

The OCC's CRA Modernization Rule – Summary of Changes, Initially Proposed Implementation, and Key Takeaways

Please Note – Approximately one year after the OCC announced its CRA Modernization Rule, the Acting Comptroller of the Currency Michael J. Hsu proposed to rescind the new rule in the OCC's efforts to work with other agencies to issue a revised inter agency CRA Modernization Rule in the future.

You may ask – ***So, why do I need to familiarize myself with the rule that is about to be rescinded?***

For two reasons:

1. Not all provisions of the OCC's CRA Modernization Rule will be suspended. Until further notice, the provisions with the October 1, 2020 compliance date will remain in effect for nationally chartered banks and federal savings associations regulated by the OCC.
2. Based on the analysis of Advance Notice of Proposed Rulemaking from other agencies coupled with statements made by FDIC Chairman Jelena McWilliams and Federal Reserve Chairman Jerome Powell, at least some of the key provisions within the OCC's Modernization Rule will remain in some shape or form in the revised inter-agency CRA Modernization Rule, which will inevitably affect almost all banks.

So, it may not hurt to get yourselves familiarized with what was initially proposed or at least get a glimpse of what's about to come.

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Introduction

The Community Reinvestment Act of 1977 (“CRA”) has been subject to various controversies, partly because the qualifying criteria has always been subjective. After decades of stagnancy, the CRA had come under increasing criticism for being inconsistent, subjective, and complicated when considering what, where, and how activities “count” under its regulatory framework.

Then, on May 20, 2020 the Office of the Comptroller of the Currency (“OCC”) adopted a final (?) rule (“2020 Rule”) to modernize the CRA for the first time in almost half-a-century. The culmination of multiple years of drafting and outreach, the 2020 Rule was a result of the agency’s bold attempt to make the CRA framework more “objective, transparent, consistent in application, and reflective of changes in banking.” In doing so, the OCC focused on elaborating the following four key evaluation criteria:

- Clarifying and expanding the activities that qualify for CRA credit (12 CFR 25.07 and 25.08);
- Updating where activities count for CRA credit (12 CFR 25.09);
- Creating a more consistent and objective method for evaluating CRA performance (12 CFR 25.10 through 25.13); and
- Providing for timelier and more transparent CRA-related data collection, recordkeeping, and reporting (12 CFR 25.21, 25.25, and 25.26).

But soon after its announcement of the 2020 Rule, the OCC was met with severe backlash and outcries from almost all banks and ancillary organizations – they were up in arms with a pitchfork in one hand and a tiki torch on the other. As a result, the OCC recently announced it will reconsider the final CRA rule.

In addition, while this reconsideration is ongoing, the OCC also announced that it will not object to the suspension of the development of systems for, or other implementation of, provisions with a compliance date of January 1, 2023, or January 1, 2024, under the 2020 Rule.

As of this writing, the OCC also does not plan to finalize the December 4, 2020, proposed rule that requested comment on an approach to determine the CRA evaluation measure benchmarks, retail lending distribution test thresholds, and Community Development (“CD”) minimums under the 2020 Rule. In addition, the OCC is discontinuing the CRA information collection pursuant to the Paperwork Reduction Act notice published in the Federal Register in December 2020.

While this reconsideration is ongoing, the OCC will not implement or rely on the aforementioned four evaluation criteria in the 2020 Rule.

However, the OCC will continue to implement the provisions of the 2020 Rule that had a compliance date of October 1, 2020. The OCC interpreted and explained these provisions in OCC Bulletin 2020-99. These implementation efforts include:

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- Issuance of OCC Bulletin 2021-5 providing bank type determinations, lists of distressed and underserved areas, and the median hourly compensation value for CD service activities
- Deployment of the CRA Qualifying Activities Confirmation Request process for banks and other stakeholders to request confirmation whether an activity meets the qualifying criteria under the June 2020 CRA rule, and
- Providing training on provisions of the June 2020 Rule with the October 1, 2020, compliance date in a series of webinars for examiners and bankers

Despite the OCC's intention to reconsider and its subsequent announcement to propose rescinding the 2020 Rule, the fate of the 2020 Rule is still uncertain; some of the key criteria may still end up in the revised final CRA Modernization Rule, the initiative of which was recently announced. As such, the safest approach tends to be the most conservative in that

- OCC-supervised banks should conservatively proceed with the understanding that this new rule is final and still in effect until the proposed rescission is finalized.
- State-chartered institutions should continue abiding by the existing CRA framework in 12 CFR 228 for those regulated by the Federal Reserve and 12 CFR 345 for those regulated by the FDIC.

