EIG
OPPORTUNITY ZONES
COALITION

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

James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

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

Re: Docket ID OCC-2022-0002/RIN 7100-AG/RIN 3064-AF81 (Joint Notice of Proposed Rulemaking on the Community Reinvestment Act)

To Whom It May Concern:

We write on behalf of a broad coalition of stakeholders to provide comments in response to the Joint Notice of Proposed Rulemaking, Community Reinvestment Act, issued June 3, 2022 ("NPRM").[1] We appreciate the work of the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency (the "Agencies") in proposing the joint rules, and write to suggest that the final regulations make clear that investments in Opportunity Zones that align with the intent of the Community Reinvestment Act ("CRA") in benefitting low- and moderate-income ("LMI") individuals and communities are eligible for CRA credit.

[1] 87 Fed. Reg. 33,884, RIN 1557-AF15/3064-AF81/7100-AG29 (June 3, 2022).

Specifically, we offer the following recommendations:

- Provide examples of Opportunity Zone investments in an illustrative, non-exhaustive list of CRA-eligible activities.
- Retain the proposed expanded areas for community development activities to cover activities in designated areas of need, such as rural areas and Indian country.
- Retain a separate investment test or, at a minimum, provide an increased impact review factor in an institution's evaluation for long-term community development investments.
- Clarify that revitalization activities may provide benefits or remedies satisfactory to residents in the event of displacement from such activities.

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 more than 8,700 OZ census tracts are among the highest-need communities in the United States by most measures of socioeconomic well-being. The map of OZs are well-targeted to needy places, demonstrating an average life expectancy three years shorter than the national figure, an average poverty rate of 26 percent based on 2019 data, and a median family income less than two-thirds the national level, on average. The goal of the Opportunity Zones provision is to help address the persistent poverty and uneven recovery from the Great Recession that left too many American communities behind.

The CRA shares many of the same goals as Opportunity Zones, namely to benefit low-income communities and their residents. 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 lower-income community focus. The Opportunity Zone definition of low-income communities[3] is similar to, and in many cases, overlaps with the

[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.

CRA's LMI definition.[4] Accordingly, Opportunity Zone investments are a natural fit for CRA credit, similar to other federal tax incentives that qualify, such as the New Markets Tax Credit and Low-Income Housing Tax Credit programs.

The NPRM defines revitalization activities as those that "benefit or serve residents, including low-or moderate-income residents, in one or more of the targeted census tracts"[5] and involve such projects as essential community facilities or infrastructure. Opportunity Zones are a federal incentive designed to revitalize certain, enumerated low-income census tracts. The Opportunity Zones incentive was specifically enacted to create new businesses and jobs in distressed communities. In his press release announcing the introduction of the *Investing in Opportunity Act*, the original legislative vehicle introducing Opportunity Zones, Senator Tim Scott (R-SC) wrote, "The *Investing in Opportunity Act* can provide the chance that entrepreneurs and small businesses are looking for to grow, innovate and create jobs," underscoring that this incentive was intended to draw capital to Opportunity Zones both to help existing businesses grow, as well as to spur the creation of new businesses. The Opportunity Zones regulations also provide rules allowing for the use of the incentive for the rehabilitation of vacant or abandoned property and brownfield sites, as defined by section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601).[6] Opportunity Zone investments can also be used to support the other activities outlined in proposed section 13(a)(2), such as affordable housing or the provision of essential community facilities or infrastructure. In fact, Novogradac's recent survey of Qualified Opportunity Funds found that at least $5.9 billion in Opportunity Zone equity has been invested in affordable and workforce housing as of December 31, 2021.[7]

The Opportunity Zones statute is also structured to incentivize long-term investments by providing the maximum tax benefit for investments lasting ten years or more.[8] As such, Opportunity Zone investments would meet and reinforce the goal of providing greater stability

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[4] (1) Low-income, which means:

(i) For individuals within a census tract, an individual income that is less than 50 percent of the area median income; or

(ii) For a census tract, a median family income that is less than 50 percent of the area median income.

(2) Moderate-income, which means:

(i) For individuals within a census tract, an individual income that is at least 50 percent and less than 80 percent of the area median income; or

(ii) For a census tract, a median family income that is at least 50 percent and less than 80 percent of the area median income.

Prop. __ CFR § __.12.

[5] Prop. __ CFR § __.13(e)(1).

[6] Treas. Reg. § 1.1400Z2(d)-2(b)(3)(iii)-(v).

[7] https://www.novoco.com/products/novogradac-opportunity-zones-investment-report-data-through-dec-31-2021-ebook-edition#:~:text=The%20Novogradac%20Opportunity%20Zones%20Investment,Novogradac%20has%20tracked%20such%20information.

