August 18, 2025

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Attention: Comment Processing, Docket ID OCC–2025–0005

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Attention: Comments RIN 3064–AG13

Re: "Community Reinvestment Act Regulations" Proposed Rule, 90 Fed. Reg. 34086 (July 18, 2025)

To Whom It May Concern:

Governing for Impact ("GFI") submits this comment on the proposed rule, Community Reinvestment Act Regulations ("the Proposed Rule"), issued by the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation ("FDIC") (collectively, "the agencies").[1] GFI is a regulatory policy organization dedicated to ensuring that the federal government operates more effectively for working Americans.[2] We appreciate the opportunity to comment, and we write in opposition to the proposed rule.

The agencies' proposal would rescind a rule ("the 2023 Rule") that modernized regulations implementing the Community Reinvestment Act of 1977 ("CRA").[3] The CRA is a seminal civil rights law meant to address redlining—banks declining to extend credit to specific communities on equitable terms, particularly communities composed of racial or ethnic minorities—by encouraging banks to "meet[] the credit needs of [their] entire communit[ies], including low- and moderate-income neighborhoods."[4] Upon publishing the 2023 Rule, the agencies identified numerous objectives the new regulation would achieve, including

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[1] Community Reinvestment Act Regulations, 90 Fed. Reg. 34086 (July 18, 2025).
[2] Governing for Impact, https://governingforimpact.org/.
[3] Housing and Community Development Act of 1977, Pub. L. No. 95-128, 91 Stat. 1111.
[4] 12 U.S.C. 2903(a)(2).

"[s]trengthen[ing] the achievement of the core purpose of the statute."[5] And the agencies estimated that compliance with the 2023 Rule would cost the private sector less than $100 million—not even enough to trigger the statutory requirement that the agencies publish a budgetary impact statement.[6] The agencies today acknowledge that those "reasons for modernizing the CRA framework remain valid."[7] Yet without substantively reevaluating the costs and benefits of the 2023 Rule, the agencies now seek to rescind that carefully considered rule on the grounds that doing so would avoid regulatory uncertainty resulting from ongoing litigation against the prior rule and limit regulatory burdens.[8]

Such a slender reed cannot support wholesale rescission: First, the Proposed Rule's logic proves too much, as it would support rescission of *any* rule subject to litigation risk—that is to say, at least a third of major rules. Second, the exclusive focus on minimizing regulatory uncertainty and burden impermissibly elevates those considerations, which do not appear in the statute, above furthering the statute's "core purpose." Third, the Proposed Rule's proffered justification appears to be pretextual cover for the agencies' actual reason for rescinding the 2023 Rule—an unspecified "change in agency priorities."[9] As a result, the agencies should withdraw the Proposed Rule. If the agencies decide to reissue the Proposed Rule, they should explain what new "agency priorities" support rescinding the 2023 Rule.

I. The logic of the Proposed Rule would justify rescission of any mildly controversial rule, thus constituting a stock justification that undermines reasoned decisionmaking.

The agencies justified rescinding the 2023 Rule "primarily" on the grounds that litigation against the rule created "uncertainty."[10] In March 2024, ahead of the April 1 effective date of the new rule, Judge Matthew Kacsmaryk of the U.S. District Court for the Northern District of Texas entered a preliminary injunction against the rule in a challenge by bankers groups.[11] Though the agencies appealed the preliminary injunction to the Fifth Circuit in April 2024, they stayed that appeal in March 2025 pending completion of this new rulemaking.[12]

But the agencies do not claim that the 2023 Rule is unlawful, which can be a valid reason to rescind a rule.[13] Instead, they offer the novel justification that the existence of the litigation itself—regardless of the merits—creates uncertainty for banks and justifies rescission. GFI has been unable to identify any previous rulemaking justifying a rescission "primarily" on the grounds that doing so will mitigate uncertainty caused by litigation.[14] At any rate, this logic proves too much. Regulation always involves some uncertainty: As soon as an agency issues a regulation, there is risk the agency will be sued; once an agency is sued, there is risk a court will issue a

