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CRA

CRA Checkpoint: Where We Are on the Journey to CRA Modernization

BY BRIAN WATERS

A LOT HAS HAPPENED since the Treasury issued its memo calling for Community Reinvestment Act (CRA) modernization in August 2018. The Office of the Comptroller of the Currency (OCC) has led the charge to reform CRA in a way that accommodates the current banking environment while providing more consistency and transparency in the examination process. They elected to go solo in their efforts, culminating in a final rule for CRA modernization effective October 1, 2020, with mandatory compliance dates through 2024.

During this same time period, the Comptroller of the OCC has changed twice, with Joseph Otting leaving the agency the day after issuing the CRA modernization final rule. Consumer groups have filed a lawsuit to challenge the new OCC final rule and Congress has issued a resolution calling for its repeal. During all this, we continue to adjust to serving our communities and their ever-changing needs during an ongoing global pandemic.

As the journey to modernize CRA continues, where do we find ourselves now? What developments have happened over the last year? Now’s the time for a quick check of new guidance, proposed rules and other key developments in CRA modernization.

How's It Going With the OCC?

The OCC's final rule for CRA modernization was effective October 1, 2020, with a transitional period through January 1, 2023, or January 1, 2024, depending on a bank's CRA designation. While banks acclimate to the new way of doing CRA, the OCC has not simply sat on the sidelines as things unfold.

First, on October 1, 2020, the OCC issued several resources to assist banks with implementing the new rule. These resources included the first version of their non-exhaustive, illustrative list of qualifying activities for CRA. This list is broken into several categories that align with the criteria for qualifying activities outlined in the new rule and provides 19 pages of examples for banks to reference. At the same time, the OCC also provided a new form and instructions for any interested party, including banks, to utilize if they would like to submit a specific activity not currently included on the illustrative list to the OCC for determination of the activity's alignment with CRA. Finally, the OCC also provided a small bank compliance guide to assist those banks with transitioning to the new rule.

On November 9, 2020, the OCC issued another guidance document titled "Key Provisions of the June 2020 CRA Rule and Frequently Asked Questions" (FAQs) to support all banks during the transition to the new rule. As expected with any significant rule change, especially one with an extended transition period, banks were wondering which set of rules to follow as they compiled loan data, qualified activities, and prepared for their next CRA examination. This new guidance answered many of the most common questions about what banks can expect during the transition period and thereafter. For example:

- Retail lending activities conducted after October 1, 2020, through the transition period will be evaluated under the 1995 rule, with banks having the option to consider retail loans under the 2020 rule as "other loan data" or "other lending-related activities."

- Examiners will consider all community development (CD) activities conducted on or after October 1, 2020, under the 2020 rule and if there are any gaps, will consider activities under the 1995 rule as well.
- Banks can receive partial credit for CD activities as outlined in the 2020 rule for qualifying activities that occur on or after October 1, 2020.
- Examiners will use the 1995 rule's large bank examination procedures to evaluate activities conducted by banks subject to the new General Performance Standards through January 1, 2023.
- Banks subject to the General Performance Standards should continue to collect and report small business loans, small farm loans, and CD loan data under the 1995 rule through 2022.

Shortly thereafter, on November 24, 2020, the OCC issued a new notice of proposed rulemaking regarding CRA evaluation measure benchmarks, retail lending distribution test thresholds, and community development minimums that will be utilized for assessing CRA performance under the General Performance Standards of the new rule. While these key CRA evaluation measures were discussed in great detail in the OCC's proposed rule for CRA modernization, when the final rule was issued in 2020, we were all surprised to find these new measurements omitted. The OCC noted that they needed more time to review and accumulate data regarding how to develop and calibrate these new measures.

This new notice of proposed rulemaking outlined the methodology and various approaches the OCC considered in developing the new CRA evaluation measures. The OCC's goal is to provide objectivity and transparency for banks evaluated under the General Performance Standards. To that end, the agency focused on ensuring that the new measures were appropriately calibrated to past examination ratings and can be used for evaluating banks of varying asset sizes and business models in the future. It also introduced the need for a new "Information Collection Survey" to gather data from banks to assist with the development of the new measures. Finally, it included technical corrections and clarifications and outlined how the OCC would assess significant declines in CRA activity levels between examinations.

On December 15, 2020, the OCC published its request for information in the *Federal Register* under the Information Collection Survey. This Survey requested that banks provide numerous data points about branch distribution, retail domestic deposit data, assessment areas, quantified dollar values of CRA activities, retail loan applications and originations, and more. While this all seems very familiar as the data that banks will need to provide starting January 1, 2023, the OCC's request asked for this data in the 2020 new rule format retroactively for January 1, 2017 through December 31, 2019. While this request for information provided a comment period, it also stipulated that banks provide the three years of data by May 31, 2021, or send explanations as to why any requested data points were not being provided by the bank. Ultimately, the OCC stepped back from requiring banks to provide this data by May 31, 2021, stating instead that they would consider comments received before finalizing next steps on the Information Collection Survey.

Lastly, on January 29, 2021, the OCC issue a trio of new resources under the final rule. The first was a comprehensive listing of all OCC-regulated banks including their CRA bank determination under the new rule. The second was the bank industry compensation value for quantifying bank service activity between October 1, 2020 and December 31, 2021, setting the hourly compensation for bank service during this period at $39.03 rounded to the nearest dollar. The third was the OCC's own list of distressed and underserved geographies, expanding those geographies to metropolitan areas and including a new underserved designation for banking deserts as outlined in the final rule.

