

**Community Reinvestment Act Public Hearings
Federal Deposit Insurance Corporation, William Seidman Center
July 19, 2010**

**Testimony of Richard D. Marsico
Professor of Law and Director, Justice Action Center
New York Law School**

Thank you for this opportunity to testify about the Community Reinvestment Act regulations. My testimony this afternoon will focus on the purpose of the CRA, the changes in the financial services market since it was passed, CRA standards and enforcement, and how these relate to my proposals to amend the CRA regulations to expand the CRA assessment area, include a bank's lending affiliates and its lending by race in the bank's CRA evaluation, and strengthen and standardize the CRA performance tests.

Congress passed the CRA in 1977 to end bank redlining of low-income, urban, and predominantly minority neighborhoods.¹ Congress placed an affirmative obligation on banks to help meet the credit needs of their local communities and required the federal banking regulators to evaluate a bank's record of meeting community credit needs and to take that record into account when considering certain bank expansion applications.²

¹RICHARD D. MARSICO, DEMOCRATIZING CAPITAL: THE HISTORY, LAW AND REFORM OF THE COMMUNITY REINVESTMENT ACT 12-16 (2005).

²12 U.S.C. §§2901(a)(3) and 2903(a)(1) and (2)(2008).

Much has changed since Congress passed the CRA. Banks are no longer the local, unitary institutions they once were, but are frequently parts of multi-layered national and multi-national corporate entities.³ They share the consumer finance market with many more competitors, including non-bank mortgage lenders and payday lenders.⁴ Finally, although there is evidence that redlining continues, reverse redlining is now an equally if not more serious problem in low-income communities and communities of color.⁵

Despite these market changes, two things have remained consistent in CRA's

³Ren S. Essene & William P. Apgar, *The 30th Anniversary of the CRA: Restructuring the CRA to Address the Mortgage Finance Revolution*, in REVISITING THE CRA: PERSPECTIVES ON THE FUTURE OF THE COMMUNITY REINVESTMENT ACT 12, 22 (Prabal Chakrabarti *et al.* eds., 2009).

⁴*Id.*; see also Gregory D. Squires, *Urban Development and Unequal Access to Housing Finance Services*, 53 N.Y.L. SCH. L. REV. 255, 259-260 (2009).

⁵See, e.g. *id.* at 261-263; Richard Marsico & Jane Yoo, *Racial Disparities in Subprime Home Mortgage Lending in New York City: Meaning and Implications*, 53 N.Y.L.SCH. L. REV. 1011, 1012-1013 (2009).

enforcement. First, it is relatively easy for banks to receive satisfactory CRA grades.⁶ Second, it is not clear whether they deserve these grades, because the CRA regulations do not contain consistent, objective criteria for defining satisfactory CRA performance.⁷ Combined, these two factors make it very difficult, if not impossible, for community groups to hold banks accountable for poor lending records.

⁶John Taylor & Josh Silver, *The Community Reinvestment Act at 30: Looking Back and Looking to the Future*, 53 N.Y.L.SCH. L. REV. 203, 216-217 (2009)(between 1990 and 2007, 95.8% of banks received satisfactory or outstanding CRA ratings, including 98.3% in 2009).

⁷MARSICO, *supra* note 1, at 89-130.

The combination of market changes and weak standards threaten the continued viability of the CRA. Unless the CRA is strengthened and updated to reflect the change in the market, it faces a future of growing irrelevance. This would be unfortunate, because the CRA has influenced banks to make more loans in low-income communities than they would have without the CRA⁸ and because loans covered by the CRA tend to be less risky than loans that are not covered.⁹

⁸*See, e.g.*, THE JOINT CENTER ON HOUSING STUDIES, THE 25TH ANNIVERSARY OF THE COMMUNITY REINVESTMENT ACT: ACCESS TO CAPITAL IN AN EVOLVING FINANCIAL SERVICES SYSTEM 59 (2002)(this study estimated that CRA lenders made 42,000 more CRA-eligible home purchase loans annually than they would have without the CRA); ROBERT E. LITAN ET AL., THE COMMUNITY REINVESTMENT ACT AFTER FINANCIAL MODERNIZATION: A BASELINE REPORT 90 (2002)(identifying a “causal link between the CRA and the recent, substantial increase in home mortgage lending....”).

