EIG
OPPORTUNITY ZONES
COALITION

April 8, 2020

Via Federal eRulemaking Portal at www.regulations.gov

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: Docket ID OCC-2018-0008/RIN 3064-AF22 (Proposed Community Reinvestment Act Regulations)

To Whom It May Concern:

I write on behalf of the broad array of stakeholders in the Opportunity Zones Coalition to provide comments in response to the Notice of Proposed Rulemaking, Community Reinvestment Act Regulations, issued January 9, 2020 ("NPRM").[1] We appreciate the work of the Office of the Comptroller of the Currency ("OCC") and the Federal Deposit Insurance Corporation ("FDIC") to produce the NPRM, particularly the proposed rules that would treat investments in Qualified Opportunity Zones as eligible to satisfy financial institutions' obligations under the Community Reinvestment Act ("CRA"). While supportive of these provisions, we suggest some modifications to the NPRM to ensure that eligible investments in Opportunity Zones deliver strong benefits to the communities in which they are made and that the final rules do not inadvertently reduce community development investments, as compared to the current rules.

Specifically, we offer the following recommendations:

- Investments in Opportunity Zones should be treated as CRA investments only if they benefit low- and moderate-income ("LMI") individuals and communities. We recommend safe harbor factors to help provide certainty on whether such benefits are achieved.

[1] 85 Fed. Reg. 1204, OCC-2018-0008/RIN 3064-AF22 (Jan. 9, 2020).

- Retain the expanded definitions of qualifying activities to cover activities in rural areas and Indian country.
- Increase the multiplier for community development investments and the bank-wide community development minimum. To ensure that the appropriate amounts are selected, we recommend that the agencies seek further public comment.

I. Opportunity Zones Investments Should Receive CRA Credit Because They Share Similar Purposes and Goals

Opportunity Zones were included as a provision in the Tax Cuts and Jobs Act to provide tax benefits for certain private investments in America's low-income communities. This incentive was designed to encourage investors to redeploy their earnings from capital gains to finance new and expanded business activity in low-income areas nationwide. Opportunity Zones are low-income and contiguous[2] census tracts that were nominated by state governors and certified by the U.S. Department of the Treasury. The goal of the Opportunity Zones provision was to help address the persistent poverty and uneven recovery that left too many American communities behind. Opportunity Zones are in general communities that have struggled to attract capital and sustain economic opportunities for their residents in recent decades.

The CRA shares many of the same goals as Opportunity Zones, namely to benefit low-income communities. We applaud the inclusion of Opportunity Zone investments as a qualifying activity for purposes of the CRA. The impact of the CRA and Opportunity Zones programs can be maximized by providing eligibility for investments in both programs. The CRA and Opportunity Zones have an overlap in their community focus. The CRA concentrates on providing benefits to LMI individuals and communities. The Opportunity Zone definition of low-income communities[3] is similar to, and in many cases, overlaps with the LMI definition.[4] Accordingly, Opportunity Zone investments are a natural fit for CRA credit, similar to other

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[2] A state could designate a small portion of its census tracts as Opportunity Zones even if the tract is not a low-income community, as long as the tract is contiguous with the low-income community that is designated as a Qualified Opportunity Zone, and the median family income of the tract does not exceed 125 percent of the median family income of the low-income community with which the tract is contiguous. 26 U.S.C. Section 1400Z-1(e).

[3] 26 U.S.C. Section 1400Z-1(c)(1), *citing* Section 45D(e):

(A) The poverty rate for such tract is at least 20 percent, or

(B)

 (i) In the case of a tract not located within a metropolitan area, the median family income for such tract does not exceed 80 percent of statewide median family income, or

 (ii) In the case of a tract located within a metropolitan area, the median family income for such tract does not exceed 80 percent of the greater of statewide median family income of the metropolitan area median family income.

[4] "Low-income, which means an individual income that is less than 50 percent of the area median income, or a median family income that is less than 50 percent in the case of a census tract.
Moderate-income, which means an individual income that is at least 50 percent and less than 80 percent of the area median income, or a median family income that is at least 50 percent and less than 80 percent in the case of a census tract." Prop. 12 CFR § 25.03.

federal tax incentives that qualify, such as the New Markets Tax Credit and Low-Income Housing Tax Credit. However, just as the Opportunity Zones statute does not confer tax benefits on *any* investment simply because it is made in a designated area, CRA credit should likewise be reserved for investments in Opportunity Zones that meet certain criteria.

