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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

OCC Finalizes Overhaul Of Community Lending Rules

By **Jon Hill**

Law360 (May 20, 2020, 10:37 AM EDT) -- The Office of the Comptroller of the Currency said Wednesday that it's formally adopting a package of revisions to regulations that require banks to lend to lower-income and underserved communities, capping off a controversial overhaul that Democrats and community advocates wanted tabled during the novel coronavirus pandemic.

The OCC, which oversees national banks and federal savings associations, issued a final rule that delivers on its Comptroller Joseph Otting's push to make the first major changes in more than two decades to agency regulations implementing the Community Reinvestment Act, a 1977 law intended to combat lending discrimination and promote equal access to credit.

Under those changes, examiners will use new metrics-based performance standards to help grade banks on their CRA compliance, and banks will have a larger, more defined range of activities that qualify for compliance credit. Banks will also be able to get credit for conducting those activities in areas where they draw a significant chunk of their deposits, not just where their branches are located.

The net effect of the overhaul will be to "increase support to small business, small and family-owned farms, Indian Country, and distressed areas, and it accommodates banks of all sizes and business models," Otting said in a statement.

"The final rule issued today will help ensure the CRA remains a relevant and powerful tool for the revitalization of our communities and for our nation's civil rights," Otting said.

Revamping the CRA has been a top priority for Otting, a Trump appointee and former bank executive who took over as comptroller in late 2017. He may now soon be headed out the door: completion of the project was widely seen within industry circles as the last big item on his to-do list, and the Wall Street Journal reported late Tuesday that his departure is expected by the end of the week.

But the 372-page rulemaking document put out by the OCC on Wednesday still leaves some open questions, including what specific numerical thresholds and benchmarks banks will be judged against under the revised grading methodology. The agency walked back numbers it had advanced at the proposal stage, saying they were based on limited data and will be pinned down more precisely as additional data comes in.

Without those numbers, though, Covington & Burling LLP's Randy Benjenk said banks will find it "very hard, if not impossible" to know how they will fare under the agency's new grading framework.

"It's a little bit like moving into a building where the exterior is done, but it doesn't yet have a floor plan," Benjenk told Law360. "That uncertainty creates a significant question as to how banks will be transitioned from the current framework to the new framework because banks need to know how much activity they should be preparing to do to get a satisfactory score."

Benjenk noted that deferring the decision on those metrics also raises the possibility that a new comptroller could approach this calibration process with different priorities.

Also to be determined is whether and when the Federal Reserve and Federal Deposit Insurance Corp. might sign on to the finished product unveiled Wednesday.

Although the OCC oversees the banks that account for roughly 70% of CRA activity, the Fed and FDIC split responsibilities for the remainder. The three agencies initially spoke of moving together on any potential CRA rule revisions to ensure consistent standards for their respective banks, but the Fed sat out a December proposal that the OCC's final rule builds on.

The FDIC did join in on that proposal, but the agency's chairwoman, Jelena McWilliams, said Wednesday that her agency just wasn't ready to sign off on the finalized changes, which came out just over 40 days after the close of a 90-day comment period on the earlier iteration.

"While the FDIC strongly supports the efforts to make the CRA rules clearer, more transparent and less subjective, the agency is not prepared to finalize the CRA proposal at this time," McWilliams said in a statement.

OCC officials stressed in a call with reporters that they are continuing to work with the FDIC and cautioned against reading too much into its decision to hang back. In her statement, McWilliams was also complimentary of the OCC's work, saying the final rule contains provisions that "will greatly benefit low- and moderate-income communities, and provide greater clarity to banks on CRA expectations."

But Democrats and community advocates argued that the absence of the other agencies was revealing, showing how rushed the rulemaking was and how little regard the OCC gave to opposing viewpoints when developing the changes.

"Comptroller Otting has ignored thousands of thoughtful comments from civil rights leaders, community development advocates, and local leaders and rammed through an overhaul to this key civil rights era law while he is reportedly on his way out the door," Sen. Sherrod Brown, D-Ohio, said in a statement. "Other regulators must give greater weight to the experiences of communities across the country that have historically seen disinvestment and reject this rushed and wrongheaded rule."

In a Twitter post, New York's Department of Financial Services Superintendent Linda Lacewell similarly criticized the OCC for going it alone.

"Without the support of the Fed or FDIC, the OCC has rushed through a final rule that weakens standards that prevent discrimination & require banks to provide credit to low & moderate-income communities," Lacewell wrote. "NY will continue to ensure compliance with our own CRA."

Otting and other OCC officials pushed back Wednesday on criticisms that they had acted unilaterally, stressing the months of interagency collaboration that went into the overhaul and extensive public

dialogue around CRA modernization that goes back years further. The final rule was also informed by feedback gathered from more than 7,500 comments on the December proposal, officials noted.

But Democratic lawmakers, state officials and community groups had been calling for the OCC to postpone further work on the rulemaking project once the COVID-19 crisis began, arguing that the regulators needed to stay focused on combating fallout from the virus.

Some voices in the banking industry have also questioned the wisdom of moving forward with the overhaul when banks already have their hands full grappling with the challenges posed by the pandemic. In a comment letter last month, for example, the Consumer Bankers Association told the OCC and FDIC that "it simply is not an appropriate time to implement a new CRA regime."

Although the final rule is set to take effect in October, Otting said it includes "an ample phase-in period," with deadlines for full compliance arriving starting in 2023. Otting has also argued previously that the pandemic has heightened the need to quickly finish and implement the CRA revisions, a view reflected in Wednesday's final rule.

"With respect to the possible effect of COVID-19 on a bank's ability to meet the compliance dates, the OCC notes that the economic challenges experienced in LMI communities as a result of the COVID-19 pandemic make it critical that implementation of this rule not be delayed so that the benefits of the new rule can reach these communities as soon as possible," the agency said.

--Editing by Katherine Rautenberg and John Campbell.

Update: This story has been updated with more details and comment.

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