s&c memo

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Federal Banking Agencies Issue Joint Proposal to Revise Community Reinvestment Act Regulations

Proposal Seeks to Modernize CRA Regulations and Standardize Their Application Across the Agencies

SUMMARY

On May 5, 2022, 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 700-page Notice of Proposed Rulemaking ("NPR")[1] proposing revisions to the Agencies' Community Reinvestment Act ("CRA") regulations.[2] The CRA was enacted in 1977 to encourage banks to meet the credit and deposit needs of the communities in which they are located and provide a framework for the Agencies to examine banks for that purpose.[3] The Agencies' objectives in issuing the NPR include "updat[ing] CRA regulations to strengthen 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," and "provid[ing] greater clarity and consistency in the application of the regulations."[4] The tailoring objective is reflected in, among other things, many of the proposed changes applying only to banks with over $2 billion in assets, and several applying only to banks with assets over $10 billion.

Several provisions of the complex proposal appear designed to focus more CRA activities on the borrowers and geographies that the Agencies perceive to have the greatest need for credit, other retail banking services, and community development financing and investment, especially low-income borrowers and geographies, areas of persistent poverty, and geographies that historically have least benefitted from significant CRA-related community development activities. Proposed changes also reflect the Agencies' broader focus on anti-discrimination and addressing climate change and promoting climate resiliency.

If implemented as proposed, the changes to the CRA regulations would have the most significant impact on banks with over $2 billion in assets (referred to in the proposal as "Large Banks"), and would impose additional requirements for banks with over $10 billion in assets. Several revised or new provisions would 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 proposal, unless they "opt into" a newly fashioned Retail Lending Test. Wholesale and limited purpose banks would be subject to a modified version of a new Community Development Financing Test. Banks of all sizes should seek to gain a sufficient understanding of the proposal to gauge its potential impact on their CRA programs and to consider providing feedback to the Agencies. Comments on the proposal are due by August 5, 2022.

SUMMARY OF THE PROPOSAL

In addition to numerous technical modifications,[5] the NPR proposes 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 would be tailored based on whether a bank is a Small, Intermediate, or Large Bank.[6]

The proposal includes numerous complex provisions that will require careful analysis to assess both their technical feasibility and their policy implications. To that end, the NPR requests feedback on 180 separate questions.

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.[7] Currently, a bank's assessment area includes the areas in which it 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.[8]

The NPR generally retains this method of delineating assessment areas, which it refers to as "facility-based assessment areas."[9] The proposal also affirms the existing requirements that assessment areas not reflect illegal discrimination or arbitrarily exclude low- or moderate-income census tracts.[10] Modifications to the current method of delineating facility-based assessment areas would apply depending on bank size. In addition, Large Banks would also be required to delineate assessment areas in which they do not have facilities but make more than a threshold number of retail loans.

- **Large Banks, wholesale banks, and limited purpose banks** would be required to delineate facility-based assessment areas as entire counties or metropolitan statistical areas ("MSAs"), rather than portions of these geographies.
- **Large Banks** would also be required to delineate additional assessment areas—so called "retail lending assessment areas"—based on their retail lending in areas in which they do not have deposit-taking facilities. These retail lending assessment areas would consist of MSAs or

nonmetropolitan areas of states in which a bank originated at least 100 home mortgage loans or at least 250 small business loans in each of the preceding two years.[11] Only the Retail Lending Test, described below, would be applied with respect to these areas.[12]

- **Intermediate Banks and Small Banks** would be able to continue to delineate partial county facility-based assessment areas, consistent with current practice.

