Commentary: The Community Reinvestment Act Must Be All About Public Participation, but It Still Doesn't Feel That Way

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Under the Community Reinvestment Act (CRA)[1] of 1977, banks have an affirmative and continuing obligation to serve the convenience and needs of the communities in which they are chartered to do business.[2] The best way to determine if banks are serving the credit and deposit needs of the communities is to listen to the residents assess the banks' records of doing so. As Marijoan Bull's article in this symposium shows, however, the public input mechanisms established by the federal bank agencies remain incomplete and, in many instances, are difficult to use (Bull, 2017). Thus, the full potential of CRA is frustrated in terms of increasing responsible lending, investing, and bank services in low- and moderate-income communities.

Two aspects of public participation are related. First, are the public input mechanisms easy to use so that members of the public know how and when to offer input on banks' reinvestment records? Second, what is the impact of public comments on bank performance, and do the agencies take the comments seriously?

In considering CRA and the role of public input on the 40th anniversary of CRA, it is necessary to consider if legislative and regulatory reluctance to update CRA frustrates public input and ultimately impedes CRA's effectiveness. A lack of updating law impedes progress. As Thomas Jefferson said—

> I am not an advocate for frequent changes in laws … but laws … must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened … new truths discovered … institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as a civilized society to remain ever under the regimen of their barbarous ancestors.[3]

The current status of CRA resembles more a straightjacket that suffocates public input than a suit that empowers community residents and enables them to make comments that count and influence bank behavior in a positive manner under CRA.

[1] Pub. L. 95–128, 91 Stat. 1147, Title VIII.
[2] 12 U.S.C. 30, available via https://www.fdic.gov/regulations/laws/rules/6500-2515.html#6500hac801.
[3] https://www.nps.gov/thje/learn/photosmultimedia/quotations.htm.

This commentary describes and assesses the formal mechanisms of public input on CRA exams and merger applications, and it explores whether legislative and regulatory constructs impede public input or create possibilities of public participation having significant impacts.

Formal Mechanisms for Public Input

Federal banking regulatory agencies have established formal mechanisms for public input during CRA exams and merger applications. Agencies solicit and accept comments while examiners conduct CRA exams.[4] Likewise, bank regulatory agencies have established procedures during merger application proceedings for accepting comments on the past and likely future CRA and fair-lending performance of a bank (OCC, 2017).[5] Public input is a primary mechanism of CRA enforcement; the CRA statute requires federal banking agencies to consider a bank's CRA performance in deciding whether to approve or deny a bank's application to merge.[6]

However, the ease of commenting on CRA exams and merger applications is uneven across and within agencies. Although agencies have web page features that facilitate commenting, other aspects of the web pages often frustrate commenting, like a lack of contact information for regulatory staff. For example, the Federal Reserve provides a list of quarterly exams on its web page, where a member of the public is directed to another section of its website to submit a comment with a 1,500-character maximum (which is insufficient for comments on complex topics or large banks spanning several states). The site gives no clear indication about whom to contact if a member of the public has basic or technical questions about the upcoming exam. Other regulators are not much better. The National Community Reinvestment Coalition (NCRC) recently produced a white paper that evaluated and rated the public comment process of the agencies. Overall, NCRC gave the agencies low and failing ratings for their public comment process (NCRC, n.d.).

In addition to the process for commenting, the second critical aspect of the public participation process is the extent to which the agencies take the comments seriously. The agencies tend to elevate the visibility of comments to a greater extent on merger applications than on CRA exams. When agencies issue decisions on merger applications, they discuss past CRA performance and the mergers' impact on future reinvestment and fair-lending performance in a section called "Convenience and Needs." In this section of the merger decision, it is common to see numerous footnotes summarizing community group comments on specific aspects of CRA and fair-lending performance. The footnotes and the body of the narrative include the agencies' responses to the community group comments. Through this discussion and the final decision, it is possible to discern whether community group comments affected the agencies' analyses, conclusions, and final orders.

