SULLIVAN & CROMWELL LLP

January 10, 2020

Community Reinvestment Act

FDIC and OCC Issue Notice of Proposed Rulemaking on Revisions to the Community Reinvestment Act Regulations

OVERVIEW

On December 12, 2019, the Federal Deposit Insurance Corporation ("*FDIC*") and the Office of the Comptroller of the Currency ("*OCC*" and, together with the FDIC, the "*Agencies*") issued a Notice of Proposed Rulemaking ("*NPR*") proposing comprehensive amendments to the Agencies' regulations that implement the Community Reinvestment Act ("*CRA*").[1] The Agencies stated that the amendments would "encourage more lending, investment, and services in the communities banks serve,"[2] and "promote greater investments in the communities that need them most."[3] The Board of Governors of the Federal Reserve System (the "*Federal Reserve*") declined to join the Agencies' NPR. In a recent speech, a Federal Reserve Governor stated that the Federal Reserve is considering a somewhat different approach, and hopes "to solicit public input on a broader set of options for reform and find a way toward interagency agreement on the best approach."[4]

The Agencies' proposed revisions would significantly affect the manner in which banks seek to satisfy their CRA obligations, including modifying incentives for banks to lend to, invest in, and provide services to their communities generally, and in Low- and Moderate-Income ("*LMI*") areas, in particular. The CRA examination process would be modified for all but the smallest banks by moving to a "metric-based" rating system, which would largely supplant the existing, more subjective, examination process. Comments on the proposal are due on March 9, 2020. Responses to a related Request for Information ("*RFI*") from the OCC for CRA-related deposit, loan and investment activity are due by March 10, 2020.[5]

BACKGROUND

The last major revisions to the CRA regulations were completed in 1995.[6] In August 2018, the OCC published an advance notice of proposed rulemaking ("*ANPR*") soliciting "ideas for building a new framework to transform or modernize the regulations that implement the [CRA]."[7]

Both banking organizations and community groups agreed in comments submitted in response to the ANPR that the current CRA framework should be updated, but differed in their recommendations for doing so.[8]

SUMMARY OF AGENCIES' PROPOSAL

The NPR proposes changes in four key areas: (A) clarifying and expanding what qualifies for CRA credit; (B) expanding where CRA activity counts; (C) providing an objective method for measuring CRA activity; and (D) revising data collection, recordkeeping, and reporting.[9]

A. WHAT QUALIFIES FOR CRA CREDIT

The NPR proposes more expansive and transparent criteria for the types of activities that would qualify for CRA credit. The proposal would require the Agencies to periodically publish a non-exhaustive list of illustrative examples of "qualifying activities," which would be revised at least every three years through a public notice and comment process; and establish a process for banks to seek Agency confirmation that an activity is a qualifying activity.[10]

The proposal would define a "qualifying activity," generally, as "an activity that helps meet the credit needs of a bank's entire community, including [LMI] individuals and communities."[11] Qualifying retail banking activities under the proposal include retail loans provided to an LMI individual (regardless of whether the individual resides in an LMI neighborhood), loans to small businesses or small farms; retail loans provided in "Indian country;" and small loans (up to $2 million) to any business or farm located in an LMI census tract.[12]

Community development activities would include, among others, financing or supporting another bank's community development activities, essential community facilities or infrastructure that primarily benefit LMI individuals, LMI census tracts or other targeted areas of need; small businesses, small farms or other targeted areas of need; certain family farm transactions and support; financial literacy programs for individuals of all income levels; and addressing housing needs in Indian country.[13]

The proposal would also increase the threshold for qualifying loans to a small business or small farm to loans of $2 million or less (from $1 million for loans to small businesses and $500,000 for loans to small farms).[14] Further, community development services would no longer be required to be related to the provision of financial services, but could include, for instance, manual labor provided to a community development project.[15] Community development activities that provide some benefit to (but do not primarily benefit) targeted populations, entities or geographies would receive *pro rata* credit.[16]

B. WHERE CRA ACTIVITY COUNTS

The proposal would retain the current requirement for "facility-based" assessment areas (branches and deposit-accepting ATMs) and also add a new category for "deposit-based" assessment areas. Nevertheless and significantly, the NPR would permit banks to receive credit under the CRA evaluation measure (discussed below) at the bank level for qualifying activities conducted outside of their assessment areas.[17] Currently, only under limited circumstances may a bank receive credit for activities conducted outside its assessment areas.

