CENTER FOR CAPITAL MARKETS
COMPETITIVENESS

TOM QUAADMAN
EXECUTIVE VICE PRESIDENT

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(202) 463-5540
tquaadman@uschamber.com

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

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

Re: Community Reinvestment Act Regulations

To Whom It May Concern:

The U.S. Chamber of Commerce's ("Chamber") Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to respond to the Proposed Rule issued by the Office of the Comptroller of the Currency ("OCC") and Federal Deposit Insurance Corporation ("FDIC") (collectively, the "Agencies") regarding modernizing the Community Reinvestment Act ("CRA").[1]

Enacted in 1977, the CRA is intended to encourage "institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions."[2] As the enactment of the CRA indicates, access to safe and affordable credit has long been central to achieving the American dream, including by making it possible for low- and moderate-income

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[1] *See* Community Reinvestment Act Regulations, 85 Fed. Reg. 1204 (Jan 9, 2020) (Proposed Rule).
[2] 12 U.S.C. § 2901(b).

("LMI") individuals to ascend the economic ladder. The Chamber strongly supports the important goals of the CRA, which has been a cornerstone of banking and has helped communities across the United States for over 40 years. We agree that the "CRA remains a powerful tool for promoting community revitalization and increasing financial activity in neighborhoods across the country."[3]

As the Agencies have recognized, however, the "current CRA regulatory framework has not kept pace with the transformation of banking."[4] The CRA and its implementing regulations have not been significantly updated for 25 years.[5] In contrast, the banking landscape has changed enormously during that same period. There have been immense technological advancements in that time, for example, meaning that a customer may interact with their bank primarily – if not exclusively – through their phone or computer, not through any local branch. Furthermore, the greater role of non-banks in consumer financial services has changed who provides services to community members.

We consequently appreciate the Agencies' efforts to modernize the regulations implementing the CRA. We welcome the Agencies' work to "strengthen the CRA regulatory framework to better achieve the underlying statutory purpose of encouraging banks to help serve their communities by making the framework more objective, transparent, consistent, and easy to understand."[6] We also appreciate that the Agencies have accurately identified and addressed various issues with the current CRA regulations in the Proposed Rule.

We nonetheless write to urge the Agencies to reconsider significant elements of the Proposed Rule before moving forward with any final rule. As drafted, the Proposed Rule would create substantial unnecessary and unjustified challenges for banks while also imposing detrimental impacts on communities. This is because the Proposed Rule would:

- Make changes to the existing regulatory framework that are unnecessary or not supported by an adequate record;

- Stifle innovation by failing to account for different business models;

[3] *See* Proposed Rule, 85 Fed. Reg. at 1206.
[4] *See id* at 1205.
[5] *See id.* at 1205 n.11.
[6] *See id.* at 1206.

- Create substantial unnecessary regulatory burdens as detailed below in our comments; and

- Create divergent standards across regulators.

Regulation under the CRA is enormously consequential for banks and the communities they serve. Banks are extremely committed to advancing the purposes of the CRA and will have to make significant changes to systems, training, and compliance monitoring to adjust to any new CRA regulations. Consequently, it is essential that the Agencies take the necessary time to get any changes to the CRA regulations right. The Agencies certainly should not rush to make changes that will have unknown or counterproductive consequences in the marketplace. Nor should the Agencies dismiss the legitimate concerns of industry stakeholders—including those who are deeply engaged on CRA compliance and have carefully evaluated the Proposed Rule—merely based on the assumption that the proposed approach will prove successful in the long run. In short, the Agencies should not undertake a wholesale revision to such a significant rule before fully evaluating and mitigating the foreseeable unintentional consequences for consumers and businesses.

We accordingly write to emphasize six points:

- Any final rule should retain the important improvements on existing CRA regulations contemplated by the Proposed Rule.

- The Agencies should rethink and rework the proposed approach to metrics.

- The Agencies should amend the Proposed Rule so that it does not stifle innovation and economic opportunity.

- The Agencies should amend or remove elements of the Proposed Rule that would unnecessarily change existing CRA regulations in counterproductive ways.

- The Agencies should formally confirm the independence of the CRA from other regulatory frameworks.

- The Agencies should work with the Federal Reserve to ensure consistent implementation of the CRA across all responsible regulators.

