

V.

REGULATORY CONTEXT AND BANK/CDFI PARTNERSHIPS

The Community Reinvestment Act (CRA) encourages commercial banks and savings associations to help meet the credit needs of their communities, including low- and moderate-income neighborhoods, in a manner consistent with safe and sound banking practices. Three federal regulatory agencies—the FDIC, the OCC, and the Federal Reserve Board—conduct regular CRA examinations and develop performance evaluations based on performance tests that vary by institution size and type. However, regardless of the size or type of covered depository institution, loans to and investments in qualifying CDFIs may be useful in helping community banks meet their CRA obligations.

CRA regulations for all insured depository institutions encourage lending activities that benefit a bank’s CRA assessment area, including low- and moderate-income census tracts, low- and moderate-income borrowers, and small businesses. The regulations also encourage community development lending, investment, or services activities that benefit the bank’s assessment area or the statewide or regional area that includes the assessment area.

Community development is defined in the CRA regulations to include (1) affordable housing (including multi-family rental housing) for low- or moderate-income individuals; (2) community services targeted to low- or moderate-income individuals; (3) promotion of economic development by financing or investing in small businesses or farms; (4) revitalization and stabilization of low- or moderate-income geographies or underserved and distressed middle-income geographies; (5) community development activities that revitalize or stabilize federally designated major disaster areas; and (6) eligible activities that support areas designated under the federal Neighborhood Stabilization Program, which targets communities with high foreclosure levels.

Because CDFIs certified by the CDFI Fund are required primarily to serve a community development purpose, the Interagency Questions and Answers Regarding Community Reinvestment (Q&As, the guidance on CRA issued by federal regulators) explicitly recognize loans to and investments in CDFIs as examples of community development loans and qualified investments.⁴⁵

A. Public Welfare Investments

Banks making investments, as opposed to loans consistent with their regular lending authority, to CDFIs should be aware of the laws, regulations and guidance applicable to public welfare investments: for national banks, 12 USC §24(Eleventh) and 12 CFR 24; for state member banks, 12 USC § 338a and 12 CFR 208; for state nonmember banks, 12 USC 1831a and 12 CFR Part 362. All state banks—state member and state nonmember banks—also are subject to Section 24 of the Federal Deposit Insurance Act. Section 24 of the Federal Deposit Insurance Act generally permits state banks to make the same types of investments or engage in the same type of activities as national banks. Because public welfare investments are permissible for national banks, a state bank would be permitted to make public welfare investments if permitted by its governing state law.

⁴⁵ Office of the Comptroller of the Currency, Treasury; Federal Reserve System; Federal Deposit Insurance Corporation; and Office of Thrift Supervision. “Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment,” 75 Federal Register 11648, 11652. (March 11, 2010). Available at <http://www.ffiec.gov/cra/pdf/2010-4903.pdf>.

According to the OCC's regulation found at 12 CFR 24, a permissible public welfare investment for a national bank would be one that primarily benefits the public welfare by providing or promoting housing, services, or jobs. Specifically, under 12 CFR 24.3, a national bank or national bank subsidiary may invest directly or indirectly if the investment primarily benefits low- and moderate-income individuals, low- and moderate-income areas, or other areas targeted by a governmental entity for redevelopment, or else the investment would receive consideration as a "qualified investment" under 12 CFR 25.23 of the CRA.

Under their public welfare investment authority, national banks may invest in community and economic development entities (CEDEs) and projects that are designed primarily to promote the public welfare, as specified in 12 USC 24 (Eleventh) and in the OCC's regulations found at 12 CFR 24. 12 CFR 24.2 defines CEDEs, in part, to include CDFIs that are certified by the CDFI Fund, CDEs that are eligible to receive New Markets Tax Credits, and minority- and women-owned depository institutions that help meet the credit needs of the communities in which they are chartered.