For Intermediate Banks that generate more than 50% of their retail loans outside of facility-based assessment areas and Large Banks that generate more than 50% of their retail loans outside of retail lending assessment areas, the Agencies propose applying the Retail Lending Test to all retail lending outside the bank's facility-based or retail lending assessment areas.[13]

The NPR also proposes that banks would receive consideration for qualifying community development activities in any state or multistate MSA[14] in which they have a facility-based assessment area when determining the "conclusion" for that state or multistate MSA.[15] At the institution level, banks would receive consideration for any qualifying activities conducted nationwide.[16]

According to the NPR, these proposed revisions are based on changes in technology and bank business models that "have resulted in banks serving local communities that may extend beyond the geographic footprint of the bank's main office, branches, and other deposit-taking facilities"[17] and reflect general stakeholder support for evaluating retail lending beyond the currently delineated assessment areas.[18]

B. OVERALL EVALUATION FRAMEWORK

The proposal introduces four new tests under which banks may be evaluated and a new framework for assigning conclusions and ratings of banks' performance. All four tests would apply to Large Banks, while certain of the four tests would or may apply to other banks.

- **Large Banks** would 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.[19]
- **Intermediate Banks** would be evaluated under: (a) the Retail Lending Test and (b) either the existing community development performance standards[20] or, if the bank chooses, the Community Development Financing Test.[21]
- **Small Banks** would be evaluated under the existing small bank performance standards[22] or, if the bank chooses, the Retail Lending Test.[23]
- **Wholesale and limited purpose banks** would be evaluated under a modified Community Development Financing Test.

The proposal would continue to allow 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 proposed 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 Retail Lending Test would use metrics and performance standards to evaluate Large and Intermediate Banks' retail lending.[24] The NPR proposes two metrics.

- A bank's *volume of retail lending* in each facility-based assessment area relative to its deposit base in that assessment area would be compared to that of other banks in the area.[25] For this purpose, retail loans would include home mortgage, multifamily, small business, small farm, and automobile loans.[26]
- 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 would be evaluated.[27] For these purposes, major product lines would include each of closed-end home mortgage loans, open-end home mortgage loans, multifamily loans, small business loans, and small farm loans that individually comprise 15% or more of the dollar amount of a bank's retail lending in each facility-based assessment area and, as applicable, retail lending assessment area or outside retail lending area.[28] Automobile loans would be a major product line if the average of the percentages of automobile loan amounts and number of loans compared to the totals for all retail lending is more than 15%.[29] The analysis for each major product line would include 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.[30] These metrics would be compared to thresholds that "differ across assessment areas and across different business cycles based on local data that reflects credit demand and lending opportunities."[31]

The NPR proposes different performance standards for (i) facility-based assessment areas, retail lending assessment areas, and outside retail lending areas, (ii) state-wide and multi-state 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 would be compared against a benchmark based on market lending volume data. The bank's performance would be represented as a percentage of the benchmark and, based on that percentage, the bank would be assigned a "conclusion" of "Substantial Noncompliance," "Needs Improvement," "Satisfactory," or "Outstanding."
- The bank's performance for a given *major product line* would be determined in a similar fashion, except that there would be 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 lending to targeted areas or targeted borrowers in an assessment area by all reporting lenders."[32] For outside retail lending areas specifically, the approach would be tailored to the bank's geographic lending footprint.[33] Again, the bank's performance would be represented as a percentage of each benchmark and, based on that percentage, the bank would be assigned a "conclusion"[34] ranging from "Substantial Noncompliance" to "Outstanding." According to the NPR, this process may lead to better ratings in markets where more banks are meeting the credit needs of the community while also preventing thresholds from becoming too stringent in markets with fewer opportunities to lend in lower-income communities or to smaller establishments.[35]

Each conclusion category would be assigned a score. In the case of major product lines, a weighted averaging methodology would be applied to the score based on the relative importance of that line to the bank's overall retail lending in major product lines. These weighted scores would be combined to arrive at an aggregate score for the assessment area, which would correspond to a particular conclusion category ranging from "Substantial Noncompliance" to "Outstanding."

For state-wide and multi-state MSA ratings, assessment area conclusions would be based on the conclusions for the facility-based assessment areas and, as applicable, retail lending assessment areas. These conclusions would be translated into scores using weighted averages based on a combination of the retail loans and deposits sourced from the relevant assessment area.