1. Facility-Based Assessment Areas

Currently, banks generally must delineate CRA assessment areas in census tracts in which the bank has its main office, branches and ATMs, and include the surrounding geographies in which the bank has originated or purchased a substantial portion of its loans.[18] The proposal would retain this requirement. These areas would be identified as "facility-based" assessment areas.[19]

2. Deposit-Based Assessment Areas

According to the NPR, the facilities-based approach does not sufficiently reflect changes in how many banks operate, including the emergence of Internet banks and the decline in reliance on brick-and-mortar locations. According to the NPR, this has resulted in "community development deserts" (places where there is a need for community development activities but in which few banks have a physical presence) and "community development hot spots" (areas in which multiple banks have offices, resulting in a surplus of community development activity).[20]

The proposal seeks to address these concerns by requiring banks to delineate additional, non-overlapping "deposit-based" assessment areas in which they collect a substantial portion of their retail domestic deposits, regardless of whether the bank maintains a physical presence. Specifically, a bank receiving 50% or more of its retail domestic deposits (which would not include brokered deposits)[21] from geographic areas outside of its facility-based assessment areas would be required to delineate deposit-based assessment areas where it receives 5% or more of its total retail domestic deposits, based on the physical address of each depositor.[22]

C. MEASURING CRA ACTIVITY

The NPR observes that the current CRA evaluation framework has been criticized as being too subjective, resulting in ratings that are "at times opaque, complex, and inconsistent."[23] The proposal would establish new numerical standards for generating "presumptive" ratings for all but the smallest banks and banks that have approved strategic plans.[24]

1. Small Banks

Small banks (defined as banks with assets of $500 million or less)[25] would continue to be evaluated according to the existing small bank performance standards. At their option, these banks could be evaluated under an approved strategic plan or under the general performance standards applicable to larger institutions.[26] The $500 million threshold combines the current categories of "small bank" and "intermediate small bank."[27]

2. General Performance Standards

One of the centerpieces of the NPR is the establishment of specific numerical benchmarks and thresholds to determine "presumptive" ratings, which would be assigned separately for each assessment area and then for the bank as a whole. The general performance standards would have three components:

> (1) the "CRA evaluation measure"—which is based on the aggregate sum of the bank's qualifying CRA activities divided by the bank's average quarterly retail deposits, plus a factor for branches located in underserved areas—must exceed 3% for a needs to improve rating, 6% for a satisfactory rating and 11% for an outstanding rating;
>
> (2) individual assessment areas must be awarded satisfactory or outstanding ratings "in a significant portion of [the bank's] assessment areas and in those assessment areas where it holds a significant amount of deposits" in order for the bank to receive satisfactory or outstanding ratings, respectively; and
>
> (3) to receive a satisfactory or outstanding rating, community development lending and investments must constitute 2% or more of the bank's average quarterly retail domestic deposits.[28]

At the assessment area level, the presumptive ratings would be assigned as follows:

> (1) banks must meet the "pass-fail" standards on the applicable "retail lending distribution tests," which are described below, for each "major retail product line" with at least 20 loans in that assessment area;
>
> (2) the CRA evaluation measure must meet the same 3/6/11% thresholds for the assessment area rating as set forth above for the bank as a whole; and [29]
>
> (3) the same 2% minimum community development lending and investment threshold for a satisfactory or outstanding rating that applies to the bank as a whole also applies for community development lending and investments and retail domestic deposits within each assessment area.[30]

The ratings derived from the thresholds are "presumptive" and may be adjusted based on consideration of the "performance context." Under the current framework, examiners assess a bank's CRA performance context in the first instance based on information about a bank and the characteristics of its assessment areas, including: (1) relevant demographic data; (2) lending, investment and service opportunities; and (3) the bank's product offerings and business strategy, institutional capacity and constraints, past performance, and performance of similarly situated lenders. According to the NPR, this performance context "would remain important" for the Agencies to consider.[31] It is not apparent from the proposal, however, whether the Agencies will apply the performance context factors in such a fashion that the presumptive ratings would be adjusted frequently.

As under the current CRA regulations, the final ratings may be adversely affected by evidence of discriminatory or other illegal credit practices.[32]

a. CRA Evaluation Measure

A bank would initially calculate its annual CRA evaluation measure for the bank as a whole and for each assessment area by calculating the percentage of its "qualifying activities value" (the sum of the quantified dollar value of CRA-credited activities divided by the average of its quarterly retail domestic deposits). The resulting percentage is then adjusted upwards by adding one-one-hundredth of the proportion of the bank's branches that are located in LMI areas, Indian country and underserved or distressed areas.[33] For example, if the qualifying activities value percentage was 6% and one-fifth of the bank's branches were located in LMI areas, Indian country and underserved or distressed areas, the CRA evaluation measure would be 6.2%.

