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OCC Goes Its Own Way on New Community Reinvestment Act Regulations

Jeffrey P. Taft, Stephanie C. Robinson, and Kerri Elizabeth Webb*

This article summarizes the changes to the final rules overhauling the Community Reinvestment Act and the implications for national banks and federal savings associations subject to the final rule.

The Office of the U.S. Comptroller of the Currency ("OCC") has announced its final rule overhauling the Community Reinvestment Act ("CRA") regulations.[1] The CRA requires insured depository institutions to participate in investment, lending, and service activities that help meet the credit needs of their assessment areas, particularly low- and moderate-income ("LMI") communities and small businesses and farms. The last major revisions to the CRA regulations were made in 1995. This article summarizes the changes to the final rules and the implications for national banks and federal savings associations subject to the final rule.

Notably, the OCC is the only agency updating its CRA regulations, even though the Federal Deposit Insurance Corporation ("FDIC") and the Board of Governors of the Federal Reserve System (the "Fed") also have regulations implementing the CRA. Although the FDIC and OCC together issued a joint proposed rulemaking on December 12, 2019, the FDIC declined to join the OCC in promulgating this final rule. And while the Fed has acknowledged the need for CRA reform, it has consistently declined to participate in the FDIC and OCC's proposal. As a result, the final rule will only apply to OCC-supervised banks, a significant number of which do not have to comply with most aspects of the rule and instead will be assessed under the existing framework.

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[1] OCC, Community Reinvestment Act Regulations, 85 Fed. Reg. 34,734 (June 5, 2020), https://www.federalregister.gov/documents/2020/06/05/2020-11220/community-reinvestment-act-regulations.

The OCC received more than 7,500 comments to its Notice of Proposed Rulemaking, reflecting disparate (and very strong) points of view, from banks to community groups to other interested parties.[2] Although most commenters evidently disagreed with the approach outlined in the proposal, the agency ultimately agreed to move forward with the issuance of the final rule. The OCC did not completely ignore critics of the proposed rule, though; in response to significant criticism by community groups, the OCC scaled back its proposed numbers-based measurements of CRA activity, returning some discretion to examiners to judge a bank's overall compliance using qualitative measures.

On June 29, 2020, the U.S. House of Representatives (the "House") passed a resolution disapproving of the OCC's final rule.[3] Even if the Senate also passes this resolution, President Donald Trump will likely veto it. Therefore, the House resolution will likely fail to kill the OCC's final rule.

SIGNIFICANT UPDATES TO THE CRA REGULATIONS

While the OCC rushed to finalize its rule, it believes that its final rule reflects more than a decade of dialogue about how to make the CRA work better. Through the new framework, the OCC seeks to shift the CRA regulatory scheme from a primarily subjective system to a primarily objective one. Pursuant to this purpose, the OCC issued the rule with four main goals:

(1) To clarify and expand the bank loans, investments, and services that qualify for CRA credit;

(2) To update the delineation of assessment areas to reflect the current banking environment;

(3) To provide a more consistent and objective method for evaluating CRA performance; and

(4) To increase timeliness and transparency in CRA reporting.

Each of these areas is discussed below.

Expansion of Qualifying Activities

The final rule encompasses qualifying activities that currently receive CRA consideration, as well as additional activities, such as certain types of consumer lending; financial literacy and education or homebuyer counseling; and activities that finance or support qualified opportunity funds and benefit LMI

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[2] FDIC & OCC, Community Reinvestment Regulations, 85 Fed. Reg. 1,204 (Jan. 9, 2020).

[3] H.J. Res. 90, 116th Cong. (2020).

qualified opportunity zones.[4] Pro-rata credit is available for community development activities that provide some benefit to, but do not primarily benefit, specified populations, entities, or areas. The final rule also will not require or provide the option for banks to consider affiliates' activities for CRA credit. This is different than the existing framework.

Under the final rule, consumer loans provided to LMI individuals and to individuals and entities located in tribal or native lands are considered qualifying activities for CRA purposes. Unlike the proposal, however, the final rule specifies that credit cards and overdraft products are not qualifying activities. The point of excluding these products was twofold: (1) to reduce the burden associated with information gathering, and (2) to ensure that banks have an incentive to engage in a variety of CRA activities that benefit LMI individuals, rather than try to rely solely on high-dollar credit card lending.

Another new factor is whether activities are located in a CRA desert, defined as an area with significant unmet community development or retail lending needs and where: (1) few banks have branches or non-branch deposit-taking facilities; (2) there is less retail or community development lending than would be expected based on demographic or other factors; or (3) the area lacks community development organizations or infrastructure. The final rule provides multipliers for qualifying activities in CRA deserts, provides that the OCC will maintain an illustrative list of CRA deserts, and includes a process for banks to obtain confirmation that an area meets the definition of a CRA desert.

