Community Reinvestment Act Final Rule: Will the FDIC Eventually Adopt the New Regulations

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Community Reinvestment Act Final Rule: Will the FDIC Eventually Adopt the New Regulations?

I. INTRODUCTION

In 1977, Congress stated that banks have continuing and affirmative obligations to help meet the credit needs of local communities, especially low-and moderate-income (“LMI”) neighborhoods where they are chartered, in a manner consistent with the safe and sound operations of the institutions.\(^1\) Congress came to this idea based on previous chartering laws requiring banks to demonstrate that their facilities serve the convenience and needs of their community, LMI neighborhoods, and credit and deposit services.\(^2\)

The Community Reinvestment Act (“CRA”) was enacted in an attempt to ensure that insured depository institutions satisfy their obligations to meet the credit needs of their entire community; specifically LMI neighborhoods.\(^3\) The CRA requires the Office of the Comptroller of the Currency (“OCC”), the Federal Deposit Insurance Corporation (“FDIC”), and the Federal Reserve Board of Governors (“FRB”) to use periodic “performance evaluations” to assess the performance of depository institutions in fulfilling these obligations.\(^4\) The OCC oversees nationally chartered banks and federal savings associations, the FRB oversees state chartered banks that are members of the Federal Reserve System (“FRS”), and the FDIC oversees insured state banks that are not members of the FRS.\(^5\)

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2. Id.

3. See 12 U.S.C. § 2901 (mandating financial institutions to “help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions”).


5. Id.
In October of 2020, the OCC adopted a final rule that modified how regulators rate banks on their community reinvestment efforts. This rule created a more objective and transparent standard for evaluating a bank’s community reinvestment performance. In addition to providing a more objective standard, the rule encourages banks to invest, lend, and provide more loans to their respective communities and LMI neighborhoods.

Beginning in 2021, the CRA will proscribe that 80% of banks will be subject to the FDIC and FRB regulatory regime, while the other 20% will be subject to the OCC regulatory regime. The FDIC originally signaled its agreement with the OCC’s December 2019 Notice of Proposed Rulemaking by engaging in a joint-rulemaking session with its fellow agency. The FDIC has since stated at the end of 2020 that it should not go through with the rulemaking during the COVID-19 pandemic. Since, in the end, only the OCC adopted the new rule, but not the FDIC or FRB, only nationally chartered banks must adhere to this rule. This could lead to opportunities for regulatory arbitrage, since state chartered banks do not have to adhere to this rule.

The OCC’s new rule, effective October 1, 2020 sounds promising on its face, but does it actually achieve the goals that it desires? In some ways it certainly does; the rule increases credit for mortgage origination in an attempt to increase the availability of affordable mortgages in LMI areas, and it increases support for small businesses, as well as small and

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8. Id.


11. Id.


13. Id.

family-owned farms. However, in some ways it came up short—there was no evidence of the proposed rule’s impact on LMI areas and there is still uncertainty as to how effective the new final rule will be in assessing banks.

This Note addresses whether the OCC’s final rule actually accomplishes the goals it desires and whether the FDIC will eventually adopt this new policy. Part II explains the history and development of the CRA and how banks have been evaluated under it in the past. Part III examines whether the final rule accomplishes the goals it desires by weighing the support of the final rule against the critiques. Part IV concludes by discussing whether the FDIC will eventually adopt these new regulations.

II. CRA History and Development

Congress passed the CRA in 1977 to require the OCC, FRB, and FDIC to examine financial institutions and encourage them to help meet the credit needs of the local communities in which they are chartered, as well as LMI neighborhoods. Since its passage in 1977, the CRA has been periodically updated in order to provide more objective standards and resolve financial and economic issues during the relevant time period. In 1989, the CRA was modified to require regulators to provide more detailed written evaluations, publicly disclose CRA results, and establish a tiered rating system.

