2000

The 21st Century CRA: How Internet Banks Are Causing Regulators to Rethink the Community Reinvestment Act

William M. Keyser

Follow this and additional works at: http://scholarship.law.unc.edu/ncbi

Part of the Banking and Finance Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/ncbi/vol4/iss1/21
The 21st Century CRA: How Internet Banks are Causing Regulators to Rethink the Community Reinvestment Act

I. INTRODUCTION

Computer use has become a staple in American society, and in today’s world of instant access and on-line commerce, consumers have come to expect computers to meet their every need. In the financial industry, Internet banking is becoming the normal banking method for some Americans, and as we enter the next the millennium more and more consumers are on-line rather than in-line.\(^1\) Technology brings convenience, but it also creates hardship for financial institutions and regulators as they struggle to keep pace with the advancing market.\(^2\) One concern that has arisen from this recent migration to on-line banking is compliance with the Community Reinvestment Act (CRA).\(^3\) The problem: How are Internet banks, that operate solely in cyberspace, supposed to comply with the CRA?\(^4\)

Regulatory agencies such as the Office of Thrift Supervision (OTS) and its Director Ellen Seidman have instigated a turf war with Congressional leaders over the application of the CRA

---


2. See Kimbrely Kegler, Note, Electronic Banking: Security, Privacy, and CRA Compliance, 2 N.C. BANKING INST. 426 (1998). In her article, Kegler discusses some of the major problems facing on-line and electronic banking, such as security, privacy, and the Community Reinvestment Act. See id.


4. See id.
Congressional leaders are reluctant to allow these financial regulatory agencies to adjust the current regulations to deal with the emerging Internet banks. Though Congress has been reluctant to grant administrative agencies the authority to attack the growing problem; however, in recent legislation, Congress did not address the growing problems surrounding Internet banking. This refusal forced regulatory agencies to develop their own solutions, which Congress claims oversteps the agencies’ statutory authority. Currently, with no concrete implementation plan in existence, the Internet banks must determine for themselves how to ensure CRA compliance.

This note addresses this growing problem by first discussing procedures used by the financial regulatory agencies to regulate CRA compliance. It then examines the problem that Internet banking has created for the regulatory agencies who must evaluate the Internet banks’ CRA compliance. Then it looks at solutions different Internet banks have used in their attempt to solve this problem and the criticisms that these methods have generated. It next reviews proposed solutions offered by Director Seidman to solve the growing problem. Finally, the Note examines who should be allowed to set the new standards by which Internet bank CRA compliance will be evaluated.

5. See Barbara Rehm, Gramm Chews Out OTS Director Over CRA Ideas, AM. BANKER, Jul. 8, 1999 at 2.
6. See id.
7. See id.
8. See infra notes 71-103 and accompanying text, which examines a proposal by Office of Thrift Savings Director Ellen Seidman to address the growing problem facing Internet banks.
9. See id.
10. See Beetham, supra note 3, at 927.
11. See infra notes 23-33 and accompanying text.
12. See infra notes 34-49 and accompanying text.
13. See infra notes 50-70 and accompanying text.
14. See infra notes 71-103 and accompanying text.
15. See infra notes 104-157 and accompanying text.
II. EXAMINING THE CRA

A. Purpose and Enforcement

Congress passed the Community Reinvestment Act in 1977 in response to growing problems associated with geographic disinvestment and redlining, which it feared would inevitably lead to the deterioration of local low-income communities. Congress hoped to halt the decay of these low-income communities by ensuring that banks which accepted deposits from these communities would funnel revenue back into them. It feared that banks were draining funds from the unstable, low-income communities and reinvesting them in stable communities with better payoffs. Though it was intended to revitalize low-income communities, the CRA was not an affirmative action provision; instead, it was viewed as a tool which would allow banks to reinvest in local communities while maintaining a substantial profit margin.

---

16. See Orin L. McCluskey, The Community Reinvestment Act: Is It Doing the Job?, 100 BANKING L.J. 33 (1983). "'Geographic Disinvestment' refers to the process by which financial institutions withdraw certain credit services, notably mortgage and home improvement loans, from those areas in which a significant number of their depositors live." Id. at 33.

17. Redlining is defined as "the alleged practice of lending institutions to discriminate against older urban areas in the granting of residential mortgage loans. The discrimination may take the form of either an outright denial of the loan or a grant of the loan on unfavorable terms." Id.


19. See id.


21. See Macey & Miller, supra note 18, at 298-299. Legislators were not trying to create an affirmative action provision which would require lending on the basis of the customer's race, religion, or ethnic background. See id. Instead, the legislators were attempting to create a mechanism which would both preserve local communities and allow banks to make profitable investments in these local communities. See id.

22. See id. Though redlining and community divestment were key issues surrounding the CRA's inception, some scholars argue that Congressional leaders were in fact promoting the notion of localism and attempting to halt the destabiliza-
As passed, the CRA requires the appropriate Federal financial supervisory agency to assess the bank's record of “meeting the credit needs of its entire community, including low and moderate-income neighborhoods, consistent with the safe and sound operation of the institution.” Each of the four major designated financial institution supervisory agencies - The Office of the Comptroller of the Currency (“OCC”), the Board of Governors of the Federal Reserve System (“Fed”), the Federal Depository Insurance Corporation (“FDIC”), and the Office of Thrift Supervision (“OTS”) - must rate the financial institution and consider this CRA rating when reviewing applications from the financial institute for additional deposit facilities. Each agency promulgates its own regulations, but aside from a few minor differences they are essentially identical.

