

**THE DOJ’S RELIANCE ON THE COMMUNITY
REINVESTMENT ACT TO SUPPORT DISCRIMINATION
ALLEGATIONS HAS NEGATIVE CONSEQUENCES FOR
COMMUNITY BANKS**

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INTRODUCTION

Under the Fair Housing Act (FHA)¹ and the Equal Credit Opportunity Act (ECOA),² the Department of Justice (DOJ) has the authority to bring enforcement actions³ against banks it has reasonable cause to believe are redlining.⁴ To support its redlining allegations, the DOJ has routinely concluded that banks have delineated their Community Reinvestment Act (CRA)⁵ assessment areas in discriminatory ways. The DOJ's authority to enforce the FHA and the ECOA (the "fair lending laws") is critical to protect individuals and communities from the damaging effects of discrimination. However, the DOJ's conclusions, with respect to the CRA assessment areas, have set up an uncertain legal framework that conflates and overly simplifies the purposes of and relationship between the fair lending laws and the CRA.⁶ Without additional clarity in this area, the DOJ risks fundamentally changing the way community banks do business and discouraging them from engaging in the types of activities that the CRA was designed to promote.

In Part I of this paper, I briefly explore the history, implementation, and interpretation of the CRA to highlight the importance and purpose of CRA assessment areas. In Part II, I turn to redlining under the fair lending laws and the roles of the DOJ and federal bank regulators in conducting redlining analyses.⁷ Unless otherwise noted, I focus on redlining in mortgage lending

*. I want to give special thanks to Professor Kathleen Engel for her thoughtful and tireless guidance and assistance while writing this Article. Without her counsel and support, this Article would not have been possible.

1. Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2012).

2. Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (2012).

3. The DOJ's authority for enforcing the ECOA and the FHA are found at 15 U.S.C. § 1691e(h) and 42 U.S.C. § 3614(a), respectively.

4. "Redlining is a form of illegal disparate treatment in which a lender provides unequal access to credit, or unequal terms of credit, because of the race, color, national origin, or other prohibited characteristic(s) of the residents of the area in which the credit seeker resides or will reside or in which the residential property to be mortgaged is located." *See generally* OFFICE OF THE COMPTROLLER OF THE CURRENCY ET AL., INTERAGENCY FAIR LENDING EXAMINATION PROCEDURES, at iv (Aug. 2009) [hereinafter FAIR LENDING PROCEDURES] (emphasis omitted), <https://www.ffiec.gov/pdf/fairlend.pdf>.

5. Community Reinvestment Act, 12 U.S.C. §§ 2901–2906 (2012).

6. I focus on the DOJ's public enforcement actions throughout this paper, because they are the only public record showing the DOJ's redlining analysis. *See Housing and Civil Enforcement Section Cases: Fair Lending Enforcement*, U.S. DEP'T JUSTICE, <https://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#lending> (last visited Jan. 26, 2020) (compiling DOJ's enforcement actions). I am not the first to question the DOJ's blending of the fair lending laws and the CRA. *See generally* John J. Spina, United States v. Albank, FSB: *Is Justice Being Served in the enforcement of Fair Lending Laws*, 2 N.C. BANKING INST. 207, 224–25 (1998) (contending that "[t]he DOJ has circumvented its lack of enforcement power under the CRA by incorporating CRA language into FHA and ECOA complaints").

7. The federal bank regulators include the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC).

throughout this paper, because mortgage loans have been the primary product the DOJ has analyzed in its redlining enforcement actions.⁸

In Part III, I describe how the DOJ's assessment area analysis can undermine the goals of the CRA by creating uncertainty for community banks operating near large metropolitan areas.⁹ I emphasize community banks, because unlike larger regional and national institutions, they have limited resources to compete in, and adequately serve, large metropolitan markets—the same markets that tend to comprise relatively high concentrations of majority-minority¹⁰ neighborhoods. In Part IV, I propose several options that the federal bank regulators and the DOJ could adopt to help ensure that community banks have a clear understanding of the expectations of CRA assessment area delineation and how it is used for redlining analysis. Finally, I provide a short conclusion.

I. THE COMMUNITY REINVESTMENT ACT AND ASSESSMENT AREAS

A. Background and History

Congress passed the CRA in 1977 to address the issue of redlining, which had been a systemic and institutionalized form of discrimination since the 1930s.¹¹ Over this period, many banks were unwilling to grant mortgage credit in urban, often minority, neighborhoods, even though the banks were physically located in, and drew deposits from, these communities.¹² As a

8. Mortgage lending for the purposes of this Article refers to loans to purchase, refinance, or improve one to four family dwellings reportable pursuant to the Home Mortgage Disclosure Act (HMDA), 12 U.S.C. §§ 2801–2811 (2012), and implemented by the Home Mortgage Disclosure (Regulation C), 12 C.F.R. §§ 1003.1–1003.6 (2020).

9. There is no universal definition of “community bank,” but for the purposes of this paper, I use community bank to describe banks with less than \$10 billion in assets that are locally controlled and owned. See FED. DEPOSIT INS. CORP., FDIC COMMUNITY BANKING STUDY 1-1 (2012) [hereinafter COMMUNITY BANKING STUDY], <https://www.fdic.gov/regulations/resources/cbi/report/cbi-full.pdf> (noting that \$10 billion is a common asset size to define community banks). A community bank is generally considered to be a hometown bank recognized primarily by residents of the area in which it is located, but not beyond. See Adam Defrias, *What Exactly Is a Community Bank?*, BANKFIVE (Feb. 2, 2018), <https://www.bankfive.com/Resources/Learning/Blog/February-2018/What-exactly-is-a-Community-Bank>.

10. Majority-minority in this context refers to areas that have a minority population greater than 50%. See *Majority-Minority District*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a *majority-minority district* as “[a] voting district in which a racial or ethnic minority group makes up a majority of the voting citizens”); see also *Majority*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *majority* as “[a] number that is more than half of a total; a group of more than 50 percent”). In this paper, consistent with the DOJ's redlining enforcement actions, I refer to Hispanic or African American persons when using the term “minority.”

11. Housing and Community Development Act of 1977, Pub. L. No. 95-128, 91 Stat. 1111 (codified as amended under 42 U.S.C §§ 5301–5322).

12. See Willy E. Rice, *Race, Gender, “Redlining,” and the Discriminatory Access to Loans, Credit, and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and*

result, the minority neighborhoods of many American cities became increasingly segregated and blighted.¹³

The principle underlying the CRA, put forth by its proponents, was the simple idea that banks ought to lend and invest in the communities in which they are located.¹⁴ Opponents of the CRA, however, expressed concerns that the CRA marked a movement toward government allocation of bank credit.¹⁵ The CRA's proponents won the day: Congress recognized the critical role of private investment and credit in community development efforts and enacted the CRA to require banks to serve the convenience and needs of their communities.¹⁶

In crafting the CRA, Congress took the approach of inducing banks to engage in activities to address inequality in access to credit. This approach contrasted with the fair lending laws already in effect in 1977, which aimed to prohibit discriminatory access to credit.¹⁷ Despite its origins, however, the CRA neither required banks to lend in areas based on their racial or ethnic characteristics, nor promoted activity to a greater extent in urban areas compared to non-urban areas.¹⁸ Instead, Congress established that banks have

Insurers in Federal and State Courts, 1950-1995, 33 SAN DIEGO L. REV. 583, 584 (1996) (describing the set of congressional hearings that revealed lenders were engaging in redlining and not "serv[ing] the credit needs of communities in which they were chartered").

13. Lending institutions, of course, were not the sole contributors to these circumstances. A detailed history of segregation and redlining is beyond the scope of this Article. For a thorough account of housing segregation in the United States, see generally DOUGLASS S. MASSEY, *Origins of Economic Disparities: The Historical Role of Housing Segregation*, in SEGREGATION: THE RISING COSTS FOR AMERICA 39-80 (James H. Carr & Nandinee K. Kutty eds., 2008) (reviewing the history of racial segregation in American cities).

14. See Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156, 22,156-57 (May 4, 1995) (providing background on the Community Reinvestment Act of 1977).

15. See *Community Credit Needs: Hearings Before the Committee on Banking, Housing and Urban Affairs*, 95th Cong. 152-53 (1977) (statement of Sen. Towers) ("This proposal would, as I read it, provide for a scheme of credit allocation in our financial institutions. I think this could be detrimental and that it could disrupt the flow of mortgage credit in this country."); *id.* at 314-16 (statement of A.A. Milligan, Am. Bankers' Assoc.) ("However, we cannot support S. 406 because it is based on a serious misunderstanding of how the nation's financial system functions to meet the credit needs of all communities."); "While we are aware that the present bill does not require mandatory credit allocation, nevertheless, we are fearful that if S. 406 were enacted, the next step would be such a requirement. Our current system of specialized thrift institutions serves the credit needs of our various housing markets quite well." *Id.* at 428-29 (statement of the Nat'l Assoc. of Realtors).

16. Congress enacted the Community Reinvestment Act as Title VIII of the Housing and Community Development Act of 1977, 42 U.S.C. §§ 5301-5322, which is a much broader law aimed at promoting community development.

17. See Jane McGrew, Thomas C. Collier & Herbert E. Forrest, *Fair Housing: An Agenda for the Washington Lawyer's Committee for Civil Rights*, 27 HOWARD L.J. 1291, 1293 (1984) (explaining how Title VIII of the Civil Rights Act of 1968 and the Civil Rights Act of 1866 prohibited discriminatory lending, among other practices).

