The Banking Law Journal

Established 1889

An A.S. PrattTM PUBLICATION MARCH 2020

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THE BANKING LAW JOURNAL

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ISBN: 978-0-7698-7878-2 (print)
ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

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(2020-Pub.4815)

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POSTMASTER: Send address changes to THE BANKING LAW JOURNAL LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207.

The CRA Revamp Is Here: Was It Worth the Wait?

Carleton Goss*

In order to completely revamp how banks' performance will be assessed under the Community Reinvestment Act ("CRA)", the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation recently issued a joint proposal. The author of this article discusses the proposal, which offers a greater degree of objectivity to CRA evaluations in exchange for a substantial investment by a bank on the front end in setting up the systems to monitor and track qualifying activity.

The Office of the Comptroller of the Currency ("OCC") and the Federal Deposit Insurance Corporation ("FDIC") issued a joint proposal ("Proposal") on December 12, 2019, to completely revamp how the agencies will assess banks' performance under the Community Reinvestment Act ("CRA"). It is a doozy. Among other changes, the Proposal (i) expands the concept of assessment area ("AA") to include geographies outside of a bank's current AAs and in which the bank receives at least five percent of its retail deposits and (ii) introduces a series of objective tests for determining a bank's presumptive CRA rating. The Proposal will be most noteworthy for banks with at least $500 million in total assets and with significant retail deposits sourced outside of their current AAs. Community banks with less than $500 million in total assets will have the option to continue to be assessed for purposes of CRA using the current small bank performance standards. Comments on the Proposal were due within 60 days of publication in the Federal Register, but in no event earlier than February 10, 2020.

BACKGROUND

In the 1960s and 1970s Congress passed several laws addressing consumer protection and fairness and access to housing and credit. The CRA was one of these laws. Unlike other laws that prohibit certain types of activity (e.g., the Equal Credit Opportunity Act prohibits creditors from discriminating against an applicant on the basis of race, color, religion, national origin, etc.) the CRA was designed to *encourage* (rather than require) sound lending to all areas of a

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bank's community. The CRA accomplishes this goal by requiring the banking agencies to consider a bank's CRA activity when ruling on banking applications. Banks that fail to conduct sufficient CRA activity may be prohibited from merging, opening a branch, or engaging in other expansionary activities.

The banking agencies have implemented the CRA through interagency regulations that set forth several evaluation methods for institutions of different sizes and business strategies. Current CRA regulations require a bank to delineate one or more geographic AAs within which a bank's regulator will evaluate a bank's record of meeting the credit needs of its community. AAs for retail banks must include geographies in which a bank has its main office, its branches, and its deposit-taking automated teller machines, and the surrounding geographies in which that bank has originated or purchased a substantial portion of its loans.

Over the last decade, community groups, the banking industry, and various other stakeholders have called for comprehensive changes to the CRA regulatory framework in response to changes that have occurred in the banking industry and economy since the CRA regulations were last updated in 1995. In 2014, the banking regulators conducted a public decennial review of their regulations, as mandated by Congress. In 2017, the banking regulators issued a report to Congress that included a summary of the public comments received during the three-year period with respect to CRA reform.[1] In 2018, the U.S. Department of the Treasury also issued recommendations to modernize the CRA regulations.[2] Also that year, the OCC issued an Advance Notice of Proposed Rulemaking on CRA that reflected input from the FDIC and the Board of Governors of the Federal Reserve (the "Board").[3] The OCC received more than 1,500 comments from the public and shared those comments with the FDIC and the Board.

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1 *See* Federal Financial Institutions Examination Council, Joint Report to Congress. Economic Growth and Regulatory Paperwork Reduction Act, pp. 41–48 (March 2017), *available at* https://www.ffiec.gov/pdf/2017_FFIEC_EGRPRA_Joint-Report_to_Congress.pdf.

2 *See* Memorandum from the U.S. Department of the Treasury to the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation, Community Reinvestment Act—Findings and Recommendations (April 3, 2018), *available at* https://home.treasury.gov/sites/default/files/2018-04/4-3-18% 20CRA%20memo.pdf.

