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THE COMMUNITY REINVESTMENT ACT—ASSET OR LIABILITY?

I. INTRODUCTION—NATURE OF THE PROBLEM

One of the banking industry’s primary functions is to provide loans for residential and commercial development. This role places enormous power in the hands of lenders who decide, through the allocation of credit, which areas of a community will receive funds for development. Clearly, developers and investors of all types will want to pursue attractive investment opportunities, but, ultimately, it is the banker’s discretion which becomes determinative of whether or not a loan will be made. The Community Reinvestment Act (CRA) provides that “regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business.”

Introduced by Senator William Proxmire (D-Wis.), this Act was premised on the assumption that “a public charter conveys numerous economic benefits and in return it is legitimate for public policy and regulatory practice to require some public purpose . . . .”

The CRA is brief and provides that regulators of publicly chartered financial institutions: (1) use their authority to encourage institutions to meet the credit needs of their local communities in a manner consistent with safe and sound operation of such institutions; (2) assess the institution’s record of meeting the credit needs of its entire community; and (3) take the institution’s record into account when evaluating applications for a deposit facility by such institution. Despite vehement objection to the CRA by lenders who viewed it as a step towards credit allocation, the CRA was passed in 1977.

The CRA took a novel approach towards government regulation. There were no strict detailed requirements. Rather, the CRA “established
a direction and goal, and then allowed private industry latitude and discretion in choosing methods to attain the goal.\textsuperscript{98} The CRA also rejected the extreme positions of credit allocation on the one hand and complete lack of social responsibility on the other, while attempting to improve lending practices.\textsuperscript{9} "[T]he bill is described almost as a sensitizing tool intended to 'raise the consciousness' of lenders and regulators, and gently lead them toward a greater awareness of urban lending needs."\textsuperscript{10}

From its inception in 1977, the CRA was not vigorously enforced nor did it receive much attention.\textsuperscript{11} However, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)\textsuperscript{12} amended the CRA and mandated public disclosure of CRA ratings with respect to examinations conducted after July 1, 1990.\textsuperscript{13} Traditionally, bankers have not been concerned about their CRA records, but the prospect of increased public scrutiny is capturing their attention because penalties for noncompliance now include public criticism and negative publicity.\textsuperscript{14}

This Comment will evaluate the boundaries of the CRA itself, evaluate the impact of the CRA on the banking industry, identify the role community groups play in ensuring compliance, illustrate how the CRA can be an asset to financial institutions, and suggest how lawmakers can improve the CRA.


\textsuperscript{9} See id.

\textsuperscript{10} \textsc{Warren L. Dennis} \& \textsc{J. Stanley Pottinger}, \textit{Federal Regulation of Banking: Redlining and Community Reinvestment} 9-22 (1980).

\textsuperscript{11} Ken Martin, \textit{Putting Teeth in the CRA}, \textsc{Austin Bus. J.}, July 30, 1990, at 1.


\textsuperscript{13} Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 526, 528 (codified at 12 U.S.C.A. §§ 2902(2), 2906 (West 1989)). This amendment affected the CRA in three ways. First, it required that regulators use a four-tier descriptive rating system in place of the five-tier numerical system that was previously in use. Second, it required that the regulatory agencies provide the institutions with a written evaluation of their CRA performance. The written evaluation contains a confidential section and a public section that must reveal the regulatory agency's findings and conclusions pertaining to each assessment factor of their examination and an overall CRA rating. Third, it mandated public disclosure of the ratings for examinations conducted after July 1, 1990. See id.

\textsuperscript{14} Jo Ann S. Barefoot, \textit{July 1 Nears. Is Your CRA Program Ready?; Public Disclosure of Ratings is Only the Beginning}, \textsc{Am. Banking Ass'n Banking J.}, June 1990, at 43.
II. THE COMMUNITY REINVESTMENT ACT

A. Purpose

The CRA was enacted as an attempt to discourage redlining. Redlining, or geographic disinvestment, is the removal of financial resources from a community that is perceived to be high risk. Anti-redlining advocates claim that savings deposited by a neighborhood should remain in that neighborhood. Outrage over institutions receiving millions of dollars in deposits from residents of a community while making virtually no loans into that community undoubtedly encouraged the passage of the CRA. Redlining in this context refers to:

[A]ny institutional conduct that has a negative impact on an identifiable neighborhood or neighborhoods. This can include the failure to take some affirmative step, (such as failing to seek out potential loan demand) as well as the commission of some negative act (e.g., refusing to lend on a particular street because of perceived risk).

Redlining is suspect when the perceived risk is unrealistic or arbitrary. Civil rights activists regard the refusal to make loans in a particular area (redlining) solely because of deteriorating conditions as symptomatic of racism. Anti-redlining activists contend that locational factors penalize potential customers for associational factors or characteristics of others that are beyond their control. Geographic discrimination is problematic when lenders generalize that all properties in a given area are unlikely to retain their value and thus are poor collateral. When this occurs, lenders are unlikely to regard the individual characteristics of a credit applicant as pertinent to their decision-making. Therefore, in areas subject to geographic discrimination, loans are typically refused or offered on less favorable terms than those offered in other parts of the community. Admittedly, location is an important factor, but geographic discrimination surfaces when there is

15. The concept of redlining exists in two different contexts. First, in the political arena, the term is used to inflame and provoke a discriminatory reaction. Second, in the legal arena, the term is used to describe prohibited kinds of commercial conduct. DENNIS & POTTINGER, supra note 10, at 1-1.

16. Art, supra note 8, at 1082.

17. Id.

18. Id.

19. DENNIS & POTTINGER, supra note 10, at 1-3.

20. Id. at 1-7.


22. DENNIS & POTTINGER, supra note 10, at 1-3.
an unrestrained use of location as the primary credit criteria. The result of such a policy may be irrational, or more seriously, socially unacceptable.23

Consequently, the CRA was enacted with its stated purpose being to:

[R]equire each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operations of such institutions.24

The CRA is neither a traditional civil rights law nor a traditional banking regulation. It does not strictly prohibit any acts nor does it establish civil penalties, damages, or injunctions. The Act is not enforced directly; it is superimposed on the existing banking and savings and loan structures and integrated into the existing system of regulation.25

While the CRA was generally aimed at the twin evils of geographic discrimination and the exportation of funds from the local community, the authors of the act had more specific goals in mind. The CRA’s regulations indicate that Congress’s priorities were aimed at revitalizing inner cities through residential mortgage loans, housing rehabilitation loans, home improvement loans, and small business or farm loans within the community.26

Although the CRA is often criticized for being so vague as to be meaningless, critics overlook the significant impact the CRA has had on financial institutions. In the words of one commentator:

The Act settled the core philosophical dispute over whether depository institutions enjoying the benefits of federal charters and federal deposit insurance owe any duty to consider the impact on neighborhoods when determining [their] lending policies. The C.R.A. was a legislative mandate for a change in policy and an unmistakable rebuke to financial institutions and the federal supervisory agencies that had previously sanctioned and even encouraged redlining.27

23. Art, supra note 8, at 1080.
24. 12 U.S.C.A. § 2901(b) (West 1989). The four federal financing supervisory agencies are: (1) the Comptroller of the Currency, which regulates national banks; (2) the Board of Governors of the Federal Reserve, which regulates state-chartered banks and bank holding companies; (3) the Federal Deposit Insurance Corporation, which regulates the state chartered commercial and savings banks it insures but does not regulate Federal Reserve System members; and (4) the Office of Thrift Supervision, which regulates savings associations whose deposits are insured by the Federal Deposit Insurance Corporation and savings and loan holding companies. See 12 U.S.C.A. § 2902(1)(A)-(D) (West 1989).
26. Id. at 9-17.
27. Art, supra note 8, at 1086.
B. Delineation of Community