In order to allow banks the opportunity to meet the needs of the low-and middle-income neighborhoods within their assessment areas, the regulatory agencies have adopted four different methods to assess a bank’s CRA record. The methods are
designed to evaluate:

(1) a bank’s lending practices in its low to middle-income assessment areas,²⁷

(2) a bank’s financial investments in its assessment area,²⁸ and

(3) a bank’s services in a given assessment area, evaluating their availability and effectiveness in delivering retail banking services,²⁹ or

(4) as an alternative, a submitted strategic plan.³⁰

CRA is enforced when the regulatory agencies evaluate the applications of financial institutions for deposit facilities, because the regulatory agencies are expected to consider the financial institution’s CRA score when evaluating the application.³¹ Community and consumer groups have criticized the regulatory agencies for not penalizing the banks when they failed to receive an adequate score;³² therefore, in an attempt to improve their

scheme of CRA evaluations. See id.

²⁷. See 12 C.F.R. § 563e.22 (1999).
²⁸. See id. at § 563e.23.
²⁹. See id. at § 563e.24.
³⁰. See id. at §563e.27. The Strategic Plan option is one that allows the financial institution to submit a CRA plan to the regulatory agency, outlining measurable goals against which it subsequent CRA performance would be evaluated. See id. Measurable goal have been defined by the OCC as the number of loans, dollar amounts, geographic locations of activities, or benefits to low- and moderate-income areas or individuals. See Interagency Q&A (visited Feb. 7, 1999) <http://www.ffiec.gov/cra/qa/sect27fg.htm>. Prior to submitting the plan, the financial institution must solicit feedback from local community organizations regarding the proposed assessment measures. See id. See also infra notes 90-103 and accompanying text (discussing the pros and cons of adopting the strategic plan option.)
³¹. See 12 U.S.C. § 2903(a)(2) (1994). The application for a deposit facility can be an application for one of several things: a charter for a national bank or Federal savings and loan association, deposit insurance in connection with a State bank, a savings bank, a savings and loan association, or a similar institution, establishing a domestic branch or similar facility with the ability to accept deposits of regulated financial institutions, or relocation of the institution’s home office or a branch office. See 12 U.S.C. § 2902(3) (1994).
³². See 58 Fed. Reg. 67,466, 67,467 (1993). Similar complaints were voiced by
evaluation process the regulatory agencies have placed more emphasis on the outcome of the evaluation rather than the paper intensive process of the evaluation itself.33

B. Assessment Area Problem

Each of the evaluation methods adopted by the regulatory agencies share one common theme: their evaluation of a financial institution's performance in a designated geographic assessment area.34 The assessment area is defined by the financial institution, but it must adhere to the guidelines established by the CRA.35 Traditional "brick and mortar" banks, are able to meet these requirements by defining their assessment area based upon geographic proximity to their bank's physical facilities, such as its branch offices or ATMs; however, changing conditions in the financial marketplace are challenging these traditional assessment area designations.36

An increase in bank consolidations, which has created such mega banks as First Union Corporation and Bank of America, has required regulators to develop new strategies to evaluate these large financial institutions.37 The OCC, which is responsible for

---

33. See id. In 1993, the four regulatory agencies, at the request of the President, conducted a series of public hearings across the nation where they enlisted suggestions from members of financial institutions as well as members of the community organizations who police these institutions. See id. As a result of these suggestions, the four agencies revamped their evaluation process to its current form. See id. See also supra notes 27-31 and accompanying text (explaining current OTS evaluation plan).

34. See 12 C.F.R. § 563e.22-27 (1999).

35. See id. at § 563e.41. The geographic assessment area must consist generally of one or more metropolitan statistic area (MSA) and include the geography in which the savings association has its main office, branches, and deposit-taking ATMs, as well as the surrounding geography in which the savings association has originated or purchased a substantial portion of its loans. See id.

36. See Kegler, supra note 2, at 439-440.

37. See id. Over a twenty-two year period from 1975 to 1997, the number of banking institutions in the nation declined from 18,679 to 11,077, a decline of over forty percent. See Robert B. Avery, Raphael W. Bostic, Paul S. Calem, & Glenn B. Canner, Trends in Home Purchase Lending: Consolidation and the Community Reinvest-
regulating these national banks, conducts an individual evaluation of each of the national bank’s state subsidiaries.\textsuperscript{38} Conducting separate evaluations of the individual subsidiaries allows the OCC to conduct a more complete evaluation of the bank’s record in each state.\textsuperscript{39} In addition to examining the individual subsidiaries, the OCC also gathers data that illustrates the bank’s compliance record within each of the region’s individual MSAs.\textsuperscript{40}

Regulators have also demonstrated flexibility in creating a CRA exception for wholesale\textsuperscript{41} or limited purpose savings institutions.\textsuperscript{42} Recognizing the difficulties placed upon these specialized institutions by the other tests, regulators have adopted a community development test to evaluate their CRA performance.\textsuperscript{43} In addition, regulators have expanded their evaluation


\textsuperscript{38} See Community Reinvestment Act Performance Evaluation, First Union National Bank of North Carolina, May 1997[hereinafter Evaluation First Union]. The OCC evaluates each of First Union’s ten subsidiaries separately and publishes a separate performance evaluation for each. See id.

\textsuperscript{39} See Kegler, supra note 2 at 439.