Proposed investments outside of the scope of the National Bank Act, the OCC's implementing regulations, official bulletins and circulars, and other written interpretations would require application to and the approval of the FDIC before a state nonmember bank could engage in the activity. Therefore, while an equity or debt investment in CDFI Fund-certified CDFIs would normally qualify as a public welfare investment and likely be viewed as a permissible investment for a state nonmember bank, investments in other CDFIs would require review and approval by the FDIC if the activity has not been approved previously by the OCC. For state chartered institutions regulated by the Federal Reserve, public welfare investments are governed by their Regulation H (12 CFR Part 208). For bank holding companies and financial holding companies regulated by the Federal Reserve, public welfare investments are governed by Regulation Y (12 CFR 225) and the Bank Holding Company Act (12 USC 1843).

Under 12 CFR 24.4, a national bank's aggregate public welfare investments and outstanding commitments cannot exceed 15 percent of its capital and surplus. The OCC must approve a national bank's aggregate public welfare investment of over 5 percent of capital and surplus. Furthermore, a national bank's public welfare investments may not expose the bank to unlimited liability. Each subordinate entity's specific organizational documents are reviewed to make sure that adequate limitations of liability are in place and that the entity is permitted to engage only in permissible activities.⁴⁶ Permissible investments by state nonmember banks are not subject to these investment limits. The FDIC would establish investment limits for each applicant state nonmember bank according to the FDIC's safety and soundness standards.

In considering the permissibility of public welfare investments, a state bank must also comply with state law governing investment limits and the organizational structure of the investing entity. In addition, banks must be mindful of safety and soundness concerns based on factors such as undue concentrations in investments or loan exposures to a single entity or a group of single-purpose entities. Banks should have systems and controls in place to monitor and control their loan participations with and investments in CDFIs.⁴⁷

46 12 C.F.R. Part 24. Community Development Corporations, Community Development Projects, and Other Public Welfare Investments. Office of the Comptroller of the Currency. 61 Federal Register 49660, (September 23, 1996).

47 Section 24 of the Federal Deposit Act, 12 USC 1831a. FDIC Law, Regulations, Related Acts. 1000-Federal Deposit Insurance Act. (July 31, 1997).

B. CRA Consideration of Bank/CDFI Partnerships

Under the CRA, community development activities can be delivered directly through, or in cooperation with, a CDFI partner that serves an area which includes the bank's assessment area. Banks of all sizes that invest in and collaborate with CDFIs may receive CRA consideration in the lending, investment, and service components of their performance evaluation.

Large Banks

The CRA evaluation of large banks is composed of three tests: lending, investment, and service. The lending test considers a bank's record of helping to meet the credit needs of its assessment area(s) through its lending activities by considering its home mortgage, small business, small farm, and other lending activities requested by the institution.⁴⁸ Community development loans, such as those with a primary purpose of community development and that do not qualify as mortgage, small business, small farm, or consumer loans, are also considered. Community development loans include, but are not limited to, loans to financial intermediaries, such as CDFIs, that lend to promote community development.

The investment test evaluates a bank's record of helping to meet the credit needs of its assessment area(s) through qualified investments that benefit its assessment area(s) or a broader statewide or regional area that includes the bank's assessment area(s).⁴⁹ The investment test considers "qualified investments," which are lawful investments, deposits, membership shares, or grants with a primary purpose of community development. CRA-qualified investments include equity investments, deposits, membership shares, grants, and in-kind contributions in or to financial intermediaries such as CDFIs. CDFIs are among a number of organizations in which banks may invest and for which they may receive CRA consideration.

The service test evaluates a bank's record of helping to meet the credit needs of its assessment area(s) by analyzing both the availability and effectiveness of a bank's systems for delivering retail banking services, and the extent and innovativeness of its community development services.⁵⁰ Community development services include the provision of technical assistance to CDFIs engaged in community development and lending bank executives as volunteers for a specified time to these organizations. Community development services should be related to the provision of financial services.⁵¹

Intermediate-Small Banks

The CRA performance evaluation of intermediate-small banks is composed of a lending test and a community development test. The community development test evaluates the amount and responsiveness of an intermediate-small bank's community development lending, investments, and services.