A financial institution's first step in complying with the CRA is to delineate the community it serves. The regulations mandate that a map be used and that the delineated area may not exclude low or moderate income neighborhoods.28 The local community consists of the contiguous areas surrounding each of the institution's offices.29 An unusually shaped community will generally create a suspicion among regulators that the institution is "gerrymandering."30 Furthermore, regulatory agencies are given broad discretion in determining the reasonableness of delineated communities.31

The regulations provide specific methods for delineating a CRA community. First, an institution may use any existing political or governmental boundaries, such as a Standard Metropolitan Statistical Area (SMSA), to identify the community it serves.32 A second method utilizes an institution's effective lending territory.33 The effective lending territory is defined as the local area around each office in which the institution makes a substantial portion of its loans and all areas equally distant from each of its offices.34 The third approach is to use any other reasonably delineated area that meets the CRA's purpose and does not exclude low and moderate income areas.35 Regardless of what method is used, the key to establishing a reasonably delineated community is to not exclude low and moderate income areas.36 Low and moderate income areas are defined as those census tracts where the median family income is less than eighty percent of the median family income for the SMSA.37

28. 12 C.F.R. § 563e.3(a) (1992). Each federal supervisory agency has its own set of regulations. See 12 C.F.R. § 25.3-7 (1992) (Comptroller of the Currency); 12 C.F.R. § 228.3-7 (1992) (Federal Reserve System); 12 C.F.R. § 345.3-7 (1992) (Federal Deposit Insurance Corporation); 12 C.F.R. § 563e.7 (1992) (Office of Thrift Supervision). All of these regulations are virtually identical. For convenience, subsequent footnotes will refer to the Office of Thrift Supervision's regulations.
29. 12 C.F.R. § 563e.3(b) (1992).
31. Id.
32. See 12 C.F.R. § 563e.3(b)(1) (1992). If the size of the institution dictates a smaller delineated area, it may adopt a fraction of the SMSA. Id. In fact, smaller institutions should carefully delineate their communities because examiners will review their lending patterns throughout their designated area. See LAPINE, supra note 30, at § 158.04[1].
33. 12 C.F.R. § 563e.3(b)(2) (1992).
34. Id.
35. 12 C.F.R. § 563e.3(b)(3) (1992).
36. See id.
C. CRA Statement, Public File, and Public Notice

1. CRA Statement

Each regulated financial institution’s board of directors is required to adopt a CRA statement.\textsuperscript{38} The statement is similar to a general prospectus regarding community lending commitments.\textsuperscript{39} The CRA statements must contain: (1) the delineation of the local community; (2) a list of specific types of credit available to the local community; and (3) a copy of the CRA notice.\textsuperscript{40} The local community delineation must be determined according to one of the permissible methods specified in the regulations. The CRA statement must also contain a map of the local community to which the CRA statement pertains.\textsuperscript{41}

In addition, the specific types of credit that the financial institution offers within the community must be described in the CRA statement.\textsuperscript{42} For example, the regulations suggest the following types of credit descriptions: residential loans on one to four family dwellings, residential loans for five-or-more unit dwellings, housing rehabilitation loans, home improvement loans, commercial loans, and consumer loans.\textsuperscript{43} The type of credit available will vary depending on the nature of the financial institution.\textsuperscript{44} For instance, wholesale banks that do not offer consumer loans will not be required to offer such loans.\textsuperscript{45} Also, the amount of credit available for a specific loan-type does not have to be disclosed.\textsuperscript{46}

Regulators must determine whether the types of loans specified in the institution’s CRA statement are actually being offered—loans available only under onerous terms may be viewed as the equivalent of not offering credit.\textsuperscript{47} Within an institution’s delineated area of service, the type of credit should not vary.\textsuperscript{48} For example, real estate loans should not be readily available in only one area unless the circumstances are particularly compelling.\textsuperscript{49} The same underwriting requirements should exist throughout the

\begin{itemize}
\item \textsuperscript{38} 12 C.F.R. § 563e.4(a) (1992).
\item \textsuperscript{39} LAPINE, supra note 30, at § 158.04[2].
\item \textsuperscript{40} 12 C.F.R. § 563e.4(b)(1)-(3) (1992); see supra notes 28-37 and accompanying text for considerations implicit in delineating a local community.
\item \textsuperscript{41} LAPINE, supra note 30, at § 158.04[2].
\item \textsuperscript{42} Id.
\item \textsuperscript{43} See 12 C.F.R. § 563e.4(b)(2) (1992).
\item \textsuperscript{44} LAPINE, supra note 30, at § 158.04[2].
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id.
\end{itemize}
community. The CRA statement is required to include a copy of the CRA notice as well.1

The CRA regulations encourage, but do not require, regulated financial institutions to include the following information in their CRA statement: (1) a description of how the institution’s current programs are helping to meet community credit needs; (2) a current report of the institution’s record of helping to meet community credit needs; and (3) a description of the institution’s efforts to determine the credit needs of the community, including communications with members of the community with respect to credit services.

Although this information is optional, lenders should include this information because these factors are taken into consideration when regulators assess an institution’s CRA performance. Furthermore, if the institution provides thorough documentation regarding these factors, it will decrease the amount of regulatory probing necessary to reconstruct this information during an examination.

The board of directors of a regulated institution is required to annually review its CRA statement and amend the statement whenever there is a material change in policy. Consideration regarding the CRA statement must be noted in the minutes of the board’s meeting. For example, a change in the availability of real estate financing may require a CRA statement modification. This type of change, as well as any board of director’s discussion, must be included in the minutes.

The regulations also require that the CRA statement be available to the public for inspection at the main office of the financial institution and at each branch office in the delineated community. In addition to the availability of the CRA statement for inspection, regulated financial institutions must provide photocopies of the statement to the public upon request. A fee not exceeding the cost of reproduction may be imposed.
2. Public File

Each regulated financial institution must maintain a CRA file readily available to the public for inspection. The files are required to contain the following: (1) any signed, written comments the institution received from the public within the last two years that specifically relates to the institution’s performance in meeting the credit needs of its community; (2) any institutional response to the comments received; and (3) any CRA statements in effect during the past two years. The CRA files may not include any comments or responses that adversely reflect upon the reputation or good name of any individual other than the institution. Additionally, any information that would violate specific provisions of the law cannot be made public. The CRA files must be available at the institution’s main office and at designated branch offices in each of the local communities served.

3. Public Notice

Each regulated institution is required to post a CRA notice in the public lobby of each of its branches or offices. Institutions serving multiple communities must provide additional information applicable to each specific community. The text of the CRA notice is incorporated in the regulations.

D. Assessment of CRA Performance

The formal requirements of the CRA regulations, such as maintaining the public file, posting the CRA notice, drafting the CRA statement, and delineating of the local community, provide the framework by which financial regulatory agencies will assess a financial institution’s CRA perform-
The Act empowers regulatory agencies to promulgate regulations that will aid them in determining whether financial institutions have: (1) demonstrated that their deposit facilities serve the convenience and needs of their communities and (2) whether they are continuing to help meet the credit needs of the local communities in which they are chartered.

