
Going it Alone: OCC Finalizes Community Reinvestment Act Regulations without Other Regulators

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On May 20, 2020, the Office of the Comptroller of the Currency (OCC) issued a [final rule](#) (the “Final Rule”) overhauling its Community Reinvestment Act (CRA) regulations. The Final Rule follows a [joint notice of proposed rulemaking \(NPR\)](#) issued by the OCC together with the Federal Deposit Insurance Corporation (FDIC) late last year (the “Proposed Rule”). The Board of Governors of the Federal Reserve System (FRB) declined to participate in either issuance. Since the Final Rule was issued by the OCC alone, it applies only to national banks, federal savings associations, insured federal branches and certain uninsured federal branches. The rule is effective October 1, 2020, and compliance is generally required by January 1, 2023.

By the relatively staid standards of bank regulation, the OCC’s solo effort is shocking. As we wrote last year, the CRA regulations have not been updated for more than 25 years, and for all that time, OCC-, FDIC-, and FRB-regulated banks have been subject to identical CRA regulations. CRA compliance often entails significant costs, and if the OCC’s Final Rule proves more bank-friendly, CRA could be a consideration for state banks contemplating conversion to a national bank. By acting alone, the OCC has shown it’s willing to upset the balance among the federal banking regulators.

After not joining in the Final Rule, [FDIC Chairman Jelena McWilliams said](#) 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.” Meanwhile, the OCC defends its actions by stating that the majority of CRA activities are performed by banks subject to the Final Rule. In fact, while as of June 30, 2019, OCC-chartered banks held more than 60% of total deposits, the OCC regulates only approximately 1,200 out of 5,100 insured depository institutions, leaving over 75% of all insured depository institutions subject to a different set of CRA rules.

Though compliance for OCC-chartered banks is required by January 1, 2024, the future of the Final Rule is unclear. It’s possible that the unusual circumstances surrounding the rulemaking will make the Final Rule more susceptible challenges in court. Furthermore, a [joint resolution](#) to rescind the Final Rule pursuant to the Congressional Review Act was introduced on June 11, 2020. While largely symbolic now (it appears unlikely to pass in both chambers), depending on the Congressional calendar (there are timelines based on legislative days) and the outcome of the upcoming elections, the Final Rule could be nullified by the next Congress.

Below is a comprehensive analysis of the Final Rule.

Background

The CRA requires insured depository institutions to meet the credit needs of its entire community, including low- and moderate-income (LMI) communities, consistent with safe and sound banking practices. Under the current CRA regulations (the “Current Rule”), the banking agencies periodically evaluate depository institution efforts in this regard and banks are given a performance rating of outstanding, satisfactory, needs to improve, or substantial noncompliance. These performance ratings are then used by the agencies when considering certain expansion applications, including those for mergers and branches. The CRA does not apply to certain special purpose banks or uninsured financial institutions.

The purpose of the Final Rule is to strengthen and modernize the CRA regulatory framework to make it “more objective, transparent, consistent in application and reflective of changes in banking.” In doing so, the OCC believes the Final Rule will be a better tool to encourage banks to engage in activities that serve the needs of LMI communities as well as other communities that have been largely ignored by the Current Rule. With this in mind, the Final Rule makes changes to the Current Rule in the following four areas: (1) qualifying activities; (2) assessment areas (AAs); (3) methods of measuring CRA performance; and (4) data collection, recordkeeping and reporting.

Qualifying Activities

Under the Current Rule, the activities qualifying for CRA credit fall into two general categories: retail banking activities and community development activities. Instead of categories, the Final Rule establishes criteria for determining whether an activity qualifies for CRA credit. A qualifying activity (QA) is defined as an activity that helps meet the credit needs of a bank’s entire community, including LMI individuals and communities. The Final Rule sets forth QA criteria identifying the types of activities that would meet those needs. Specifically, QAs include retail loans, community development (CD) investments and CD services that meet the criteria set forth in the rule. Along with the rule, the OCC has issued a non-exhaustive list of QAs which will be updated annually and available in a searchable format on its website. Key features related to QAs include the following:

- **New QAs** – In addition to many of the activities qualifying under the Current Rule, the Final Rule includes activities that previously did not receive credit such as activities in underserved and distressed areas, disaster areas, and Indian country and other tribal and native lands.
- **Consumer Loans** – Credit card loans and overdraft products are not QAs.
- **Home Mortgage Loans** – QAs are limited to home mortgage loans to LMI individuals and families and those provided in Indian country. In a departure from the Current Rule, home mortgage loans to middle- and upper-income individuals and families in LMI census tracts no longer qualify for CRA credit.
- **Affordable Housing** – QAs include activities that support affordable housing that partially or primarily benefit LMI individuals and families. The rule clarifies that this is to be demonstrated by the median rents that do not (and are not projected at the time of the transaction) to exceed 30% of 80% of the area median income. Importantly, banks are not required to ensure LMI individuals and families occupy unsubsidized affordable units. Activities that partially or primarily benefit middle income housing in high cost areas are not QAs.
- **CRA Deserts** – The Final Rule encourages QAs in CRA Deserts through the use of multipliers (discussed below). A CRA Desert is an area with significant unmet CD or retail lending needs and where (i) few banks have branches or nonbranch deposit-taking facilities, (ii) there is less retail or CD lending than would be expected based on demographic or other factors, or (iii) the area lacks community development organizations or infrastructure. The OCC must confirm CRA Deserts and the rule provides a confirmation process. The OCC will maintain a non-exhaustive list of areas determined to be CRA Deserts on its website.
- **Affiliate Activities** – Unlike the Current Rule, the Final Rule limits QAs to those conducted by the bank directly. However, a bank’s financing or support of activities through an intermediary may qualify under certain circumstances.
- **Grandfathered Activities** – The Final Rule grandfathers activities that received positive consideration in a CRA evaluation under the Current Rule and are on a bank’s balance sheet on the effective date of the Final Rule. However, home mortgage loans and consumer loans provided to middle- and upper-income individuals in LMI census tracts are not grandfathered.
- **Quantification/Valuation** - For purposes of the CRA Evaluation Measure (discussed below), banks must value QAs annually based on the quantified dollar value of all QAs originated, made, performed or on the bank’s balance sheet during

the year. The value is generally calculated by adding (i) the quantified dollar value of qualifying loans and CD investments originated, made, or performed by the bank during the year or on the bank's balance sheet during the year and (ii) the quantified dollar value of CD services conducted, and in-kind and monetary donations made, during the year. Each quantification may be subject to adjustment based on a multiplier.

- **Multipliers** – To encourage certain types of activities and address undervaluation of other activities, the Final Rule allows for adjustments to certain QAs based on a specified multiplier. The multiplier is applied to the balance sheet value of certain activities as part of the CRA Evaluation Measure and CD Minimum calculations. For example, QAs in a CRA desert are subject to a multiplier of 2. A bank is not eligible to use a multiplier 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 provides a process for an “interested party” to obtain confirmation that an activity is a QA. All decisions will be published. In addition to assisting banks, providing this process and transparency will enable nonbanks to create CD investments and other opportunities attractive to banks and with confidence that the activity will qualify for CRA Credit.

Assessment Areas

Currently, the delineation of CRA AAs is “facility-based” and includes (1) where a bank has its main office, branches, and deposit-taking facilities; and (2) the surrounding geographies where a bank originates or purchases a substantial portion of its loans. The Final Rule adds a “deposit-based” AA delineation beyond a bank's physical footprint to include areas where banks collect a substantial portion of their deposits. The addition of deposit-based AAs is meant to account for the realities of online banking, but the OCC does not believe the majority of banks will see AA changes.

This new deposit-based AA requirement affects banks receiving 50% or more of their Retail Domestic Deposits from geographic areas outside of their facility-based AAs. For such banks, areas where the bank receives 5% or more of its total Retail Domestic Deposits would be considered a deposit-based AA. Key features related to AAs include the following:

- **Retail Domestic Deposits** - Retail Domestic Deposits are deposits held in the U.S. that are reported on Schedule RC-E of the Call Report as item 1 or item 3 and non-brokered reciprocal deposits for the bank sending the reciprocal deposit. It does not include brokered deposits, deposits originated from broker-dealer sweep transactions, deposits held in Health Savings Accounts and prepaid card accounts or non-brokered reciprocal deposits for the *receiving* bank.
- **AA Delineation** - facilities-based and deposit-based AAs are delineated to consist of the following divisions:
 - A state;
 - A whole metropolitan statistical area (MSA);
 - The whole nonmetropolitan area of a state;
 - One or more whole, contiguous metropolitan divisions in a single MSA,
 - The remaining areas of a state, MSA, nonmetropolitan area, or metropolitan division not containing a facility-based AA; or
 - One or more whole, contiguous counties or county equivalents in a single MSA or non-MSA.
- **Deposit-Taking ATMs** – In a change from the Current Rule, facilities-based AAs need not include areas with deposit-taking ATMs.
- **Larger Deposit-Based AAs** - Deposit-based AAs may be delineated in the smallest geographic area where a bank receives 5% or more of its Retail Domestic Deposits *or* a larger AA that includes these geographic areas.
- **Military Bank AA** – A military bank's AA is the entire U.S. and its territories.
- **AA Changes** – A bank may adjust its AAs annually.