Small Banks

Small banks are evaluated primarily on their lending activity and must achieve a satisfactory rating on this activity to receive an overall CRA evaluation of satisfactory.⁵² Any community

48 Federal Deposit Insurance Corporation, FDIC Law, Regulations, Related Acts, Part 345 – Community Reinvestment. (Washington DC: Federal Deposit Insurance Corporation). Available at <http://www.fdic.gov/regulations/laws/rules/2000-6500.html>.

49 Ibid.

50 Ibid.

51 2010 Interagency Questions and Answers Regarding Community Reinvestment at 11650

52 Ibid.

development loans and lending-related qualified investments may be considered under the lending-related criteria of the small bank CRA performance test. In addition, the bank may opt to have their other qualified community development investments and services reviewed for consideration for an outstanding CRA rating.

Wholesale and Limited Purpose Banks

Banks with limited purpose and wholesale designations are evaluated under the community development test, which assesses the bank's community development lending, qualified investments, and community development services.

The CRA regulations offer a different evaluation for wholesale and limited purpose banks, a designation that must be requested from and approved by their supervisory agency. These banks are not in the business of extending home mortgage, small business, small farm, or consumer loans to retail customers. Instead, they offer only a narrow product line (such as consumer credit cards or automobile loans) to a regional or broader market. Lending tests are not applicable to these institutions because many of them do not accept consumer deposits or make home loans.⁵³ The CRA regulations for wholesale and limited purpose banks focus on community development lending, investments, and services.

Wholesale and limited purpose banks may receive consideration on their CRA evaluation for community development loans, investments, and services made across the country. However, these banks must adequately address the community development needs within their assessment areas and the statewide and regional areas that include the assessment area before examiners will consider other community development activities.

Strategic Plan Option

Any bank can choose to have their CRA performance evaluated under the strategic plan option, which allows banks to tailor their CRA goals to address market needs consistent with their business strategy and operational focus. The strategic plan option allows community banks to collaborate with CDFIs, local government, and other community partners to develop a comprehensive reinvestment plan for the area and to incorporate community development activities into their performance goals. An institution's plan must be approved in advance by its regulatory agency.

According to CRA rules, lending-related activities should generally be emphasized. However, the strategic plan option allows for flexible emphasis on plan elements. A higher level of community development lending compared to retail lending activities may be appropriate for an institution that does not make a significant number of mortgage or small business loans. For example, wholesale or limited purpose banks can focus on other activities since these banks do not offer direct lending services. The bank's lending, investment, and service goals must have annual targets during the years the plan covers. After the plan is reviewed and approved by the bank's federal regulator, the agency evaluates the extent to which the bank has met its goals.⁵⁴

53 2010 Interagency Questions and Answers Regarding Community Reinvestment at 11652.

54 Federal Deposit Insurance Corporation, *Community Reinvestment Act: Guide to Developing the Strategic Plan*. (Washington DC: Federal Deposit Insurance Corporation, 1998). Available at <http://www.fdic.gov/news/news/financial/1998/fil9826b.pdf>.

C. CRA Consideration of CDFI Investments and Lending Activities

Bank loans to and investments in effective CDFIs provide an opportunity to leverage public and other private resources to meet community development needs. Community banks may receive CRA consideration for qualifying loans and/or equity investments as permitted by law and regulation.

Loans made directly to a CDFI to carry out its community development mission may receive consideration as a community development loan. These loans may be considered favorably under the lending test for a large institution, the community development test for an intermediate-small institution, and as lending-related activities under the performance factors for a small institution.

Bank equity investments and grants to a CDFI may be considered under the investment test for large institutions and the community development test for intermediate-small institutions. For small institutions not routinely evaluated for community development performance, such investments would support a satisfactory lending test rating when the investment supports lending-related activities and an outstanding CRA performance rating once the lending test factors are considered satisfactory.

If a CDFI's primary purpose is community development in one or more of the categories described above, the entire investment or loan that supports its programs qualifies for CRA consideration. In addition, regulators will consider the qualitative aspects of the program including, for all institutions, responsiveness to community credit needs and, for large institutions, the innovation and complexity of the program.

