February 19th, 2021

National Community Reinvestment Coalition
740 15th St. NW
Washington, DC 20005

Kathy L. Moe
Regional Director
Federal Deposit Insurance Corporation
25 Jessie Street at Ecker Square
Suite 2300
San Francisco, CA 94105-2780

RE: Comment Letter Regarding Deposit Insurance Application from Rakuten Bank America

Dear Director Moe:

The National Community Reinvestment Coalition (NCRC) and the 36 undersigned organizations maintain that Rakuten's application for deposit insurance for an Industrial Loan Charter (ILC) would not accord with safety and soundness standards for banks and has not demonstrated a significant commitment to meeting the convenience and needs of the community to be served as required per the Federal Deposit Insurance Act (FDIC Act) and the FDIC statement of policy on applications for deposit insurance.[1] Rakuten does not address significant safety and soundness, privacy, or fair lending concerns. Rakuten has developed an incomplete strategic plan for its Community Reinvestment Act (CRA) evaluation that does not adequately serve the credit and deposit needs of the communities, including low- and moderate-income (LMI) communities.

This is Rakuten's third application for a bank charter. Astonishingly, Rakuten has not improved its application in any significant manner from a safety and soundness, fair lending and convenience and needs perspective. This does not show an adherence to CRA's statutory purpose that banks continually and affirmatively serve the needs of their communities. NCRC and the undersigned organizations oppose Rakuten's charter application and urge the FDIC to deny it.

I. ILCs, Rakuten included, present an unacceptable risk to the financial system

NCRC is opposed to ILC charters as problematic from a safety and soundness perspective. ILC charters often include a parent institution that is not a financial institution. Federal agencies cannot comprehensively examine the parent nor other affiliates and subsidiaries for their safety and soundness. The ability of the FDIC to thoroughly monitor the relationship between the ILC and its parent and to

[1] FDIC. (2014, September 14). *FDIC Statement of Policy on Applications for Deposit Insurance.* Retrieved at https://www.fdic.gov/regulations/laws/rules/5000-3000.html

monitor the risk the parent poses to the ILC has been questioned by the Government Accountability Office and other stakeholders.[2]

During the financial crisis, two ILCs, Security Savings Bank, based in Nevada, and Advanta Bank Corp., based in Utah, failed. In addition, many parents of ILCs, including Lehman Brothers, General Motors, Flying J Inc., CIT Group Inc., CapMark Financial Group Inc., and Residential Capital, LLC, filed for bankruptcy.[3]

These concerns are magnified in the case of Rakuten since its application says it owns 43 companies in the United States alone.[4] What is the financial condition of these companies? Should any of them become imperiled financially, what demands will Rakuten's parent place on the proposed ILC to bail out the troubled companies? In addition, NCRC is concerned that the parent companies would exert undue pressure on the lending operations to push loans to Rakuten's customers for retail products and merchant lines of credit.[5] Rakuten operates as a discount brokerage, offering discounts to retail customers buying merchandise from participating businesses. In order to increase business, would the parent company push Rakuten Bank to make ever-increasing volumes of risky loans to retail customers as well as participating merchants? The application does not address how this perverse business practice would be avoided.

A. Rakuten's scale creates safety and soundness concerns

Rakuten is not another small fintech, but instead a company that may become a sizable entrant in financial services for consumers and small businesses. Both the audiences served and the product mix offered could be very broad. The application promises that during the bank's three-year de novo period, the bank will limit its offerings to credit cards and negotiable order of withdrawal (NOW) accounts. What happens after the de novo period is an open question.

Everything we know about how Rakuten operates in other countries suggests that its expansive structure, with linkages across financial services and other commercial activities, will mean that it wants to operate similarly in the United States. In its application, Rakuten states that "Rakuten is a global internet services and financial services company…While the internet and financial services are separate distinct arms of the business, in Japan, Rakuten has created a unique ecosystem linking the two businesses in the form of an online marketplace that creates strong loyalty and value for both merchants and consumers who sell and shop there, respectively…in the other half of the ecosystem, Rakuten offers consumers a variety of financial services including banking, insurance, securities, and Rakuten credit cards."

In other countries, Rakuten's payments portfolio includes the issuance of credit and debit cards, a mobile wallet, a retail point-of-sale system, and a trading exchange for cryptocurrency.[6] According to its recent report to shareholders, Japanese account holders transacted 16.6 trillion yen in the first three quarters of 2020.[7] Rakuten European Bank provides small businesses with working capital loans, point-of-sale terminals, and factoring.