For certain qualifying activities, adjustments may be made when evaluating CRA credit. For qualifying loans and community development investments, the value is the average monthly outstanding balance of the qualifying loans or investment on the bank's balance sheet. For qualifying retail loans that are sold within 90 days of origination, only 25% of the value of the loan at origination is included. The criteria also include assignment of a dollar value for community development services based on employee compensation for the hours the employee spends performing the service, the market value of in-kind donations and the dollar value of cash donations. Finally, the values are *pro rated* if the qualifying activity only provides a partial benefit for CRA purposes.[34] In contrast, support for Community Development Financial Institutions, other community development investments (other than investments in mortgage-backed securities or municipal bonds) or affordable housing-related community development loans would receive "double" credit.[35]

Importantly, for purposes of calculating the CRA evaluation measure for the bank as a whole, it would *not* matter whether the qualifying activity takes place within one of the bank's assessment areas.

The NPR notes that the proposed thresholds are based, in part, on the Agencies' analysis of currently available historical data and certain assumptions made where data was unavailable. For the CRA evaluation measure, the Agencies calculated an approximate value for each bank's CRA evaluation measure from 2011 to 2018. The data led the Agencies to suggest that the "average CRA evaluation measure benchmark" for an outstanding rating should be set at between 10% and 15%, at between 5% and 10% for satisfactory, and between 2% and 5% for needs to improve. The minimum for each rating level has been set at one percentage point above the low end of the range.[36]

The Agencies acknowledge limitations in the data they relied upon in establishing the thresholds, and intend to assess additional data before finalizing the rule.[37] On January 10, the OCC issued the RFI, seeking detailed data from banks on deposits, and relevant loans and investments, to be submitted by March 10, 2020, the day after the end of the comment period on the NPR. The NPR provides some information on the methodology used and assumptions made, but does not disclose detailed statistics. The proposal includes a requirement that the Agencies will, following notice and comment, "periodically adjust" the performance standard thresholds (expected to happen at least every three years) after considering the level of qualifying activities conducted by banks, market conditions and unmet needs and opportunities.[38]

b. Retail Lending Distribution Test

The retail lending distribution tests would be conducted for each assessment area for each major retail lending product line[39] with at least 20 loans in an assessment area.[40] These include home mortgages, small loans to a business or a farm, and consumer lending products, including auto loans and credit cards.[41] The tests would be "pass-fail." Failing the tests would preclude a satisfactory or outstanding rating for the particular assessment area.

The criteria for the tests differ between small loans to businesses and farms, on the one hand, and home mortgage and consumer lending, on the other. For small loans to businesses and farms, both a "geographic distribution" test and a "borrower distribution" test must be passed. For home mortgages and consumer lending, there is only the "borrower distribution" test.[42] This distinction means that whether a loan is made in an LMI census tract within an assessment area is only taken into account for business and farm loans. For home mortgage and consumer lending, the key criterion is whether the borrower has low or moderate income, regardless of whether the borrower lives in an LMI tract. The difference is designed to prevent banks from receiving CRA credit for mortgages or other consumer loans made to higher income individuals and families, even when such borrowers are located in LMI census tracts, and to provide incentives to banks to lend to LMI individuals and families, regardless of where they live in the community.[43]

The NPR states that the Agencies would collect and make public data to permit banks to apply the required tests, but recognizes that the available data for small loans to businesses and farms, in particular, may be insufficient to perform the calculations, and suggested that banks purchase private datasets.[44]

i. Borrower Distribution Tests – Small Loans to Businesses and Farms

a) Geographic Distribution Test

To satisfy the proposed "geographic distribution" test for small loans ($2 million or less) to businesses ("*SLBs*"), regardless of the overall size of the business, a bank must satisfy one of two alternative calculations.[45] The "geographic demographic comparator" test is described algebraically for business loans in the NPR as follows:[46]

$$\frac{\#\ of\ Bank\ SLBs\ \ in\ LMI\ census\ tracts\ in\ AA/\#\ of\ Bank\ SLBs\ in\ AA}{\#\ of\ businesses\ in\ LMI\ census\ tracts\ in\ AA/\#\ of\ businesses\ in\ AA} \geq 55\ \%$$

For example, if a Bank made 20 small loans to business in the LMI areas of an assessment area out of a total of 100 small loans the bank made to businesses in the assessment area as a whole, the numerator would be 0.2 or 20%. If there were 300 businesses in the LMI tracts of the assessment area and a total of 1,000 businesses in the assessment area overall, the denominator would be 0.3 or 30%. The resulting percentage would be 67%, and the bank would satisfy the "geographic comparator test."

