NFHA

February 16, 2021

Ann E. Misback
Secretary, Board of Governors of the Federal Reserve System,
20th Street and Constitution Avenue NW,
Washington, DC 20551

Submitted via email to regs.comments@federalreserve.gov

RE: Docket No. R-1723; RIN 7100-AF94; Modernizing the Regulatory and Supervisory Framework for Reg. BB, the Community Reinvestment Act

Dear Ms. Misback:

The following comments on the Board's Advance Notice of Proposed Rulemaking on Regulation BB are submitted on behalf of the National Fair Housing Alliance. Founded in 1988 and headquartered in Washington, D.C., the National Fair Housing Alliance (NFHA) is the only national organization dedicated solely to ending discrimination in housing. NFHA is the voice of fair housing and works to eliminate housing discrimination and to ensure equal housing opportunity for all people through leadership, education and outreach, membership services, public policy initiatives, community development initiatives, advocacy, and enforcement. NFHA is a consortium of more than 220 private, nonprofit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. NFHA recognizes the importance of home as a component of the American Dream and aids in the creation of diverse, barrier-free communities throughout the nation.

As the Board considers ways to modernize the regulatory and supervisory framework for the Community Reinvestment Act (CRA), we appreciate the opportunity to provide input about changes that would enhance access to mortgages and other types of credit, as well as banking services, in communities of color. These are the very communities most affected by the redlining practices that the Act was intended to address, yet CRA has not brought the benefits to these communities that Congress envisioned. Given the Act's original mandate and the challenges currently facing our nation, it is more important than ever to revise our approach to CRA implementation and enforcement to ensure that CRA is an effective tool for increasing access to safe, affordable, sustainable lending, services and investments in communities of color. We applaud the Board for seeking input on ways to accomplish this goal, and in particular, for not following the lead of the Office of the Comptroller of the Currency in this matter, as the OCC's approach is likely to further constrict access to credit, services and investments in communities of color.

NFHA's comments do not attempt to answer all of the questions posed in the Board's Advance Notice of Proposed Rulemaking on Reg. BB. Rather, we focus on a select number of questions and issues that are most directly related to the lending, service and investment needs of people and communities of color.

Question 2. In considering how the CRA's history and purpose relate to the nation's current challenges, what modifications and approaches would strengthen CRA regulatory implementation in addressing ongoing systemic inequity in credit access for minority individuals and communities?

The Board rightly notes that one of the most pressing challenges currently facing our nation is long-standing and on-going systemic inequity in access to credit for people and communities of color. While the CRA can and should be a useful tool for addressing these inequities, to date it has not served this purpose in a meaningful way. As the Board considers modifications to CRA to increase its effectiveness in ensuring equitable access to credit and other banking services for all communities, it should adopt an explicit requirement that banks must identify and help meet the needs of communities of color in order to fulfill their ongoing and affirmative obligations under the Act. This must include all communities of color, including but not limited to those that happen to be low- and moderate-income, as experience shows that people in higher income communities of color also face significant barriers to credit access.

These inequities impose significant costs and burdens on our nation and our economy, as Raphael Bostic, President and CEO of the Federal Reserve Bank of Atlanta noted in a recent blog. Reflecting on the protests then taking place throughout the country, he wrote,

> "These events are yet another reminder that many of our fellow citizens endure the burden of unjust, exploitative, and abusive treatment by institutions in this country. Over the course of American history, the examples of such institutionalized racism are many, and include slavery, federal law (consider the Three-Fifths Compromise our founding fathers established to determine federal representation), sanctioned intimidation during Reconstruction, Jim Crow laws in southern states, redlining by bankers and brokers, segregation, voter suppression, and racial profiling in policing.
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> These institutions hurt not only the African Americans they've targeted, but the systemic racism they've codified also hurt, and continues to hurt, America and its economy. By limiting economic and educational opportunities for a large number of Americans, institutionalized racism constrains this country's economic potential. The economic contributions of these Americans, in the form of work product and

> innovation, will be less than they otherwise could have been. Systemic racism is a yoke that drags on the American economy.
>
> This country has both a moral and economic imperative to end these unjust and destructive practices."[1]

We couldn't agree more and revising the CRA regulations to better incorporate consideration of the extent to which banks are serving the needs of communities of color is one way the Board can advance this goal.