[5] Community Reinvestment Act, 89 Fed. Reg. 6574, 6575 (Feb. 1, 2024).
[6] 89 Fed. Reg. at 7106 (citing Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532).
[7] 90 Fed. Reg. at 34089.
[8] *Id.*
[9] *Id.* at 34089 n.28.
[10] *Id.*
[11] Tex. Bankers Ass'n v. Off. of the Comptroller, 728 F. Supp. 3d 412 (N.D. Tex. 2024).
[12] Defendants-Appellants' Unopposed Motion to Stay Pending Completion of New Rulemaking Proceedings, Tex. Bankers Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., No. 24-10367 (5th Cir. Mar. 28, 2025), ECF No. 165.
[13] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1910 (2020) (implying that unlawfulness may be a permissible ground to rescind a regulation).
[14] A student note observed that no rule before 2018 had relied on the similar justification of avoiding litigation risk. Timothy G. Duncheon, Note, *Litigation Risk as a Justification for Agency Action*, 95 N.Y.U. L. Rev. 193, 194 (2020). Relying on uncertainty caused by litigation is one step further removed from even that shaky justification, as it relies solely on assertions of confusion by regulated industry, rather than at least some independent analysis of legality by the agency itself. *See id.* at 205.

preliminary injunction; then, there is risk the court will strike down a rule. Nearly thirty percent of major rules faced challenges during the Biden and first Trump administrations[15]—and across both terms, the government lost more than half of those cases.[16] If those ever-present uncertainties provided valid reasons to rescind a rule, agencies would have a stock reason to trot out any time they were dissatisfied with a rule. Rather than fulfill the requirement that an agency reversing a prior position provide "good reasons for the new policy"—under what the Supreme Court has referred to as the "change in position doctrine"[17]—that stock justification would effect an end-run around the Administrative Procedure Act's reasoned decisionmaking requirement.

The agencies provide no limiting principle for the uncertainty justification, instead asserting that the "[s]pecific[]" impetus for the rescission is that the agencies "have observed confusion and inconsistent understandings among stakeholders."[18] That reasoning implies that any time regulated entities tell an agency they are "confus[ed]," or when different entities have "inconsistent understandings" of a rule, that industry confusion is enough to justify scrapping a rule. Nor does the posture of this particular rulemaking—following a single district court's preliminary injunction—provide a reasonable limiting principle: As the Supreme Court recently reiterated in *Lackey v. Stinnie*,[19] "preliminary injunctions do not conclusively resolve the rights of parties on the merits."[20] Rather, preliminary injunctions are "merely [meant] to preserve the relative positions of the parties until a trial on the merits."[21] Agencies may not wield the award of tentative, interim relief as an all-purpose excuse to rescind a disfavored rule.

Moreover, this argument will rarely make sense given agency rescissions may just as often lead to additional challenges to the rescission—thus perpetuating, not mitigating, regulatory uncertainty.[22] Community groups have already stated their opposition to the Proposed Rule.[23] And the last time the Trump Administration attempted a major CRA rulemaking, community groups did challenge the rule and obtained an order denying the government's motion to dismiss their claim.[24] The agencies, plowing ahead under conditions of uncertainty, risk simply starting the litigation merry-go-round anew. As the en banc Ninth Circuit held in considering an agency action premised on reducing the cost of litigation to the agency, the litigation-risk rationale cannot "withstand[] even the forgiving general requirement that the proffered reason for agency action not be 'implausible'" where "[a]t most, the [agency] deliberately traded one lawsuit for another."[25] At the very least, the agencies here "failed to consider" this "important aspect of the problem"[26]—that their attempt to avoid regulatory uncertainty could instead create more of it.

