

November 6, 2023

Federal Banking Agencies Adopt Final Amendments to Community Reinvestment Act Regulations

Final Rule Makes Major Changes to CRA Regime

SUMMARY

On October 24, 2023, the Office of the Comptroller of the Currency (“OCC”), the Board of Governors of the Federal Reserve System (the “Fed”), and the Federal Deposit Insurance Corporation (“FDIC”) (together, the “Agencies”) issued a nearly 1500-page release¹ (the “Adopting Release”) finalizing comprehensive revisions to the Agencies’ Community Reinvestment Act (“CRA”)² regulations.³ The Agencies’ objectives in issuing the final rule include “strengthen[ing] the achievement of the core purpose of the statute,” “adapt[ing] to changes in the banking industry, including the expanded role of mobile and online banking,” “tailor[ing] performance standards to account for differences in bank size and business models and local conditions,” “confirm[ing] that CRA and fair lending responsibilities are mutually reinforcing,” and “promot[ing] a consistent regulatory approach that applies to banks regulated by all three agencies.”⁴

The changes to the CRA regulations most significantly affect banks with over \$2 billion in assets (referred to in the final rule as “Large Banks”), and impose additional requirements for banks with over \$10 billion in assets. Several revised or new provisions also apply to banks with between \$600 million and \$2 billion in assets (“Intermediate Banks”). Banks with less than \$600 million in assets (“Small Banks”) are unaffected by the final rule, unless they “opt into” the new Retail Lending Test, which we describe below. The final rule combines banks that are separately considered wholesale banks and limited purpose banks under the current rule and the proposed rule into one limited purpose bank category, which will be evaluated under a modified version of the Community Development Financing Test, which we also describe below.

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The final rule tracks the Agencies' proposal in May 2023.⁵ For a discussion of the proposal, please see our [Memorandum to Clients](#) dated May 23, 2023. Key changes from the proposed rule include:

- A reduction in the number of major product lines (from six to three) that will be considered in the Retail Lending Test's distribution analysis;
- An adjustment to the standards for assigning ratings under the Retail Lending Test to make them more achievable;
- A reduction in the number of Large Banks required to define "retail lending assessment areas," which we describe below, by increasing the loan threshold and exempting a Large Bank that conducts 80% or more of its retail lending inside its facility-based assessment areas;
- Implementation of a new metric and "impact factor" designed to evaluate the community development investments of Large Banks with over \$10 billion in assets under the Community Development Financing Test;
- Clarifications regarding the strategic plan option; and
- The retention of the current standard for CRA rating downgrades based on evidence of "discriminatory and other illegal credit practices," rather than the standard in the proposed rule, which would have permitted downgrades based on evidence of discriminatory and other illegal practices, whether credit-related or not.

The final rule is expected to go into effect on April 1, 2024, but most provisions of the rule, including the new tests, the need to define retail lending assessment areas, and the data collection requirements, will become applicable on January 1, 2026.⁶ Reporting of the collected data will not be required until 2027; the reporting will be required by April 1 beginning in that year.⁷

SUMMARY OF THE FINAL RULE

In addition to numerous technical modifications,⁸ the final rule introduces major changes to the CRA regulations in four key areas: (A) the delineation of assessment areas; (B) the overall evaluation framework and performance standards and metrics; (C) the definition of community development activities; and (D) data collection and reporting. The new evaluation framework is "tailored" based on whether a bank is a Small Bank, Intermediate Bank, or Large Bank,⁹ with new provisions applicable to strategic plan and limited purpose banks.

The final rule and the accompanying Adopting Release give rise to numerous interpretive and implementation-related issues that are beyond the scope of this memorandum, although we offer several observations in the concluding section of this memorandum. The Agencies "expect to issue supervisory guidance, including examination procedures," "conduct outreach and training," "develop data reporting guides and technical assistance materials," and provide "data tools" to facilitate the implementation and operation of performance tests."¹⁰

A. DELINEATION OF ASSESSMENT AREAS AND OTHER TESTING AREAS

The existing CRA regulations require a bank to delineate one or more assessment areas within which its CRA performance will be evaluated.¹¹ Currently, a bank's assessment area includes the areas in which it

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has its main office, its branches, and any deposit-taking ATMs, as well as surrounding areas in which it does a substantial portion of its lending activity.¹²

The final rule generally retains this method of delineating assessment areas, which it refers to as “facility-based assessment areas,” except that Large Banks may not adjust the boundaries of their facility-based assessment areas to include only portions of counties.¹³ The final rule also affirms the existing requirements that assessment areas not reflect illegal discrimination or arbitrarily exclude low- or moderate-income census tracts.¹⁴

In addition to facility-based assessment areas, however, Large Banks will be required to delineate assessment areas in which they do not have facilities but make more than a threshold number of retail loans—so-called “retail lending assessment areas.”

1. Facility-based assessment areas and retail lending assessment areas

As indicated above, the assessment areas any given bank must delineate will depend, in general, on the bank’s size.

- **Large Banks and limited purpose banks (including former wholesale banks)** will be required to delineate facility-based assessment areas, and to do so as entire counties or metropolitan statistical areas (“MSAs”) rather than portions of those geographies.
- **Large Banks** will also be required to delineate retail lending assessment areas unless they conduct more than 80% of their retail lending within their facility-based assessment areas.¹⁵ These retail lending assessment areas consist of MSAs or non-metropolitan areas of states in which a bank originated at least 150 closed-end home mortgage loans or at least 400 small business loans in each of the preceding two years.¹⁶ The final rule increased these thresholds from the proposed 100 home mortgage loans and 250 small business loans.¹⁷ Only the Retail Lending Test, described below, would be applied with respect to these areas, and only closed-end mortgage lending and small business lending would be considered major product lines, to the extent they exceed the 150 or 400 loan thresholds.¹⁸
- **Intermediate Banks and Small Banks** would be able to continue to delineate partial county facility-based assessment areas, consistent with current practice.

2. Outside retail lending area

Large Banks will also be evaluated under the Retail Lending Test in their “outside retail lending area,” which is the nationwide area consisting of all geographies that are not already defined as facility-based or retail lending assessment areas and excluding any counties in non-metropolitan areas in which the bank did not conduct any retail lending.¹⁹ For Intermediate Banks, the Agencies will evaluate their performance under the Retail Lending Test, which we describe in subsection B.1.a below, in their outside retail lending assessment areas if they originate or purchase more than 50% of their retail loans outside their facility-based assessment areas or if they opt to have their major product lines evaluated in their outside retail lending assessment areas.²⁰

Under the final rule, banks will receive consideration for qualifying community development activities outside their facility-based assessment areas.²¹ For Small Banks, these activities are only considered in

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determining whether to adjust the Small Bank Lending Test rating from “Satisfactory” to “Outstanding.”²² For Intermediate Banks evaluated under the Intermediate Bank Community Development Test, the extent to which these activities will be taken into consideration depends on the adequacy of a bank’s responsiveness to the needs of its facility-based assessment areas.²³ Large Banks will receive consideration for these activities as a matter of course under the Community Development Financing Test.²⁴ These various tests are described in subsection B below.

