Fed CRA Plan Seen as Bridging Divide With OCC

By Brendan Pedersen, American Banker, October 1, 2020

WASHINGTON — While the Federal Reserve's proposal to modernize the Community Reinvestment Act has key differences from a competing rule by the Office of the Comptroller of the Currency, some observers are still holding out hope that the two agencies can get on the same page.

The agencies have bucked tradition by pursuing separate plans to reform the 1977 anti-redlining law. The Fed's advance of notice of proposed rulemaking last week made clear the central bank still disagrees with the OCC's approach to scoring a bank's combined CRA activities and other issues.

The regulators appear willing ultimately to go it alone and have not shown signs of coming back to the negotiating table. But experts who have dug deeper into the details say there are enough parallels between the two plans that there may be a path for the agencies to coalesce around a joint rule.

“We were led to believe the differences were so great that they weren’t able to work together, and that does not appear to be the case,” said Diego Zuluaga, associate director of financial regulation studies at the Cato Institute.

At a broad level, both plans are intended to improve how regulators evaluate a bank's retail lending and community development projects in its footprint, and cover CRA-related activities beyond an institution's traditional branch network.

Parallel CRA plans

OCC rule	Fed ANPR
CRA test combines all metrics into single score	Differentiates assessments for retail lending and community development
Potentially requires banks to submit new compliance data	Relies on existing data sources, including HMDA and U.S. census
Lists dozens of acceptaple CRA projects	Suggests rule will include examples of eligible CRA projects
Requires full compliance in 2023	Effective date unknown; public comments due early 2021

“Both proposals have a lot of the same modules: retail lending and distribution analysis, community development analysis, having better clarity around eligible activities,” said Buzz Roberts, president and CEO of the National Association of Affordable Housing Lenders. “Those are really common elements between the OCC approach and the Fed’s approach. They’re just put together differently.”

The clearest point of contention remains how dramatically the regulators shake up their CRA scoring methodologies.

The Fed's proposal would avoid the OCC's controversial scoring metric to evaluate a bank’s combined retail lending and community development performance — based largely on the dollar-value of CRA-eligible projects. The Fed would alternatively score retail lending and community development performance separately. While the OCC may require banks to submit new of compliance data, the Fed has indicated it would rely on existing data sources.

"In an effort to reduce burden, the proposed metrics would rely to the greatest extent possible on existing data collections and public data sources, and the approach would exempt small banks from deposit and certain other data collection requirements," Fed Gov. Lael Brainard said in a speech Sept. 21, the day the ANPR was released.

But commentators have noted that the two plans have more similarities than they had expected.

Some provisions of the Fed’s outline are “strikingly similar to the OCC’s final rule, either in concept or execution,” said Randy Benjenk, an attorney at Covington.

“The commonalities may be a reflection of points on which the agencies agreed during the interagency discussions that took place before the OCC issued its proposal,” Benjenk said. “They may also be the result of the Federal Reserve having the opportunity to leverage aspects of the OCC’s final rule and industry and community group feedback on that rule.”

Even though the central bank stopped short of proposing the OCC’s overarching dollar-based metric for scoring a banks’ CRA performance, the Fed has proposed to use some dollar-based metrics in its separate tests for retail lending and community development, which advocates say would avoid watering down the impact of community development work on a bank’s score.

“The OCC provided leadership and pushed the other regulators to revamp the CRA framework into something that’s fully modernized — something that reflects what banking looks like today,” said Quyen Truong, a partner at Stroock and former assistant director of the Consumer Financial Protection Bureau. “The Federal Reserve’s ANPR reflects that work. There’s more recognition of the need to respond to a different model of banking and how it would apply to increases in online and mobile banking over time. That’s significant.”

In her speech, Brainard said, "Stakeholders have expressed strong support for the agencies to work together to modernize the CRA."

"By reflecting stakeholder views and providing a long period for public comment, the ANPR is intended to build a foundation for the banking agencies to converge on a consistent approach to strengthening the CRA that has broad support among stakeholders," she said.

In a statement, OCC spokesperson Bryan Hubbard said it would be "premature to comment on similarities and differences based on an" ANPR.