18. I note here that, while Congress's primary motivation for enacting the CRA was the lack of investment in declining urban areas, Congress recognized that rural and suburban areas were also a focus of CRA. See *Community Credit Needs: Hearings Before the Comm. on Banking, Housing and Urban*

a continuing and affirmative obligation to help meet the credit needs of their communities, including low- and moderate-income neighborhoods, giving banks latitude to define the communities to which this obligation applied.¹⁹

Congress charged the federal bank regulators with implementing the CRA. In 1978, the regulators promulgated the first CRA regulations, which focused on activities in banks' communities.²⁰ In 1995, the bank regulators revised the CRA regulations to require banks to establish assessment areas according to certain requirements and limitations.²¹

Banks have broad discretion in defining the bounds of their assessment areas. According to the CRA regulations, banks generally must delineate their assessment areas to comprise one or more Metropolitan Statistical Areas (MSAs),²² Metropolitan Divisions (MDs),²³ or contiguous political subdivisions (e.g., counties, cities, or towns).²⁴ Further, banks must include in their assessment areas all geographies²⁵ in which they maintain branches

Affairs, 95th Cong. 159 (1977) (statement of Sen. Heinz) (emphasizing that “the problem . . . can strike just as hard in rural areas, or in small- or medium-sized cities”).

19. 12 U.S.C. § 2901(b) (2012) charges the federal bank regulators with the obligation of encouraging banks to meet the needs of their communities, while § 2903(a)(1) introduces the low- and moderate-income criteria for the federal bank regulators to consider when assessing the extent to which banks meet the needs of their communities.

20. See Community Reinvestment Act of 1977; Implementation, 43 Fed. Reg. 47,144, 47,148–49 (Oct. 12, 1978). The CRA regulations are promulgated jointly by the federal bank regulators. For consistency, I will cite throughout this paper to Community Reinvestment (Regulation BB), 12 C.F.R. § 228 (2020), as promulgated by the Federal Reserve System. Banks subject to oversight by the FDIC are subject to 12 C.F.R. § 345.11 (2020). Banks subject to oversight by the OCC are subject to 12 C.F.R. § 25.11 (2020). Thrifts formerly subject to oversight by the OTS were subject to 12 C.F.R. § 563e.11. Effective in 2011, section 312 of the Dodd-Frank Wall Street Reform and Consumer Protection Act transferred the OTS functions among the Federal Reserve, the OCC, and the FDIC. Dodd-Frank Act, Pub. L. No. 111-203, § 312, 124 Stat. 1376, 1521–23 (2010).

21. Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156, 22,195 (May 4, 1995).

22. An MSA is a geographic area delineated by the Office of Management and Budget (OMB) for use by federal agencies in collecting, tabulating, and publishing federal statistics. *Metropolitan Areas*, U.S. CENSUS BUREAU, GEOGRAPHIC AREAS REFERENCE MANUAL 13-1 (1994), <https://www2.census.gov/geo/pdfs/reference/GARM/Ch13GARM.pdf>. An MSA contains a core urban area with a population of 50,000 or more people. *Id.* “An MSA consists of one or more counties that contain a city of 50,000 or more inhabitants, or contain a Census Bureau-defined urbanized area . . .” *Id.*

23. An MD is a “grouping[] of counties or equivalent entities defined within a metropolitan statistical area containing a single core with a population of at least 2.5 million” and “consists of one or more main/secondary counties that represent an employment center or centers, plus adjacent counties associated with the main/secondary county or counties through commuting ties.” WHAT GEOGRAPHIES ARE AVAILABLE FOR ECONOMIC DATA?, U.S. CENSUS BUREAU, <https://www2.census.gov/programs-surveys/economic-census/guidance/available-geographies.pdf> (last visited Jan. 26, 2020).

24. 12 C.F.R. § 228.41(c)(1).

25. The CRA Regulation defines “geography” to be a “census tract.” *Id.* at § 228.12(k). “Census [t]racts are small, relatively permanent statistical subdivisions of a county or equivalent entity that are updated by local participants prior to each decennial census The primary purpose of census tracts is to provide a stable set of geographic units for the presentation of statistical data.” *Glossary*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/geography/about/glossary.html#par_textimage_13 (last visited Jan. 26, 2020).

and deposit-taking ATMs, or where they have originated or purchased a substantial portion of their loans.²⁶

The CRA regulations account for the reality that practical and financial conditions limit the reach of banks. Thus, banks may set the boundaries of their assessment areas to include only areas that they reasonably can be expected to serve.²⁷ However, banks cannot delineate assessment areas that comprise partial census tracts, reflect illegal discrimination, or arbitrarily exclude low- and moderate-income census tracts.²⁸

B. The Influence of the CRA Assessment Area

How banks designate their assessment areas directly impacts where they allocate their resources. This is because the CRA regulations encourage banks to focus their activities within their assessment areas.²⁹ For example, examiners consider the overall percent of loans a bank originates inside its assessment area as one of several performance criteria.³⁰ Generally speaking, the more banks lend inside their assessment areas, the better.³¹ In addition, federal bank regulator examiners do not consider bank activities outside their assessment areas when evaluating CRA performance.³² Finally, examiners emphasize the extent to which a bank's loan origination activity, particularly in low- and moderate-income census tracts, is consistent with other lenders operating inside the assessment area.³³ Given the importance of assessment areas to CRA performance, banks are careful to delineate communities that

26. 12 C.F.R. § 228.41(c)(2).

27. *Id.* § 228.41(d).

28. *Id.* §§ 228.41(e)(1)–(3).

29. Opponents of the CRA expressed concern that it would lead to the government allocation of bank credit. *See supra* note 15 and accompanying text (collecting statements by opponents of the CRA during congressional hearings). Commenters on the proposed CRA regulations echoed similar concerns to the federal bank regulators, because the 1993 proposal included objective criteria, including: market share, a presumptively reasonable loan-to-deposit ratio, loan mix, investment to capital ratios, and the number of branches readily accessible to low- and moderate-income geographies. To address this issue, the federal bank regulators crafted the CRA Regulation in a way that allowed examiners to apply a broad range of qualitative and quantitative criteria when evaluating banks' performance. Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156, 22,195 (May 4, 1995).

30. 12 C.F.R. § 228.22(b)(1).

31. While the CRA regulations do not obligate banks to lend only inside their assessment areas, they do require that banks include in their assessment areas all geographies where they originate or purchase a substantial portion of their loans. *Id.* § 228.41(c)(2).

32. The exception to this general rule is for community development activities, which may receive CRA consideration if they serve the needs of larger state or regional areas, which include the assessment area, or if they support organizations or programs that operate on a statewide or multistate basis. Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance, 81 Fed. Reg. 48,506, 48,529–30 (July 25, 2016).

33. This is referred to as the "geographic distribution" criterion under the Lending Test. 12 C.F.R. § 228.22(b)(2).

they can reasonably serve, even if they may be *willing* to originate loans in larger geographic areas.³⁴

C. Supervision by the Federal Bank Regulators: The CRA

Assessment areas are critical to the CRA because they represent the area within which federal bank regulators examine³⁵ a bank's record of meeting the needs of its community.³⁶ Bank examiners rely on Interagency CRA Examination Procedures (CRA Procedures)³⁷ to carry out these examinations.

Before beginning the evaluation of a bank's CRA performance, examiners determine the appropriateness of a bank's assessment area by applying the requirements and limitations described in the CRA regulations.³⁸ Assessment area delineation itself, however, is not a CRA performance criterion—it merely defines the boundary within which bank examiners assess a bank's performance.³⁹ If bank examiners determine that a bank's assessment area does not comply with any provision of the CRA regulations, they have the authority to adjust the bank's assessment area for the purposes of evaluating a bank's performance under the CRA.⁴⁰

Bank examiners evaluate a bank's CRA performance inside its assessment area using one of three types of procedures based on the bank's

34. Commenters to the 1995 CRA regulation expressed concern that the federal bank regulators could revise a bank's assessment area—thus expanding the area the bank would be obligated to serve and in which the federal bank regulators would evaluate the bank's performance. Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156, 22,171 (May 4, 1995).

35. Each bank regulator publishes its CRA examination schedule quarterly. *CRA Examinations*, FED. FIN. INSTS. EXAMINATION COUNCIL, <https://www.ffiec.gov/cra/examinations.htm> (last updated Dec. 31, 2019).

36. 12 C.F.R. § 228.41(a).

37. See *CRA Examinations*, *supra* note 35 (providing materials for institutional examination procedures).

38. 12 C.F.R. § 228.21(b).

39. *Id.* § 228.41(a); see also Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance, 81 Fed. Reg. 48,506, 48,548–49 (July 25, 2016) (clarifying examination criteria and standards).

