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Richard D. Marsico
New York Law School

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The 2004–2005 Amendments to the Community Reinvestment Act Regulations: For Communities, One Step Forward and Three Steps Back

By Richard D. Marsico

Richard D. Marsico
Professor of Law and Codirector
of the Justice Action Center

New York Law School,
47 Worth St.
New York, NY 10013
212.431.2180
rmarsico@nyls.edu

In 2001 the four federal banking agencies that enforce the Community Reinvestment Act (CRA) began a review of CRA regulations that they adopted in 1995.¹ The review lasted until they issued amendments in 2004 and 2005. The review process was controversial, tortuous, and divisive.² By the time it was over, residents of the communities that the CRA was intended to benefit—including low- and moderate-income and predominantly minority neighborhoods, or “underserved communities”—gained a victory in their efforts to promote community reinvestment and economic development but lost significant ground. The victory was the strengthened regulation of subprime and predatory lending. The losses included a reduction in the number of banks and savings associations subject to more rigorous CRA standards, a loss in the amount of publicly available data about small-business and small-farm lending, and the elimination of community development lending and investment and retail banking service requirements for large savings associations. As a result of the amendments to the CRA regulations, underserved communities face a reduction in loans, investments, and services.

In this article I describe the CRA and the 1995 CRA regulations, identify some of the key issues in the CRA amendment process, describe the amendments to the regulations, evaluate the amendments’ likely effect on underserved communities, and suggest to advocates how they can use the amended CRA regulations to help underserved communities and how to prevent further cutbacks in the CRA’s protection provisions.

¹Community Reinvestment Act (CRA), 12 U.S.C. §§ 2901–2908 (2001). Four federal agencies enforce the Community Reinvestment Act (CRA) for different types of banks: the Office of the Comptroller of the Currency for national banks, the Board of Governors of the Federal Reserve System (Federal Reserve Board) for state-chartered banks that are members of the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC) for state-chartered banks and savings banks that are not members of the Federal Reserve Board, and the Office of Thrift Supervision for savings associations. *Id.* § 2902(1).

²A timeline of the review process follows July 19, 2001—the agencies issue Joint Advance Notice of Proposed Rulemaking, 66 Fed. Reg. 37602; February 6, 2004—the agencies issue a joint notice of proposed rule making, 69 Fed. Reg. 5729 [hereinafter Joint Notice of Proposed Rulemaking]; August 18, 2004—the Office of Thrift Supervision announces that it is amending its CRA regulations to define a small savings association as having assets less than \$1 billion, 69 Fed. Reg. 51155 [hereinafter Office of Thrift Supervision Small Savings Association Regulations]; August 20, 2004—the FDIC issues a notice of proposed rule making to define a small bank as having assets up to \$1 billion and proposes adding a community development test to the CRA performance evaluations of small banks with assets greater than \$250,000 up to \$1 billion, 69 Fed. Reg. 51611; November 24, 2004—the Office of Thrift Supervision issues a notice of proposed rule making defining community development to include efforts in rural areas and allowing a large savings association to determine the weights that its lending, investments, and services would have in determining its CRA rating, 69 Fed. Reg. 68257 [hereinafter Office of Thrift Supervision Large Savings Association Proposal]; March 2, 2005—the Office of Thrift Supervision adopts the Large Savings Association Proposal, 70 Fed. Reg. 10023 [hereinafter Office of Thrift Supervision Large Savings Association Regulations]; March 11, 2005—the FDIC reunites with the Office of the Comptroller of the Currency and the Federal Reserve Board to issue another joint notice of proposed rule making, similar to the notice that the FDIC issued on August 18, 2004, 70 Fed. Reg. 12148 [hereinafter Second Joint Notice of Proposed Rulemaking]; August 2, 2005—the Office of the Comptroller of the Currency, Federal Reserve Board, and FDIC issue a joint final rule amending their CRA regulations, 70 Fed. Reg. 44256 [hereinafter Final CRA Regulations].

The Community Reinvestment Act

The CRA places on banks a “continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.”³ The CRA requires each federal banking agency to encourage each bank it regulates to help meet the credit needs of its local community.⁴ The agencies enforce the CRA by evaluating each bank’s record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, and issuing a written CRA performance evaluation report with a CRA rating.⁵ The agencies also take account of a bank’s CRA record when considering the bank’s expansion applications and may deny an application if the bank has a poor CRA record.⁶

The 1995 CRA Regulations

In 1995 the federal banking agencies adopted revised CRA regulations.⁷ Under the 1995 CRA regulations, large banks, small banks, and wholesale banks are subject to different tests for CRA compliance.⁸

Large Banks. The 1995 CRA regulations subject large banks and savings associations with \$250 million or more in assets to the lending, investment, and service tests. The lending test evaluates a bank’s

