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A Guide to Enforcing the Community Reinvestment Act

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A GUIDE TO ENFORCING THE COMMUNITY REINVESTMENT ACT

Richard Marsico*

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I. Introduction

The Community Reinvestment Act ("CRA")\(^1\) represents a departure from the traditional view that a bank's only responsibilities are to maximize profitability and preserve financial safety.\(^2\) The CRA adds a continuing, affirmative obligation on banks to meet the credit needs of their communities — including low and moderate income neighborhoods — by providing appropriate credit products and deposit services.\(^3\)

The CRA requires each appropriate federal banking regulator\(^4\) to

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3. There are four federal banking regulators. CRA enforcement responsibilities are divided among them as follows: (1) Comptroller of the Currency — national banks; (2) Board of Governors of the Federal Reserve System — state chartered banks that are members of the Federal Reserve System; (3) Federal Deposit Insurance Corporation — state chartered banks and savings banks that are not members of the Federal Reserve System, and whose deposits are FDIC insured; and (4) Office of Thrift Supervision — savings associations whose deposits are insured by the FDIC and savings and loan holding companies. See 12 U.S.C. § 2902(1) (1988 & Supp. III 1991). There are several methods for determining which agency regulates a particular bank. See Federal Fi-
"encourage . . . [financial] institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions." The operative terms are "encourage," "consistent with safe and sound operation," "local communities," and "meet the credit needs." The CRA does not contain further definition of these terms, and Congress did not provide any standards for determining whether a bank is meeting the local community's credit needs. Nor did Congress clearly define the process by which the regulators would enforce the CRA, other than specifying that regulations must periodically assess a bank's CRA record and take that record into account when considering a bank's application to merge with another bank, to acquire the assets of another bank, or to open branches.6 Thus, Congress has left to the federal regulators the task of creating CRA standards and the mode of enforcing the CRA.7

The federal regulators have been hesitant to enforce the CRA aggressively, and community based organizations ("CBOs") have taken the lead in using the CRA to improve bank lending in low and moderate income communities.8 CBOs have done this in two ways: by raising challenges to bank applications with the federal banking


7. See Art, supra note 2, at 1073-74 n.10; see also Philip C. Jackson, Jr., Member, Board of Governors of the Federal Reserve System, Statement Before the Subcomm. on Fin. Inst. Supervision, Reg. and Ins. of the House Comm. on Banking, Fin. and Urb. Aff. (July 26, 1978), reprinted in 64 Fed. Res. Bull. 631, 632 (1978) [hereinafter Jackson Statement, July 26, 1978] (suggesting that all four federal banking regulators are troubled by the absence of statutory definitions for terms such as "entire community," "credit needs," and "low and moderate income neighborhoods").

8. See Art, supra note 2, at 1075, 1095-1101. As indicated infra notes 670-78 and accompanying text, the Board has recently begun to enforce the CRA more aggressively.
regulators on the grounds that the banks have not satisfied their CRA obligations; and by negotiating CRA lending agreements with banks.

A combination of recent legislation and social developments ensure an increase in CBOs' CRA enforcement activity. Among these developments are the 1989 Savings and Loan ("S&L") bailout legislation, which strengthened the CRA and the Home Mortgage Disclosure Act ("HMDA"); the recent wave of bank mega-mergers; the release of 1990 and 1991 HMDA data indicating widespread racial disparities in home mortgage lending; and the renewed attention to urban poverty engendered by the Los Angeles riots. Additionally, President Clinton's vision of bank lending as a social policy tool promises to focus more attention on banks' lending practices.

This Guide has a twofold purpose. The first is to catalogue and analyze the decisions, policy statements, testimony, and regulations of

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11. Several major banks announced merger plans in 1991, including NCNB and C&S/Sovran, Chemical Bank and Manufacturers Hanover Trust Company, and Bank of America and Security Pacific. Community groups threatened CRA challenges against all of these mergers and entered into negotiations with the banks. Subsequently, the three sets of merger partners announced major CRA lending commitments: $10 billion by NCNB; $750 million by Chemical; and $12 billion by Bank of America. For a comprehensive description of bank merger trends, see John P. LaWare, Member, Board of Governors of the Federal Reserve System, Statement Before the House Comm. on Banking, Fin., and Urb. Affairs (Sept. 24, 1991), reprinted in 77 Fed. Res. Bull. 932 (1991) [hereinafter LaWare Statement, Sept. 24, 1991].


<table>
<thead>
<tr>
<th></th>
<th>1990</th>
<th>1991</th>
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<tbody>
<tr>
<td>African-American</td>
<td>33.6%</td>
<td>37.6%</td>
</tr>
<tr>
<td>Latino</td>
<td>21.4%</td>
<td>26.6%</td>
</tr>
<tr>
<td>White</td>
<td>14.2%</td>
<td>17.3%</td>
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</tbody>
</table>

See 1991 HMDA Results, supra, at 806.

the Board of Governors of the Federal Reserve System ("Board") regarding the CRA, in an attempt to describe the Board's CRA enforcement standards. The second purpose is to provide a framework for a CBO to follow when seeking to use the CRA to increase the amount of credit available in its community. The Board's decisions, policy statements, and regulations suggest five steps that a CBO should undertake to enforce the CRA:

Step One: Assessing Community Credit Needs
Step Two: Gathering Information about a Bank's CRA Record
Step Three: Evaluating the Bank's Record of Meeting Community Credit Needs
Step Four: Attempting to Negotiate a Credit Agreement with a Bank
Step Five: Enforcing the CRA through the Legal Process

14. The Board has had a major role in developing CRA standards and enforcement procedures, in part because it has the authority to decide a disproportionate number of banking applications that are challenged on CRA grounds. It has exclusive regulatory jurisdiction over bank holding companies ("BHCs"). A BHC is a corporation that owns one or more bank subsidiaries. 12 U.S.C. § 1842(a) (1988); 12 C.F.R. § 225.11 (1992). Even if a BHC's bank subsidiaries are regulated by one of the other three federal banking regulators, the Board will determine the BHC's application. BHC-related applications include applications by a bank or other company to become a BHC, applications to cause a bank to become a subsidiary of a BHC, applications by a BHC to acquire control of a bank or BHC, and BHC applications to merge with or acquire control over another bank.

15. Cf. CENTER FOR COMMUNITY CHANGE, THE COMMUNITY REINVESTMENT ACT: A CITIZEN'S ACTION GUIDE (1987) (suggesting a three stage process for enforcing the CRA: (1) determining community credit needs; (2) evaluating a lender's performance; and (3) using the CRA to approach lenders) [hereinafter CITIZEN'S ACTION GUIDE].

The primary sources for describing the five step CRA process will be: (1) the nearly 200 written decisions and policy statements the Board has issued regarding the CRA; (2) the CRA and HMDA; (3) the Board's CRA, HMDA, and related procedural regulations: Community Reinvestment, 12 C.F.R. pt. 228 (1992); Rules of Procedure, 12 C.F.R. pt. 262 (1992); Rules of Practice for Hearings, 12 C.F.R. pt. 263 (1992); Rules Regarding Delegation of Authority, 12 C.F.R. pt. 265 (1992); and Home Mortgage Disclosure, 12 C.F.R. pt. 203 (1992); and (4) various interagency policy statements including the Joint Statement, supra note 3, the Uniform Interagency Community Reinvestment Act Final Guidelines for the Disclosure of Written Evaluations and Revised Rating System, 55 Fed. Reg. 18,163 (May 1, 1990) [hereinafter Final CRA Guidelines], and the CRA Q and A, supra note 5. One cautionary note is necessary regarding these resources. CRA enforcement policy has evolved over time and appears to be tightening. See infra Parts V & VI. Thus, the standards described in this Guide will probably continue to evolve and change.

Although this Guide is based primarily on the Board's policies, much of it will be useful in enforcing the CRA before the other federal regulators as well. Steps One and Two of the CRA enforcement process are based on statutes, regulations, and policy statements (e.g. the Joint Statement, the Final CRA guidelines, and the CRA Q and A, which are common to all the regulators). The substantive CRA performance criteria used in Step Three are identical for all agencies, although the agencies may differ in their application of the criteria. See Art, supra note 2, at 1105-37. Finally, the ideas for CRA lending agreements described in Step Four can be used regardless of a bank's regulator.
Throughout this Guide, one overriding theme emerges: while most CBOs are “outcome” oriented and are interested in seeking more loans for their communities, the Board’s CRA policy — although it appears to be undergoing something of a shift — has been “process” oriented, focusing instead on the procedures by which a bank undertakes to satisfy its CRA obligations; and refusing to “allocate” credit by establishing quantified lending standards or requiring banks to offer certain loan products. Thus, the Board pays much attention to a bank’s efforts to ascertain its community’s credit needs, its marketing, and the extent to which the CRA has been incorporated into its management structure, and not as much attention to its actual lending record. This will be frustrating for a CBO that is seeking more and varied types of loans, but the reason for the Guide’s detailed analysis of the Board’s CRA decisions and policy statements is to give a CBO the tools to seek more loans by focusing on what the Board has traditionally found important — weaknesses in a bank’s CRA procedures.

For example, a CBO that raises a CRA challenge to a bank merger application on the grounds that the bank does not make enough multi-family housing loans in its neighborhood is not likely to get very far. However, if the CBO documents the critical need for multi-family loans in an overall community assessment, seeks to meet with the bank to document the need and discuss with the bank how it can meet this need, and then shows the bank’s regulator that the bank has not made meaningful efforts to ascertain its community’s credit needs, or that the bank’s senior management has only a cursory interest in the CRA, it will have a much better chance at receiving multi-family loans for its neighborhood. The Board will be less likely to defer to the bank’s CRA lending decisions, since the bank has failed to comply with the Board’s procedures.

Another important implication of the Board’s emphasis on CRA procedures is the Board’s attitude regarding claims of lending discrimination. The underlying assumption of the Board’s emphasis on bank procedures is that if a bank has an effective system in place to obtain information about the credit needs of the low and moderate income neighborhoods in its community, meaningful lending in these neighborhoods will naturally follow. Thus, arbitrary impediments to lending such as discrimination are condemned by the Board. However, the Board has had a hard time identifying lending discrimination, even in the face of dramatic racial disparities in lending rates. Once again, the reason for the detailed examination of the Board’s decisions relating to lending discrimination is to give a CBO the tools to address lending discrimination in a way the Board might accept.
This Guide is divided into five parts, each devoted to one step of the CRA enforcement process. Part II describes the first logical step for a CBO to take in order to enforce the CRA. It must systematically gather information about the CBO's community and assess the community's credit needs. This information can be used as a lens through which to view the bank's CRA performance, and a well-documented presentation about community credit needs gives greater weight to a CBO's voice in the CRA process.

Part II describes how to define the CBO's community for CRA purposes, presents an outline and description of socioeconomic data to gather about the CBO's neighborhood, and offers suggestions about how to gather the data. The data relates to demographics, income and employment, small businesses, housing, and quality of life. Part II then describes how to use this information to prepare a "Community Credit Needs Statement," which describes in detail the credit needs of the residents of the CBO's community in terms of housing, small business, and consumer loans.

While gathering this data and preparing an adequate credit needs statement may seem a daunting task, the data is relatively easy to gather, as most of it is available in useful form from the Census Bureau and local planning departments. Additionally, the CRA does not require a CBO to gather and present information as a professional urban planner would. Nor should gathering and analyzing data become an end in itself, delaying the process. Nevertheless, a documented presentation of the community's credit needs that relies on something more than anecdotal evidence should enhance the CBO's credibility with the bank and the Board.

Part III of this Guide describes Step Two of the CRA process, gathering information about the bank's CRA record to use in evaluating that record relative to the documented needs of the community. It presents a descriptive outline of sources from which to seek information about the bank's record of meeting the credit needs of the CBO's community and describes the information that will be helpful. The primary source of information is the bank itself, which must post a CRA notice in each of its branches, publish a CRA statement that describes the types of credit it offers, maintain a file containing any public comment about the bank's CRA record, and provide information about its home mortgage lending record. Other information available from the bank includes its annual report and the promotional material and signs in its branches. Sources of information outside the bank itself include the federal banking regulators, other
state and local agencies and government officials, various media sources, and surveys.

Step Two of the CRA process is crucial, as it provides the factual basis for evaluating a bank’s CRA record. In gathering this information, a CBO cannot simply rely on the bank’s published material; the bank is an interested party and is likely to put the best possible spin on its record. Rather, information from various sources must be pieced together in order to get a good sense of the bank’s CRA record. For example, pursuant to a freedom of information law request, the Board will provide a CBO with the record in any previous CRA challenges or bank applications. Based on this record, a CBO can identify commitments that were not kept or trends in CRA noncompliance. Similarly, a comparison of the Board’s CRA assessment reports and a bank’s CRA statement can indicate whether a bank’s CRA plan is sincere and ongoing or simply a patchwork response to regulatory criticisms.

Part IV of this Guide describes Step Three of the CRA process: evaluating a bank’s record of meeting the credit needs of the community. Part IV describes the Board’s thirteen criteria for assessing a bank’s CRA record. These criteria and the standards that have emerged evidence the Board’s procedural approach to the CRA. Even the criteria that relate to the loans a bank has extended are vague and do not establish clear standards for evaluating a bank’s lending record. Nevertheless, it is important to learn the Board’s standards, even those related to CRA procedures, because arguing according to these standards is the most effective way of seeking more loans. Thus, the Guide’s detailed analysis of the Board’s CRA decisions is intended as a means of learning how the Board views CRA.

The first three CRA assessment criteria in Part IV relate to a bank’s efforts to ascertain community credit needs, the extent to which the bank’s management structure incorporates CRA concerns, and a bank’s advertising record. The Board has generally placed great emphasis on these criteria, much to the dismay of CRA advocates, who are generally more interested in increasing the number of loans in their community.

However, rather than simply arguing that a bank fails to make sufficient loans in its community, a CBO can more effectively argue to the Board that a bank’s CRA procedures are insufficient, thus leading to inadequate lending. For example, a bank might have a strong ascertainment record on paper in that it frequently meets with several community groups. However, if the bank does not do anything with this information, such as summarize it and present it to senior man-
agement responsible for developing and marketing new credit products, its ascertainment efforts could be viewed as meaningless and should not satisfy the CRA. Similarly, a bank may seem to have an impressive CRA management structure that includes bank officials at several different levels — including the bank’s board of directors — who are responsible for the CRA. Once again, however, this structure may merely exist on paper. It is important to examine, for example, how frequently the board discusses the CRA, and whether its discussions are anything more than perfunctory. Finally, a bank may frequently advertise, but if it only advertises its deposit products, and does not advertise in media targeted to minorities, it may not have discharged its CRA responsibilities.

Additionally, the Board recently appears to have shifted subtly its analysis of these three CRA assessment factors, and has indicated that it expects more than just surface CRA compliance. The Board’s view seems to be that a bank’s ascertainment, advertising, and management efforts should result in the creation and active marketing of credit products that meet ascertained needs. One theme of the Board’s new approach to these evaluation criteria seems to be “targeting.” The Board recently has highlighted efforts by banks to target their ascertainment efforts on underserved areas and to systematically collect and analyze information about the needs of these areas. Similarly, the Board has praised advertising that is designed specifically for minority audiences. Finally, the Board has recently begun to highlight how a bank’s management has used its ascertainment efforts to create new products; the Board describes the products and discusses how the bank markets them.

The next two CRA evaluation criteria relate specifically to the extent of a bank’s credit extensions and its participation in government-insured lending programs. These criteria are more closely related to what is expected from the CRA, but they contain some surprises and frustrations as well.

First, all sorts of credit, including small business loans, consumer credit loans such as credit cards and student loans, multi-family housing loans, and large commercial loans can satisfy the CRA. One frustration about the various credit products that satisfy the CRA is that the only relatively detailed and readily available information about a bank’s lending record is a bank’s housing lending. Information about other credit extensions must be pieced together from various sources, including a bank’s annual report, the reports it submits to its regulators relating to its financial condition, the record in other CRA chal-
lenges and its pending application, and through voluntary disclosure by the bank.

Another frustration related to the range of credit that satisfies the CRA is that a CBO may feel that its community needs one type of credit, such as financing for constructing affordable multi-family housing, but the Board will not require a bank to offer that particular type of credit to satisfy the CRA. However, this is another area where investigating the bank’s practices and developing information about the CBO’s community is helpful. If, for example, the bank has the capital and expertise to engage in multi-family lending, the need has been articulated to the bank, and a compelling case is made that this lending is crucial to the community, a CBO can continue to press the bank to offer such loans and may eventually convince the bank or the Board that it must do so.

Finally, while the Board has avoided establishing quantitative standards for determining how much credit is sufficient to satisfy a bank’s CRA obligations, it frequently cites in its CRA decisions the number and dollar amount of the loans a bank has made in low and moderate income neighborhoods, suggesting that it is evolving some sort of standard in this regard.

The next five of the thirteen CRA assessment criteria deal, in effect, with several forms of discrimination. These include lending discrimination based on the location of the loan or the race of the applicant, discrimination in opening and closing branches, and discrimination in defining a bank’s CRA lending community. While such discrimination is what many people associate with the heart of the CRA, the Board’s enforcement has been disappointing, although it may be strengthening.

The prime source of the Board’s disappointing performance in enforcing the discrimination criteria is its skepticism about the usefulness of the only source of lending data publicly available that traces a bank’s loans according to address and applicant characteristics - a bank’s Home Mortgage Disclosure Act data. However, legislative changes improved this data starting in 1990, and the Board has now issued two reports that document widespread disparities in lending rates between minorities and whites. This disparity has prompted the Board to take the important new position that the relevant issue is not whether banks discriminate, but what they are doing to eliminate lending disparities.

Another surprising aspect of the discrimination criteria is that while discriminatory branch closings are considered CRA violations, the CRA does not permit a challenge to a bank’s decision to close a
branch. However, the CRA does permit the Board to take the bank's record of closing branches into account in evaluating subsequent applications, and a discriminatory closing pattern can theoretically threaten an application. Yet, the Board has not rejected an application due to a bank's branch closings. The Board instead examines whether the bank has followed internal procedures, and whether the closing will have a significant effect on the bank's ability to meet community credit needs. This may change, however, with the passage of new legislation requiring banks to give notice, with reasons and statistical support, of branch closings. In any event, a threatened branch closing may be a mobilizing opportunity for a CBO, and a pivotal opportunity to begin a CRA initiative.

Finally, the discrimination criteria contain a standard that is little understood or analyzed: the bank's delineation of its lending community. Surprisingly, the CRA leaves it up to a bank in the first instance to define its local lending community and thus to decide where it has CRA obligations. In this way, a bank can "gerrymander" its community by excluding low and moderate income or predominantly minority neighborhoods from its local lending area. To use the CRA to prevent this, a CBO must learn about the bank's lending territory, examine where it advertises, and understand how it does business.

The next CRA criterion relates to the bank's participation in community development projects. While this may sound similar to the CRA assessment criteria related to a bank's lending record, it has a different spin that offers CBOs a whole new set of opportunities. Under this criterion, a CBO can press a bank to participate in government-sponsored loan programs, private loan pools, and the efforts of nonprofit community development corporations. With some prodding and creativity, a CBO might even be able to convince a bank to create new programs that meet the articulated credit needs of the CBO's community.

Part V of this Guide deals with Step Four of the CRA process: negotiating a credit agreement with a bank. The important point about this step is that the Board's standards for enforcing the CRA as described in Part IV are only a starting point for negotiating a credit agreement. Because CRA standards are vague, and a bank should always be able to do better, a CBO can seek innovative lending agreements from a bank. CBOs have been very creative in negotiating lending agreements with banks, and have obtained concessions that the Board would never have directly ordered, such as specific monetary commitments for specific loans at flexible rates, minority hiring,
representation on the bank's board of directors, and doing business with minority vendors.

Finally, Part VI of the Guide describes the final step of the CRA process, enforcing the CRA through legal means, either through participating in the Board's CRA evaluation process or challenging a bank merger application on CRA grounds. Part VI focuses on the technical aspects of filing a CRA challenge and discusses some of the general policies and procedures the Board applies in evaluating CRA challenges, including the thirteen CRA assessment criteria described more fully in Part IV.

