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STRENGTHENING MORTGAGE LENDING DISCRIMINATION SAFEGUARDS: THE REQUISITE NEED FOR MODERNIZING THE COMMUNITY REINVESTMENT ACT

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Homeownership is the American dream. Not only does it promote personal autonomy and achievement, it is beneficial to neighborhoods in that it increases residents' involvement in their own community.[1] One of the primary methods of accumulating wealth today is home ownership.[2] Ownership enables one to borrow against their home to finance the necessities and luxuries of life, education, retirement, and vacations.[3] Unfortunately, for most, home ownership is unfeasible without access to credit.[4] Minorities often face discrimination in attempting to obtain credit to finance a mortgage, resulting in an inability to become a homeowner and pursue the American dream.

This comment will highlight the Community Reinvestment Act ("CRA"), a congressional vehicle for encouraging lending institutions to adopt non-discriminatory practices. CRA standards and enforcement mechanisms will be examined, focusing on the impact of financial modernization and technology on CRA principles. Section I investigates the problem of discrimination in mortgage lending. Section II addresses the regulatory framework and the limits of the CRA, as well as methods of enforcing CRA standards. Financial modernization, specifically the Gramm-Leach-Bliley Act ("GLBA"), and the phenomenon of internet banking are the focuses of Section III. Particular provisions of the GLBA, which weaken the CRA, are scrutinized, along with the effects of internet banking on the CRA. Section IV proposes solutions to strengthen CRA principles in light of financial modernization and technology.

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1. *See generally* THE URBAN INSTITUTE, MORTGAGE LENDING DISCRIMINATION: A REVIEW OF EXISTING EVIDENCE (Margery Austin Turner & Felicity Skidmore eds., 1999) (claiming homeownership increases individuals' stake in their future, which strengthens neighborhoods and sense of control over life), *available at* http://www.urban.org/UploadedPDF/mortgage_lending.pdf.

2. *Id.*

3. David H. Harris, Jr., *Using the Law to Break Discriminatory Barriers to Fair Lending for Home Ownership*, 22 N.C. CENT. L.J. 101, 101 (1996).

4. For the majority, access to credit is necessarily essential in the home-buying process. Harris, *supra* note 3, at 101.

I. THE PERSISTENT PROBLEM OF MORTGAGE LENDING DISCRIMINATION

Prejudicial practices in mortgage lending have persisted throughout history.[5] Since the Reconstruction Era, minorities have encountered discrimination in housing and lending.[6] Despite the enactment of the Fair Housing Act,[7] prohibiting discrimination in real estate transactions, and the Equal Opportunity Act,[8] proscribing discrimination in denying credit, discriminatory practices in mortgage lending are nevertheless widespread.

A. *Recent Studies Evidencing Mortgage Discrimination*

Housing Discrimination Study 2000 ("HDS 2000") is a recent study released by the U.S. Department of Housing and Urban Development.[9] HDS 2000 revealed the presence of housing discrimination at unacceptable levels, specifically for Hispanic and African American homebuyers, as well as Asians and Native Americans.[10] Caucasian homebuyers were particularly preferred over minorities—the study documented non-minority homebuyers were favored over African Americans in 17% of the tests, and favored in 19.7% of the tests over Hispanics.[11] Specifically, non-minority buyers enjoyed more information and assistance in financing aspects, further opportunities to inspect homes, additional encouragement not offered to minority buyers, and were more likely to be shown homes in non-minority neighborhoods.[12] Additionally, the study found increases in "geographic steering," a trend encouraging individuals to buy homes in neighborhoods of their same race.[13]

Complementing the HDS 2000 study, the National Fair Housing Alliance ("NFHA") conducted a study that revealed lending discrimination

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5. *Id.* at 102.

6. *See id.* (alleging historical discrimination during the Reconstruction Era regarding credit to raise crops and buy or build a home, specifically towards African Americans).

7. 42 U.S.C. § 3605 (2004) (prohibiting discrimination in the residential real estate market and real estate related transactions).

8. Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1693f (1994) (prohibiting discrimination of a creditor against an applicant in any credit transaction).

9. THE URBAN INSTITUTE: METROPOLITAN HOUSING & COMMUNITIES, DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE 1 HDS 2000 (2002), *available at* http://www.huduser.org/publications/pdf/Phase1_Report.pdf.

10. The study conducted 4,600 paired tests in 23 cities nationwide during 2000, each pair consisting of a minority and a non-minority posing as identical homebuyers. HDS is the third pair-testing study by HUD measuring discrimination in housing markets. *Id* at iv.

11. *Id.*

12. *Id.*

13. *Id.* at 8.

in the mortgage application process.[14] The study contains results from audits conducted by fair housing organizations using testers posing as refinancers or first-time homebuyers.[15] NFHA evidenced lenders denying information to minorities during the application phase.[16] Specifically, lenders discouraged minorities from participating in the process by urging them to find other lenders and representing that "procedures would be long and complicated."[17] Though equally qualified, minorities were quoted higher mortgage rates or experienced outright repudiation, while non-minorities received assistance in correcting credit problems and additional information on various types of loan products.[18] HDS 2000 and the NFHA study discernibly evidence minority discrimination in the lending process.

Further discriminatory practices consist of discouraging minorities from applying for a loan, rejecting loan applications from minorities, or implementing harsh, adverse loan terms despite creditworthiness.[19] Minorities also face discrimination in the automated underwriting process.[20] The underwriting process may "give greater points to applicants from geographic areas that are predominately white than to applicants from geographic areas that are predominately minority."[21]

Additional instances of lending discrimination are discussed by the Federal Interagency Task Force on Fair Lending. According to the Task Force policy, a lender may not:

> (1) fail to provide information or services or provide different information or services regarding any aspect of the lending process, including credit availability, application procedures, or lending standards; (2) discourage or selectively encourage applicants with respect to inquiries about or applications for credit; (3) refuse to extend credit or using different standards in determining whether to extend credit; (4) vary the terms of credit offered, including the

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14. *Id.* at iv.

15. THE URBAN INSTITUTE, *supra* note 1.

16. *Id.*

17. *Id.*

18. THE URBAN INSTITUTE, *supra* note 9.

19. HUD, together with the regulatory agencies overseeing CRA compliance of financial institutions, adopted this policy statement describing the general principles the agencies will consider in identifying discriminatory practices in lending and violations of the FHA and ECOA. Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266, 18268 (proposed Apr. 15, 2004).

20. *See* Charu A. Chandrasekhar, *Can New Americans Achieve the American Dream?: Promoting Homeownership in Immigrant Communities*, 39 HARV. C.R.-C.L.L. REV. 169, 186 (2004) (arguing that because minorities are of differing racial groups than mortgage lenders, they face more discrimination in the underwriting process).

21. *Id.* at 184.

amount, interest rate, duration, or type of loan; (5) use different standards to evaluate collateral; and (6) treat a borrower differently in servicing a loan or invoking default remedies.[22]

Undeniably, discriminatory lending practices are rampant throughout the mortgage process. In an attempt to solve discrimination, the legislature drafted, adopted, and amended the Community Reinvestment Act.[23] Though the CRA has manifested positive results in lending discrimination, recent campaigns threaten CRA principles. As discussed below, financial modernization and the rise of internet banking may substantially compromise the future of the CRA. Without modernizing the CRA, its conviction towards assuring fair lending and community reinvestment will eventually become obsolete.