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[2] General Accounting Office. (2005, September 15). *Industrial Loan Corporations: Recent Asset Growth and Commercial Interest Highlight Differences in Regulatory Authority*. GAO-05-621. Retrieved at https://www.gao.gov/products/GAO-05-621
[3] *Statement of Martin J. Gruenberg, Chairman, Federal Deposit Insurance Corporation on De Novo Banks and Industrial Loan Companies before the Committee on Oversight and Government Reform*; U.S. House of Representatives; 2157 Rayburn House Office Building, https://www.fdic.gov/news/news/speeches/spjul1316.html
[4] Rakuten's application, p. 2.
[5] Application, p. 64.
[6] Rakuten. (2019, December 24). "*Rakuten Wallet Launches Service for Exchanging Rakuten Super Points for Crypto Assets."* Retrieved at https://global.rakuten.com/corp/news/press/2019/1224_01.html From the Rakuten Wallet on the company's mobile app, an account holder can trade Bitcoin, Ethereum, and Bitcoin Cash.
[7] Rakuten. (2020, November 12). *FY 2020 Third Quarter Consolidated Financial Results Appendix*. Retrieved at https://global.rakuten.com/corp/investors/documents/results/

In Japan, analysts often compare Rakuten to Amazon. That is an understatement - Rakuten does more than Amazon. Rakuten is not only an e-commerce platform with advanced logistics and specific digital content offerings. It is also a bank, a securities firm, an insurer, a travel firm, an electricity provider, a search engine, a career recruiter, an advertising agency, a sports ticket brokerage, a car rental company, an AI-based digital marketing firm, and a venture capitalist. In Japan, Rakuten is not only an analog of Amazon – but also of Square, MetLife, Yahoo, Indeed, Uber, Disney, and others.

We understand that Rakuten will not underwrite insurance policies, but no such concessions exist elsewhere in the application concerning other activities. However, Rakuten's affiliate network includes two domestic insurance companies.[8]

B. Rakuten would violate Regulation W designed to uphold safety and soundness

In the United States, bright lines have existed to separate banking from commerce. The industrial loan charter is a problematic contradiction to that principle. Significantly, by receiving an ILC, Rakuten avoids supervision under the Bank Holding Company Act. Fewer safeguards will be in place. The FDIC will not have the same regulatory partners.

The deep relationship between a Rakuten Bank and non-bank lines of commerce is evidenced by Rakuten's own internal measurements of success. For example, public filings show that Rakuten tracks its ability to convince members to use more than one service. At the end of Q3 2020, 72.6 percent of Rakuten members used more than one of its services.[9] We see no reason not to believe that the same cross-selling practices will not occur in the United States.

Many companies with ILCs have suffered financial emergencies. Earlier in this comment, we listed those events, but the point deserves further emphasis. Because of its ecosystem structure, Rakuten's revenues correlate closely with their online affiliate businesses' performance. Retail is undergoing seismic changes – it is not wise to provide access to the banking system when longstanding and previously successful retail firms are now going out of business regularly.

Section 23A of the Federal Reserve Act (Regulation W) states that a transaction of an affiliate should also be considered a transaction of the financial institution.[10] Regulation W covers instances where credit issued by a bank is used to purchase a good from an affiliate of the bank, and the availability of the credit enables the sale of a good or service to occur that would not have happened but for the bank's extension of credit. Rakuten Bank's business model oversteps these boundaries. Rakuten intends to issue credit cards to its small business affiliates and consumers who use those credit lines to purchase goods from Rakuten's small business affiliates. Regulation W applies sensible provisions to limit the risk exposure that a bank has to customers of a bank's affiliates and to prevent evasions of the rule by banks that use intermediaries.[11]

While a strict reading of Regulation W would excuse Rakuten from these rules because it would be a non-member bank, we believe this interpretation ignores common sense. Rakuten's promise to limit its offerings to credit card and NOW accounts holds only through its three-year de novo period. At the end of that period, the FDIC may find it much harder to restrict Rakuten Bank's lines of business. Rakuten's

[8] Rakuten Advertising portal.
[9] Rakuten. (2020, November 12). "*Expansion of Cross-Use Ratio: Number of Rakuten members who have utilized two or more Rakuten services during the past 12 months*." FY 2020 Third Quarter Consolidated Financial Results.
[10] 12 C.F.R. § 223.16(a) A member bank must treat any of its transactions with any person as a transaction with an affiliate to the extent that the proceeds of the transaction are used for the benefit of, or transferred to, an affiliate."
[11] 12 C.F.R. § 223.16(c)(4).

prior applications included proposals for a broader portfolio, and even the comments made in this application by Rakuten emphasize their belief in providing their customers with multiple services.