II. Step One: Assessing Community Credit Needs

The goal of Step One of the CRA enforcement process is to describe the community in a way that will lead to and support a description of the community's credit needs. There are three phases to assessing the community's credit needs: defining the community; gathering socioeconomic data about the community; and preparing a community credit needs statement.

A. Defining the Community

The community boundaries may be determined by political subdivisions or geographic areas, but the most helpful boundary delineates a neighborhood with similar economic characteristics and thus a "common credit need."16 Once the community is defined, it is important to determine which census tracts are contained within the community, as both a bank's home mortgage lending data and census data are presented according to census tract. Census tract maps can be obtained from a number of sources, including local planning commissions, local Census Bureau offices, or public libraries.

B. Gathering Socioeconomic Data About the Community's Residents

A socioeconomic profile of the community must be prepared, based on demographic, income, employment, business, housing, and quality of life data. There are several sources of socioeconomic data, includ-

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16. Citizen's Action Guide, supra note 15, at 12. In New York City, for example, Manhattan is both a political subdivision (one of the City's five boroughs) and a geographic area (an island). It is not a helpful CRA community, however, because it contains some of the wealthiest and poorest neighborhoods in the country and thus does not have common credit needs. However, East Harlem, for example, which is a neighborhood within Manhattan, is a better CRA community, as its socioeconomic characteristics are relatively uniform and thus its residents have a common credit need.
ing the U.S. Census Bureau, local planning agencies, and libraries that contain studies related to housing, employment, poverty, welfare, and other social policy issues. Another helpful source of data is the "Comprehensive Housing Affordability Strategy" which municipalities are required to prepare to qualify for federal housing funds. In addition, community residents, community based not-for-profit housing developers, local development corporations, local planning boards, and other community based organizations may be helpful. Important data include:

1. Demographic Data

The racial composition of the community is essential, as it is the starting point for determining whether race is a factor in bank lending decisions. Other helpful demographic data include the percentage of female headed households, the number of persons below eighteen and over sixty-five years, the percentage of the population that is disabled or seriously ill, and population growth trends.

2. Income and Employment Data

The Board's basic measure of a community's income for CRA purposes is the community's median household income as a percentage of the median income of the Metropolitan Statistical Area ("MSA") in which the community is located. Besides median household income, it is also helpful to determine the percentage of families below the poverty level, the percentage receiving public assistance, per capita income, median household income, and the unemployment rate.

3. Business Data

Perhaps the most important business data for determining a community's credit needs is a breakdown of the average gross income of the community's businesses. Other important data include a profile of the types of businesses in the community and information about business failures and start-ups. It is also helpful to have a map that identifies vacant commercial space, the commercial areas in the

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community, and any areas designated as special economic development zones.

4. **Housing Data**

Important housing information includes the total number of one to four family units, owner-occupied one to four family units, multi-family units, and owner-occupied multi-family units. Other important data about housing include the number and location of vacant lots, vacant buildings, and municipally owned buildings; the condition of the housing; sales and deed transfer data; occupancy/overcrowding rates; and the age of the housing. Deed transfers and mortgages, which are generally recorded in county clerks' offices, indicate the name of the buyer and seller, the property address, the sale and mortgage amount, and the mortgage issuer.19 This data is also available from a company called TRW/REDI, Inc.

5. **Quality of Life Data**

This category includes miscellaneous data about a community that may be relevant to determining its credit and banking needs or explaining why banks may have ceased lending there. Such data might include the sufficiency of the supply of necessities such as chain grocery stores, public transportation, medical facilities, and childcare.

6. **Community Outreach Data**

In addition to gathering and analyzing statistics, it is also necessary to canvass members of the community to determine their description of the community and its credit needs. This outreach can take the form of discussions with community members, public meetings, informal interviews, surveys, and doorknocking.20 Discussions with politicians, other CBOs, and local planning agencies may also be helpful.

C. **Preparing a Community Credit Needs Statement**

The socioeconomic data about a community should be used to prepare a profile of the community and a description of its credit needs based on that profile. "Community credit needs" is a broad term that encompasses a wide variety of credit and banking services. It encompasses virtually all categories of credit, including: (1) credit for construction, acquisition, rehabilitation, and improvement of multi-family and single family housing; (2) small business credit for start-

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20. *Id.* at 13.
up, working capital, expansion, and commercial real estate; (3) personal credit, including education and automobile loans and credit cards; and (4) credit for community development projects such as housing or commercial projects specifically intended to benefit low and moderate income neighborhoods. Community credit needs also include the lending terms and underwriting criteria that, consistent with safe and sound banking principles, are necessary to make credit affordable to low and moderate income persons. These include low downpayments, longer payment terms, and low interest rates. Finally, community credit needs can also encompass banking services such as low cost and low minimum balance savings and checking accounts, automatic teller machines, or increased hours and teller services.

An example of the format a credit needs statement can take and the points it can address follows. This sample community profile is based in part on data gathered about Harlem in connection with a CRA challenge.21

1. Socioeconomic Profile

The racial composition of the community is predominantly minority, and it has a higher than average percentage of elderly and disabled persons, children, and female headed households. Its population is growing. The median family income is less than half of the MSA median income. Nearly 20% of the community is unemployed and one-third receives public assistance.

An overwhelming percentage of the housing is renter occupied multi-family, but there are pockets of one to four family, owner occupied units. The housing is old, overcrowded, and in poor condition. The community contains hundreds of vacant lots and thousands of units in abandoned buildings, most of which are owned by the municipality due to defaults in property tax payments. Construction of new units has increased and abandonment and demolition have decreased, but there is still a net annual loss of housing units. This pattern, combined with population growth, has created a severe shortage of decent, affordable housing. There are a relatively low number of recorded real estate transactions, and real estate prices are relatively stable.

Most of the resident owned businesses within the community are small retail stores with annual sales of less than $100,000. There

21. See Manufacturers Hanover Trust Co., 77 Fed. Res. Bull. 493 (1991). This hypothetical community is only one type of community that can benefit from the CRA. Rural communities and moderate income suburban or urban communities, for example, whose credit needs are different from this urban area, can also benefit from the CRA.
are also several factories and warehouses, most of which are owned by medium-sized corporations. The retail businesses are mostly coffee shops, small grocery stores, and variety shops. There are no chain grocery stores or department stores, relatively few pharmacies, hardware stores, or electronics stores, and relatively little office space. The commercial businesses are located along three main strips, one of which is designated as a special state economic development zone. Approximately $100,000,000 is spent annually at the retail stores, less than half is retained by resident merchants. Much of the space zoned for commercial uses is under-utilized or contains abandoned factories, storefronts, or warehouses. Business failures far outnumber business start-ups.

2. Credit Needs Statement

A comprehensive array of housing finance is necessary to address the shortage of affordable housing in the community. Since most of the housing is multi-family and renter-occupied, financing must be available for nonowner-occupied multi-family housing. Moderate rehabilitation loans are necessary to alleviate the poor condition and age of the occupied housing. The overcrowding and loss of units indicate a need for new housing, and the large number of vacant lots and abandoned buildings demonstrates a need for credit for new construction and gut rehabilitation. The large number of shelters indicates a need for permanent housing. The high number of children and elderly and the inadequacy of childcare suggest a need for social services within buildings. The community’s income is low, so in order to ensure that community residents can afford the housing, the financing must make concessions on loan terms, rates, and fees. Finally, although the number of one to four family owner-occupied units is small, there is a need for home mortgage and home improvement loans affordable to community residents.

A complete set of small business credit products is also necessary to meet the credit needs of the community. The large number of small businesses indicates a need for small minimum loan amounts. The small number of business start-ups and resident owned businesses indicates a need for flexible terms for business start-up loans for community residents. The high unemployment rate suggests a need for credit to lure needed businesses into the community or to redevelop abandoned industrial or commercial space. The large number of retail stores suggests a need for special business services such as low cost merchant accounts that accept credit card deposits as cash.

Personal credit — which includes credit cards, lines of credit, car loans, consumer loans, and students loans — is not a primary credit...
need. The large number of elderly and children suggests that student loans are not in strong demand. Car loans are probably not in great demand either, as the community is in an urban area without highways. Credit cards and other forms of consumer loans probably would be helpful to community residents, but the low median income, the high unemployment rate, and the large percentage of public assistance recipients suggest that many people will not qualify for such loans under traditional lending criteria. In order to meet the needs of a relatively low income community, the terms of the personal credit must be adjusted, consistent with safe and sound banking practices, to make it affordable.

Finally, the community needs banking services tailored for a low income population. Service fees, minimum balances, and transaction charges must be reduced or eliminated for certain customers. The large number of elderly and disabled, combined with a high crime rate, suggest a need for Social Security check direct deposit services, automatic teller machines, and “lifeline” bank accounts. The large number of public assistance recipients, elderly, and disabled persons indicates a need for government check cashing services.

III. Step Two: Gathering Information about a Bank’s CRA Record

The goal of this step is to gather information related to whether a bank is offering the sort of credit the community needs at terms its residents can afford.22 This step involves choosing a bank and locating information about the bank’s CRA record.

A. Choosing a Bank to Evaluate

Banks with branches in a CBO’s neighborhood are a logical starting point. However, since most low income neighborhoods have a relatively low number of bank branches, the selection process should not end with banks in the neighborhood. Rather, since the CRA requires a bank to serve the credit needs of its entire community, including low and moderate income neighborhoods, most banks include low income neighborhoods in their CRA lending communities even if they do not have a branch in the community. If it does not, this may be a CRA violation.23

23. See infra notes 331-441 and accompanying text.
B. Locating Information about a Bank's CRA Record

1. The Bank

The Board requires each bank to make available for public inspection a CRA public file, a CRA statement, and the results of the Board's most recent CRA assessment of the bank. In addition, HMDA requires each bank to provide a written report detailing its home mortgage lending. Finally, a bank's loan and bank account pamphlets and its annual report also contain useful information.

a. CRA Disclosure Requirements

Each bank must post in the public area of the lobby of each of its branches a notice that describes the following information: its CRA obligations; the availability of its CRA statement and public CRA file; the address of its head office; the name and address of its federal regulator; the procedures for sending comments about its CRA record to the bank and the regulator; the availability from the Board of announcements that the bank has filed an application that can be challenged on CRA grounds; a statement (if applicable) that the bank is a subsidiary of a banking holding company and the name of the BHC. The bank must maintain a complete public CRA file at its main office. At least one branch within each of the bank's CRA communities must maintain a public CRA file with materials relating to that community. The public CRA file must contain all signed written comments related to the bank's CRA record that the bank received from the public within a two year period, the bank's response to the comments, the bank's CRA statement(s) for the previous two years, and the most recent federal CRA assessment. Besides placing the assessment in its public file, a bank must also make its most recent CRA assessment available by mail upon request.

The bank must make a CRA statement available for public inspection at the head office of the bank and at each branch of the bank.

24. See supra note 1.
26. Id. § 228.5(c).
27. Id. § 228.5(a); Final CRA Guidelines, supra note 15, at 18,165. A regularly published Board publication indicates the name of each bank that has been assessed. In addition, each local Federal Reserve Bank announces the results of its CRA assessments.
within the CRA community to which the statement applies. Each CRA statement is required to contain the following: a description and map of the bank’s local CRA community or communities; a list of the specific types of credit that the bank will make available in its local CRA community; and a copy of the bank’s CRA notice. The Board encourages each bank to include the following additional information in its CRA statement: a description of its special credit-related programs to help meet community credit needs; a periodic report regarding its record of helping to meet community credit needs; and a description of its efforts to ascertain the credit needs of its community and to communicate with members of the community regarding those needs.

b. The Home Mortgage Disclosure Act

HMDA requires federally regulated or insured banks, savings associations, and credit unions, as well as certain mortgage lending institutions that are not banks, to disclose several categories and subcategories of information regarding their home mortgage loan applications, loans, and loan purchases. These include the following:

(1) The type and purpose of the loan or application. HMDA covers applications for three categories of loans: home purchase loans, which are any loans secured by and made for the purchase of a dwelling; home refinancing loans; and home improvement loans. For each of these loans, a bank must report several items of information, including: whether the loan is a conventional loan; whether the loan is insured by the Federal Housing Administration ("FHA"), the Vet-

29. Id. § 228.4(e). Although the Board does not require a bank to provide bilingual CRA materials, it has praised one bank for providing a Spanish version of its CRA notice and statement. Texas Regional Bancshares, Inc., 78 Fed. Res. Bull. 289, 291 (1992).
30. Id. § 228.4(b).
31. Id. § 228.4(c); Joint Statement, supra note 3, at 13,744.
32. See 12 U.S.C. §§ 2802-2803 (1988 & Supp. III 1991); 12 C.F.R. § 203.4 (1992). HMDA reporting requirements do not apply to a financial institution that does not have its home office or a branch in an MSA, or with less than $10 million in assets. 57 Fed. Reg. 56,963 (Dec. 2, 1992) (codified at 12 C.F.R. § 203.3(a)(1) (1992)). A mortgage lending institution that is not a bank is exempt if it does not have a home office or branch in an MSA or its total assets combined with its parent were $10 million or less and it made fewer than 100 loans in the preceding year. 57 Fed. Reg. 56,963 (Dec. 2, 1992) (codified at 12 C.F.R. § 203.3(2) (1992)). Similarly, it does not apply to loans made outside of an MSA. See First Bancshares of St. Landry, Inc., 78 Fed. Res. Bull. 136, 138 n.8 (1992).
33. 12 C.F.R. §§ 203.4(a), 203.2(f)-(g) (1992). Loans secured by real estate but made for purposes other than home improvement or refinancing are not reported under HMDA. 12 C.F.R. pt. 203, App. A, § II.B.1. Temporary financing such as a bridge or construction loan or the purchase of an interest in a pool of loans is also not reported under HMDA, even if the loan relates to housing. 12 C.F.R. §§ 203.4(d)(3)-(4).
(2) The owner-occupancy status of the property to which the loan or application relates.  
(3) The dollar amount of the loan or application.  
(4) The disposition of the application. There are six possibilities for the disposition of each application: loan originated; application approved but not accepted by the applicant; application denied; application withdrawn; file closed for incompleteness; and loan purchased by bank.  
(5) The location of the property to which the loan or application relates, by state, county, MSA, and census tract, if the bank has a home or branch office in that MSA.  
(6) The race or national origin, sex, and income of the applicant.  
(7) Whether the bank sold the loan and the identity of the purchaser.

Each bank then submits its HMDA data to the Federal Financial Institutions Examination Council, ("FFIEC") which organizes each bank's HMDA data for each MSA into eight uniform aggregate tables as follows:

Table 1: (Section 1) The bank's disposition, by census tract and in the aggregate, of all HMDA covered loan applications for property located in an MSA in which the bank has a home or branch office.  
(Section 2) The bank's disposition, in the aggregate, of all HMDA covered loan applications for property not located in an MSA in which the bank has a home or branch office.

Table 2: The bank's purchases, by census tract, of all HMDA covered loans except home refinance loans.

Table 3: The bank's HMDA covered loans sold, by type of purchaser, borrower characteristics (race, gender, and income), and demographic characteristics (race and income) of the census tract in which the property is located.

35. Id. § II.C.1.d.
36. Id. § II.C.1.f.
38. 12 C.F.R. § 203.4(a) (1), (2), (3), (4), (5), and (6) (1992).  
40. Id. § 203.4(a)(7).  
41. Id. § 203.4(a)(8).  
Tables 4-1 through 4-6: The number, dollar amount, and disposition of each HMDA covered application and either the race, gender or income of each applicant.

Tables 5-1 through 5-6: The number, dollar amount, and disposition of each type of HMDA covered loan application, according to the race and income of each applicant.

Tables 6-1 through 6-6: These tables are identical to Tables 5-1 through 5-6, but control for the gender and income of each loan applicant instead of race and income.

Tables 7-1 through 7-6: The number, dollar amount, and disposition of each type of HMDA covered loan application, according to either the racial composition, the income, or the combined income/racial composition of the census tract in which the property related to the loan is located.

Table 8: The reason for the denial of applications for HMDA covered loans according to the race, gender, and income of the applicant.43

In addition to preparing these tables for each HMDA reporting bank, the FFIEC prepares aggregate tables for all banks in each MSA.44 The FFIEC also makes the raw HMDA data available.45 HMDA data can be obtained and copied at a bank’s home office and at least one branch office within each MSA in which the bank has an office.46 In addition, the FFIEC makes HMDA data available in central depositories around the country.47

c. Information from the Banks

Other valuable sources of information from the bank are its branch signs and pamphlets. Among the important information they contain are the fees, minimum balance requirements, and other terms and conditions of the account products the bank offers, information about the bank’s loan products, and a description of the bank’s services.

A CBO usually can obtain a bank’s annual report from the bank’s head office. The annual report contains useful CRA information, including the structure of the bank’s overall loan portfolio and the volume of loans it makes within its home state, in other states, and in foreign countries. The report may indicate, for example, the amount

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43. A bank is not required to disclose the basis for loan denials, but may do so. 12 C.F.R. § 203.4(c) (1992). Thus, Table 8 is available only for banks that submit this information.
45. Availability of HMDA Data, supra note 42, at 27,888.
47. Id. § 2803(f); 12 C.F.R. § 203.1(d) (1992).
a bank has loaned for commercial real estate (which includes multifamily housing), home mortgages, and small business. In addition, the annual report describes the financial condition of the bank, lists the members of the bank's board of directors and their other affiliations, lists the bank's subsidiaries, and describes its branch network.

d. The Bank's CRA Officer

Many banks have an officer exclusively responsible for CRA compliance. Other banks assign CRA responsibilities to one particular officer of the bank. Their responsibilities frequently include meeting with CBOs to discuss the bank's CRA lending obligations and providing access to CRA information.

e. Log of Activities

It is important to maintain a log of efforts to obtain CRA information from a bank. The log should describe each attempt to gather information, the location of the branch or office, the names, titles, and phone numbers of each bank representative encountered, and the result of the contact. This log will be helpful as a central location for information about the bank and in analyzing whether the bank is in compliance with the CRA and HMDA disclosure requirements.

2. Banking Regulators as Sources of Information

a. The Federal Reserve System

The Federal Reserve System is divided into twelve districts, each of which is headed by a Federal Reserve Bank. The system is governed by the Board. Each Federal Reserve Bank has a community affairs office that is responsible for providing information about community development strategies to banks and becoming familiar with the credit needs of the Federal Reserve district.

Another means of obtaining information from the Board, as well as the other federal banking regulators, is through the Freedom of Infor-


mation Act. Although the Freedom of Information Act specifically exempts from disclosure much helpful information about a bank, it can still be an important tool. For example, the Freedom of Information Act can be used to obtain the record in a prior CRA challenge, which should include the bank’s application, the comment in opposition to the application, the bank’s response, and either the Board’s decision or, if the challenge was settled, a written lending agreement. The record can provide valuable information about the bank’s CRA policies, trends in CRA noncompliance, CRA promises the bank has not fulfilled, and changes in the bank’s CRA policies. The Freedom of Information Act can also be used to obtain the regulators’ CRA assessments.

b. Other Federal Banking Regulators

Starting in 1993, all the federal regulators are required to collect information about the total number and dollar amount currently outstanding in a bank’s commercial real estate and business loans with original amounts of less than $1 million and agricultural loans of less than $500,000. Presumably, this information will be available either through the Freedom of Information Act or upon other request.

The FDIC maintains records of bank deposits as of June 1 each year. The information, contained in the FDIC’s “Data Book,” breaks down deposit information by bank and branch. The Data Books are available at government document depositories or from the FDIC itself. Three additional reports are also helpful: Call Reports; Uniform Bank Performance Reports; and Peer Group Reports. These can be used to determine the bank’s loan to asset ratio and loan to deposit ratio as well as the structure of the bank’s loan portfolio. In addition, they indicate how the bank’s ratios compare to other banks. These reports are available for commercial banks from the FDIC and for savings and loans from the Office of Thrift Supervision (“OTS”).

51. For a description of CRA challenges, see infra notes 615-704 and accompanying text.
54. Id.
c. State Banking Regulators

Many states have statutes similar to the CRA that require state banking regulators to evaluate a bank’s performance at satisfying the credit needs of its community. In New York, for example, the New York State Banking Department is required to prepare and make available to the public a written evaluation of each state-chartered bank’s performance at meeting the community credit needs and to take that record into account when evaluating a bank application. A state’s freedom of information law can be used to obtain information from the regulator.