II. THE COMMUNITY REINVESTMENT ACT: A POTENTIAL SOLUTION TO LENDING DISCRIMINATION

Adopted in 1977, the CRA encourages banks to reinvest in their local communities, particularly in low and moderate-income neighborhoods.[24] Specifically, the Act requires each financial institution to "demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business."[25] The congressional intent behind the CRA stems from a desire to cure the underlying evils of mortgage discrimination, redlining, and disinvestment.[26] The Act's purpose is to remedy geographical disparities in allocating credit, specifically in lower-income communities.[27]

A. *Redlining and Disinvestment*

Redlining, a historic practice, is specifically termed from the process of "outlining in red certain poor neighborhoods on a map . . . in order to indicate areas considered too high a risk for lending."[28] The systematic

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22. Policy Statement on Discrimination in Lending, 59 Fed. Reg. at 18267-68.

23. *See* Community Reinvestment Act (CRA), 12 U.S.C. §§ 2901-2907 (2004).

24. The CRA requires each federal agency to use its authority upon examining financial institutions to encourage the institution to meet the needs of the local community and ensure that the institution serves the community's needs with safe and sound operation. *See id.*

25. *Id.* at § 2901(a)(1).

26. Marcia Johnson et al., *The Community Reinvestment Act: Expanding Access*, 12 KAN. J.L. & PUB. POL'Y. 89, 90 (2002). One factor associated with redlining is community disinvestment. *Id.*

27. Keith N. Hylton & Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and The Community Reinvestment Act*, 85 GEO. L.J. 237, 237 (1996).

28. Johnson et al., *supra* note 26, at 90.

denial of extending credit based on the applicant's community of residence is still practiced by institutions today.[29] According to some, financial risk is not the motive behind redlining, rather the practice stems from impermissible racial prejudice.[30] Considerations of individual characteristics, such as creditworthiness, are purely fictional.[31] This geographic practice of denying loans inauspiciously impacts minorities who reside in redlined communities.

The other evil Congress intended to ameliorate by enacting the CRA is community disinvestment.[32] This materializes when banks accept local deposits and reinvest the funds outside the local community.[33] In other words, a financial institution practicing disinvestment invests all of its deposits outside the community of origin. This invidious practice removes financial resources from the community the bank serves.[34]

The combination of redlining and community disinvestment produces a disconcerting cycle. Lenders conclude redlined communities are poor collateral; rather than extending credit to these communities, credit is tendered elsewhere.[35] Mortgage loans, a type of credit, are denied in redlined communities or are offered only under adverse terms. As a result, the community's net worth decreases. This diminution reaffirms the belief that the community is poor collateral. Consequently, credit is never extended to the community. Redlined residents are deprived of the possibility of becoming homeowners – an opportunity that would increase the value of their neighborhoods and influence banks to reinvest in their community.

B. *The Regulatory Policy of the CRA*

The CRA is exclusively applicable to banks.[36] To comply with the CRA, banks must lend to low and moderate-income communities.[37] More specifically, banks must satisfy the CRA requirements in three ex-

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29. *Id.*

30. *Id.* at 90-91 (alleging banks refused to lend to redlined-individuals on the basis of race).

31. *Id.* at 91.

32. *Id.* at 92.

33. *Id.*

34. David Evan Cohen, Comment, *The Community Reinvestment Act - Asset or Liability?*, 75 MARQ. L. REV. 599, 601 (1992).

35. *See id.* (contending that lenders typically refuse to extend loans to redlined communities because they view such communities as poor collateral).

36. Richard D. Marsico, *Enforcing the Community Reinvestment Act: An Advocate's Guide to Making the CRA Work for Communities*, 17 N.Y.L. SCH. J. HUM. RTS. 129, 134 (2000).

37. 12 U.S.C. §§ 2903(a).

plicit substantive areas: community delineation, disclosure, and compliance.[38]

The first requirement, delineating the community served, is for the bank to define independently.[39] Though autonomous in this aspect, banks may not exclude low or moderate-income communities.[40] Further, the contiguous area surrounding the financial institution must be included.[41]

Initially, the disclosure requirement directed institutions to post a CRA notice at each branch.[42] Notice informs the public on methods for accessing the institution's CRA performance and submitting comments about the institution's CRA compliance.[43] A 1989 amendment consummated more stringent disclosure requirements.[44] Institutions must publicly make available a CRA statement including its community delineation and information regarding the type of credit extended in the community.[45]

CRA compliance, the third requirement, is measured by a composite rating determined from three tests initialized during review.[46] First, the lending test measures the institution's record of equitable lending in terms of mortgages, small business, and farm lending.[47] Second, the investment test examines the amount of investments made within the community.[48] The dollar amount, along with the innovativeness and complexity of the investments, are scrutinized.[49] Lastly, the service test analyzes the availability of services, the distribution of branches, and the methodology for creating accessible banking services for low and moderate-income communities.[50] Upon completion of these tests, the regulatory agency assigns a rating for the institution; the ratings include "outstanding," "satisfactory," "needs to improve," or "substantial noncompliance."[51]

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38. A. Brooke Overby, *The Community Reinvestment Act Reconsidered*, 143 U. PA. L. REV. 1431, 1459 (1994-1995).

39. *See id.*

40. *Id.*

41. *Id.*

42. *Id.* at 1460.

43. *Id.*

44. *Id.*

45. *Id.*

46. Johnson et al., *supra* note 26, at 95.

47. *Id.*

48. *Id.*

49. *Id.*

50. Overby, *supra* note 38, at 1472.

51. Mark A. Malaspina, *Special to the National Law Journal*, NAT'L L.J., Mar. 6, 2002, at B9.

C. *Enforcing the CRA's Regulatory Policies*

Two indirect mechanisms assist in enforcing CRA compliance: regulatory review and community groups. The first device, regulatory review, is provided by the CRA.[52] The Act delegates enforcement to four specific regulatory agencies; under this authority the agencies examine banks for compliance.[53] The agencies are assigned to review institutions based on the type of bank the agency regulates.[54] The Office of the Comptroller of the Currency manages national banks, the Office of Thrift Supervision oversees savings associations, the FDIC regulates state chartered banks and savings banks that are not members of the Federal Reserve, and lastly, the Federal Reserve regulate state chartered banks.[55]

An agency's reviewing power is only invoked in two isolated situations: review transpires during the periodic CRA examination or upon a bank's request to modify its structure.[56] A request to modify structure typically follows when a bank applies to "obtain a charter, obtain deposit insurance, establish a branch, relocate a home office or branch, merge with another bank, or obtain the assets or assume the liabilities of another bank."[57] The agency may deny the restructure application if the institution has received a poor CRA rating.[58] However, substantial deference is granted to the reviewing agency,[59] a deference that may cause agencies to grant applications that should in fact be denied.

As a result of this deference, enforcement through the second indirect mechanism is imperative to ensure institutions remain accountable to the communities they serve.[60] This intermediary is the "community group."[61] As one commentator has emphasized, "The success or failure of the CRA currently rests in the hands of community groups. The energy, activism, and sophistication of these groups can affect the conduct of financial institutions and the amount of attention regulators focus on lenders."[62]

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52. Regulatory agencies are required to use their authority when examining financial institutions for CRA compliance. 12 U.S.C. § 2901(b).

53. Marsico, *supra* note 36, at 135.

54. *Id.*

55. *Id.*

56. *See id.*

57. *Id.* at 137.

58. *See id.* at 138.

59. *See id.* (arguing that courts afford substantial deference to regulatory agencies in application decisions).

