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Bank Counsel Roundtable—
The Prudential Banking Regulators' Joint Proposed Community Reinvestment Act Regulations

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Agenda

- **The Prudential Banking Agencies proposed revisions to the Community Reinvestment Act's implementing regulations (the "Proposal")**
  - **Background and History of the CRA**
  - **The Ill-fated OCC final rule**
  - **The Proposal**
  - **An analysis of reporting and compliance issues**

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Background and History of the CRA
Erin Bryan

The CRA is OLD

- **Adopted in 1977**
  - **Initial regulations issued in 1978**
    - 43 FR 47144 (Oct. 12, 1978).
- **Current version issued in 1995 under the Clinton Administration**
  - 60 FR 22156 (May 4, 1995).
- 12 CFR parts 25
- 12 CFR 195
- 12 CFR 228,
- 12 CFR 345.
  - **Adopted the current three primary tests for measuring CRA performance**
    - **Lending test**
    - **Deposit test**
    - **Service test**
  - **Small bank asset size created in 2005**
    - **Very small banks only examined every 5 years**
  - **Limited purpose/Wholesale institutions category added**
  - **Option created for use of a strategic plan**
  - **CRA Sunshine Requirements added in the GLBA Act**

CRA

- Ratings
  - Outstanding
  - Satisfactory
  - Needs to Improve
  - Substantial Noncompliance
- Required annual filings and disclosures
  - Including the availability of HMDA data

CRA

- A bank's CRA rating is taken into account—
  - In a bank merger, consolidation, acquisition of assets or assumption of liabilities transaction
  - The establishment of a new branch
  - The relocation of a bank's main office or branch
  - Approval of deposit insurance for a new bank, or
  - The exercise of extended financial services

The reality of the CRA is that if a merger is protested by a consumer group, the transaction stops dead until the protest is settled

The Ill-Fated OCC Final Rule
Erin Bryan

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The Rescinded OCC Rule

- **The OCC Rule made major changes in four areas of the prior CRA framework—**
  - **New requirements for delineating a national bank's CRA assessment area(s)**
  - **Expanded and identifiable qualifying CRA activities and investments (formerly merely identified as activities falling within the broad yet undefined categories of the lending, investment, and services tests)**
  - **Instructions to OCC examiners for evaluating a national bank's CRA performance, and**
  - **Reporting standards to be developed and implemented by a national bank**
- **Due to the rescission of the OCC Rule, promised metrics to measure a national bank's CRA performance were never published**

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Revised Delineation of a National Bank's CRA Assessment Area(s)

- The OCC Rule recognized that geographic location may no longer be the singular component of a bank's core operations
  - While the use of a geographic assessment area was retained, the OCC Rule added a new assessment component reflecting the migration of a national bank's lending and deposit functions to technologies
- The two assessment schemes were termed—
  - A "Facility-based Assessment Area" or "FBAA", and
  - A "Deposit-based Assessment Area or "DBAA"

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Facility-based Assessment Area

- Required a national bank to delineate an assessment area encompassing each location where the bank maintains a main office, a branch, or a non-branch deposit-taking facility (which need not include ATM locations)
  - Including the surrounding locations in which the bank has originated or purchased a substantial portion of its qualifying retail loans
- When delineating a facility-based assessment area, the area must consist of:
  - One whole metropolitan statistical area
  - The whole nonmetropolitan area of a state
  - One or more whole, contiguous metropolitan divisions in a single metropolitan statistical area, or
  - One or more whole, contiguous counties or county equivalents in a single metropolitan statistical area or nonmetropolitan area

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Deposit-Based Assessment Area

- For larger-sized national banks and non-traditional national banks (*e.g.*, internet banks) that gather more than 50% of their deposits from outside of their facility-based assessment areas must also delineate "deposit-based assessment areas" or "DBAAs."
- A DBAA was defined as an area where the national bank receives more than 5% of its retail domestic deposits—outside of its facility assessment areas—, and must be delineated to consist of:
  - One whole state
  - One whole metropolitan statistical area
  - The entire nonmetropolitan area of a state
  - One or more whole, contiguous metropolitan divisions in a single metropolitan statistical area
  - The remaining geographic area of a state, metropolitan statistical area, nonmetropolitan area, or metropolitan division other than where it has a facility-based assessment area, or
  - One or more whole, contiguous counties or county equivalents in a single metropolitan statistical or nonmetropolitan area

