

OCC Finalizes Rule Intended to Strengthen and Modernize Community Reinvestment Act Regulations

May 28, 2020

On May 20, 2020, the Office of the Comptroller of the Currency (“OCC”) published a final rule (the “Final Rule”) intended to strengthen and modernize the OCC’s regulations under the Community Reinvestment Act of 1977 (“CRA”).¹ Generally, the CRA requires federal banking agencies, including the OCC, to assess a regulated institution’s record of helping to meet the credit needs of its entire community, including low- and moderate-income neighborhoods (“LMIs”), and consider that record in evaluating an institution’s applications for regulated activities such as applications for new branches, relocation of an existing branch, mergers and consolidations. The Final Rule replaces the OCC’s historical CRA framework by which banks have received ratings based on peer performance with one based on incentives for banks to achieve specific performance goals.² The Final Rule is effective October 1, 2020 with phased-in compliance dates starting in 2023, as further discussed below. A redline of the Final Rule against the current OCC rule is provided [here](#).

Prior to the Final Rule’s enactment, on December 12, 2019, the Federal Deposit Insurance Corporation (“FDIC”) and OCC issued a joint Notice of Proposed Rulemaking (“NPR”). The NPR concluded that the current CRA regulatory framework has not kept pace with the banking industry and has had the unintended consequence of incentivizing banks to provide short-term loans, rather than long-term community development loans needed in LMIs. As discussed below, the FDIC did not join the OCC in the Final Rule. Moreover, Joseph M. Otting, the Comptroller of the Currency, while declaring the revision of the OCC CRA framework will “ensure the CRA remains a relevant and powerful tool for the revitalization of our communities and for our nation’s civil rights,” announced he is resigning on May 29, 2020.³

The Final Rule implements four main areas of change to the CRA.

- Expanding the **activities** that qualify for CRA credit;

¹ 12 U.S.C. 2901.

² OCC, 12 C.F.R. Parts 25 and 195, Final Rule Community Reinvestment Act Regulations, page 4 (May 20, 2020).

³ FDIC News Release 2020-64, Comptroller of the Currency Highlights Final Rule Strengthening and Modernizing the Community Reinvestment Act (May 20, 2020).

- Updating how banks delineate the **assessment areas** in which they are evaluated for CRA credit;
- Creating an **objective method for evaluating CRA performance**; and
- Requiring CRA-related reporting and **data collection**.

The Final Rule is largely consistent with the NPR, but several changes were made to respond to stakeholders' comments.⁴ We discuss each of the main areas of change highlighting where the Final Rule departs from the NPR in relevant part, the Final Rule's implementation process, and its implications.

Notably, the Final Rule does not provide the complete revision to the OCC CRA framework. Specifically, as noted throughout, the OCC will have to publish more guidance and pursue further rulemaking before the new CRA framework can be implemented. Particularly given the change in OCC leadership, and upcoming elections, this will continue to create uncertainty in this area for some time to come. This rulemaking, though lengthy, should be viewed as a first step in a process which as of now the OCC is pursuing alone.

OCC's CRA Final Rule

Under the traditional framework, the OCC conducts a CRA examination of national banks generally every three years (with specified extended time frames for national banks with \$250 million or less in aggregate assets that received a rating of either "Outstanding" or "Satisfactory").⁵ A bank receives a rating based on a four-tiered rating system, either "Outstanding," "Satisfactory," "Needs to Improve" or "Substantial Noncompliance."⁶ The new CRA framework retains this four-tiered rating system but introduces new quantitative metrics that form the basis of a *presumptive CRA rating*, as described below. We discuss the key changes to the traditional framework below.

I. Expanding Activities Qualifying for CRA Credit

The Final Rule expands on the types of bank activities that qualify for CRA credit. The Final Rule adds several new qualifying activities, including those related to community development lending, investment and services.

⁴ OCC, 12 CFR Parts 25 and 195, Final Rule Community Reinvestment Act Regulations, page 13 (May 20, 2020).

⁵ OCC, Community Reinvestment Act (CRA) Questions and Answers, found [here](#).

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Issue with Current Framework: The OCC determined that the current framework did not provide comprehensive, objective criteria for activities that qualify for CRA credit. The Preamble to the Final Rule states that activities that qualify for CRA credit have varied not only from region to region, but also from bank-to-bank. As a result, the OCC believes banks' CRA lending often focuses on relatively few activities that are more certain to receive credit based on past practices.

