February 16, 2021

Ann E. Misback, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave., N.W.
Washington, D.C. 20551

Re: Community Reinvestment Act, Docket No. R-1723, RIN 7100-AF94

Dear Ms. Misback,

The Federal Reserve Board must bolster the Community Reinvestment Act ("CRA") to promote a robust economic recovery from the COVID-19 pandemic and to help underserved communities recover from longstanding inequities in credit access. Such a recovery must include those consumers, including individuals with disabilities and communities of color, that have been the most severely harmed by the current turbulent state of our economy and who have not yet recovered from the last economic crisis. While the Board's Advance Notice of Proposed Rulemaking (ANPR) for Regulation BB offers some welcome changes to CRA enforcement, further action is necessary to ensure that banks will better serve communities of color, low- and moderate-income (LMI) individuals, and people with disabilities.

We urge the Board to adopt a race-conscious approach in its modernization of the regulatory and supervisory framework of the Act. A focused and consistent approach premised on racial equity is necessary to dismantle "persistent systemic inequity in the financial system for LMI and minority individuals and communities."[1] We support the supplemental comments submitted by the National Community Reinvestment Coalition (NCRC) calling on the FRB to incorporate race and ethnicity in CRA evaluations and within the agency's framework design.

To ensure that financial institutions meet the credit needs of their communities we highlight several steps the Board can take to address barriers in the financial markets.

I. The Board should encourage banks to provide safe deposit products and assess whether traditional bank accounts with high fees are harming LMI consumers.

In general: We support the FRB's proposal to elevate and strengthen the evaluation of deposit products and the degree to which the products meet the needs of LMI communities. As the Board observes, deposit accounts not only provide a service in their own right, but they are also a critical entry point into the banking system that can provide a pathway to access to a broader range of financial services.

[1] 85 Fed. Reg. 66410, 66412.

The FRB appropriately identified low costs, low or no opening deposit minimums, and low or no overdraft and nonsufficient funds (NSF) fees as important elements. Overdraft and NSF fees in particular cause enormous harm to LMI consumers, and often drive them out of the banking system.

In order to evaluate whether a bank's deposit products are meeting the needs of LMI communities, we urge the FRB to evaluate: (1) whether the bank offers safe, low-fee checkless checking or prepaid accounts that have <u>no</u> overdraft or NSF fees, and (2) assess whether the bank's traditional checking or bank accounts have significant levels of overdraft, NSF or other fees that are harming LMI consumers.

Safe, low-fee accounts: With respect to safe deposit accounts, the simplest metric that will ensure that these accounts actually meet the needs of LMI consumers is whether the bank offers an account that meets the Bank On National Account Standards published by Cities for Financial Empowerment.[2] The Bank On standards provide a clear template for safe, low-cost deposit accounts focused on LMI consumers. These standards ensure that the accounts, which may be checkless checking or prepaid accounts:

- Are accessible to LMI consumers through small opening balances.
- Have low fees that are sustainable for LMI consumers.
- Have no overdraft or NSF fees that can trip up LMI consumers.
- Provide full branch and customer service access, ensuring that LMI consumers are treated like real customers.
- Have full functionality, with a variety of check substitutes that give LMI consumers the ability to pay rent and make other payments beyond use of a card.

The Bank On standards are widely accepted, and a growing number of banks offer Bank On certified accounts. The American Bankers Association recently announced a partnership with Cities for Financial Empowerment to urge their thousands of members to offer Bank On certified accounts.[3]

We also strongly support the Board's emphasis on both the usage and impact of deposit products and not just their availability. A deposit account that is available in theory but that does not reach significant numbers of LMI consumers does not meet their needs. Thus, the FRB should only give credit based on the number of actual, active accounts that meet the Bank On standards, not for merely offering such accounts. Banks should actively promote these accounts and actively reach out to LMI consumers to bring them in, and thus banks should be judged by their success in actually reaching LMI consumers.

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[2] *See* Cities for Financial Empowerment, Bank On National Account Standards (2021-2022), https://2wvkof1mfraz2etgea1p8kiy-wpengine.netdna-ssl.com/wp-content/uploads/2020/10/Bank-On-National-Account-Standards-2021-2022.pdf ("Bank On Standards"). NCLC provides validation services for CFE to assess whether accounts can be certified as meeting the standards.

[3] *See* ABA, Press Release, ABA Urges America's Banks to Offer Bank On-Certified Accounts; Core Providers Pledge Support for Financial Inclusion Initiative (Oct. 19, 2020), https://www.aba.com/about-us/press-room/press-releases/ABA-Urges-Americas-Banks-to-Offer-Bank-On-Certified-Accounts.