- number and dollar amount of home mortgage, small business, and small farm loans;
- geographic distribution of loans, including proportion of the bank’s lending in its

community, dispersion of lending, and number and dollar amount of loans in low-, moderate-, middle-, and upper-income census tracts;

- loans to borrowers at different income levels, including home mortgage loans, small businesses and small farms with annual revenue less than or equal to \$1 million, and small-business and small-farm loans by amount at origination;
- community development loans, including their innovativeness and complexity; and
- innovative or flexible credit practices.⁹

The investment test measures

- dollar amount of community development investments;
- their innovativeness and complexity;
- their responsiveness to credit and community development needs; and
- the extent to which they are not provided by other investors.¹⁰

The service test measures a bank’s

- branch distribution by neighborhood income level;
- record of opening and closing branches, particularly in low- and moderate-income neighborhoods;
- alternative means such as automated teller machines for providing banking services to low- and moderate-income neighborhoods;

³12 U.S.C. § 2901(a)(3) (2001).

⁴*Id.* § 2901(b).

⁵*Id.* §§ 2903(a)(1), 2906(a)(1), (b)(1)(A). The possible ratings are outstanding, satisfactory, needs to improve, and substantial noncompliance. *Id.* § 2901(b)(2).

⁶*Id.* §§ 2903(a)(2), 2902(3); 12 C.F.R. § 25.29(4) (2005).

⁷The 1995 regulations are available at 12 C.F.R. pts. 25 (Office of the Comptroller of the Currency), 228 (Federal Reserve Board), 345 (FDIC), and 563e (Office of Thrift Supervision) (2005). Because the agencies’ 1995 regulations were substantially identical, the 1995 regulation citations are to the Office of the Comptroller of the Currency’s regulations only.

⁸A wholesale bank is one not in the business of extending loans to retail customers. 12 C.F.R. § 25.12(w) (2005). Wholesale banks are not discussed here because the amendments did not involve them.

⁹*Id.* § 25.22(b)(1)–(5). Community development is defined as affordable housing for low- and moderate-income individuals, community services targeted to low- and moderate-income individuals, activities that promote economic development by financing small businesses or small farms, and activities that revitalize or stabilize low- and moderate-income areas. *Id.* § 25.12(h).

¹⁰*Id.* § 25.23(e)(1)–(4).

- range of services provided in neighborhoods by income level; and
- community development banking services.¹¹

Large banks report three types of data under the 1995 CRA regulations:

- Small-business and small-farm loans—by census tract, aggregate number, and dollar amount at various amounts to businesses and farms with annual revenue less than or equal to \$1 million.
- Community development loans—total number and dollar amount.
- Home mortgage lending—location of each loan application or loan that is outside the metropolitan areas in which the bank has a home or branch office or outside any metropolitan area.¹²

Small Banks. Under the 1995 CRA regulations, a small bank or savings association with less than \$250 million in assets is evaluated according to a test that is not as rigorous or demanding as the lending test for large banks and is not subject to an investment or service test. The small-bank test evaluates the bank's

- loan-to-deposit ratio;
- percentage of loans in its community;
- record of lending to borrowers at different income levels and farms and businesses of different sizes;
- geographic distribution of loans; and
- responsiveness to complaints.¹³

Small banks and savings associations are not required to report data under the CRA.

Rules Applicable to All Banks. Under the 1995 CRA regulations, two rules are

applicable to all banks and savings associations. First, evidence that a bank is engaged in discriminatory or illegal credit practices will adversely affect its CRA evaluation.¹⁴ Second, each bank must define the geographic area in which it has CRA obligations and in which its CRA record will be evaluated.¹⁵

Community Reinvestment Issues in Amending the CRA Regulations

When the federal banking agencies adopted the 1995 CRA regulations, they committed to review them in 2002.¹⁶ Beginning with the agencies' Joint Advance Notice of Proposed Rulemaking, underserved communities and banks raised several issues. Underserved communities pressed for

- stricter regulation of subprime and predatory lending;
- expanded CRA assessment areas and mandatory evaluation of bank affiliate loans; and
- increased data disclosure requirements.

Banks sought to

- reduce the asset threshold for defining small banks and savings associations and
- weaken community development lending and investment obligations.

Subprime and Predatory Lending. Subprime home mortgage loans are loans at higher than prime interest rates to borrowers with less than perfect credit. While the subprime market serves to make home mortgage loans available to borrowers who might otherwise not receive a loan, the subprime lending market is subject to abuse.¹⁷ The first abuse takes two forms: "steering"

¹¹*Id.* §§ 25.21(d)(1)–(4), (e)(1)–(2). Community development banking services consist in providing technical expertise to not-for-profit entities involved in economic development, serving on the board of directors of a community development organization, credit counseling, or low-cost government check cashing. Community Reinvestment Act Regulations, 60 Fed. Reg. 22156, 22160, n.2 (April 19, 1995) [hereinafter 1995 CRA Notice of Rulemaking].