\textsuperscript{40} See Evaluation First Union, supra note 38. The evaluation of the First Union National Bank of North Carolina (“FUNB-NC”) also examined each of the state’s 10 MSAs. See id.

\textsuperscript{41} See 12 C.F.R. § 563e.12(v) (1999). Wholesale savings associations are defined by the OTS as saving associations which are not in the business of extending home mortgage, small business, small farm, or consumer loans to retail customers. See id. See id. at § 25.12 (defining wholesale banks according to the OCC). In addition, the association must receive designation by the OTS to qualify as a wholesale association, which requires the association to file a request in writing to the OTS, at least three months prior to the proposed date of designation. See id. at § 563.25(b). Once designated by the OTS as a wholesale savings association, the designation remains in effect until the savings association requests revocation of the designation or until one year following notification by the OTS that the designation has been revoked. See id.

\textsuperscript{42} See id. at § 563e.25. The OTS defines limited purpose savings associations as saving associations that offer a narrow product line to a regional or broader market. See id. at § 563e.12(n). An example of a narrow product line would be a saving association that deals exclusively in credit card loans or in motor vehicle loans. See id. Similar to wholesale savings associations, limited purpose savings associations must be designated as such by the OTS, which requires the savings association to file a request in writing at least three months prior to the proposed effective date of the designation. See id. at § 563e.25. This designation also remains in effect until the savings association request revocation or until one year following revocation by the OTS. See id. See also id. at § 25.12(w) (defining limited purpose banks, according to the OCC).

\textsuperscript{43} See id. The community development test, which is currently limited to wholesale or limited purpose banks, evaluates a bank’s community development lending, qualified investments, or community development services. See id.
areas to encompass the broader statewide or regional area that
includes the institution's original assessment area. This allows
the wholesale or limited purpose institution to remove the
boundaries created by its original assessment area.

Similar to wholesale and limited purpose banks, Internet
banks are also challenged with the need to define a geographic
assessment area. In 1977, "brick and mortar" banks were the
norm, but recently, nontraditional banks, using alternative meth-
ods such as mail, telephone, and the Internet, have begun to
change how banks collect deposits. Without the traditional
brick and mortar sites, the geographic assessment area does not
logically apply, because the community of an Internet bank can
be as vast as the Internet itself. Thus, Internet banks could po-
tentially service customers around the nation, while maintaining
their headquarters in a small affluent isolated town.

1. Early Attempts to Solve The Problem

Traditionally, regulatory agencies have allowed banks to
define their own assessment areas within specified guidelines.

44. See id.
46. See Beetham, supra note 3, at 928-930.
47. See Ellen Seidman, Remarks by Ellen Seidman, Director, Office of Thrift
Supervision at the Consumer Bankers' Association Annual Conference, Arlington, VA
[hereinafter Seidman Remarks]. Ellen Seidman, director of OTS, outlines the
problems facing CRA evaluators as they begin evaluating nontraditional banks,
such as Internet banks, in a speech given at the Consumer Banker's Association
Annual Conference in Arlington, Virginia. See id.
48. See Beetham, supra note 3, at 930.
49. See Jennifer Kingson Bloom, Puzzler: What's CRA Duty of an On-Line Bank;
Banks, Regulators Ponder 'Reinvesting' in a Cyberspace 'Community', AM. BANKER, Jan.
7, 1997 at 19. As stated by Stephen M. Cross, Deputy Comptroller for Community
and Consumer Policy, "The issue of assessment is an arcane one. Does the concept
of an assessment area, as laid out in our regulations, give us enough flexibility to
conduct CRA examinations that are meaningful at Internet banks whose customers
are geographically far removed from banks' branches?" Jennifer Weitzman, Regu-
lators See Alterations in CRA Because of Changes Forced by On-Line Banking, AM.
50. See 12 C.F.R § 563e.41 (1999). "A savings association shall delineate one or
more assessment areas within which the OTS evaluates the savings association's
Early Internet banks have used this concept of self-defining assessment areas to ensure compliance with the CRA. A common approach was used by Telebank, an early pioneer in Internet banking, which used the area surrounding its Arlington, Virginia, headquarters to define its assessment area.

Other Internet banks have taken different approaches. For example, in December of 1988, Canadian Imperial Bank of Commerce (CIBC) applied to the OCC for a United States bank charter to open an Internet bank based in Orlando, Florida. CIBC entered into an agreement with Winn Dixie Stores, under the brand name Marketplace Bank, to establish banking kiosks in Winn Dixie’s Florida stores. The OCC designated Marketplace as a large bank for CRA purposes and evaluates the bank’s CRA performance based upon the lending, investment, and service tests. In its application, CIBC indicated that it will offer unsecured consumer loans to individuals of all income levels, and that its ATMs would be available for use by all Winn Dixie customers, including customers who do not have accounts with the bank. CIBC plans to centralize its banking kiosks

---

51. See Kevin Kane, The Challenge of Regulating Cyberbanks, MORTGAGE BANKING, Nov. 1998 at 42.
52. See Community Reinvestment Act Performance Evaluation, Telebank, 5 [hereinafter Telebank Evaluation].
54. See id.
55. See id. Each banking kiosk will have a phone line connected to the bank’s call center in Maitland, Florida, and some of the kiosks will be connected to the Internet that will allow customers to transact business through the bank’s Web site. See id. In addition, a deposit-taking automated teller machine (ATM) will be located adjacent to the banking kiosk, to allow customers to make deposits at the remote sites. See id.
56. See id.; 12 C.F.R. §25.22 - 24 (1999); see also supra notes 27-30 and accompanying text (referring to the equivalent regulations promulgated by the OTS). The OCC notes in its application approval that CIBC indicates that it may develop a strategic plan in the future. See CIBC Application, supra note 53.
57. See CIBC Application, supra note 53. Consumer groups voiced concern with the ability of CIBC to serve the credit needs of low- to moderate-income individuals, because this class of customer is unlikely to have access to the Internet. See id. The OCC notes that CIBC will provide free Internet access at many of its kiosks. See id.
within the Orlando area; therefore, it designated the Orlando MSA as its initial assessment area, noting that as the bank expands its base of kiosk centers, its assessment area will be re-evaluated.58