40. 12 C.F.R. § 228.41(g).

asset size:⁴¹ small bank CRA Procedures, intermediate-small bank (ISB)⁴² CRA Procedures, or large bank CRA Procedures. Examiners evaluate: small banks using a *lending test*; ISBs using a *lending test* and a *community development test*; and large banks using a *lending test*, *investment test*, and a *service test*.⁴³ The CRA Procedures for large banks also consider community development activities, but, unlike the ISB procedures, these criteria are incorporated into each of the three tests and are not a standalone community development test.⁴⁴

Bank examiners do not evaluate a bank's CRA performance in absolute terms. Instead, when evaluating a bank's performance under the CRA, examiners apply "[p]erformance context."⁴⁵ Performance context generally assesses the bank's activities against external factors, such as the opportunities within the bank's assessment area and the performance of other similar lenders. Performance context also assesses internal factors, such as the bank's financial condition, business strategy, and product offerings.⁴⁶ Performance context is an essential element of a thorough evaluation of bank performance, because it reconciles the opportunities and needs within the bank's CRA assessment area with the bank's ability to meet them.⁴⁷

D. Impact of Federal Bank Regulators' CRA Ratings

The CRA contains no direct enforcement mechanism. Thus, federal bank regulators cannot use the CRA regulations to compel banks to serve the needs of their communities. The "enforceability" of the CRA lies in the value

41. *Small institution* "means a bank . . . that, as of December 31 of either of the prior two calendar years, had assets of less than \$1.284 billion." *Explanation of the Community Reinvestment Act Asset-Size Threshold Change*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, <https://www.ffiec.gov/cra/pdf/AssetThreshold2019.pdf> (last visited Jan. 26, 2020). *Intermediate small institution* "means a bank . . . with assets of at least \$321 million as of December 31 of both of the prior two calendar years and less than \$1.284 billion as of December 31 of either of the prior two calendar years." *Id.* (emphasis omitted). *Large institutions* "are banks . . . with assets of at least \$1.284 billion as of December 31 of both of the prior two calendar years." *Id.* (emphasis omitted). Procedures also exist for banks under a strategic plan and for limited purpose and wholesale banks. *Wholesale and Limited Purpose Banks Under the Community Reinvestment Act (CRA)*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, <https://www.occ.treas.gov/topics/consumers-and-communities/cra/wholesale-and-limited-purpose-banks-under-cra.html> (last updated Jan. 1, 2020). These types of examinations are not typical, and most banks are evaluated using either small, intermediate-small, or large bank procedures.

42. The category of ISB was added with the Regulation BB revisions in 2005 in an effort to reduce the regulatory burden on community banks. Community Reinvestment Act Regulations, 70 Fed. Reg. 44,256, 44,258–60 (Aug. 2, 2005).

43. 12 C.F.R. §§ 228.21–228.24.

44. See Community Reinvestment Act Regulations, 70 Fed. Reg. at 44,259–60 (explaining the community development test for ISBs).

45. 12 C.F.R. § 228.21(b).

46. *Id.* §§ 228.21(b)(3)–(6).

47. *Id.* §§ 228.21(b)(2), (4).

banks place on CRA ratings.⁴⁸ Whether using large bank, ISB, or small bank examination procedures, bank examiners will rate a bank's performance as "outstanding," "satisfactory," "needs to improve," or "substantial noncompliance."⁴⁹ CRA ratings can significantly impact banks. First, the federal bank regulators account for a bank's CRA performance when considering an application for establishing branches or engaging in merger, consolidation, or acquisition activities.⁵⁰ Federal bank regulators may use a bank's record of its CRA performance as the basis for denying or conditioning approval of an application for such activities.⁵¹ Second, the federal bank regulators publicize reports of banks' performance, known as "Performance Evaluations."⁵² Less-than-satisfactory CRA ratings can harm a bank's reputation.⁵³

E. Fair Lending Examinations Influence CRA Ratings

In addition to CRA examinations, bank examiners conduct separate compliance examinations to evaluate banks' compliance management systems and identify any violations of consumer protection laws and regulations—including the fair lending laws.⁵⁴ When conducting CRA examinations, examiners review the results of a bank's most recent compliance examinations and determine if evidence of discriminatory credit practices identified during those examinations should lower the bank's CRA ratings.⁵⁵ While all CRA Performance Evaluations contain a section related to discriminatory or illegal credit practices,⁵⁶ any evidence comes not from

48. *See id.* § 228.21(c) ("The rating assigned by the Board reflects the bank's record of helping to meet the credit needs of its entire community . . .").

49. *Id.*

50. *Id.* § 228.29(a).

51. *Id.* § 228.29(c).

52. *See Evaluating a Bank's CRA Performance*, FED. RESERVE BD., https://www.federalreserve.gov/consumerscommunities/cra_peratings.htm (last updated Dec. 7, 2018) (explaining that the "Federal Reserve makes banks' Performance Evaluations public through an online database . . .").

53. According to the CRA Procedures, less than satisfactory performance will receive a rating of "needs to improve" or "substantial noncompliance." *Id.*

54. *Policy Statement on Discrimination Lending*, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/regulations/laws/rules/5000-3860.html> (last updated Apr. 20, 2014) (providing information about what constitutes lending discrimination under the ECOA and the FHA and answering questions about how the federal bank regulators will respond to discrimination).

55. 12 C.F.R. § 228.28(c).

56. According to the CRA Procedures, discriminatory or other illegal credit practices include, but are not limited to: "(i) Discrimination against applicants on a prohibited basis in violation, for example, of the Equal Credit Opportunity Act or the Fair Housing Act; (ii) Violations of the Home Ownership and Equity Protection Act; (iii) Violations of section 5 of the Federal Trade Commission Act; (iv) Violations of section 8 of the Real Estate Settlement Procedures Act; and (v) Violations of the Truth in Lending Act provisions regarding a consumer's right of rescission." *Id.*

the CRA examinations themselves, but from the fair lending reviews conducted during the compliance examinations.⁵⁷ In cases where examiners identify discriminatory or illegal credit practices, banks' overall CRA ratings may be lower than they would have been based solely on the results of the "performance tests."⁵⁸

II. FAIR LENDING AND REDLINING

As I discuss below, redlining is a concern in fair lending examinations and, thus, in CRA examinations as well. The fair lending laws prohibit lenders from considering race and other prohibited bases when making credit decisions.⁵⁹ Neither the fair lending laws nor their implementing regulations specifically address the practice of redlining.⁶⁰ However, the Interagency Fair Lending Examination Procedures (FL Procedures) do address redlining and describe it as a type of

illegal disparate treatment in which a lender provides unequal access to credit, or unequal terms of credit, because of the race, color, national origin, or other prohibited characteristic(s) of the residents of the area in which the credit seeker resides or will reside or in which the residential property to be mortgaged is located.⁶¹

A. Fair Lending Supervision by Federal Bank Regulators

As a component of compliance examinations, federal bank regulators use the FL Procedures to conduct fair lending examinations. While CRA examinations focus on the income levels of consumers and communities, fair lending examinations focus on the race and ethnicity, among other prohibited bases, of consumers and communities.⁶² Examiners focus their fair lending

57. Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156, 22,165 (May 4, 1995).

58. See, e.g., FED. RESERVE, CRA PERFORMANCE EVALUATION: FIRST AMERICAN BANK (850036) 1, 3 (2001) (explaining that examiners lowered the bank's CRA rating from *needs to improve* to *substantial noncompliance* "based on substantive violations of the Equal Credit Opportunity Act and the Fair Housing Act, [which] were detected during the compliance examination that was conducted concurrently with th[e] CRA performance evaluation").

59. See 24 C.F.R. § 100.5(a) (2020) (implementing the Fair Housing Act's anti-discrimination provision); and 12 C.F.R. § 1002.1(b) (2020) (implementing the Consumer Credit Protection Act's anti-discrimination provision).

60. *Id.*

61. FAIR LENDING PROCEDURES, *supra* note 4, at iv. For the purposes of this Article, I focus on the existing redlining complaints brought by the DOJ, which have been based on race (Black or African American) and ethnicity (Hispanic) only.

62. FAIR LENDING PROCEDURES, *supra* note 4, at i, 8.

examinations largely on the presence of “risk factors” inherent in banks’ products and services, markets, operations, and activities.⁶³ The FL Procedures define risk factors and categorize them by the nature of the risk and the type of potential discrimination.⁶⁴

There are twelve redlining risk factors that address activities generally associated with the accessibility of banks’ products, services, and facilities in areas with high concentrations of minority residents.⁶⁵ The redlining risk factors also address overt statements made by bank staff and complaints received from the public that suggest banks are unwilling to lend in areas with high minority populations.⁶⁶ One of the twelve redlining risk factors defined in the FL Procedures expressly connects CRA assessment area delineation to redlining risk.⁶⁷ Specifically, the *R9 Risk Factor* looks at whether banks’ assessment areas appear to have been drawn to exclude areas with relatively high concentrations of minority residents.⁶⁸ The *R9 Risk Factor* is akin to the CRA regulations’ provision that prohibits banks from delineating assessment areas that reflect illegal discrimination.⁶⁹

Even if a bank’s assessment area meets the technical requirements of the CRA regulations, and is not drawn in a discriminatory way, a bank may be engaged in discrimination outside of its assessment area. Loan patterns outside the bank’s assessment area, for example, may suggest the bank is avoiding certain communities or consumers in a discriminatory way.⁷⁰ Therefore, the FL Procedures permit bank examiners to conduct redlining analyses within a bank’s CRA assessment area or reasonably expected market area (REMA).⁷¹ In some cases, a bank’s REMA and assessment area are the same. The FL Procedures do not expressly define REMA, but provide that redlining analyses can take place in “areas where the institution actually marketed and provided credit and where it could reasonably be expected to have marketed and provided credit.”⁷² In developing the concept of a REMA,

63. *Id.* at 1.

64. Fair lending examiners will generally focus their examination activities in one or more of the following areas, each of which contains its own unique risk factors: overt discrimination, disparate treatment in underwriting, disparate treatment in pricing, disparate treatment by steering, disparate treatment by redlining, and disparate treatment in marketing. There are also risk factors related to the bank’s overall compliance program. *Id.* at 1–38.

65. *Id.* at 10–11.

66. *Id.* at 8–11.

67. *Id.* at 10–11.

68. *Id.* at 11.

