The Community Reinvestment Act After Fifteen Years: It Works, But Strengthened Federal Enforcement is Needed

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I. Introduction and Key CRA Elements

The Community Reinvestment Act ("CRA") was adopted fifteen years ago to curb redlining, the discriminatory mortgage lending practice whereby lenders refuse to make loans to certain geographic areas based on the racial or ethnic composition of those areas or the age of their housing stock. The law reflected the Congressional judgment that lending institutions were overlooking important credit needs within their local communities and that the banking regulators' efforts were inadequate to deter this neglect. Although the law was rarely enforced, some organized community groups made it work. Today's climate of bank restructuring presents new challenges to making the law effective.

The CRA is premised upon the view that although they are privately capitalized, banks and savings institutions are subject to an underlying charter obligation to serve the banking needs of their local communities. These public obligations form the quid pro quo for the extensive government backing that is provided to these types of financial institutions (federal backing for deposit insurance, access to the Federal Reserve System's lender of last resort facility).

Further, the CRA's enactment represented a rebuke to the federal

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banking supervisors for their lack of interest in policing the industry's lending practices. Indeed, the CRA appears to have been aimed as much at modifying the behavior, norms, and attitudes of the regulators as it was at changing the practices of the lending industry.⁴

Thus, the CRA implicitly sanctioned an important role for local citizen monitors, whose “regulation from below,” as it has been termed, was believed to be needed to augment the traditional enforcement apparatus (i.e., “regulation from above”).⁵ In places where local community groups have made active use of the law, the CRA has proven to be a remarkably effective tool in opening access to credit for those who have felt previously shunned by the banking system. It is estimated that the CRA has resulted in the commitment by lenders of over $30 billion to poor communities around the country.⁶

Despite its apparent success, or perhaps because of it, the CRA remains a controversial law. Banking trade groups originally fought the law’s passage in 1977, arguing that it would lead to federally mandated credit allocation. Community groups long have complained about indifferent regulators and weak enforcement. During the past Congress, elements of the banking industry mounted yet another offensive against the CRA, complaining that the law imposed costly regulatory burdens on them. Although these efforts to curb the CRA were thwarted, they are likely to be renewed.⁷

The new administration’s position on the CRA will be critical to the success of the industry efforts. During the campaign, President Clinton pledged that he would seek to strengthen the CRA’s enforcement, to the delight of community advocates. Yet, the banking interests are hopeful that the President will be sympathetic to their pleas for regulatory relief for their industry, including scaling back on some of the CRA’s requirements they find especially burdensome.

As indicated above, the CRA clarifies the public responsibilities of federally insured financial institutions to their local communities. The law does this in three important ways. First, it affirms the obligation of banks and savings institutions to help meet the credit needs

⁶ Based on information compiled by the Center for Community Change and other sources.
(both housing and non-housing) of the entire communities in which they are chartered, including low- and moderate-income areas.\footnote{12 U.S.C. § 2901 (1988 & Supp. III 1991).}

Second, the CRA directs banking and thrift regulators\footnote{Federal Reserve Board ("FRB"); Office of the Comptroller of the Currency ("OCC"), Federal Deposit Insurance Corporation ("FDIC"), and the Federal Home Loan Bank Board, now the Office of Thrift Supervision ("OTS").} to evaluate as part of their regular on-site examination the extent to which lenders are meeting local credit needs.\footnote{12 U.S.C. § 2903 (1988 & Supp. III 1991).} Regulations issued jointly by the four agencies to implement the law require them to rate these institutions on the basis of their community reinvestment records.\footnote{See 12 C.F.R. § 25 (OCC); Id. § 228 (FRB); Id. § 345 (FDIC); Id. § 563e (OTS).} Third, the CRA permits regulators to impose sanctions on lenders with weak records. The law directs the appropriate federal banking agency to “take [an institution’s community reinvestment record] into account in its evaluation of an application for a deposit facility by such institution.”\footnote{12 U.S.C. § 2903 (1988 & Supp. III 1991).}

