Western New England Law Review

Volume 29 *29 (2006-2007)*
Issue 1 *SYMPOSIUM: ISSUES IN COMMUNITY ECONOMIC DEVELOPMENT*
Article 4

1-1-2006

ADVANCING THE CRA—USING THE CRA'S STRATEGIC PLAN OPTION TO PROMOTE COMMUNITY INCLUSION: THE CRA AND COMMUNITY INCLUSION

Cassandra J. Havard

ADVANCING THE CRA—USING THE CRA'S STRATEGIC PLAN OPTION TO PROMOTE COMMUNITY INCLUSION: THE CRA AND COMMUNITY INCLUSION

CASSANDRA JONES HAVARD*

INTRODUCTION

Banks, banking regulators, and community organizations have spent nearly thirty years interpreting and re-interpreting the simple but ambiguous mandate of the Community Reinvestment Act (CRA). The statute imposes an affirmative duty requiring "regulated financial institutions [to] have continuing . . . obligation[s] to help meet the credit needs of the local communities in which they are chartered."[1] The CRA was met with much resistance and lax enforcement for almost a decade. Active protest from community groups,[2] a more defined CRA exam,[3] and innovative, profitable lending strategies,[4] have resulted in a dramatic increase in community reinvestment dollar commitments and in loans to low- and

---

* B.A., Bennett College; J.D., University of Pennsylvania School of Law; Associate Professor of Law, University of Baltimore School of Law. I am grateful to Western New England College School of Law, Eric Gouvin, Associate Dean for Academic Affairs and Professor of Law at the Western New England College School of Law, for the invitation to participate in the symposium, and for the assistance of Margaret Solis and the *Western New England Law Review*.

1. Community Reinvestment Act, Congressional Findings and Statement of Purpose, 12 U.S.C. § 2901(a)(3) (2000).

2. Marion A. Cowell, Jr. & Monty D. Hagler, *The Community Reinvestment Act in the Decade of Bank Consolidation*, 27 WAKE FOREST L. REV. 83, 88 (1992) (explaining how community groups were able to halt a bank's proposed expansion by showing poor CRA performance).

3. When Congress amended the CRA, the four banking agencies issued joint regulations for the first time. E.L. Baldinucci, *The Community Reinvestment Act: New Standards Provide New Hope*, 23 FORDHAM URB. L.J. 831, 847-52 (1996) (comparing the revised CRA tests measuring a bank's lending, investment, and service with the former twelve factors used to evaluate CRA lending).

4. Andrew Jacobson, *The Burden of Good Intentions: Intermediate-Sized Banks and Thrifts and the Community Reinvestment Act*, 6 U.C. DAVIS BUS. L.J. 119, 135-36 (2006) (discussing a 2000 Federal Reserve study on the performance and profitability of CRA-related lending, reporting that 84 percent of CRA lending is profitable).

moderate-income (LMI) and minority households.[5]

Banks have accepted reinvestment as a means of meeting the convenience and credit needs of communities and preventing urban deterioration. Yet, implementation and enforcement of the CRA remain problematic. The increase in lending has created another trouble—less vigorous and less qualitative enforcement. In an era of potentially lessened accountability due to almost laissez-faire enforcement, the CRA can benefit from increased use of regulatory enforcement powers and from more standardized performance reports.

The CRA is designed to make lending institutions more accountable to the communities they affect. By definition, accountability requires banks to have some input from constituent communities. Measuring the CRA's efficacy according to outcome—that is, the real improvement of physical infrastructures, maintenance of social and economic stability, and the actual influx of credit and investment capital into communities—is desirable.

The dilemma presented when balancing community participation and inclusiveness while preserving as much autonomy as possible for financial institutions is the subject of this article. Part I discusses the CRA's explicit and implicit objectives. Part II discusses the CRA's evaluative tools: the traditional three-part test and the strategic CRA plan. The three-part test measures a bank's actual performance in service, investment, and lending. As an optional way to comply with the CRA, the strategic CRA plan envisions that lenders will seek community input in setting five-year CRA objectives.[6] The strategic plan brings to the forefront the conflict and pressure that banks experience when community groups organize to halt an institution's merger or expansion plans based on past CRA performance. Part III discusses the potential pitfalls that can be produced by the CRA's obligations. Such obligations, if not carefully crafted, could limit the flow of capital into communities even from banks that are willing to reinvest. Efforts to increase capital must be paired with sensitivity to a community's redevelopment concerns. Vocal communities that are able to determine their sustainable economic need must have the opportunity to participate meaningfully in the funding process. The conflict between allowing communities to participate in shaping the bank's funding commit-

5. Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and its Critics*, 80 N.Y.U. L. Rev. 513, 569-73 (2005).

6. *See infra* Part II.B.

ments and requiring a bank to pledge its financial support in advance is discussed in Part III. Part IV discusses the definition and role of community participation and outlines various ways that communities can be better included in a bank's reinvestment process. The section concludes with a suggestion of factors to use in evaluating the level of community participation and inclusiveness. Part V discusses the importance of the strategic plan option to community participation.

I. THE CRA'S COMPLEMENTARY OBJECTIVES

The CRA's basic premise of making access to credit available across all neighborhoods is as relevant today as it was when the statute was passed. The CRA has evolved to have several complementary objectives: prohibiting redlining, halting community disinvestment, and protecting LMI borrowers.

