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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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| NATIONAL COMMUNITY REINVESTMENT COALITION; CALIFORNIA REINVESTMENT COALITION,<br><br>Plaintiffs,<br><br>vs.<br><br>OFFICE OF THE COMPTROLLER OF THE CURRENCY and BRIAN BROOKS, in his official capacity as Acting Comptroller of the Currency,<br><br>Defendants. | Case No.<br><br>**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**<br><br>Administrative Procedure Act Case |

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Plaintiffs the National Community Reinvestment Coalition ("NCRC") and California Reinvestment Coalition ("CRC"), by and through undersigned counsel, hereby allege as follows:

## I. INTRODUCTION

1. Plaintiffs bring suit under the Administrative Procedure Act, 5 U.S.C. § 702, to challenge a Final Rule issued by the Office of the Comptroller of the Currency ("OCC") revising the regulations implementing the Community Reinvestment Act, 12 U.S.C. § 2901 et seq.

2. In 1977, Congress passed the Community Reinvestment Act ("Act" or "CRA") to address systemic discrimination in the provision of financial services to low- and moderate-income ("LMI") neighborhoods and communities of color—especially the practice of refusing to provide financing in these neighborhoods, commonly known as "redlining." Recognizing the devastating effect on these neighborhoods of decades of redlining and other forms of discrimination, Congress passed the Act to encourage banks to invest in underserved communities. Since its enactment, the CRA has been a critical part of federal, state, local, and nongovernmental efforts to improve the economic condition of LMI communities.

3. Plaintiffs, two nonprofit organizations, are focused on increasing the flow of investment to LMI communities. Plaintiffs work, along with and on behalf of their members, to ensure that banks fulfill their CRA obligations and to maximize the benefits that LMI communities realize from these investments. Through negotiations with banks, Plaintiffs have helped secure over $150 billion in CRA funds for these communities since 2016 alone.

4. Until now, the three federal financial regulatory agencies charged with implementing the Act—OCC, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation—have jointly issued uniform regulations ensuring that the Act is implemented robustly and that banks' incentives are properly aligned, consistent with the Act's text and purpose, to serve the needs of the LMI communities where they operate.

5. In June 2020, OCC, acting alone and without the support of the other federal regulatory agencies that implement the CRA, issued a Final Rule that guts the Act and eviscerates the backing it provides to the LMI communities and communities of color that have long suffered from discrimination by financial institutions. Led by a Comptroller of the Currency who has a

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long history of antipathy to the Act and community development organizations, the Final Rule will siphon significant amounts of lending, investments, and bank services away from LMI communities. It will allow banks to receive credit for activities that do little or nothing to help those communities and that may in fact harm and displace the residents of these communities. By broadening the regulation's geographic criteria and applying a one-size-fits-all formula, the Final Rule ignores local needs and allows banks to disregard a large number of communities in favor of ones where it may be more financially advantageous to concentrate their investments. And in implementing a ratio-based approach and removing the right of the public to comment on bank performance, the Final Rule will result in banks passing over smaller, more beneficial projects, and will diminish or eliminate opportunities for community engagement and input—long the linchpin of successful community reinvestment efforts.

6. The Final Rule is inconsistent with OCC's duties under the CRA. Specifically, the Final Rule fails to adhere to OCC's affirmative obligation to ensure that the banks it regulates meet the needs of the communities, including LMI communities, where they do business. *See* 12 U.S.C. § 2901(a)(3), (b). The Final Rule also violates the statute by allowing banks to ignore local needs, instead assessing banks' compliance on a sweepingly broad scale and permitting banks to obtain CRA compliance credit for financing mega-projects that do little to serve LMI communities. *See* 12 U.S.C. § 2901(a)(3), (b).

7. Separate and apart from those statutory violations, the Final Rule also represents a failure by OCC to engage in the "reasoned decisionmaking" required by the Administrative Procedure Act ("APA").[1] In rushing its Final Rule through the administrative process, OCC provided little or no data or analysis to support its new approach—to a degree that even many banks criticized the measure because of the uncertain effects it will have on their operations. Further, OCC ignored or brushed aside comments—including by Plaintiffs and countless others—about the harmful effects the Final Rule would have on LMI neighborhoods and communities of color. The Final Rule also ignores concerns expressed by other federal regulators and many

[1] *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

commenters, including Plaintiffs, about the deleterious effects of OCC breaking from the unified regulatory framework. These effects include increasing the burden on organizations like Plaintiffs, which focus on ensuring that banks meet their obligations under the Act in a way that maximizes community benefits, to have to address different and potentially conflicting regulatory regimes depending on which bank they are dealing with. Moreover, in the midst of an unprecedented global pandemic that completely upended assumptions about the U.S. economy and in particular devastated LMI communities and communities of color, OCC rejected or ignored all calls by Congress, industry associations, and community groups, including Plaintiffs, to suspend the rulemaking process and reevaluate its proposal to ensure that it comports with changed needs and opportunities arising from the COVID-19 crisis.

8. Accordingly, and for the reasons set forth herein, Plaintiffs respectfully request that the Court set aside the Final Rule as arbitrary and capricious, contrary to law, and issued without adherence to required process.

## II. JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331.

10. Venue is proper under 28 U.S.C. § 1391(e) because Plaintiff CRC has its principal place of business in San Francisco, California, which is within the Northern District of California.

## III. PARTIES

11. Plaintiff National Community Reinvestment Coalition, founded in 1990, is a nonprofit organization operating under Section 501(c)(3) of the Internal Revenue Code. NCRC is based in Washington, D.C. NCRC's mission is to help increase the flow of capital into underserved communities; the CRA is an essential tool for it to meet that mission. Its membership comprises more than 600 community reinvestment organizations; community development corporations; local and state government agencies; faith-based institutions; community organizing and civil rights groups; minority- and women-owned business associations; and local and social service providers from across the nation. In particular, NCRC seeks to accomplish its mission by publishing evidence-based reports to educate its members, which inform NCRC's own

negotiations with lenders and educate the public and lenders about local needs; negotiating agreements with lenders to increase lending to and investments in LMI communities; and participating in public processes to comment on banks' CRA performance.

12. Plaintiff California Reinvestment Coalition, founded in 1986, is a nonprofit organization operating under Section 501(c)(3) of the Internal Revenue Code. CRC is based in San Francisco, California. CRC was founded to aid low-income communities and communities of color throughout California in accessing affordable housing financing, community development funds, small business loans, mortgage loans, and bank services. Its membership comprises more than 300 nonprofit community-based organizations and public agencies that work directly with LMI communities and communities of color to ensure access to CRA-qualified funds. CRC is itself a member of NCRC. CRC works to build an inclusive and fair economy that meets the needs of communities of color and low-income communities by ensuring that banks and other corporations invest and conduct business in such communities in a just and equitable manner. Of particular relevance here, CRC seeks to accomplish its mission by publishing evidence-based reports to educate its members, policymakers, and the public about areas of need and ways to promote CRA investment, negotiating agreements with lenders to increase CRA commitments in LMI communities, and participating in public processes to comment on bank CRA performance.

13. Defendant Brian Brooks is Acting Comptroller of the Currency.

14. Defendant Office of the Comptroller of the Currency ("OCC") is a subagency of the United States Department of the Treasury and is headquartered in Washington, D.C.

## IV. FACTUAL ALLEGATIONS

### A. The Community Reinvestment Act

15. In 1933, the federal government established the Home Owners' Loan Corporation ("HOLC"). HOLC examiners classified neighborhoods on the basis of perceived financial risk from the highest to the lowest, A-D. A, the "best" area, was colored green; B, the "still desirable" area, blue; C, the "definitely declining" area yellow and D, the "hazardous" area, red.[2] For

[2] For example, on the HOLC map of San Francisco the notes for the "green" A2 area (which



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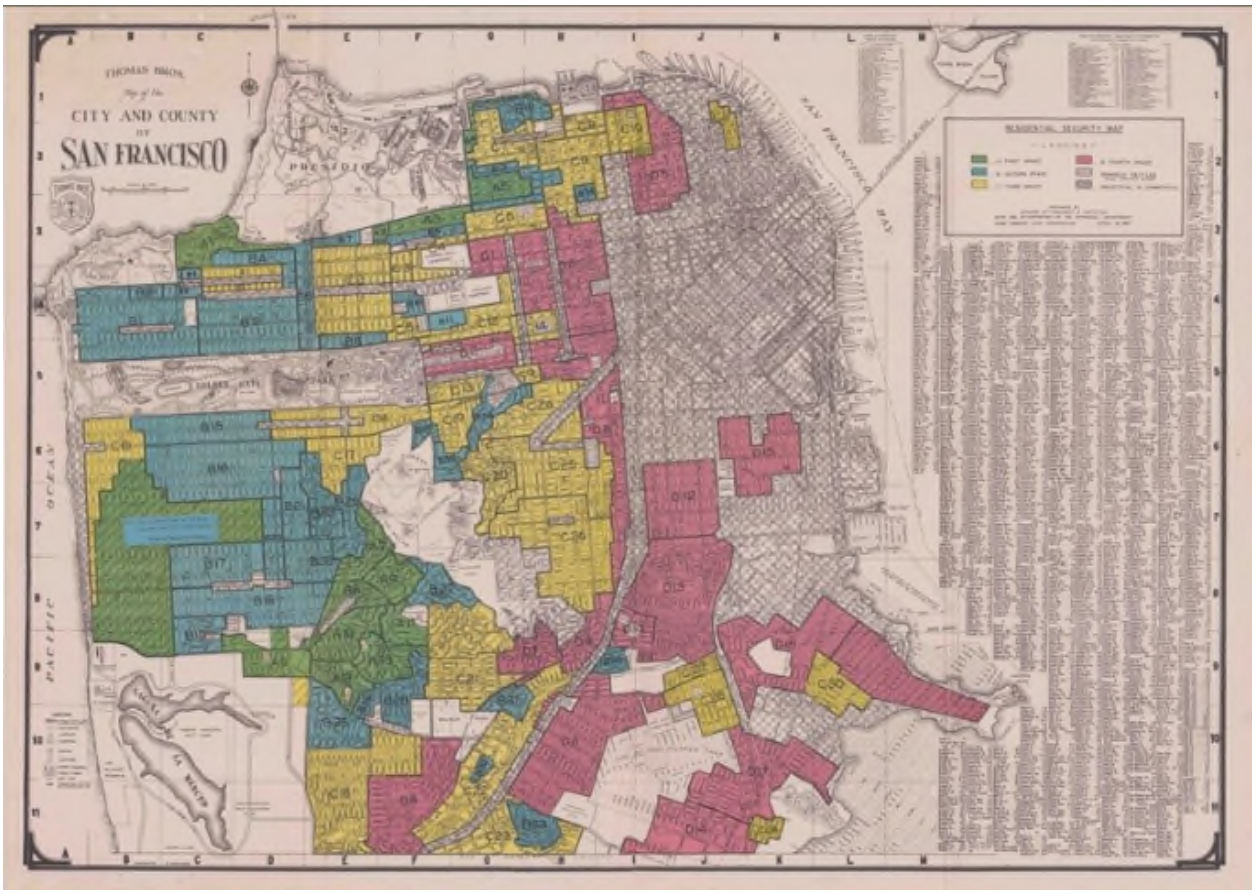
example, below is the HOLC map of San Francisco from 1937.




A 1937 San Francisco "residential security map" created by the Home Owners' Loan Corporation (*Courtesy of University of Maryland's T-Races project*)

16. Banks did not lend in the neighborhoods HOLC classified as "hazardous" and colored red, which consisted of LMI communities comprised predominantly of people of color and recent immigrants from southern and eastern Europe. This systemic racist and discriminatory practice is now commonly called "redlining."

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corresponds to Presidio Terrace) state: "This is an exclusive and secluded area, and there is no possibility of invasion by undesirable social elements." The notes for "blue" B1 (which corresponds to the central and outer Richmond) state: "There is no threat of undesirable racial influences." The notes for "yellow" C4 (which roughly corresponds to Laurel Heights) state: "There are no racial concentrations in the area but there is a distinct threat of infiltration of Negroes and Japs from areas D-1 and D-3. However, this possibility will be minimized when the proposed removal of Laurel Hill Cemetery takes place." The notes for the eastern adjoining "red" area D1 state: "There is a decided concentration of undesirable racial elements. More than half the Negro population of San Francisco are located here, and it is considered a highly hazardous area." https://dsl.richmond.edu/panorama/redlining/#loc=14/37.763/-122.503&city=san-francisco-ca

17. The net effect of redlining compounded over several decades in the United States. Redlining limited the flow of capital for homeownership in LMI communities of color. It also prevented small businesses in those communities from accessing capital to grow and develop. These results were exacerbated by widespread racial discrimination and segregation in housing. In short, financial institutions—aided by the federal government—systematically denied economic development and its concomitant housing and economic opportunities to LMI neighborhoods that disproportionately were composed of people of color.

