

OCC Issues Final Rule Revising Community Reinvestment Act Regulations

May 26, 2020

Financial Services

On May 20, 2020, the Office of the Comptroller of the Currency (the “OCC”) issued a [final rule](#) overhauling its regulations implementing the Community Reinvestment Act (the “CRA”). The CRA, enacted in 1977, incentivizes banks to meet the credit needs of their entire communities, including low- and moderate-income (“LMI”) neighborhoods. The final rule makes the first major revisions to CRA regulations in nearly twenty-five years, and applies only to national banks, federal savings associations, and insured federal branches.

While OCC-regulated banks will be required to comply with the final rule’s new standards beginning in 2023 or 2024, the OCC has deferred to a future rulemaking process the important decision of how to calibrate the key thresholds and benchmarks used in the rule to determine the level of performance necessary to achieve a performance rating. As a result, the final rule creates some uncertainty for these banks in planning their CRA activities in the coming years until that decision is made.

Neither the Federal Deposit Insurance Corporation (“FDIC”) nor the Federal Reserve joined the OCC in issuing the final rule, even though the FDIC joined the OCC in issuing the December 2019 proposed rule, which we [summarized previously](#). State-chartered banks will therefore continue to operate under the FDIC’s and Federal Reserve’s existing CRA regulations rather than the final rule. Concurrently with the OCC’s release of the final rule, FDIC Chairman Jelena McWilliams issued a [statement](#) saying that “[w]hile 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.”

At the core of the OCC’s final rule is a set of new general performance standards that establish more quantitative measures of CRA performance than the tests set forth in existing CRA regulations, including the Lending Test, Community Development (“CD”) Test, and Service Test. The new standards include (1) a CRA Evaluation Measure that measures a bank’s total CRA qualifying activities relative to its retail domestic deposits, (2) a CD Minimum that requires a bank to engage in a minimum amount of CD activity relative to its retail domestic deposits, and (3) a series of Retail Distribution Tests that evaluate the credit distribution of a bank’s “major retail lending product lines” in its assessment areas. The OCC will maintain on an ongoing basis a public list of examples of qualifying activities that count toward the CRA Evaluation Measure and CD Minimum. An initial list of qualifying activities was published with the final rule.

Like the OCC and FDIC proposal, the final rule requires a bank that sources 50 percent or more of its retail domestic deposits from outside its “facility-based” assessment areas (defined by its physical deposit-taking facilities) to designate “deposit-based” assessment areas that include non-overlapping geographies from which the bank sources 5 percent or more of its retail domestic deposits.

Appendix A to this alert includes a step-by-step summary of the general performance standards’ methodology for determining a bank’s rating under the final rule.

Compared with the proposal, the most significant features of the OCC’s final rule include the following:

- **Key Numerical Thresholds Not Finalized.** The final rule does not set the most important numerical thresholds used in its new general performance standards – the benchmarks for achieving Outstanding or Satisfactory ratings under the CRA Evaluation Measure, the threshold for satisfying the CD Minimum, or the percentages needed to pass the Retail Lending Distribution Tests. The preamble to the final rule indicates that the OCC was unable to gather sufficient data to calibrate reliably these measures for all banks subject to the general performance standards, and will issue another notice of proposed rulemaking shortly to explain the process it will use to calibrate the measures.
- **More Credit for Retail Loan Originations.** Compared with the proposal, the final rule provides more credit in the CRA Evaluation Measure to a bank that originates and sells a retail loan within one year. Specifically, the final rule provides a full year’s worth of credit for the origination value of the loan; this contrasts with the proposed approach of granting credit based on the amount of time the loan is held on the bank’s balance sheet, subject to a 90-day floor.
- **Exclusion of Credit Cards.** The final rule does not subject credit card loans to evaluation under the Retail Lending Distribution Test as the proposal would have done. This change addresses concerns by industry commenters that subjecting those products to a credit distribution analysis for the first time could incentivize unsafe or unsound lending practices.
- **Greater Impact of Assessment Area-Level Performance.** The final rule’s general performance standards require a bank with six or more assessment areas to receive a given rating (e.g., Outstanding or Satisfactory) in 80 percent or more of its assessment areas, and in assessment areas from which the bank receives 80 percent or more of its retail domestic deposits that it receives from assessment areas, to receive that rating at the bank level. The former threshold has been set at 50 percent for a bank with five or fewer assessment areas. The proposal would have set both thresholds at 50 percent for all banks subject to the general performance standards. This change marks a meaningful increase in stringency for large banks that have many assessment areas.
- **Wholesale and Limited Purpose Bank Designations Preserved.** Wholesale and limited purpose banks retain those designations under the final rule, and can continue to be evaluated under the Community Development Test of the existing CRA regulations, rather than become subject to the new general performance standards as had been proposed.
- **Higher Threshold for Small and Intermediate Banks.** The final rule makes the general performance standards optional for banks with \$2.5 billion or less in total assets,