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[15] *Challenge Rates*, Inst. for Pol'y Integrity at N.Y.U. Sch. of L. (last updated July 15, 2025), https://policyintegrity.org/tracking-major-rules/challenge-rates.
[16] *Presidential Win Rates*, Inst. for Pol'y Integrity at N.Y.U. Sch. of L. (last updated July 15, 2025), https://policyintegrity.org/tracking-major-rules/presidential-win-rates.
[17] FDA v. Wages & White Lion Invs., LLC, 145 S. Ct. 898, 918 (2025).
[18] 90 Fed. Reg. at 34089.
[19] 145 S. Ct. 659 (2025).
[20] *Id.* at 667.
[21] *Id.*
[22] *See* Brief of Twenty-Four Law Professors as Amici Curiae in Support of Plaintiffs at 12, Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476 (9th Cir. 2018) (No. 18-15068), 2018 WL 1595535.
[23] Barbara Pianese, *Community Advocates Criticise Rollback of Community Reinvestment Act Reforms,* The Banker (Apr. 2, 2025), https://www.thebanker.com/content/4eb1bfb0-d3fc-445e-b27b-81cc66d5e029.
[24] Order Denying Motion to Dismiss, Nat'l Cmty. Reinvestment Coal. v. Off. of the Comptroller of the Currency, No. 20-cv-04186 (N.D. Cal. Jan. 29, 2021), ECF No. 45.
[25] *See* Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 969–70 (9th Cir. 2015) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).
[26] *State Farm*, 463 U.S. at 43.

II. The Proposed Rule fails to adequately evaluate the burdens and benefits of the 2023 Rule.

Agency decisionmaking must be "based on a consideration of the relevant factors," and may not "rel[y] on factors which Congress has not intended [the agency] to consider."[27] Although statutory language like "appropriate and necessary" may "require[] at least some attention to cost,"[28] agencies must regardless give appropriate weight to the statutory factors that are "pre-eminent"[29] or deserve "paramount importance."[30] The agencies failed to give those factors due consideration in issuing the Proposed Rule.

a. The agencies impermissibly elevated their interest in minimizing regulatory uncertainty and burden above the value of furthering the CRA's "core purpose."

The statute conferring the agencies' rulemaking authority provides that "[r]egulations to carry out *the purposes of this chapter* shall be published by each appropriate Federal financial supervisory agency."[31] The CRA's corresponding purpose section provides that the chapter's "purpose" is "to encourage [financial] institutions to help meet the credit needs of the[ir] local communities . . . consistent with the safe and sound operation of such institutions."[32] In full, it states:[33]

> (a) The Congress finds that—
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> > (1) regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business;
> >
> > (2) the convenience and needs of communities include the need for credit services as well as deposit services; and
> >
> > (3) regulated financial institutions have continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.
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> (b) It is the purpose of this chapter to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the

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[27] *Id.*

[28] Michigan v. EPA, 576 U.S. 743, 752 (2015).

[29] *State Farm*, 463 U.S. at 55.

[30] *See* Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 412–13 (1971); *see also* Nat. Res. Def. Council, Inc. v. EPA, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (Bork, J.) (holding that even though EPA was not "preclude[d]" from considering "cost and technological feasibility in setting emission standards," it was still arbitrary and capricious for EPA to "substitute[] technological feasibility for health as the primary consideration" where the statute prioritized health); Ctr. for Sci. in the Pub. Int. v. Dep't of the Treasury, 573 F. Supp. 1168, 1174 (D.D.C. 1983) ("Whatever the consideration given to costs and benefits, however, an agency may not substitute its policy judgment for the judgment that has already been articulated by Congress. In this case, Congress announced that the Department had the authority to issue regulations requiring producers of alcoholic beverages to adequately inform the consumer . . . . It did not condition such a grant of authority with a proviso that the regulations could be withdrawn if the costs to the industry turned out to be too high."), *vacated in different part sub nom.* Ctr. for Sci. in the Pub. Int. v. Regan, 727 F.2d 1161 (D.C. Cir. 1984).

[31] 12 U.S.C. § 2905 (emphasis added), *cited in* 90 Fed. Reg. at 34093.