> When Congress enacted the [CRA] in 1977 . . . . [t]he act easily could have been hailed as fundamental civil rights and business opportunity legislation, as the Act encouraged the fair treatment of potential borrowers regardless of race, ethnicity or geographical location. The CRA also expanded opportunities for the financial industry by establishing lending criteria that opened the door to a significantly greater credit market. [CRA lending policy is specifically aimed at] overcoming [the ingrained] financial policies within the banking and lending industry that limited access to credit and thereby wealth, based often on the race or ethnicity of the borrower or borrower['s] community.[7]

Similarly, the CRA complements national policies designed to revitalize severely economically depressed communities. Access to affordable credit is also a consequence of community reinvestment lending and arguably an implicit objective. CRA policymakers recognized that the credit markets were neither competitive nor diverse. The CRA is a limited government intervention in the financial-services market meant to address issues of market failure and inequity. Requiring that minorities and their communities be included in the mainstream economy was Congress's way of ensuring minimal equality of economic opportunity.[8]

---

7. Marcia Johnson, JaPaula Kemp & Anh Nguyen, *The Community Reinvestment Act: Expanding Access*, 12 KAN. J.L. & PUB. POL'Y 89, 89 (2002).

8. *See* Barr, *supra* note 5, at 523-24.

A. *Prohibiting Redlining*

When passed by Congress in 1977, the CRA was a direct response to the specifically identified practice of redlining.[9] Banks deliberately refused to lend to communities based upon the communities' racial makeup. Redlining is the historical practice of literally using a red pen to outline minority neighborhoods.[10] Loan officers were not to make loans to applicants who lived in redlined areas. Lenders impermissibly used race as a determinant of creditworthiness without any consideration of financial risk. While some scholars might define redlining as an illegal practice of discriminating based on geographic location, it is inconceivable that redlining was not race-based. Thus, the CRA is appropriately viewed as an anti-discrimination statute. As further evidence of the need to override the discriminatory practice, it is noteworthy that federal regulations now require that banks have a map available to visually display the locations of home loans that the banks have made.[11]

As a response to race-based discrimination, the CRA addressed the disconnect between the services offered by financial institutions and the financial needs of the local communities. The practice of redlining was blatant. The patterns in minority neighborhoods were then, and are now, consistent: an outright refusal to lend in minority neighborhoods; frequent denial of minority mortgage applications; policies of making loans only for high-minimum loan amounts; unusual delays in processing loans; and failure to give black loan applicants the same advice that is given to white loan applicants.[12] The refusal to look at a borrower's creditworthi-

---

9. *See* Cassandra J. Havard, *Synergy and Friction—The CRA, BHCs, the SBA, and Community Development Lending*, 86 KY. L.J. 617, 617 n.3 (1997-98) [hereinafter Havard, *Synergy and Friction*].

10. *See* Gary M. Swidler, Note, *Making the Community Reinvestment Act Work*, 69 N.Y.U. L. REV. 387, 390 (1994).

11. Patterns of residential segregation began in the United States at the behest of the federal government. The Housing Act of 1934 established the Federal Housing Authority (FHA) and the Department of Housing and Urban Development (HUD). The National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. § 1701 (2000)). HUD, in an initiative designed to develop housing for poor residents of urban areas, was also required by law to identify in each city specific areas and neighborhoods for different racial groups. There were areas in cities that were ineligible for federal mortgage lending because of the racial composition of the neighborhoods. *Id.*

12. *See generally* Elizabeth Renuart, *Toward One Competitive and Fair Mortgage Market: Suggested Reforms in A Tale of Three Markets Point in the Right Direction*, 82 TEX. L. REV. 421 (2003).

ness or qualifications was common among private lenders and the federal government, both of which justified collecting housing and demographic information in order to avoid areas of high risk.[13] Only with federal intervention through the CRA was the redlining problem highlighted and then slowly addressed.

B. *Community Disinvestment*

Equally offensive as the practice of redlining was the practice of community disinvestment.[14] Lenders refused to extend credit to redlined communities, but used the deposits from those communities to extend credit in other neighborhoods.[15] This practice was contrary to congressional intent, which was arguably to require banks to reinvest deposits in the communities in which they received deposits. Thirty years after the passage of the statute, however, the precise definition of "community" remains unclear.

Congress designed the CRA to help address issues of urban decay and housing deterioration. By accepting deposits from economically distressed communities and then making loans in communities that were more financially more stable, banks were contributing to the financial decay of economically distressed neighborhoods and were perpetuating a vicious cycle. Redlined neighborhoods experienced a decline in net worth because there was no influx of capital. When mortgage loans were offered in redlined communities, the terms were unusually harsh and oppressive. Poorly performing loans reinforce the view that a community has poor collateral and is not creditworthy. The poor performance of mortgage lending in certain neighborhoods creates unstable home-

13. *See* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 198-203; 209-13 (1985). Historical redlining has deep roots in the federal government. *See id.* at 197. Congress created the Home Owners' Loan Corporation (HOLC) during the Depression to help homeowners avoid foreclosure. *See id.* at 195-203, 215. In the three-year period following the Depression, HOLC provided new mortgages to one million homeowners across the country at risk of foreclosure. *Id.* at 196. HOLC mapped neighborhoods in particular cities by identifying the level of security for real estate investments. *Id.* at 199. These maps graded neighborhoods from first to fourth grade and colored fourth grade areas considered "hazardous." *Id.* at 195-209.

14. Craig E. Marcus, *Beyond the Boundaries of the Community Reinvestment Act and the Fair Lending Laws: Developing a Market-Based Framework for Generating Low- and Moderate-Income Lending*, 96 COLUM. L. REV. 710, 728-29 (1996) (distinguishing community disinvestment from race-based redlining historically and noting that redlining now refers to both racial discrimination and disinvestment).