3. Other Agencies

Several other federal, state, and local government agencies can provide helpful information. For example, if the bank’s stock is publicly traded, the Securities and Exchange Commission will have several different types of information, including the bank’s quarterly report of financial condition. State and local consumer affairs departments also might have helpful information. In New York City, for example, the Department of Consumer Affairs has issued reports on bank advertising practices and fees for banking services.

In addition, many state and local governments have begun to link the awarding of municipal contracts to banks with good CRA performance. In New York City, the Department of Finance has published regulations that require banks seeking city contracts to complete questionnaires regarding state CRA performance. The Department of Finance takes this record into account when awarding contracts to banks. The results of the Department of Finance’s analy-

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56. N.Y. BANKING LAW § 28-b (McKinney 1985 & Supp. 1987). The New York State Banking Department has begun a process that it expects will result in new CRA regulations. On Sept. 8, 1992, the Department submitted for public comment a series of 11 questions about CRA enforcement policy. After it receives comments, the Department plans to commence a formal rulemaking process. The three key proposals in the Department’s questions would create a list of CRA lending activities, establish a CRA loan to deposit ratio for evaluating a bank’s CRA record, and protect a bank against CRA challenges if it received an “outstanding” CRA rating for three straight years.


sis and each bank's questionnaire are available through a freedom of information law request.

Local politicians are also frequently concerned about banking issues. The banking committees of state and local legislatures may issue reports about bank compliance with various laws, including the CRA. In New York City, for example, State Senator Franz Leichter and State Assemblyperson Herman Farrell have issued reports concerning bank branch closings and discriminatory account opening policies.59

4. Newspapers, Periodicals, Computer Databases, and Electronic Media

Newspapers such as The New York Times, The Wall Street Journal, and The American Banker cover banking extensively and will frequently publish articles about the banking industry and particular banks. Periodicals related to community development are also important. In New York City, City Limits and the Association of Neighborhood and Housing Development's Weekly Reader both provide information relevant to the CRA.

Finally, computerized databases such as Lexis and Nexis are potentially invaluable. Through research on such computer databases, a CBO can discover whether any reported cases have accused a bank of discriminatory lending practices. Some of these systems contain a vast database of periodicals that contain articles relating to banks.

5. Other CBOs, Community Surveys, and Testing

Other CBOs, particularly those engaged in housing and economic development, are helpful in investigating a bank's CRA record. Important for CRA purposes is whether any of the CBOs have sought financing from the bank for a development project and the results of the requests. It is also important to determine whether the bank has made any outreach efforts to the CBOs seeking information about community credit needs. Also important are the names of particular individuals within the community who have sought credit from the bank and the results of their applications. Although data about a bank's home mortgage loan application dispositions is available to the public, the name of the individual applicant is not disclosed. One way

to gather information from CBOs and individuals is to circulate a survey.

Testing a bank’s loan practices by sending loan seekers of different races to the bank’s branches is another important means of gathering information. Such testing would have to be carefully controlled and planned and would take a significant amount of resources, but the results would be very helpful in determining whether the bank is engaged in discriminatory lending practices. Testing is especially helpful in determining whether a bank is engaging in subtle forms of lending discrimination such as discouraging minorities from applying for a loan or requiring higher points or fees for loans for property in low income neighborhoods.60

6. Information Not Publicly Available

Several types of information are not available to the public but are important in analyzing a bank’s CRA record. Most significant is the bank’s small business, commercial, and consumer lending record within its CRA community. While such data is available in aggregate form in the bank’s annual report and in its annual report of conditions, it is important for CRA purposes to know the bank’s record at making such loans in each census tract within its community.

Similarly, information about certain types of housing finance is not publicly available either. For example, HMDA data does not report temporary construction loans or participation in loan pools. A bank’s underwriting criteria for housing lending is also important, but with the exception of federally chartered and insured savings and loan associations, is not generally available.61

The only way for a CBO to obtain this information is to request it from the bank through its CRA officer or to raise it as an issue in negotiating with a bank to improve its CRA record.62 Although the bank might refuse to disclose all or part of this information, there is no harm in asking.

IV. Step Three: Evaluating the Bank’s Record of Meeting Community Credit Needs

Once the CBO has assessed the community’s credit needs and gath-

60. The requirements for conducting a lending discrimination test that would have legally probative value are complex and beyond the scope of this Article. The Center for Community Change, 1000 Wisconsin Ave. N.W., Washington, D.C., has prepared a series of very helpful manuals on testing for lending discrimination.
61. 12 C.F.R. § 528.2(b) (1992).
62. For a discussion of negotiating a CRA agreement with a bank, see infra Part V.
ered information about the bank's record of meeting those needs, the next step is to evaluate this record. It is helpful to follow the standards the Board applies when it evaluates a bank's CRA record. This section will describe both the general framework and the thirteen specific evaluative criteria the Board (as well as the three other federal banking regulators) uses to evaluate a bank's CRA performance.  

A. The Board's Standards for Evaluating a Bank's CRA Performance: General Framework

The Board considers four fundamental principles in analyzing the CRA performance of a bank, including: (1) the process by which a bank seeks lending opportunities in low and moderate income neighborhoods; (2) the inability under the CRA to permit credit allocation or to permit the Board to dictate how a bank shall meet community credit needs; (3) the lack of discretion that a bank has to determine the products it will offer to meet community credit needs; and (4) the consistency of the CRA loan programs with safe and sound banking practices.

1. The Process for Seeking Lending Opportunities

The Board has stated that CRA was passed by Congress pursuant to a widely held perception that banks were ignoring or not recognizing sound lending opportunities in inner city areas. The primary purpose of the CRA was thus to assure that banks did not ignore the credit needs of their local communities, including low and moderate income neighborhoods.

The Board's position as to how best to implement this purpose is to encourage banks to be sensitive to lending opportunities in their entire community, including low and moderate income neighborhoods. Thus, in evaluating a bank's CRA performance, a crucial factor to the

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63. This Part is meant only to be descriptive of the Board's policies, not evaluative of their merits.
Board is the process by which a bank defines its community, determines its needs, and takes steps to meet those needs. In fact, in the early years of the CRA, the Board emphasized a bank’s sensitivity to lending opportunities over the bank’s actual loans, and awareness of credit opportunities over lending for specific purposes. This policy may have shifted, as the Board’s recent CRA decisions have focused more heavily on the results of a bank’s CRA procedures in terms of the amount of credit extended in low and moderate income neighborhoods.

Nevertheless, an emphasis on sensitivity to lending opportunities is reflected in the Joint Statement, which emphasizes a bank’s CRA procedures. According to the Joint Statement, the “key elements” of an effective CRA program are: an affirmative community outreach program; a means for incorporating findings regarding community credit needs into the development and delivery of products and services; marketing and advertising that reaches the entire community; an active management role in CRA planning and oversight; and a periodic analysis of loan applications to prevent discrimination.

2. Credit Allocation

The Board has stated that in passing the CRA, “Congress did not support nonmarket methods of credit allocation, such as quotas, to meet the credit needs of the local community.” The CRA thus does not permit the Board to influence the allocation of credit. This means that the Board will not dictate a bank’s loan portfolio, lending

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67. Id.; Citizen’s CRA Guide, supra note 4, at 3-4.
69. Johnson Statement, Sept. 8, 1988, supra note 49, at 738 (The CRA’s “present emphasis” is “on expanding awareness of credit-granting opportunities” rather than “directed lending for specific purposes”).
70. See infra Part V.
mix, services, credit terms, or proportion of credit that it will devote to a product, customer, or neighborhood. The Board will not establish the terms and conditions upon which lending activities must be conducted, nor will it specify which credit products a bank should offer to meet community credit needs. Finally, the Board will not establish fixed ratios of loans to deposits in particular neighborhoods or require fixed proportions of retail or commercial deposits to retail or commercial lending.

The Board has been so resistant to credit allocation that it has previously stated that it will not necessarily endorse voluntary agreements by a bank to allocate credit to a neighborhood or product, and that it will carefully scrutinize any such agreements. Recent indications, however, evidence a loosening of this strict scrutiny of banks' initiatives to dedicate credit to low and moderate income communities. The most telling example of this trend appears in the Board's decision approving the merger of NCNB Corp. and C&S Sovran. In this decision, the Board approved of NCNB's Community Investment Policy, which established a quarterly goal of originating eight CRA loans per branch.

3. Bank Discretion

The third general principle the Board applies is the corollary to the Board's refusal to allocate credit: a bank has discretion to develop, on its own and using its own judgment, the sorts of loans and services it will offer to meet community credit needs. A bank's discretion is


78. Second CRA Progress Report, supra note 74, at 815; CRA Progress Report, supra note 73, at 95.


not unqualified. Rather, the bank must exercise it in a way that is consistent with the purposes of the CRA and must offer credit which is designed to meet the community's credit needs.  

The Board has articulated three major justifications for bank discretion. First, the Board believes that a bank is in the best position to develop an appropriate CRA plan. A CRA program depends on several factors, including the bank's size, location, expertise, and business strategy, as well as the needs of the community. Second, the Board believes that the CRA can be satisfied by a "long list" of credit products, including small business loans, home mortgage loans, and consumer loans, and that the choice of which products to offer is best left up to the bank. Third, the Board believes that if it emphasizes some form of credit over others, banks will not meet the other credit needs.

4. Safety and Soundness

Concern that a bank avoid CRA lending activities that are not safe and sound banking practices permeates the Board's analysis of a bank's CRA performance. Simply put, the CRA does not require a bank to make unsafe loans. The Board is so concerned with safety/

Bancshares, Inc., 65 Fed. Res. Bul. 500 n.3 (1979) (bank's failure to participate in small business program not shown to be anything other than a legitimate business decision).


87. Citizen's CRA Guide, supra note 4, at 3; Joint Statement, supra note 3, at 13,743; BankAmerica Corp., 78 Fed. Res. Bul. at 350 n.69 (high delinquency rate for special flexible consumer loans, as well as poor economic conditions, justified decrease in lend-
soundness that it evaluates whether a bank's voluntary CRA credit commitments are consistent with safety/soundness and has indicated that it will not endorse a voluntary agreement by a bank to commit to lend particular dollar amounts if it is inconsistent with safety/soundness concerns.\textsuperscript{88} Besides causing legitimate regulatory concerns, however, "safety and soundness" can also be used as an excuse for a bank's failure to engage in innovative loan programs, for disparities in lending between different neighborhoods, and for a bank's refusal to make a loan commitment.\textsuperscript{89}

In its recent statements, however, the Board has attempted to synthesize a bank's fair lending with its safety and soundness obligations. For example, one of the Board's governors stated that the goal of the CRA and other anti-discrimination laws is to ensure that "safe and sound lending takes place in every community in the country and that it is done fairly."\textsuperscript{90} The Board has also begun to insert language in its analysis of HMDA data in CRA challenges that indicates that banks are obliged to ensure that their lending criteria assure both safe and sound practices and equal access to creditworthy applicants regardless of race.\textsuperscript{91}

\textbf{B. The Board's Standards for Evaluating a Bank's CRA Record:}

\textbf{The Thirteen CRA Assessment Criteria}

The federal banking regulators, including the Board, have established thirteen substantive criteria to evaluate a bank's performance at meeting its community's credit needs.\textsuperscript{92} These criteria are in turn divided among five categories.

These thirteen criteria do not represent a set of objective or quantifiable legal standards a bank must meet to satisfy the CRA. Rather, they are more like guides to the sorts of programs and policies a bank...
can adopt to satisfy the CRA. They are not strict tests, but rather elaborations or descriptions of bank practices that satisfy the CRA.93

The Board has not established any sort of formula that states the relative weight of each criterion or how it will deal with a bank that satisfies some of the criteria but not others. There is also no standard method for applying the criteria and reaching a conclusion about a bank's CRA record.94 Nevertheless, in the course of applying these criteria over more than a decade, certain general standards have emerged.

I. Category One: Ascertainment of Community Credit Needs

Assessment Criterion: Activities conducted by the institution to ascertain the credit needs of its community, including the extent of its efforts to communicate with community members regarding the credit services being provided by the institution

The Board places special emphasis on a bank's efforts to ascertain the credit needs of its community.95 It stresses the importance of two-way communication between a bank and the community in helping the bank to develop appropriate credit products and in providing the community with information about the types of credit the bank offers.96

There are several elements to a satisfactory ascertainment effort. First, a bank should have an ascertainment program in place prior to filing an application, as failure to do so may be grounds for denying the application.97

Second, the ascertainment effort should be systematic and documented, and the bank should take the lead in establishing "ongoing, meaningful contacts with a wide full range of individuals and groups,


representing civic, religious, neighborhood, minority, small business, and commercial and residential real estate development." Special praise is given to affirmative efforts to target community groups in small clusters of underserved census tracts. Community contacts can be made by participating in community groups; holding public meetings; appointing a community advisory board and reviewing advisory board meeting minutes to help develop credit products; documenting meetings with community groups; requiring branch


managers to develop community relations plans, providing intercultural training; holding board of directors meetings in neighborhoods served by the bank; and establishing and documenting regular communication or call programs with real estate agents, small businesses, small business associations, minority-owned businesses, government officials, nonprofit private developers, and financial intermediaries. One efficient way to ascertain community credit needs is to participate in a consortium of banks that shares ascertainment information.

Through these efforts to establish and maintain contact with community groups, the banks can gather and analyze data related to the credit needs of the bank's community. This can be accomplished by formally studying the community's credit needs, mailing surveys and questionnaires to community groups, and holding consumer "focus" group discussions.


106. Id.


Assessment Criterion: The extent of participation by the institution’s board of directors in formulating policies and reviewing the institution’s performance with respect to the purposes of the CRA

Under this assessment criterion, the Board examines not only the participation of a bank’s board of directors in its CRA process, but also whether the bank has incorporated the CRA into its management structure. Like ascertainment, this criterion is crucial to the Board.113

The Board has identified several components of a sufficient CRA management structure. First, as with ascertainment, the Bank must incorporate the CRA into its management structure prior to making an application to the Board, as failure to do so may result in a denial of the application.114

Second, the CRA should be a routine part of a bank’s management activities and structure.115 The bank cannot simply assume that it will meet its CRA responsibility in the normal course of its business.116 Rather, the bank should adopt a formal, written plan with CRA goals, objectives, and methodologies for self-assessment.117

Third, the CRA management structure should extend through all levels of the bank.118 The CRA should be an important part of the planning process of the bank’s board of directors and senior management.119 In one recent decision, the Board denied a bank’s application in part because of its board’s failure to be involved in CRA

118. Joint Statement, supra note 3, at 13,743.
Fourth, a bank’s CRA management structure should be designed to incorporate findings (about the needs of the community gained through the bank’s ascertainment efforts) into the development and delivery of loan products and services. Failure to do so may be grounds for denying an application. One effective way to translate ascertainment into loan products is to enter information gained through ascertainment efforts into a central database for review by bank officers involved in developing and offering credit products.

In its recent decisions on CRA applications, the Board has highlighted efforts by several banks to translate ascertainment into loan products. One bank, following discussions with community groups, completed detailed studies of low and moderate income areas and created two new products: a consumer and home loan product, offering more flexible underwriting criteria. Another bank created a bank subsidiary to focus exclusively on community development lending activities. A third bank used the results of its ascertainment efforts to modify three lending products and make them more affordable: (1) it increased the maximum term of its home improvement loans from five to eight years; (2) it increased the debt/income ratio on home equity lines of credit from 32% to 40%; and (3) it expanded its product line to include VA and FHA adjustable rate mortgages. Yet another bank created a special consumer credit group whose responsibilities encompassed three steps related to meeting community credit needs: ascertaining credit needs; developing new credit products designed to meet those needs; and advertising these products. One bank developed a program to provide loans for closing costs, promoted long-term/low income home improvement loans, and provided purchase and rehabilitation loans for homes foreclosed by federal gov-

Bull. 312, 315 (1989); see Columbus Junction CRA Enforcement Action, supra note 117, ¶ 7 (requiring banks' board and senior management to be involved in CRA activities).
125. Id.
Finally, another bank used the results of its ascertainment efforts to increase its efforts to lend to minority-owned businesses, to develop bilingual promotional material and automatic teller machines, and to create an emergency expense loan product.

The Board has identified several methods for a bank’s board of directors to utilize the CRA in its planning process. These include formulating CRA policy and reviewing the bank’s CRA performance at board meetings, forming a board CRA compliance committee, and reviewing the bank’s CRA statement, HMDA data, ascertainment efforts, and credit products annually. The bank’s board of directors should also demonstrate a willingness to adopt flexible and innovative but prudent underwriting criteria.

The Board also recommends several CRA functions for a bank’s management. The starting point is appointing a CRA officer or forming a CRA management committee to formulate and implement the bank’s CRA programs and goals. The activities of the CRA officer
or committee include monitoring the bank's CRA performance;\textsuperscript{135} proposing, adopting, or implementing new CRA policies;\textsuperscript{136} conducting CRA training for bank employees;\textsuperscript{137} preparing and analyzing reports about the extent of the bank's small business, real estate, and other lending activity in low and moderate income communities;\textsuperscript{138} participating in community activities;\textsuperscript{139} updating the board of directors and senior management on the bank's CRA record;\textsuperscript{140} preparing a community assessment that documents community composition and needs, and existing or proposed programs to meet those needs;\textsuperscript{141} and documenting the bank's advertising and ascertainment efforts.\textsuperscript{142}


The Board has identified three management functions that merit special attention. The first is reviewing the performance of bank subsidiaries. If a BHC controls several bank subsidiaries, particularly in different states, the Board expects it to adopt a CRA management structure with two primary elements. First, each subsidiary should have its own CRA plan and structure and report on its CRA performance to the BHC. Second, the BHC should adopt a centralized structure to coordinate, review, and evaluate the subsidiaries' CRA plans and performance. The Board has also praised efforts by BHCs to provide technical assistance or community development lending opportunities to its subsidiary banks.

The second specially identified management function is analysis of a geocoded loan database to ensure compliance with anti-discrimination laws and to ensure that all neighborhoods within a bank's CRA community are being properly served. A bank should employ a computerized system to sort the geographic distribution of all of a bank's loans and then overlay this with demographic information. The results of the analysis should be documented and made available to the bank's board and senior management, as well as to the bank's regulators. The bank should use the results of the analysis in sev-


148. See Fair Housing-Fair Lending No. 7, supra note 147, at 4, 6.

149. Id. at 3, 8.
eral ways: to evaluate its record in serving the needs of low and moderate income communities; to develop credit products in response to those needs; and to formulate and refine marketing strategies.\textsuperscript{150}

The final significant management function is ensuring compliance with CRA disclosure requirements and remedying any violations.\textsuperscript{151} The Board’s general policy is that as long as a bank remedies such violations, it will not prevent an application from being granted.\textsuperscript{152} In connection with reviewing several bank applications, the Board has identified disclosure violations but in each case has found that the banks’ remedies were sufficient. Examples of remedied violations include: technical violations of the Consumer Credit Protection Act and problems in collecting HMDA data;\textsuperscript{153} failure to complete an HMDA statement and to place one letter in the CRA public file;\textsuperscript{154} failure to include two letters in the CRA public file;\textsuperscript{155} failure to comply with CRA and HMDA disclosure requirements;\textsuperscript{156} failure to provide a map of the bank’s delineated CRA community;\textsuperscript{157} incorrect lending data on HMDA forms;\textsuperscript{158} deficiencies in the description of the bank’s CRA community delineation and listings of the types of credit available;\textsuperscript{159} and failure to make available the public CRA file.\textsuperscript{160}

2. **Category Two: Marketing and Types of Credit Extended**

**Assessment Criterion:** The extent of the institution’s marketing and special credit-related programs to make members of the community aware of the credit services offered by the institution.