The alternative "geographic peer comparator" is calculated in a similar fashion, but the denominator is based on the aggregate level of small loans to businesses by all banks that are evaluated under the general performance standards (*e.g.*, excluding small banks) in the assessment area, rather than the number of businesses:[47]

$$\frac{\#\ of Bank\ SLBs\ in\ LMI\ census\ tracts\ in\ AA/\#\ of\ Bank\ SLBs\ in\ AA}{\#\ of\ all\ banks'\ SLBs\ in\ LMI\ census\ tracts\ in\ AA/\#\ \ of\ all\ banks'\ SLBs\ in\ AA} \geq 65\ \%$$

In other words, to pass this alternative, the bank involved must make small loans to businesses at a rate that is at least 65% of the rate of all banks in the same assessment area.

b) Borrower Distribution Tests – Small Loans to Small Businesses and Farms

The "borrower distribution test," which is performed in the same fashion for small loans to both businesses and farms has the same structure, permitting a bank to satisfy the tests through either a "borrower demographic comparator" or a "peer comparator." However, this test does *not* take into account whether the loans are made in LMI areas.

For small loans to businesses (or farms), the following illustrates the calculation for determining whether there were sufficient small loans made in the assessment area to *small* businesses ("*SBs*") (the "*demographic comparator*"):[48]

$$\frac{\#\ of\ Bank\ SLBs\ made\ to\ SBs\ in\ AA/\#\ of\ Bank\ SLBs\ in\ AA}{\#\ of\ SBs\ in\ AA/\#\ of\ businesses\ in\ AA} \geq 55\ \%$$

Thus, if a bank made 20 loans of under $2 million to small businesses in the assessment area out of a total of 50 loans of under $2 million to all businesses, large and small, the numerator would be 0.4. Assuming that there were 200 small businesses in the assessment area out of a total of 400 businesses, the denominator would be 0.5. The resulting percentage would be 80%, which would exceed the threshold. If the bank had made only 10 such loans to small businesses out of the 50 made to all businesses, however, the test would not have been passed (0.2 divided by 0.5 = 40%).

The "borrower demographic comparator" for small loans to businesses (or farms) is expressed as follows:[49]

$$\frac{\#\ of\ Bank\ SLBs\ to\ SB\ in\ AA / \#\ of\ Bank\ SLBs\ in\ AA}{\#\ of\ all\ banks\ SLBs\ to\ SB\ in\ AA / \#\ of\ all\ banks\ SLBs\ in\ AA} \geq 65\ \%$$

In other words, to pass this alternative of the test, a bank would have to make small loans (under $2 million) to small businesses at a rate that was at least 65% of the rate that all banks made such loans to small businesses compared to all businesses in the assessment area.

ii. Borrower Distribution Tests – Home Mortgage and Consumer Lending

For home mortgages and consumer lending business lines, only the "borrower distribution" tests are performed, not the geographic test. The two alternatives are similar to tests for small loans to small businesses and farms, except that the key variable is whether the borrower has an LMI profile. For home mortgage "borrower demographic test," the formula is expressed as follows:[50]

$$\frac{\#\ of\ Bank\ HMLs\ to\ LMI\ borrowers\ in\ AA / \#\ of\ Bank\ HMLs\ to\ LMI\ borrowers\ in\ AA}{\#\ of\ LMI\ families\ in\ AA / \#\ of\ families\ in\ AA} \geq 55\%$$

In other words, to pass the threshold, the percentage of a bank's home mortgage loans in an assessment that were made to LMI borrowers must be at least 55% of the percentage of LMI families in the assessment area as a whole. For example, if 20% of a bank's mortgages in an assessment area were to LMI borrowers, but 40% of the families in the assessment area had low or moderate income, the resulting percentage would be 50% (0.2 / 0.4). The standard would not have been passed.