B. OVERALL EVALUATION FRAMEWORK

The final rule provides four new tests under which banks may be evaluated and a new framework for assigning conclusions and ratings of banks’ performance. All four tests apply to Large Banks, while certain of the four tests (or variations on them) would or may apply to other banks.

- **Large Banks** will be evaluated under the: (a) Retail Lending Test, (b) Retail Services and Products Test, (c) Community Development Financing Test, and (d) Community Development Services Test.²⁵
- **Intermediate Banks** would be evaluated under: (a) the Retail Lending Test and (b) either the existing community development performance standards,²⁶ which are renamed the Intermediate Bank Community Development Test, or, if the bank chooses, the Community Development Financing Test.²⁷
- **Small Banks** would be evaluated under the existing small bank performance standards,²⁸ which will be renamed the Small Bank Lending Test, or, if the bank chooses, the Retail Lending Test.²⁹
- **Wholesale and limited purpose banks** would be combined into one category of limited purpose banks and evaluated under a modified Community Development Financing Test.³⁰

The final rule retains the option for banks to choose to be evaluated based on a strategic plan, albeit with more specific criteria for approval of such plans.

In the subsections that follow, we provide an overview of (1) the four tests and their application to banks of different sizes, (2) the standards applicable to wholesale and limited purpose banks, (3) the strategic plan provisions, and (4) the new framework for assigning conclusions and ratings.

1. The Four Tests

a. Retail Lending Test

The general framework of the Retail Lending Test in the final rule is consistent with the proposed rule. However, the Agencies made several changes to reduce the complexity of the Retail Lending Test:

- The Agencies introduced a new defined term, “majority automobile lender,” which is a bank for which more than 50% of its retail lending consists of automobile loans.³¹ Automobile loans are only evaluated in the retail lending volume screen and as major product lines in the distribution analysis for majority automobile lenders.³² The Agencies estimate that only five Large Banks are currently majority automobile lenders.³³
- The final rule excludes open-end home mortgage loans and multifamily loans from the products that may be evaluated as major product lines. These products are still included in the retail

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lending volume screen, however, and are evaluated qualitatively under the Retail Services and Products Test.³⁴

- The final rule also limits the products that may be evaluated as major product lines in retail lending assessment areas to closed-end home mortgage loans and small business loans and only if they exceed the threshold requiring delineation of the retail lending assessment area.³⁵

The Retail Lending Test uses metrics and performance standards to evaluate Large and Intermediate Banks' retail lending. The Retail Lending Test consists of two evaluations: the retail lending volume screen and the major product lines distribution analysis.³⁶

- A bank's dollar *volume of retail lending* in each facility-based assessment area relative to its deposit base in that assessment area is compared to that of other banks in the area.³⁷ Consistent with the proposed rule, for this purpose, retail loans include home mortgage, multifamily, small business, and small farm loans.³⁸ In a change from the proposed rule, automobile loans would only be counted toward a bank's volume of retail lending if the bank is a majority automobile lender.³⁹
- The *borrower and geographic distributions of a bank's "major product" lines* in each facility-based assessment area and, as applicable, retail lending assessment area and outside retail lending area will be evaluated.⁴⁰ In a change from the proposed rule, major product lines are limited to closed-end mortgage loans, small business loans, small farm loans, and, for majority automobile lenders, automobile loans. Open-end home mortgage loans and multifamily loans were omitted from the final rule.⁴¹ As noted above, only the distribution of closed-end mortgage loans and small business loans will be considered in a retail lending assessment area if they exceed the applicable 150- or 400-loan threshold for delineating a retail lending assessment area.⁴² In facility-based assessment areas and outside retail lending areas, a major product line is any of the four products that comprises 15% or more of a bank's retail lending (based on a combination of dollar amount and loan count) in a facility-based assessment area or outside retail lending area.⁴³ The analysis for each major product line includes performance metrics *calculated separately* for lending to each of low-income borrowers, moderate-income borrowers, low-income census tracts, moderate-income census tracts, and different sizes of small businesses and small farms.⁴⁴ These metrics will then be compared to thresholds that "reflect the potential lending opportunities in the area" and "tak[e] into account changes in economic conditions."⁴⁵

Banks will be evaluated against different performance standards for (i) facility-based assessment areas, retail lending assessment areas and outside retail lending areas, (ii) state-wide and multistate MSAs, and (iii) the institution overall. As to facility-based assessment areas, retail lending assessment areas, and outside retail lending areas:

- For *retail lending volume*, the bank's performance will be compared against a benchmark based on market lending volume data.⁴⁶ The bank's performance is represented as a percentage of the benchmark and is considered to meet or surpass the retail lending volume screen if that percentage is 30% or more.⁴⁷ If a bank does not meet the retail lending volume threshold in an assessment area, the Agencies will consider whether the bank has an "acceptable basis" for not meeting the retail lending volume threshold.⁴⁸ If it does have an acceptable basis, the Agencies will determine a recommended conclusion for the assessment area based on the distribution analysis.⁴⁹ For a Large Bank that does not have an acceptable basis for not meeting the retail lending volume threshold, the bank may only receive a recommended conclusion of "Substantial Noncompliance" or "Needs to Improve."⁵⁰ For Small Banks and Intermediate Banks that fail the retail lending volume screen, the Agencies will develop a recommended

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conclusion based on the distribution analysis, as well as the bank's lending volume and the amount by which it did not meet the retail lending volume threshold.⁵¹

- Once a bank passes the retail lending volume screen, its performance for a given *major product line* will be determined based on a comparison of the bank's performance to market benchmarks. The final rule employs two "calibrated" benchmarks—a "community benchmark" reflecting the demographics of a given assessment area, such as the percentage of families that are low income, and a "market benchmark" reflecting the aggregate amount of lending to targeted borrowers or targeted census tracts by all reporting lenders.⁵² For outside retail lending areas specifically, calculation of the benchmarks is tailored to the bank's geographic lending footprint.⁵³ The bank's performance will be compared to the lower of the community and market benchmarks adjusted by multipliers for each possible conclusion ranging from "Substantial Noncompliance" to "Outstanding."⁵⁴ As compared to the proposal, the final rule lowers the multipliers of the market benchmark used to determine when a bank's performance is "Outstanding" or "High Satisfactory" and the multipliers of the community benchmark used to determine when a bank's performance is "High Satisfactory," "Low Satisfactory," or "Needs to Improve."⁵⁵ As a result, the multipliers in the final rule will result in higher average ratings than under the proposed rule.