18. Against this backdrop, the primary purpose of the CRA was to eradicate the practice of redlining and to ensure that banks invest in LMI communities, especially neighborhoods of color, that had for decades suffered from discrimination. During the Senate hearings on the CRA, Senator William Proxmire of Wisconsin stated:

> By redlining let me make it clear what I am talking about. I am talking about the fact that banks and savings and loans will take their deposits from a community and instead of reinvesting them in that community, they will actually or figuratively draw a red line on a map around the areas of their city, sometimes in the inner city, sometimes in the older neighborhoods, sometimes ethnic and sometimes black, but often encompassing a great area of their neighborhood.[3]

19. Accordingly, the CRA, enacted in 1977, combats systemic racism and discrimination against LMI neighborhoods by ensuring access to fairly priced credit and capital. Such access is essential to economic inclusion and wealth-building in the United States. It enables individuals and families to become homeowners and acquire loans for other needs. It also is critical in the growth and development of small businesses. Access to fairly priced credit and capital results in more productive local and national economies. Prior to the passage of the CRA, LMI individuals, who disproportionately are people of color, experienced intense discrimination in accessing fairly priced credit.

[3] Community Credit Needs: Hearings on S. 406 Before the S. Comm. on Banking, Housing, and Urban Affairs, 95th Cong. 9, 123 Cong. Rec. 17630 (1977).

20. The CRA provides that "regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business," and imposes upon banks a "continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered." 12 U.S.C. § 2901(a). The Act further "require[s]" each Federal financial regulatory agency—OCC, the Federal Deposit Insurance Corporation, and the Board of Governors of the Federal Reserve System—"to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered." *Id.* § 2901(b). The regulatory agencies are required to issue implementing regulations. *Id.* § 2905.

21. The CRA also imposes an affirmative obligation on banks to serve all communities where they do business, including LMI communities. *See* 12 U.S.C. § 2903(a)(1). Examiners from federal bank agencies must scrutinize lending, investment, and services to LMI neighborhoods and rate banks on those measures in a written evaluation. *Id.*; *id.* § 2906. Low or failing grades can result in delays or denials of bank merger applications. *Id.* § 2903(a)(2).

22. The CRA also contains robust public input and accountability mechanisms. Each financial regulatory agency, including OCC, is required to report to Congress annually on the "actions it has taken to carry out its responsibilities" under the Act. 12 U.S.C. § 2904. The financial regulatory agencies must issue public reports assessing whether banks are meeting their assessment criteria and discuss the facts and data supporting such conclusions, among other requirements, and issue a rating of "outstanding," "satisfactory," "needs or improve," or "substantial noncompliance" with respect to meeting community credit needs. *Id.* § 2906(b).

23. Since the passage of the CRA, banks work harder in LMI communities because they are being graded and publicly watched. A 2017 study by the Federal Reserve Bank of Philadelphia found that, when CRA exams no longer cover a metropolitan area or county, home lending in LMI census tracts can decline up to 20 percent. Since 1996, NCRC has found that banks have made almost $2 trillion in small business loans and community development loans in LMI neighborhoods. The CRA has been a key instrument in efforts to improve economic development and opportunities in LMI communities.

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24. Now, OCC's Final Rule threatens to undermine the core purpose of the CRA and roll back the clock by discouraging banks from making precisely the kinds of investments and extensions of credit that most benefit LMI neighborhoods.

**B. The Unified CRA Implementing Regulations**

25. The three major U.S. banking regulators—OCC, the Federal Deposit Insurance Corporation ("FDIC"), and the Board of Governors of the Federal Reserve System ("Federal Reserve" or "Fed")—share responsibility for implementing the CRA. *See* 12 U.S.C. § 2902(1).

26. Until the present rulemaking, these agencies have worked in unison, together with stakeholders from the financial industry, nonprofit community organizations, and state and local governments, to establish a single framework for evaluating bank compliance with the CRA. The resulting framework—to which FDIC and the Federal Reserve continue to adhere—balances the interests in consistency and certainty with ensuring that banks' activities actually help to meet the needs of LMI communities, including through opportunities for public input and engagement by members of those communities. *See* Joint Final Rule, Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156 (May 4, 1995).

27. The unified framework resulted from an extensive multi-year joint rulemaking in the 1990s "to emphasize performance rather than process, to promote consistency in evaluations, and to eliminate unnecessary burden." *Id.* at 22,158. To accomplish these goals, the agencies held a series of seven public hearings across the country where they heard from over 250 live witnesses and received dozens of written statements. *Id.* This process generated two proposed rules that refined the regulatory framework. *Id.* Together, the two Notices of Proposed Rulemaking generated over 13,000 public comments that informed the final rule, "the vast majority of [which] expressed support for the agencies' goal[s]." *Id.* at 22,157 (1993 rulemaking), 22,158 (1994 rulemaking).

28. This joint effort "[e]stablish[ed] the framework and criteria by which the [agencies] assess[] a bank's record of helping to meet the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of the bank."

12 C.F.R. § 25.11(b)(1).[4]

29. The CRA framework guides bank evaluations based on overlapping and intertwined performance standards, criteria, and context. The framework establishes different sets of performance standards depending on the size (large, intermediate small, or small) or type (wholesale or limited purpose) of a bank. Each performance standard is composed of performance criteria and tests to evaluate bank performance, and considers performance context, the bank's circumstances, its customers, and the economy to further account for the differences in bank operations, structure, and the needs of the communities in which the bank operates. *See* OCC, Comptroller's Handbook, Community Reinvestment Act Examination Procedures 1 (May 1999) ("Neither the CRA nor its implementing regulations inject hard and fast rules or ratios into the examination or application processes. Rather, the law contemplates an evaluation of each lender's record that can accommodate individual circumstances.").

30. Because banks are evaluated based on their record of helping to meet the needs of their local communities, assessment areas are used as a basis for bank evaluation. An assessment area is generally the local community around a bank office, branch, and/or "deposit-taking ATMs". *See* 12 C.F.R. § 25.41. The agencies evaluate each bank's performance within its assessment areas to ensure its compliance with the CRA. For banks with multiple assessment areas, assessment areas are evaluated individually and then considered together to assign a bank-level rating.

31. The agencies jointly established performance standards to evaluate bank activity based on bank size and business strategy. The large bank performance standard contains three performance criteria, testing a bank's lending, investment, and service. First, the lending test, the most heavily weighted of the three for large banks, evaluates the bank's record of helping to meet

[4] The uniform regulations are codified for each agency in separate but substantively identical sections of the Code of Federal Regulations. For ease of reference, only OCC regulations for banks are cited in the main text. OCC's regulations for savings associations can be found at part 195 of Title 12, the FDIC's regulations at part 345, and the Fed's regulations at part 228. Each section follows the same subpart numbering; for example, the provision cited in the text above, 12 C.F.R. § 25.11(b)(1), is mirrored at sections 195.11(b)(1), 345.11(b)(1), and 228.11(b)(1).



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credit needs by considering the volume of the bank's mortgage, small business, small farm, community development, and sometimes consumer lending activities as well as the geographic distribution and income of borrowers. *See id.* § 5.22. Second, the investment test evaluates the bank's community development activities by dollar amount, innovation, complexity, and responsiveness to community needs. *Id.* § 25.23. Finally, the service test evaluates the bank's record of offering retail banking services such as the presence of bank branches in assessment areas. *Id.* § 25.24.

32. Intermediate small, small, wholesale, and limited purpose banks have been evaluated under different standards with varied criteria due to their size or limited lines of business. Wholesale or limited purpose banks that do not engage in retail lending may opt for an evaluation that measures community development activities. *Id.* § 25.25. Small banks are evaluated based on a lending test, while intermediate small banks are subject to a lending test as well as a community development test. *See id.* § 25.26.

33. The agencies tailor their evaluations to the individual circumstances of the bank by considering the bank's performance context. Performance context accounts for the circumstances in which the bank operates, such as information about the bank, its community, and other banks. *See id.* § 25.21(b). Performance context includes the demographic and economic profile of the community; the business climate; the availability of opportunities to lend, invest, and serve the community; the bank's business model, size, and structure; the history of the bank's performance; the bank's public file; and community comments about the bank's CRA performance. *Id.*

34. CRA examiners evaluate all this material to produce a CRA rating. Banks may be rated "outstanding," "satisfactory," "needs to improve," or in "substantial noncompliance." 12 U.S.C. § 2906(b)(2); 12 C.F.R. § 25.28. To determine an overall CRA rating, agencies first evaluate each applicable performance criterion. For example, to achieve an "outstanding" component rating for the lending test, a large bank must demonstrate "excellent" responsiveness to credit needs, make a "substantial majority" of its loans in its assessment area(s), demonstrate an "excellent" geographic and income distribution of loans in its assessment area(s), have an "excellent" record of serving the needs of highly economically disadvantaged areas, exhibit

"[e]xtensive" use of innovative or flexible lending practices, and be a "leader" in community development lending. 12 C.F.R. Pt. 25, App. A(b)(1)(i). The other performance criteria are scored similarly with standards for each rating level. The agency then combines the component ratings to determine the bank's overall CRA rating, and reports both the overall rating and the component scores.

35. The primary effect of a CRA rating is that a lower rating can limit a bank's ability to grow. The regulatory agencies consider a CRA rating when a bank seeks certain regulatory approvals, for example to establish a new domestic branch, merge with or acquire another bank, or obtain a national bank charter or deposit insurance. *See* 12 C.F.R. § 25.29(a). Local governments and the public also consider CRA ratings in determining which banks to patronize, as reflected in certain local Responsible Banking Ordinances, which may condition bank receipt of local deposits on an Outstanding or Satisfactory CRA Rating.

36. This unified framework provides a well-established test under which "upwards of 90 percent of banks" regularly obtain a "Satisfactory" rating and about 9 percent obtain an "Outstanding" rating.[5]

37. Relative to other banking regulations, the burden of the existing CRA process is comparatively light. As a recent study by the Federal Reserve Bank of St. Louis found, CRA compliance is only the sixth most costly regulation for banks, at just 7.2 percent of all compliance expenses.[6]

**C. Joseph Otting's Longstanding Hostility to the CRA**

38. After being nominated by President Trump and confirmed by the United States Senate, Joseph Otting took office as Comptroller of the Currency on November 27, 2017.

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[5] Josh Silver and Jason Richardson, NCRC, "Do CRA Ratings Reflect Differences in Performance: An Examination Using Federal Reserve Data" (May 27, 2020), https://ncrc.org/do-cra-ratings-reflect-differences-in-performance-an-examination-using-federal-reserve-data/.

[6] Federal Reserve Bank of St. Louis, "Compliance Costs, Economies of Scale and Compliance Performance," 5 (April 2018), https://www.communitybanking.org/~/media/files/compliance%20costs%20economies%20of%20scale%20and%20compliance%20performance.pdf.

39. Otting brought to his role an antipathy toward the CRA and its objective of addressing discrimination by holding banks accountable for their record of investing in underserved communities. By his own admission, his impetus for revising the CRA regulations arises from his prior experience as Chief Executive Officer of OneWest Bank, a Pasadena-based bank that was owned by a group of private equity investors led by now-Treasury Secretary Steven Mnuchin.

40. At OneWest Bank, instead of investing in LMI communities as the CRA requires, Otting oversaw more than 10,000 foreclosures concentrated in minority communities. Analysis by CRC found that fully 68 percent of OneWest's foreclosures in California were in neighborhoods of color.[7] A subsequent investigation by the California Attorney General's Office "uncovered evidence suggestive of widespread misconduct" by OneWest Bank in carrying out these foreclosures, including executing backdated and false instruments and performing acts without valid legal authority. *See* Ex. F (Executive Summary at 2).

41. Analysis by CRC found that OneWest had only one of its 74 branches in a majority Asian-American census tract, and none in majority Black census tracts. The analysis also found that over a two-year period, OneWest originated only two mortgage loans to Blacks in the greater Los Angeles area, where it is based.[8]

42. As discussed further below, OCC's Final Rule eliminates opportunities for public input into CRA compliance. This has been a particular focus for Otting, arising from the resistance he encountered from community groups, including CRC, when he sought to obtain approval of a merger of OneWest Bank with CIT Bank. Community groups, led by CRC, were concerned that OneWest Bank and CIT Bank had not adequately committed to reinvesting in underserved communities and fulfilling their CRA obligations.

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[7] CRC, "Coalition Calls for Federal Investigation into Impacts on Communities of Color of OneWest Bank Foreclosures," http://calreinvest.org/press-release/coalition-calls-for-federal-investigation-into-impacts-on-communities-of-color-of-onewest-bank-foreclosures/.

[8] Testimony of Paulina Gonzalez-Brito, Executive Director, CRC, Before the House Financial Services Committee, Subcommittee on Consumer Protection and Financial Institutions at 10 (Jan. 14, 2020), available at: http://calreinvest.org/wp-content/uploads/2020/01/PGB-Congressional-Testimony-1.14.20-with-Appendix.pdf.