The final regulations increase the maximum amount of a small loan to a business for CRA consideration from $1 million to $1.6 million and the maximum amount of a small loan to a farm from $500,000 to $1.6 million. The OCC similarly increased the maximum annual revenue for a business or

[4] The OCC pointed out that several of the comments it received were based on the commenters' misperception or misunderstanding of the proposal. In those instances, the OCC attempted to provide clarity. For example, the OCC received numerous comments regarding one of the examples in its proposed illustrative list of CRA-eligible activities: investment in a qualified opportunity fund established to finance improvements to an athletic stadium in an opportunity zone that is also an LMI census tract. Commenters expressed concern based on the misperception that the proposal would have created a new incentive by giving banks CRA credit for financing athletic activities. The OCC clarified that under the existing framework, banks receive CRA credit for financing involving athletic facilities that increase opportunities for economically-disadvantaged individuals and areas, such as repairs to high school and municipal athletic facilities that serve local communities. The OCC made a corresponding change in the illustrative list to better reflect the types of athletic activity financing historically approved for CRA credit: investment in a qualified opportunity fund, established to finance improvements to an athletic facility owned and operated for community benefit by a local nonprofit in an opportunity zone that is also an LMI census tract.

farm to be considered a "small business" or "small farm" under the regulations from $1 million to $1.6 million. The OCC originally had proposed to increase each of these thresholds to $2 million. After receiving comments that the justification for this precise amount was unclear, the OCC used inflation figures calculated by the Government Accountability Office to arrive at the final thresholds. The OCC will adjust the thresholds for inflation once every five years.

The OCC will maintain a publicly available, non-exhaustive, illustrative list of examples of qualifying activities that meet the rule's qualifying activities criteria, as well as examples of activities that the OCC has determined, in response to specific inquiries, do not qualify. The rule also establishes a process for a bank to submit a form through the OCC's website to seek agency confirmation that an activity is a qualifying activity, and contemplates a 60-day approval time for a request for consideration of a new activity.[5] In response to comments, the OCC reiterated that the list is illustrative only, not a complete list of activities that meet the regulatory criteria: "no such list exists, nor will it exist under the final rule." Banks will receive CRA credit for any activity that satisfies the qualifying activities criteria, regardless of whether it is on the list.

Expansion of Assessment Areas

Under the existing framework, a depository institution's assessment area is defined by the institution's physical branch locations and the communities served at those locations. The new framework requires banks that collect 50 percent or more of their total retail domestic deposits from outside of their physical branches to delineate additional assessment areas in those areas where they draw five percent or more of their deposits. The final rule allows a bank to delineate its deposit-based assessment areas at any geographical level up to the state level. This change is intended to reflect the ongoing shift away from "brick and mortar" branch locations to online banking and other similar technologies.

New Evaluation Method

The existing regulations impose various CRA performance requirements based on a bank's size and activities. Under the existing framework, banks are divided into the following categories: small institutions, intermediate small institutions, large institutions, wholesale and limited purpose institutions, and institutions with strategic plans.[6] The existing framework directs examiners to

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[5] Subject to a 30-day extension.

[6] Banks can apply to their primarily financial regulator to be evaluated under a strategic plan, which provides banks with the option to tailor their CRA objections based on the needs of a

primarily consider the geographic and borrower distribution of the number of a bank's retail lending activities and the impact of the dollar amount of retail lending and community development activities, as well as the hours of community development services engaged in by a bank. Examiners also utilize qualitative factors, such as responsiveness, innovativeness, and complexity, to assess a bank's overall compliance with the CRA. The examiner then determines a bank's CRA rating based primarily on a curve compared to its peers' performance.

The new framework maintains the distinction between small banks, intermediate small banks (renamed intermediate banks), large banks, and wholesale and limited purpose banks and retains the strategic plan option. However, the rule adjusts the threshold for small banks to $600 million and the threshold for intermediate banks to $2.5 million. The new evaluation method does not apply to wholesale and limited purpose banks, which instead will be subject to the performance standards under the existing framework. Small and intermediate banks similarly are not required to switch to the new evaluation framework, but can choose to opt in.

The OCC designed the new framework to reduce the subjectivity involved in CRA performance evaluations. The final rule provides objectivity by setting specific performance standards upon which examiners can base their judgments in determining ratings. The framework requires banks to use the following formula to measure value of qualifying activities as a dollar amount by adding: (1) the quantified value of community development and retail loans on the bank's balance sheet for at least 365 days, and community development investments on the bank's balance sheet; (2) 100 percent of the origination value of retail loans sold within 365 days of origination; and (3) community development services, monetary donations, and in-kind donations. Certain qualifying activities included in this calculation may be eligible for a multiplier, thus giving the bank increased CRA credit for those activities. Such activities include those that are particularly responsive to community needs, innovative, complex, provide particular benefits to LMI communities, or involve minority depository institutions, women's depository institutions, or low-income credit unions, among others.

