

# The Federal Reserve’s Proposal on the Community Reinvestment Act (CRA)

## *Opportunities to consider race more explicitly in the framework*

*“(a) **In general** In connection with its examination of a financial institution, the **appropriate Federal financial supervisory agency** shall—*

- (1) assess the institution’s record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution;”

- 12 U.S.C. 2903

Despite the statutory purpose and history of the Community Reinvestment Act (CRA) to address “persistent systemic inequity in the financial system for [low- and moderate-income] LMI and minority individuals and communities,”<sup>1</sup> regulators have to-date resisted an affirmative consideration of race in CRA. Regulators and supporters of CRA have also questioned whether racial distinctions in the law might draw an equal protection legal claim that would be subject to [strict scrutiny review](#) by the federal courts. Constitutional scholars widely consider strict scrutiny review to be “strict in name, but fatal in practice.” However, the [Federal Reserve’s Advance Notice of Proposed Rulemaking \(ANPR\)](#) invites an open discussion about race in question two, asking: “*what modifications and approaches would strengthen CRA regulatory implementation in addressing ongoing systemic inequity in credit access for minority individuals and communities?*”

The board’s question invites a dialogue about whether and where the Federal Reserve’s framework might affirmatively consider race more explicitly. While we are not yet committing to support various aspects of the Federal Reserve’s proposed framework for CRA examinations, this paper is designed to explore where and whether regulators could insert race in a framework like this from a statutory and constitutional perspective.

**1. Include racial demographics in performance context.** CRA examiners consider a broad range of economic, demographic, institution- and community-specific data to calibrate the bank’s CRA evaluation.<sup>2</sup> Performance context continues to be relevant for all categories of banks regardless of asset-size under existing CRA standards and is also key to both the quantitative metrics and qualitative considerations outlined in the Federal Reserve’s proposed framework.

<sup>1</sup> Federal Reserve’s Advance Notice of Proposed Rulemaking (ANPR), p. 66412.

<sup>2</sup> ANPR, p. 66414.

- *Legal question:* Examiners could consider racial demographic data, which is applicable to performance context and could inform an examiner’s analysis and conclusions when conducting CRA examinations.

**2. Affirmatively consider race in the delineation of assessment areas.** Banks delineate geographic areas around their bank branches where their performance is assessed consistent with their local communities. The Federal Reserve proposes additional assessment areas based on where bank’s make loans or collect deposits. Today, bank assessment areas cannot reflect illegal discrimination and not arbitrarily exclude LMI geographies consistent with the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA).<sup>3</sup>

- *Legal question:* Given that CRA is a “continuing and affirmative obligation,” should assessment areas be examined for the extent to which banks affirmatively include majority-minority tracts? In a similar and somewhat more affirmative analysis, the board is considering whether banks should receive additional consideration for operating branches in banking deserts.<sup>4</sup>

**3. Consider racial demographics in the retail lending distribution benchmark metrics**

**(quantitative).** The Federal Reserve proposes to provide a bank with a presumption of a “satisfactory” CRA rating on its retail lending subtest if it meets or exceeds a threshold level of lending based on a list of “community” and “market” retail lending distribution benchmarks.<sup>5</sup> A bank’s percentage of mortgage, small business, small farm and consumer loans to LMI census tracts and LMI borrowers would be measured against a set of population/demographic data points in the local community and aggregate lending by all the lender’s peers in that market. A retail lending dashboard would allow banks to track their performance in meeting the various quantitative lending thresholds set by regulators based on the community and market benchmarks.<sup>6</sup>

- *Legal questions:* Currently, banks can be downgraded for violating fair lending laws, including illegal discrimination and illegal credit practices. Some LMI census tracts and LMI borrowers also overlap with communities and borrowers of color. Could racial demographics be more affirmatively included and considered as part of the proposed community and market benchmark metrics without running afoul of equal protection concerns and/or survive a strict scrutiny court review?
  1. *Benchmarks/Dashboard:* In addition to the percentage of LMI census tracts and LMI families, regulators could include a “community” benchmark for the percentage of majority-minority census tracts and African American and Latino families, as well as the percentage of minority-owned business enterprises (MBEs) and minority-owned farms. Regulators could include a “market” benchmark for aggregate retail lending by banks to borrowers and communities of color.