For the institution overall, a Retail Lending Test conclusion would be developed based on the bank's performance on all of the Retail Lending Test conclusions for its facility-based assessment areas and, as applicable, retail lending assessment areas and outside retail lending areas. These conclusions would be translated into scores, again using weighted averages based on retail loans and deposits sourced from the relevant assessment area. An overall institution conclusion would be assigned based on the combined weighted scores. The combined weighted score would again correspond to a particular conclusion category ranging from "Substantial Noncompliance" to "Outstanding."

b. Retail Services and Products Test

The proposed Retail Services and Products Test would involve an analysis of the availability and responsiveness of Large Banks' (i) delivery systems, (ii) credit products, and (iii) for banks with assets greater than $10 billion, or other Large Banks that request consideration, their deposit products targeted to low- and moderate-income individuals and in low- and moderate-income census tracts in a bank's facility-based assessment areas and at the state, multi-state MSA, and institution levels.[36] Similar to the Retail Lending Test, the Retail Services and Products Test would utilize a scoring system to assess performance.

- The *delivery systems evaluation* would consider branch availability and services, remote services facility availability, and digital and other delivery systems for banks with over $10 billion in assets or Large Banks that request consideration of such systems.[37] 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.[38] The analysis would also consider favorably a bank's branches within or near census tracts with "low" and "very low" branch access and in middle- and upper-income census tracts where branches deliver services to low- and moderate-income individuals.[39] The remote services availability evaluation would look at 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.[40] Digital and other delivery systems would undergo a mostly qualitative analysis, which would consider 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 accountholder usage in low-, moderate-, middle-, and upper-income census tracts.[41]
- *Credit products and, where applicable, deposit products* would be assessed qualitatively for their responsiveness to the needs of low- and moderate-income individuals and, in the case of credit

products, small businesses and small farms.[42] Examples of responsive credit products identified include those that facilitate home mortgage and consumer lending targeted to low- and moderate-income individuals (such as small-dollar mortgage products and underwriting consumer lending products using alternative credit histories)[43] and those conducted in cooperation with minority depository institutions, women's depository institutions, low-income credit unions, or Community Development Financial Institutions.[44] The NPR 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.[45] For deposit products, examiners would consider the usage of the bank's deposit products with such features. For credit cards, for example, examiners would consider the number of low- and moderate-income customers using the bank's credit card (or other consumer loan product not included in a major product line), "including rates of successful repayment, the loan terms, underwriting, pricing and safeguards that minimize adverse borrower outcomes."[46]

As with the Retail Lending Test, point values would be assigned for the various "conclusion" categories for each facility-based assessment area. These assessment area point values would then be aggregated, weighted, and averaged to arrive at state and multi-state MSA point values, which would correspond to conclusion categories. Compared to the Retail Lending Test, these conclusions would rely more heavily on examiner judgment than on quantitative analysis.

c. Community Development Financing Test

The Community Development Financing Test would evaluate 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.[47] The proposed test consists of two parts: a community development financing metric and an impact review.[48]

- The *community development financing metric* would measure 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.[49, 50] The metric is measured against the community development financing 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 nonmetropolitan areas.[51]
- The *impact review* would be a qualitative consideration of how a bank's activities responded to community development needs and opportunities.[52] 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) result in a new community development financing product or service.[53] Small-dollar contributions to organizations that provide assistance to small businesses may be critically important for "addressing small business credit needs."[54]

The proposal 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. The examiner's judgment on which conclusion category should be applied, however, would be assigned a numerical score corresponding to conclusion categories ranging from "Outstanding" to "Substantial Noncompliance" for each facility-based assessment area.[55] Similar calculations would be made for state-wide and multi-state MSA conclusions, with weighting calculations based on both facility-based assessment area conclusions and the bank's activities outside those areas. The institution-level conclusions would follow a similar process as that for the state-level conclusions, but also include the results of the nationwide community development financing metric and an overall impact review.

