University of the Pacific Law Review

Volume 53
Issue 1 *SYMPOSIUM—FOR WHOSE BENEFIT PUBLIC CORPORATIONS? PERSPECTIVES ON SHAREHOLDER AND STAKEHOLDER PRIMACY*

Article 6

1-1-2021

The Community Reinvestment Act and The Unbanked: No Stake to Hold Onto

Michael P. Malloy
University of the Pacific, McGeorge School of Law

Follow this and additional works at: https://scholarlycommons.pacific.edu/uoplawreview

Part of the Law Commons

Recommended Citation

Michael P. Malloy, *The Community Reinvestment Act and The Unbanked: No Stake to Hold Onto*, 53 U. PAC. L. REV. 1 (2021).
Available at: https://scholarlycommons.pacific.edu/uoplawreview/vol53/iss1/6

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in University of the Pacific Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Symposium – For Whose Benefit Public Corporations? Perspectives on Shareholder and Stakeholder Primacy

The Community Reinvestment Act and the Unbanked: No Stake to Hold Onto*

*Michael P. Malloy***

TABLE OF CONTENTS

I. INTRODUCTION

The issues surrounding corporate social responsibility have gained increasing prominence over the past fifty years. Is it within the power of a corporation to support or contribute to the interests of stakeholders other than shareholders? Does a corporation have an affirmative obligation to consider the interests of such stakeholders in making decisions with respect to its business activities? From the perspective of financial services firms like commercial banks, these questions may seem almost redundant and unnecessary because consideration of the interests of other stakeholders is hard-wired into the corporate law and regulation of financial services firms. This Article examines the ways in which social responsibility is assimilated into the corporate law of financial services firms. It also argues that there are significant limits on the utility and effectiveness of these assimilated principles.

The corporate law and policy applicable to banks and other financial services firms are shaped and almost defined by the simple fact that banking is a regulated industry.[1] This fact adds a new dimension to the question for whose benefit does a business enterprise operate. Indeed, legal issues that are basically the same as those encountered in generally applicable corporate law and policy are likely to

* Copyright © 2021 by Michael P. Malloy. This article is derived from remarks delivered by the author at a panel of the Section on Socio-Economics, *For Whose Benefit Public Corporations? Perspectives on Shareholder and Stakeholder Primacy*, during the virtual Annual Meeting of the Association of American Law Schools in January 2021.

** Distinguished Professor of Law, University of the Pacific McGeorge School of Law.

1. *See generally* MICHAEL P. MALLOY, THE CORPORATE LAW OF BANKS VOL. 1 (Little, Brown and Co., 1988) (examining interaction of corporate law and bank regulation).

be skewed significantly by the regulated nature of financial services firms,[2] generically known as depository institutions.[3]

II. Social Responsibility and the Corporate Law of Depository Institutions

A. Limitations on Entry

In general business corporation law, entry into business as a corporate entity is limited by very modest statutory requirements that amount to little more than filling out minimal documentation and paying a filing fee.[4] In contrast, entry into the business of banking requires the active approval of a state or federal regulator,[5] subject to *inter alia* an affirmative demonstration of the way in which the new corporate entity will provide for the "convenience and needs of the community to be served."[6] For example, in applying for a charter for a national bank or a federal savings association, the applicants—as promoters—must

2. *See, e.g.*, Poindexter v. Wachovia Mortg. Corp., 851 F. Supp. 2d 121 (D.D.C. 2012) (holding that issue of whether corporate veil could be pierced could not be resolved in motion to dismiss in action by mortgagor against mortgagee, note holder, bank holding company, and others, alleging fraudulent inducement to refinance mortgage with unaffordable loan); Brown v. Wells Fargo Bank, N.A., 869 F. Supp. 2d 51 (D.D.C. 2012) (holding certain claims of borrower against S&L for affirmative misrepresentations in connection with mortgage loan were preempted by federal regulatory law).

3. *Cf., e.g.*, 12 U.S.C. § 461(b)(1)(A) (defining *depository institution* for purposes of Federal Reserve Act to include *inter alia* insured banks, savings banks, credit unions, and savings associations). For discussion of the meaning of this term and its implications, see MICHAEL P. MALLOY, BANKING LAW AND REGULATION, VOL. 1 § 1A.02[A] (Aspen Publishers 2d ed. 2011).

4. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 101–103 (West 2021) (listing formation requirements for incorporation under Delaware law); MODEL BUSINESS CORPORATION ACT §§ 2.01–2.03 (AM. BAR FOUND. 2003) (listing formation requirements under the Model Act).

