



October 29, 2021

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street, SW
Suite 3E-218
Washington, DC 20219

Re: Docket ID OCC-2021-0014 (Community Reinvestment Act Regulations)

To Whom It May Concern:

On behalf of the members of the Opportunity Zones (OZ) Working Group, we appreciate the opportunity to comment on the Office of the Comptroller of the Currency's (OCC) Notice of Proposed Rulemaking (NPR) regarding the Community Reinvestment Act (CRA). Our group includes nearly 500 professionals that are primarily investors, syndicators, lenders, community development entities (CDEs), community development financial institutions (CDFIs), for-profit and nonprofit developers, consultants, law firms, and other community development professionals who work together to suggest consensus solutions to technical OZ incentive issues and provide recommendations to make the OZ incentive more efficient in delivering benefits to low-income communities (LICs). In particular, our group contains banks and representatives of banks that have made OZ investments that were eligible for CRA consideration. In fact, we have submitted several comment letters regarding CRA rules, of note, an Oct. 2019 letter to OCC urging the bank regulators to clarify how OZ investments could qualify for CRA consideration.

Although a relatively new incentive, OZs have already attracted private capital into areas in need of investment, which have also been targets of CRA activity. Among the needy areas nominated by governors, 294 contain Native American lands (which are [historically underfunded](#)) and 23.3 percent of the zones are in rural areas. The poverty rate of OZs nationwide (27.7 percent) is much higher than the U.S. rate (14.1 percent). The median family income in the United States is \$73,965 per year, whereas OZs nationwide have a median family income of \$47,316 per year. The share of minorities in OZs are much higher than the U.S. share (56.5 percent to 38.9percent). Though efforts continue around data collection since the final OZ regulations were released, so



far, Novogradac has documented [more than \\$20 billion has been raised to serve these low-income communities.](#)

The CRA shares many of the same purposes as OZs, such as bringing private capital to LICs for community and economic development. In an Apr. 2020 comment letter in regards to the OCC final CRA rules, we applauded the inclusion of OZ investments as a qualifying activity for purposes of the CRA. We believed then, as we do now, that the combination of the CRA and OZ incentives would be optimized by ensuring that the CRA regulations support bank involvement in OZs. The CRA and OZs have a large overlap in their targeted geographies and populations. The CRA provides an incentive to banks to provide community development (CD) lending and investment to low- and moderate-income (LMI) individuals and areas. The OZ definition of LICs is similar to, and in most cases overlaps with, the LMI definition.

With the current proposal to effectively rescind the OCC final CRA rules published by OCC on June 5, 2020, and replace that rule with rules based on the 1995 CRA rules, as revised, issued by OCC, Board of Governors of the Federal Reserve System (Board), and Federal Deposit Insurance Corporation (FDIC), we understand the need to reexamine how the rules can be improved to better serve the needs of LMI communities. We had been pleased to see the OCC final rule included provisions favorable to OZs. One such provision was that an activity that would qualify for CRA credit is a CD activity that provides financing for or supports qualified opportunity funds (QOFs) that benefit LMI OZs. Furthermore, under the proposal, the expansion of qualifying CD activities would include adding a criterion for QOFs, as defined in 26 U.S.C. 1400Z2(d)(1), that benefit qualified OZs in LMI tracts, as defined in 26 U.S.C. 1400Z-1(a). We agree that adding this criterion would help to incentivize banks to meet the needs of LMI individuals and tracts located in OZs. While these provisions would help to incentivize investment in LMI communities through the OZ incentive, numerous comments were submitted to OCC detailing how other provisions of the final CRA rule could actually inhibit affordable housing and community development investment, and we echo those sentiments.

We are encouraged by the desire of OCC to work together with the Board and FDIC on a joint proposal to modernize the CRA rules, as recommended in our 2019 comment letter to OCC. This joint effort will provide the consistency and clarity member banks will need moving forward, and reduce any burdens faced by those banks who are examined by more than one agency.

As the banking agencies work together, we believe the OCC, Board and FDIC should ensure that the CRA serves as a robust incentive to investment in OZs. While not all banks regularly have

capital gains to invest, some banks on occasion do realize capital gains under current authority. Furthermore, even if banks do not have capital gains to invest in qualified opportunity funds (QOFs), they are often integral partners in financing opportunity zone loans and investments. In order to incentivize the most impactful OZ investments, we believe OCC should ensure that the CRA serves as a robust incentive to investment in OZs.

As the agencies work to modernize the CRA rules, we ask that they consider our comments below of how to facilitate more bank investment in OZs, provide an incentive to banks for the OZ investments with the greatest community development impact, and allow for greater flexibility of the OZ incentive to qualify for CRA.