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Expanded and Identifiable Qualifying CRA Activities and Investments

- When identifying qualifying CRA investments, the OCC Rule provided the most potential benefit to a national bank
- Specifically, the OCC Rule
  - Replaced the lending, deposit and services tests with a broader scope of CRA-related activities that qualify to receive CRA credit
  - Identified specific categories of activities that would qualify for CRA credit
  - Published a pre-approved lists of specific loans, investments and other activities that fall within the scope of the new CRA categories
    - To be updated on a regular basis
  - Created a process whereby a national bank could receive pre-approval from the OCC for innovative CRA-related activities that formerly were rejected during CRA examinations

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Expanded and Identifiable Qualifying CRA Activities and Investments

- **The OCC Rule adopted new terminology for functions and investments that qualify for CRA credit**
  - **C*ommunity development investments*—which means a lawful investment, membership share, deposit, legally binding commitment to invest that is reported on the national bank's Call Report in Schedule RC-L**
  - **C*ommunity development loans*—which means a loan, line of credit, or commitment to lend in the loan categories identified in the CRA Rule, and**
  - ***Community development services*—which means time bank employee spent volunteering as a representative of the national bank on activities (or supporting activities) identified in the CRA Rule and OCC interpretative guidance**

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Expanded and Identifiable Qualifying CRA Activities and Investments

- **The OCC Rule identified numerous categories of loans and other banking services that qualify for CRA credit**
  - **Coupled with a requirement that they *partially or indirectly benefit* low- or moderate-income ("LMI") communities within a national bank's delineated assessment area(s)**
- **Categories included—**
  - **Retail loans;**
  - **A broad scope of identified community development loans, community development investments, and community development services, including**
    - **Affordable housing;**
    - **Participating in another bank's community development loans, community development investments, or community development services;**
    - **Community support services, such as child care, education, workforce development and job training programs, health services, and housing services which partially or primarily serve or assist LMI individuals or families;**

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Expanded and Identifiable Qualifying CRA activities and Investments

- Broad Scope (Continued)
  - Economic development for small businesses or family farms
  - Essential infrastructure that partially or primarily serves LMI communities
  - A family farm's lending, leasing and technical support
  - Federal, state, local, or tribal government programs, projects, or initiatives that partially or primarily serve LMI individuals or families
  - Financial literacy programs or education or homebuyer counseling
  - Loan and other assistance in Indian country or other tribal and native lands
  - Qualified opportunity funds that benefit low- or moderate-income qualified opportunity zones, and
  - Investments in entities such as MDIs, WDIs CDFIs and certain credit unions

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Instructions to OCC Examiners for Evaluating a National Bank's CRA Performance

- An essential—yet unpublished component of the OCC Rule—was the *quantification* of CRA-qualified activities based upon—
  - The quantified dollar value of qualifying CRA loans and community development investments originated, made, or performed by the national bank during the year (or on the bank's balance sheet during the year); and
  - The aggregate:
    - Quantified dollar value of community development services conducted during the year
    - Quantified dollar value of in-kind donations made during the year, and
    - Quantified dollar value of monetary donations made during the year

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Reporting Standards to be Developed and Implemented by a National Bank

- Although the expanded range and scope of CRA-qualified investments and activities was welcomed by national banks, certain concerns were identified
  - Expanded identification requirements for CRA performance, including
    - Assessment areas delineation and monitoring
    - Commercial lending CRA credit
    - Application of the direct or indirect requirement
- Whether these record keeping and reporting concerns remain under the Proposal will be discussed by Walt Mix in a few moments

The Joint Agency Proposal
Joe Lynyak

The Joint Agency Proposed CRA Amendments

- **The OCC tried but failed**
  - [Community Reinvestment Act: Final Rule to Rescind and Replace Community Reinvestment Act Rule Issued in 2020 | OCC]
  - **The OCC's rescinded Rule would have adopted**
    - **New requirements for delineating a national bank's CRA assessment area(s)**
    - **Expanded and identified specific qualifying CRA activities and investments**
    - **Clarified instructions to OCC examiners for evaluating a national bank's CRA performance, and**
    - **Reporting standards to be developed and implemented by a national bank**