Regulations for the CRA generally focus on assessing the lender’s community reinvestment record in serving underserved credit needs. Bank examiners are directed to look at thirteen assessment factors.\footnote{The assessment factors include the following: (a) activities conducted by the lender to ascertain the credit needs of its community; (b) originations of residential mortgage loans, housing rehabilitation loans, home improvement loans, and small-business or small-farm loans within its community, or the purchase of such loans originated in its community; (c) the geographic distribution of credit extensions, credit applications, and credit denials; (d) participation, including investments, in local community development and redevelopment projects; and (e) participation in governmentally-insured, guaranteed, or subsidized loan programs for housing, small businesses, or small farms.} The assessments factors are grouped into five performance categories for evaluation purposes.\footnote{(1) ascertainment of community credit needs; (2) marketing and types of credit offered and extended; (3) geographic distribution and record of opening and closing offices; (4) discrimination and other illegal credit practices; and (5) community development activities. For an extended discussion of the five performance categories and the thirteen assessment criteria therein, see Richard Marsico, A Guide to Enforcing the Community Reinvestment Act, 20 FORDHAM URB. L.J. 165, 199 (1993).} Lenders are rated for their record within each performance category and then given one of four possible composite ratings to reflect their overall CRA performance: outstanding, satisfactory, needs improvement, and substantial non-compliance.

Generally, the CRA exam cycles vary by agency and with the size of the lending institutions. The most recent CRA ratings affect the frequency of the exam cycle — ranging from six months for lenders with poor performance ratings on their last exams, to every twenty-
four months for large national banks, to as long as six or seven years for small community banks.

To a large extent, examiners rely on information provided by the lending institutions themselves. Procedures permit examiners to talk to community groups and public agencies about the community reinvestment records of local lenders. These procedures, however, are used with varying degrees of frequency, depending on the particular agency and the proclivities of the individual examiner.

II. CRA Improvements Produce New Successes

A. Complaints About Inadequacies in the CRA Enforcement Process

Almost from the outset, community advocates criticized the way in which the regulators enforced the CRA. The agencies were viewed as being too cozy and too protective of the institutions they supervise to enforce the new requirements effectively.

In 1988, the regulators' laxity in CRA enforcement came under heavy criticism from Senator Proxmire, then chairman of the Senate Banking Committee and the law's original sponsor. Proxmire, at the first formal oversight on the CRA to be conducted by his committee, opened with this observation:

Let's face it. Redlining hasn't disappeared. Neighborhoods are still starving for credit. Too many bankers still think the grass is greener elsewhere . . . . Regulators seem to think that we're all living in Lake Woebegone. Like the children of the fictional village, U.S. lenders are all above average. Almost all get high ratings year after year and almost none are ever held back. And I ask myself, how is it that so many neighborhoods are continuing to fail while so many lending institutions are continuing to pass. This record, needless to say, raises questions about whether the examination process has succeeded.15

Testimony presented at the oversight hearings emphasized the extent to which the practice of rating inflation had hampered the use of the examination process to encourage lenders to better address their CRA responsibilities. The panel learned that the CRA examination had become virtually fail-safe for lenders, with a paltry 2.4% of the 26,000 CRA examinations conducted by federal regulators from 1985-1988 resulting in poor grades being assigned (i.e., less than satisfactory or below).

Although Proxmire's committee made no formal recommendations, the hearings appear to have had an impact on regulatory enforcement. Within twelve months, the four agencies issued new CRA policy guidelines in which they emphasized that deeds and not merely promises would receive greater weight in future CRA examinations.\(^\text{16}\) In addition, the following year Congress amended the CRA to require federal regulators for the first time to disclose their written CRA evaluations and ratings for individual lenders.\(^\text{17}\) The disclosure requirement was intended to spur reforms in the CRA evaluation process.

\section*{B. Leverage for Neighborhood Groups}

From the standpoint of grassroots citizens' organizations, unquestionably the most important feature of the CRA is that it provides implicit standing for them to intervene in lender expansion application proceedings. Banking law, either by statute or regulation, routinely provides opportunities for public comment on pending financial institution expansion requests (mergers, acquisitions, branch openings and relocations of existing facilities). To reach a final decision, regulators have broad discretion in weighing an applicant's record, but evidence presented through the public comment process must be reviewed. While the CRA itself is vague and the regulatory process complex, the law has provided community groups with substantial leverage to end disinvestment practices and to obtain commitments from lenders to undertake new community reinvestment initiatives.