d. Community Development Services Test

The proposed Community Development Services Test would qualitatively examine Large Banks' community engagement based on activities that have a primary purpose of community development (as defined below) and are related to the provision of financial services.[56] The proposal would also allow Large Banks to receive credit for volunteer activities in nonmetropolitan areas that are not related to the provision of financial services, but meet an identified community development need.[57] The test would assess (i) the extent to which a bank provided community development services and (ii) the impact and responsiveness of those services.[58] For Large Banks with assets greater than $10 billion, the test would include a quantitative component measuring the bank's community development services hours relative to the number of full-time employees in each facility-based assessment area.[59]

The conclusion assigned for each facility-based assessment area would be qualitative, again resulting in conclusions that are assigned a numerical score corresponding to conclusion categories ranging from "Substantial Noncompliance" to "Outstanding." A state-wide conclusion would also be assigned, based on a weighted average of facility-based assessment area scores and an evaluation of whether community development service activities in the state outside of the facility-based assessment areas justifies an upward adjustment in the conclusion generated by the weighted average of the facility-based assessment area scores. The same process would apply for multistate MSAs. For an institution-level conclusion, examiners would also take into account Community Development Services activities occurring on a nationwide basis for purposes of an upward adjustment.

2. Wholesale and Limited Purpose Banks

Wholesale[60] and limited purpose banks[61] would be evaluated under a modified version of the Community Development Financing Test to account for banks with these business models.[62] Specifically, the test for these institutions would use assets rather than deposits as the denominator in calculating the community development financing metric and do so only at the institution level.[63] At the facility-based assessment area level, examiners would review the dollar value of community development loans and investments, but not assess the dollar value against a benchmark, and conduct an impact review, with similar exercises undertaken at the state and multi-state MSA level.[64]

3. Strategic Plans

The Agencies' proposal would continue to permit banks to submit strategic plans for approval. The proposal includes provisions to provide more clarity on the setting of goals in the plans, including the flexibility of utilizing different metrics to measure performance if the bank is "substantially engaged in activities outside of the scope of the standard performance test." 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.[65] In addition, the proposal includes provisions designed to encourage public participation in the approval process, and would require banks to submit information on each of their major retail product lines and those of their subsidiaries.

4. Proposed Approach to Conclusions and Ratings

As noted in section B above, the proposal includes a new approach to conclusions—a bank's performance on each test at the assessment area, state, multistate MSA, or institution level. The proposal also includes a new approach to ratings; that is, a bank's overall CRA performance across tests at the state, multistate MSA, and institution levels.[66] The proposal includes as possible conclusions the four existing overall ratings of "Outstanding," "Satisfactory," "Needs to Improve," and "Substantial Noncompliance," except it splits "Satisfactory" into "High Satisfactory" and "Low Satisfactory" to "better differentiate between very good performance and performance on the lower end of the satisfactory range."[67] For a bank's overall performance, the four statutorily required ratings are retained under the proposal.[68]

The proposed ratings approach would combine a bank's conclusions (translated into performance scores) on each test according to a set of weights tailored to Large Banks, Intermediate Banks, and wholesale and limited purpose banks.[69] The proposed approach would combine the conclusions at each of the state, multistate MSA, and institution levels to calculate a bank's rating for each of these levels.[70] 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.

For Large Banks, the final ratings for the state, multi-state MSA, and institution levels would reflect weightings of: (i) 45% for the Retail Lending Test, (ii) 30% for the Community Development Lending Test, (iii) 15% for the Retail Services and Products Test, and (iv) 10% for the Community Development Services Test. For Intermediate Banks, the Retail Lending Test and the community development evaluation (or Community Development Lending Test, if applicable) would be equally weighted at 50%.