69. Community Reinvestment (Regulation BB), 12 C.F.R. § 228.41(e)(2) (2020).

70. FAIR LENDING PROCEDURES, *supra* note 4, at 10–11.

71. *See id.* at 31, 32 (stating that step one in a bank’s comparative analysis for redlining is to “[i]dentify and delineate any areas within the institution’s CRA assessment area and reasonably expected market area” to assess minority areas).

72. *Id.*

federal bank regulators recognized that discrimination can occur outside of lawfully-delineated CRA assessment areas, but that this does not imply that a bank's assessment area was drawn in a discriminatory way.⁷³

B. Enforcement by the DOJ

Federal bank regulators refer potential redlining matters to the DOJ when they have reason to believe banks are engaging in or have engaged in a pattern or practice of discrimination.⁷⁴ The DOJ is authorized to bring civil actions against banks whenever it believes a bank has a pattern or practice of discrimination in violation of the ECOA or the FHA.⁷⁵ The DOJ can also bring these claims absent a federal bank regulator's referral.⁷⁶ Ultimately, the DOJ enforces the fair lending laws by issuing complaints and consent orders.

The DOJ generally supports its redlining complaints by relying on four factors: loan application and origination volume, branch network and activity, marketing and outreach efforts, and CRA assessment area delineation.⁷⁷ The DOJ's analysis focuses on a bank's loan originations or applications in majority-minority census tracts relative to similar lenders in the same market.⁷⁸ In so doing, the DOJ tends to look at banks' lending activities within MSAs or counties, even if the banks' assessment areas and REMAs are significantly smaller.⁷⁹

The DOJ also evaluates a bank's existing branch network—including patterns of branch openings, closings, and acquisitions—to determine if there is evidence suggesting that the bank is systematically avoiding areas with high minority populations. Finally, the DOJ examines the extent to which a

73. *Id.* at 32.

74. Equal Credit Opportunity Act, 15 U.S.C. § 1691e(g) (2012).

75. *Id.* § 1691e(h).

76. *Id.*; Fair Housing Act, 42 U.S.C. § 3614(a) (2012).

77. There is no formal public guidance that indicates how the DOJ has developed or applies these redlining risk factors. I gleaned this information by reading DOJ complaints. *See Housing and Civil Enforcement Section Cases, supra* note 6 (EP?). In more recent complaints, the DOJ also incorporates "overt statements" into its analysis. It is also likely that the DOJ and the federal bank regulators collaborate on these matters outside of the public eye.

78. *See* Complaint at ¶ 4, *United States v. KleinBank*, No. 17-cv-136 (D. Minn. Jan. 13, 2017) ("[F]rom 2010 to 2015, . . . comparable lenders generated applications in majority-minority tracts at over five times the rate of KleinBank, and originated loans in majority-minority tracts at over four times the rate of KleinBank.").

79. In one exception, in addition to analyzing lending activity in a larger geographic area, the DOJ indicated that the bank generated "smaller proportion[s]" of applications and loans in majority-minority census tracts within its assessment area than comparable lenders. *Id.* at ¶¶ 32–35.

bank's marketing and outreach activities appear to avoid high minority areas or otherwise differ based on the minority composition of areas.⁸⁰

III. CRITIQUE OF THE DOJ'S USE OF CRA ASSESSMENT AREAS TO SUPPORT ITS REDLINING ALLEGATIONS

The DOJ's redlining analysis is flawed along several dimensions. First, the CRA does not support, or at least does not encourage, banks to serve communities located outside of their CRA assessment areas.⁸¹ Second, the DOJ ignores the practical and financial constraints that limit the territories banks can reasonably serve.⁸² Third, the DOJ creates a conflict for banks that seek to comply with the CRA by focusing their expenditures inside assessment areas that are more narrowly drawn than MSAs or counties. At the same time, these banks want to avoid allegations of lending discrimination, which, under the DOJ's approach, suggests expanding their lending beyond their assessment areas.⁸³

As a result, the DOJ has found redlining to exist, not where banks have carved out and denied access to credit in minority communities but, instead, where banks have failed to include entire metropolitan areas in their CRA assessment areas.⁸⁴ As a result, banks are lending in areas with higher minority populations at lower rates than banks that serve the metropolitan areas.⁸⁵ Based on its analysis, the DOJ can use its enforcement authority to redefine what banks' assessment areas ought to be.⁸⁶ The issue, however, is that in these situations, the DOJ offers no proof that the banks delineated their

80. Marketing is not a redlining risk factor in the FL Procedures. FAIR LENDING PROCEDURES, *supra* note 4, at 11. Instead, marketing is a standalone area of focus for fair lending examinations and includes its own set of distinct risk factors. *Id.*

81. *See supra* Parts II, III.A (revisiting flaws within the DOJ's redlining analysis; specifically, the CRA's lack of encouragement toward banks to serve communities outside of their assessment areas).

82. *See* Community Reinvestment (Regulation BB), 12 C.F.R. § 228.41(d) (2020) (allowing banks to "include only the portion of a political subdivision that it reasonably can be expected to serve"); *see also infra* Part III.B (discussing conflicts between the DOJ's assessment area analysis and the CRA regulations).

83. *See supra* Part III (summarizing a recurring issue banks face when trying to comply with the CRA regulations).

84. *See* Complaint at ¶ 19, *United States v. KleinBank*, No. 17-cv-136 (D. Minn. Jan. 13, 2017) ("Since approximately 2007, KleinBank's main CRA assessment area has consisted of Anoka, Carver, Dakota, McLeod, Scott, Sherburne, Sibley, and Wright Counties, and a portion of Hennepin County. Within Hennepin County, the assessment area excludes an area roughly consistent with the city limits of Minneapolis.").

85. *Id.* ¶¶ 24–37.

86. Equal Credit Opportunity Act, 15 U.S.C. §§ 1691e(g)–(h) (2012).

CRA assessment areas in discriminatory ways, which is what the law requires for liability to attach.⁸⁷

Small banks, faced with a DOJ fair lending lawsuit, face difficult choices. Assuming they cannot afford an expensive lawsuit and lack the resources to expand into a large metropolitan market, small banks are in a no-win position. They can contest the DOJ's methodology, which would be expensive and could generate negative publicity.⁸⁸ Or, they can enter into a consent decree to avoid the litigation costs and publicity, but would need to expand their assessment areas.⁸⁹ The latter would require extracting resources from their existing assessment areas, which they committed to serve under the CRA,⁹⁰ and spreading those resources across vast geographies that they are ill-equipped to serve. The unintended consequence is, thus, that DOJ redlining cases have the potential to inhibit small banks' ability to serve the needs of their communities.

A. The Importance of CRA Assessment Areas to the DOJ's Redlining Claims

To illustrate the problem I have described, I have created several scenarios below. Clark Bank delineates its assessment area to include contiguous cities and towns located outside of Metropolis. For simplicity, assume that the only majority-minority census tracts in the state are located in Metropolis and that the entire state is contained in one MSA. Therefore,

87. While beyond the scope of this Article, I note here that redlining is a form of disparate treatment, which requires proof of intent to discriminate. *See* *Gallagher v. Magner*, 619 F.3d 823, 831 (8th Cir. 2010) (citation omitted) (“Proof of discriminatory purpose is crucial for a disparate treatment claim.”).

88. *See, e.g., Citibank Pays \$49M to Resolve Fair Housing Charges in Mortgage Program*, YAHOO! FINANCE (Mar. 20, 2019), <https://finance.yahoo.com/news/citibank-pays-49m-resolve-fair-042140572.html> (reporting that Citibank was ordered to pay a steep price of \$24 million to 24,000 affected customers after it self-reported to the Office of the Comptroller of the Currency).

89. *See* Consent Order at 1 and ¶¶ 23, 50, *United States v. Eagle Bank & Trust Co. of Mo.*, No. 4:15-cv-1492 (E.D. Mo. Oct. 1, 2015) (explaining that Eagle Bank agreed to expanded “physical presence” to “avoid the risks and burdens of litigation”).

90. The research in this area is limited. However, others have researched whether the CRA creates a potential for banks to avoid serving the communities it was designed to benefit. *See, e.g.,* Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291, 340 (1993) (noting that the CRA requirements may dissuade banks from serving low-income urban communities, and thus “probably harms the very areas that it was ostensibly designed to serve”); *see also e.g.,* Vincent D. Rougeau & Keith N. Hylton, *The Community Reinvestment Act: Questionable Premises and Perverse Incentives*, 18 ANN. REV. BANKING L. 163, 187 (1999) (arguing that a bank not currently operating in an area with low-income residents would have an incentive to stay outside such an area). *But see, e.g.,* Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 614–15 (2005) (contending that the CRA does not cause banks to avoid low-income communities, based primarily on the 1995 changes to the CRA Regulation). I do not offer a position on this point, and instead propose that a bank will take steps to avoid being compelled to serve a large metropolitan area or, if compelled to serve a large metropolitan area, will change its business model to accommodate that new market.

Clark Bank has delineated an assessment area that is comprised of a partial MSA and that does not contain any majority-minority census tracts. The DOJ issues a complaint against Clark Bank, alleging the bank is redlining the majority-minority census tracts in Metropolis.

