

September 4, 2018

## Community Reinvestment Act

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### OCC Issues Advance Notice of Proposed Rulemaking to Improve the Regulatory Framework Implementing the Community Reinvestment Act

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#### SUMMARY

On August 28, the Office of the Comptroller of the Currency published an advance notice of proposed rulemaking (the “ANPR”) soliciting “ideas for building a new framework to transform or modernize the regulations that implement the Community Reinvestment Act of 1977 [(“CRA”).”<sup>1</sup> The ANPR does not propose specific revisions to the current CRA regulations, which were last materially revised in 1995, but requests comment on a series of questions that appear designed to inform the OCC on the scope and desirability of possible changes. The ANPR indicates that these changes could range from relatively minor updates of the current CRA regime to a major overhaul in approach that could significantly affect the actions of banks in lending, investing, and providing other banking services in low- and moderate-income (“LMI”) geographies. The ANPR does not indicate why it was issued by the OCC alone, notwithstanding a history of joint banking agency CRA rulemakings.

In a recent op-ed, Comptroller of the Currency Joseph Otting noted that, “[f]or years we have resisted amending our approach to the CRA out of fear of what could happen, but we have reached a point where we should be more afraid that [the] CRA will become increasingly ineffective if we fail to modernize our approach to implementing this important statute.”<sup>2</sup>

In the ANPR, the OCC expresses firm support for the CRA’s fundamental purpose—encouraging banks to help meet the credit and deposit needs of the communities in which they operate, including LMI communities<sup>3</sup>—noting that a new CRA regulatory framework would help banks “more effectively serve this purpose by (1) encouraging more lending, investment, and activity where it is needed most; (2) evaluating CRA activities more consistently; and (3) providing greater clarity regarding CRA-qualifying

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activities.” The OCC also notes that an updated framework would facilitate more timely evaluations of bank CRA performance, offer greater transparency regarding ratings, promote a consistent interpretation of the CRA, and encourage increased community and economic development in LMI areas.

The OCC notes that “although aspects of the current CRA regulatory framework may be sufficient for certain locally focused and less complex banks[,]”<sup>4</sup> “[c]hanges in the industry offer more opportunities for banks to engage in business outside of the geographies surrounding physical branches” and “technological advances in the delivery of banking services, shifting business models, and changes in consumer behavior and preferences permit banks to engage in the business of banking,”<sup>5</sup> whether or not they have physical branches and regardless of the location of any physical branches.

The ANPR comes several months after the U.S. Department of the Treasury issued a memorandum to the OCC, the Federal Reserve, and the FDIC setting forth Treasury’s findings and recommendations resulting from its review of the CRA examination and ratings framework (the “*Treasury Memorandum*”).<sup>6</sup> In the ANPR, the OCC cites—as the basis for the potential changes contemplated by the ANPR—two primary concerns that were highlighted in the Treasury Memorandum: (1) that the current CRA regulatory framework no longer reflects how many banks and consumers engage in the business of banking, and (2) that there is a lack of clarity, consistency, and certainty with respect to current CRA regulatory requirements. The ideas and questions included in the ANPR focus primarily on addressing these two concerns.

The thirty-one questions and accompanying commentary in the ANPR focus on establishing “metric-based thresholds” for CRA ratings; making bank CRA performance evaluations more transparent; revisiting how assessment areas are defined and used; clarifying and expanding the types of activities eligible for CRA consideration; increasing lending and services to people and in areas that need it most, including in LMI areas; improving the timeliness of regulatory decisions related to the CRA; and reducing the cost and burden related to evaluating performance under the CRA. Key themes of the ANPR include:

- ***Establishing metrics-based thresholds and making bank CRA performance evaluations more transparent.*** The OCC suggests that metrics-based evaluations could be used to improve the consistency and transparency of the evaluation process and solicits comment on how metrics could either be incorporated into the existing CRA evaluation framework or serve as the foundation of a transformed evaluation framework, “taking into account ... bank business model, asset size, delivery channels, and branch structure” as well as “consideration for qualifying activities that serve areas outside a bank’s delineated assessment areas.”<sup>7</sup> One approach suggested by the OCC is a “metric-based performance measurement system” with thresholds or ranges (benchmarks) that correspond to the four statutory CRA rating categories composed of the “micro” components of CRA-qualifying lending, investment and services.<sup>8</sup> Under this framework, a bank’s scores in each category (representing the dollar value of CRA-qualified activity compared to objective criteria, such as percentage of domestic assets or balance sheet capital) would be aggregated to determine the bank’s overall benchmark or level of CRA performance.<sup>9</sup> This approach, the OCC suggests, could allow “flexibility to accommodate capacity and business models while facilitating the comparison among banks of all sizes and business models and the evaluation against an objective, transparent threshold.”<sup>10</sup> The OCC invites comments on the structure and viability of such a metrics-based approach,<sup>11</sup> as well as on