The regulations for assessing a financial institution's CRA performance provide that the requirement of helping to meet community credit needs be consistent with the safe and sound operation of that institution. The CRA does not impose many procedural obligations or strict recordkeeping requirements. However, regulators' enforcement practices indicate that special records should be kept to record an institution's performance. Thus, most lenders engage in additional recordkeeping as a defensive measure. It is important to note that when a financial institution's community includes both low and moderate income areas, the CRA does not mandate that each be served equally with mathematical precision. An area within the community may simply not offer qualified lending opportunities. The CRA does not attempt to fix amounts of lending in particular areas (credit allocation) nor does it mandate that every loan application be approved.

In addition to the CRA statement and any signed, written comments, the regulations provide twelve areas of consideration that regulators are to utilize in assessing an institution's CRA performance. In an attempt to make the assessment factors more workable, the American Bankers Association has classified these twelve assessment factors into five broader categories to help institutions more thoroughly implement the Act's requirements.

The first category assesses an institution's activities regarding efforts to ascertain the credit needs of its community. Regulators will look for contact with individuals, groups, government officials, and community lead-

70. LAPINE, supra note 30, at § 158.04[3].
72. 12 U.S.C.A. § 2901(a)(1), (3) (West 1989) (emphasis added). A community's convenience and needs include the need for credit services as well as deposit services. 12 U.S.C.A. § 2901(a)(2).
73. 12 U.S.C.A. § 2901(b) (West 1989); see also 12 C.F.R. § 563e.7.
74. See generally LAPINE, supra note 30, at § 158.04[4] & n.2.
75. Id. at § 158.04[4].
76. Id.; see also DENNIS & POTTINGER, supra note 10, at 9-24.
77. DENNIS & POTTINGER, supra note 10, at 9-42.
80. 12 C.F.R. § 563e.7(a) (1992).
Further, regulators will search for evidence of participation in public programs, relationships with nonprofit developers, and the collection and analysis of local demographic data reflecting loan activity. In addition, examiners will scrutinize the participation of the institution's board of directors in formulating and reviewing the CRA statement and related policies.

The second category assesses marketing programs and the types of credit extended. In this category, regulators evaluate the extent of marketing of services and the availability of "special credit-related programs" to low and moderate income individuals, the "origination" or "purchase" of community loans, and the level of "participation in government insured, guaranteed, or subsidized loan programs."

The third group of assessment factors is used to analyze the institution's geographic distribution of loans and its record of opening and closing offices. These factors include the extension of credit, the number of credit applications, and the number of denials geographically. Examiners look at the geographic distributions of loans within the delineated community, the procedures used to identify credit distribution, and the supporting documentation of credit extensions used by management to formulate policies and create products, services, and marketing strategies. In addition, action taken to remedy past lending previously judged unreasonable and the impact of the institution's loan policies on the local community are considered.

An institution's record of opening and closing branch offices and the services they provide is also scrutinized. In analyzing this assessment factor, regulators determine the institution's accessibility by considering busi-

81. See generally Lapine, supra note 30, at § 158.04[4].
82. See American Bankers Ass'n, supra note 79, at 27.
83. 12 C.F.R. § 563e.7(c) (1992).
84. Regulators who examine an institution's marketing efforts consider advertisements of available credit services, personnel involvement in marketing and assisting in the application process for loans within the institution's delineated community, the CRA's statement of credit-types available, and the institution's loan volume relative to their resources and community needs. See American Bankers Ass'n, supra note 79, at 27-28.
85. 12 C.F.R. § 563e.7(b) (1992).
86. 12 C.F.R. § 563e.7(i) (1992).
87. 12 C.F.R. § 563e.7(j) (1992).
88. 12 C.F.R. § 563e.7(e) (1992).
89. 12 C.F.R. § 563e.7(g) (1992).
90. 12 C.F.R. § 563e.7(e) (1992).
91. See American Bankers Ass'n, supra note 79, at 27.
92. Id.
93. 12 C.F.R. § 563e.7(g) (1992).
ness hours and services offered.\textsuperscript{94} Finally, regulators examine to what extent the institution has assessed the impact of an office closing and its record of opening and closing branches, particularly in low and moderate income areas.\textsuperscript{95}

Discrimination and illegal credit practices comprise the fourth area regulators investigate during a CRA review.\textsuperscript{96} Any practice intended to discourage applications for the types of credit set out in the CRA statement will not be tolerated.\textsuperscript{97} To determine whether these practices occur, examiners study the manner in which an institution solicits credit applicants throughout the community.\textsuperscript{98} Further, management policies, procedures, and training programs designed to prevent the discouragement and pre-screening of applicants are examined.\textsuperscript{99} Any evidence of noncompliance with antidiscrimination credit laws or of other illegal credit practices will adversely affect an institution's CRA performance.\textsuperscript{100}

Community development is the final category regulators consider.\textsuperscript{101} Participation in local investment and development projects\textsuperscript{102} and the ability of an institution to meet local community credit needs based on its financial condition and size\textsuperscript{103} are taken into consideration. The last factor is a catch-all intended to allow regulators to consider any other activities targeted at helping the institution meet community credit needs.\textsuperscript{104}

\textbf{E. Effect on Applications}

Under the CRA, each regulated institution has an affirmative obligation to help meet the credit needs of its local community.\textsuperscript{105} Under the current structure of the CRA, financial institutions must demonstrate that they are currently serving the “convenience and needs”\textsuperscript{106} of the community when applying to their regulatory agency for permission to change their structure.\textsuperscript{107} The regulatory agency’s enforcement tool under the CRA is the

\begin{itemize}
  \item \textsuperscript{94} See \textit{American Bankers Ass'n}, \textit{supra} note 79, at 29.
  \item \textsuperscript{95} \textit{Id.} at 28-29.
  \item \textsuperscript{96} 12 C.F.R. § 563e.7(f) (1992).
  \item \textsuperscript{97} 12 C.F.R. § 563e.7(d) (1992).
  \item \textsuperscript{98} \textit{American Bankers Ass'n}, \textit{supra} note 79, at 29.
  \item \textsuperscript{99} \textit{Id.}
  \item \textsuperscript{100} 12 C.F.R. § 563e.7(f) (1992).
  \item \textsuperscript{101} \textit{American Bankers Ass'n}, \textit{supra} note 79, at 29.
  \item \textsuperscript{102} 12 C.F.R. § 563e.7(h) (1992).
  \item \textsuperscript{103} 12 C.F.R. § 563e.7(k) (1992).
  \item \textsuperscript{104} 12 C.F.R. § 563e.7(l) (1992).
  \item \textsuperscript{105} 12 U.S.C.A. § 2901(a)(3) (West 1989).
  \item \textsuperscript{106} 12 U.S.C.A. § 2901(a)(1) (West 1989).
  \item \textsuperscript{107} \textit{Dennis & Pottinger}, \textit{supra} note 10, at 9-5. Changes in a financial institution's structure that require regulatory approval include a charter for a national bank or federal savings and
\end{itemize}
power to deny an institution’s application to change its structure or to condition such approval upon development of a plan to ascertain and meet future needs.\textsuperscript{108}

CRA examinations are conducted at regularly scheduled intervals and when an application for structural change is made.\textsuperscript{109} Regular CRA examinations have not been given “teeth” in situations where the examiner determines that an institution has acted in a manner inconsistent with the CRA. The examiner can do little more than include the inconsistency in the “write-up” to be “taken into account” if and when an application is filed.\textsuperscript{110} In the words of one commentator:

After a decade of experience with administration of the Act, it is safe to say that poor C.R.A. performance will not result in denial of an application except in the most extreme, egregious cases, and perhaps not even then. The number of denials on C.R.A. grounds is miniscule . . . . Other factors, however, cumulatively provide substantial incentives to depository institutions. Principal among those factors are delay in processing the application, adverse publicity, and embarrassment.\textsuperscript{111}

III. THE CRA REPRESENTS A FUNDAMENTAL CHANGE IN THE BANKING INDUSTRY

A. Traditional View

Prior to the enactment of the CRA in 1977, it appeared that the banking industry rejected the notion that a financial institution had a responsibility to affirmatively contribute to the economic health of the low and moderate income neighborhoods that they served.\textsuperscript{112} Further, federal regulatory agencies supported and encouraged the bankers’ view that financial safety and profitability were the only acceptable goals, regardless of the adverse effects on surrounding communities.\textsuperscript{113} Today, more than thirteen years

\begin{itemize}
\item loan association, the granting of deposit insurance to a newly chartered bank, the establishment of a branch or other deposit-accepting facility, the relocation of the home or branch office, the merger or acquisition of a commercial bank or savings association that requires regulatory approval, and acquisitions covered by the Bank Holding Company Act or National Housing Act. See 12 U.S.C.A. § 2902(3)(A)-(F) (West 1989).
\item \textsuperscript{108} \textsc{Dennis & Pottage}, \textit{supra} note 10, at 9-4.
\item \textsuperscript{109} \textit{Id.} at 9-5.
\item \textsuperscript{110} \textit{Id.} at 9-7.
\item \textsuperscript{111} \textit{Art, supra} note 8, at 1101. Of 628 banks rated nationwide, only 68 have been given a “needs to improve” rating and only three have failed. Mike Dorning, \textit{Minorities Hope Loan Rules Pack Teeth, Not Paperwork}, CHI. TRIB., Dec. 3, 1990, (Bus.), at Cl.
\item \textsuperscript{112} \textit{Art, supra} note 8, at 1072.
\item \textsuperscript{113} \textit{Id.}
\end{itemize}
after the CRA was passed, bankers still voice complaints that they should not be mandated to lose money through, what they call, social engineering.\textsuperscript{114}

The view that banking was an entrepreneurial business fostered the belief that the only justifiable limitations on banking were those of "safe and sound" practices.\textsuperscript{115} Previously, the purpose of government regulation was to protect the funds of depositors and shareholders.\textsuperscript{116} The public was served through the benefits afforded by the presence of financial intermediaries in the economy.\textsuperscript{117} Nevertheless, banking law, since the Depression, has principally targeted early detection and prevention of unsafe banking practices.\textsuperscript{118}

\textbf{B. Modern View}

Throughout the 1970s, Congress took a broader view of the role of financial institutions in the economy and enacted numerous laws that expanded their obligation beyond mere safe and sound operation.\textsuperscript{119} Consequently, the CRA resulted from Congress's new perspective on the role of financial institutions.\textsuperscript{120} Today, enhanced CRA enforcement has occurred at the same time that there has been a change in American values.\textsuperscript{121} James Valliere explained this change in the following way:

Just as bank deregulation in the early 1980s was coincident with an anti-tax, anti-federal regulation movement, so too we now find that CRA enforcement meshes with a broad trend in which society sees a need to have pressing social issues addressed by banks . . . . Themes such as affordable housing, lending to minority-owned businesses, and simply providing credit to the communities that banks serve, are now viewed as elemental demands on banks.\textsuperscript{122}

Critics of the CRA classify it as a form of credit allocation and, as such, view it as intolerable in our capitalistic society. However, given the vital

\begin{itemize}
\item \textsuperscript{114} Chuck Hawkins et al., \textit{Why More Banks May Start Doing the Right Thing}, BUS. WK., June 18, 1990, at 171.
\item \textsuperscript{116} \textit{Id.} at 694.
\item \textsuperscript{117} \textit{Id.} at 695.
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{120} Dennis, \textit{supra} note 115, at 696.
\item \textsuperscript{121} James T. Valliere, \textit{CRA Marks Basic Change in Nation's Social Values}, AM. BANKER, Aug. 13, 1990, at 4.
\item \textsuperscript{122} \textit{Id.}
\end{itemize}
economic role that financial institutions play in our economy, the federal government's regulatory influence on private credit decisions is supported by precedent. The Federal Home Loan Bank Act\(^{123}\) established the savings and loan system for the purpose of providing residential real estate loans within a restricted geographic radius of the institution's office.\(^{124}\) Further examples of federal government credit allocation include secondary market agencies such as the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Association (Freddie Mac).\(^{125}\) These associations were established to divert dollars to finance real estate mortgages that would otherwise be invested elsewhere.\(^{126}\) The Federal Housing Administration and the Veterans Administration are additional organizations created to channel funds into real estate financing that is considered socially desirable.\(^{127}\) Although there is some debate as to which federal government efforts constitute "credit allocation," governmental influence over private credit decisions as introduced in the CRA was not a novel concept.\(^{128}\) Such "influence" originated many decades earlier.\(^{129}\)

Bankers correctly view themselves as having a bottom-line mentality,\(^{130}\) which they admit sometimes causes them to lose sight of the needs of their communities. However, this view is changing among bankers who now perceive that financial institutions have a responsibility to their communities.\(^{131}\) The relatively new provision mandating public disclosure of CRA ratings\(^{132}\) provides a business incentive for bankers to change both their attitudes and their lending patterns in order to comply with the CRA provisions. A negative CRA evaluation will have costs. With ratings being made public, banks are concerned that big depositors, such as government entities, may pull their funds from institutions receiving poor evaluations.\(^{133}\) Further, applications for expansion can be denied or delayed if the institution has a poor rating.\(^{134}\)
The CRA does not require credit allocation. Rather, it serves to emphasize that regulated financial institutions have an obligation to serve the convenience and needs of their communities including low and moderate income neighborhoods.\textsuperscript{135}

The underlying issue is the balance between a financial institution's responsibility to its communities and its very business of lending money for a return, with the attendant responsibility to shareholders.\textsuperscript{136} The balance is weighted further by congressional demands and the mandates of the regulators.\textsuperscript{137}

\section*{IV. ROLE OF COMMUNITY GROUPS}

The C.R.A. was a compromise between the demands of community groups for rigid credit allocation and the denial by bankers and regulators that any problem meriting legislative attention existed. More importantly, it was an effort to guide private investment decisions in a manner deemed socially responsible, while avoiding the economic inefficiencies and bureaucratic intrusiveness of some federal regulatory schemes. Congress sought to preserve private control over specific private institutional lending decisions, but to influence the attitudes, norms, and behavior of the decision makers.\textsuperscript{138}

The success or failure of the CRA currently rests in the hands of community groups. The energy, activism, and sophistication of these groups can affect the conduct of financial institutions and the amount of attention regulators focus on lenders.\textsuperscript{139} The CRA has enhanced the bargaining position of community groups because concern over CRA lending has brought these groups off the streets and into the conference rooms of regulated institutions and regulatory agencies.\textsuperscript{140} The bargaining position of community groups is greatest when a depository institution's application for expansion is up for review.\textsuperscript{141} Although financial institutions are most vulnerable to a community group's demands for more credit while an application is pending, institutions should always be responsive to community activists to ad-

\begin{thebibliography}{99}
\bibitem{137} Id.
\bibitem{138} Art, \textit{supra} note 8, at 1085.
\bibitem{139} Id. at 1095.
\bibitem{140} Id. at 1097.
\bibitem{141} Id.
\end{thebibliography}
dress credit policy issues. Bankers who fail to establish communication with community groups place their CRA ratings in jeopardy and increase the probability of future challenges to applications. Formal protests to an institution’s application for expansion, as well as the bank’s own failure to communicate with the community, can be extremely costly both in terms of unnecessary delays and negative publicity.