The close relationship between credit extended by Rakuten Bank and the commercial activities of the affiliates within its e-commerce ecosystem exceeds the tests outlined in Section 23A. Any financial difficulties among the affiliates within Rakuten's overall e-commerce ecosystem and Rakuten's foreign non-bank financial institutions would create safety and soundness concerns.[12] Regulators made anti-tying rules to prevent a commercial business's financial troubles from spreading to the point where they imperiled the soundness of a bank.

When those anti-tying rules were established in the 1970s, they did not contemplate a business model that would break down natural barriers between the use of credit and the opportunity to purchase goods. Rakuten may not force consumers to use its credit products as a condition of making a purchase on its ecosystem, but it may design services to encourage them to do so. By using analytics, Rakuten can easily create special offers for individual borrowers. The original anti-tying provisions were not prepared for companies that used convenience and financial incentives to reduce market competition. The FDIC must not ignore the implications that Rakuten's model poses for anti-competitiveness and coercion.

The FDIC will accept great responsibility to supervise Rakuten without the support of other regulators. If Rakuten was a member bank, then the Federal Reserve could work side-by-side with the FDIC on the challenge posed by Rakuten. However, given that this application uses the ILC loophole, it cannot. It leaves all of the work to the FDIC. That duty will be large, given Rakuten's ecosystem's size. It will also be complicated by the fact that Rakuten Bank will be a small subsidiary within a much larger foreign corporation. Significantly, a subsidiary of a foreign corporation is particularly difficult to control. The Bank Holding Company Act provides a framework for the supervision and regulation of such entities.[13] The experience of Germany's Wirecard scandal underscores the risks associated with financial institutions that are subsidiaries of commercial corporations.[14]

C. Approval establishes a dangerous precedent

We have concerns that if this application is approved, it creates a precedent that could set a basis for other large tech companies to receive charters. Already, many of our country's largest non-bank companies have begun to offer non-bank financial services.[15] It stands to reason that some of them will want to pursue financial services even further if chartering is an option. Companies such as Amazon, Google, Apple, and Facebook all have payment services or partner with banks to issue credit products to their

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[12] FDIC Law, Regulations, and Related Acts: Section 7500 FRB Regulations Part 223. Transactions between member banks and their affiliates. Retrieved at https://www.fdic.gov/regulations/laws/rules/7500-1850.html#fdic7500223.12 12 C.F.R. § 223.12 § 223.12 A member bank may not engage in a covered transaction with any affiliate if the aggregate amount of the member bank's covered transactions with all affiliates would exceed 20 percent of the capital stock and surplus of the member bank.

[13] *Federal Reserve Board Supervisory Letter SR 08-9*. The [BHC Act] provides a federal framework for the supervision and regulation of all domestic and foreign companies that control a bank and the subsidiaries of such companies. Among the principal purposes of the BHC Act is to protect the safety and soundness of corporately controlled banks. Financial trouble in one part of an organization can spread rapidly to other parts of the organization…. Risks that cross legal entities or that are managed on a consolidated basis cannot be monitored properly through supervision directed at any one of the legal entity subsidiaries within the overall organization."

[14] RDC and Moody's Analytics: (2020, August 27). "*Wirecard Scandal: A String of Red Flags*." Retrieved at https://rdc.com/financial-institutions/blog/wirecard-scandal-a-string-of-red-flags In spite of numerous warnings about Wirecard's balance sheet manipulations, Germany regulators were unable to address money-laundering activities in its payment processing business.

[15] Barber, Gregory. (2019, November 16). *"Every Tech Company Wants to be a Big Bank - Someday, At Least: Apple, Google, Amazon, Facebook, and Uber are all Eyeing Financial Services in the Next Frontier.* Wired Magazine. Retrieved at https://www.wired.com/story/tech-companies-banks/

customers. A trade association representing the nation's largest tech companies urged the OCC to advance the special-purpose national bank charter for fintech companies.[16] Some have said that the Rakuten application re-energizes the conversation about charting of tech companies and sets an opening to allow closer ties between banks and commercial firms,[17] posing both systemic as well as fair lending and consumer protection risks. We cannot be sure of how large tech firms' integration would impact banking, but we can rest assured that it would not be a minor event.
In short, we are concerned that approval would make it harder for regulators to deny charters to other large technology companies in the future.