Analysis

1. Any final rule should retain the important improvements on existing CRA regulations contemplated by the Proposed Rule.

We applaud the Agencies for the important goals that they have sought to advance in this rulemaking. We agree that it is important to make the regulatory framework more objective, transparent, consistent, and easy to understand. We welcome significant elements of the Proposed Rule that would help achieve those goals. In particular, we support the Proposed Rule's:

- Expansion of qualifying activities: The Proposed Rule's expansion of qualifying activities will help ensure that banks have appropriate incentives to engage in a broad range of activities that advance the purposes of the CRA.

- Creation of a preapproved list of qualifying activities: The creation of non-exhaustive, preapproved list of examples of qualifying activities will reduce regulatory uncertainty and provide much-needed clarity.

- Establishment of a five-year evaluation period for banks with an "Outstanding" rating: The establishment of a five-year evaluation period for banks with an outstanding rating will allow banks to fulfill the purposes of the CRA and agencies to prioritize examination resources.

We urge the Agencies to include these principles in any final rule, subject to any refinements recommended by stakeholders to best support banks' work to advance the goals of the CRA.

2. The Agencies should rethink and rework the proposed approach to metrics.

We appreciate the Agencies' goal of "establishing objective ways to evaluate CRA performance."[7] Consistent with the Agencies' statement, we too have repeatedly heard that banks find the evaluation of their CRA-qualifying lending, investments, and services to be "inconsistent, opaque, and complex."[8] For these reasons, we continue to support the development of appropriate quantitative performance measures. However, as we wrote in response to the ANPR, "we urge the banking regulators to exercise caution when developing a standardized approach to ensure there is the

[7] *See id.* at 1206.
[8] *See id.*

necessary flexibility for complex CRA assessments and that unintended consequences are minimized."[9]

The proposed approach to metrics contained in the Proposed Rule does not reflect such caution to avoid unintended consequences. Instead, as proposed, the metrics will impose an enormous – and unjustified – burden on banks without increased consumer benefit. Banks will be required to create monthly totals by loan category, geocode various transactions, determine CRA qualification, and then aggregate by category. Somehow—although it is not yet clear how—these various inputs will ultimately be combined into a single rating. All of this will require banks to undertake enormous investments in the systems necessary to support this analysis, along with corresponding investments in training and compliance monitoring.

The corresponding benefits of the new approach that would be imposed by the Proposed Rule are unclear, at best. We understand that the Agencies believe that the proposed approach will work in practice. However, the Proposed Rule does not present any meaningful evidence that provide confidence that the contemplated approach will be workable or improve upon the status quo. To our knowledge, the Agencies have not worked with individual banks to conduct trials of the proposed approach to metrics. Nor, to our knowledge, have the Agencies worked through multiple iterations of the contemplated approach to address any concerns or otherwise refine the Proposed Rule so that it best supports banks' efforts to advance the goals of the CRA.

The Agencies should not undertake such a wholesale change to measuring CRA activities without clear evidence that the change is justified and will benefit banks' communities. In short, any significant change to metrics under the CRA should be supported by a strong factual basis indicating that it will create meaningful net benefits compared to the status quo. The Agencies have not presented such evidence to date. The Agencies, consequently, should continue to study how best to measure CRA activities. To the extent that the Agencies decide to proceed with revisions to the status quo on this point, they should issue any revised performance metrics for public comment, along with the data supporting the move to the proposed approach.

3. **The Agencies should amend the Proposed Rule so that it does not stifle innovation or limit economic opportunity.**

[9] *See* Letter to Comptroller Otting re. Advanced Notice of Proposed Rulemaking Regarding "Reforming the Community Reinvestment Act Regulatory Framework," Docket ID: OCC-2018-008 (Nov. 19, 2018).

The Agencies intend for the Proposed Rule to enable innovation and support economic opportunity. The Proposed Rule, as currently drafted, includes various flaws that will undermine, rather than advance, those goals. The Agencies should correct these unintended consequences of their proposed approach before proceeding with any final rule.

a. The Agencies should not further perpetuate CRA hotspots by forcing banks with innovative business models to use deposit-based assessment areas.