[32] *Id.* § 2901(b). "[S]afe and sound operation" is a banking supervision term of art that refers to how banks manage their financial risks—not general regulatory burdens. *See generally Understanding Federal Reserve Supervision*, Bd. of Governors of the Fed. Rsrv. Sys. (Apr. 27, 2023), https://www.federalreserve.gov/supervisionreg/understanding-federal-reserve-supervision.htm. As defined in the statute mandating that "[e]ach appropriate Federal banking agency" prescribe "[s]tandards for safety and soundness," this concept "relat[es] to": "internal controls[;] . . . loan documentation; credit underwriting; interest rate exposure; asset growth; . . . compensation, fees, and benefits; . . . [and] asset quality, earnings, and stock valuation." 12 U.S.C. § 1831p–1(a).

[33] *Id.* § 2901.

> credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.

Separately, the Riegle Community Development and Regulatory Improvement Act of 1994 requires federal banking agencies, "[i]n determining the effective date and administrative compliance requirements for new regulations that impose additional . . . requirements on insured depository institutions" to "consider, consistent with the principles of safety and soundness and the public interest" both: "(1) any administrative burdens that such regulations would place on depository institutions . . . ; and (2) the benefits of such regulations."[34]

Taken together: The CRA establishes its "pre-eminent" or "paramount" purpose that any CRA regulations must "carry out": "encourag[ing] [financial] institutions to help meet the credit needs of the[ir] local communities." Per the catch-all statute governing all financial regulatory actions, the agencies must also consider administrative burdens alongside a regulation's "benefits." So although the Riegle Community Development and Regulatory Improvement Act requires the agencies to consider regulatory burdens in certain circumstances, nowhere does it mandate (or even permit[35]) the agencies to elevate vague appeals to regulatory certainty above the CRA's core purpose.

And regardless, the specific statute governing this regulatory action, as opposed to the generic statute governing financial regulation, prioritizes financial inclusion and nowhere reflects a congressional mandate to mitigate regulatory uncertainty or burden in the way the Proposed Rule prioritizes. Unlike the statute at issue in *Michigan v. EPA*, the CRA does not even include statutory boilerplate like "appropriate and necessary" that the Court said implicates cost.[36] Although the CRA does separately express Congress's interest in "regulatory relief" for small banks,[37] the 2023 Rule permitted small banks to continue using the previous 1995 Rule's lending test and data requirements, unless they opted into the new lending test.[38] Thus, the Proposed Rule does not provide relief for small banks, given that the 2023 Rule did not burden them in the first place.[39] The Proposed Rule is thus arbitrary and capricious for "prioritiz[ing] non-statutory objectives to the exclusion of the statutory purpose."[40]

b. The agencies do not adequately explain how they compared effectuating the statute's purpose to regulatory uncertainty and burden.

Even assuming the agencies are allowed to prioritize regulatory uncertainty and burden, their reasoning is arbitrary and capricious because the agencies failed to (1) substantiate and explain the extent of the uncertainty and burden beyond conclusory statements; and (2) meaningfully weigh an important aspect of

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[34] 12 U.S.C. § 4802(a).
[35] *Cf.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 467 (2001) ("We have therefore refused to find implicit in ambiguous sections of the [statute] an authorization to consider costs that has elsewhere, and so often, been expressly granted.").
[36] Michigan v. EPA, 576 U.S. 743, 752 (2015).
[37] *Id.* § 2908.
[38] 89 Fed. Reg. at 6582 ("Small banks would be evaluated under the status quo small bank lending test, unless they opted into the Retail Lending Test."); *id.* at 6584 ("The data requirements under the proposal for intermediate banks and small banks would remain the same as the current requirements.").
[39] As the Proposed Rule observes, "The agencies . . . recognized [in the 2023 Rule] that *a subset* of banks would have additional regulatory requirements." 90 Fed. Reg. at 34089 (emphasis added).
[40] Gresham v. Azar, 950 F.3d 93, 104 (D.C. Cir. 2020), *vacated as moot sub. nom* Becerra v. Gresham, 142 S. Ct. 1665 (2022).

the problem, namely, achieving the statute's purpose. The agencies' "conclusory or unsupported"[41] statements that they did consider those factors, or reasoning "based on speculation,"[42] do not satisfy the requirement that they provide a "satisfactory explanation for [their] action."[43] Merely "[s]tating that a factor was considered . . . is not a substitute for considering it."[44] And agencies must provide "sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."[45]

