Additionally, OCC Bulletin 2018-17[20] should be substantially revised. Historically, if a bank was under investigation for credit discrimination by the OCC or another federal agency, the OCC would delay release of the Bank's CRA exam results. This allowed examiners to incorporate findings from that investigation and adjust the bank's final CRA rating accordingly. The downside of this practice was that a particularly complex or serious investigation could delay the final release of the results for years.

Bulletin 2018-17 ends this practice but creates a more serious problem. Now, the OCC will not take findings of illegal credit discrimination practices into account in its assessment of the

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[17] OCC, PPM 5000-43, Impact of Evidence of Discrimination or Other Illegal Credit Practices on Community Reinvestment Act Ratings (2018) (as updated by OCC 2018-23), https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/ppms/ppm-5000-43.pdf.
[18] *Id.* at 2-3.
[19] See, e.g., Charles S. Fleet, Federal Reserve, *CRA and Consumer Protection Issues in Banking Applications* (2010), https://consumercomplianceoutlook.org/2010/first-quarter/cra-and-consumer-protection (noting that "[a] less than satisfactory CRA rating can pose a formidable and often insurmountable hurdle for an applicant [for a merger or acquisition]. Denials are made public and therefore carry significant reputational risk.").
[20] OCC, Bulletin 2018-17, Supervisory Policy and Processes for Community Reinvestment Act Performance Evaluations (2018), https://www.occ.treas.gov/news-issuances/bulletins/2018/bulletin-2018-17.html.

banks' performance during the time period for the exam in which these issues arise, but only as part of the bank's next CRA exam. For large banks, this next exam will not occur for four years, far too long to effectively hold banks accountable for discriminatory practices. Rather than wait to incorporate findings of credit discrimination for the subsequent exam, OCC and other federal agency examiners should be permitted to retroactively downgrade the bank's last CRA rating, if the investigation occurred during the bank's last examination period.

III. Reject a "One-Ratio" Approach to CRA Evaluation.

Under current examination procedures, banks are evaluated under both quantitative and qualitative standards. The ANPR suggests that the OCC could evaluate a bank's compliance with CRA requirements by simply measuring a bank's total CRA activities as a percentage of its total assets, a so-called "one-ratio" approach which would severely undermine the CRA's purpose of ensuring responsiveness to local community needs.[21]

Under current practice, a CRA examiner, through public comment and other methods, evaluates priority needs for a given geography. While one area may, for example, need affordable housing development due to rapidly increasing housing prices, another with high unemployment may need to prioritize small business lending and job creation. Adopting a "one-ratio" formula will make it more difficult for CRA examiners to evaluate how well banks are responding to these *local* needs, as expressed by community members. A one-ratio formula would likely incentivize banks to focus predominantly or exclusively on large-dollar loans and investments that qualify under the CRA, enabling banks to bump up their ratios regardless of whether these investments actually meet local credit needs (e.g., of LMI small businesses and individuals) which can involve more challenging or labor-intensive efforts on the part of banks.

FDIC Director (and former Chairman) Martin J. Gruenberg recently emphasized that a single ratio approach for CRA evaluation "could obscure the current community-based focus of [the] CRA and undermine its basic purpose."[22] He cautioned that a single ratio evaluation would "fundamentally change the relationship between banks and local communities" because it will "undermine the incentive that banks currently have to develop constructive partnerships with community organizations."[23] These partnerships, Director Gruenberg noted, "have been central to community development in low- and moderate-income neighborhoods . . . around the country." Lastly, he noted that a single ratio approach could potentially violate "the statutory requirement that . . . [a] CRA evaluation be presented separately for each metropolitan area in which a bank maintains one or more branches."[24]

Similarly, the Federal Reserve Board's Community Advisory Council (CAC) has urged banking regulators, including the OCC, "not to adopt a single quantitative assessment to