As the Agencies recognize, Consumer banking behaviors are changing. Customers are frequenting local bank branches less and conducting more of their banking transactions online. Banks' business models are evolving to fulfill these needs. As the Agencies acknowledge, an "increasing number of banks [] operate primarily through the internet or otherwise serve customers located far from the banks' physical locations."[10]

The Agencies express concern that the current approach to "delineating a bank's assessment areas, which is focused on the areas surrounding brick-and-mortar bank locations, ... creates disincentives for banks to meet the needs of their *entire* communities or even their own customers if they are located outside of the banks' assessment areas."[11] The Agencies are concerned that these disincentives will lead to "CRA deserts" (i.e., areas where an insufficient number of banks are engaged in CRA activities) or "CRA hotspots" (i.e., areas where an unduly high number of banks must compete to provide the limited number of CRA activities that the area can support).

To address this concern, the Proposed Rule would employ deposit-based assessment areas that focus on areas that comprise 5% or more of a bank's deposits *if* the bank receives 50% or more of its deposits from outside the facility-based assessment area(s). Thus, the Agencies explain that "if a bank receives 60 percent of its retail domestic deposits from outside of its facility-based assessment area and 5 percent of its deposits come from Cook County, Illinois, which is not in a facility-based assessment area, it must delineate Cook County, Illinois as a deposit-based assessment area."[12]

This approach has a clear flaw, however, as areas of the highest population density will be overly represented in banks' lists of areas that comprise 5% or more of

[10] *See id.* at 1216.
[11] *See id.* at 1215.
[12] *See id.* at 1216.

their deposits. The practical effect will be to force more banks to compete for CRA-eligible transactions in New York, Los Angeles, and other hot spots. This will not benefit consumers—and particularly consumers in current "CRA deserts." Instead, it will further perpetuate CRA hotspots since areas of highest population density will be represented among areas above that 5% threshold. The inclusion of corporate deposits in this calculation will further exacerbate the concentration of CRA activity in population centers.

Forcing more banks to compete for safe and sound CRA eligible transactions in New York, Los Angeles, and other highly populated areas will not benefit consumers. Rather, it will shift banks' focus away from their current assessment areas and from their use of technology and other innovative approaches to serve areas of greater need. The Agencies consequently should not use deposit-based assessment areas. In doing so, the Agencies should develop an approach that appropriately reflects the practical realities of innovative banks' modern digital business models and serve areas with the most need. Moreover, the Agencies should eliminate corporate deposits from the calculations for deposit-based assessment areas. Once a bank has achieved Satisfactory performance within its assessment areas (whether the bank has only one or three hundred assessment areas), that bank has the ability to receive CRA consideration for qualified activities nationally. Further, banks can be incented to invest in the CRA deserts through the use of a multiplier sufficient to recognize the challenges in those underserved markets."

b. The Agencies should continue to encourage innovation in small-business job creation in banks' communities.

Investing in small-business job creation can provide enormous benefits for local communities. Banks appropriately have historically received CRA credit for such activities that advance the statute's purposes. The Agencies intend to continue support of this goal, emphasizing the value of small-business job creation in the Proposed Rule. To achieve this goal, however, the Agencies would retain only a limited list of specific activities as qualifying for CRA credit: "activities that finance (1) SBDCs, SBICs, New Markets Venture Capital companies, qualified Community Development Entities, or RBICs; (2) businesses or farms that meet the size-eligibility standards of the SBDC or SBIC by providing technical assistance and supportive services; or (3) Federal, state, local, or tribal government programs, projects, or initiatives that partially or primarily benefit small businesses, or small farms."[13]

[13] *See id.* at 1213.

The Agencies decline to give CRA credit going forward, however, for "the more general aspect of economic development that involved a bank having to demonstrate that its activities that finance businesses or farms that met the size test support job creation, retention, and improvement for LMI individuals, LMI census tracts, and other areas targeted for redevelopment by Federal, state, local, or tribal governments."[14] The Agencies explain this decision on the basis that they "could not identify an objective method for demonstrating job creation, retention, or improvement for LMI individuals or census tracts or other targeted geographies, other than by determining if the activity would create additional low-wage jobs."[15]

We believe that this decision not to include the more general aspect of economic development was a mistake.