"Like our colleagues at the Fed, we look forward to reviewing the comments for potential insights that we can consider as we continuously look to improve our existing rule for the national banks and thrifts that conduct approximately 70% of CRA activity in our country," Hubbard said. "We are pleased that with the initial step by the Fed to begin its rulemaking, the public consensus has shifted from defending the previous status quo to recognizing it is past time to improve the CRA regulatory framework that was last updated put in 1995."

Another key element of the Fed’s proposal is a direct pull from one of the most popular component’s of the OCC’s rulemaking: having an illustrative list of acceptable CRA activity.

Without the OCC, “the Fed’s staff would probably not have included an explicit list of activities, and it’s clear now they’ve adopted that approach, albeit in a less expansive way,” said David Dworkin of the National Housing Conference. “That’s going to provide the clarity the OCC has made clear it wants.”

Meanwhile, analysts point to other evidence that the Fed is trying to leave the door open to compromise.

For one thing, the issuance of an ANPR before a more explict proposal and the fact that the Fed is providing a 120-day comment period leave ample time for the public to respond, and much of the OCC's new framework does not go into effect until 2023 or 2024, depending on the size of the bank. By the time the central bank crafts a complete rulemaking, the presidential election will have ended and regulators will know the White House occupant for the next four years, which could have an effect on leadership at both the OCC and the Fed.

"A key question is whether the OCC will be willing to slow the pace of implementing its rule to allow time for it to consider joining the Federal Reserve in further changes without requiring banks to overhaul their compliance systems twice," Benjenk said.

Still, some of the staunchest opponents of the OCC's approach to modernizing the CRA say that it's less clear the different approaches will be so easy to reconcile without a significant shift from one regulator or the other.

"There are significant, vast differences between the two proposals," said Gwendy Brown, head of policy at the Opportunity Fund.

Community groups and their advocates point to the OCC's heavy emphasis on the dollar value of CRA projects as the overarching metric of evaluating a bank's overall performance. The national regulator has argued its approach is more objective than the current framework. Community groups say the OCC's rule will undervalue smaller projects and other instances of service-oriented CRA compliance.

"At the core of the OCC's ... [rule], which drives the rest of the details of that proposal, is measuring CRA activities by dollar value," said Jesse Van Tol, CEO of the National Community Reinvestment Coalition.

"The Fed's proposal is grounded more in performance context and the needs of the community. The OCC proposal defines those needs as a certain dollar volume, and that's irreconcilable," said Van Tol. "You have to make a choice."

Others noted that even if the two agencies developed a consensus plan, it could require a more complicated rulemaking process.

"Conceptually, there are enough similarities in the two agencies' approaches to think that the agencies could find common ground if they were motivated to do so," Benjenk said. "However, if the OCC now decides to try to find middle ground, there are enough technical differences between the approaches that the OCC likely would need to engage in a new rulemaking process to harmonize the standards."

There's also the matter of data collection. While the OCC's regulation will require banks to change much of their existing CRA compliance infrastructure, potentially requiring new data submissions, the Fed's outline made a point of stressing that the agency will use existing or otherwise public data to fuel their modernized framework.

"It seems that the Fed's plan is much better grounded in data than the OCC approach," Roberts, the CEO of the affordable housing lender association, said. "Part of what makes everyone nervous right now is not really knowing where the OCC is going on metrics and the actual performance levels. Obviously, the OCC has had to defer on that, because they didn't have the data to even consider it, and they're launching a new regulatory process to flesh that out."

The appeal of avoiding new regulatory burdens around data requirements will not be lost on banks.

“It’s a big deal,” said Truong. “Any time banks have to change their data collection practices and comply with new reporting requirements, they’re adjusting very complex, coordinated systems with both business and compliance purposes. Having to change that framework is a significant burden.”

Other analysts were skeptical, however, that the Fed’s purported reliance on existing data — either through banks’ call reports or via public data sources, like the U.S. Census — would lead to an effective modernization of the CRA regime.

“Both the Fed and the OCC want to move away from the world of vague metrics and this question of whether the banks are good or bad — they want something metric-based,” said Cato’s Zuluaga. “But they’re all making heroic assumptions about the availability and accuracy of data, whether that’s Census data, [Home Mortgage Disclosure Act] data or otherwise.”

“You either collect all the data yourself,” Zuluaga said, referring to the OCC’s approach, “or you depend on other databases for purposes they’re not designed for.”