Another Internet bank, Compubank uses a different approach to solve the assessment area problem.59 Compubank received preliminary OCC approval as a limited purpose bank because it offers deposit products and payment related services that are different from the traditional loans normally evaluated under the CRA.60 In addition to designating Compubank as a limited purpose institution, the OCC also allowed Compubank to define its assessment area as the Greater Houston MSA, which is the area surrounding its Houston headquarters.61 Thus, to meet its CRA requirements, Compubank plans to develop community investment opportunities that will allow it to provide computers and computer training to the schools within the Greater Houston MSA.62

58. See CIBC Application, supra note 53. Some community groups have criticized the OCC and CIBC for allowing CIBC to designate the Orlando MSA as its assessment, because the bank receives deposits from across the nation. See id. In response to this criticism, the OCC has declared that CIBC's delineation of its initial assessment area is in accordance with CRA regulations and as conditions change, the assessment area will be reevaluated. See id.

59. See OCC Conditional Approval 253, Decision of the Office of the Comptroller of the Currency on the Application to Charter Compubank, National Association, Houston, Texas (Aug. 20, 1997) available in 1997 WL 581004 [hereinafter Compubank Application]. Compubank is the first national bank that delivers its products and services solely through electronic means to apply for a charter with the OCC. See id. Compubank targets customers between the ages of 18 and 49 who own personal computers, and who use ATMs, hoping to draw them away from the traditional brick-and-mortar type banks by offering low- or no-fee electronic banking with "more personalized customer service." Id.

60. See id. See also, 12 C.F.R. § 563e.25 (1999) (defining a limited purpose savings association).

61. See Compubank Application, supra note 59.

62. See id. Compubank also plans to seek other qualified community development service opportunities, listing Minority Enterprise Small Business Investment Companies, credit counseling small business incubation projects, and special bonds designed to offer mortgage loans to low- and moderate-income individuals as potential projects. See id.
2. Critics Are Outraged

Many community groups have responded to the Internet banks with criticism.\(^6\) Groups, such as New York based Inner City Press/Community on the Move (ICP), believe that Internet banks such as Telebank, which receives deposits from customers nationwide, should be required to meet the needs of low- and moderate income people nationwide.\(^6\) They criticize the OTS for allowing Telebank to designate its “community” as the affluent Arlington County that surrounds its headquarters when Telebank receives only 5.9 percent of its total deposits from Arlington County residents.\(^5\) ICP claims that by allowing Telebank to restrict its CRA commitments to Arlington County, the OTS is removing money from the CRA duties in the cities in which Telebank actually receives its deposits.\(^6\)

In addition to community advocacy groups, many conservative Congressional leaders, particularly Senate Banking Committee Chairman Phil Gramm,\(^6\) are outspoken against the CRA, but for different reasons.\(^6\) These Congressional leaders believe that the CRA is an “over-regulation” of financial institutions.\(^6\) In particular they are opposed to subjecting financial institutions to the CRA’s burdensome administrative provisions, which they believe are unduly costly to smaller financial institutions.\(^7\)

---


\(^6\) See id. See also Inner City Press’ Community Reinvestment Reporter (last modified Feb. 7, 2000) <http://www.innercitypress.org/crreport.html> (criticizing OTS for allowing Telebank to limit its assessment area to its headquarters location when it uses nationwide television ads to expand its customer base).

\(^5\) See Telebank Evaluation, supra note 52, at 5.


\(^6\) Phil Gramm(R) is the senior Senator from Texas, and the Senate Banking Committee Chairman. See Rehm, supra note 5.

\(^6\) See id.

\(^6\) See id.

\(^7\) See Kisha Blackwell, Gramm’s Vision: *Financial Services Modernization Law Passes in February*, AMERICA’S COMMUNITY BANKER, Feb. 1, 1999, at 10. As stated by Congressman Bill McCollum, vice chair of the House Banking and Financial Ser-
Acknowledging past mistakes and questioning the ability of geographically based CRA exams to suffice in this age of technological advancement, OTS Director Ellen Seidman has proposed several solutions which may improve her organization's (and potentially other agencies') ability to evaluate an Internet bank's CRA compliance. According to Seidman, one option would be to redefine the assessment areas focusing on the location of the financial institution's customers instead of its branches.

Regulatory agencies traditionally have focused their evaluations on the lending activities of a financial institution within an area defined by the location of its main office, branches, and Automated Teller Machines (ATM). By adopting Seidman's new definition of an assessment area, the Internet banks would be able to designate their assessment areas based upon the location of their on-line customers. Successful implementation of this option would require the regulatory agencies to establish threshold customer levels in order to save banks from having to designate as customer areas locations where there may only be a small number of customers.