60. Cohen, *supra* note 34, at 613 (contending that the role of community groups is vital to the CRA enforcement).

61. *Id.*

62. *See id.*

Community groups have two primary means of highlighting an institution's CRA compliance rating.[63] Groups may file a criticism regarding the failure to comply with CRA lending.[64] Such comments will be added to the institution's public file and may receive special inquiry by the overseeing regulatory agency.[65] Alternatively, groups may protest.[66] Agency response is almost guaranteed by this method.[67] In sum, community groups can influence banks to comply with CRA principles and, thereby, influence lending policy.[68]

D. *Limitations of the CRA*

The CRA is a positive piece of legislation. It encourages banks to reinvest in local communities and assists in alleviating mortgage discrimination.[69] Nonetheless, the Act suffers from notable limits. For instance, the CRA does not provide for a private cause of action.[70] Further boundaries are exacerbated by the adoption of the Gramm-Leach-Bliley Act, as well as the trend of technological modernization.

As initially drafted, the CRA is unduly vague and broad.[71] Critics of the Act's language have remarked that "regulations are framed so broadly that they provide little guidance for institutions on how compliance will be measured."[72] As one commentator contends, the CRA fails to establish loan allocations or lending goals for low-income neighborhoods,[73] and it also fails to proscribe specific activities such as redlining or disinvestment.[74] Although the CRA attempts to restrict these practices, "it fails to establish a comprehensive legislative scheme for remedying such abuses."[75]

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63. *Id.*
64. *Id.*
65. *Id.*
66. *See id.*
67. *Id.*
68. *See id.*
69. *Id.*
70. Robert G. Schwemm, *Introduction to Mortgage Lending Discrimination Law*, 28 J. MARSHALL L. REV. 317, 320 (1995).
71. *See* Cohen, *supra* note 34, at 613 (pointing out that the CRA is often criticized for being so vague as to render it meaningless).
72. *Id.*
73. *See* Richard D. Marsico, *Fighting Poverty Through Community Empowerment and Economic Development: The Role of the Community Reinvestment and Home Mortgage Disclosure Acts*, 12 N.Y.L. SCH. J. HUM. RTS. 281, 284 (1995) (stressing that the CRA's lack of loan quotas for low-income neighborhoods is one of the Act's limits).
74. *See* Cohen, *supra* note 34, at 613 (contending that the CRA does not specifically address the problem of redlining or a methodology to prohibit it).
75. *Id.*

One restrictive limit is the CRA's model of "local bank consumer participation."[76] The local bank consumer model encompasses the idea that individuals go to the local community bank to make deposits, apply for loans, and engage in other banking activities.[77] This model envisions consumers participating in banking services, such as making deposits or applying for loans, at their local branch office.[78] However, current local banking is archaic. As a result of financial modernization and the growth of internet banks, local community banking is superseded by a national banking paradigm.[79] Therefore, to maintain an enforceable presence in the banking industry, CRA policy must be realigned to apply to a national banking framework.

Currently, the CRA applies solely to banks insured under the FDIC or OTS.[80] It does not extend to independent mortgage companies, community credit unions,[81] or financial affiliates of banks.[82] Consequently, the CRA's limited reach leaves vital lending institutions unrestrained by CRA compliance standards.

Certain provisions of the Gramm-Leach-Bliley Act (GLBA) dissimulate CRA enforceability.[83] As a result of the GLBA, "banks aren't simply banks anymore."[84] The Act reconstructed the financial services industry, allowing banks to engage in activities previously proscribed.[85] Banks may now partner with investment or securities firms to become financial holding companies.[86] As a result of the growth of these holding

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76. Susan R. Jones, *Planting Money Where It's Needed Most: A Look at the Community Reinvestment Act After 25 Years*, BUS. L. TODAY, Nov. - Dec. 2003, at 47.

77. *Id.*

78. *See id.*

79. Robert W. Dixon, *The Gramm-Leach-Bliley Financial Modernization Act: Why Reform in the Financial Services Industry Was Necessary and the Act's Projected Effect on Community Banking*, 49 DRAKE L. REV. 671, 676 (2001).

80. Jonathan P. Tomes, *The "Community" in the Community Reinvestment Act: A Term in Search of a Definition*, 10 ANN. REV. BANKING L. 225, 230 (1991).

81. *See* Liz Laderman, *Has the CRA Increased Lending For Low-Income Home Purchases?*, ECON. LETTERS (Federal Reserve Bank of San Francisco), June 25, 2004, at 1, *available at* http://www.frbsf.org/publications/economics/letter/2004/el2004-16.html.

82. *See* Tomes, *supra* note 80, at 230-31.

83. *See* Gramm-Leach-Bliley Financial Modernization Act (GLBA), 12 U.S.C. § 1843 (2004).

84. Jones, *supra* note 76, at 47-48.

85. 12 U.S.C. § 1843.

86. Previously, banks were not permitted to engage in non-banking activities. David L. Glass, *The Gramm-Leach-Bliley Act: Overview of the Key Provisions: Presentation Before the State of New York Banking Department*, 17 N.Y.L. SCH. J. HUM. RTS. 1, 1-2 (2000). However, in 1999 Congress approved the GLBA permitting banks to expand their permissible financial activities. *Id.*

companies, the number of CRA-exempt institutions has increased.[87] Covered institutions may manipulate CRA ratings by shifting assets to non-covered affiliates. The GLBA also conveys the perception that CRA exams are more lenient.[88] Furthermore, GLBA's sunshine provision and its conflicting standards for different banks negate CRA principles.[89]

Additionally, technological advances in the banking industry impact CRA provisions. The movement towards internet banking questions the CRA's definition of 'community.'[90] Moreover, this luxury may act as a form of discrimination. Individuals unable to obtain personal computers and internet service, the majority of whom are minorities, are left without online access to credit.

III. THE IMPACT OF THE GRAMM-LEACH-BLILEY ACT AND INTERNET BANKING ON THE COMMUNITY REINVESTMENT ACT

A. *Financial Modernization: The Gramm-Leach-Bliley Act*

The Gramm-Leach-Bliley Act of 1999 drastically changed the structure of the financial world.[91] The Act, repealing the Depression Era's banking framework, allows financial institutions to merge with insurance companies and securities underwriting firms for the first time in history.[92] In essence, new financial holding companies are permitted to engage in any type of financial activity. Opponents of the Act, many of whom are community bank proponents, view the legislation as reducing regulatory safeguards and consumer choice.[93] The result of the permissible merging is the birth of immeasurable financial institutions.[94] Localism will be replaced.[95] Inevitably, these money-making conglomerates are predisposed

87. Deborah Goldberg, *Remarks of Deborah Goldberg*, 17 N.Y.L. SCH. J. HUM. RTS. 67, 68 (2000-2001).

88. *See* NAT'L TRAINING & INFO. CTR., THIS OLD REG: THE COMMUNITY REINVESTMENT ACT NEEDS RENOVATION 10 (2002), *available at* http://www.ntic-us.org/currentevents/press/pdf/Findings.pdf (alleging that the current rating system is geared toward passing financial institutions).

89. *See* 12 U.S.C. § 1843.

90. Cheryl R. Lee, *Cyberbanking: A New Frontier for Discrimination?*, 26 RUTGERS COMPUTER & TECH. L.J. 277, 289 (2000).

91. Martin E. Lybecker, *Financial Holding Companies and New Financial Activities of the Gramm-Leach-Bliley Act,* SJ071 ALI-ABA 75 (2004) (stating that if an institution elects to become a financial holding company, permissible activities include those that are "financial in nature or incidental to such financial activity").

92. *See* Dixon, *supra* note 79, at 671-72.

93. *Id.* at 675-76 (contending that the enactment of the GLBA would create huge financial institutions limiting consumer choice).

94. *See id.* at 676.

95. Lawrence J. White, *Financial Modernization: What's in it for Local Communities?,* 17 N.Y.L. SCH. J. HUM. RTS. 115, 121 (2000-2001).

with new business ventures rather than community banking. "Financial institutions have gained unprecedented powers and privileges, and yet they have not been asked to assume any more responsibility to serve underserved communities."[96] Not only does the GLBA hinder progress for community reinvestment, certain provisions of the Act directly impede CRA success.