43. By his own admission, the process of having to deal with community groups' concerns about OneWest's failure to invest in communities that have historically been subjected to discriminatory banking practices was "a very difficult period" for Otting that gave him "very strong viewpoints" about reshaping the way the CRA is implemented.[9] Otting also expressed his frustration that "community groups" can "use your lack of compliance"[10] with the CRA to object to mergers or other activities, and said that "[w]e won't tolerate groups . . . disrupt[ing] the process and affect[ing] our decisions."[11]

44. Otting has also appeared to question the purpose of the CRA—to combat pervasive discrimination in the banking industry and stubborn (indeed, growing) income inequality in American communities. Otting stated in sworn congressional testimony that he "ha[s] never personally observed" discrimination, and that he does not read any newspapers or watch television. Otting further claimed that economic inequality is not expanding in America today, a statement that is at odds with virtually all current measurements of the wealth gap, including data from the Federal Reserve.[12] He did concede that his "friends from the inner city across America will tell me that [discrimination] is evident today."[13]

**D. Otting's Decision to Break from the Unified CRA Regulatory Framework**

45. Otting's position as Comptroller provided him with the opportunity to eviscerate the rule that had been a thorn in his side in the private sector, and to sideline the community

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[9] *See* "Bankers vs. Activists: Battle Lines Form Over Low-Income Lending Rules," Wall Street Journal (Sept. 25, 2018), available at: https://www.wsj.com/articles/mnuchins-fight-with-activists-inspired-community-reinvestment-act-revamp-1537885753.

[10] Rachel Witkowski, "5 items on the OCC chief's reg relief to-do list," American Banker, April 9, 2019.

[11] "Q&A with Comptroller Joseph Otting," available at: https://www.cbaofga.com/uploads/1/2/3/8/123887871/qa_comptroller_otting.pdf.

[12] *See* Ana Kent, Lowell Ricketts, & Ray Boshara, Federal Reserve Bank of St. Louis, "What Wealth Inequality in America Looks Like: Key Facts & Figures (Aug. 14, 2019) (analyzing Federal Reserve data, among other sources), available at: https://www.stlouisfed.org/open-vault/2019/august/wealth-inequality-in-america-facts-figures.

[13] Testimony of Joseph Otting, Comptroller of the Currency, Before the House Committee on Financial Services (June 13, 2018), https://www.govinfo.gov/content/pkg/CHRG-115hhrg31475/html/CHRG-115hhrg31475.htm.

groups whose advocacy he resented. By revising the framework for CRA evaluation, Otting could allow banks to claim CRA credit for activities that had little if anything to do with the purposes of the CRA, while simultaneously eliminating the vital role that community groups, such as Plaintiffs and their members, play in ensuring that banks meet the needs of LMI communities.

46. Based on his "very strong viewpoints" about revising the CRA regulations, Otting issued an Advance Notice of Proposed Rulemaking on the CRA regulations in September 2018. *See* 83 Fed. Reg. 45,053 (Sept. 5, 2018) ("ANPR") (Ex. D). The ANPR outlined an approach that, under the auspices of "modernization," would dismantle the unified regulatory framework and replace it—at least for OCC—with a new rule that would, among other things, (1) dramatically expand the types of activities that would qualify for CRA credit, including ones that are far attenuated from supporting LMI communities; (2) apply a single overall metric to a bank's CRA activities, meaning it could completely ignore a large number of its communities and still receive a "passing" grade; and (3) diminish or eliminate the role of community engagement in CRA evaluation.

47. OCC received 1,587 comments in response to the ANPR from an array of stakeholders, many of which cautioned OCC that without adequate supporting data and analysis, any regulatory revision risked decreasing investment in LMI communities and creating additional regulatory uncertainty.

48. In its comment on the ANPR, NCRC warned OCC that the agency was suggesting an approach that would eliminate the CRA's focus on local community needs; dilute CRA's benefits for LMI communities; promote "grade inflation" for financial institutions seeking CRA credit for activities that did not really benefit these communities; and diminish transparency and public input into the process.[14]

49. Similarly, CRC noted that a single-metric approach would lead banks to "seek the easiest, largest deals and simply stop when the goal is reached," so they could focus their efforts

[14] Comment of NCRC (Nov. 23, 2018), available at: https://www.regulations.gov/document?D=OCC-2018-0008-1132.

on some communities and ignore others altogether. CRC further expressed concern that OCC's approach would reduce or eliminate the opportunities for community input that are key to ensuring that banks are truly meeting community needs with their CRA-qualifying activities.[15]

50. Rather than carefully considering Plaintiffs' concerns, OCC instead sought to silence their dissent. In January 2019, OCC Deputy Comptroller Barry Wides sent CRC a letter calling CRC's concerns "false and negatively prejudging" and demanding that it "refrain from mischaracterizing the OCC's CRA ANPR in any future CRC releases and other public communications."[16] In October 2019, OCC's Wides sent yet another letter seeking to silence CRC, calling its statement that OCC sought to water down the CRA, a sentiment shared by many commenters, "misleading and unsupported."[17] OCC again provided no facts, data, or analysis to support this assertion. Wides also wrote an op-ed chastising community groups for, in OCC's view, not contributing positively to the discussion about CRA reform.[18]

51. Meanwhile, OCC forged ahead with the rulemaking. In January 2020, together with FDIC, it issued a Notice of Proposed Rulemaking. 85 Fed. Reg. 1,204 (Jan. 9, 2020) ("Proposed Rule") (Ex. E).

52. Other federal banking regulators were quick to distance themselves from Otting's Proposed Rule. The Federal Reserve declined to join the Proposed Rule, noting substantive concerns with Otting's proposal, a lack of data and analytical support, and uniformity concerns that would result if OCC pressed forward alone.

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[15] Comment of CRC (Nov. 21, 2018), available at: https://www.regulations.gov/document?D=OCC-2018-0008-1051.

[16] *See* Letter from Barry Wides, Deputy Comptroller, for Paulina Gonzalez-Brito, Executive Director, CRC (Jan. 9, 2019), available at: http://calreinvest.org/wp-content/uploads/2019/03/Wides-Letter-to-CRC.pdf.

[17] *See* Letter from Barry Wides, Deputy Comptroller, for Paulina Gonzalez-Brito, Executive Director, CRC (Oct. 2, 2019), available at: https://twitter.com/CalReinvest/status/1179491967308185600/photo/1.

[18] Barry Wides, "Setting the Record Straight on CRA Reform," American Banker (Mar. 25, 2019), https://www.americanbanker.com/opinion/setting-the-record-straight-on-cra-reform.

53. Jerome Powell, Chair of the Federal Reserve Board of Governors, stated that the Federal Reserve had "worked very hard to try to get aligned with OCC, really," but had been unable to do so. He also noted that he was concerned that having different regimes for CRA implementation—as would happen if OCC proceeded without the Federal Reserve—could "create confusion or, you know, sort of tension between the regimes."[19]

54. Lael Brainard, the member of the Federal Reserve Board of Governors who leads its CRA efforts, criticized OCC's proposal while outlining an alternative approach to CRA regulatory revision. She stated that OCC's "uniform ratio" approach "could provide too little incentive to make good loans during an expansion and incentives to make unsound loans during a downturn, which could be inconsistent with the safe and sound practices mandated by the CRA statute." Brainard also noted that the discretionary adjustments to the ratio that OCC put under the umbrella of performance context (discussed *infra*) would "undermine the certainty a metric purports to provide." Brainard stated that data the Federal Reserve compiled showed that a "tailored approach using targeted metrics" would "yield[] more consistent and predictable overall ratings than any comprehensive uniform metric," such as that which OCC proposed. She also explained that the Federal Reserve's analysis "did not find a consistent relationship between CRA ratings and a uniform comprehensive ratio."[20]

55. Brainard further said that the Federal Reserve had "devoted substantial time and effort to engaging with the other banking agencies," and that the Federal Reserve had shared its analysis, data, and proposals "in greater detail with our counterparts at the other banking agencies in an effort to forge a common approach." Nevertheless, OCC had been unwilling to consider the Federal Reserve's proposal. Brainard said that "[w]e continue to believe that a strong common set of interagency standards is the best outcome." And while expressing hope that the regulators could come together, in commenting on the OCC proposal, she cautioned, "I think we want to make sure

[19] Transcript of Chair Powell's Press Conference (Dec. 11, 2019), https://www.federalreserve.gov/mediacenter/files/FOMCpresconf20191211.pdf.

[20] Governor Lael Brainard, Federal Reserve, "Strengthening the Community Reinvestment Act by Staying True to Its Core Purpose" (Jan. 8, 2020), https://www.federalreserve.gov/newsevents/speech/brainard20200108a.htm.

that any rulemaking we do, we feel really confident about that rulemaking furthering the core purposes of the statute." [21]

56. Martin Gruenberg, a member of the FDIC's Board of Directors, echoed these concerns. He called the Proposed Rule "a deeply misconceived proposal that would fundamentally undermine and weaken the Community Reinvestment Act." He said that OCC's single-metric proposal amounted to a "'count the widgets' approach that does not take into account the quality and character of the bank's activities and its responsiveness to local needs." Gruenberg further noted that OCC had itself acknowledged a lack of data and analysis to support its new approach; that it would allow banks to entirely ignore many of its assessment areas and still receive a "passing" grade; that it would dilute the CRA's focus on LMI communities; and that it would undermine bank engagement and dialogue with local community stakeholders.[22]

57. Otting's proposal was also met with near-universal criticism from across the spectrum of CRA stakeholders. OCC received several thousand comments, the vast majority of which did not support the proposed framework. Indeed, NCRC analysis showed that roughly 1 percent of all commenters agreed with the Proposed Rule in its entirety. Commenters expressed concern that the new evaluation measures were not supported by data and analysis; that the Proposed Rule would dilute contributions to LMI communities that are at the core of the CRA; and that going forward without all three banking regulators on board would create confusion and disarray.

58. Community groups, including Plaintiffs, criticized the Proposed Rule for, among other things, (i) dramatically expanding the definitions of qualifying activities, thereby diluting the intended focus on services to LMI communities; (ii) diminishing the value the CRA places on bank branches and accessible bank accounts and services in LMI communities; (iii) proposing a single evaluation measure unsupported by data that would discourage vital small-dollar retail

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[21] *Id.*

[22] Statement by Martin J. Gruenberg, Member, FDIC Board of Directors, "Notice of Proposed Rulemaking: Community Reinvestment Act Regulations" (Dec. 12, 2019), https://www.fdic.gov/news/news/speeches/spdec1219d.pdf.

lending and allow banks to ignore a large number of communities altogether; and (iv) reducing transparency and opportunities for community input.[23] Plaintiffs also identified several respects in which the Proposed Rule would violate the CRA by failing to achieve the statutory purpose of supporting LMI communities.

59. Plaintiffs were far from alone in their criticism. The vast majority of commenters, including a coalition of 22 states led by California, expressed deep concerns about the entire framework of the proposal. The states' comment, for example, noted that the proposed benchmarks were "apparently arbitrary"; that the evaluation method would permit banks to ignore the needs of a great number of their communities; that the Proposed Rule eliminated the CRA's focus on service to LMI communities; and that OCC had provided virtually no data to support its proposal.[24]

60. Even banks opposed the Proposed Rule. The American Bankers Association said that it had "serious concerns" about OCC's proposed evaluation metrics; that further data and analysis were required; and that a failure of the regulatory agencies "to act in coordination would yield undesirable results that would be contrary to the objectives of the modernization effort and would undermine the longevity of any final rule."[25]

61. Despite the overwhelming opposition voiced in the public comments and from the other agencies that implement the CRA, OCC released the Final Rule on May 20, 2020, just six weeks after the close of the comment period. This six-week period—in the midst of a global pandemic, no less—represents a strikingly short amount of time given the complexity of the issue and the many thousands of comments received, nearly all of them critical of the proposed

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[23] *See generally* Comment of NCRC (April 8, 2020) ("NCRC Comment"), https://ncrc.org/wp-content/uploads/2020/04/NCRC-comment-v4b.pdf (Ex. B); Comment of CRC (April 8, 2020) ("CRC Comment"), https://beta.regulations.gov/document/OCC-2018-0008-3181 (Ex. C).

[24] *See generally* Comment of State of California and 21 Other States (Apr. 8, 2020), https://oag.ca.gov/system/files/attachments/press-docs/Final%20CRA%20regs%20comment%20letter%20-%2004.08.2020.pdf.

[25] *See generally* Comment of American Bankers Ass'n (Apr. 8, 2020), https://www.aba.com/-/media/documents/comment-letter/joint-letter-cra-04082020.pdf?rev=47ec78e4a44f4669b042e70510142fe2.

framework, that OCC was legally required to meaningfully consider and address.

62. OCC's Final Rule had no support from its fellow bank regulators. Even FDIC, which had jointly issued the Proposed Rule with OCC, ultimately thought better of moving forward. FDIC Chair Jelena McWilliams released a statement saying that, especially in light of COVID-19, it was not prepared to finalize the rule.[26]

63. Virtually every interested party, from Federal Reserve Chair Powell to banks to community groups like Plaintiffs, has expressed serious concern with the confusion, tension, and disarray that would result from the creation of a completely different CRA evaluation system for OCC-regulated entities versus the unified framework, to which FDIC and the Federal Reserve continue to adhere. Yet OCC's Final Rule contains no indication that OCC even considered, let alone evaluated and accounted for, this serious problem.

