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Our Perspectives

Commentary on Economic and Regulatory Policies Affecting Financial Services Companies

OCC Takes the First Step Towards Modernizing CRA[1]

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The Office of the Comptroller of the Currency (OCC) released an advance notice of proposed rulemaking on reforming the Community Reinvestment Act regulatory framework (CRA ANPR)[2]. This begins a potentially substantial overhaul of the CRA regulations, including a new approach to assessing a bank's performance in meeting the credit needs of its communities. Significant changes to the CRA regulations were last made in 2005.

Comments are due November 19, 2018. Once comments are received and reviewed, the OCC will then develop a notice of proposed rulemaking, likely, and, hopefully, in coordination with the other banking agencies. That proposed rulemaking is not expected to be issued until at least the second half of 2019.

The OCC issued this ANPR without the Federal Reserve Board (Board) and the Federal Deposit Insurance Corporation (FDIC), reportedly due to disagreements on the approach the OCC is considering, including a metric-based framework for CRA evaluations. Traditionally, the CRA regulations are issued through joint agency rulemakings. This ANPR is only information-gathering and not a proposed rulemaking, and the OCC has committed to sharing the comments received with the Board and the FDIC. OCC leadership has stated they are interested in a joint rulemaking and will continue to work to that end. There is at least one recent example of a similar approach, amendments to the Volcker Rule, in which one agency (again, the OCC) issued an ANPR and then the three agencies issued a joint proposed rulemaking. The same process could be followed for amending the CRA regulations.

The OCC is seeking input on ways that the CRA regulatory framework can be improved to help banks more effectively serve the convenience and needs of their communities by: (1) encouraging more lending, investment and activity where it is needed most; (2) evaluating CRA activities more consistently; and (3) providing greater clarity regarding CRA-qualifying activities. The CRA ANPR is in line with the Treasury Department's recent recommendations regarding updating the CRA regulations, including a new approach to delineating assessment areas, improving the evaluation process, increasing clarity and flexibility of CRA evaluations and incorporating performance incentives[3].

The CRA ANPR poses questions in regard to five aspects of the CRA regulations: (A) changing the current approach to performance evaluations; (B) developing metrics to increase the objectivity of performance measures; (C) updating how communities and assessment areas are defined to accommodate banks with different business strategies and allow banks to help meet the needs of underserved communities; (D) broadening the range of qualifying activities to better support the purpose of the CRA; and (E) enhancing recordkeeping and reporting.

A. Current CRA Regulatory Approach

This section reviews the various tests banks are subject to under CRA based on their size and business model, the delineation of assessment areas, which focuses on the locations of a bank's main office, physical branches and deposit-taking ATMs, and the treatment of CRA-eligible activities outside a bank's assessment area(s). The OCC notes the shifts in business models and technological advances in the delivery of banking services permitting banks to engage in the business of banking regardless of the existence or location of their branches.

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1 **The information contained in this newsletter does not constitute legal advice. This newsletter is intended for educational and informational purposes only.**

2 *Reforming the Community Reinvestment Act Regulatory Framework,* 83 Fed. Reg. 45053 (Sept. 5, 2018) (available at https://www.federalregister.gov/documents/2018/09/05/2018-19169/reforming-the-community-reinvestment-act-regulatory-framework).

3 Memorandum from the U.S. Department of the Treasury to the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation (April 3, 2018) (available at https://home.treasury.gov/sites/default/files/2018-04/4-3-18%20CRA%20memo.pdf).

Questions Regarding Current Regulatory Approach

1. Are the current CRA regulations clear and easy to understand?
2. Are the current CRA regulations applied consistently?
3. Is the current CRA rating system objective, fair, and transparent?
4. Two goals of the CRA are to help banks effectively serve the convenience and needs of their entire communities and to encourage banks to lend, invest and provide services to low- and moderate-income (LMI) neighborhoods. Does the current regulatory framework support these goals in light of how banks and consumers now engage in the business of banking?
5. With the statutory purpose of the CRA in mind, what aspects of the current regulatory framework are most successful in achieving that purpose?
6. If the current regulatory framework is changed, what features and aspects of the current framework should be retained?