3 *See* OCC News Release 2018-87 (August 28, 2018), *available at* https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-87.html.

THE PROPOSAL

To improve the current CRA regulatory framework and promote increased lending and investment, the FDIC and OCC propose to make changes in four key areas:

1. Clarifying and expanding what qualifies for CRA credit;
2. Expanding where CRA activity counts;
3. Providing an objective method to measure CRA activity; and
4. Revising data collection, recordkeeping, and reporting.

Clarifying and Expanding What Qualifies as CRA Credit

At a high level, the Proposal begins by (i) listing those products and services that qualify for CRA credit ("Qualifying Activities"), (ii) providing a process whereby banks can petition for additional products and services to be added to the list of Qualifying Activities and (iii) explaining how to assign a value to the Qualifying Activities provided.

Qualifying Activities are divided into retail loans and community development activities. Banks may request confirmation from the OCC or FDIC that an activity counts as a "Qualifying Activity." The agencies would consult and coordinate with one another on a jointly maintained, and publicly available, list of Qualifying Activities.

Under the Proposal, banks evaluated under the general performance standards would determine their presumptive CRA ratings by first calculating their "qualifying activities values." The Proposal sets out rules as to how these values are calculated. The Proposal also addresses situations in which a bank may receive pro-rata value for a Qualifying Activity. Banks would calculate both "assessment area qualifying values" (based on qualifying values of qualifying activities provided in the AAs) and "bank-level qualifying values" (based on total qualifying values of all Qualifying Activities).

Expanding Where CRA Activity Counts

Under the current framework, a bank's CRA performance is generally measured within the bank's AAs, which are generally limited to where the bank has a main office or branch. The Proposal correctly notes that this method of delineating AAs "is challenged by how today's consumers meet their banking needs and banks provide services." Therefore, the agencies are proposing to create two categories of AAs:

1. *Facility-based assessment areas.* This category of AA is generally the same as the current definition of an AA.

2. *Deposit-based assessment areas.* A bank that receives 50 percent or more of its retail domestic deposits from geographic areas outside of its facility-based assessment areas must delineate separate deposit-based assessment areas for areas in which it receives five percent or more of its retail domestic deposits.

The Proposal would allow a bank to change its AA delineation once during each evaluation period. The regulators specifically seek comment on the 50 percent and five percent ratios.

Providing an Objective Method to Measure CRA Activity

The current CRA regime provides different methods for evaluating a bank's CRA performance depending on the bank's asset size and business strategy. According to the Proposal, "[b]ecause of the subjective nature of the current framework, exactly how an agency determined the appropriate rating is at times opaque, complex, and inconsistent." To address this problem, the Proposal includes a set of "general performance standards" ("GPS") that would be used to evaluate banks that are not small banks.

Under the GPS, banks would be evaluated in each AA under three benchmarks: (i) the CRA Evaluation; (ii) Retail Lending Distribution Tests; and (iii) Community Development ("CD") Minimums. Generally, a bank would receive an overall bank-level rating and a separate rating for each AA. The charts below illustrate possible ways to achieve each presumptive ratings category associated with each of the three benchmarks in a given AA and overall.

ASSESSMENT AREA **PRESUMPTIVE RATING**

CRA Evaluation	Retail Lending Distribution Tests	CD Minimums	Presumptive Rating Category
Average of a bank's annual AA CRA evaluation measures meets or exceeds *11* percent.	Bank meets the established thresholds of all the retail lending distribution tests for its major retail lending prod- uct lines in that AA.	The quantified value of CD activity in the AA, divided by average of the bank's AA retail deposits must meet or exceed two percent.	**Outstanding**
Average of a bank's annual AA CRA evaluation measures meets or exceeds *six* percent.	Bank meets the established thresholds of all the retail lending distribution tests for its major retail lending prod- uct lines in that AA.	The quantified value of CD activity in the AA, divided by average of the bank's AA retail deposits must meet or exceed two percent.	**Satisfactory**
Average of a bank's annual AA CRA evaluation measures meets or exceeds *three* percent.			**Needs Improvement**
Average of a bank's annual AA CRA evaluation measures is *less than three* percent.			**Substantial Non-compliance**