The bank's lending will be assigned a supporting conclusion for each category of geographic or borrower distribution analyzed. To determine the product line score, the Agencies will take a weighted average of the geographic distribution supporting conclusions based on a weighted average, which is based on the assessment area's demographics, do the same for the borrower distribution supporting conclusions, and combine these two averages.⁵⁶ Then a weighted averaging methodology will be applied to the bank's product line scores for an assessment area based on the relative importance of that line to the bank's retail lending in that assessment area to determine the Retail Lending Test score for that assessment area, which corresponds to a particular conclusion category ranging from "Substantial Noncompliance" to "Outstanding."⁵⁷

For state-wide and multistate MSA ratings, assessment area conclusions will be based on the weighted average of scores for the facility-based assessment areas and, as applicable, retail lending assessment areas.⁵⁸ The weightings for the weighted average will be based on the average of the proportions of retail loans and deposits sourced from the relevant assessment area.⁵⁹

For the institution overall, a Retail Lending Test conclusion will be developed based on the bank's performance on all the Retail Lending Test conclusions for its facility-based assessment areas and, as applicable, retail lending assessment areas and outside retail lending areas.⁶⁰ These conclusions will be subject to a weighted averaging methodology based on retail loans and deposits sourced from the relevant assessment area.⁶¹ An overall institution conclusion will be assigned based on the combined weighted score.⁶² The combined weighted score again corresponds to a particular conclusion category ranging from "Substantial Noncompliance" to "Outstanding."⁶³

b. Retail Services and Products Test

The Retail Services and Products Test in the final rule is substantially as proposed with a few minor changes to increase clarity, reduce complexity, and allow for flexibility:

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- In the final rule's description of the scope of the Retail Services and Products Test, the Agencies declined to include the word "targeted" to clarify that the evaluation does not require targeting certain populations.⁶⁴
- Under the final rule, Large Banks will not receive additional consideration for branches in low or very low branch access census tracts in the branch distribution analysis.⁶⁵ The Agencies explain that this change is due to the limitations of this approach in terms of taking into account local context and to minimize unnecessary complexity in the final rule.⁶⁶
- The final rule also clarifies that low-cost education loans and special purpose credit programs are examples of responsive credit products under the Retail Services and Products Test.⁶⁷ The addition of special purpose credit programs as an explicit example rather than included under programs that facilitate mortgage and consumer lending to low- or moderate-income borrowers is intended to acknowledge that not all special purpose credit programs have income limitations or are targeted to low- or moderate-income borrowers.⁶⁸
- In determining the conclusion for the Retail Services and Products Test, a bank's retail banking products, including credit and (where applicable) deposit products, may only have a positive effect on the conclusion.⁶⁹ However, if a bank does not offer or provide for consideration any credit products responsive to the needs of low- and moderate-income borrowers or small businesses or farms, the performance evaluation will state as such.⁷⁰ The Agencies believe this change will "allow[] for flexibility without increased burden on banks."⁷¹

The Retail Services and Products Test involves an analysis of the availability and responsiveness of Large Banks' (i) banking services, including digital delivery systems for certain banks; and (ii) retail banking products, including deposit products responsive to the needs of low- and moderate-income individuals, families, or households for banks with assets greater than \$10 billion, or other Large Banks that request consideration.⁷² Similar to the Retail Lending Test, the Retail Services and Products Test utilizes a scoring system to assess performance.

- The *delivery systems evaluation* considers branch availability and services, remote services facility availability, and, for banks with over \$10 billion in assets, Large Banks that do not operate branches, and Large Banks that request consideration of such systems, digital and other delivery systems.⁷³ Branch availability would be analyzed using a combination of quantitative factors, such as the distribution of branches in low-, moderate-, middle-, and upper-income census tracts measured separately, and qualitative factors, such as branch openings and closings, the reasonableness of branches' hours of operation, and services responsive to the needs of low-income and moderate-income individuals and communities.⁷⁴ The analysis also considers favorably a bank's branches in middle- and upper-income census tracts where branches deliver services to low- and moderate-income individuals and in distressed or underserved non-metropolitan middle-income census tracts.⁷⁵ The remote services availability evaluation evaluates the number and percentage of remote service facilities within low-, moderate-, middle-, and upper-income census tracts, as well as whether a bank offers access to out-of-network ATMs in low- and moderate-income census tracts.⁷⁶ Digital and other delivery systems undergo a mostly qualitative analysis, which considers the range of digital and other delivery systems available and the bank's strategy to use these systems to serve low- and moderate-income individuals, supplemented by quantitative data on digital activity, such as number of digital checking and savings accounts opened and active in low-, moderate-, middle- and upper-income census tracts.⁷⁷
- *Credit products and, where applicable, deposit products* would be assessed qualitatively for their responsiveness to the needs of their entire communities, including those of low- and moderate-income individuals and, in the case of credit products, small businesses and small farms.⁷⁸ Examples of responsive credit products identified include those that facilitate home

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mortgage and consumer lending targeted to low- and moderate-income individuals; those conducted in cooperation with minority depository institutions, women's depository institutions, low-income credit unions, or Community Development Financial Institutions; low-cost education loans; and special purpose credit programs.⁷⁹ The final rule lists features and cost characteristics of deposit products responsive to the needs of low- and moderate-income individuals, including no overdraft or insufficient funds fees, as well as features that facilitate access by persons without banking or credit histories.⁸⁰ Examiners will also consider the usage of the bank's deposit products with such features.⁸¹

Banks will receive conclusions for the delivery systems evaluation in each facility-based assessment area, which will then be aggregated to determine an institution level conclusion.⁸² In a change from the proposed rule, the evaluation of a bank's retail banking products will not receive a separate conclusion; instead, the Agencies will determine whether a bank's retail products evaluation contributed positively to the Retail Services and Products Test conclusion.⁸³ Compared to the Retail Lending Test, the Retail Services and Products Test relies more heavily on examiner judgment than on quantitative analysis.

c. Community Development Financing Test

The Community Development Financing Test is largely adopted as proposed with the addition of a new metric to measure separately community development investment:

- To address commenters' concerns regarding the combined evaluation of community development loans and investments, the final rule adds a nationwide community development investment metric and corresponding benchmark for banks with more than \$10 billion in assets.⁸⁴ This metric may only contribute positively to a bank's performance under the Community Development Financing Test.⁸⁵

The Community Development Financing Test evaluates how well Large Banks, as well as any Intermediate Banks choosing to be evaluated under the test, meet the community development lending and investment needs of each facility-based assessment area, state, multistate MSA, and nationwide area.⁸⁶ The test consists of two parts: a community development financing metric and an impact and responsiveness review.⁸⁷