The following are some key points from the 2020 Rule, including major changes and critical implications, that may still end up in the revised interagency CRA Modernization Rule.

Side Note (“Too Long, Didn’t Read” or TL:DR) - For a summary of the key changes between the OCC’s 2020 Rule and the corresponding requirements in the existing CRA regulations, please refer to the Appendix A at the end of this primer.

Key Points of 2020 Rule

A. 2020 Rule Expands and Elaborates the Framework for and Descriptions of “Qualifying Activities” Under CD Test.

Since 1977, it has been a challenge for banks, regulators, community groups, public officials, and others to evaluate activities in the absence of comprehensive and transparent criteria for which activities qualified for CRA consideration. The task of evaluation became increasingly frustrating thanks to the subjectivities involved and the criteria for the activities receiving CRA credit have varied among examiners, banks, and regions.

The OCC's modernized framework attempts to eliminate these variations in treatment by creating greater certainty and predictability regarding whether certain activities qualify for CRA credit. Banks subject to the general performance standards (required for those with greater than \$2.5 billion in assets) will calculate their qualifying activities value annually based on all qualifying loans and CD investments during the year, aggregated with CD services, in-kind donations, and monetary donations. Only activities originated, made, or performed directly by the institution qualify; any undertaken by affiliates will not.

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B. 2020 Rule Defines Location or Where Qualifying Activities Will Count Towards a Subject Bank's CD Activities

The location where the qualifying activities take place was highlighted in the 2020 Rule. The revised criteria capture activities that are consistent with the statutory purpose of the CRA but that may not receive adequate consideration under the 2020 Rule, such as:

- Activities in areas of need beyond low-and-moderate income ("LMI") areas (i.e., underserved areas, distressed areas, disaster areas, Indian country and other tribal and native lands); and
- A limited set of activities that benefit a whole community, while still maintaining a focus on LMI neighborhoods.

Concurrently, the criteria also seem to exclude activities that may have qualified for CRA consideration in the past, like loans to middle- and upper-income borrowers in LMI census tracts, in order to focus on activities that support LMI and other communities of need. Furthermore, qualifying retail loans include small loans to businesses or farms in LMI tracts up to \$1.6 million, plus all loans to CRA-eligible businesses and CRA-eligible farms (gross annual revenues of no more than \$1.6 million).

In addition, those qualifying activities that are not conducted within assessment areas ("AA") will be counted in a bank's qualifying activities value but not in the bank's assessment-area qualifying-activities value. Moreover, if a qualifying activity is only partially allocated to an AA, it may receive partial credit to the extent that the activity is not allocated to another AA.

C. 2020 Rule Allows Banks to Apply Multipliers to Enhance Valuation of Qualifying Activities

An important concept under the 2020 Rule is the implementation of multipliers when assessing a bank's qualifying activities. Under the 2020 Rule, participating in certain types of activities or being involved in activities in certain areas would enable the bank to receive double or even quadruple weighting in its evaluation of qualifying activities. These can range from investments in affordable housing to lending in "CRA deserts,"¹ a new concept introduced in the 2020 Rule. The hope is that through the use of multipliers, banks will be incentivized to engage in activities that are particularly valuable to CD.

On the other hand, in order to ensure that multipliers do not decrease overall CRA activity, a bank will not be eligible until the quantified dollar values of its current CD activities are approximately equal to those of its prior evaluation period. In addition, banks will be required to collect and maintain an indicator of whether a multiplier applies, providing stakeholders more transparency in assessing whether CRA activity is increasing and communities' needs are being met.

¹**CRA Desert** - an area the OCC has confirmed to have significant unmet CD or retail lending needs and has few banks with branches, less than expected retail or CD lending based on demographics or lacks CD organizations or infrastructure. To encourage banks to engage in activities in these areas, the CRA 2020 Rule provides that the OCC will create a CRA desert list and establish a confirmation process a bank may follow to request the OCC to confirm an area as a CRA desert. If a bank engages in qualifying activities in a CRA desert, the quantified value of the activity for purposes of applying the general performance standards to the bank's activities will be increased by a multiplier during the evaluation period but only if the bank has properly obtained confirmation by the OCC. The multiplier essentially increases the dollar value of the activity by two in most cases. As of this writing, the details of the required confirmation process or related form are not yet available.