Final Rule Framework: The Final Rule provides that the OCC will maintain and update a publicly available, non-exhaustive, illustrative list of examples of qualifying activities that meet the Final Rule's qualifying activities criteria, as well as examples of activities that the agency has determined, in response to specific inquiries, do not qualify. On its website, the OCC provided the initial non-exhaustive list of qualifying activities broken out according to each section of the rule that can be found [here](#). The Final Rule provides a process for the list to be updated by the OCC, and the list will be subject to a notice and comment period at least once every five years.

Other takeaways regarding the qualified activities framework are provided below.

- *Affiliate Activities.* The Final Rule provides that affiliate activities will not qualify for CRA credit unless the bank finances or otherwise supports a qualifying activity, although such support may be provided through an intermediary. This is a departure from the existing CRA framework which generally allows activities conducted by affiliates to be counted at the bank's option.
- *Valuation of Qualifying Activity.* For purposes of the CRA Evaluation Measure, the Final Rule provides that qualifying activity will be valued based on the period for which a bank kept the relevant loan or investment on its balance sheet. In a change from the proposed rule, retail loan originations (including mortgage originations) sold at any time within one year will receive credit for the origination value as though the bank held the loans on its balance sheet for a full year. The proposed rule provided that loans sold within ninety days of origination would only receive credit for ninety days.
- *Community development investments.* Activities that currently receive CRA consideration as "qualified investments" will receive consideration as "CD investments." The term "CD Investment" replaces the term "qualified investment" to use consistent terminology for loans, investment and securities that have a community development purpose.
- *Consumer loans.* The Final Rule provides that consumer loans provided to LMI individuals and in Indian country or other tribal or native lands, excluding credit cards and overdraft products, generally qualify for CRA credit. This is a departure

from the NPR, which credited credit cards and overdraft products. Banks thus will not be required to pass the retail lending distribution test for credit card or overdraft products. This also differs from the current framework in which consideration of consumer lending is optional unless it involves a substantial majority of the bank's lending.

- *Home mortgage loans.* CRA credit under the “CRA Evaluation Measure” for home mortgage loans generally will be limited to home mortgage loans to LMI individuals and families and in Indian country, and thereby excludes mortgage lending to middle- and upper-income individuals and families.
 - However, even though lending to LMI census tracts more broadly (i.e. middle- and upper-income individuals and families) does not qualify for the CRA Evaluation Measure, the Final Rule added a geographic distribution test for evaluating home mortgage loans that will consider these activities. The geographic distribution test evaluates the share of a bank's home mortgage loans in an assessment area that it originates in LMI census tracts, as compared to either the percentage of the assessment area's housing stock located in LMI census tracts, or to LMI mortgage origination performance by other peer banks operating in the assessment area that are evaluated under the general performance standards.

II. Expanding Assessment Areas

The Final Rule expands on the current assessment area framework with the goal of modernizing the standards to account for the development of online banking. The OCC stressed in the Preamble to the Final Rule, however, that the vast majority of traditional “branch focused” banks would not see their assessment areas significantly altered by the Final Rule. The changes in the Final Rule principally will affect banks with business models that are significantly different than the bank business models that were used when the CRA regulations were last significantly reformed in 1995, such as, internet banks. Banks implicated by this change will be required to add additional assessment areas outside of their physical branch footprint to their CRA evaluation.

Issue with Current Framework: The current regulatory framework relies on physical branch footprint as the sole basis for delineating a bank's CRA assessment areas (“facility-based assessment areas”). The OCC acknowledged this metric alone no longer adequately reflects how many banks conduct business.

Final Rule Framework: The Final Rule adds deposit-based assessment areas to the current framework for affected banks. More specifically, if a bank collects 50% or more of its total retail domestic deposits from outside of its physical branch footprint, it must

delineate additional assessment areas (as described below) in locations where it draws more than five percent of deposits unless overlapping with facility-based assessment areas. If a bank does not have the requisite retail domestic deposits outside its physical branch footprint then the new expanded assessment area does not apply to the bank.

Other takeaways to the new area framework are provided below.