- The *community development financing metric* measures the aggregate dollar value of a bank's community development loans and community development investments, compared to the bank's capacity as reflected by dollar value of deposits in the geography under evaluation.⁸⁸ The metric is measured against the community development lending and investment of Large Banks in aggregate against the total dollar value of deposits at Large Banks in the facility-based assessment area and nationwide in metropolitan or non-metropolitan areas, depending on whether the assessment area is in a metropolitan or non-metropolitan area.⁸⁹
- The *impact and responsiveness review* is a qualitative consideration of how a bank's activities responded to community development needs and opportunities.⁹⁰ Factors to be considered in the impact review include whether activities (i) serve "persistent poverty" counties, (ii) serve geographic areas with low levels of community development financing, (iii) serve low-income individuals and families, (iv) support small businesses or small farms, (v) benefit Native American communities, or (vi) are a new community development financing product or service.⁹¹

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The final rule does not include numeric thresholds for assigning any of the five conclusion categories for the Community Development Financing metric or a numerical weighting for taking into account the results of the impact review due to data limitations.⁹² The Adopting Release notes that the Agencies “could consider thresholds in a future rulemaking once they have accumulated data and have experience applying the metrics and benchmarks,” but “intend to issue guidance to further clarify how they will apply the Community Development Financing Test” for now.⁹³ The examiner’s judgment on which conclusion category should be applied is assigned a numerical score corresponding to conclusion categories ranging from “Outstanding” to “Substantial Noncompliance” for each facility-based assessment area.⁹⁴ For state-wide and multistate MSA conclusions, the conclusion is based on both a weighted average of the facility-based assessment area conclusions and the bank’s activities outside those areas, as evaluated by the community development financing metric and an impact review.^{95, 96} The institution level conclusion follows a similar process as that for the state-level conclusions, but, for banks with more than \$10 billion in assets, also includes any positive effects from the new nationwide community development investment metric.⁹⁷

d. Community Development Services Test

The Community Development Services Test is largely consistent with the proposed test; however, it will now be totally qualitative as the final rule does not include the proposed quantitative metric measuring a bank’s community development service hours.⁹⁸

- This metric would only have applied to banks with \$10 billion or more in assets.⁹⁹ The Adopting Release explains that “[c]ommunity development services do not lend themselves easily to a metrics-based approach,” but that the Agencies will provide guidance and training to examiners to limit discretion and potential rating inflation.¹⁰⁰

The Community Development Services Test qualitatively examines Large Banks’ community engagement based on activities that support community development (as described below) and are related to the provision of financial services.¹⁰¹ The test would assess (i) the extent to which a bank provided community development services and (ii) the impact and responsiveness of those services.¹⁰²

The conclusion assigned for each facility-based assessment area is qualitative, again resulting in conclusions that are assigned a numerical score corresponding to conclusion categories ranging from “Substantial Noncompliance” to “Outstanding.” The statewide, multistate MSA, and institution level conclusions are determined based on a weighted average of facility-based assessment area scores and an evaluation of whether community development service activities in the state outside the facility-based assessment areas justifies an upward adjustment in the conclusion generated by the weighted average of the facility-based assessment area scores.¹⁰³

2. Wholesale and Limited Purpose Banks

The final rule combines banks that are defined as wholesale¹⁰⁴ and limited purpose banks¹⁰⁵ under the current rule into one limited purpose bank category (the definition of which is substantially similar to the current definition of wholesale bank).¹⁰⁶ Limited Purpose Banks will be evaluated under a modified version

of the Community Development Financing Test to account for banks with these business models. At the facility-based assessment area level, examiners will review the dollar value of community development loans and investments, but not assess the dollar value against a benchmark, and conduct an impact review.¹⁰⁷ At the state and multistate MSA level, examiners will develop a conclusion based on a similar assessment, as well as the bank's performance in its facility-based assessment areas within the state or multistate MSA.¹⁰⁸ At the nationwide level, the test will include a community development financing metric and, for limited purpose banks with more than \$10 billion in assets, a community development investment metric.¹⁰⁹ The denominator for each of these metrics would be the limited purpose bank's assets (rather than deposits, as with the metrics for non-limited purpose banks).¹¹⁰

3. Strategic Plans

The final rule will continue to permit banks to submit strategic plans for approval. Consistent with the proposal, a strategic plan under the final rule must include the same performance tests that would apply in the absence of a plan except when the bank does not conduct retail lending or offer retail products or services that would be evaluated under the relevant tests.¹¹¹ For example, a bank that does not make home mortgage, small business, small farm, or automobile loans would not be expected to include metrics similar to those of the Retail Lending Test.¹¹² The final rule adds provisions detailing the modifications or additions that may be made to the performance tests that would apply in the absence of the plan.¹¹³ These possible modifications include, among others, adding additional loan products to be evaluated, assigning weights to components of the Retail Products and Services Test, separating goals for community development investment and community development lending, and specifying measurable goals for community development services.¹¹⁴ In addition, the final rule includes provisions designed to encourage public participation in the approval process.¹¹⁵

4. Approach to Conclusions and Ratings

The final rule's approach to assigning ratings and conclusions is largely consistent with the proposed approach. The final rule refers to a bank's performance on each test at the assessment area, state, multistate MSA, or institution level as a "conclusion." Under the final rule, a "rating" is a bank's overall CRA performance across tests at the state, multistate MSA, and institution levels. The final rule includes as possible conclusions "Outstanding," "High Satisfactory," "Low Satisfactory," "Needs to Improve," and "Substantial Noncompliance." For a bank's overall performance rating, the four statutorily required ratings are retained under the final rule.

The final rule's ratings approach combines a bank's conclusions (translated into performance scores) on each test according to a set of weights tailored to Large Banks, Intermediate Banks, and limited purpose banks.¹¹⁶ The final rule requires combining the conclusions at each of the state, multistate MSA, and institution levels to calculate a bank's rating for each of these levels.¹¹⁷ Small Banks that continue to be evaluated under the small bank performance standards would receive a rating based on the conclusions in each of their assessment areas.