The second metric, which quantifies retail loans sold within 365 days of origination based on their full origination value, is a significant change from the proposed rule. The proposal would have generally quantified qualifying activities based on their average month-end on-balance-sheet value and would have quantified retail loans that were sold within 90 days of origination at 25

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bank's community and its own capacities, business strategies, and expertise.

percent of the dollar value at origination. This provision was one of the most controversial aspects of the OCC's proposal. Both industry and community groups commented that the proposed rule could result in fewer retail loan originations and penalize banks that originate loans to sell in the secondary market. Commenters also argued that the proposal undervalued originations for retail loans that are sold, and disfavored the originate-to-sell business model, particularly with regard to mortgage loans. In consideration of these comments, the agency analyzed 2018 Home Mortgage Disclosure Act data and found that originating and selling retail loan accounts for a significant portion of the LMI home mortgage market under the 90-day weighting method may not sufficiently reflect the magnitude of the origination dollar volume for banks that utilize the originate-to-sell business model.

Similarly, commenters argued that the proposed rule undervalued activities in which banks served as syndicators or sponsors of funds supporting Low Income Housing Tax Credit ("LIHTC") and New Markets Tax Credit ("NMTC") projects. The OCC revised the final rule to provide credit for the total dollar value of a fund in the year it was originated, without the application of a multiplier, for banks serving as syndicators or sponsors of funds supporting LIHTC and NMTC projects and provides that the syndicating or sponsoring bank will also receive additional credit for the LIHTC or NMTC investment after the transaction is complete.

Although the OCC's proposal contained benchmarks for CRA evaluations, specific community development minimum requirements, and thresholds for retail lending distribution tests, the OCC eliminated these provisions in response to comments that the values were not supported by adequate evidence. At a later date, after additional data collection and analysis, the agency will set the objective thresholds and benchmarks for the level of performance necessary to achieve each rating category; these thresholds and benchmarks will be applied as of the compliance date applicable to each bank.

The final rule does not include a service test, which under the current framework is used to evaluate banks' retail banking services and delivery systems and community development services. Instead, the OCC will account for retail banking services and delivery systems qualitatively as part of performance context. Community development services will be quantified based on the standard figure for the median hourly compensation value for the banking industry calculated using Call Report data ($38 based on 2019 data). In addition, the quantified dollar value of CD services will be adjusted by multipliers, as applicable.

Enhanced Data Collection, Recordkeeping, and Reporting Requirements

The final rule imposes unique data collection and reporting requirements for large, small and intermediate, and wholesale and limited purpose banks. As a general matter, all banks under the OCC's supervision will be required to collect and maintain CRA data on a machine-readable form that the OCC will provide. The OCC will also provide additional guidance on the specific data banks will need to collect and maintain and the format in which such data will need to be recorded.

- *Requirements for large banks, banks with strategic plans, and banks that opt-in to the new framework.* These banks will be required to report, at the end of each quarter, the value of the bank's retail deposit account and the physical address of each depositor. Retail domestic deposit accounts must be geocoded to the county level, rather than the census tract level. Banks must collect and maintain certain balance sheet information. The final rule also requires banks to collect and maintain the quantified dollar value of activities before applying multipliers, as well as an indicator of whether a multiplier applies. Multipliers will only apply to community development activities if the bank maintains approximately the same level of these activities as in the prior period. In addition to collecting data for qualifying activities,[7] banks must also collect non-qualifying home mortgage and consumer loan origination data and collect, maintain, and report information on the number of home mortgage loans originated in LMI census tracts. In contrast to the current framework, under which examiners use data provided by a bank to prepare a performance evaluation and ascertain the bank's CRA rating based on that evaluation, the final rule requires banks to collect, maintain, and report their presumptive ratings, the results of their CRA evaluation measure calculations and retail lending distribution tests, and community development minimum calculations at the end of each evaluation period. Examiners will then validate the presumptive ratings.
- *Requirements for wholesale and limited purpose banks.* These banks will be required to collect and maintain information about community development activities, including an indication of which new qualifying activity criteria these activities satisfy. The rule also requires the banks to collect and maintain information on retail domestic deposits,

[7] Activities on a bank's balance sheet prior to the effective date of the final rule, other than home mortgage loans and consumer loans provided to middle- and upper-income individuals in LMI census tracts, will be considered qualifying but will be subject to more limited data collection, recordkeeping, and reporting requirements.

including the physical address of the depositor and their assessment areas. These banks must report information on their community development loans and investments, assessment areas, and performance context.

- *Requirements for small and intermediate banks.* These banks will be required to collect and maintain information on retail domestic deposits, including the physical address of the depositor.