BANK-LEVEL PRESUMPTIVE RATING

CRA Evaluation	**Assessment Area Test**	**CD Minimums**	**Presumptive Rating Category**
Average of a bank's bank-level CRA evaluation measures meets or exceeds *11* percent.	Bank receives outstanding rating "in a significant portion" (i.e., at least 50 percent) in each AA *and* those AAs where it holds significant deposits (i.e., at least 50 percent).	The quantified value of CD activity, divided by average of the bank's retail deposits must meet or exceed two percent.	**Outstanding**
Average of a bank's bank-level CRA evaluation measures meets or exceeds *six* percent.	Bank receives outstanding rating "in a significant portion" (i.e., at least 50 percent) in each AA *and* those AAs where it holds significant deposits (i.e., at least 50 percent).	The quantified value of CD activity divided by average of the bank's retail deposits must meet or exceed two percent.	**Satisfactory**
Average of a bank's bank-level CRA evaluation measures meets or exceeds *three* percent.			**Needs Improvement**
Average of a bank's bank-level CRA evaluation measures is *less than three* percent.			**Substantial Non-compliance**

Small banks (defined generally as banks with less than $500 million in total assets) that do not elect to opt in to the GPS framework (or elect to be evaluated pursuant to a Strategic Plan) would be evaluated under the existing CRA performance standards applicable to small banks. This would enable small banks to continue to be assessed under the CRA performance standards with which they are already familiar. The Proposal also retains the option for a bank to select to be evaluated under a Strategic Plan.

The regulators would retain the discretion to adjust the presumptive CRA ratings based on certain performance context factors as well as any evidence of discriminatory or other illegal credit practices. It is unclear from the Proposal how often these considerations might overrule a presumptive CRA rating.

Revising Data Collection, Recordkeeping, and Reporting

The current CRA framework requires banks to collect and report a variety of data on loans. However, small banks, as defined under the current rule, generally are exempt from these requirements. Under the Proposal, banks evaluated under the existing CRA small bank performance standards would generally be exempt from the data collection, recordkeeping, and reporting requirements of the Proposal. Banks evaluated under the GPS, however, would be required to collect and maintain their (i) retail lending distribution test results, (ii) CRA evaluation measures calculations, and (iii) presumptive ratings determinations. The agencies would then review a sample of a bank's collected data that was used to determine the presumptive rating as part of a bank's CRA evaluation. Additionally, banks would annually report their (i) retail lending distribution test results, (ii) CRA evaluation measures calculations, and (iii) presumptive ratings determinations to the agencies.

ANALYSIS

Given the complexity of the presumptive CRA calculations and the associated data collection, recordkeeping and reporting requirements, it is likely that the majority of community banks under $500 million in total assets will determine that it is in their best interests to continue to be evaluated under the existing CRA small bank performance standards.

For banks over $500 million in total assets, the primary issues will likely be the following:

- *Qualifying Activities.* Does the list of Qualifying Activities capture conduct for which the bank would get, or would like to get, CRA credit?
- *Deposit-based assessment areas.* Will the bank become subject to deposit-

based assessment areas? If so, how would that impact its presumptive CRA ratings and should the bank adjust our lending strategy in response?

- *Supporting compliance infrastructure*. Banks that become subject to GPS will have to substantially revamp their existing CRA compliance infrastructure. Consultants will likely develop software to automate the calculation of presumptive CRA ratings.
- *The Federal Reserve*. The Federal Reserve did not join in the Proposal. Because the OCC and the FDIC supervise depository institutions that conduct approximately 85 percent of all CRA activity, we believe that the Federal Reserve will eventually join in the Proposal, but may be able to influence the drafting of the final rule.

Overall, the Proposal offers a greater degree of objectivity to CRA evaluations in exchange for a substantial investment by a bank on the front end in setting up the systems to monitor and track Qualifying Activity. Whether this trade-off will be worthwhile remains to be seen.