Activities Qualifying for CRA Credit

When considering changes to the list of activities that qualify for CRA credit, OZs represent an example of areas with the greatest need for economic development, investment, and financing needs that may be underserved by the current regulations. The inclusion of OZs is warranted considering OZs are either (1) a qualified LIC, using the same criteria as eligibility under the New Markets Tax Credit (NMTC – census tracts that have an individual poverty rate of at least 20% and median family income up to 80% of the area median) or (2) a census tract that was contiguous with a LIC if the median family income of the tract does not exceed 125% of that contiguous LIC.

As noted above, we recommend that those provisions that made CD activity in OZs eligible for CRA credit be considered in future CRA rules. Further, adding specific examples in CRA regulations of OZ activities that banks would receive positive CRA consideration is also very helpful considering OZs are a relatively new tax incentive created by the Tax Cuts and Jobs Act signed into law on Dec. 22, 2017. One activity is an investment in a QOF, established to finance construction of a new manufacturing facility in an OZ that is also an LMI census tract. Additional activities include: an investment in a QOF, established to finance renovation of a vacant building into a cultural arts facility, including loft space for artists and a community theater, in an OZ that is also an LMI census tract; and, an investment in a QOF, established to finance the rehabilitation of an acute care hospital facility, including the purchase of new medical equipment, in an OZ that is also an LMI census tract. While these examples are by no means exhaustive of the types of OZ-qualifying activities that should be considered under proposed §§ 25.04 and 345.04, they do provide tacit recognition of the importance of OZs in any discussion of modernizing the CRA regulations.

In an effort to provide even more clarity around when OZ investments might qualify, we recommend the agencies establish a safe harbor set of criteria that would provide banks with the presumption that if an OZ investment meets one or more of the safe harbor criteria, such investment would be a qualified CD investment under CRA. Such a policy is important so that banks would know prior to making an OZ investment not explicitly described in the illustrative list that it would qualify. Having to wait for an updated list, or any other process that would render a judgment on whether an OZ investment qualifies after it was made would seriously undermine the value of the CRA incentive. We recommend the safe harbor criteria establish positive CRA consideration and should be given to the extent the OZ investment:

1. Is combined with low-income housing tax credit (LIHTC) or NMTC investments. These investment vehicles have a proven track record of being highly responsive to LMI needs, are difficult to obtain from other sources, and require banks to allocate higher levels of capital to support them;
2. Is combined with the historic tax credit (HTC) for properties located in LMI census tracts or in areas of economic distress as defined by the NMTC statute (section 45D(e) of the Internal Revenue Code), which have historically been areas targeted for positive CRA consideration. Similar to LIHTC and NMTC as noted above, the HTC has a proven track record of positive community development, especially in LMI census tracts or areas of economic distress;
3. Finances housing that is subject to a land use restriction agreement or similar deed restriction that includes at least 20% of its units affordable to LMI households;
4. Finances rental housing in LMI census tracts or areas of economic distress targeted to LMI households, as well as middle-income households in markets where there exists a demonstrated lack of supply;
5. Finances single family housing (one to four units) intended for homeownership affordable to LMI households, as well as middle-income households in markets where there exists a demonstrated lack of supply;
6. Revitalizes or stabilizes a community including federally or state declared disaster areas;
7. Is in an LMI census tract or area of economic distress that is currently the focus of mutually reinforcing state, local or private development initiatives to attract private investment and foster startup activity;

8. Is in an area that has recently experienced significant layoffs due to business closures or relocations;
9. Revitalizes a blighted property in an LMI census tract or area of economic distress;
10. Finances essential infrastructure, community facilities or services primarily benefitting LMI households; and,
11. Provides significant investment in a new business located in LMI census tract, areas of economic distress or employing LMI individuals.

We believe investments that support permanent job creation, retention, and/or improvement through workforce development and/or job or career training programs that target unemployed or low- or moderate-income persons is important, promotes economic development and are measurable. For example, an investment in a OZ to fund a full-service hotel that will create a significant number of jobs, the majority of which are accessible to LMIs can be obtained through projected outcome data from the project sponsor or using economic impact modeling software to estimate the number of construction jobs.

Community Development Test

The OZ incentive was designed by Congress to foster long-term patient equity investments in low-income communities, and as mentioned previously, banks should be able to play an important role in helping to finance the most impactful OZ investments in LMI areas.

We believe an equitable method to measuring CRA performance should be grounded in the “large bank” three-test evaluation regime, where the relative merits of lending, investing and services are judged on their own and not pitted against each other. Retaining an Investment Test or establishing a Community Development Financing Investment Subtest in the CRA regulations would ensure that banks continue to have a focused incentive to meet the needs of LMI communities from all three critically important perspectives. Evaluation of all of a bank’s CRA community development investments and loans in one test would enable banks to shift towards an increased (and potentially exclusive) reliance on debt products, reducing and perhaps eliminating equity investments such as those in OZs. Such equity investments must be committed for an extended period of time (7 years in the case of OZs), and such long-term commitments were designed to be, and surely are, more transformative for the communities that CRA is intended to support than traditional debt products, with far-ranging impacts for LMI residents as well as the surrounding neighborhoods.