D. We should acknowledge the concerns that Rakuten Bank would pose to the privacy rights of consumers and hence safety and soundness

The Gramm-Leach-Bliley Act (GLBA) established a lower bar for data sharing restrictions between affiliates than unrelated businesses. Under GLBA, privacy rules permit information to be disclosed between a financial institution's divisions without prior notice of the right to opt-out.[18]
When Congress passed the GBLA, it did not contemplate a structure like the one proposed by Rakuten Bank. Congress meant to ease some of the restrictions between different financial activities within financial institutions, but did not intend to lighten the limits between a bank and its commercial businesses. Rakuten has non-financial affiliates, so the same bright lines for sharing may not work. This temptation will pit the interests of Rakuten against the privacy rights of its customers, and probably in a way that will not be apparent. Customers will not expect a different level of privacy protection between Rakuten Bank and other financial institutions.

Yet, it stands to reason that Rakuten will push for that privilege, as the ability to use predictive analytics that includes financial information and consumer retail shopping preferences will give Rakuten a competitive advantage. Indeed, Rakuten indicates that intention in the overview of its business model in the deposit insurance application: It states that "Rakuten seeks to bring its expertise in financial services to the United States market. While Rakuten owns 43 companies in the United States, for a select few of those U.S.-based companies, the strategic vision of Rakuten is to further develop its U.S. offerings by linking the existing internet services businesses with financial services to provide the same value-add to consumers in the U.S."

The lack of a privacy firewall also poses safety and soundness concerns. The data breach of an affiliate could potentially spread to the entire Rakuten ecosystem. If that happened, the public reaction could easily undermine their business model. The anger would damage Rakuten's affiliate network, and it stands to reason that the financial and reputational damage would cross over to Rakuten Bank. As noted earlier, the success of Rakuten Bank depends on the success of Rakuten's e-commerce platform. The breach of one would damage the public perception of both, and such a breach would then undermine the safety and soundness of the bank itself.

Additionally, the application states that employees of affiliates of Rakuten will provide "select administrative, operational, and other services including accounting, human resources, facilities

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[16] Financial Innovation Now. (2016, January 17). *Comment to the Office of the Comptroller of the Currency regarding Special Purpose National Bank Charters for Fintech Companies*. Retrieved at https://s22127.pcdn.co/wp-content/uploads/2017/01/fin-occ-charter-comment-letter-1-17-17.pdf
[17] Bank Policy Institute. (2020, November 6). "*Is it OK for Fintechs to Use Regulatory Arbitrage to Avoid Consolidated Supervision*?" retrieved at https://bpi.com/is-it-ok-for-fintechs-to-use-regulatory-arbitrage-to-avoid-consolidated-supervision/
[18] Federal Trade Commission. "*How to Comply with the Privacy of Consumer Financial Information Rule of the Gramm-Leach-Bliley Act*." Retrieved at https://www.ftc.gov/tips-advice/business-center/guidance/how-comply-privacy-consumer-financial-information-rule-gramm

management, legal, and technology support." That intention is but one more example of the small firewall between commerce and banking at Rakuten.

II. While the application should be denied on safety and soundness grounds, the bank has also failed to propose a sufficient CRA plan

As discussed in the prior section, the scale, scope and activities of the proposed bank present risks to the financial system that cannot be resolved and we urge that the FDIC deny this application on those grounds. In addition, the CRA plan submitted as part of that application is woefully insufficient for any bank, even one whose proposed structure did not raise these problems.

While we describe the unresolved challenges with the proposed bank's CRA plan below, we do not believe that application should be approved even if substantial changes to the CRA plan are made. Rather, this section seeks to highlight Rakuten's unwillingness to develop a meaningful CRA plan even after public feedback on two prior attempts. It also seeks to highlight the fundamental problem implementing CRA for ILCs, generally.

A. Rakuten does not demonstrate a willingness to use its ability to serve financial needs

The FDIC's statement of policy on applications for deposit insurance states that a factor for consideration of approval of a charter application is the willingness and ability of the applicant to serve those financial needs (credit and deposit needs).[19]

Receiving a bank charter is a privilege, not a right. Rakuten proposes a CRA strategic plan that focuses on community development, although it will be a significant retail lender offering credit card loans. Although Rakuten will be engaged in retail lending nationwide, it states that it does not want to be evaluated regarding whether its retail activity is serving LMI consumers and communities. In other words, it is asking the FDIC to refrain from evaluating its ability to serve financial needs. Since the application does not show a willingness to serve needs commensurate with the applicant's ability, the FDIC must reject the application in its current form.

In order for a bank to be adequately evaluated for the nationwide reach of its retail products, NCRC believes that it must not be allowed to designate only one assessment area (AA). The designation of one AA will not allow for a sufficient evaluation of Rakuten's retail activities and will also needlessly restrict its community development activities. NCRC proposes below that proposed banks engage in data analysis and dialogue with community-based organizations as a means of designating additional AAs that will encompass a significant amount of its lending activity.