consisting of “small” banks of up to \$600 million in assets, and “intermediate” banks of more than \$600 million, but not more than \$2.5 billion in assets. Under the proposal, only banks with \$500 million or less in assets would have been exempt from the general performance standards. Small and intermediate banks that do not opt in to the general performance standards will generally be subject to the same standards that the existing CRA regulations set forth for small banks and intermediate small banks, respectively, but will be subject to the final rule’s new qualifying activities criteria and the requirement to delineate a deposit-based assessment areas if applicable.

The final rule is effective October 1, 2020. The compliance date for banks other than small and intermediate banks is January 1, 2023. Small and intermediate banks must comply with the new regulations beginning January 1, 2024. In the period between the final rule’s effective date and a bank’s compliance date, the bank may continue to follow existing CRA regulations or opt to comply with the new general performance standards, though that option first requires the OCC to set final benchmarks.

The remainder of this alert describes notable changes the OCC made to the proposal in the final rule.

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Definitional Changes

- **Changes to definition of “retail domestic deposits.”** The proposal’s definition of “retail domestic deposits” – a key metric in determining the magnitude of a bank’s CRA obligations under the CRA Evaluation Measure and CD Minimum, and determining whether and where a bank must delineate deposit-based assessment areas – attracted substantial feedback from commenters. The OCC changed the definition in the final rule by (1) excluding reciprocal deposits received from another bank, deposits received in a broker-dealer sweep, and deposits held in a health savings account or prepaid card account, and (2) including reciprocal deposits sent to another bank. The final rule continues to exclude brokered deposits from the definition.
- **Exclusion of credit cards from “consumer loans.”** The final rule excludes credit card loans from the definition of “consumer loans.” As a result, under the final rule, unlike the proposal, credit card loans are not subject to the Retail Lending Distribution Tests, but a bank will not receive credit under the CRA Evaluation Measure for making credit card loans to LMI individuals.
- **Exclusion of overdraft lines of credit from “consumer loans.”** Likewise, unlike the proposal, the final rule would not include overdraft lines of credit in its definition of “consumer loans.”
- **Limitation on number of major retail lending product lines.** The final rule defines a bank’s “major retail lending product lines” – *i.e.*, the product lines subject to evaluation of credit distribution under the Retail Lending Distribution Tests – as retail lending product lines that comprise at least 15 percent of the bank’s overall dollar volume of retail loan originations during the two years preceding the evaluation period, but provides that a bank need not have more than two major retail lending product lines. The proposal included a similar 15 percent threshold, but would have based the calculation on retail loan originations during the evaluation period itself, and would not have capped the number of major retail lending product lines, meaning that mathematically, a bank could have had as many as six such product lines.

- **Reduced ceilings for small loans to businesses and farms.** The final rule sets the size cap for “small loans to businesses” and “small loans to farms” to loans of \$1.6 million or less, rather than the proposal’s limit of \$2 million. Similarly, the final rule’s gross annual revenue ceiling in the definition of a “small business” or “small farm” is \$1.6 million, rather than the proposal’s \$2 million limit.