In contrast, community group influence on CRA exams is more difficult to discern. CRA exams have a section called "Community Contacts." This section often offers generic and cursory

[4] See the CRA regulations 12 CFR Part 25 §25.26. The most explicit statement of this procedure is in the regulations for small-bank CRA exams, in which public comment on a bank's record is one criterion for determining the rating of a small bank.

[5] Federal Reserve rules for public comment and hearings on mergers are in 12 CFR Part 225, specifically see §225.16, Public notice, comments, hearings, and other provisions governing applications and notices. See http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=635f26c4af3e2fe4327fd25ef4cb5638&tpl=/ecfrbrowse/Title12/12cfr225_main_02.tpl.

[6] See Section 804 of the CRA statute (12 U.S.C. 30 §804).

observations of community groups regarding the credit needs and economic conditions of a locality. From these general observations, it is usually not possible to determine if the public input influenced the CRA examiner's analyses, conclusions, or ratings. NCRC commented about a year ago on the CRA exam of Texas Capital Bank. The comments concerned the low levels of lending to businesses with revenues of less than $1 million. The comments caught the attention of the bank's CRA staff, who had some conversations with NCRC. The Office of the Comptroller of the Currency, however, did not contact NCRC for any followup regarding its concerns, leading NCRC to wonder whether its comments had any effect.

The seriousness with which community input is solicited and reflected on CRA exams and merger applications motivates or discourages public involvement. If members of the public regard either CRA exams or merger applications as rubber stamp processes—in which public input is formally solicited in a minimalistic manner, acknowledged in a brief manner, but then largely discarded—then public participation will be infrequent. On the other hand, if substantive comments are elevated in importance, are treated courteously, and influence analyses or conclusions, then public input will be more frequent.

Impact of Public Comment on Community Reinvestment Act Exams—Constraints and Opportunities

In addition to the difficulty of figuring out how to comment on CRA exams, limits on CRA exams' coverage and flexibility, due to legislative and regulatory impediments, curtail the effectiveness of public comments. In particular, three features of CRA exams currently constrain the influence of public comments: (1) assessment areas or geographical areas on CRA exams, (2) the treatment of bank affiliates on exams, and (3) fair lending reviews accompanying exams.

Assessment Areas

Assessment areas are geographical areas on CRA exams that are usually metropolitan areas or counties that contain bank branches. In the case of traditional banks that conduct most of their lending through branches, assessment areas will cover the great majority of a bank's retail lending activity. In contrast, assessment areas will be less effective and cover only a minority of a bank's lending activity when a bank is a nontraditional lender using the internet, brokers, or loan officers to make large numbers of loans. Retail lending outside of assessment areas does not factor in a bank's CRA rating. If a community group therefore raises a legitimate issue concerning retail lending to low- and moderate-income borrowers outside an assessment area, the comment will not factor on the CRA exam.

It is possible to fix the assessment area constraint in a number of ways. The more difficult one in the current political environment is to amend the CRA statute to stipulate that CRA exams consider most bank retail lending, regardless of whether it is conducted through branches. Another fix that could be readily implemented is to follow the example of a few outlier CRA exams that considered lending outside of assessment areas. These exams rely on the current regulation and interagency guidance indicating that a small percentage of lending in the assessment areas will reflect poorly on

a bank (Silver, 2015). The exams then check to see if lending outside the assessment areas is serving low- and moderate-income borrowers. NCRC has yet to see an exam conducted in this manner lower a rating for poor retail lending performance outside of assessment areas. However, it would seem that if an examiner observes poor performance, the exam narrative could point it out and encourage the bank to improve performance. Although a more effective and sweeping procedure is needed, this approach would at least be able to incorporate and respond to community group concerns about substantial volumes of bank lending wherever it is occurring.

A second problem with assessment areas is the distinction between full-scope and limited-scope assessment areas. Full-scope areas have a considerable influence on the final rating, whereas limited-scope areas have little influence on the final rating. In the case of several large-bank CRA exams, full-scope assessment areas are the minority of assessment areas. Moreover, full-scope areas tend to be large metropolitan areas, whereas medium-sized or small cities and rural counties are usually limited-scope areas. NCRC members from areas like Dayton, Ohio; Gary, Indiana; or Upstate New York often have less influence than other members in larger cities on a CRA exam rating, only because of where they live and work.