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the data collection, reporting and record keeping requirements that such an approach would entail.<sup>12</sup>

- ***Defining and using assessment areas in ways that recognize the evolution of banking practices.*** The OCC solicits comment on potential modifications to the definition and interpretation of a bank's "community" (a term that is not defined in the CRA or the CRA regulations) and other, related changes to "assessment areas" used in evaluating a bank's CRA performance.<sup>13</sup> The OCC suggests that a revised assessment area need not necessarily be limited to the geographic areas surrounding the bank's branch, deposit-taking, and ATM footprint, but could also include activities in other underserved areas, such as areas tied to the bank's business operations.<sup>14</sup> The OCC notes that providing for consideration for activities conducted in areas "that have historically been largely excluded from consideration" may "accommodate banks that either operate with business models that have no physical branches or banks with services that reach far beyond the geographic location of their physical branches," including, for example, activities targeting underserved areas "such as remote rural populations or Indian country."<sup>15</sup>
- ***Clarifying and broadening the range of activities supporting community and economic development that would qualify for CRA consideration.*** Citing stakeholders' expressed desire for more clarity and certainty regarding the types of activities that will receive CRA consideration, the OCC seeks stakeholder feedback on "regulatory changes that could ensure CRA consideration for a broad range of activities supporting community and economic development ... while retaining a focus on LMI populations and areas," and on changes that could clarify standards for determining whether an activity qualifies for CRA consideration.<sup>16</sup> Specifically, the OCC solicits comment on the extent to which small business loans should receive CRA consideration, whether there should be specific standards for or limits on the inclusion of Community Development activities in CRA considerations, and whether and under what circumstances specific categories of activities (for example home mortgage, small farm lending and consumer lending) should be considered as CRA-qualifying activities.<sup>17</sup>

### OBSERVATIONS AND IMPLICATIONS

The ANPR suggests that the OCC may be willing to propose revised regulations that could substantially modify the actions that banks take to provide lending, investment and other services in their communities to meet CRA expectations. Any resulting proposed regulations will presumably better target the availability of bank products and services to areas and populations that are currently underserved and also ease compliance burdens.

Although the ANPR was issued by the OCC alone, it is possible that the Federal Reserve and the FDIC could join the OCC at the Notice of Proposed Rulemaking ("NPR") stage. Last week, responding to questions after her presentation of the FDIC's Quarterly Banking Profile, FDIC Chairman Jelena McWilliams, when asked about reports that the OCC was preparing to issue its own ANPR on CRA reform, said, "there are many opportunities for the agencies to work together" and noted that the publication of an ANPR that is "issued by a single agency . . . does not mean the other agencies will not join in at the NPR stage."

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ENDNOTES

- <sup>1</sup> Office of the Comptroller of the Currency, *Reforming the Community Reinvestment Act Regulatory Framework*, available at <https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-87a.pdf> (Aug. 28, 2018).
- <sup>2</sup> Joseph Otting, “We have a once-in-a-generation chance to revamp CRA. Let’s use it.” *American Banker* (Aug. 30, 2018), available at <https://www.americanbanker.com/opinion/we-have-a-once-in-a-generation-chance-to-revamp-cra-lets-use-it>.
- <sup>3</sup> *Id.* at 4.
- <sup>4</sup> *Id.* at 8.
- <sup>5</sup> *Id.* at 13.
- <sup>6</sup> 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>. Detailed discussion of the findings and recommendations in 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](https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Community_Reinvestment_Act.pdf).
- <sup>7</sup> *ANPR* at 14-15.
- <sup>8</sup> *Id.* at 15.
- <sup>9</sup> *Id.*
- <sup>10</sup> *Id.*
- <sup>11</sup> *Id.* at 15-16.
- <sup>12</sup> *Id.* at 23.
- <sup>13</sup> *Id.* at 17.
- <sup>14</sup> *Id.*
- <sup>15</sup> *Id.*
- <sup>16</sup> *Id.* at 19-20.
- <sup>17</sup> *Id.* at 20-21.

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