OCC Solicits Comment on Modernizing Community Reinvestment Act Regulations

Overview: On August 28, the Office of the Comptroller of the Currency (“OCC”) announced an advance notice of proposed rulemaking ("ANPR") soliciting comment from the public on ways to transform or modernize Community Reinvestment Act ("CRA") regulations. The ANPR appears to be in response to a Treasury Department report released in April that called on the statute’s primary regulators—the OCC, the Federal Reserve Board, and the FDIC—to offer reforms. The OCC, which notes that it has already engaged with more than 1,000 stakeholders about the existing CRA regime, is the first of these agencies to begin its CRA rulemaking with the release of its ANPR.

Current CRA Framework

Originally enacted in the late 1970s (and amended several times since), the CRA is intended to encourage banks to “help meet the credit needs of the communities that they serve,” including low- and moderate-income (“LMI”) areas, consistent with safe and sound business operations. To achieve this goal, regulators periodically examine bank records of providing lending, investments, and services—i.e., CRA-qualifying activities—to traditionally underserved neighborhoods in the bank’s community, or “assessment area.” How the OCC conducts these examinations varies based on a bank’s size and business strategy.

The final results of these performance evaluations are publicly disclosed in the form of a written report and CRA rating—(1) outstanding, (2) satisfactory, (3) needs to improve, or (4) substantial non-compliance. Low ratings can subject banks to certain consequences, such as denials or delays of their applications for acquiring another bank, opening or relocating a branch, or expanding business services.

The ANPR and Feedback Requested

The ANPR’s overview of the current CRA regulatory approach focuses, in particular, on how bank CRA performance is evaluated, how the assessment area is determined, and the relationship between the assessment area and the CRA-qualifying activities. The desire for updated requirements in the face of an evolving financial services industry, as well as for regulatory clarity, consistency, and certainty—yet also flexibility—underpin the OCC’s discussion throughout the ANPR.

According to the OCC, its goal for issuing the ANPR “is to obtain additional public input on how to revise the CRA regulations to encourage more local and nationwide community and
economic development—and thus promote economic opportunity—by encouraging banks to lend more to LMI areas, small businesses, and other communities in need of financial services.” The OCC invites stakeholders to provide comments responding to a list of 32 questions that fall under several key themes on modernizing the CRA, including the following:

*Changing the current approach to performance evaluations or developing metrics to increase the objectivity of performance measures.*

**Current Framework:** Banks are currently subject to different CRA performance evaluation methods based on their size and business strategy, as follows: (1) small banks (those with less than $313 million in assets); (2) intermediate small banks (those with $313 million to $1.252 billion in assets); (3) large banks (those with more than $1.252 in assets); and (4) wholesale and limited purpose banks. The ANPR cites a need for the current performance evaluation approach to see increased transparency and streamlining.

**Potential Updates:**

- The existing framework could be modified with alternative evaluation methods (e.g., replace existing performance tests and standards and separately evaluate retail or community development activities for all banks, accounting for variations in size, business model, and other factors).

- A metrics-based performance measurement system could be created for CRA ratings (e.g., use thresholds corresponding to the four CRA rating categories, which are aggregated to obtain a particular rating based on CRA-qualifying activities).

*Updating how communities and assessment areas are defined to accommodate banks with different business strategies and allow banks to help meet the needs of underserved communities.*

**Current Framework:** The CRA and its regulations do not define “community”—rather, a bank delineates its own “assessment areas” for the OCC to use in evaluating CRA performance. Currently, these assessment areas are largely tied to a bank’s physical locations, a relic from when banking was based largely on physical branches.

**Potential Updates:**

- In addition to assessing activities in a bank’s physical footprint, examinations could include additional areas tied to the bank's business operations, such as areas where the bank has a concentration of deposits or loans, non-bank affiliate offices, or loan production offices.

- Bank activities could be weighted based on targeted geographic areas to ensure areas continue to receive appropriate focus from banks.

*Broadening the range of CRA-qualifying activities to better support the purpose of the CRA.*

**Current Framework:** CRA-qualifying activities are generally defined by regulation and agency guidance and fall within two categories—retail and community development. According to stakeholders, there is a need for increased clarity about, and expansion of, what specific activities qualify under the CRA.

**Potential Updates:**

- CRA-qualifying activities could be further clarified by regulation and “community and economic development” could be defined.

- Specific standards could be provided for community development activities to receive consideration (e.g., requiring activities to provide identified benefits to LMI individuals and small businesses, or investing in LMI populations that have been identified by the government as being underserved).

*Enhancing recordkeeping and reporting.*
Current Framework: CRA regulations do not currently facilitate regular tracking, monitoring, and comparisons of banks’ levels of CRA performance.

Potential Updates:

- A metric-based framework could be implemented to allow banks to track CRA performance on a regular, periodic basis. This could also support comparison among banks/industry to show industry-wide activity and trends.

Outlook: The ANPR is consistent with the Trump Administration’s emerging approach to financial regulation, which is focused on updating and modernizing existing statutory and regulatory frameworks as the financial services industry continues to innovate and reform. Within this theme, the ANPR emphasizes that along with soliciting comments responding to the key items noted above, the OCC also welcomes any other ideas or options that were not identified, but that could help modernize the current CRA regulatory framework. Comments must be submitted to the OCC by November 19, 2018 to be considered by the agency.

It will be interesting to see whether the OCC collaborates with the other federal financial regulators as it moves forward on its rulemaking efforts, given that the statute is implemented by several different agencies, based on their jurisdiction over different types of financial institutions. Indeed, Federal Reserve Chairman Jerome Powell said in late September that the Fed is very interested in undertaking a joint rulemaking with the OCC and other relevant regulators. We will monitor forthcoming activity related to CRA reform and report on new developments in future editions of this newsletter.

Craig Saperstein, a member of NACHA’s Government Relations Advisory Group, is an attorney in the Public Policy practice of Pillsbury Winthrop Shaw Pittman LLP in Washington, D.C. In this capacity, he provides legal analysis for clients on legislative and regulatory developments and lobbies congressional and Executive Branch officials on behalf of companies in the payments industry. Deborah Thoren-Peden is a partner and member of the Financial Institutions Team at Pillsbury Winthrop Shaw Pittman LLP. She provides advice to financial institutions, bank and non-bank, and financial services companies. Andrew Caplan is an associate and member of the Financial Institutions Group and the Privacy, Data Security, and Information Use Focus Team at Pillsbury Winthrop Shaw Pittman LLP. He counsels and defends financial institutions, technology companies, and other clients that offer consumer products or services on a range of issues related to credit, payments, data privacy, cybersecurity, and e-commerce. The information contained in this update does not constitute legal advice and no attorney-client relationship is formed based upon the provision thereof.