1. The Small Bank Provision

The GLBA changed the CRA's small bank provision. Presently, smaller institutions, with assets under $250 million, are only subject to CRA exams every four or five years, depending on their current CRA rating.[97] Institutions with an "outstanding" grade are subject to review every five years and those deemed "satisfactory" are reviewed every four years.[98]

The rationale behind the alteration included lessening the regulatory burden of smaller institutions.[99] However, the provision "is unlikely to reduce the regulatory burden for them, because their safety and soundness and consumer compliance examinations will not be on shorter cycles, and their CRA exams, although less frequent, will cover more time."[100] Therefore, smaller institutions will not affirmatively benefit from the weakened provision.[101] On the other hand, the likelihood of affliction to local communities and the minorities served by smaller banks is considerable. Communities will be less successful in influencing institutions to engage in CRA lending. Banks on the infrequent exam cycle may discount CRA compliance the first two years after an exam. Community focus will only manifest shortly before the institution's review. Thus, fewer exams will promote reinvestment considerations only before regulatory review rather than on a permanent basis.

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96. Malcolm Bush & Katy Jacob, *Financial "Progress" Leaves Communities Behind*, SHELTERFORCE ONLINE, Nov.-Dec. 1999, *at* http://www.nhi.org/online/issues/108/woodstock.html (last visited Mar. 26, 2005).

97. John Taylor, *Treasury Underestimates the Damage that Gramm-Leach-Bliley Did to CRA*, AM. BANKER, Feb. 2, 2001, at 14; Deborah Goldberg, *Remarks of Goldberg supra* note 87, at 69.

98. Goldberg, *supra* note 87, at 69.

99. Prior to the Act, small banks were required to comply with the CRA in the same manner and under the same exam schedule as larger institutions. Richard D. Marsico, *Forward* to Symposium, *Financial Modernization: The Effect of the Repeal of the Glass-Stegall Act on Consumers and Communities*, 17 N.Y.L. SCH. J. HUM. RTS. i, vi (2000-2001). The GLBA reduced this burden for small banks by requiring a review every four to five years. *Id.*

100. *Id.*

101. *See id.*

In addition to disconnecting CRA requirements because of the small bank provision, clientele served by smaller institutions will also suffer. This clientele encompasses a majority of the public. "The lower frequency [of exams] will apply to 80 percent of all banks and thrifts."[102] Consequently, a meager 20 percent of banks will remain CRA accountable on a permanent basis. A great more than a majority of those served will be served by banks who are remotely concerned with CRA compliance. Therefore, under the new provision, a substantial number of clientele will be served by financial institutions who are distantly concerned in reinvesting in the community served.

2. Exempt Institutions

The GLBA neglects expanding CRA principles to other segments of the financial industry.[103] Banking institutions covered by the GLBA are comprised of traditional banks and their affiliates, as well as insurance and securities firms.[104] However, only traditional banks are subjected to CRA review.[105]

Performance of an institution's non-CRA affiliates is not a mandatory part of the institution's CRA examination. Banks have the option to choose inclusion of affiliates and subsidiaries in their CRA exam.[106] This choice may lead to potential manipulation of CRA ratings.[107] A bank may opt not to include an affiliate that might have an adverse effect on its rating. The inclusion option renders CRA ratings that fail to reflect an accurate representation of an institution's lending practices.[108]

For example, State Farm Insurance, a financial firm, offers savings accounts, checking accounts, money market accounts, insurance, and home mortgage and equity loans.[109] Included in Paine Webber's services are insured deposits and home mortgages.[110] Merrill Lynch offers checking

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102. Vincent Di Lorenzo, *Financial Services Modernization Provides an Opportunity for Increased Responsiveness to Community Needs*, 10 J. AFFORDABLE HOUS. & COMTY. DEV. L. 177, 187 (2001).

103. Goldberg, *supra* note 87, at 68.

104. *See generally* Bush & Jacob, *supra* note 96.

105. *See* Goldberg, *supra* note 87, at 68.

106. Under current CRA rules, institutions have the option of including affiliates in their CRA exam. *See* GAIL PARSON, OUTSIDE THE LAW: HOW LENDERS DODGE COMMUNITY REINVESTMENT 9 (rev. ed. 2003), *available at* http://www.ntic-us.org/issues/cra/outsidethelaw/Report.pdf.

107. *See* NAT'L TRAINING & INFO. CTR., *supra* note 86, at 10 (recognizing that under the current regulation institutions have the option to include affiliates in or out of their CRA exam).

108. *See id.*

109. Lorenzo, *supra* note 102, at 179.

110. *Id.*

accounts and home mortgages.[111] These depository institutions may "choose to have affiliate activities considered when regulators assess compliance with the CRA regulations' lending, service and investment tests."[112] The power of companies like Merrill Lynch and their affiliates creates the ability to manipulate ratings.[113] Rarely would an institution undertake necessary steps to insure CRA compliance of its affiliates when inclusion of the affiliates is optional.[114] If an affiliate threatens the institution's CRA rating, the affiliate will simply be excluded from review.

As many affiliates are exempt from CRA review, they may offer adverse loans or deny credit to the low-income residents the CRA was enacted to protect.[115] Opponents of the Act believe "banks should not be permitted to avoid CRA obligations when their affiliates conduct lending activity."[116] Indeed, all lending activity, whether conducted by banks or bank affiliates, should come under CRA review.[117]

Since the adoption of the CRA, and partially due to enactment of the GLBA, the number of CRA-covered institutions has steeply declined.[118] The increase in institutions not covered by the CRA exceeds 70%.[119] In addition to exempt affiliates, the GLBA omits extending CRA compliance to mortgage lending institutions or credit unions.[120] For example, in 2000, private mortgage companies in Boston maintained 70% of the market share of mortgage loans, which is a significant increase from 29% in

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111. *Id.*

112. *Id.*

113. *See* Malaspina, *supra* note 51, at B9 (illustrating GLBA does not prevent a financial holding company from shifting assets to non-CRA covered institutions).

114. *See* Timothy R. McTaggart et al., *Gramm-Leach-Bliley Act Provisions Relating to CRA and Community Development* (1999), *available at* http://library.lp.findlaw.com/articles/file/00105/000756/title/Subject/topic/Finance%20and%Banking_Bank%20Holding%20Companies/filename/financeandbanking_1_550 (identifying that instead of insuring CRA compliance, institutions may simply close institutions which fail to meet compliance standards).

115. *See* 12 U.S.C. §§ 2902(2) (defining "regulated financial institutions" to which the Act extends to as insured depository institutions); *see also* Johnson et al., *supra* note 26, at 100 (noting that the GLBA allows banks to partner with affiliates permitting banks to elect organizing themselves as institutions other than insured depository institutions, such as financial holding companies or form financial subsidiaries).

116. Don Allen Resnikoff, *The Consumer Advocates v. The Banks: Public Debate of Regulation Issues Survives Passage of the Financial Services Modernization Act*, 12 LOY. CONSUMER L. REV. 284, 291 (2000).

117. *Id.*

118. *See generally* Bush & Jacob, *supra* note 96.