Another important component of this option would be its

---

71. See Seidman's Remarks, supra note 47. Seidman outlined different methods for attacking the geographic problem facing Internet and other non-traditional banks during a speech given to the Consumer Bankers' Association Annual Conference in Arlington, Virginia. See id. It is important to note that Seidman's proposals are merely suggestions on ways to deal with the growing problem, none of which has been approved by any of the regulatory agencies. See id.

72. See id. at 3.

73. See 12 C.F.R. § 563e.41(b) (1999).

74. See Seidman's Remarks, supra note 47, at 4.

75. See Claire Chapman, Internet Meets CRA, FIN. MODERNIZATION REP., May 17, 1999, at 1. These benchmarks would assist regulators, because it would be an administrative nightmare to require regulators to assess a bank on CRA compliance where every customer resides. See id. "If you have one customer making deposits in Alaska, that should not trigger CRA requirements for the region," states Janis Smith, senior public affairs specialist for the OCC. Id.
ISSUES IN LENDING

ability to change as the Internet bank develops and expands its customer base.76 Seidman believes to properly enforce the CRA, regulatory agencies must broaden their enforcement, expanding the size of or increasing the number of their assessment areas as financial institutions expand their customer base.77 This idea is consistent with the way in which other regulatory agencies have attacked the problem created by financial institutions that operate in the national marketplace, such as Citigroup or Bank of America.78 OCC officials evaluate the megabanks' CRA compliance on a continuous basis, breaking down each institution's performance by region or subsidiary.79 Breaking the evaluation into regional evaluations creates a more manageable process for the regulators.80

In 1978, Congress created a similar type of exception for financial institutions whose primary customers were military personnel.81 Congress allowed these institutions to define their community based upon their military customer base,82 but such a designation may draw criticism.83 Internet users generally are middle- to upper-income families; therefore, to define an assess-

77. See id. Using Seidman's assessment of State Farm's thrift CRA compliance as an example, it can be argued that Seidman intends to allow regulatory enforcement to expand as the financial institutions expand their customer base. See id. Currently, OTS addresses State Farm's CRA compliance based upon their activity in the area which surrounds their Bloomington, Indiana, headquarters, but "OTS will evaluate this institution's performance as it grows and expands to other states and regions ... even if there is only one main assessment area." Id.
78. See Kane, supra note 51, at 49-50; see also Community Reinvestment Act Performance Evaluation, Bank of America, NT, & SA, Sept. 30, 1997 (where the OCC issues ratings for each of the 12 different states in which Bank of America operates).
79. See Kane, supra note 51, at 50. See also supra notes 38-40 and accompanying text (explaining how the OCC evaluates First Union Bank Corporation).
80. See Kane, supra note 51, at 50. OCC officials believe that evaluating Internet banks on a regional basis will be easier, because they lack the volume of national megabanks, which require a state-by-state breakdown. See id.
82. See id. The code states that "a financial institution whose business predominately consists of serving the needs of military personnel who are not located within a defined geographic area may define its entire community to include its entire deposit customer base without regard to geographic proximity." Id.
83. See Beetham, supra note 3, at 926.
ment area based upon on-line user location would exclude exactly those neighborhoods that the CRA intends to protect.\textsuperscript{84} Recognizing this potential problem, Seidman proposes an evaluation procedure which prevents financial institutions from delineating those areas "where their CRA performance looks good."\textsuperscript{85}

A second option proposed by Seidman would allow financial institutions to satisfy their CRA compliance through community development lending, investment, and services outside of their assessment area.\textsuperscript{86} This option has been eagerly pursued by some of the earlier Internet banks.\textsuperscript{87} Currently, the OTS and other regulatory agencies grant this option to wholesale or limited purpose savings institutions, in an effort to ease the burden upon these specialized institutions.\textsuperscript{88} This exception applies to many of the foreign banks which operate as non-insured wholesale institutions within the United States, but as many of these foreign banks have begun to expand into Internet banking, they have drawn criticism from local community groups for their ability to use this exempt status to evade CRA compliance.\textsuperscript{89}

A third option proposed by Seidman urges banks to take advantage of the already available strategic plan.\textsuperscript{90} The strategic plan is a five-year plan which must include measurable goals\textsuperscript{91}

\begin{footnotesize}
\begin{itemize}
  \item {84} See id.
  \item {85} Seidman's Remarks, supra note 47, at 4. Seidman calls this practice of delineating areas where CRA performance looks good as "cherry picking." Id.
  \item {86} See id. at 3.
  \item {87} See James Peterson, Web Banks Confront CRA Compliance, FUTURE BANKER, July 1998, at 32. See also supra notes 59-62 and accompanying text (explaining how Compubank satisfied its CRA requirements as a limited purpose bank).
  \item {88} See 12 C.F.R. § 563e.25 (1999). Though it should be noted that the regulations state that the OTS will consider the qualified investments, community development loans, and community development services that benefit neighborhoods outside of the assessment area "if the savings association has adequately addressed the needs of its assessment areas." Id. See also id. at §§ 25.25, 228.25, and 345.25 (promulgating regulations by the OCC, the Federal Reserve, and the FDIC).
  \item {89} See Chapman, supra note 75. The article depicts the debate surrounding the OCC's approval of CIBC, a bank which enjoyed wholesale status in the United States prior to attempting to create an Internet bank in Orlando, FL. See id. The OCC based its approval on CIBC's kiosk based assessment area designation. See supra, notes 54-59 for a full explanation of CIBC's CRA plan.
  \item {90} See Seidman's Remarks, supra note 47, at 4.
  \item {91} In defining measurable goals, the OTS requires the financial institution to specify in its plans measurable goals for helping to meet the needs of low- and
\end{itemize}
\end{footnotesize}
by which the regulatory agency can evaluate the institution's CRA compliance.\textsuperscript{92} Prior to submitting the plan, the financial institution must seek suggestions from members of the public within its designated assessment area, and once the plan is developed, the institution must formally solicit public comment by publishing notice of the plan in a newspaper of general circulation in each of its assessment areas.\textsuperscript{93} Seidman is promoting this proposal, because it does not require any changes to the existing CRA; thus, regulators and financial institutions would not have to muddle through a period of uncertainty as changes were made to existing CRA regulations.\textsuperscript{94} Many bank consultants, in addition to Seidman, are urging financial institutions to take advantage of the current state of uncertainty and adopt the strategic plan option before Congress and regulatory agencies act to toughen compliance standards.\textsuperscript{95}

