

**DECISION OF THE
SUPERVISION APPEALS REVIEW COMMITTEE**

CASE NO. 2008-02

I. Summary of Findings

After careful consideration of all of the written and oral submissions and the facts of this case, the Bank's appeal is denied. For the reasons set forth in this decision, we uphold the Bank's Community Reinvestment Act ("CRA") Rating of "Needs to Improve." We find that, in accordance with the FDIC Rules and Regulations, the FDIC's Division of Supervision and Consumer Protection ("DSC") appropriately evaluated the Bank's CRA performance under the small bank performance standards. We further find that the Bank has not demonstrated good cause to support a waiver of the one-year requirement for operating under an approved strategic plan.¹

II. Background

DSC conducted concurrent compliance and CRA examinations of *** (the "Bank"), beginning on August 6, 2007. The DSC examination team assigned the Bank a Consumer Compliance Rating of 1. In addition, based on the small bank performance standards, DSC assigned the Bank a CRA rating of "Needs to Improve."

The Bank filed a Request for Review of a Material Supervisory Determination with the Director of DSC, Sandra L. Thompson, on April 3, 2008. Specifically, the Bank requested reversal of the "Needs to Improve" CRA rating because it believed that DSC should have evaluated the Bank's CRA performance under its approved Strategic Plan ("Strategic Plan" or "Plan") rather than the small bank performance standards. After considering the facts and the issues presented, Director Thompson determined that the assigned rating and the standards under which DSC evaluated the Bank's CRA performance were appropriate. Ms. Thompson informed the Bank of her determination by letter dated August 12, 2008. The Bank timely filed an appeal with the FDIC's Supervision Appeals Review Committee ("SARC" or "Committee") on September 10, 2008. On December 18, 2008, the Committee held a meeting with the Bank and FDIC staff.²

¹ Notwithstanding the denial of the Bank's appeal, we encourage DSC to schedule the Bank's next CRA performance evaluation at the earliest possible date so that its CRA performance can be evaluated under its approved Strategic Plan.

² Appearing on behalf of the Bank were *** (A) and *** (B), outside counsel; *** (C), President and Chief Executive Officer; *** (D), Chief Operating Officer and Chief Credit Officer; and *** (E), CRA Officer. Appearing on behalf of DSC were Sylvia Plunkett, Associate Director, Compliance Examination Branch; Alice Beshara, Chief, Compliance Examination Branch; Lorraine Rushing, Review Examiner; and Gregory Gore, Counsel.

In its appeal, the Bank challenges the standards under which DSC evaluated its CRA performance. According to the Bank, it should have been evaluated for CRA compliance under its Strategic Plan rather than the small bank performance standards. At the time of the CRA examination, the Bank had been operating under an approved CRA strategic plan for nearly two months. The applicable regulations, 12 C.F.R. § 345.27(a)(4), require that a bank operate under an approved strategic plan for at least one year before being assessed under that standard. The Bank asserts that DSC should have, for good cause, waived the one-year requirement for operation under a strategic plan. Alternatively, the Bank argues that good cause exists to delay the publication of the 2007 CRA Performance Evaluation until after the next examination, at which time the Bank can be examined under its Strategic Plan.

DSC urges the Committee to uphold the Bank's CRA rating of "Needs to Improve" because, according to DSC, the Bank was properly evaluated under the small bank performance standards. In DSC's view, the Bank's CRA performance could not be reviewed under its Strategic Plan because the Bank had not been operating under the Plan for the required one-year period after its approval. Furthermore, DSC argues that the Bank has not shown any compelling reasons to justify a waiver of the requirement that an institution operate under an approved strategic plan for at least one year before being assessed under that plan.

In accordance with the *Guidelines for Appeals of Material Supervisory Determinations* ("Guidelines"), the Committee reviews the Bank's appeal for consistency with the policies, practices, and mission of the FDIC, as well as the reasonableness of, and support for, the respective positions of the parties.

