

XVI. *OCC's Final Rule on the Community Reinvestment Act – Separate from Other Regulators*

A. Introduction

In June 2020, the Office of the Comptroller of the Currency published a final rule meant to modernize the Community Reinvestment Act and encourage banks to engage in more activities to serve their communities.¹ The amendments include changes to general performance standards for banks, including the evaluation measure benchmarks, retail lending distribution test thresholds, and community development minimums.² However, this rule was finalized without the support of the other regulators involved in enforcing the Community Reinvestment Act, the Federal Reserve and the Federal Deposit Insurance Corporation.³ Without the support of these partner regulators the Community Reinvestment Act will likely be weakened and different banks will be subjected to different versions of the rule.⁴ This could lead to unequal application of the Community Reinvestment Act, ultimately diluting the positive effects the Office of the Comptroller of the Currency hopes to achieve with the new amendments.

B. The Community Reinvestment Act

1. Enactment of the CRA

The Community Reinvestment Act of 1977 (CRA) was enacted following debate over a singular question: whether banks and other financial institutions have a duty to affirmatively contribute to

¹ Community Reinvestment Act Regulations, 85 Fed. Reg. 34,734, 34,734 (proposed June 5, 2020) (to be codified at 12 C.F.R. pts. 25 & 195) (“The Office of the Controller of the Currency ... is adopting a final rule to strengthen and modernize implementation of the Community Reinvestment Act (CRA).”).

² *Id.* at 34,734–36 (describing updated performance measure system proposed to make evaluation more objective).

³ Jon Hill, *OCC Finalizes Overhaul of Community Lending Rules*, LAW360 (May 20, 2020, 10:37 AM), <https://www-law360-com.ezproxy.bu.edu/articles/1275376>.

⁴ *Id.* (observing that the OCC regulates only 70% of CRA activities).

the economic health of the communities in which they operate.⁵ Prior to 1977, the banking industry and federal regulators believed that duty did not exist for banks and financial institutions.⁶ However, community groups alleged that financial institutions were frequently denying credit services to credit-worthy individuals simply because they resided in “disfavored” neighborhoods and participating in racial discrimination through actions like redlining.⁷ In response, Congress enacted the CRA as an attempt to reverse the negative consequences of redlining and other discriminatory lending practices.⁸

⁵ Community Reinvestment Act of 1977, 12 U.S.C. § 2901 (2018); *see also* Robert C. Art, *Social Responsibility in Bank Credit Decisions: The Community Reinvestment Act One Decade Later*, 18 PAC. L.J. 1072, 1072 (1987) (“A vociferous public debate in many urban areas in the mid-1970s focused on the issue of whether banks and other financial institutions that accumulated deposits in neighborhoods having lower-income or racial minority residents owed any responsibility to make mortgage loans available in those neighborhoods.”).

⁶ Art *supra*, note 5, at 1072 (Discussing view before 1977 that it was not proper for depository institutions to have goal of community development).

⁷ *See id.* at 1073 (“They pointed to evidence that many depository institutions systematically denied loans to creditworthy individuals residing in disfavored neighborhoods, and that the practice was often closely correlated with racial discrimination.”). “Redlining” refers to the discriminatory practice of refusing mortgages to residents of certain neighborhoods, mostly based on the neighborhoods’ racial composition. *See* Camila Domonoske, *Interactive Redlining Map Zooms In on America’s History of Discrimination*, NPR (Oct. 19, 2016, 3:22 PM), <https://www.npr.org/sections/thetwo-way/2016/10/19/498536077/interactive-redlining-map-zooms-in-on-americas-history-of-discrimination> (describing practice of redlining). The Home Owners’ Loan Corporation (HOLC) graded neighborhoods into categories, and neighborhoods with minority residents were marked on HOLC maps in red (which led to the nickname “redlining”). *See id.* These “red” neighborhoods were considered high-risk for mortgage lenders, and mortgages were often denied to residents of these neighborhoods. *See id.* This led to low rates of home ownership and poor financial health in the redlined neighborhoods. *See id.*; Robert K. Nelson et al., *Mapping Inequality: Redlining in New Deal America*, UNIV. RICHMOND DIGIT. SCHOLARSHIP LAB, <https://dsl.richmond.edu/panorama/redlining/#loc=5/39.1/94.58&text=about> (displaying redlined maps of American cities).