Although some have encouraged adoption of the strategic plan option, others believe it overburdensome and inefficient.\textsuperscript{96} In addition, the historical lending data utilized by banks to develop their strategic plans may create measurable goals which are

\textsuperscript{92} See 12 C.F.R. § 563e.27(f)(1) (1999). During the regulatory agencies' rewriting of their CRA guidelines in 1993, many of the community groups strongly encouraged the regulatory agencies to include this type of language in their revisions. See 58 Fed. Reg. 67,466 (1993).

\textsuperscript{93} See 12 C.F.R. § 563e.27 (1999). In addition to addressing measurable goals, the plan must also designate and explain the institution's assessment area. See id. Congress has allowed the financial institution to create one plan to service all of its assessment areas or to develop more than one plan to service a single assessment area. See id.

\textsuperscript{94} See Rehm, \textit{supra} note 76.

\textsuperscript{95} See Peterson, \textit{supra} note 87, at 32. "I'd be very aggressive in offering regulators a CRA plan now," states Jerry Comizio, a D.C. attorney who works with banks to resolve CRA compliance issues. \textit{Id}.

\textsuperscript{96} See Rehm, \textit{supra} note 76. Seidman admits that few institutions are using the strategic plan, because "[t]he [strategic plan] option is perceived as more work than it is worth." \textit{Id}.
unrealistic for Internet banks thereby ensuring lower than desired CRA scores. Critics have also directly attacked OTS's evaluation procedures, accusing them of being time-consuming to the extent that banks are inhibited from gaining approval of their submitted strategic plans.

Seidman has addressed some of this criticism, asserting that for nontraditional financial institutions, the strategic plan proposal adds flexibility to an otherwise regimented system. Utilizing a strategic plan allows a financial institution to "customize" its CRA exam, which should make the strategic plan option appealing to developing Internet banks. The Internet bank can emphasize the performance measure that is best suited to its local community thereby creating measurable goals which are more easily obtainable. Though it does not completely solve the assessment area problem, since Internet banks still must designate an assessment area to satisfy the requirements of the strategic plan, it does allow the Internet banks to adopt a CRA plan which places less emphasis on activities which it conducts within its assessment area and more emphasis on programs and activities it conducts nationwide.

IV. TURF WAR: WHO REALLY REGULATES?

Though Seidman has been applauded for taking the initiative to propose solutions to the problems created by Internet banking, she has also received heavy criticism from Congressional leaders, particularly Senate Banking Committee Chairman Phil Gramm, for overstepping her authority. Congressman Gramm and others believe that if the OTS or any of the other regulatory agencies were to implement these proposals, they

97. See Kane, supra note 51, at 50.
98. See Rehm, supra note 76.
100. Id.
101. See id.
104. See, supra note 5.
would be overstepping their legislative authority.\textsuperscript{105} Although Congressional leaders recognize the need for financial legislation that addresses the growing problem with the CRA, they do not support Seidman’s proposals.\textsuperscript{106}

The criticism appears to be partly due to Congressional Republicans’ desire to ease the administrative burdens of the CRA, a goal which Senator Gramm and others assert Seidman’s proposals do not achieve.\textsuperscript{107} In addition, many Congressional leaders are claiming that the regulatory agencies do not have the statutory authority to enact these proposals without Congressional approval, which Congress is reluctant to give.\textsuperscript{108} Many Congressional officials assert that Seidman’s proposals are contrary to the original intent of the CRA, which was established to require banks to “meet the credit needs of their local communities.”\textsuperscript{109}

This battle between Congressional intentions and regulatory actions has been an ongoing struggle in the financial marketplace.\textsuperscript{110} At its inception, Congressional leaders intended to use the CRA to promote reinvestment by financial institutions in their local communities.\textsuperscript{111} This sparked debate between the CRA’s sponsor, Senator Proxmire,\textsuperscript{112} and financial institution regulators, whom the Senator accused of being against the proposed legislation “in character.”\textsuperscript{113}

