November 27, 2019

MEMORANDUM TO: The Board of Directors

FROM: Mark Pearce
Director, Division of Depositor and Consumer Protection

SUBJECT: Notice of Proposed Rulemaking on Community Reinvestment Act Regulations

I. SUMMARY

Staff presents the attached Notice of Proposed Rulemaking (NPR) for approval by the Federal Deposit Insurance Corporation (FDIC) Board of Directors (Board) and for Board authorization of its publication in the **Federal Register** for a 60-day comment period. The NPR, to be issued jointly with the Office of the Comptroller of the Currency (OCC), proposes comprehensive regulatory amendments implementing the Community Reinvestment Act of 1977 (CRA).[1]

II. BACKGROUND

Congress passed the CRA to encourage insured depository institutions (banks) to help meet the credit needs of the local communities in which they are chartered, consistent with banks' safe and sound operations, by requiring an examination of banks' records of meeting the credit needs of their entire community, including low- and moderate-income (LMI) neighborhoods. Congress enacted the CRA with the purpose of encouraging sound lending to all areas of a community. Specifically, Congress found that (1) banks are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business; (2) the convenience and needs of communities include the need for credit services as well as deposit services; and (3) banks have a continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.[2]

The agencies charged with implementing the statute—the FDIC, the OCC, the Board of Governors of the Federal Reserve System (Federal Reserve) and the Office of Thrift Supervision (OTS) (collectively, the Federal banking agencies)—first issued regulations in 1978 to implement the statute.[3] Since then, the Federal banking agencies (including the OTS until 2011)

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[1] 12 U.S.C. § 2901 *et seq.*
[2] 12 U.S.C. § 2901(a).
[3] 43 Fed. Reg. 47144 (Oct. 12, 1978).

have issued, revised, and sought to clarify the CRA regulations several times. The last major revisions were completed in 1995.[4]

Although the Federal banking agencies issued a few rounds of Questions and Answers guidance on the current regulations,[5] various stakeholders have requested over the past decade that the agencies consider more comprehensive revisions to the regulations themselves. The Federal banking agencies have held hearings on CRA modernization and have met with various stakeholders to get their views. In addition, on April 3, 2018, the U.S. Department of the Treasury also released recommendations, based on stakeholder input, to modernize the CRA regulations.[6]

In August 2018, the OCC issued an Advanced Notice of Proposed Rulemaking (ANPR), which provided a suggested framework for modernizing the CRA regulations and solicited comments on a number of questions about the current regulations.[7] The OCC received more than 1,500 comments on the ANPR from various stakeholders and shared these comments with the FDIC and the Federal Reserve. Additionally, the OCC and the Federal Reserve separately engaged with stakeholders to obtain their perspectives and feedback on all aspects of the CRA and potential improvements that could be made to the regulations.

III. ANALYSIS

In an effort to improve the current CRA regulatory framework, the NPR proposes changes in four key areas: (1) what qualifies for CRA credit; (2) where CRA activity counts; (3) what method should be used to measure CRA activity; and (4) how banks should collect, record, and report data. The following sections provide a brief overview of the proposal's significant changes in those areas.

(1) Qualifying Activities

Currently, under the CRA regulations, whether a bank's activities qualify for consideration generally depends on the characteristics of the activities and where the activities take place. As a general matter, the types of activities that currently qualify for CRA consideration fall into two general categories: (1) retail banking activities; and (2) community development activities. In evaluating a bank's CRA performance, the agencies assess certain factors, including (1) the level of relevant retail lending activity and the geographic and borrower distribution of that retail

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4 60 Fed. Reg. 22156 (May 4, 1995).
5 Interagency Questions and Answers Regarding Community Reinvestment; Guidance, https://www.govinfo.gov/content/pkg/FR-2016-07-25/pdf/2016-16693.pdf.
6 *See* "Community Reinvestment Act - Findings and Recommendations." U.S. Department of the Treasury, https://home.treasury.gov/sites/default/files/2018-04/4-3-18%20CRA%20memo.pdf. (April 3, 2018).
7 83 Fed. Reg. 45053 (Sept. 5, 2018).

lending activity; and (2) the level, responsiveness, innovativeness, complexity, and flexibility of the community development (CD) lending activity.

The NPR proposes to create more descriptive and expansive criteria for the type of activities that qualify for CRA credit. First, the NPR would provide defined criteria that identify the types of activities that meet the credit needs of banks' communities and, thus, can be considered qualifying activities. These criteria would both encompass the many activities that currently qualify for CRA consideration and include additional activities that meet the credit needs of banks' communities, such as expanding credit to areas considered distressed or underserved and "Indian country."