⁸ OFF. OF THE COMPTROLLER OF THE CURRENCY, FACT SHEET: COMMUNITY REINVESTMENT ACT 1 (2014) [hereinafter *Fact Sheet*] (“The Community Reinvestment Act (CRA) was enacted in 1977 to prevent redlining and to encourage banks and savings associations (collectively, banks) to help meet the credit needs of all segments of their communities, including low- and moderate-income neighborhoods and individuals.”).

The CRA is based on the idea that banks have a “continuing and affirmative obligation to help meet the credit needs” of the communities where they are chartered, including low- and moderate-income (LMI) neighborhoods.⁹ Banks and financial institutions are encouraged to invest in their communities through safe and sound lending practices that benefit both the bank itself and the community it serves.¹⁰ The CRA applies to national banks, savings associations, and state-chartered banks that are insured by the Federal Deposit Insurance Corporation (FDIC).¹¹ Credit unions and nonbank entities are not subject to the CRA’s requirements.¹² With the CRA, regulators sought to “guide private investment decisions in a manner deemed socially responsible.”¹³ The CRA is meant to “preserve private control over specific private institutional lending decisions” while also influencing the attitudes, norms, and behaviors that accompany these practices.¹⁴ The CRA was purposely kept vague to further these goals, a feature that is commonly criticized but has been clarified over the years.¹⁵

The federal regulators involved in executing the CRA are the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Federal Reserve), and the FDIC.¹⁶ The inclusion of three regulators in the enforcement of the CRA promoted uniformity in application and denied financial institutions the option to transfer jurisdictions to avoid complying with the CRA.¹⁷

⁹ *Community Reinvestment Act (CRA)*, BD. OF GOVERNORS OF THE FED. RESRV. SYS., (Dec. 7, 2018) https://www.federalreserve.gov/consumerscommunities/cra_history.htm (“Congress found that banks have a continuing and affirmative obligation to help meet the credit needs of their local communities, including low- and moderate-income (LMI) neighborhoods where they are chartered, consistent with the safe and sound operations of the institutions.”).

¹⁰ *Id.* (stating the goals for banks under CRA).

¹¹ 12 U.S.C. § 2902 (defining institutions covered under CRA).

¹² *Fact Sheet*, *supra* note 8, at 1–2 (“CRA does not apply to credit unions insured by the National Credit Union Share Insurance Fund (NCUSIF) or nonbank entities supervised by the Consumer Financial Protection Bureau (CFPB).”).

¹³ *Art*, *supra* note 5, at 1085.

¹⁴ *Id.*

¹⁵ *Id.* (describing the lack of specific standard or rigid form requirements in the Act).

¹⁶ *Fact Sheet*, *supra* note 8, at 1.

¹⁷ *Art*, *supra* note 5, at 1087; *see also Community Reinvestment Act (CRA)*, *supra* note 9.

These agencies promulgated regulations and examinations that were largely identical, until the most recent changes put forth by the OCC.¹⁸

The CRA is used to assess the record of each bank in fulfilling its obligation to the community using criteria designated by the agencies to determine whether the institution is granting credit fairly and evenly among all its customers.¹⁹ The criteria include (but are not limited to) communication with members of the community, participation by the institution's board of directors in CRA policies and performance, any discriminatory or other illegal practices, ability to meet the credit needs of the community, and extension of credit for various assets like homes and small farms.²⁰ These evaluation methods are different depending on the size of the bank in question.²¹

This record compiled during the examination of the CRA criteria leads to the assignment of one of the following four CRA ratings: outstanding, satisfactory, needs to improve, or substantial noncompliance.²² This rating is then used by the regulators when considering and evaluating applications for charter, bank mergers or acquisitions, branch openings, and other similar activities.²³

2. *Impact*

The CRA has helped to overcome financial problems within LMI neighborhoods by fostering competition and innovation among financial institutions serving these communities.²⁴ Under the CRA,

¹⁸ *Id.*

¹⁹ Community Reinvestment Act of 1977, 12 U.S.C. §§ 2903(a), 2905, 2906(a)(1) (2018).

²⁰ Community Reinvestment Act Regulations, 43 Fed. Reg. 47,144, 47,145–46 (1978) (current version at 12 C.F.R. § 25.0) (describing the criteria for evaluations in final regulations).

²¹ *Id.*

²² *Fact Sheet*, *supra* note 8, at 2 (stating the four ratings for CRA performance).