15. *See* Willie Brown, Note, *The Forgotten Type of Capital: Addressing the Social Capital Deficiency in the Inner City*, 11 GEO. J. ON POVERTY L. & POL'Y 527, 550 n.166 (2004).

ownership rates. A spiraling decline in home ownership continues as potential new residents are denied the mortgage credit to purchase homes. The confluence of race and class is evident here, given that most minority communities, even today, continue to be areas of disinvestment.[16]

C. *Protecting Low- and Moderate-Income Borrowers*

In addition to its explicit purposes, the CRA has an implicit purpose of financial inclusion. It is an income-sensitive piece of legislation that protects all borrowers, regardless of race, who reside in LMI neighborhoods.[17] The CRA is intended to help overcome market failures and discrimination.[18] The CRA encourages the development of lending criteria that would promote individual fairness for borrowers and expand credit markets for banks. Implicit within the notion of fairer financial policies is the expansion of access to credit and to wealth. In this regard, the CRA is a tool used to close the wealth gap, providing access to those who are traditionally excluded from wealth-making activities and thereby addressing issues of poverty and deprivation.

The need for individual equality justifies the financial inclusion component of the CRA. The inability to access mainstream financial products, such as bank accounts and low cost loans, makes access to credit extremely costly. In turn, the high cost of credit and use of non-traditional lenders creates a cycle of financial loss and exclusion that leads to increased financial strain and unmanageable debt—a reiterative pattern with no visible end.

Banks, as credit-providers, make loans that either create more barriers or eliminate the ones that exist. Financial exclusion is often a symptom and cause of poverty. Conversely, financial inclusion encompasses the provision of appropriate financial products and services to groups of vulnerable people. This includes educating borrowers to provide them with the skills, knowledge, and understanding that will allow for better use of products and services.

---

16. Ted Sickinger, *American Dream Denied: When the Door Is Locked To Buying A Home*, KANSAS CITY STAR, Feb. 28, 1999, at A1, *available at* 1999 WLNR 7447313 (Westlaw).

17. Mae A. Cavoli, *Fair Lending Laws: The Growing Tension*, 115 BANKING L.J. 604, 608-09 (1998) (distinguishing a bank's obligation to offer a variety of low-income loan products from the obligation to provide loan subsidies for low- and moderate-income borrowers).

18. *See* Barr, *supra* note 5, at 519.

The CRA requires that all borrowers, including LMI borrowers, have access to fairly priced financial products.

Finally, the CRA is, in practice, a financial-inclusion statute. It requires that lenders engage in responsible lending, with every loan having an indirect goal of building wealth in traditionally underserved communities. In this regard, the statute should become more responsive to the environment in which the financial markets operate. Recognizing that safety and soundness are chief concerns in any lending decision, the statute must advance to evaluate CRA compliance in a more qualitative and objective manner. Specifically, CRA must provide LMI borrowers and LMI neighborhoods protection from practices that steer certain types of credit to certain borrowers and neighborhoods. Equality of access and equality of opportunity are best measured in a results-based enforcement regime. As argued below, the CRA should do more to ensure that banks are meeting discernible goals that have been embraced by the community.

Opponents of the CRA argue that it is really a credit-allocation statute.[19] They view the CRA's requirement that lending institutions meet the credit needs of their LMI communities as overly restrictive, unnecessary, and inefficient.[20] Opponents also criticize making credit available on favorable terms to undeserving borrowers. Others assert that the CRA promotes geographically restrictive lending that lacks diversity because it is highly concentrated in one area,[21] and that the CRA actually drives capital out of communities.[22]

An examination of CRA lending records has shown this complaint to be unfounded. Recent empirical studies evaluating present lending activities in LMI and minority communities reveal the opposite. LMI lending is profitable,[23] and racial bias in lending to LMI and minority communities is still prevalent.[24] Thus, the lend-

---

19. *See, e.g.*, Vern McKinley, *Community Reinvestment Act: Ensuring Credit Adequacy or Enforcing Credit Allocation?*, 4 REGULATION 25 (1994), *available at* http://www.cato.org/pubs/regulation/regv17n4/vmck4-94.pdf.

20. Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291, 295 (1993) (making an efficiency argument against enforcement of the CRA).

21. *Id.* at 295, 324.

22. *Id.* at 296.

23. *Id.*

24. African-American, Hispanic, Asian, and Native American homebuyers continue to face unprecedented levels of housing discrimination, geographic steering, lending discrimination, and discrimination in the automatic underwriting process. Giselle R.

ing practices that the statute aimed to redress now appear in old and new forms. The new regulation is not an efficient means of promoting low income lending because "[i]t drives capital away from poor neighborhoods by imposing a tax on those depository institutions foolhardy enough to do business in such communities."[25]

II. Measuring CRA Performance

Banks are subject to an annual CRA examination. During that exam, regulators assess whether the bank is meeting the credit needs of the community. Regulators use either the performance-based standard or the strategic business plan. The financial institution elects the method of assessment.

A. *The Performance-Based Standard*

In 1989, the federal banking agencies amended the CRA's assessment criteria.[26] Under the old regulations, banks were obli-

---

Finne, *Strengthening Mortgage Lending Discrimination Safeguards: The Requisite Need for Modernizing the Community Reinvestment Act*, 7 SCHOLAR 229, 231-32 (2005) (citing ERIN B. GODFREY ET AL., URBAN INST., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE 1 HDS 2000 (2002), *available at* http://www.huduser.org/publications/pdf/Phase1_Report.pdf). Discriminatory practices continue that effectively discourage minorities from applying for loans or that grant loans to minorities "under harsh, adverse loan terms despite creditworthiness." *Id.* The federal regulatory agencies responded by adopting a policy statement describing the general principles the agencies will consider in identifying discriminatory practices in lending and violations of the FHA and ECOA. Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266, 18268 (proposed Apr. 15, 1994).