¹²12 C.F.R. § 25.42(b)(1)–(3) (2005). These reporting requirements are in addition to home mortgage lending data reporting requirements for lenders under the Home Mortgage Disclosure Act. 12 U.S.C. §§ 2801–2808 (2001)

¹³12 C.F.R. § 25.26(a)(1)–(5).

¹⁴*Id.* § 25.28(c).

¹⁵*Id.* § 25.41(a).

¹⁶1995 CRA Notice of Rulemaking, 60 Fed. Reg. at 22177.

¹⁷See Joint Notice of Proposed Rulemaking, 69 Fed. Reg. at 5739.

and “targeting.” Steering is referring borrowers to subprime loans even if they might qualify for prime loans. Targeting is marketing subprime loans aggressively in underserved neighborhoods. Data released in 2005 under the Home Mortgage Disclosure Act, though not conclusive, suggest that steering and targeting based on race occur as higher percentages of African Americans and Latinos than whites received high-cost subprime loans.¹⁸ The second abuse is predatory lending, which is subprime lending that has any number of abusive characteristics, such as excessive and hidden fees, prepayment penalties, single-premium credit insurance, mandatory arbitration, frequent refinancing of the same loan, and asset-based lending without regard to repayment ability.¹⁹

The 1995 CRA regulations do not regulate subprime and predatory lending as effectively as they could under the law. The CRA’s mandate that banks help “meet” the credit needs of their entire communities can be construed to mean that a bank that is hurting the community with discriminatory subprime or predatory lending is not helping meet the community’s credit needs.

Following the adoption of the 1995 CRA regulations, the subprime lending market—and with it the problem of predatory lending—grew significantly especially in underserved neighborhoods.²⁰ When the regulations were being amended, community groups called on the federal banking

agencies to strengthen the CRA’s role in fighting abusive subprime and predatory lending.²¹ The National Community Reinvestment Coalition proposed amendments that would strengthen the CRA’s regulation of abusive subprime and predatory lending. The coalition proposed that the regulations have a comprehensive list of lending practices that constitute predatory lending, require fair lending audits to ensure that subprime lending is not discriminatory, cover all types of loans made by a bank and its affiliates, cover loans whether in the bank’s CRA assessment area or not, and require mandatory penalties in CRA performance evaluations for violations.²²

Affiliate Lending and Assessment Areas.

The 1995 CRA regulations created two loopholes that allow a bank to avoid CRA regulation of a significant part of its lending. First, the loans that a large bank’s nonbank affiliate lenders make are not evaluated in the bank’s CRA performance evaluation unless the bank elects them to be covered.²³ Community groups argued that this allowed a bank to skew its CRA record favorably by engaging in CRA-related lending only while referring its wealthy applicants to a lending affiliate that was nothing more than an alter ego.²⁴ Community groups also argued that predatory and other abusive lending practices generally took place in the nonbank lending affiliates of banks; groups proposed that to help prevent these practices all lending by a

¹⁸Edmund Andrews, *Blacks Hit Hardest by Costlier Mortgages*, *NEW YORK TIMES*, Sept. 14, 2005, at C1.

¹⁹See Joint Notice of Proposed Rulemaking, 69 Fed. Reg. at 5739.

²⁰See JOINT COMMITTEE FOR HOUSING STUDIES, *THE 25TH ANNIVERSARY OF THE COMMUNITY REINVESTMENT ACT: ACCESS TO CAPITAL IN AN EVOLVING FINANCIAL SERVICES SYSTEM 1-18* (2002). In 2005 subprime lending constituted 10-to-15 percent of home mortgage lending. Letter from John Taylor, President and Chief Executive Officer, National Community Reinvestment Coalition, to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System; Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation; Office of the Comptroller of the Currency 11 (May 6, 2005) [hereinafter Taylor Comments] (on file with Richard D. Marsico).

²¹Joint Notice of Proposed Rulemaking, 69 Fed. Reg. at 5739.

²²Letter from John Taylor, President and Chief Executive Officer, National Community Reinvestment Coalition, to Communications Division, Office of the Comptroller of the Currency; Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System; Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation, Chief Counsel’s Office, Office of Thrift Supervision 15 (April 12, 2004) [hereinafter Taylor Letter] (on file with Richard D. Marsico).

²³12 C.F.R. § 25.22(c)(1) (2005). Many banks are owned by holding companies that also own nonblank lenders. These nonbank lender affiliates of banks are not subject to the CRA.