119. *Id.*

120. *Id.*

1980.[121] Absent inclusion of mortgage lenders, the GLBA stimulates increases in the amount of home mortgages originated in institutions not covered by the CRA.[122]

Lastly, covered institutions are only required to maintain a minimum CRA rating before the institution may permissibly change structure by incorporating one or more affiliates.[123] The GLBA does not stipulate a penalty if an institution does not maintain a satisfactory rating after the approval of the expansion.[124] Following approval, the newly incorporated affiliate is not covered under the CRA.[125]

3. Grade Inflation

As a result of financial modernization, CRA grades have inflated.[126] CRA compliance is no longer regarded as strict; almost any institution will pass regardless of their lending practices.[127] A recent study, conducted by the Greenlining Institute, reports that "barely 1% of banks and thrifts received a 'substantial noncompliance' grade, the equivalent of an F, in the 860 exams conducted last year."[128] The National Training and Information Center ("NTIC") states "97 percent of banks receive a satisfactory or outstanding rating on their CRA exams."[129] One regulatory agency was condemned for dispensing a disproportionately high number of top grades.[130] The current rating system is clearly geared toward passing an institution, regardless of its record of community reinvestment.[131]

One of the NTIC's policy recommendations is to construct CRA ratings that more adequately reflect a bank's performance.[132] Currently, if a bank receives a meager 46 out of 100 points, the bank still receives a "satisfactory" rating.[133] The lower rating of "needs to improve" falls between 21 to 42 percent of compliance.[134] So, if a "passing" grade is over-

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121. Peter Dreier, *The Future of Community Reinvestment: Challenges and Opportunities in a Changing Environment*, J. AM. PLANNING ASSN., Sept. 22, 2003, at 341.

122. *See* Lorenzo, *supra* note 102, at 178.

123. *See generally* McTaggart et al., *supra* note 114.

124. *Id.*.

125. *Id.*

126. Brad Berton & Susan Futterman, *Community Groups See Continuing "Chill" on CRA* (Oct. 2, 2002) (on file with author).

127. *Id.*

128. *Id.*

129. Nat'l Training & Info Center, *NTIC's Proposed Changes to the CRA* (2003), *at* http://www.ntic-us.org/issues/cra/cra-proposed-changes.htm (last visited Mar. 26, 2005).

130. *See* Berton & Futterman, *supra* note 126.

131. *See generally* NAT'L TRAINING & INFO. CTR., *supra* note 88, at 17.

132. *See id.*

133. *See id.*

134. *See id.*

whelmingly likely, why would an institution strive to emulate superior CRA lending policies?

Grade inflation renders the rating system a wholly ineffective tool for measuring compliance, as Greenlining's executive director contends.[135] When one in five institutions receive an "outstanding" rating and none receive a "needs to improve" rating, how can one decipher which institutions actually need to improve? Grade inflation, resulting from relaxed CRA provisions due to enactment of the GLBA[136], serves no motivational function for institutions to be concerned with community lending. Instead, the overwhelming probability of passing the CRA exam, despite arbitrary lending policies, motivates institutions to be concerned with anything but community reinvestment.

4. The Sunshine Provision

Perhaps the most deterring provision of the GLBA to the CRA is the controversial "sunshine provision." This provision requires all CRA agreements between banks and community groups to be disclosed publicly.[137] The provision is burdensome for banks and community groups, resulting in the discouragement of community focused lending agreements.

During the drafting phase of the GLBA, Senator Phil Gramm, the leading proponent and namesake of the GLBA, verbally agreed with former President Clinton that the provision would endorse only a "comprehensive" disclosure requirement.[138] However, the final bill required a detailed and itemized list of expenditures made pursuant to CRA agreements.[139] Penalties are imposed on nonprofit organizations for failing to disclose CRA agreement; however, banks are not penalized for failure to disclose agreements.[140] The apparent initiative behind the stringent disclosure requirement stems from a contrived notion that CRA lending agreements are suspect.[141]

Under the sunshine provision, community groups and lenders are required to fully and publicly disclose agreements made in connection with

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135. *See* Berton & Futterman, *supra* note 126.

136. *See* NAT'L TRAINING & INFO. CTR., *supra* note 88, at 10 (stating that community groups believe financial modernization has allowed banks to reduce lending in low and moderate-income communities).

137. *See* Taylor, *supra* note 97.

138. *See generally* Bush & Jacob, *supra* note 96.

139. *Id.*

140. *Id.*

141. *See generally* McTaggart et al., *supra* note 114.

the CRA.[142] Covered agreements include loans to community groups between the amount of $10,000 and $50,000.[143] Banks are required, at the least, to file annual reports to regulatory agencies detailing the agreement.[144]

In his article *Financial Modernization: What's in it for Local Communities?*, Michael S. Bylsma states:

> A financial institution must report annually to its federal regulator on the fees, payments, or loans it makes to or receives from other parties to a covered agreement and on the terms and conditions of these payments, fees, or loans. The annual report also must include aggregate data on the loans, investments, and services each party provides under a covered agreement.[145]

The community group must report the use of funds in an itemized list, including "compensation, administrative expenses, travel, entertainment, and consulting and professional fees."[146]

The sunshine provision imparts a "chilling effect on CRA activity."[147] The extensive and burdensome requirements discourage lenders from lending to community groups and community groups from pursuing CRA agreements.[148] Even proponents of the GLBA admit the legislation will lead to higher compliance costs.[149] Requiring additional reports from lenders, already weary of CRA compliance, serves as a deterrent to meet and work with community groups. The regulatory burdens of the sunshine provision will undoubtedly result in fewer CRA agreements.

Community groups will suffer from the compliance demands. Additional labor and financial resources will be required to persevere through the extensive disclosure prerequisites.[150] Unfortunately, most community groups are nonprofit organizations or operate on a low budget and

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142. *See* Michael S. Bylsma, *Financial Modernization: What's in it for Local Communities?*, 17 N.Y.L. SCH. J. HUM. RTS. 39, 47 (2000).

143. *Id.* at 48.

144. *Id.* at 49.

145. *Id.*

146. *Id.*

147. Marsico, *supra* note 99, at vi.

148. *See id.* at vi-vii (describing the "chilling effect," as termed by Deborah Goldberg of the Center for Community Change, as the resulting discouragement of lenders and community groups to participate in CRA-related lending due to the increased burdens imposed by the GLBA).

149. Press Release, Dept. of Treasury, The Community Reinvestment Act After Financial Modernization: A Final Report (Jan. 2001), *available at* http://www.treas.gov/press/releases/reports/finalrpt.pdf.

150. *See* NAT'L. TRAINING & INFO. CTR, *supra* note 106.

do not have resources readily available.[151] Community groups will be confronted with a choice: either they will forgo lending agreements or they will disobey the law by disregarding disclosure requirements. Overall, the provision will discourage "the partnerships that have emerged between banks and community groups, both of which have been fundamental to CRA's success."[152]

The president of the NCRC contends "the sunshine statute strikes at the heart of the CRA."[153] The CRA strives to encourage members of the public to address the credit needs of their community.[154] Communities have the right to seek reinvestment opportunities and inform banks about the positive aspects of lending.[155] However, it is unlikely banks will appreciate the positive prospects of CRA lending while under the stringent disclosure requirements. The sunshine provision renders CRA-related lending suspect by requiring disclosure.[156] Consequently, successful partnerships between community groups and lenders will diminish.[157] John Taylor, NCRC's president, argues that the sunshine provision will impede lending to low-income communities because it scrutinizes the private sector activities of financial institutions.

Accompanying the disclosure requirements, the sunshine provision may also implicate the First Amendment.[158] The National Reinvestment Coalition argues the provision violates basic First Amendment principles as it infringes on the public's right to free speech.[159] When free speech is imposed upon by the enactment of a statute, Congress must articulate a substantial and compelling need to justify the law. However, the sunshine requirement fails to demonstrate a compelling reason that justifies the infringement of free speech rights.[160]

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151. *See* Johnson et al., *supra* note 26, at 101 (asserting that the cost of reporting will dissipate community group funds).