Delineation of Assessment Areas

- **Exclusion of deposit-taking ATMs from facility-based assessment areas designation.** The final rule clarifies that a deposit-taking ATM does not constitute a “non-branch deposit-taking facility” for the purpose of requiring a bank to delineate a facility-based assessment area wherever it maintains a main office, branch, or non-branch deposit-taking facility. This change, which is a departure from the existing CRA regulations, will allow OCC-regulated banks greater flexibility to open deposit-taking ATMs outside of the areas surrounding their branch networks.
- **More flexibility to change assessment areas.** Banks may change their assessment areas once each year, rather than once during a multi-year evaluation period as had been proposed.
- **Larger deposit-based assessment areas.** Like the proposal, the final rule requires a bank that receives 50 percent or more of its retail domestic deposits from geographic areas outside its facility-based assessment areas to designate separate deposit-based assessment areas in geographies where it receives 5 percent or more of its total retail domestic deposits. Under the final rule, a bank may draw its deposit-based assessment areas to encompass geographies that are as large as a statewide area, rather than the smallest geographic area from which the bank receives 5 percent or more of its total retail domestic deposits as would have been required under the proposal.

Activities Eligible for CRA Credit

- **Process for OCC additions to list of qualifying activities.** As in the proposal, the final rule includes a process for banks to petition the OCC to add a new activity to the list of qualifying activities that receive credit under the CRA Evaluation Measure and CD Minimum, as appropriate. The final rule sets forth a 60-day timeline for approval, rather than the proposal’s six-month timeframe.
- **Inclusion of economic development initiatives.** The final rule includes in its list of qualifying activities certain categories of economic development activities that currently qualify for CRA credit, including activities that support job creation and retention for LMI individuals. The proposal would have omitted several of these categories.
- **Clarifications on qualifying activities.** The OCC has clarified in the final rule that certain examples on the qualifying activities list that were the focus of criticism by community groups and certain members of Congress – such as activities supporting the construction of a stadium, or benefiting opportunity zones – must benefit LMI individuals or communities in order to receive credit as a qualifying activity. Additionally, the final rule omits activities financing rental housing for middle-income individuals in high cost areas as a qualifying activity.
- **Grandfathering of CRA activities currently on the bank’s balance sheet.** The final rule includes grandfathering provisions that permit activities that would have received CRA credit in previous evaluation periods to continue to receive such credit under the new regime, even if they are not enumerated in the final rule’s list of qualifying activities.

Grandfathered activities are subject to data collection, recordkeeping, and reporting requirements.

- **Credit for branches serving LMI communities and branches located in LMI areas.** While the proposal's CRA Evaluation Measure would have provided credit for branches located in LMI census tracts, Indian country, underserved areas, and distressed areas, the final rule also provides credit for branches that serve those areas, even if not physically located in them. The final rule also increases the amount of credit awarded to these branches, as discussed below.
- **Consideration of affiliate activities.** The final rule provides credit only to those activities that a bank directly undertakes, which is a departure from the existing CRA regulations' approach that activities conducted by affiliates may be counted at the bank's option. However, the preamble states that the OCC "considers qualifying activities to be conducted by a bank if the bank finances or otherwise supports a qualifying activity, even if the transaction involves an intermediary."