B. Metric-based Framework

The OCC is exploring a significant change in the approach to the CRA regulatory framework under which a bank's CRA performance would be evaluated by using quantitative benchmarks for specific ratings and clear standards for quantifying CRA activities. The metric-based performance measurement system could have thresholds or ranges (benchmarks) that correspond to the four statutory CRA rating categories – outstanding, satisfactory, needs to improve, and substantial non-compliance. These "macro" benchmarks could be composed of the "micro" components of CRA qualifying lending, investments, and services. The benchmarks representing the dollar value of CRA-qualified activity could be compared to readily available and objective criteria, such as, a percentage of domestic assets, deposits, or capital from the bank's balance sheet, to calculate a ratio that could correspond to the benchmark established for each rating category.

Questions on Metric-based Framework

1. How could an alternative method for evaluating CRA performance be applied, taking into account the following factors: bank business model, asset size, delivery channels and branch structure; measures or criteria used to evaluate performance, including appropriate metrics; and consideration for qualifying activities that serve areas outside a bank's delineated assessment areas?
2. How could appropriate benchmarks for CRA ratings be established under a metric-based framework approach, taking into account balance-sheet items, such as assets, deposits or capital and other factors, including business models?
3. How could performance context be included in such a metric-based approach?
4. In a metric-based framework, additional weight could be given to certain categories of CRA-qualifying activities, such as activities in certain geographies, including LMI areas near bank branches; activities targeted to LMI borrowers; or activities that are particularly innovative, complex or impactful on the bank's community. How could a metric-based framework most effectively apply different weighting to such categories of activities? For example, should a $1 loan product count as $1 in the aggregate, while a $1 community development (CD) equity investment counts as $2 in the aggregate?
5. How can community involvement be included in an evaluation process that uses a metric-based framework?
6. For purposes of evaluating performance, CD services are not currently quantified in a standard way, such as by dollar value. Under a metric-based framework, how should CD services be quantified? For example, a bank could calculate the value of 1,000 hours of volunteer work by multiplying it by an average labor rate and then include that number in the aggregate total value of its CRA activity.

C. Redefining Communities and Assessment Areas

The OCC is seeking input on how to update how a bank's "community" is interpreted. Banks would continue to receive consideration for CRA-qualifying activities within their branch and deposit-taking ATM footprint and could receive consideration for providing these types of beneficial activities in LMI areas outside of their branch and deposit-taking ATM footprint and other underserved areas. An updated approach to defining assessment areas could allow a bank to include additional areas tied to the bank's business operations (e.g., areas where the bank has a concentration of deposits or loans, non-bank affiliate offices, or loan production offices).

Questions on Redefining Communities and Assessment Areas

1. How could the current approach to delineating assessment areas be updated to consider a bank's business operations, in addition to branches and deposit-taking ATMs, as well as more of the communities that banks serve, including where the bank has a concentration of deposits, lending, employees, depositors or borrowers?
2. Should bank activities in the LMI geographies surrounding branches and deposit-taking ATMs, or in other targeted geographic areas, be weighted (and if so, how), or should some other approach be taken to ensure that activities in those areas continue to receive appropriate focus from banks, such as requiring banks to have some minimum level of performance in the metropolitan statistical area (MSA) and non-MSA areas in which they have domestic branches before receiving credit for activity outside those areas?

D. Expanding CRA-qualifying Activities

The OCC is asking for comment on the type and categories of activities that should receive CRA consideration, including whether more clarity and certainty is needed regarding which CD, small business, lending and retail services activities will receive CRA consideration. The OCC specifically invites comments on the role of small business credit in LMI areas or for LMI small business owners, and under what circumstances small business loans should receive CRA consideration.

