Experts Say Some OZ Investments Should be CRA Eligible

By Mark O’Meara, Novogradac, February 5, 2019

The Community Reinvestment Act (CRA) of 1977 provides a framework for financial institutions, state and local governments and community organizations to promote banking services to all members of a community.

“The CRA remains the primary driver of bank financing,” according to Local Initiatives Support Corporation’s (LISC’s) comments in response to the advance notice of proposed rulemaking (ANPR) pertaining to reforming the CRA regulatory format. “CRA has been a critical, if not the most critical, resource available to facilitate the flow of private capital into underinvested communities. It has been successful not only for the communities and community residents that have benefited from these investments, but also for the banks–who have managed to find new and profitable investment opportunities that generally perform as well or better than other bank investments.”

LISC is a nonprofit housing and community development organization and certified Community Development Financial Institution.

Community development industry participants like the idea of opportunity zones (OZ) investments being CRA eligible.

The question is: Should all OZ investments qualify for CRA? Some believe all OZ investments should automatically become CRA eligible, while others think that some OZ investments should be CRA eligible.

“OZ investments should qualify if the benefit goes to low- and moderate-income people,” said Buzz Roberts, president and CEO of National Association of Affordable Housing Lenders (NAAHL), a national alliance of banks, nonprofits and other private lenders and investors in affordable housing and neighborhood revitalization. NAAHL provides expertise on effective implementation of the CRA and other policy tools. “In order for [investments] to become CRA eligible, the primary purpose needs to be community-impact focused.”

However, “Just because an investment is in a low-income area doesn’t mean it should qualify for CRA,” said Roberts, who elaborated by saying that luxury condos built in an OZ should not qualify for CRA eligibility as the primary beneficiary is not low- and moderate-income families.

“It’s hard to argue that if I create a trophy real estate property for high-income, white-collar workers, that it should be CRA eligible,” said Peter Lawrence, director of public policy and government relations at Novogradac Consulting LLP. “It could kick out low-income residents and bring in upper-income workers. And, that’s not what the CRA was designed to do.”

David Dworkin, president and CEO of National Housing Conference, agrees. “There are a couple of reasons why it does not make much sense as a blanket proposal,” he said. Dworkin is worried that low- and moderate-income families could get displaced in scenarios such as the one Lawrence describes.

“However, there are certain OZ investments that should get CRA credits,” said Lawrence. “My attempt at a compromise is to not look at CRA eligibility for OZs as an open-and-shut case, but establish clear criteria that would make clear which OZ investments qualify and which do not.”

Roberts would support creating criteria that OZ investments would have to meet, “that way banks would know if [OZ] investments would qualify for CRA.”

“There has to be a primary purpose of community development,” said Roberts. “It’s tough with OZs because there are no guardrails for low-income benefit. … Make sure it’s in the spirit of the CRA.”

Lawrence said establishing safe harbor guidelines would incentivize banks to do the most impactful OZ investments. However, he acknowledged that defining safe harbor criteria would be challenging.

Dworkin said the CRA was created to ensure banks invest in geographies from which they take deposits. “You don’t want to create a loophole to [the CRA’s] geographic emphasis where banks take money from some area and invest in another. Money chases success, which could end in disinvestment in low-income communities,” said Dworkin. “The purpose of the CRA is to reverse that, to create a significant incentive for banks to invest locally.”

LIHTCs, NMTCs Differ from OZs

Low-income housing tax credit (LIHTC) and new markets tax credit (NMTC) investments automatically qualify for CRA. That’s because both programs have rules and regulations ensuring these investments serve low- and moderate-income people.

“The NMTC and LIHTC get blanket approval, but [those] are a different kind of incentive,” said Matt Josephs, senior vice president of policy at LISC. “With NMTCs, there is an annual competitive process with built in checks and balances. LIHTC properties generally serve families earning less than 60 percent of the area median income and the LIHTCs go through a state allocating agency. Those safeguards don’t exist for the OZ.”

“The structure of the OZ incentive favors investments expected to generate the greatest capital gain, [whereas] LIHTCs align private motivation with community service,” said Roberts. “In the case with OZs, you don’t have that alignment.”

LISC’s comments in response to the ANPR went a step further in saying, “Without guardrails in place, it is likely that some opportunity zones investments may end up harming the communities they are intended to serve (e.g., through displacement of community residents). The OCC should establish a “safe harbor” list of the kinds of [OZ] investments that will be given preferential CRA treatment, but otherwise should review [OZ] investments on a case-by-case basis to ensure that the community is in fact benefiting from the investment.”

Dworkin agrees.

“Opportunity zones are a good fit for CRA eligibility. OZs represent areas that receive clear support from the state,” said Dworkin. “[However,] we want to be mindful of the negative consequences and mitigate them. The worst case for OZ legislation would be if it created displacement of low-income families. The regulatory structures are so loose [now]. We need to be careful that wouldn’t occur. It would taint the [incentive].”

Conclusion

Not all OZ investments fit the CRA criteria, but the ones that do should be eligible. “If you create an investment to benefit low- and moderate-income families in an OZ, it would be a logical addition to the CRA,” said Dworkin. “We need a CRA with flexibility to best serve areas in need.”