²⁴See Memorandum of Josh Silver, Vice President of Research and Policy, National Community Reinvestment Coalition, to National Community Reinvestment Coalition Members (Feb. 17, 2004) [hereinafter Silver Memo] (on file with Richard D. Marsico); Taylor Letter, *supra* note 22, at 20.

bank's affiliates be part of the bank's CRA evaluation.²⁵

Second, a bank is evaluated for CRA compliance only in its self-defined CRA assessment area, the one in which it has branches and takes deposits.²⁶ Community groups, pointing out that many banks did a significant amount of lending outside the areas in which they had branches and took deposits, argued that this loophole allowed banks to escape CRA regulation of a significant part of their lending and that banks subject to the CRA should not be allowed to ignore the credit needs of low- and moderate-income communities simply because the communities were outside the banks' self-defined CRA assessment areas.²⁷ They proposed that the definition of a CRA assessment area be expanded to cover all areas where a bank makes a significant portion of its loans.²⁸

Data Disclosure. Data constitute one of the most important tools for promoting community reinvestment. The public disclosure of detailed data about bank home mortgage lending in 1991 pursuant to the Home Mortgage Disclosure Act, showing that minorities were rejected for loans at much higher rates than whites, was followed by dramatic increases in lending to low- and moderate-income and minority persons and neighborhoods.²⁹ The data about small-business, small-farm, and community development lending that the 1995 CRA regulations require banks to disclose are not as detailed as Home Mortgage Disclosure Act data. Community groups have been seeking the disclosure of similarly detailed data about small-business and small-farm lending;

they expect such disclosure to spur growth in such lending in underserved communities. They proposed requiring banks to make public more data—applicant race, census tract of the small business or small farm, and the decision on the application—regarding their small-business and small-farm loans.³⁰

Small Bank Asset Threshold. Several banks asserted, when the regulations were being amended, that the \$250 million threshold for defining small banks was too low.³¹ They argued that banks with assets slightly above the threshold had a difficult time competing with much larger institutions for investments, rarely qualified for an outstanding CRA rating, invested in projects inconsistent with their business strategy and financial interests, and faced disproportionately higher data collection and reporting costs.³² Banks also argued that the \$250 million asset threshold for defining a small bank was outdated because the percentage of banks that were small in 2001 was significantly lower than in 1995.³³

Community Development Investments. Many banks criticized the investment test. They stated that strong competition and low rates of return resulted from an insufficient number of eligible community development investments.³⁴ The banks proposed treating investments as extra credit in the CRA performance evaluation, having investments count toward the lending or service tests, treating investments equally with community development loans and services as part of a new community development test, and expanding the definition

²⁵Joint Notice of Proposed Rulemaking, 69 Fed. Reg. at 5739; Silver Memo, *supra* note 24, Taylor Letter, *supra* note 22, at 20–21.

²⁶12 C.F.R. § 25.41(c) (2005).

²⁷See Silver Memo, *supra* note 24, Taylor Letter, *supra* note 22, at 21.

²⁸Joint Notice of Proposed Rulemaking, 69 Fed. Reg. at 5735. See Taylor Letter, *supra* note 22, at 21.

²⁹RICHARD D. MARSICO, DEMOCRATIZING CAPITAL: THE HISTORY, LAW, AND REFORM OF THE COMMUNITY REINVESTMENT ACT 166–72 (2005).

³⁰Joint Notice of Proposed Rulemaking, 69 Fed. Reg. at 5737.

³¹*Id.* at 5737.

³²*Id.* at 5737–38.

³³*Id.* at 5738.

³⁴*Id.* at 5732.

of “community development” to mean also the revitalization efforts that incidentally benefit low- and moderate-income persons or neighborhoods.³⁵

The CRA Regulatory Amendments

The Federal Reserve, the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency adopted identical amendments to the CRA regulations, while the Office of Thrift Supervision parted ways with the three agencies and issued different amendments. The three agencies strengthened the CRA’s regulation of abusive subprime and predatory lending, took no action regarding CRA assessment areas and affiliate lending, did not expand CRA data disclosure requirements, increased the asset threshold for defining small banks, and redefined “community development” to cover activities that target distressed middle-income rural areas and designated disaster areas. The Office of Thrift Supervision increased the asset threshold for defining a small savings association and allowed large savings associations to excuse themselves from the investment and service tests. The office did not change any of the regulations on predatory lending, data disclosure, or CRA assessment and affiliate lending.

The key results of amending the CRA regulations are shown in Table 1.

Regulation of Subprime and Predatory Lending. The Federal Reserve Board, FDIC, and Office of the Comptroller of the Currency significantly amended the CRA regulations on predatory lending.³⁶ The Office of Thrift Supervision did not amend it. The amendments:

- Evidence of illegal practices by a bank in any census tract, whether in the bank’s CRA assessment area or not, will have an adverse impact on the bank’s CRA evaluation.

- Evidence of illegal practices by a bank’s affiliate in the bank’s CRA assessment area will have an adverse impact on the bank’s CRA evaluation if the bank elected to have its affiliate’s lending considered in its CRA record.