\textsuperscript{105.} See id. \\
\textsuperscript{106.} See id. \\
\textsuperscript{107.} See id. \\
\textsuperscript{108.} See id. As Senator Gramm states, “Your [Seidman’s] proposed alternatives -- which include ‘customer-based’ assessment areas, or expanding the scope of the community development test -- seem to suffer from a serious problem: a lack of statutory authority.” See id. \\
\textsuperscript{109.} Id. Congressional leaders again refer to the notion of localism, a notion which many believe dominated Congressional thinking during the debates which surrounded the inception of the CRA in 1977. See supra notes 21-22 and accompanying text. \\
\textsuperscript{110.} Macey & Miller, supra note 18, at 299. \\
\textsuperscript{111.} See id. \\
\textsuperscript{112.} Senator William Proxmire(D) of Wisconsin was the author of the CRA in 1977. See Beetham, supra note 3, at 913. \\
\textsuperscript{113.} Macey & Miller, supra note 18, at 299. During the floor debate concerning the CRA, Senator Proxmire attempted to discredit the regulatory agencies’ opposition to the CRA by addressing their unwillingness to enforce the existing discrimi-
This debate as to who has the authority to establish guidelines to allow Internet banks to operate within the framework of the CRA produces three logical choices, each with its own distinct ability to influence a certain aspect of the debate. The three possibilities are: Congress, the regulatory agencies, or the Internet banks themselves. The next section will discuss each of the group's abilities to establish guidelines for the CRA evaluations and what steps they have taken to allow Internet banks to meet the requirements of the CRA.

A. Congress

As previously stated, the purpose of the CRA indicates that Congress intended to provide a means to ensure that financial institutions meet the credit needs of their local communities, paying particular attention to the low- to middle-income areas. However, the legislation does not specifically dictate how "local communities" are to be defined.

Congress designed the CRA to inhibit financial institutions from receiving deposits from struggling neighborhoods and reinvesting them in wealthier less risky neighborhoods within their local community. Unfortunately, the Internet has undermined the local markets which Congress so desperately wanted to preserve. Internet banks have the ability to reach customers anywhere on the globe; thereby giving every bank the potential to reach national markets like Citigroup or Bank of America currently do.
In 1999, Congress passed the Gramm-Leach-Bliley Act of 1999 ("Gramm-Leach Act"). The purpose of this legislation is to enhance competition in the financial services industry. Congress leaders used this bill to reduce some of the unnecessary burdens placed upon financial institutions by existing legislation. Some Congressional leaders specifically targeted the CRA, asserting that many of the CRA’s procedures are unnecessary and overburdensome particularly on smaller financial institutions. Congressional leaders believe that this new legislation will address the criticisms of the CRA’s unenforceability; by requiring federal regulators to prohibit banks from participating in new financial affiliations authorized under the Gramm-Leach Act unless the bank received a score of satisfactory or better on its most recent CRA evaluation.

Congress also reduced the administrative burden that the CRA places on small, rural banks, and savings and loans, whose total assets are less than $250 million. Smaller institutions are no longer subject to annual CRA evaluations. Instead the evaluations will be every four or five years depending upon their most recent CRA evaluation score.

Though Congress has chosen to address certain problems plaguing the enforcement of CRA, it is important to note that it did not address the issue of Internet banks. By not addressing
the issue of Internet banks, Congress has presented the regulatory agencies with a dilemma. They must appease Congress, thereby leaving the CRA in its current form and face the growing criticism of the community groups, or they must change the CRA and face a potential court battle with the financial institutions for overstepping their legislative authority.

B. Administrative Agencies

Congress has created a difficult situation for regulatory agencies such as the OTS, which must develop a method to evaluate Internet banks' compliance with CRA regulations without giving Congress the impression that the agency is significantly altering the structure of the existing CRA legislation. In addition, the agencies must accommodate the needs of the financial industry by avoiding regulations which may hamper or stifle the industry's innovation. The agencies must also be mindful of community watch dog groups which constantly demand increased accountability of financial institutions and are often at odds with the conservative members of Congress.

When Congress passed the CRA, it gave ultimate authority for establishing evaluation guidelines to four financial


133. See supra notes 104-118 and accompanying text.
134. See supra notes 63-70 and accompanying text. The text explains the pressure placed upon the regulatory agencies by the Community groups who are requesting that the CRA be strengthened against Internet banks. See id.
135. See supra note 104-118 and accompanying text.
136. See Rehm, supra note 76. The administrative officials, such as Director Seidman, must deal with the developing situation created by banks as they advance into the computer age without putting themselves "in the place of Congress and seek(ing) to make laws." Id. at 2.
137. See Technology and Banking, supra note 1. In his statement before the House Subcommittee, Mr. Kamihachi explains how technology is changing the make up and delivery of banking services and "molding the structure of the industry." Id. He also explains how regulatory agencies, such as the OCC are faced with the dilemma of developing methods to regulate these new financial institutions without stifling the innovation which is currently driving the industry. See id.
138. See Rehm, supra note 5. In a letter to OTS Director Seidman, Senator Gramm explains that the Gramm-Leach-Bliley Act, is designed to remove the burdens of the existing CRA by exempting small banks from the reinvestment law and preventing community organizations from forcing banks into "big-dollar investments" to accommodate their social agendas. Id. at 2.
regulatory agencies. Over time, the regulatory agencies have established the means by which banks must maintain their CRA compliance, with each agency developing the guidelines to regulate its own particular section of the financial industry. Congress has taken a laissez-faire attitude to the regulation of the CRA, because in the four times it has amended the CRA, Congress has refrained from establishing its own set of guidelines for regulatory agencies to ensure bank compliance.

Historically, Congress has allowed the regulatory agencies to adapt their CRA guidelines to meet the changing needs of the financial community. The CRA has faced numerous challenges from critics, claiming that it was over burdensome to financial institutions, that it was inconsistent in its application, and that it lacked the necessary enforcement to achieve its intended goal. The regulatory agencies have responded by altering their enforcement strategies and developing new methods of evaluation intended to ease the administrative burden on the financial institutions while strengthening enforcement in order to reach the goals established by Congress. When the banking industry


140. See 58 Fed. Reg. 67,466 (1993). The four regulator agencies have established guidelines which are essentially identical; thereby creating a consolidated front in attempting to capture the intentions of Congress in their enforcement of the CRA. See id.