We encourage OCC to continue to support the CRA's current role in incentivizing these types of investments, thereby avoiding the potentially unintended consequence of incentivizing banks to limit (or eliminate) their OZ investments that otherwise may best meet the needs of their LMI communities.

Assessment Area Reform

In addressing assessment area reform, if an institution with a traditional facility based bank branch network has demonstrated that it has been responsive to needs in its assessment area in its prior CRA examination (e.g., a "satisfactory" or greater CRA rating), we suggest such institution could receive additional credit for a proportional amount of CRA-eligible activity that's undertaken outside the bank's assessment area, but located in the same or neighboring state, and that targets particularly highly distressed areas or targeted populations (see further discussion of this below). This approach would better incentivize banks to address local needs in traditionally underserved areas. Essentially, focusing on the demographic, economic, and financial condition of an area would be a better measure of local needs than basing the analysis merely on where a bank accepts deposits outside its facilities-based assessment areas. See below for a list of areas identified by Congress and the Administration as in need of greater investment:

1. **ECONOMICALLY DISTRESSED COMMUNITIES** - Census tracts with poverty rates greater than 30 percent; OR Census tracts with, if located within a non-Metropolitan Area, have a median family income that does not exceed 60 percent of statewide median family income, or, if located within a Metropolitan Area, have a median family income that does not exceed 60 percent of the greater of the statewide median family income or the Metropolitan Area median family income; OR Census tracts with unemployment rates at least 1.5 times the national average.
2. **NON-METROPOLITAN COUNTIES** - Qualifying census tracts that are located in counties not contained within a Metropolitan Statistical Area (MSA), as defined in OMB Bulletin No. 15-01 (Update of Statistical Area Definitions and Guidance on Their Uses) and applied to the 2010 census tracts.
3. **HOPE VI/CHOICE NEIGHBORHOODS INITIATIVE REDEVELOPMENT** - Areas encompassed by a HOPE VI or Choice Neighborhoods Initiative redevelopment plan.
4. **FEDERAL NATIVE AREAS** - Federally Designated Indian Reservations, Off Reservation Trust Lands or Alaskan Native Village Statistical Areas, or Hawaiian Home Lands.

5. ARC/DRA AREAS - Areas designated as distressed by the Appalachian Regional Commission or Delta Regional Authority.
6. COLONIAS AREAS – low-income communities on the U.S.-Mexico border as designated by the U.S. Department of Housing and Urban Development.
7. FEDERAL/STATE/LOCAL ZONES - Federally designated Opportunity Zones, Enterprise Zones, Promise Zones, Base Realignment and Closure areas, State Enterprise zone programs, or other similar state/local programs targeted towards particularly economically distressed communities.
8. FEMA DISASTER AREAS - Counties for which the Federal Emergency Management Agency (FEMA) has: issued a “major disaster declaration” and made a determination that such County is eligible for both “individual and public assistance”; provided that the initial investment will be made within 36 months of the disaster declaration.

To further any efforts to tailor the CRA rules for banks with nontraditional business models, such as wholesale and limited purpose banks and digital banks that primarily serve customers outside a traditional bank network, we also recommend an assessment area framework that reflects these banks’ distinct business models and nationwide reach. With respect to wholesale and limited purpose banks, we urge the Board to retain the existing policy that allows banks with these designations to get CRA credit for any community development activities nationwide after they have adequately addressed the needs of their facilities-based assessment areas. We recommend a similar policy for digital banks, which also have a nationwide reach and operate without a network of traditional brick-and-mortar branches.

In conclusion, meaningful CRA reform could boost lending, investments, and access to banking for traditionally underserved communities and populations. The CRA has been a crucial incentive for banks to invest in community development investment, and with an appropriate revised regulatory framework, will continue to be an essential incentive to help address the nation’s disparity in private investment between low-income communities and the rest of the nation. That disparity pre-dated the pandemic and has been exacerbated by it. We urge OCC, and the other two banking agencies, to carefully consider the impact of any CRA regulatory reform that may limit or harm the incentive to invest in OZ and community development investment.

We hope that you find these comments, considerations and recommendations helpful as you

update the CRA regulations. Thank you in advance for your time and consideration. Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance.

Yours very truly,

Novogradac and Company LLP

A handwritten signature in blue ink, appearing to read "JS", with a horizontal line extending to the right.

By

John Sciarretti, Partner