Violations of any of the following nonexclusive list of statutes constitutes an illegal credit practice: Fair Housing Act or Equal Credit Opportunity Act, Home Ownership and Equity Protection Act, Federal Trade Commission Act, Real Estate Settlement Procedures Act, and Truth in Lending Act. The agencies did not adopt several key provisions that community groups called for: a mandatory downgrade for evidence of illegal credit practices, mandatory fair lending audits, and a comprehensive description of all practices constituting predatory lending.³⁷

CRA Assessment Areas and Affiliate Lending. None of the agencies required affiliate lending to be included in a bank’s CRA performance evaluation. Nor did they change the definition of a bank’s CRA assessment area. They stated that no definition of the CRA assessment area would address every bank, the current definition covered most situations, examiners could adjust for unusual circumstances, and determining the appropriate type of activity (loans, deposits, or investments) that would be measured and the amount of activity that would be sufficient would be too difficult.³⁸ That the Federal Reserve Board, FDIC, and Office of the Comptroller of the Currency amended their CRA regulations to penalize a bank for illegal credit practices anywhere, such as outside its CRA assessment area, mitigates to some degree their failure to expand a bank’s CRA assessment area. Nevertheless, banks still are not required to meet the credit needs of areas outside their self-defined CRA assessment areas and thus in these areas may lend extensively and exclusively to

³⁵*Id.* at 5733.

³⁶Final CRA Regulations, 70 Fed. Reg. at 44266–70 (to be codified at 12 C.F.R. §§ 25.28(c)(1)(i)–(iv)(OCC), 228.28(c)(1)(i)–(iv) (Federal Reserve Board), 345.28(c)(1)(i)–(iv) (FDIC)).

³⁷Silver Memo, *supra* note 24.

³⁸Joint Notice of Proposed Rulemaking, 69 Fed. Reg. at 5735–36.

wealthy individuals or make only sub-prime loans as long as they do not otherwise violate the law.

Data Disclosure. None of the agencies adopted community advocates' data disclosure proposals. One consequence of their amendments, however, is to reduce the amount of lending data that banks report.

Asset Threshold and Performance Evaluations for Small Banks. The Federal Reserve Board, FDIC, and Office of the Comptroller of the Currency changed the asset threshold for small banks. They

- increased it from less than \$250 million to less than \$1 billion;
- created an intermediate small bank with assets from \$250 million to less than \$1 billion; and
- subjected these asset thresholds to annual adjustments based on changes in the Consumer Price Index.³⁹

Intermediate small banks, which were large banks under the 1995 CRA regulations, will no longer be evaluated according to the lending, investment, and service tests. Instead they will be evaluated according to the streamlined lending test for small banks and a new community development test.⁴⁰ The new community development test evaluates the number and dollar amount of an intermediate small bank's community development loans and investments, the extent of its community development services, and its responsiveness to community development lending, service, and investment

needs.⁴¹ Under the services category, the agencies will evaluate an intermediate small bank's provision of banking services (e.g., low-cost bank accounts and branches in low- and moderate-income neighborhoods) for low- and moderate-income persons.⁴² Intermediate small banks are not required to report data on their small-business, small-farm, and community development loans.

The increase in the asset threshold for the definition of small banks represents a victory for banks over the needs of underserved communities, particularly in rural areas and smaller cities. The National Community Reinvestment Coalition found, that as a result of this amendment, 1,508 banks with 13,643 branches and total assets of \$679 billion were no longer subject to the more rigorous lending, investment, and service tests for large banks and no longer required to disclose data about their small-business, small-farm, and community development lending.⁴³ Communities where these banks are located face a reduction in lending, services, and investment and a loss of the data that they need to detect and oppose the reduction. Residents of smaller cities and rural areas are particularly hard hit since higher percentages of banks that serve them are smaller.⁴⁴

Asset Threshold for Small Savings Associations. The Office of Thrift Supervision increased the asset threshold for a small savings association from less than \$250 million to less than \$1 billion.⁴⁵ From now on, savings associations with less than \$1 billion in assets will be evaluated according to the

³⁹Final CRA Regulations, 70 Fed. Reg. at 44266–70 (to be codified at 12 C.F.R. §§ 25.12(u)(1)–(2) (Office of the Comptroller of the Currency), 228.12(u)(1)–(2) (Federal Reserve Board), 345.12(u)(1)–(2)(FDIC))

⁴⁰*Id.* (to be codified at 12 C.F.R. §§ 25.26(a)(2) (Office of the Comptroller of the Currency), 228.26(a)(2) (Federal Reserve Board), 345.26(a)(2) (FDIC)).

⁴¹*Id.* (to be codified at 12 C.F.R. §§ 25.26(c) (Office of the Comptroller of the Currency), 228.26(c) (Federal Reserve Board), 345.26(c) (FDIC)).

⁴²*Id.* at 44260.