In 1991, the FDIC Improvement Act (“FDICIA”) strengthened the role of the FDIC by giving it an increased role in overseeing banks

15. See generally Otting, supra note 7 (explaining how an increase in credit for mortgage origination positively affects LMI households).
17. See infra Part II.
18. See infra Part III.
19. See infra Part IV.
22. The CRA temporarily created the Resolution Trust Corp. in an attempt to help the nation's failed savings and loan institutions. In addition, the CRA abolished the Federal Savings and Loan Insurance Corporation, as well as created the Savings Association Insurance Fund and the Bank Insurance Fund. Regulations were also finalized to make sure that real estate appraisals are performed to a certain standard, including requirements for adequate training of appraisers and of their supervisors. See 12 U.S.C. § 2906 (2012) (describing all other changes that were made to the CRA at this time).
and protecting consumers.\textsuperscript{23} Congress enacted the FDICIA as a response to the Savings and Loan Crisis—an event that caused the failure of nearly a third of the U.S. savings and loan associations by 1995.\textsuperscript{24} The FDICIA created the Truth in Savings Act, which requires banks to provide disclosures regarding savings account interest rates, allowing consumers the ability to compare products offered by different banks so that they have more information.\textsuperscript{25}

The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 requires separate CRA performance assessments in every state where a bank has an actual physical presence.\textsuperscript{26} It also requires an agency to evaluate an out-of-state national bank’s CRA rating or a state bank’s CRA rating when deciding whether to allow banks to build interstate branches.\textsuperscript{27}

In 1995, the CRA regulations were updated in an attempt to account for an institution’s size and business operations.\textsuperscript{28} The updates in 1995 instituted three “performance tests.”\textsuperscript{29} First, the Lending Test, which is the most heavily weighted in terms of a bank’s CRA rating, rates institutions on the number, amount, and distribution of loans across different geographic neighborhoods and income groups.\textsuperscript{30} Second, the

\begin{thebibliography}{99}
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\item \textsuperscript{23} 12 U.S.C. § 1811(a) (2010).
\item \textsuperscript{24} Julia Kagan, \textit{FDIC Improvement Act (FDICIA)}, \textsc{Investopedia} (July 16, 2020), https://www.investopedia.com/terms/f/federal-deposit-insurance-corporation-improvement-act-fdicia.asp [https://perma.cc/7JRM-GTQR]; see also 12 U.S.C. § 1811 (outlining all of the changes made to the FDICIA).
\item \textsuperscript{25} See 12 U.S.C. § 1811(b)(3) (explaining how this act requires financial institutions with over $500 million in consolidated assets to go through extremely thorough financial audits and be in accordance with additional annual reporting requirements. Financial institutions that fail to comply with FDICIA requirements would face civil penalties and additional actions from regulators).
\item \textsuperscript{26} 12 U.S.C. § 2906(d).
\item \textsuperscript{28} See Community Reinvestment Act Regulations, 60 Fed. Reg. 22156, 22156 (July 1, 1995) (“The final rule seeks to emphasize performance rather than process, to promote consistency in evaluations, and to eliminate unnecessary burden. As compared to the 1993 and 1994 proposals, the final rule reduces recordkeeping and reporting requirements and makes other modifications and clarifications.”); see also Sandra F. Braunstein., \textit{The Community Reinvestment Act}, \textsc{Fed. Res.} (Feb. 13, 2008), https://www.federalreserve.gov/newsevents/testimony/braunstein20080213a.htm [https://perma.cc/RZ2B-84HI3] (explaining the details of the 1995 changes to the CRA).
\item \textsuperscript{29} John Alexander et al., \textit{Effects of Revisions to the CRA in 1995 on Regulatory Enforcement}, \textit{J. of Bus. and Econ. Res.} 1 (2009).
\item \textsuperscript{30} Sandra F. Braunstein, Dir., Div. of Consumer and Cmty. Affs., \textit{The Community Reinvestment Act} (Feb. 13, 2008),
\end{thebibliography}
Investment Test examines how well the institution meets the needs of the local communities by making community investments.31 Lastly, the Service Test evaluates the ability of the institution to meet the credit needs of the community and LMI neighborhoods through its retail service delivery system.32 This was the first time that these tests were used for evaluating a bank’s CRA rating.33 The determinations of these tests also introduced asset size thresholds to define whether a bank would be considered a small or large bank, thereby subjecting them to different regulations.34