²³ *Id.* at 1 (“Today, CRA and its implementing regulations require Federal financial institution regulators to assess the record of each bank in fulfilling its obligation to the community and to consider that record in evaluating and approving applications for charters, bank mergers, acquisitions, and branch openings.”).

²⁴ Michael S. Barr, *Credit Where It Counts: Maintaining a Strong Community Reinvestment Act*, 29 W. NEW ENG. L. REV. 11, 14 (2006) (“By fostering competition among banks in serving low-income areas, CRA generates larger

financial institutions have developed innovative solutions for serving LMI neighborhoods that meet the credit needs of these areas while still managing risk.²⁵ These updated practices led to a positive lending cycle in these areas, which steadily increased as the CRA became more intensely enforced.²⁶ As the CRA aged, studies showed that CRA lenders increased their lending to individuals residing in LMI neighborhoods faster than those who were not regulated by the CRA.²⁷

The CRA continues to have a strong impact on credit availability in LMI neighborhoods, helping to grow businesses and strengthen communities overall.²⁸ CRA lending increased home mortgage lending and small business lending, leading to increased financial health of LMI neighborhoods while also showing banks that lending within LMI neighborhoods would not weaken their profitability.²⁹ While the CRA should continue to modernize in order to reflect how consumers bank in the internet age, maintaining the CRA's strength is of vital importance for LMI communities' continued growth and financial health.

C. Office of the Comptroller of the Currency Modernizes the CRA

1. *Modernizing the CRA after Twenty-Five Years*

The OCC proposed an overhaul of the CRA in August 2018 with the intent to modernize the regulations and bring them into the

volumes of lending from diverse sources, and adds liquidity to the market, decreasing the risk of each bank's loan.”).

²⁵ *Id.* (“Banks and thrifts have engaged in special marketing programs to targeted communities; experimented with more flexible underwriting and servicing techniques to serve a broader range of households, and funded credit counseling for borrowers.”).

²⁶ *Id.* at 15 (“Studies have found evidence that CRA improved access to home mortgage credit for low-income borrowers during the 1990s, as CRA regulatory intensity increased.”).

²⁷ *See generally* Robert E. LITAN ET AL., U.S. DEP'T OF THE TREAS., THE COMMUNITY REINVESTMENT ACT AFTER FINANCIAL MODERNIZATION: A FINAL REPORT (2000) (reporting on the impact of CRA through 1998).

²⁸ Barr, *supra* note 23, at 23 (“CRA can continue to help grow small businesses and strengthen communities in the years ahead.”).

²⁹ *Id.* at 16.

digital age.³⁰ With these changes, the OCC is taking unilateral action³¹ to finalize the changes that were first proposed jointly by the OCC and the FDIC.³² Despite calls from elected officials and community groups to postpone the changes during the COVID-19 pandemic, the OCC proceeded to finalize the new rule.³³

The CRA hasn't been updated in over twenty years, so the new changes are intended to be a needed reflection on how the average consumer banks today.³⁴ Major technological advances in banking have made the industry more efficient and have expanded access to banking services for LMI neighborhoods and individuals.³⁵ Improvements in the efficiency and cost of providing financial services has increased the availability of these services, but the CRA com-

³⁰ Jon Hill, *OCC Seeks Input on Lending Regs for Underserved Areas*, LAW360 (Aug. 28, 2018, 11:16 PM), <https://www-law360-com.ezproxy.bu.edu/articles/1077711?scroll=1&related=1> (“The Office of the Comptroller of the Currency kicked off a process Tuesday that could lead to an overhaul of regulations around bank lending in underserved areas, drawing praise from industry groups that say the rules need modernizing and pushback from community groups that say any reform shouldn't weaken existing standards.”).

³¹ The OCC's rulemaking power originates in the National Currency Act of 1863, which was later amended and updated into the National Bank Act. 12 U.S.C. § 211(a) (2018) (“The Comptroller of the Currency may prescribe such rules and regulations as the Comptroller may deem necessary to carry out the provisions of this Act.”).

³² Jon Hill, *OCC Won't Halt Community Lending Overhaul for Pandemic*, LAW360 (Apr. 9, 2020 10:42 PM), <https://www-law360-com.ezproxy.bu.edu/articles/1262325?scroll=1&related=1>; see also Christina Grigorian, *OCC and FDIC Release Proposed Revisions to Community Reinvestment Act*, NAT'L L. REV. (Jan. 17, 2020), <https://www.natlawreview.com/article/occ-and-fdic-release-proposed-revisions-to-community-reinvestment-act> (“On January 9, the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) ... published proposed rules in the Federal Register that are designed to make the regulatory framework related to the Community Reinvestment Act (CRA) more “objective, transparent, consistent, and easy to understand””).