Overdraft fees on other accounts. With respect to more traditional bank accounts, the FRB should assess the bank's overdraft and NSF fee practices and how those practices translate into actual fees charged. Banks that impose significant levels of these fees should be evaluated negatively. As the FRB's proposal indicates, the Board should look at the *impact* of products, not just at policies that claim to offer occasional accommodations but that result in significant fees charged to families least able to pay them.

More specifically, we urge the Board to establish a presumption of a fair lending violation if a bank charges an individual more than six overdraft fees in a rolling 12-month period. Overdraft fees should be charged only for the occasional courtesy of covering a check or electronic payment that would otherwise bounce. Overdraft fees should not operate as a high-cost credit product. We also urge the Board to give credit to banks that have a policy of not offering "opt in" to so-called "courtesy" overdraft services on ATM and debit cares. These so-called "services" are really just permission for overdraft fees, making it more difficult for LMI consumers to manage their finances, to devastating effect.

In terms of data, we encourage the FRB to solicit the gross amount of overdraft fee revenue and, separately, NSF fee revenue; the average amount and range of fees charged to accounts that had at least one overdraft or NSF fee; the distribution of fees across accounts; and the average dollar amount of fees charged to the hardest hit consumers. The FRB should also solicit the bank's involuntary account closure rates.

Functionality limitations in FRB's Regulation II rules governing prepaid accounts: While this request for comments concerns the Community Reinvestment Act and not Regulation II, we would be remiss if we did not point out that the FRB's goal under the CRA of ensuring that banks fully meet the needs of LMI communities is undermined by the Board's Regulation II rules governing prepaid cards. We urge the Board to revisit those limitations so that large financial institutions are not inhibited in their ability to offer LMI customers fully functional accounts.

Regulation II implements the "Durbin Amendment" to the Wall Street Reform and Consumer Protection Act, which places limits on the interchange fees that large financial institutions can charge to merchants. However, Congress exempted government-administered prepaid or debit cards and general-use prepaid cards from the interchange fee limits in order to ensure sufficient revenue to sustain low-fee, low-balance accounts provided to LMI consumers. To qualify, the cards must have no overdraft fees and must allow at least one free ATM withdrawal per month.

Yet in implementing the prepaid card exception, the FRB went further and required that a general-use prepaid card, to be exempt, must be the only means of accessing the underlying funds.[4] That is, a prepaid account could not be linked to savings or other accounts, and could not come with bill payment,

[4] 12 C.F.R. § 235.5 (c)(1)(iii).

wire transfer, or other electronic payment features. These limitations are not in the statute, and were not even in the proposed rule, giving the public no opportunity to comment on them.

As we and other organizations have told the Board, the prohibited features are especially important for LMI consumers who lack access to safe deposit accounts.[5] The Bank On National Account Standards, which govern both checking accounts and bank-provided prepaid accounts, require bill pay functionality beyond use of the card itself, either through a bill payment feature or through at least four free money orders or cashier checks per month.[6] The Bank On Standards also list links to a savings account as a "strongly recommended feature."

Thus, Regulation II prohibits a general-use prepaid card issued by a bank over $10 billion from taking advantage of the interchange fee limit exception if it has features that are deemed essential to meet the needs of the LMI consumers that are the target of the Bank On program. Yet these are precisely the cards that need the interchange revenue, as they are aimed at consumers with low balances, and they are required, under the Bank On standards, to have low monthly maintenance fees and are prohibited from having overdraft fees, NSF fees, and a host of other fees.

It is incongruous for the FRB to be simultaneously encouraging banks, through the CRA regulations, to offer low-cost deposit accounts "tailored to meet the needs of LMI consumers" while simultaneously inhibiting the revenue possible to sustain those accounts. The FRB should revise Regulation II to lift the functionality limitations on exempt prepaid cards.

II. The Board must take action to address persistent systemic inequity in the financial markets that disadvantages households and communities of color, people with disabilities, and LMI consumers harmed by predatory lending.

The CRA was enacted to address systemic barriers in access to credit due to redlining and other abusive practices. The legacy of redlining is far reaching and impacts not just household finances but health, employment, and educational opportunities. Redlined communities experience reduced homeownership rates, housing values, increased racial and economic segregation, and significant disinvestment.[7] These credit-starved communities were targeted by high-cost, predatory lenders and suffered the highest rates of foreclosure during the Great Recession. These are the communities economically battered by the COVID-19 pandemic and in need of protection and investment, including access to small-dollar loans and safe and affordable financial products.

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[5] *See* Comments of Americans for Financial Reform *et al.* to the FRB, Regulatory Publication and Review Under the Economic Growth and Regulatory Paperwork Reduction Act of 1996, FRB Docket No. R–1510, Regulation II (interchange fees and prepaid cards), 12 CFR Part 235 (Mar. 22, 2016), https://www.nclc.org/images/pdf/rulemaking/EGRPRA-Reg-II-comments-consumer-groups.pdf.