The preamble to the NPRM states that one of the goals of the proposed rules is to "[E]ncourage long-term commitment and reduce the current churn and short-term focus of CRA activities, providing banks more incentive to engage in long-term investments and loans, which would, in turn, provide community developers and advocates greater stability and more incentive to engage in longer term strategic initiatives."[5] The NPRM would accomplish this goal through evaluating on-balance sheet activities, rather than using the current framework of evaluating the amount spent on CRA activities when made. The OCC and FDIC seek to minimize the problem of institutions "gaming the system" by purchasing frequently traded loans or securities just prior to CRA evaluation and then selling off the loans or securities shortly thereafter.

The Opportunity Zones statute is structured to incentivize long-term investments by providing the maximum tax benefit for investments lasting ten years or more.[6] As such, Opportunity Zone investments would meet and reinforce the agencies' goal and result in greater stability and long-term strategic initiatives in LMI areas. Accordingly, we believe it is appropriate to provide CRA credit for Opportunity Zone investments that, as discussed in the next section, align with LMI community benefits.

II. Clarify the Scope of Opportunity Zone Investments that Count as CRA Investments

The NPRM defines community development loans, community development investments, and community development services as qualifying activities if they provide financing or support for:

> "(11) Qualified opportunity funds, as defined in 26 U.S.C. 1400Z-2(d)(1), that benefit low- or moderate-income qualified opportunity zones, as defined in 26 U.S.C. 1400Z-1(a)."[7]

We appreciate that the NPRM defines an Opportunity Zone investment as a qualifying activity; however, we think the definition in the NPRM should be clarified in a couple of respects and modified to require LMI community benefit.

First, it is not clear whether the phrase "as defined in 26 U.S.C. 1400Z-1(a)" is modifying "qualified opportunity zones" or "low- or moderate-income qualified opportunity zones." As such, it is not apparent that qualifying investments must be in Opportunity Zones that are also LMI census tracts. As stated earlier, the definitions of LMI for CRA purposes and low-income

[5] 85 Fed. Reg. at 1207.

[6] The Opportunity Zones statute excludes from taxable income the appreciation of investments in Opportunity Zones that have been held by the taxpayer for at least ten years. 26 U.S.C. Section 1400Z-2(c).

[7] Prop. 12 C.F.R. §§ 25.04(c)(11) and 345.04(c)(11).

communities for Opportunity Zones overlap somewhat, but not entirely, because of the different metrics used, including the use of the poverty rate for Opportunity Zones. Thus, not all Opportunity Zones are LMI. However, requiring that qualifying investments must be made in Opportunity Zones that are also LMI areas would unduly deny CRA consideration for investments that are appropriately targeted to LMI populations. Simply because the zone itself is not LMI does not mean that the investment does not or will not benefit LMI individuals.

Second, it is not clear whether Opportunity Funds can make investments through a lower-tier entity. In order to maximize flexibility under the Opportunity Zone rules, most investors have established two-tier structures in which Opportunity Funds make investments through qualified Opportunity Zone businesses as subsidiary entities.

Third, we think the definition in the NPRM of qualifying investments in Opportunity Zones for the purposes of CRA credit should more directly link to benefits for LMI individuals or communities. We suggest the current definition be replaced with one that looks more to benefits than categorizations.

In order to address these recommendations, we propose the following definition:

> "Qualified opportunity funds, as defined in 26 U.S.C. 1400Z-2(d)(1), that make investments directly or indirectly in qualified opportunity zones, as defined in 26 U.S.C. 1400Z-1(a), that benefit low- or moderate-income individuals or communities."

This definition would tie CRA qualification to the results of the investment and not simply to the location of the investment. In addition, it would remove the requirement that the Opportunity Zone also be an LMI census tract and clarify that investments may be made through lower-tier entities. Additionally, this definition would be more consistent with the purpose of the CRA to require banks to meet the needs of the communities they serve, including LMI neighborhoods.