CRA examination procedures could be changed to facilitate influence from community organizations in smaller metropolitan areas or rural counties by increasing the number of full-scope areas.[7] This change would not significantly increase examiners' workloads or exhaust resources because examiners conduct data analysis for all areas already. Alternatively, agencies could use a random process for designating some full-scope assessment areas so that a bank would be compelled to perform reasonably well in all areas.[8] Still another approach would be to group all limited-scope areas in a state together and count them as one full-scope area, which would give these areas a greater chance to influence a rating.

The CRA examiner could also expand the exam narrative for limited-scope areas, indicating where performance could be improved. Overall, NCRC believes that expanding CRA exam narrative to include discussions of expected improvements in CRA performance—for example, in a new section on CRA exams called "Expectations for Improvement"—would actually be beneficial for both limited- and full-scope exams.

The relatively few times that NCRC and its members have affected a CRA rating involved a systemic issue, meaning that it was significant enough to capture regulator attention. In the case of Woodforest National Bank, for example, NCRC commented on a low loan-to-deposit ratio; that is, the bank was taking deposits but not making loans. The bank failed its exam (OCC, 2012a). Likewise, several NCRC members commented on a restrictive policy involving credit scores and FHA lending in the case of BBVA Compass Bank, which contributed to low levels of lending to low- and moderate-income and minority borrowers (Federal Reserve Bank of Atlanta, 2013).[9]

[7] Presently, full-scope areas tend to be where the most loans are made, deposits are received, or both. However, although a large bank may have a small minority of its loans and deposits in a limited-scope area, the bank, by virtue of its size and market presence, might be a major lender in the limited-scope area. Hence, the case can be made that a number of limited-scope areas on large-bank CRA exams should receive more consideration.

[8] The bank's largest markets, where it has its highest numbers of loans or deposits, will likely remain full scope. However, an examiner could create a random process for smaller markets (whether they be smaller metropolitan areas or rural areas) in which some of these areas are assured full-scope status.

[9] Compass received a needs-to-improve and passed its subsequent exam.

However, identifying systemic issues is a high bar that will not be met in all cases, particularly in the cases of uneven lending across assessment areas. Having an "Expectations for Improvement" section may point to an unmet need that the examiner could agree that the bank has the capacity to address, even when community groups' concerns do not lead to a lower rating. Examiner narrative indicating expectations for improvement would increase the chances that nonsystemic issues, which will probably not impact a rating, will nevertheless be addressed. Also, if a need remains unaddressed and community organizations issue comments in the bank's CRA public file during subsequent years, these comments should influence a bank's rating in one or more states or overall on the next exam.

Affiliates

The current examination procedure of allowing banks to decide whether their nondepository affiliates are included on CRA exams also limits community-group input on CRA exams. Banks tend to include their affiliates if they are making responsible loans and are effective in serving low- and moderate-income borrowers. However, banks will tend to exclude affiliates from their CRA exams if they have compliance concerns or if the affiliates are not particularly effective in reaching low- and moderate-income borrowers. In the early 2000s, leading up to the financial crisis, a number of nondepository affiliates made high numbers of questionable subprime loans that were not included on CRA exams. Clearly, this limited the CRA exams' effect on the behavior of these affiliates and also prevented community organizations from commenting during CRA exams about the affiliates. Community groups would have to wait for merger applications to make their views known about the affiliates. Thus, timely community input on these important matters was limited.

The agencies have not mandated inclusion of affiliates on CRA exams. If they believe action is needed by Congress to mandate nondepository affiliates be included on CRA exams, the agencies could nevertheless amend CRA examination procedure. At the very least, if community groups believe that affiliates are violating antidiscrimination and consumer protection law, they should be able to present their concerns on CRA exams. If the agencies identify violations or inadequate compliance controls, they should downgrade the bank's rating. The inadequate legal compliance would ultimately affect the bank because management does not have strong enough controls throughout the entire organization to ensure legal and responsible operations.