The alternative "borrower peer comparator" test utilizes the same numerator as the "borrower demographic test." The denominator, though, is based on the percentage of mortgage loans made by all banks subject to the general performance standards to LMI "individuals and families" in the assessment area. The threshold for passing is 65%:

$$\frac{\#\ of\ Bank\ HMLs\ to\ LMI\ borrowers\ in\ AA / \#\ of\ Bank\ HMLs\ to\ LMI\ Borrowers\ in\ AA}{\#\ of\ all\ banks\ HMLs\ to\ LMI\ individuals\ and\ families / \#\ of\ all\ banks\ HMLs} \geq 65\%$$

For example, if the same 20% of the bank's mortgages were to LMI borrowers in the assessment area, but the corresponding percentage for all banks was 30%, the resulting percentage would be 67% (0.2 / 0.3) — a passing grade.[51]

For other consumer lending product lines with at least 20 loans in an assessment area in a year, the tests are performed in a similar fashion as for home mortgages.[52]

3. Strategic Plan

The proposal would not only retain the option for banks to be evaluated under a strategic plan but also require that a bank submit a strategic plan if the bank does not maintain retail domestic deposits on-balance sheet or is a small bank that does not originate retail loans.[53] Strategic plans would "address the unique needs of banks with business models that could not be effectively evaluated under the proposed objective framework."[54]

D. COLLECTING, RECORDING, AND REPORTING DATA

The existing CRA regulations require banks to collect and report a variety of data on loans, Much of the information is made public on the FFIEC website.[55] The proposed amendments will require additional data to be collected and reported, such as for loans to businesses up to $2 million.[56] The Agencies expect that such data collection will eventually facilitate "timelier and more efficient CRA evaluations," while recognizing a considerable upfront cost.[57]

Under the proposed regulation, the Agencies would publish annually for each bank evaluated under the general performance criteria the "quantified values" of its qualifying retail loans, community development loans, community development investments and community development services.[58] This disclosure may be important, because the NPR suggests that banks with an outstanding rating will be examined only once every five years, unless "the data reported indicates that an earlier evaluation is warranted."[59]

Currently, small banks (as defined under the current regulation) are generally exempt from these requirements.[60] The proposal would require banks evaluated under the small bank performance standards to collect and maintain, but not report, data related to the physical location of retail domestic deposits.[61]

FEDERAL RESERVE VIEW

The Federal Reserve has also recognized that the current CRA regulations are due for revision, but did not join the Agencies' NPR. In a January 8, 2020 speech, Federal Reserve Governor Lael Brainard sketched an alternative approach to CRA reform that would "use[] a set of tailored thresholds that are calibrated to local conditions."[62] The approach would include two tests: a retail test for retail banks and a community development test for large, wholesale and limited-purpose banks. Under the retail test, each bank could, using a dashboard provided by the Federal Reserve, track its own activity in each assessment area against thresholds determined by local demographics and the aggregate lending of other in-market competitors. The metric would also automatically adjust to changes in the business cycle. Under the community development test, the combined measure of a bank's community development financing relative to deposits in its local assessment area would be compared to both a national average (set differently for rural and urban areas) and a local average. Further, consideration would be given to all of a bank's community development activities in a state or territory where it has an assessment area, and banks may be able to seek conditional examiner review of proposed CRA activities. Aside from the quantitative standards, each of the retail test and the community development test would include qualitative standards to evaluate relevant retail or community development services provided.

Governor Brainard's remarks alluded to data analysis the Federal Reserve has performed which have led it to conclude that "a tailored approach using targeted metrics also yielded more consistent and predictable overall ratings than any comprehensive uniform metric."[63]

In her closing remarks, Governor Brainard stated: "By sharing [the Federal Reserve's] work publicly, we hope to solicit public input on a broader set of options for reform and find a way toward interagency agreement on the best approach."[64]

IMPLICATIONS

The revised CRA compliance framework outlined in the NPR would significantly overhaul the existing regulatory framework. The Agencies' releases express a belief that the overhaul would result in enhanced community reinvestment activities and levels. However, the Federal Reserve's apparent decision not to join the proposal and the recent speech by Governor Brainard suggesting that a different approach is preferable, as well as the dissent of an FDIC director suggests that the revised structure of CRA compliance rules will be very controversial. For example, FDIC Director Gruenberg has criticized this framework, alleging that it "would allow a bank to achieve a less than satisfactory rating in nearly half of its assessment areas and still receive a satisfactory or even outstanding rating."[65] The House Financial Services Committee has also scheduled a hearing for January 14 on the CRA proposal.[66]

The "CRA evaluation measure" and "retail lending distribution" tests—the linchpins of the revised framework—are novel. The NPR discusses very generally how the minimums for satisfactory and outstanding presumptive ratings were determined, but it does not disclose the Agencies' estimates of the distribution of CRA evaluation measures or retail lending distribution test results among banks based on historical CRA and related data, and how well they correlate to historical ratings. In fact, the NPR suggests that currently available data may not be sufficient to provide those estimates without making significant assumptions. Without this data, it may be difficult to predict the effect of the proposed revisions on banks' CRA activities. In addition, the numerically derived CRA ratings may be adjusted, based on the subjective factors included in the "performance context" analysis. There is potential, then, for the CRA rating process to continue to have a significant subjective element, albeit with the benefit of flexibility for different bank business models and conditions.