In 2005, the CRA’s regulations were updated to adjust the asset size thresholds35 for small and large banks depending on what the Consumer Price Index (“CPI”) prescribes.36 The CPI is an index that measures the average change over time in prices paid by urban consumers for a market basket of consumer goods and services.37 The CRA regulations added an intermediate small bank category to classify institutions by size, and it expanded the definition of community development to broaden the geographic areas where activities can qualify for CRA recognition.38

Other efforts to update the regulation occurred in 2018, including attempts to make receiving CRA credit clearer and more transparent.39 Updates also extended the CRA examination cycle for some banks and reduced the amount of discretion that examiners possess in deciding whether to evaluate banks under a full or limited scope examination.40

As of today, performance evaluations are based on two criteria: (1) whether a bank is a nationally chartered bank or a state-chartered bank and (2) a consideration of the size of the bank.41 Large banks with assets totaling more than $1.252 billion have the most comprehensive test,
consisting of the Lending Test, Service Test, and Investment Test. Both large and small banks are subject to the Lending Test, which evaluates the number and monetary amount of home mortgage, small farm, small business, and consumer loans with all of the income levels in the bank’s assessment area. The Service Test examines the availability and effectiveness of a bank’s retail banking services and how they give community development services in their assessment areas. Finally, the Investment Test weighs the investment’s complexity, dollar amount, and its benefit to the assessment area. It also assesses the likelihood that private investors will provide investments and gives an inferior grade depending on the size of the private investors’ contribution.

CRA ratings are made by the summation of points received on the three tests (Lending, Investment, and Services Tests). Regulators, like the OCC and FDIC, use these ratings when pondering a bank’s application to expand facilities, relocate an office, open up new branches, and merge with other banks. In addition to these requirements, a bank’s CRA rating must be satisfactory or better to establish a financial subsidiary. If a bank receives a CRA rating below satisfactory and already has financial subsidiaries, it cannot commence any additional activity or acquire control of any company until they receive a satisfactory CRA rating. Additionally, a bank holding company’s depository institution’s subsidiaries must have a CRA rating of satisfactory or above for the bank holding company to ask the FRB to treat it as a financial holding company. If the bank holding company is treated as a financial holding company, it can engage in a broader array

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42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
50. 12 C.F.R. § 208.75(a) (2020); see also 12 C.F.R. § 208.75(a)(2) (2020) (explaining how a CRA grade generally works).
of activities, undoubtedly a strong incentive for banks to obtain a satisfactory or above rating.\textsuperscript{52}

III. DOES THE CRA ACCOMPLISH ITS GOALS

A. Criticisms of the CRA

Many critics find the CRA requirements vague and have asked for more clear and concise guidelines to determine what constitutes an acceptable means of reinvesting into the community and LMI neighborhoods.\textsuperscript{53} Critics frequently disagree over what should receive CRA credit.\textsuperscript{54} Many argue that the standard is too subjective. Sometimes loans or investments do not count as CRA credit even though most would say that credit is warranted given that such loans and investments will positively impact local communities and LMI neighborhoods.\textsuperscript{55}

The National Community Reinvestment Coalition (“NCRC”) and American Bankers Association (“ABA”) disagree about small business lending and whether it should be considered for community development credit.\textsuperscript{56} The ABA argues that loans to small businesses and nonprofits with an actual purpose of community development should be considered community development loans, so the CRA rating can correctly measure the impact that banks have in their assessment areas.\textsuperscript{57} On the other hand, the NCRC claims that “doing so would double count small business loans and inflate the Lending Test rate.”\textsuperscript{58}

\textsuperscript{52} See 12 U.S.C. § 1843(k)(4) (listing the broad array of financial activities that financial holding companies are permitted to engage in).


\textsuperscript{54} Goodman, et al., supra note 12.


\textsuperscript{56} Letter from John Taylor, President and CEO of the Nat’l Cmty. Reinvestment Coal., to Steven T. Mnuchin, Sec’y of the Treasury (Feb. 5, 2018), https://ncrc.org/letter-to-treasury/ [https://perma.cc/RX5Z-HPHZ].