As the Board also notes, the CRA was one in a remarkable series of laws passed by Congress between 1964 and 1977 that were aimed at ending racial and other forms of discrimination, expanding access to opportunity for everyone in this country and redressing the harms caused by the discriminatory policies and practices of both the government and the private sector. The first of this series of laws was the Civil Rights Act of 1964, a broad statute that prohibits discrimination in employment, public accommodations and federally funded programs, among other areas, but does not have provisions specific to housing or lending. It was followed by a series of statutes that do apply to these markets. The first of these was the Fair Housing Act, which bans discrimination based on race, national origin and other characteristics in all types of housing transactions, including mortgage lending. The Fair Housing Act also imposes an obligation on all federal agencies – including agencies with regulatory authority over financial institutions - to administer their programs and activities in a manner "affirmatively to further" fair housing. This provision was intended to eliminate discrimination in federal programs and activities related to housing, and also to spur efforts to dismantle residential segregation and overcome its deleterious effects. In 1974, Congress passed the Equal Credit Opportunity Act (ECOA), which bans discrimination based on race and other characteristics in all credit transactions, including but not limited to credit for housing and small businesses. In 1975, Congress enacted the Home Mortgage Disclosure Act (HMDA), requiring lenders to make public information about their mortgage lending activities. Finally, in 1977, Congress passed the Community Reinvestment Act (CRA). The CRA reiterates the "continuing and affirmative obligation" of lenders who receive federal deposit insurance to serve the credit needs of their communities, including – but not limited to – low- and moderate-income areas. It also directs the federal banking regulatory agencies to assess banks' performance in meeting those needs and mandates that those agencies take that performance into consideration when deciding whether or not to grant banks' applications for expansion.

Although the text of the CRA does not call out the credit and deposit services needs of classes protected under these other statutes, the Board is correct in characterizing the Act as a civil

[1] Bostic, Raphael, "A Moral and Economic Imperative to End Racism," Federal Reserve Bank of Atlanta, June 12. 2020. Available at https://www.frbatlanta.org/about/feature/2020/06/12/bostic-a-moral-and-economic-imperative-to-end-racism.

rights law, intended to eliminate the barriers to credit not only in low- and moderate-income communities, but also in communities of color and other underserved areas that had been erected by redlining and disinvestment. This is evident in the quote from the original sponsor of the Act, Senator William Proxmire, cited in this ANPR, "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."[2]

CRA was intended as an antidote to redlining, a practice that was largely based on the racial and ethnic composition of the population in the affected neighborhoods. Despite the fact that the legislative history is clear about the intended scope of the Act, its implementation by the Board and other federal financial regulatory agencies has focused almost exclusively on the needs of low- and moderate-income people and communities. As a result, while the CRA has been an important mechanism for increasing the flow of credit into low- and moderate-income communities, it has failed to facilitate the same access to credit and other banking services in other underserved communities. Key among these is communities of color.

To correct this deficiency and fulfill Congress' intention of ending and remediating redlining and the segregation and other inequities it engendered, the Board must incorporate consideration of banks' performance in serving the credit and other banking needs of people and communities of color – including people with limited English proficiency - throughout the entire regulatory and supervisory framework for CRA. This includes where banks locate their branches, how they delineate their communities, the extent to which both their suite of retail products and their community development investments serve these market segments, their actual lending performance, their record of loan servicing and the results of their fair lending examinations. We discuss these issues in more detail below.

Eliminating Banking Deserts

Question 25. How should banking deserts be defined, and should the definition be different in urban and rural areas?

Regulators Should use Both the Per Capita and Spatial Approaches for Defining Banking Deserts

A banking desert is a geographical area without the presence of banks or depository institutions. There are several possible approaches for defining what constitutes a banking desert – the per capita approach and the spatial approach (discussed in more detail below).

[2] 123 Cong. Rec. 17630 (June 6, 1977), cited in 85 FR 66410.

Researchers, reporters, fair housing advocates, and other stakeholders appear to use either of these to determine how and whether consumers have adequate access to banks and the products and services they provide. We encourage regulators to use both approaches in order to best assess consumers' ability to adequately access financial services and products.

It is critically important that consumers are able to access banking services in the communities where they live. Studies have shown that people who live in bank deserts have worse financial literacy[3], are less trusting of bankers[4], develop worse credit histories, have fewer banking relationships, are more likely to use high-cost credit options[5], be credit invisible or have lower credit scores.[6] Consumers with restricted access to bank branches have less access to quality, sustainable and affordable credit that can help build wealth and are more susceptible to abusive loan products that strip wealth from families.[7]

Communities of color and low-income areas are most likely to be banking deserts and have disproportionately limited access to banking services. For communities of color, lack of access to credit is not a new phenomenon. These communities have suffered from centuries-long discriminatory practices including redlining, disinvestment, and product steering.[8] It is one reason communities of color have been disproportionately serviced by high-cost, subprime, and predatory lenders. These riskier lenders moved in to provide financial services and products to communities of color that had been abandoned by the financial mainstream. In fact, prior to the 2008 financial crisis, almost half of Black and Latino consumers obtained mortgage loans from subprime lenders. Consumers were steered into subprime loans even when they qualified for prime credit.[9] And of course, steering was facilitated by the dearth of bank branches located in underserved areas.

The National Fair Housing Alliance partnered with Zillow and Trulia to delve deeper into whether communities of color have access to mainstream financial services. This research is disturbing in that it revealed the inextricable link to place and access to opportunity. Not only are people segregated by race, but opportunities and amenities are segregated by the racial composition of a neighborhood. Over 50 years after passage of the Fair Housing Act and 43

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[3] Cookson, Tony, "Growing up in a banking desert can hurt your credit for the rest of your life," The Chicago Reporter, February 20, 2020, available at https://www.chicagoreporter.com/growing-up-in-a-banking-desert-can-hurt-your-credit-for-the-rest-of-your-life/#:~:text=A%20banking%20desert%20is%20an,areas%20that%20are%20less%20profitable.