We realize that this definition could create some uncertainty as to what investments benefit LMI individuals or communities. As such, we recommend adoption of a safe harbor in which a proposed Opportunity Zone investment will be presumed to benefit LMI individuals or communities if it is intended to have one or more of the following results:

- Creation of new jobs targeted to LMI individuals,
- Provision of essential infrastructure or services benefiting LMI individuals or an LMI community,
- Creation or rehabilitation of housing with at least a portion affordable[8] to LMI individuals; specifically, we recommend that such housing provide

[8] Verification will be needed to ensure that the housing ultimately meets these affordability standards.

- at least 20 percent of the units be offered at median rents that do not exceed 30 percent of 80 percent of the area median income,[9] or
- workforce housing that is available to moderate-income individuals where this activity has been deemed a priority by the local government

- Revitalization of blighted property in an LMI community,
- Formation of a new business that serves or employs LMI individuals,
- Significant investment in an existing business in an LMI community,
- Investment in an underserved community or Indian country[10] that is also an LMI community, or
- Investment in an area that is targeted for revitalization by a state, local, or tribal government.

This safe harbor would help to provide certainty that if an Opportunity Zones investment will provide one of these benefits, then it will qualify for CRA credit. However, these factors are only a safe harbor, and an institution could still show by facts and circumstances that the investment benefits LMI communities or individuals.

Some financial institutions have already engaged in investments in Opportunity Zones that support the CRA's purpose and would meet this proposed safe harbor:

- PNC Bank provided $11 million in equity through its Opportunity Fund and $4.2 million in loans to transform a vacant, nearly century-old office building into much-needed workforce housing in Birmingham, Alabama.[11]
- PNC Bank also redeveloped an obsolete cold storage warehouse into needed residential apartments on the South side of Bethlehem, Pennsylvania, using traditional financing and Opportunity Zone investments.[12]
- Woodforest National Bank made a $3 million investment in an Opportunity Zone in the Anacostia neighborhood of Washington, D.C. The investment will go toward the creation of 252 units of housing, 80 percent of which will be affordable, and commercial office space, in which one of the tenants will be a healthcare nonprofit creating 500 jobs and bringing healthcare access to a medically underserved area.

These sorts of projects are clearly of the type that should receive CRA credit—and did under the existing regime—because they are examples of banks serving and benefitting their communities, and in particular LMI communities.

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[9] Referencing the language in Prop. 12 CFR §§ 25.04(c)(1)(i)(A) and 345.04(c)(1)(i)(A) or similar language as finalized.
[10] As these terms are defined in Prop. 12 CFR § 25.03.
[11] http://pnc.mediaroom.com/2019-07-30-PNC-Provides-15-Million-To-Finance-American-Life-Redevelopment-In-Birmingham-Opportunity-Zone.
[12] https://www.pnc.com/en/about-pnc/topics/pnc-pov/community/opportunity-zone.html.

In addition, we welcome the additional certainty provided by the NPRM in the listing of illustrative examples in §§ 25.04(c)(11) and 345.04(c)(11) of investments in Opportunity Funds. However, we recommend that these examples be amended to incorporate the modifications recommended above.[13] Thus, the financing of improvements to an athletic stadium in an LMI Opportunity Zone would not, by itself, qualify without showing benefits to LMI individuals. Additional examples would be helpful to illustrate specific projects that would satisfy the safe harbor factors listed above or that benefit LMI individuals without necessarily being in LMI census tracts. For instance, the following examples would reflect our recommendations for Opportunity Zone investments:

- Investment in a qualified opportunity fund that finances construction of a grocery store in an opportunity zone that would serve the needs of LMI individuals.

- Investment in a qualified opportunity fund that finances the construction of affordable residential apartments in an opportunity zone that is not an LMI census tract in which at least 20 percent of the units will be offered at median rents that do not exceed 30 percent of 80 percent of the area median income.

- Investment in a qualified opportunity fund that finances the establishment of a business incubator for start-up businesses that provides services available to LMI individuals.

- Investment in a qualified opportunity fund that finances the construction of a commercial building intended for retail and restaurant use in an underserved community that is an LMI community.