The relatively strong consideration that the Board gives to this assessment criterion continues to reflect its emphasis on a bank’s CRA structure and procedures.\textsuperscript{161} The Board’s primary concern is that a bank implement advertising programs that ensure that all the mem-

\textsuperscript{150} Id. at 3, 4; see CoreStates Fin. Corp., 78 Fed. Res. Bull. at 782.
\textsuperscript{151} Final CRA Guidelines, supra note 15, at 18,170. For a description of these requirements, see supra notes 24–31 and accompanying text.
\textsuperscript{158} National City Corp., 74 Fed. Res. Bull. at 583 n.13.
\textsuperscript{159} Fifth Third Bank, 77 Fed. Res. Bull. at 349 n.7.
\textsuperscript{161} Garwood Statement, July 31, 1989, supra note 72, at 624; see Johnson Statement, Sept. 8, 1988, supra note 49, at 737. Jo Ann Barefoot, former deputy comptroller of the currency, suggests that this is the second most important criterion to the federal regulators. See Fair Housing-Fair Lending No. 7, supra note 147, at 4.
bers of the community are informed of its credit products and services. Failure to do so can contribute to denial of an application on CRA grounds. In particular, the Board desires that a bank target advertisements for its credit products at low and moderate income communities. The Board gives its highest praise to marketing programs that are specifically intended to promote special products designed to meet the credit needs of low and moderate income communities or to reach minority audiences. Examples include an advertising plan that targeted small business and low and moderate income individuals and an officer call program designed specifically to develop CRA and small business loans. Two banks pre-screened their advertisements geared at minority audiences to ensure their effectiveness. Another bank developed multi-media advertising campaigns aimed at Latino and African-American customers, and retained Latino-owned and African-American-owned advertising agencies to develop each respective campaign.

The Board expects a bank to advertise both in media of general circulation and in media particularly geared toward minority communities. The Board thus encourages advertising in television, radio, and newspapers; including minority oriented media,

165. See Final CRA Guidelines, supra note 15, at 18,171.
owned radio stations and newspapers; in inner city, neighborhood, or trade newspapers or newsletters; in foreign language or ethnic newspapers; on billboards in minority neighborhoods; on buses whose routes cover low and moderate income neighborhoods; in church bulletins; and on railroad posters. One bank retained a minority-owned advertising firm that specialized in advertising in minority neighborhoods, and two banks sponsored radio programs dedicated to financial advice for members of minority groups.

In addition to media advertising, the Board encourages other forms of marketing. These include conferences, credit seminars, and meetings in neighborhoods and with community groups; meetings with
realtors to promote mortgage products;\textsuperscript{181} bilingual signs and promotional materials in bank branches;\textsuperscript{182} guides to obtaining credit or otherwise facilitating applications from minority communities;\textsuperscript{183} direct mail solicitations;\textsuperscript{184} and geographically documented telemarketing or officer call programs to solicit small business and home mortgage loan applicants from low and moderate income neighborhoods.\textsuperscript{185}

Although the Board has not frequently articulated its preference for bank advertisements, it favors efforts to advertise credit products such as real estate, home mortgage, home improvement, and small business loans, as opposed to deposit products.\textsuperscript{186}

\textit{Assessment Criterion:} The institution's origination of residential mortgage loans, housing rehabilitation loans, home improvement loans, and small business and small farm loans within its community; or the purchase of such loans originated in its community

Pursuant to this assessment criterion, the Board evaluates whether a bank is making loans within its delineated CRA community, in general, and in low and moderate communities in particular, and whether a bank is making loans that meet the community's credit needs.\textsuperscript{187}

\textsuperscript{187} Final CRA Guidelines, supra note 15, at 18,171-72; Joint Statement, supra note 3,}
The Board has not established quantified standards for determining how much credit is sufficient, whether the credit is affordable, nor whether the credit products meet the community's needs.\textsuperscript{188} In its recent decisions on CRA applications, however, the Board has begun to cite more frequently the number and amount of a bank's loans within low and moderate income areas of its delineated community, indicating that it may have adopted some form of lending target.\textsuperscript{189}

\textbf{a. Loans Outside a Bank's CRA Community}

The first issue under this criterion is the extent of a bank's lending within its CRA community.\textsuperscript{190} The Board has not articulated a clear standard for determining whether the extent of a bank's lending outside its CRA community is too high. The Board's general position is that a commercial bank's internationally-oriented lending program is not necessarily inconsistent with its meeting the credit needs of its community.\textsuperscript{191} In evaluating the extent of a bank's foreign loans, the Board will consider several factors, including the proportion of the loans that are made outside the community, whether that proportion exceeds expectations based on the record of similar banks, and the extent to which a bank's lending is responsive to community needs.\textsuperscript{192}

The Board has considered several claims that the large extent of a bank's lending outside its CRA community impaired the bank's ability to meet community credit needs. On one occasion, the Board indicated that the bank balanced its extensive foreign lending with its involvement in local community development activities and its expressed willingness to meet community credit needs.\textsuperscript{193} On another

\textsuperscript{188} CRA Q and A, supra note 5, at 10,901.
\textsuperscript{189} See, e.g., First Interstate BancSystem of Mont., Inc., 78 Fed. Res. Bull. at 940 ($315,000 in loans to a Reservation in the first half of 1992 as opposed to $309,000 in loans in all of 1991); AMCORE Fin., Inc., 78 Fed. Res. Bull. at 930-31 ($55 million in commercial loans to integrated and minority tracts and $240.1 million in commercial loans in low income census tracts); see infra notes 190-321 and accompanying text.
\textsuperscript{190} For a description of the standards relating to a bank's CRA community delineation, see infra notes 331-412 and accompanying text.
\textsuperscript{192} Final CRA Guidelines, supra note 15, at 18,172; CRA Q and A, supra note 5, at 10,901; Somerset Bankshares, Inc., 74 Fed. Res. Bull. at 620 (a "substantial portion" of bank's loans were outside its community); Manufacturers Hanover Trust Co., 66 Fed. Res. Bull. at 602 (the fact that half of a bank's home mortgage loans were made outside its state was not problematic because it was consistent with the record of other similar banks).
\textsuperscript{193} Mellon Nat'l Corp., 69 Fed. Res. Bull. 721, 722-23 (1983) (The bank also asserted...
occasion, the Board ruled that there was no evidence that the bank's ability to meet community credit needs was diminished by its investment outside its community.\textsuperscript{194} However, the Board recently has granted two CRA challenges where the banks made only "nominal" amounts of loans to their CRA communities,\textsuperscript{195} which comprised less than 28\% of their total loans.\textsuperscript{196}

An important issue related to lending within the bank's community arises from the practice of some banks that attempt to meet community credit needs by participating in intermediary organizations that invest in or make loans to support small business, affordable housing, or community development projects on a statewide, regional, or national basis.\textsuperscript{197} Although many such programs provide financial support for projects within a bank's delineated community, the bulk of the lending may occur outside the community.\textsuperscript{198} The Board has indicated that it may give CRA credit for participation in such programs even if most of the loans are made outside the bank's community, as long as such lending augments the bank's overall CRA program and is directly responsive to the needs of the bank's delineated community.\textsuperscript{199}

Another issue related to foreign lending is whether extensive Third World or other speculative lending impairs a bank's ability to meet local credit needs. The Board has indicated that it considers such assertions in the context of its evaluation of a bank's capital and overall financial condition, but not as part of the CRA evaluation.\textsuperscript{200}

\textbf{b. Forms of Credit That Satisfy the CRA}

The second main issue under this assessment criterion is whether a bank offers credit products in its community that meet the community's credit needs.\textsuperscript{201} The Board has not established any standards for the type and amount of lending that a bank should provide, nor does it favor one form of lending over another.\textsuperscript{202} The Board's policy

\begin{itemize}
\item that its foreign loans were not funded with local deposits and that foreign deposits outnumbered foreign loans.\textsuperscript{194} Norwest Corp., 77 Fed. Res. Bull. at 112 n.12 (1991).
\item First Interstate Bancsystem of Mont., Inc., 77 Fed. Res. Bull. at 1009.
\item For a more detailed description of such programs, see infra notes 264-307, 472-505 and accompanying text.
\item CRA Q and A, supra note 5, at 10,902-03.
\item CRA Q and A, supra note 5, at 10,903-04.
\item Final CRA Guidelines, supra note 15, at 18,171-72.
\item Seger Statement, March 23, 1988, supra note 84, at 308.
\end{itemize}
is that a bank need not offer every form or one particular form of credit in its community.\textsuperscript{203} Rather, many forms of credit satisfy the CRA, and what is important to the Board is a bank's overall lending record.\textsuperscript{204} The various forms of credit include home improvement and home mortgage loans;\textsuperscript{205} commercial and industrial loans;\textsuperscript{206} small business and Small Business Administration ("SBA") loans;\textsuperscript{207} municipal bonds;\textsuperscript{208} student loans;\textsuperscript{209} urban development loans;\textsuperscript{210} in-

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industrial development loans with government agencies;\textsuperscript{211} loans to nonprofit organizations;\textsuperscript{212} consumer, credit card, and unsecured personal loans;\textsuperscript{213} farm loans;\textsuperscript{214} and loans to churches.\textsuperscript{215}

\textit{(i) Home Mortgage Loans}

The Board does not require a bank to make home mortgage loans for the purchase, improvement or refinancing of one to four family houses to satisfy the CRA.\textsuperscript{216} However, the CRA is most frequently identified with home mortgage lending.\textsuperscript{217} Home mortgage lending that meets the needs of low and moderate income neighborhoods is a major consideration in evaluating the CRA record of most banks.\textsuperscript{218} In evaluating a bank's home mortgage lending record, the Board considers several factors, including the extent of the bank's lending, whether the bank has adopted flexible lending criteria, and whether the bank is involved in other programs that support home mortgage lending.\textsuperscript{219}

\begin{itemize}
\item \textsuperscript{216} Hutsonville Bank Corp., 67 Fed. Res. Bull. at 48 (Board granted applications even though Board noted its concern that the bank stopped granting residential mortgage loans).
\item \textsuperscript{217} Seger Statement, Mar. 23, 1988, \textit{supra} note 84, at 308.
\item \textsuperscript{219} Joint Statement, \textit{supra} note 3, at 13,744.
\end{itemize}
(I) The Extent of a Bank's Home Mortgage Lending

The Board has not articulated any standards for evaluating whether the extent of a bank's home mortgage lending is sufficient. Nevertheless, it frequently cites the total number and dollar amount of home mortgage loans which a bank makes.\textsuperscript{220} The extent of a bank's mortgage subsidiary's lending is also relevant.\textsuperscript{221}

(II) Flexible Lending Criteria

In order to predict the creditworthiness of a borrower, banks evaluate loan applications according to "underwriting criteria." The most significant of these underwriting criteria are income, mortgage and overall debt to income ratios, employment record, and credit history. Banks also establish other requirements for secured loans, including the amount and source of the downpayment. While the Board does not require a bank to adopt flexible criteria in order to satisfy the CRA, banks earn CRA credit for doing so.\textsuperscript{222} The Board has cited several examples of flexible credit programs. These include programs which: (1) allow a higher debt to income ratio, allow rent, utility and other types of payments to establish a credit history, and modify usual minimum employment requirements;\textsuperscript{223} (2) increase conventional mortgage ratios for housing expenses and total debt, permit a downpayment from sources other than the borrower's own funds, permit alternative documentation to complete a credit history, include non-taxable income in gross income, permit flexibility relating to employment history, and consider nonfinancial equity as part of a downpay-


ment;\textsuperscript{224} (3) minimize closing costs, allow a 5% down-payment and require no mortgage insurance;\textsuperscript{225} (4) advance 100% of the equity in the borrower's home;\textsuperscript{226} (5) require 30% less income than standard home mortgage loans, permit credit histories based on rent or utility payments, and waive closing cash reserve requirements;\textsuperscript{227} (6) recognize all forms of income, including government assistance, use higher debt to income ratios, reduce fees and points, and lend up to 95% of the value of the property;\textsuperscript{228} (7) allow high loan to value ratios and provide private mortgage insurance;\textsuperscript{229} (8) reduce points, expand debt ratios, refund mortgage application fees, and consider various sources of income for first mortgages on single family homes;\textsuperscript{230} (9) permit low minimum mortgage amounts;\textsuperscript{231} (10) waive the underwriting fee and finance closing costs;\textsuperscript{232} (11) provide down-payment assistance and mortgage counseling;\textsuperscript{233} (12) offer flexible, affordable mortgage loans to families with low and moderate incomes;\textsuperscript{234} (13) provide below market rate financing for families earning less than $35,000 annually;\textsuperscript{235} (14) provide below market financing for first mortgages in inner city areas;\textsuperscript{236} (15) require no points and offer flexible down-payment requirements;\textsuperscript{237} (16) offer graduated mortgage payments at high loan to value ratios;\textsuperscript{238} (17) require a down-payment of only $1,000, which can be obtained through several means, including a secured or unsecured loan;\textsuperscript{239} (18) offer minimum loans of $2,000 and lend up to 100% of the equity in a home;\textsuperscript{240} and (19) require only a 5% down-payment and higher than normal debt to income ratios, reduce closing costs, charge no points on mortgages up to $35,000, permit flexible credit and employment standards, and allow nonfinancial equity as part of the downpayment.\textsuperscript{241}

\begin{itemize}
\item \textsuperscript{224} \textit{Id.} at 561-62.
\item \textsuperscript{225} \textit{Id.} at 562 n.46.
\item \textsuperscript{226} \textit{Id.}
\item \textsuperscript{227} BankAmerica Corp., 78 Fed. Res. Bull. at 349-50 n.60.
\item \textsuperscript{228} Chemical Banking Corp., 78 Fed. Res. Bull. at 82.
\item \textsuperscript{229} Joint Statement, \textit{supra} note 3, at 13,744.
\item \textsuperscript{230} National City Corp., 74 Fed. Res. Bull. at 583 n.10.
\item \textsuperscript{231} Norwest Corp., 74 Fed. Res. Bull. at 570.
\item \textsuperscript{232} U.S. Bancorp, 76 Fed. Res. Bull. at 1056.
\item \textsuperscript{233} Norwest Corp. 77 Fed. Res. Bull. at 345 n.13.
\item \textsuperscript{234} Fifth Third Bank, 77 Fed. Res. Bull. at 350.
\item \textsuperscript{235} C&S/Sovran Corp., 76 Fed. Res. Bull. at 783.
\item \textsuperscript{236} Huntington Bancshares, Inc., 78 Fed. Res. Bull. at 63.
\item \textsuperscript{237} Muskingum Valley Bancshares, 76 Fed. Res. Bull. at 645.
\item \textsuperscript{238} Manufacturers Hanover Trust Co., 75 Fed. Res. Bull. at 763.
\item \textsuperscript{239} First Bank Sys., Inc., 78 Fed. Res. Bull. at 951.
\item \textsuperscript{240} \textit{Id.} at 952.
\item \textsuperscript{241} First of Am. Bank Corp., 78 Fed. Res. Bull. at 374.
\end{itemize}
Several banks have gone further than simply changing their underwriting criteria. They have agreed to keep certain loans in their own portfolios\(^{242}\) that do not satisfy secondary market underwriting criteria.\(^{243}\) One bank, for example, created a $10 million "flexible lending pool" to provide loans with flexible lending criteria to persons who might otherwise fail to satisfy secondary market requirements.\(^{244}\)

### (III) Other Forms of Support for Home Mortgage Lending

The Board also gives CRA credit to banks that participate in activities that support home mortgage lending. These include credit counseling programs,\(^{245}\) home mortgage loan plans to promote affordable mortgage and home improvement loans to residents of inner city neighborhoods,\(^{246}\) mortgage review procedures for rejected loan applications from residents of low and moderate income communities,\(^{247}\) the assignment of mortgage originators to the exclusive responsibility for low and moderate income neighborhoods,\(^{248}\) and anti-discrimination training and self-testing.\(^{249}\) Other banks have supported, through grants and loans, local nonprofit organizations involved with housing programs that benefit low income individuals.\(^{250}\) Finally, banks have financed construction of single-family houses in inner city areas,\(^{251}\) and have arranged for the purchase and rehabilitation of distressed one to four family dwellings based on the value of the property after rehabilitation.\(^{252}\)


\(^{243}\) The secondary market for loans, composed primarily of public/private agencies such as FNMA and FHLMC as well as private entities such as pension funds and insurance companies, purchases mortgages from banks and establishes underwriting criteria that must be met to qualify for purchase.


\(^{249}\) *1991 HMDA Results*, *supra* note 12, at 813.


(ii) Multi-family Housing Lending

Also frequently identified with the CRA is multi-family housing lending, and the Board has given CRA credit to several forms of support for affordable multi-family housing, including construction, permanent acquisition, and rehabilitation lending. The Board has frequently cited as relevant the amount of multi-family housing loans a bank has extended but has not established a standard to evaluate whether it is sufficient. Examples include a $525,000 loan to a non-profit developer, loans for multi-family housing made in cooperation with community groups, loans for three housing projects for the elderly sponsored by the U.S. Department of Housing and Urban Development ("HUD"), financing for the rehabilitation of a twenty-five unit multi-family housing project in a low and moderate income neighborhood, financial support for two multi-family developments for low and moderate income families, and the financing of a small hotel used as a homeless shelter.

Although the Board supports multi-family housing, it does not require a bank to provide credit for multi-family housing. In fact, the Board has held that it is permissible for a bank to employ loan underwriting criteria that would inhibit lending to multi-family housing due to the risky nature of such lending. The Board has also indicated that a bank has discretion as to the type of multi-family housing credit it may offer.

(iii) Miscellaneous Housing Finance Programs

One effective way to support both single and multi-family afforda-
ble housing is to participate in government-supported, insured, or subsidized housing loan programs.264 One such program, sponsored by HUD, helps low and moderate income individuals purchase homes by providing downpayment assistance, financing approximately half the closing costs, financing repairs and energy efficiency improvements, and permitting applicants to establish credit histories through various means including utility payments.265 Other HUD programs are the 203(k) purchase-rehabilitation loan program and the Title I home improvement loan program.266 Other examples include municipal housing finance agencies and programs,267 state-sponsored downpayment assistance programs,268 state-sponsored below market weatherization loan programs,269 and tax credit programs for home mortgage interest payments.270

The secondary mortgage market presents another significant opportunity to support housing finance.271 The three major government agencies involved in the secondary market are the Federal National Mortgage Association ("FNMA"), the Federal Home Loan Mortgage Corporation ("FHLMC"), and the Government National Mortgage Association ("GNMA").272 FNMA and FHLMC purchase loans originated by financial institutions and establish the underwriting criteria for the underlying loans. GNMA supports VA and FHA loans by guaranteeing payment of principal and interest.273 FNMA recently initiated an affordable home loan program for single family


271. Joint Statement, supra note 3, at 13,744; CRA Q and A, supra note 5, at 10,904.

272. 1990 HMDA Results, supra note 12, at 878.

273. Id.
residences. Known as the Community Home Buyer's Program, it offers flexible underwriting criteria including low downpayments, waives the traditional requirement that the purchaser have a two-month cash reserve on hand at closing, permits borrowers to dedicate 33% of their income to mortgage payments as opposed to 28% and permits applicants to establish credit histories through various means, including utility payments. 274 One bank received CRA credit for providing twenty-one such mortgages for $2.7 million. 275 FHLMC sponsors a program that provides mortgages with flexible underwriting criteria to applicants who have received credit counseling. 276

(iv) Small Business Lending

CRA also covers loans to small businesses in low and moderate income areas, including loans to farms. 277 As with other forms of credit, the Board has not established quantified standards for determining the sufficiency of a bank's small business lending. In recent decisions on bank merger applications, however, it has begun to cite the total number and/or dollar amount of a bank's small business loans. 278

The Board's definition of a small business is vague: a business that does not have access to regional and national credit markets and relies

on local lending institutions for credit. As a result, the Board does not have any quantified standards for determining when a business is "small." Thus, when analyzing the extent of a bank's small business lending, the Board uses a number of indicators, including annual sales, loan amount, and number of employees. The Board has not set standards for any of these indicators.