\textsuperscript{58} Letter from John Taylor, supra note 56.
Critics of CRA also argue that it addresses a nonexistent problem.\(^{59}\) They argue that the issues occurring in credit markets are inadequate to justify intervention and that the CRA is the wrong policy to effect those changes even if intervention is warranted.\(^{60}\) Earlier research found that the CRA did not have a positive effect on credit markets and that the policies came at a high cost.\(^{61}\) For example, ten years ago, corporate law professors Jonathan Macey and Geoffrey Miller, tried to demonstrate the weak effects and high cost of the CRA in response to changes made to the Act in 1989.\(^{62}\) They explained that the CRA is unjustified, threatens the safety and soundness of the banking system, and encourages community groups to seek out cheaper rent, only at the cost of banks’ profitability.\(^{63}\) It is further argued that the CRA actually provides little benefit to LMI neighborhoods and is costly because it makes banks give unprofitable and risky loans to people with low credit scores.\(^{64}\) Compliance costs are also high for these loans.\(^{65}\) Critics believe that there are other alternatives that can overcome these market failures, help lessen credit discrimination, and provide funds to help LMI neighborhoods.\(^{66}\)

B. Changes Made by the Final Rule

The final rule’s updates could generally fit into four categories.\(^{67}\) First, it clarifies which bank activities qualify for positive CRA consideration.\(^{68}\) The rule defines a “qualifying activity” as an activity that helps meet the credit needs of a bank’s entire community, including LMI neighborhoods.\(^{69}\) Qualifying activities include retail loans,

\(^{59}\) See Michael S. Barr, Credit Where It Counts: The Community Reinvestment Act and Its Critics, 80 N. Y. U. L. Rev. 513 (2005) at 519 (explaining that although he is arguing in favor of the CRA, other critics suggest that it is unnecessary to change it) (emphasis added).

\(^{60}\) Id. at 527.

\(^{61}\) Id.

\(^{62}\) Id. at 527–28.

\(^{63}\) Id.


\(^{65}\) Barr, supra note 59, at 519.

\(^{66}\) Id.

\(^{67}\) See generally Community Reinvestment Act Regulations, 85 Fed. Reg. 34734 (June 5, 2020) (codified at 12 C.F.R. 25 and 12 C.F.R. 195) (discussing all the changes that have been made to the final rule).

\(^{68}\) Id.

\(^{69}\) Id. at 34735.
community development loans, community development investments, and community development services. The OCC released a comprehensive list to make the standard for what is considered a “qualifying activity” more objective.

The second area of change is redefining how banks delineate the assessment areas in which they are evaluated based on changes to banking business models over the past twenty-five years. The prior regulatory framework only considered physical branches as the basis for delineating a bank’s CRA assessment areas (“Facility-Based Assessment Areas”). The OCC acknowledged this standard no longer correctly reflects the manner in which many banks conduct their business, recognizing that many banks receive deposits from customers residing in areas not contiguous with the bank’s physical facilities. The rule requires a bank that receives 50% or more of its retail domestic deposits from areas outside its own Facility-Based Assessment Areas to have separate deposit-based assessment areas in places where it acquires 5% or more of its total domestic deposits. Despite this realization, the rule provides that an ATM does not constitute a “non-branch deposit-taking facility” for the purpose of delineating a Facility-Based Assessment Area wherever a bank has a main office, branch, or non-branch deposit-taking facility. Banks can also change their assessment areas once per year.

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70. Id.


72. See Community Reinvestment Act Regulations, 85 Fed. Reg. 34734, 34735 (explaining all of the changes made to assessment areas based on online transactions, as well as in-person transactions).