Questions on Expanding CRA-qualifying Activities

1. How should "community and economic development" be defined to better address community needs and to incentivize banks to lend, invest and provide services that further the purposes of the CRA? For example, should certain categories of loans and investments be presumed to receive consideration, such as those that support projects, programs or organizations with a mission, purpose or intent of community or economic development, or, within such categories, only those that are defined as community or economic development by federal, state, local or tribal governments?
2. Should there be specific standards for CD activities to receive consideration, such as requiring those activities to provide identified benefits to LMI individuals and small business borrowers or to lend to and invest in LMI communities or other areas or populations identified by federal, state, local or tribal government as distressed or underserved, including designated major disaster areas (hereinafter referred to as "other identified areas" or "other identified populations")?
3. Are there certain categories of CD activities that should only receive consideration if they benefit specified underserved populations or areas, such as providing credit or technical assistance to small businesses or small farms; credit or financial services to LMI individuals or other identified populations (such as the disabled); or social services for LMI individuals or job creation, workforce development, internships or apprentice programs for LMI individuals or other identified populations?
4. Should consideration for certain activities that might otherwise qualify as CD be limited or excluded? For example, how should investments in loan-backed securities be considered?
5. How should financial education or literacy programs, including digital literacy, be considered?
6. Should bank activities to expand the use of small and disadvantaged service providers receive CRA consideration as CD activities?
7. The current regulatory framework provides for CRA performance evaluations to consider home mortgage, small business and small farm lending, and consumer lending in certain circumstances. Should these categories of lending continue to be considered as CRA-qualifying activities or should consideration in any or all of these categories be limited to loans to LMI borrowers and loans in LMI or other identified areas?
8. Under what circumstances should consumer lending be considered as a CRA-qualifying activity? For example, should student, auto, credit card or affordably priced small-dollar loans receive consideration? If so, what loan features or characteristics should be considered in deciding whether loans in these categories are CRA-qualifying?
9. Under what circumstances should small business loans receive CRA consideration? For example, should consideration be given to all loans to businesses that meet the Small Business Administration standards for small businesses?
10. How should small business loans with a CD purpose be considered?
11. Should a bank's loan purchases and loan originations receive equal consideration when evaluating that bank's lending performance?
12. Should loans originated by a bank to hold in portfolio be weighted differently from loans originated for sale? If so, how?
13. Should bank delivery channels, branching patterns and branches in LMI areas be reviewed as part of the CRA evaluations? If so, what factors should be considered?
14. The CRA states that the agencies may take into consideration in the CRA evaluation of a non-minority-owned and non-women-owned financial institution (majority-owned institution) any capital investment, loan participation and other venture undertaken in cooperation with MWLIs, even if these activities do not benefit the majority-owned institution's community, provided that these activities help meet the credit needs of local communities in which the MWLIs are chartered. What types of ventures should be eligible for such consideration, and how should such ventures be considered?

E. Recordkeeping and Reporting

Finally, the OCC invites comments on how to modernize CRA regulations to promote transparency and consistency in recordkeeping, reporting and examination requirements. The OCC notes that a metrics-based framework would allow for better tracking by banks of their overall CRA level of performance on a regular, periodic basis, including comparison among banks, their peer groups or the entire industry. This may involve an updated approach to the OCC's CRA-related data collection, as well as additional recordkeeping and reporting of activities based on their location, type or other factors.

Questions on Recordkeeping and Reporting

1. Could the reporting of data gathered using a metric-based approach on a regular, periodic basis better support the tracking, monitoring and comparison of CRA performance levels?
2. How frequently should banks report CRA activity data for the OCC to evaluate and report on CRA performance under a revised regulatory framework?
3. As required by law, and to the extent possible, the OCC attempts to minimize regulatory burden in its rulemakings consistent with the effective implementation of its statutory responsibilities. The OCC is committed to evaluating the economic impact of, and costs and benefits associated with, any changes that are proposed to the CRA regulations. Under the current regulatory framework, what are the annual costs, in dollars or staff hours, associated with CRA-related data collection, recordkeeping and reporting?