When an expansion application is submitted by a lender with a weak CRA record, the regulators have the option to deny the requests or approve the request conditioned upon the applicant undertaking specific actions to improve its record. For example, in 1989 the Federal Reserve Board denied the merger application by the Continental Bank Corporation of Illinois to acquire an Arizona bank.\(^\text{18}\) The Center for Community Change, a national non-profit organization that advises community groups involved in CRA activities, estimates that since the CRA's inception in 1978, federal regulators have denied approximately fifteen expansion requests on CRA grounds and granted conditional approval imposing CRA requirements in roughly fifty to sixty cases.


Interestingly, despite its popularity with local groups, the CRA challenge has rarely worked the way its drafters originally envisioned it would. During the law's initial ten years, only eight of an estimated 40,000 expansion applications acted upon by federal regulators during this period were denied on CRA grounds. Instead, the effectiveness of the CRA challenge process usually rests with the ability of the community group leaders to use the law to negotiate an agreement under which applicants make specific commitments to improve their community reinvestment records. If such an agreement is reached, the community group protestant withdraws its challenge and the application continues to be processed by the regulator. Community groups viewed negotiated settlements as preferable to outright application denials, or even to the types of conditional orders typically imposed by the regulators.

Often these negotiated settlements are quite detailed, spelling out the steps to be taken by the applicant lending institution to step up its activity in low- and moderate-income and minority communities. Although neither sanctioned nor enforced by the federal regulators, this informal dispute resolution mechanism is viewed by community groups as the heart of the CRA process. It is estimated that since the CRA’s enactment, community groups have negotiated more than $7.5 billion in commitments from lenders. Moreover, lenders have made an additional $23 billion worth of unilateral commitments to community development lending while their expansion requests were pending before federal regulatory bodies. Thus, the CRA is credited with resulting in total commitments in excess of $30 billion to poor communities throughout the country, far exceeding whatever conditions would have been imposed by regulators.

The commitments obtained from lenders have been impressive on paper, but community groups have learned that translating promises into actual performance is a demanding task. Nevertheless, the increasing numbers of successful reinvestment partnerships stemming from CRA agreements provide ample testament to the importance of this strategy to local communities.

C. CRA Settlement Agreements And Unilateral Lender Initiatives

Many community advocates believe that the negotiated CRA agreements are the best means for ensuring changes in the manner in which lenders operate in low- and moderate-income and predominately minority neighborhoods. And indeed, the elements contained

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19. Based on estimates developed by the Center for Community Change.
in many agreements clearly exceed the types of provisions featured in conditional approval orders by the regulators. Two types of negotiated agreements and examples of lender initiated reinvestment commitments are discussed below.

In 1984, three large lending institutions, the First National Bank of Chicago, Harris Trust and Savings Banks, and the Northern Trust Company, announced they had committed $153 million over a five year span as a result of negotiations with the Chicago Reinvestment Alliance, a grouping of neighborhood organizations and not-for-profit community development corporations. The funds were targeted for single family and multi-family housing, mixed use buildings, and small business loans. The agreements were extended at the end of the initial period for an additional five years and expanded to commitments totalling $200 million.  

By almost any measure the agreements have succeeded. By August 1989, $117.5 million was generated for 572 loans, producing or maintaining nearly 5,000 housing units. All but one loan were performing. The programs provided new loan products, developed new markets for the banks involved, and established models for future partnerships between lenders and non-profit organizations.

Another approach has been pioneered by the Association of Community Organizations for Reform Now (“ACORN”), a national membership organization representing lower income people in communities throughout the country. ACORN has sought to apply principles from collective bargaining between unions and employers to the community reinvestment field. Thus, ACORN has used “pattern bargaining” to negotiate similar types of reinvestment agreements with different lenders. Through this approach ACORN has been able to introduce a standardized home ownership program into different communities in which it has local chapters.