5. *See* MALLOY, BANKING LAW, *supra* note 3, at § 2.02:

> Unlike the situation of a general business corporation, the formation of a commercial bank is subject to a relatively detailed approval process controlled, both in terms of its content and timing, by the state or federal chartering authority. The conditions to be met in order to obtain a charter for a commercial bank are generally set by statute. The degree of detail in these statutes varies greatly. The National Bank Act (NBA), which authorizes the chartering of national banks, exhibits perhaps the least degree of detail in this regard; much of this detail is to be found in the regulations, forms, and instructions of the chartering authority itself.

(Footnotes omitted).

6. 12 U.S.C. § 1816(6). This statutory provision appears in the Federal Deposit Insurance Act, governing the requirements for deposit insurance applicable to all depository institutions except credit unions. However, the standard is also incorporated into the regulations governing the chartering (*i.e.*, incorporation) of national banks. *See* 12 C.F.R. § 5.20(h)(5). During the 1920s, states began incorporating a convenience-and-needs standard into their banking statutes. *See generally* Note, *Bank Charter, Branching Holding Company and Merger Laws: Competition Frustrated*, 71 Yale L.J. 502 (1962). Since 1933, the standard has been a typical feature of state and federal law. *See, e.g.*, Banking Act of 1933, ch. 89, § 8, 48 Stat. 168 (1933) (codified at 12 U.S.C. § 264 (1934), *recodified*, 12 U.S.C. § 1816. *See generally* Peter C. Carstensen, *Regulating Banking in the Public Interest: The Case for an Open Approach to Chartering and Branching*, 57 TEX. L. REV. 1085 (1979) (providing analysis of implications of convenience-and-needs standard). *Cf.* Roger E. Alcaly, *Neither Convenient nor Needed: the Convenience and Needs and Public Benefits Tests of the Bank Holding Company Act*, 96 BANKING L.J. 325 (1979) (discussing standard in context of bank holding company formation).

include a business plan or operating plan that indicates their plans for serving the community,[7] evaluating "the banking needs of the community, including its consumer, business, nonprofit, and government sectors."[8] Even at this stage in the corporate life of the institution, a certain tension is evident in the extent to which the needs of community stakeholders are to be served. The regulation emphasizes that "[t]he business plan or operating plan must demonstrate how the proposed national bank or Federal savings association responds to those needs consistent with the safe and sound operation of the institution."[9] Clearly then, while the interests of community stakeholders are an explicit responsibility of a banking corporation, those interests are subordinate to the financial integrity and operation of the corporation.[10]

B. The Community Reinvestment Act

In addition to this general standard requiring attention to community needs, there is also specific statutory authority focused upon a financial institution's responsibility to reinvest in the community within which it operates, the Community Reinvestment Act ("CRA").[11] The CRA explicitly links itself to the traditional banking factor of "convenience and needs," which regulators routinely apply in deciding a wide variety of applications.[12] However, unlike this rather vague and flexible concept, the CRA imposes some relatively specific and arguably inflexible expectations about serving the credit needs of low-income segments of an institution's local market.

Significantly, the CRA is a continuing requirement to demonstrate an institution's service to its community's needs during periodic examinations,[13] not

---

7. 12 C.F.R. § 5.20(h)(5)(i).

8. *Id.*

9. *Id.*

10. This prioritization is underscored by a subsequent provision in the chartering regulations. In § 5.20(h)(6), the Office of the Comptroller of the Currency ("OCC"), the federal regulator of national banks and federal savings association, states:

> The business plan or operating plan must demonstrate that the organizing group (and the sponsoring company, if any), is aware of, and understands, applicable depository institution laws and regulations, and safe and sound banking operations and practices. *The OCC will deny an application that does not meet these safety and soundness requirements*.

(Emphasis added).

11. Pub. L. No. 95–128, tit. VIII, 91 Stat. 1147 (1977), (codified at 12 U.S.C. §§ 2901–2907), *as amended*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 358(1)-(2), 124 Stat. 1376, 1548 (codified at 12 U.S.C. §§ 2902, 2905). For legislative history of the CRA, see H.R. Rep. No. 95–128, 95th Cong., 1st Sess. (1977); H.R. REP. NO. 95–634, 95th Cong., 1st Sess. (1977) (Conf. Rep.), *reprinted in* 1977 U.S. Code Cong. & Admin. News 2884.