Moreover, when investments support a CDFI intermediary and that intermediary in turn makes loans to small businesses or low- and moderate-income individuals or in low- and moderate-income areas, the institution may choose to have its investment considered in three ways:

1. The total amount of the bank's community development investment in the CDFI may be considered under the investment or community development test as a community development investment.
2. A pro rata share (based on the bank's share of CDFI equity) of loans made by the CDFI to the ultimate small business or low- and moderate-income borrowers or areas can be considered under the bank's lending performance test.
3. An institution may choose to allocate a share of its investment amount for consideration under the investment or community development test and allocate the remainder for consideration under the lending test.

Any amount considered under the lending test would equal the bank's pro rata share, based on its equity investment of community development loans made by the CDFI during the period under review, provided these loans benefit the bank's assessment area or a broader statewide or regional area that includes the assessment area. (See the Interagency Q&A at Section 12_.23(b) for the complete agency interpretation of dividing the funding consideration between tests.)

The investor bank may receive credit each year for its share of the CDFI's new lending while the equity investment is in effect.⁵⁵ Also, a qualified investment will be favorably considered throughout the period of continued investment. Institutions should keep in mind that the qualitative and quantitative factors for any one investment or lending activity will not guarantee a particular rating. The entire record of an institution's performance and the performance context must be evaluated by the regulatory agency responsible for a CRA evaluation.

Any investment in or loan to a CDFI should be predicated on appropriate due diligence and in accordance with prudent banking principles. Favorable CRA credit is considered only when investments or loans are consistent with safety and soundness standards.

D. CRA Consideration of CDFI Partnerships and Community Development Services

Providing technical assistance to a community development organization, such as a CDFI, may be considered a community development service. Examples of qualifying technical assistance include serving on a board of directors; serving on a loan review committee; developing loan application and underwriting standards; developing loan-processing systems; assisting in marketing financial services; providing financial services training to staff; helping with fundraising; providing bookkeeping services; and providing services reflecting financial institution employees' areas of expertise at the institution, such as information technology and legal services.⁵⁶

Also, at an institution's option, the agencies will consider services performed by a third-party CDFI partner on the institution's behalf, if the services enable the institution to help meet community development services and lending needs. However, if grant funding is available for these activities, that funding can be considered a community development investment or the services provided can be considered community development services, but not both.

E. CRA Consideration for Investments in CDFIs that Serve Areas Broader than a Bank's Assessment Areas

A financial institution may receive CRA consideration for investments in CDFIs that serve a statewide or regional area that includes the bank's assessment area. A regional area is generally an intrastate area or multi-state area that includes the bank's assessment area(s).

For example: a bank's activity may receive consideration as a community development loan or service or a qualified investment if it supports a CDFI that covers a state or regional area that is larger than, but includes, the bank's assessment area(s). The institution's assessment areas need not receive an immediate or direct benefit from the institution's participation in the CDFI if the purpose, mandate, or function of the organization includes serving geographies or individuals located in the institution's assessment areas. The institution will receive CRA consideration for these activities even if they do not benefit the institution's assessment area, as long as the

55 2010 Interagency Questions and Answers Regarding Community Reinvestment at 11659.

56 Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; and the Federal Deposit Insurance Corporation. "Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment," 78 Federal Register 69678, 69679 (November 20, 2013), (§ 12(i)-3) . Available at <http://www.federalregister.gov/articles/2013/11/20/2013-27738/community-reinvestment-act-interagency-questions-and-answers-regarding-community-reinvestment-notice>.

institution has been responsive to community development needs and opportunities in its assessment area.⁵⁷

The regulatory agencies recognize that CDFIs are efficient and effective ways for banks to meet local credit needs. In many instances, the best way for a bank to meet the market needs of low-income borrowers and communities may be through a CDFI. Most CDFIs are structured to serve geographical areas that may be wider than a community bank's assessment area. In many cases, the best way for CDFIs to make credit available to low-income borrowers and communities is through a statewide or regional organization that can generate a sustainable amount of business by serving a wide territory.⁵⁸

In addition, a financial institution that has been responsive to the community development needs and opportunities in its assessment area(s) will receive CRA consideration for other community development activities in collaboration with a statewide or regional CDFI. These activities only need to benefit geographies or individuals located in the broader statewide or regional area that includes the institution's assessment areas; they do not have to benefit the institution's assessment areas. Consideration for the community development activities under any relevant performance test may be enhanced when they are particularly responsive to a bank's assessment area needs.