As noted, the proposed "laundry list" of CRA-eligible loans and investments represents an expansion from currently considered instruments, and the Agencies intend for the list to be elastic, with additional instruments added as banks innovate. This ongoing flexibility permits the regulatory requirements to adapt more readily to innovative methods of satisfying community credit needs, but could also be perceived as diluting the beneficial impact of CRA activities on community development and meeting the credit needs of LMI areas and individuals.

While branch-centric assessment areas would remain relevant under the proposed regulation, banks would have considerably more flexibility in where they choose to focus their CRA efforts. For example, there would no longer be a separate "service" test for each assessment area or for the bank overall,[67] and qualifying activities under the CRA Evaluation Measure need not be in an assessment area.

The NPR solicits comments on a lengthy list of issues. These include questions regarding the appropriateness of the threshold levels for determining deposit-based assessment areas, the CRA evaluation measure and retail lending test percentages, and the percentage of assessment areas (by number and deposit percentage they represent) that must receive a satisfactory or outstanding rating for a bank to be eligible for a satisfactory or outstanding rating. Commenters are also asked to opine on the appropriateness of the list of qualifying activities in light of the CRA's purposes.

*   *   *

ENDNOTES

1 FDIC and OCC, *Joint Notice of Proposed Rulemaking: Community Reinvestment Act Regulations*, 85 Fed. Reg. 1204 (Jan. 9, 2020) ("*NPR*").

2 Comptroller of the Currency Joseph Otting, *Comptroller Statement Regarding Joint Proposal to Modernize the Community Reinvestment Act Regulations* (Dec. 12, 2019), *available at* https://www.occ.treas.gov/news-issuances/news-releases/2019/nr-occ-2019-146.html.

3 FDIC Chairman Jelena McWilliams, *Statement on the Notice of Proposed Rulemaking on Revisions to the Community Reinvestment Act Regulations* (Dec. 12, 2019) at 1, *available at* https://www.fdic.gov/news/news/press/2019/pr19120.html ("*McWilliams Statement*").

4 Federal Reserve Governor Lael Brainard, *Strengthening the Community Reinvestment Act by Staying True to Its Core Purpose* (Jan. 8, 2020), *available at* https://www.federalreserve.gov/newsevents/speech/brainard20200108a.htm ("*Brainard Speech*").

5 Community Reinvestment Act Regulations; Request for Public Input, 85 Fed. Reg. 1285 (Jan. 10, 2020).

6 NPR at 1205. In April 2018, the U.S. Department of the Treasury issued a memorandum to the OCC, the Federal Reserve, and the FDIC setting forth the Treasury's findings and recommendations resulting from its review of the CRA examination and ratings framework (the "*Treasury Memorandum*"). U.S. Department of the Treasury, *Memorandum for the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation* (Apr. 3, 2018), *available at* https://home.treasury.gov/sites/default/files/2018-04/4-3-18%20CRA%20memo.pdf. Further discussion of the Treasury Memorandum can be found in our previous memorandum to clients entitled "Community Reinvestment Act: Treasury Releases CRA Reform Recommendations Focused on Assessment Areas, Examination Clarity and Flexibility, Examination Processes, and CRA Performance" (Apr. 10, 2018), *available at* https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Community_Reinvestment_Act.pdf.

7 OCC, *Reforming the Community Reinvestment Act Regulatory Framework* (Aug. 28, 2018), *available at* https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-87.html. Further discussion of the ANPR can be found in our previous memorandum to clients entitled "Community Reinvestment Act: OCC Issues Advance Notice of Proposed Rulemaking to Improve the Regulatory Framework Implementing the Community Reinvestment Act" (Sept. 4, 2018), *available at* https://www.sullcrom.com/Community-Reinvestment-Act-Revisions-OCC-Publishes-Advance-Notice-of-Proposed-Rulemaking.

8 *See, e.g.*, National Community Reinvestment Coalition, *Analysis of Public Comments on the Community Reinvestment Act* (Dec. 7, 2018), *available at* https://ncrc.org/analysis-of-public-comments-on-the-community-reinvestment-act/.