25. Macey & Miller, *supra* note 20, at 296.

26. "Under the final rule, a performance-based evaluation system replaces the twelve assessment factors previously used to evaluate the CRA performance of financial institutions. A large retail bank receives individual scores on three separate tests." Havard, *Synergy and Friction*, *supra* note 9, at 635; *see* Community Reinvestment Act Regulations, 12 C.F.R. §§ 25.22(a), 228.22(a), 345.22(a), 563e.22(a) (2006). This evaluation focuses on three specific tests that measure lending, investment, and service. Havard, *Synergy and Friction*, *supra* note 9, at 635; 12 C.F.R. §§ 25.21(a)(1), 228.21(a)(1), 345.21(a)(1), 563e.21(a)(1) (2006). Although the categories are delineated, "[t]he compliance rating for each test is . . . ambiguous, [and] non-numerical." Havard, *Synergy and Friction*, *supra* note 9, at 636. The following excerpt describes the current evaluation process.

> The lending test evaluates the bank's lending performance. Although the test focuses primarily on direct lending activity, a bank may also request that the regulatory agency evaluate its indirect lending through its investments in loan pools, lending consortia, and subsidiaries. The lending test also evaluates the bank's lending practices to determine whether they are innovative and flexible.
>
> . . . .

gated to ascertain community credit needs and document their findings to the regulators. Regulators evaluated the banks on how well they made that assessment.[27] Under current regulations, banks need only collect information on community credit needs as a part of their own business plan development.

Under the performance-based assessment, there is an opportunity for community groups to comment on a bank's CRA compliance.[28] The regulators publish a quarterly list of banks to be examined for CRA compliance.[29] This publication requirement appears to allow community groups to make their opinions known to banking regulators during the CRA examination process.[30]

While the large retail bank has an option of using the performance test or the strategic business plan, the strategic business plan, as will be argued below, requires more community involvement in creating the bank's CRA goals, and is therefore more responsive to the actual fulfillment of the community's credit needs.[31]

B. *The Strategic Plan Option*

Banks have some flexibility in complying with the CRA under the strategic business plan.[32] The optional compliance program allows banks more "control and independence in the CRA regulatory process."[33] It also mandates community participation in the formation of a plan.[34]

A bank that elects CRA compliance under the strategic business plan must provide a detailed statement indicating how the

---

> The investment test evaluates whether the bank's lending has resulted in a benefit to its designated assessment area. After identifying the dollar amount of the institution's qualified investments, which is independent of the institution's capital, the innovation and complexity of those investments is considered. The qualified investments are then considered in connection with the community's credit needs and the institution's responsiveness to those needs.

Id. at 635-39 (citations omitted); *see also* 12 C.F.R. §§ 25.22(d)(3), 228.22(d)(3), 345.22(d)(3), 563e.22(d)(3).

27. 12 C.F.R. § 228.7(a) (1997).

28. Havard, *Synergy and Friction*, *supra* note 9, at 640-44.

29. 12 C.F.R. §§ 25.45, 228.45, 345.45, 563e.45 (2006).

30. *See* Richard D. Marsico, *The New Community Reinvestment Act Regulations: An Attempt at Implementing Performance-Based Standards*, 49 CONSUMER FIN. L.Q. REP. 47, 49-50 (1995). *See generally* 12 C.F.R. §§ 25.45, 228.45, 345.45, 563e.45; Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156, 22,168 (May 4, 1995).

31. Havard, *Synergy and Friction*, *supra* note 9, at 639-40.

32. 12 C.F.R. §§ 25.27(c)(1), (f)(1), 228.27(c)(1), (f)(1), 345.27(c)(1), (f)(1), 563e.27(c)(1), (f)(1).

33. Havard, *Synergy and Friction*, *supra* note 9, at 640.

34. *Id.*

bank plans to meet its CRA obligations.[35] Furthermore, the bank will be evaluated under the traditional tests for the first year.[36] After the agency has approved the plan and the plan has been implemented successfully, the bank may elect to forego the traditional CRA tests.

The strategic business plan must be approved by the banking regulators prior to an examination date.[37] The plan must include specific goals for attaining a "satisfactory" rating.[38] The bank will receive that rating if it has substantially achieved its goals. Likewise, a bank cannot obtain an "outstanding" rating unless it includes in its plan specific goals to achieve one. A bank may receive an "outstanding" rating if it has achieved substantially all of the goals outlined for an outstanding rating.[39] A bank that fails to meet its strategic business plan may choose to be evaluated under the traditional three-part test instead.[40]

Choosing the strategic business plan option provides the financial institution with measurable, attainable goals that the institution itself has developed in complying with the CRA. As an independently defined plan, the strategic plan directs the regulators' CRA evaluation to the identified performance goals. Choosing this plan for CRA compliance gives the institution the advantage of defining the performance measures that regulators will use in assessment.

A strategic plan may cover a period up to five years and must include annual, measurable goals.[41] Using this option to fulfill its CRA obligations, "a bank must [first] conduct informal meetings with the community [representatives in the designated assessment area] to identify [and assess the community's] credit needs."[42] Second, the bank must "establish specific, measurable goals."[43] Third, it must "solicit formal comments from the public on the plan"

35. *Id.* at 639-40.

36. *See* 12 C.F.R. §§ 25.27(a)(3)-(4), 228.27(a)(3)-(4), 345.27(a)(3)-(4), 563e.27(a)(3)-(4); Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156, 22,168 (May 4, 1995).