Currently, affiliate violations can lead to downgrades in ratings only if the violations occur in the assessment areas and the bank has included the affiliates in the exam. A recent example of this involves SunTrust Bank, whose affiliate, SunTrust Mortgage Company, was involved in two settlements involving price discrimination[10] and violations of the Home Affordable Modification Program (HAMP)[11] program that occurred during a time period covered by two consecutive CRA exams. The settlements did not affect the bank's CRA exam because the affiliate was not included on the CRA exam. The mortgage company, however, was making high volumes of home loans that the bank was purchasing (Federal Reserve Bank of Atlanta, 2010).

[10] https://www.justice.gov/opa/pr/justice-department-reaches-21-million-settlement-resolve-allegations-lending-discrimination.

[11] HAMP was a federal program that provided subsidies to banks to restructure mortgages of distressed borrowers in order to prevent foreclosure. See https://www.justice.gov/opa/pr/suntrust-mortgage-agrees-320-million-settlement.

Fair Lending Reviews

CRA does not consider lending to people of color or communities of color. Ironically, before the CRA regulatory reform of the mid-1990s, analysis of lending to people of color would occasionally be included on CRA exams (Silver, 2015). Now, a fair-lending review section affirms that either the bank regulatory agency or the Consumer Financial Protection Bureau has conducted a fair-lending review. In a few brief sentences, the section will state that neither review detected discrimination or other illegal activity. Sometimes, the section will state whether occurrences of discrimination or other violations were widespread, thus resulting in a rating downgrade. Occasionally, the exam will describe the nature and type of the violation and which protected classes were victimized. Recently, some very large banks, including Wells Fargo (OCC, 2012b), failed their CRA exams due to serious violations of fair lending and consumer compliance, which were described in the fair-lending review section. However, in many—if not most—instances, the exam will not describe the violation.

When violations are not described, community group input is stunted. Fair-housing and fair-lending groups are unable to engage in testing or mystery shopping to determine if the violations have indeed ceased. They are thus unable to report findings from their investigations on future CRA exams or merger applications. Also, when CRA examiners do not describe community group comments on bank performance concerning communities of color, the community group does not know if the agencies took these comments into account when conducting the fair-lending review. Even if the agencies find that no discrimination occurred, the exam narrative should describe that community organizations raised concerns but that the agencies did not find violations. This would provide reassurance that serious concerns of the public were at least addressed. Overall, the CRA examiner narrative on the fair-lending section needs improvement to be more transparent.

Impact of Public Comments on Mergers and Applications—More Effective Than Community Reinvestment Act Exams

In contrast to CRA exams, the regulators' responses to public comments on merger applications have resulted in public input achieving significant impacts. The Bank Merger Act[12] requires the federal agencies to consider the "probable effect of the merger transaction in meeting the convenience and needs of the community to be served." The "probable effect" is also referred to as the "public benefit" standard. Although not in most cases, the agencies have acted on public comments regarding public benefit.

Past performance will provide a guide to likely future performance. If a bank performed poorly in the past and received a low CRA rating, the future performance is likely to be poor or mediocre at best. Thus, commenting on CRA exams is also important for merger applications. If community groups influence the CRA rating, they can also influence the outcome of a merger proceeding by pointing out weaknesses or strengths in bank CRA performance and exams.

[12] 12 U.S.C 1828 (b). https://www.law.cornell.edu/uscode/text/12/1828.

It is also the case that future performance could be different from past performance. For example, suppose a bank did well on its CRA exam and received a good rating. The future performance could decline if the bank closed several branches after its merger in a cost-cutting move. Hence, careful review of the merger application by federal agencies and the public is important to determine the likely impacts on future performance.

A number of banks try to satisfy the forward-looking requirement with vague promises that they will continue to comply with their CRA and fair-lending requirements. However, NCRC and its member organizations maintain that assessing the probable effect of a merger entails using objective measures of performance in determining whether a proposed merger will have public benefits in the future. For example, will the number and percent of branches in low- and moderate-income communities increase or decrease after the merger is consummated?