[4] Ibid

[5] Friedline, Terri, and Mathieu Despard, "Life in a Banking Desert," The Atlantic, March 13, 2016. Available at https://www.theatlantic.com/business/archive/2016/03/banking-desert-ny-fed/473436/

[6] Squires, Gregory. 2018. The Fight for Fair Housing: Causes, Consequences, and Future Implications of the 1968 Federal Fair Housing Act. New York, NY. Routledge. See Chapter 6 titled "The Fair Housing Act: A Tool for Expanding Access to Quality Credit."

[7] See Access to Credit webpage by the National Fair Housing Alliance. Available at https://nationalfairhousing.org/access-to-credit/

[8] Squires.

[9] Brooks, Rick, and Ruth Simon, "Subprime Debacle Traps Even Very Credit-Worthy," The Wall Street Journal, December 3, 2007. Available at https://www.wsj.com/articles/SB119662974358911035

years after passage of the Community Reinvestment Act, communities of color still lack access to wealth-building opportunities and are saddled with a financial services infrastructure that limits their options and chances in life. The Inequality Lingers research revealed that, on a per capita basis, communities of color have significantly fewer traditional financial services like banks and credit unions. On the other hand, they unfortunately have an over-concentration of non-traditional financial services providers like payday lenders, title lenders, and check cashers. In the cities researched, majority non-White census tracts have 35.1% fewer mainstream financial services providers and twice as many non-traditional financial services entities.[10]

Indicators point to a worsening of this problem. Researchers at S&P Global found current patterns of bank branch closures are having greater impacts on predominately Black communities. And measures like wealth and income do not explain the disparities. In fact, banks are closing branches in wealthy Black communities at higher rates than they are closing branches in low-income non-Black communities.[11]

Some have argued that online banking provides ample access to banking services for those living in credit deserts but this has not been born out. Banking deserts, which are largely urban and rural areas and Native American reservations are also impacted by the digital divide with less access to Internet services and broadband. Many underserved consumers may be left to trying to access financial services on their mobile devises, which can be quite tricky for completing applications, submitting forms and documentation, and procuring customized services. Online chat functions which are often populated with automated responses cannot take the place of the direct assistance that can be provided person-to-person in a bank branch.

A) Per Capita Approach – In this approach, geographical areas, such as census tracts or block groups, are placed into certain classifications based on racial composition and/or income. For example, census tracts with greater than 50% non-White populations might be designated as a "non-White census tract" while tracts with greater than 50% non-Hispanic White populations might be designated as a "White census tract". Then the number of financial services facilities in all of the census tracts designated as "non-White" would be calculated. The same would be done for "White" tracts. The number of facilities would then be calculated per unit of population, for example, for every 10,000 people. That calculation provides a way to comparatively measure the number of bank branches in certain geographical areas on a per capita basis. Whether a geographical area is designated as a banking desert could then be based on how the areas compare to one another. For example, geographical areas could be broken down into quintiles and areas falling in lower quintiles could be designated as banking deserts.

[10] Young, Cheryl, and Felipe Chacon, "50 Years After the Fair Housing Act - Inequality Lingers," Trulia, April 19, 2018. Available at https://www.trulia.com/research/50-years-fair-housing/

[11] Fox, Zach, Zain Tariq, Liz Thomas, and Ciaralou Palicpic, "Bank Branch Closures Take Greatest Toll on Majority-Black Areas," S&P Global, July 25, 2019. Available at https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/bank-branch-closures-take-greatest-toll-on-majority-black-areas-52872925

    a. While it did not identify areas with few banks as "banking deserts" the per unit of population method was used by Magnify Money in their research on bank branch penetration. They found that majority-White counties had far more bank branches for every 100,000 people than majority-non-White counties.[12]

B) Spatial Approach – In this approach consideration is given to how far a consumer must travel in order to access credit from a bank or how far a bank branch is located from a particular geographical point, like a census block group or tract. Using a spatial approach to identifying banking deserts is important because many underserved communities, including rural areas, lack affordable public transportation options making it profoundly difficult for consumers to visit a bank branch. Moreover, underserved groups, like people of color, people with disabilities, and seniors are less likely to own their own cars making transportation a barrier to access. Below are examples of various defining characteristics researchers, community groups, and other entities have used in designating what constitutes a banking desert.

    a. The Federal Reserve Bank of New York, in a study published in 2016, defined a banking desert as a census tract in which there were no bank branches in a 10-mile radius from the center of the census tract.[13]

Question 27. Should a bank receive consideration for delivering services to LMI consumers from branches located in middle- and upper-income census tracts? What types of data could banks provide to demonstrate that branches located in middle- and upper-income tracts primarily serve LMI individuals or areas?