<sup>3</sup> ANPR III.A, p. 66415

<sup>4</sup> ANPR, V.B.3.a, p. 66430

<sup>5</sup> ANPR V.A, p. 66422, Table 1

<sup>6</sup> ANPR, p. 66425, Figure 1.

2. *Quantitative Thresholds/Goals:* Regulators could set a quantitative threshold for retail lending to racial subgroups based on the benchmarks in communities with high minority concentration, or alternatively, track a goal on the retail lending dashboard.
3. *CRA Rating Presumption Test:* In the penultimate circumstance, failing to meet a quantitative threshold for retail lending to borrowers or communities of color in the proposed retail lending screen could defeat a presumption of a “satisfactory” CRA rating on the retail lending subtest.<sup>7</sup>

#### **4. Consider lending to minority borrowers and communities as part of CRA rating ranges (qualitative).**

On the retail subtests, the Federal Reserve proposes to use the community and market benchmarks to also develop CRA “performance ranges” to guide an examiner’s final decision in assigning a bank one of four CRA rating categories – outstanding, satisfactory, needs to improve and substantial noncompliance.<sup>8</sup> The board proposes, for example, to assess performance separately for low-income and for moderate-income borrowers, and it would compute a weighted average to determine how well the bank performed on different components of the retail lending distribution metrics relative to the performance ranges in recommending a final assessment area rating. The board also proposes to consider a number of qualitative factors specific to the particular banks being examined, such as the extent to which a bank exceeded a quantitative benchmark lending threshold, and bank’s responsiveness, flexible or innovative lending products offered, activities undertaken with Minority Depository Institutions (MDIs) and others.

- *Legal question:* A performance ranges approach provides a number of ways to give *more* qualitative consideration to how banks lend to borrowers and communities of color. CRA examiners could assess performance separately for minority borrowers as a component of the retail lending distributions metrics and provide CRA credit for excellent distribution. In the penultimate circumstance, examiners could compute performance for minority borrowers as part of the weighted average used to determine how well the bank performed and the final assessment area rating.

**5. Consider racial demographics in the benchmarks for bank branch distribution:** In addition to examiner judgment and performance context, the board is proposing to examine bank branch distribution based on three “community” benchmarks and one “market” benchmark<sup>9</sup> related to census tract income. The board is also exploring whether banks should receive additional consideration for operating branches in banking deserts.

- *Legal question.* Examiners could also consider geographic branch distribution across majority-minority census tracts, and provide additional consideration for operating branches in those communities.

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<sup>7</sup> See ANPR IV.A.3, 66423 and 66224.

<sup>8</sup> ANPR V.A.6.a, p. 66428

<sup>9</sup> ANPR V.B.3.a.i., Table 3 and 4, p. 66430

**6. Consider racial demographics in establishing community development financing benchmark metrics (quantitative).** The board is proposing to provide a bank with either a presumption or guidelines for a “satisfactory” CRA rating on its CD financing subtest if it meets or exceeds a threshold level of community development (CD) financing based on a “local” benchmark, and perhaps a “national” benchmark.<sup>10</sup> The local benchmark will be based on the dollar amount of all large bank qualifying community development (CD) financing activities historically in a local assessment area. The national benchmark would be based on the dollar amount of all large bank qualifying CD financing activities nationwide. A CD financing dashboard would allow banks to track their performance in meeting the various quantitative lending thresholds set by regulators based on local and national benchmarks.

*Legal questions*

- *Benchmarks/Dashboard:* In addition to broader benchmarks totaling all CD financing locally and nationally, the board could also establish local and national benchmarks for the total dollar amount of all large bank qualifying CD financing activities in majority-minority census tracts.
- *Quantitative Thresholds/Goals:* Regulators could set a quantitative threshold for CD financing in majority-minority census tracts, or perhaps track a goal on the CD financing dashboard.
- *CRA Rating Presumption/Guideline:* In the penultimate circumstance, failing to meet a quantitative threshold for CD financing in communities of color could in some instances defeat a presumption of or inform a guideline about a “satisfactory” CRA rating for a bank on the CD financing subtest.