The Committee has carefully considered all of the written submissions made by the Bank and by DSC, as well as the oral presentations made at the meeting. Under the Guidelines, the scope of the Committee's review is limited to facts and circumstances as they existed prior to or at the time of the examination (August 6, 2007). No consideration has been given to facts or circumstances that developed after the examination.

III. Applicable Law

Section 345.21 of the FDIC Rules and Regulations allow the FDIC to assess the CRA performance of a small bank pursuant to the small bank performance standards or under a strategic plan if the bank submits, and the FDIC approves, a strategic plan as provided in section 345.27. 12 C.F.R. § 345.12(a)(3) and (4). Section 345.27 further requires that a bank operate under an approved strategic plan for at least one year before being assessed under that standard. 12 C.F.R. § 345.27(a).

Pursuant to section 345.43, within 30 days of receiving its CRA Performance Evaluation from the FDIC, a bank must place that information in its public file. 12

C.F.R. § 345.43(a)(2). In addition, section 345.43(b)(5) provides that a bank that received a less than satisfactory rating during the most recent examination shall include in its public file a description of its current efforts to improve its performance in helping to meet the credit needs of its entire community and that the bank shall update the description quarterly. Finally, section 303.12 permits the FDIC Board of Directors to waive the applicability of any provision in the FDIC Rules and Regulations for good cause and to the extent permitted by statute. 12 C.F.R. § 303.12(a).

IV. Facts

On January 19, 2005, the FDIC received the Bank's deposit insurance application. In its application, the Bank provided a proposed business plan. The business plan explained that the Bank intended to work closely with venture capital firms and start-up companies, such as technology and biosciences companies, in need of financing. In particular, the Bank proposed to offer banking services, including offering working capital lines of credit, equipment financing, and asset acquisition loans to companies that had already received funding from established venture capital firms. The Bank also at this time requested that it be designated a wholesale bank for CRA purposes.

On February 23, 2005, FDIC examiners met with Bank organizers to discuss CRA issues. At this meeting, examiners recommended that the organizers consider submitting a strategic plan. On April 25, 2005, Atlanta Regional Director Mark Schmidt sent the proposed Bank a letter explaining that the Bank's proposed business plan, which included making small business loans, disqualified it from meeting the standards of a wholesale bank, and therefore, its request to operate as such was denied.³ In that same letter, Regional Director Schmidt informed the Bank that it would be evaluated under the small bank performance standards for CRA purposes and again suggested that the Bank consider submitting a strategic plan. On July 1, 2005, the FDIC approved the Bank's deposit insurance application. The Bank opened for business on August 8, 2005.

DSC conducted a new bank visitation as of August 8, 2006. While examiners did not conduct a formal CRA evaluation at this time, the Report of Visitation states that examiners encouraged management to consider a strategic plan for CRA purposes. Examiners also provided management with additional information, including the applicable regulations and guidelines on the strategic plan application process. During the month of August 2006, the Bank held two teleconferences with DSC to discuss its CRA responsibilities.

In the fall of 2006, the Bank informally provided DSC with a draft CRA strategic plan. On December 20, 2006, the Bank published a public notice of its proposed plan, and on January 26, 2007, the Bank formally submitted the plan to the FDIC. On March 23, 2007, DSC informed the Bank that, although the service goals in the proposed strategic plan were reasonable, the goals were insufficiently supported and the plan was technically deficient in numerous ways. Consequently, DSC did not approve the

³ Section 345.12(x) of the FDIC Rules and Regulations defines a wholesale bank as one "that is not in the business of extending home mortgage, small business, small farm, and consumer loans to retail customers."

proposed strategic plan and requested that the Bank revise the plan to provide additional support for the goals and to address the plan's technical deficiencies. The Bank submitted a revised strategic plan to the FDIC on April 27, 2007. On June 25, 2007, DSC approved the Bank's Strategic Plan.