37. *See* 12 C.F.R. §§ 25.27(a), (e), 228.27(a), (e), 345.27(a), (e), 563e.27(a), (e).

38. 12 C.F.R. §§ 25.27(f)(3), 228.27(f)(3), 345.27(f)(3), 563e.27(f)(3).

39. *See* 12 C.F.R. §§ 25.27(f)(3), 228.27(f)(3), 345.27(f)(3), 563e.27(f)(3); Community Reinvestment Act Regulations, 60 Fed. Reg. at 22,169.

40. 12 C.F.R. §§ 25.27(f)(4), 228.27(f)(4), 345.27(f)(4), 563e.27(f)(4).

41. 12 C.F.R. §§ 25.27(c)(1), 228.27(c)(1), 345.27(c)(1), 563e.27(c)(1).

42. Havard, *Synergy and Friction*, *supra* note 9, at 640 (citing 12 C.F.R. §§ 25.27(d)(1)); *see* 12 C.F.R. §§ 228.27(d)(1), 345.27(d)(1), 563e.27(d)(1).

43. Havard, *Synergy and Friction*, *supra* note 9, at 640 (citing 12 C.F.R. §§ 25.27(c)(1)); *see* 12 C.F.R. §§ 25.27(f)(1), 228.27(f)(1), 345.27(f)(1), 563e.27(f)(1).

before submitting it to the regulator.[44] Finally, it must receive approval from the banking regulator.[45]

The strategic business plan encourages a bank to be innovative in developing its community lending plans. It also encourages involvement on the part of the community that the bank serves. This optional CRA program gives community participation a settled place in CRA enforcement. Previously, that participation had been on the back end—lenders entered into loan commitments to halt community protests and to obtain regulatory approval of mergers. Community groups are often seen as opportunists because they are able to hold up the regulatory approval process if no agreement is reached between the bank and the community group.[46] The strategic business plan changes the function and timing of community participation. The bank would consult community groups to define its CRA goals before submitting its plan to federal regulators.

Although the CRA business plan gives a bank[47] some choice in the evaluative method used to assess compliance, the examination still involves a significant amount of discretion on the part of the examiner. Therefore, approval of the plan does not mean that the regulatory agency will assess performance in the same way as the bank proposes. Furthermore, because the plan encourages innovation, regulators may unconsciously resist some proposals. Thus, "[t]he plan's short implementation time frame, mandatory public disclosure, and lack of specific guidance are all disincentives to institutions from attempting a CRA strategic [business] plan."[48]

III. Community Inclusiveness and Participation

The CRA recognizes the critical importance of input from underserved groups in the community. Thus, their involvement in

44. Havard, *Synergy and Friction*, *supra* note 9, at 640 (citing 12 C.F.R. §§ 25.27(d)(2)); *see* 12 C.F.R. §§ 228.27(d)(2), 345.27(d)(2), 563e.27(d)(2). The publication requirement mandates that the notice be put in a "newspaper of general circulation in each [of its] assessment areas" for a period of at least thirty days. 12 C.F.R. § 228.27(d)(2).

45. Havard, *Synergy and Friction*, *supra* note 9, at 640 (citing 12 C.F.R. §§ 25.27(a)(2), 228.27(a)(2)); *see* 12 C.F.R. §§ 345.27(a)(2), 563e.27(a)(2).

46. *See* Keith N. Hylton & Vincent D. Rougeau, *The Community Reinvestment Act: Questionable Premises and Perverse Incentives*, 18 Ann. Rev. Banking L. 163, 193 (1999).

47. The CRA requires insured depository institutions to comply with the statute's mandates. The CRA does not apply to non-bank financial institutions. *See generally* Baldinucci, *supra* note 3.

48. Havard, *Synergy and Friction*, *supra* note 9, at 640 (citing 12 C.F.R. § 25.27 (1997)).

evaluating the lending performance of federally regulated financial institutions has become standard practice. The CRA must avoid marginalization of communities and their interests. "[T]he objective here [is] to design new [CRA] governance structures that enable [community groups] to effectively express their perspectives and represent the interests of these broader communities within the decision-making processes of [CRA lending]."[49]

Enforcement of the CRA continues to struggle to get out from under its past, when the examination process was considered burdensome and opponents charged that the criteria allowed for impermissible credit allocation. Long ignored during the examination process, early CRA enforcement was considered to be arbitrary and inconsistent.[50] When enforcement of the CRA began, it was, admittedly, ineffective.[51] The legislative goals of prohibiting redlining, promoting reinvestment, and encouraging financial inclusion were supported only by bank efforts and not by actual enforcement.

Richard D. Marisco notes:

> The regulations require the federal banking agencies to consider the extent of the bank's lending in its community, the geographic distribution of its loans, and its lending to persons of different income levels. However, the regulations do not contain objective and quantitative criteria for measuring bank lending and community credit needs, or evaluating whether the lending meets credit needs. Thus, despite the improvement, the regulations fall short of fulfilling the capital-democratizing promise of the CRA.[52]

The strategic plan is a more objective measure of CRA performance. As a test that establishes quantitative and objective criteria, this plan maximizes the statute's potential for serving the needs of LMI persons. The greatest concern with setting quantifiable and objective criteria is that such a standard results in credit allocation or lending quotas. This concern has less potency when one realizes that the CRA contains neither a private right of enforcement nor monetary penalties for noncompliance.

---

49. Elizabeth M. Iglesias, *Institutionalizing Economic Justice*, 2 U. PA. J. LAB. & EMP. L. 773, 801 (2000) (using this language in discussing union governance structures).