The ACORN program includes the use of flexible, below market rate mortgage products, the use of non-standard underwriting criteria that recognizes the different sets of needs for low-income households, the provision of counseling both before and after the loan application process, and the application of the land trust model of ownership which is built into the mortgage instrument to ensure long-term af-

22. Id. at 26.
Fordability for low-income families. ACORN has succeeded in convincing lenders to use the program in such cities as Brooklyn, Chicago, Dallas, Philadelphia, Phoenix, St. Louis and Washington, D.C. The ACORN program has greatly increased the approval rates for mortgages submitted by low income families, while default rates remain comparable or even lower than other mortgages made by participating lenders.

The spate of CRA agreements has influenced some lenders to "jump the gun" and unilaterally announce expanded reinvestment efforts they plan to undertake. These efforts are intended to offset expected community group challenges to future expansion requests. Thus, NCNB and C&S Sovran announced that it would set aside $10 billion for an expanded community reinvestment initiative at the time it was seeking to merge to become NationsBank. Chemical Bank of New York made a similar commitment while seeking Federal Reserve Board approval for its merger with Manufacturers Hanover Trust Bank.

Not to be outdone, Bank of America announced its plans for a ten year, $12 billion commitment for CRA-related activities at the time of its proposed merger with Security Pacific. The bank's program included: (a) $750 million per year for loans to targeted low-income census tracts and the expansion of special mortgage products for lower income and minority borrowers; (b) $150 million per year for development and long term financing of low-income housing; (c) $100 million per year under government-guaranteed and other special programs for small businesses; (d) $200 million per year for conventional small business loans under $50,000; and (e) $12 million annually under a consumer loan program with modified underwriting and credit terms intended to accommodate the needs of lower income families.23

Most CRA activists are skeptical of unilateral lender initiatives, especially those that do not appear to result from careful assessments of the credit needs of their local communities. Whatever their limitations, the fact that these initiatives occurred when they did indicates the great importance that lenders attach to insulating themselves from criticism during pending restructuring requests.

III. The Impact of Public Disclosure of CRA Evaluations and Ratings

In 1989, Congress amended the CRA to require federal banking

23. Id. at 26-27.
regulators to disclose to the public written CRA evaluations and ratings for individual lending institutions. The publication of information on lender performance expanded the scope of the CRA and established it as a "right to know" law.

Ratings disclosure reflected a basic Congressional dissatisfaction with the adequacy of the CRA examination process in the absence of community group challenges to expansion requests. Congress hoped that putting this information into the hands of the public would: (1) exert pressure on the regulators to improve the quality of the examinations and curb rating inflation; and (2) provide the public and lenders alike with a better understanding of the underlying performance standards employed by the regulators in assigning the CRA ratings.24

The amendment's sponsor in the House of Representatives, Representative Joseph P. Kennedy, Jr., commented:

Although bank examination reports, including the CRA exam reports, have traditionally not been made available to the public, the [House Banking] Committee found public disclosure of the CRA exam reports to be essential if the public and bankers are to acquire a clear understanding of the standards used by the agencies in the CRA evaluations and ratings. It is only by re-viewing how the agencies have evaluated the facts and rated CRA performance in specific cases that one can gain a sense of the underlying standards.25

Senator Proxmire also underscored the need to reform the CRA exam process: "Regulators are inclined to be friendly and favorable and supportive of the people they regulate. Disclosure is a cleansing, disciplining force here."26

The preliminary experience to date suggests that public disclosure has somewhat curbed the rating inflation that was prevalent in the mid-1980's. Since the ratings began to be published in mid-1990, the regulators have assigned fewer high grades and more low ones. Yet, much less is known about how the shift in the ratings distribution has altered the lending practices of banking institutions.

Over the course of the first twenty-four months that public disclosure was in effect (July 1, 1990 to June 30, 1992), about two-thirds of all lenders were examined for CRA purposes (9,520 out of approximately 14,400 covered by the law). Of the lenders rated, 929 (9.7%)
were rated as outstanding; 7,565 (79%) as satisfactory; 939 (9.8%) lenders were rated as needing to improve; and 87 (.9%) banks were judged to be in substantial non-compliance. Overall, this represents about an 11% "failure" rate (needs to improve or substantial non-compliance). Thus, the post-disclosure rating distribution represents nearly a five-fold increase in the failure rate from the three year period immediately preceding adoption of the new requirement, in which only about 2.5% of lenders were found to have failed.27