DSC began the first full-scope compliance and CRA examination of the Bank on August 6, 2007. At the examination, DSC evaluated the Bank's CRA performance according to the small bank performance standards. Due to the Bank's overall limited volume of lending within its assessment area, DSC assigned the Bank a CRA rating of "Needs to Improve."

V. Discussion

The Bank does not dispute the less than satisfactory CRA rating it received under the small bank performance standards arising from the August 2007 examination. Rather, the Bank's position is that, pursuant to section 303.12 of the FDIC regulations, good cause exists for the FDIC to waive the requirement that an institution operate under an approved strategic plan for one year before it can be evaluated under that plan. In other words, the Bank believes that DSC should have evaluated the Bank under its Strategic Plan rather than the small bank performance standards. To obtain a waiver of an FDIC regulation, the SARC would have to recommend to the Board of Directors, and the Board of Directors would have to agree, that good cause exists to support a waiver of the relevant provision.

The applicable regulation provides that a bank will be evaluated under its approved strategic plan only if it has been operating under that plan for at least one year. 12 C.F.R. 345.27(a)(4). In this case, when the examination began in August 2007, the Bank had been operating under its approved Plan for fewer than two months. Thus, pursuant to section 345.27(a)(4), the Bank's performance could not be reviewed under its Strategic Plan.

The Bank sets forth a number of arguments to establish that good cause exists to justify a waiver of the one-year requirement. According to the Bank, good cause exists because even though the Bank's Strategic Plan was not formally approved by the FDIC until June, 2007, it had been informally operating in conformance with the goals set forth in the Plan since the summer of 2006. The suggestion that good cause exists because the Bank had been informally operating under its Strategic Plan since the summer of 2006 overlooks the fact that an acceptable plan was not submitted until April 27, 2007, and not officially approved until June 25, 2007. The Committee finds it persuasive that the Bank was advised repeatedly over a two-year period, beginning in 2005, that it would be evaluated under the small bank performance standards unless a strategic plan was submitted, approved, and in effect for one year. Moreover, the Bank acknowledges that it knew prior to its opening that, given its proposed business plan, it could not meet the small bank performance standards. These factors indicate that the Bank had sufficient opportunity to develop and submit a strategic plan in a timely manner so that its initial

CRA evaluation could have been conducted under an approved strategic plan. Moreover, allowing an institution to meet the requirement that it operate under an approved plan for at least one year by informally operating under a not-yet approved plan would be contrary to the regulation. Given these circumstances, good cause does not exist to waive the applicable CRA regulation.

The Bank also contends that its good faith interest in serving the needs of its community and satisfying its CRA responsibilities supports a waiver of the one-year requirement. The Committee appreciates the Bank's interest in serving the lending needs of the community and meeting its CRA obligations. A good faith interest in complying with applicable banking regulations does not, however, constitute good cause to justify a waiver of the one-year requirement.

To further demonstrate good cause to support a waiver of the one-year requirement, the Bank challenges whether DSC's issuance of a "Needs to Improve" CRA rating serves any regulatory purpose. According to the Bank, the rating should serve as a means to ensure that an institution improves its CRA performance. The Bank contends that, in this case, the rating would serve no regulatory purpose because, by the time the FDIC issued its CRA Performance Evaluation, the Bank was already operating under its approved Strategic Plan. Moreover, the Bank asserts that it makes no sense for the FDIC to consider the Bank's CRA performance under the small bank performance standards in August 2007 when the FDIC approved the Bank's Strategic Plan two months earlier, and the Bank was already acting in accordance with the goals set forth in the Plan at the time.

Despite the Bank's arguments, ratings are useful regulatory tools that serve multiple meaningful purposes. In addition to prompting an institution to improve its performance, CRA ratings also advise the institution and the public of that institution's performance during a discrete period of time and provide guidance to similarly situated depository institutions on how they can expect to be evaluated in similar circumstances. Here, the "Needs to Improve" rating accurately reflects the Bank's performance under the small bank performance standards for the period between 2005 and 2007.