142. See 58 Fed. Reg. 67,466 (1993). The four regulatory agencies tasked with administering the CRA propose changes to the methods in which financial institutions are evaluated to determine CRA compliance. See id.

143. See Lawrence J. White, The Community Reinvestment Act: Good Intentions Headed in the Wrong Direction, 20 FORDHAM URB. L.J. 281 (1993). The financial marketplace has changed in recent years, making the intentions of Congress when enacting the law in 1977 almost obsolete. See id. at 284. In the 1990s, the number of banks operating in the financial marketplace has increased dramatically; thereby reducing the monopoly that local banks maintained over their surrounding communities. See id. This has weakened the banks ability or desire to “redline.” See id.

144. See 58 Fed. Reg. 67,466 (1993). To address the growing criticism, the four regulatory agencies changed the existing compliance scheme from the 12 points of CRA compliance that the financial institutions were evaluated against. The agencies adopted the three different types of CRA compliance testing: the lending, service and community development tests. See id.
or those who police the banking industry have demanded change, the agencies have evaluated these requests and attempted to respond in-kind.\textsuperscript{145}

C. Banks

In their initial evaluations of Internet banks, regulatory agencies have used geographically focused assessment strategies.\textsuperscript{146} The regulators have allowed the Internet banks to develop broad service areas, which has created a way for the banks to include low- and moderate-income areas within their boundaries.\textsuperscript{147} Using this traditional approach, many of the Internet banks have convinced regulators that their assessment area should be the community which surrounds their headquarters.\textsuperscript{148} Thus, in evaluating Security First Network Bank ("SFNB"), the nation's first Internet bank, regulators based their initial assessment on the community surrounding SFNB's Atlanta headquarters.\textsuperscript{149}

Confining the assessment areas of Internet banks to the regions that encircle their banking headquarters has drawn criticism from community organizations.\textsuperscript{150} The banks receive only a minimal amount of their deposits from their designated geographic area; therefore, they are accepting deposits from low- and middle-income communities across the nation, but only targeting their CRA efforts to the communities which are close to home.\textsuperscript{151}

This problem stems from the smaller Internet bank's reluc-
tance to embrace the notion of nationwide CRA assessment areas, which many of the larger banks, such as Citigroup and Bank of America, are already developing.\textsuperscript{152} This solution may not be a fair assessment measure for the smaller, less established Internet banks, but from the perspective of the community groups it is the only fair solution.\textsuperscript{153} Adopting a plan similar to the strategic plan option would allow the Internet banks to work with the regulatory agency and the community groups to develop an assessment area that is suitable to all concerned.\textsuperscript{154}

Banks may also begin to define their community nationally, which would also satisfy their critics.\textsuperscript{155} In doing so, Internet banks would hope that regulators would allow them the same leniency they allow wholesale and limited-purpose banks.\textsuperscript{156} This would allow banks to use community development projects in urban communities located within the same region or state as their headquarters to satisfy their CRA compliance requirements.\textsuperscript{157}

\section*{V. Conclusion}

As Internet banks grow in number, the question of how to evaluate their CRA compliance will become more important. By not addressing the problem in the recent banking legislation, Congress has passed this problem onto the regulatory agencies.\textsuperscript{158} Thus, the regulatory agencies working closely with the

\textsuperscript{152} See Kane supra note 51, at 50.
\textsuperscript{153} See id. SFNB acknowledged the difficulty facing developing Internet banks in their policy statement, claiming that defining their CRA assessment area with a national focus would be challenging for their bank. See id.
\textsuperscript{154} See id.
\textsuperscript{155} See Seidman Remarks, supra note 47, at 2. See also supra notes 59-62 and accompanying text that describes how Compubank uses its designation as a limited purpose bank to achieve its CRA goals. Internet banks would not need to be designated limited purpose banks as Compubank has done; instead, they would only need to be granted the leniency that the regulatory agencies have granted the limited purpose and wholesale financial institutions. See Seidman Remarks, supra note 47, at 3.
\textsuperscript{156} See id.
\textsuperscript{157} See id.
Internet banks and their community group critics must solve the dilemma.

In 1995, the regulatory agencies demonstrated their ability to address the problems that changing circumstances imposed upon the CRA, by adapting their procedures as the needs of the financial community changed. Presently, the growing number of non-traditional financial institutions, such as Internet banks, necessitates additional changes to CRA’s evaluation procedures, and by working with the Internet banks, the financial regulatory agencies are in the best position to make these adjustments.

The regulatory agencies should encourage Internet banks to adopt the strategic plan approach which, though administratively burdensome, will allow the banks to tailor their CRA evaluation to the particular strengths of their individual bank and the customers it serves. In addition, the agencies should use the methods adopted by early successful Internet banks, such as CIBC and Compubank as models for new startup banks to follow. By adopting these solutions to the CRA problem, the regulatory agencies will be able to preserve the spirit of the CRA as Congress intended it. The geographic constraints imposed by the 1977 definition of a bank’s assessment area do not apply to modern Internet banks, but by allowing Internet banks to adopt a method of CRA compliance which best address the needs of the particular Internet banks, the regulatory agencies will ensure that these new banks adhere to the spirit of the CRA.

WILLIAM M. KEYSER