The proposal also precludes an overall rating of "Satisfactory" at the state, multistate MSA, or institutional level if the Retail Lending Test conclusion at that level was below the "Low Satisfactory" threshold.[71] Intermediate Banks are currently precluded from receiving an overall "Satisfactory" rating if they receive less than a "Satisfactory" conclusion on either the existing lending test or community development evaluation; however, the proposal would eliminate this requirement.[72] Large Banks with ten or more assessment areas at the relevant level (i.e., a state, multi-state 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."[73] That overall performance measure would be calculated for purposes of this limitation using only a set of weightings across the individual assessment area tests.[74]

In addition, the proposal would expand the scope of discriminatory or other illegal practices that can adversely affect a bank's CRA rating beyond the current limitation to "credit practices" to include any illegal or discriminatory practice, specifically referencing deposit services.[75] The proposed regulations would also update the criteria used to consider the appropriate impact to a bank's rating to include the "root cause of any violations of law, the severity of any consumer harm resulting from violations, the duration of time over which the violations occurred, and the pervasiveness of the violations."[76] The proposal also clarifies that 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 are also included, as are illegal or discriminatory practices by bank subsidiaries.[77]

C. DEFINITION OF COMMUNITY DEVELOPMENT ACTIVITIES

Community development activities are at the heart of both the existing CRA evaluation framework and the new proposed 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."[78] 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.[79] The proposed approach is similar to the current framework, but would expand the possible community development purposes an activity can have.

1. Proposed Primary Purpose Approaches

The NPR proposes two complementary approaches for determining whether an activity has community development as its primary purpose.[80]

- The first approach determines whether a majority of the dollars, applicable beneficiaries, or housing units of the activity at issue are identifiable to one of 11 "community development purposes" listed below.[81]
- The second approach considers whether the "express, bona fide intent" of the activity at issue is one or more of those 11 community development purposes and whether the activity is "specifically structured to achieve, or is reasonably certain to accomplish" the community development purpose.[82]

For activities in support of affordable rental housing for low-income or moderate-income individuals where fewer than 50% of the housing units supported by the activity are affordable, the activity may receive consideration as a community development activity only for the proportion of the total housing units that are affordable.[83, 84] For an activity involving low-income housing tax credits that support affordable housing, however, the activity may be considered a community development activity to the full value of the activity, even if fewer than 50% of the housing units supported by the activity are affordable.[85]

The proposed regulations would expand beyond the current approach the possible community development purposes an activity may have as its primary purpose under the two approaches above.[86] These expanded community development purposes 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.[87] The 11 possible community development purposes are:[88]

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 or targeted census tracts;
6. Provision of essential community infrastructure that benefits residents of targeted census tracts;
7. Recovery activities in a designated disaster area;
8. Disaster preparedness and climate resiliency activities that benefit residents of targeted census tracts;
9. 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;
10. Financial literacy programs, including housing counseling; and
11. Activities undertaken in Native Land Areas[89] that benefit residents, including low- or moderate-income residents, of those areas.

The proposed revisions to the CRA regulations elaborate on the activities that support each of the 11 community development purposes.[90] For example, activities that support affordable housing include: (i) rental housing purchased, developed, financed, rehabilitated, improved, or preserved in conjunction with a government affordable housing program, initiative, tax credit, or subsidy; (ii) activities involving multifamily rental housing if monthly rent for the majority of units does not exceed 30% of 60% of the area median income and the project expresses a commitment to affordable housing in one of four possible ways; (iii) activities that assist low- or moderate-income individuals to obtain or maintain owner-occupied housing, other than home mortgage loans counted under the Retail Lending Test; and (iv) purchases of mortgage-backed securities containing a majority of loans financing affordable housing or housing for low- or moderate-income individuals.[91] The proposed rule clarifies the definition of "affordable housing" and would allow banks to receive credit for supporting "naturally occurring" affordable housing, i.e., affordable housing that does not involve a government program or subsidy.[92]

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

The proposed regulations include a requirement that the Agencies maintain an illustrative list of activities that qualify for CRA consideration.[93] 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 NPR notes "broad support" from stakeholders for a non-exhaustive, illustrative list of qualifying activities similar to that required under the now-rescinded OCC CRA rule issued in 2020.[94] The NPR solicits feedback on whether the benefit of such a list would outweigh the potential harm of effectively limiting banks' activities to those on the list.[95] The proposal further notes that the Agencies would update the list "periodically."[96]