64. Once OCC released the Final Rule, Otting had achieved his primary goal as Comptroller, and he announced his resignation immediately thereafter—the day after the Final Rule was publicly released.

**E. OCC's Refusal to Publish All Data, Analysis, and Input Underlying the Rule**

65. Although the Proposed Rule stated it was based upon consideration of OCC's research and analysis, OCC refused to publish the research, data, and analysis it claimed supported its issuance of the rule.

66. OCC also failed to publish the data and analysis the Federal Reserve stated it provided OCC regarding CRA regulatory revisions.

67. OCC acknowledged that Otting personally had calls with the CEOs of 17 large banks, including the CEOs of Chase, Citi, Bank of America, and Wells Fargo, to solicit feedback regarding the rule, but failed to produce any substantive description of the content of these discussions. Only on the final day of the comment period, after the calls were disclosed in news reports and Plaintiffs requested that OCC submit these materials to the rulemaking record, did

[26] *See* Statement by FDIC Chairman Jelena McWilliams on the CRA Joint Proposed Rulemaking (May 20, 2020), https://www.fdic.gov/news/news/speeches/spmay2020.html ("FDIC Statement").

OCC publish perfunctory call logs acknowledging that they occurred without providing any detail.[27]

68. OCC also refused to publish the information obtained following a Request for Information on CRA qualifying activities, including retail deposits and loans, even though the stated purpose of the Request for Information was to collect data for use in preparing the Final Rule.[28]

69. OCC's refusal to publish the data and analysis it collected regarding the Proposed Rule left stakeholders, including Plaintiffs, unable to fully and meaningfully evaluate its various provisions and how all of the provisions would work together.

### F. Otting's Refusal to Change Course Despite COVID-19 or Even Acknowledge the Changed Economic Landscape

70. By the time the Proposed Rule's comment period closed on April 8, 2020, the United States was in the midst of an unprecedented social and economic lockdown as a result of the global COVID-19 pandemic. In April 2020 alone, 20.5 million jobs were lost and the unemployment rate soared to 14.7 percent. The data also showed that LMI communities—those which depend on the CRA for economic investment—were especially hard-hit economically.

71. Recognizing that the global pandemic had completely changed the economic landscape for those communities the CRA is designed to serve, many stakeholders, including Congress, industry trade associations, and Plaintiffs, urged OCC to suspend the rulemaking until additional data could be gathered regarding the economic impact of the global pandemic.[29]

72. Plaintiffs, among others, also requested additional time to comment, noting that their ability to fully evaluate the rule had been compromised by the disruption caused by the

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[27] *See* OCC, "Summaries of Comptroller Calls with Bank CEOs" (Apr. 8, 2020), available at: https://www.regulations.gov/document?D=OCC-2018-0008-2668.

[28] *See* 85 Fed. Reg. 1,285 (Jan. 10, 2020) (request for information); Final Rule, 85 Fed. Reg. at 34,786 (OCC's refusal to publish responses to request for information).

[29] *See* Letter from NCRC (Mar. 24, 2020) https://ncrc.org/wp-content/uploads/2020/03/COVID-extension-request.pdf; Letter from CRC (Mar. 2020), http://calreinvest.org/wp-content/uploads/2020/03/CA-orgs-urge-OCC-and-FDIC-to-end-CRA-rule-making.pdf.

pandemic.[30]

73. Consistent with these concerns, in explaining why her agency declined to proceed with the Final Rule, FDIC Chair Jelena McWilliams indicated that moving forward would distract banks and small businesses from responding to the financial devastation caused by the global pandemic.[31]

74. Otting, however, rejected these requests to suspend the rulemaking, extend the comment period, or gather additional data on the effects of the pandemic and the ensuing lockdown to determine whether they had any implications for CRA implementation. Indeed, the Final Rule contains only four passing references to COVID-19 and no analysis whatsoever of the pandemic's effect on the needs of LMI communities.

75. The impropriety of failing to consider COVID-19's impact is underscored by OCC's participation in a joint interagency statement on COVID-19 that promoted activities responsive to the current pandemic such as waiving fees, easing check cashing requirements, and offering payment accommodations. As explained below, the Final Rule creates disincentives for such activities by rewarding banks more highly for other projects with more attenuated benefits to LMI communities.[32]

**G. OCC's Flawed Final Rule**

76. The Final Rule was posted to OCC's website on May 20, 2020 and published in the Federal Register on June 5, 2020. *See* 85 Fed. Reg. 34,734 (June 5, 2020) (Ex. A). OCC dismissed the vast majority of comments out of hand and implemented Otting's "very strong viewpoints" instead.

77. OCC acknowledged that most "commenters disagreed with the approach outlined in the proposal," but nevertheless stated that "the agency ultimately agreed with the minority of

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[30] *See id.*

[31] *See* FDIC Statement, *supra* note 26.

[32] *See* OCC, FDIC & Federal Reserve, Joint Statement on CRA Consideration for Activities in Response to COVID-19 (Mar. 19, 2020), https://www.federalreserve.gov/supervisionreg/caletters/CA%2020-4%20Attachment.pdf.

commenters who expressed support for the proposed framework." 85 Fed. Reg. at 34,738.

78. Perhaps unsurprisingly given the rushed six-week timeframe in which OCC issued the Final Rule, OCC failed to meaningfully engage with, evaluate, and respond to a substantial number of significant concerns raised by stakeholders, including Plaintiffs.

79. Instead, OCC largely adopted the framework that it had proposed from the beginning. That framework made sweeping changes to the CRA's implementation. As discussed further below, the Final Rule changed what activities count for CRA credit, how they are counted, where they will be counted, and how the public can understand and engage with the CRA process.

80. Specifically, the Final Rule revised many of the core components of the CRA process:

a. *Defining CRA-Qualifying Activities:* The Final Rule expanded the range of activities for which banks could receive CRA credit, allowing them to obtain credit for infrastructure projects and similar activities whose benefits to LMI communities are attenuated and speculative at best, for providing financial education to upper-income individuals, for financing large corporate farms, and for financing housing that may be occupied by upper-income individuals. It also created a new definition of "CRA deserts" where banks can receive credit—and even, via a large multiplier, extra credit—in areas where it may be especially beneficial for *them* to make investments, even if the areas are not truly underserved.

b. *Defining Assessment Areas:* The Final Rule limited the areas in which OCC would measure banks' performance, allowing them to exclude areas where they have deposit-taking ATMs, while diminishing the importance of meeting local needs in a variety of other ways. And for banks that take 50 percent of their deposits over the Internet, it allowed them to ignore areas that account for less than 5 percent of the bank's overall business, even if the bank represents a huge share of the community's banking, and to get credit for activities undertaken anywhere in the community's state rather than in the community itself.

c. *Rating Performance:* The Final Rule employs a new rating system in which banks

are graded on a single overall metric, and can receive an "outstanding" rating even if they fail to provide credit in 20 or (for some banks) even 50 percent of the communities in which they do business. It also freed banks of any evaluation of most product lines, limiting mandatory evaluations to just one or two product lines per area. The rule essentially eliminates the services test—previously a critical element of determining whether banks are meeting community needs—and combines major elements of the lending and investment tests into the CRA evaluation measure, thereby reducing scrutiny of those important CRA activities. The Final Rule also added a pass/fail retail lending test that has significantly less weight than the previous retail test, in contravention of the anti-redlining mission of the CRA.

d. *Public Input*: The Final Rule eliminated the requirement that CRA examiners consider public comments on banks' actual record of serving credit needs, requiring only that they consider public comments on the needs of and opportunities in the assessment area as a whole. It also reduced the frequency with which banks will be examined.

81. This Final Rule suffers from the same critical legal defects as the Proposed Rule. These problems include, but are not limited to, the dilution of benefits to LMI communities; the lack of data and analysis supporting the proposed evaluation measures; and the elimination of opportunities for public input and community engagement. The Final Rule also changed the Proposed Rule in detrimental ways, without providing the public an opportunity to comment on those last-minute changes.

### 1. The Final Rule Allows Credit for Activities Whose Benefit to LMI Communities Is Speculative and Negligible

82. Despite the CRA's singular focus on redlined and LMI communities, the Final Rule seeks to allow banks to claim credit for a wide array of activities that have only speculative and negligible effects on these communities, and indeed would funnel money away from LMI communities and people of color—the very neighborhoods the CRA was designed to protect.

Commenters, including Plaintiffs, identified these problems in response to the Proposed Rule, and even proposed alternatives that would not have the same effect while achieving some of OCC's stated goals. But in nearly every case, OCC rejected the comments without reasonable explanation and without any supporting data or analysis.

83. For example, the Final Rule for the first time allows banks to claim CRA credit for "essential community facilities" and "essential infrastructure," which are defined broadly to include, e.g., telecommunications infrastructure, sewage treatment facilities, industrial parks, and bridges, police stations, and public safety facilities, no matter where they are located or who their primary beneficiaries are. 85 Fed. Reg. at 34,794, 34,796.

84. As commenters, including Plaintiffs, noted, this provision will allow banks to claim credit for massive projects that they undoubtedly would have financed anyway; whose benefit to LMI people is questionable and speculative; and that are so costly that they will allow banks to fill up their CRA credits without making real investments in LMI communities as the CRA intended. *See, e.g.*, NCRC Comment at 19; CRC Comment at 10. For example, a bank that helped to finance reconstruction of the eastern span of the San Francisco–Oakland Bay Bridge—a $6.5 billion project—could claim CRA credit for it based on the possibility that LMI people would drive across it, even though it cannot be said that the purpose of the project was to help LMI communities, and quantifying the benefit to members of those communities would be extremely speculative. OCC acknowledged this concern but did not meaningfully address it, nor did it provide any data or analysis to support its approach. *See* 85 Fed. Reg. at 34,744-45.

85. The Final Rule allows banks to claim pro rata credit for such activities even if they have only trivial benefits for LMI individuals, marking a substantial change from the existing rules, which require credit for qualifying activities that "primarily benefit" LMI communities. *See* 85 Fed. Reg. at 34,796 (various references to activities that only "partially . . . serve" LMI individuals).

86. As commenters, including Plaintiffs, noted, not requiring that an activity provide a minimum level of benefit to LMI individuals or communities in order to be counted will allow banks to string together a number of large projects with relatively low levels of benefits to LMI

communities to obtain CRA credit, rather than making the sort of direct investments in communities that have traditionally been the bread-and-butter of CRA activity and that have consistently been found to have the greatest impact in combating wealth inequality and lending discrimination. *See, e.g.*, NCRC Comment at 24-25; CRC Comment at 10. OCC dismissed this concern out of hand, saying that, notwithstanding the concerns of "members of Congress, government, community groups, and industry," banks were "unlikely" to string together large projects with limited benefits to LMI communities. For this conclusion, OCC provided no supporting data or analysis, but instead relied only on "the agency's judgment." 85 Fed. Reg. at 34,754.

87. As another example, banks will now receive credit for all of their financial education efforts, regardless of the intended or actual beneficiary of these services. *See* 85 Fed. Reg. 34,796. As commenters, including Plaintiffs, noted, this provision will allow banks to receive credit for programs that have absolutely nothing to do with benefiting LMI communities. *See, e.g.*, NCRC Comment at 28-29; CRC Comment at 10. Indeed, financial institutions could conceivably receive CRA credit for providing lucrative financial education services to high net worth clients. This is far afield from the CRA's statutory purpose and further diverts the CRA's focus away from its intended beneficiaries. OCC again dismissed this concern out of hand and did not meaningfully address it, nor provide any data or analysis to support its approach. Rather, OCC disputed the fundamental and longstanding understanding that the CRA is intended to benefit LMI communities. *See* 85 Fed. Reg. at 34,745-46.

88. Similarly, the Final Rule allows banks to claim CRA credit for financing affordable housing that does not benefit LMI individuals at all. Specifically, the Final Rule considers as a qualifying activity funding of so-called "naturally occurring affordable housing"—e.g., market-rate housing with rent levels that would be affordable for LMI households—even if the housing is to be occupied by upper-income residents. Even some industry stakeholders had suggested approaches attempting to ensure that LMI households would be the occupants, which were disregarded in the Final Rule. *See* 85 Fed. Reg. 34,796. In other words, CRA credit will be available even if the housing is occupied by people of substantial means.

89. As commenters, including Plaintiffs, noted, this provision will allow banks to claim credit for funding development that provides no benefit whatsoever to LMI individuals and could actually divert funding for affordable housing away from LMI individuals, in contravention of the text and purpose of the CRA. *See, e.g.*, NCRC Comment at 28; CRC Comment at 10. OCC rejected this concern with a vague reference to the burden on banks of income verification, but did not provide any data or analysis to support that concern or rebut commenters' concerns. *See* 85 Fed. Reg. at 34,742-43.

90. The Final Rule also introduces a completely new concept of "CRA deserts"—a concept that is neither in the Proposed Rule nor a logical outgrowth of it—that increases the opportunities for subjectivity and abuse. Banks will be permitted to request designation of areas as "CRA deserts" and will then be eligible for a "multiplier"—essentially, double credit— for any CRA activities in this area. This process permits banks to identify areas where they wish to receive double credit for CRA activities, without any opportunity for public comment or community engagement, and without any indication in the Final Rule as to when it will and will not apply. *See* 85 Fed. Reg. at 34,794.