9 NPR at 1208.

10 NPR at 1208, 1213-1214; Proposed Rule at §§ __.04, __.05. The OCC regulation is codified in 12 C.F.R. Part 25 and the FDIC regulation codified in 12 C.F.R. Part 345.

11 NPR at 1210; Proposed Rule at §§ __.03; __.04(a).

12 NPR at 1210; Proposed Rule at § __.04(b). *See also* Proposed Rule at § __.03(c) ("Indian country has the same meaning as this term is given in 18 U.S.C. 1151," which includes Indian reservations and various other Native American communities).

13 NPR at 1211-1212; Proposed Rule at § __.04.

14 NPR at 1210-1211; Proposed Rule at § __.03.

15 NPR at 1212-12131.

ENDNOTES (CONTINUED)

16 NPR at 1213; Proposed Rule at § __.06(e).

17 NPR at 1216.

18 12 C.F.R. Parts 25.41(c)(2) (OCC), 345.41(c)(2) (FDIC).

19 NPR at 1208; Proposed Rule at § __.08(b).

20 NPR at 1215.

21 NPR at 1217.

22 NPR at 1208; Proposed Rule at § __.08(b). Unlike facility-based assessment areas, where banks may choose the geographic level where they delineate their assessment areas, the NPR would require banks to delineate deposit-based assessment areas at the smallest geographic level where they receive 5% or more of their retail domestic deposits to help ensure that banks' deposit-based assessment areas reflect their qualifying activities in the same areas as their concentrations of deposits. NPR at 1216; Proposed Rule at § __.08(b).

23 NPR at 1217.

24 NPR at 1208-1209.

25 Proposed Rule at § __.03.

26 NPR at 1223-1224; Proposed Rule at §§ __.09(a)(2), __.13.

27 NPR at 1224. Under the current regulations, for 2020, a small bank has assets of less than $1.305 billion. An intermediate small bank is a small bank that has assets between $326 million and $1.305 billion. 12 C.F.R. §§ 25.12(u)(2) (OCC-regulated institutions other than savings associations), 195.12(u)(2) (federal savings associations), 345.12(u)(2) (FDIC-supervised banks). *See Agencies Release Annual CRA Asset-Size Threshold Adjustments for Small and Intermediate Small Institutions,* Dec. 31, 2019, *available at:* https://www.occ.gov/news-issuances/news-releases/2019/nr-ia-2019-153.html.

28 NPR at 1209.

29 NPR at 1217; Proposed Rule at § __.12(d).

30 NPR at 1218; Proposed Rule at § __.12(d). The minimum threshold of 2% for community development lending and investments in each assessment area could be an impediment to the entry of banks into new markets, where it may be difficult to satisfy that test with a toe-hold initial presence.

31 NPR at 1222; Proposed Rule at § __.14.

32 NPR at 1223; Proposed Rule at § __.15. In 2018, the OCC issued a Policies and Procedures Manual update stating that evidence of discriminatory or other illegal practices would be taken into account in assigning ratings "[w]hen there is evidence of discriminatory or other illegal credit practices directly related to a bank's CRA lending activities." OCC Policies and Procedures Manual, PPM 500–43, *available at* https://www.occ.gov/news-issuances/bulletins/2018/ppm-5000-43.pdf.

33 NPR at 1214, 1220; Proposed Rule at §§ __.07; __.10.

34 Proposed Rule at § __.06.

35 Proposed Rule at §__.07(b)

36 NPR at 1221-1222.

37 NPR at 1221-1222.

38 NPR at 1222; Proposed Rule at § __.12(b).

ENDNOTES (CONTINUED)

39 Under the NPR, a bank's major retail lending product line is defined at the bank level and is any retail product line that composes at least 15% of the bank's overall dollar volume of retail loan originations during the evaluation period. NPR at 1219; Proposed Rule at § __.03.

40 NPR at 1217; Proposed Rule at § __.11(a).

41 *See* Proposed Rule at § __.03.

42 NPR at 1219; Proposed Rule at § __.11(a).

43 NPR at 1219.

44 NPR at 1220. The Agencies also invited comment on whether smaller banks should be allowed to use publicly available data as a proxy. *Id.*

45 NPR 1219; Proposed Rule at § __.11(b)–(c).

46 NPR at 1220; Proposed Rule at § __.11(b).

47 NPR at 1220; Proposed Rule at § __.11(b).

48 NPR at 1220; Proposed Rule at § __.11(c)(3)–(4).

49 NPR at 1220; Proposed Rule at § __.11(c)(3)–(4).

50 *See* Proposed Rule at § __.11(c)(1).