12. *See, e.g.*, MALLOY, BANKING LAW, VOL. 2, *supra* note 3, at § 2.02[A] (discussing "convenience and needs" in context of chartering).

13. This periodic examination typically has been annual, but there are exceptions. For example, since 1999, the CRA has provided that regulated financial institutions with aggregate assets not exceeding $250 million are subject to routine CRA examinations not more than once every 60 months, if the institution received a CRA rating of "outstanding" at its most recent examination, and not more than once every 48 months, if the

a one-time requirement upon the event of chartering.[14] In addition, satisfactory compliance with the CRA is also a condition for a bank holding company ("BHC") to become a more diversified financial holding company ("FHC")[15] or for an FHC (or a bank, through a financial subsidiary)[16] from commencing any new activity.[17] The same requirement applies to the acquisition of any company under the Bank Holding Company Act ("BHCA"),[18] the National Bank Act,[19] or the Federal Deposit Insurance Act.[20]

The law requires agencies to take a depository institution's CRA record into account in its evaluation of any application by the institution for a "deposit facility."[21] The CRA definition of this term is the key to the act's potentially broad effect. The term "application for a deposit facility" is defined for these purposes to mean any application for a charter for a national bank or federal savings association,[22] for deposit insurance, in the case of "a newly chartered state bank, savings bank, savings and loan association or similar institution,"[23] for a domestic branch or other facility that can accept deposits,[24] for the relocation of a home or branch office,[25] for the merger, consolidation or purchase/assumption requiring approval under the Bank Merger Act ("BMA");[26] or "for acquisition of shares in, or the assets of," a depository institution requiring approval under federal holding company law.[27]

---

institution received a rating of "satisfactory" at its most recent examination. 12 U.S.C. § 2908(a). In addition, if the institution received a rating of less than "satisfactory" at its most recent examination, it is subject to routine CRA inspections as deemed necessary by the appropriate federal banking agency. *Id.*

14. *See* 12 U.S.C. § 2903(c) (concerning periodic examination of CRA compliance).

15. 12 U.S.C. § 1843(k), (l)(2).

16. *See* 12 U.S.C. § 24a(a)(7) (applying requirements of 12 U.S.C. § 1842(l)(2) to financial subsidiaries of national banks).

17. *Id.* § 1843(l)(2).

18. *Id.* § 1843(k), (n).

19. *Id.* § 24a(a)(7).

20. *Id.* § 1831w(a).

21. *Id.* § 2903(a)(2). On application of the CRA requirements to financial holding companies, see 12 U.S.C. § 2903(c). In evaluating an institution's record, the CRA discriminates between "majority-owned institutions" on the one hand, and "minority-" or "women-owned institutions" on the other. 12 U.S.C. § 2903(b). In evaluating a majority-owned institution's record, the agency may consider the institution's capital investment in, and loan participation and other joint ventures with, minority- and women-owned financial institutions and low-income credit unions. *Id.* These activities may be considered only if they "help meet the credit needs of local communities in which such institutions and credit unions are chartered." *Id.* On operation of branch facilities by minorities and women, see 12 U.S.C. § 2907.

22. 12 U.S.C. § 2902(3)(A).

23. *Id.* § 2902(3)(B).

24. *Id.* § 2902(3)(C). *See, e.g.*, Corning Sav. & L. Ass'n v. Fed. Home L. Bank Bd., 571 F. Supp. 396 (E.D. Ark. 1983), *aff'd*, 736 F.2d 479 (8th Cir. 1984) (upholding approval of branch application in light of CRA).

25. 12 U.S.C. § 2902(3)(D).

26. *Id.* § 2902(3)(E). *See, e.g.*, Office of the Comptroller of the Currency CRA Decision No. 118 (Nov. 6, 2003), *reprinted in* 2003 WL 23013555 (applying CRA and approving consolidation of various affiliated banks into and purchase and assumption of affiliate's assets and liabilities by Wells Fargo Bank, NA).

Obviously, if vigorously implemented[28] and administered by the agencies,[29] these CRA requirements could have a significant impact on an institution's credit and asset-management policies. The question remains, however, whether any such impact has emerged.