91. Contrary to the requirements of the Administrative Procedure Act, stakeholders, including Plaintiffs, had no opportunity to evaluate and comment on this proposal, as OCC invented it in the Final Rule. They will be continually denied the opportunity to comment as OCC makes ad hoc decisions about CRA deserts behind closed doors with banks, at banks' requests. And, in combination with other changes in the Final Rule (such as the provision allowing banks to receive "outstanding" ratings despite ignoring 20 or even 50 percent of their assessment areas, discussed further below), this provision will allow banks to concentrate their CRA activities in only the areas they find most lucrative, ignoring communities where they take residents' deposits but prefer not to provide services.

92. The Final Rule adopts new definitions of "distressed area" and "underserved area" that lacked any supporting data or analysis. Distressed areas are defined as middle-income tracts that exhibit high levels of unemployment and poverty. 85 Fed. Reg. at 34,794. Underserved areas are measured by a scarcity of branches. *Id.* at 34,795.

93. OCC provided no reasoned justification for these new definitions and designations of targeted areas. Commenters, including Plaintiffs, identified OCC's failure to support these definitions with any data or analysis showing that areas that qualify under the new definitions actually exhibit low levels of lending or high levels of economic distress. *See, e.g.*, NCRC Comment at 31-32. As they explained, the multipliers applied to activities in underserved areas, distressed areas, and CRA deserts could inflate CRA ratings, particularly if these areas are not truly distressed economically. NCRC proposed an alternative definition based on lending rates per capita that would not have this consequence. OCC did not meaningfully respond to this concern and did not provide any data or analysis to support its approach. *See id.*

94. The OCC designations of underserved, distressed, and CRA deserts could also encourage banks to neglect needs in their assessment areas and local communities because the Final Rule allows activities in any of these areas across the country to count toward the bank's CRA lending and investment dollars.

95. The Final Rule also grants banks "multipliers"—effectively, two to four times the normal amount of credit—for various activities. *See* 85 Fed. Reg. 34,798. In addition to the multiplier for CRA deserts, described above, the Final Rule provides a multiplier based on OCC's own "determination of the activity's responsiveness, innovativeness, or complexity," terms OCC does not even attempt to define or explain how it will implement. Commenters, including Plaintiffs, explained that this list of multipliers was arbitrary and would have the effect of reducing overall CRA activities and funneling CRA dollars away from some of the most consequential activity. *See, e.g.*, NCRC Comment at 40. Although it made some relatively minor revisions, OCC did not meaningfully respond to these concerns, nor did it provide any data or analysis supporting its approach.

96. OCC also dramatically increased the threshold for a qualifying "small loan" and for the revenues of a qualifying small business or farm from $1 million to $1.6 million. 85 Fed. Reg. 34,794, 34,795. Rather than considering the current needs and opportunities in the small business lending marketplace in evaluating whether to make this dramatic change, as Plaintiffs urged, OCC made the change based only on rote application of an inflation multiplier. In particular,

commenters, including Plaintiffs, identified the particular need for additional lending of less than $1 million to ensure that the smallest businesses can obtain capital for startup and growth. *See, e.g.*, NCRC Comment at 54; CRC Comment at 11-12. Although it reduced its proposed threshold from $2 million to $1.6 million, OCC did not provide any data or analysis regarding the needs of the small business lending marketplace to support its approach. *See* 85 Fed. Reg. at 34,740-41.

**2. The Final Rule Allows Banks to Obtain Credit Without Meeting the Need for Services in LMI Communities Where They Do Business**

97. The Final Rule also alters the way banks draw their assessment areas. Like the changes to what activities count for CRA credit, this revision would radically reorient banks' CRA activities away from LMI communities and exacerbate the credit shortages in underserved areas that Congress enacted the CRA to address. OCC implemented these changes without supporting data, citing little more than its purported expertise and ignoring detailed comments that identified flaws in the proposal and suggested alternative approaches.

98. As discussed above, assessment areas are a central element of CRA implementation. Each regulated bank "must delineate one or more assessment areas within which OCC evaluates the bank's record of helping to meet the credit needs of its community." 12 C.F.R. § 25.41(a); *accord* 85 Fed. Reg. at 34,798 (preserving this definition in proposed 12 C.F.R. § 25.09(a)). Under existing law, wholesale or limited purpose banks must designate all "MSAs or metropolitan divisions … or one or more contiguous political subdivisions, such as counties, cities, or towns, in which the bank has its main office, branches, and deposit-taking ATMs," while other banks must designate those areas as well as "surrounding geographies in which the bank has originated or purchased a substantial portion of its loans." 12 C.F.R. § 25.41(b)-(c). An assessment area may not "extend[] substantially across the boundaries of an MSA unless the MSA is in a combined statistical area," nor may an institution "delineate a whole state as its assessment area unless the entire state is contained within an MSA." 75 Fed. Reg. at 11,667.

99. Under the auspices of amending the implementing regulations to account for non-traditional banks that collect deposits over the Internet, OCC revised this existing, facility-based method for delineating assessment areas and created a new test for deposits collected outside of

branches. Neither change was grounded in data or reasoned analysis, nor did OCC provide a reasoned response to comments opposing the changes or suggesting alternative approaches.

100. First, as to the existing facility-based assessment areas, OCC removed the requirement that banks delineate assessment areas around deposit-taking ATMs. *See* 85 Fed. Reg. at 34,756. This runs directly counter to the CRA, which expressly requires OCC to evaluate "each metropolitan area in which a regulated depository institution maintains one more domestic branch offices," 12 U.S.C. § 2906(b)(1)(B), which Congress specifically defined to include any "facility … that accepts deposits," *id.* § 2906(e)(1).

101. This was a major departure not only from the CRA and existing law but from the Proposed Rule, which explicitly said that "banks would continue to be required to delineate assessment areas around their … non-branch deposit-taking facilities." 85 Fed. Reg. at 1,236; *accord id.* at 1,244. OCC did not suggest anywhere that it might relieve banks of their requirement to delineate assessment areas around deposit-taking ATMs, so Plaintiffs and other interested parties had no opportunity to comment on that possibility.

102. Moreover, OCC's two-sentence explanation provided no reasoned explanation for the change. OCC relied on the evidence-free supposition that "[i]f a deposit-taking ATM is the only means by which the bank is drawing deposits, it is likely to be a very minor amount of retail domestic deposits" and that including deposit-taking ATMs "would make the assessment area delineation costly." 85 Fed. Reg. at 34,756. OCC provided no data to back up these claims, despite having required banks to base assessment areas on deposit-taking ATMs for the past 25 years.

103. Second, OCC introduced deposit-based assessment areas to adjust to "the emergence of Internet banks and other banks whose business models generate deposits from areas not tied to their physical location." 85 Fed. Reg. at 34,757. In general, commenters agreed with the concept of updating the CRA's implementing regulations to account for such banks—but the specific means that OCC chose were unsupported by its evidence, ignored comments and reasoned proposed alternatives, made changes that were not a logical outgrowth of the Proposed Rule, and failed to fulfill what OCC acknowledged as "the CRA's purpose[:] to ensure that banks help meet credit needs where they collect deposits." *Id.*

104. OCC's Proposed Rule "would have required that banks that received more than 50 percent of their retail domestic deposits from outside of their facility-based assessment areas (50 percent threshold) delineate separate deposit-based assessment areas in the smallest geographic area from which they received five percent or more of their retail domestic deposits (five percent threshold)." *Id.* The Final Rule largely adopted this proposal, with one significant change: rather than requiring that banks delineate assessment areas in "the smallest geographic area" in which they met the five percent threshold, OCC allowed them to delineate their assessment areas "at any geographical level up to the state level." *Id.*

105. As commenters explained, the approach outlined in the Proposed Rule is deeply flawed and entirely unsupported by any evidence. Despite ostensibly "considering a range" of possibilities around both the 50 percent and five percent thresholds, and specifically soliciting comments on whether those thresholds "strike the right balance between allowing flexibility and ensuring that banks serve their communities," 85 Fed. Reg. at 1,216-17, OCC did not even attempt to explain why they were better than the proposals that Plaintiffs and others submitted—some of which were accompanied by supporting data, unlike OCC's choices.

106. For example, NCRC showed that the five percent threshold would relieve large banks of CRA obligations even in areas where they received a substantial portion of deposits. As NCRC demonstrated, large banks could take in 10 percent or more of deposits in small cities without incurring an obligation to delineate assessment areas in those cities, because the small cities amount to less than five percent of the banks' deposits despite the banks' sizable market share in those communities. This flouts the CRA's goal of ensuring that banks serve the communities whose money they take—yet OCC did not even respond to such comments. Nor did it respond to alternative proposals, such as NCRC's suggestion to base assessment areas on banks' market share in an area. Instead, OCC dismissed those suggestions as "based on [commenters'] favored policy outcomes," 85 Fed. Reg. at 34,757—a criticism it tellingly did not level against the industry commenters whose suggestions it often embraced.

107. Indeed, the one way in which OCC did alter its assessment areas proposal from the Proposed Rule was based solely on the concerns of banks that desired "additional flexibility." *Id.*

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As noted above, OCC opted not to require delineation of assessment areas at the "smallest geographic area from which they received five percent or more of their retail domestic deposits," as proposed, instead allowing delineation "at any geographical level up to the state level." *Id.* In other words, under the Final Rule, if a bank collects five percent of its deposits from, say, Fresno County, it may delineate an assessment area that covers all of California and satisfy its CRA obligations with lending in, say, Los Angeles, without lending a dime in Fresno County. OCC did not even attempt to show how this unannounced change could fulfill the CRA's goals of ensuring that a financial institution "meet[] the credit needs of its entire community," 12 U.S.C. § 2903(a)(1), nor did it address the obvious concern that banks might take deposits from underserved areas and then claim credit for lending in only the easiest, most lucrative markets. And, because OCC did not include this approach in the Proposed Rule, commenters were denied the opportunity to weigh in on the sudden reversal. Finally, it is hard to evaluate these provisions when even OCC is unsure how many financial institutions would be impacted by this rule change. When asked about this, Otting indicated he did not know, but perhaps it was 10 to 15 banks that would be impacted by this seemingly consequential provision.[33]

108. These are only some of the many comments, concerns, and proposals that OCC ignored on its way to its preordained conclusion. For example, commenters, including Plaintiffs, suggested that all banks should be required to delineate deposit-based assessment areas, instead of just banks that took 50 percent or more of their deposits outside their facility-based assessment areas; that the changes to the definition of assessment areas would encourage banks to chase large-dollar depositors; that the changes would encourage banks to focus CRA activities in already well-served areas; that OCC should use lending data to establish additional assessment areas; that OCC should collect data on community development activities outside assessment areas; and that OCC should identify specific underserved counties where banks could get credit for community development activities. *See, e.g.*, NCRC Comment at 45-52; CRC Comment at 12-14. To these

[33] Brendan Pedersen, American Banker, "CRA Cheat Sheet: New Regime Would Look Very Different" (Dec. 12, 2019), https://www.americanbanker.com/news/cra-cheat-sheet-new-regime-would-look-very-different.

and numerous other substantial comments, OCC had little or no response—much less a reasoned explanation for its choices.

### 3. The Final Rule Abandons the Needs of Local Communities for a One-Size-Fits-All Formula

109. The Final Rule replaces the traditional CRA focus on the needs of the local communities served by large banks with a presumptive, quantitative general performance standard dominated by activity ratios and minimums. OCC claims that its approach is a "primarily objective" CRA evaluation where "the same facts and circumstances will be evaluated in a similar manner regardless of the particular region" and thus regardless of different circumstances in different places. 85 Fed. Reg. at 34,735. Instead, it has created a system that fails to measure actual benefits to LMI communities and that even fails on OCC's own terms, because it introduces an opaque, under-specified system that incorporates significant subjectivity. This new framework, which centers on a dominant ratio-based metric and pass/fail tests, rewards high-dollar lending and investments of minimal benefit to LMI communities over actually addressing community needs and providing opportunities for public input.

110. Even on OCC's own terms, the Final Rule fails to achieve OCC's ostensible goal of making evaluations more objective and quantitative. Rather than establish the precise thresholds that are necessary for the Final Rule's performance standard, OCC left these critical requirements to a future rulemaking. This represents a tacit—and at times express—recognition that, after significant effort to collect the data necessary to support its approach, OCC lacks sufficient data to support the framework of the Final Rule.

111. OCC also shunted significant CRA elements to the "performance context" element of evaluations, preserving and even increasing the opacity and subjectivity that supposedly motivated its changes. Despite justifying the Final Rule as a means of drastically reducing subjective considerations in CRA implementation, OCC put myriad key factors into the subjective performance context framework, where they will be exempt from objective measurement and largely sheltered from public scrutiny. At the same time, OCC removed the ability of the public to comment on bank performance in the performance context altogether.