Banks should receive consideration for delivering services to LMI consumers, as well as other underserved groups, including consumers of color, from any branch that provides service to consumers. That includes branches located in middle- and upper-income census tracts. However, this consideration should be tempered by other measures that provide a full and robust picture of how well banks are fulfilling the whole credit needs of their entire delineated service areas. Banks should not be allowed to exclude low-income areas or communities of color from their delineated service areas. The Community Reinvestment Act requires banks to service their entire assessment areas – not just portions of the assessment areas. This means regulators must take into consideration how well banks are meeting the needs of all market segments including low-income consumers, female-head-of-households, persons with disabilities, consumers of color – in other words, all segments of the market. No segment should be excluded.

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[12] Clements Nick, "Research on Bank Branch Penetration," Magnify Money, February 17, 2016. Available at https://www.magnifymoney.com/blog/market-data/research-bank-branch-penetration/

[13] Morgan, Don, Maxim Pinkovskiy, and Bryan Yang, "Banking Deserts, Branch Closings and Soft Information," Liberty Street Economics, Federal Reserve Bank of New York, July, 2016.

Additionally, regulators must look at a bank's entire branching system in order to understand how much consideration or weight should be given in cases where branches in affluent areas deliver services to LMI and other underserved consumers.

If a bank only has one branch, and that branch is located in a middle- or upper-income census tract, the Community Reinvestment Act fully anticipates and expects that the lender will serve low-income and other underserved areas. Regulators should not create any incentive that would result in a bank not including a low-income area or community of color in its service area. Any indication that a bank will not receive consideration for providing services to certain areas or to certain consumers could produce this result.

However, banks must not receive clear signals from regulators that they can establish branches in a way that would exclude low-income areas or communities of color. The Community Reinvestment Act was passed to combat redlining of low-income neighborhoods and communities of color; the law's purpose is that these areas would be fully and equitably served, not avoided. Regulators must do all they can to urge banks to establish branches in underserved areas.

Too many neighborhoods are banking deserts without sufficient access to banking services and this results in dire consequences for consumers. (See our response to question #25.) Regulators must act to remove gaps in financial services coverage, particularly for low-income consumers and consumers of color.

Banks can provide critical data to help inform regulators about whether the financial institution is meeting the credit needs of the consumers in its market. Those include but are not limited to:

- LARs data indicating the characteristics of customers seeking mortgage services from the bank
- Demographic information about customers who have accounts with the bank including information about the types of accounts customers have and costs associated with those accounts/services
- Banks's policies regarding requirements for establishing accounts and accessing services, including check-cashing services
- Information about the criteria the bank uses to establish a branch and whether the criteria has been followed
- Information about the bank's branching and service locations
- Information about whether full-service facilities are concentrated in higher-income areas
- Information about whether full-served facilities are concentrated in predominately White communities
- Information about whether scaled-down service facilities (such as ATMs) are disproportionately located in low-income areas

- Information about whether scaled-down service facilities (such as ATMs) are disproportionately located in communities of color

Assessment Areas

Question 3. Given the CRA's purpose and its nexus with fair lending laws, what changes to Regulation BB would reaffirm the practice of ensuring that assessment areas do not reflect illegal discrimination and do not arbitrarily exclude LMI census tracts?

Any effort to modernize of the CRA regulations should contemplate additional requirements for the publication of banks' Assessment Areas (AA) and provide additional guidance to bank examiners to include in their evaluation of AA coverage the demographic characteristics of contiguous area excluded from AAs.

Under the most recent CRA data collection and reporting guidance published the Federal Financial Examinations Council in 2013, covered banks are to include in their public files "[a] map of each assessment area showing the boundaries of the area and identifying the geographies contained within the area, either on the map or in a separate list." [14] This, as well as other information, is available for inspection by the public upon request. However, because an AA can be (and has been) a fundamental indicator of illegal redlining, covered banks should be required to publish current and past AA maps online on or linked to their websites with plain language in an accessible font size and style. Additionally, color images of AA maps—not just a description of the AA area or list of Census tract coverage—should be included in each bank's CRA Public Evaluation, which are also available online. Additionally, covered banks should be required to attach to their AA maps lists of branches open or closed (such lists are already required to be maintained in the public file) and include the most recent census tract racial demographic statics for each address. These two changes will greatly enhance the public's ability to access and visualize the assessment areas and provide useful feedback to both the bank and the regulators about any issues those may give rise to. The current protocol for obtaining this information, in world that is increasing moving online, is outdated, and may be discouraging—even unknown—to all but those with subject matter knowledge of the CRA or some other specialized knowledge.

Additionally, the CRA should be modernized to provide additional guidance to banks and bank examiners to evaluate AAs in the context of the racial and other demographic information of geographies contiguous to but excluded from AAs, even when AAs appear to be delineated in accordance with CRA requirements. For example, a covered bank in the tri-county area of southwest Tennessee that includes Fayette and Tipton Counties in its AA but excludes Shelby County may appear to delineate an AA lawfully unless the racial demographics of the included counties *and* the excluded county are compared/contrasted. In this example, not including Shelby County excludes most of the Black residents in the tri-county area from the AA.