How the Final Rule Measures CRA Credit

- **Full credit for parties originating and selling loans.** The final rule provides credit to a bank that originates and sells a loan within 365 days of origination in the amount of the dollar value of the loan at origination. This is a departure from the proposal, which would have afforded a discounted dollar value depending on when the originator sold the loan, subject to a floor of 90 days' worth of credit (or one quarter of one year of the evaluation period).
- **Added credit for legally binding commitments to lend.** The final rule expands the amount of CRA credit provided to certain types of commitments to lend compared with the proposal. Specifically, legally-binding commitments are counted based on the value of the entire commitment, while other lines of credit are quantified based on the on-balance sheet funded portion.
- **Activities in CRA deserts.** Under the final rule, a bank may request confirmation from the OCC that a geography is a "CRA desert" that has significant unmet CD or retail lending needs. Activities in a geography confirmed to be a CRA desert are eligible for a multiplier to the amount of CRA credit rewarded under the CRA Evaluation Measure and CD Minimum.
- **Increased use of multipliers.** The final rule makes greater use of multipliers by expanding on the proposal's list of activities eligible for multipliers. The final rule's additions to the list of activities eligible for a 2X multiplier include CD services, qualifying activities located in OCC-designated CRA deserts, loans generated by branches in LMI census tracts, and qualifying activities involving minority depository institutions, women's depository institutions, or low-income credit unions. Furthermore, the final rule allows for an up to 4X multiplier based on the OCC's determination of an activity's responsiveness, innovativeness, or complexity. However, a bank is not eligible for the use of multipliers in its CRA performance evaluation unless the value of CD activities in the bank's current period is approximately equal to the value of such activities in the bank's prior evaluation period. The preamble to the final rule suggests that this limitation is intended to guard against a bank using multipliers to reduce its overall CD activity.
- **Increased credit for low-income housing tax credits ("LIHTC") and new market tax credits ("NMTC") activities.** A bank that syndicates or sponsors a community development investment fund to support projects eligible for LIHTCs or NMTCs will

receive credit for (1) the total dollar value of the fund in the year of origination, and (2) one-half of the dollar value of a portion of the fund that is sold, in the year after the sale. The proposal would have only provided credit for the value of the activity on the bank's balance sheet.

- **Increased credit for share of branches in or serving LMI areas.** The final rule provides an add-on to a bank's CRA Evaluation Measure that is calculated as the proportion of its total branches that are located in or serve LMI census tracts, distressed areas, underserved areas, and Indian country, multiplied by 0.02, subject to a cap of 0.01 (or one percent of its retail domestic deposits). This multiplier provides double the amount of credit for branches located or serving LMI areas compared to the proposal, subject to the cap.

Performance Metrics

- **New geographic distribution test for home mortgages.** The OCC final rule adapts the proposal's Geographic Distribution Test (which the proposal would have used only to assess small loans to business and farms) to evaluate the distribution of a bank's home mortgage loans. The test assesses 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 banks operating in the assessment area that are evaluated under the general performance standards.
- **Increased and clarified thresholds for bank-level ratings.** Under the final rule, to receive a given rating at the bank level, a bank with six or more assessment areas must obtain at least the same rating in 80 percent of its assessment areas *and* in those assessment areas from which it receives at least 80 percent of the share of retail deposits it receives in its assessment areas. A bank with five or fewer assessment areas is eligible to obtain a given bank-level rating if it obtains at least the same rating in 50 percent of its assessment areas *and* in those assessment areas from which it receives at least 80 percent of the share of retail deposits it receives in its assessment areas. The proposal would have required only that a bank receive a given rating in a "significant portion" of its assessment areas (defined in the preamble as 50 percent) and where it receives a "significant portion" of retail domestic deposits (defined in the preamble as 50 percent) in order to obtain the same rating at the bank level.
- **Annual, rather than evaluation period-long, count of loans in setting Retail Lending Distribution Tests threshold.** The final rule applies the Retail Lending Distribution Tests to a major retail lending product line in any assessment areas in which the bank originates 20 or more loans in that product line *per year* during the evaluation period. The proposal would have set this threshold at 20 or more loans throughout the entire multi-year evaluation period.