1. The DOJ's Analysis of Redlining by Clark Bank

The DOJ evaluates Clark Bank's loan application and origination volume, branching activity, and marketing and outreach efforts *in the entire MSA* to determine if there is evidence that the bank is avoiding majority-minority census tracts located in Metropolis. The DOJ notes in its complaint that Clark Bank does not operate a branch in the majority-minority census tracts in Metropolis,⁹¹ nor does it conduct significant marketing and outreach activities in the city. The bank opts instead to focus its resources inside its CRA assessment area, which is comprised of non-majority-minority census tracts.⁹² The DOJ compares the bank's application and origination volume in majority-minority census tracts to other "comparable lenders" operating in the MSA. If Clark Bank's volumes differ significantly from comparable lenders, the DOJ considers this evidence of redlining.

a. Activities within Clark Bank's Assessment Area

The following chart depicts Clark Bank's and comparable lenders' application and origination activity inside the bank's CRA assessment area.

	Census Tracts in Assess. Area	Clark Bank App.	Clark Bank App. Total	Comp. Banks App.	Comp. Banks App. Total	Clark Bank Orig.	Clark Bank Orig. Total	Comp. Banks Orig.	Comp. Banks Orig. Total
Majority-White	100	1,000	100%	10,000	100%	900	100%	9,000	100%
Majority-Minority	0	0	0%	0	0%	0	0%	0	0%
Totals	100	1,000	100%	10,000	100%	900	100%	9,000	100%

Table 1. Activities Within Clark Bank's Assessment Area

Looking at application and origination activity within Clark Bank's assessment area, it is clear that Clark Bank and comparable banks receive all of their applications and originate all their loans in non-minority census

91. If Clark Bank operated a branch in Metropolis, it would need to include Metropolis in its CRA assessment area, which it chose not to do. *See* Community Reinvestment (Regulation BB), 12 C.F.R. § 228.41(c)(2) (2020) (requiring banks to include certain "geographies" in their assessment areas).

92. Consistent with the DOJ's actual complaints, the DOJ also does not provide any context to explain why Clark Bank does not operate a branch within Metropolis—e.g., saturated with competitors' branches, high real estate costs, and low levels of foot traffic.

tracts, because the assessment area does not contain any majority-minority census tracts.

b. Activities Within the Metropolis MSA

If a bank that operates in a majority-white area is compared to banks that operate across more diverse markets, the comparable banks will lend more in minority areas. Clark Bank, like many community banks, receives applications and originates loans outside of its CRA assessment area.⁹³ To determine if Clark Bank is redlining in the majority-minority census tracts in Metropolis, the DOJ evaluates Clark Bank's application and origination volume against comparable lenders operating in the entire MSA.⁹⁴ As depicted in the table below, the DOJ finds that Clark Bank lags comparable lenders in both application volume and origination volume.⁹⁵

	Census Tracts in MSA	Clark Bank App.	Clark Bank App. Total	Comp. Banks App.	Comp. Banks App. Total	Clark Bank Orig.	Clark Bank Orig. Total	Comp. Banks Orig.	Comp. Banks Orig. Total
Majority-White	200	1,050	98%	22,000	88%	940	98%	20,500	92%
Majority-Minority	50	20	2%	3,000	12%	15	2%	1,800	8%
Totals	250	1,070	100%	25,000	100%	955	100%	22,300	100%

Figure 2. Activities Within the Metropolis MSA
Note: Percentages are rounded to the nearest percent.

The DOJ uses these lending disparities, coupled with the absence of branches and the limited marketing and outreach efforts in majority-minority

93. For my purposes, I assume that the volume of Clark Bank's applications and originations outside of its CRA assessment area are sufficient to show potentially concerning application or origination patterns outside of the assessment area. For example, if the bank originated just five loans outside its assessment area, regardless of where those loans were located, the volume is likely not high enough to show any pattern from which any conclusions should be drawn.

94. The FL Procedures permit analysis based on a bank's REMA, the area in which the bank actually is, or can reasonably be expected to, market and provide credit. FAIR LENDING PROCEDURES, *supra* note 4, at 32. However, there is no evidence that the DOJ used banks' REMAs in analyzing redlining claims in enforcement actions. In fact, the DOJ never mentions REMA in any of its public documents related to redlining. Instead, the DOJ defaults to arbitrarily large county- or MSA-delineated areas to conduct its redlining analyses. *See* Consent Order at 8, *Consumer Fin. Prot. Bureau v. Hudson City Savs. Bank*, F.S.B., No. 15-cv-7056 (D.N.J. Nov. 4, 2015) (listing the counties and cities that Hudson Bank must include in its revised assessment area); *see also infra* note 104 (listing consent and settlement agreements where banks agreed to expand their assessment areas to include larger portions of surrounding counties).

95. The DOJ has not disclosed the statistical method it uses to find statistical differences between a bank's activity and that of other comparable lenders. Further, the DOJ has not defined the cohorts of comparable lenders it uses in its comparisons. For our purposes, I can assume the comparable lenders and statistical method the DOJ uses are appropriate. I did not conduct a statistical analysis in this paper, but for the purposes of this example, I assume that the disparities in Table 2 are statistically significant.

census tracts, to allege that Clark Bank is engaging in a pattern or practice of discrimination by redlining the majority-minority census tracts in the MSA.

c. Clark Bank's Response to Analysis Using the MSA

Faced with a redlining allegation supported by application and origination volume, branching activity, and marketing and outreach efforts, Clark Bank could respond by stating that it has delineated its CRA assessment area in compliance with the CRA regulations and has focused its limited resources within this area as required by the CRA. Therefore, Clark Bank could argue that any disparities identified in the DOJ's analysis are the result of the bank's efforts to serve the communities in which it has a presence. Furthermore, the bank could contend that it cannot dramatically expand its operations into the Metropolis MSA, because it does not have the financial capacity for such a transformation. Doing so would require the bank to use deposits from within its assessment area to make loans outside the area it serves, which is exactly the scenario the CRA is structured to avoid.

Therefore, the DOJ must allege that Clark Bank delineated its assessment area in a discriminatory way, essentially arguing that the bank ought to have been serving the entire MSA under the CRA and that, therefore, the disparities are meaningful. As I discuss below, however, the DOJ relies on a flawed interpretation of the CRA regulations to make these allegations.⁹⁶ Additionally, the DOJ's analysis does not consider any legitimate business reasons for why Clark Bank excluded Metropolis from its assessment area.

d. A Deeper Analysis of Clark Bank's Situation

In this part, I show that a deeper analysis of Clark Bank's activities can undermine the DOJ's finding that the bank is redlining.

Assuming that Metropolis has the highest density of majority-minority tracts in the Metropolis MSA, an examination of Clark Bank's activities within the City of Metropolis can provide a more accurate measure of discrimination. If Clark Bank was redlining majority-minority census tracts in Metropolis, one would expect to see applications and originations only in the non-minority census tracts. To test this hypothesis, I ask: to the extent the bank has chosen to lend in Metropolis, is it lending in majority-minority census tracts similar to other banks operating in Metropolis? Table 3 depicts Clark Bank's application and origination volumes compared to other lenders.

96. *See infra* Part IV.B. (outlining how the DOJ interprets the CRA to include requirements that are not explicitly or implicitly stated in the regulation).

	Census Tracts in Metro-polis	Clark Bank App.	Clark Bank App. Total	Comp. Bank App.	Comp. Bank App. Total	Clark Bank Orig.	Clark Bank Orig. Total	Comp. Bank Orig.	Comp. Bank Orig. Total
Majority-White	100	50	71%	12,000	80%	40	73%	11,500	86%
Majority-Minority	50	20	29%	3,000	20%	15	27%	1,800	14%
Totals	150	70	100%	15,000	100%	55	100%	13,300	100%

Table 3. Activities Within Metropolis City Limits

Note: Percentages rounded to the nearest percent.

Table 3 shows a few important things. First, it shows that by excluding Metropolis from its assessment area, Clark Bank, like other community banks, is excluding from its CRA assessment area more non-minority census tracts than majority-minority census tracts in the city. Second, it reveals that Clark Bank has limited lending activity in Metropolis, regardless of the racial or ethnic composition of the census tracts. Furthermore, the bank is willing to extend credit throughout the city. Finally, Table 3 shows that Clark Bank, to the extent it originates loans in Metropolis, originates a greater proportion in majority-minority census tracts than comparable lenders operating in the city.

This illustration highlights why it is essential that the DOJ engage in a nuanced analysis when considering a redlining claim against a regulated bank. Not only should the DOJ consider banks' financial and other capacities to expand, but it also should conduct the type of analysis described above, so it can have a more robust picture of banks' activities. Without a thorough and subtle redlining evaluation, the DOJ can ignore the factors that justify banks' CRA assessment areas, yet still conclude that banks' CRA assessment areas are discriminatory.

B. The DOJ's Assessment Area Analysis Conflicts with the CRA Regulations

Assessment areas are important to community banks, because they represent the areas in which the federal bank regulators will evaluate banks' CRA performance. Given the reputational, business, and strategic risks associated with less-than-satisfactory CRA performance ratings, community banks need access to clearly-articulated standards and guidance to allow them to delineate the areas in which their performance will be evaluated.⁹⁷

97. See *supra* Part II (discussing consequences of less-than-satisfactory performance evaluations).

When the federal bank regulators added the provision to the CRA regulations that prohibits banks from delineating assessment areas in ways that reflect illegal discrimination,⁹⁸ they failed to provide standards against which banks' assessment areas would be evaluated.⁹⁹ The CRA, the CRA regulations, and the Interagency Questions and Answers (CRA Guidance)¹⁰⁰ are silent on the factors that federal bank regulators consider in determining whether banks' assessment areas reflect illegal discrimination. The only source of public guidance on what constitutes a discriminatory assessment area is found in the DOJ redlining cases.¹⁰¹ Further, there is usually little or no public record of the redlining evidence, because banks often settle to avoid the costs, burdens, and risks of litigation.¹⁰²

In many of the public complaints where the DOJ alleged that banks' assessment areas were drawn in discriminatory ways, the DOJ's interpretation of the CRA regulations¹⁰³ conflicts with the express provisions

98. Community Reinvestment (Regulation BB), 12 C.F.R. § 228.41(e)(2) (2020).

99. For example, unlike the provision that prohibits a bank from delineating an assessment area that comprises partial census tracts, which is an observable and objective fact, the provision that prohibits a bank from delineating an assessment area that reflects illegal discrimination is a conclusion, which must be supported by facts. *Id.*

100. The federal bank regulators issue CRA Q&As that serve as official guidance interpreting and clarifying the CRA regulation. Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance, 81 Fed. Reg. 48,506, 48,506 (July 25, 2016).