Four years ago, NCRC and its member organizations opposed a proposal by Renasant Bank in Mississippi to acquire another midsize bank. Renasant's percentage of loans to minorities and low- and moderate-income borrowers was much lower than that of its peers in a number of metropolitan areas. NCRC asked for a specific plan and performance measures indicating how the bank would improve. The Federal Deposit Insurance Corporation (FDIC) responded in a conditional merger approval requiring the bank to develop an action plan that would indicate how it would improve lending performance to be at or above the level of its peers within 3 years.

NCRC applauded the FDIC's move but noted that the action plan was to be submitted to the agency directly, without the public being able to comment on its adequacy before submission. Ultimately, NCRC and its members want banks to develop such plans regularly and submit them as part of their application. This would help significantly in the implementation of the public benefit standard.

In subsequent mergers, NCRC and its members were not content to wait for the agencies to require action plans submitted by banks. In recent cases involving large banks, NCRC saw an opportunity to work with forward-thinking banks in jointly developing public benefit plans. In early 2016, Keybank proposed to acquire First Niagara, which was a major lender in New England. Communities throughout Keybank's footprint, but particularly in New England, were concerned about branch closures and reductions in lending. Taking advantage of a positive relationship with Keybank, NCRC approached the bank regarding a public benefits agreement.

During the merger application process over a period of several months, NCRC, 100 NCRC member organizations, and Keybank negotiated a public benefits agreement that lasts 5 years that commits Keybank to significant increases over the premerger lending of it and First Niagara. Committed totals include $5 billion in mortgage lending, $2.5 billion in small business lending, and $8.8 billion in community development lending in low- and moderate-income communities. Also, Keybank agreed to halt the closure of four branches in low- and moderate-income tracts and to open a branch in a low- and moderate-income tract in Buffalo (NCRC, 2016).

To increase the chances that the benefits plan can be achieved, Keybank and NCRC established a national advisory committee and several local advisory committees consisting of bank officials and community group representatives. These committees will review the bank's progress in meeting plan goals and work together to magnify successes and also address any obstacles or challenges

impeding goal attainment. The Federal Reserve Board issued a conditional merger approval of Keybank's merger, acknowledging the execution of the benefits agreement reached with community organizations.

Shortly after the Keybank merger, NCRC and Huntington worked together to strike a similar public benefit commitment to be implemented after Huntington's acquisition of First Merit. The total commitment of $16 billion was quite similar to Keybank's. Other important provisions included the addition of dedicated community mortgage loan officers and the formation of a dedicated mortgage processing team to handle unique underwriting opportunities. Reforms in bank processes and additions of specialized loan officers will help banks reach traditionally underserved communities.

The merger application process is far from perfect. Public benefit plans and commitments do not happen regularly. Community groups need to advocate vigorously for their adoption. The agencies, however, recognize the importance of considering convenience and needs in the merger process to make sure that mergers do not benefit banks at the expense of communities. During NCRC's annual conference in 2016, Comptroller of the Currency Thomas Curry called conditional merger approvals a "unique tool" and said that community groups like NCRC have a "critical role" in addressing public benefit concerns (NCRC, 2016).

Conclusion

A law, no matter how well constructed, is only as good as its implementation. CRA and the merger application process have conferred significant benefits on traditionally underserved communities, but the constrained and tentative regulatory implementation of these laws has frustrated their full potential. Integral for the full attainment of these laws is the active participation of the communities these laws are intended to empower. The participation of the communities, however, will be stunted if CRA exam procedures continue to limit the scope and application of community group comments due to blinkered procedures regarding assessment areas, affiliates, and fair-lending reviews. Although the procedures regarding public input and the consideration of public input are more developed and effective on merger applications, inconsistencies remain. CRA and the merger application process should ultimately be regarded as means for creating dialogue and conversation among stakeholders (community groups, banks, and regulators) about the extent to which banks are meeting community credit needs. If the conversation is stilted and options are limited for responding to the conversation, then CRA and the merger application process will fall short of their potential to increase access to credit, investment, and bank services for traditionally underserved communities. The recommendations in this commentary are geared toward promoting a rich and powerful dialogue that leads to mutually beneficial results for communities and banks.

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