[14] https://www.ffiec.gov/cra/pdf/2013_CRA_Guide.pdf, p. 39

Moreover, this evaluation should be reported in the fair lending portion of the Public Evaluation to inform the public.

Improving Mortgage Lending to People and Communities of Color through Special Purpose Credit Programs

CRA was designed as an antidote to redlining, and increasing access to affordable, sustainable mortgage credit is key to reducing the deep and long-standing racial homeownership gap in this country and the racial wealth gap that it fuels. Today, the gap between the White homeownership rate, which stands at 71 percent, and the Black homeownership rate of 42%, is as great as it was in 1968 when the Fair Housing Act was passed. Worse, that gap is growing. The gap for Latinx households is also substantial (XX percent). Because homeownership is the primary means by which households build wealth in this country, it is difficult to see how we can reduce the wealth gap without closing the homeownership gap.

As an anti-redlining law, one of the outcomes of CRA should be to expand access to mortgages for people and communities of color. As the enormous and persistent racial homeownership gap demonstrates, it has not achieved this outcome. And too often, when families of color pay a higher price for their mortgages, as has been demonstrated by many researchers. The most recent research on this topic was released just today by Raheem Hanifa, at the Harvard Joint Center for Housing Studies. Mr. Hanifa's research found that, "Black homeowners not only have primary mortgages with higher interest rates than white homeowners with similar incomes, they also have higher interest rates than white homeowners with substantially lower incomes, according to my new analysis of data from the 2019 American Housing Survey (AHS). While refinancing can lead to lower interest rates and cost savings, even when Black homeowners refinance their mortgages, interest rate disparities exist. These inequities are, in part, due to both historic and recent instances of discrimination in mortgage markets and could be costing black homeowners significant amounts of money."[15]

Changes to the CRA regulatory and supervisory framework could help address this problem and increase the flow of safe, affordable, sustainable mortgage credit into communities of color. One way for banks to accomplish this goal is to take advantage of an underutilized provision of the Equal Credit Opportunity Act and set up Special Purpose Credit Programs.

The ECOA and its implementing regulation, Regulation B, allow both non-profit and for-profit organizations to utilize SPCPs to meet borrowers' unique credit needs. Specifically, if a for-profit entity has determined that a SPCP would "benefit a class of people who would otherwise

[15] Hanifa, Raheem, "High Income Black Homeowners Receive Higher Interest Rates than Low Income White Homeowners," Harvard Joint Center for Housing Research, February 16, 2021. Available at https://www.jchs.harvard.edu/blog/high-income-black-homeowners-receive-higher-interest-rates-low-income-white-homeowners.

be denied credit or would receive it on less favorable terms," the organization can create a program that meets certain qualifications, including:

1. The program is established and administered pursuant to a written plan that identifies the class of persons that the program is designed to benefit and sets forth the procedures and standards for extending credit pursuant to the program; and
2. The program is established and administered to extend credit to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit.

Further, eligibility criteria for the program may require applicants to share certain characteristics, including race, national origin or other characteristics that lenders are normally prohibited from considering. The program elements make SPCPs particularly promising vehicles for developing targeted programs to close the racial homeownership gap.

The CFPB has published several resources on SPCPs, including a recent Advisory Opinion that provides guidance on how banks can develop these programs within the boundaries of the ECOA.[16] NFHA has also written about the need for these programs and the promise they hold[17], as well as how they comply with both the Equal Credit Opportunity Act and the Fair Housing Act.[18]

Despite their potential for addressing one of our country's most pressing credit needs, SPCPs are severely underutilized. Using the CRA, the Federal Reserve and its sister agencies can help change this. The Board and the other prudential regulators should work with the CFPB and HUD to help educate lenders about what these programs are, how they work, and how they can fit into a bank's CRA strategy. As part of the CRA examination process, examiners should ask whether banks have considered using or are taking advantage of the SPCP provisions of Reg. B to help meet local credit needs. Examiners should also look at any SPCPs that banks have established, and determined how well they are working to meet those needs. Banks with well-structured and well-resourced programs that are producing positive results should receive credit for these outcomes on their CRA evaluations.

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[16] See CFPB Advisory Opinion on Special Purpose Credit Programs, issued December 21, 2020. Available at https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_special-purpose-credit-program_2020-12.pdf.

[17] Rice, Lisa, "Using Special Purpose Credit Programs to Expand Equality," National Fair Housing Alliance, November 4, 2020. Available at https://nationalfairhousing.org/using-spcps-blog/.

[18] Hayes, Stephen, "Special Purpose Credit Programs: How a Powerful Tool for Addressing Lending Disparities Fits Within the Antidiscrimination Law Ecosystem." National Fair Housing Alliance and Relman Colfax, PLLC. November, 2020. Available at https://nationalfairhousing.org/wp-content/uploads/2020/11/NFHA_Relman_SPCP_Article.pdf.

Serving the Needs of Consumers with Limited English Proficiency (LEP).