First, "creat[ion] of additional low-wage jobs" is an appropriate goal of CRA activities. Indeed, the Interagency Q&A for CRA has long indicated that supporting "job creation, retention, and/or improvement" for "low- or moderate-income (LMI) persons," is a valuable outcome of CRA activities.[16] In addition, not all LMI jobs are "low-wage." In fact, LMI can be up to 80% of Area Median Income, so in a county with $80,000 AMI,[17] an LMI job could be up to $64,000, which would not typically be characterized as "low-wage." In fact, millions of important jobs fall into that category, including many of our teachers and law enforcement personnel. In addition to jobs for LMI persons, the Interagency Q&A for CRA currently lists four additional types of job creation, retention, and/or improvement that all qualify for CRA credit and that are not limited to "low-wage jobs"[18] (some of which were added in the July 2016 expansion of Section ____.12(g)(3)-(1) of the Interagency Q&A on CRA[19]). Because of the critical importance that small businesses and job creation play in economic development in this country (especially in times of wide-spread economic

[14] *See id.*.
[15] *See id.*
[16] *See* Interagency Q&A on CRA, Section ____.12(g)(3)-(1), 81 Fed. Reg. 48506, 48526 (July 25, 2016) ("2016 Interagency Q&A Revision").
[17] *See generally* U.S. Bureau of Labor Statistics, www.bls.gov.
[18] *See id.* (CRA credit is also currently given for job creation, retention, and/or improvement: (1) in LMI geographies; (2) in areas targeted for redevelopment by Federal, state, local, or tribal governments; (3) by financing intermediaries that lend to, invest in, or provide technical assistance to start-ups or recently formed small businesses or small farms, and (4) through technical assistance, supportive services for small businesses or farms, such as shared space, technology, or administrative assistance.) The category of financing intermediaries that invest in start-ups and recently formed small businesses has been especially effective in bringing additional resources that are critical in the support of early seed stage small businesses.
[19] *See* 2016 Interagency Q&A Revision, 81 Fed. Reg. at 48506.

distress such as the United States is currently experiencing), and based on the important policy considerations emphasized by the Agencies in the 2016 Revision to the Interagency Q&A,[20] all of the activities currently listed in the Interagency Q&A Section ____.12(g)(3)-(1) as "promoting economic development" should be retained or even expanded.

Second, practically speaking, this approach will put regulatory hurdles in the way of economic development. For example, by granting credit to activities that grant CRA credit for investing in SBICs and other programs administered by government agencies – but not to privately-funded programs – the Proposed Rule effectively would allow the Small Business Administration and other agencies to serve as the exclusive gatekeepers for CRA credit. That would not only introduce unnecessary risks of delay into the system, but would also stifle the creation of innovative funds, many of which may not need or want to go through the lengthy and expensive process of SBIC licensure, but which still finance small businesses that create jobs in a similar manner as SBICs.

We appreciate that the Agencies have sought to remove "ambiguous or unclear terms used in the current regulations," but, in this case, the Agencies have proposed an approach that, contrary to their stated goals, will "reduce the activities that qualify for CRA credit."[21] The Agencies should not create artificial barriers that, practically speaking, will stop banks from investing in job creation activities in their communities. The Agencies instead should continue to grant CRA credit and incentivize banks to undertake community development financing that is innovative and responsive to community needs – including through job creation.

4. **The Agencies should amend or remove elements of the Proposed Rule that would unnecessarily change existing CRA regulations in counterproductive ways.**

The Agencies proposed to make a series of unnecessary and counterproductive changes to the existing CRA regulations. The Agencies should not incorporate these provisions into any final rule. Rather, they should work to ensure that they do not attempt to fix what is not broken.

[20] *Id*. at 48507 – 48509. There, the three federal banking regulators discuss the strong policy reasons supporting their decision to *expand* the list of activities that promote economic development through job creation, retention, and/or improvement, so it is not clear why the Agencies would reverse course three years later.
[21] *Id*. at 48526.

a. The Agencies should not discourage sales into the secondary market that benefit consumers.

Access to consumer credit is critical for American families. Whether offering mortgages, student loans, or credit cards, banks make it easier for Americans to realize their dreams. But the story does not end there for most loans, as the secondary market sees loans securitized, thereby enabling lenders to extend further credit rather than having their capital tied up in the earlier loan. The secondary market thus itself plays an important role in expanding access to credit and supporting the purposes of the CRA.