⁴³Taylor Comments, *supra* note 20, at 3, 12. These banks controlled 16.8 percent of all branches owned by banks regulated by the Federal Reserve Board, Office of the Comptroller of the Currency, and FDIC. *Id.* at 12

⁴⁴E.g., in 2004 intermediate small banks controlled 40 percent of rural bank assets in sixteen states and 25 percent of rural bank assets in thirty-three states. Taylor Comments, *supra* note 20, at 3. Intermediate small banks constituted at least 30 percent of all banks in sixteen states. *Id.* In twelve states they held at least 25 percent of all bank assets. *Id.*

⁴⁵Office of Thrift Supervision Small Savings Association Regulations, 69 Fed. Reg. at 51161 (to be codified at 12 C.F.R. § 563e.12(t)).

streamlined lending test for small savings associations and excused from the investment and service tests and the CRA data collection and reporting requirements. The Office of Thrift Supervision did not create an intermediate small savings association as the other three agencies did for banks, that is, the agencies differently treat banks and savings associations with similar assets.

Definition of “Community Development.” The Federal Reserve Board, FDIC, and Office of the Comptroller of the Currency amended their regulations to expand the definition of “community development.” The definition now covers activities that revitalize or stabilize low- and moderate-income neighborhoods and designated disaster areas or distressed or underserved rural middle-income census tracts.⁴⁶ Census tracts will be designated as distressed or underserved by the three agencies based on poverty and unemployment rates, and population size, loss, density, and dispersion.⁴⁷ The second change is intended to promote community reinvestment in rural areas. Many rural areas lack sufficient low- and moderate-income census tracts to qualify as low- and moderate-income, and, although they need revitalization, banks did not get CRA credit under the 1995 CRA regulations for loans, investments, and services that revitalized rural areas that were not low- and moderate-income.⁴⁸ Under the amendments, banks will get credit as long as the rural areas are distressed or underserved.

The CRA Performance Evaluation of Large Savings Associations. The Office of Thrift Supervision amended its regulations governing the performance eval-

uation of large savings associations with \$1 billion or more in assets. Large savings associations may now elect the weight that the lending, investment, and service tests will have in their CRA performance evaluations, provided that the lending test is worth at least half the weight.⁴⁹ Large savings associations may opt out of the investment and service tests entirely, that is, they may excuse themselves from making community development loans and investments and providing banking services in low- and moderate-income neighborhoods. Like small savings associations, large savings associations are now treated differently from large banks.

Community groups opposed this amendment because it will reduce the investments and services by large thrifts.⁵⁰ The National Community Reinvestment Coalition estimated that large savings associations held \$1.3 billion in community development investments and that this amount could drop by more than half under the Office of Thrift Supervision amendment.⁵¹

A Parting of the Ways. For the first time in the CRA’s history, the four federal banking agencies that enforce the CRA now have significantly different CRA regulations. This split among the agencies will most likely be harmful for communities and further reduce loans, investments, and services beyond the changes in the regulations themselves. For example, citing the absence of investment and service requirements for their large savings association cousins, large banks might pressure their regulatory agencies to use weaker standards to evaluate invest-

⁴⁶Final CRA Regulations, 70 Fed. Reg. at 44266–70 (to be codified at 12 C.F.R. §§ 25.12(g)(4)(i)–(iii)(A)–(B) (Office of the Comptroller of the Currency), 228.12(g)(4)(i)–(iii)(A)–(B) (Federal Reserve Board), 345.12(g)(4)(i)–(iii)(A)–(B) (FDIC)).

⁴⁷*Id.* (to be codified at 12 C.F.R. §§ 25.12(g)(4)(i)–(iii)(A)–(B) (Office of the Comptroller of the Currency), 228.12(g)(4)(i)–(iii)(A)–(B) (Federal Reserve Board), 345.12(g)(4)(i)–(iii)(A)–(B) (FDIC)).

⁴⁸Second Joint Notice of Proposed Rulemaking, 70 Fed. Reg. at 12152. Of rural counties 57 percent had no low- and moderate-income census tracts, and low- and moderate-income census tracts constituted only 15 percent of all tracts in rural counties. *Id.*

⁴⁹Office of Thrift Supervision Large Savings Association Regulations, 70 Fed. Reg. at 10030 (to be codified at 12 C.F.R. § 563e.28(d)). See Office of Thrift Supervision Large Savings Association Proposal, 69 Fed. Reg. at 68262.

⁵⁰Office of Thrift Supervision Large Savings Association Regulations, 70 Fed. Reg. at 10027.

⁵¹Letter from John Taylor, President and Chief Executive Officer, National Community Reinvestment Coalition, to Chief Counsel’s Office, Office of Thrift Supervision 3 (Jan. 21, 2005) (on file with Richard D. Marsico). Taylor Letter, *supra* note 22, at 7–8.