Another underserved community that has been overlooked under the CRA is people with limited English proficiency. The US Census Bureau defines an LEP individual as anyone over the age of 5 who speaks English less than very well. The U.S. Department of Justice and the Department of Housing and Urban Development define an LEP individual as someone with limited ability to read, write or understand English. According to a 2016 analysis by the US Department of Housing and Urban Development, "[o]ver twenty-five million persons in the United States, approximately nine percent of the United States population, are LEP. Among LEP persons in the United States, approximately 16,350,000 speak Spanish (65%), 1,660,000 speak Chinese (7%), 850,000 speak Vietnamese (3%), 620,000 speak Korean (2%), 530,000 speak Tagalog (2%), 410,000 speak Russian (2%), and fewer speak dozens of other languages.[19]"

For consumers who are not proficient in English, entering into a financial transaction such as a mortgage can be a risky proposition. These transactions are inherently complex and involve technical terms that are not commonly understood in any language, let alone a language in which one has only limited proficiency. It is not uncommon that marketing for mortgages and other financial products is conducted in-language, but it is less common for the actual transaction to be conducted in any language other than English. Providing mortgage documents and related disclosures to LEP borrowers in English only places them at a considerable disadvantage. They may not be able to compare the terms and conditions they were promised with those that are actually provided. They may not fully understand the terms and conditions of the mortgage they are actually receiving, which may lead them to accept mortgages that they do not want or cannot afford.

Once a loan is originated, unless the mortgage servicer offers assistance in-language, LEP borrowers may be unable to obtain the help they need from their loan servicer in a timely fashion, or in some cases, at all. It can be difficult for LEP borrowers to navigate loss mitigation systems in which there are multiple barriers to getting both critical documents and verbal assistance in a language they understand. Although lenders may make special efforts to market products to LEP consumers, failure to address these barriers at the point of sale and afterwards may lead to confusion, misunderstandings, inadvisable decisions and financial hardship.

Past experience demonstrates that LEP Borrowers have been subject to abusive and discriminatory practices.

The problems outlined above are not mere hypotheticals. In the wake of the foreclosure crisis of the 2000s and the ensuing financial crisis, housing counselors and legal services attorneys who worked with LEP borrowers in financial distress documented numerous cases in which those borrowers encountered tremendous barriers to obtaining loss mitigation. Some of these

[19] U.S. Department of Housing & Urban Development, "Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency," September 15, 2016, available at https://www.hud.gov/sites/documents/LEPMEMO091516.PDF.

borrowers became delinquent when the payments rose to unaffordable levels on loans that they had been told would be 30-year, fixed-rate mortgages but were in fact adjustable-rate and/or interest-only mortgages. These borrowers were the victims of bait and switch tactics. They had been sold one product with marketing conducted in their preferred language, but unbeknownst to them, received a very different product at closing. They were unable to detect this bait and switch because none of the relevant documents were in a language they could understand.

Even LEP borrowers who were not subjected to such abusive and fraudulent practices during the mortgage origination stage frequently found themselves at a disadvantage during the loss mitigation process. Most servicers do not collect and track borrowers' language preferences. As a result, LEP borrowers would find that each and every time they contacted their servicer by phone, they would have to re-establish their language preference and go through what could be a lengthy and frustrating process to be connected to someone who could speak their language, either someone on the servicer's staff or through a third-party language line. If servicers used a language line to provide oral interpretation in a particular language, those LEP borrowers might need to make an appointment in advance, adding to the time needed to conduct even the most basic interaction. Important documents outlining the loss mitigation options available to the borrower, the documentation required to obtain those options, and the timelines and deadlines associated with the loss mitigation process were provided only in English. In some cases, borrowers were unable to obtain the loan modifications for which they were eligible because they could not understand the offers provided to them in writing and did not realize what steps they needed to take or the applicable deadlines.[20] They lost their homes to foreclosures that should have been avoidable.

The Consumer Financial Protection Bureau (CFPB or the Bureau), which has rulemaking authority under the Equal Credit Opportunity Act, has recognized many of these problems, including with respect to mortgage servicing. In considering changes to its mortgage servicing regulations it in 2016, the Bureau acknowledged the significance of the comments it had received about the problems faced by LEP borrowers both at the mortgage origination stage and in mortgage servicing, saying, "The Bureau recognizes the challenges borrowers with limited English proficiency face in understanding the terms of their mortgage. The Bureau believes that servicers should communicate with borrowers clearly, including in the borrower's native language, where possible, and especially when lenders advertise in the borrower's native language."[21]

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[20] Americans for Financial Reform, "Barriers to Language Access in the Housing Market," May, 2016, available at https://ourfinancialsecurity.org/wp-content/uploads/2016/05/AFR_LEP_Narratives_05.26.2016.pdf.

[21] Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72160, at 72163 (Oct. 19, 2016).