Federally-insured savings institutions fared worse than commercial banks. Figures released by the Office of Thrift Supervision indicate that fully 19% of savings institutions received a failing grade (272 out of 1,370 examined), compared to failure rates of 13.7% for the Office of the Comptroller of the Currency (182 out of 1,316 examined), 9% for the Federal Deposit Insurance Corporation (460 out of 5,454 examined), and 9% for the Federal Reserve Board (112 out of 1,280 examined). Assuming these patterns hold, by the time the first cycle of the CRA ratings are made public, about 130 lenders will have received substantial non-compliance ratings. Perhaps another 1400-1500 lenders will have received needs improvement ratings. These institutions could provide an important database to study the subsequent effects of ratings disclosure on lender performance.

A. Is More Enough?

There appears to be little question but that the regulators and lenders are devoting considerably more attention to the CRA than they did prior to institution of the disclosure requirements. Whether increased attention, however, translates into demonstrable improvements in lending performance is more difficult to track.

At the FDIC, the average time devoted to a CRA exam has increased from seven hours in 1989 to thirty hours in 1991. At the OCC, the total hours spent on the CRA exams increased from 12,064 in 1989 to 84,840 in 1991. The Federal Reserve and the OTS also showed similar increases, with the exception of the time devoted to very large lenders. Surprisingly, for institutions with over $1 billion in assets examiner time devoted to the CRA exams actually dropped during this same two year period.28

Similarly, the CRA ratings disclosures have propelled many lenders to improve their outreach and communications with local community groups. In fact, a whole industry of CRA consultants has sprung up

27. BROWN, supra note 3, at 9.
28. Statistics compiled by the Center for Community Change.
to advise lenders on methods for boosting their CRA records in order to obtain favorable ratings from their regulator. But the question remains whether ratings disclosure is improving the flow of credit to underserved segments of our society.

One reason for the lack of certainty about the correlation between ratings and lending performance is the uneven quality of the written evaluation reports prepared by the agencies. The 1989 amendment to the CRA made clear that the disclosure documents should not be boilerplate or conclusionary summaries, but rather that they must set forth the facts supporting the regulator’s conclusions for each assessment factor.

Staff from the Housing Subcommittee of the Senate Banking Committee reviewed a large sampling of the CRA evaluations drawn from each agency and representing lenders of all sizes and from all regions of the country. The subsequent report issued by the Subcommittee found that “[t]he evaluations reviewed justify for the most part the harsh criticisms about their quality. The evaluations range from excellent to unacceptable. Unfortunately, the excellent ones are few and inadequate ones are the norm.29

The Subcommittee suggests that one reason for the lack of quality in the evaluation reports is attributable to the failure of the regulators to adopt well-articulated standards for evaluating lender performance. The panel recommended that the quality of the evaluation reports be substantially improved.

B. Ratings Disclosure and Greenlining

Public disclosure of the CRA ratings and evaluations appears to be stimulating some new approaches for encouraging improvements in lender performance. One strategy centers on using the placement of deposits and investments in banking institutions with demonstrated commitments to community reinvestment. “Greenlining” strategies were employed to deter redlining even prior to the CRA’s enactment and state and local units of government have experimented with the placement of public funds based upon social criteria. However, in the past these strategies were greatly handicapped by the lack of uniform criteria for rating individual lenders.

Seventeen state governments and nine large cities have instituted some type of linked-deposit program that ties the placement of public funds to some specific lending activity requirements. Cincinnati, Los Angeles, Newark, New York, Pittsburgh and St. Paul are among the

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29. See CRA Status Report, supra note 21, at 48 (emphasis added).
municipalities whose linked deposit ordinances use the CRA evaluations as part of their weighting criteria.

Moreover, the public disclosure requirements have opened up the opportunities for churches, labor unions, professional associations, and charitable organizations to use the CRA performance ratings to guide them on the placement of their funds. For example, the American Bar Association became the first professional association to adopt policies for itself and for the encouragement of its members to bank with lending institutions with good CRA records.

The potential reach of the CRA ratings information is great. American Banker, a banking trade daily, surveyed consumers to determine the impact of a lender's community reinvestment record on their choice of institutions. The newspaper found that one-third of all consumers surveyed said they would switch their accounts from lending institutions with a poor CRA record. The figure was even higher among minority consumers, one-half of whom said they would be influenced in where they banked by a lender's CRA record.