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D. 2020 Rule Adds an Illustrative List of Qualifying Activities, Agency Confirmation Process

In conjunction with the modernized criteria for qualifying activities, the OCC has put forth a non-exhaustive, illustrative list of example activities that would meet the criteria and qualify for credit under the 2020 Rule. Although the list adds significant value, the OCC reiterates that it is illustrative only and not a complete list of activities that meet the regulatory criteria. Put another way, banks will receive CRA credit for any activity that satisfies the qualifying activities criteria, regardless of whether it is included in the CRA illustrative list.

Moreover, the OCC encouraged banks to engage in innovative activities that are responsive to the needs of their communities and, in areas of uncertainty, to confirm with the agency that an activity qualifies. The 2020 Rule provides that the agency will respond directly to requests for confirmation and post its responses to its website. Banks can leverage these responses as interpretive guidance to determine whether particular activities meet the qualifying activities criteria.

E. 2020 Rule Delineates AAs Based on Both Facilities and Deposits to Reflect Evolving Business Models

The ultimate purpose of the CRA is to encourage banks to engage in qualifying activities in areas where they collect deposits. Historically, brick-and-mortar branches were the primary means by which banks gathered deposits and, in turn, delivered financial products and services to their customers, so the placement of branches did in fact closely reflect where banks received deposits. However, a bank's branch footprint as the sole basis of its AA delineation doesn't align with newer business models, which often rely on significant deposits from areas far outside of the physical branch footprint.

To close this gap under the 2020 Rule, banks that collect 50% or more of their retail domestic deposits from outside of their physical branch footprint must delineate separate, non-overlapping AAs in any areas where they draw 5% or more of retail domestic deposits. These thresholds were intended to capture banks with non-traditional business models, such as Internet banks, while not affecting the delineations of many traditional banks.

On the other hand, the 2020 Rule maintains AAs around physical deposit-taking locations, recognizing the large and important role they play in meeting certain communities' needs. Nevertheless, it is important to note that banks may, but are not required to, delineate AAs around deposit-taking ATMs. Besides mergers and acquisitions, the 2020 Rule allows a bank to change its AA delineations once a year to account for changes in branching strategies or depositor concentrations.

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F. 2020 Rule May Affect More Than Just CRA Compliance and Beyond the Scope of the Evaluation

It is well known that CRA AAs are one of the tools under the “Fair Lending Umbrella” used to detect potential redlining violations. In the past few years, however, some regulators have increasingly focused their redlining enforcement on the Reasonably Expected Market Area (“REMA”). While still a nebulous concept, the REMA is generally understood to be the area where the bank markets and provides credit. The REMA does not necessarily include the same geographies as the bank’s CRA AAs—some of the areas may be beyond or otherwise shaped differently than the AAs.

Regardless, the AA is a valuable starting point in determining where your regulator may consider a subject bank’s REMA to lie. If the bank’s AA delineation will undergo significant changes in response to this 2020 Rule, then the bank’s REMA and other compliance considerations may be affected as a result.

G. Introduction of New “Presumptive Ratings” for Evaluating CRA Performance

Because the CRA regulatory framework historically has not provided a transparent and objective means of measuring a bank’s CRA activity, bank examiners have been left to apply their best subjective judgment to assess performance and assign ratings.

The 2020 Rule attempts to correct this by introducing “presumptive” ratings of “Satisfactory” or “Outstanding.” These set high standards, however, requiring the bank to pass all applicable retail lending distribution tests in a given area in order to achieve the presumptive rating.

For a bank with more than five AAs, the bank must receive at least the corresponding rating (“Satisfactory” or “Outstanding”) in:

1. 80% of its AAs, and
2. AAs from which the bank receives at least 80% of the retail domestic deposits.

For a bank with five or fewer AAs, the 2020 Rule provided additional flexibility and stated that a bank must receive at least the corresponding rating (“Satisfactory” or “Outstanding”) in:

1. 50% of its AAs, and
2. the AAs from which it receives at least 80% of its retail domestic deposits.

If a bank narrowly fails one of the tests, examiners still may consider that as a factor in the bank’s performance context in order to determine the bank’s final rating.

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H. 2020 Rule Makes Data Collection, Retention, and Reporting More Standardized and Transparent

Under the current framework, CRA performance evaluations can be complex and lengthy, making it challenging to draw comparisons from bank to bank. The 2020 Rule's more systematic and standardized information will enable the OCC to assess the level of qualifying activities through more comparable and timely data.

Common definitions and better data over time would've allowed the OCC to adjust the thresholds and benchmarks for delineating deposit-based AAs and the levels of performance necessary to achieve certain rating categories. Objective measures, when reported transparently, would've also allowed banks and other stakeholders to assess performance and progress.