The federal bank agencies have promoted mobile and online banking as a means of serving traditionally underserved populations. The agencies have devoted considerable time amending the Interagency Q&A document on CRA in order to encourage and evaluate online banking. Stakeholders, including financial technology trade associations, likewise tout online lender's ability to reach underserved populations.

Rakuten, however, discounts the possibility that its online business model will serve LMI populations, perhaps to lower expectations for its strategic plan. Rakuten cites a number of reasons why it cannot be evaluated under a traditional lending test. It states, "Because the traditional Lending Test is infeasible for most branchless banks, many existing branchless banks in Utah fulfill their CRA responsibilities through strategic plans."[20] Rakuten continues its efforts to tamp down expectations by stating, "Because very few

[19] FDIC. (2014, September 14). Op. cit.
[20] Application, p. 59.

of the Bank's clients live within the Bank's AA, and because many of the clients will not qualify as "low- or moderate-income" the Bank's strategy for complying with its CRA obligations will focus on making "community development" loans and investments."[21]

These explanations amount to self-fulling prophecies in terms of not being able to serve LMI customers. Because most customers will not be LMI, the bank asks the FDIC to allow it to opt out of any assessment of retail lending. However, most banks do not make the majority of their retail loans to LMI borrowers, in part, because the CRA definition of LMI income levels results in about 40% of the population being classified as LMI.

Using Rakuten's logic, most banks, including traditional branch-based lenders, hybrid lenders, and online lenders, could ask their regulatory agency to allow them to optout of retail lending tests since the majority of their loans are not for LMI borrowers. To declare in a charter application that a proposed bank will not even try to market its products to LMI borrowers or compare itself to online peers in its success in doing so is a clear abdication of its responsibilities per the FDIC's policy statement quoted above. Moreover, the fact that most of its borrowers will reside outside of its proposed AA is a result of the bank's own proposal to designate only one metropolitan area as its AA.

B. <u>While Rakuten emerges as a winner if its application is approved, consumers do not, and thus this application fails to meet a critical standard for charter approval</u>

Most fintechs offering digital-first bank accounts contend that their analytics advantage their ability to expand financial services to low-credit, thin-file, and no-file consumers. Rakuten's charter will not lead to any of those benefits. Rakuten will not introduce consumers to the banking system. Its consumer journey structure requires that individuals have a bank account as a precondition of shopping or to receive a post-purchase incentive rebate.

When examined through the lens of the standard account enrollment process, the mechanics of onboarding new accounts show how Rakuten's model is not suited to sign up previously unbanked households for a new bank account. Consumers must first purchase an item before they can receive a cashback transfer. Thus, all consumers who use Rakuten will necessarily already have a deposit account. It is impossible to use Rakuten without a bank account.

Rakuten's application concedes its inability to serve unbanked consumers' needs and conveniences through its standard business lines. The bank admits that "many of the clients will not qualify as 'low- or moderate-income.'" Similarly, it is unlikely that its NOW account will be attractive to previously unbanked consumers. The dim prospects for expanding access are understandable when seen in the context of how most consumers use Rakuten's e-commerce portal. Unbanked consumers are less likely to shop online in the first place, as it is not possible to make a purchase without a network-branded transaction account. If a consumer did have the initiative, there would be additional obstacles. Rakuten would have to sign an unbanked consumer up for a NOW account, mail the card out to the consumer, and then wait for the account to be activated and then to receive a deposit. Such a process could take two to four weeks, depending on when a consumer gets their next direct deposit. Unbanked consumers will not enroll their direct deposits on to a card that they cannot see. Banked consumers will probably use the accounts only as a secondary account.

Its application concedes to that fact, observing that its credit card will primarily serve "existing clients of the bank's affiliates."

[21] Application, p. 64.

Rakuten will market its NOW accounts to help consumers pay for goods and receive "cashback" from purchases made inside the Rakuten shopping portal. These are the two pieces necessary to allow Rakuten to internalize its merchant acquiring and transaction processing inside its e-commerce platform, thereby eliminating its need to share profits with Synchrony and avoid using PayPal to transfer rebates. Thus, the NOW accounts are not designed to help consumers or the unbanked, but instead would enable Rakuten to end its relationship with third parties.

Rakuten would realize a benefit from a charter, but it remains an open question if consumers see any benefit at all.