IV. Legislative Proposals to Modify the CRA

In response to banking industry urgings, several legislative proposals were offered during the past Congress to limit the reach of the CRA. These proposals generally fell into two categories: (1) providing safe harbors from challenges to expansion requests for lenders receiving passing grades from the regulators; and (2) exempting small banks from the CRA's coverage altogether. Neither of these measures had been acted upon before Congress adjourned.

A. Safe Harbors

The safe harbor provision would narrow the situations in which community groups could contest lending institution expansion requests. This proposal is strongly supported by some of the nation's largest banks, especially those who have been victims of recent CRA challenges to their mergers and acquisitions. These interests argue that lenders receiving good ratings from federal regulators should be protected from the delays associated with community groups using the expansion application process to raise CRA issues.

Community advocates, on the other hand, vehemently opposed proposals to limit public input into the application review process. These groups contend that the public would have no way to comment on proposed bank actions that would have great impact on their community. According to this view, the opportunity for public comment should not be determined solely by the CRA ratings, which even the
regulators would concede are far from perfect and in many cases not particularly current (the OCC examines some national banks as infrequently as once every seven years).

Additionally, although it is frequently asserted by safe harbor proponents that the CRA challenges result in unwarranted and costly delays in processing, the facts appear to speak otherwise. According to the FRB, the average processing time for applications under a CRA protest has been two days shorter than the average processing time for non-protested applications processed by the agency (seventy-three versus seventy-five days).30

B. Small Bank Exemption

Small and rural banks also have been actively advocating their exemption from the CRA. Depending on the formula used, the exemptions discussed could exempt as much as 87% of the banking industry from the CRA’s coverage. The rationale for this proposal is that small banks, almost by definition, must be community-minded and, therefore, should not be burdened by requirements like the CRA.

The evidence suggests that size is not a perfect measurement of how well a lender is serving local credit needs. For one thing, not all small banks are active lenders in their communities. For example, a recent report by the House Banking Committee found that banks with under $100 million in assets, which are generally defined as “community” banks, had a lower loan to asset ratio than did banks whose asset size exceeded $10 billion (55% compared to 63%). Second, there is data to suggest that smaller banks are the worst CRA performers. According to K.H. Thomas Associates, a consultant to banks, 71% of the banks that received the lowest CRA ratings category between 1990 and 1992 had assets of less than $100 million.

Smaller banks assert that an exemption from the CRA is justified because the law imposes a heavy and unnecessary regulatory burden on them. These claims are part of a broader industry effort to seek curtailment of government regulation of banks in general and of smaller banks in particular.31 A recent American Bankers Association survey cited the CRA as the greatest regulatory concern.

Community advocates, however, respond that bankers are using the regulatory burden issue merely as a stalking horse to win curtailments in the law’s coverage. They note that the CRA and its implementing regulations do not require lenders to file any reports at all. Under the

30. See CRA Hearings, supra note 26, at 356-57.
31. See, e.g., Macey & Miller, supra note 7; White, supra note 7, at 282.
regulations for the CRA, lenders need only adopt a “CRA Statement,” post a “CRA Notice” in the lobbies of their branches, and maintain a “CRA Public File” in their main offices. In the CRA Statement, the lender simply describes its lending territory and the types of credit it offers. In the CRA Notice, the lender simply states how the public can get a copy of the CRA Statement and where to send comments about the institution’s CRA performance. The CRA Public File simply contains public comments received and the lender’s response.

The Office of Management and Budget (“OMB”) recently confirmed the slim compliance burden associated with the CRA. In 1991, OMB analyzed the hours that banks regulated by the Federal Reserve spent complying with various consumer compliance regulations. Of all the laws reviewed, OMB reported that the CRA was the least burdensome — on average, OMB found that the banks studied spent only six hours per year complying with the law.32

Notwithstanding the actual compliance burden associated with the CRA, the reinvestment law seems to generate a special animus that other consumer protection laws do not. Why is this? Two factors appear to be fueling recent lender efforts to weaken the CRA: the onset of the new public disclosure requirements, and the compliance techniques employed by the regulators.