74. Id. at 5.


76. Id.

77. Id.
The third general category of changes is articulating more objective standards for evaluating banks’ CRA performances. 78 This includes incorporating a process for banks to petition the OCC to add a new activity to the list of qualifying activities that receive credit under the CRA. 79 The OCC’s final rule also includes in its list of qualifying activities certain categories of economic development activities that currently qualify for CRA credit, showing how these updates do not deviate entirely from the regulatory framework that was previously used. 80 Qualifying activities that were the main source of criticism by communities, neighborhoods, and certain members of Congress—including investing money into the construction of a stadium, or benefiting opportunity zones—must directly benefit LMI neighborhoods in order to receive credit as a “qualifying activity.” 81 The rule also permits activities that would have received CRA credit in the previous evaluation periods to continue to get the same credit under the new regulations, even if they are not specifically stated in the rule’s list of qualifying activities. 82

The rule’s fourth and final requirement mandates more transparent and timely reporting. 83 The OCC found that the CRA performance evaluations can be difficult to navigate and use. 84 It can also be onerous to make comparisons from one bank to another, or from one bank’s evaluation to its other evaluations. 85 The rule also gives credit to a bank that originates and sells a loan within 365 days of origination in the amount of the loan at its inception. 86 Previously, a bank only received credit when it originated and sold a loan within ninety days of origination, so this update made it much easier to receive credit in this regard. 87 A bank may also request confirmation from the OCC that an area is considered a “CRA desert.” 88

79. COVINGTON, supra note 75, at 4.
80. Id.
81. Id.
82. Id.
84. Debevoise & Plimpton, supra note 73, at 9.
85. Id.
86. COVINGTON, supra note 75, at 5.
88. COVINGTON, supra note 75, at 5; see also Community Reinvestment Act Regulations, 85 Fed. Reg. at 34747 (explaining that a “CRA desert” is considered an area that experiences lower than expected levels of lending and investments).
C. Support and Critique of the Final Rule

Although the OCC’s final rule is certainly not perfect, it attempts to fix prior issues that agencies had with the CRA in many ways.\footnote{89} Previously, banks would have only received 25% credit for loans sold within ninety days.\footnote{90} Under the new rule, banks will get credit for an entire 100% of origination value for loans sold during the year the loan was originated.\footnote{91} This change primarily targets single-family mortgage lenders, where many LMI loans are sold.\footnote{92}

There is generally better support for low-income families and small businesses in the new proposal.\footnote{93} The rule increased support to small business, small and family-owned farms, Native American territories, and distressed areas by using the “CRA desert” classification, while also accommodating banks of all business models and sizes by adjusting their asset size thresholds.\footnote{94} This adjustment was accomplished by both requiring banks to fund such communities in greater capacity, as well as adding greater incentives to do so.\footnote{95} Since there is now a comprehensive list, there is finally more clarity in what qualifies for CRA consideration under the OCC’s final rule.\footnote{96} Additionally, the rule updated how banks define assessment areas by maintaining immediate geographies around branches and establishing more assessment areas for smaller banks that do not rely on branch networks to meet the needs of their customers.\footnote{97}

Regulators are able to evaluate bank CRA performance more objectively through quantitative measures that measure the value and volume of bank activities.\footnote{98} Some have argued that the CRA gave limited evaluations to some banks, so the update requires regulators to thoroughly evaluate banks’ CRA performance in all their assessment

\footnote{89} See generally Letter from Robert Feldman, supra note 53 (describing the positive attempts the final rule makes to making a more objective standard).
\footnote{90} Goodman, et al., supra note 12, at 3.
\footnote{91} Id.
\footnote{92} Id.
\footnote{94} Id.
\footnote{95} Id.
\footnote{96} CRA Illustrative List of Qualifying Activities, supra note 71, at 1.
\footnote{97} OCC Press Release, supra note 93.
\footnote{98} Id.
However, the OCC has deferred setting thresholds for assessing banks' CRA performance until the agency can review and understand this improved data. The rule also required regulators to consider performance context, discrimination, and illegal credit activity before assigning their final ratings.

Despite all these advantages, the FDIC did not adopt the rule due to its many critiques. Additionally, there were complications with finalizing this rule during the COVID-19 pandemic. There was no evidence of the proposed rule's impact. Public data would be lost, while bank reporting burdens would increase. Furthermore, there is no data indicating that the new rule will take a step towards making standards more objective or make a bigger impact than the previous regulations.