³³ Hill, *supra* note 32.

³⁴ *OCC Unilaterally Finalizes Community Reinvestment Act Changes*, ABA BANKING J. (May 20, 2020), <https://bankingjournal.aba.com/2020/05/occ-unilaterally-finalizes-community-reinvestment-act-changes/>.

³⁵ Mark Willis, *It's the Rating, Stupid: A Banker's Perspective on the CRA*, 4 REVISITING THE CRA: PERSPECTIVES ON THE FUTURE OF THE COMMUNITY REINVESTMENT ACT 59, 61 (Feb. 2009), https://www.frbsf.org/community-development/files/its_rating_stupid1.pdf.

pliance criteria have not been updated to reflect these new services.³⁶ The OCC Comptroller in charge at the time of the amendments,³⁷ Joseph Otting, stated the changes were meant to “help ensure the CRA remains a relevant and powerful tool for the revitalization of our communities and for our nation’s civil rights.”³⁸ Critics disagree with this statement, predicting that the revised rules will “defang” the CRA and make it easier for banks to be in compliance.³⁹

2. *OCC’s Changes to the CRA*

The OCC’s proposed changes, authored by the agency without input from the other CRA regulators, came in response to a memorandum from the Department of the Treasury calling for improvements to the regulation.⁴⁰ The Department of the Treasury stated that the statute is “in need of modernization” and the current supervisory and regulatory framework of the CRA needs to be improved.⁴¹ Notably, the report calls for the “additional harmonization of CRA supervision given the oversight by multiple regulators,” a suggestion which the OCC did not take.⁴²

It is speculated that the OCC’s swift, unilateral amendments to the CRA were an attempt to enact these changes before the transition to a new presidential administration after the 2020 election.⁴³ A more

³⁶ *Id.*

³⁷ Following the 2020 presidential election, Blake Paulson became Acting Comptroller of the Currency effective January 14, 2021. *Blake Paulson, Acting Comptroller of the Currency*, OFF. OF THE COMPTROLLER OF THE CURRENCY (2021), <https://www.occ.treas.gov/about/who-we-are/comptroller/bio-blake-paulson.html>.

³⁸ Hill, *supra* note 3.

³⁹ Emily Fitter & Jeanna Smialek, *Bank Regulator’s Battle with Anti-Redlining Law Comes to an End*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/business/economy/community-reinvestment-act-joseph-otting.html> (“Critics say that the revised rules have the potential to defang the C.R.A. by making it easier for banks to meet their obligations”).

⁴⁰ *See generally* U.S. DEP’T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: BANKS AND CREDIT UNIONS (2017) (discussing, *inter alia*, the need to modernize the CRA).

⁴¹ *Id.* at 9.

⁴² *Id.* at 65.

⁴³ *The Business Rules the Trump Administration Is Racing to Finish*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/business/trump->

charitable view is that the CRA was desperately in need of an update to bring it into the twenty-first century and more in line with how consumers bank today (i.e., not at brick-and-mortar bank branches), and it was not benefitting LMI communities to wait on the changes.⁴⁴

The new changes provide examiners with new metrics-based performance standards to aid in grading banks on their CRA compliance.⁴⁵ They also provide a longer list of activities that qualify for CRA compliance.⁴⁶ The updates clarified and expanded the qualifying activities that are able to receive CRA consideration, and the locations where bank activity counts were also updated.⁴⁷ The new rule also institutes a more objective evaluation of CRA performance, which the OCC says will make CRA reporting “more transparent and timelier.”⁴⁸ The OCC states that the rules were informed by feedback gathered by the Federal Reserve, which did not ultimately sign on to the changes with the OCC when they were finalized.⁴⁹ The new rules do not mention the coordination or comparison of the evaluation processes across agencies, or even between individual examiners.⁵⁰

The FDIC’s and Federal Reserve’s hesitation in joining the OCC in the changes likely stems, among other reasons, from the tumultuous atmosphere of the COVID-19 pandemic and the short time frame proposed by Otting for vetting the new rule.⁵¹ Lawmakers and industry experts alike requested that the rewrite effort be put on hold,

business-regulations-biden.html?searchResultPosition=1 (updated Jan. 20, 2021).

