

The OCC's CRA Regulatory Reboot

by Joseph Lynyak and Erin Bryan

1. Introduction

Immediately prior to his departure as the Comptroller of the Currency, Joseph Otting finalized the OCC's restructuring of its version of the Community Reinvestment Act's implementing regulations (the "CRA Amendments")¹—while leaving to the newly appointed Acting Comptroller, Brian Brooks, the task of explaining and defending it to both the national bank community and consumer advocates.²

Unlike the approach taken by the prior version of the CRA Regulations, the CRA Amendments deviate from the three-pronged approach which identified three required CRA-related tests (*i.e.*, the lending, deposit and services tests), and replaced them with two distinct assessment areas, specific CRA-approved activities within those assessment areas, and the prospect of expanded community investments and activities that previously were frequently disallowed by CRA compliance examinations.

Perhaps the most important change adopted by the CRA Amendments was the use of *quantitative* measurements to be applied when evaluating a national bank's CRA performance, including multiplier factors to be applied to preferred CRA-approved investments and activities. (As discussed below, however, the CRA Amendments omit the actual metrics to be applied to the quantitative measurements to achieve outstanding, satisfactory, needs to improve and substantial non-compliance CRA ratings.)

While the OCC's CRA Amendments are commendable for recognizing that the American banking system is no longer solely a brick and mortar platform, the new approach is complicated (*i.e.*, HMDA-reporting complicated) and will require wholesale modifications to many national banks' CRA strategies, operations and reporting systems. Accordingly, the phase-in of the new CRA compliance scheme will take effect over several years, based upon the size and category of the particular national bank.

During this phase-in period, however, it is likely that the OCC will participate in a

Related People

- Joseph Lynyak
- Erin Bryan

Related Capabilities

- Banking & Financial Institutions
- Bankruptcy & Financial Restructuring

continuing debate with both the national bank community and consumer groups over whether the CRA Amendments represent an effective new approach to evaluating a national bank's CRA performance, or whether this regulatory effort lacks ascertainable benefits advancing the goals of the CRA.

What follows is an overview and summary of the more important changes made by the CRA Amendments, including a discussion of the new nomenclature being employed, as well as the effective dates for compliance.

2. Discussion

The CRA Amendments make major changes in four areas of the prior CRA framework. Specifically, the CRA Amendments adopt: (a) new requirements for delineating a national bank's CRA assessment area(s); (b) expanded and identifiable qualifying CRA activities and investments (formerly merely identified as activities falling within the broad yet undefined categories of the lending, investment, and services tests); (c) instructions to OCC examiners for evaluating a national bank's CRA performance; and (d) reporting standards to be developed and implemented by a national bank.

Each of these modifications made by the CRA Regulations will be discussed separately below.

A. CRA Revised Assessment Area Delineations

The genesis for the adoption of the CRA in 1977 was the criticism that many state and national banks failed to provide necessary loans and other non-deposit services to the communities from which they gathered deposits. Accordingly, because virtually all banking was centered around a bank's branch operations, a bank's CRA evaluation was focused on the "assessment areas" that reflected the geographic areas surrounding a bank's branch network.

In recognition that geographic location remains an important component to most national bank's operations, the CRA Amendments retain the use of a geographic assessment area, but add an important new deposit assessment area, which reflects the migration of a national bank's lending and deposit functions to technologies, including internet and mobile banking and similar services unrelated to geographic proximity.

The geographic component is now termed a "facility-based assessment area," and requires a national bank to delineate an assessment area encompassing each location where the bank maintains a main office, a branch, or a non-branch deposit-taking facility (which need not include ATM locations) as well as the surrounding locations in which the bank has originated or purchased a substantial portion of its qualifying retail loans.³

When delineating a facility-based assessment area, the area must consist of:

- One whole metropolitan statistical area;
- The whole nonmetropolitan area of a state;

- One or more whole, contiguous metropolitan divisions in a single metropolitan statistical area; or
- One or more whole, contiguous counties or county equivalents in a single metropolitan statistical area or nonmetropolitan area.

While the CRA Amendments recognize that smaller-sized national banks will continue to gather deposits within their respective facility-based assessment areas, larger-sized banks and non-traditional national banks (e.g., internet banks) that gather more than 50% of their deposits from outside of their facility-based assessment areas must also delineate “deposit-based assessment areas” or “DBAAs.”⁴ A DBAA is an area where the national bank receives more than 5% of its retail domestic deposits (outside of its facility assessment areas), and must be delineated to consist of:

- One whole state;
- One whole metropolitan statistical area;
- The entire nonmetropolitan area of a state;
- One or more whole, contiguous metropolitan divisions in a single metropolitan statistical area;
- The remaining geographic area of a state, metropolitan statistical area, nonmetropolitan area, or metropolitan division other than where it has a facility-based assessment area; or
- One or more whole, contiguous counties or county equivalents in a single metropolitan statistical or nonmetropolitan area.⁵

B. Identifying Qualifying CRA Activities and Investments

One of the consistent complaints regarding CRA compliance by banks has centered on the qualitative approach taken by examiners in regard to the approval of activities that qualified for CRA credit. Due in part to an absence of interpretative guidance by the prudential banking regulators, new and innovative investments and programs to benefit low-and-moderate income communities were avoided by banks because of the risk that a creative and innovative yet productive CRA project would be rejected for CRA credit.