To raise concerns over an institution’s CRA performance and challenge its application to expand, community groups have two formal options. They may file negative comments with the appropriate regulatory agency, adding them to the targeted institution’s public file, or they can file a protest. Negative comments will eventually reach the attention of regulators and may cause some special inquiry, while protests almost always will elicit an agency response.

The effectiveness of a community group’s protest depends on the level of expertise they develop in documenting alleged CRA violations and their persistence in negotiating for loan commitments within their community. Regulatory agencies place little weight on insufficiently documented complaints and encourage community groups to negotiate rather than seek regulatory action for their grievances. Thus, protests have frequently become the driving force of nonregulatory action. Community groups are able to use protests to force financial institutions to the bargaining table. Consequently, lending agreements may be established under the threat of a costly protest.

The purpose of CRA evaluations is to provide a mechanism that encourages dialogue between financial institutions and their communities regarding the best method to meet community credit needs. Federal Reserve Governor John P. LaWare contends that community groups should play an active role in educating the public so it understands that CRA evaluations assess community reinvestment performance and not the

142. Id.
143. See 12 C.F.R. § 563e.7(a) (1992).
144. Art, supra note 8, at 1097-98.
146. Id.
147. Art, supra note 8, at 1098.
148. Id.
149. DENNIS & POTTINGER, supra note 10, at 10-4.
150. Id.
safety and soundness of a financial institution. 152 Because community
groups have the biggest stake in creating CRA support, these groups must
work at illustrating and emphasizing the economic advantages of com-
nunity lending. 153

V. CRA AS AN ASSET

The CRA and proponents for even stricter community lending stan-
dards argue that CRA lending should not be viewed as a losing proposi-
tion. 154 While profits from CRA lending may not be extraordinary, its
return on investment is far more attractive than many Third World
loans. 155 CRA supporters contend that if "Black America" was a Third
World country, lending institutions would pour dollars into impoverished
communities. 156 They argue that the black community has a $200 billion
annual cash flow, millions of well-educated and skilled citizens, and solid
credit-worthy businesses. 157 Inner cities and poor rural and small town
communities are effectively Third World economies that have the same de-
velopment banking needs as any other distressed economy. 158 Unfortu-
nately, the CRA is the only attempt to define such a role for lenders within
the United States. 159

A fundamental flaw of regulated financial institutions is that they have
responded to the CRA with a crisis-management approach to compliance. 160
Apparently, many institutions view CRA activity and corporate
social responsibility as submerging safety and soundness concerns. 161 This
belief is unfounded because the CRA stipulates that financial institutions
"must not violate safety and soundness principles" in order to meet the

152. Id. The above are Federal Reserve Governor John P. LaWare's comments to the Con-
sumer Federation of America. He also stated that the CRA was not a charitable program and it is
not in any group's interest to foster this view. Id.
153. Id.
154. Hawkins et al., supra note 114, at 171. The article cites Wells Fargo Bank, which has
yet to have a default on $137 million in CRA housing loans since 1986, and the profitability of
Cleveland's Ameritrust Development Bank, which is committed exclusively to local development
projects. Id.
155. Daud M. Watts, Unlocking the Potential of the CRA, BLACK ENTERPRISE, July 1989, at
21. In drawing the analogy comparing inner cities to Third World countries, the author quoted
Dr. Charles Bradford, a Hoover Institute Fellow, who testified at Senate hearings in March 1987.
See id.
156. Id.
157. Id.
158. Id.
159. Id.
160. Ruth H. Scott, Making CRA an Asset (Or a Limited Liability), BOTTOMLINE, Mar.
1989, at 95.
161. Id.
credit needs of their communities. Financial institutions fear poor CRA ratings because of their potentially devastating effects.

Whether because of altruism, fear of negative publicity, or the threat of denial of regulatory applications due to poor performance, banks are paying careful attention to CRA compliance. Many institutions are being creative and generous in their quest for positive evaluations. It is in the best interests of financial institutions to make these kind of activities known. Institutions profiting under the CRA have developed, and are continuing to develop creative ways to market their community investment activities, while reducing risk and gaining status within their communities.

For example, financial institutions may provide small business loans and at the same time protect that investment by providing training in bookkeeping, marketing, and inventory control for applicants. Joint ventures with the government and private investors designed to enhance low-income housing markets provide another risk-reducing mechanism that financial institutions can apply to CRA loans. Another possible strategy is to offer a special savings account to customers who wish to make a socially conscious investment. The account would pay a low interest rate enabling the bank to extend credit within the community at lower than market-rate interest. A financial institution's commitment to the economic development of the communities it serves makes good business sense. Deposits are likely to increase if the community has the ability to access credit for economic development. Those banks that take the lead stand to gain the most.

VI. CRITICISMS OF THE CRA

The CRA and the regulatory agencies' corresponding regulations are framed so broadly that they provide little guidance for institutions on how compliance will be measured. The vague and undemanding nature of the regulations may induce a false sense of security that may have serious con-
sequences to a naive lender. 173 "Some question arises as to whether this is truly a system of 'voluntary' gestures, or whether it is a game of regulatory hide and seek, or regulation by telepathy." 174 Nonetheless, there are expectations under the CRA that may not be clearly expressed but which institutions must be aware of and plan for. 175 The vagueness of the CRA and its regulations can work to the advantage of lenders who are forced to defend their lending record. However, regulators are constantly attempting to tighten the regulatory language and direct lending institutions towards a more thorough understanding of the CRA. 176

A potential pitfall for lenders is not recognizing the difference between "process" and "bottom line" in CRA evaluations, the two being inversely related. The better the "bottom line" (the level of low and moderate income lending), the less concern for "process" (the procedural requirements). The less substantial the "bottom line," the more an institution must convince regulators that it has complied with all of the CRA assessment factors. Essentially, the CRA requires a good faith effort that should in turn result in a good "bottom line," but in the event it does not, the CRA contains a safety valve. Lenders are not penalized for a poor "bottom line" if they have complied with the CRA's procedural requirements. 177

An express prohibition of redlining would be an improvement to the CRA. As one commentator noted:

173. DENNIS & POTTINGER, supra note 10, at 9-12.
174. Id. The CRA provides a threefold mandate to regulatory agencies: "(1) to encourage banks to help meet the credit needs of their entire communities, including low-and moderate-income areas, (2) to assess their records during examinations, and (3) to take their records of service under the CRA into account when evaluating proposals for expansion." 75 FED. RES. BULL. 619. Bankers and regulators alike are trying to determine when and to what extent the power of encouragement is appropriately applied.
175. 75 FED. RES. BULL. 619; see also supra notes 28-111 and accompanying text.
176. See Statement of the Federal Financial Supervisory Agencies Regarding the Community Reinvestment Act, 54 Fed. Reg. 13,742 (Apr. 5, 1989). In their 1989 policy statement, the four regulatory agencies indicated that, based on their experience, institutions that are most effective in meeting their CRA responsibilities have taken many of the following measures:
(I) implemented more flexible lending policies consistent with safe and sound operation in order to provide more widespread services to low-and moderate-income individuals;
(2) advertised and marketed availability of services through many mediums (television, radio, and newspapers);
(3) established a process that includes contact by all levels of management with community-related organizations to discuss needed financial services;
(4) extended credit to non-profit developers of low-income housing.
These are just a few of the many steps taken on behalf of institutions that have met their CRA responsibilities. Id. at 13,744.
Although the Community Reinvestment Act is an attempt to restrict redlining practices, it fails to establish a comprehensive legislative scheme for remedying such abuses. While the legislative history clearly indicates that Congress was concerned with redlining, neither the Act nor the regulations specifically address this issue or declare such practice illegal. Rather, the Act and the regulations merely stress the affirmative obligation of lending institutions to service their local areas.\textsuperscript{178}

