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The OCC's CRA Final Rule: What is a Qualifying Activity?

The Office of the Comptroller of the Currency ("OCC") issued a Community Reinvestment Act ("CRA") final rule^[1] ("Final Rule") on May 20, 2020 effective October 1, 2020. The OCC announced a new framework for evaluating CRA performance with the objective to encourage banks to meet the credit needs of their entire communities, including low-moderate income ("LMI") individuals and areas. The Final Rule clarifies and expands the bank lending, investment and services (collectively "Qualifying Activities") of national banks, Federal branches of a foreign bank, Federal savings associations, and State savings associations that qualify for positive CRA consideration. The current CRA framework (that financial institutions regulated by the Federal Reserve or FDIC will continue to follow) has been faulted for highly variable and subjective determinations on what activities qualify for CRA consideration, often discouraging financial institutions from branching out into new activities that have not been "blessed" by their specific CRA examiners.

The Final Rule defines a Qualifying Activity as "a retail loan, a community development loan, a community development investment, or a community development service that helps to meet the credit needs of a bank's entire community, including low- and moderate-income communities, is a qualifying activity if it meets the criteria [in this section] at the time the activity is originated, made or conducted."^[2]

Determination of Qualifying Activity

Accompanying the Final Rule is the CRA Illustrative List^[3] the OCC has determined are Qualifying Activities that will receive positive CRA consideration. The illustrative list is a publicly available list of non-exhaustive examples of qualifying activities that meet, the criteria of 12 CFR 25.04. The regulation permits the OCC to also include on the illustrative list those activities determined not to be Qualifying Activities. In the introductory paragraph, the OCC makes

clear that it is not making any determination concerning the safety or soundness of the activities or whether they are legally permissible activities.

The regulation includes a process for an interested party to submit a request to the OCC to confirm that an activity meets the criteria of §25.04. Requests are to be submitted on a Qualifying Activity Confirmation Request Form to be made available [on the OCC's website](#). Decisions made by the OCC regarding submissions of consideration of qualifying activities are to be published, and the OCC may include the activity in the list of activities that meet or do not meet the Qualifying Activity criteria.

Retail Loans

The Final Rule increases the annual revenue threshold for small businesses and farms to be considered a CRA-eligible business or a CRA-eligible farm to \$1.6 million. The amount that qualifies as a small loan to these businesses and farms was also increased to \$1.6 million. The increases were based generally on inflation since the thresholds were instituted 25 years ago and will be adjusted for inflation every five years and be made publicly available. A small loan to a business or farm is a Qualifying Activity when located in an LMI census tract.

A home mortgage loan or a consumer loan is a Qualifying Activity if it is provided to an LMI individual or family. A consumer loan is defined as a loan to individuals for household, family, and other personal expenditures other than overdraft plans and includes revolving credit not accessed by credit cards, automobile loans, and any other loan for household, family and personal expenditures including low-cost education loans but excluding loans secured by real estate and for the purpose of purchasing or carrying securities.

Community Development Loans, Investments and Services

A community development loan, investment or service will be considered a Qualifying Activity if it provides financing for or supports various activities.^[4] As a significant simplification, the

Final Rule applies the same parameters of qualification for community development across the lending, service and investment tests. The regulations that remain in effect for non-OCC regulated entities regarding CRA qualifying activity apply differing factors to loans, investments, and services to determine whether it would receive positive CRA consideration. This new approach is evidenced in the below excerpt from the CRA Illustrative List concerning affordable housing.

§25.04(c)	<i>Community development loans, community development services. A community development investment, or community development service, is a qualifying activity if it provides financing for or supports the development of affordable housing.</i>
§25.04(c)(1)	<i>Affordable housing, which means</i>
§25.04(c)(1)(ii)	<i>Owner-occupied housing purchased, refinanced, or otherwise financed on behalf of low-or moderate-income individuals or families; or mortgage loans provided directly to individuals or families.</i>
	Investment in a mortgage-backed security that is purchased by LMI borrowers.
	Bank employees help to build a single-family home for a non-profit organization with an express purpose of providing affordable housing purchase by LMI individuals or families.
	Down payment and closing cost assistance grants for LMI borrowers.

The specific reference to bank employees helping to build a single-family home for a non-profit example above is also interesting. Every CRA Officer has responded to the query “will working on a Habitat for Humanity build give the bank CRA credit?” Every CRA Officer has had to answer “no” under the current CRA framework as the employee time building the home was not considered “financial in nature.” In the new OCC framework, the emphasis is on supporting affordable housing, not on the financial in nature aspect of the service. Now the CRA Officer can say, “Yes. the Habitat for Humanity build will give the bank CRA credit.”

National banks and other financial institutions regulated by the OCC should review the OCC’s Illustrative List to determine how closely aligned their current CRA strategies and activities are.

To read our article focused on the compliance dates of the OCC's CRA Final Rule, please see ["The OCC's CRA Final Rule: Where Do You Fall and When Must You Comply?"](#)

In future articles, we will provide information and analysis about the more significant revisions contained in the OCC's Final Rule surrounding:

- General Performance Standards and Presumptive Ratings
- Assessment Areas, Data Collection and Reporting.

To be certain you receive these future articles, please [visit our newsletter sign-up page](#). Be sure to select the Daily Coronavirus Updates as well as any industries or practice groups from whom you would like to receive updates.

Financial Institutions with Community Reinvestment Act questions may contact any of Frost Brown Todd's [Financial Services attorneys](#) experienced with CRA matters. For more information, please contact [Nancy Presnell](#), or [Shannon Kuhl](#).

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Response Team](#). Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

[1] OCC New Release, NR 2020-63, May 20, 2020

[2] 12 CFR 25.04(a) Qualifying activities criteria, General

[3] NR 2020-63, May 20, 2020

[4] 12 CFR 25.04(c) Community development loans, community development investments, and community development services.

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