152. Marsico, *supra* note 99, at vii.

153. Press Release, National Community Reinvestment Coalition, CRA Sunshine Melts First Amendment Rights and Community Reinvestment (July 11, 2000) (on file with author) [hereinafter Press Release].

154. *See* 12 U.S.C. § 2901.

155. *See* Press Release, *supra* note 153 (contending that the public has the right to articulate credit needs to financial institutions).

156. *See* 12 U.S.C. §1831y(a); *see also* Taylor, *supra* note 97, at 14.

157. Press Release, *supra* note 153.

158. *Id.*

159. *See id.* (highlighting the NCRC's proposition that the CRA violates First Amendment rights) (on file with author).

160. *See id.* (stating that namesake of the GLBA, Phil Gramm, failed to demonstrate a compelling need for the law).

B. *The Technological Divide and Internet Banking*

1. Internet Banking Basics

Congress, by enacting the GLBA, reduced regulation within the banking industry.[161] One thing Congress failed to address in the Act was the rise of internet banking and the resulting effect on the CRA.[162]

Many of the 1977 CRA founders had never anticipated the internet.[163] The concept of cyberbanking was unfathomable. Since the CRA's enactment, technology has transformed the banking business.[164] Many institutions offer a full service financial center online, including balance inquiry, fund and wire transfers,[165] access to checking and savings accounts, loan and mortgage application and information, credit cards, and bill payment.[166] Though perhaps beneficial to the majority of customers, many minorities are adversely affected from the technological trends of cyberbanking.[167]

Congress denied addressing cyberbanking in the GLBA.[168] Due to this congressional inaction, the overseeing regulatory agencies, community groups, and banks are left to solve the problem of complying with the CRA upon chartering an internet bank.[169] The CRA is a federal piece of legislation and inescapably cyberbanks and regulatory agencies must comply with the Act's mandates or face the potential problem of preemption.[170] Regulatory agencies have a clear dilemma: appease Congress by confining cyberbanks to the vague language of the CRA while encounter-

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161. *See generally* Bush & Jacob, *supra* note 96 (alleging that the GLBA will result in financial institutions having unprecedented power).

162. *See* Oliver A. Thoenen, *Functional Obsolescence: The Community Reinvestment Act and the Dilemma of Internet Banking Regulation*, 5 J. SMALL & EMERGING BUS. L. 425, 428 (2001).

163. *See* John Reosti, *Internet Banks Challenged by CRA Requirements*, AM. BANKER, Sept. 18, 2000, at 11.

164. *See* Lee, *supra* note 90, at 284 (identifying new technological services banks currently offer).

165. John L. Douglas, *Cyberbanking: Legal and Regulatory Considerations for Banking Organizations*, 4 N.C. BANKING INST. 57, 73 (2000).

166. Lee, *supra* note 90, at 284.

167. *See* Doug Anderson, *PC Banking: A Brief Overview*, CREDIT WORLD, Mar.-Apr. 1997, at 33; *see also* Lee, *supra* note 90, at 288 (alleging that many minorities do not have internet access in their homes and therefore lack easy access to online credit opportunities).

168. *See* Thoenen, *supra* note 162, at 428.

169. *See* William M. Keyser, *The 21st Century CRA: How Internet Banks are Causing Regulators to Rethink the Community Reinvestment Act*, 4 N.C. BANKING INST. 545, 546 (2000) (contending that traditional brick-and-mortar banks are being replaced for alternative methods, such as the internet).

170. *See id.* at 564 (illustrating agencies must choose to comply or overstep legislative authority).

ing increased criticism by community groups, or adopt an alternative method of compliance, potentially overstepping the bounds of the CRA.[171]

As banks gain approval to engage in technological banking, the number of internet banks will grow.[172] In 2000, over one-third of national banks had internet banking available and 18% of national banks had plans to undertake cyberbanking practices.[173] With technological improvements, cyberbanks will continue to flourish, generating additional institutions not covered by the CRA.

The growth of internet banks is inevitable. First, as consumers engage in more web-based transactions, their desire to have convenient, internet banking options increases.[174] It is simply easier to access funds from home at anytime of the day or night than it is to physically go to a bank to do the same. Second, the cost-effectiveness of cyberbanking will fuel growth.[175] Internet banks have much less overhead expenses and transaction costs than traditional institutions.[176] Third, the need for opening new branches diminishes, as does the cost per transaction.[177] Finally, as internet security fears ease among both banks and consumers, the number of banks offering online services will grow.[178]

2. Defining the Internet's "Community"

The first internet bank, Security First Network Bank, received approval to offer services online in 1995.[179] This approval commenced changes to the banking industry that drastically affect the enforceability of the CRA. The construction of the CRA is based on a localized banking model; it is comprised of "regulations for the physical world."[180] Trouble arises when attempting to define an internet bank's community under the CRA. Delineation of the community served is infeasible because cyberbanking is not localized, but rather takes the form of a national, intangible medium

171. *Id.*

172. *See* Miho Kubota, Note, *Encouraging Community Development in Cyberspace: Applying the Community Reinvestment Act to Internet Banks*, 5 B.U. J. SCI. & TECH. L. 8, 21-23 (1999) (recognizing the factors that will drive the continued growth of internet banks).

173. *Developments in Banking Law: 2001, Electronic Banking*, 21 ANN. REV. BANKING L. 58, 58-59 (2002).

174. Kubota, *supra* note 172, at 20-23.

175. *Id.* at 21.

176. *Id.*

177. *Id.*

178. *Id.* at 22.

179. Thoenen, *supra* note 162, at 427.

180. Lee, *supra* note 90, at 289.

of which a specific community demarcation is unattainable.[181] The traditional "brick and mortar" approach is challenged by cyberbanks.[182] These unique financial institutions have the ability to solicit deposits nationwide while maintaining one physical location.

Internet banks are not subject to geographic boundaries; rather, these institutions are simultaneously everywhere and nowhere.[183] The director of the Office of Thrift Supervision, Ellen Seidman, notes that cyberbanks solicit loans and deposits in cyberspace, illustrating a business strategy that does not touch any one community.[184] She also questions internet banking and the best means to implement this trend into CRA standards.[185] The community of an internet bank is possibly the entire nation.[186] Online banking activities are available to all who solicit their services and send their deposits, regardless of customer location.[187] However, cyberbanks lack a "community" as defined by the CRA.[188]

Telebank, another early internet bank, defined its assessment area in terms of physical location—Arlington, Virginia.[189] If, for example, Telebank collected deposits nationwide, its CRA compliance examination would only be confined to Virginia. This epitomizes the problem of internet banking and CRA compliance. Telebank would not be reinvesting in the numerous communities from which it solicits deposits.

Additionally, the enforceability of the CRA through community groups is negatively impacted by the proliferation of internet banking.[190] Community groups are the most effective vehicle for ensuring that financial institutions comply with the CRA.[191] However, a cyberbank is un-

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181. Thoenen, *supra* note 162, at 431 (noting a cyberbank's community is simultaneously nowhere and everywhere).

182. Keyser, *supra* note 169, at 552.

183. *See* Thomas W. Beetham, *The Community Reinvestment Act and Internet Banks: Redefining the Community*, 39 B.C. L. REV. 911, 912 (1998) (asking what constitutes an internet bank's "community").

184. Ellen Seidman, Remarks at The Consumer Bankers' Ass'n. Annual Conference (Apr. 26, 1999) (transcript available at http://www.ots.treas.gov/docs/8/87038.pdf).

185. *Id.*

186. *See id.*; *see also* Gary Rice, *Selected Issues Relating to Banking and the Internet, in* PLI CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES NO. B-1156 803 (1999).

187. *See* Kubota, *supra* note 172, at 26.