Table 1.—Changes in the Community Reinvestment Act Regulations

Issue	Federal Reserve Board, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency	Office of Thrift Supervision
Regulation of subprime and predatory lending	<ul style="list-style-type: none"> ■ Covers all home mortgage loans that a bank makes ■ Covers affiliate loans if bank elected to include them in its Community Reinvestment Act (CRA) evaluation ■ An illegal credit practice: violation of nonexclusive list of statutes 	No changes
CRA assessment area and affiliate lending	No changes	No changes
Data disclosure	Banks with assets less than \$1 billion no longer required to report small-business, small-farm, and community development loans and location of home mortgage loans outside areas where they do not have a branch or home office or outside any metropolitan area	Same
Asset threshold of small banks and savings associations	<ul style="list-style-type: none"> ■ Raised to less than \$1 billion ■ Community development test for intermediate small banks with assets of \$250 million to less than \$1 billion 	Raised to less than \$1 billion
Definition of "community development"	Covers revitalization efforts in distressed middle-income rural census tracts and designated disaster areas	Large savings associations excused from investment and service tests at their discretion

ments and services. Similarly, intermediate small banks, comparing themselves with their small savings association relatives that do not have community development lending, investment, and service requirements, might press their regulators to ease up on the new community development test. Now that the precedent for departure has been set, to break away from the others and create its own weaker standards might be easier for any one of the three agencies.

What Next for the CRA? Questions and Suggestions for Advocates for Underserved Communities

Several questions arise about the future of the CRA in light of the 2004-2005 regulatory amendments:

- How can advocates use the amendments to help underserved communities?
- How can advocates work to restore the cut-backs in the CRA's protection provisions?

- How can advocates preserve their proposals that the agencies did not adopt when the regulations were being amended?

- How can advocates prevent more cut-backs?

Using the CRA Amendments to Help Underserved Communities: Predatory Lending. Although the protection provisions against abusive subprime and predatory lending in the amended CRA regulations are not as strong as community advocates had hoped, they are useful for advocates who are representing individual victims of predatory lending or communities that are harmed by predatory lending. If a bank is violating the new regulations, advocates can invoke such protection in CRA performance evaluations, in CRA challenges to bank expansion applications, and in individual litigation.

If a bank is engaging in abusive subprime lending or predatory lending in violation

of the CRA, advocates can submit comments in connection with the bank's CRA performance evaluations. Advocates can also submit comments about lending practices even if they are not explicitly prohibited by the amended regulations. For example, a bank might have a relationship with a predatory lender that facilitates its efforts, such as purchasing loans from it. If the agency agrees that the bank engaged in abusive subprime or predatory lending, the agency might lower the bank's CRA rating. This could result in a denial of any subsequent bank expansion applications, the risk of which could lower the bank's stock price and make an acquisition more expensive. Even if the bank's rating is not lowered, the agency might comment negatively in the evaluation report or might work informally with the bank to change its practices.

When a bank submits an application to its regulatory agency to expand its business, members of the public can "challenge" the application by filing written comments with the relevant agency. The comments can raise all CRA-related issues and—practices that violate the CRA's predatory lending rules. Comments can also raise issues relating to whether the community's convenience and needs will be met by the merger—predatory lending practices that are not explicitly prohibited by the regulations such as purchasing predatory loans. A CRA challenge has several possible results: The agency may deny the application, although this is rare. The bank can commit to change its practices. The agency may condition approval of the application on the bank changing its practices. The agency can convince the bank informally to change its practices. Despite all, the agency may approve the application and take no action regarding the predatory lending.

The amendments might give leverage to attorneys who are representing clients in individual foreclosure cases. The leverage comes from the regulatory provision that allows a bank to avoid CRA penalties for predatory lending practices if the

bank takes steps to end its practices and make sure they do not recur. Settling a particular case alleging predatory lending, both as to the individual borrower and systemic illegal practices, can help a bank with its CRA rating.

Another issue is whether the new CRA regulations can be used in predatory lending litigation. The CRA has been found not to create a private cause of action.⁵² The new regulations seem unlikely to change this. However, the regulations may be useful in litigation by, for example, helping develop discovery requests or establish industry standards.

Using the CRA Amendments to Help Underserved Communities: Rural Areas.

Probably the greatest beneficiaries of the amendments are residents of distressed middle-income census tracts in rural areas. Bank loans, investments, and services in these census tracts are now eligible for CRA credit. Advocates for these communities can use this to encourage banks to make investments and loans and services in their neighborhoods. One possible downside of this change is the potential loss of community development loans, investments, and services from low- and moderate-income rural census tracts, and advocates should monitor for this.

Restoring the CRA Cutbacks. At some point, community advocates will have an opportunity to restore the cutbacks in the CRA's protection provisions. Documenting the harms that the amendments cause would be useful. For example: Did overall lending, service, and investment levels drop in a community where a large proportion of banks and savings associations were reclassified as small? How did home mortgage lending change for reclassified banks? Did a large savings association close a branch in a low- to moderate-income neighborhood? Stop offering services tailored to the needs of low- to moderate-income persons such as a basic banking account? Withdraw from a low-income housing tax credit project?⁵³ One useful way to discover this would be to compare the preamendment CRA per-

⁵²See MARSICO, *supra* note 29, at 35–36.