Under the existing regulatory scheme, the CRA assessment is only one aspect of reviewing an institution's application for expansion. Financial, managerial, and competitive concerns are considered as well.\textsuperscript{179} The importance of the CRA could be enhanced if an adverse CRA rating alone could prevent approval of an application for expansion.

Another problem is exemplified by institutions that have no intent to expand and may never apply to their regulatory agency for such permission. The sanction of noncompliance—the denial of an application to expand—becomes meaningless. These institutions have no incentive to comply with the CRA. Consequently, lenders should be subject to both private and public lawsuits under the CRA.\textsuperscript{180} Private and public actions would help to establish and to refine precedent as a guide to interpreting the CRA.

In an attempt to aid the regulated institutions' understanding of the CRA, the four regulatory agencies issued a new policy statement in 1989 stating that:

A major thrust of the policy statement is to shift the "CRA spotlight" away from the applications process . . . . We think that the expanded CRA statement is an ideal vehicle for doing that by focusing the attention of an institution's management, and of the public at large, on the institution's record on an ongoing basis . . . .\textsuperscript{181}

\begin{footnotesize}
\begin{enumerate}
\itemsep0pt
\item 178. Anne Marie Regan, \textit{The Community Reinvestment Act Regulations: Another Attempt to Control Redlining}, 28 CATH. U. L. REV. 635, 656 (1979). A similar viewpoint was expressed in the following terms:
\begin{quote}
The problem is that the Act fails to specify particular practices that are prohibited or required. Even the most discriminatory policy is not made an automatic ground for rejecting an application; it is simply one factor to be taken into account in the evaluation. Therefore, the first national redlining law to go beyond mere disclosure does not even purport to prohibit redlining.
\end{quote}
\item 179. 75 FED. RES. BULL. 550, 554 (Aug. 1989).
\item 180. "Such remedies are needed because the single existing sanction of denying permits for structural change may be unimpressive to many institutions; for an institution that has already achieved its desired structure it is no deterrent at all." Tolcott, \textit{supra} note 178, at 180.
\item 181. 75 FED. RES. BULL. 550, 554.
\end{enumerate}
\end{footnotesize}
The policy statement also urges institutions that plan on expanding to have appropriate CRA policies in place, and working well, before filing an application.\textsuperscript{182} This suggestion is in response to the highly publicized and rare CRA-based denial of Continental Illinois Bancorp Inc.’s application to acquire an Arizona bank.\textsuperscript{183} In the past, the probability of a denial has been remote,\textsuperscript{184} but now the Continental decision may be viewed as a precursor to regulators’ increased expectations of compliance. However, two of the Federal Reserve’s Board of Governors dissented in the decision to deny the application to expand in spite of Continental’s total disregard for all of the CRA’s procedural requirements.\textsuperscript{185} The Continental application suggests that there was blatant disregard for the CRA, yet two Governors still thought that the bank’s application merited approval.\textsuperscript{186} This outcome raises serious doubts about the impact of this case and, consequently, the prescribed sanctions under the CRA do not appear to be a sufficient threat to an institution’s plans for expansion.

\section*{VII. CRA AT WORK}

\subsection*{A. Alarming Statistics}

Nationally, African-American loan applicants are rejected twice as often as white applicants.\textsuperscript{187} Although the Federal Reserve Board’s study that produced this conclusion did not take into account applicants’ credit histories and their existing debt, the fact remains that African Americans do not enjoy the same access to credit as whites.\textsuperscript{188} The mortgage gap between African Americans and whites is alarming because home ownership is a principal method of increasing wealth in the United States. Consequently, barriers to home ownership as well as to funds for commercial development only serve to prevent upward economic mobility for African Americans.

\begin{thebibliography}{99}
\bibitem{182} Id.
\bibitem{184} Of 628 banks rated nationwide, just 3 failed and 68 received a “needs to improve” rating. Dorning, \textit{supra} note 111, at C1.
\bibitem{186} \textit{Id.} at 305-06.
\bibitem{187} Paulette Thomas, \textit{Behind the Figures, Federal Data Detail Pervasive Racial Gap in Mortgage Lending}, \textit{Wall St. J.}, Mar. 31, 1992, at A1. The Wall Street Journal critically analyzed the Federal Reserve Board’s recent release of data based on 1990 data. The Federal Reserve Board’s figures indicate that of 6.3 million mortgage applications at 9,300 financial institutions, African American applicants were rejected 34\% of the time while only 14\% of white mortgage applications were rejected. \textit{Id.}
\bibitem{188} \textit{Id.} (conclusion drawn by Donald Shackelford (President, State Savings Bank, Columbus, Ohio)).
\end{thebibliography}
Lenders explain that the mortgage gap exists for a variety of reasons. For instance, the median income of African Americans is approximately one-half of that of whites, which translates into a lower likelihood that African Americans will have the funds for a down payment.\textsuperscript{189} In addition, lower-income individuals tend to change jobs more frequently for marginally higher wages.\textsuperscript{190} Lenders perceive these frequent job changes as evidence of instability.\textsuperscript{191} Furthermore, lower-income individuals are not as likely to have credit cards or any other source to develop a solid credit history.\textsuperscript{192} Perhaps the most alarming reason lenders cite for the mortgage gap is the standards of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac).\textsuperscript{193} These two entities have tremendous influence over the underwriting standards of home mortgage loans because they are the principal purchasers of mortgages. Financial institutions often sell the mortgages that they originate to Fannie Mae or Freddie Mac in order to generate more funds for future loans. If the lending institution fails to comply with the established underwriting standards, it will be unable to bundle the particular loan with others for sale. Consequently, the loan will not be extended.\textsuperscript{194}

In an effort to dispel the belief that low-income lending is not profitable, community groups are pre-screening potential low-income loan applicants and counseling those who may not qualify for a loan.\textsuperscript{195} Pre-screening loan applicants not only saves lenders administrative costs in processing loan applications, it assists lenders in making more profitable loans.\textsuperscript{196} In Milwaukee, Wisconsin, counseling agencies are growing with the assistance of government commitment. The Home Buyer Counseling Task Force, created in 1991 by Mayor John Norquist, instituted a fee-for-service system.