The proposal also includes a mechanism through which banks could receive feedback on whether an activity would be eligible for CRA consideration, either before or after engaging in the activity.[97] In contrast to a similar mechanism in the OCC's 2020 CRA rule, the proposed mechanism would only be available to banks, not other stakeholders, including community groups.[98] Under the proposed process, the Agencies would consider (i) the information provided to support the request, (ii) whether the activity is consistent with safe and sound banking operations, and (iii) any other information the Agencies deem relevant.[99] The Agencies would also be permitted to impose any conditions on confirmation of an activity's eligibility to ensure consistency with the CRA regulations.[100] The Agencies request comment on whether the feedback should be a joint undertaking of the three Agencies, or whether each Agency should assess the propriety of the proposed community development activity for only its supervised banks.

D. DATA COLLECTION AND REPORTING

The NPR's proposed revisions to data collection and reporting are meant to facilitate the implementation of the metrics and benchmarks used in the four proposed performance standards discussed above.[101] According to the Agencies, they have tried to use existing data where possible and tailor data requirements where appropriate.[102]

Large Banks would be required to collect and report data on community development loans and investments, branch locations, and remote service facility locations.[103] The proposal retains Large Banks' existing reporting requirements on small business and small farm lending until the CFPB completes its Section 1071 rulemaking and that data becomes available.[104] Large Banks with assets over $10 billion would be required to collect data on deposits, retail services, and community development services.[105] Small and Intermediate Banks would not be required to collect or report any additional data not required by the current CRA regulations.[106]

The proposal would require 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 depositor, rather than branch location.[107] The NPR would not require Small or Intermediate Banks to collect or report deposit data; instead, the Agencies would use the FDIC's Summary of Deposits data to formulate any applicable metrics.[108] While the proposal would not require Large Banks with less than $10 billion in assets to collect or report this data, it requests feedback on whether these banks should be required to collect the same deposit data as Large Banks with more than $10 billion in assets.[109]

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.[110] The data would be used in the parent bank's evaluations, consistent with the requirements for the parent bank.[111] According to the NPR, this change is based on the fact that "banks exercise a high level of ownership, control, and management of their operations subsidiaries or operating subsidiaries."[112]

In addition, the Agencies propose disclosing, as part of a bank's CRA report, data on the bank's number and percentage of mortgage applications by borrower race and ethnicity.[113] This data would come from existing HMDA data and "would have no direct impact on the conclusions or ratings of the bank and would not constitute a lending analysis for the purpose of evaluating redlining risk factors."[114]

IMPLICATIONS

The Agencies' proposal is a far-reaching overhaul of the CRA rules that reflects several years of discussion among stakeholders. As previously indicated, the proposal is complex and banks of all sizes may need substantial time to gauge its potential impact on their CRA programs. However, we offer several observations:

- The proposal would increase the significance of quantitative measurements to encourage uniformity, but also explicitly continue to rely on examiner judgment in other areas.
- The NPR emphasizes that many of the proposed changes are directed at making banks' CRA activities more focused on individuals, geographies, and small farms and businesses most in need of improved credit availability, other banking services, and community development. This focus on the most difficult to serve populations and areas could present additional challenges for banks in meeting their CRA obligations.
- The proposed changes to the definition of community development activities and the introduction of the illustrative list and eligibility confirmation mechanism might provide banks with more certainty as to which activities would count toward their CRA performance and therefore provide a better idea of their overall performance.
- The proposal reflects the Agencies' recent focus on anti-discrimination and climate change. In terms of anti-discrimination, the proposal suggests several changes to the way in which discriminatory and other illegal practices can affect a bank's CRA rating. For example, discrimination or illegal behavior by operating subsidiaries would impact a bank's CRA rating. In addition, under the current CRA framework, only discriminatory or illegal *credit* practices are taken into account; the proposal would broaden the scope to include discriminatory or illegal practices *in general*. The Agencies also propose reporting HMDA data on banks' home mortgage loan originations and applications by borrower race and ethnicity in banks' CRA reports. As to climate change, the proposed modifications to the definition of community development activities include that certain "climate resiliency activities" could qualify for CRA consideration.
- A stated goal of the NPR is tailoring its requirements based on banks' relative size and business models. To that end, many of the proposed changes would apply only to Large Banks, while others apply only to Large Banks with assets greater than $10 billion. For example, only Large Banks are evaluated under the new Community Development Services Test, and only Large Banks with more than $10 billion in assets are evaluated under this test through the use of a standard metric. Accordingly, only those largest Large Banks must collect and report community development services data.
- The NPR was issued to modernize the CRA regulations in light of changes in technology and bank business models. In that vein, banks would receive CRA credit for retail lending beyond their facility-based assessment areas in recognition of the fact that bank lending is no longer reliant on brick-and-mortar branches. In addition, Large Banks' remote service facility locations in addition to their branch locations, and the digital and non-branch delivery services of banks with assets