Finally, we support the inclusion in the definition of qualifying activities in the NPRM for activities in distressed and underserved areas, including rural areas and Indian country.[14] Of the over 8,700 census tracts that have been designated as Opportunity Zones, many are in rural areas that have a dearth of new economic investment. While much of the focus of CRA investments has been on urban communities, it is important to promote investments in rural communities that are outside of a bank's service areas and often become CRA deserts. We encourage the final regulations to retain provisions allowing CRA credit for an institution's bank-wide evaluation for investments in underserved rural communities, including rural Opportunity Zones.

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[13] The Opportunity Zone examples also seem to require that the Opportunity Fund be "established" to finance the particular Opportunity Zone project described. Such a purpose for Opportunity Funds is not a requirement in 26 U.S.C. § 1400Z-2, which requires only that Opportunity Funds be established for the purpose of investing in qualifying property in Opportunity Zones and not for any delineated project. Indeed, Opportunity Funds often invest in several different projects through ownership in multiple subsidiary Opportunity Zone businesses. We recommend that the final regulations replace the phrase "established to finance" with "that finances" in the examples in reference to Opportunity Funds.

[14] Prop. 12 CFR § 25.04.

III. Maintain Incentives for Community Development Investments

We are concerned about provisions in the NPRM that may decrease community development investments from current levels. The current CRA regulations require qualifying loans, investments, and services by separately testing banks' performance in each of these three areas. We are concerned that by measuring loans and equity investments together, banks would be disincentivized to engage in equity investments to meet their CRA requirements. Equity investments have a greater cost of capital, and it is easier for banks that are in the business of lending money to simply lend money. We support retaining the investment test as a separate test; however, we understand that there are motivations to move away from these three separate testing categories. If the investment test is not retained in the final regulations, we suggest that financial institutions be given extra incentive to engage in large and small equity investments.

The NPRM acknowledged that the figure for the multiplier for community development investments in § 25.07 may be changed, and the OCC issued a Request for Information ("RFI") on January 10, 2020, requesting data on bank assets for purposes of determining an appropriate multiplier.[15] To ensure that all stakeholders possess the information necessary to comment about the multiplier, we recommend the agencies seek further public comment on the multiplier after the responses to the RFI have been submitted. After evaluating such data, the multiplier may need to be increased to properly incentivize community development investments.

Finally, we recommend reevaluating the new bank-wide community development minimum in the proposed rules:

> "The quantified value of community development loans and community development investments during the evaluation period, as valued in § 25.07, divided by the average quarterly value of the bank's retail domestic deposits as of the close of business on the last day of each quarter of the evaluation period, must meet or exceed 2 percent."[16]

From listening to stakeholders and the House Financial Services Committee's January 29 hearing, we are aware that many financial institutions, especially small banks, currently have amounts greater than two percent of their total deposits in community development activities. Similar to the lack of adequate data about the multiplier, the data to support the two percent minimum has thus far not been released, and we urge you to evaluate this threshold to ensure that financial institutions do not actually reduce their community development activities as a result of these new rules.

Community development activities are part of the core purposes of the CRA intended to benefit LMI communities. Final rules should ensure that the community development minimum complements the multiplier for community development investments. For example, increasing

[15] 85 Fed. Reg. 1285, OCC-2019-0029 (Jan. 10, 2020).
[16] Prop. 12 CFR § 25.12.

the multiplier by itself could have the result of decreasing community development investments because those investments would be counted for a greater value for CRA credit. Also, the community development minimum should complement the balance sheet approach, if retained. Because of the shift to the balance sheet approach, long-term investments and loans may continue to qualify for CRA credit without the institution needing to engage in any recent activities. We recommend that the final rules encourage the origination of new community development investments. Thus, the minimum amount of required community development activities may need to be increased to ensure that financial institutions continue to engage in such activities, and to achieve an outstanding rating, more activity should be required than the minimum for a satisfactory rating.

Therefore, we recommend that the agencies seek further public comment on the community development minimum after the responses to the RFI have been submitted, for the same reasons stated above. After evaluating the comments, the minimum may need to be increased to properly incentivize community development investments.

We appreciate the ability to provide feedback on the NPRM and your consideration of these recommendations. If you have any questions, please contact Catherine Lyons at catherine@eig.org.

Sincerely,

John W. Lettieri
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cc: cra.reg@occ.treas.gov;
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