III. THE EFFECTIVENESS OF THE "COMMUNITY NEEDS" APPROACH

The CRA has prompted much comment and controversy.[30] There has been continuing debate over whether state and federal CRAs and other "community needs" requirements effectively achieve their objectives. Empirical studies focusing on the Texas market have suggested that CRA regulations have not increased the availability of banking services in low-income communities, and that the number of branches in low-income areas actually decreased in the period following relevant regulatory changes.[31]

Another problem is that in an increasingly interstate—and often transnational—market for financial services,[32] it may not be meaningful to speak of the "community" that a financial institution serves as if it were a single, localized market. It remains to be seen whether the state and federal CRAs and related policies can offset the effects of current federal interstate banking and branching policy and the emerging industry consolidation that has resulted from interstate policies,[33] and which may leave many consumers "underbanked" or "unbanked."[34] Regulators have acknowledged market changes

---

27. 12 U.S.C. § 2902(3)(F).

28. *See id.* § 2905 (mandating promulgation of regulations), *as amended*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 358(2), 124 Stat. 1376, 1548 (2010) (codified at 12 U.S.C. § 2905) (transferring rulemaking authority of former Office of Thrift Supervision to OCC). The agencies have promulgated substantially identical CRA implementing regulations. 12 C.F.R. pts. 25, 195, 228, 345 (providing CRA regulations of OCC, Fed, and FDIC, respectively), *as amended*, 82 Fed. Reg. 5354 (2017) (codified at 12 C.F.R. pts. 25, 195 (OCC rules), 228 (Fed rule), 345 (FDIC rule)) (adjusting asset-size thresholds used to define "small bank," "small savings association," "intermediate small bank," and "intermediate small savings association").

29. *See* 12 U.S.C. § 2904 (requiring annual report to Congress by agencies outlining CRA actions taken).

30. *See generally* Stephen Labaton, *New Phase Under Way in Battle Over Banking Law*, N.Y. TIMES, July 3, 1999, at B1, col. 6, B14, col. 5 (noting threatened veto over Senate proposal to exempt potentially thousands of banks from CRA requirements); *Symposium Issue*, 143 U. PA. L. REV. 1285–1593 (1995) (presenting range of views on CRA); David Evan Cohen, *The Community Reinvestment Act—Asset or Liability?*, 75 MARQUETTE L. REV. 599 (1992); Michael E. Schrader, *Competition and Convenience: The Emerging Role of Community Reinvestment*, 67 IND. L.J. 331 (1992).

31. Leonard Bierman, et al., *Regulatory Change and the Availability of Banking Facilities in Low-Income Areas: A Texas Empirical Study*, 49 S. METHODIST U. L. REV. 1421 (1996); *see also* Leonard Bierman, et al., *Community Reinvestment Act: A Preliminary Empirical Analysis*, 45 HASTINGS L.J. 383 (1994).

32. On interstate banking and branching, see MALLOY, BANKING LAW, VOL. 2, *supra* note 3, at §§ 3.07–3.07[D][2] (discussing interstate branching); *id.* at 10.7–10.7[B] (discussing interstate acquisitions by bank holding companies); *id.* at 12.06–12.06[F] (discussing interstate mergers). On regulation of transnational banking and branching, see *id*. § 15.03.

33. *See, e.g.*, Dwight Golann, et al., *Introduction to the 1996 Annual Survey of Consumer Financial Services Law*, 51 BUS. LAW. 825 (1996). *See generally* Michael P. Malloy, *Towards a National Community: The CRA and the Contemporary Market*, 29 W. NEW ENG. L. REV. 25 (2006) (noting three layers of CRA

with new data collection and reporting requirements,[35] increasing the CRA burden on financial institutions. However, in the view of some commentators, these developments are unlikely to satisfy the objectives of CRA public policy.[36] Nevertheless, 1994 amendments revitalized the CRA, which Congress intended as a way to retool the act to deal with the increasingly interstate depository institutions market.[37]

Critics of the CRA have seized on the 2008 economic crisis[38] to argue that the act pushed banks and other mortgage lenders into unsafe mortgages to borrowers who were not creditworthy. However, lending data reported to the Federal Reserve under the Home Mortgage Disclosure Act exhibit no evidence that the CRA was a "driving force in the risky subprime lending market."[39] Indeed, independent mortgage companies—which are not subject to CRA requirements—were responsible for approximately fifty percent of the higher-priced loans issued during the height of the housing boom in 2005–2006.[40] As to higher-priced mortgage loans issued by depository institutions and their affiliates, most were outside CRA assessment areas.[41] These results were emphatically confirmed in December 2008, in a speech by Federal Deposit Insurance Corporation ("FDIC") Chair Sheila Bair before the Consumer Federation of America.[42]

IV. CONCLUSION

This disagreement over purported unintended consequences of the "community needs" principle in relation to safety and soundness in the financial services industry is unlikely to be resolved to the satisfaction of either side. What it does suggest, however, is that low- and middle-income community

review applicable to interstate banks, as well as state regulation); Mark D. Rollinger, *Interstate Banking and Branching Under the Riegle-Neal Act of 1994*, 33 HARV. J. LEGIS. 183 (1996) (surveying potential effect of interstate banking legislation on banking industry).