[8] 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).

and long-term capital in LMI areas.[9] As described further below, we believe that Opportunity Zone investments in LMI tracts that benefit the LMI community should qualify for CRA credit, consistent with the goals stated in the NPRM.[10]

II. Provide Illustrative Examples of Opportunity Zone Activities that Benefit LMI Individuals and Communities

We support the NPRM's proposal to provide an illustrative, non-exhaustive list of qualifying community development activities, which will provide greater certainty to financial institutions and investors.[11] Under the current rules, the lack of assurance regarding whether activities will qualify for CRA credit discourages financial institutions from engaging in activities other than those that are certain to qualify.

Considering that not all Opportunity Zone investments would meet the requirements of the CRA to provide benefit to LMI communities or individuals, proposed regulations should provide illustrative examples of Opportunity Zone activities that would qualify for CRA credit. Some financial institutions have already engaged in investments in Opportunity Zones that support the CRA's purpose:

- 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.[12]
- 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.[13]
- Silicon Valley Bank provided $22.1 million in equity through its LIHTC Opportunity Zone fund and $15.3 million in construction debt to Burbank Housing Dev. Corporation and Catholic Charities of Santa Rosa to construct 64 new apartments for low-income families with incomes between 20-50 percent of Area Median Income (AMI), including 30 units set aside for chronically homeless individuals with disabilities. The new apartments are located in Santa Rosa, California.

These sorts of projects are clearly of the type that should receive CRA credit – but the lack of certainty makes it riskier for banks to engage in these activities. We recommend that if the

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[9] *See* 87 Fed. Reg. at 33,972 ("The agencies propose to count both new and prior activities remaining on the bank's balance sheet in the numerator of the metric in order to emphasize the provision of long-term capital.").

[10] Given the similarity of the issues presented in the NPRM to those of previous proposals of the Agencies, this letter reflects our comments letters submitted on those proposals. *See* EIG's comment letters dated April 8, 2020 in response to Docket ID OCC-2018-0008/RIN 3064-AF22 and February 16, 2021 in response to Docket No. R-1723/RIN 7100-AF94.

[11] Prop. __ CFR § __.14.

[12] http://pnc.mediaroom.com/2019-07-30-PNC-Provides-15-Million-To-Finance-American-Life-Redevelopment-In-Birmingham-Opportunity-Zone.

[13] https://www.pnc.com/en/about-pnc/topics/pnc-pov/community/opportunity-zone.html.

Agencies approve an activity for CRA purposes for one institution, that the Agencies make their determination public and that the same activity should be considered to qualify for CRA credit for other institutions. We also recommend that the list of qualifying activities be updated every three years, consistent with the interval by which full scope reviews of large institutions are conducted.

Illustrative examples would help to provide certainty that if an Opportunity Zone investment engages in one of these activities, then it will qualify for CRA credit. For instance, the following examples of Opportunity Zone investments would reflect our recommendations of activities that should be presumed to benefit LMI individuals or communities in accordance with CRA requirements. This list is meant to be demonstrative, not comprehensive.

- Qualified opportunity fund investment that finances construction of a grocery store in an Opportunity Zone that is also an LMI census tract.

- Qualified opportunity fund investment that finances the construction of a commercial building intended for neighborhood-serving retail, such as a restaurant or convenience store in an Opportunity Zone that is also an LMI census tract.

- Qualified opportunity fund investment that finances construction of a new manufacturing facility that creates jobs for local residents in an Opportunity Zone that is also an LMI census tract.

- Qualified opportunity fund investment that finances renovation of a vacant building into a cultural arts facility in an Opportunity Zone that is also an LMI census tract.

- Qualified opportunity fund investment that finances the rehabilitation of an acute care hospital facility, including the purchase of new medical equipment, in an Opportunity Zone that is also an LMI census tract.[14]

- Qualified opportunity fund investment that finances the construction or renovation of facilities oriented toward serving low-income children, such as charter schools, day care centers, and early childhood centers in LMI Opportunity Zones.

- Qualified opportunity fund investment that finances the construction or renovation of office space occupied by non-profit organizations, community recreation, and similar gathering spaces in LMI Opportunity Zones.

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[14] These first five examples were contained in § 25.04(c)(11) of the Office of the Comptroller of the Currency's illustrative list of qualifying activities under prior 12 CFR 25.04.

- Qualified opportunity fund investment that finances the construction of residential apartments in an Opportunity Zone that are affordable to LMI individuals.

- Qualified opportunity fund investment that finances the establishment of a business incubator for start-up businesses in an LMI Opportunity Zone.

- Qualified opportunity fund investment that finances essential infrastructure in an LMI Opportunity Zone.

However, these should be non-exclusive examples, and an institution should be able to show by facts and circumstances that an Opportunity Zone investment benefits LMI communities or individuals to receive CRA credit.