⁴⁴ See John A. Kimble, *Response from Community Groups to OCC/FDIC Joint CRA Proposal*, CONSUMER FINANCE MONITOR, BALLARD SPAHR (Dec. 27, 2019), <https://www.consumerfinancemonitor.com/2019/12/27/response-from-community-groups-to-occ-fdic-joint-cra-proposal/>.

⁴⁵ Hill, *supra* note 3 (“[E]xaminers will use new metrics-based performance standards to help grade banks on their CRA compliance, and banks will have a larger, more defined range of activities that qualify for compliance credit.”).

⁴⁶ *Id.*

⁴⁷ OFF. OF THE COMPTROLLER OF THE CURRENCY, COMMUNITY REINVESTMENT ACT FACT SHEET 1 (2020) (describing changes made to CRA regulations).

⁴⁸ *Id.*

⁴⁹ *Id.* at 2; Flitter & Smialek, *supra* note 39.

⁵⁰ Morgan O. Schick, Note, *Modernization or a Missed Opportunity? The Comptroller of the Currency Updates the Community Reinvestment Act*, 23 N.C. BANKING INST. 485, 505 (2019) (discussing shortcomings in the OCC’s approach to updating the CRA regulations).

⁵¹ Flitter & Smialek, *supra* note 39.

and an extension of the public comment period was eventually won.⁵² Another reason could be that the FDIC and Federal Reserve simply don't see the amendments as a good plan for the CRA or the LMI neighborhoods the rule is supposed to serve.⁵³ Martin Gruenberg, an FDIC commissioner, went so far as to call the OCC's amendments "a deeply misconceived proposal."⁵⁴

D. Response to the Changes

1. OCC Takes a Single-Agency Approach to CRA Modernization, Putting CRA Enforcement in Jeopardy

A great source of criticism toward the CRA, even before the new amendments, stems from the unpredictability of the multi-agency structure tasked with enforcing the regulation.⁵⁵ By changing the CRA on their own terms without the buy-in of the FDIC or Federal Reserve, the OCC is making the enforcement of the CRA even more unpredictable.⁵⁶ In a letter to the OCC predating the final changes, the American Bankers Association (ABA) commented that, without coordination with its partner agencies, the new rules would "perpetuate confusion and inconsistency and would create competitive inequities."⁵⁷ The ABA compared this confusion and inconsistency to the

⁵² Press Release, House Comm. on Fin. Servs., 117th Cong., Waters Wins Extension of Comment Period for CRA Rule (Feb. 24, 2020), <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=406269> ("I am pleased that our efforts have resulted in regulators providing a 30-day extension of the comment period for Otting's proposed CRA rule.").

⁵³ Emily Flitter & Jeanna Smialek, *Bank Regulators Disagree on Changes to Rules for Poor Communities*, N.Y. TIMES (Dec. 12, 2019), <https://www.nytimes.com/2019/12/12/business/banks-federal-reserve-community-reinvestment-act.html> (discussing oppositions to OCC proposal from the Federal Reserve and FCIC).

⁵⁴ *Id.*

⁵⁵ Schick, *supra* note 50.

⁵⁶ *Id.* ("It seems counterintuitive that the OCC would make efforts to modernize the CRA on its own").

⁵⁷ Letter from Krista Shonk, Vice President, Center for Regulatory Compliance, American Bankers Association, to Office of the Comptroller of the Currency, at 2 (Nov. 15, 2018) (on file with American Bankers Association).

confusion and inequity created by credit unions and their activities in LMI neighborhoods, which are not covered by the CRA.⁵⁸

The Federal Reserve did not join in the final rulemaking with the OCC and, though it joined in the initial effort, the FDIC declined to sign on to the final changes citing the “burden on banks responding to the coronavirus pandemic.”⁵⁹ The OCC’s unilateral action could cause “regulatory disarray, perhaps for years.”⁶⁰ Financial institutions which are overseen by the Federal Reserve or the FDIC must determine whether the new CRA applies to them and may have to take on large expenses to comply.⁶¹ The OCC responded to this criticism by pointing out that seventy percent of banks (when measuring by assets) that conduct CRA-related activities are subject to the OCC’s rules, not the Federal Reserve’s or the FDIC’s.⁶² However, the remaining thirty percent of financial institutions that are covered by the FDIC or Federal Reserve will be operating under a different version of the CRA.⁶³ With large commercial banks like PNC Bank International and Goldman Sachs under the Federal Reserve’s jurisdiction and a large number of smaller banks under the FDIC’s, this disparity in CRA enforcement is not insignificant.⁶⁴

More concerning is the fact that the thirty percent of financial institutions remaining under the purview of the Federal Reserve or the FDIC could change their charters to seek regulation by the OCC because of the relaxed guidelines in the CRA reform.⁶⁵ As previously

⁵⁸ *Id.* (comparing potential confusion caused by proposed OCC rules to, “a problem that we already see with regard to credit unions, which lack the obligations and supervision programs applied to banks to serve their local communities”).