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112. At the center of the Final Rule is a new general performance standard that will replace the large bank performance standard. The application of the new general performance standard results in a "presumptive rating" at the bank and assessment area levels, 85 Fed. Reg. at 34,801, which examiners can then adjust under the guise of performance context that includes qualitative considerations and community needs. *Id.* at 34,802.

113. The general performance standard for large banks[34] has three components: the retail lending distribution test, CRA evaluation measure, and community development minimum. First, the retail lending distribution test is itself composed of a geographic distribution test and a borrower distribution test. The geographic distribution test measures the bank's pattern of lending to borrowers in LMI areas, while the borrower distribution test assesses the distribution of retail loans to LMI borrowers, small businesses, or small farms. 85 Fed. Reg. at 34,766, 34,800. The bank's lending will be measured against either opportunities created by local demographics (the demographic comparator) or peer-bank activity (the peer comparator). Each comparator would be accompanied by a numerical target set by OCC to measure the distribution of retail lending to LMI areas and borrowers of an assessment area. The bank would need to pass only one of the comparators on a pass/fail basis. If the bank exceeds the threshold, it passes; if not, it fails. *Id.* The retail lending distribution test would apply only to a bank's "major" retail lending product lines, defined as no more than two product lines that each compose at least 15 percent of the bank's overall dollar volume of retail loan origination, where the bank originates more than 20 of products within the major retail lending product lines per year in an assessment area under evaluation. 85 Fed. Reg. at 34,766, 34,794-95, 34,800.

114. As explained by commenters, including Plaintiffs, the retail lending distribution test fails to account for local community credit needs. *See, e.g.*, NCRC Comment at 60-63; CRC Comment at 23. For example, a bank may be a major lender for a product line in a small, rural, or underserved community even if the product line is not a major line for the bank. Especially for

[34] The Final Rule replaces the term "intermediate small," used in current CRA regulations, with "intermediate." While the standards for other types of banks are generally left the same, the Final Rule increases the asset thresholds that define small and intermediate banks, as discussed *infra*.

large banks, a 15 percent threshold would exclude a large volume of lending dollars from evaluation. OCC did not provide any data or analysis to respond to these concerns or justify the threshold for a major retail product line. *See* 85 Fed. Reg. at 34,766.

115. In addition, the Final Rule added a new provision absent from the Proposed Rule, freeing banks from examination on all but one or two retail lending product lines for each bank, even though additional product lines may be important for a locality. *See* 85 Fed. Reg. at 34,766. This new provision did not represent a logical outgrowth of the Proposed Rule or the comment period, and commenters were given no opportunity to evaluate and comment on the new provision.

116. Further, by allowing banks to use either a peer or demographic comparator and making the test pass/fail rather than using the tiered CRA ratings (outstanding, satisfactory, etc.), the Final Rule could in fact decrease CRA lending. For example, a bank could lend more than its peers, thus passing the peer comparator, while lending little overall to LMI borrowers, failing the demographic comparator. Under the Final Rule, the bank could still pass the retail lending distribution test—a determination that would depend on the rating thresholds, an essential element of consideration of the Final Rule that OCC left entirely unresolved. OCC did not meaningfully address this concern, nor did it provide any data or analysis to support its approach.

117. Second, OCC created a single ratio as the evaluation measure to determine CRA compliance, which will be calculated both for individual assessment areas and at the bank-level. The evaluation measure is calculated by the sum of two figures: (1) the dollar amount of qualifying activities divided by average quarterly retail domestic deposits and (2) the number of bank branches in or serving LMI, distressed, underserved, or native/tribal areas divided by the total number of bank branches and multiplied by .02. 85 Fed. Reg. at 34,768, 34,799-800.

$$\frac{Qualifying\ Activities\ Value}{Quarterly\ Retail\ Deposits} + .02\left(\frac{Branches\ in\ Specific\ Areas}{Total\ Branches}\right)$$

OCC capped the weight of branch distribution in this formula, limiting the second figure to no more than .01 even for banks with excellent branch distribution. 85 Fed. Reg. at 34,799-800. OCC would compare the sum of this evaluation measure against numeric benchmarks that correspond to

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tiered ratings (outstanding, satisfactory, etc.). To receive an outstanding or satisfactory rating at the bank-wide level, a bank with more than five assessment areas would need to receive the corresponding rating in 80 percent of assessment areas and in assessment areas where the bank receives at least 80 percent of retail domestic deposits. For a bank with fewer than five assessment areas, a bank would need to receive the corresponding rating in 50 percent of assessment areas and in assessment areas where the bank receives at least 80 percent of retail domestic deposits. 85 Fed. Reg. at 34,801. OCC provides no data or information to show how many banks have fewer than five assessment areas. *See, e.g., id.* at 34,772.

118. Commenters, including Plaintiffs, noted that the evaluation measure is inconsistent with the community focus of the CRA because it would turn evaluations into a primarily mathematical activity-to-deposits ratio-driven exercise that prioritizes the dollar value of CRA activity over community needs that might call for smaller or better targeted investments. *See, e.g.*, NCRC Comment at 52-60; CRC Comment at 21-25. The CRA imposes an "affirmative obligation [on banks] to help meet the credit needs of the local communities in which they are chartered." 12 U.S.C. § 2901(a)(3), (b).

119. A ratio-based activity-to-deposit framework was explicitly considered and rejected by Congress when it passed the CRA. *See* NCRC Comment at 13-14. Congressional witnesses were concerned that a ratio would require banks to issue loans where there was no demand or where the needs of the community required something different, just to meet a target ratio. *Id.*

120. Similar concerns were echoed by commenters during the rulemaking. For example, prioritizing the total dollar value of activity in the CRA evaluation measure would drive banks to prioritize larger loans rather than the small-dollar home or small business loans necessary in many communities. *See, e.g.*, NCRC Comment at 55-57. This effect will be exacerbated by other provisions of the Final Rule that, taken together, will compound the harm to the small businesses that Plaintiffs and their members support. OCC dismissed these concerns out of hand, simply stating that it "disagrees" without providing any data or analysis to support its approach. *See* 85 Fed. Reg. at 34,770.

121. Further, the branch distribution calculation, which cannot add more than 1

percentage point to a bank's evaluation measure, drastically reduces the importance of local branches relative to the pre-existing service test, which accounts for 25 percent of a bank's overall CRA score. Compounding the issue, banks may now count branches outside of but "adjacent" to LMI areas. 85 Fed. Reg. at 34,771. This could lead to significant losses of branches in underserved areas, as banks can receive CRA credit for more profitable branches in wealthier neighborhoods or suburbs. OCC did not provide any data or analysis to support its conclusory contention that the bank distribution calculation would not reduce the presence and importance of local branches in underserved areas. This is especially important amidst reports that banks will use COVID-19 and shelter-in-place orders as justifications to close branches.[35] They can now do so without the same level of scrutiny from OCC.

122. The Final Rule also allows banks to obtain a "satisfactory" or even "outstanding" rating based on only a fraction of its evaluated assessment areas—80 or 50 percent, depending on the footprint of a bank—while failing in the rest. 85 Fed. Reg. at 34,801. In other words, banks could fail to meet their obligations in 20 or even 50 percent of the areas where they take residents' money, but still receive an "outstanding" rating from OCC. This runs contrary to the CRA, which requires OCC to assess a bank on its record of meeting the credit needs of its "entire community." 12 U.S.C. § 2903(a)(1). OCC would allow a bank to neglect its performance on the evaluation measure in whichever assessment areas it deemed least financially appealing. When passing the CRA, Congress considered and rejected text that would have assessed banks based on where they have a majority of customers.[36] Commenters similarly suggested that OCC adopt a tiered approach that mirrored the traditional CRA ratings and rewarded incremental improvements by a bank. *See, e.g.*, NCRC Comment at 67-68. OCC did not meaningfully address this concern, nor provide any data to support how it arrived at the 80 and 50 percent figures. It said the numbers were based on

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[35] *See* Orla McCaffrey, Wall Street Journal, "People Aren't Visiting Branches. Banks Are Wondering How Many They Actually Need." (June 7, 2020), https://www.wsj.com/articles/people-arent-visiting-branches-banks-are-wondering-how-many-they-actually-need-11591531200.

[36] *See* Hearings Before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate 95-1 (Mar. 1977) at 6-7.

"its supervisory judgment and experience" and that it "conducted data analysis," with little further elaboration. 85 Fed. Reg. at 34,772.

123. Third, for a bank to receive an outstanding or satisfactory rating, a bank would need to meet a minimum dollar value of community development loans relative to its retail domestic deposits. 85 Fed. Reg. at 34,772. Commenters, including Plaintiffs, noted that setting a minimum threshold for community development lending may encourage financial institutions to do no more than that minimum. The Proposed Rule would have established a 2 percent minimum, which commenters explained would be insufficient to increase CRA activity and could even lead to a decrease, as some lenders already meet or exceed that level. *Id.* (describing proposal and criticism). To avoid this criticism, OCC punted, leaving the minimum threshold—a critical metric without which the Final Rule cannot be implemented—for future rulemaking, without providing any data or analysis to explain how it will reach an appropriate threshold or prevent the problems identified by commenters. *Id.* at 34,773.

124. Although the general performance standard depends on numerical benchmarks, thresholds, and minimums to assess bank performance for the retail lending distribution test, evaluation measure, and community development minimum, OCC did not finalize precise figures based on its recognition that it lacked the data necessary to do so. The Proposed Rule contained proposed targets, for example, a 55 percent demographic comparator for the retail lending distribution test, an 11 percent threshold for outstanding performance on the evaluation measure, and a 2 percent community development minimum. 85 Fed. Reg. at 1,218-19. But here again, the Final Rule omits them because "the agency agrees [with commenters] that the existing data [used to set the targets] was limited, rendering the agencies' and commenters' choice of thresholds uncertain." 85 Fed. Reg. at 34,774. Despite this admitted defect, OCC "concluded it is appropriate to finalize each component of the objective evaluation framework contained in the proposal (with revisions as described above) and to separately gather more data and conduct further analysis to calibrate the benchmarks, thresholds, and minimums associated with each of the three components of the framework." *Id.*

125. OCC already tried to collect and use the available data during the rulemaking—

from data and comments submitted during the rulemaking, CRA performance evaluations, call reports, Federal Financial Institutions Examination Council data, Home Mortgage Disclosure Act data, credit bureau data, and a separate Request for Information—but came up short. 85 Fed. Reg. at 34,773; OCC, Request for Information, Community Reinvestment Act Regulations, 85 Fed. Reg. 1,285 (Jan. 10, 2020). Without the precise benchmarks, thresholds, and minimums, stakeholders are left in the dark as to how the Final Rule will operate in practice. OCC's decision to adopt the framework despite its admitted inability to identify the specific numerical benchmarks, thresholds, and minimums needed to operationalize it is arbitrary and capricious, because without these numbers, neither the agency nor the public can fully understand the potential implications and unintended consequences of the Final Rule.

126. The Final Rule simultaneously sweeps more banks in under the definitions of "small bank" and "intermediate bank" by raising the asset thresholds required to qualify, and then allows them to "opt in" to whichever regulatory regime they prefer. *See* 85 Fed. Reg. at 34,794, As commenters, including Plaintiffs, noted, this "opt-in/opt-out" approach will allow banks to choose the framework most beneficial to them—not the one most beneficial to the communities they serve. *See, e.g.*, NCRC Comment at 68-69. OCC did not meaningfully address these concerns, instead saying that it preferred to let banks "choose the performance standards that best fit their needs and objectives." 85 Fed. Reg. at 34,790.

127. The Final Rule also incorporates consideration of performance context, including the consideration of community needs and demographics, business strategy, or economic conditions, in assigning ratings, but makes these important factors secondary to the presumptive rating derived from the general performance standard and wields performance context as a catch-all to try to fix the adverse effects of the numerical performance standard. As before, performance context could include a range of factors, from community needs to bank business strategy to "[a]ny other information deemed relevant by the OCC." 85 Fed. Reg. at 34,803.

128. Commenters, including Plaintiffs, noted that the new way OCC uses performance context would diminish the importance of public input, qualitative factors, and community needs. *See, e.g.*, NCRC Comment at 58-59. OCC has been emphatic that its goal in the rulemaking is a

"primarily objective" CRA evaluation where "the same facts and circumstances will be evaluated in a similar manner regardless of the particular region." 85 Fed. Reg. at 34,735. As a result, the general performance standard results in a presumptive rating based on whether the banks meet or exceed thresholds for the retail lending distribution test, evaluation measure, and community development minimum. Any consideration not accounted for by an activity-to-deposit ratio or minimums in the favored, quantitative performance standard, such as community needs or bank responsiveness, is therefore made less important—and, despite OCC's ostensible goal, less objective. This is particularly true for factors such as the provision of retail services that previously were expressly considered by measurable performance criteria but are now lumped together as performance context. Unquantified aspects are thus left by the wayside. OCC does not meaningfully address this concern.