101. See *Housing and Civil Enforcement Section Cases*, *supra* note 6 (compiling DOJ redlining cases); see, e.g., Consent Decree at 1, *United States v. Chevy Chase Bank*, No. 94-cv-2829 (D.D.C. Aug. 22, 1994) (using "redlining" as a blanket term to describe "[t]he totality of the [discriminatory] policies or practices challenged" in this particular case).

102. See, e.g., Consent Order at 4, *United States v. BancorpSouth Bank*, No. 1:16-cv-118 (N.D. Miss. July 25, 2016) (indicating that "the bank [settled to avoid] contested litigation with the United States and the Bureau"); Consent order at 3, *United States v. Hudson City Sav. Bank*, No. 15-7056 (D.N.J. Nov. 4, 2015) ("Hudson City enters this settlement solely for the purpose of avoiding contested litigation with the United States and the Bureau, and to instead devote its resources to providing fair credit services to eligible persons, and to providing important and meaningful assistance to borrowers in certain markets."); Consent Order at 1, *United States v. Eagle Bank & Tr. Co. of Mo.*, No. 4:15-cv-1492 (E.D. Mo. Oct. 1, 2015) ("[T]he parties have entered into the Order . . . to avoid the risks and burdens of litigation.").

103. In ten of the sixteen public redlining complaints identified when researching this paper, the DOJ has interpreted the CRA regulation. See Complaint at 17, *United States v. Centier Bank*, No. 2:06-cv-344 (N.D. Ind. Oct. 13, 2006) (referencing 12 C.F.R. §§ 228.41(b), (d), (e)); Complaint at 24, *United States v. Citizens Republic Bancorp, Inc.*, No. 2:11-cv-11976 (E.D. Mich. May 5, 2011) (referencing 12 C.F.R. §§ 228.41(c)-(e)); Complaint at 5, *United States v. Cmty. State Bank*, No. 2:13-cv-10142 (E.D. Mich. Jan. 15, 2013) (referencing 12 C.F.R. §§ 345.41(c)-(e) (2020)); Complaint at 4, *United States v. Eagle Bank & Tr. Co. of Mo.*, No. 4:15-cv-1492 (E.D. Mo. Sept. 29, 2015) (referencing 12 C.F.R. §§ 228.41(c)-(e)); Complaint at 8-9, *United States v. First Am. Bank*, No. 1:04-cv-4585 (N.D. Ill. July 13, 2004) (referencing 12 C.F.R. §§ 228.41(c)-(e)); Complaint at 5, *United States v. First United Sec. Bank*, No. 1:09-cv-644 (S.D. Ala. Sept. 30, 2009) (referencing 12 C.F.R. §§ 228.41(c)-(e)); Complaint ¶ 17, *United States v. Mid Am. Bank, F.S.B.*, No. 1:02-cv-9458 (N.D. Ill. Dec. 30, 2002) (referencing 12 C.F.R. §§ 228.41(b), (d), (e)); Complaint at 15, *United States v. Midwest BankCentre*, No. 4:11-cv-1086 (E.D. Mo. June 16, 2011) (referencing 12 C.F.R. §§ 228.41(b), (d), (e)); Complaint ¶ 17, *United States v. KleinBank*, No. 17-cv-136 (D. Minn. Jan. 13, 2017) (referencing 12 C.F.R. §§ 228.41(c)-(e)); see also Settlement Agreement at 5, *United States v. Old Kent Fin. Corp.*, No. 04-71879 (E.D. Mich. May 19,

of the CRA. The DOJ contends that banks should use county or MSA boundaries to define their assessment areas.¹⁰⁴ Nothing in the CRA regulations contains this requirement, and the federal bank regulators, which have sole authority to enforce the CRA regulations, have never communicated such a requirement. Instead, the CRA regulations explicitly state that banks' assessment areas must "[c]onsist generally of one or more MSAs or metropolitan divisions . . . or one or more contiguous political subdivisions, such as counties, cities, or towns."¹⁰⁵ The only limitation is that the CRA prohibits assessment areas from comprising portions of census tracts.¹⁰⁶ Therefore, the CRA regulations permit banks to delineate partial MSAs, counties, cities, or towns within their assessment areas.

The DOJ also asserts that banks can revise their CRA assessment areas to include partial counties or MSAs only when failure to do so would result in assessment areas that would be "extremely large, of unusual configuration,

2004) (interpreting 12 C.F.R. § 228.41(e) to allege that the bank delineated its assessment area in a discriminatory way).

104. As detailed in 12 of the 16 public redlining consent orders or settlement agreements identified when researching this Article, banks ultimately revised their assessment areas to include entire counties or MSAs. *See* Consent Order at 8, *Consumer Fin. Prot. Bureau v. Hudson City Sav. Bank*, F.S.B., No. 15-cv-7056 (D.N.J. Nov. 4, 2015) (requiring the Hudson City Savings Bank to "revise its CRA assessment areas to include all of Bronx, Kings, Queens, and New York Counties in New York State, the city of Camden, NJ, and the city of Philadelphia, PA"); Consent Order at 21, *United States v. BancorpSouth Bank*, No. 1:16-cv-118 (N.D. Miss. July 25, 2016) (noting that BancorpSouth amended its assessment area in the Memphis MSA to include more counties); Consent Order at 14, *United States v. Centier Bank*, No. 2:06-cv-344 (N.D. Ind. Oct. 16, 2006) (explaining that Centier Bank "revised its CRA assessment area to include all of the Gary MSA . . . [and] the whole of Lake and Porter counties"); Consent Decree at 7, *United States v. Chevy Chase Bank*, No. 1:94-cv-1829 (D.D.C. Aug. 22, 1994) ("[I]n February 1994, Chevy Chase revised its delineated territory to include the District of Columbia, in its entirety."); Consent Order at 3, *United States v. Citizens Republic Bancorp, Inc.*, No. 2:11-cv-11976 (E.D. Mich. June 23, 2011) (explaining that "Citizens Bank revised its assessment area . . . to include all of Wayne County and the City of Detroit" and requiring Citizens Bank to include these areas throughout the Agreement); Consent Order at 4–5, 16, *United States v. Cmty. State Bank*, No. 2:13-cv-10142 (E.D. Mich. Mar. 12, 2013) (requiring Community State Bank to serve a lending area within the assessment area as required by the CRA); Consent Decree at 2, *United States v. Decatur Fed. Sav. & Loan*, No. 92-cv-2198 (N.D. Ga. Sept. 17, 1992) (explaining that Decatur agreed to "expand its delineated community under the Community Reinvestment Act to include all of Fulton County"); Consent Order at ¶ 5, *United States v. Eagle Bank & Tr. Co. of Mo.*, No. 4:15-cv-01492 (E.D. Mo. Oct. 1, 2015) ("In 2013, Eagle modified its CRA assessment to include the entire City of St. Louis and St. Louis and Jefferson Counties."); Consent Order, *United States v. First Am. Bank*, No. 1:04-cv-4585 (N.D. Ill. July 13, 2004) ("[T]he Bank revised its CRA assessment area to include all of the Chicago and Kankakee MSAs. The Bank shall continue to include the entirety of those two MSAs in its CSA assessment area."); Consent Order at 4, *United States v. Mid Am. Bank*, F.S.B., No. 1:02-cv-9458 (N.D. Ill. Jan. 8, 2003) ("[Mid America Bank] revised its CRA assessment area in December, 2001, to include all of Cook, DuPage, Kane, and Will Counties."); Amended Agreed Order at 7, *United States v. Midwest BankCentre*, No. 4:11-cv-1086 (E.D. Mo. Apr. 15, 2013) ("In 2010, Midwest revised its CRA assessment area to include all of St. Louis, St. Charles and Jefferson Counties and the City of St. Louis."); Settlement Agreement at 2, *United States v. KleinBank*, No. 17-cv-136 (D. Minn. May 8, 2018) (requiring KleinBank to expand its CRA assessment area to include Hennepin County).

105. Community Reinvestment (Regulation BB), 12 C.F.R. § 228.41(c)(1) (2020).

106. *Id.* § 228.41(e)(1).

or divided by significant geographic barriers.”¹⁰⁷ The DOJ’s interpretation is inaccurate and incomplete. It is inaccurate, because the actual provision provides that adjustments are “*particularly appropriate* in the case of an assessment area that otherwise would be extremely large, of unusual configuration, or divided by significant geographic barriers.”¹⁰⁸ It is incomplete, because it omits the portion of this provision that allows banks to adjust their assessment area boundaries to areas that they reasonably can be expected to serve.¹⁰⁹ When read in their entirety, the CRA regulations do not, as the DOJ contends, preclude banks from accounting for other factors when delineating their assessment areas.