⁹*See, e.g.*, JOINT CENTER FOR HOUSING STUDIES, *supra* note 8, at 47-54 (banks lending in their CRA assessment areas had higher market shares of prime loans than did lenders not covered by the CRA or banks lending outside their CRA assessment areas); Randall Kroszner, *The Community Reinvestment Act and the Recent Mortgage Crisis*, in REVISITING THE CRA: PERSPECTIVES ON THE FUTURE OF THE COMMUNITY REINVESTMENT ACT 8, 9 (Prabal Chakrabarti

The following proposals to amend the CRA regulations would both strengthen the CRA and update it to reflect current market conditions.

et al. eds., 2009)(in 2005 and 2006, “only six percent of higher-priced loans were extended by CRA-covered lenders to low-income borrowers or neighborhoods in their CRA assessment areas”); and Warren W. Traiger, *The CRA: A Welcome Anomaly in the Foreclosure Crisis*, 53 N.Y.L. SCH. L. REV. 227, 229 (2009)(banks were two-thirds less likely to make subprime loans than were lenders not covered by the CRA).

Expand the CRA Assessment Area to Include the Areas in which Banks Make Loans and Include Affiliate Lending in a Bank's CRA Performance Evaluation: The CRA regulations contain two provisions that have caused a reduction in the percentage of home mortgage loans the CRA covers. First, the regulations define a bank's CRA assessment area--the geographic area in which it has CRA obligations--as the metropolitan area in which the bank has its branches and makes its loans.¹⁰ As banks have grown and created loan distribution mechanisms not dependent on branches, more and more of their loans have been made outside areas in which they have branches, and thus fewer loans are covered by the CRA. The CRA regulations also allow banks to choose whether to include the lending records of their non-bank lending affiliates as part of the bank's CRA performance evaluation.¹¹ The impact of the assessment area and affiliate rules has been to reduce the percentage of loans subject to the CRA; as of 2006, only 26% of all home purchase loans were by banks in their CRA assessment areas, down from 36.1% in 1993.¹² One negative consequence of this is that a bank can shift its risky lending or lending that might hurt its CRA record outside of regulatory scrutiny.¹³ The assessment area and

¹⁰See, e.g., 12 C.F.R. §345.41(c)(2010).

¹¹See, e.g., 12 C.F.R. §345.22(c)(2010).

¹²Essene & Apgar, *supra* note 3, at 22.

¹³Taylor & Silver, *supra* note 6, at 211. Evidence has shown that banks were shifting subprime lending to their affiliates or outside of their CRA assessment areas. *See supra*, note 9.

affiliate rules defeat the purpose of the CRA and should be changed. Affiliate lending should count as part of a bank's CRA record and a bank's CRA assessment area should include, for example, the area in which its market share of loans or the percentage of all of its loans meets a certain threshold.

Consider the Bank's Lending According to the Race of the Borrower and the Racial Composition of the Community: Several studies have documented continued disproportionately low rates of home mortgage loans to African-American and Latino borrowers and, conversely, disproportionately high rates of subprime lending to these same groups.¹⁴ It is difficult to reconcile this with the CRA obligations of banks, and the regulations should be amended to evaluate a bank's record of lending to minority borrowers and predominantly minority neighborhoods. At the very least, the CRA performance evaluations should include an extensive analysis of the bank's lending by race--including evidence of reverse redlining--in the section on illegal and discriminatory lending practices instead of the conclusory and brief statements that now appear in CRA performance evaluations, and the regulations should identify penalties for discriminatory and illegal practices, including reverse redlining.

Adopt a Consistent Set of Objective Criteria and Benchmarks for Evaluating a Bank's Lending: The CRA regulations do not contain a consistent set of objective criteria for evaluating bank lending. This makes it difficult to hold banks accountable for poor lending records. Although there should be room for discretion and judgment in evaluating a bank's CRA record and the CRA regulations cannot allocate credit, these concerns should not completely displace the important goal of creating a clear set of standards, consistently applied. The CRA

¹⁴Marsico & Yoo, *supra* note 5, at 1012-1013.

regulations should require the agencies to consider bank lending compared to objective benchmarks and should state clearly how the bank's performance on these criteria will be weighed in evaluating the bank's CRA record. Among many possible criteria, for example, is the bank's percentage of home mortgage loans to predominantly minority communities compared with the overall percentage for all lenders in the metropolitan area.¹⁵ Such criteria will put both banks and community groups on notice of what constitutes a satisfactory CRA performance and improve implementation of the CRA's purpose.

The CRA has expanded safe and sound lending in low- and moderate-income neighborhoods and it is urgent that you act to expand its coverage and strengthen its enforcement to ensure it continues to do so. Thank you once again for this opportunity to testify.

¹⁵See MARSICO, *supra* note 1, at 176-186 (proposing objective CRA evaluative criteria for bank lending, services, and community development lending and investment).