**7. Consider majority-minority individuals and census tracts in CD qualifying activities and geographies.** The board is proposing to clarify where banks can receive CRA credit for CD financing activities outside of the bank’s assessment areas. It also proposes to publish an illustrative list of example activities that qualify.<sup>11</sup> The board is considering ways to standardize how a bank can determine whether a community service meets the “targeted to LMI” standard, for example by the use of a geographic or other proxy.<sup>12</sup> The board is also considering ways to revise the economic development definitions around size and purpose to better encourage bank activities that are most supportive of minority-owned small businesses and farms.<sup>13</sup> The agency is also considering how to update and clarify the revitalization and stabilization subcomponent of the CD definition, which currently encompasses activities in three targeted geographies: LMI census tracts, designated disaster areas and distressed or underserved nonmetropolitan middle-income census tracts.<sup>14</sup>

*Legal questions:*

- *Community Services:* The board could add majority-minority census tracts to the list of geographic proxies where community services meet the “targeted to LMI” standard.

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<sup>10</sup> ANPR VII.A.5, p. 66439-41

<sup>11</sup> ANPR, VIII, p. 66444

<sup>12</sup> ANPR VIII.A.2, p. 66445

<sup>13</sup> ANPR, VIII.A.3, p. 66446

<sup>14</sup> ANPR, VIII.A.4, p. 66447

- *Economic Development (ED)*: The board could add majority-minority census tracts to those areas that demonstrate the ED purpose when supporting job creation, retention and improvement.
- *Revitalization and stabilization*: Majority-minority tracts could be added to the targeted geographies for revitalization and stabilization activities.<sup>15</sup>
- *Existing standards*: Questions could also be raised around the extent to which existing standards and restrictions on which types of activities qualify should apply in majority-minority census tracts, considering the goal of addressing the ongoing systemic inequity in credit access.
  1. *ED definitions*: Currently, the exam qualifies economic development using definitions such as the Small Business Administration’s Development Company (SBDC) or Small Business Investment Company (SBIC). The board could clarify that bank activities with MBEs designated under federal, state [and maybe association] certifications, as well as minority farms designated under federal, state [and maybe associations], like the Farm Service Agency’s “socially disadvantaged applicants”, promote economic development.
  2. *Outside Assessment Areas*: The board could add majority-minority census tracts in eligible states, territories and regions to those designated areas of need for CD activities outside of a bank’s local assessment areas. The agency is exploring designating other areas of need that may overlap with some high minority census tracts: certain economically distressed rural or metropolitan areas with high unemployment or poverty; areas with low levels of CD financing; areas with low levels of mortgage or small business lending; areas with limited bank branches; other federally-designated geographies.<sup>16</sup>

**7. Consider majority-minority community feedback in strategic plan review.** The board is considering how to update public input in the strategic plan process.

- *Legal question*: Where the bank would be serving a significant number of majority-minority census tracts, the board could require that the bank has included public input from organizations representing communities of color to demonstrate that the bank has had “meaningful engagement” with their community in developing their strategic plan and once the plan is completed.<sup>17</sup>

**8. Consider activities in Black communities as an enhancement to state, multistate MSA and institution ratings.** The board is proposing to evaluate activities in Indian country outside of a bank’s assessment area(s) qualitatively, and consider them as a possible enhancement to a bank’s retail test state or institution rating.<sup>18</sup> Bank activities outside of a bank’s assessment areas, but within the respective

15 ANPR, p. 66448 includes some of the qualifying activities, existing guidance and standards. Questions could be raised around whether those standards should or should not apply in majority-minority census tracts.

16 ANPR VIII.C.2.b, p. 66451.

17 ANPR, p. 66454, Question 74.

18 ANPR X.D.1.b, p. 66456

state or multistate MSA, may also merit an increase in the bank's CD test state or multistate MSA score, as well as an adjusted institution CD test score.<sup>19</sup>

- *Legal question:* The board should enhance a bank's CRA ratings for retail lending and CD financing activities in Indian country. It could also provide similar enhancement for majority-Black census tracts given the history and purpose of CRA and the ongoing systemic inequity in credit access that the law is designed to address.

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<sup>19</sup> ANPR X.D.2, p. 66457