51 *See* Proposed Rule at § __.11(c)(1).

52 *See* Proposed Rule at § __.11(c)(2).

53 NPR at 1209; Proposed Rule at § __.16.

54 NPR at 1209.

55 NPR at 1226; Proposed Rule at § __.20. *See CRA Data Products*, *available at* https://www.ffiec.gov/cra/craproducts.htm.

56 NPR at 1209.

57 NPR at 1209.

58 Proposed Rule at § __.24.

59 NPR at 1226.

60 NPR at 1226; Proposed Rule at § __.20.

61 NPR at 1209; Proposed Rule at §§ __.19, __.23.

62 Brainard Speech.

63 *Id.*

64 *Id.*

65 FDIC Director Martin J. Gruenberg, *Statement on Notice of Proposed Rulemaking: Community Reinvestment Act Regulations* (Dec. 12, 2019) at 5, *available at* https://www.fdic.gov/news/news/press/2019/pr19120.html.

66 *See* U.S. House Committee on Financial Services, January Committee Schedule, *available at* https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=406007.

67 The "service test" includes consideration of both retail banking services and community development services. With respect to retail banking services, the Agencies consider the bank's branches and alternative systems for delivering retail banking services (*e.g.*, ATMs, computer) with a focus on any difference in the level of service provided and the products offered in geographies of different income levels. With respect to community development services, the

Agencies consider the extent, innovativeness and effectiveness of a bank's community development services. *See* OCC, *Community Reinvestment Act Examination Procedures* (May 1999), *available at* https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/cra-exam-procedures/index-cra-examination-procedures.html.

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.

CONTACTS

New York

Thomas C. Baxter Jr.	+1-212-558-4324	baxtert@sullcrom.com
Whitney A. Chatterjee	+1-212-558-4883	chatterjeew@sullcrom.com
H. Rodgin Cohen	+1-212-558-3534	cohenhr@sullcrom.com
Elizabeth T. Davy	+1-212-558-7257	davye@sullcrom.com
Mitchell S. Eitel	+1-212-558-4960	eitelm@sullcrom.com
Michael T. Escue	+1-212-558-3721	escuem@sullcrom.com
Jared M. Fishman	+1-212-558-1689	fishmanj@sullcrom.com
C. Andrew Gerlach	+1-212-558-4789	gerlacha@sullcrom.com
Wendy M. Goldberg	+1-212-558-7915	goldbergw@sullcrom.com
Charles C. Gray	+1-212-558-4410	grayc@sullcrom.com
Joseph A. Hearn	+1-212-558-4457	hearnj@sullcrom.com
Shari D. Leventhal	+1-212-558-4354	leventhals@sullcrom.com
Mark J. Menting	+1-212-558-4859	mentingm@sullcrom.com
Camille L. Orme	+1-212-558-3373	ormec@sullcrom.com
Stephen M. Salley	+1-212-558-4998	salleys@sullcrom.com
Rebecca J. Simmons	+1-212-558-3175	simmonsr@sullcrom.com
William D. Torchiana	+1-212-558-4056	torchianaw@sullcrom.com
Donald J. Toumey	+1-212-558-4077	toumeyd@sullcrom.com
Marc Trevino	+1-212-558-4239	trevinom@sullcrom.com
Benjamin H. Weiner	+1-212-558-7861	weinerb@sullcrom.com

Michael M. Wiseman	+1-212-558-3846	wisemanm@sullcrom.com
Washington, D.C.		
Eric J. Kadel, Jr.	+1-202-956-7640	kadelej@sullcrom.com
William F. Kroener III	+1-202-956-7095	kroenerw@sullcrom.com
Stephen H. Meyer	+1-202-956-7605	meyerst@sullcrom.com
Jennifer L. Sutton	+1-202-956-7060	suttonj@sullcrom.com
Andrea R. Tokheim	+1-202-956-7015	tokheima@sullcrom.com
Samuel R. Woodall III	+1-202-956-7584	woodalls@sullcrom.com
Los Angeles		
Patrick S. Brown	+1-310-712-6603	brownp@sullcrom.com
London		
Richard A. Pollack	+44-20-7959-8404	pollackr@sullcrom.com
Evan S. Simpson	+44-20-7959-8426	simpsone@sullcrom.com
Paris		
William D. Torchiana	+33-1-7304-5890	torchianaw@sullcrom.com
Tokyo		
Keiji Hatano	+81-3-3213-6171	hatanok@sullcrom.com