The Bureau has provided lenders with considerable guidance about how best to serve the needs of LEP consumers, and this guidance should help shape the manner in which a bank's record of performance in serving these consumers is evaluated as part of its CRA performance. For example, the Bureau's Fall 2016 Supervisory Highlights includes examples of practices it has observed that, "provide access to credit in languages other than English in a manner that is beneficial to consumers as well as the institution, while taking steps to ensure their actions are compliant with ECOA and other applicable laws."[22]

In November 2017, the Bureau published a summary of information that it had gleaned from interviews with a wide range of stakeholders, along with secondary research on best practices for serving LEP consumers. This "Spotlight on serving limited English proficiency consumers" discusses assessing consumers' language needs, centralized points of contact for LEP consumers, translation and interpretation systems, training for employees and interactions with consumers, among other topics, and points lenders to a variety of additional resources to assist them in serving these consumers.

Lenders can take additional guidance from the questions in the CFPB's examination procedures that pertain to their treatment of LEP borrowers. These procedures point lenders to the issues and information that examiners will consider in determining whether the institution's practices with respect to LEP consumers pose any fair lending concerns. The questions cover such topics as the marketing and targeting of financial products, fair lending training for employees and service providers, servicing practices and resources, tracking of borrowers' language preferences and the use of outside service providers to provide language assistance.[23]

More recently, the Bureau issued a Statement on the Provision of Financial Products and Services to Consumers with Limited English Proficiency[24] that goes into greater detail on steps that institutions can take to serve these borrowers and how they can manage the relevant compliance considerations. In addition to providing practical advice, these guidance documents provide assurance about how lenders can serve LEP consumers while remaining in compliance with the Equal Credit Opportunity Act.

One notable recommendation is for lenders to adopt a plan for serving their LEP consumers, and the Advisory Opinion describes the steps involved in creating and maintaining such a plan.

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[22] Consumer Financial Protection Bureau, "Supervisory Highlights," Issue 13, Fall 2016, p. 20.

[23] CFPB Examination Procedures, ECOA Baseline Review Module 13, 20-21 (Oct. 2015), available at *files.consumerfinance.gov/f/201510_cfpb_ecoa-baseline-review-modules.pdf.*

[24] Consumer Financial Protection Bureau, "Statement on the Provision of Financial Products and Services to Consumers with Limited English Proficiency," January 13, 2021. Available at https://files.consumerfinance.gov/f/documents/cfpb_lep-statement_2021-01.pdf.

The concept of a language access plan has been explained in detail in guidance[25] issued by the US Department of Justice for federal government agencies and other entities that receive federal financial assistance and are therefore subject to the provisions of Title VI of the Civil Rights Act of 1964 that prohibit discrimination on the basis of national origin and Executive Order 13166.[26] DOJ's guidance lays out a four-factor analysis to enable recipients to determine what language assistance services are appropriate for them to provide. That four-factor analysis balances:

> (1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee;
>
> (2) the frequency with which LEP individuals come in contact with the program;
>
> (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and
>
> (4) the resources available to the grantee/recipient and costs.[27]

Based on the outcome of this analysis, which takes into consideration the recipient's size, the nature of the services offered and the size of the relevant LEP population, DOJ then recommends that recipients develop written language access plans that detail the assistance they will provide to LEP persons to ensure that they have meaningful access to important government services.

HUD has adopted guidance on language access containing a similar four-factor analysis.[28] The HUD guidance also contains recommendations about the level of written translation assistance that should be provided depending on the size of the local LEP population. Based on the HUD guidance, we recommend that banks' language access plans spell out the services they will provide to members of any LEP group that constitutes 5% of the population of a local market area, or 1,000 persons, whichever is less.

With minor changes, this four-factor analysis would provide a useful framework with which banks could assess the language access needs of the markets they serve. The resulting information could then be used to develop a written language access plan that would describe

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[25] U.S. Department of Justice, "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons," 67 Fed. Reg. 41455 (June18, 2002).

[26] Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency," adopted August 11, 2000. Available at https://www.justice.gov/crt/executive-order-13166.

[27] U.S. Department of Justice, op. cit., p. 41459.

[28] U.S. Department of Housing and Urban Development [Docket No. FR–4878–N–02] Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 72 Fed. Reg. 2732 (January 22, 2007).

the steps banks will take, with appropriate time frames for each, to ensure that LEP persons have meaningful access to the important financial services they provide.

Further, the Federal Housing Finance Agency, working with Fannie Mae, Freddie Mac, lenders and advocates, has aggregated a sizeable number of commonly used mortgage-related documents, translated them into five languages (Spanish, Chinese, Vietnamese, Korean and Tagalog) and made them available to banks and the general public on FHFA's Mortgage Translations website.[29] This is an important resource for banks seeking to serve the credit needs of LEP borrowers who speak these languages.

When conducting CRA examinations, examiners should develop an understanding of the LEP population in the bank's assessment areas and assess the bank's record of performance in meeting their banking needs. This includes determining whether the bank has developed a language access plan or something comparable, the extent to which the institution has implemented the plan and updated it on a regular basis, and the impact of these efforts in meeting the banking needs of the LEP members of their local communities. All of this should factor into the institution's CRA rating.