⁵⁹ *OCC Unilaterally Finalizes Community Reinvestment Act Changes*, *supra* note 34.

⁶⁰ Fitter & Smialek, *supra* note 39.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Flitter & Smialek, *supra* note 53 (“Should the changes be enacted without the Fed’s support, it would create two sets of rules: One for those overseen by the central bank and one for those overseen by the other two agencies.”).

⁶⁴ *Who Regulates My Bank?*, OFF. OF THE COMPTROLLER OF THE CURRENCY, <https://www.helpwithmybank.gov/who-regulates-my-bank/index-who-regulates-bank.html> (last visited Apr. 02, 2021).

⁶⁵ Carolyn Duren & Zain Tariq, *Regulatory Split on CRA Gives Banks Another Reason to Change Charters*, S&P GLOBAL MARKET INTELLIGENCE (May 27, 2020), <https://www.spglobal.com/marketintelligence/en/news->

discussed, one of the benefits of having the CRA executed by the three partner regulators is that financial institutions were unable to change their charters in order to escape compliance with the CRA.⁶⁶ The OCC regulates the largest banks in the U.S., including Bank of America, Citibank, and Fifth Third Bank.⁶⁷ After the OCC proposed its changes to the CRA, eleven more banks changed their charters to be governed by the OCC.⁶⁸ While the avoidance of the Federal Reserve and FDIC's version of the CRA cannot be claimed for certain as the motivation of these changes in charter, more charter changes could follow.⁶⁹ The more lenient CRA requirements could be the driving force for banks switching into the OCC's jurisdiction.⁷⁰ Given the criticisms of the new CRA amendments, this could lead to problems such as a decrease in available credit or decreased access to services like low-cost checking accounts for LMI communities served by the banks that choose to switch.⁷¹

2. *Suit to Block OCC's Unilateral CRA Amendments*

The unilateral action of the OCC in reshaping the CRA has led community advocates to sue the OCC to block the new rule.⁷² In June 2020, the National Community Reinvestment Coalition and the California Reinvestment Coalition filed suit in California requesting

insights/latest-news-headlines/regulatory-split-on-cra-gives-banks-another-reason-to-change-charters-58793872.

⁶⁶ Art, *supra* note 5, at 1087.

⁶⁷ National Banks Active as of 2/28/2021, OFF. OF THE COMPTROLLER OF THE CURRENCY, <https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists/national-by-name.pdf> (listing active banks under OCC purview).

⁶⁸ Duren & Tariq, *supra* note 65.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Changing Rules to Help Bankers and Hurt Poor Neighborhoods*, N.Y. TIMES OP. (Jan. 10, 2020), <https://www.nytimes.com/2020/01/10/opinion/Community-Reinvestment-Act.html>.

⁷² Complaint at 1, Nat'l Cmty. Reinvestment Coal. et al. v. Off. Comptroller Currency et al., No. 3:20-cv-04186 (N.D. Cal. 2020); *see also* Jon Hill, *Advocates Sue over Community Lending Rules Overhaul*, LAW360 (Jun. 25, 2020, 5:42 PM), <https://www-law360-com.ezproxy.bu.edu/articles/1286878?scroll=1&related=1> (discussing suit to block OCC's CRA update).

that the court block the OCC's final rule.⁷³ The plaintiff's complaint listed many of the allegations and criticisms that the OCC has been receiving since it published the final rule.⁷⁴ The plaintiffs allege that the OCC has "sever[ed] the previously unified CRA regulatory framework" and that "community groups ... will experience challenges adjusting their CRA programs because the regulators are no longer moving in lockstep."⁷⁵ The plaintiffs also allege that Otting rushed the OCC's final rule through the regulatory process in order to weaken the CRA and did not meaningfully address the "near-universal criticism" the rule received.⁷⁶ The National Community Reinvestment Coalition and the California Reinvestment Coalition also listed a multitude of ways the new CRA rules will impact their own operations in advocating for greater access to credit in LMI communities.⁷⁷