The agencies do not explain the extent of the regulatory uncertainty and burden that they seek to mitigate. Regarding uncertainty: The Proposed Rule does not attempt to estimate the amount of regulatory uncertainty, or the resulting costs of that uncertainty to banks, that it claims justifies scrapping the 2023 Rule. Instead, the agencies simply state that:[46]

- they "have observed confusion and inconsistent understandings";
- the "shifting CRA regulatory landscape . . . *may have* affected the planning, development, and management of banks' CRA programs"; and
- "if the litigation continues, banks *may need* to anticipate and plan for potential contingencies."

Those unsupported and speculative statements are not sufficient for reasoned decisionmaking or adequate notice. Commenters cannot meaningfully weigh in on the agencies' argument that regulated entities are experiencing regulatory uncertainty where the agencies have failed to provide "factual detail," such as how many regulated entities have complained, what specifically they are confused about, and the like.

Similarly, the Proposed Rule fails to explain the cost of the regulatory burden it seeks to lift—implicitly conceding that the cost is very low. The 2023 Rule concluded that compliance costs in the new regulation's first year would total $91.8 million, provided a breakdown of that total between several categories of costs, and updated its estimates in response to commenters who argued that the NPRM had underestimated costs.[47] That figure was less than the $100 million dollar mark, above which it would have been deemed a "significant regulatory action[]" for which the agencies would have needed to prepare a budgetary impact statement.[48] The Proposed Rule does not call into question that cost estimate, instead merely asserting that the regulatory burden of reinstating the already-in-force 1995 Rule would be *de minimis*, and thus doing so "would better limit overall regulatory burden on banks at this time given the totality of the circumstances."[49] But even if the $92 million per year saved is greater than the *de minimis* regulatory cost of reinstating the 1995 Rule, the agencies never explain why that small savings in lower regulatory cost is worth abandoning the 2023 Rule and its conceded benefits to achieving the CRA's purpose.

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[41] Nat'l Shooting Sports Found., Inc. v. Jones, 716 F.3d 200, 214 (D.C. Cir. 2013) (quoting McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182, 1187 (D.C. Cir. 2004)).
[42] Del. Dep't of Nat. Res. & Env't Control v. EPA, 785 F.3d 1, 11 (D.C. Cir. 2015).
[43] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
[44] Getty v. Fed. Sav. & Loan Ins. Corp., 805 F.2d 1050, 1055 (D.C. Cir. 1986).
[45] Nat'l Lifeline Ass'n v. FCC, 921 F.3d 1102, 1115 (D.C. Cir. 2019) (quoting Fla. Power & Light Co. v. United States, 846 F.2d 765, 771 (D.C. Cir. 1988).
[46] 90 Fed. Reg. at 34089 (emphasis added).
[47] 89 Fed. Reg. at 7106 & n.1644.
[48] 2 U.S.C. § 1532.
[49] 90 Fed. Reg. at 34089.

On the other side of the ledger, the agencies provide no satisfactory explanation as to how they assessed whether the Proposed Rule would achieve CRA's purpose—certainly an "important aspect of the problem."[50] The Proposed Rule states that "the agencies took into account that any changes to the proposed CRA regulatory framework must continue to focus on the CRA's purpose."[51] But the agencies' only attempt to justify the Proposed Rule as a means to achieving that purpose is their claim that "banks *might be* devoting resources toward preparing for the [2023 Rule] that could otherwise be allocated toward helping to meet the credit needs of banks' communities."[52] As a result, returning to the 1995 Rule (the agencies assert) "*could* better facilitate the purpose of the CRA."[53] On the other hand, the agencies recognize that the "reasons for modernizing the CRA framework"—including, presumably, that the 2023 Rule "[s]trengthen[ed] the achievement of the core purpose of the statute"[54]—"remain valid."[55] Do the funds that banks are allegedly diverting from lending toward regulatory compliance outweigh the substantial benefits the 2023 Rule identified?[56] The agencies do not say. And the Proposed Rule does not provide support for its claim that banks "might be" diverting funds, indicating that this claim may rest on nothing more than speculation. The agencies' bare statement that banks "might" be spending lending dollars on compliance, and that rolling back the 2023 Rule "could" better effectuate the CRA's purpose, renders their action arbitrary and capricious.