While the OCC recognizes that there are costs associated with the 2020 Rule's data requirements—both the upfront costs of developing and implementing new systems and the ongoing costs of data collection and maintenance—the agency sounded confident that the certainty the 2020 Rule provides will offset these costs in the long run.

I. 2020 Rule Deviates from Existing FDIC and Federal Reserve Requirements

It is important to note that these changes apply only to nationally chartered banks and federal savings associations regulated by the OCC, which according to the 2020 Rule, conduct the majority of all CRA activity.

By way of background, the Federal Deposit Insurance Corporation ("FDIC") joined the OCC in the initial proposal, but ultimately elected against joining in the OCC's 2020 Rulemaking. Although FDIC Chairman Jelena McWilliams issued a statement expressing strong support for the OCC's efforts in moving forward with a 2020 Rule, she made it clear that the FDIC and its supervised banks should remain focused on helping small businesses and families overcome the challenges of the COVID-19 pandemic.

The Federal Reserve, on the other hand, declined to join the original OCC and FDIC proposal in 2019 and instead announced its own Advance Notice of Proposed Rulemaking ("ANPR") on September 21, 2020.

With the FDIC and Federal Reserve stepping aside, the OCC's new 2020 Rule and its performance standards only applied to a limited population of banks – approximately 120 institutions. This number only represented roughly 11 percent of OCC-regulated institutions and 2.4 percent of the banking industry overall.

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Before his January 2021 resignation, Acting Comptroller of the Currency Brian Brooks stated that he was open to the idea of working with the Federal Reserve given the “significant amount of overlap” between the ANPR and the OCC’s 2020 Rule. McWilliams poetically echoed this sentiment, saying, “It would be optimal [for the FDIC] to have two dance partners and one set of music playing.” Soon after, Federal Reserve Chairman Jerome Powell jumped in the mix by saying, “I think there is an opportunity for a harmonized rule among the agencies.” (Are they taking some dance class together?)

So, on July 20, 2021, the three agencies, hand-in-hand, announced that they will act jointly on CRA Rules Modernization restoring peace within the financial industry.

However, as it was explained in the “Intro” section of this article, some of the provisions of the OCC’s 2020 Rule remain in effect and those banks that were originally subject to the new 2020 Rule, regardless of its proposed rescission, are required to comply with those provisions that had a mandatory compliance date of October 1, 2020. Simply put, those aforementioned 120 or so financial institutions with assets of more than \$2.5 billion must continue to comply with the following provisions announced in the OCC Bulletin 2021-24 from May 18, 2021²:

1. Issuance of [OCC Bulletin 2021-5](#) providing bank type determinations, lists of distressed and underserved areas, and the median hourly compensation value for community development service activities;
2. Deployment of the CRA Qualifying Activities Confirmation Request process for banks and other stakeholders to request confirmation whether an activity meets the qualifying criteria under the June 2020 CRA rule; and
3. Provision of training on provisions of the 2020 Rule with the October 1, 2020, compliance date in a series of webinars for examiners and bankers.

Looking Ahead

Now that the OCC is reconsidering its 2020 Rule, does that mean your bank can relax and ignore the provisions of 2020 Rule? If I were to accurately predict the outcome of this continuing CRA reform, I wouldn’t be in this business.

The CRA modernization effort continues to take twists and turns, and the process so far has been anything but a typical rulemaking exercise. But one fact remains: a unified, inter-agency regulation will be the key to a CRA framework that stands the test of time and is not subject to continual revision based on the political winds of the day. And, more importantly, consistent CRA regulations will encourage the multi-bank lending and investment partnerships that will benefit communities as our nation’s banks help address the wide-spread economic fallout from the COVID-19 pandemic.

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Although the OCC announced it will propose to rescind the 2020 Rule, some of the key provisions will most likely remain in place even after the joint-agencies' modernization of CRA regulations. As such, this writer believes all banks, especially those evaluated under the large bank CRA test, should at least familiarize the key points delineated herein.

Furthermore, there are a number of measures that financial institutions can take to prepare for the inevitable modernization of CRA regulation, regardless of what form it may take. On that note, here are some recommendations to consider:

- Conduct a CRA Self-Assessment in accordance with the updated rule and compare the rating to that of the bank's last/latest rating issued by the supervising agency.
- Assess current systems to pinpoint possible transition challenges.
- Conduct CRA community-needs or -demands assessments to bolster compliance with the final CD standards.
- Update existing or develop new systems for ongoing collection and reporting of data for CD qualifying activities.
- Evaluate relevant policies and procedures (not just pertaining to CRA, but also fair lending) to ensure they are adequately updated to reflect any transition strategy that the bank is considering in light of this modernization efforts.
- Revisit and identify new qualifying CD activities that may now be considered for credit under the alternative compliance options.
- Review assessment-area delineations for compliance with new or proposed regulatory constraints and individual growth and expansion opportunities.
- Determine whether CRA CD credit may now be allocated beyond existing assessment-area delineations.
- Monitor and adjust CRA evaluation processes as updated metrics are released.
- Develop and provide training to the bank's Board of Directors, senior management, and other affected employees for any of the major provisions discussed in this article.
- Perform periodic internal testing and external audits as appropriate.