In addition, FDIC applies the requirements of section 345.27(a) consistently across the industry. While an institution, such as the Bank, may choose to operate under a different standard at some point in the future, under the FDIC rules and policies, it must be examined under the standards applicable to it at the time of examination. In other words, even if an institution intends to operate under a different standard in the future and even if the institution has already taken steps to qualify for that different standard, the FDIC will evaluate the bank according to the standards applicable to it at the time of the examination. Furthermore, future performance under a different standard does not absolve or affect an institution's CRA performance under a prior applicable standard for the period being examined. For the reasons set forth above, we find that the Bank's argument that good cause exists to excuse it from the relevant one-year CRA requirement is without merit.

The Bank's last contention is that good cause exists because its reputation within the community will be unfairly tainted by a "Needs to Improve" CRA rating. The Bank maintains that it has clearly established and demonstrated its commitment to serving the needs of its community. In addition, the Bank points out that it has exceeded its 2008 strategic plan goals for lending, investments, and services. As discussed above, the "Needs to Improve" rating is an accurate reflection of the Bank's performance under the standards applicable to it at the time of the examination.

While the Bank would prefer reversal of the "Needs to Improve" rating, in the alternative, the Bank argues that DSC should have, for good cause, allowed the Bank to delay publication of the 2007 Performance Evaluation until a new CRA examination could be conducted under the Bank's Strategic Plan. Section 345.43(a)(2) of the FDIC regulations requires that a bank place, within 30 days of receipt, a copy of its CRA Performance Evaluation in its public file. 12 C.F.R. 345.43(a)(2). The Bank believes that publishing its CRA Performance Evaluation with a "Needs to Improve" rating will tarnish its reputation. This effect, according to the Bank, would be mitigated if it is assigned a "Satisfactory" rating based on a new examination prior to the publication of the 2007 Performance Evaluation.

The applicable CRA disclosure regulations address the concerns that the Bank articulates. In instances where a bank receives a less than satisfactory rating, the regulations require that the bank include in its public file a description of its current efforts to improve its performance in helping to meet the credit needs of the communities it serves. 12 C.F.R. § 345.43(b)(5). Section 345.43, therefore, balances the need of a bank to protect against the effect of a less than satisfactory CRA rating with the need of a community to learn about the CRA ratings of its area banks. Because the regulation provides the Bank with a reasonable means to mitigate any potential effect of a "Needs to Improve" rating, the Bank's contention that publication of the rating would be injurious to its reputation is without merit. Good cause, based on this argument, does not exist to excuse the Bank from its CRA publication responsibilities.

In sum, the Bank has not provided persuasive evidence to support its contention that good cause exists to support waiver of the requirement that the Bank operate under an approved strategic plan for one year before being evaluated under that Plan. The Bank was repeatedly advised that it would be evaluated under the small bank performance standards unless it submitted an acceptable strategic plan and was operating under that plan for at least one year at the time of the examination. The Bank had ample opportunity to submit an acceptable strategic plan so that its initial CRA evaluation could have been of its operations under that Plan. Accordingly, we find that the Bank has not demonstrated that good cause exists to support its appeal. Furthermore, we find that DSC appropriately followed the applicable regulations when evaluating the Bank's CRA performance under the small bank performance standards. Despite these findings, we acknowledge and applaud the Bank's interest in serving the needs of its community. To facilitate the Bank's next CRA evaluation, we encourage DSC to expedite the Bank's examination cycle so that it may be assessed under its approved Strategic Plan at the earliest possible date.

VI. Conclusion

For the reasons set forth above, the Bank's appeal is denied.

By direction of the Supervision Appeals Review Committee of FDIC, dated February 13, 2009.

Robert E. Feldman
Executive Secretary