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For Large Banks, the final ratings for the state, multistate MSA, and institution levels reflect weightings of: (i) 40% for the Retail Lending Test, (ii) 40% for the Community Development Lending Test, (iii) 10% for the Retail Services and Products Test, and (iv) 10% for the Community Development Services Test.¹¹⁸ In a departure from the proposed rule, the Agencies changed the weighting of the four tests for Large Banks so that the two retail tests have a combined weight of 50%, and the two community development tests also have a combined weight of 50% (the proposed weights were 60% and 40%, respectively).¹¹⁹ For Intermediate Banks, the Retail Lending Test and the community development evaluation (or Community Development Lending Test, if applicable) are equally weighted at 50%.¹²⁰

The final rule also precludes an overall rating of “Satisfactory” or higher at the state, multistate MSA, or institutional level if the Retail Lending Test conclusion at that level was below the “Low Satisfactory” threshold.¹²¹ A Large Bank with 10 or more assessment areas at the relevant level (*i.e.*, a state, multistate MSA, or institution level) would not be eligible to receive a “Satisfactory” or higher rating unless at least 60% of its assessment areas receive an overall performance of “Low Satisfactory” or higher.¹²²

Contrary to the proposal, the final rule retains the current standard that allows for downgrades due to “discriminatory or other illegal credit practices.”¹²³ The proposed rule would have expanded the types of activities that could lead to a downgrade to all “discriminatory or other illegal practices,” not just credit-related practices. The final rule also updates the criteria used to consider the appropriate impact to a bank’s rating to include the root cause of any violations, the severity of any harm resulting from violations, the duration of time over which the violations occurred, and the pervasiveness of the violations.¹²⁴ The final rule also clarifies that credit-related violations of the Military Lending Act, the Servicemembers Civil Relief Act, and the Consumer Financial Protection Act’s prohibition on unfair, deceptive, or abusive acts or practices may lead to a downgrade, as well as illegal or discriminatory credit practices by bank subsidiaries.¹²⁵

C. DEFINITION OF COMMUNITY DEVELOPMENT ACTIVITIES

Community development activities are at the heart of both the existing CRA evaluation framework and the new framework. Under the current framework, an activity is a community development activity and therefore qualifies for consideration in the CRA examination if it has community development as its “primary purpose.”¹²⁶ The Interagency Questions and Answers issued by the OCC, Fed, and FDIC in October 1997 lay out the current approach to assessing whether an activity satisfies this primary purpose test.¹²⁷ In a change from both the current rule and the proposed rule, the new rule does away with the idea of having community development as the “primary purpose” of qualifying activities and instead provides criteria for when a loan, investment, or service can receive full or partial credit.¹²⁸

1. Standards for Receiving Community Development Credit

Under the final rule, a bank may receive community development credit for an entire loan, investment, or service if they activity satisfies one of the following criteria:¹²⁹

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- The *majority standard* is satisfied when an activity supports community development under one of the 11 categories listed below and when a majority of the dollars, applicable beneficiaries, or housing units benefit the category's targeted population (e.g., low- and moderate-income individuals for affordable housing and community supportive services and small businesses and small farms with respect to economic development).¹³⁰
- The *bona fide intent standard* is met when the majority standard may not be satisfied because the housing units, beneficiaries, or proportion of dollars are not reasonably quantified, the "express, bona fide intent" of the activity is one or more of those 11 community development categories, and activity is "specifically structured to achieve" community development under one of the 11 categories.¹³¹
- The activity is conducted in conjunction with a minority depository institution, women's depository institution, low-income credit union, or Community Development Financial Institution.¹³²
- The activity supports low-income housing tax credit-financed affordable housing.¹³³

A bank may receive partial credit for activities in support of affordable rental housing for low-income or moderate-income individuals that do not meet the majority standard in proportion to the percentage of the total housing units that are affordable.¹³⁴

The final rule expands beyond the current approach the categories of community development that activities may support in order to receive credit.¹³⁵ These include a focus on activities in "targeted census tracts," which are defined as low-income census tracts, moderate-income census tracts, or distressed or underserved non-metropolitan middle-income census tracts. The 11 categories of community development are:¹³⁶

1. Affordable housing that benefits low-income or moderate-income individuals;
2. Economic development that supports small business or small farms;
3. Community supportive services that assist low-income or moderate-income individuals;
4. Revitalization activities undertaken in partnership with a federal, state, local, or tribal government that include an explicit focus on revitalizing targeted census tracts;
5. Provision of essential community facilities that benefit residents of targeted census tracts;
6. Provision of essential community infrastructure that benefits residents of targeted census tracts;
7. Recovery of a designated disaster area;
8. Disaster preparedness and weather resiliency activities that benefit targeted census tracts (the proposed rule used the term "climate resiliency," rather than "weather resiliency");
9. Revitalization or stabilization, essential community facilities and infrastructure, and disaster preparedness and weather resiliency activities in Native Land Areas¹³⁷ that benefit residents, including low- or moderate-income residents, of those areas;
10. Activities undertaken in partnership with minority depository institutions, women's depository institutions, low-income credit unions, or Community Development Financial Institutions, regardless of geographic area;
11. Financial literacy programs, including housing counseling.

The final rule elaborates on the types of activities that support each of the 11 community development purposes.¹³⁸

2. Illustrative List of Eligible Activities and Process for Confirming Activities' Eligibility

The final rule provides that the Agencies will jointly maintain an illustrative list of activities that qualify for CRA consideration.¹³⁹ Currently, banks must submit activities for CRA consideration without any assurance that the activities will be eligible for consideration. The current Interagency Questions and Answers provide some examples, but the final rule notes that most commenters expressed support for a non-exhaustive, illustrative list, which would “simplify compliance, and provide more regulatory certainty.”¹⁴⁰ The Adopting Release notes that the Agencies considered whether the benefits of such a list would outweigh the potential harm of leading banks to focus on the activities in the list and concluded that “the benefit of greater certainty, transparency, and clarity outweigh this potential concern.”¹⁴¹ The final rule provides that the Agencies will update the list “periodically.”¹⁴²

The final rule also includes a mechanism through which banks can receive feedback on whether a loan, investment, or service would be eligible for CRA consideration, either before or after engaging in the activity.¹⁴³ The Adopting Release notes that the Agencies determined not to expand the confirmation process to stakeholders beyond banks subject to the CRA.¹⁴⁴ Under the final rule’s confirmation process, the Agencies will consider the information provided to support the request and any other information the Agencies deem relevant, including information relating to whether the activity is consistent with the safe and sound operation of the bank.¹⁴⁵ The appropriate Agency may also impose limitations or requirements on a determination of an activity’s eligibility to ensure consistency with the CRA final rule.¹⁴⁶ The final rule also provides that the Agencies are presumed to jointly determine the eligibility of a loan, investment, or service and that the determining Agency will consult with the other agencies before making a determination.¹⁴⁷

D. DATA COLLECTION AND REPORTING

The final rule’s revisions to data collection and reporting are meant to facilitate the implementation of the metrics and benchmarks used in the four performance standards discussed above.¹⁴⁸ According to the Agencies, they have tried to tailor data requirements where appropriate.¹⁴⁹