III. Assessment areas cannot be narrow and must include areas where a substantial amount of business is conducted

Rakuten proposes to establish Salt Lake City CMSA as its sole AA.[22] The CRA regulations do not prohibit a branchless bank from establishing AAs beyond its headquarters. AAs can include areas where substantial amounts of lending activity occur.[23] Again, if a bank's AA is restricted to the Salt Lake City CMSA, it is not demonstrating a willingness to serve the credit and deposit needs where it does business as required by the FDIC statement of policy.

Moreover, Rakuten is effectively representing that its headquarters is a mechanism akin to branches that generates lending transactions. The headquarters is not analogous to a branch and is thus invalid as a basis for establishing an AA. Instead, customers across the country are using the internet to access Rakuten's lending and deposit services. The Federal Reserve Board is currently contemplating creating additional AAs on CRA exams that consist of areas with significant amounts of loans or deposits. In the spirit of this proposed reform, Rakuten could likewise create AAs across the country that includes significant numbers of loans and deposits. These AAs should capture the great majority of a bank's lending and deposit activity.

NCRC's recent white paper suggests that branchless banks establish AAs using loan and deposit data. The AAs would represent significant levels of lending and/or deposit activity. NCRC also suggests that using loans per one thousand residents as a means of identifying AAs can be effective in assisting branchless banks in identifying areas (metropolitan areas or counties) where they make a high number of loans and which are relatively underserved by traditional banks.[24] If branchless banks establish AAs that are underserved by traditional banks, they would help to reduce disparities among CRA deserts and better-served areas. The objective is to establish AAs in a healthy diversity of areas, including larger metropolitan areas, smaller metropolitan areas and rural counties.

If Rakuten was interested in establishing AAs in good faith and in compliance with CRA's statutory purpose to extend credit to where it is needed most, it would publicly review its lending data on loan counts on a county and metropolitan level and engage community-based organizations and other stakeholders in a conversation about identifying areas for AAs. Instead, for the third time in a row, it opts for the minimal amount of work that is not responsive to needs by establishing just one AA and saying it may extend CRA activities to San Mateo, California if the market for community development financing is saturated in Salt Lake City, Utah.[25]

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[22] Application, p. 46.
[23] See § 345.41 (c) (2), Assessment area delineation, of the FDIC CRA regulation. A document retrieved at https://www.fdic.gov/regulations/laws/rules/2000-6500.html#fdic2000part345.41
[24] Josh Silver. (2021, January 19) *How Can Geographical Areas on CRA Exams Work for Branchless Banks*? Retrieved at https://www.ncrc.org/how-can-geographical-areas-on-cra-exams-work-for-branchless-banks/
[25] Application, pp. 59-60.

IV. CRA strategic plan goal setting must be rigorous and in relation to peers and needs

In its third try, Rakuten does not update its analysis of needs or performance context from its first application. Most of the data used in the application are from local studies of Salt Lake City CMSA's economic conditions and demographic characteristics conducted before 2019. The application ignores the pandemic and its devastating consequences when describing the types of community development activities Rakuten will undertake to respond to needs. This shows a lack of responsiveness to local needs and conditions. In addition to the mix of activities not changing to respond to changes in needs, the numerical targets for community development lending and investing remain the same as from the 2019 application.

A. Goals for community development lending and investment

As NCRC stated in its letter in 2019 in opposition to Rakuten's application, Rakuten's proposed level of community development lending and investment is modest compared to the peers it lists in its application. Rakuten suggests a level of new community development (CD) financing of 0.5% of assets for a Satisfactory rating and 0.65% of assets for an Outstanding rating. NCRC analyzed the levels of comparable CD financing for four of its peers listed in its application (Enerbank, Medallion, Celtic Bank, and Pitney Bowes Bank).[26] The average CD financing per assets for these banks over their strategic plan time period was 0.64% of assets. Two of the banks with above-average performance had ratios of 0.89% and 1.14%.

An Outstanding goal of 0.65% places Rakuten at around average performance compared to its peers. Given the size of Rakuten's parent and that one or more of its affiliates might be involved in its CRA activities, NCRC believes that 0.5% to 0.65% goals are too modest. We would suggest 0.65% for Satisfactory and 0.80% for Outstanding. It is hard to determine whether the bank should stretch even further because the strategic plan does not indicate an estimated asset level. If the bank is estimated to have more than $1 billion in assets, it should aim for at least 0.89% since this is the ratio achieved by one of its peers that have about $1 billion in assets.