Alternative Evaluation Frameworks

- **Treatment of wholesale and limited purpose banks.** The final rule largely maintains the existing CRA regulations' wholesale and limited purpose bank designations, which the proposal would have eliminated outright. Unless they opt in to the general performance standards, wholesale and limited purpose banks will be evaluated under a Community Development Test that is similar to that contained in the existing regulations. Wholesale and limited purpose banks must comply with streamlined versions of the new recordkeeping and reporting requirements that apply to other banks. Additionally,

because they tend to operate few (if any) branches, wholesale and limited purpose banks may be at greater risk of being required to designate deposit-based assessment areas under the final rule.

- **Use of strategic plans.** The final rule generally maintains the strategic plan option as reflected both in the proposal and in the existing CRA regulations. It includes a 90-day timeframe for OCC approval of a strategic plan, which is longer than current regulations' review period of 60 days, but shorter than the proposal's review period of six months.

Looking Ahead

- **Future implementation of specific key numerical thresholds.** The proposal set forth specific numeric thresholds to which banks would be subject in various aspects of the general performance standards, including the CRA Evaluation Measure, the Community Development Minimum, and the Retail Lending Distribution Tests. The OCC has omitted key numeric thresholds in the final rule. Instead, the OCC will continue to gather data on what benchmarks are appropriate and will set such benchmarks through a notice-and-comment process.
- **Combined compliance period.** While the final rule takes effect on October 1, 2020, most banks will have until January 1, 2023 to bring their operations into compliance with the rule and be subject to the general performance standards for the first time. This single compliance window is in contrast to the proposal's two-tier compliance period, which would have provided banks other than small banks one year to comply with assessment area designation, data collection, and recordkeeping requirements, and two years to comply with reporting requirements. The compliance date for small and intermediate banks (defined in the final rule as those banks with assets of \$600 million or less, or assets of more than \$600 million but less than \$2.5 billion, respectively) is January 1, 2024. Between October 1, 2020 and a bank's new compliance date, the bank may either comply with existing CRA regulations in effect as of September 30, 2020, or may voluntarily comply with the new amended regulations.
- **Uncertainty regarding transition to general performance standards.** The final rule does not specify how (or whether) the OCC will evaluate a bank's CRA performance between the time of its last evaluation under the existing CRA regulations and the compliance date of the final rule. For instance, if a bank is to become subject to the final rule's general performance standards beginning January 1, 2023, and receives a performance evaluation under the existing CRA regulations in January 2022, it is not clear how the bank's community reinvestment activities for the remainder of the year 2022 would be taken into account, if at all. The preamble to the final rule states that "[t]he OCC retains the authority to ensure an orderly transition between the two frameworks and will work with banks that are impacted by the transition during this time."

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Financial Services

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Appendix A: Step-by-Step Summary of the Final OCC CRA Rule's Ratings Mechanics

This Appendix summarizes the general performance standards that the OCC uses to evaluate banks under the final rule. The general performance standards are optional for small and intermediate banks, banks operating under limited purpose or wholesale designations, and banks operating under a strategic plan.

Step 1: Assessment Area Determination

The scope of a bank's assessment area(s) is determined through two tests:

Facility-Based Assessment Area: Every bank must delineate an assessment area encompassing each location where it maintains its main office, a branch, or a non-branch deposit-taking facility (other than a deposit-taking ATM), as well as the surrounding locations in which the bank has originated or purchased a substantial portion of its qualifying retail loans.

Deposit-Based Assessment Area: A bank that receives 50 percent or more of its retail domestic deposits from outside of its facility-based assessment area must delineate separate, non-overlapping assessment areas either: (1) in the smallest geographic areas where it receives 5 percent or more of its retail domestic deposits, or (2) in larger assessment areas that include those geographic areas, up to the size of one whole state.

Step 2: Assessment Area-Level Presumptive Rating Determination

The bank's presumptive assessment area-level rating is determined by its CRA Evaluation Measure, and a Satisfactory or better rating also requires passing the Retail Lending Distribution Measure and satisfying the CD Minimum.