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[21] *See* 12 U.S.C. § 2901(a)(1)-(3).
[22] FDIC, Remarks by Director Martin J. Gruenberg, The Community Reinvestment Act: Its Origins, Evolution, and Future (Oct. 29, 2018), https://www.fdic.gov/news/news/speeches/spoct2918.html.
[23] *Id.*
[24] *Id.*

determine the majority of a bank's score on CRA performance evaluations."[25] The CAC was formed by the Federal Reserve Board in 2015 to offer a diverse perspective on the needs of consumers and communities, with a particular focus on LMI populations. The CAC unanimously agreed that a one-ratio approach would likely not be able to include a role for public input, nor would it be able to factor in local community needs. Further, the CAC noted that a strictly quantitative approach could make "the CRA far more complex, which would be detrimental to all stakeholders and would negate the goal of simplifying performance evaluations."[26]

In short, while OCC claims that adopting a one-ratio approach for measuring community investment will bring clarity and certainty to CRA examinations, it is likely to be an inferior method of ensuring that banks are responsive to LMI communities' needs.

IV. Highlight Community Benefits Agreements as a Tool for CRA Compliance.

The OCC should encourage and recognize community benefits agreements as a positive factor in CRA ratings.

Banks' applications for mergers and acquisitions are subject to public comment periods. These comments often involve discussion of CRA performance ratings. Banks that receive adverse comments have, on some occasions, entered into agreements with community groups to demonstrate how they will meet local credit needs post-merger or acquisition. These community benefit agreements include specific lending and investment goals in designated LMI communities or commitments to not close certain branch locations, and are highly useful means of injecting local public input into the CRA process.

Unfortunately, in a recent guidance document, the OCC failed to recognize the importance of these agreements, allowing banks with failing CRA ratings to merge, acquire, or grow their business without any requirement or incentive to enter into community benefits agreements or otherwise respond to local community concerns.[27] The OCC should remedy this failure in the ANPR by affirming the important role that community benefits agreements can play in helping banks with less than satisfactory CRA ratings to come into CRA compliance.

Federal policymakers have recommended that regulators formalize the use of these agreements. Treasury's April 2018 CRA memorandum states that regulators should make clear to banks that a community benefits agreement "can be an effective tool for banks with less than Satisfactory ratings . . . to demonstrate how the approved application [to merge, acquire or

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[25] CAC meeting minutes, *supra* note 11 at 2.
[26] *Id.*
[27] OCC, Bulletin 2017-51, Impact of CRA Ratings on Licensing Applications (2017), https://occ.gov/news-issuances/bulletins/2017/bulletin-2017-51.html.

expand] would benefit the communities served."[28] The OCC should adopt this recommendation, and encourage banks to enter into community benefits agreements as part of their CRA compliance.

Community benefits agreements have led to billions of dollars of additional investment in LMI communities.[29] For example:

- Fifth Third Bank pledged $30 billion in community investment across 10 states in a 2016 agreement.[30] This included $11 billion in mortgage lending for low-to-moderate income individuals and communities, $10 billion in small business lending, and $9 billion in community development loans for affordable housing and revolving loan funds.

- Also in 2016, Key Bank promised $16.5 billion in community investment.[31] These investments included: $5 billion in mortgage lending to low- to moderate-income communities and borrowers; $2.5 billion in small business and farm lending, targeted to low- to moderate-income urban and rural communities; $8.8 billion in community development lending and investment commitments; and $3 million in an "innovation fund" to support the development of banking services for underserved communities and populations.

The OCC should encourage and recognize community benefits agreements in order to motivate financial institutions to use these highly effective means of meeting the credit needs of the communities that banks serve.

V. Maintain Primacy of Physical Branch Locations in Any Revisions of Assessment Areas to Reflect Technology-Driven Changes to Service Delivery.

There is no question that the financial services marketplace has evolved with the advent of mobile banking, online lending, and other technologies. CRA regulations should account for these market changes, but the importance of branches and deposit-taking ATMs as a proxy for communities served should not be diminished in that effort.

