

OCC Leads Movement to Modernize Community Reinvestment Act Regulations

September 19, 2018

On August 28, 2018, the Office of the Comptroller of the Currency (“OCC”) published an advance notice of proposed rulemaking (“ANPR”) inviting public comment on ideas for modernizing the regulatory framework for the Community Reinvestment Act of 1977 (“CRA”).¹ Comments must be received by November 19, 2018.

The ANPR addresses concerns from banks, community groups, academics and other stakeholders that CRA regulations have become ineffective because they no longer reflect the banking activities of many banks or consumers, given the dramatic growth of digital banking and technologies that have allowed banks to become active in

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communities where they do not have physical branches. These developments have also led to confusion surrounding the current CRA regulatory requirements. The ANPR mirrors many of the recommendations made in a memorandum issued last year by the U.S.

Department of the Treasury (the “Treasury”), which has named CRA modernization a top priority. The Treasury’s recommendations include updating how assessment areas are delineated to better reflect the changing nature of banking, making the evaluation process more timely to enable greater accountability, increasing flexibility and clarity in that process to foster transparency in rating determinations, and incorporating performance incentives for banks to meet the needs of their communities.²

Below we first discuss the areas in the ANPR for which the OCC seeks comment and then provide certain thematic considerations regarding the OCC’s approach to CRA reform.

¹ Advance Notice of Proposed Rulemaking, *Reforming the Community Reinvestment Act Regulatory Framework*, 83 Fed. Reg. 45,053 (Sept. 5, 2018).

² Department of the Treasury, Memorandum for the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation (Apr. 3, 2017), available [here](#).

The ANPR

The ANPR proposes 31 questions across five topical areas regarding the revision of CRA regulations:

- the current regulations;
- revisions to clarify and bring consistency to the performance evaluation process and to “accommodate banks with different business strategies”;
- redefining communities and assessment areas to both accommodate digital lending channels and retain a focus on communities where bank branches are located;
- broadening the range of CRA-qualifying activities; and
- enhancing recordkeeping and reporting.

The ANPR does not indicate whether OCC rulemaking will address all or only some of these areas. However, the comprehensive nature of the ANPR seems to suggest that the OCC favors a more broad-based approach in updating the above categories of its existing regulation. We summarize each of these topic areas in turn:

The Current Regulations

The OCC requests information on whether the current CRA regulations are appropriately applied and whether the existing regulatory framework appropriately addresses the goals of allowing banks to serve the needs of their communities. These questions are intended to assess the limitations of the current CRA framework, the features that should be retained in any future CRA rulemaking and the ways in which this framework would benefit from being updated.

The CRA Performance Evaluation Process

Currently, the method used to evaluate a bank’s CRA performance is determined by the bank’s asset size and business strategy: Small- and intermediate-sized banks are evaluated under a retail lending test and potentially a community development test, while large banks are evaluated under lending, investment and service tests. Specialized banks, such as wholesale banks or those predominantly serving military personnel, are subject to other tests or standards.

In the ANPR, the OCC seeks input regarding two new options it is currently considering for assessing a bank’s CRA performance. The first, which it refers to as the

“modernizing approach,” would replace all current tests and standards and separately evaluate retail or community development activities for all banks, accounting for variations in size, business model and other factors, alongside updated metrics that take into account the demographic and economic considerations of specific communities. The second method, termed the “transformational approach,” would deploy a “metric-based performance measurement system” with objective numerical thresholds or benchmarks corresponding to the four statutory rating categories: outstanding, satisfactory, needs to improve, and substantial noncompliance.³ The benchmarks would represent the overall thresholds for obtaining a particular rating. Each particular benchmark would be comprised of the components of CRA-qualifying lending, investments and services, and each component’s measure would demonstrate the bank’s performance in these particular areas. Each component would then be aggregated to establish the overall level of the bank’s CRA performance. As part of this framework, these benchmarks could be based upon, for example, the dollar value of the bank’s CRA-qualified activity in relation to its total assets or other similar objective criteria.

Regardless of which method the OCC ultimately selects, the ANPR reflects a move toward a more tailored approach to CRA compliance based upon clear thresholds and whether a bank meets its obligations through its actual banking operations and CRA-qualifying activities, while also providing regulators the flexibility to assess a bank individually based on its business model and capacity, and comparatively to other institutions. It is worth noting that in some respects this resembles the approach the OCC has taken in establishing its special purpose national bank charter (the “Charter”) for financial technology (“FinTech”) companies. There, the OCC has noted that it will consider how such a FinTech company seeking a Charter meets its community’s financial services needs based on the applicant’s projected financial condition and size, economic conditions in the anticipated markets and communities, and other factors.⁴

Redefining Communities and Assessment Area

The OCC proposes updating the definition of “community” and “assessment areas” to allow banks to define their assessment areas based upon their branch or ATM footprint, as well as those additional areas where a bank may have additional operations and activities, enabling consideration of qualifying activities performed in those areas. This would benefit banks in two significant ways. *First*, banks with business models that go beyond physical locations would receive CRA consideration for their broader activities. *Second*, the need for increased branch presence to meet CRA obligations would be

³ 12 U.S.C. 2906(b)(2).