- *Deposit-based assessment area, delineation.* Banks are provided additional flexibility to delineate their deposit-based assessment areas at any geographical level up to the state level, including at the metropolitan division (“MD”), Metropolitan Statistical Area (“MSA”), or non-MSA level provided the deposit-based assessment areas do not overlap facility-based assessment areas. This is a change from the proposed rule, which required a bank to delineate at the smallest geographical area (e.g., state, MSA, MD) where it has a five percent concentration of its retail domestic deposits.
- *Changes to assessment area delineations.* A bank may change its assessment area delineations once during each year but a bank must not change its assessment area delineations during the year used to calculate its CRA evaluation measure (described below).
- *Deposit-taking ATMs.* The Final Rule provides that banks may, but are not required to, delineate assessment areas around deposit-taking ATMs.

III. More Objective Method for Evaluating CRA Performance

In evaluating a bank’s CRA performance, examiners currently consider both the distribution and the impact of CRA activity. When examining the distribution of CRA activity, the examiners look at where loans have been distributed throughout an assessment area (i.e., whether lending activity is concentrated to certain neighborhoods) and borrower characteristics. The Final Rule crystalizes the distribution and impact analysis in new and more quantitative performance standards upon which examiners can base their judgments in determining ratings, thereby also providing more certainty to banks.

Issue with Current Framework: The current evaluation framework for large banks includes the Lending Test, Community Development (“CD”) Test, and Service Test. On the other hand, wholesale or limited purpose institutions are evaluated by their: number and amount of community development loans; use of innovative or complex qualified investments, community development loans, or community development services and the extent to which the investments are not routinely provided by private investors; and responsiveness to credit and community development needs. Further, all institutions, may instead, develop a plan for meeting its CRA responsibilities, subject to approval by

its supervisory agency (“the strategic plan option”). Under the current framework, the OCC found that examiners measure the impact of banks’ CRA activities inconsistently when evaluating how much activity is enough to receive a CRA rating of satisfactory or outstanding.

Final Rule Framework: The Final Rule introduces new general performance standards which include new quantitative measures of CRA performance that form the basis of *presumptive CRA ratings* at the assessment area and bank level. The *presumptive CRA ratings* may be adjusted based on a series of performance context factors (the performance context factors are more subjective, however the OCC intends to issue guidance to examiners to promote consistency). The general performance standards include a new *CRA evaluation measure* which is evaluated for each assessment area and aggregate bank level to calculate an “*average CRA evaluation measure*”.

- *At the area assessment level*, the CRA evaluation measure for each area is generally the *sum* of: (i) the bank’s annual *assessment area* qualifying activities value divided by the average quarterly value of the bank’s *assessment area* retail domestic deposits as of the close of business on the last day of each quarter for the same period used to calculate the annual qualifying activities value; and (ii) the number of the bank’s branches located in or that serve LMI census tracts, distressed areas, underserved areas, and Indian country or other tribal and native lands in the assessment area; *divided* by its total number of branches in the assessment area as of the close of business on the last day of the same period used to calculate the annual qualifying activities value *multiplied* by .02 (but subject to a cap of .01).
- *At the Bank level* (evaluating a bank’s *total* qualifying activities both within and outside of its assessment areas), the CRA evaluation measure is generally the *sum* of: (i) the bank’s annual qualifying activities value divided by the average quarterly value of the bank’s retail domestic deposits as of the close of business on the last day of each quarter for the same period used to calculate the annual qualifying activities value; and (ii) the number of the bank’s branches located in or that serve LMI census tracts, distressed areas, underserved areas, and Indian country or other tribal and native lands; *divided* by its total number of branches as of the close of business on the last day of the same period used to calculate the annual qualifying activities value *multiplied* by .02 (but subject to a cap of .01).

The Final Rule also introduces CD minimums and Retail Distribution tests (each as highlighted below) that must be passed to receive a rating of satisfactory or outstanding, as described below.

The Final Rule does not itself set forth the numerical thresholds used in the new general performance standards the benchmarks for achieving a *presumptive CRA rating* of

Outstanding or Satisfactory ratings under the CRA Evaluation Measure, the threshold for satisfying the CD minimums (as discussed below), or the percentages needed to pass the Retail Lending Distribution Tests. Notably, the OCC intends in the future to use another rulemaking process to set these objective thresholds and benchmarks for the level of performance necessary to achieve each rating category and these thresholds and benchmarks will be applied as of the compliance date applicable to each bank. This approach is a departure from the proposed rule, which itself specified the threshold percentages that form the basis of the exam scores.