The primary metric used for assessing CRA compliance also neglected community needs. The bank-level CRA evaluation metric emphasized the evaluation of banks’ activities on its bank-wide balance sheet that displays “CRA-eligible activities,” rather than the investments and loans made to serve LMI neighborhoods. The rule created limited and, at times, unforgiving testing on retail and community development lending, with a limit on community coverage. Since banks would be tested only for retail lines with at least 15% of the bank’s retail activities, some large banks that do almost all of their business in one retail line would not be evaluated on other lines because one retail line consisted of more than 85% of their retail lending.

There are modernization issues with the rule as well, namely a huge time lag between examination and the issuance of exam reports. The most recent reports available for some of the largest banks were

99. Id.
100. Id.
101. Id.
102. Krista Shonk, Three Takeaways from CRA Modernization, ABA BANKING J. (July 9, 2020), https://bankingjournal aba.com/2020/07/three-takeaways-from-cra-modernization%e2%80%a8%e2%80%a8%e2%80%a8%e2%80%a8 https://perma.cc/9RDD-ZNZQ).
103. See id. (describing the troubles of adopting a new rule when facing bigger issues due to the COVID-19 pandemic).
104. Letter from Robert Feldman, supra note 53.
108. Id.
109. Id. at 2.
110. Id.
111. Letter from Robert Feldman, supra note 53.
issued in 2013, severely limiting the reports’ functionality for both banks and their communities.\textsuperscript{112} Moreover, there are still communities—especially those with a large number of online banks—where the amount of money available for CRA-eligible investments is high, generally exceeding the actual needs of the community (“CRA hotspots”).\textsuperscript{113} This is an issue because there are CRA deserts where there is not enough money available to meet the needs of their community.\textsuperscript{114}

Finally, there is uncertainty as to what counts, particularly when discussing community development loans and investments.\textsuperscript{115} This lack of clarity could lead to fewer investments that actually respond to community needs and could eventually lead to less investment overall.\textsuperscript{116} The examination process not only varies from regulator to regulator, but within each individual agency.\textsuperscript{117} Previously, all three agencies followed the same set of rules.\textsuperscript{118}

As of October 2020, the OCC has adopted its final rule; the FRB is working on a different rule; and the FDIC is still subject to the former rule.\textsuperscript{119} This has led to confusion for banks as to what set of regulations they must abide by, while the chance of regulatory arbitrage has increased.\textsuperscript{120} The OCC also has way more bank assets under its jurisdiction, so it can be viewed as having the most influential force among the three regulators, which could lead to even more confusion.\textsuperscript{121} The OCC controls a higher percentage of overall banks as well, so the agency has the most power out of all the bank regulators over all the banks in the United States.\textsuperscript{122} These uncertainties could potentially

\textsuperscript{112} Id.
\textsuperscript{113} Id.; see also Letter from Julius Robinson, Managing Director, MUFG Union Bank, N.A., to Joseph Otting, Comptroller of the Currency, and Jelena McWilliams, Chair, Fed. Deposit. Ins. Corp. (Apr. 8, 2020), https://www.fdic.gov/regulations/laws/federal/2020/2020-community-reinvestment-act-regulations-3064-af22-c-485.pdf#:~:text=The%20CRA%20hotspots%20are%20also%20where%20large%20concentrations,will%20limit%20CRA%20hotspots%20and%20reduce%20CRA%20deserts [https://perma.cc/3UHL-SEM7] (explaining how “CRA hotspots” are “where large concentrations of banks who have the same CRA obligations are located”).
\textsuperscript{114} Letter from Robert Feldman, supra note 53.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Goodman, et al., supra note 12, at 2–3.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
including superficial examinations of a bank’s community development activity in many of their assessment areas.¹²³

IV. CONCLUSION

A. Why Didn’t the FDIC Adopt the Final Rule?

The general consensus seems to be that the OCC’s final rule was rushed.¹²⁴ “This final 372-page set of rules came just six weeks after the close of the public comment period, a record-breaking pace, and a day before Comptroller Otting resigned from the agency.”¹²⁵ Many commenters seemed distressed that the OCC’s final rule was finalized during the COVID-19 pandemic and claim that it will harm many communities suffering from the pandemic.¹²⁶ However, it is important to note that some people believe that the pandemic is a reason to accelerate the need for the rule.¹²⁷ Comptroller Otting stated, “[t]he [COVID-19] pandemic has only made it more dire that communities—particularly [LMI] neighborhoods—need more capital and better access to credit. And they need it now.”¹²⁸