50. *See, e.g.*, Richard D. Marsico, *A Guide to Enforcing the Community Reinvestment Act*, 20 FORDHAM URB. L.J. 165, 269 (1993).

51. *Cf.* David K. Hales, *Reallocating Credit: An Economic Analysis of the New CRA Regulation*, 15 ANN. REV. BANKING L. 571, 588 (1996).

52. Richard D. Marsico, *Democratizing Capital: The History, Law, and Reform of the Community Reinvestment Act*, 49 N.Y.L. SCH. L. REV. 717, 723 (2004/2005) [hereinafter Marsico, *Democratizing Capital*].

Meeting the credit needs of a community requires a fair interpretation of the demographics of the community. Under the present regulations, however, there is a disconnect between lending and whether it meets the lending needs of the identified community. Including citizen participation not only democratizes the process but also begins to challenge the dominant exclusionary processes.[53] The economic, political, and even cultural environment begins to change whenever those affected by the process have greater opportunities to modify its outcome.

Recognizing the CRA as a participatory process also lodges it within the sphere in which it was enacted. It represented an unfinished agenda of the civil rights movement. As an interventionist statute designed to encourage economic equality, the CRA presents a legal structure that ought to promote access to credit. Any future course for CRA enforcement must recognize that while there are competing interests, the most important goal is to produce an institutional arrangement that is genuinely inclusive and participatory.

Undoubtedly, when Congress passed the CRA, there was at least an implicit recognition that the existing economic and political power structure was deeply invested in a dominant process that denied the material interests and cultural ideologies of a group of people. Lending was blatantly anti-democratic and exclusionary in the very structures of internal banking governance. The CRA, along with other fair-lending laws, was an effort to promote more effective lending given the communities' use of the depository institutions. The statute provides a way of monitoring the structures and procedures of internal governance that affect credit access.

To note, as critical race theorists do, that there are "racial spaces" is to recognize the law's role in the production of subordination and the relationship between racial discrimination and class.[54] The confluence of politics and economics has created an institutional structure that is racially, politically, and economically unequal.[55]

---

53. *See* Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, 24 STAN. ENVTL. L.J. 269, 307-16 (2005).

54. Racial spaces are geographical areas of economic disinvestment that are also void of political power. They are born of race-based discrimination. Unlike healthy economic communities, there is an absence of investment production. It is race-based discrimination that creates this circumstance. *See* Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1847 (1994).

55. *See* Keith Aoki, *Space Invaders: Critical Geography, the "Third World" in International Law and Critical Race Theory*, 45 VILL. L. REV. 913, 949-50 (2000) (citing

Furthermore, the CRA allows economic exploitation that is often race-based. The federal banking agencies and other government entities with jurisdiction over lending discrimination are not very aggressive in declaring loan products and services non-compliant, such as in the case of predatory lending.[56] Procedures should be much more explicit in identifying and detecting lending discrimination. As an anti-discrimination measure, the CRA should have evaluative tools that help to eliminate discriminatory lending practices.[57]

IV. Strategic Plans Requiring Verifiable Lender Performance and Community Participation

As a matter of public policy, the future approach of the CRA requires a balance between the inclusion of all possible requirements that may enhance community lending, and the avoidance of changes to the initial requirements. The crucial issue becomes how to make the CRA more effective in the climate of modernization and securitization. Requiring the CRA to be more responsive to changing financial markets is not at odds with this.

A key feature of the strategic plan is the inclusion of community groups in the creation of the plan. The informal consultation envisioned by the plan recognizes the inherent benefit that citizen protests have made to effective CRA enforcement and lender accountability. Allowing community groups to participate in the creation of the strategic plan recognizes the need for citizen inclusion in making a credit democracy.[58] It also highlights the effective role that citizen monitors have played in making the CRA process work.

The citizen-participation component of the strategic plan also has the advantage of ensuring that community concerns are heard in advance of the protests that have traditionally accompanied merger applications. The types of affirmative lending agreements

---

Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debates*, 28 U. Miami Inter-Am. L. Rev. 361 (1996)).

56. *See generally* Cecil J. Hunt, II, *In the Racial Crosshairs: Reconsidering Racially Targeted Predatory Lending Under a New Theory of Economic Hate Crime*, 35 U. Tol. L. Rev. 211 (2003) (arguing that the financial exploitation that constitutes predatory lending ought to be subject to criminal prosecution).

57. *See* Cassandra Jones Havard, *To Lend or Not to Lend: What the CRA Ought to Say About Sub-Prime and Predatory Lending*, 7 Fla. Coastal L. Rev. 1, 25-27 (2005).

58. *See, e.g.*, Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 Fla. L. Rev. 807, 867 (2003) (discussing the costs of using the "fringe" banking system).

that local citizens' groups negotiate when threatening to stop or delay a merger will now become an integral part of the federal regulatory examination process. Inclusion at this stage of the process also allows community groups a basis for challenging the accuracy of the CRA ratings that institutions ultimately receive.

A. *The Participatory Approach and CRA Lending*

Community participation in development decision-making is a widely accepted concept.[59] The dilemma continues to be how to make mandated participation meaningful and truly inclusive in substantive decision-making areas. Developing a strong participatory structure requires a commitment to inclusive practices and a willingness to alter organizational structures to meet changing community needs.[60]

The justifications for community participation are varied. Founded on democratic principles that correlate equality with engagement, the presumption is that citizens are interested in outcomes that affect them and will therefore make the administration of the affected program more efficient. The intrinsic value of the individual, and the potential contributions that come from collaboration, also lie at the base of this theory.[61] Community participation is premised on notions of government efficiency, citizen democracy, and, more recently, the notion of empowerment for affected communities.[62] Inherent in the theory that includes participant communities in the decision-making process is the notion of redistribution of power.[63]

---

59. Federal law mandates community participation in other areas, such as development, land-use planning, and environmental management. In international development, community participation is commonplace. *See* Tania Kaiser, *Participation or Consultation? Reflections on a "Beneficiary Based" Evaluation of UNHCR's Programme for Sierra Leonean and Liberian Refugees in Guinea, in June-July 2000*, 17 J. REFUGEE STUD. 185, 186 (2004).