129. Moreover, throughout the Final Rule, OCC invokes "performance context" as a catch-all to claim examiners will consider factors and problems that the actual framework of the Final Rule ignores. *See, e.g.*, 85 Fed. Reg. at 34,740 (OCC will consider "qualitative aspects of qualifying activities through performance context"), 34,743 (whether affordable housing complies with local laws), 34,745 (benefits of essential infrastructure projects), 34,751 ("whether the bank is being responsive to community needs"), *Id.* (retail banking services and delivery systems), 34,755 (impact of activities to LMI communities), 34,760 (assessment area delineations), 34,765 (performance context may bump a failing grade to a passing grade on retail lending distribution test), 34,768 (financial condition, loan product demand, or "relevant demographic conditions"), 34,770 ("unique constraints"), 34,774 ("various external factors affecting a bank or all banks' ability to meet their CRA evaluation measures"), 34,776 (community engagement), *id.* (discriminatory or illegal credit practices).

130. There is no question what OCC seeks to accomplish through its incantations of "performance context": it hopes to sweep under the rug the core CRA elements that its quantitative test fails to address, while reserving for itself discretion as to whether, or how, to consider those issues in individual circumstances. These efforts do not cure the Final Rule's fatal failure to address these important issues. Rather than fixing these problems, OCC's vague and

unelaborated reliance on "performance context" undermines its stated purpose for the Final Rule, making the rule inconsistent with increasing the "objectivity" of CRA evaluations. *See, e.g.*, *id.* at 34,737.

**4. The Final Rule Reduces Public Input and Transparency**

131. The Final Rule limits public input into CRA examinations and makes them considerably less transparent—despite OCC's professed desire to make CRA implementation "more … transparent." 85 Fed. Reg. at 34,734. Here again, OCC ignored substantial comments and alternative proposals in favor of adopting without reasoned explanation an approach that undermines the CRA's purposes.

132. Under current law, OCC is required to consider "any written comments about the bank's CRA performance submitted to the bank or the OCC" when assessing a bank's CRA performance. 12 C.F.R. § 2906(c)(6). The Final Rule abandons this commitment, instead stating only that OCC will consider "[a]ny written comments about assessment area needs and opportunities submitted to the bank or the OCC." 85 Fed. Reg. at 34,803; *accord id.* at 34,776. Thus, CRA examiners will no longer consider public input about the very subject at issue in their examinations: "the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods." 12 U.S.C. § 2906.

133. OCC did not attempt to justify this restriction on public input, or even acknowledge the change it was making. Rather than serving any goal of the CRA, it appears to implement Otting's preconceived "very strong viewpoint[]" that members of the communities served by banks—the very entities with whom the CRA is concerned—should be stripped of the ability to "use [banks'] lack of compliance" to "affect [OCC's] decisions." *See supra* ¶ 131.

134. Similarly, OCC refused to require reporting of data elements necessary to evaluate banks' performance under its new tests. For example, the Final Rule does not require the reporting of retail domestic deposit data from banks or of the geographic location of deposits, despite acknowledging that the absence of such data makes it hard to set and evaluate policy. 85 Fed. Reg. at 34,780, 34,782. Without public dissemination of this data, the public would have no way of knowing where the deposit-based assessment areas of banks would be. Indeed, as OCC

acknowledged, the absence of this data frustrates even OCC's evaluation. *See id.* at 34,756 ("The current data limitations make it impossible to ascertain the volume of deposits from depositors' geographic locations.").

135. The Final Rule also made examinations significantly less frequent for banks that received an "outstanding" rating (a rating that, as discussed above, will now be substantially easier to obtain). Currently, banks are evaluated every two to three years. Under the Final Rule, banks receiving an outstanding rating "would be evaluated every five years." *Id.* at 34,783. With little explanation, OCC is cutting examinations in half for many banks, despite Congress's recognition of banks' "continuing and affirmative obligation" to comply with the CRA. 12 U.S.C. § 2901.

136. OCC ignored or cursorily dismissed numerous other comments expressing concerns about its proposed recordkeeping requirements and suggesting alternative approaches. For example, commenters argued for disseminating CRA data at the level of individual census tracts, just as banks do under the Home Mortgage Disclosure Act ("HMDA"). *See* NCRC Comment at 71. Not only did OCC fail to even acknowledge this suggestion or explain why it was rejecting it, OCC actually removed HMDA data from banks' public files. 85 Fed. Reg. at 34,783. OCC similarly deleted its previous requirement that banks' small business and farm data be publicly disseminated at a county level and for income categories of census tracts. OCC further opted against the public reporting of the new community development lending and investment data at the county or census tract level that is to be submitted by banks to OCC, despite requests from commenters, including Plaintiffs. 85 Fed. Reg. at 34,781; *see* NCRC Comment at 71.

**H. Harm to NCRC**

137. Although NCRC has been supportive of policies that would strengthen and modernize the CRA, OCC's Final Rule achieves the opposite, and will frustrate NCRC's mission in several respects. The Final Rule will impair NCRC's ability to prepare evidence-based reports on banks' CRA-qualifying activities in specific communities; impair its negotiations of agreements to increase CRA investment in LMI communities; impede its members' efforts to secure investments in the LMI communities they serve; decrease banks' incentives to lend to clients in NCRC's housing counseling and small business lending programs; put NCRC and its

members in competition with large-scale infrastructure projects and similar financing opportunities; and impede NCRC's ability to advocate on behalf of its members and LMI communities throughout the CRA evaluation process.

138. NCRC devotes substantial resources to negotiating agreements with lenders to support the credit needs of LMI communities and communities of color. NCRC negotiates these agreements in tandem with member organizations that have a presence in the areas where the bank is located. NCRC also steps in to help negotiate agreements in pockets of the country where there are few or no organizations working to advance CRA investments in LMI communities. Through these agreements, NCRC obtains bank commitments to provide loans, investments, and bank services in communities that have historically faced barriers to accessing credit and deposit services.

139. For example, in 2016, NCRC and numerous member organizations in the Midwest negotiated an agreement with a bank wherein the bank committed to spend $16.1 billion in low-income communities and communities of color over the next five years, including through mortgage and small business lending, community development lending, and opening ten new branches. In 2017, the first year of the agreement, the bank increased its mortgage lending to LMI communities and borrowers by over 16%. Overall, since 2016, NCRC's agreements with banks have helped secure over $158 billion in commitments to invest, lend, and open branches in LMI communities.

140. The Final Rule impairs NCRC's efforts by making it far more difficult for NCRC to identify the communities most in need of CRA-qualifying investments. This increases the difficulty of and resources required for each effort NCRC undertakes, reducing the number of agreements NCRC can pursue; restricting NCRC's ability to address a specific community's small business lending needs in such agreements; and preventing NCRC from being able to address these issues adequately in meetings with banks with whom they do not have formal agreements. The Final Rule further impairs the local efforts of NCRC's members, who depend on the reports that NCRC provides to negotiate their own agreements with banks. OCC regulates the nation's largest banks so the loss of small business and farm loan data for these banks represents a significant burden and cost.

141. Outside of the new impediments to data-gathering erected by the Final Rule, the Final Rule impairs the ability of NCRC and its members to obtain meaningful investments in the LMI communities they serve. In particular, the new rule makes it easier for banks to pass their CRA exams; creates incentives for banks to choose higher-dollar projects, including those that may only partially benefit LMI communities; and reduces the exam's focus on bank services. If banks can fulfill CRA obligations through other means that are not focused on LMI communities, those banks can ignore entire LMI communities. NCRC will lose leverage to negotiate commitments for banks to increase their mortgage lending, small business lending, and bank services in LMI communities. The changes will also intensify the competition NCRC and its members face for CRA-qualifying investments, placing their more individualized, smaller-dollar proposals in direct competition with a wide range of infrastructure and similar projects that they do not compete against in the same way under current law. Moreover, when, in the future, NCRC seeks to reach a community benefits agreement with an OCC-chartered bank, NCRC will have to work to reach resolution on a new definition of "community development" that excludes some activities covered by the overbroad definition in the Final Rule.

142. As part of its mission, NCRC comments on bank merger applications and bank charter applications, and its evidence-based reports assist its members and the public in doing so. NCRC also submits comments on banks' CRA performance, based on the data that is available. Under the current CRA framework, regulators must consider these comments when evaluating bank merger applications.

143. The Final Rule will impair NCRC's ability to prepare reports that help NCRC, members and the public make meaningful, informed comments on CRA performance because the CRA data that OCC will provide under the new rule will be less transparent. Further, the public will no longer be able to provide direct input on a bank's CRA performance, and will instead be limited to commenting about assessment area needs and opportunities. *See supra* ¶ 140. The Final Rule (in a change from the Proposed Rule) also permits banks themselves to request designation of areas as "CRA deserts." As a practical matter, this change will make it more difficult for communities to comment on the bank's performance through the limited means that will remain

available, because NCRC and its members have little visibility and no input into which areas a bank might designate and obtain agency approval for as deserts.

144. NCRC operates programs whose missions will directly suffer as a result of the Final Rule's diversion of lending from small-dollar to large-dollar loans, and away from programs that directly benefit LMI communities. First, through its D.C. Women's Business Center and Small Business Technical Center, NCRC provides counseling to small business owners on how to secure loans and in some cases directly connects small business owners with lenders. These programs serve small business owners that rely on these loans to launch or grow. The Final Rule will impair these programs by expanding CRA-qualifying activities to include activities that are attenuated from LMI communities, thereby reducing the incentives for banks to make small business loans in communities to achieve passing CRA grades. The general performance standard encourages banks to focus on high-dollar lending, and lending that only partially benefits LMI communities, to the detriment of programs like the D.C. Women's Business Center and Small Business Technical Center that are specifically focused on securing small business loans for low-income communities and communities of color. As small business loans in LMI communities decrease, these programs and similar ones maintained by NCRC's members will see their resources increasingly taxed as the number of people who need their services grows.

145. Second, NCRC convenes the Housing Counseling Network, which has more than 50 members and helps potential homeowners in LMI communities secure non-predatory mortgage loans. These housing counseling organizations often receive grants directly from banks to fund their services. If banks can achieve a passing CRA score through large-dollar infrastructure projects or "essential facilities" that the bank asserts partially benefit LMI communities, a bank can suspend smaller-dollar grants for housing counseling in LMI communities, and may reduce the number of mortgage loans available to LMI homebuyers.

146. Finally, OCC's unilateral decision to sever the previously unified framework for CRA examination will itself impede NCRC's mission. NCRC devotes significant resources to aggregating, analyzing, and sharing CRA data, and to providing its members guidance on the CRA. The lack of a unified framework means that some banks in an area will be subject to the

current regulations administered by FDIC and the Federal Reserve, while others will be subject to OCC's Final Rule (unless, as is permitted for certain banks, those banks opt to stick with the current rule). This inconsistency will necessarily multiply the resources NCRC spends to aggregate and compare data across banks, to advise its members on the CRA requirements applicable to banks in members' service areas, and potentially for NCRC and its members to negotiate agreements with banks. Additionally, NCRC will need to work to prevent "charter-shopping" as banks seek to claim that they fall under OCC's relaxed CRA regulations rather than their existing FDIC or Fed regulations.

147. Moreover, NCRC's evidence-based reports are a principal way that NCRC achieves its mission and helps its more than 600 member organizations around the country work to increase bank investments in their communities. Currently, NCRC pulls publicly available data on mortgage lending, which is available from the Consumer Financial Protection Bureau ("CFPB") under the Home Mortgage Disclosure Act; publicly available data on bank branches, which is available from the FDIC; and publicly available data on farm and small business lending, which is available from OCC, FDIC, and the Federal Reserve under the existing CRA regulations. All are available at a census tract level. From the CRA data, a member of the public can determine, for each bank, the number and dollar amount of small business and farm lending for income categories of census tracts. NCRC regularly uses these data sources to prepare reports for members on mortgage lending, business lending, and branch locations in relevant census tracts, comparing data by income and race and visually mapping where a given bank's loans are going. NCRC also prepares reports on broader issues related to community investment and ways to strengthen the CRA, such as a recent report comparing bank mortgage lending in LMI communities against such lending by non-banks.[37] NCRC is one of the few groups offering reports with this data to the public on a national level.

[37] NCRC, "Home Lending to LMI Borrowers and Communities by Banks Compared to Non-Banks," https://ncrc.org/home-lending-to-lmi-borrowers-and-communities-by-banks-compared-to-non-banks/.

148. NCRC's members use these evidence-based reports to understand a given bank's current CRA-qualifying activities in LMI communities, which informs members' discussions with banks about community credit needs and strengthens members' ability to negotiate agreements for banks to commit to increasing their CRA investments or lending or institute new programs or products. NCRC members and the public also use the reports to inform comments on banks' CRA performance. Likewise, NCRC itself uses its reports to inform and strengthen its own negotiations with banks for agreements to increase their CRA-qualifying activities, like small business and mortgage lending, in LMI communities.

149. The Final Rule will impair NCRC's ability to acquire and analyze the data necessary to prepare these reports for its members and the public. In particular, the Final Rule will combine, or aggregate, all small business lending in a county. NCRC will no longer be able to analyze a specific bank's performance at the county level, let alone for income categories of census tracts as is currently possible. With only aggregate data available, NCRC and its members will lack the information about a specific bank necessary for discussions and negotiations to ensure that the bank is investing in its LMI communities. To understand banks' farm and small business lending, NCRC will have to spend additional resources to undertake costly surveys or other means to approximate the data that is currently available.

