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Rethinking CRA: Key Considerations for Implementing the New OCC Final Rule

Legal Update

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On May 20, 2020, following much industry debate and speculation, the OCC released its final rule (Final Rule) on the Community Reinvestment Act (CRA) in an effort to modernize, strengthen, and establish more objectivity with respect to CRA regulations. As OCC-regulated institutions begin to sort out the new rules and expectations, here are some key considerations to keep in mind.

What's changing?

The Final Rule makes comprehensive changes to several areas of CRA, including:

- **Clarification on qualifying activities for CRA credit.**

The Final Rule amends the criteria used by the OCC to determine what kinds of activities qualify for positive CRA credit and expands the list of qualifying activities.

- **Updated assessment areas.**

While the OCC did not change the delineation requirement of assessment areas based on a bank's physical deposit-taking locations, the OCC did add a delineation requirement for deposit-based assessment areas. Under this new requirement, banks that collect more than 50 percent of their retail domestic deposits from outside their facility-based assessment areas must also delineate separate deposit-based assessment areas in geographies where they receive 5 percent or more of their retail domestic deposits.

- **Objective performance evaluations.**

The Final Rule establishes several new metrics used to measure CRA performance based on various lending, deposit-taking, and community development activities.

- **Data collection and reporting obligations.**

The Final Rule requires OCC-regulated institutions to collect and report significant data on qualifying loans, assessment areas, and deposit-taking activities to feed into the new performance evaluations.

The Final Rule takes effect on October 1, 2020, and offers a phased-in approach to allow banks that opt in to the Final Rule provisions more time to comply with and understand the changes.

Notably, the Federal Reserve and the FDIC did not join the OCC in issuing the Final Rule, meaning the Final Rule currently only applies to national banks and federal savings associations. While the reasons behind the agency split remain unclear, the FDIC did comment that it was not prepared to finalize the CRA proposal when it was issued, citing the efforts community banks are undertaking in response to COVID-19. Whether the Federal Reserve and the FDIC will adopt the OCC's CRA framework (or something similar) in the future remains an open question.

Three Key Considerations

1. To opt in or not to opt in?

While certain provisions of the Final Rule apply to all OCC-regulated institutions, banks with less than \$600 million in assets can choose whether to be evaluated using the prior Small Bank Lending Test that is currently in place, or to opt in to the Final Rule's new quantitative framework. Likewise, banks between \$600 million and \$2.5 billion in assets may opt to be evaluated using the prior Intermediate Small Banks Lending Test and Community Development test rather than the new framework. This is certainly a weighty decision and must be evaluated on an individual bank basis. Banks can start by taking a look at their existing CRA data and assessing how their performance will stack up under the new evaluation methodology. Working with counsel and other advisers to evaluate the pros and cons of opting in to the new framework will be critical to determine the best course of action for each financial institution.

2. Analyze deposits and reevaluate assessment areas.

The new rule requires that banks include in their assessment area(s) those geographic areas where they draw a significant portion of their deposits – which for some banks could mean adding areas significantly distanced from their branch locations. Banks should take a close look at the current geographic spread of their deposits and determine whether they meet the 50 percent threshold that could require them to expand their assessment area(s). This might produce some surprising results for Midwestern banks in particular, where long-time depositors may have shifted their legal addresses to warmer climates or states with more beneficial tax codes.

3. Prepare for new data collection requirements.

While the bulk of the data collection and reporting requirements do not go into effect for small and intermediate small banks until 2024, OCC-regulated community banks would be wise to get a head start on preparations. Bankers should examine current data collection methods and identify any gaps that will need to be filled and resources that should be added. In addition, now is the time for banks to reach out to any vendors they engage to assist in data collection or analysis to begin

discussing necessary changes and explore product options.

A Well-Timed Opportunity

Recent events have caused us all to confront head-on the social and economic inequalities that have lingered within communities of color. This is an ideal time for leadership of community banks – whether or not OCC-regulated – to reevaluate current CRA plans and priorities and check for additional opportunities to elevate and invest in parts of their communities that may have been historically overlooked. For OCC-regulated institutions, how can the expanded array of qualifying activities be leveraged? Opportunities will look different for different markets, so banks should be thoughtful and targeted.