60. Developing and sharing the power base in participatory research requires striking several delicate power balances—the inter-group dynamics, how to best use the suppliers of knowledge, and the effective use of the acquired knowledge.

61. *See generally* Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433 (2004) (discussing the participative process and ways to improve citizen participation).

62. Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 297-98 (1999) (arguing that economic-development policy must address structural barriers to community participation).

63. *See generally* Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Reform*, 61 WASH. & LEE L. REV. 663 (2004) (discussing democratic participation in the context of campaign financing); Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and*

Promoting participatory approaches is consistent with both the process of making loans and the goals of the CRA. To the extent that CRA lending encourages development in LMI communities, there must be a process that is both accessible and accountable to those communities. Participatory approaches, in general, are recognized for their effectiveness in allowing communities to identify their own priorities and influence policy.[64]

Perhaps the most significant advantage of this approach as it relates to lending is the access that banks have to "inside expertise" that, in effect, substitutes for transaction costs.[65] The direct experience of living in a community that is underdeveloped in meeting the service and housing needs of its residents provides essential information that can help shape lending criteria and decisions. Such an effective use of the participatory approach marries policy with practice and allows the third-party recipients of the CRA lending—the members of the community—to have an essential stake in the process. Thus, as a form of joint inquiry, a participatory approach involves those who have both direct and indirect stakes in the outcome.

Yet another benefit from a participatory approach is that it provides a basis for monitoring and evaluating the outcome. As discussed below, the strategic plan option can help reduce the complexity of complying with the bank's CRA goals and provide a settled guide on the policy interventions needed to achieve them.

B. *Establishing Verifiable Community Lending Needs*

To have meaningful community inclusion, there must be a community definition process and a significant level of community involvement.[66] The two most important considerations of community definition are group self-identification and the criteria for inclusion. Definition of the group should come from the participants who are able to choose the factors that are significant for inclusion.

---

the Democratic Dilemma, 93 NW. U. L. REV. 1083, 1089-90 (1999) (discussing redistributive theory in general).

64. *See generally* Thomas F. McInerney, *Law and Development as Democratic Practice*, 38 VAND. J. TRANSNAT'L L. 109 (2005) (discussing participatory governance).

65. *See* Amy C. Bushaw, *Small Business Loan Pools: Testing the Waters*, 2 J. SMALL & EMERGING BUS. L. 197, 216 (1998) (explaining that prohibitive costs deter small businesses from seeking their own investors independently of organized financial structures such as banks).

66. *See* Sean T. McAllister, Note, *Community-Based Conservation: Restructuring Institutions to Involve Local Communities in a Meaningful Way*, 10 COLO. J. INT'L ENVTL. L. & POL'Y 195, 202-03 (1999).

Among the criteria for inclusion are spatial and non-spatial interests, and resource identification and dependence.[67] The wider the interests of the group, the more representative the group can be in handling the burdens and benefits of the project.

A CRA participatory group should avoid producing a process that guarantees only procedural fairness. Instead, the community group must be given significant levels of involvement through the process. The more vibrant the community group is, the more helpful it can be in identifying its needs and wants, thereby gaining from the process. There must be "ownership" of some part of the process; some part of the decision-making process must be the exclusive domain of the community group.

Defining "community" under the CRA when using the strategic business plan, therefore, means that the institutional capacity of the community group is recognized and well-used. Making the CRA evaluation less subjective and more standardized will accomplish this goal. Specifically, regulators evaluating lending in the financial institution's community or defined assessment area must qualitatively evaluate lending based on volume of deposits, minority population, average income levels, and type of loans.[68] This type of evaluation requires regulators and the financial institution to use Home Mortgage Disclosure Act (HMDA)[69] data in a manner that requires accountability. It combines the features of the already recognized strategic plan with the use of HMDA data to allow the option of the creation of a strategic plan "plus." The effect is for the institution to have a plan that becomes the focus of the CRA examination process. It also will require more verifiable lender performance.

A more stringent strategic plan is needed. A modified strategic business plan can concentrate on the lending and investment tests by making commitments to individual communities and providing more detailed reporting of their lending activities within specified markets. Financial institutions demarcate their assessment areas, which are not necessarily tied to the geographical locations of the particular banks. The assessment area must be one that serves LMI persons, small businesses, small farms, or designated rural areas.[70] This approach is actually an effective way of integrat-

67. *Id.* at 207.

68. Community Reinvestment Act—Community Development, Assigned Ratings, 69 Fed. Reg. 68,257, 69,260 (Nov. 24, 2004) (codified at 12 C.F.R. § 563e).

69. 12 U.S.C. §§ 2801-2809 (2000).

70. *See* Richard D. Marsico, *Enforcing the Community Reinvestment Act: An Ad-*

ing LMI lending into the bank's mission and is a crucial part of its business strategy.[71] The lender follows sound lending policies and directs capital as identified by community conditions.

Lending and investment would continue to be conducted in communities that are underserved. Effective use of statistical data can be useful in closing the access-to-credit gap in these communities. The strategic plan "plus" also puts critical HMDA data to use in a meaningful way. If financial institutions are required to use HMDA data, along with input from community groups, as an indicator of immediate community needs, the bank's CRA performance can be consistently responsive, rather than responding to community needs only when a pending merger is challenged.