Large Banks will be required to collect and report data on community development loans and investments, branch locations, and remote service facility locations.¹⁵⁰ In a change from the proposed rule, all Large Banks will also be required to collect community development services data.¹⁵¹ The final rule largely retains Large Banks’ existing reporting requirements on small business and small farm lending (with additional indicators for the annual revenue of the business or farm lent to) until the CFPB completes its Section 1071 rulemaking and that data becomes available.¹⁵² Large Banks with assets over \$10 billion will be required to

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collect data on deposits and digital delivery systems.¹⁵³ Small and Intermediate Banks will not be required to collect or report any additional data not required by the current CRA regulations.¹⁵⁴

Consistent with the proposed rule, the final rule requires Large Banks with assets above \$10 billion to collect data on and report their aggregate deposits at each of the county, state, multistate MSA, and institution levels based on the location of the address associated with the deposit account.¹⁵⁵

Bank operating subsidiaries would be required to collect and report retail lending, retail services and products, community development financing, and community development services activities data, as applicable.¹⁵⁶

In addition, the Agencies will disclose, on their respective websites, data on a bank's number and percentage of mortgage applications by borrower race and ethnicity.¹⁵⁷ This data would come from existing HMDA data and would be accompanied by data on aggregate mortgage lending by all HMDA reporters and demographic data.¹⁵⁸ According to the Adopting Release, the Agencies believe that "public disclosure of these data in each assessment area will increase the transparency of a bank's mortgage lending operations."¹⁵⁹

OBSERVATIONS

The final rule is so significantly different from the current rule framework that it will affect banks in myriad ways. Some banks' CRA activities and performance evaluations may be affected only modestly. Others may have to modify significantly their CRA activities (or even their business models) in order to obtain "Satisfactory" or higher CRA ratings. Such a rating is critical both reputationally and to be qualified to expand.

The Adopting Release contains lengthy discussions of the comments received on individual sections and the rationales for each provision. However, the Agencies do not analyze in detail the *overall* expected impact of the final rule on the goals of the CRA or how the final rule's framework will result in more accurate, predictable, and consistent assessments of banks' CRA activities than the current CRA rule.

The final rule is broadly consistent with the proposed rule, but does make changes (several of which are discussed in this memorandum) that are likely to have some impact on the overall CRA evaluation framework. Certain of these changes, particularly to the Retail Lending Test, seem to reflect the Agencies' attempt to address the industry's comments partway and reduce some of the operational burden the overhauled framework would impose on banks, particularly Large Banks. Below we highlight a few of the changes and offer some observations on some of the analysis presented in the Adopting Release:

- The Agencies raised the threshold number of home mortgage and small business loans that must be made in a geographic area in order to consider it a retail lending assessment area.¹⁶⁰ The Agencies also included in the final rule an approach considered in the proposal, under which Large Banks that conduct more than 80% of their retail lending in their facility-based

- assessment areas are exempt from defining retail lending assessment areas.¹⁶¹ According to the Adopting Release, these changes reduce the proportion of Large Banks required to define retail lending assessment areas from 33.5% of Large Banks to 16.9%; 62 Large Banks that would have been required to define retail lending assessment areas under the proposed rule are not required to do so under the final rule.¹⁶² In addition, the number of Large Banks required to define more than one retail lending assessment area is reduced to 44 under the final rule compared to 71 under the proposed rule.¹⁶³
- The Agencies received some comments arguing that they do not have the legal authority under the CRA to evaluate banks' retail lending in retail lending assessment areas.¹⁶⁴ The statutory purpose of the CRA is to require the Agencies to "encourage [banks] to help meet the credit needs of the local communities in which they are chartered."¹⁶⁵ Commenters pointed to this provision of the CRA, among others, to argue that the CRA evaluation is limited to those communities around branches and offices.¹⁶⁶ In response, the Agencies point to a different provision of the CRA and note that "the CRA requires the agencies to assess a bank's record of meeting the credit needs of its *entire community*, without defining what constitutes a bank's entire community."¹⁶⁷ Similarly, according to the Agencies, the provisions of the CRA requiring separate performance evaluations for each metropolitan area in which a bank has a branch do not mean that a bank's "entire community" consists only of those areas.¹⁶⁸ The Adopting Release concludes that "[t]he agencies have determined, based on their supervisory experience and expertise, that a large bank's 'entire community' can reasonably be considered to include areas where the bank is conducting meaningful banking activity by making a substantial number of retail loans."¹⁶⁹
 - The Adopting Release includes a historical analysis of banks' performance under the final rule's Retail Lending Test, which informed the Agencies' decisions regarding the multipliers used to determine a bank's conclusion under the final rule¹⁷⁰ (among other things).¹⁷¹ Using reported CRA and HMDA data from large and intermediate banks from 2018 to 2020¹⁷² and Summary of Deposits data,¹⁷³ the Agencies estimate that 9.4% of banks in the data set would achieve an "Outstanding" conclusion on the final rule's Retail Lending Test (compared to 6.6% under the proposed rule's multipliers), 46.2% would receive a "High Satisfactory" (compared to 41.7%), 34.1% would receive a "Low Satisfactory" (compared to 39.3%), 10.1% would receive a "Needs to Improve" (compared to 12.3%), and 0.2% would receive a "Substantial Noncompliance" conclusion (same as under the proposed rule multipliers).¹⁷⁴
 - One of the Agencies' objectives for the final rule is to "[c]onfirm that CRA and fair lending responsibilities are mutually reinforcing."¹⁷⁵ According to the Adopting Release, the Agencies received many comments regarding the consideration of race and ethnicity in the CRA framework.¹⁷⁶ Many of these comments "asserted that the agencies' proposal represented a missed opportunity to make racial equity a central focus of the CRA and to maximize what some commenters viewed as the statute's potential impact on advancing minority access to lending, investment, and services through the mainstream financial system."¹⁷⁷ The final rule does not venture far beyond the proposed rule with regard to consideration of race and ethnicity in the CRA framework.¹⁷⁸ As noted above, the final rule explicitly provides that special purpose credit programs may be a type of responsive credit program under the Retail Services and Products Test, which allows banks to receive credit for such programs that are not specifically targeted at low- or moderate-income borrowers (e.g., special purpose credit programs based on residents of majority-minority census tracts).¹⁷⁹

The final rule is consistent with the current rule and unlike the proposed rule, limits the type of discriminatory or illegal practices that may lead to a CRA rating downgrade from any discriminatory or illegal practices to just discriminatory or illegal *credit* practices.¹⁸⁰