Methods of Measuring CRA Performance

Currently, banks are evaluated based on the distribution and impact of CRA activity in a bank's AA with ratings mainly based on a curve compared to the performance of the bank's peers. While evaluation under the Final Rule is still based on distribution and impact, the rule uses new performance standards designed to provide a more quantitative measure of performance. The new performance standards are not a single measure but "multiple measures that operate together to assess both qualitative and quantitative aspects of a bank's performance," with the goal to provide an objective, transparent and consistent way to evaluate CRA performance. The OCC expects that the new performance standards will incentivize banks to achieve specific performance goals.

- **General Performance Standards.** The Final Rule establishes general performance standards that form the basis for calculating presumptive ratings at both the bank and AA levels. The new performance standards at the bank level include (i) a CRA Evaluation Measure, (ii) AA ratings and (iii) a CD Minimum. At the AA level, the performance standards include (i) a CRA Evaluation Measure, (ii) a CD Minimum, and (iii) a Retail Distribution Test. These measures are then compared against benchmarks and thresholds to be established by the OCC and from there a presumptive rating is determined. Thereafter, adjustments may be made by examiners to the presumptive rating based on certain performance context factors. The assigned rating is then determined based on the established performance standards for each rating category—Outstanding, Satisfactory, Needs to Improve or Substantial Noncompliance. Key factors related to the measuring of CRA performance under the general performance standards include:
 - **CRA Evaluation Measure** – The CRA Evaluation Measure is determined annually by the bank at both the bank and AA levels.
 - Bank-Level CRA Evaluation Measure - A bank's bank-level CRA Evaluation Measure is generally the *sum of*: (i) the bank's annual QAs 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 QAs value; and (ii) the number of branches located in or that serve LMI census tracts, distressed areas, underserved areas, and Indian country or other tribal and native lands *divided by* the total number of branches the bank has as of the close of business on the last day of the same period used to calculate the annual QAs value *multiplied by* .02.
 - AA-Level CRA Evaluation Measure - The AA CRA Evaluation Measure is calculated for each AA and is generally the *sum of*: (i) the bank's annual AA QAs value *divided by* the average quarterly value of the bank's AA 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 AA QAs value; and (ii) the number of branches located in or that serve low- or moderate-income census tracts, distressed areas, underserved areas, and Indian country or other tribal and native lands in the AA *divided by* its total number of branches in the AA as of the close of business on the last day of the same period used to calculate the annual AA QAs value *multiplied by* .02.
 - **AA Rating** – To achieve an overall presumptive rating of Outstanding or Satisfactory, a bank must receive an assigned rating of Outstanding (or Satisfactory) in (i) 80% of its AAs and (ii) the AAs from which it receives 80% of its Retail Domestic Deposits that it receives from its AAs. For banks with five or fewer AAs, the bank received an assigned rating of outstanding in (i) 50% of its AAs and (ii) AAs from which it receives 80% of its Retail Domestic Deposits that it receives from its AAs.
 - **CD Minimum** – The CD Minimum is a measure that requires a bank to engage in a minimum amount of CD activities based on its Retail Domestic Deposits. A bank's CD measure is generally the quantified dollar value of CD loans and investments during the evaluation period (including any multipliers) *divided by* the average quarterly value of the bank's

total Retail Domestic Deposits as of the last day of each quarter of the evaluation period. This is calculated at both the bank-level and the AA-level. To receive an Outstanding or Satisfactory rating, a bank must meet or exceed the CD Minimum—a threshold to be set by the OCC.