Mortgage Servicing Evaluations Should be a Factor in CRA Exams

In addition to reviewing a bank's mortgage loan origination activities, the adequacy of mortgage servicing for residential loans should be a factor in CRA exams. Illegal and substandard servicing practices that harm borrowers should have a negative impact on the bank's CRA rating. There is ample independent information available regarding mortgage servicers' performance and the negative effects of substandard mortgage servicing to warrant including servicing operations as a factor in CRA ratings.

Mortgage servicing evaluations in CRA exams should include, at a minimum, review of state and federal supervisory examinations, and regulatory and enforcement actions relating to:

- the bank's servicing of loans in its own portfolio and servicing on behalf of other investors; and
- the bank's transferee servicers and subservicers, including servicing transfers coupled with transfers of ownership of mortgage loans.

The adequacy of default mortgage servicing by the originating bank and transferee servicers has a significant impact on the sustainability of home ownership. CRA exams should not be limited to a review of loan originations. A bank's responsibility to ensure the adequacy of servicing standards for its loan should not cease upon transfer of servicing and/or sale of the underlying mortgages. Homeowners have no control over the sale of their mortgages and the transfer of mortgage servicing rights. Rather, the entity that controls these decisions should

[29] https://www.fhfa.gov/MortgageTranslations

retain responsibility to ensure that homeowners, particularly those seeking loss mitigation home retention options, are not harmed by such sales and/or transfers.

The outcome of the Independent Foreclosure Review (IFR) conducted by the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), and the Federal Reserve during the foreclosure crisis demonstrated that homeowners suffered financial injury as well as unnecessary foreclosures because of servicing practices that ignored statutory and regulatory requirements, specific state foreclosure process laws, and acceptable industry practices.[30] The joint state and federal investigations that led to the 2012 National Mortgage Settlement (NMS) also exposed mortgage servicing abuses that caused significant financial harm and loss of homeownership.[31] The results of the IFR and the NMS provide ample evidence that sustainable homeownership is not limited to the origination of fair and affordable mortgages and that high quality mortgage servicing plays a significant role in preventing unnecessary loss of equity and foreclosures for all borrowers, and LMI borrowers and borrowers of color in particular.

In its 2014 publication, *Zipcode Inequality: Discrimination by Banks in the Maintenance and Marketing of Homes in Neighborhoods of Color*, NFHA wrote of the disproportionate impact of foreclosures in communities of color:[32]

> Communities across the country will continue to feel the effects of the foreclosure crisis in the coming years, but none more acutely than those where the residents are primarily African-American and Latino. A wide breadth of research and legal actions have established that subprime loans, loans that were much more likely to experience default and foreclosure, were deliberately marketed and originated to homeowners of color. The Center for Responsible Lending (CRL) reported that for mortgages originated between 2004 and 2008, African-American and Latino borrowers were nearly twice as likely as White borrowers to have one or more "high risk" features or conditions in their loans. Such features included higher interest rates, option Adjustable Rate Mortgages (ARMs), or a prepayment penalty. Even after controlling for factors such as credit score and income, African American and Latino home buyers were 80% and 70% more likely respectively to receive a subprime loan when compared to White home buyers.
>
> As a result of these predatory and discriminatory actions by large banks, the effects of the foreclosure crisis are more heavily compounded in neighborhoods where the majority of the residents are African-American or Latino. Estimates from 2012 show that the average American household lost $1,700 in just *one* year as a result of foreclosures alone. For neighborhoods that had majority non-White households, the wealth loss increased to an average $2,200. Household wealth loss in general showed even starker trends for communities of color post-foreclosure crisis; from 2005 to 2009 White households lost

[30] https://independentforeclosurereview.com

[31] www.nationalmortgagesettlement.com

[32] 2014-08-27_NFHA_REO_report.pdf (nationalfairhousing.org) at p. 8-9. Internal citations omitted.

> 16% of their net worth while African American households lost 53% and Latino households lost 66%.
>
> Because African American and Latino homeowners disproportionately faced adverse actions on their loans, the neighborhoods and communities they lived in disproportionately felt the impact. CRL's most recent estimates state that families affected by nearby foreclosures have lost or will lose a total of 8.8% of their home values. For residents in African American or Latino communities, that number nearly doubles to a staggering 16% of their home value. The same study finds that over one-half of the spillover loss from nearby foreclosures has or will occur in non-White communities because of the disproportionate concentration of foreclosures and resulting REOs in these communities. The total loss amounts to about 1.1 trillion dollars in home equity stripped from communities of color alone.

Finally, CRA reform should include data from servicers regarding borrowers' loss mitigation outcomes based on race, gender, national origin and geographic location (census tract). The federal agencies should work together to establish protocols for this data collection so that it available for use in CRA exams.

Conclusion

We appreciate the opportunity to submit these comments and hope there will be opportunities to discuss these issues further as the Board considers how to update Regulation BB to better address racial inequity in access to credit and other challenges facing our country. If you have questions about NFHA's comments or need more information about any of the issues we have raised, please contact me at dgoldberg@nationalfairhousing.org.

Sincerely,

/S/

Deborah Goldberg
Vice President, Housing Policy and Special Programs
National Fair Housing Alliance