Banking Law News

OCC Goes It Alone on Anti-Redlining Rule Rewrite (2)

By Evan Weinberger

May 20, 2020, 8:01 AM; Updated: May 20, 2020, 2:59 PM

- Fed, FDIC hold back on final rules for anti-redlinining law
- OCC final rules eased some controversial proposals

The Office of the Comptroller of the Currency issued a sweeping rewrite of a key anti-redlining law that stepped back from a few controversial proposed changes.

The OCC on Wednesday issued new rules for determining banks' compliance with the Community Reinvestment Act, a 1977 law aimed at boosting lending and investment in low- to moderate-income communities.

However, the Federal Deposit Insurance Corp., which signed on to an original December proposal, and the Federal Reserve, which abstained from the proposal, didn't sign on to the final rules.

FDIC Chairman Jelena McWilliams said that while there "many provisions" in the OCC's final rule that will increase lending and investing in low- to moderate-income areas and bring more CRA clarity to banks, her agency wasn't ready to sign on "at this time."

"The FDIC recognizes the Herculean effort community banks are making to support America's small businesses and families during this challenging time and encourages financial institutions to work constructively with borrowers affected by COVID-19," McWilliams said in a statement.

The Fed didn't have any comment.

The public comment period for the CRA changes closed on April 8, making the OCC's turnaround on the rules particularly fast. The OCC said it received more than 7,500 comment letters.

Comptroller of the Currency Joseph Otting is expected to resign from his post in the coming days.

"By finalizing the rule to improve the regulatory framework, we will make CRA work better for everyone and are encouraging banks and savings associations to lend, invest, and provide more services in the communities they serve, including low- and moderate-income neighborhoods across our country," Otting said in a statement.

Delayed Changes

The new rules for assessing banks' compliance with the CRA will change the way banks' loans and investments in low- to moderate-income communities are measured, but those new measurements will not begin for the largest banks until January 2023 and midsize banks until January 2024. That could give a new administration time to change them should Democrats win the presidential election later this year.

The OCC said that it would need time to assess the new metrics before requiring banks to operate under them.

"It's not an issue of gathering the data. It's an issue that the data doesn't exist," OCC Chief Operating Officer Brian Brooks, who would become the acting comptroller if Otting departs, said on a call with reporters. Otting did not participate in the call.

The OCC's plans to assess new data as banks are still complying with existing CRA rules is going to create problems for the industry and the agency's examiners, said Randy Benjenk of Covington & Burling LLP.

"CRA personnel are going to have to be doing many things at once," he said.

The rules will provide a single overall grade for banks' loans and investments into affected communities, a change opposed by both community groups and banks. A bank with more than five assessment areas, defined largely by branch locations, would have to receive a score of satisfactory or outstanding in 80 percent of those areas to get that score overall, according to the rules.

Banks with fewer than five assessment areas will be measured for compliance differently.

The final rules also give OCC examiners the opportunity to evaluate a bank's "performance context" and "evidence of discrimination" when evaluating a bank's CRA activity, rather than looking solely at lending and investment statistics to determine whether banks complied with fair lending laws.

Otting said in his statement that the OCC would address potential discrimination and illegal lending activity through fair lending examinations and enforcement actions.

Stadium Projects Out

The OCC also removed funding for stadium projects in affected communities as a category of lending and investment that would count toward CRA requirements. Stadium funding was included in the original proposal, issued in December, and was blasted by Democratic members of Congress and community groups.

The list of qualifying activities for CRA credit includes a heavy focus on mortgages and small business loans, and also includes small-dollar loans to qualifying borrowers.

The OCC and other regulators have been trying to get banks to issue small-dollar loans as a more consumer friendly alternative to payday loans.

The new list of qualifying CRA activity and other portions of the new rules will take effect as early as October.

The rules allow small banks with total assets of $600 million or less to be evaluated using the existing CRA framework, which was last updated in the early 1990s. The OCC also raised the midsize institution threshold, where banks up to $2.5 billion of assets can opt to operate under the existing CRA rules.

Quick Turnaround

Congressional Democrats and community groups raised concerns that the OCC rushed the final rules to meet a timeline set by Otting. The time between the closing of the comment period and the final rule's release was only 41 days.

Brooks said the OCC had been in constant dialogue with banks and industry members since the Treasury Department first recommended making changes to the CRA in 2017.

"This was not 41 days of work. This was 2-and-a-half years of work," he said.

The OCC's decision to go forward with a different CRa regime than the Fed and FDIC could sow confusion at banks and make it harder for communities to get the money they need, said Buzz Roberts, the CEO of the National Association of Affordable Housing Lenders.

"We all know, when people are confused, they do not act," he said.

'Slow Death'

There are doubts that the OCC's final CRA rule would ever go live if a new administration take power in 2021.

There are even questions about whether Trump appointees would embrace this version of a CRA rewrite.

The current leadership at the FDIC has not given any indication that it plans to move forward with the OCC's rules any time soon, said Jesse Van Tol, the CEO of the National Community Reinvestment Coalition.

"I think they're letting this thing die a slow death. It's very unlikely that any significant part of this will have any effect," he said.

(Updates with more details on the rule in paragraphs 10, 12-14, 17 and 24; comments from OCC officials in paragraphs 25-27; and critics of the rule in paragraphs 28-34.)

To contact the reporter on this story: Evan Weinberger in New York at eweinberger@bloomberglaw.com

To contact the editor responsible for this story: Michael Ferullo at mferullo@bloomberglaw.com