It is in this area of compliance that the CRA Amendments provide the most potential benefit to national banks—which is accomplished by specifically expanding and identifying the universe of investments, loans and services that qualify for CRA credit. First, the CRA Amendments replace the lending, deposit and services tests with a broader scope of CRA-related activities that qualify to receive CRA credit. Second, the CRA Amendments identify specific categories of activities that qualify for CRA credit. Finally, the CRA Amendments will provide national banks with pre-approved lists of specific loans, investments and other activities that fall within the scope of the new CRA categories, as well as an ability to receive pre-approval from the OCC for innovative CRA-related activities that formerly were rejected during CRA examinations.

In regard to CRA-related functions by a national bank, the CRA Amendments establish new terminology for national bank-related functions that may qualify for CRA credit by a national bank:

- A *community development investment*—which means a lawful investment, membership share, deposit, legally binding commitment to invest that is reported on the national bank’s Call Report in Schedule RC-L;
- A *community development loan*—which means a loan, line of credit, or commitment to lend in the loan categories identified in the CRA Amendments; and
- *Community development services*—which means bank employee time spent volunteering as a representative of the national bank on activities (or supporting activities) identified in the CRA Amendments and OCC interpretative guidance.⁶

The CRA Amendments follow this broad approach to CRA-eligible bank functions by incorporating *into* the CRA Regulations numerous categories of loans and other banking services that qualify for CRA credit if they partially or indirectly benefit low- or moderate-income (“LMI”) communities within a national bank’s delineated assessment area(s), and include:

- Retail loans;
- Community development loans, community development investments, and community development services, including:
 - Affordable housing;
 - Another bank’s community development loan, community development investment, or community development service;
 - Community support services, such as child care, education, workforce development and job training programs, health services, and housing services, that partially or primarily serve or assist LMI individuals or families;
 - Economic development, which means activities that provide financing for or support small businesses or family farms;
 - Essential infrastructure that partially or primarily serves LMI communities:
 - A family farm’s purchase or lease of farm land, equipment, and other farm-related inputs for the family farm’s use in operating the farm (including technical assistance);
 - Federal, state, local, or tribal government programs, projects, or initiatives that partially or primarily serve LMI individuals or families; and
 - Financial literacy programs or education or homebuyer counseling; and
- Owner-occupied and rental housing development, construction, rehabilitation, improvement, or maintenance in Indian country or other tribal and native lands;
 - Qualified opportunity funds that benefit low- or moderate-income qualified opportunity zones; and
 - Other activities and ventures undertaken, including capital investments and loan participations, by a bank in cooperation with a minority depository institution, women’s depository institution, Community Development Financial Institution, or low-income credit unions.⁷

When reviewing this list of CRA-approved categories, a national bank should note that in each case there must be a discernable nexus to a targeted CRA-related person or entity (e.g., LMI individuals and communities, small businesses and small farm lending, etc.) However, a review of this expanded approach to CRA qualified loans and other investments indicates that the OCC now intends to expand the reach of CRA to loans, investments and topics formerly not deemed CRA-related for credit.⁸

This conclusion is amply supported by Section 25.06 of the CRA Regulations, which states that the OCC will publish a list of activities that fall under the rubric of a CRA-qualified activity.⁹

Significantly, to underscore this change in perspective, simultaneously with the issuance of the CRA Amendments, the OCC published its initial list of approved CRA-qualified activities, which includes dozens of loans, investments and other services that will specifically receive CRA credit when performed or engaged-in by a national bank.¹⁰

C. CRA Examination and Compliance Reviews

To evaluate a national bank's CRA performance, the CRA Amendments improve on the former CRA examination approach by *quantifying* the value of the aggregate CRA loans, investments and other CRA-qualified activities provided or engaged-in by a national bank—by calculating a sum of all qualifying activities based upon the following:

- The quantified dollar value of qualifying CRA loans and community development investments originated, made, or performed by the national bank during the year (or on the bank's balance sheet during the year); and
- The aggregate:
 - Quantified dollar value of community development services conducted during the year;
 - Quantified dollar value of in-kind donations made during the year; and
 - Quantified dollar value of monetary donations made during the year.¹¹

While the adoption of a quantitative value calculation may be a welcomed approach for determining objectively a national bank's CRA performance, the CRA Amendments *do not* include the performance metrics for awarding a CRA rating (*i.e.*, outstanding, satisfactory, needs to improve and unsatisfactory).