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The Joint Agency Proposed CRA Amendments

- **On June 3, the prudential bank regulators issued a proposal to amend the CRA (the "Proposal")**
  - [Federal Register :: Community Reinvestment Act]
  - **Perhaps an "OCC-Lite" rewrite**
    - **Is the Proposal the "Revenge of the FRB"?**
  - **Creates new size categories for banks**
    - **Allows smaller banks to continue to comply with the current CRA structure**
  - **Expands for "larger banks" the categories of CRA tests**
    - **The Retail Lending Test**
    - **The Retail Services and Products Test**
    - **The Community Development Financing Test**
    - **The Community Development Services Test**
  - **Importantly, creates "benchmarks" and weights for assigning CRA ratings**

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The Proposal

- Definitions
- Assessment area delineation
- Qualifying CRA activities
- Community development definitions
- Standards for accessing CRA performance
- Record keeping, reporting and disclosure requirements

The Proposal—Definitions

- The Proposal would create new definitions for covered banks that significantly affects compliance requirements
- Large bank—A large bank means a bank that had average assets of at least $2 billion in both of the prior two calendar years
  - For some purposes a large bank means a bank with assets at or exceeding $10 billion
- Intermediate bank—means a bank that had average assets of at least $600 million in both of the prior two calendar years and less than $2 billion in either of the prior two calendar years
- Small bank—means a bank that had average assets of less than $600 million in either of the prior two calendar years

The Proposal—Definitions

- **Community Development Activities—A bank may receive community development consideration for a loan, investment, or service that has a primary purpose of community development—generally meaning that the majority of dollars are identifiable to community development activities**
  - **Certain liberalizing percentage tests apply for activities such as affordable housing**
  - **However, deductions from CRA credit required for percentage amounts not meeting community development activities**
- ***Community development purposes*—Loans, investments, or services have a community development purpose if they promote designated LMI individuals or are directed at designated census tracts and similar geographic areas of concern**

The Proposal—Definitions

- **A community development purpose includes—**
  - **Affordable housing that benefits LMI individuals**
  - **Economic development that supports small businesses or small farms**
  - **Community supportive services that serve or assist LMI individuals**
  - **Revitalization activities undertaken in conjunction with a federal, state, local, or tribal government plan, program**
    - **The activity must include an explicit focus on revitalizing or stabilizing targeted census tracts**
  - **Essential community facilities that benefit or serve residents of targeted census tracts**
  - **Essential community infrastructure that benefits or serves residents of targeted census tracts**
  - **Recovery activities that support the revitalization of a designated disaster area**
  - **Disaster preparedness and climate resiliency activities that benefit or serve residents of targeted census tracts**
  - **Activities undertaken with MDIs, WDIs, LICUs, or CDFIs**
  - **Financial literacy programs or initiatives, including housing counseling**
  - **Activities undertaken in Native Land Areas**

Community Development Purpose List

- The Proposal states that the Agencies will maintain one list of qualified community development activities
- A bank may also request pre-approval for a proposed CRA investment or activity
- In both cases the determination appears to require consent by all the prudential bank regulators
  - Veto power by a bank agency in these instances much more powerful than consent
  - Unlike the OCC Rule the Proposal
    - Abandons the "direct or indirect" analysis
    - Appears to deny banks CRA credit for commercial and business lending in underserved areas (*i.e.,* shopping areas, grocery stores, manufacturing, etc.)

The Proposal—Assessment Area Delineation

- For all banks the Proposal requires that a "facility assessment area" be delineated, which must include, "each county in which a bank has a main office, a branch, any other staffed bank facility that accept deposits, or a deposit-taking remote service facility, as well as the surrounding geographies in which the bank has originated or purchased a substantial portion of its loans (including home mortgage loans, small business loans, small farm loans, and automobile loans)."
- An intermediate bank may adjust its assessment area to include only those portions of a county in which it operates
- A small bank would continue to delineate its assessment area in accordance with the current CRA regulations
- Military banks may define their assessment area not by geographic area but by the customer base