\begin{itemize}
\item \textsuperscript{189} \textit{Id.} at A10.
\item \textsuperscript{190} \textit{Id.}
\item \textsuperscript{191} \textit{Id.}
\item \textsuperscript{192} \textit{Id.}
\item \textsuperscript{193} \textit{Id.} According to the Wall Street Journal, Fannie Mae purchased only 2.5\% of its loans from neighborhoods comprised of 80\% or more minorities. Since most financial institutions resell the mortgages they originate to either Fannie Mae or Freddie Mac, these entities set mortgage underwriting standards. Until 1991, Fannie Mae would not purchase loans for less than $25,000. While many low-income neighborhoods contained properties priced below this cut-off, bankers would systematically deny these loans because they were too small to sell. Mortgage size and neighborhood vacancy rates are often-cited criteria which take many lower-income individuals out of the mortgage market.
\item \textsuperscript{194} \textit{Id.} at A10.
\item \textsuperscript{195} \textit{Id.} at A11.
\item \textsuperscript{196} \textit{Id.} The article makes reference to the success some financial institutions have had with pre-screened loans. At one institution, only one of 175 pre-screened loans was 30 days past due. At another institution, the portfolio of pre-screened mortgages outperformed the rest of their portfolio of loans. \textit{Id.}
\end{itemize}
whereby lenders pay counseling agencies based on the number of loans the lenders originate.197

In Milwaukee, African Americans are four times as likely to be rejected when applying for mortgage loans than whites.198 Furthermore, minorities whose incomes were 120% or more of the area's median income were rejected 18% of the time while poorer whites whose incomes were between 80-99% of the area's median income were turned away only 7.1% of the time.199 In 1980, the income of African Americans in Milwaukee was approximately 70% that of whites' compared to the 63% national average, yet forty-nine other cities' African American rejection rates were lower.200 This statistical disparity illustrates that a racial gap exists in the mortgage lending market.201 Minority census tracts (census tracts which contain over 50% minority households) comprise 22% of Milwaukee's households but receive approximately 8% of the loans.202

Milwaukee has targeted a core of eighty-one census tracts in the central city in an attempt to spark community lending.203 However, the most recently released figures indicate that lending in the target area is declining.204 The area includes approximately 13.5% of the four-county area’s households.205 In 1988, the target area received 4.8% of all mortgage and home improvement loans and in 1989, 4.3% of loans were made in the target area.206 The 1990 figures revealed that the target area received only 3.7%
of the loans and only 1.9% of the actual funds. Another related statistic in a recent study revealed "that neighborhoods that are primarily white have seven times as many offices per person as neighborhoods that are primarily [African American]."

The Fair Lending Project, a consortium of local community leaders, has taken aim at Milwaukee lenders to assure CRA compliance. As of September 1991, it has secured pledges totaling $32 million from banks and thrifts towards central city loans. Lenders fear community groups, like the Fair Lending Project, because they do not have any political or financial ties to the banking industry. These groups are referred to as "loose cannons," which allow them to command respect from banks and thrifts at the negotiating table.

Banks are now approaching community groups before going to their supervisory banking agency to apply for merger approval. The goal of financial institutions is to avoid a community group's protests as well as costly delays in the merger application process. The respect lenders are showing to community groups is directly tied to the CRA. Without a law requiring lenders to address the credit needs of low-income areas, lenders would not be as willing to negotiate investment strategy with community groups.

High rejection rates of African-American mortgage applicants in Boston has motivated thoughtful assessment of the causes. One study of the disparity that exists in Boston has attempted to explain the systematic de-

207. Id. The study revealed that in 1990, 32% of applications from within the target area were rejected as compared to the four-county 7.87% rejection rate. In addition, 22% of the residential loans were to non-occupants. Id. at 1.

208. Jack Norman, Black Areas in County Short of Lenders, Survey Shows, MILWAUKEE J., Apr. 5, 1992, at D1. The precise figures relied upon in the Milwaukee Journal article revealed the following:

<table>
<thead>
<tr>
<th>Neighborhood demographic</th>
<th>No. of bank offices per 100,000 people</th>
</tr>
</thead>
<tbody>
<tr>
<td>90% white</td>
<td>35.3</td>
</tr>
<tr>
<td>10%-90% minority</td>
<td>17.6</td>
</tr>
<tr>
<td>90% minority</td>
<td>5.2</td>
</tr>
</tbody>
</table>

See Geoff Cooper, Lenders Say They Go Where the Growth Is, and Report Proves It, BUS. J., Apr. 6, 1992, at 7 (source of figures in table is the Fair Lending Project).


210. Id.

211. Id. at 1.

nial of credit to low-income neighborhoods. According to information disclosed pursuant to the Home Mortgage Disclosure Act, Boston was rejecting black loan applicants 34.9% of the time. The study considered a myriad of factors that might explain the number of mortgages originating in a particular neighborhood. The study concluded that two major factors that lead to a lack of community reinvestment are: (1) discrimination in the housing market, which restricts the mobility of African Americans and leads to fewer lending transactions, and (2) lending discrimination, which deters African Americans from applying for a loan because of the perception that they will be rejected. The study also concluded that:

From the available data it is not possible to sort out the precise role played by lenders, as opposed to buyers, sellers, developers, realtors, appraisers, insurers and others, in the complex housing and mortgage markets. What is indisputable is that the ratio of mortgage loans to housing varies by race and this pattern cannot be fully explained by economic and other non-racial factors.

B. Criticisms of the CRA Examination Process

The 1989 amendment to the CRA that mandated public disclosure of CRA ratings has resulted in increased scrutiny of the regulatory examinations. After hundreds of completed CRA examinations, some critics contend it is obvious that something is wrong because African American rejection rates remain disproportionately high as compared to those of whites. Yet, CRA statistics reflect a high level of compliance. "Statistics compiled by federal regulators indicate that approximately one out of every ten banking institutions examined for compliance with the Community Reinvestment Act, since July 1, 1990, needs to improve its performance in meeting the credit needs of its community." Lenders, who are defending themselves against allegations of discrimination, point to these statistics to

215. See Cooper, supra note 198, at 38.
216. Bradbury et al., supra note 213, at 3.
217. Id. at 4.
218. See supra notes 12-13 and accompanying text.
220. Regulators Find CRA Performance Lacking for One Out of 10 Institutions Examined, 57 Banking Rep. (BNA) No. 4, at 137 (July 22, 1991). The following statistics represent the results of the various federal supervisory agencies' CRA examinations.
strengthen their contention that they are meeting the needs of their communities in accordance with the CRA. CRA proponents point to the Home Mortgage Disclosure Act statistics, which conflict sharply with the positive tone that regulatory examinations have established. The net result is a fundamental questioning of the entire CRA process.

The CRA examination process has been criticized because of the emphasis on documentation of a lender’s activities. Compounding the criticism is the fact that documentation alone is not necessarily an accurate measure of an institution’s efforts to comply with the CRA. Smaller community bankers, in particular, are upset with the growing cost of regulatory compliance. Smaller bankers contend that everything they do is CRA-related and, thus, they are required to keep track of everything. To alleviate this regulatory burden, community bankers suggest that the CRA should exempt banks with less than $150 million in assets and exclude towns with fewer than 5,000 residents. However, since these institutions