[6] Bank On Standards, *supra.*

[7] Daniel Aronson et al, *The Effects of the 1930s HOLC Redlining Maps* (Revised Aug. 2020), Working Paper No. 2017-12 2017, The Federal Reserve Bank of Chicago, at 27.

The Board must encourage responsible and sustainable consumer lending. Expanding access to credit is vital for underserved communities—but only if that credit is sustainable. Banks should not receive credit for unaffordable, high-risk loans, or high cost loans. Historically, high cost lending has harmed communities of color more than others. The last great wave of irresponsible, unaffordable lending stripped communities of color—particularly Black communities—of more than a generation of wealth.[8] While research has disproven politicized claims that the CRA contributed to the Great Recession,[9] there has not been enough "good" lending to the communities that need it most. Numerous studies show that borrowers of color receive high-cost loans with a frequency that is not fully explained by creditworthiness.[10] So we urge the Board to use the CRA to encourage more prime or even subsidized lending to communities in need.[11]

The Board must encourage banks to make small-dollar mortgage loans to credit-starved communities**.** We recommend that the Board use the CRA to encourage banks to make more small-dollar mortgages ($70,000 or less). Banks are currently reluctant to make such loans because they are less profitable. But without them, many LMI buyers cannot afford a first home and existing LMI homeowners cannot afford needed repairs. Expanding the availability of small-dollar mortgages would increase access to existing low-cost properties and expand the pool of affordable housing.[12] This is especially important for expanding access to homeownership in communities of color, where homes often appraise at lower values, in part due to historic patterns of disinvestment and discrimination. In the current market conditions, getting a small-dollar mortgage from a bank is nearly impossible. This lack of access drives would-be homeowners into abusive rent-to-own schemes that drain wealth rather than building it.[13] It also contributes to the rise of investors speculating in the single-family rental market, further reducing homes that are available for homeowner occupancy in these communities and contributing to the eviction crisis.[14]

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[8] See, e.g., Dedrick Asante-Muhammad, Chuck Collins, Josh Hoxie, & Emanuel Nieves, Prosperity Now, *The Road to Zero Wealth: How the Racial Wealth Divide Is Hollowing Out the Middle Class* 8 (Sept. 2017), https://prosperitynow.org/sites/default/files/PDFs/road_to_zero_wealth.pdf (showing decline in both African-American and Latino household wealth over the period from 2007-2013 to levels below household wealth thirty years earlier).

[9] Bhutta, Neil, and Daniel R. Ringo (2015). "Assessing the Community Reinvestment Act's Role in the Financial Crisis," FEDS Notes. Washington: Board of Governors of the Federal Reserve System, May 26, 2015. https://doi.org/10.17016/2380-7172.1530

[10] *See* National Consumer Law Center, Mortgage Lending at § 1.3.4.4(3d ed. 2019), *updated at* www.nclc.org/library.

[11] NCLC supports NCRC's more detailed recommendations on the consideration of affordability, in response to Questions 17, 18, and elsewhere.

[12] *See* Alanna McCargo, Bing Bai, Taz George, Sarah Strochak, Small-Dollar Mortgages for Single-Family Residential Properties, Urban Institute (April 25, 2018), available at https://www.urban.org/research/publication/small-dollar-mortgages-single-family-residential-properties.

[13] *See* National Consumer Law Center, *Toxic Transactions: How Land Installment Contracts Once Again Threaten Communities of Color* (2016), available at https://www.nclc.org/issues/toxic-transactions-threaten-communities-of-color.html; Sarah Mancini and Margot Saunders, *Land Installment Contracts: The Newest Wave of Predatory Home Lending Threatening Communities of Color*, FEDERAL RESERVE BANK OF BOSTON COMMUNITIES & BANKING (April 2017).

[14] *See* Alana Semuels, *When Wall Street is Your Landlord*, The Atlantic (Feb 13, 2019), available at https://www.theatlantic.com/technology/archive/2019/02/single-family-landlords-wall-street/582394/.

While banks may already get credit for making small-dollar loans, the current CRA rules treat them the same as larger mortgages, so banks have no incentive to make small mortgages. The OCC's new rule exacerbates this problem by tracking mortgages and all lending by dollars, which will substantially disincentivize banks from doing small loans. We support the Board's proposal to count the number of loans, rather than aggregate dollars. But that will not be enough. Banks already make as many loans as they can, and they prefer larger loans for multiple reasons. So we also support the Board's proposal for impact scoring. Banks should receive a positive score for originating more small loans than their peers originate, and penalized for making fewer. Banks should also receive a positive impact score for having compensation structures that offset the financial pressure on loan officers to originate only larger mortgage loans.