IMPLICATIONS FOR DEPOSITORY INSTITUTIONS AND THE FEDERAL BANKING REGULATORS

The OCC likely finalized the final rule without the support of the FDIC in an effort to complete the rule before Comptroller of the Currency Joseph Otting's resignation and to prevent a potentially incoming Democratic Congress from overturning the final rule. Shortly after issuing the final rule, Otting announced his resignation.[8] Brian P. Brooks, who joined the OCC in March 2020, became the Acting Comptroller of the Currency upon Otting's resignation on May 29, 2020. Under the Congressional Review Act, Congress can pass a joint resolution of disapproval which, if enacted, prevents the rule from going into effect.[9] The House of Representatives has passed a resolution, but the Senate has not yet voted on it. Even if the Republican-controlled Senate passes the resolution, President Trump will likely veto Congress' attempt to overrule the OCC's rulemaking. An override of a Presidential veto is almost certainly out of the question, as the resolution passed the House by a 230-179 vote. Because Congress can only issue this joint resolution within a statutorily defined period of time, generally within 60 days of session after the agency publishes the rule, the OCC effectively eliminated the risk that the next Congress could overturn the rulemaking if the Democrats, who have largely opposed the rule,[10] win a majority of congressional seats in the November 2020 election.

The OCC's move to go its own way on CRA updates is unprecedented in terms of CRA regulations, which the banking regulators have historically issued jointly. Now, for the first time, banks will be subject to different CRA regulatory schemes not only depending on the size and purpose of the bank but

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[8] OCC, Comptroller of the Currency Joseph Otting to Step Down, Brian P. Brooks to Become Acting Comptroller of the Currency on May 29, 2020 (May 21, 2020), https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-66.html.

[9] 5 U.S.C. §§601 et seq.

[10] Maxine Waters et al., Letter to Comptroller Otting and Chairman McWilliams (Apr. 7, 2020), https://financialservices.house.gov/uploadedfiles/hfsc_cra_letter_to_occ_fdic_040620.pdf.

also depending on the bank's prudential regulator. Exacerbating the issue, the FDIC could enact a variation of the rule it jointly proposed with the OCC, but that would likely contain differences from the OCC's final rule. The Fed also likely intends to update its CRA regulations eventually, but it almost certainly will not adopt a rule similar to the OCC's, based on the Fed's criticisms of the proposal. Differences between the CRA regulatory schemes and how they are implemented are likely to cause confusion and increase uncertainty for banks attempting to comply with the CRA, as well as for other CRA stakeholders such as investment funds, developers, businesses, farms, and community groups seeking funding and support. Banks may experience challenges in determining which regulatory scheme they fall under and establishing appropriate policies and procedures for compliance, particularly if a bank experiences a shift in size or purpose. Critics of the OCC's new regulatory scheme, including the Fed, are concerned that the framework's emphasis on the dollar amount of qualifying activities will reduce banks' incentive to invest in LMI communities and other markets important to the CRA's purpose of addressing credit inequities.[11] Community groups have also come out in opposition to the new framework; some of these groups reportedly plan to sue the OCC over the final rule.[12]

Notwithstanding these inevitable challenges, the rule will become effective on October 1, 2020.[13] The deadline for compliance with the rule varies depending on the regulatory provision and type of bank, with some requirements not taking effect until 2024. The OCC provided the chart herein to clarify the various compliance deadlines.

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[11] Governor Lael Brainard, Strengthening the Community Reinvestment Act by Staying True to Its Core Purpose (Jan. 8, 2020), https://www.federalreserve.gov/newsevents/speech/brainard20200108a.htm.

[12] Brendan Pedersen, Community groups plan to sue OCC over CRA rule, American Banker (May 21, 2020), https://www.americanbanker.com/news/community-groups-plan-to-sue-occ-over-cra-rule.

[13] The rule's effective date is the first day of the first calendar quarter that begins at least 60 days after the issuance of the final rule, which is also at least 30 days after its publication in the *Federal Register*.

Compliance Dates				
Bank Type	**Qualifying Activities Quantification, Qualifying Activities Value, General Performance Standards, and Presumptive Ratings**	**Assessment Area, Data Collection, and Recordkeeping Requirements, as Applicable**	**Reporting Requirements**	**All Other Requirements**
Banks other than small, intermediate, wholesale, and limited purpose banks	January 1, 2023	January 1, 2023	January 1, 2023	October 1, 2020
Wholesale and limited purpose banks	Not Applicable	January 1, 2023	January 1, 2023	October 1, 2020
Small and intermediate banks	Not Applicable	January 1, 2024	Not Applicable	October 1, 2020

As with any other rule, the OCC also plans to develop webinars and other guidance and resources to help ease the transition to the new framework.