greater than $10 billion, are considered under the Retail Services and Products Test to ensure that banks receive CRA credit for these now-common channels for reaching customers.

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ENDNOTES

1 OCC, Fed, and FDIC, *Joint Notice of Proposed Rulemaking: Community Reinvestment Act Regulations* (May 5, 2022), *available at* https://www.federalreserve.gov/consumerscommunities/files/cra-npr-fr-notice-20220505.pdf ("NPR").

2 *See* 12 CFR Part 25; 12 CFR Part 228; 12 CFR Part 345.

3 *See* 12 U.S.C. 2901 *et seq*.

4 NPR at 7.

5 For example, the proposed rule would require that banks include the activities of operating subsidiaries of banks (such as mortgage companies) in the bank's CRA assessment. Currently, banks have the option of including the activities of any affiliate, including operating subsidiaries of banks. NPR at 154–55; Proposed Rule at § __.12; § ___.42(c).

6 NPR at 149–50; Proposed Rule at § __.12.

7 12 CFR 25.41; 12 CFR 228.41; 12 CFR 345.41.

8 *Id.*

9 NPR at 120; Proposed Rule at § __.16.

10 *Id.*

11 *Id.*

12 NPR at 120; Proposed Rule at § __.17.

13 Proposed Rule at § __.22.

14 The CRA requires a separate evaluation of a bank's performance in a multistate MSA when the bank maintains branches in two or more states within the multistate MSA. 12 U.S.C. 1906(d)(2).

15 NPR at 121; Proposed Rule at § __.18.

16 *Id.*

17 NPR at 120.

18 NPR at 124.

19 NPR at 143; Proposed Rule at § __.21(b)(1).

20 *See* 12 CFR 25.29(b)(2); 12 CFR 228.29(b)(2); 12 CFR 345.29(b)(2).

21 NPR at 146; Proposed Rule at § __.21(b)(2).

22 *See* 12 CFR 25.29(a); 12 CFR 228.29(a); 12 CFR 345.29(a).

23 NPR at 147; Proposed Rule at § __.21(b)(3).

24 NPR at 182.

25 *Id.*; Proposed Rule at § __.22(c).

26 NPR at 186.

27 NPR at 182; Proposed Rule at §__.22(b)(2).

28 Proposed Rule at § __.22(a)(4).

29 Specifically, automobile loans would be a major product line if the average of the percentage of automobile loans out of total loans based on dollar value and the percentage of automobile loans out of total loans based on loan count is 15% or greater in a facility-based assessment area, retail lending assessment area, or outside retail lending area. See Proposed Rule at § __.22(a)(4)(iii).

ENDNOTES (CONTINUED)

30 NPR at 182–83; Proposed Rule at § __.22(d)(2)(ii), (iii).

31 NPR at 183.

32 NPR at 203–04.

33 NPR at 236–38.

34 The proposed regulation labels the test result categories as "conclusions," rather than "ratings," even though the descriptions are the same as for overall rating categories. NPR at 360.