B. Goals for credit card lending

Rakuten should have developed goals such as percent of credit card loans to LMI borrowers as part of its strategic plan. It should collect data on the number and percent of its borrowers that are LMI. The GAO reported that about a quarter of CRA exams include evaluations of consumer lending.[27] The exams include comparisons of the percent of consumer loans to the percent of AA populations that are LMI. Rakuten should consult with these exams to further develop their goals for credit card lending. Moreover, Celtic Bank, one of the peers Rakuten lists in its application, has a strategic plan that includes measurable goals such as percent of loans to small businesses in LMI tracts and to small businesses with revenues under $1 million.[28]

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[26] National Community Reinvestment Coalition. (2019, August 30). *NCRC Comment Letter on Rakuten Charter Application.* Retrieved at https://ncrc.org/ncrc-comment-letter-on-rakuten-charter-application/

[27] Government Accountability Office (2018, March 16) *Community Reinvestment Act: Options for Treasury to Consider to Encourage Services and Small-Dollar Loans When Reviewing Framework.* Retrieved at https://www.gao.gov/products/GAO-18-244

[28] CRA exam of Celtic Bank. (2017) Retrieved at https://www5.fdic.gov/CRAPES/2017/57056_171106.PDF

C. Goals for deposit accounts and service delivery

For its mobile banking, Rakuten should have adopted benchmarks based on specific guidance on how CRA examiners evaluate alternative delivery systems in the Interagency Questions and Answers Regarding CRA (Interagency Q&A).[29] The Interagency Q&A advises that CRA examiners will scrutinize whether a financial institution's alternative delivery systems are effectively delivering services to LMI populations by considering a variety of factors including: ease of access, cost to consumers, the range of services delivered, ease of use, the rate of adoption and use, and the reliability of the system.[30]

Rakuten should have established specific performance measures and goals for LMI consumers for each of these factors. Factors like the rate of adoption and use and the reliability of the system should have separate metrics and goals specifically set for rural as well as urban areas and for underbanked populations. The FDIC has an opportunity to use its recent Q&A guidance and insist that Rakuten's CRA plan incorporate these metrics so that the public can discern whether Rakuten's charter application would specifically meet the convenience and needs of LMI communities.

D. Goals for financial education and counseling

NCRC finds the community development service portion of the strategic plan to be sorely wanting and not responsive to community needs. An internet-based bank that specializes in online provision of financial products should have tailored a community development service program that focuses on increasing access to responsible mobile bank products and services.

Instead, Rakuten's draft strategic plan merely lists the number of community development service hours that will be performed annually during each of the three years. Each employee will commit up to six hours. In year one, a goal of 300 hours implies that Rakuten's Bank will have 50 U.S.-based employees. By year three, the goal of 400 hours implies that the number of employees will grow to about 66.[31] The goals in terms of hours do not indicate any comprehensive or strategic approach to delivering financial education in terms of helping the un- or under-banked access mobile banking. Instead, the goals in terms of hours suggest an ad hoc approach in which each employee will engage in activities, some of which will only be vaguely associated with the regulatory definition of community development.
NCRC expected a well-thought-out plan of how Rakuten would deliver financial education across its business footprint in additional AAs in urban and rural areas (chosen in a manner suggested above) and not just in Salt Lake City CMSA. Rakuten could also have used the FDIC's study of the under- and un-banked[32] for identifying areas in its footprint that would be targeted for community development services because they have high percentages of these populations. The plan should have either identified nonprofit or public sector partners for financial education activities.

In addition to hours of financial education counseling, any plan should include outcome measurements. How many classes will the hours commitments produce? How many LMI clients will be served? How many of the clients will have improvements in their accounting, credit scores, ability to secure loans, and other objective measures of achievement. How many accounts were opened? How much did participants save? How much did participants pay down debts? It is not enough to simply list staffing hours. There must be a commitment to a thoughtful program of financial education and coaching that produces

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29 *Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment Act Guidance.* OCC, Board of Governors of the Federal Reserve System, FDIC, Fed. Reg. 81, 142 at 48506. Retrieved at https://www.gpo.gov/fdsys/pkg/FR-2016-07-25/pdf/2016-16693.pdf
30 Interagency Q&A at 48542.
31 Application, p. 73.
32 Federal Deposit Insurance Corporation. (2020, October 19) *How America Banks: Household Use of Banking and Financial Services*. Retrieved at https://www.fdic.gov/analysis/household-survey/index.html

measurable improvements for the clients. These outcomes measurements should be based on the firm's own experience delivering counseling or based on the experience of its nonprofit partners.

V. Execution of the plan must involve robust community input

Rakuten's application lacks a detailed description of how it plans to engage the community in assessments of whether it is meeting community needs, which of course, is the central aim of the Community Reinvestment Act (CRA). The application states that periodically, members of community-based organizations will be invited to CRA committee meetings of Rakuten management staff. It also states that Rakuten staff serve on boards of, volunteer at, and engage community organizations, which helps Rakuten develop knowledge of community needs.[33] While commendable, this description is vague regarding how community-based organizations will inform and help shape the CRA strategic plan.