To avoid the considerable flexibility that is inherent in the strategic plan, regulators will need to provide specific guidance on the expected measures of performance.[72] By identifying a community to serve, financial institutions choose to serve low- to moderate-income individuals and small businesses across the United States. Regulators can verify the eligibility of the identified individuals and communities. Regulators can also focus upfront on an institution's compliance with fair-lending statutes and evaluate CRA loans for credit practices that will harm these communities, such as predatory lending.

By integrating statistical information, the strategic plan "plus" will give community groups a means to assess information about lending to low- to moderate-income and minority borrowers and neighborhoods, small businesses, small farms, and rural area designations. There is also the added benefit that all of the loans in the strategic plan "plus" will be examined. In contrast, under the routine geographical assessment, CRA loans made outside of the geographical assessment area are not examined.

The current criticism of the strategic plan approach is that regulators have been slow to approve the plans submitted for review. The approach is labeled burdensome and inefficient. Because the strategic plan "plus" allows for lending and investment outside of

---

vocate's Guide to Making the CRA Work for Communities, 17 N.Y.L. SCH. J. HUM. RTS. 129, 141-42 (2000) (citing 12 C.F.R. § 25.22(b)(1)-(5) (2000)).

71. *See, e.g.*, Marsico, *Democratizing Capital*, *supra* note 52, at 720.

72. *See* FDIC, COMMUNITY REINVESTMENT ACT: GUIDE TO DEVELOPING THE STRATEGIC PLAN, ATTACHMENT TO FIL-26-98, at 5 (1993), *available at* http://www.fdic.gov/news/news/financial/1998/fil9826b.pdf (providing general factors, not all of which would apply to each institution).

the bank's "community," it is arguably not as effective a reinvestment tool as one that ties bank deposits to the community.

C. *Evaluating Verifiable Community Participation*

As discussed above, the informal citizen participation required by the strategic plan brings citizen's groups into the examination process earlier. Banks should also find it more satisfactory because it should halt meritless challenges when an institution is seeking approval for a merger, because the institution's goals and objectives have been pre-defined. Finally, effective inclusion requires some neutral review of the substantive and procedural aspects of creating the plan. Criteria to resolve disputes and get issues to the forefront are crucial.

V. Strategic Option Plan as a Type of Participatory Approach

Given the CRA's implicit objective to provide credit access to LMI borrowers and neighborhoods, it is only equitable to require discernable goals that are identified and embraced by the expectations of a given underserved community. The CRA, as legislation rooted in the social history of the 1960s, demonstrates a marked turn in the direction of most economic and governmental redevelopment programs by requiring participatory democracy. The CRA's history has shown a steady progression toward a more active and, more importantly, strategic participation by those who live and own businesses in a bank's "community." Implicit, again, within the statute is the notion that community home and business owners are stakeholders. The validation of the expertise of local communities in the policy debate allows them to lay claim to the internal agenda of reinvestment that most often separates their concerns and issues.

The participatory approach underlies the strategic plan option of the CRA. It is an approach modeled on democratic principles.[73] Sharing of power in a participatory regime is more than obligatory. Promoting a more participatory approach requires a different type of effort. Under the current regime, banks often meet with community groups to determine the community's needs. However, those

73. The participatory approach is a concept that is well-recognized in development law and is often used in international law. *See generally* Pritha Gopalan, *The Role of NGOs: Charity and Empowerment: The Trust Factor in Participation and Social Education*, 554 Annals Am. Acad. Pol. & Soc. Sci. 178 (1997).

banks are not required to view the community as an equal participant. A more defined participatory approach directs the bank to recognize and highlight community assets and strengths, with community members being seen as equal participants and serving as capable advisors and experts.

It also requires banks to develop a mechanism addressing the community's needs by determining whether they are providing effective service to disinvested communities. While some of this can be done by making use of existing community structures, an effective approach requires building and maintaining respecting, trusting relationships within and across the community. As many are already doing, this approach depends on developing relationships with opinion leaders in the community.

It is the ability to sustain relationships with community groups and leaders that is the hallmark of any participatory approach. In this regard, the challenge is to have banks share, in a meaningful way, the power structure involved in issues surrounding reinvestment. A meaningful participatory approach requires that the community groups understand the local power structure and the issues. Making banks assume responsibility for the effectiveness of meaningful community participation is important to the disempowered in the community. Effectiveness can be achieved if the bank's clear status and relationship with the community can command resources for a long-term commitment.

A participatory approach is most important for the measure of trust that it imparts between the bank and the community group. Many complaints based on communication gaps and a failure to receive information can be avoided, thus eliminating the need for groups to become suspicious as to whether the planned reinvestment is in the communities' best interests.

Admittedly, one of the downsides of this approach is that it may require a bank to make contacts with and develop programs for more than one community group. Developing increased incentives will most likely make for more committed communities in the long run. Again, it is important to think about how the power is shared as an incentive to sustained community involvement and participation.

Conclusion

Banks now face the task of balancing community participation and inclusiveness while at the same time preserving as much autonomy as possible in setting CRA obligations. The CRA must adapt to the changing financial environment and yet remain viable as a statute that prohibits discrimination, encourages community reinvestment, and protects LMI borrowers. Predictions from bankers that the CRA is too risky and unprofitable have not been borne out. In their stead have been programs that have resulted in innovative and profitable lending. Implementation and enforcement of the statute remain integral goals of securing credit for all economic segments of our country. But now the advancements must go further to embrace the statute's implicit and explicit goals and to keep pace with fast-changing financial products and markets.