

United States House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, D.C. 20515

January 24, 2020

Memorandum

To: Members, Committee on Financial Services

From: FSC Majority Staff

Subject: January 29, 2020, “The Community Reinvestment Act: Is the OCC Undermining the Law’s Purpose and Intent?”

The Committee on Financial Services will hold a hearing entitled “The Community Reinvestment Act: Is the OCC Undermining the Law’s Purpose and Intent?” at 10:00 a.m. on Wednesday, January 29, 2020, in room 2128 of the Rayburn House Office Building. This will be a single panel hearing with the following witness:

- **The Honorable Joseph M. Otting**, Comptroller of the Currency, Office of the Comptroller of the Currency

Overview

The responsibility for prudential regulation of insured depository institutions is divided among four Federal regulators consisting of the Board of Governors of the Federal Reserve System (Federal Reserve), Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC), and the National Credit Union Administration (NCUA). The Federal Reserve, FDIC, and NCUA testified before the Committee in December 2019. Comptroller Otting did not appear at that hearing, but provided written testimony.¹ Therefore, this hearing will examine the OCC’s work on the Community Reinvestment Act, as well as other supervisory and regulatory developments.

Community Reinvestment Act Proposed Rulemaking

Since Comptroller Otting was sworn in on November 27, 2017, the OCC has advocated for reforming the Community Reinvestment Act (CRA).² Enacted into law by Congress in 1977,³ CRA addresses how banks meet the credit and capital needs of the communities they serve. As part of landmark civil rights legislation passed in the 1960s and 1970s, CRA was created in response to redlining, a practice by which banks discriminated against prospective customers based primarily on where they lived, or their racial or ethnic background, rather than creditworthiness. In passing CRA, Congress affirmed that “regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business,” and for “each appropriate federal financial supervisory agency to use its authority when examining financial institutions,

¹ Full Committee hearing entitled, “[Oversight of Prudential Regulators: Ensuring the Safety, Soundness, Diversity, and Accountability of Depository Institutions?](#)” Dec. 4, 2019. Comptroller Otting last appeared before the Committee in May 2019. See Full Committee hearing entitled, “[Oversight of Prudential Regulators: Ensuring the Safety, Soundness and Accountability of Megabanks and Other Depository Institutions.](#)” May 16, 2019.

² See e.g. Ben Lane, “[Trump administration considering changes to Community Reinvestment Act.](#)” HousingWire Aug. 28, 2018.

³ P.L. 95-128, 91 Stat. 1147, title VIII of the Housing and Community Development Act of 1977, 12 U.S.C. § 2901 et seq.

to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.”⁴

Under the current CRA framework, the primary banking regulators – specifically the OCC, FDIC and Federal Reserve – conduct regular examinations to evaluate banks’ activities to provide credit, services and make investments in low and moderate income (LMI) communities where the banks operate. CRA applies only to banks with federally insured deposits, and excludes bank affiliates, credit unions and nonbank financial companies.⁵ CRA examinations focus on LMI loans and investments by institutions in designated assessment areas.’ Assessment areas are defined by banks, and must “consist of one or more [Metropolitan Statistical Areas] or metropolitan divisions or one or more contiguous political subdivisions, such as counties, cities or towns . . . [and] must include geographies in which the bank has its main office, branches and deposit-taking ATMs, as well as the surrounding geographies in which the bank has originated or purchased a substantial portion of its loans.”⁶ Within assessment areas, CRA examinations evaluate banks’ service to local LMI communities and issue grades for the tests in the following three principal categories: lending, investment, and service.⁷

On August 28, 2018, the OCC issued an Advanced Notice of Proposed Rulemaking (ANPR), soliciting public comments on modernizing the CRA.⁸ The OCC’s ANPR drew nearly 1,500 comments.⁹ Several key pillars of the ANPR drew significant resistance from a broad set of respondents, including most notably the consideration of a simple ratio approach to CRA evaluations, focused principally on total CRA activities against total bank assets. On December 12, 2019, the OCC and FDIC released a Notice of Proposed Rulemaking (NPRM) on CRA modernization.¹⁰ FDIC Board Member Martin Gruenberg voted against the proposal, describing it as “a deeply misconceived proposal that would fundamentally undermine and weaken the Community Reinvestment Act.”¹¹ It is notable that the Federal Reserve did not join this NPRM due to remaining concerns about certain elements of the proposed rulemaking.¹² Key elements of the NPRM include:

1. **Qualifying activities:** The proposal expands the list of qualifying activities well beyond the current list.¹³ Qualifying activities would include small business loans (raising the threshold for qualifying small businesses from \$1 million to \$2 million), family farms with revenues up to \$10 million, “essential infrastructure” including stadiums and bridges, and others. The proposal also requires the regulator to maintain on their websites a list of examples of qualifying activities, which must be updated at least every three years, and opened for public comment. The proposal would establish a process for banks to submit proposed projects for approval as qualifying activities, requiring the agencies to provide a response within six months. Concerns have been raised that the proposal, and the accompanying list of sample projects, would increase CRA activity that may be contrary to the

⁴ 12 U.S. Code § 2901 - Congressional findings and statement of purpose.

⁵ Some stakeholders have suggested expanding CRA to cover these entities. For example, *see* Government Accountability Office, “[Community Reinvestment Act: Options for Treasury to Consider to Encourage Services and Small-Dollar Loans When Reviewing Framework](#),” (Feb. 14, 2018), 44-46.

⁶ Federal Reserve Bank of Dallas, “[A Banker’s quick guide to CRA](#)” Sep. 1, 2005.

⁷ Darryl Getter, “[The Effectiveness of the Community Reinvestment Act](#),” Congressional Research Service (CRS) (Feb. 28, 2019). *See also* Federal Reserve Bank of Saint Louis, “[What Qualifies as a CRA Investment?](#)”

⁸ OCC Bulletin 2018-24, Advance Notice of Proposed Rulemaking, “[Reforming the Community Reinvestment Act Regulatory Framework](#),” (Aug. 28, 2018).

⁹ Comment letters to OCC on CRA available [here](#).

¹⁰ OCC and FDIC Notice of Proposed Rulemaking, “[Community Reinvestment Act Regulations](#),” (Dec. 12, 2019).

¹¹ FDIC, “[Statement by Martin J. Gruenberg, Member, FDIC Board of Directors; Notice of Proposed Rulemaking: Community Reinvestment Act Regulations](#),” (Dec. 12, 2019).

¹² According to one report, Fed officials objected to the proposal because it lacks analytical rigor. *See* Andrew Ackerman, “[Bank Regulators Propose Overhaul of Lending Rules for Poorer Communities](#),” Wall Street Journal (Dec. 12, 2019).

¹³ OCC, “[Community Reinvestment Act Fact Sheet](#),” (Dec. 12, 2019).

law's purpose by allowing projects that show little or no demonstrable impact to low-income communities.¹⁴

2. **Assessment areas:** Current CRA evaluations are focused on activity around a bank's branches and offices, which poses some challenges in assessing online deposit-taking and lending activity. The proposal puts forward two new types of assessment areas. Facility-Based Assessment Areas would include branches, offices, and other physical locations used for deposits mobilizations, as well as surrounding areas where a bank has originated or purchased qualifying retail loans. For banks that source 50% or more of domestic deposits outside Facility-Based Assessment Areas, the proposal establishes Deposit Based Assessment Areas would be geographies where the bank sources 5% or more of its domestic retail deposits. When calculating the overall dollar value of CRA activity, the proposal allows banks to include activities outside of the bank's assessment areas, raising additional concerns about decoupling the link to the original intent of CRA in redressing redlining. Furthermore, the proposal would expand assessment areas in a manner that relies on data that is not yet collected, raising concerns about its feasibility.¹⁵
3. **Measuring CRA Performance:** Under the proposal, CRA evaluation and scoring relies on the sum of two metrics. The first is a ratio of total qualifying activities to retail domestic deposits, to which is added 0.01 times the ratio of bank branches in LMI census tracks, under-served areas, distressed areas, and Indian country to total branches. A bank's score will be as follows:
 - 11% or higher = Outstanding
 - 6% to 11% = Satisfactory
 - 3% to 6% = Needs to Improve
 - Less than 3% = Substantial Noncompliance