Particularly important to the Board are loans to small businesses or financial institutions owned by minorities and women. Once again, there are no benchmarks for determining the adequacy of such lending. The Board has cited approvingly banks which: (1) made thirty-seven loans to minority-controlled businesses; (2) had $11.4 million in loans to minority-owned businesses and $4.4 million in loans to businesses owned by women outstanding; (3) increased the percentage of their small business loans in the central city from twenty to 49%; (4) made one-third of their small business loans to businesses owned by women and minorities; (5) made 53% of the total number and 31% of the total dollar amount of its commercial loans to Hispanic borrowers; (6) made $24.3 million in loans to small businesses with annual sales of $1 million or less and located in low and moderate income areas; and (7) made $7 million in loans to low income and minority entrepreneurs. Finally, although

279. CRA Q and A, supra note 5, at 10,900.
280. See, e.g. Meridian Bancorp, 78 Fed. Res. Bull. at 946-47 (20 or fewer employees); BankAmerica Corp., 78 Fed. Res. Bull. at 351, 353 (less than $5 million in annual sales; loans of less than $500,000 each; loans of less than $50,000 each; loans less than $100,000 each; loans for less than $250,000, averaging $41,000); NCNB Corp., 78 Fed. Res. Bull. at 153 n.67 (less than $1 million in sales). Some guidance may be provided by the FFIEC's proposed and enacted reporting requirements for small business loans. See Federal Financial Institutions Examination Council, Reporting of Information of Small Business and Small Farm Lending by Insured Banks, Thrifts, and U.S. Branches of Foreign Banks, 57 Fed. Reg. 54,325 (Nov. 17, 1992). The FFIEC originally defined a small business as one with less than $10 million in annual sales, but abandoned this due to the difficulty banks would have in collecting this data. Eventually, it settled on loan amount as the benchmark, and settled on loans of $1 million or less.
282. Old Nat'l Bancorp, Inc., 79 Fed. Res. Bull. at 59 n.18. However, the Board criticized the bank for failing to solicit enough credit applications from the minority business community.
purchases from minority- or female-owned vendors do not technically satisfy a credit need, the Board has referred to a bank’s positive record in making such purchases as an additional form of support for small businesses.\(^{289}\)

Loans guaranteed by the SBA or other government programs also help satisfy the CRA,\(^{290}\) but failure to make SBA loans has not been sufficient grounds for denying an application.\(^{291}\) Once again, the Board has not established any standards for evaluating a bank’s SBA lending, but rather simply recites the bank’s number and dollar amount of small business loans without any organizing principle.\(^{292}\)

Participating in or creating small business loan programs is also relevant.\(^{293}\) Relevant activities include: funding a small business investment corporation or minority-enterprise small business investment corporation;\(^{294}\) investing in a corporation that provides funding to minority businesses that do not meet standard underwriting crite-

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289. See BankAmerica Corp., 78 Fed. Res. Bull. at 348 n.51 (10% of all purchases from vendors, totaling $60.6 million, from minority- or female-owned businesses in 1991).


ria,\textsuperscript{295} participating in micro-loan programs;\textsuperscript{296} lending to small business enterprise programs;\textsuperscript{297} participating in a small business capital access lending program;\textsuperscript{298} and participating in a consortium to make working capital loans to female- and minority-owned businesses.\textsuperscript{299}

The Board also encourages banks to offer flexible lending criteria, services, and products tailored to the needs of small businesses.\textsuperscript{300} Examples include programs that provide rapid turn-around on loan applications and small business loans at 1\% below prime rate,\textsuperscript{301} and loans to small businesses and nonprofits at 1.25\% below the prime rate.\textsuperscript{302} Examples of products that the Board approves of include revolving credit lines, business installment loans, time and demand commercial loans, and letters of credit.\textsuperscript{303} The Board has also approved flexible start-up loans, short-term capital, and a revolving credit line for operating costs and capital improvements.\textsuperscript{304}

Finally, the Board encourages banks to provide technical assistance to small businesses.\textsuperscript{305} Technical assistance can take several forms, including advice on loan proposals\textsuperscript{306} and assistance with completing SBA applications.\textsuperscript{307}


\textsuperscript{303} Manufacturers Hanover Trust Co., 77 Fed. Res. Bull. at 496; BankAmerica Corp., 78 Fed. Res. Bull. at 353 (SeaFirst offers a line of credit as low as $5,000 for small businesses).


(v) Consumer Loans

Personal loans to consumers are also covered by the CRA. The Board encourages banks to provide flexible terms for consumer loans. Examples of such consumer loans include: a no fee, low interest, low monthly payment credit card, lower amounts and longer terms that can be made on the basis of alternative sources of credit history such as rent receipts and utility bills; loans for $500 or less to low income customers; loans geared toward persons with a maximum household income of $40,000 with no minimum loan amount and a maximum loan amount of $50,000; and loans with no minimum loan amount (one third of the bank's consumer loans were for lower than $500) and no origination fee.

The Board also encourages banks to make consumer loans to residents of low and moderate income neighborhoods. While it frequently cites the amount of such lending, the Board has not established quantified standards for evaluating it. For example, during a three year period one bank made $77 million in personal loans and $52 million in credit extensions to residents of low and moderate income neighborhoods. Other banks have been praised for making $874,000 and $55 million in consumer loans.

(vi) Charity, Grants, and Technical Assistance

The Board's previous position regarding charity was that a bank's charitable contributions do not satisfy the CRA because charity and grants are not credit. Nevertheless, in several recent decisions, the Board has cited a bank's charitable contributions, among other

things, to justify granting an application.\textsuperscript{319} The Board's position appears to be that if a charitable grant is part of a bank's overall CRA strategy and, for example, supports a CDC involved in low income housing development, the grant counts towards the bank's CRA obligations.\textsuperscript{320} Similarly, banks can earn CRA credit by demonstrating that they have provided technical assistance to community development organizations through: participation on their board of directors or on their loan review committees; development of loan applications or underwriting standards; training staff or management; or the provision of accounting or bookkeeping services.\textsuperscript{321}

\textit{Assessment Criterion:} When an identified community credit need exists, the institution takes a leadership role in meeting that need and affirmatively participates in government-insured, guaranteed, or subsidized loan programs for housing, small businesses, small farms, and rural development.

The major government-insured loan programs that help satisfy the CRA include FHA, FmHA, and VA home mortgage insurance programs, and SBA guaranteed loans.\textsuperscript{322} A bank's willingness to participate in such insured loan programs is an especially important indicator of its ability to meet the credit needs of African-Americans, who apply for FHA or VA loans at a rate nearly twice that for whites.\textsuperscript{323}

The Board does not require a bank to offer insured loans and it has not established any guidelines for determining whether a bank's par-


\textsuperscript{323} 1991 HMDA Results, supra note 12, at 803.
participation in insured loan programs is sufficient. Nevertheless, it has frequently cited the total number and dollar amount of insured loans a bank makes.

Failure to participate or limited participation in these programs has not been grounds for denying a bank’s application, even if it results in fewer loans to low and moderate income neighborhoods. On the other hand, while participating in such loan programs does not guarantee Board support for an application, it certainly helps. For example, one application was granted when the bank made 20% of all FHA and VA loans in its community. Other banks whose applications have been granted have agreed to participate in the FHA home improvement loan program, to hire an FHA/VA underwriter, or to certify as a FHA/VA lender.

3. **Category Three: Geographic Distribution of Credit and Record of Opening and Closing Offices**

Pursuant to this category, the Board evaluates the bank’s performance pursuant to three criteria: the reasonableness of the bank’s delineated CRA community; the geographic distribution of the bank’s credit extensions; and the bank’s record of opening and closing offices and providing banking services to the community.

*Assessment Criterion:* Whether the institution’s delineated commu-

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324. See, e.g., AmeriTrust Co., 68 Fed. Res. Bull. at 69 n.10 (Board questioned the extent of the bank’s commitment to participate in such programs, but noted that at least the bank did offer SBA loans); F & M Bankshares, Inc., 66 Fed. Res. Bull. at 509 (Board dismissed allegations that bank’s SBA lending level was low because Board did not have authority to dictate bank’s portfolio).


329. *Id.* at 563 n.51.


nity meets the purpose of the CRA and does not exclude low and moderate income neighborhoods.

The Board requires each bank to delineate its local lending community in a way that reflects its lending territory and does not arbitrarily exclude low and moderate income neighborhoods. A bank’s community delineation is crucial, since the bank has CRA obligations only in its delineated community. Thus, the Board’s primary concern in evaluating a bank’s CRA community delineation is that it not defeat the purpose of the CRA and arbitrarily exclude low and moderate income neighborhoods.

In delineating its local lending community, a bank may follow one of three guidelines. First, the community can consist of a recognized geographical area such as an MSA or a county. Second, a bank’s CRA community may be based on its local lending market. In determining the local lending market, several factors are relevant, including the bank’s branch locations and the geographic distribution of its credit applications and extensions. Third, a bank may employ any other reasonable delineation that does not exclude low and moderate income neighborhoods.

The Board relies on HUD income guidelines to determine whether a neighborhood is low or moderate income. Pursuant to these guidelines, a low or moderate income neighborhood is one whose median family income is less than 80% of the MSA median family income.

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333. See, e.g., CRA Q and A, supra note 5, at 10,899.


335. CRA Progress Report, supra note 73, at 88. This may be measured, for example, by the number of loan applications a bank receives from its community. First Commercial Holding Corp., 77 Fed. Res. Bull. at 669 n.19.


337. See Norwest Corp., 77 Fed. Res. Bull. at 112; (CRA community delineation of a 15 mile radius from the bank’s headquarters was acceptable because it did not exclude low and moderate income communities).

A predominantly minority neighborhood is one that has a minority composition in excess of 80% of the total population.339

The Board has stated that gerrymandering a community to exclude low and moderate income neighborhoods is a serious CRA violation, and may be grounds for denying an application.340 For example, one bank revised its community delineation to exclude a Native American reservation after a group from the reservation challenged an application the bank had filed.341 The bank’s primary regulator (the FDIC) found that this violated its regulations. Although the bank corrected the violation, it contributed to the Board’s eventual denial of the application. On another occasion, the Board conditioned its approval of a bank’s application on the inclusion of predominantly low and moderate income/minority neighborhoods of New York City within the bank’s delineation.342

On other occasions when the Board has evaluated a bank’s community delineation in the context of a CRA challenge, it has not been as strict. In one case, the Board found that the bank had actually expanded its community delineation to include more low income and predominantly minority tracts than it had before.343 In another case, the Board, without further analysis, simply stated that a community delineation encompassing an area within twenty-five miles from the bank’s office was acceptable.344 In two other cases, the Board found that the banks had excluded low income neighborhoods from their CRA communities. Nevertheless, the Board excused the first bank because the relevant neighborhood was encompassed within another bank’s CRA community;345 and excused the second bank because it agreed to review its community delineation with community

Bull. at 747 n.10; Hibernia Corp., 72 Fed. Res. Bull. at 658 n.6; but see Advance Bancorp, Inc., 72 Fed. Res. Bull. at 835 n.4 (low income is less than 80% and moderate income is between 80% and 125%). Upper income neighborhoods are those where the median family income exceeds 120% percent of the MSA median. 1990 HMDA Results, supra note 12, at 864.

341. Id. The Board granted a subsequent application by First Interstate with the bank’s extraordinary commitment that it would not amend its community delineation without the prior approval of the Federal Reserve Bank of Minneapolis. First Interstate BancSystem of Mont., Inc., 78 Fed. Res. Bull. at 940.
342. The Bank of N.Y., 79 Fed. Res. Bull. at 63 (bank had excluded the predominantly minority/low and moderate income communities of Harlem, the Bronx, and Brooklyn from its community despite the fact that it sought and did business in these communities).
representatives. 346

Assessment Criterion: The geographic distribution of the institution's credit extensions, credit applications, and credit denials

At the heart of most allegations that a bank is not meeting the credit needs of its community is evidence that a bank’s HMDA data indicates geographic disparities in the distribution of the bank’s loans. 347 Geographic disparities can take two main forms: (1) lending a disproportionately low amount in low and moderate income or predominantly minority (“low income/minority”) census tracts, compared to affluent or nonminority (“affluent/white”) census tracts, whether or not the low income/minority tracts are contiguous; and (2) “redlining” which is either refusing to lend or lending a disproportionately small amount to a contiguous geographic area or neighborhood for inappropriate reasons such as the racial composition or income level of the community. 348

a. Using HMDA to Demonstrate Geographic Loan Disparities

As described earlier, 349 HMDA data is designed to help determine a bank’s home mortgage lending record. It can be used in a number of different ways to identify geographic disparities in a bank’s lending record and to help determine whether these disparities are the result of redlining or discriminating against low income/minority census tracts.

(i) Determining Whether a Bank’s Home Mortgage Loans Indicate a Pattern of Discrimination Against Low Income/Minority Census Tracts

HMDA Tables 7-1 through 7-6 350 report the number and disposition of all HMDA covered loan applications according to the income/racial composition of the tract in which the property related to the loan is located. Tables 7-1 and 7-6, in conjunction with census data, can be used to determine several categories of information about the geographic distribution of a bank’s loans. These include: the total number/dollar amount of loans a bank has made in low income/minority tracts; the proportion of loans it has made in such tracts compared to loans it has made in affluent/white tracts; the proportion of

347. Another type of lending discrimination, based on the race or ethnic background of the loan applicant, is considered infra at notes 442-71 and accompanying text.
349. See supra notes 32-47 and accompanying text.
350. Id.
its total loan portfolio composed of loans to low income/minority tracts; the proportion of its loans to low income/minority tracts compared to such proportions of other similar banks; the proportion of its loans to low income/minority tracts compared to the percentage of low income/minority tracts in the community; and the proportion of loans to low income/minority tracts compared to the percentage of the population living in low income/minority tracts. Although the Board has frequently cited such comparisons in its analysis of lending discrimination in CRA challenges,\textsuperscript{351} it does not consider such evi-


idence to be dispositive proof of a pattern of loan discrimination.

A more persuasive analysis of whether a bank is discriminating against low income/minority tracts is based on its overall lending record controlling for loan demand.\textsuperscript{352} If the demand for loans from census tracts with opposite racial compositions (e.g. 80% white compared to 80% minority) is controlled for demand, yet loan disparities exist, these disparities may be caused by illicit factors such as the racial composition of the tracts. The Board has indicated that several factors relate to demand, including income, the number of mortgage applications a bank receives, the number of deed transfers in a community, and the number of owner-occupied units in a community.\textsuperscript{353}

HMDA Tables 7-1 through 7-6 control for demand in the form of the total loan applications a bank receives and the income level of the census tracts in which property related to the applications are located. They indicate the total number of applications a bank receives from and loans it makes to census tracts that have identical income levels yet opposite racial compositions (e.g. moderate income tracts that are 80% white compared to moderate income tracts that are 80% minority). Using Tables 7-1 through 7-6, it is thus possible to determine a bank’s lending rate for mortgage applications for property in tracts with similar income levels but different racial characteristics. These tables might indicate, for example, the following information regarding a bank’s conventional home mortgage lending record:


Lending Rate Controlling for Income and Total Applications

<table>
<thead>
<tr>
<th>Tract characteristics</th>
<th>Loans</th>
<th>Applications</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Middle income, 80% black</td>
<td>30</td>
<td>100</td>
<td>.30</td>
</tr>
<tr>
<td>Middle income, 80% white</td>
<td>300</td>
<td>500</td>
<td>.60</td>
</tr>
</tbody>
</table>

This chart indicates that the bank makes twice as many loans, controlling for demand in the form of income and applications, in tracts that are 80% white than in tracts that are 80% black. This is evidence of a pattern of discrimination against minority census tracts. 354

HMDA Tables 7-1 through 7-6 can also be used in connection with the two other proxies for demand: 355 deed transfers 356 and the number of owner-occupied units in a community. 357 These can be calculated as follows:

Lending Rate Controlling for Deed Transfers and Income

<table>
<thead>
<tr>
<th>Tract characteristics</th>
<th>Loans</th>
<th>Deed transfers</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Middle income, 80% black</td>
<td>10</td>
<td>100</td>
<td>.10</td>
</tr>
<tr>
<td>Middle income, 80% white</td>
<td>100</td>
<td>500</td>
<td>.20</td>
</tr>
</tbody>
</table>

This chart demonstrates that the bank makes twice as many loans, controlling for demand in the form of income and deed transfers, in tracts that are 80% white than in tracts that are 80% black. This once again is evidence of a pattern of discrimination against minority census tracts. 358

Lending Rate Controlling for Owner-Occupied Units and Income


355. Information about these proxies are not included in the HMDA data but must be tabulated separately and combined with the HMDA data.


358. The Board has indicated that deed transfers may underestimate demand for two reasons: (1) many real estate transfers are completed through installment contracts and thus do not show up as deed transfers; and (2) many would-be or desirable transactions do not take place due to regulatory constraints such as usury ceilings. Caution is thus necessary in applying this proxy. CRA Progress Report, supra note 73, at 90.
(ii) Using HMDA Data to Demonstrate Redlining

The techniques for demonstrating that a bank is redlining a contiguous geographic area are similar to those for demonstrating a pattern of discrimination against low income/minority tracts. The major difference is that instead of comparing the bank's lending record in all of the tracts within its community, whether contiguous or not, the method is to compare the bank’s lending record in a particular neighborhood with its record in the rest of its community, and particularly those areas or tracts with a similar income level but an opposite racial composition.

For example, if the claim is that a bank is redlining a neighborhood because of its racial composition, HMDA data can be used to compare the bank’s lending in the census tracts that comprise that neighborhood to tracts with similar income characteristics but an opposite racial composition. Thus, a bank’s lending record in a middle income/80% minority neighborhood can be compared to its record in lending to middle income/80% white census tracts. Unfortunately, the HMDA tables aggregate a bank’s lending data by MSA, and not by neighborhood. Therefore, the data must be tabulated by hand using Table 1 of the HMDA data, which presents a bank’s lending data tract by tract. If, after studying the bank’s record using the proxies for demand described above, disparities exist, this is evidence of redlining.

Another method for determining whether a bank is redlining is to consider the bank’s “loan to deposit” ratio (“l/d ratio”). The l/d ratio compares the ratio of the value of home mortgage loans that a bank has made to a community to the deposits in the bank’s branches in the community. A low ratio indicates that the community’s deposits are not being returned to the community in the form of loans.