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Appendix A

The table below summarizes the key changes between the OCC’s 2020 Rule and the corresponding requirements in the existing CRA regulations.

	Existing CRA Framework	The OCC’s 2020 Rule
Qualifying Activities	<p>There were no codified or standardized criteria to objectively and consistently measure and evaluate a subject bank’s CRA Community Development qualifying activities. As such, over time, the activities which have been awarded CRA credit have varied among examiners, banks, and regions. This in turn resulted in banks re-directing their resources to a limited number of activities that were previously approved within its region while forgoing untested activities that may have provided an even greater community benefit.</p>	<p>The new 2020 Rule aims to create greater certainty and predictability when determining whether certain activities qualify for CRA credit. Banks subject to the general performance standards will calculate their qualifying activities value annually based on all qualifying loans and CD investments during the year, aggregated with CD services, in-kind donations, and monetary donations.</p> <p>Multipliers may be applied to enhance activities of particular importance, and an illustrative list provides definitive examples of activities that would meet the new criteria and qualify for credit under the 2020 Rule.</p>
Assessment Areas	<p>Existing CRA regulation focuses strictly on physical branch locations, which in the past has ensured that banks reinvest capital and credit in the areas where they draw deposits because of their branch presence.</p> <p>Although the current framework addresses certain issues that would arise if banks took deposits from one community and lent that capital in another community - often one that is more profitable - it fails to consider the evolving business models of banks in today’s increasingly digital environment.</p>	<p>The 2020 Rule updates how banks delineate assessment areas. Banks that collect at least 50% of deposits outside of their physical branch footprint must delineate additional assessment areas where they draw 5% or more.</p> <p>The 2020 Rule aims to set this threshold percentage at a level that will not affect the vast majority of traditional banks, but that will generally capture other banks with significantly different business models (e.g. internet banks). Unlike the current framework which permits partial counties to be included, the assessment area must now be comprised of a whole county or county equivalent.</p>

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	Existing CRA Framework	The OCC’s 2020 Rule
Performance Standard	<p>The original CRA regulation was controversial for not providing a transparent and objective means of measuring a subject bank’s CRA activity, leaving examiners to apply their best subjective judgment to assess performance and assign ratings. To do this, examiners considered two primary aspects of a bank’s CRA activity: (1) The distribution of the number of its retail lending activities (i.e., home mortgage loans, small loans to businesses, small loans to farms, and consumer loans); and (2) and the impact of the dollar value of CD activities. Examiners have also considered qualitative factors like responsiveness, innovativeness, and complexity. Formulas or benchmarks have never been formally established under the old framework, and have typically been published to a very limited extent in performance evaluations</p>	<p>The 2020 Rule serves as a more objective and consistent means of evaluating qualifying activities. These new standards, which are applied to the bank as a whole and its individual assessment area, are comprised of the following: (i) the CRA evaluation measure; (ii) assessment area ratings; and (iii) community development minimum. The final rule establishes an evaluation method that assesses a bank’s retail lending and CD activities by considering: (1) The distribution of retail lending activities relative to LMI populations and tracts in the assessment area; and (2) the impact of all CRA activity in dollars, to more accurately quantify activities. The 2020 Rule also provides quantitative credit for branches in, or that serve, LMI census tracts or other identified areas of need. Additionally, the final rule provides for the qualitative aspects of CRA activities by including an assessment of a bank’s performance context.</p>
Data Collection, Retention, and Reporting	<p>Under the current CRA framework, performance evaluations (“PEs”) can comprise thousands of pages. Moreover, PEs can also be years in the making, in which case they provide only an outdated and stale assessment of bank performance. Further, PEs can be difficult to interpret, making it hard to draw meaningful comparisons from bank-to-bank or even from one bank’s evaluation to the next.</p>	<p>A goal of the 2020 Rule is that examiners produce more consistent, useful, and timely CRA PEs that give banks, regulators, and others a better understanding of both individual bank and industry wide CRA performance. Objective criteria, transparently reported, will allow interested parties to assess performance and progress more accurately.</p>