⁴ OCC Begins Accepting National Bank Charter Applications From Financial Technology Companies (July 31, 2018), *available* [here](#); *see also* Debevoise Update: A Turning Point for FinTech? OCC and Treasury Signal Commitment to Financial Innovation, *available* [here](#).

reduced, thus allowing banks to more directly evaluate the cost considerations of branch operations in light of changing customer demands.

For example, the OCC notes that a bank may engage in CRA-qualifying activities in geographic areas where the bank has a concentration of deposits or loans, non-bank affiliate offices, or loan production offices, or may only have an online presence, which under the current CRA framework would not be considered part of a bank's assessment area. As Comptroller Joseph M. Otting has pointed out, the current definition of CRA assessment area does not include all of the areas in which banks provide their services, but rather solely concentrates on geographies defined by branches or ATMs.⁵ The OCC is thus exploring ways assessment areas can be updated to reflect a bank's physical presence through branches or offices, as well as the communities it serves, and also whether bank activities in Low and Moderate Income ("LMI") areas surrounding branches and deposit-taking ATMs or other targeted areas should be weighted.

Expanding CRA-Qualifying Activities

The OCC proposes that while the CRA-qualifying activities should continue to focus on a bank's retail and community development activities for LMI populations, consideration should also be given to a broader range of activities that support community and economic development. The ANPR suggests that CRA-qualifying activities may diversify from predominantly single and multi-family residential lending activities to include other types of investments and lending activities for small businesses and consumers, such as providing small business credit in LMI areas or for LMI small business owners, including innovative programs that a bank may develop to serve these categories of customers.

Recordkeeping and Reporting

The OCC notes that a modernized framework using objective metrics will facilitate banks' tracking of their overall CRA performance (and ratings) and banks' comparison of their performance to other banks. Objective metrics would also make a bank's CRA performance more transparent for the communities in which the bank operates. Additionally, the use of objective metrics aligns with the transformational approach discussed in the section on the CRA performance evaluation process. The OCC invites comments on whether such reporting is useful for monitoring CRA performance, how frequently reporting should occur, and the current costs of CRA-related reporting.

⁵ Testimony of Joseph M. Otting, Comptroller of the Currency, before the Committee on Financial Services, U.S. House of Representatives (June 13, 2018) and before the Committee on Banking, Housing and Urban Affairs, U.S. Senate (June 14, 2018).

The Implications of the ANPR

In publishing the ANPR, the OCC's efforts not only reflect long-standing views of the OCC's Comptroller, Joseph M. Otting, and the Treasury regarding the CRA, but also demonstrate an independent policymaking stance by the OCC toward the CRA, foregoing interagency collaboration with the Federal Reserve Board ("FRB") or the Federal Deposit Insurance Corporation ("FDIC"). The ANPR is not the first time that the OCC has sought to take a different approach to that of the FDIC or FRB on the CRA—in August, the OCC revised its CRA Policies and Procedures Manual ("PPM") to require a "logical nexus" between an assigned CRA rating and any alleged discriminatory or illegal credit practice in a bank's CRA lending activities.⁶ Further, in November 2017, the OCC updated its PPM to allow banks with a less than "satisfactory" rating to receive approval for certain licensing applications, including Bank Merger Act filings or conversions to a federal charter, subject to meeting certain conditions.⁷

Although Comptroller Otting previously had stated that the OCC, FRB and FDIC were discussing issuing a joint ANPR in testimony earlier this summer,⁸ the issuance of this ANPR unilaterally by the OCC demonstrates its intention to move without delay to reform the CRA and the possibility that its views regarding the reform process differ from those of the FRB and the FDIC. While the reasons behind the OCC's independent push to rulemaking are not fully clear, the intention does appear to be, at minimum, to gather sufficient data and information so as to understand the underlying issues and to galvanize support for comprehensive CRA modernization efforts from the FRB and FDIC. Regardless of the ultimate CRA framework that emerges, the ANPR is a signal to banks that the OCC is committed to reducing the regulatory and operational costs to banks of CRA compliance in a manner that is also designed to expand opportunities for growth in a bank's communities.

⁶ OCC, Impact of Evidence of Discriminatory or Other Illegal Credit Practices on Community Reinvestment Act Ratings, PPM 5000-43 (Aug. 15, 2018), available [here](#).

⁷ OCC, Impact of CRA Ratings on Licensing Applications, PPM 6300-2 (Nov. 8, 2017), available [here](#).

⁸ See Otting Testimony, *supra* note 4.

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

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