The Proposed Rule would discourage the sale of loans into the secondary market, however, by giving only 25% CRA credit to lenders who sell a loan within 90 days.[22] The Agencies appear to believe that taking this approach will encourage banks to make longer-term commitments to communities. Our conversations with banks, however, make clear that selling loans into the secondary market in no way reflects a shorter-term commitment to a community. Quite the opposite, selling loans into the secondary market allows a bank to further demonstrate their commitment to a community by extending additional loans in that community. The Agencies should not discourage such valuable further extensions of credit out of an abstract sense that lenders should hold loans on their balance sheets for some undefined period of time. Rather, the Agencies should preserve the existing regulations' treatment of loan sales – at least until they develop a clear and well-supported basis for such a significant change.

b. The Agencies should not mandate a new, counterproductive approach to evaluating consumer lending.

The Proposed Rule would depart from the existing regulatory approach— which provides for evaluation of consumer lending when it is a "substantial majority" of the bank's business or upon the bank's election – and require evaluation of consumer lending under the retail lending distribution test. This is a dramatic and unnecessary change to the CRA regulations that is poised to have significant counterproductive effects. As proposed, it appears certain to put pressure on banks to extend a greater number of consumer loans to LMI individuals, thus pushing them further into subprime lending. This in turn is likely to frustrate the very purpose of the CRA by pressing banks to engage in lending that could jeopardize their safety and soundness. As with other elements of the Proposed Rule, the new approach to

[22] Practically speaking, the credit will be much less than even this 25% level over the course of an examination period.

consumer lending also would suffer from numerous practical flaws that we anticipate will be thoroughly discussed in comments by other industry stakeholders. In short, the new proposed approach to consumer lending not only will risk violating the purposes of the CRA but will be very difficult to administer. The Agencies consequently should not pursue this new approach to consumer lending. But should maintain the current framework of evaluation of consumer lending only at the choice of the bank.

c. The Agencies should preserve the current regulations' approach to strategic plans as well as wholesale and limited purpose banks.

The CRA regulations long have recognized that banks come in all shapes and sizes. For example, certain banks with untraditional business models do not fit readily into the traditional model contemplated by the CRA. The CRA regulations allow these banks to develop strategic plans that are subject to public comment from the community and agreement of the regulators. These plans allow the banks to achieve the goals of the CRA in a manner that best serves the unique needs of the communities where they are chartered and that makes sense within the context of their businesses.

The Proposed Rule would change how the Agencies approach strategic plans, however, and make it harder for banks to rely upon these sound—and publicly vetted—options for ensuring that banks advance the purposes of the CRA. The purpose of the strategic plan option is to provide flexibility for banks whose balance sheets generally do not have the typical composition seen at a traditional bank. The Proposed Rule, however, does not give banks that would rely upon strategic plans sufficient flexibility in reference to its fixed thresholds (which appear to have been developed in reference to the composition of a typical traditional bank's balance sheet). As a result, the practical utility of strategic plans will be significantly—if not fatally—reduced. But the Proposed Rule does not provide an adequate basis for making this disruptive change. As in other areas, the Agencies should not make such a consequential change to the CRA regulations' approach to strategic plans unless they can articulate how the benefits of this change will outweigh its clear downsides for banks that currently perform under transparent strategic plans.

Likewise, the Agencies should retain the current designations for Wholesale and Limited Purpose banks. The Agencies have not provided an adequate basis for eliminating these designations that provide appropriate flexibility for banks with nontraditional business models. In fact, the Proposed Rule makes this change without any particular note or discussion, making it impossible to provide meaningful

comment on the purported basis for this change. We cannot think of any sound justification for this significant and counterproductive change to the CRA Regulations, which will subject Wholesale and Limited Purpose banks to ill-fitting evaluations. The Agencies should not change the current regulations' approach to Wholesale and Limited Purpose banks based on the record and explanation provided to date.

d. The Agencies should not require large scale data collection as part of any final rule.