CRA Evaluation Measure: The bank's assessment area-level CRA Evaluation Measure is the sum of: (1) the dollar value of qualifying activities, divided by the average quarterly value of the bank's assessment area retail domestic deposits; and (2) the percentage of branches in the assessment area that are located in or serve LMI census tracts and other underserved areas, multiplied by 0.02, subject to a cap of 0.01. The value of certain CD activities is multiplied by two or four for the purposes of this measure, so long as the value of a bank's CD activities in the current evaluation period are approximately equal to those in its prior evaluation period. A bank's presumptive rating in an assessment area is assigned based on whether the bank meets or exceeds specified percentage benchmarks for each rating (e.g., Outstanding or Satisfactory) that the OCC will set through a future notice-and-comment rulemaking process.

Retail Lending Distribution Measure: The bank must pass (1) a borrower distribution test for each major retail lending product line for which a bank has originated 20 or more loans per year in the assessment area during the evaluation period, and (2) a geographic distribution test for any major retail lending product line that is a home mortgage lending, small loans to businesses, or small loans to farms product line for which the bank has originated 20 or more loans in the product line per year in the assessment area during the evaluation period.

- Under the **borrower distribution test**, the percentage of the bank's loans in a given category in the assessment area that the bank has made to LMI individuals, small businesses, or small farms (as applicable) must exceed either (a) a comparator of the percentage of families or households in the assessment area that are LMI, or percentage of businesses or farms in the assessment area that are small businesses or small farms (as applicable), or (b) a comparator of the percentage of peer banks' loans within the category in the assessment area that the peer banks have made to LMI families, households, small businesses, or small farms (as applicable).
- Under the **geographic distribution test**, the percentage of the bank's home mortgage loans or small loans to businesses or farms in the assessment area that the bank has made in LMI census tracts must meet or exceed either (a) a comparator of owner-occupied housing units, businesses, or farms in the assessment area that are in LMI census tracts, or (b) a comparator of the percentage of peer banks' home mortgage loans, loans to businesses, or loans to farms in the assessment area that peer banks have made in LMI census tracts.

These tests measure the number, rather than the dollar value, of loans that the bank has made. The OCC will set the comparators through rulemaking.

CD Minimum: The value of the bank's CD loans and investments in the assessment area (including any applicable multipliers) divided by the average quarterly value of the bank's assessment area retail domestic deposits must meet or exceed a threshold to be set through rulemaking.

Step 3: Bank-Level Presumptive Rating Determination

The bank's presumptive bank-level rating is determined by its bank-level CRA Evaluation Measure and its assessment area ratings, and a Satisfactory or better bank-level rating also requires satisfying the bank-level CD Minimum.

CRA Evaluation Measure: The CRA Evaluation Measure described in Step 2 is also used to evaluate the bank's total qualifying activities both within and outside of its assessment areas to calculate the bank-level CRA Evaluation Measure. The average of the annual bank-level CRA Evaluation Measures during the evaluation period must meet thresholds that the OCC will set for each rating through rulemaking.

Assessment Area Ratings: To receive a given rating at the bank level, a bank must receive (1) the same rating in those assessment areas from which it receives 80 percent of the retail domestic deposits that it receives from all its assessment areas, and (2) the same rating in 80 percent of its assessment areas if the bank has more than five assessment areas, or in 50 percent of its assessment areas if it has five or fewer assessment areas.

CD Minimum: The value of the bank's total CD loans and investments both within and outside its assessment areas (including any applicable multipliers) divided by the average quarterly value of the bank's retail domestic deposits must meet or exceed a threshold to be set through rulemaking.

Step 4: Application of Performance Context Factors

The bank's primary federal regulator may adjust its presumptive assessment area-level and bank-level ratings based on a series of performance context factors. These factors include the bank's explanation of its product offerings, business strategy, financial constraints, economic factors, and assessment area needs. Evidence that the bank has engaged in discriminatory or other illegal credit practices may also provide grounds for a downward ratings adjustment.