The DOJ’s approach oversimplifies the myriad factors that banks consider when determining the area they can reasonably serve, implying that the *mere exclusion* of majority-minority census tracts in non-county or non-MSA delineated assessment areas is discriminatory. By using the racial and ethnic composition of census tracts as the focal point of assessment area delineation, the DOJ essentially strips community banks of their discretion to define communities that they can reasonably serve according to the practical and financial constraints imposed by their business models and strategies. Thus, the DOJ is effectively rewriting the CRA rules.

107. *Id.* § 228.41(d). While the DOJ generally requires that assessment areas be delineated at the MSA or county level, there are cases in which the DOJ deviates from this approach. *See, e.g.*, Consent Order at 5, *United States v. Eagle Bank & Tr. Co. of Mo.*, No. 4:15-cv-01492 (E.D. Mo. Oct. 1, 2015) (requiring Eagle Bank to revise its assessment area to include all of St. Louis City and St. Louis County instead of using Interstate I-64 as a northern assessment area border). The CRA’s Q & As, however, expressly include highway systems as an example of a geographic barrier that would permit a bank to adjust its assessment area boundaries to a portion of a political subdivision. Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance, 81 Fed. Reg. 48,506, 48,549 (July 25, 2016). *See also, e.g.*, Consent Order at ¶ 9, *United States v. First United Sec. Bank*, No. 1:09-cv-644 (S.D. Ala. Nov. 18, 2009) (requiring the bank to add “all of the majority-African-American tracts of Tuscaloosa County south of the Black Warrior River” and to submit to the DOJ a revised “South Alabama assessment area to include at least five (5) additional majority African-American census tracts”). The primary focus of this Article is on the risk presented by the DOJ’s focus on MSAs and counties for purposes of determining whether assessment areas are discriminatory. It is important to note, as these cases reflect, that the DOJ’s analysis occasionally deviates from the norms it has established, which can make it difficult for banks to know how to comply.

108. 12 C.F.R. § 228.41(d) (emphasis added).

109. *Id.*

*C. The DOJ's Approach to Redlining Places a Particularly Onerous
Burden on Community Banks*

The risk of redlining allegations and unsatisfactory CRA ratings can lead community banks to make decisions that are not in the best interests of the banks or the communities they serve.¹¹⁰

1. Community Banks, Competition, and Assessment Areas

Competitive pressures often drive the business and strategic decisions community banks make. As such, community banks delineate CRA assessment areas that not only comport with the technical requirements of the CRA regulations, but also are compatible with, for example, their business strategies, business models, product offerings, and infrastructure.¹¹¹ In areas with large populations and high levels of competition, it is not uncommon for community banks to delineate geographically-compact CRA assessment areas that reflect the markets that they can reasonably serve.¹¹² This means that community banks operating outside of major metropolitan areas may choose to exclude those metropolitan areas from their CRA assessment areas for legitimate, nondiscriminatory reasons.¹¹³

Community banks understand that there are limitations on the size of the territories they can serve, but also recognize that these limits do not preclude them from lending beyond their lawfully delineated assessment area

110. Further, as a form of industry guidance, the DOJ's enforcement actions have the potential to effectively create new official CRA regulation guidance, which is under the purview of the federal bank regulators and must go through the notice and comment rulemaking process. *See What Is a Regulation and How Is It Made?*, FED. RESERVE, <https://www.federalreserve.gov/faqs/what-is-a-regulation.htm> (last updated June 29, 2018) (explaining how a regulation is made by the central bank of the United States).

111. *See, e.g.*, Settlement Agreement at 7–8 n. 1, *United States v. Old Kent Fin. Corp.*, No. 04-71879 (E.D. Mich. May 19, 2004) [hereinafter *Old Kent Settlement Agreement*] (“Old Kent asserts that its Assessment Areas were determined in a fair and objective manner, by drawing circles of fixed radius around its branch locations and including all census tracts within those circles.”); *see also id.* at 7–8 (“Old Kent asserts that the cost of entering a new market through the construction of new bank branches is very high, and, therefore that Old Kent grew principally by acquiring a number of smaller community banks, which had branches outside of the City of Detroit.”).

112. *See id.* at 8 (highlighting that “bank lending in the City of Detroit is dominated by a few large banks who were not suitable acquisition targets for Old Kent”).

113. In several consent orders, the DOJ provided a summary of the banks' responses to the redlining allegations. However, the DOJ has failed to articulate how the bank's reasoning was factually or legally inadequate. *See, e.g.*, Consent Agreement at 8–9, *United States v. Centier Bank*, 2:06-cv-344 (N.D. Ind. Oct. 13, 2006) (explaining that legal restrictions, competition created and entrenched by those restrictions, and lack of households able to afford a home hindered Centier Bank's expansion into Gary, East Chicago, and Hammond); *see also, e.g.*, *Old Kent Settlement Agreement*, *supra* note 111, at 8 (describing that, due to the high cost of new construction, Old Kent's strategy was to grow and expand by acquiring smaller community banks, and, because “Detroit [wa]s dominated by a few large banks who were not suitable acquisition targets for Old Kent,” the bank had been unable to acquire branches in Detroit).

boundaries.¹¹⁴ Inside their assessment areas, community banks remain competitive by leveraging local knowledge and expertise and focusing on building and fostering customer relationships.¹¹⁵ In doing so, community banks are able to serve the needs of individuals, businesses, and other organizations within their communities.

For most banks, the local focus rarely has the purpose or the effect of denying access to credit in any areas outside of the banks' assessment areas.¹¹⁶ In fact, as profit-seeking enterprises, community banks take advantage of opportunities to lend outside their assessment areas and have used technological advancements to expand the reach of their businesses.¹¹⁷ Attracting customers outside their assessment areas is good for the banks and their customers. However, simply because a bank has been able to secure customers outside its assessment area, does not mean the bank has shifted away from its local focus, nor does it mean the bank can, or should, enlarge its assessment area.

2. The Effects of the DOJ's Redlining Enforcement Actions on Community Banks' Assessment Area Delineation and Business Decisions

The DOJ's approach to redlining claims has generated unanticipated consequences for small community banks. Banks do not make business decisions without considering legal and regulatory risks. Thus, bank executives track legal developments and enforcement actions to assess areas in which they have to enhance their compliance risk management or otherwise change their practices. The significant consequences of a DOJ fair lending enforcement action make community banks particularly responsive to the risk of a DOJ redlining claim, which can lead them to overextend themselves by defining their markets using MSA or county lines, rather than thoughtfully assessing where they can profitably sell their products and

114. As it exists, the CRA Regulation strikes a reasonable balance between requiring banks to define communities to "serve" and recognizing that banks will necessarily originate loans in areas they are unable to serve. This is precisely why the CRA Regulation requires only that CRA assessment areas include census tracts where the bank has originated or purchased a "substantial portion" of its loans. 12 C.F.R. § 228.41(c)(2).

115. See COMMUNITY BANKING STUDY, *supra* note 9, at 1-1 and 3-9 (explaining that "community banks tend to base credit decisions on local knowledge and nonstandard data obtained through long-term relationships" and that "community banks hold a much stronger competitive position in nonmetro counties" relative to large banks' "dominance in metro areas").

116. 12 C.F.R. § 228.41(c)(2).

117. See Lawrence J. White, *Financial Modernization After Gramm-Leach-Bliley: What About Communities?*, in FINANCIAL MODERNIZATION AFTER GRAMM-LEACH-BLILEY 252-53 (Patricia A. McCoy ed., 2002) (referencing Internet banking while questioning the rationale for the CRA's requirement that banks retain a local geographic focus).

services.¹¹⁸ Furthermore, banks risk deploying their limited resources in areas based on their racial or ethnic characteristics, rather than the opportunities or needs in those areas.¹¹⁹

By overlooking the potential that community banks simply cannot compete in large metropolitan markets, and applying a flawed interpretation of the CRA regulations, the DOJ has effectively communicated that the location of majority-minority census tracts should drive assessment area delineation and business decisions. The DOJ's redlining enforcement actions can be problematic because they direct banks' resources to urban areas in a way that cannot be supported by business realities.¹²⁰ While expansion into urban areas may make business sense for some community banks,¹²¹ entering new markets can create problems for community banks that lack the flexibility to adjust their business strategies and models; alter their risk tolerances; open branches or other banking facilities; acquire other banks; hire staff, such as loan officers; or change their products' scope, pricing, terms, and conditions to meet the competitive and consumer demands of metropolitan markets. For example, a metropolitan area may have higher property values and larger commercial projects that are incompatible with a community bank's products, staff expertise, or risk tolerance. Also, lenders operating in that market may have more competitive pricing, larger product scope, or differing credit standards.¹²² The DOJ can therefore exert

118. See *supra* Part III.C.1 (summarizing the previous Part's discussion about the consequences for community banks when choosing their assessment areas).

119. As a policy matter, the DOJ's approach to redlining enforcement may also reignite industry concerns that the CRA is a law aimed at the government allocation of bank credit. While lawmakers and regulators alike have allayed industry concerns over this issue, the statistical analysis employed by the DOJ implies that community banks should "allocate" a similar amount of their resources to minority communities compared to other comparable lenders. See Complaint at 2, *United States v. KleinBank*, No. 17-cv-136 (D. Minn. Jan. 13, 2017) (showing that "comparable lenders" to KleinBank "generated applications in majority-minority tracts at over five times the rate of KleinBank, and originated loans in majority-minority tracts at over four times the rate of KleinBank"). To be sure, there is an expectation of such allocation to the extent majority-minority census tracts are in a bank's delineated community. However, the issue arises from the DOJ's conclusion that a community bank ought to be serving a minority area outside of its delineated assessment area, thereby redefining what the bank's community ought to be.