Undoubtedly, public disclosure of the CRA ratings has generated a great deal of anxiety among lenders. These institutions know that the stakes are greater than ever to pass regulatory muster. Those that have already received poor grades worry about the impact of these ratings on their future expansion requests. They also worry about how these grades will be received in the “court of public opinion,” which may turn out to be a far tougher regulator than the federal agencies. Meanwhile, the lenders that have yet to be examined (about one-third of all banks and savings institutions) know that between ten to eleven percent of them will receive a failing grade and they are worried about it.

Another source of frustration appears to have stemmed from the message lenders received from their regulators in the wake of ratings disclosure. At first, they were told to “document, document, document” all the activities undertaken in fulfillment of their CRA responsibilities. Many lenders apparently inferred from this that the regulators were more interested in paper trails than they were in actual lending. As a result, the regulators unwittingly contributed to

the perception that expanded record keeping was required in the new CRA environment.

The American Bankers Association appears to have been guilty of overzealousness as well in the guidance it provided to its members. The trade association itself developed a 475-page CRA compliance manual. The guidebook suggests that lenders maintain fifteen separate files and various subfiles to document their CRA performance. The manual also provides more than eighty pages of suggested forms to use to satisfy agency examiners. It was this type of guidance that led the Cranston Subcommittee to suggest: "the banking industry itself may be inadvertently contributing to the problem of emphasizing documentation rather than performance." 33

However, by June 1992, the regulatory agencies had issued formal policy guidelines instructing lenders that no new documentation was needed for lenders to pass CRA muster:

The documentation expected by the agencies is primarily that which is useful to the institution's own management needs. In a well-managed CRA program a financial institution's board of directors and management use relevant documentation to make sure their programs are working as planned. The agencies can use this documentation in their assessment of the institution's CRA performance and make sure that a proper level of management oversight of the institution's CRA program is in place. . . . Information that the institution prepares and maintains for its own management use should demonstrate the level of CRA performance. The agencies do not expect detailed documentation of every contact or finding to effectively demonstrate performance. 34

In the same joint guidance statement, the agencies indicated that they evaluate a bank on its actual performance and not on the paper trail it produces:

CRA ratings should be based on an institution's performance (primarily the granting of loans, also technical support for community development efforts, and other activities that help make credit available to members of the community), not on the amount of documentation it maintains. The lack of documentation is not sufficient basis on which to grant a poor rating if performance can otherwise be determined to be satisfactory or better. 35

Thus, supporters of the CRA argue that the banking trade groups'
real agenda goes well beyond paperwork — that the groups simply do not like the type of public regulation that the CRA represents, and that the groups believe the CRA impermissibly dictates how lending institutions must conduct their business.

V. Conclusion: What Is Likely To Happen Next?

The next few years are likely to be important ones for the CRA. For much of its history, the CRA has been administered by regulators who have been hostile or indifferent to carrying out the law's intent. President Clinton indicated during the campaign that he viewed the CRA more positively than did his recent predecessors. And indeed, the new administration will have an important, perhaps historic, opportunity to enable the CRA to achieve its full potential.

Much of what is needed is tougher, more aggressive enforcement of the existing CRA law. It is not the lack of laws, but rather lackluster enforcement of the CRA, that has contributed to the continuance of neighborhood disinvestment and lending discrimination. The appointment of agency chiefs committed to the CRA's full and effective implementation would go a long way toward stimulating the flow of credit to capital-starved neighborhoods and rural communities.

Traditionally, Presidential appointments to fill the banking regulatory agencies have been drawn from a small pool — the financial services industry itself, large law firms and Wall Street. These slots have been filled with individuals who know or care little about the rules governing community reinvestment or fair lending enforcement. Consequently, the regulators have tended to view the constituency to be served as the industry itself, rather than the broader public interest.

The Clinton Administration can use its appointment power to break with the past record of neglect. A progressive set of regulators willing to put the public interest first could accomplish much. The following are a few suggestions for improving CRA enforcement:

1. Focus the CRA examination process more closely on verifiable lender performance by conducting tougher, more rigorous assessments and increasing the opportunities for public input into the evaluation process.
2. Make greater use of available enforcement powers, such as cease and desist orders and denials of expansion requests, for lenders with weak CRA records.
3. Standardize the CRA performance evaluation reports. The reports should contain statistical information to provide the public with information about the extent to which lending institutions make mortgages, small business loans and small farm loans to low-
and moderate-income and minority borrowers and neighborhoods (or the equivalent rural area designation).