360. This analysis can also be done using a computer and HMDA data on computer tape, which is available from the FFIEC.
The Board's position, however, is that l/d ratios are only a broad measure of lending activity and that there are many nondiscriminatory reasons that a neighborhood may generate more deposits than loan requests, or more requests than deposits.361 Despite the Board's position, its use of loan to deposit ratios in analyzing bank lending records has been somewhat inconsistent. On the one hand, the Board has indicated that a bank's l/d ratio is not prima facie evidence of loan discrimination362 and not helpful in the case of a commercial bank with a diversified portfolio.363 On the other hand, the Board has praised the CRA record of banks with "good," "improved," "reasonable," or "satisfactory" l/d ratios while never articulating a standard for determining a "good" or "poor" ratio.364

Finally, direct evidence of a bank's intent to redline a particular neighborhood is also helpful. Such evidence could include failing to provide credit on the same terms to all parts of its community, failing to solicit credit applications from all parts of its community, and failing to provide all the credit listed in the CRA statement to all parts of its community.365

In two cases where the Board has considered evidence of intentional redlining, however, it has excused the bank's behavior. In the first case, a bank's underwriting guidebook instructed loan officers to scrutinize closely applications for mortgages on properties in neighborhoods that were undergoing a transition from single family homes to apartment, commercial, or industrial buildings.366 The Board found that this was not redlining, because the guidebook also stated that officers should give full, unbiased consideration to financing the needs of low income residents of its community. In the second case, the bank aimed an advertising campaign at Bronx residents that suggested that home mortgages were more readily available in areas outside the Bronx such as Westchester and Rockland Counties.367 The Board indicated its concern but nevertheless granted the bank's

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application, because it found that the direct impact of the advertisement on the community was not great, the bank offered credit to Bronx residents on the same terms as residents of other communities, and the bank claimed the program was the result of a marketing error.

b. The Board's Treatment of Geographic Loan Disparities in Bank Lending Records

(i) The Board's General Policies

The Board heightens its scrutiny where a bank’s lending records indicate geographic loan disparities.368 However, when disparities exist, the Board’s usual position is that mere disparity is no proof of discrimination. This is because the Board believes that many legitimate factors can explain loan disparities, and that analyses of bank lending records rarely account for all of them.369

Thus, rather than relying on statistical disparities alone, the Board also examines the extent of a bank’s efforts to lend to low income/minority tracts to see if it indicates an intent to redline or if it mitigates statistical disparities. The Board considers several factors, including the bank’s efforts to ascertain and systematically determine the community’s credit needs;370 the bank’s advertising record;371 the bank’s credit products and terms, including whether the bank has utilized strict underwriting criteria;372 whether the bank was previously involved in home mortgage lending;373 whether the bank has introduced more flexible credit criteria or new credit products designed to meet the needs of low income/minority communities or participates in programs to provide credit to low income areas;374 the performance

of the bank's mortgage lending subsidiary or affiliate;\textsuperscript{375} the business needs of the bank;\textsuperscript{376} whether the bank has made a commitment to improve its lending record;\textsuperscript{377} whether the bank makes government-sponsored or -insured loans;\textsuperscript{378} the bank's outreach efforts such as lending seminars;\textsuperscript{379} whether the bank makes FHA loans;\textsuperscript{380} and whether the bank's lending has improved.\textsuperscript{381} If a bank is, in the Board's opinion, making efforts to lend in low income/minority communities, the Board frequently excuses loan disparities with explanations such as differences in demand,\textsuperscript{382} differences between the types of products offered by depository and nondepository institutions,\textsuperscript{383} and market conditions that do not favor home mortgage lending.\textsuperscript{384}

(ii) The Board's Opinion of the Usefulness of HMDA Data

A second reason that the Board is hesitant to rely on statistical disparities in a bank's HMDA data to prove lending discrimination is its position that HMDA data alone is too limited to prove or refute systematic discrimination.\textsuperscript{385} It is, according to the Board, only a tool to assist in identifying discriminatory lending.\textsuperscript{386} Further analysis must be accomplished to determine whether statistical disparities are the result of discrimination.\textsuperscript{387}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{376} First Midwest Bancorp, Inc., 73 Fed. Res. Bull. at 460.
\item \textsuperscript{377} See infra notes 683-701 and accompanying text.
\item \textsuperscript{378} First Interstate BancSystem of Mont., Inc., 77 Fed. Res. Bull. at 1008 n.5.
\item \textsuperscript{379} SouthTrust Corp., 76 Fed. Res. Bull. at 649.
\item \textsuperscript{380} LaWare Statement, Oct. 24, 1989, supra note 354, at 795.
\item \textsuperscript{381} Banc One Corp., 78 Fed. Res. Bull. at 936.
\item \textsuperscript{385} Chemical Banking Corp., 78 Fed. Res. Bull. at 81; 1990 HMDA Results, supra note 12, at 866.
\item \textsuperscript{386} 1990 HMDA Results, supra note 12, at 860.
\item \textsuperscript{387} Id. at 859.
\end{itemize}
\end{footnotesize}
The Board has cited two main reasons that HMDA data is too limited to demonstrate geographic discrimination in a bank's lending record. First, HMDA data reports the geographic distribution of a bank's home mortgage related credit only. The Board has indicated that a bank's overall CRA record is based on the geographic distribution of all of its credit products, including commercial real estate loans, consumer loans and credit cards, student loans, and small business loans. According to the Board, an implication of home mortgage lending redlining can be overcome if these other forms of credit are more evenly distributed.

The second HMDA limitation the Board emphasizes is that other than income, the data provides no information about the creditworthiness of an individual loan applicant or the adequacy of the loan collateral. The Board has indicated that credit history problems and excessive debt are the two most common reasons for credit denials, but HMDA does not yield any information about these. Examples of other information HMDA does not include are liquid assets, loan payment to income ratio, total debt payment to income ratio, employment experience, debt repayment record, and

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388. Recently, the Board indicated another potential weakness of HMDA data. It found that a loan pool with 52 nonminority and 19 minority applications was a "statistically small" application pool. The Board also indicated that the bank's HMDA data underestimated its lending activity, as over half the bank's loans were not in a MSA, and thus not reported by HMDA. See First Bancshares of St. Landry, Inc., 78 Fed. Res. Bull. at 138.


392. 1991 HMDA Results, supra note 12, at 807.
downpayment availability.\textsuperscript{393}

Despite these limitations, the Board has indicated that the 1989 HMDA amendments will aid it in detecting and preventing loan discrimination.\textsuperscript{394} Most importantly, the amendments, which require banks to report the total number of applications they receive, permit the Board to determine whether the bank’s credit extensions match demand.\textsuperscript{395} If the HMDA data indicates geographic disparities, the Board has indicated that it will then review loan application files and institutional lending criteria to determine if the denials were the result of inappropriate lending practices.\textsuperscript{396} These can include giving whites but not minorities a chance to explain weaknesses in their credit histories, taking more time to process minority loan applications, granting policy exceptions to whites but not minorities, or applying stricter appraisal standards to property in minority neighborhoods. Using this methodology, the Board believes it may be able to overcome HMDA’s limitations.

Perhaps most significantly, the Board has indicated recently that debate about HMDA’s limitations and whether it proves lending discrimination should not sidetrack CRA enforcement efforts. The Board has stated that “it is time to move beyond debating about whether unequal treatment may be taking place to discussing efforts to ensure that minorities have equal access to credit.”\textsuperscript{397} The Board, apparently moved by two consecutive years of HMDA data evidencing wide disparities in lending rates to minorities, is apparently signaling to banks that, despite weaknesses in the data, they should attempt more seriously to eliminate lending disparities.

\emph{(iii) The Board’s Method of Analyzing Disparities in the Geographic Distribution of a Particular Bank’s Loans}

When the Board finds disparities in the geographic distribution of a bank’s loans, its analysis traditionally follows a standard pattern that reflects its attitude about the overall usefulness of HMDA. The analysis has five steps: (1) the Board recites the facts indicating the dispar-

\textsuperscript{393} \textit{Id.} at 865, 868, 875.
\textsuperscript{394} LaWare Statement, Jan. 22, 1992, \textit{supra} note 391, at 195; \textit{1990 HMDA Results, supra} note 12, at 877-78.
\textsuperscript{395} LaWare Statement, January 22, 1992, \textit{supra} note 391, at 195; \textit{1990 HMDA Results, supra} note 12, at 873-74, 877-78. The Board admits that application information has always been available to examiners, but only in non-aggregate form. \textit{Id.}
\textsuperscript{396} \textit{1990 HMDA Results, supra} note 12, at 860; Chemical Banking Corp., 78 Fed. Res. Bull. at 81 (HMDA data indicated loan disparities, but the Board’s examination of loan applications found no evidence of illegal discrimination).
\textsuperscript{397} \textit{1991 HMDA Results, supra} note 12, at 813.
ities; (2) it indicates its concerns; (3) it states that HMDA data is inconclusive in demonstrating lending discrimination; (4) it recites the results of that portion of the most recent CRA assessment dealing with lending discrimination; and (5) it lists the steps the bank has taken to improve its record.\textsuperscript{398} Examples of efforts to overcome disparities include creating flexible home mortgage loan products;\textsuperscript{399} undertaking special efforts to market home loan products in minority communities through contacting community groups, real estate brokers, civic organizations, and churches;\textsuperscript{400} advertising in minority newspapers, publications, community newsletters, and church bulletins;\textsuperscript{401} instituting credit counseling programs;\textsuperscript{402} purchasing a branch in a low income neighborhood;\textsuperscript{403} purchasing properties suitable for low income housing development;\textsuperscript{404} hiring a mortgage loan originator to serve only low and moderate income applicants;\textsuperscript{405} installing geocoding and mapping software;\textsuperscript{406} instituting additional levels of re-


\textsuperscript{405} Id.; BankAmerica Corp., 78 Fed. Res. Bull. at 356.

view prior to rejecting a loan from a minority applicant; reviewing all appraisals that are lower than the purchase price; reviewing all housing loans to ensure that lending criteria are evenly applied; reviewing minority mortgage lending practices; training personnel in fair lending compliance; and participating in a regional mortgage review plan to reconsider rejected minority applicants.

Assessment Criterion: The institution's record of opening and closing branch offices and providing services at those offices.

a. Branch Closings and Openings

Regarding branch closings, the Board's policy is that banks have broad discretion to make business decisions such as whether to close a branch, and that the Board cannot control such decisions. The Board also believes that bank branches do not necessarily play an exclusive role in supplying credit as there is not an automatic correlation between the location of a branch and the provision of credit. Thus, closing a branch in a low income/minority neighborhood is not necessarily a CRA violation.

The Board's policies regarding branch closings will presumably be affected by section 228 of the Federal Deposit Insurance Corporation Improvement Act of 1992, which requires banks to give ninety days notice of intent to close a branch to its regulator and its customers and to post a notice at the branch thirty days prior to the closing. The notice must include a detailed statement, with statistical support, of the reason for closing the branch. This law should have a signifi-

cant impact on the ability of low and moderate income neighborhoods to prevent branch closings in their neighborhoods. Prior to the enactment of this law, the Board's policy was that a bank should adopt a branch closing policy that gives appropriate notice, analyzes the impact the closing will have on the bank's community, and minimizes such adverse impact, if any.\textsuperscript{418} When examining a bank's branch closing record, the Board examines several factors: whether the bank followed internal bank standards and procedures for closings; the bank's efforts to increase the profitability of the branch; the location of nearby banking alternatives; whether the bank gave notice to the community and met with community representatives; whether the bank ensured the closing would not have a negative impact on the bank's CRA goals; and whether the bank considered alternatives to closing the branch.\textsuperscript{419}

Also relevant to the Board is the extent to which the bank has opened branches in low income areas or to which its branches are accessible to all segments of the bank’s community.\textsuperscript{420} The Board considers factors such as the number of branches the bank has opened and/or closed in low income/minority neighborhoods compared to wealthy/white neighborhoods;\textsuperscript{421} the bank's proportion, relative to other banks, of branches in low income/minority neighborhoods;\textsuperscript{422} the total number of branches the bank has in low income/minority census tracts;\textsuperscript{423} the number of branches the bank has opened in low income/minority neighborhoods;\textsuperscript{424} and the amount of money the


bank has spent on renovating branches in low income/minority neighborhoods.\textsuperscript{425}

b. Customer Services

The Board also analyzes a bank’s record of providing account products and services that meet the needs of its community.\textsuperscript{426} While creating affordable bank accounts or providing special customer services helps a bank satisfy the CRA, the Board will not generally give much weight to a bank’s failure to supply affordable products or services.

Underlying the Board’s approach are three significant factors. First, the Board gives banks discretion to offer services and account products that are consistent with their business purposes. The Board has stated that while it favors account products and services that are responsive to the needs of the community and encourages banks to create them, it will not require banks to offer them.\textsuperscript{427} Second, the Board’s research on bank account products indicates that account charges and minimum balances are not the reason that many low income families do not have bank accounts. Rather, the Board claims it is simply not worthwhile for such families to have an account since they do not have much money.\textsuperscript{428} Third, the Board’s research has also found that there is a sufficient supply of check cashing services and affordable banking account products.\textsuperscript{429}

Nevertheless, the Board has noted several products and services that help satisfy the products and services criterion. One bank has combined elements of a flexible home mortgage loan product with a savings account. Customers make monthly payments into a money market savings account, accumulate sufficient funds for a downpayment within one or two years, and prequalify for a mortgage with no commitment fee and reduced closing costs.\textsuperscript{430} Another means of providing services is through supporting minority financial institu-

\textsuperscript{427} Seger Statement, June 7, 1989, supra note 49, at 555.
\textsuperscript{429} Seger Statement, October 17, 1989, supra note 428, at 786-87; Seger Statement, June 7, 1989, supra note 49, at 555.
ations. Other services include NOW accounts, credit card services, lower Certificate of Deposit ("CD") minimums, decreased or no minimum balance requirements, special low cost accounts for senior citizens, students, low and moderate income persons, or community organizations; government check cashing services for customers or noncustomers at low or no charge; bilingual staff and credit applications; limited identification requirements for opening accounts; a neighborhood financial center that provides basic financial seminars and instruction in financial transactions; and sending loan officers to underserved communities to take loan applications.

4. Category Four: Discrimination and Other Illegal Credit Practices

Pursuant to this category, the Board considers two related assessment criteria:

Assessment Criterion: Any practices intended to discourage applications for the types of credit set forth in the institution’s CRA statement.

Assessment Criterion: Evidence of prohibited discriminatory or other illegal credit practices.

The Board is concerned with three different types of loan discrimination: policies and practices that have a discriminatory effect on minority applicants; intentional discrimination against loan applicants on the basis of race; and failure to comply with the notice and record-keeping requirements of the various anti-discrimination laws.

a. Policies and Practices that Have a Discriminatory Impact

Pursuant to this category, the Board applies a three-step "disparate
impact” analysis. First, it determines whether a bank’s facially neutral lending policies, applied evenhandedly, nevertheless have a disparate impact against minority loan applicants.\footnote{442. CRA Q and A, supra note 5, at 10,901; Teeters Statement, Dec. 21, 1979, supra note 389, at 23.} If the Board finds that a policy has such a disparate impact, it then determines whether a business necessity justifies the policy. If so, the third step is to determine whether an alternative policy would serve the same business necessity but have less of an impact on the protected class.\footnote{443. But see First Marengo Fin. Corp., 77 Fed. Res. Bull. at 60 (Board examined only whether credit denials to minorities were based on valid credit criteria, and not whether alternate criteria would serve the same business needs with a less discriminatory impact.).} For several reasons, the Board has found it very difficult to apply this test.

The Board has stated in the past that the first step of the test, determining whether a bank’s lending policies have a disparate impact, takes a great deal of time, and that the Board lacks the resources to make such a determination for the thousands of banks it regulates.\footnote{444. Teeters Statement, Dec. 21, 1979, supra note 389 at 24.} However, the Board has indicated that this resource problem should be alleviated with the new HMDA data, which for the first time in 1990 provided information about the race and income of each loan applicant.\footnote{445. 1990 HMDA Results, supra note 12, at 877. HMDA Tables 4, 5, and 6, indicate the loan rejection rate for minorities and whites with similar incomes.} Thus, the Board will be able to determine whether minority loan applicants are rejected at higher rates than whites with similar incomes.

If the Board determines that minority applicants are rejected at higher rates than whites, it can then determine whether any of the bank’s policies resulted in the disparate impact by examining loan applications and determining the reason minority loan applications were rejected.\footnote{446. Provident Bancorp, Inc., 75 Fed. Res. Bull. at 95 n.9.} Even if the Board finds evidence that a bank’s lending policies resulted in a disparate impact, it still has a difficult time with the second step of the test: evaluating whether the bank’s lending policies which resulted in the disparate impact are supported by a legitimate business necessity. As described earlier, the Board is loath to interfere with a bank’s business discretion and finds the task of questioning a bank’s lending policies particularly troublesome.\footnote{447. Teeters Statement, Dec. 21, 1979, supra note 389, at 23.}

In applying the second part of the test, the Board first examines the bank’s underwriting criteria to determine whether they are supported by the “one legitimate criterion on which to base loan decisions: the expectation that repayment will be made.”\footnote{448. Lindsey Statement, May 14, 1992, supra note 90, at 501, 503.} The Board has sug-
gested several traditional underwriting criteria that may have a disparate impact but are not necessarily legitimate indicia of creditworthiness. These include property standards such as maximum age or minimum size, employment stability at one particular job, or the existence of a credit history reflected on credit reports.\textsuperscript{449} The Board suggests, for example, that consistent employment over time with different employers or credit history as reflected in timely payment of nondebt obligations such as rent or utilities may be equally good indicia of creditworthiness.

The Board also considers policies other than underwriting criteria that may have a disparate impact. These include minimum loan amounts, steering minority applicants to other sources such as FHA lenders, marketing strategies that do not include contact with realtors who serve minority communities, and unduly conservative appraisal practices.\textsuperscript{450} Another example is a policy to accept loan applications only from depositors.\textsuperscript{451} The Board has indicated that such a policy may have a disparate impact, but whether it is justified by a business necessity must be determined based on the circumstances of the particular bank.\textsuperscript{452} The Board has considered such policies in two CRA-challenged applications. In the first, the bank accepted loan applications only from depositors and gave home mortgage loans only as an accommodation to corporate customers.\textsuperscript{453} Although the Board indicated its concern that the bank was offering credit to some members of the community and not others, it did not deny the bank's application. It accepted the bank's representation that it had ended its policy of accepting loan applications only from depositors and that it was making plans to advise the community more fully about the availability of mortgage credit. In the second case, where the bank required personal loan customers to establish an account before it would disburse a loan, the Board did not find this to be a problem because the minimum deposit for an account was low, from one to five dollars.\textsuperscript{454}

The Board has also begun to suggest that banks examine whether third parties with whom they work have policies which have a disparate impact. These include secondary market mortgage providers, mortgage brokers, appraisers, and private mortgage insurance companies.\textsuperscript{455}

\textsuperscript{449} 1991 HMDA Results, supra note 12, at 814, 815.
\textsuperscript{450} Id. at 815.
\textsuperscript{451} Teeters Statement, Dec. 21, 1979, supra note 389, at 24.
\textsuperscript{452} Id.; see First Nat'l Boston Corp., 66 Fed. Res. Bull. at 164.
\textsuperscript{454} AmeriTrust, 68 Fed. Res. Bull. at 68 n.7.
\textsuperscript{455} 1991 HMDA Results, supra note 12, at 817, 822.
Regarding the third step of the test, the Board has not engaged in an extended discussion of requiring a bank to consider alternative policies that serve the same business necessity but have a less discriminatory impact. Nevertheless, it has praised several banks for adopting flexible underwriting criteria and has approved several settlements in CRA challenges in which banks agreed to adopt them. Such underwriting criteria include counting all sources of a family’s income, using higher debt to income ratios, financing a higher percentage of the value of the property as well as closing costs, decreasing minimum mortgage amounts, adopting nontraditional means to evaluate a credit history, and reducing interest rates.

b. Intentional Discrimination

The Board is committed to eliminating unlawful discrimination in credit transactions, and has suggested that banks develop procedures such as second reviews for rejected minority loan applications and that banks use “testers” to ensure compliance with fair lending procedures. There are two primary occasions when intentional discrimination can occur: in the pre-application stage, when the applicant is simply seeking to apply; and the post-application stage, when the bank is considering a completed loan application. Additionally, another form of lending discrimination relates to different lending terms for different neighborhoods. These include different credit or loan terms, and higher fees or downpayments.

Pre-application loan discrimination can take many forms, including failing to solicit credit applications from all segments of the community, pre-screening loan applicants based on illegal criteria, referring minority applicants to mortgage companies, suggesting that minorities consider FHA loans, aggressively pointing out problems with a minority applicant’s record, and failing to provide informal “how to” instructions to minority applicants. The Board considers pre-application loan discrimination a serious problem. Nevertheless, in the one case where it found a bank had engaged in illegal pre-screening in three branches in low and moderate income neighborhoods, it still granted the bank’s application based on the bank’s commitment to cease pre-screening.

456. See infra notes 534-44 and accompanying text.
458. 1991 HMDA Results, supra note 12, at 815.
459. See, e.g., 1991 HMDA Results, supra note 12, at 819.
The Board's general standard for determining whether particular individual loan applicants suffered discrimination at the post-application stage is whether the bank followed its standard lending policies in reviewing the application.\textsuperscript{461} If the Board finds that a minority loan applicant met standard credit criteria but was denied credit, or that the applicant failed to meet the criteria but was not given an exception commonly given to white applicants, it will investigate whether the bank is engaged in discrimination against individual loan applicants.\textsuperscript{462} Other forms of post-application discrimination include taking more time to process applications from minorities, refusing to give minorities the same opportunity to explain credit problems as non-minorities, and employing stricter appraisal criteria for property in minority neighborhoods.

c. Compliance with Notice and Recording Requirements

The Equal Credit Opportunity Act ("ECOA") and the Board's regulations implementing it prohibit banks from discriminating against loan applicants on the basis of race, gender, and several other factors and require banks to take credit applications in writing and notify applicants of the reasons for adverse action.\textsuperscript{463} ECOA also prohibits banks from requesting certain information such as spousal income on an individual loan application.\textsuperscript{464} The Board has indicated that failing to comply with these requirements by, for example, not sending proper written adverse action notices to applicants whose loans were denied and not recording anti-discrimination information properly, are serious matters.\textsuperscript{465} However, such violations have not been grounds for denying an application on CRA grounds if they are isolated and the bank takes steps to correct them and ensures they do not recur.\textsuperscript{466}


\textsuperscript{462} 1991 HMDA Results, supra note 12, at 814; LaWare Statement, Jan. 22, 1992, supra note 391, at 194.


d. Discrimination Not Related to Lending

The Board does not consider allegations of race discrimination not directly related to lending, such as employment discrimination or doing business with South Africa, as relevant to a bank's record of meeting community credit needs. The Board has also stated that it does not consider the racial composition of a bank's board of directors as relevant to the CRA. The Board's explanation is that there are limits on the extent to which it may consider matters of public interest that are not within its regulatory responsibilities. Regarding South Africa, the Board has indicated that the existence of a relationship with the country is not, by itself, evidence of discriminatory lending practices, and the only issue it will consider is whether the bank is in compliance with applicable law.