The Federal Reserve Dives In

In the midst of the many issuances, clarifications, and proposed rules from the OCC to update, correct and finalize portions of its CRA modernization framework, on October 19, 2020, the Federal Reserve Board published its own Advanced Notice of Proposed Rulemaking (ANPR) for CRA modernization in the *Federal Register*. While the Federal Reserve has continued to support the overall need for CRA modernization, this ANPR is the agency's first official regulatory proposal on the topic. Comments were accepted on the proposal through February 16, 2021, utilizing a list of 99 questions included in the ANPR.

The Federal Reserve is focused on more effectively meeting the needs of low- and moderate-income (LMI) communities and addressing inequities in credit access, adhering to the foundational principles of CRA. Much like the OCC, the Federal Reserve's ANPR calls for increased clarity, consistency, and transparency in supervisory expectations, activity eligibility, and CRA supervision. Its stated goals include promoting community engagement, strengthening special treatment for Minority Depository Institutions, and recognizing the mutually reinforcing relationship of CRA and fair lending.

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Within the ANPR, the Federal Reserve seeks to align CRA with the way that banks operate, and the way consumers engage with banks, today. As such, the agency outlines its plans for updating CRA assessment areas. It recommits to the need for physical presence assessment areas based on bank facility locations, while also outlining ideas for new deposit-based or lending-based assessment areas. It introduces the idea of creating a new definition for "Internet Bank" and allowing these banks, which usually operate nationally from a single location, to have a nationwide assessment area.

The ANPR introduces a new CRA evaluation framework that builds off the historical three-prong approach but streamlines that approach into two tests—retail and community development, each with two subtests. Large banks would be subject to all tests while small banks would be subject to the retail lending test. The intermediate bank designation would be eliminated, and the Federal Reserve is considering whether to set the threshold for a "small bank" designation to an asset threshold of $750 million or $1 billion. Wholesale and Limited Purpose banks would be subject to the community development test, much as they are today.

Within these new tests, the Federal Reserve will utilize a blend of metrics-based and qualitative assessments to evaluate CRA performance. Under the retail test, the retail lending subtest will utilize a metrics-based approach to determine how well a bank is serving its LMI census tracts, LMI borrowers, small businesses, and small farms. It introduces a new "retail lending screen" that would be used to determine whether a bank should be eligible for a metrics-based evaluation and a presumed "satisfactory" rating or should be evaluated utilizing examiner discretion due to low levels of retail lending. Lending activity would be evaluated in each assessment area for each major product line measured against market benchmarks provided on a new dashboard by the Federal Reserve. The retail services subtest will use a predominately qualitative approach to evaluate the bank's delivery systems such as branches, branch services, etc. and deposit products including those which are responsive to the needs of LMI communities and consumers.

Under the community development test, the community development financing subtest will evaluate a bank’s record of making loans and investments and will consider both new loans and investments made as well as prior period loans and investments still reported on the bank’s balance sheet. The value of these activities will be assessed utilizing a new CD financing metric for each assessment area calculated as the ratio of the bank’s CD financing divided by the bank’s deposits in the assessment area. The bank’s activities will be compared to a standard local or national benchmark tailored to the assessment area. The Federal Reserve is considering utilizing "impact scores" to further demonstrate bank responsiveness to local needs. Bank volunteer service will be evaluated under the community development services subtest and will be reviewed qualitatively, with potential expansion of eligibility for activities serving rural markets.

In general, activities will continue to be categorized under the historical CRA definitions of affordable housing, economic development, community services, and revitalization/stabilization, with some additional clarifications and revisions to these criteria. Increased focus is placed on support for Minority Depository Institutions, women-owned depository institutions, low-income credit unions, and Treasury-certified Community Development Financial Institutions, with the Federal Reserve proposing automatic credit for activities supporting the latter. The Federal Reserve is also considering providing an illustrative list of CRA qualifying activities, increased support for activities in "Indian country," and designating areas of need such as CRA deserts and banking deserts.

What About the FDIC?

While the FDIC initially signed on to the OCC’s proposed rule for CRA modernization, in March 2020, the FDIC withdrew from this proposed rule, citing its commitment to focus on the immediate needs stemming from the pandemic. Since that time, the FDIC has remained mostly silent on any formal plans for CRA modernization, with FDIC Chairman McWilliams publicly reiterating the need for an interagency approach for CRA modernization.

Where Does That Leave Us?

Within the banking industry, the general attitude is that within the coming months, we are likely to see a pause, rewrite or potentially full repeal of the OCC's final rule in its current form. The staggered rollout of the OCC's final rule, the extended transition period, and the overall general pushback to its expansive changes has led most CRA experts to believe that major revisions will come before the final rule ever fully takes hold. Given the Federal Reserve's proposal, which differs substantially from the OCC's methodology, and the FDIC's ongoing call for interagency collaboration, we all believe that CRA modernization is very much evolving. Unfortunately, while these efforts continue to playout, OCC-regulated banks must proceed with implementation and transition plans for adhering with the new rule until told otherwise.

Keep in mind, even if the OCC's final rule is repealed or rewritten, many of the concepts contained within it and the Federal Reserve's proposal are likely to carry forward into new proposals. The need for modernizing CRA is not questioned, but determining the right approach is still up for debate. Without a doubt, there are few banking professionals who would say that the 1995 CRA rule still effectively meets consumer and community needs in 2021 and beyond.

Over the coming months, the hope is that the three regulatory agencies will realign their approach for CRA evaluation to allow equitable comparison of bank performance across all institutions. As always, we'll track each new CRA modernization update and share key developments as the journey unfolds.

ABOUT THE AUTHOR

BRIAN WATERS, CRCM, is the President, COO and Co-Founder of findCRA, which offers both online services for banks to identify and document CRA-qualified nonprofit relationships and build instant performance context, as well as traditional CRA consulting and training services. He has 20 years of experience in banking compliance and community development and is a resident of Louisville, KY. Contact him at **brian@findCRA.com**.