Finally, in response to Question 34, we support the inclusion in the proposed impact review factors of activities serving persistent poverty counties, high poverty census tracts, and areas with low levels of community development financing.[15] By definition, the vast majority of Opportunity Zones are economically distressed areas. 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. In addition, 362 Opportunity Zones overlap with Indian tribal lands,[16] and some Opportunity Zones encompass impoverished communities along the Mexico border, including Colonias. While much of the focus of CRA investments has been on urban communities, it is important to promote investments in communities that are outside of a bank's service areas and often become CRA deserts.

III. Clarify Criteria for Revitalization Activities

The NPRM enumerates revitalization activities as a type of community development activity, which are defined as activities "undertaken in conjunction with a federal, state, local, or tribal government plan, program, or initiative that includes an explicit focus on revitalizing or stabilizing targeted census tracts."[17] The definition of revitalization activities also requires that "[t]he activities do not displace or exclude low-or moderate-income residents in the targeted census tracts."[18]

This is a worthy goal but too broadly worded. The rule could mean, for example, that a revitalization project benefiting low- and moderate-income residents, such as the replacement of a deteriorated building with a library or child care facility, would not qualify for CRA credit if it results in the permanent displacement of two or more residents.

[15] 87 Fed. Reg. at 33,915.
[16] Opportunity Zones in Indian Country, U.S. Department of the Interior, at 3, *available at:* https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/ieed/pdf/Opportunity_Zones_Primer.pdf.
[17] Prop. __ CFR § __.13(e).
[18] Prop. __ CFR § __.13(e)(2).

We suggest the revision of this requirement to permit agreements satisfactory to displaced residents that provide for compensation, alternative housing in or near the relevant community, or other similar benefits. This would recognize the advantage to a community of economic development activities and ensure that displaced residents would be part of the development process and agree to alternatives satisfactory to them before the development occurs. However structured, a balance should be achievable between assuring development activities consistent with the NPRM that benefit low- and moderate-income residents and addressing the needs of any residents displaced by such activities.

IV. Maintain Incentives for Community Development Investments

The NPRM proposes to combine the evaluation of community development loans and investments into one subtest, the Community Development Financing Test.[19] We are concerned that this would decrease, not increase, community development investments from current levels.

The current CRA regulations separately test a large bank's CRA performance in three areas: loans, investments, and services. 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 generally have a greater cost of capital, longer term, higher origination costs, and are more illiquid. It is easier for banks that are in the business of lending money to simply make loans. Community development investments are critically important for communities, and the significance of investments would be diminished through the combination of lending and investments into one evaluation. We support retaining the investment test as a separate test or, alternatively, establishing three subtests for loans, investments, and services under the Community Development Test. The NPRM proposes to retain a separate Community Development Services Test, which would incentivize banks to perform such services. Community development investments are critical to improving communities and certainly deserve comparable regulatory treatment. If a separate investment test or subtest is not retained, we suggest that a financial institution should only be able to achieve an outstanding rating for the Community Development Financing Test if it engages in adequate levels of equity investments.

We are also concerned that the NPRM's proposed weights for determining ratings of large banks do not adequately account for the importance and value of community development activities. Under the proposal, the proposed weights would be: 45 percent for retail lending; 15 percent for retail services and products; 30 percent for community development financing; and 10 percent for community development services.[20] The result would be an aggregate 60 percent weight for retail activities and an aggregate 40 percent weight for community development activities. The NPRM does not describe the empirical basis for assigning a lower overall percentage for community development activities in comparison to the current rule. With the increased weights

[19] 87 Fed. Reg. at 33,971.
[20] 87 Fed. Reg. at 33,988.

for retail activities, a large bank's overall rating could be largely unaffected by poor performance on the community development tests. As compared to the current rule, this weighting would give a large bank less incentive to engage in community development activities, and no incentive to engage in community development investments. Given this, and the value to communities of both retail and community development activities, we recommend that the overall retail lending and community development tests should be weighted equally, at 50 percent. To accomplish this, the weight assigned to the community development financing test should be increased to 45 percent (25 percent for community development lending and 20 percent for community development investments) for example, and the weight assigned to the community development service test should be reduced to 5 percent, as many of the community developments services are eligible to be considered under the retail product and services test.

The NPRM explains that "[t]he impact and responsiveness of loans and investments would also be considered as part of a bank's impact review."[21] We support the use of an impact review factor given to community development activity based on the assessment of local impact. Community development activities are part of the core purposes of the CRA intended to benefit LMI communities and should be given extra weight in the institution's evaluation based on their impactfulness. To ensure that investments remain an important part of community development, an impact review factor for investments would be an appropriate way to assess an institution's commitment to and level of investments for purposes of determining whether the institution qualifies for an outstanding rating. Additionally, longer-term activities should be rated as more impactful than short-term activities. The Opportunity Zone investment is expressly designed to meet community needs for long-term investments, and financial institutions should be given extra consideration for such responsiveness.

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

Sincerely,

Catherine Lyons
Director of Policy and Coalitions
Economic Innovation Group

cc: regs.comments@federalreserve.gov; comments@fdic.gov

[21] 87 Fed. Reg. at 33,971.