* * *

ENDNOTES

- 1 OCC, Fed, and FDIC, *Federal Register Notice: Community Reinvestment Act* (Oct. 24, 2023), available at <https://www.federalreserve.gov/aboutthefed/boardmeetings/files/frn-cra-20231024.pdf> (“Adopting Release”).
- 2 See 12 U.S.C. 2901 *et seq.*
- 3 See 12 CFR Part 25; 12 CFR Part 228; 12 CFR Part 345.
- 4 Adopting Release at 4.
- 5 See 87 FR 33884 (June 3, 2022).
- 6 Adopting Release at 12.
- 7 *Id.*
- 8 For example, the final rule will require a bank to include the activities of its operating subsidiaries (such as a mortgage company) in the bank’s CRA assessment. Currently, banks have the option of including the activities of any affiliate, including operating subsidiaries of banks. Adopting Release at 424–34; Final Rule at § __.21; § __.42(c).
- 9 Adopting Release at 5; see Final Rule at § __.12.
- 10 Adopting Release at 13.
- 11 12 CFR 25.41; 12 CFR 228.41; 12 CFR 345.41.
- 12 *Id.*
- 13 Adopting Release at 343–44; Final Rule at § __.16. Compare 12 CFR. § 25.41(d); 12 CFR. § 228.41(d); 12 CFR. § 345.41(d) (“A [bank] may adjust the boundaries of its assessment area(s) to include only the portion of a political subdivision that it reasonably can be expected to serve.”).
- 14 Adopting Release at 345–46; Final Rule at § __.16(c).
- 15 *Id.* at § __.17(a)(2).
- 16 *Id.* at § __.17(c).
- 17 Adopting Release at 376.
- 18 *Id.* at 384–87; Final Rule at § __.17(d).
- 19 Final Rule at § __.18.
- 20 *Id.* at § __.18(a)(2).
- 21 Adopting Release at 402; Final Rule at § __.19.
- 22 Adopting Release at 404; Final Rule at § __.29(b).
- 23 Adopting Release at 404; Final Rule at § __.30(a)(2)(ii).
- 24 Adopting Release at 403.
- 25 *Id.* at 410; Final Rule at § __.21(a)(1).
- 26 See 12 CFR 25.29(b)(2); 12 CFR 228.29(b)(2); 12 CFR 345.29(b)(2).
- 27 Adopting Release at 415; Final Rule at § __.21(a)(2).
- 28 See 12 CFR 25.29(a); 12 CFR 228.29(a); 12 CFR 345.29(a).
- 29 Adopting Release at 419; Final Rule at § __.21(a)(3).
- 30 Adopting Release at 420–21; Final Rule at § __.21(a)(4).
- 31 *Id.* at § __.12.

- 32 Adopting Release at 465.
- 33 *Id.* at 466, fn. 815.
- 34 *Id.* at 536–37; 542–43.
- 35 Final Rule at § __.22(d)(1); § __.22(d)(2)(ii).
- 36 Adopting Release at 481.
- 37 *Id.* at 489–99; Final Rule at § __.22(c).
- 38 Adopting Release at 492.
- 39 *Id.* at 465.
- 40 Final Rule at § __.22(d)(1).
- 41 Adopting Release at 511; Final Rule at § __.22(d)(1).
- 42 Final Rule at § __.22(d)(1); § __.22(d)(2)(ii).
- 43 Adopting Release at 549; Final Rule at § __.22(d)(2)(i).
- 44 Adopting Release at 560–61; Final Rule at § __.22(e)(2).
- 45 Adopting Release at 562–63.
- 46 Final Rule at § __.22(c).
- 47 *Id.* at § __.22(c)(1).
- 48 *Id.* at § __.22(c)(3).
- 49 *Id.* at § __.22(c)(3)(ii).
- 50 *Id.* at § __.22(c)(3)(iii)(A).
- 51 *Id.* at § __.22(c)(3)(iii)(B).
- 52 See Adopting Release at 596–603; Final Rule at § __.22(e)(3) and (4).
- 53 Adopting Release at 612–16.
- 54 See *id.* at 624; Final Rule at § __.22(f).
- 55 Adopting Release at 623. The Federal Reserve has published a search tool on its website which illustrates the applicable percentages based on 2017 to 2019 data that would be needed to attain each “conclusion” level based on the market benchmark for each MSA, Metropolitan Division and county. The search tool is available at <https://www.federalreserve.gov/consumerscommunities/performance-thresholds-search-tool.htm>.
- 56 Adopting Release at 641–44.
- 57 Adopting Release at 646–47.
- 58 Adopting Release at 666.
- 59 *Id.*
- 60 Adopting Release at 670.
- 61 *Id.*
- 62 *Id.*
- 63 *Id.*
- 64 Adopting Release at 689; see Final Rule at § __.23(a)(1).
- 65 Adopting Release at 699.

- 66 *Id.*
- 67 See *id.* at 725; Final Rule at § __.23(c)(2)(iv) and (v).
- 68 Adopting Release at 725.
- 69 *Id.* at 745.
- 70 *Id.* at 744.
- 71 *Id.* at 745.
- 72 See Final Rule at § __.23.
- 73 *Id.* at § __.23(b).
- 74 See *id.* at § __.23(b)(2).
- 75 *Id.* at § __.23(b)(2)(i)(C).
- 76 See *id.* at § __.23(b)(3).
- 77 See *id.* at § __.23(b)(4).
- 78 *Id.* at § __.23(c).
- 79 See *id.* at § __.23(c)(2).
- 80 See *id.* at § __.23(c)(3)(i).
- 81 *Id.* at § __.23(c)(3)(ii).
- 82 Adopting Release at 743.
- 83 *Id.* at 745; Final Rule at § __.23(d).
- 84 Adopting Release at 754.
- 85 *Id.* at 755.
- 86 See Final Rule at § __.24.
- 87 *Id.* at § __.24(b).
- 88 Adopting Release at 781–84; Final Rule at § __.24(b)(1).
- 89 Adopting Release at 789; Final Rule at § __.24(b)(2).
- 90 Adopting Release at 796.
- 91 See Final Rule at § __.15(b).
- 92 Adopting Release at 757–58.
- 93 *Id.* at 758.
- 94 *Id.* at 804.
- 95 Final Rule at § __.24(c) and (d).
- 96 The weightings for the weighted average are based on the average proportions of loans and deposits sourced from facility-based assessment areas versus the whole state or multistate MSA. For example, if the average is 80% or more, the facility-based assessment area performance scores component and the state or multistate MSA performance component are equally weighted. Adopting Release at 812–14.
- 97 *Id.* at § __.24(e).
- 98 Adopting Release at 827.
- 99 *Id.* at 830.

