

CRA Deal Between Fed, FDIC and OCC Still Not a Slam Dunk

By Brendan Pedersen, American Banker, July 30, 2021

WASHINGTON — Federal bank regulators have their best chance in years to ink common reforms of the Community Reinvestment Act after committing to interagency talks. But resuming negotiations and reaching a deal are two different things, observers warn.

Experts say the formal decision by the Office of the Comptroller of the Currency to [rescind its Trump-era CRA rule](#) and rejoin discussions with the other regulators was very encouraging. But several outstanding issues remain before the OCC, Federal Reserve and Federal Deposit Insurance Corp. can develop an interagency CRA plan that has eluded them for years.

Stumbling blocks could include legal issues with unwinding the still-active OCC rule, resolving potential differences over how a new CRA framework deals with online banking activity and whether banks should be evaluated on efforts to address racial inequity in the financial system.

“The agencies and the stakeholders generally agree conceptually on most of the issues” behind CRA reform, said Quyen Truong, a partner at Stroock & Stroock & Lavan and former assistant director at the Consumer Financial Protection Bureau. “But there remain key portions that are very hard to tackle,” not to mention “differences in political leanings and ideological viewpoints among the agencies as well,” she added.

In their joint statement July 20, the agencies said they “are committed to working together to jointly strengthen and modernize” CRA rules. Instead of the rule that former Comptroller of the Currency Joseph Otting issued last year, the regulators will use an alternative reform outline developed by the Fed as a starting point.

“I think there's a sound basis for optimism that consensus can be achieved over the next year,” said Walter J. Mix III, head of the financial services practice at Berkeley Research Group and former California commissioner of financial institutions.

But even though acting Comptroller Michael Hsu and FDIC Chair Jelena McWilliams are both former Fed officials, the three agencies traditionally bring different perspectives on a host of issues. Whereas McWilliams and Fed Chair Jerome Powell were both Trump-appointed, Hsu was installed by the Biden administration. (The White House has yet to name a nominee for permanent comptroller.)

Jesse Van Tol, CEO of the National Community Reinvestment Coalition, said it was “generally correct that there’s a lot of consensus on a lot of issues,” but he warned that the policy areas “where there is not yet necessarily consensus are some of the biggest issues.”

Discord between the bank regulators was a [defining feature](#) of the process that resulted in the prior CRA modernization, which was [finalized alone](#) by the OCC in May 2020. But Hsu, who came to the OCC from the Fed, has [repeatedly urged interagency coordination](#) since taking office.

“Considering that [Hsu] is the one heading the OCC, the same agency that now is voluntarily making the decision to pull back its rule and work towards an interagency rule, I cannot imagine that he thinks there are barriers here that are insurmountable,” said Lisa Weingarten Richards, an attorney with Murphy & McGonigle and an 11-year veteran of the OCC.

“Taken together, we have an OCC that is now essentially committed to reaching an interagency revision, that has inside knowledge of the Fed’s position on CRA, and an FDIC that had initially planned on joining the OCC,” Weingarten Richards said. “I just cannot see that there will be anything insurmountable in reaching an interagency CRA revision.”

But other factors could complicate a new round of interagency discussions after the OCC issued its rule last year. Even though the OCC stated its intent to unwind the rule, rescinding the framework needs to go through its own rulemaking process. The 2020 reforms are still the letter of the law and parts of the new framework are already in effect for some banks.

The OCC cannot just quickly revert to the previous framework particularly if there are any parts of the Trump-era rule the regulators want to keep, like the [broadly popular](#) list of qualifying CRA activities. Speaking with reporters last week, Hsu said it was “absolutely true” that rescinding the 2020 rule would add to the complications regulators face.

Under the Administrative Procedure Act, Hsu said, the OCC will need to propose a replacement at the same time that it rescinds the 2020 rule to avoid leaving behind a regulatory vacuum.

Today, there are complexities around having an OCC rule here and the other two agencies here, and as we go through this process, there’ll be even more,” Hsu said. “There are a lot of devilish details, so I’m not going to lie about that. That’s why we’ve got staff working through it, that’s why we’re going to have a comment process — to seek out where would those disruptions be biggest, and how can we minimize that.”

There are also outstanding questions about how the CRA framework should change to reflect the growing dominance of digital banking. The traditional CRA framework organizes bank obligations around an institution's physical branch activities.

“The biggest looming issue, with regards to CRA reform, is how to update the rules to take into account the ever increasing amount of online banking activity,” said Truong.

“I think there's closer agreement [among stakeholders] as to the usefulness of accounting for online activities and not limiting the analysis to brick-and-mortar locations,” Truong added. “But the nature of online banking is such that it's difficult to tell how that issue will be resolved. I anticipate that issue will have a significant delay in resolution.”

One of the enduring goals of the reform effort since the Trump administration has been modernizing the way that assessment areas are drawn for banks, particularly digital banks with few if any physical locations.

The OCC's 2020 reform attempted to introduce a “deposit-based” CRA assessment scheme for digital banks, organizing CRA obligations around areas where concentrations of depositors live. But the banking industry claimed that the data and recordkeeping burden of such an approach would have been considerable.

“We've concluded that doesn't work and won't help, [and] in some ways [will] make things worse,” said Buzz Roberts, president and CEO of the National Association of Affordable Housing Lenders, referring to deposit-based assessment areas. “So what's the alternative? ... Those have to be worked through, and there may be some more research, data that has to be looked at before those decisions can be made.”

There is also the question of whether regulators should consider a regulatory framework that takes race and the legacy of racial discrimination in the U.S. financial system more directly into account for banks' CRA scores.

The statutory text of the CRA does not mention race and is instead focused on “low-to-moderate-income” communities per census data. But a prominent question for public comment in the Fed's advance notice of proposed rulemaking was: “What modifications and approaches would strengthen CRA regulatory implementation in addressing ongoing systemic inequity in credit access for minority individuals and communities?” Some analysts have taken that question as a signal that Federal Reserve Board Gov. Lael Brainard and others may push to make banks more accountable for the racial-equity impact of lending and other services.

“What's missing in the statute is a direct requirement that race be addressed,” said David Dworkin, president and CEO of the National Housing Conference. “But the statute does not forbid it.”

Such a development would likely draw scorching criticism from Republicans on Capitol Hill, some of whom have [blasted](#) the Federal Reserve and its regional banks in recent months just for studying the impact of racism on the American financial system.

Others are skeptical that the bank regulators — famously conservative institutions by nature — would propose especially strong requirements aimed at racial equity.

“There will be a very strong desire from members of Congress and the advocacy community for them to address that in a meaningful way,” Van Tol said, but “that’s a complex issue, and in an agency full of lawyers, you can imagine them coming out with something quite timid.”