The Proposal—Assessment Area Delineation

- **Large banks must also delineate a "retail lending assessment area", which is**
  - Outside of a bank's facility assessment area
  - Must consist of a single MSA or all of the counties in a single state that are outside of an MSA
  - In the case of either an MSA or nonmetropolitan area of a state, a geographic area where:
    - The bank originated at least 100 home mortgage loans or
    - At least 250 small business loans

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The Proposal—Performance Tests for Accessing CRA Performance

- **Depending upon the category size for a bank, the Proposal creates several new categories of performance tests and standards to assess a bank's CRA performance:**
- **For larger banks—**
  - The Lending Test
  - The Retail Services and Products Test
  - The Community Development Financing Test
  - The Community Development Services Test
- **For intermediate banks—**
  - The intermediate bank community development performance standards

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The Proposal—Performance Tests for Accessing CRA Performance

- For small banks—
  - The status quo under the current CRA regulations
- For wholesale or limited purpose banks
  - The community development financing test
- For all banks if requested
  - A strategic plan
- Except for large banks, a degree of mixing and matching in categories is permitted
  - A Bank may received CRA credit outside of required parameters

The Retail Lending Test

- The Retail Lending Test evaluates a bank's record of helping to meet the credit needs of its facility-based assessment areas through a bank's origination and purchase of retail loans in each facility-based assessment area.
- Major product lines are evaluated in a bank's assessment areas and outside of those areas, including
  - Closed-end home mortgage loans
  - Open-end home mortgage loans
  - Multifamily loans
  - Small business loans
  - Small farm loans, and
  - Automobile loans

The Retail Lending Test

- A bank is evaluated based upon the following metrics as described in several appendices of the Proposal—
  - The Retail Volume Threshold
  - The Bank Volume Benchmark, and
  - The Market Volume Benchmark
  - The Geographic Bank Metric
  - The Geographic Market Benchmark
  - The Geographic Community Benchmark
  - A Borrower Bank Metric
  - A Borrower Market Metric
  - A Borrower Community Benchmark

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The Retail Services and Products Test

- The Retail Services and Products Test evaluates the availability and responsiveness of a bank's retail banking services and products targeted to LMI and in LMI census tracts in a bank's facility-based assessment areas and at the state, multistate MSA, and institution levels
  - A bank's delivery systems are analyzed in regard to branch locations and services provided, including
    - Branch distribution and LMI locations
    - Census tracts
    - Branch openings and closings, including hours of operation
    - Range of services benefiting LMI populations, including
      - Bilingual and translation services;
      - government and payroll check cashing services;
      - international remittance services; and E
      - Electronic benefit transfer accounts.
  - For bank's with assets over $10 billion in assets, digital delivery systems will also be evaluated
  - Metrics are provided

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The Community Development Financing Test

- The Community Development Financing Test will evaluate a bank's record of helping to meet the community development financing needs of the bank's facility-based assessment areas, states, multistate MSAs, and nationwide area, through its provision of community development loans and community development investments
  - The definition relates back to the definitions of community development and community development purpose
  - Metrics are provided

The Community Development Services Test

- The Community Development Services Test evaluates a bank's record of helping to meet the community development services needs of the bank's facility-based assessment areas, states, multistate MSAs, and nationwide area.
- Community development services means activities that:
  - Have the primary purpose of community development
  - Are volunteer activities performed by bank board members or employees of the bank, and
  - Are related to financial services, including
    - Serving on the board of directors of an organization that has a primary purpose of community development
    - Providing technical assistance on financial matters to non-profit, government, or tribal organizations or similar entities,
    - Providing support for fundraising,
    - Providing financial literacy, and
    - Providing services reflecting other areas of expertise at the bank
  - Metrics are provided

Ultimately—the CRA Ratings

- Except for small banks, the Proposal will assign ratings in each assessment test category using assigned benchmark values, resulting in ratings of
  - Outstanding
  - High Satisfactory
  - Low Satisfactory
  - Needs to Improve, or
  - Substantial Noncompliance
- The "High Satisfactory" rating will not apply to small banks

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Ultimately—the CRA Ratings

- After assigning ratings on individual performance categories, the Proposal assigns weights to each performance category:
  - The Retail Lending Test—45 percent
  - The Retail Services and Products Test—15 percent
  - The Community Development Financing Test—30 percent, and The and
  - The Community Development Services Test—10 percent
- The complexity of the record keeping requirements is daunting, as well as the calculations required under the Proposal