188. *See generally* Seidman, *supra* note 184 (noting that cyberbanking in its purest form would consist of all deposits and loan activity taking place in cyberspace, rather than a local, physical area).

189. Keyser, *supra* note 169, at 553.

190. *See* Kubota, *supra* note 172, at 31 (arguing cyberbanks will not feel the pressure of community groups because of the dispersed location of customers).

191. *See* Cohen, *supra* note 34, at 613 (arguing that the CRA's success depends on community groups).

likely to feel pressure from community groups.[192] The "customer base will be more a function of who has heard about its services and has Internet access than a function of where the customers reside."[193] A geographically dispersed community, such as a nationwide community of cyberbank customers, is unlikely to ban together, protest, and seek reinvestment.[194]

3. The Digital Divide

Internet access demonstrates a disparity among racial groups fostering the growth of the "digital divide."[195] Minorities often lack the necessary tools to engage in internet banking and access to online credit.[196] To participate in cyberbanking, the internet itself is compulsory. Requirements consist of a computer, telephone line, and internet service.[197] The access to internet is not available to consumers who are unable to obtain these luxuries.[198] Moreover, to access online financial tools one must know how to use the internet and feel comfortable transacting business online.[199] In lieu of computer training and knowledge, traditional banking methodologies and local transactions are preferred. Without access to such training or knowledge and the required financial resources, minorities are limited to traditional, antiquated banking methodologies.[200]

IV. Proposed Solutions

A. *The Profitability of CRA Lending*

Arguments may be made against modernizing the CRA or to abolish the regulatory burdens imposed on financial institutions—specifically, that the CRA is an outdated vehicle to cure the problem of mortgage lending discrimination or that the Act is too burdensome on banks in light of financial and technological advances.[201] These may be the arguments extended by financial institutions or the leaders of the GLBA

192. Kubota, *supra* note 172, at 24.

193. *Id.*

194. *Id.*

195. *See* Anderson, *supra* note 167, at 33.

196. *See id.*

197. Lee, *supra* note 90, at 280.

198. *Id.*

199. *See* Beetham, *supra* note 182, at 926 (implying that the younger generation utilizes the internet more because of their familiarity with it).

200. *See* Lee, *supra* note 90, at 288.

201. Goldberg, *supra* note 87, at 67.

movement.[202] However, contrary to what most banks postulate, CRA lending is profitable.[203]

Modernizing the CRA will not negatively impact financial institutions.[204] A study conducted by the Federal Reserve Board in 1997 evidenced banks which offer more loans to low and moderate-income borrowers are slightly more profitable than banks that make fewer loans to these borrowers.[205] Consequently, CRA lending has proven profitable. This favorable result will be maintained by modernizing the CRA, in light of financial and technological advancement. Banking institutions should therefore regard modernization as advantageous. The final result will be beneficial to all. Minority borrowers will have the opportunity to receive fair mortgages and lenders will increase their profits, while giving back to the community they serve.

B. *Proposed Solutions: GLBA*

The CRA should be redrafted to include all credit extending institutions. As the GLBA has increased the permissible scope of banking activities, the CRA should reflect this change and extend coverage to all financial activities which banks are permitted to engage in.[206] Redrafting to include new banking activities is a logical and reasonable response to the GLBA. It would keep the CRA consistent with its original intent: requiring financial institutions to serve the needs of communities. Covering all permissible activities by modernizing the CRA will maintain CRA accountability in all aspects of banking practices.[207]

Furthermore, the CRA should be restructured to include mortgage companies and credit unions. In 1977, most mortgages originated from local banking institutions.[208] Currently, however, the majority of mortgages stem from independent mortgage companies.[209] The exclusion of mortgage lenders is contrary to the heart of the legislation. Though mortgage companies and credit unions do not fall in the traditional confines of "brick and mortar" institutions, these vital lenders should not be able to

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202. *Id.* at 68 (noting GLBA "falls short of what Chairman Leach would have us believe is the application of CRA to the insurance and securities branches of financial services industry"); *see also* Goldberg, *supra* note 87, at 69 (alleging the "chilling effect appears to be just what the key sponsors of the provision intended").

203. *See generally* Press Release, *supra* note 153.

204. *Id.* (posing CRA lending is profitable for financial institutions).

205. *Id.*

206. *See* Resnikoff, *supra* note 116, at 291.

207. *Id.* at 293.

208. Di Lorenzo, *supra* note 102, at 177.

209. *Id.*

circumvent reinvesting in communities and providing equal access to credit.[210]

Regulatory agencies will be unable to hold mortgage companies, credit unions, and bank affiliates accountable without redrafting the Act to include these institutions.[211] Without modernization, government agencies are paralyzed in applying CRA principles to exempt lenders who may be illegally denying credit. The continued success of banishing the unwanted practices of redlining and disinvestment is contingent on redrafting to include the excluded. Upon inclusion, the agencies and the public would know the extent of the loans allocated.[212] As a result of public disclosure, more institutions would encouragingly adopt impartial lending policies.

In addition to inclusion of all lenders, the CRA exam and grading structure should be modernized. The GLBA's policies possibly convey the wrong message to financial institutions that CRA standards are lax and an institution may easily pass their CRA exam.[213] To cure expectations of leniency, the CRA must be reformed. First, a more stringent grading policy should be adopted. If there is any evidence of discrimination, a "satisfactory" rating should be denied.[214] Agencies, during an exam, should closely scrutinize allocated loans and reinvestment activities. Additionally, each of the three tests—investment, lending, and compliance—should receive a separate grade.[215] In computing the overall grade, if a "substantial non-compliance" or "needs to improve" rating is received in any one test, the institution should be barred from receiving a "satisfactory" rating.[216] If a lender apportions egregious and adverse loans to minorities, the institution should receive a "substantial non-compliance" rating.[217]

Public access and an appeals process for specific grades should be an additional feature in the new rating process.[218] Currently, community groups do not have the opportunity to appeal inflated grades afforded to

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210. *See id.* at 178-79 (observing the CRA does not extend to mortgage companies and non-CRA lenders which may result in greater challenges to the credit needs of low and moderate-income communities).

211. *See* Goldberg, *supra* note 87, at 73 (contending that because of their company classification, mortgage companies and affiliates escape CRA review); *see also* Taylor, *supra* note 97, at 14 (contending the CRA does not cover mortgage companies, financial holding companies or insurance affiliates).

212. *See* NAT'L TRAINING & INFO. CTR., *supra* note 88, at 10.

213. *See* Resnikoff, *supra* note 116, at 293.

214. NAT'L TRAINING & INFO. CTR., *supra* note 88, at 10.

215. *Id.*

216. NAT'L TRAINING & INFO. CTR., *supra* note 129.

217. *Id.*

218. *Id.*

an institution.[219] Modernizing this aspect would create a system of checks and balances of power within CRA review. The power of the regulatory agency to assign grades would be checked with the community group's ability to appeal a given grade. In turn, regulatory agencies would afford more time and scrutiny to an institution's lending policies before designating grades. To minimize against appeals, agencies could support grades with facts providing an accurate picture of the institution's lending practices. Accordingly, each institution would be more accountable to CRA lending policies.