Proposed criteria would include retail loans provided to an LMI individual, a small business, or a small farm, loans in Indian country regardless of the income of the consumer, and small loans to a business or farm located in an LMI census tract. The proposal would also list community development activities that provide funding or services to an expansive range of projects and entities. Examples include adding Community Development Financial Institutions to the CRA-credited ventures currently undertaken with minority- and women-owned depository institutions and low-income credit unions, as long as the activity helps the credit needs of the communities where those institutions are chartered.

Second, the NPR would require the FDIC and the OCC (agencies) to publish periodically a list of non-exhaustive, illustrative examples of qualifying activities, and establish a process for stakeholders to seek agency determination if an activity is a qualifying activity.

(2) Assessment Areas

Currently, the CRA regulations require that banks delineate assessment areas where the bank has its main office, branches, and deposit-taking facilities, and to include in those assessment areas the surrounding geographies where the bank has originated or purchased a substantial portion of its loans.[8] The NPR would retain the current regulation's delineation of assessment areas, and would add a new requirement that additional assessment areas be delineated where a bank collects a substantial portion of its deposits. This new requirement could potentially expand the number of assessment areas a bank may be required to delineate.

a. Facility-Based Assessment Areas

The NPR would require that banks continue to delineate assessment areas around their main office, branches, and non-branch deposit-taking facilities, and to include in those assessment areas the surrounding areas where banks have originated or purchased a substantial portion of

[8] 12 C.F.R. § 345.41(c)(2).

their loans. Delineation of these assessment areas would ensure that CRA activity continues to have a local community focus where banks maintain a physical presence and conduct a substantial portion of their lending activity. These areas would be identified as "facility-based" assessment areas.

b. Deposit-Based Assessment Areas

The NPR would require banks to delineate additional, non-overlapping "deposit-based" assessment areas, not required in the current regulation, where banks have significant concentrations of retail domestic deposits, regardless of physical presence. Delineation of these assessment areas would recognize changes in how banks operate, including the emergence of Internet banks. Specifically, a bank that receives 50 percent or more of its retail domestic deposits (not counting brokered deposits) from geographic areas outside of its facility-based assessment areas would be required to delineate deposit-based assessment areas where it receives five percent or more of its total retail domestic deposits, based on the physical address of each depositor.

Deposit-based assessment areas would be delineated to consist of: (1) a state; (2) a whole metropolitan statistical area (MSA); (3) the whole nonmetropolitan area of a state; (4) one or more whole, contiguous metropolitan divisions in a single MSA; (5) the remaining geographic area of a state, MSA, nonmetropolitan area, or metropolitan divisions other than where it has a facility-based assessment area; or (6) one or more whole, contiguous counties or county equivalents in a single MSA or non-MSA.

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 five percent 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.

Banks would receive CRA credit for qualifying activities conducted in their facility-based assessment areas and deposit-based assessment areas at the assessment area and bank levels, consistent with the NPR's proposed performance standards, as applicable. Subject to certain conditions, the NPR would permit banks to receive CRA credit for qualifying activities conducted outside of their assessment areas at the bank-level.

Under this approach, banks would still be expected to meet local community needs where they have branches and depositors, but also would be given flexibility to serve other communities, as these activities would be considered when calculating the overall dollar value of their qualifying activities.

(3) Methods of Measuring CRA Performance

Currently, the CRA regulations provide for different methods to evaluate a bank's CRA performance depending on the bank's asset size and business strategy.[9] For each type of bank, the agencies evaluate all or a portion of its retail and community development activities. For example, banks with less than $321 million in assets are currently evaluated under a retail lending test, and various types of community development activities are also considered.[10] For banks with $1.284 billion or more in assets, all community development lending and investments and all retail and community development services are evaluated.[11]

The NPR would establish new performance standards to evaluate banks that are not small banks. Small banks, as defined in the NPR, would have assets of $500 million or less in each of the previous four calendar quarters (to be increased for inflation annually). Small banks could select to (1) be evaluated under the current small bank performance standards; or (2) opt in to the NPR's new performance standards, as discussed below.