For instance, rural areas and smaller metropolitan areas receive little CRA attention and have few bank branches. CRA exams should be flexible to include these additional assessment areas,

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[28] U.S. Dep't Of Treasury, Community Reinvestment Act - Findings and Recommendations, 22 (2018), https://home.treasury.gov/sites/default/files/2018-04/4-3-18%20CRA%20memo.pdf. This memorandum does note that such plans are neither required nor the only such tool.
[29] PolicyLink, *Banks' Community Benefits Agreements Bring Billions in Community Reinvestment* (Mar. 21, 2017), http://www.policylink.org/equity-in-action/newsletters/banks-cbas.
[30] Ben Lane, *Fifth Third pledges $30 billion for community development, mortgage lending*, HousingWire (Nov. 18, 2016), https://www.housingwire.com/articles/38561-fifth-third-pledges-30-billion-for-community-development-mortgage-lendin.
[31] Teresa Dixon Murray, *KeyBank promises to pump $16.5 billion into lower-income communities*, Cleveland Plain Dealer (Mar. 24, 2016), https://www.cleveland.com/business/index.ssf/2016/03/keybank_promises_to_pump_165_b.html.

where banks and their financial technology partners collect deposits and make loans, while still retaining a local geographic focus. Bank branches remain critical for rural and LMI communities and are essential for small business credit, as many low-income census tracts remain bank deserts.[32] A recent study found that when a low-income neighborhood loses its CRA-eligibility status, lending decreases by at least 10%.[33]

FDIC Director Gruenberg recently advised that when federal regulators update CRA assessment areas, they should consider how "to include communities in which banks do substantial business but do not fall within existing assessment areas."[34] He further urged that while the definition of assessment areas could be reevaluated, and potentially expanded, current assessment areas should not be eliminated, and it is essential that policymakers "retain the central focus of [the] CRA on local communities."[35] To meet these goals, rather than decreasing the importance of bank branches or eliminating assessment areas, the OCC could expand its consideration of the income level of banks' customers to determine whether these banks and their technology partners are fulfilling the needs of LMI communities.

VI. Include Banks' Affiliates' Activities as Part of CRA Examinations.

Several banks own mortgage companies as affiliates. The current regulations give banks the option of including their affiliates as part of any CRA examination, but does not require that the activities of affiliates undergo CRA scrutiny.[36] This loophole has created serious deficiencies in the CRA examination process; for example, it allowed several banks' affiliate mortgage companies with abusive practices to avoid examination for CRA compliance.[37] A properly modernized CRA would require the activities of bank affiliates to be considered in any examination. Notably, Treasury commented negatively on this loophole in its April 2018 memorandum, and recommended that regulators take steps to address it.[38]

The undersigned States fundamentally disagree with the proposed ANPR. If adopted, the ANPR's proposals will undermine the affirmative and continuing obligation banks have to meet the credit needs of *all* of the communities they serve, in particular, low- and moderate-income communities. We urge the OCC to withdraw the ANPR and rescind recently issued CRA guidance. In the alternative, the changes recommended above should be considered as part of any future joint rulemaking. Thank you for your consideration of our views.

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[32] *See Small Business Lending, supra* note 9.
[33] Lei Ding and Leonard Nakamura, *"Don't Know What You Got Till It's Gone" - The Effect of the Community Reinvestment Act on Mortgage Lending in the Philadelphia Market,* Federal Reserve Bank of Philadelphia, Working Paper 17-15, 16 (June 2017), https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2017/wp17-15.pdf.
[34] Gruenberg speech, *supra* note 24.
[35] *Id.*
[36] Community Reinvestment Act and Interstate Deposit Production Regulations, 12 C.F.R § 25.24(c).
[37] Ellen Harnick, Center for Responsible Lending, *Testimony at Community Reinvestment Act Regulation Hearings* (Aug. 31, 2010), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/Ellen-Harnick-CRA-Testimony-Atlanta-August-6.pdf.
[38] *See* Treasury memo, *supra* note 28 at 24.

Sincerely,

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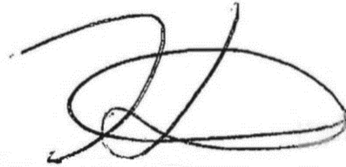

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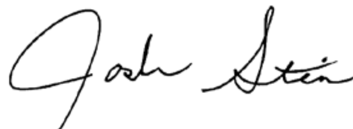

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