The timing was also not right for the FDIC to ask small community banks to meet new regulatory requirements.¹²⁹ Bank officials emphatically agreed with this idea because they were concerned that they do not have the necessary tools and time to implement changes to their CRA operations while they are trying to deal with the small-business lending program and other issues related to the COVID-19 pandemic.¹³⁰

The rule has also become increasingly political.¹³¹ The House Democrats were much more willing to pass the regulations as opposed to

¹²³ Letter from Robert Feldman, supra note 53.
¹²⁵ See id. (quoting Jesse Van Tol, CEO of the National Community Reinvestment Coalition).
¹²⁶ Id.
¹²⁷ Id.
¹²⁸ Otting, supra note 7.
¹³⁰ Id.
¹³¹ Id.
the House Republicans, which are largely symbolic of the pandemic and social issues. The rule is becoming more of a social issue as racial inequity is underlined by protests over George Floyd’s death in Minneapolis police custody, so the FDIC was hesitant to adopt the rule out of a desire to placate concerns over social issues, rather than to meet a need for updates.

B. Will the FDIC Eventually Adopt the Final Rule?

When asked if the FDIC will eventually adopt the final rule, the consensus among most commentators appears to be, “yes.” The FDIC was originally supposed to adopt the regulations with the OCC, but dropped the proposed regulations at the end due to the aforementioned reasons. Since the FDIC controls state-chartered banks and the OCC controls nationally chartered banks, this has created opportunities for regulatory arbitrage and also created a separation between state and nationally chartered banks. Since the goal of the OCC and the FDIC is the same in this matter, a solution will likely be worked out in order to maintain consistency.

The OCC’s proposed rule made specific numeric thresholds that banks would be subject to in different aspects of the general performance standards, including the CRA Evaluation Measure, the Community Development Minimum, and the Retail Lending Distribution Tests. The OCC omitted key numeric thresholds in the final rule, stating that it had not done enough research to justify these thresholds. Instead, the OCC will continue to gather data on what thresholds are appropriate and will set such benchmarks through a notice-and-comment process.

132. Id.
133. Id.
135. Id.
136. Id.
137. Id.
138. COVINGTON, supra note 75, at 7.
139. Id.
140. Id.
Once numeric thresholds are put in place, the FDIC is more likely to join the OCC’s rulemaking.\textsuperscript{141} 

“The rule also does not specify how (or whether) the OCC will evaluate a bank’s CRA performance between the time of its last evaluation under the previous CRA rules and the date of the rule.”\textsuperscript{142} If more specific information becomes available as to how a bank’s CRA performance will be evaluated before the compliance date of the final rule, the FDIC would be more ready to accept the regulations.\textsuperscript{143} An argument can be made that banks should not be held to standards that they do not understand, and the FDIC does not want to waste time and resources in instructing all of its examiners to evaluate banks based on whatever standard should be applied.\textsuperscript{144} 

The FDIC was also hesitant to adopt the regulations due to it being rushed by the OCC.\textsuperscript{145} The COVID-19 pandemic played into this decision, as some argued that it needed to be rushed out, despite not being completely ready.\textsuperscript{146} The FDIC may be willing to join the OCC once the pandemic’s economic effect stabilizes.\textsuperscript{147} The OCC will also have additional time to judge the efficacy of their new rules.\textsuperscript{148} 

The FDIC did not think it would be wise to impose new CRA standards on small community banks to meet the new standard since there are many issues that small banks must deal with just to stay afloat during the COVID-19 pandemic.\textsuperscript{149} However, once the pandemic ends, there will be fewer burdens on small community banks, so the FDIC may be more willing to adopt the OCC’s CRA rule.\textsuperscript{150} 