NCRC urges any applicant to provide a thoughtful and rigorous description of community engagement. In particular, NCRC urges applicants for charters to commit to establishing CRA committees composed of representatives of community organizations. These committees would meet on a periodic basis to consider a bank's CRA plan, to review the bank's progress in meeting the plan's goals, and to offer additional proposals for improving CRA performance.

NCRC notes that the CEO of the proposed bank met with us after submission of the first application but Rakuten has not reached out to us subsequently although we had commented on the second application. This is a further indication of the extent to which the bank hopes to pay minimal attention to reinvestment and consumer protection issues.

VI. Absence of discussion of fair lending or consumer protection compliance is unacceptable

Despite its third attempt, Rakuten continues to disregard the importance of compliance with fair lending and consumer protection compliance. The application lacks any discussion of these issues, although access to branchless banks presents challenges for underserved populations, including people of color, older adults and people with disabilities. Moreover, compliance with consumer protection laws becomes even more important because disclosures are often online without in-person or phone discussions of loan terms and conditions. Rakuten needs to explain in a clear and detailed manner how its online operations will comply with consumer protections, disclosure laws and regulations, as well as fair lending law. The application completely fails in this regard.

Federal interest rate preemption is another serious concern posed by any new ILC charter. Non-bank financial providers are increasingly looking to ILC charters with the primary intent to obtain federal interest rate preemption. Granting a behemoth like Rakuten the privilege of preemption will severely undermine state interest rate caps, paving a path for federal interest rate preemption far broader than the narrow scope Congress has intended.

VII. Approval of applications involving branchless banks is premature before the completion of an interagency CRA modernization rule

The Federal Reserve Board has issued an Advance Notice of Proposed Rulemaking (ANPR) on CRA that entails a more thoughtful approach to CRA evaluations for branchless banks than the approach utilized in this application. The Board asks the public whether consumer lending should be regularly evaluated on CRA exams.

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[33] Application, p. 45.

The Board is also considering establishing local AAs that capture significant amounts of lending activity beyond the headquarters of branchless banks. This important component of the Board's proposal would define how a branchless lender would be examined for its lending and community development activity. Given the evolving landscape in the regulatory approach to CRA, we believe that charter applications that would be affected by this rule are premature and should not be considered until the issue of AAs for branchless banks has been adequately proscribed on an interagency basis. If this application moves forward, it must, at minimum, address the meaningful AA designation and strategic plan goal setting described in this letter.

VIII. Conclusion

The FDIC must not approve this application. The application poses significant and insurmountable safety and soundness concerns. Its minimal CRA plan is not commensurate with the bank's ability. It lacks a fair lending approach or plan. Its approval would present substantial risk to the banking system and set a harmful example for future charter applications.

Thank you for the opportunity to comment on this important matter. If you have questions, contact me, Josh Silver (jsilver@ncrc.org) or Adam Rust (arust@ncrc.org) at 202-628-8866.

Sincerely,

Jesse Van Tol
Chief Executive Officer
National Community Reinvestment Coalition

And the following organizations
Center for Responsible Lending
National Consumer Law Center (on behalf of its low-income clients)
Affordable Homeownership Foundation, Inc.
Africa Diaspora Directorate
Alabama Association of Community Development Corporation
Alabama Small Business Development Initiative
Bankers Small Business CDC of California

Birmingham Business Resource Center
Birmingham City Wide
Building Alabama Reinvestment
Cash Community Development
CDC Small Business Finance
Commune Action Association of Alabama
Community Service Network Inc.
Consumers Council of Missouri
Continuum of Care Network NWI, Inc.
Delaware Community Reinvestment Action Council, Inc.
Durham Committee for the Affairs of Black People
Edgemoor Revitalization Cooperative, Inc.
Fair Finance Watch
Fair Housing Council of the San Fernando Valley
Friends of the African Union Chamber of Commerce
Georgia Advancing Communities Together, Inc.
Hamilton County Community Reinvestment Group
Harlingen CDC
Jewish Community Action
Justine Petersen Housing & Reinvestment Corp
Maryland Consumer Rights Coalition
Metropolitan Milwaukee Fair Housing Council
PathStone Enterprise Center
S J Adams Consulting
Sons and Daughters of Africa (SADA)
St. Louis Equal Housing and Community Reinvestment Alliance
The Historic Marble Hill Community Association
Universal Housing Solutions CDC
Woodstock Institute