35 NPR at 215. 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 for the various metrics for each MSA, Metropolitan Division and county. NPR at 223. The search tool is available at https://www.federalreserve.gov/consumerscommunities/performance-thresholds-search-tool.htm.

36 NPR at 255.

37 NPR at 261; Proposed Rule at § __.23(b).

38 *See* Proposed Rule at §__.23(b)(1).

39 NPR at 267.

40 *See* Proposed Rule at § __.23(b)(2).

41 *See* Proposed Rule at § __.23(b)(3).

42 NPR at 255; Proposed Rule at § __.23(c).

43 NPR at 288–89.

44 *See* Proposed Rule at § __.23(c)(1).

45 *See id.* at § __.23(c)(2).

46 NPR at 176.

47 NPR at 302–03.

48 NPR at 302.

49 NPR at 303; Proposed Rule at § __.24(b)(1).

50 Wholesale and limited purpose banks would be assessed using a similar community development metric, but with capacity based on assets rather than deposits.

51 Proposed Rule at § __.24(b)(2).

52 NPR at 318.

53 *See* Proposed Rule at § __.15(b).

54 NPR at 319.

55 NPR at 322,

56 NPR at 338–39.

57 NPR at 339; Proposed Rule at § __.25(d)(4).

58 NPR at 340; Proposed Rule at § __.25(b).

59 NPR at 340; Proposed Rule at § __.25(b)(2).

ENDNOTES (CONTINUED)

60 Under both the current rule and the Proposed 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." Proposed Rule at § __.12.

61 Under both the current rule and the Proposed 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." Proposed Rule at § __.12.

62 NPR at 345.

63 *Id.* at 347–48.

64 *Id.* at 348–49.

65 NPR at 356.

66 NPR at 360–61.

67 NPR at 361.

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.* at 367.

72 *Id.*

73 *Id.* at 368.

74 *Id.* at 367–68.

75 *Id.* at 371.

76 NPR at 373; *see* Proposed Rule at § __.28(d)(3).

77 Proposed Rule at § __.28(d).

78 12 CFR 25.12; 12 CFR 228.12; 12 CFR 345.12.

79 *See* OCC, Fed, and FDIC, *Community Reinvestment Act: Interagency Questions and Answers*, __.12(h)—8.

80 NPR at 32; Proposed Rule at § __.13(a)(1).

81 NPR at 32; Proposed Rule at § __.13(a)(1)(i).

82 Proposed Rule at § __.13(a)(ii); *see* NPR at 32.

83 NPR at 33; Proposed Rule at § __.13(a)(1)(i)(A).

84 The NPR seeks feedback on whether any other specific activities should be given pro rata credit as certain affordable housing activities are.

85 NPR at 33; Proposed Rule at § __.13(a)(1)(i)(B).

86 *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 nonmetropolitan 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.*

87 Proposed Rule at § __.12.

ENDNOTES (CONTINUED)

88 Proposed Rule at §§ __.13(a)(2)(i) – (xi).

89 "Native Land Areas" include land within Indian reservations, independent Indian communities, and land held in trust for Native Americans by the United States. Proposed Rule at § __.12.

90 *See* Proposed Rule at §§ __.13(b) – (l).

91 Proposed Rule at § __.13(b).

92 NPR at 37, 43.

93 NPR at 105; Proposed Rule at § __.14.

94 NPR at 104; *see* 85 FR 34734, 34797 (June 5, 2020).

95 NPR at 105.

96 Proposed Rule at § __.14(b).

97 NPR at 105; Proposed Rule at § __.14(c), (d).

98 NPR at 105.

99 Proposed Rule at § __.14(d)(2).

100 Proposed Rule at § __.14(d)(3).

101 NPR at 384.

102 *Id.*

103 NPR at 384.

104 *Id.*

105 *Id.*

106 NPR at 385.

107 NPR at 390; Proposed Rule at § __.42.

108 *Id.*

109 NPR at 396.

110 NPR at 417.

111 *Id.*

112 *Id.*

113 NPR at 420.

114 *Id.*

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