The OCC motioned for the case to be dismissed, arguing that the community groups did not have standing, but its motion was denied in January 2021.⁷⁸ Judge Kandis Westmore was not persuaded by the OCC's arguments and wrote that the Plaintiffs' arguments "go directly to the merits of the case, rendering this argument more appropriately addressed on summary judgment."⁷⁹ The next hearing is set for January 20, 2022, so it may be some time before the fate of the new CRA is determined.⁸⁰ If the plaintiffs are successful, the OCC may be forced to halt the implementation of its amendments to the CRA.

⁷³ Complaint at 50–51, Nat'l Cmty. Reinvestment Coal. et al. v. Off. Comptroller Currency et al., No. 3:20-cv-04186 (N.D. Cal. 2020) (requesting that the rule be "declared unlawful and set aside").

⁷⁴ *Id.* at 50–53 (arguing against implementation of OCC's update to CRA regulations).

⁷⁵ *Id.* at 51.

⁷⁶ *Id.* at 52 ("Otting pushed the Final Rule through the regulatory process—based on his long-held and, by his words, "very strong viewpoints" about weakening the CRA—without meaningfully addressing the near-universal criticism the rule received from stakeholders ranging from community groups to banks to the other financial regulatory agencies.").

⁷⁷ *Id.* at 41–50 (arguing that the regulations will impair plaintiffs' ability to help communities).

⁷⁸ Order Denying Motion to Dismiss at 15, Nat'l Cmty. Reinvestment Coal. et al. v. Off. Comptroller Currency et al., No. 4:20-cv-04186-KAW (N.D. Cal. 2020).

⁷⁹ *Id.*

⁸⁰ Order Setting Case Schedule at 1, Nat'l Cmty. Reinvestment Coal. et al. v. Off. Comptroller Currency et al., No. 20-cv-04186-KAW (N.D. Cal. 2020).

3. *The Future of CRA Modernization Efforts*

It is likely that the next Comptroller, when confirmed by the Senate, will reexamine the CRA final rule.⁸¹ Recently-elected President Biden has pointed to Michael Barr, a former Treasury Department official, as a potential pick.⁸² Community advocacy groups see Barr as “an ally who will reverse federal regulators’ traditional reluctance to press banks too hard on behalf of Americans historically excluded from the financial system.”⁸³ Advocates hope that Barr will reexamine the CRA and route more investment into LMI neighborhoods.⁸⁴

No matter who is eventually chosen to head the OCC, the CRA amendments are likely to be under some scrutiny after being pushed through at breakneck speed at the end of the previous administration. This reevaluation, coupled with the pending outcome of the lawsuit against the OCC discussed above, could provide a path forward that includes input on the CRA from all three partner agencies.

E. Conclusion

Without the support of the FDIC and the Federal Reserve, the CRA standards are weakened, and banks could be governed by vastly different CRA criteria. With more clarity about the status of their compliance with the CRA, banks would be able to “maximize their service to the community while promoting cooperation and efficiency for these regulatory bodies during the examination process,” and further the goals of the CRA as they were intended.⁸⁵ This mismatch in CRA criteria could impart a heavier burden on community organizations or state equivalents of the CRA when it comes to serving the credit needs of LMI communities. Without the involvement of all

⁸¹ Scott Coleman & Lori Sommerfield, *The OCC’s CRA Final Rule under a New Comptroller and the Biden Administration: What Now?*, JD SUPRA (Jan. 28, 2021), <https://www.jdsupra.com/legalnews/the-occ-s-cra-final-rule-under-a-new-3822057/>.

⁸² Ronald Brownstein, *Why Democrats Are Fighting Over an Obscure D.C. Bureaucrat*, THE ATLANTIC (Feb. 18, 2021), <https://www.theatlantic.com/politics/archive/2021/02/why-democrats-are-split-over-potential-biden-pick-michael-barr/618056/>.

⁸³ *Id.*

⁸⁴ *Id.* (“[T]hey believe Barr can reinvigorate the Community Reinvestment Act, or CRA, Washington’s most powerful lever to channel more investment into low-income neighborhoods . . .”).

⁸⁵ Schick, *supra* note 50; Hill, *supra* note 30.

the partner agencies, the future of the CRA as a resource for expanding credit access in LMI neighborhoods is unclear.

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