The structure of the formula and calculation gives overwhelming weight to the ratio of qualifying loans to total domestic retail deposits, with a marginal contribution for branch location. This methodology, combined with the broad expansion of qualifying activities and areas, raises serious concerns about substantial dilution of CRA examination and requirements, and an effective break of the historical link between this CRA proposal and the law's origins in redressing redlining and systemic discrimination in banking and lending. It is worth noting that, to achieve an Outstanding or Satisfactory rating, a bank must also meet a minimum threshold of community development lending or investing, defined as 2% of the bank's domestic retail deposits. Here, there are also concerns, as activities that may qualify for community development lending or investments is broadened to include activities that may not have a direct link back to low-income communities.¹⁶ Under the proposal, the CRA exam will include a Retail Lending Distribution Test, which uses a Geographic Distribution Test and a Borrower Distribution Test to evaluate the distribution of loans over an Assessment Area. Concerns with this approach include the elimination of specific evaluation of mortgage lending in LMI areas, and the fact that these tests count for less in the overall CRA examination, as banks can fail in half their assessment areas and still pass.¹⁷

4. **Small Community Banks and Specialized Banks:** Banks with assets under \$500 million will be able to opt-in to the new CRA framework or continue to be examined under the current CRA framework. The proposal retains the current option for certain banks to develop a strategic plan, which would be subject to public comment, and require regulators to respond within six months of receipt of the

¹⁴ See Noah Buhayar and Jesse Hamilton, "[Financing for Sports Stadiums Could Count as Helping the Poor](#)," Bloomberg (Dec. 16, 2019).

¹⁵ For example, see NCRC, "[Initial NCRC Analysis Of The FDIC And OCC Notice Of Proposed Rulemaking Concerning The Community Reinvestment Act](#)," (Dec. 18, 2019). Also see OCC, "[Community Reinvestment Act: Request for Public Input](#)," (Jan. 10, 2020).

¹⁶ *Id.*

¹⁷ See FDIC, Statement by Martin J. Gruenberg, *supra* note 11.

strategic plan or request a 90-day extension. The proposal eliminates the current option for wholesale and limited purpose designations, which allows certain specialized banks to be evaluated solely on community development activities. All such banks would not have to conform with the updated CRA evaluation program.

Recent Congressional Action on Community Reinvestment Act

Due to significant concerns raised by community stakeholders with the OCC's process and proposal to reform the CRA, the Subcommittee on Consumer Protection and Financial Institutions convened a hearing earlier this month to review the matter.¹⁸ At the hearing, witnesses raised concerns about the rulemaking process, including the 60-day length of the public comment period.¹⁹ Some witnesses urged the OCC and FDIC to withdraw the proposal and to better consult with civil rights and community organizations that will be significantly impacted by the proposal.²⁰ The Subcommittee held another hearing in April 2019 that found that redlining continues to be pervasive in many communities across the country.²¹ A witness at the hearing described a 2018 investigative report on the status of mortgage lending showed widespread discrimination in bank lending.²² After reviewing 31 million records of loan data, the report found that modern-day redlining persists in 61 metro areas across the country. Specifically, black mortgage applicants were turned away by banks at significantly higher rates than whites in 48 cities, Latinos in 25, Asians in nine and Native Americans in three. Yet over the past decade, bank regulators have consistently given approximately 98 percent of banks a passing CRA grade.²³

While some industry stakeholders have voiced support for the plan,²⁴ there have been additional concerns raised by others, including the process being utilized. For example, Members of Congress, hundreds of stakeholders and even some industry stakeholders have requested that any significant CRA proposal provide the public with at least 120 days to analyze and comment on the proposal,²⁵ and yet the NPRM gives the public only 60 days to comment. Moreover, some stakeholders have been critical of Comptroller Otting's bus tour on CRA modernization for not being open to the public, with select groups invited to attend.²⁶ Concerns have also been raised that the OCC has taken unusual steps to silence opposition to its CRA reform efforts.²⁷ Furthermore, given the lack of consensus between the Federal Reserve, OCC and FDIC, the result may lead to inconsistent regulatory treatment and regulatory arbitrage with banks choosing whichever framework they prefer.²⁸ At a recent speech, Governor Brainard of the Federal Reserve underscored the importance of all three regulators working together, stating, "Major updates to the CRA regulations happen once every few decades. So, it is much more important to get