<table>
<thead>
<tr>
<th>Office of Thrift Supervision (OTS)</th>
<th>Federal Reserve</th>
</tr>
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<tbody>
<tr>
<td>(501 thrifts)</td>
<td>(522 state-chartered member banks)</td>
</tr>
<tr>
<td>84-Needs-to-improve (17%)</td>
<td>49-Needs-to-improve (8.9%)</td>
</tr>
<tr>
<td>19-Substantial non-compliance (3%)</td>
<td>5-Substantial non-compliance (&lt;1%)</td>
</tr>
<tr>
<td>374-Satisfactory (75%)</td>
<td>445-Satisfactory (80.6%)</td>
</tr>
<tr>
<td>24-Outstanding (5%)</td>
<td>53-Outstanding (9.6%)</td>
</tr>
</tbody>
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<tr>
<td>(477 national banks)</td>
<td>(2,162 state-chartered non-member banks)</td>
</tr>
<tr>
<td>63-Needs-to-improve (13%)</td>
<td>201-Needs-to-improve (9%)</td>
</tr>
<tr>
<td>4-Substantial non-compliance (1%)</td>
<td>9-Substantial non-compliance (1%)</td>
</tr>
<tr>
<td>357-Satisfactory (75%)</td>
<td>1,813-Satisfactory (84%)</td>
</tr>
<tr>
<td>53-Outstanding (11%)</td>
<td>139-Outstanding (6%)</td>
</tr>
</tbody>
</table>

Id. The breakdown of lending institutions' CRA ratings in Wisconsin and in Milwaukee are as follows:

<table>
<thead>
<tr>
<th>Wisconsin (127 institutions rated)</th>
<th>Milwaukee (14 institutions rated)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2-Needs to improve (1.6%)</td>
<td>12-Satisfactory (85.7%)</td>
</tr>
<tr>
<td>98-Satisfactory (77.1%)</td>
<td>2-Outstanding (14.3%)</td>
</tr>
<tr>
<td>27-Outstanding (21.3%)</td>
<td></td>
</tr>
</tbody>
</table>

Cooper, supra note 219, at 8.

221. Regulators Find CRA Performance Lacking for One Out of 10 Institutions Examined, supra note 220, at 137.

222. See supra notes 187-217 and accompanying text.

223. See Regulators Find CRA Performance Lacking for One Out of 10 Institutions Examined, supra note 220, at 137.


225. Id.

226. Id.
contend that all of their business is CRA-related, they should have no trouble complying with regulatory guidelines.

Rather than exempt smaller lenders from CRA requirements, these lenders should focus on more cost-effective methods to track their CRA activities. CRA requirements should apply to all federally or state-chartered lenders because discriminatory lending practices should not be precluded simply because of an institution's size or location.

C. Encouraging Lenders to Meet Community Lending Needs

Governments at the community, state, and federal levels are large customers of various financial institutions regulated under the CRA. It has been suggested that these governmental entities develop a linked deposit program. This program envisions that governmental agencies establish criteria that incorporate a financial institution's lending commitment to targeted CRA areas in deciding where to deposit public funds. A linked deposit program will "encourage" lenders to critically assess their CRA obligation so that they may compete for government agencies' deposits.

Another method to encourage lenders to meet their CRA obligations is to permit civil actions for court review of a supervisory agency's decision approving a financial institution's merger application and to allow recovery for harm caused by such an approval. In Kaimowitz v. Board of Governors, the Eleventh Circuit dismissed an attorney's pro se petition for court review of a Federal Reserve Board of Governor's decision to approve a bank merger. Because the petitioner failed to establish that he suffered personal injury, the constitutional standing requirement was not met and the court dismissed his petition.

In dicta discussing the weaknesses of the petitioner's case, the court may have opened a potential cause of action for a successful challenge of a financial supervisory institution's merger approval. The court stated that a challenge to a Federal Reserve Board's decision requires: (1) participation in the administrative proceedings, and (2) direct and personal injury. The petitioner participated in the administrative proceeding challenging approval of

227. See OFFICE OF THE COMPTROLLER, supra note 200, at 18.
228. 940 F.2d 610 (11th Cir. 1991) (per curiam).
229. Id. at 611. A Florida attorney, who represented a number of minority-owned businesses, protested First Union Corporation's acquisition of Florida National Banks of Florida, Inc. for failing to meet its obligations under the CRA. Relying on the First Union's promises to implement programs addressing CRA concerns, the Federal Reserve Board approved the acquisition despite the attorney's protests alleging that First Union misrepresented its CRA commitment. Id.
230. Id. at 613.
the merger, but failed to establish that he was personally injured. The court stated:

We note that petitioner has not alleged any other personal injury, for example, that he is a member of the class of citizens that CRA seeks to benefit; that he is a member of a minority or low- or moderate-income group that might benefit from First Union’s improved CRA performance; that he resides in a minority or low- or moderate-income census tract that might benefit under the CRA; or that he has sought or is likely to seek credit from a bank owned by First Union or Florida National. Consequently, the Eleventh Circuit defined a class of individuals who have standing to challenge a Federal Reserve Board’s approval based on the CRA. To date, there has not been a court reversal of an institution’s approved application for merger for lack of CRA performance.

Although standing is a prerequisite to bringing an action to reverse a supervisory agency’s decision, proof that a lender is failing to comply with the CRA after an application for merger has been approved appears to be even more difficult. In Washington v. Office of the Comptroller of the Currency, the plaintiff sought reversal of the decision approving the merger of First Union Bank of Savannah and First Union National Bank of Georgia. The plaintiffs opposed the merger based on inadequate CRA performance. The court in rejecting this opposition because of poor documentation stated:

SCRA did submit data documenting a wide discrepancy between the amount of First Savannah’s lending which is directed toward affluent neighborhoods and the amount of First Savannah’s lending which is directed toward low-income, minority neighborhoods. The Community Reinvestment Act was not intended to, and could not possibly, equalize lending to the affluent and to the poor. The Act merely requires the OCC to “encourage” banks to meet the credit needs of low and moderate income neighborhoods, “consistent with the safe and sound operation of such [banks].”

While the plaintiffs were unsuccessful in reversing the OCC’s decision because of insufficient documentation, the possibility remains that courts may accept more sophisticated illustrations of a lender’s failure to comply

231. Id. (emphasis added).


233. Id. at *11 n.3 (citation omitted). Savannah Community Reinvestment Alliance (SCRA) is a community based organization and was a named plaintiff in this action. The Office of the Comptroller of the Currency (OCC) was also a named plaintiff in this action.
with the CRA. The mortgage gap statistics presented in this Comment, which are the results of recent data, may lead the way for future community protests to use the CRA as a sword to check supervisory agencies. Additionally, the Federal Reserve has promised to use the Home Mortgage Disclosure Act data as an additional tool to assess a lender’s CRA performance.  

The savings and loan debacle combined with the precarious financial position of many banks has created an environment in which lenders have a heightened interest in avoiding the costs and bad publicity associated with a CRA protest. Consequently, lenders have discovered the benefits of complying with the CRA and many have taken affirmative measures to identify and address community needs before community groups confront them and they are forced to defend their lending practices.  

VIII. CONCLUSION  

Undoubtedly, the CRA has influenced the banking industry and has sparked a heightened awareness of a financial institution’s role in the community and the corresponding obligation to serve the needs of low and moderate income neighborhoods. Increased public and regulatory scrutiny of financial institutions has created a unique opportunity for community groups to be heard. Successful CRA challenges to regulatory approval of mergers will provide lenders an incentive to address the needs of the communities they serve. Through this remedy, communities can motivate lenders to begin making up for their neglect while convincing others that their community is a worthwhile investment. Although some critics contend that the CRA is a “paper tiger,” its presence in the regulatory scheme has undeniably encouraged lenders to address and invest in their communities.

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234. See supra notes 187-217 and accompanying text.
235. See Cooper, supra note 219, at 8.
236. See supra notes 138-171 and accompanying text.
* This article would be incomplete without a sincere and heartfelt thanks to my wife, Elana, and to my parents, Melvin and Esther.