(4) Improve access to the CRA performance evaluations. The public should be able to obtain copies of the CRA reports by contacting a toll-free telephone number.

(5) Hold public hearings on all lender expansion requests raising significant CRA issues or affecting multiple-state markets areas.

Perhaps more than anything else, the new administration needs to appreciate the role of citizen monitors in the CRA process. The experiment with the use of "de facto" bank examiners to augment the formal regulatory apparatus has been the strongest component of the CRA. "Regulation from below" has nudged lending institutions to pay more attention to the capital needs of underserved communities and consumers. The new regulators must be careful not to ignore the importance of community-based watchdogs of the CRA in their efforts to reform the administration of the reinvestment law.

At the same time, community groups must keep pace with the changing CRA environment. Local citizens' groups have successfully negotiated affirmative lending agreements, usually by threatening to stop or delay mergers by intervening in the federal regulatory process. With many mergers on the horizon, lending institutions have become more sophisticated in dealing with community groups. The new CRA and Home Mortgage Disclosure Act requirements have made the compliance process much clearer. Both of these factors could reduce the leverage that community groups have learned to exercise.

As a result, grassroots organizations are attempting to adapt their strategies. The advent of the CRA ratings disclosure has led to speculation from some quarters that the action will now shift away from application challenges to the examination process. Indeed, some recent policy pronouncements from the regulators indicate that the CRA evaluations will be controlling the way they handle community group challenges to expansion requests. Consequently, savvy community groups are already experimenting with new approaches before they seek to bring CRA challenges.

For example, community groups are starting to collect and review the CRA ratings and performance evaluations from their local banks. The Massachusetts Affordable Housing Alliance recently released an in-depth report analyzing the CRA ratings received by state-based lending institutions. Meanwhile, the Delaware Community Reinvestment Action Council complained to federal regulators about the rating assigned to a local lender, as have Chicago and Los Angeles community groups. These groups recognize that unless they chal-
lengage ratings they disagree with, their silence is likely to be interpreted as tacit acceptance of the accuracy of agency evaluations, which may impair future challenges the groups may seek to bring.

At the same time, deregulation, new technologies and increased competition, both foreign and domestic, are dramatically changing how lending institutions view their geographic markets and deploy their assets. In the near future, we can expect to see a substantially different banking system — one with larger and fewer banks operating multistate branch networks and offering a wide array of financial services. The CRA remains one of the few tools that communities have to ward off the possible disinvestment consequences of full-fledged bank restructuring. Yet, the CRA may not be sufficient to withstand all these new forces.

Despite the perception by many bankers that lending in low and moderate income areas is too risky and unprofitable, the experience over the last fifteen years has debunked these myths. Numerous examples of successful community reinvestment partnerships that have come into being since the CRA’s enactment demonstrate that lending to the residents of older urban neighborhoods is both prudent and profitable for banking institutions. These CRA success stories provide proof that the law is most effective when financial institutions integrate it fully into their mission and their business strategy. Some bankers now even acknowledge that if more in their industry stuck to the less glamorous but sounder policies of lending to their local communities, their industry today would be in far sounder financial condition.

The CRA will likely need to be adapted to cover bank entry into nonbanking activities (securities and insurance underwriting and mutual money market funds). Similarly, geographic expansion through interstate branching would appear to necessitate changes to the CRA, such as requiring nationwide institutions to spell out their commitments to individual communities and to provide more detailed reporting of their lending activities within individual markets. To be sure, the CRA will continue to draw criticism from certain circles, but as a recent Congressional report on the status of the CRA concluded, "[t]he message is clear. CRA is a law whose purpose is as relevant today as it was when it was written 15 years ago. This issue is not the law, but its implementation and enforcement."37

36. See White, supra note 7, at 285-87, (arguing that banks must “cross-subsidize” the risky and unprofitable CRA-induced services, by earning above-normal profits in other operations).

37. See CRA Status Report, supra note 21, at 6.