The Board must ensure safeguards for single-family home loans made for energy-efficiency purposes. There has been some suggestion that banks could receive CRA credit for loans that fund energy efficiency measures. Opportunities for progress to address climate change are growing and stakeholders are exploring a range of options to promote energy efficiency in the single-family housing market. One avenue that has been raised as a potential locus for expanding energy efficiency is through housing finance. While there are several approaches that could meaningfully grow energy efficiency in single-family homes, the use of housing finance presents significant risks for homeowners and the housing market without clearly providing the level of energy efficiency progress sought. Too many homeowners have been harmed by inflated promises of energy savings and abusive practices by home improvement contractors.[15] So any CRA loans made for single-family energy efficiency measures should come with carefully tailored safeguards. Our recommendations for such safeguards are detailed in comments we previously submitted to the Department of Energy's Office of Energy Efficiency & Renewable Energy.[16]

***The Board must ensure that the CRA promotes racial justice*.** Since the start of the pandemic, more than 41% of African American small businesses have been forced to close, compared to just 17% of white-owned small businesses.[17] Discrimination in lending contributes significantly to racial disparities in small business survival rates. The CRA must be strengthened considerably in order to combat discrimination and help our communities recover from the pandemic.

The Board's proposal asks whether underserved areas should be designated based on high levels of poverty or low levels of retail lending. We support NCRC's recommendation for designation of

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[15] *See, e.g.*, Kevin G. Hall, Clean energy improvement project - Consumers warned program could cost them home, The Miami Herald at 1A (Dec. 31, 2018); "Caution urged against home improvement project scams." Woburn Advocate (MA), sec. Business, 2 June 2011, p. 9; Layden, Laura. "Bruno Total Home sued for fraud." Banner, The (Bonita Springs, FL), 20 Apr. 2019, p. A10. (describing multiple allegations of fraud and misconduct).

[16] National Consumer Law Center comments to U.S. Department of Energy, at pg. 11-12, http://bit.ly/2ceBOJF (Aug. 18, 2016). *See also* National Consumer Law Center, PACE Energy Efficiency Mortgages Still Risky Despite New Department of Energy Guidelines, https://www.nclc.org/media-center/pace-energy-efficiency-still-risky.html (Nov. 18, 2016).

[17] See Rodney Brooks, *More than Half of Black-owned Businesses May Not Survive COVID-19*, National Geographic (July 17, 2020), available at https://www.nationalgeographic.com/history/2020/07/black-owned-businesses-may-not-survive-covid-19/.

underserved census tracts based on low levels of lending, which would effectively target neighborhoods redlined because of the HOLC classifications. We also ask the Board to consider explicitly including race on CRA exams. CRA exams could include performance measures assessing lending, investing, branching and services to communities of color. In addition, CRA exams can include racial and ethnic demographic data in performance context analysis and require banks to affirmatively include communities of color in their geographic assessment areas. The Board could give credit in its CRA examinations for lending and investing in majority minority census tracts outside of assessment areas, just as the Board is considering for Indian reservations and other underserved areas. Finally, the Board should further develop its procedures for awarding CRA credit for financing affordable housing that is not subsidized, so that such financing actually serves LMI tenants.

***The Board must ensure protections for Americans with disabilities*.** The Federal Reserve's proposal to reform the CRA ignores the importance of including LMI people with disabilities as a key target audience for qualified CRA investing, lending, and services. For too long, people with disabilities in LMI neighborhoods have not been a part of the performance evaluation process. People with disabilities are more likely to be low- or moderate-income than those without disabilities. People with disabilities are often excluded from mainstream financial services and less likely to be banked or have access to mainstream credit.

Future rulemaking should address the financial and economic needs of low- and moderate-income people with disabilities. To properly support Americans with disabilities, the regulations should: 1) require banks to disaggregate reporting data by gender, race, ethnicity, and disability; 2) highlight the applicability of the Americans with Disabilities Act (ADA) to CRA enforcement; 3) ensure that no banks receive an outstanding rating without both the Community Development and Retail Services Subtests demonstrating a direct response to identified community needs of LMI people with disabilities; 4) include a qualifying list of CRA activities that banks could adopt to benefit LMI individuals with disabilities through investments, lending, and other service activities; and 5) offer banks CRA credit for investment in workforce development activities -- including apprenticeships, internships, on-the-job training, and skill certifications -- that are vitally important to LMI populations with disabilities.

III. Conclusion

We believe that this ANPR serves as an important starting point. With adoption of the recommendations offered above, this rulemaking could strengthen the CRA and take a critical step towards promoting both an equitable recovery and justice for communities of color, individuals with disabilities, and other vulnerable consumers. Thank you for considering our suggestions.

Sincerely,

National Consumer Law Center (on behalf of its low-income clients)