Consistent with modernizing the CRA is the repeal of the small bank provision. Small banks should be subject to the same exam components that larger institutions endure, specifically the lending, investment, and service tests.[220] The concept of reviewing a small institution more frequently should be re-institutionalized as well. Smaller institutions gain little from infrequent exams because when the institution is examined it is more extensive. The effect of fewer exams is detrimental to communities as banks become less concerned with CRA lending on a permanent basis. Maintaining frequent exams for smaller banks instills CRA obligations on a steadfast basis insuring continual community reinvestment.[221]

Lastly, in light of the GLBA, modernization of the CRA should include a repeal of the sunshine provision. Abrogation of this provision is supported by the National Reinvestment Coalition and the FDIC's Vice Chairman John M. Reich, as it negatively impacts community lending.[222] The provision is contrary to the affirmation that CRA agreements increase CRA lending.[223]

Prior to the sunshine provision, banks approached CRA agreements negatively due to the extensive regulatory requirements.[224] The sunshine provision exacerbates this negativity.[225] Phil Gramm admitted, "I can meet with the largest bankers or the smallest bankers . . . and in private every one of them hates CRA."[226] To encourage banks to change their outlook toward CRA requirements, this counterproductive provision

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219. *See* NAT'L TRAINING & INFO. CTR., *supra* note 88, at 10 (maintaining community groups cannot challenge inflated ratings).

220. *See generally* NAT'L TRAINING & INFO. CTR., *supra* note 129.

221. Goldberg, *supra* note 87, at 69 (alleging fewer exams are detrimental to the public).

222. Craig Linder, *Reviewing the Rules for CRA: A Provision both Banks, Activists Want to Erase,* AM. BANKER, Aug. 17, 2004, at 1.

223. Taylor, *supra* note 97, at 14.

224. Linder, *supra* note 222, at 1.

225. *See generally* Press Release, *supra* note 153 (contending that as a result of the sunshine provision, banks will make fewer CRA agreements due to the extensive disclosure requirements).

226. Di Lorenzo, *supra* note 102, at 184.

should be repealed. Its elimination would make CRA agreements less suspect, while reducing the burdens on both financial institutions and community groups.

In the alternative, if abrogation is not an option, the sunshine provision should be redrafted. Primarily, the regulatory burden on community groups and banks should be reduced.[227] Instead of paperwork, the entities could focus on community lending from which a working relationship would develop in constructing CRA agreements.[228] Additionally, in redrafting the sunshine provision, the penalties imposed on community groups for non-compliance should be abolished. As bank penalties are absent from the legislation,[229] it is unjust to penalize community groups. Rather than penalties, the revision should contemplate compensation.[230] Incentives could be adopted for banks working with community groups to ensure CRA lending.[231] CRA compliance would potentially be interpreted as a positive aspect of banking, increasing the willingness to engage in community lending.

C. *Proposed Solutions: Internet Banking*

Internet banking poses new challenges to CRA lending and advancement. The predominant challenge lies in determining what comprises the internet's community. The congressional redefinition of the "community" in the Community Reinvestment Act should encompass an assessment area based on today's society.[232] Instead of reinvesting in the geographic community surrounding an institution, banks could reinvest regionally or nationally.[233] In accordance with this idea, the regulatory agencies could identify low-income areas to which banks could direct reinvestment efforts.[234] Eliminating the geographic limitations would focus the lending process on those in need, thereby, reaffirming the core principle of the CRA.

Alternatively, the term "community" could be replaced by the term "equality."[235] Basing the CRA on the concept of equality would accomplish Congress' fundamental intent of reducing credit discrimination in

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227. Marsico, *supra* note 99, at vi-vii.
228. Thoenen, *supra* note 162, at 433.
229. *See* Bush & Jacob, *supra* note 96.
230. Thoenen, *supra* note 162, at 442.
231. *Id.*
232. *See generally* Seidman, *supra* note 184.
233. *See* Lee, *supra* note 90, at 314-15 (proposing new legislation in which CRA compliance could be gained by reinvestment in the various markets where institutions conduct business).
234. Kubota, *supra* note 172, at 40.
235. Beetham, *supra* note 182, at 928.

low-income areas.[236] The underlying goal would be equal access to services; customers would have the opportunity to apply for mortgages and credit utilizing a non-discriminatory model.[237] The aspiration of equal opportunity in the mortgage lending process would be consistent with the CRA.

Another viable solution would be allowing banks to satisfy CRA requirements by banking with the "unbanked."[238] For example, banks could be responsible for meeting the needs of those who do not have a checking account or banking services. Institutions could offer individuals check-cashing services, methods of receiving direct deposits, or a place to conduct other financial services. Banks could also educate the unbanked on the benefits of having a bank account and basic banking services.

Furthermore, community redefinition enables banks to develop online systems without agonizing about geographic delineation. Instead, an institution could define their area of CRA responsibility by looking to the location of their customers. Reinvestment would be directed toward the original location of their deposits.

NetBank's approved 2001 CRA plan is consistent with this idea.[239] The cyberbank maintains one walk in branch, but operates on a national basis.[240] As a result, the institution needed a national CRA plan. The approved plan consisted of NetBank delineating its community as the regions where it does the most business, specifically Georgia, Florida, and California.[241] Reinvestment focused specifically in these areas.[242]

In expanding on the idea of education, internet banks could receive CRA credit by providing minorities with internet education and access.[243] Some financial institutions are already undertaking this reputable goal. Wells Fargo, via "eBuses," is bringing technology into low-income neighborhoods, stopping at libraries, community centers, and schools.[244] Volunteers invite people into the buses, equipped with internet workstations, and introduce them to email and other skills such as resume writing.[245]

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236. *Id.*

237. *Id.*

238. Kubota, *supra* note 172, at 41-42.

239. Megan J. Ptacek, *NetBank's CRA Plan Said Approved*, AM. BANKER, Mar. 13, 2001, at 17 (illustrating NetBank's CRA plan which has an extended community defined area).

240. *Id.*

241. *Id.*

242. *Id.*

243. *See* Jessica Toonkel, *Wells and First Union Do Well by Doing Good*, AM. BANKER, Sept. 8, 2000 at 11 (exemplifying educational programs by Wells Fargo and First Union which receive CRA credit for educating the public).

244. *Id.*

245. *Id.*

Another institution, First Union, began offering free computer training in the city where it is headquartered.[246] This program trains minorities, children, senior citizens, and the poor in basic internet skills.[247] These initiatives serve and educate the community, thereby constituting a form of community reinvestment. Moreover, these initiatives may begin to resolve the problem of the digital divide. Educating those without internet skills encourages more participation in online banking.[248] Educational and access programs constitute reinvestment and should be an alternate way to gain CRA credit.[249]

A strategic plan is another problem-solving proposition regarding the cyberbank dilemma.[250] The concept requires bank and community representatives to formulate a CRA plan together.[251] The institution then notifies the public of its plan, as well as submits it for approval to the corresponding overseeing agency.[252] By working conjointly, a methodology is formulated to define how the institution will reinvest in the community. Strategic plans will reduce the pressure of community groups on institutions, as the groups would take a part in the drafting process. This clearly constitutes another method for maintaining CRA success.

V. Conclusion

The Community Reinvestment Act is a positive piece of legislation. Without the CRA, discrimination against minorities in the mortgage lending process will persist.[253] The CRA's goals of redressing discrimination, specifically redlining practices and disinvestment of communities, will be realized by holding financial institutions accountable.[254] To maintain the core principles of the CRA in the future, the outdated legislation must be modernized. The GLBA and the rise of internet banking substantially threaten CRA principles. Without modernization, the notions of community lending and equal access to credit will eventually become obsolete.

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246. *Id.*

247. *Id.*

248. *See* Beetham, *supra* note 182, at 926 (explaining the digital divide).

249. *See* Toonkel, *supra* note 243, at 11 (reporting Wells Fargo and First Union earn CRA credit for educational programs).

250. *See generally* Seidman, *supra* note 184.

251. *Id.*

252. *Id.*

253. *See* Johnson et al., *supra* note 26, at 90 (contending Congress enacted the CRA to curb discrimination by financial institutions).

254. *See generally* Nat'l Training & Info. Ctr., *supra* note 88, at 10.