Other key takeaways to the evaluation process are provided below.

- *LMI census tracts.* The Final Rule provides quantitative credit for branches in, or that serve, LMI census tracts or other identified areas of need.
- *CD minimums.* The Final Rule establishes CD minimums that apply to both the bank and the assessment area presumptive ratings. Banks subject to the general performance standards (see below, *Implementing the CRA Final Rule*) are required to engage in a minimum level of CD loan and investment activities in both their assessment areas and at the aggregate bank level based on their retail domestic deposits received from the assessment area or their total retail domestic deposits, as applicable. Under the proposed rule, in order to be eligible to receive a presumptive CRA rating of satisfactory or outstanding, the sum of the quantified dollar value of CD loans and CD investments, divided by the average of the bank's retail domestic deposits would have needed to meet or exceed two percent. The Final Rule retains these obligations with the minimum thresholds to be defined at a later date.
- *Retail Lending Distribution Tests.* The Final Rule also introduces a series of Retail Distribution Tests that evaluate the credit distribution of a bank's "major retail lending product lines" in its assessment areas. These include "borrower distribution tests" and "geographic distribution tests." The "borrower distribution tests" compare a bank's rate of originations of home mortgages and of loans in other "major retail lending lines" to LMI individuals and families to those of its peers (a "peer comparator") and to the demographics of the assessment area (a "demographic comparator"). The "geographic distribution test" compares the bank's rate of small business loan originations (including small loans to farms and home mortgages) in LMI neighborhoods to a peer comparator and a demographic comparator. With respect to both the borrower distribution test and the geographic distribution test, a bank's performance is required to exceed a certain percentage of either the peer comparator or the demographic comparator in order to pass the retail lending distribution tests. In a change from the proposed rule, a bank will only be evaluated based on at most two "major retail lending product lines," and OCC examiners will be responsible for performing these calculations based on data obtained by the OCC.

- *Presumptive Ratings.* As noted above, numerical thresholds for achieving a *presumptive CRA rating* have not been established. However, the Final Rule provides details for the percentage of assessment areas that must achieve a rating of “satisfactory” or “Outstanding” in order to receive that overall presumptive rating at the bank level. This change is a clarification from the NPR which did not list specific thresholds, and instead required the corresponding rating in “a significant portion” of assessment areas representing a “significant portion of its retail domestic deposits” but did not define “significant portion”
 - A bank with six assessment areas must receive a given rating (e.g., Outstanding or Satisfactory) in (i) 80% or more of its assessment areas, and (ii) also in assessment areas from which the bank receives 80% or more of its retail domestic deposits that it receives from its assessment area.
 - A bank with five or fewer assessment areas, a bank must receive at least the corresponding rating in (i) 50% of its assessment areas, and (ii) also in the assessment areas from which it receives at least 80% of its retail domestic deposits received from its assessment areas.
- *Multipliers.* To incentivize certain types of activities or address situations in which the activity could be undervalued, the Final Rule applies multipliers to the balance-sheet value of certain activities for purposes of calculating the CRA Evaluation Measure and CD minimum requirements. However, a bank is not eligible for the use of multipliers unless the value of its CD activities in the current period is “approximately” equal to the value of such activities in the bank’s prior evaluation period. The Final Rule expands the use of multipliers to certain activities, including:
 - A 2X multiplier for CD services, retail loans generated by branches in LMI census tracts, qualifying activities located in OCC-designated CRA deserts, qualifying activities involving minority depository institutions, women’s depository institutions, or low-income credit unions.
 - The possibility of up to a 4X multiplier, as the OCC may determine, based on the responsiveness, innovativeness, or complexity of the specific qualifying activity.

IV. Data Collection, Recordkeeping and Reporting

The Final Rule includes enhanced data collection, recordkeeping, and reporting requirements to support the new CRA regulatory framework. As mentioned above, for banks evaluated under the general performance standards, the Final Rule implements changes aimed at creating more “systematic and standardized” CRA performance evaluations (“CRA PEs”).