Wholesale and limited purpose organizations (as designated by their regulatory agency) will receive CRA consideration for investments, loans, or services conducted with CDFIs nationwide once they adequately address the community development needs of their assessment areas.

Other institutions may receive CRA consideration for activities conducted with CDFIs nationwide provided that the community development activities benefit individuals and geographies located in the institution's assessment area. Financial institutions may also receive CRA consideration for these investments that benefits the broader statewide or regional area that includes the institution's assessment area(s), as long as the institution has been responsive to the community development needs and opportunities in its assessment area(s).⁵⁹

F. CRA Consideration for Investments in Minority- and Women-Owned Financial Institutions and Low-Income Credit Unions

The CRA generally provides that a financial institution's CRA lending, investment, and service activities must benefit an institution's assessment area or, for community development activities, a broader statewide or regional area that includes the assessment area. However, under the regulations, banks may receive CRA consideration for capital investments, loan participations, and other ventures undertaken by minority- or women-owned financial institutions and low-income credit unions, as long as these activities help to meet the credit needs of local communities in which the minority- or women-owned institutions or low-income credit unions are located or chartered.

A financial institution's investments in a minority- or women-owned financial institution or low-income credit union, including one designated as a CDFI, will receive favorable CRA

57 Ibid at 69678, (§ __.12(h)-6).

58 2013 Interagency Questions and Answers Regarding Community Reinvestment at 69679, 69680, __.23(a)-2.).

59 Ibid.

consideration even if the CDFI is not serving the assessment area of the investing institution or the broader statewide or regional areas that include the investing institution's assessment area. The CRA does not restrict consideration of these activities to those that benefit the investing bank's assessment area.⁶⁰ CRA ratings are determined based on the bank's overall performance in its assessment area(s) together with the bank's activities in partnership with minority- and women-owned financial institutions and low-income credit unions.⁶¹

Of the 84 CDFI banks, approximately 50 percent are Minority Depository Institutions (MDIs). The FDIC publishes on a quarterly basis a list of MDI banks at www.fdic.gov/mdi. The list includes FDIC-supervised banks that meet either of the following two definitions: federally insured depository institutions in which (1) 51 percent or more of the voting stock is owned by minority individuals, or (2) the majority of the board of directors is minority and the community that the institution serves is predominantly minority.⁶² The FDIC's list of MDI banks also includes FDIC-insured minority depository institutions that are supervised by the OCC and the Federal Reserve. Each of those agencies has its own definition of MDIs. FDIC publishes the names of MDIs supervised by the OCC and Federal Reserve that are consistent with the MDI categories defined by Section 308 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.⁶³ Participating in the MDI program is voluntary and some institutions meeting the above definitions choose not to be included on the list.

Most CDFI credit unions have sought and received designation as low-income credit unions by the National Credit Union Administration.

60 Stephanie Caputo, "Encouraging National Bank Investments in Minority-Owned Financial Institutions," *Community Developments* (Winter 2007). Available at <http://www.occ.gov/static/community-affairs/community-developments-newsletter/Winter06/cd/encouragingnational.html>.

61 2013 Interagency Questions and Answers Regarding Community Reinvestment at 69679 (§__.21(f)-1).

62 Federal Deposit Insurance Corporation, Policy Statement Regarding Minority Depository Institutions, April 9, 2002.

63 Federal Deposit Insurance Corporation, Policy Statement Regarding Minority Depository Institutions. *Federal Register* Vol. 67, no. 73 (April 16, 2002), 18618.