This is a very unfortunate yet critical omission that will prevent national banks from commencing the process of building models to access and monitor their respective CRA performance based upon the requirements of the CRA Amendments.¹²

D. Record Retention Requirements

As noted above, while national banks may have to wait until the OCC provides advice regarding the performance metrics that will apply to CRA examinations under the CRA Amendments, a cursory review of the record-keeping requirements is reminiscent of the data reporting requirements now required by HMDA and the CFPB's Regulation C¹³—except that the universe of required record-keeping will include a national bank's LMI loan and investment portfolio across its assessment areas.

While the quantification of CRA credit that now will be possible pursuant to the CRA Amendments may benefit national banks by bringing greater certainty to the CRA compliance process, the structuring of a reporting system for CRA-related activities may be costly and time consuming. Among other things, the range of CRA-qualified loans, investments and services is broader than solely consumer credit—which means that

capturing CRA data will require a monitoring system that will include CRA-qualified commercial loans as well.

In the minimum, implementing an appropriate CRA record-keeping system and operating the same has cemented the job security of a national bank's CRA compliance professionals.

3. Conclusions

Whether the clarity and predictability of the OCC's CRA Amendments outweighs the concomitant complexity and compliance expense will likely constitute the response by the national bank community as the impact of the CRA Amendments is evaluated.

Thankfully, the effective dates for the various provisions of the CRA Amendments range from January 1, 2023 to January 1, 2024 (depending upon whether the national bank falls in the category of small, intermediate, wholesale and limited purpose national bank, or larger national bank).¹⁴ (The technical effective date for the changes made by the CRA Amendments is October 1, 2021, although compliance is optional as noted immediately above.) However, a national bank may elect to effect compliance earlier than the stated dates the OCC has indicated, and transitional accommodations with individual national banks will be considered. During the next several months, the OCC will likely clarify several of the concerns identified in this Alert, and will begin to promulgate revised examination procedures that may further clarify appropriate compliance steps that a national bank should consider.

* * *

Please note that this Alert is intended to summarize several of the major changes made by the CRA Amendments to the current version of the OCC's CRA Regulations.

¹ <https://www.occ.gov/news-issuances/federal-register/2020/nr-occ-2020-63a.pdf>.

² 12 U.S.C § 2901 *et seq.*; 12 C.F.R. § 25.11 *et seq.* For purposes of this analysis, unless otherwise indicated, references to the OCC's CRA Regulations will refer to the CRA Regulations as modified by the CRA Amendments.

³ Section 25.09(a) of the OCC Regulations. In its discretion, a national bank may also include within a delineated assessment areas the locations of one or more deposit-taking ATMs.

⁴ When viewed from the perspective of the old CRA Regulations, the new assessment requirements resemble in many ways the specialized CRA plans that have been adopted by national banks with non-traditional business plans.

⁵ Section 25.07(c) of the CRA Regulations. The CRA Amendments indicate that when delineating either a facility-based assessment area or a deposit-based assessment area, a bank may identify the smallest permissible geographic area permitted or may delineate a larger assessment area that includes more expansive geographic locations as permitted by the CRA Amendments.

⁶ Section 25.03 of the OCC Regulations.

⁷ Section 25.04 of the OCC Regulations.

⁸ For example, an infrastructure project with intended result of employing LMI individuals should now qualify for CRA credit, even though the project may not be located in an LMI community.

⁹ See, <https://www.occ.gov/topics/consumers-and-communities/cra/cra-qualifying-activities.pdf>. The list of qualifying CRA activities will be updated regularly and published at www.occ.gov.

¹⁰ Importantly, a national bank wishing to receive pre-approval for a proposed CRA activity may request in advance an approval from the OCC that the proposed activity will receive appropriate CRA credit. See Section 25.05(b) of the CRA Regulations.

¹¹ Section 25.08 of the OCC Regulations. When making these value calculations, certain activities will be assigned a “multiplier” factor as an indication of the value the OCC places on that investment or activity, including support for minority depository institutions, CDFIs, affordable housing development loans, and certain other community development services. See, Section 25.08(b) of the OCC Regulations.

¹² Further, when examining for CRA compliance, the CRA Amendments require that the retail lending distribution test be applied, including product lines (if applicable) for home mortgage lending, small business loans, auto loans, consumer loans and small farm loans. See Section 25.12 of the OCC Regulations. (How these retail tests will interface with the new quantitative CRA calculations will require considerable additional clarification by the OCC.)

¹³ 12 C.F.R. § 1003.1 *et seq.*

¹⁴ In perhaps the most unartful definitional approach contained in the CRA Amendments, a small national bank is a bank with assets of less than \$600 million in four of the last five calendar quarters; an intermediate national bank is a bank that exceeds the small bank size threshold and has assets of \$2.5 billion or less in four out of five of the last five calendar quarters; a larger sized national bank is a bank with assets exceeding \$2.5 billion; a wholesale bank is a bank not in the business of specified retail lending; and an internet bank is undefined.