- **Retail Lending Distribution Test** – The Retail Lending Distribution Test includes a “Borrower Distribution Test” and a “Geographic Distribution Test” to evaluate the credit distribution of a bank’s Major Retail Lending Product Lines. The tests are performed in each AA but only for those product lines with 20 or more originations per year in the AA during the evaluation period. To receive an Outstanding or Satisfactory rating, a bank must “pass” both the Borrower and Geographic Distribution Tests for the Major Retail Lending Product Lines evaluated. These tests are based on the number rather than the dollar volume of originations.
 - Borrower Distribution Test – The Borrower Distribution Test is the percentage of the bank’s loan originations in each Major Retail Lending Product Line to LMI families in the AA as compared to (i) its peers (“Peer Comparator”) and (ii) the percentage of LMI families in the AA (“Demographic Comparator”). The bank must pass either the Peer Comparator or the Demographic Comparator to pass the Borrower Distribution Test for each product line.
 - Geographic Distribution Test – The Geographic Distribution Test is the percentage of the bank’s loan originations in its home mortgage product line, small loan to a business product line, or small loan to a farm product line in LMI census tracts (if these product lines are Major Retail Lending Product Lines) in the AA as compared to the relevant (i) Peer Comparator and (ii) Demographic Comparator. The bank must pass either the Peer Comparator or the Demographic Comparator to pass the Geographic Distribution Test for each product line.
 - Major Retail Lending Product Line – A bank’s Major Retail Lending Product Lines are those retail lending product lines that, for the two years prior to the beginning of the evaluation period (i) composed of at least 15% of the bank’s dollar volume of total retail loan originations and was the first or second largest line by dollar volume and (ii) at the bank’s option, composed of at least 15% of the bank’s dollar volume of total retail loan originations.
- **Adjustments** – Addressing the qualitative aspects of the performance measure, presumptive ratings are subject to adjustment for determination of the assigned rating based on the following:
 - Performance Contexts. The Final Rule allows examiners to adjust presumptive ratings based on a fixed set of performance context factors. These more qualitative factors help to gauge the effectiveness of the bank’s engagement with its community, including (i) responsiveness of QAs to local needs, (ii) innovativeness, complexity and flexibility of the QAs, (iii) the availability of market opportunities to meet local needs and (iv) written comments about local needs and opportunities submitted to the bank or the OCC. To promote consistent application of the performance context factors, the OCC plans to issue guidance for examiners.
 - Illegal Credit Practices - Evidence of illegal credit practices may provide grounds for a downgrade to a bank’s presumptive rating. The OCC will apply its current policies and procedures related to consideration of discrimination or other illegal credit practices.
- **Small and Intermediate Bank Performance Standards.** Small banks (banks with assets of \$600 million or less) and intermediate banks (banks with assets of more than \$600 million but less than \$2.5 billion) are exempted from the new general performance standards, but have the option to opt-in. Banks that do not opt-in will generally be subject to the performance standards under the Current Rule for small banks and intermediate banks, as applicable. However, small and intermediate banks will be subject to the Final Rule’s QAs and deposit-based AAs, if appropriate.
- **Wholesale and Limited Purpose Bank Performance Standards.** The Final Rule exempts wholesale and limited purpose banks from the general performance standards. These banks remain subject to the Current Rule performance standards for wholesale and limited purpose banks.

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- **Strategic Plans.** The evaluation of strategic plan banks is not tied to the new general performance standards. These banks are subject to the facilities-based and deposit-based AA requirements.

Data Collection, Recordkeeping, and Reporting

The Final Rule includes enhanced data collection, recordkeeping and reporting requirements to support the purposes of the new general performance standards. Key features related to data collection, recordkeeping and reporting include the following:

- **Data Collection** – The extent of a bank’s data collection requirements depends on the performance standards under which it is evaluated:
 - General Performance Standards Banks and Strategic Plan Banks – These banks are required to collect and maintain (i) performance standard data, including Retail Loan Distribution Test ratios, bank and AA-level CRA Evaluation Measures, (ii) QA and Retail Domestic Deposit data (value and physical address of each depositor), (iii) AA data and (iv) deposit-taking facilities data.
 - Small & Intermediate Banks – These banks are only required to collect and maintain Retail Domestic Deposit data.
 - Wholesale & Limited Purpose Banks – These banks must collect and maintain (i) qualifying CD loan, CD investment and CD service data, (ii) Retail Domestic Deposit data, (iii) AA data and (iv) deposit-taking facilities data.
- **Recordkeeping** – Records must be maintained in machine readable format (to be determined by the OCC) until completion of the bank’s next CRA evaluation. Data must be reported using the OCC’s CRA data reporting form available on its website.
- **Reporting** – Banks subject to the general performance standards, the wholesale and limited purpose bank performance standards and strategic plans generally have the same reporting requirements which include (i) performance standards, QA and Retail Domestic Deposit data, (ii) AA data and (iii) performance context information. The Final Rule does not impose any reporting requirements on small and intermediate banks.

Contemplating The Future

- **Effective Date** – The Final Rule is effective October 1, 2020. Banks subject to the general performance standards and wholesale and limited purpose bank performance standards must comply with the appropriate provision of the rule by January 1, 2023. Small and intermediate banks that choose not to opt-in to the general performance standards must comply with applicable AAs, data collection, and recordkeeping requirements by January 1, 2024.
- **Transition** – Until the appropriate compliance date for a bank, as an alternative compliance option, the OCC *may* permit banks to rely on either (i) the applicable performance standards and tests, procedures, processes, definitions, or another element of the Current Rule; or (ii) the new framework in the Final Rule. The OCC states that it “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.” It is not clear exactly what this will look like and may be an area ripe for OCC guidance (see below).
- **Future Rulemakings & Guidance** – Due to lack of sufficient data, the Final Rule did not include the CRA Evaluation Measure benchmarks, a specific CD Minimum or the Retail Loan Distribution Test thresholds. The OCC expects to issue another notice of proposed rulemaking setting forth the process it will undertake to calibrate the requirements for each of these components. In addition, the OCC expects to issue additional guidance related to application of the Final Rule as needed. Stay tuned.

For more information about the CRA, charter conversions, or the Congressional Review Act, please contact the authors.