The Agencies have proposed that banks undertake massive data collections so that they can submit highly detailed reports to the Agencies. This information is largely unnecessary with respect to mortgages, however, given the availability of other data reported under the Home Mortgage Disclosure Act. Other product categories, such as credit cards, will require vast new data collections that will be expensive to gather and may create new data security risks. Moreover, all of the data collected will become stale over time because of the challenges effectively documenting income levels for consumers—and particularly for credit cards. For example, information gathered from a college student applying for their first credit card will have little or no value once that individual has gone on to become a practicing doctor. As a result, through no fault of the bank, CRA credit may be awarded (or withheld) based on faulty information under the Proposed Rule's approach.

The Agencies, in short, have not established that the significant burdens and risks imposed by the contemplated data collection and associated reporting are outweighed by the incremental benefits. The Agencies consequently should not require large scale data collections as part of any final rule—or at least should not do so without a detailed cost-benefit justification based on a thorough evaluation of the practical value of the data that will be collected.

5. The Agencies should formally confirm the independence of the CRA from other regulatory frameworks.

Banks have long been concerned that resolution of unrelated regulatory enforcement actions have unduly led to lowered CRA ratings. A bank should not have its CRA rating reduced because it engages in conduct that violates an independent regulatory scheme in a manner that does not impair its service to its community. Congress created these different regulatory schemes to serve different purposes and granted enforcement authority to other regulatory agencies, including the Consumer Financial Protection Bureau. The Agencies should not create undue links between different regulatory regimes that further complicate compliance or delay examination

processes. The Agencies instead should work to ensure that banks are evaluated under the CRA based on the extent to which they have advanced the purposes of the CRA. This generally will mean evaluating a bank without considering compliance under other statutes. However, if the violation of the separate statute also reflects a failure to advance the purposes of the CRA, then such conduct could inform a CRA rating – but only because of its frustration of the purposes of the CRA, not any other statute.

We appreciate that the OCC has issued a policy statement that makes clear that CRA ratings should be calculated by reference to the purposes of the CRA.[23] Like the OCC, we of course support the important goal of ensuring compliance with all laws, but banks should not be doubly penalized for conduct that is not directly related to CRA activities or that the bank has fully remediated. We accordingly would urge the Agencies to formally adopt the OCC's policy in any final rule implementing the CRA.

6. **The Agencies should work with the Federal Reserve to ensure consistent implementation of the CRA across all responsible regulators.**

We appreciate the OCC and the FDIC's commitment to CRA reform. It is important, however, that a single, consistent regulatory framework govern CRA activities. Banks should not be subject to different rules if they happen to be regulated by different agencies. After "providing feedback and input" into the advanced notice of proposed rulemaking issued in August 2018 and having received the comments submitted in response,[24] the Federal Reserve has not joined the Agencies in issuing the Proposed Rule.[25] Indeed, statements by individual members of its Board of Governors have made clear that significant differences of opinion persist between the Federal Reserve and the Agencies on how best to implement the CRA in today's banking system.

Experts from different agencies of course will not always immediately agree on the best path forward on changes to shared regulatory frameworks. When this happens, the best approach is for those regulators to come together and develop a consensus solution. Individual regulators should not rush ahead with revised regulatory frameworks without such consensus—or at least without making every reasonable effort to achieve such consensus. Otherwise, the regulatory framework will become inherently unstable, as, over time, different administrations will be sure to

[23] *See* OCC, Impact of Evidence of Discriminatory or Other Illegal Credit Practices on Community Reinvestment Act Ratings, PPM 5000-43 (Aug. 15, 2018), *available at* https://www.occ.gov/news-issuances/bulletins/2018/ppm-5000-43.pdf.
[24] *See* Proposed Rule, 85 Fed. Reg. at 1206.
[25] *See* 12 U.S.C. § 2901(b).

press the responsible agencies to collectively adopt one of the two governing frameworks (or perhaps even a third framework it prefers). In the meantime, the presence of different frameworks will distort the marketplace as banks that undertake the same CRA activities will have different CRA ratings – which, of course, are publicly disclosed – depending on which regulatory framework applies to those activities.

We consequently urge the Agencies to work with the Federal Reserve to reach a consensus before issuing any final rule amending the CRA's regulations.

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We thank you for the consideration of these comments and would be happy to discuss these issues further.

Sincerely,

Tom Quaadman