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Reporting and Compliance Issues
Walt Mix

Record Keeping and Reporting

- **The Proposal envisions a potentially complex implementation task requiring wholesale revamping of a bank's CRA record keeping and monitoring for large banks (really not that large)**
- **Above the line compliance record keeping requirements for each bank facility assessment area and retail lending assessment area**
  - **Small business and farm loans**
  - **Consumer loans**
  - **Home mortgage loans**
  - **Retail services and products data**
  - **Community development loans**
  - **Community development investments**
  - **Deposits**

Exemplars of Required Data Required

- Business loans—as to each loan—
  - A unique number or alpha-numeric symbol that can be used to identify the relevant loan file
  - An indicator for the loan type
  - The date of the loan origination or purchase
  - The loan amount at origination or purchase
  - The loan location, including state, county, and census tract
  - Whether the loan was originated or purchased by the bank, and
  - Whether the loan was to a business with gross annual revenues of $1 million or less

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Exemplars of Required Data Required

- Census tract disclosure for a county with a population over 500,000—
  - Small business loans originated in a covered county and each census tract
    - With median income relative to the area median income of less than 10 percent
    - 10 percent or more but less than 20 percent
    - 20 percent or more but less than 30 percent
    - 30 percent or more but less than 40 percent
    - 40 percent or more but less than 50 percent
    - 50 percent or more but less than 60 percent
    - 60 percent or more but less than 70 percent
    - 70 percent or more but less than 80 percent
    - 80 percent or more but less than 90 percent
    - 90 percent or more but less than 100 percent
    - 100 percent or more but less than 110 percent
    - 110 percent or more but less than 120 percent, and
    - 120 percent or more

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Exemplars of Required Data Required

- **Community development loans and investments—**
  - Investment activity information
    - Name of organization or entity
    - Activity type
      - a loan or investment
    - Community development purpose
  - Activity description
  - Analysis whether the impact of the activity
    - Serves persistent poverty counties;
    - Serves geographic areas with low levels of community development financing
    - Supports an MDI, WDI, LICU, or Treasury Department-certified CDFI
    - Serves low-income individuals and families
    - Supports small businesses or small farms with gross annual revenues of $250,000 or less

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Exemplars of Required Data Required

- **Community development loans and investments**
  - Analysis whether the activity
    - Directly facilitates affordable housing in "High Opportunity Areas"
    - Benefits Native communities
    - Activity is a qualifying grant or donation
    - Reflects bank leadership, and
    - Results in a new community development financing product or service
  - Location information

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A Few Closing Thoughts

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Erin is a Co-Chair of the Firm's Consumer Financial Services Group. She is also a member of the Firm's Innovation Committee, Technology Industry Group, and Finance & Restructuring Practice Group. Erin is passionate about identifying innovative legal solutions for her clients. She draws on her prior in-house experience as a Senior Corporate Counsel for one of the largest banks in the United States in order to anticipate her clients' evolving business needs and tailor her legal services to their specific goals.

Erin's regulatory and compliance practice includes advising clients on anti-money laundering laws, the Bank Secrecy Act, cannabis regulations, collections, consumer lending, consumer loan servicing, credit reporting, default servicing, the Dodd-Frank Act, electronic banking, financial technology, government examination/supervision, licensure, mortgage (origination, servicing, and warehouse lending), and privacy. Her default and bankruptcy practice includes bankruptcy litigation, consumer bankruptcy compliance, lien enforcement, receiverships, and out-of-court commercial workouts.

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Speakers

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Mr. Mix, who heads the Financial Services practice at BRG, advises domestic banks, international banks, and financial services companies on corporate governance, enterprise risk management, strategic planning, financial advisory, fintech, digital currency, payments, and credit risk management. He has significant experience with the Bank Secrecy Act/anti-money laundering, sanctions, cybersecurity, the Consumer Financial Protection Bureau, regulatory compliance, mergers and acquisitions, and capital planning. He has extensive experience serving as a monitor based on the approval of regulatory agencies and law enforcement. He also advises clients on reengineering and implementing technology to improve profitability, including artificial intelligence. In addition, he performs litigation and expert services based on his extensive expertise in financial services. He speaks frequently before bankers' groups and regulatory seminars.

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