⁵³See, e.g., Silver Memo, *supra* note 24; Taylor Letter, *supra* note 22, at 3.

formance evaluations of banks reclassified as small with their first evaluations after the amendments were adopted. Such comparison could show, for example, whether a particular bank reclassified as an intermediate small bank decreased its investments, services, or lending. The comparison could also document whether large savings associations opted out of investment and service tests and how their records changed.

Also useful would be to document any changes in the standards that the Federal Reserve Board, FDIC, and Office of the Comptroller of the Currency apply to large banks and to identify the standards that they use for the community development test for intermediate small banks. Reviewing CRA performance evaluation reports for these banks before and after the 2004-2005 amendments should once again be helpful. For example, did an agency give the same rating on the investment test or the service test to a large bank whose investment or service levels dropped? What standards did the agency apply to an intermediate small bank's community development loans, investments, and services, and how did the standards and the bank's performance as an intermediate small bank compare with the standards and performance when it was a large bank?

Keeping Community Proposals Alive.

Advocates can keep community group proposals that were not adopted in the amended regulations alive by documenting the consequences of the agencies' failure to adopt the proposals. This includes information about the continuing extent of and harm from abusive subprime and predatory lending, bank affiliates' abusive subprime and predatory lending that is not included in a bank's CRA performance evaluation, and the extent of bank lending outside their CRA assessment areas and the income and race of loan recipients.

Preventing More Cutbacks. The risk to the CRA has not ended with these amendments. Banks will continue to press for regulatory relief. If trends over the last several years hold, they will continue to get such relief. Starting with the passage of the Economic Growth and Paperwork Reduction Act in 1996, there have been several cutbacks in the CRA and Home Mortgage Disclosure Act.⁵⁴ Among the cutbacks: increasing the asset threshold for lenders required to report Home Mortgage Disclosure Act data and creating an annual increase based on the increase in the Consumer Price Index, limiting the frequency of CRA performance evaluations for small banks with satisfactory CRA ratings, and creating reporting requirements for CRA agreements.⁵⁵ When Congress repealed the Glass-Steagall Act and permitted banks to engage in insurance and securities, Congress did not subject banks' applications to CRA scrutiny, nor did it extend CRA obligations to the banks' insurance or securities business.⁵⁶

Advocates can take several steps to prevent more cutbacks: Besides using the CRA to help communities, working to restore the cutbacks, and working to implement the proposals that the agencies did not adopt, advocates can show the usefulness of Home Mortgage Disclosure Act data and CRA data by using and publicizing them. For example, new data reported under the Home Mortgage Disclosure Act allow advocates to study subprime lending patterns. Advocates can use these data to issue reports about subprime lending patterns in their neighborhoods, particularly if they show evidence of steering or targeting. Advocates can participate in future administrative rule making. According to the National Community Reinvestment Coalition—which spearheaded letter-writing efforts when the CRA regulations were being amended—letters from com-

⁵⁴Economic Growth and Paperwork Reduction Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

⁵⁵12 U.S.C. §§ 1831y(a), 2908(a)-(b) (2001).

⁵⁶See MARSICO, *supra* note 29, at 26.

munities and community advocates helped convince the Federal Reserve Board, FDIC, and Office of the Comptroller of the Currency not to adopt some of the most damaging CRA provisions adopted by the Office of Thrift Supervision and to institute a community development test for intermediate small banks.⁵⁷

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For nearly thirty years, the CRA has been a source of loans, investment, and banking services for underserved communities. The federal government's commit-

ment to enforcing the CRA has waxed and waned, but community support for the CRA has never wavered. Community group tenacity and commitment will bring the CRA through this low period and eventually restore and improve it.

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Organizations that Can Assist on the Community Reinvestment Act

Several organizations with expertise in the Community Reinvestment Act and community reinvestment may be available for assistance, information, or advice:

California Reinvestment Coalition, www.calreinvest.org

Center for Community Change, www.communitychange.org

Community Reinvestment Associates of North Carolina, www.cra-nc.org

Delaware Community Reinvestment Action Council, www.drcac.org

Economic Justice Project at New York Law School, 212.431.2180

Greenlining Institute, www.greenlining.org

Inner City Press, www.innercitypress.org

National Community Reinvestment Coalition, www.ncrc.org

Neighborhood Economic Development Advocacy Project, www.nedap.org

New Jersey Citizen Action, www.njcitizenaction.org

Pittsburgh Community Reinvestment Group, www.prcg.org

Woodstock Institute, www.wodstockinst.org

⁵⁷Memorandum of Josh Silver, Vice President of Research and Policy, National Community Reinvestment Coalition, to National Community Reinvestment Coalition Members (Aug. 23, 2005) (on file with the Richard D. Marsico).