**I. Harm to CRC**

150. OCC's Final Rule will likewise harm CRC, its member organizations, and the communities they serve throughout California. Specifically, the rule will inhibit CRC's ability to advocate for and obtain greater access to credit for LMI communities; to educate homeowners, tenants, small business owners, lenders, and policymakers about the issues impeding access to credit in LMI communities; to issue evidence-based reports about CRA investments in LMI communities; to work with lenders to encourage investment in low-income communities and communities of color; and to analyze and comment on a bank's CRA performance. It will also place CRC and its members at a significant disadvantage in seeking to encourage financing for LMI communities, forcing them to compete with high-dollar projects that currently do not qualify for CRA credit.

151. Like NCRC, CRC devotes substantial resources to negotiating agreements wherein banks commit to increasing small business, mortgage lending, bank services, and other CRA funds in LMI communities. Through these agreements, CRC obtains commitments to provide loans, investments, and financial services in communities that have historically faced barriers to accessing such resources. For example, in 2017, CRC, along with NCRC and organizations in other states, secured a commitment from CIT Bank to invest $7.75 billion in CRA-qualifying funds in LMI communities between 2020 and 2023. CIT committed to spend $6.5 billion specifically in California, including for single-family mortgage loans in LMI census tracts and in majority-minority census tracts, and small business lending in the same communities. CRC has secured several other multibillion-dollar commitments from banks since 2015.

152. The Final Rule impairs these efforts by making it far harder for CRC to identify the communities most in need and the CRA investments that could be most beneficial. This increases the difficulty of and resources required for each effort CRC undertakes, reducing the number of agreements CRC can pursue; restricts CRC's ability to address specific community needs in agreements; limits CRC's ability to work with local policymakers and community leaders regarding bank performance and activities in their neighborhoods; and prevents CRC from being able to address these issues adequately in meetings with banks with whom they do not have formal agreements.

153. The Final Rule further impairs these efforts by expanding the activities that qualify for CRA credit and making it easier for banks to achieve passing grades. In particular, the Final Rule creates incentives for banks to pursue high-dollar investments with only a tangential benefit for the communities served by CRC, to the detriment of CRA activities like mortgage and small business lending in LMI communities—the activities that most directly address wealth inequality. Additionally, the expansion of qualifying activities in a ratio-based system will likely harm communities by fueling and exacerbating the financing of displacement of vulnerable residents and small businesses, a pressing problem that CRC has expended its limited resources attempting to address and rectify. For the first time, CRC and its members will need to compete with large-scale infrastructure and similar projects in their efforts to encourage and obtain CRA-qualifying

investments. This, combined with the Final Rule making it easier for banks to receive a passing rating, will reduce CRC's ability to obtain funding for LMI communities through these agreements.

154. A central aspect of CRC's mission is holding banks accountable to their CRA obligations in the communities that CRC and its members serve. CRC and its members use CRC's reports and analyses to inform comments on bank merger applications and comments on banks' CRA performance. Further, CRC and its members use CRC's analyses to identify local needs in their specific communities and how banks are addressing those needs, and to submit their own comments on bank CRA performance.

155. The Final Rule will significantly impair CRC's efforts to hold banks accountable for fulfilling their CRA obligations. The Final Rule's anti-transparency measures and failure to continue furnishing small business lending data will limit the usefulness of CRC's and its members' comments. While the "OCC agrees that it is important to consider both positive and negative qualitative aspects of a bank's CRA performance," 85 Fed. Reg. at 34,776, the Final Rule strikes language about the public's ability to comment on bank performance, which is the main way in which OCC would hear about negative aspects of a bank's CRA performance and which directly frustrates CRC's CRA-related activities. Instead, CRC will be limited to comments on local needs, rather than a bank's CRA performance. Further, the Final Rule's use of a presumptive rating based on the total dollar amount of a bank's CRA activities will undermine any consideration of public comments. Rather than being part of the regulator's CRA evaluation, CRC's and its members' comments must go up against the bank's presumptive rating and will be limited to addressing community needs rather than the bank's actual CRA performance. OCC's Final Rule also further reduces CRC's opportunities for input by indicating that CRA exams will occur only once every five years for banks that receive Outstanding ratings.

156. CRC also provides specific services that will be harmed by OCC's Final Rule. Specifically, CRC's immigrant financial security program assists immigrant families with obtaining access to small business loans and banking services, including advocating for banks to expand language access and Individual Tax Identification Number ("ITIN") lending, activities that

are seemingly devalued by the new rule.

157. OCC's Final Rule will impair CRC's programs for immigrants in LMI communities by reducing the CRA exam's focus on the service test. Banks will not specifically receive credit for these services that banks might undertake to aid immigrant communities and, as a result of the performance standard, can fulfill their CRA obligations through other activities that are far attenuated from supporting LMI communities. The Final Rule's focus on high-dollar lending to larger businesses will also reduce banks' incentives to provide small business loans to LMI communities, which will adversely affect CRC's clients and increase their need for CRC's resource-constrained services.

158. The Final Rule will also impair the missions of many of CRC's members, which are nonprofits and public agencies that provide services to LMI communities and communities of color. Members include organizations focused on housing counseling, access to affordable housing, working with small business lenders, increased access to credit, and community development financial institutions. Many, if not all, have relationships to banks. Many of these member organizations receive direct grants from banks to fulfill their organizational missions to serve the economic development, financial, and credit needs of communities, as part of banks' CRA activities, and the Final Rule will reduce the incentives for banks to engage in these sorts of CRA-qualifying activities that aid the members' clients since grants generally are the smallest part of bank CRA activities and will be substantially devalued under the new ratio-based regime in favor of almost any other qualifying activity.

159. For example, affordable housing organizations rely heavily on tax credits, including Low-Income Housing Tax Credits ("LIHTC"). LIHTC credits are counted as part of the investment test. However, the Final Rule essentially eliminates a separate investment test and creates incentives for banks to pursue high-dollar lending, including lending that only partially benefits LMI communities. LIHTC credits are complicated and can be expensive for banks to administer. If banks can achieve CRA credit through larger, high-dollar investments or community development loans, banks will pursue fewer tax credits, harming CRC's members in LMI communities that rely on tax credits for affordable housing. Reduced bank demand for LIHTC

credits will impact pricing in the market and will lead to fewer affordable housing units being built, and such units will likely be less targeted to extremely low-income residents.

160. OCC's unilateral departure from the unified framework for CRA examination will itself impair CRC's mission. For example, CRC regularly publishes analyses of access to small business, mortgage loans, and other CRA investments in low-income communities and communities of color. The lack of a unified framework means that some banks in an area will be subject to the current regulations administered by FDIC and the Federal Reserve, while others will be subject to OCC's Final Rule. This disruptive inconsistency across agencies will make it more difficult for CRC to compare data across banks, to advise its members on the CRA requirements applicable to specific banks, and potentially for CRC and its members to negotiate agreements with banks.

161. In addition, CRC regularly publishes analyses of access to small business, mortgage loans, and other CRA investments in low-income communities and communities of color. CRC and its members use these reports to identify local credit needs, prepare for meetings with local banks, and develop comments to regulators. CRC will develop these analyses in response to questions from CRC members and local policymakers and community leaders, to address broader issues at an area or state level, or to examine a specific bank's activities at a census-tract level. As explained above, the Final Rule will prevent public access to bank-level information about small business and farm lending, which will limit CRC's ability to produce informed analyses and increase the costs of obtaining necessary information.

## V. CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

### COUNT ONE
### VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. §§ 706(2)(A), (C)

162. Plaintiffs re-allege and reincorporate the paragraphs above as fully set forth herein.

163. The APA requires that a reviewing court "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. §§ 706(2)(A), (C)

164. The Final Rule should be declared unlawful and set aside as arbitrary, capricious, and/or contrary to law for the reasons described above, and as summarized in part below:

165. First, the Final Rule severs the previously unified CRA regulatory framework. The three major bank regulators—FDIC, the Federal Reserve, and OCC—have always moved in lockstep with respect to CRA regulatory revisions. FDIC and the Federal Reserve declined to join OCC's radical restructuring of the CRA rules, which means that banks will now be subject to different CRA rules depending on whose jurisdiction they fall under, and community groups such as Plaintiffs will experience challenges adjusting their CRA programs because the regulators are no longer moving in lockstep. Yet, even though a vast array of stakeholders, including Plaintiffs, banks, and the other financial regulatory agencies, raised concerns about the confusion and conflict this could cause, OCC provided no response at all in the Final Rule.

166. Second, the Final Rule's general performance standard framework is contrary to the CRA's "affirmative obligation [on banks] to help meet the credit needs of the local communities in which they are chartered," 12 U.S.C. § 2901(a)(3), (b), and the requirement that OCC assess a bank on its record of meeting the credit needs of its "entire community." 12 U.S.C. § 2903(a)(1). Rather than focus on local needs, OCC establishes for the first time a presumptive ratio-based framework that rewards large investments and allows banks to do far less for LMI communities and still get a passing grade, contrary to the statutory command. This interpretation is confirmed by the history of the passage of the CRA, where Congress considered and rejected a ratio-based framework similar to the general performance standard for these very reasons. Further, the ability of banks to receive passing bank-level grades while neglecting a significant portion of their assessment areas, 20 or 50 percent, means that OCC would fail to evaluate performance based on a bank's record in its entire community. Legislative history again confirms this interpretation. The unprecedented general performance standard is contrary to the text, history, and purpose of the CRA, and to the preceding decades of its implementation by the regulatory agencies. Similarly, the Final Rule unlawfully frees banks from the requirement to designate assessment areas around deposit-taking ATMs, despite Congress's express requirement that OCC evaluate "each

metropolitan area" in which a bank maintains any "facility . . . that accepts deposits." *Id.* §§ 2906(b)(1)(B), 2906(e)(1).

167. Third, in numerous respects discussed above, the Final Rule is almost entirely unsupported by data or analysis, and fails to account for contrary data and analysis provided by commenters, including Plaintiffs, and even by other federal regulatory agencies.

168. Fourth, Otting pushed the Final Rule through the regulatory process—based on his long-held and, by his words, "very strong viewpoints" about weakening the CRA—without meaningfully addressing the near-universal criticism the rule received from stakeholders ranging from community groups to banks to the other financial regulatory agencies. OCC's failure to meaningfully consider and respond to these comments and the alternative approaches they proposed renders the Final Rule arbitrary and capricious.

169. Fifth, the Final Rule sweeps aside the longstanding understanding of the CRA to require banks to focus their efforts on supporting LMI communities, communities of color, and other communities that have historically been subjected to discrimination in the provision of financial services (i.e., redlining). In its public statements, OCC has asserted, without evidence, that the Final Rule will in fact benefit LMI communities. In the Final Rule, OCC alternates between denying without evidence or altogether ignoring comments about the adverse effect it would have on these communities, and asserting, sweepingly and for the first time, that the CRA has no such statutory focus. This unprecedented interpretation is contrary to the text, history, and purpose of the CRA, and to the preceding decades of its implementation by the regulatory agencies. The Final Rule should therefore be set aside because it is contrary to law, and because it is arbitrary and capricious for failing to consider important aspects of the problem, and for its failure to recognize, much less provide good reasons for, its dramatic upending of a decades-long approach to CRA implementation that focuses principally on the needs of LMI communities.[38]

[38] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

170. Sixth and finally, in the midst of the rulemaking process, the COVID-19 pandemic took hold, and the ensuing lockdown and economic crisis completely reshaped the financial landscape for communities across America—effects that were exacerbated in LMI communities and communities of color. Stakeholders, including Plaintiffs, implored the regulatory agencies to suspend the rulemaking process and reevaluate the Proposed Rule in light of the seismic shift that had occurred in the American economic landscape. The FDIC agreed. Without sufficient explanation, OCC refused, and pressed forward with the Final Rule.

**COUNT TWO**
**VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT,**
**5 U.S.C. §§ 706(2)(A), (C)**

171. Plaintiffs re-allege and reincorporate the paragraphs above as fully set forth herein.

172. The APA provides a remedy to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

173. OCC failed to make public a complete rulemaking record of the data, analysis, ex parte communications, and other material that was before the agency as it issued the Proposed Rule and the Final Rule.

174. The Final Rule contained significant new substantive provisions that it did not describe in the Proposed Rule, and that did not represent a logical outgrowth of the comments received in response to the Proposed Rule.

175. OCC failed to extend the comment period on the Proposed Rule beyond April 8, 2020, despite the requests of the public, including Plaintiffs, to do so in order to allow a sufficient period for review in the midst of an unprecedented global pandemic.

176. These failures rendered the public, including Plaintiffs, unable to fully evaluate and comment on the Final Rule prior to its issuance.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray that this Court:

(1) Declare that the Final Rule violates the APA and the CRA;

(2) Issue an order holding unlawful and setting aside the Final Rule;

(4) Award Plaintiffs their attorneys' fees and costs pursuant to 28 U.S.C. § 2412; and

(5) Grant such other and further relief as this Court deems proper.

Dated: June 25, 2020

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