5. Category Five: Community Development

Assessment Criterion: The institution's participation, including investments, in local community development and redevelopment projects or programs

Pursuant to this evaluation criterion, the Board considers the extent of a bank's participation in development and redevelopment projects in its community. The Board does not require participation in local community development and redevelopment projects, but strongly encourages it. Support for community development can take

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468. Fifth Third Bancorp, 77 Fed. Res. Bull. at 746 n.16; but see Chemical Banking Corp., 77 Fed. Res. Bull. at 50 n.14 (Board noted that the bank's senior lending officer, executive vice-president, and three of its eleven directors were Latino.)


472. 12 C.F.R. § 225.127; Final CRA Guidelines, supra note 15, at 18,174; Luxemburg Bancshares, Inc., 77 Fed. Res. Bull. 63 n.3 (1991). There are several areas of overlap between the Board's analysis under this criterion and its analysis under the criterion dealing with the types of credit products the bank offers, particularly as related to low income housing initiatives.
many different forms. One form is simply a basic dollar commitment to community economic development projects.\footnote{473} Another form is providing finance or other support for complex economic development efforts such as city-wide redevelopment or reinvestment programs;\footnote{474} renovation of cultural centers in low income neighborhoods;\footnote{475} local community development and redevelopment projects, including those that support low and moderate income housing;\footnote{476} and commercial loans to companies in low income neighborhoods.\footnote{477}

A third form of support for community development includes participating in and supporting government sponsored and related community development programs. Such support mechanisms include the Community Development Block Grant or Urban Development Action Grant Programs;\footnote{478} municipal bonds (especially those that support affordable housing, community development, or small business loan programs);\footnote{479} city supported loan programs that provide low rate, flexible, affordable home mortgage loans or support small business or community development;\footnote{480} community development programs that support commercial enterprises in low income neighborhoods;\footnote{481} and linked deposit programs in which a state or municipality deposits its money in a bank in return for a commitment

\footnote{473. Wells Fargo & Co., 76 Fed. Res. Bull. at 252 (bank set annual goal of $41 million for community and economic development loans to projects related to low income housing projects, job creation, and small businesses); Meridian Bancorp, Inc., 74 Fed. Res. Bull. at 52 (bank committed $700,000 over a five year period for economic and community development).


to make community development loans.\footnote{482} A fourth form consists of support for community development corporations.\footnote{483} This can include establishing a bank community development corporation,\footnote{484} investing in a community development corporation,\footnote{485} providing financial or technical support to a community development corporation,\footnote{486} providing community development advice to banks or other organizations,\footnote{487} or offering bridge loans.\footnote{488} In addition, banks can support community development corporations by serving on the board of an organization that supports community development corporation efforts\footnote{489} or by making grants — either direct or through organizations such as the United Way or the Local Initiatives Support Corporation — to support them.\footnote{490}

A fifth form of support for community development is participation

\footnote{482}{AMCORE Fin., Inc., 78 Fed. Res. Bull. at 931 n.9 ($1.1 million to linked deposit programs to support rehabilitation of apartments for low income tenants, refinancing an emergency shelter for pregnant adolescent women, and upgrading a tire rubber recycling facility); Comerica, Inc., 78 Fed. Res. Bull. at 563 n.52.}

\footnote{483}{CRA Q and A, supra note 5, at 10,904; Seger Statement, March 23, 1988, supra note 84, at 309-10; Chemical Banking Corp., 78 Fed. Res. Bull. at 80.}


\footnote{488}{BankAmerica Corp., 78 Fed. Res. Bull. at 54 n.88.}

\footnote{489}{Comerica, Inc., 77 Fed. Res. Bull. at 133.}

\footnote{490}{Chemical Banking Corp., 78 Fed. Res. Bull. at 80; Chemical Banking Corp., 78}
in loan pools which support affordable housing, small businesses, or economic development. One of the Board's favored loan pools is sponsored by Neighborhood Housing Services, which is comprised of locally based organizations that pool money from several different banks to make housing loans in low and moderate income areas. Other efforts cited by the Board include providing a secondary market for nonprofit developer paper, and making capital loans for graduates of a municipal self-employment program. One bank committed $17 million to create a twenty-five bank/$100 million revolving loan fund to provide fixed rate, long term loans for affordable housing projects. Another bank participated in a community loan pool that finances minority businesses that do not qualify for conventional bank financing or SBA programs. Another made $7.6 million in loans to a loan pool that provides reduced rate mortgage financing to low and moderate income persons who would not otherwise qualify for loans. Yet another bank provided $4.5 million to a new home loan pool and $4.9 million to an urban development corporation loan pool. Finally, another bank committed $11.7 million and $313,000 to two loan pools that support affordable multi-family housing.

A sixth way a bank can support community development is by “making equity and debt investments in corporations or projects designed primarily to promote community welfare, such as the economic rehabilitation and development of low income areas by provid-

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Projects organized to rehabilitate or build upper income housing or office or commercial space but not designed explicitly to create improved job opportunities for low income persons are presumed not to be oriented to promoting community welfare, unless there is substantial evidence to the contrary. Examples of investments that are designed primarily for community welfare include construction or rehabilitation of housing for low income persons, construction of commercial facilities to provide goods or services principally to persons of low and moderate income, projects designed explicitly to create improved job opportunities for low or moderate income persons, and projects that will provide health or educational services to persons of low and moderate income. One bank, for example, invested $70 million in municipal and public housing projects. Other banks have supported low income housing through low income tax credit investments through the Local Initiatives Support Corporation. Another bank formed a subsidiary to invest in the nonbankable portions of financing packages for new and expanding small businesses.

Assessment Criterion: The institution's ability to meet various community credit needs based on its financial condition and size, legal impediments, local economic conditions, and other factors.

Pursuant to this criterion, the Board considers a bank's CRA record from the perspective of the bank's financial condition, size, location, and local economic conditions. If, for example, a decline in a

500. 12 C.F.R. § 225.25(b)(6); see Investments for Community Development, supra note 484, at 389; C & S Sovran Corp., 76 Fed. Res. Bull. at 782 (bank invested in Atlanta Equity Fund, which contributed equity to low income multi-family housing programs); First Fin. Corp., 76 Fed. Res. Bull. at 671-72 (bank took an equity interest in an experimental farm designed to diminish the community's dependence on wheat and provide financial counseling to area farmers); Illinois Neighborhood Dev. Corp., 64 Fed. Res. Bull. 45 (1978) (projects included restoring abandoned and substandard residential properties, forming an educational development center, providing employment and career counseling services, and establishing a cultural center).

501. 12 C.F.R. § 225.127(e); Luxemburg Bancshares, 77 Fed. Res. Bull. at 63-64. In Luxemburg Bancshares, the Board approved a bank's application to invest in a project that was not designed explicitly to provide jobs but which was for the community's welfare because it was the only medical clinic in the town. See also Investments for Community Development, supra note 484, at 389.


bank’s home mortgage lending to low and moderate income areas is part of a general decline in mortgage lending due to market conditions, the Board will consider the bank’s practices under this assessment criterion. If a bank is in troubled financial condition, it may satisfy CRA by emphasizing education and advertising rather than loans. If a bank has a poor CRA record due to financial troubles, it will be easier for the Board to accept the bank’s commitment to improve its record. “Economic conditions,” however, could be used as a pretext to justify practices such as requiring higher down-payments for home mortgages, even though this may have a disparate impact on low income persons. Similarly, usury and rent control laws have been used by banks to justify their failure to engage in home mortgage and multi-family housing lending.

One issue relevant to a bank’s ability to meet the credit needs of its community is the nature of the bank’s business. Retail banks with branches that offer consumer loans are not the only types of banks with CRA obligations. The Board has indicated that wholesale banks that do not have branches also have CRA obligations. In a recent policy statement, the federal banking regulators provided specific guidance as to the types of activities wholesale banks can engage in to satisfy the CRA. These activities fall into three broad categories: (1) debt investments such as acquiring an interest in debt investment and related securities by purchasing mortgage-backed securities; purchasing housing, community or economic development loans; participating in loan pools; purchasing government loans such as SBA, FmHA, FHA or federal Economic Development Administration loans; or purchasing state and local government agency housing mortgage bonds; (2) equity investments such as acquiring an interest in equity investments, including purchasing limited partnership shares to provide equity financing for public purpose projects; investing in

514. CRA Q and A, supra note 5, at 10,903.
the stock of a public purpose corporation chartered to carry out activities that benefit low and moderate income areas; or managing a public purpose revolving loan fund to provide financing that cannot be provided through the private market; and (3) other services and activities, including technical assistance to community groups, state and local government agencies, and financial intermediaries that focus on helping to meet the credit needs of low income areas and small businesses.515 Other ways wholesale banks can meet their CRA obligations are through "lending to inner-city revitalization efforts, supporting state and local government economic development programs, lending to small or minority businesses, lending to multi-family housing projects, lending to non-profit developers, and financing individual facilities."516

Assessment Criterion: Other factors that, in the regulatory authority's judgment, reasonably bear upon the extent to which an institution is helping to meet the credit needs of its entire community

Pursuant to this criterion, the Board considers whether a bank is involved in other meaningful activities, not covered under other CRA performance categories, which nevertheless contribute to the institution's efforts to help meet community credit needs.517

V. Step Four: Attempting to Negotiate a Credit Agreement with a Bank

Once the community credit needs assessment and the bank evaluation is complete, if the CBO determines that the bank is not meeting the community's credit needs, the next step is to approach the bank and seek an agreement to improve its lending record.

The Board expects a CBO to approach a bank with proposals for meeting the credit needs of the community prior to filing a CRA protest against an application.518 The Board has stated that "community organizations and other members of the public are strongly encouraged to bring comments regarding an institution's CRA performance to the attention of the institution and to the appropriate supervisory agency at the earliest possible time."519 The Board be-

515. For a more thorough discussion of community development lending activities, grants and technical assistance that are covered by CRA, see supra notes 318-30, 472-505 and accompanying text.
517. Final CRA Guidelines, supra note 15, at 18,175.
518. The process for filing CRA challenges to bank applications is described more fully in part VI infra.
519. Joint Statement, supra note 3, at 13,745; see also Seger Statement, June 7, 1989, supra note 49, at 551. Although it is desirable for a CBO to discuss a bank's lending
lies that CRA works best when it is the basis of an ongoing dialogue and not associated exclusively with pending applications.\textsuperscript{520}

A CBO can make several different proposals to banks, from asking the bank to participate in a comprehensive reinvestment strategy to seeking a grant or loan either to meet very particularized needs or to support a specific project. In order to describe the parameters of possible agreements, it is helpful to examine the CRA lending commitments banks have made in the context of CRA challenges to their applications.\textsuperscript{521} The following ideas for proposals are drawn from reported protests.

A. Housing Loans

1. A Commitment to Lend a Specific Dollar Amount

Banks in several CRA challenges have made specific CRA lending commitments for housing, including:\textsuperscript{522} (1) a minimum of $112 million housing loans and $20 million in housing bonds underwritten for five years;\textsuperscript{523} (2) $18 million over three years for affordable housing with at least two-thirds of the funds allocated to projects for very low income households;\textsuperscript{524} (3) $12 billion over ten years for low income/minority home mortgage loans, construction of low income rental housing, small business loans of less than $50,000, government guaranteed small business loans, and lower-income consumer credit;\textsuperscript{525} (4) $260 million over four years to increase home mortgage lending in low income/minority areas, $20 million to fund the construction of new housing, $12 million to purchase and rehabilitate existing distressed housing, and $100 million for small business loans;\textsuperscript{526} (5) $10 billion over ten years for single family home mortgage, multi-family housing finance, small businesses, minority-owned small businesses,

\textsuperscript{520} Citizens CRA Guide, supra note 4, at 13.

\textsuperscript{521} The Board has tended to construe CRA to involve credit only, excluding, for example, a bank’s minority hiring record from consideration. It has also refused to order a bank to make certain types of credit available. Nevertheless, as described in this section, CBOs can attempt to reach agreements with banks that go beyond the Board’s narrow construction.


\textsuperscript{523} \textit{Id.} at 354.

\textsuperscript{524} \textit{Id.} at 356.

agricultural/rural loans, and general consumer lending;\(^{527}\) (6) $13.2 million over two years to a municipal program that provides loan discounts to families with incomes under $35,000;\(^{528}\) (7) $10 million in real estate loans to senior citizens;\(^ {529}\) (8) a 100% increase in residential mortgage volume in low and moderate income communities;\(^ {530}\) (9) $700,000 over five years for economic and community development programs, $60 million in loans over five years for home mortgage and home improvement loans, participation in state and regional debt issues, loans to small businesses, and $750,000 in deposits in neighborhood credit unions;\(^ {531}\) (10) an increase in the bank’s loan to deposit ratio within five years, and an increase in the number of loans within the delineated CRA community to a level that provides an equivalent ratio of the number of loan accounts to the number of deposit accounts both inside and outside the delineated CRA community;\(^ {532}\) and (11) $4 million in new loans over five years to residents of a Native American reservation.\(^ {533}\)

2. *Flexible Lending Terms*

A CBO can also make proposals designed to make credit more affordable to low and moderate income persons through concessions on loan rates, terms, and fees.\(^ {534}\) Examples of such concessions include low or below market interest rates,\(^ {535}\) long terms and low downpayments,\(^ {536}\) high loan to value ratios,\(^ {537}\) low minimum loan amounts,\(^ {538}\) and lower points, application fees, and processing fees.\(^ {539}\)

Banks can also agree to adopt flexible underwriting criteria and to recognize nontraditional indicia of creditworthiness and ability to re-


pay a loan. They may thus consider rent and utilities payment records and references from landlords for applicants who do not have a credit history, or evaluate an applicant's credit history for only the prior twelve months while permitting the applicant to deposit disputed bill amounts. A bank can also agree to increase the permissible ratio of monthly income to monthly loan payments and the ratio of monthly income to total monthly debt payments. In addition, the bank may be willing to include income from all household members — and not just the loan applicant — in its calculation of income. Finally, the bank can count public assistance, social security payments, or various nontraditional forms of support as income.

3. Government and Private Loan Programs

A bank can help create affordable housing by participating in government or private loan programs that reduce the cost of financing by spreading the risk, providing insurance, or leveraging government subsidies. Banks have agreed, for example, to participate in secondary market housing finance arrangements. One bank committed to a $10 million participation in a FNMA program for lending to senior citizens. Another bank agreed to improve its knowledge of the loan application process for home purchase loans that qualify for FHLMC and FNMA participation.

Several banks have committed to participate in loan pools that attract loans from different sources and then lend money to targeted projects. The most effective pools are able to decrease interest rates and make loans that are affordable to low income persons. One bank, for example, committed to lend $5 million to a loan program designed to benefit individuals who earn between 45% and 67% of the MSA median income. Another bank committed to establish a $2.5 million loan pool to fund minority and low income loans.

Government-sponsored loan programs promote affordable lending

540. LaWare Statement, May 16, 1990, supra note 369, at 514.
by insuring the bank's portion of the loan or by providing subsidies. Examples include commitments to participate in state housing finance agency loan programs, block grant programs for low and moderate income housing, and government-sponsored housing programs.551

Programs such as the FHA or VA insured housing loan programs are a variation on the government-sponsored loan programs. Banks have made various types of commitments to such programs, including advertising that an unaffiliated mortgage company will accept VA and FHA loan applications on the bank's premises,552 participating in FHA and VA loan programs,553 agreeing to participate without adding restrictions on the loans,554 agreeing to fund all FHA and VA loans in low and moderate income areas that satisfy the bank's underwriting criteria,555 and agreeing to make a minimum of $2 million in FHA and VA loans available in a two year period.556

B. Supporting Community Development Projects

Banks can support community development by supporting community development corporations. In the past, they have committed to give loan support to community development corporation activities,557 to participate in equity partnerships with or purchase shares of community development corporations,558 and to assist in capitalizing a community development corporation.559

C. Small Business Lending

1. Lending Goals

Several banks in CRA-challenged applications have committed to increase small business lending levels. Some of the commitments have been vague, consisting of, for example, agreements to set small busi-

ness lending goals. Banks have also committed to maintain specific lending levels. Examples include financing all small business loans in low and moderate income areas within the bank’s CRA community that meet its underwriting criteria; lending $20 million to minority- and female-owned small businesses, nonprofit developers, and multifamily and mixed use commercial real estate projects; and lending to a $3 million pool designed to provide start-up and short term capital to minority-owned small businesses.

2. Loan Products and Terms

Several banks whose CRA applications have been challenged have made commitments to create new small business loan products. Some have had to start from scratch, agreeing simply to hire a small business loan officer or to investigate and develop small business loan products. Several banks have designed innovative small business lending products. One bank agreed to decrease equity requirements for small business loans, to extend lines of credit with no minimum dollar amount to small businesses that meet the guidelines of the SBA Section 7(a) program, and to consider blended rate loans in conjunction with government loan programs. Another bank offered a “Small Business Base Rate” program, which provided small business loans at below the prime rate. Another created a small business rate index for small business loans at 1.25% below its basic business loan rate.

3. Insured and Subsidized Lending

Another way for a bank to increase its small business lending is to participate in SBA-insured lending programs. Several banks have agreed either to do so or to increase the current level of their participation. A bank can also expand its small business lending by participating in other government-sponsored and subsidized loan

programs. Two banks agreed to participate in government programs designed to support small businesses.\textsuperscript{570} Two other banks agreed to participate in municipal loan programs providing special loan rates and terms.\textsuperscript{571}

D. Consumer Loans

Several banks have made commitments to increase support for consumer lending in their CRA communities.\textsuperscript{572} One bank agreed to consider offering new consumer products, such as credit cards and student loans.\textsuperscript{573} Another bank agreed to introduce a secured credit card for people without a credit history.\textsuperscript{574} Finally, other banks have agreed to develop or to continue participating in student loan programs.\textsuperscript{575}

E. Improved Banking Opportunities

An agreement not to close any branches in low and moderate income neighborhoods\textsuperscript{576} is one of the most important types of commitments a bank can make. A bank may also agree to open or consider opening branches or other service centers in order to make loan officers responsible for low and moderate income neighborhoods, or to improve its branches in such neighborhoods.\textsuperscript{577}

A bank also can commit to improving the services it offers in low and moderate income neighborhoods. It can improve services by expanding hours and adding more tellers, cashing government checks, providing bilingual banking tellers or fliers, or providing automatic

Finally, a bank can commit to making banking more affordable. For example, a bank may agree to waive or reduce fees and minimum balance requirements on bank accounts or certificates of deposit or to create "lifeline" or "basic banking" checking and savings accounts with low fees and minimum balances.

F. Sensitizing Bank Management to Community Lending Opportunities

A bank can agree to change its management structure to ensure that it is more aware of and sympathetic to CRA issues. It can effect such changes by, for example, offering CRA-related training to employees; hiring a CRA officer to monitor the bank's CRA performance, coordinate and develop CRA policies, and meet with community groups; hiring more officers and employees from low and moderate income neighborhoods; assigning senior management representatives or committees to track and evaluate the bank's CRA performance; developing a written CRA policy; and hiring an


officer to review all denied mortgage applications from low and moderate income borrowers.\(^586\)

**G. Ascertainment, Outreach, Advertising, Monitoring and Community Participation**

Banks have agreed to several different types of programs to ensure continued and meaningful contact between the bank and the community. It is an important prerequisite for the bank to agree to define its community so that it includes low and moderate income neighborhoods.\(^587\) Then the bank can agree to ensure the community's voice in the bank's lending policies by, for example, conducting credit needs surveys,\(^588\) seeking out and meeting with community groups on a regular basis,\(^589\) creating a community advisory council to review lending programs or implementation of lending agreements,\(^590\) and seeking minorities and women to serve on the bank's board of directors.\(^591\)

Conducting seminars that explain a bank's credit programs and application procedures\(^592\) is another helpful way for the bank to simultaneously reach out to the community and ascertain its needs. Similarly, some banks have agreed to provide credit counseling serv-

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ices to community members.\textsuperscript{593}

Banks can also agree to increase their efforts to market their credit programs, especially those specifically designed to meet the credit needs of low and moderate income communities.\textsuperscript{594} Examples of such efforts include officer call programs,\textsuperscript{595} direct mail campaigns,\textsuperscript{596} contact with real estate agents, enhanced branch advertising and promotional literature, advertisements in community and alternative language newspapers and electronic media,\textsuperscript{597} brochures and posters outlining mortgage programs located in the lobby of each bank branch in Spanish where appropriate,\textsuperscript{598} and designation of an officer responsible for marketing and outreach to the inner city community.\textsuperscript{599}

Finally, the bank should allow a CBO to monitor the bank's performance in meeting its commitments. Effective monitoring requires periodic meetings between CBOs and bank officers empowered to develop and implement CRA loan programs, and prior disclosure to the CBO of useful information. In this regard, some banks have agreed to provide information about their appraisal standards\textsuperscript{600} and lending policies,\textsuperscript{601} as well as regular written reports of their lending activities.\textsuperscript{602} Data on the bank's small business and consumer lending is also helpful.