ENDNOTES (CONTINUED)

- 100 *Id.* at 828.
- 101 See *id.* at 832; Final Rule at § __.12.
- 102 Final Rule at § __.25(b).
- 103 *Id.* at § __.25(c).
- 104 Under the current rule, a “wholesale bank” is “a bank that is not in the business of extending home mortgage, small business, small farm, or consumer loans to retail customers, and for which a designation as a wholesale bank is in effect.” 12 CFR 25.12(x); 12 CFR 228.12(x); 12 CFR 345.12(x). The proposed rule included the same definition.
- 105 Under the current rule, a “limited purpose bank” is “a bank that offers only a narrow product line (such as credit card or motor vehicle loans) to a regional or broader market and for which a designation as a limited purpose bank is in effect.” 12 CFR 25.12(n); 12 CFR 228.12(n); 12 CFR 345.12(n). The proposed rule included the same definition.
- 106 Adopting Release at 837. The final rule defines “limited purpose bank” as “a bank that is not in the business of extending closed-end home mortgage loans, small business loans, small farm loans, or automobile loans evaluated under § __.22 to retail customers, except on an incidental and accommodation basis, and for which a designation as a limited purpose bank is in effect.” Final Rule at § __.12.
- 107 Adopting Release at 844; Final Rule at § __.26(d).
- 108 Adopting Release at 844; Final Rule at § __.26(e).
- 109 Final Rule at § __.26(f)(2).
- 110 Adopting Release at 845–48; Final Rule at § __.26(f)(2).
- 111 Final Rule at § __.27(c)(2) and (g)(1).
- 112 See *id.* at § __.27(g)(1)(i).
- 113 Adopting Release at 870; Final Rule at § __.27(g)(2).
- 114 *Id.*
- 115 See *id.* at § __.27(e).
- 116 See Final Rule at § __.28(b)(3).
- 117 *Id.*
- 118 Final Rule at § __.28(b)(3)(i).
- 119 Adopting Release at 899–900.
- 120 Final Rule at § __.28(b)(3)(ii).
- 121 *Id.* at § __.28(b)(4)(i).
- 122 *Id.* at § __.28(b)(4)(ii).
- 123 Adopting Release at 916–17.
- 124 Final Rule at § __.28(d)(3).
- 125 *Id.* at § __.28(d).
- 126 12 CFR 25.12; 12 CFR 228.12; 12 CFR 345.12.
- 127 See OCC, Fed, and FDIC, *Community Reinvestment Act: Interagency Questions and Answers*, __.12(h)–8.

ENDNOTES (CONTINUED)

- 128 Adopting Release at 132; see Final Rule at § __.13(a).
- 129 Adopting Release at 132–33; Final Rule at § __.13(a)(1).
- 130 Adopting Release at 133–34; Final Rule at § __.13(a)(1)(i).
- 131 Adopting Release at 134–35; Final Rule at § __.13(a)(1)(ii).
- 132 Adopting Release at 135–36; Final Rule at § __.13(a)(1)(iii).
- 133 Adopting Release at 136–37; Final Rule at § __.13(a)(1)(iv).
- 134 Adopting Release at 137–38; Final Rule at § __.13(a)(2).
- 135 See OCC, Fed, and FDIC, *Community Reinvestment Act: Interagency Questions and Answers*, __.12(h)–8. The purposes listed under the current approach are “revitalizing or stabilizing low- or moderate-income areas, designated disaster areas, or underserved or distressed non-metropolitan middle-income areas”; “providing affordable housing for, or community services targeted to, low- or moderate-income persons”; and “promoting economic development by financing small businesses or farms.” *Id.*
- 136 Final Rule at §§ __.13(b) – (l).
- 137 “Native Land Areas” include land within Indian reservations, independent Indian communities, and land held in trust for Native Americans by the United States. Final Rule at § __.12.
- 138 See Final Rule at §§ __.13(b) – (l).
- 139 Adopting Release at 293; Final Rule at § __.14.
- 140 Adopting Release at 292.
- 141 *Id.* at 293.
- 142 Final Rule at § __.14(a)(2).
- 143 Adopting Release at 297–98; Final Rule at § __.14(b).
- 144 Adopting Release at 298.
- 145 Final Rule at § __.14(b)(2)(i); see Adopting Release at 299.
- 146 Adopting Release at 300; Final Rule at § __.14(b)(2)(iii).
- 147 Adopting Release at 299–300; Final Rule at § __.14(b)(2)(ii).
- 148 Adopting Release at 951.
- 149 *Id.*
- 150 *Id.* at 966 and 978.
- 151 *Id.* at 983.
- 152 *Id.* at 955. See our [Memorandum to Clients](#) on the CFPB’s proposed rule to implement the Section 1071 data requirements, dated May 3, 2023.
- 153 Final Rule at § __.42(a)(4)(ii) and (iii).
- 154 See Board of Governors of the Federal Reserve System, *Memorandum re Final Rule Amending Community Reinvestment Act Regulations (Regulation BB)* at 4 (Oct. 16, 2023), available at <https://www.federalreserve.gov/aboutthefed/boardmeetings/files/cra-memo-20231024.pdf> (“Board Memo”).
- 155 Final Rule at § __.42(b)(3).
- 156 *Id.* at § __.42(c).
- 157 Adopting Release at 1012.

ENDNOTES (CONTINUED)

- 158 *Id.* at 1012–13.
- 159 *Id.* at 1013.
- 160 *Id.* at 357.
- 161 *Id.*
- 162 *Id.* at 359.
- 163 *Id.*
- 164 *See id.* at 352.
- 165 12 U.S.C. § 2901(b).
- 166 *See* Adopting Release at 352.
- 167 *Id.* at 354 (emphasis in original).
- 168 *Id.*
- 169 *Id.* at 355.
- 170 *See supra* notes 54 and 55 and accompanying text; *see also* Adopting Release at 672.
- 171 *See* Adopting Release at 671–85.
- 172 The Adopting Release notes that intermediate banks are likely underrepresented in this sample because most intermediate banks do not report CRA small business and small farm loan data or HMDA data or both. Adopting Release at 672.
- 173 *See* Adopting Release at 672–74 for the Agencies’ discussion of the limitations of their data set.
- 174 Adopting Release at 676.
- 175 *Id.* at 4.
- 176 *Id.* at 33.
- 177 *Id.* at 34.
- 178 The Adopting Release notes that the Agencies assessed “constitutional considerations . . . associated with adopting regulatory provisions that expressly address race and ethnicity when implementing statutory text that does not expressly address race or ethnicity.” *Id.* at 37. The Agencies may have determined that the Supreme Court’s recent decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), could provide a basis for constitutional challenge to the CRA rules if they provided for explicit consideration of lending based on race and ethnicity in the CRA evaluation.
- 179 *See supra* notes 67–68 and accompanying text; *see also* Adopting Release at 37–38.
- 180 *See supra* note 123 and accompanying text; *see also* Adopting Release at 38.

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