a. Small Banks

Under the proposal, small banks would not be evaluated pursuant to the new performance standards that consider a bank's CRA evaluation measure and the retail lending distribution tests. Instead, small banks would continue to be evaluated according to the small bank performance standards applicable to small banks that are not intermediate small banks in the current CRA regulations, unless they are evaluated under an approved strategic plan or elect to opt in to the new performance standards.

b. New Performance Standards

The new performance standards under the NPR would assess two fundamental components of a bank's CRA performance: (1) the distribution (i.e., number) of its qualifying retail loan originations to LMI individuals, small farms, small businesses, and LMI census tracts in an assessment area; and (2) the quantified value of the bank's qualifying activities relative to its assessment area- and bank-level retail deposits (i.e., the CRA evaluation measure). Both components would be compared to specific benchmarks and thresholds that would be established prior to the beginning of a bank's evaluation period.

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[9] 12 C.F.R. § 345.21.
[10] 12 C.F.R. § 345.21(a).
[11] 12 C.F.R. § 345.21(a)(1).

i. Retail Distribution Test

Under the first part of the evaluation, the retail lending distribution tests would be applied at the assessment area level and would require that a bank meet the minimum thresholds for each major retail lending product line[12] with at least 20 loans in that assessment area. By only evaluating a bank's distribution of retail loans in areas where the bank has at least 20 loans in a major retail product line, this approach would be tailored to a bank's business strategy and product offerings.

The retail lending distribution tests would evaluate the bank's originations in each assessment area using both a geographic distribution test and a borrower distribution test for small loans to businesses and farms, and solely a borrower distribution test for home mortgage and consumer lending. The geographic distribution test assesses a bank's distribution of lending in LMI areas while the borrower distribution test assesses a bank's distribution of lending to LMI borrowers or small businesses or small farms. A bank can pass these tests by meeting or exceeding a threshold associated with the demographics of the given assessment area <u>or</u> a threshold associated with peers' performance in the given assessment area associated with that test.

ii. CRA Evaluation Measure

Under the second part of the evaluation, the NPR would provide an overall quantitative measure of a bank's ongoing commitment to CRA, to be calculated annually at both the assessment area- and bank-level. The CRA evaluation measure would be calculated by taking the average of the annual sum of a bank's total qualifying activities divided by the average of its quarterly retail domestic deposits. The calculation would be modified by providing a small degree of "extra credit" for branches located in LMI areas, Indian country, underserved areas, and distressed-areas and dividing that amount by the bank's total number of branches.

Banks evaluated under the new performance standards would also be required to meet a minimum CD lending and investment requirement in each assessment area and at the bank level to achieve a satisfactory or outstanding rating.

These tests would lead to a "presumptive" rating, although to get a satisfactory rating at a state or bank level, a bank would need to get a satisfactory rating in a significant portion of its assessment areas.

The NPR would preserve consideration of both performance context, which would allow the agencies to recognize and account for facts and circumstances specific to the bank, and a

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[12] 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 percent of the bank's overall dollar volume of retail loan originations during the evaluation period.

determination of whether the bank was lending in an illegal or discriminatory manner. These factors could lead to a change in the "presumptive" rating.

c. Strategic Plan

The current CRA regulations allow any bank the option of being evaluated under a strategic plan, as long as certain requirements are met. The NPR would retain the strategic plan option for any bank. However, a bank would be required to 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. Any bank that has a strategic plan would be required to collect and report data established under the new performance standards.

(4) Data Collection, Recordkeeping, and Reporting

Currently, the CRA regulations require banks to collect and report a variety of data on loans. However, small banks, as defined under the current regulation, generally are exempt from these requirements.

The NPR would require banks evaluated under the small bank performance standards to collect and maintain, but not to report, data related to their retail domestic deposits so that the agencies could validate their deposit-based assessment area delineations, as applicable.

In addition, banks evaluated under the new performance standards would be required to collect, maintain, and report certain data related to their qualifying activities, certain non-qualifying activities, retail domestic deposits, and assessment areas. For example, these banks would be required to collect and maintain data for each qualifying loan or community development investment on-balance sheet, and community development services and monetary and in-kind donations that the bank provides, until the completion of its next evaluation. For each qualifying activity, among other things, a bank would collect and maintain records of the dollar value of the activity, the activity location, that the activity satisfies the qualifying activities criteria or that it is on the illustrative list, and whether it serves a particular assessment area, if applicable. All necessary data would need to be collected and maintained in machine-readable form.

IV. COMMENT PERIOD

Under the NPR, comments would need to be received on or before 60 days after publication in the **Federal Register**.

V. STAFF CONTACTS

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