\textsuperscript{601} Id.

VI. Step Five: Enforcing the CRA through the Legal Process

If a CBO is not satisfied with a bank's performance at meeting the credit needs of its community and if the bank is not willing to improve its record, the CBO can turn to the legal process to enforce a bank's CRA obligations. The CRA provides two enforcement opportunities. The first is in connection with the CRA assessment the Board periodically makes of the bank. The second is to raise a challenge to a bank's application to the Board on the grounds that the bank has not met its CRA obligations, and to ask the Board to deny the application.

A. The CRA Assessment

The CRA requires the Board to evaluate the CRA performance of each bank it regulates. The assessment must state the Board's conclusions regarding each of the thirteen assessment factors and the facts supporting the conclusions. The Board then assigns one of four ratings to the bank's CRA performance: outstanding; satisfactory; needs to improve; and substantial noncompliance. The Board conducts examinations of banks with a prior CRA rating of satisfactory or better approximately every eighteen months. Banks with the strongest CRA records are examined less frequently, approximately every two years. Banks with poorer records are examined once a year or even more frequently.

The CRA assessment is becoming a more important part of the CRA enforcement process. As described earlier, the assessments are now made public. The Board considers the CRA assessment to be "[t]he cornerstone of CRA enforcement" and has stated that "CRA examinations are our best vehicle to encourage better performance and will increasingly be the focal point of our enforcement efforts." In addition, the results of the CRA assessment are given great, although not determinative weight, in evaluating bank applications.

603. There are several other means for attempting to force banks to improve their lending records that are beyond the scope of this Article. These include Board enforcement proceedings against banks, and litigation pursuant to the Fair Housing, Equal Credit Opportunity, or Civil Rights Acts.
605. For a discussion of these assessment criteria, see supra Part IV.
608. See supra notes 26-28 and accompanying text.
610. For a detailed description of the role of CRA assessment ratings in evaluating banking applications, see infra notes 660-78 and accompanying text.
Community groups have at least two primary opportunities to participate in the CRA examination. First, when conducting an examination, Board representatives interview government officials, business leaders, and community group leaders in the bank's community. Second, the Board reviews all comments in the bank's CRA public file when conducting an examination, and aggressively encourages CBOs to submit comments on the bank's CRA record to the public file. By submitting such comments, CBOs can actively participate in the assessment.

B. CRA Challenges to Bank Applications

1. Procedures

The CRA challenge process begins when a bank files an application for permission to engage in one of a number of business ventures or banking activities. Such activities include obtaining a charter for a national bank or savings and loan association, receiving deposit insurance for a newly chartered bank, establishing a domestic branch, relocating the home or branch office, or merging with another bank. Also subject to Board CRA scrutiny are applications from a BHC.

Notice of an application is published in three places: local newspapers; the Federal Register; and the local Federal Reserve Bank's Weekly Bulletin. Applications are generally available for public inspection at the Federal Reserve Bank in the bank's home district, although some portions of the application might be designated as con-
fidential pursuant to the Administrative Procedure Act.\textsuperscript{618}

Any member of the public may comment on the application within thirty days of publication of the notice.\textsuperscript{619} Requests for an extension of the thirty day comment period must be made directly to the Secretary of the Board in Washington, D.C.\textsuperscript{620} The request must be submitted on or before the expiration of the comment period and must show good cause for the extension, such as a clear demonstration of hardship or other meritorious reason.\textsuperscript{621}

The Board does not automatically grant extensions.\textsuperscript{622} It has suggested that an extension would be warranted when the application has not been promptly made available for inspection by the parties or there has been inadequate public notice of the application.\textsuperscript{623} On the other hand, it will generally not extend the comment period simply to allow a community group to pursue negotiations.\textsuperscript{624} The Board may also grant an extension exclusively to the parties who requested it.\textsuperscript{625} It has discretion to consider late comments, and may consider such comments without consulting the parties.\textsuperscript{626}

The comment (also referred to as "the challenge") must be in writing and may be submitted to either the Secretary of the Board or the appropriate Federal Reserve Bank.\textsuperscript{627} There is no prescribed form for a challenge, and it need not be filed in legal brief format.\textsuperscript{628} Generally, however, it should identify the challenger (also referred to as the "protestant"), state the basis for the objection to approval of the application, and provide available written evidence to support the

\textsuperscript{619} 12 C.F.R. § 262.3(e) (1992).
\textsuperscript{620} Id. § 265.2(a)(10).
\textsuperscript{621} Id. § 262.25(b)(2).
\textsuperscript{622} Garwood Statement, July 31, 1989, supra note 72, at 623. Even when the Board does grant an extension, it will only be for a short time and will generally not be beyond the 60 day time limit imposed on the application processing period. See Joint Statement, supra note 3, at 13,747.
\textsuperscript{623} Garwood Statement, July 31, 1989, supra note 72, at 623.
\textsuperscript{624} Id.; see also Seger Statement, June 7, 1989, supra note 49, at 554.
\textsuperscript{625} Bank of Boston Corp., 75 Fed. Res. Bull 35, 36 n.8 (1989) (basis for extension request was to allow the protestants time to complete a study of bank's branch closings and openings).
\textsuperscript{627} 12 C.F.R. § 262.3(e) (1992).
\textsuperscript{628} Id. § 262.25(d)(1)(i).
objection.\textsuperscript{629}

The Board has the power to order a public meeting or a formal evidentiary hearing on an application challenged on CRA grounds.\textsuperscript{630} If a party desires a hearing on the issues raised in the challenge, it must request one in the body of the challenge.\textsuperscript{631} The term “hearing” encompasses at least three different proceedings: (1) a formal adjudicatory hearing conducted by an administrative law judge; (2) a public meeting presided over by an officer designated by the Board at which members of the public and the bank may submit evidence; and (3) an oral presentation to the Board or its representative.\textsuperscript{632} The hearing request must state why a written presentation will not suffice, identify specifically any questions of fact that are in dispute, summarize the evidence that would be presented at a hearing, and state that there are members of the public who desire to speak at a public forum.\textsuperscript{633}

A hearing is required only if facts are in dispute or if the bank’s state supervisory authority (in the case of state chartered banks), or the Office of the Comptroller of the Currency (“OCC”) (in the case of national banks), requests a hearing.\textsuperscript{634} Otherwise, the Board has discretion to hold a hearing, but it exercises this discretion rarely. It has apparently never held a formal evidentiary hearing on a CRA challenge and has held few public meetings, although it has recently begun to order public hearings more frequently.\textsuperscript{635} In fact, it may be beginning to show a tendency to grant public hearings on large bank mergers, particularly controversial ones. The Board held hearings on the proposed merger of NCNB and C&S/Sovran, on an application related to the Mitsui/Taiyo Kobe merger, and on BankAmerica’s application to merge with Security Pacific Corporation.\textsuperscript{636} It indicated that the reason for the hearings was widespread public interest in the

\begin{footnotesize}
\begin{enumerate}
\item Id. § 262.25(d)(1)(ii).
\item See 12 C.F.R. § 262.3(e) (1992) (formal hearing); 12 C.F.R. §§ 262.3(e), 262.25(d) (1992) (public meeting). In addition, on at least one occasion, the Board conducted an on-site review of a challenged bank. See Texas Regional Bancshares, Inc., 78 Fed. Res. Bull. at 291.
\item 12 C.F.R. § 262.3(e) (1992).
\item Id. §§ 262.3(i)(2)-(3), 262.25(d).
\item Id. §§ 262.3(c), 262.25(d)(1)(ii).
\end{enumerate}
\end{footnotesize}
merger.637

The Board has not established clear criteria defining when it will grant a hearing and when it will not. In its orders either granting or denying hearings, it usually states its conclusion regarding the hearing request without further elaboration. Generally, when the Board denies requests for hearings or public meetings it does so for several reasons.638 Perhaps the most frequently cited reason is that material facts are not in dispute. This is problematic, as facts are frequently disputed, and the Board has never defined fully its definition of a factual dispute. Furthermore, even on the rare occasion when the Board conceded that a factual dispute did exist, it indicated that it was not sufficient, where all facts in the record were considered, to justify a hearing or meeting.639 Other reasons for denying a hearing or a meet-


ing include the following: the only issues are the conclusions to be
derived from undisputed facts and a hearing is not necessary because
the Board is charged by the with making those judgments; the bank
has made commitments to improve its record; the parties have had
the opportunity to submit their arguments in writing; and the parties
have had the opportunity to discuss their positions at private
meetings.

When the Board has granted a hearing, it has not articulated the
criteria it used to reach its decision. Nor has it explained how the
record in those cases was different from the record in cases in which a
hearing was denied. 640

When the Board orders a hearing it does so in a written notice
which will state the following information: the date, time, and place of
the hearing; the legal authority under which the hearing is to be held;
the names and addresses of the presiding officer and the panel of hear-
ing officers; and a statement of the legal and factual issues that consti-
tute the grounds for the hearing. 641 The notice will also indicate how
to request permission to participate in the hearing. 642 Hearings are
transcribed and participants may be represented by counsel. 643

Regardless of whether a hearing is ordered on a CRA challenge,
the Board sends copies of the CRA challenge to the bank for its re-
sponse. 644 The bank must respond in writing and send the response to
the Secretary of the Board within eight business days. 645 It must also
send the response to the protestant. 646

The Board’s regulations do not specifically allow or prohibit the
protestant to file a reply to the bank’s response. The Board’s practice
has been to treat a reply as if it were a late comment, and, as stated
above, exercise its discretion regarding whether to consider it.

After the Board and local Reserve Bank receive a challenge, if they
determine that the issues are substantive, they will seek to arrange a

644. 12 C.F.R. § 262.3(e) (1992). Although the CBO is not responsible under the reg-
ulations for serving the bank with a copy of the comment, it is a good idea to do so. In
addition, the CBO should also consider filing copies with its state’s banking regulator (if
the state has a CRA law that permits challenges to bank applications, the CBO can lodge
a comment with the regulator as well) and the bank’s primary regulator if it is not the
Board.
645. Id.
646. Id.
private meeting between the parties. The parties are not required to attend, but the Board encourages such meetings as consistent with its policy of facilitating communication between banks and community groups. The purposes of the meeting are to help the Reserve Bank staff plan its investigation, to identify areas meriting special attention, to help resolve differences based on misunderstandings, to help negotiate a settlement, and to clarify issues raised in the challenge.

The appropriate Federal Reserve Bank then investigates each comment and issues a report and recommendation to the Board. The Board's staff then prepares and submits its comments to the Board, and the Board makes a final decision. The Board then informs the parties promptly of its action on an application.

An aggrieved party can request that the Board reconsider an adverse decision. The request must be in writing, must be received by the Secretary of the Board within fifteen days of the Board's decision, must specify the reasons the Board should reconsider its actions, and must present relevant facts that, for good cause shown, were not previously presented to the Board. Within ten days, the general counsel will make a decision as to whether reconsideration is merited.

2. The Board's Standards for Deciding CRA Challenges

The primary standards the Board employs in deciding CRA chal-
In addition to those, the Board considers several other factors.

a. The Bank’s Prior CRA Record and CRA Assessment

The Board requires a bank, prior to submitting an application, to establish a CRA program that satisfies the Board’s standards. Most important to the Board appears to be whether the bank has implemented adequate procedures to ascertain community credit needs, whether it adequately advertises its products, whether it has incorporated the CRA into its management structure, and whether it offers credit products suited to the community’s needs. If it does not have such programs in place well before it files an application with the Board, it risks denial of the application.

A bank’s most recent CRA assessment rating is also relevant in deciding an application that is challenged on CRA grounds. Although the CRA assessment rating does not provide conclusive evidence of an institution’s CRA record, the Board gives the rating great weight, and it may be determinative of the application. Nevertheless, even if a bank has a generally satisfactory record, the Board may
identify areas where it needs to improve its performance.\textsuperscript{664} The assessment rating is especially important when the same issues raised in the challenge were considered in the assessment.\textsuperscript{665} On the other hand, if the assessment is not recent or the challenge raises issues not covered in the assessment, the assessment will carry less weight.\textsuperscript{666}

Although the Board has stated that a less than satisfactory CRA assessment is a significant adverse factor for a CRA-challenged application, it consistently finds reasons to deny CRA challenges against banks even with poor records.\textsuperscript{667} These reasons include a bank’s commitment to improve its record, conditions the Board places on approval, or the need to give a new owner the chance to improve a bank’s CRA record. Of particular significance is whether the transaction that is the subject of the application will save a failing bank.\textsuperscript{668} The Board has thus denied a CRA challenge even when the bank violated state and federal consumer laws and regulations; failed to ascertain community credit needs or advertise products; failed to support community development lending, government-supported housing, or small business lending; and made the bulk of its loans outside its community.\textsuperscript{669}

Recent signs, however, indicate that the Board may be toughening its enforcement policy against banks with poor recent CRA assessment ratings. In less than one year, the Board has denied two bank


\textsuperscript{666} Joint Statement, \textit{supra} note 3, at 13,745.


\textsuperscript{668} \textit{See}, e.g., ABN AMRO Holding, 78 Fed. Res. Bull. at 298.

\textsuperscript{669} Somerset Bankshares, Inc., 74 Fed. Res. Bull. at 620; \textit{see also} First Union Corp., 76 Fed. Res. Bull. at 87 (bank application approved even though it failed to advertise products designed for low and moderate income persons and did not have a method for analyzing the geographic distribution of its loans); \textit{but see} First Interstate BancSystem of Mont., Inc., 77 Fed. Res. Bull. at 1008 (application denied when bank received a “needs to improve” CRA rating on two successive assessments).
applications due to weak CRA ratings. In fourteen years of prior CRA enforcement, the Board had only denied one banking application on CRA grounds, and that application had not even been challenged.

When a BHC applies to the Board, the CRA performance of all of its subsidiaries is relevant. The Board denied one bank's application when both its subsidiaries had received "needs to improve" CRA ratings, and one subsidiary received two such ratings consecutively. On the other hand, poor CRA records by only a few of a bank's subsidiaries will generally not be sufficient to defeat a BHC's application. The Board's policy seems to be that as long as most of the subsidiaries have a good CRA record, there is no evidence that the poor record is an indication of chronic institutional CRA deficiencies; moreover, when the bank has taken steps to correct the deficiencies, the BHC's application will be granted.

Another issue is the relevance of the CRA record of the target bank in a merger application. The Board has stated that it is required to consider only the record of the applicant, not the target. However, the Board has indicated that it will consider the record of the target when the two banks are of approximately equal size. If the target has a poor CRA record and the acquiring bank has a good record and commits to improve the record of the target, the Board will likely approve the application.

b. The Effect of Prior Decisions on CRA-Challenged Applications

A decision on a prior CRA challenge against a bank will have an impact on the Board’s consideration of a pending application.\textsuperscript{679} If the parties are the same and the challenge presents no new evidence, the Board will abide by its prior decision.\textsuperscript{680} If the issues and parties are the same but new evidence is raised, the Board will consider the bank’s record since the prior decision.\textsuperscript{681} If new issues are raised or the parties are different, the Board will consider the new issues.\textsuperscript{682}

c. The Effect of a Bank’s Commitments to Improve its CRA Record

Rather than denying a bank’s application for failing to comply with the CRA, the Board’s policy is to encourage future CRA compliance by obtaining a commitment from a bank to improve its CRA record.\textsuperscript{683} The Board’s policy behind obtaining commitments is that working in a positive vein with banks rather than denying applications is consistent with the CRA’s mandate to encourage banks to meet community credit needs.\textsuperscript{684} Thus, many banks whose applications are challenged on CRA grounds make commitments to the Board to improve their CRA records.\textsuperscript{685} The Board may seek to obtain commitments even when an application is not challenged on

\begin{footnotesize}
\item[685] By 1989, approximately one-third of the 150 applications challenged on CRA grounds before the Board resulted in commitments. Garwood Statement, July 31, 1989, supra note 72, at 623; see also Seger Statement, Mar. 23, 1988, supra note 84 at 311 (28 of 112 CRA protests reviewed between 1977 and 1987 resulted in commitments).
\end{footnotesize}
The Board's position regarding the impact that a bank commitment will have on its consideration of a challenged application has been somewhat inconsistent. On the one hand, a commitment is technically not considered a substitute for a bank's demonstrated record of CRA performance. Nevertheless, if a bank has an otherwise satisfactory overall CRA record, the Board may give weight to its commitments as an indicator of potential improvement in specific problem areas.

Even if a bank has a less than satisfactory assessment, however, the Board may nevertheless approve an application based on the bank's commitments. In such situations, the Board generally requires the following: the bank must show some level of CRA compliance on the basis of which the commitments can be evaluated.


have taken immediate and effective steps to improve its CRA record, the prior deficiencies must not be serious and it must be likely that the bank will accomplish its commitments. Also important to the Board is whether a troubled bank will be saved as a result of the application or if financial, management, competitive and legal factors favor approval. A commitment made by a bank should survive any subsequent bank mergers.

The Board monitors a bank's compliance with commitments in at least three ways: by examining such compliance during the bank's CRA assessment; by considering this factor when a bank makes a subsequent application; and by requiring the bank to make regular reports to the Board or to the local Federal Reserve Bank. On the

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694. Gore-Bronson Bancorp, Inc., 78 Fed. Res. Bull. at 786 (Board found that bank's record was not likely to improve because CRA deficiencies of its subsidiaries had existed for some time, had increased under the bank's ownership and did not improve over two consecutive CRA assessments).


occasions when the Board has evaluated a bank's compliance with past commitments in the context of a CRA-challenged application, the Board has found in each case that the bank has complied.  

*d. The Board’s Power to Impose Conditions*

The Board has the power to require a bank to take specific actions to improve its CRA record by granting conditional approval of a bank’s application. The Board may impose conditions if, for example, it does not believe that a bank's commitments will be sufficient to eliminate any deficiencies. In the past, the Board did not often impose conditions, but it now seems to be doing so more frequently. For example, it has required banks to keep a log of all inquiries regarding home mortgage and home improvement loans, to fulfill all commitments to improve the bank's CRA record, and to submit periodic reports to the local Federal Reserve Bank. The Board has the authority to enforce conditions through appropriate proceedings.

*e. The Effect of a Settlement of a CRA Challenge*

Frequently the parties may reach a settlement while a challenge is pending. The bank, for example, may make a lending commitment and the challenger may withdraw its challenge and even endorse the application. While the settlement and withdrawal of the protest are relevant to the Board’s review of the application, they do not alter the Board’s obligation to review the applicant’s CRA record. In fact, the Board need not approve or enforce an agreement, and has stated it

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may reject one on safety/soundness concerns. 707

VII. Conclusion

The CRA presents an excellent opportunity for CBO's to increase the extent of a bank's lending in its community. This opportunity is challenging, as the CRA is a vague statute that has not been vigorously enforced. Taking advantage of this opportunity requires a commitment by a CBO to plan, persevere, and be creative. Nevertheless, as evidenced by strengthening enforcement standards and the billions of dollars of CRA lending commitments banks have made, the return is worth the effort.

707. Joint Statement, supra note 3, at 13,746; CRA Progress Report, supra note 73, at 95; CRA Information Statement, supra note 74, at 32.