¹⁸ Hearing entitled, "[The Community Reinvestment Act: Reviewing Who Wins and Who Loses with Comptroller Otting's Proposal](#)," Jan. 14, 2020

¹⁹ For example, see "[Testimony of Gerron S. Levi Director, Policy and Government Affairs National Community Reinvestment Coalition](#)," Jan. 14, 2020 ("The 240-page proposal is dense, complex and has many interlocking pieces – in terms of how all the new benchmarks, thresholds and definitions fit together. Neither the 60-day timeframe nor the information provided in the notice of proposed rulemaking offer a meaningful opportunity to comment.")

²⁰ For example, see "[Why Latinos Will Lose Under the OCC and FDIC's Proposal to Modernize the Community Reinvestment Act](#)," Jan. 14, 2020 ("In proposing a new, revised NPRM, we urge all three prudential regulators—together—to further consult with civil rights, economic justice, and community organizations about how best to modernize the regulations under this important law to serve all communities—especially those it was designed to protect.")

²¹ Subcommittee on Consumer Protection and Financial Institutions hearing entitled, "[The Community Reinvestment Act: Assessing the Law's Impact on Discrimination and Redlining](#)," (Apr. 9, 2019).

²² [Aaron Glantz and Emmanuel Martinez, Kept Out: For People of Color, Banks Are Shutting the Door to Homeownership](#), Revealed from the Center for Investigative Reporting (Feb 18, 2018).

²³ See [The Effectiveness of the Community Reinvestment Act](#), CRS, (Feb 28, 2019).

²⁴ See Brendan Pedersen, "[Regulators' powerful incentive to fast-track CRA reform](#)," American Banker (Jan. 6, 2020).

²⁵ See FSC, "[Waters, Brown, and Meeks Lead House and Senate Committee Democrats in Letter to Regulators on Proposed CRA Changes](#)," (Dec. 13, 2019), NCRC, "[More Than 500 Community Organizations Urge FDIC To Not Join Flawed Notice Of Proposed Rulemaking For Community Reinvestment Act](#)," (Dec. 11, 2019), and <https://www.regulations.gov/document?D=OCC-2018-0008-1578>, Jan. 15, 2020.

²⁶ See "[CRC Responds To OCC Visit To Southern California To Discuss CRA Reforms](#)," California Reinvestment Coalition.

²⁷ See "[Coalition Of Community Orgs Seeks Records On Trump Administration's Attempt To Silence Opposition To Gutting Anti-Redlining Rules](#)," California Reinvestment Coalition.

²⁸ See Brendan Pederson, "[What's the Fed's next move on CRA reform?](#)" American Banker (Jan. 3, 2020).

reform right than do it quickly. If we only have one opportunity for a few decades, I want to make sure CRA reform is based on the best analysis and ideas and the broadest input available.”²⁹

Other Supervisory and Regulatory Developments

More generally, the OCC charters, regulates, and supervises national banks and federal savings associations and licenses, regulates, and supervises federal branches and agencies of foreign banking organizations. The agency also supervises services provided by certain third parties.³⁰ As of September 30, 2019, the OCC supervises 1,200 institutions, comprising of 840 national banks, 303 Federal savings associations, and 57 Federal branches and agencies of foreign banking organizations. Together, these institutions hold nearly \$13 trillion in total assets. According to its 2019 Annual Report,³¹ the OCC issued 176 enforcement actions, resulting in \$125 million in civil money penalties. With respect to enforcement actions, compared to 2018, this represents a nearly 20 percent decline, where the OCC issued 216 enforcement actions. Some notable regulatory developments include:

- **Applicability of State Usury Caps.** In November 2019, the FDIC and OCC issued a proposed rulemaking to clarify that when a loan that is non-usurious when originated by a bank, it remains non-usurious if the loan is sold, assigned, or otherwise transferred to a non-bank. In 2015, the Second Circuit held in *Madden v. Midland Funding*, that non-bank debt collectors that had purchased debt originated by a national bank could not benefit from the bank's exportation power.³² The OCC stated the proposal is intended to “address confusion resulting from” the *Madden* decision.³³ Stakeholders have raised concerns that the proposal will encourage predatory rent-a-bank schemes that are designed to evade state usury caps.³⁴
- **Capital and Liquidity Requirements for Large Banks.** In November, the OCC issued, along with the Federal Reserve and FDIC, a final rule to revise capital and liquidity requirements for banks with \$100 billion or more in total assets.³⁵ The rule separates certain banking organizations into four different categories based on several factors including asset size, cross-jurisdictional activity, reliance on short-term wholesale funding, nonbank assets, and off-balance sheet exposure.
- **Volcker Rule.** In October 2019, financial regulators, including the OCC, finalized significant revisions to the Volcker Rule.³⁶ Critics have characterized the rule as effectively undoing the Volcker Rule’s prohibition on speculative proprietary trading with federally insured deposits.³⁷ The rule states that additional Volcker Rule reforms will be addressed in a future rulemaking.
- **Swap Margin Proposal.** In October 2019, federal banking regulators issued a proposed rule modifying the swap margin rule to “facilitate the implementation of prudent risk management strategies.”³⁸ The proposed rule would exempt uncleared swaps with inter-affiliates from initial margin requirements, while keeping variation margin requirements.³⁹ In December, the agencies announced an extension to the comment period for the proposed rule.

²⁹ Lael Brainard, “[Strengthening the Community Reinvestment Act by Staying True to Its Core Purpose](#),” Federal Reserve Board at the Urban Institute, Jan. 8, 2020.

³⁰ The OCC examines certain third-party entities for the services they provide to national banks and federal savings associations based on authorities provided by the Bank Service Company Act, 12 USC 1867(c), and the Home Owners’ Loan Act, 12 USC 1464(d)(7)(D).

³¹ <https://www.occ.gov/about/what-we-do/annual-report/index.html>

³² 786 F.3d 246, 249-53 (2d Cir. 2015)

³³ <https://www.occ.treas.gov/news-issuances/news-releases/2019/nr-occ-2019-132.html>.

³⁴ For example, see NCLC, “[FDIC/OCC Proposal Would Encourage Rent-a-Bank High-Cost Predatory Lending](#),” Nov. 18, 2019.

³⁵ See “[OCC Issues Final Rule to Change Applicability Thresholds for Regulatory Capital and Liquidity Requirements](#),” Nov. 1, 2019

³⁶ Federal Reserve, OCC, FDIC, SEC, and CFTC, joint statement, “[Agencies Finalize Changes to Simplify Volcker Rule](#),” press release, Oct. 8, 2019.

³⁷ For example, see Pete Schroeder, “[U.S. regulators hand Wall Street a major win with stripped-down 'Volcker Rule'](#),” Reuters, Aug. 20, 2019. Also see [Statement by FDIC Board Member Martin Gruenberg](#), Aug. 20, 2019 (“The final rule before the FDIC Board today would effectively undo the Volcker Rule prohibition on proprietary trading by severely narrowing the scope of financial instruments subject to the Volcker Rule. It would thereby allow the largest, most systemically important banks and bank holding companies to engage in speculative proprietary trading funded with FDIC-insured deposits.”)

³⁸ OCC et al., “[Agencies Propose Rule to Amend Swap Margin Rules](#),” press release, October 28, 2019, at. See also FDIC, “[Fact Sheet](#),” Sep. 17, 2019.

³⁹ Concerns have been raised by the proposal. For example, see Federal Reserve, “[Statement by Governor Lael Brainard](#),” Oct. 28, 2019; Statement by [FDIC Board Member Martin Gruenberg](#) and a [2015 letter from Americans for Financial Reform](#) to the CFTC outlining their views on the importance of maintaining swap margin requirements on inter-affiliate transactions.