And in comparing both sides of the ledger, the Proposed Rule does not make clear how it balanced speculative regulatory uncertainty and low regulatory burden against the 2023 Rule's conceded substantive benefits. The agencies' only statutory hook for considering regulatory burden, the Riegle Community Development and Regulatory Improvement Act, requires the agencies to consider *both* that burden and the regulation's benefits. The Proposed Rule recognizes that the 2023 Rule already conducted this balancing inquiry: it "sought to balance the increased regulatory burden imposed by the revised framework with benefits associated with the agencies' policy objectives for updating the CRA framework."[57] But without reassessing that balance, the agencies do nothing to explain why they prioritized "limit[ing] overall regulatory burden" and "restor[ing] much needed certainty" over the CRA's textually recognized purposes. If the 2023 Rule already imposed a fairly light regulatory burden relative to the policy objectives it achieved—which the agencies do not contest—it would be arbitrary and capricious to sacrifice the latter in favor of the former. And if the agencies do seek to reassess the 2023 Rule's factual findings regarding the balance between statutory purpose and regulatory burden, they would need to provide the "more detailed justification" required when a "new policy rests upon factual findings that contradict" prior findings.[58]

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[50] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
[51] 90 Fed. Reg. at 34089.
[52] *Id.* (emphasis added).
[53] *Id.* (emphasis added).
[54] 89 Fed. Reg. at 6575.
[55] 90 Fed. Reg. at 34089.
[56] The agencies concluded in the 2023 Rule that the new regulations would: "[1] Strengthen the achievement of the core purpose of the statute; [2] Adapt to changes in the banking industry, including the expanded role of mobile and online banking; [3] Provide greater clarity and consistency in the application of the regulations; [4] Tailor performance standards to account for differences in bank size and business models and local conditions; [5] Tailor data collection and reporting requirements and use existing data whenever possible; [6] Promote transparency and public engagement; [7] Confirm that CRA and fair lending responsibilities are mutually reinforcing; and [8] Promote a consistent regulatory approach that applies to banks regulated by all three agencies." 89 Fed. Reg. at 6575.
[57] 90 Fed. Reg. at 34089.
[58] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

III. The Proposed Rule's thin regulatory uncertainty justification appears to be a pretext for the agencies' unspecified policy disagreements with the 2023 Rule.

As a general matter, agencies must "disclose the basis" for their actions.[59] They may permissibly make decisions based on "political considerations" like "an Administration's priorities," and may have "unstated reasons" in addition to its "stated reasons."[60] But offering a "contrived" reason that "played an insignificant role in the decisionmaking process"[61] violates the APA's requirement that agency action be "reasonable and reasonably explained."

The Proposed Rule's claim that it was "precipitated primarily by the uncertainty created by the pending litigation" appears pretextual given the agencies' admission in the footnote appended to that claim: The agencies "note that a change in agency priorities at the FDIC and OCC has taken place since the agencies adopted the 2023 CRA Final Rule."[62] Given the weakness of the agencies' analysis of the claimed regulatory uncertainty and burden, the "agency priorities" hinted in this footnote appear to be the actual impetus for this rulemaking. Current FDIC Acting Chairman Travis Hill may have previewed those new "priorities" in his October 2023 statement accompanying his vote in opposition to the 2023 Rule.[63] He listed several substantive policy disagreements with the 2023 Rule, arguing that the rule's curved grading system was too stringent and that the rule would disincentivize banks from providing digital banking services to some communities.[64]