34. *See generally* Cassandra Jones Havard, *Doin' Banks*, 5 U. PA. J.L. & PUB. AFF. 317 (2020) (discussing disintermediation of low- and moderate-income communities).

35. *See* 12 C.F.R. §§ 25.21–25.27, 228.42, 345.42 (imposing data collection, reporting, and disclosure requirements). The federal regulators have also issued extensive revised guidelines, in Q&A format, to assist both examiners and depository institutions in implementing the CRA. 64 Fed. Reg. 23,618 (May 3, 1999).

36. David E. Teitelbaum & John M. Casanova, *Regulatory Reform or Retread? The New Community Reinvestment Act Regulations*, 51 BUS. LAW. 831 (1996). *Cf.* Charles R. Whitt, *Eleven Accuse NationsBank of Bias in Mortgages*, 8 LOY. CONSUMER L. REP. 6 (1996) (noting lawsuit against interstate-expanding NationsBank Corp., alleging mortgage-lending discrimination).

37. *See* Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103–328 § 110, 108 Stat. 2364 (1994) (codified at 12 U.S.C. § 2906).

38. On the origin and dynamics of the 2008 economic crisis, *see* MICHAEL P. MALLOY, ANATOMY OF A MELTDOWN 24–38 (Aspen Publishers, 2010).

39. Mike Ferullo, *Community Reinvestment Act Not to Blame for Mortgage Crisis, Fed Official Says*, BNA BANKING DAILY (Nov. 10, 2008).

40. *Id.*

41. *Id.*

42. *See* Thecla Fabian, *Unsound Lending Is Unsound Lending; CRA Did Not Cause Credit Crisis, Bair Says*, BNA BANKING DAILY (Dec. 5, 2008) (reporting on speech).

members remain to some significant extent stakeholders without a stake in the financial services market.

In January 2020, the Office of the Comptroller of the Currency ("OCC") and the FDIC joined a proposed rulemaking that would significantly revise and reorganize the CRA regulations,[43] but the FDIC "elected not to join [the] final rule."[44] In June 2020, the OCC alone published a final rule that did in fact revise and reorganize the CRA regulations in very significant ways,[45] but for the most part these changes were intended to unify and make consistent CRA rules applicable to national banks and federal savings associations. The problem of the under-served communities remains.

Finally, in November 2020, the OCC revisited this problem[46] in a broader perspective, an effort to secure fair access to financial services. Charged with "assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction,"[47] the OCC proposed a regulation "to ensure that national banks and federal savings associations offer and provide fair access to financial services."[48]

The renewed attention to fair access to community stakeholders is encouraging, but the tension and balance with the competing principle of safety and soundness persists. As the OCC explained in introducing its proposed rule:

the OCC has repeatedly stated that while banks are not obligated to offer any particular financial service to their customers, they must make the services they do offer available to all customers *except to the extent that risk factors particular to an individual customer dictate otherwise*.[49]

Hence, safety and soundness will continue to define the boundaries of community involvement, and—perhaps more significantly—the OCC focus is on *individual* access to financial services, not *community* access.[50] It is possible, therefore, that no change in the structural priorities of banking as a regulated industry will occur. Community stakeholders may therefore remain unstaked in the financial services market.

43. 85 Fed. Reg. 1204 (2020) (to be codified at 12 C.F.R. pts. 25, 195 (OCC rules), 345 (FDIC rule)).

44. 85 Fed. Reg. 34,734, 34,734 n.2 (2020).

45. 85 Fed. Reg. 34,734 (2020) (codified at 12 C.F.R. pt. 25; removing 12 C.F.R. pt. 195).

46. 85 Fed. Reg. 75,261 (2020) (to be codified at 12 C.F.R. pt. 55).

47. 12 U.S.C. § 1(a).

48. 85 Fed. Reg. at 75,261.

49. *Id.* at 75, 262 (emphasis added).

50. *Id.* at 75, 263 ("The OCC discussion of the proposal refers to this as the "principle of individual, rather than category-based, customer risk evaluation.").