Just as the pandemic pushed the FDIC to hold out on adopting the rule, the same can be said about the political concerns of racial inequality.\textsuperscript{151} The importance of such a social movement cannot be put into words.\textsuperscript{152} However, the FDIC does not want to finalize a rule

\begin{itemize}
\item \textsuperscript{141} See id. (showing that the lack of numeric thresholds was a contributing factor in the FDIC ultimately deciding not to adopt the final rule).
\item \textsuperscript{142} Id.
\item \textsuperscript{143} See id. (describing different ways the final rule can be modified to make it more appealing for the FDIC to eventually adopt).
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Hrushka, supra note 124.
\item \textsuperscript{146} Id.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Id.
\item \textsuperscript{149} Williams, supra note 129.
\item \textsuperscript{150} Hrushka, supra note 124.
\item \textsuperscript{151} Williams, supra note 129.
\item \textsuperscript{152} Id.
\end{itemize}
affecting all state nonmember banks as a reaction to the movement.\textsuperscript{153} Since the FDIC felt that the rule was rushed and that it had been finalized in an attempt to seek social justice, it did not sign off and instead wanted to give more time for many of the issues in the rule to be addressed.\textsuperscript{154} Essentially, the FDIC may think it would be a good idea to adopt the rule if modifications are made to the existing rule.\textsuperscript{155} Letting time pass will be the best way to allow the FDIC to adopt the regulations in a way that they feel is not rushed.\textsuperscript{156}

Although the FDIC may think it would be a good idea to eventually adopt the final rule, the FRB may not have the same thoughts.\textsuperscript{157} Since the OCC’s final rule was passed, the FRB issued an Advance Notice of Proposed Rulemaking (“ANPR”) that also attempts to modify the prior CRA regulations.\textsuperscript{158} However, these updates do not exactly match the updates of the OCC’s final rule. The updates show that the FRB may not join the FDIC in potentially adopting the OCC’s final rule if the FDIC ultimately decides to do so.\textsuperscript{159}

Although the ANPR matches the final rule in the non-exhaustive list of qualifying activities and expanding deposit-based assessment areas, it differs from the OCC’s final rule in that it focuses more on addressing inequities in credit access, ensuring an inclusive financial services industry, and minimizing the reporting burden on regulators.\textsuperscript{160} This is a shift from the final rule’s focus on objective standards to be met for evaluating a bank’s CRA performance.\textsuperscript{161} Federal Reserve Board Governor Lael Brainard showed her dissatisfaction with the passage of the final rule when she said, “it is much more important to get reform

\begin{enumerate}
\item\textsuperscript{153} Id.
\item\textsuperscript{154} Id.
\item\textsuperscript{155} Id.
\item\textsuperscript{156} Id.
\item\textsuperscript{158} Id.
\item\textsuperscript{160} Id.
\item\textsuperscript{161} Id.
\end{enumerate}
right than to do it quickly.”

This also feeds the theory that letting time pass to allow modifications to be made to the final rule could entice the FDIC to eventually adopt the final rule. It may be likely that the FRB will not adopt the final rule and will instead focus on making their own CRA regulations. This stance by the FRB will have a significant impact on the FDIC’s adoption of the final rule, since the FRB’s willingness to create their own CRA regulations may motivate the FDIC to do the same. This would not help the OCC in its attempt to create a uniform system for evaluating CRA standards. Additionally, this would create an apparent ridge between the standards of nationally chartered banks and state chartered banks, potentially leading to chaos in the future.

Kevin Goldman*

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162. Id.
163. Williams, supra note 129.
164. Tax Cred., supra note 159.
165. Id.
166. Id.
167. Id.

* Thank you to my Mother, Father, and Brother Danny who gave me all the support I would ever need. Thank you to my friends from New York, New Jersey, and North Carolina (Kevin Durk, Vito Friscia, Shay Potter, Upstate, Valley Stream Central, Caldwell Baseball Team Class of 2018, and Picklebacks) who have provided me with wanted and unwanted distractions throughout my experience with the Banking Journal. Thank you to my editors Kemper Patton and Elizabeth Hobbs for always being readily available during the entire writing process. I would also like to thank Professor Lisa Broome for taking the time to teach me this area of banking law and for giving me this opportunity.