Moreover, the agencies' conduct belies their suggestion that concerns about regulatory uncertainty and burden motivated their decision to rescind the 2023 Rule. The agencies continued to defend the 2023 Rule for nearly a year following the district court's preliminary injunction that had purportedly generated a lack of clarity.[65] And if regulatory uncertainty was the agencies' core concern, the agencies could have considered providing clarity by "postpon[ing] the effective date" of the 2023 Rule until a meaningful time after the conclusion of the *Texas Bankers* litigation.[66] That the agencies instead proposed to entirely rescind the 2023 Rule provides further indication that the regulatory uncertainty rationale is pretextual—and renders the rule arbitrary and capricious even on its own terms for its failure to consider alternatives.[67]

The agencies should explain the extent to which their unidentified policy disagreements motivated their decision to rescind the 2023 Rule. But if regulatory uncertainty and burden are too thin a justification for this rescission to stand on, those new priorities would likely be an even weaker justification. The agencies do not identify what the new "priorities" are, their role in precipitating this rescission, and how they compared to the other

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[59] Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167–68 (1962) (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941)).
[60] Dep't of Com. v. New York, 588 U.S. 752, 781 (2019).
[61] *Id.* at 782, 784.
[62] 90 Fed. Reg. at 34089 n.28.
[63] Travis Hill, Vice Chairman, FDIC, Statement on the Final Rule on Community Reinvestment Act Regulations (Oct. 24, 2023), https://www.fdic.gov/news/speeches/2023/spoct2423c.html.
[64] *Id.*
[65] *Compare* Tex. Bankers Ass'n v. Off. of the Comptroller, 728 F. Supp. 3d 412 (N.D. Tex. 2024) (imposing a preliminary injunction on March 29, 2024), *and* Reply Brief for Defendants-Appellants, Tex. Bankers Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., No. 24-10367 (Oct. 9, 2024) (continuing to defend the 2023 Rule), *with* ECF No. BL-88; Defendants-Appellants' Motion to Postpone Oral Argument, *Tex. Bankers Ass'n*, No. 24-10367 (5th Cir. Jan. 23, 2025), ECF No. BL-117 (moving to postpone oral argument "[i]n light of certain recent and anticipated leadership changes at the FDIC and OCC following the change in Presidential administration," *id.* ¶ 4).
[66] 5 U.S.C. § 705.
[67] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 51 (1983).

considerations discussed in both the 2023 Rule and the Proposed Rule. By claiming that mitigating uncertainty and burden were the Proposed Rule's "two major objectives" while providing no reasoned explanation for the agencies' new "priorities,"[68] the agencies offer a "distraction" rather than a "genuine justification[]" for their decision, depriving "the interested public" of the opportunity to "scrutinize[]" the agencies actual reasons for acting.[69] GFI requests that the agencies withdraw the Proposed Rule, and if they decide to promulgate a new proposal, disclose any new "agency priorities" and explain how they factored into the agencies' decision to rescind the 2023 Rule.

IV. Conclusion

The agencies use this Proposed Rule to deploy a novel justification for rescinding a rule: Rather than adhere to the Supreme Court's "change-in-position doctrine," the agencies' logic would create a workaround permitting agencies to rescind rules any time regulated entities express confusion or face the risk that the rules governing them could change as a result of litigation. But such risks are inherent to any regulatory scheme—it would be absurd for those inherent risks to justify any and all regulatory rollbacks. Even assuming that regulatory uncertainty could be a valid reason to rescind a rule, the agencies failed to explain how they balanced that consideration against the 2023 Rule's admittedly valid aims, rendering the Proposed Rule arbitrary and capricious. Finally, the agencies' statements, the Proposed Rule's timing, the agencies' prior posture in litigation, and their failure to consider alternatives raise the prospect that regulatory uncertainty is in fact pretext for a policy disagreement with the 2023 Rule. Though such a disagreement could be a basis for rescission, the agencies must own up to their actual reasons for rescission, rather than present a pretextual one.

As a result, we request that the agencies withdraw the Proposed Rule and, if they choose to reissue the Proposed Rule, explain the "agency priorities" mentioned in footnote 28 and describe the role they played in precipitating this rulemaking.

Sincerely,

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[68] *Id.* at 34089 & n.28.
[69] Dep't of Com. v. New York, 588 U.S. 752, 785 (2019).