Issue with Current Framework: The OCC found that CRA PEs can be difficult to use, and it can be hard to draw comparisons from bank-to-bank or from one bank's evaluation to the next.

Final Rule Framework: A key difference in the Final Rule is that for banks evaluated under the general performance standards or a strategic plan are essentially keeping track in real time their CRA performance and must collect and maintain the bank's:

- Retail lending distribution test ratios;
- CRA evaluation measure (at the Bank level);
- Each assessment-area CRA evaluation measure;
- CD minimum (at the Bank level);
- Each assessment-area level CD minimum, and
- Presumptive ratings.

Because these are new measures and ratios, CRA PEs require new data reporting systems that can collect and maintain a variety of data about a bank's qualifying activities and where each activity took place. Moreover, a bank evaluated under the general performance standards or a strategic plan must annually report its average quarterly retail domestic deposits as of the close of business on the last day of each quarter. The Final Rule adds separate requirements for the reintroduced categories of banks (intermediate, wholesale, and limited purpose banks). The OCC plans to provide further detail on the data that banks must collect and maintain.

Other key takeaways to the data collection provisions are provided below.

- *Supporting Documentation.* In addition to the items listed above, banks must also collect, maintain and report information on the number of home mortgage loans originated in LMI census tracts.
- *Record Maintenance.* The Final Rule reduces the length of time that banks must maintain data by providing that data must be maintained until the completion of the relevant CRA evaluation.

Implementing the CRA Final Rule

The Final Rule will be implemented in phases according to bank size. Banks that have less than \$2.5 billion in assets also can choose not to opt in the new general performance standards and continue to be subject to the current CRA rules, but they will still be subject to the new qualifying activities criteria (as described in Section I) and the requirement to delineate deposit-based assessment areas (as described in Section II) if applicable.

The Final Rule retains the distinction for small and intermediate sized banks that are able to follow a simpler CRA compliance burden by avoiding the new general performance standards and related reporting requirements. The small bank threshold has been raised from \$500 million to \$600 million and the intermediate bank threshold applies to those above \$600 million but not exceeding \$2.5 billion in assets in four of the previous five calendar quarters.

The Final Rule does not clarify how the new evaluation framework will be applied to banks between the time of their last evaluation under the existing CRA regulations and the compliance dates applicable in the Final Rule.

The below chart provides phases for compliance with the Final Rule.

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

Agency Variations Caused by the OCC's CRA Final Rule

By publishing the Final Rule, the OCC embraces the long-standing views of Mr. Otting on the CRA, who as stated above, has since departed as Comptroller. The Final Rule also demonstrates an independent policymaking stance by the OCC, foregoing interagency collaboration with the Federal Reserve Board ("FRB") or the FDIC.

Unlike the NPR issued earlier this year, the FDIC did not adopt the Final Rule. Notably, FDIC Chairman Jelena McWilliams released a statement expressing general support for the work put into the Final Rule, but that the FDIC is not ready to finalize the rule at this time. Ms. McWilliams also recognized community banks for their efforts during the COVID-19 pandemic.⁷

Even though the FRB was involved in CRA reform efforts, the FRB did not join either the NPR or the Final Rule. The FRB has expressed support for more moderate changes to the CRA and reservations regarding the OCC's shift to a metric only based approach.⁸

The OCC has taken independent action on the CRA previously, including the advance notice of proposed rulemaking on August 28, 2018. However, in this case, absent other regulatory action, the OCC's action will now cause CRA compliance to vary by regulator in the coming years. As a result, the American Bankers Association, for example, urged the FDIC and the FRB to reconcile the regulatory regimes to avoid any unintended consequences of having inconsistent rules.⁹

⁷ Statement by FDIC Chairman Jelena McWilliams on the CRA Joint Proposed Rulemaking (May 20, 2020), found [here](#).

⁸ Statement of Lael Brainard Member of the Board of Governors of the Federal Reserve System, on Strengthening the Community Reinvestment Act by Staying True to Its Core Purpose (January 6, 2020), found [here](#).

⁹ Rob Nichols, ABA Statement on OCC's CRA Final Rule (May 20, 2020), found [here](#).

We hope these perspectives are helpful. Please do not hesitate to contact us with any questions.

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