120. See *supra* Part III.C.1 (reiterating how the DOJ's redlining enforcement actions cause banks to take on more than they can handle).

121. In fact, research shows that metropolitan areas offer good opportunities for community banks. See COMMUNITY BANKING STUDY, *supra* note 9, at 3-7 ("These disparities in long-term growth rates between metro and nonmetro areas point to greater opportunities for growth on the part of banks that do business in metro areas.").

122. See, e.g., JIM CAMPEN, CHANGING PATTERNS XXIII, at 10 (2016) (finding that for home-purchase loans in Greater Boston in 2015, "the FHA loan share in the 53 predominantly minority tracts (those with at least 75% minority residents) was 3.6 times greater than the FHA loan share in the 398 predominantly white tracts (32.0% vs. 8.8%)"). Banks that offer only conventional financing may therefore be at a competitive disadvantage in these census tracts.

significant strain on community banks' business by sending a message—through enforcement actions—about what communities banks should serve.

While overextension is the primary risk for community banks, the DOJ's approach can also have the reverse effect of creating disincentives for banks to expand, lend, or invest in larger geographic areas. For example, a bank might forego acquiring another bank out of fear that the target's branch network could give the appearance that the bank is avoiding majority-minority census tracts.¹²³ There is also a risk that banks that lend outside their lawful assessment areas may pull back for fear that the DOJ will misconstrue such lending as evidence of the banks' ability to serve larger areas, and thus require the bank to expand its market.¹²⁴ Such actions would undermine one of the CRA's goals of increasing banking opportunities for certain areas and individuals.¹²⁵ For banks that forgo expansion opportunities or pull back lending and investment, communities outside of their CRA assessment areas may be harmed to the extent the banks' products and services are not made as readily available, and there is less competition.

3. Community Banks that Expand Without Adequate Resources Can Run Afoul of the CRA

The DOJ's approach can have a significant effect on banks' CRA ratings by limiting their ability to direct resources to areas of greatest need or with the greatest potential opportunity. Technology, while expanding the reach of community banks, has not eliminated the importance of the geographic proximity of bank staff and facilities.¹²⁶

Community banks serve their communities in many ways that loan application and origination data do not show. The DOJ does not consider how

123. See, e.g., Old Kent Settlement Agreement, *supra* note 111, at 4 (alleging that Old Kent Bank acquired new branches to serve predominantly-white neighborhoods).

124. This may be particularly apparent where technology would allow a bank to lend across large geographical areas, including major cities. If this activity, while profitable to the bank, is construed by the DOJ as demonstrating the bank's ability to serve a larger area, banks may fail to take advantage of technological advancements that make their products and services more readily available across large geographies. It is possible that a bank can make loans in an area, but not fully serve the area in the ways the CRA contemplates. This issue may be as much a CRA matter as a fair lending matter and, perhaps may be addressed with revisions to the CRA regulations.

125. The stated purpose of the CRA, "to encourage such institutions to help meet the credit needs of the local communities in which they are chartered," may not be well served by community banks' hesitancy toward some profitable and sustaining outreach. Community Reinvestment Act, 12 U.S.C. § 2901(b) (2012).

126. While I do not address the issue here, neither the CRA regulations nor the CRA Procedures have been updated to accommodate banks with diffuse lending patterns over large geographic areas. Some experts have questioned the relevance of the CRA in a financial landscape that has largely eliminated geographic obstacles to obtaining financial services. For a more in-depth look at the CRA in the modern banking environment, see White, *supra* note 117, at 252–53.

its data-driven analysis, focused on loan application and origination volume relative to comparable lenders, will impact community development activities throughout banks' assessment areas. For example, community banks support their communities through CRA-qualified investments, community development services, and community development loans that do not show up in the reported loan data that the DOJ analyzes.¹²⁷ All of these services are critical to evaluations of the CRA performance of ISBs and large banks. In their efforts to serve major cities and reduce redlining risk, banks may seek to drive application and origination volume and overlook other assessment area needs or be unable to take advantage of community development opportunities.

It is uncertain how federal bank regulators will treat expanded assessment areas during CRA examinations. The CRA Guidance recognizes that there are times when banks may designate larger CRA assessment areas than required under the CRA regulations.¹²⁸ In these situations, the CRA Guidance makes clear that the federal bank regulators do not expect banks to serve those entire areas.¹²⁹ However, DOJ enforcement actions have contended that banks' assessment areas must be delineated using MSA or county boundaries.¹³⁰ Assessment area revisions in these situations, therefore, would theoretically obligate banks to serve the entirety of a new area.¹³¹ Equally important, if banks expand their assessment areas because they fear potential redlining claims, they may fail to meet the needs of their revised communities, which could have a negative impact on their CRA ratings, bringing about the consequences I described in earlier Parts.¹³²

127. See Community Reinvestment (Regulation BB), 12 C.F.R. §§ 228.21–228.24, 228.26 (2020) (describing the tests federal bank regulators use to evaluate a bank's record of helping to meet the credit needs of local communities).

128. See Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156, 22,171 (May 4, 1995) (“If . . . an institution delineated the entire county . . . but could have delineated . . . only a portion of the county, it will not be penalized . . . so long as that portion does not reflect illegal discrimination or arbitrarily exclude low- or moderate-income geographies.”).

129. See *Large Institution Examination Procedures*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, FED. RESERVE BD., & FED. DEPOSIT INS. CORP. (April 2014), <https://www.occ.treas.gov/news-issuances/bulletins/2014/bulletin-2014-16a.pdf> (adding that, pursuant to the lending test within the CRA Examination Procedures, “[larger] institutions are not required to lend in every geography”).

130. See *supra* note 103 (listing cases in which DOJ interpreted the assessment area provisions of the CRA); see also *supra* note 104 (listing the banks that revised their assessment areas to comprise full counties or full MSAs).

131. The guidance actually reads: “[i]f, for example, an institution delineated the entire county in which it is located as its assessment area but could have delineated its assessment area as only a portion of the county, it will not be penalized for lending only in that portion of the county, so long as that portion does not reflect illegal discrimination or arbitrarily exclude low- or moderate-income geographies.” Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156, 22,171 (May 4, 1995).

132. See *supra* Part I.D (explaining how the CRA ratings impact both large and small banks).

IV. PROPOSALS

In this Part, I propose several ways to mitigate the problems I have identified with the DOJ's redlining enforcement actions. These proposals strike a balance between enforcing the fair lending laws and furthering the goals of the CRA, by ensuring that: (1) the DOJ comports with the CRA regulations and official guidance; (2) community banks are informed of the factors that put them at risk of redlining enforcement actions; and (3) banks are not being discouraged from engaging in CRA activities because of uncertain redlining risks.

A. Federal Rulemaking and Other Forms of Guidance

The federal bank regulators should use their rulemaking authority to promulgate CRA guidance that establishes criteria for determining whether an assessment area reflects illegal discrimination.¹³³ In addition, the rulemaking should clearly state how and to what extent CRA assessment areas can be used in redlining cases. The rulemaking notice and comment period would enable community banks and others to identify specific situations that have given rise to confusion about the factors that go into determining whether an assessment area delineation reflects illegal discrimination. With detailed CRA guidance clarifying the assessment area analysis, banks will know what factors federal bank regulators consider when determining a violation of the CRA regulations, and how this can be used by the DOJ in redlining cases.

A rulemaking approach would have the additional benefit of communicating expectations to the industry as a whole, limiting the need for banks to rely on the DOJ's interpretations of the CRA regulations in individual redlining enforcement actions. Clear communication to the industry would shed light on the supervisory and enforcement approaches and clearly articulate the overlap between CRA assessment areas and fair lending, so banks can better understand and manage their fair lending risk on an ongoing basis. Given the gravity of the issue and the implications of CRA assessment area revisions, federal bank regulators and the DOJ should

133. Interestingly, another vague provision of the CRA regulation prohibits a bank from delineating an assessment area that "arbitrarily exclude[s] low- and moderate-income geographies." Community Reinvestment (Regulation BB), 12 C.F.R. § 228.41(e)(3) (2020). The federal bank regulators have provided guidance about what "arbitrarily exclude[s]" means. Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance, 81 Fed. Reg. 48,506, 48,549 (July 26, 2016). As majority-minority census tracts tend to correlate with low- and moderate-income census tracts, the federal bank regulators' failure to provide similar guidance about the meaning of "reflects illegal discrimination" is surprising.

expressly state what banks should consider in determining if an assessment area is inappropriately delineated.

B. The DOJ Should Provide a Robust Analysis of How Assessment Area Delineation Supports Its Redlining Allegations

The DOJ should better communicate its assessment area analysis when it brings redlining enforcement actions. The CRA regulations prohibit banks from delineating assessment areas that reflect illegal discrimination, which the DOJ uses as a substantive factor in its redlining analysis.¹³⁴ But the CRA regulations also permit banks to limit their assessment areas to areas they can reasonably be expected to serve.¹³⁵ While the rulemaking proposal outlined above will clarify expectations surrounding assessment area delineation to some extent, the DOJ should develop and articulate a more robust analysis to prevent banks from making the inference that the exclusion of majority-minority census tracts alone can create legal liability.

In particular, the DOJ should: (1) clearly articulate the factors it relied on in determining that a bank's assessment area was delineated in a discriminatory manner;¹³⁶ (2) describe how the revised assessment area comports with the CRA regulations, including the basis on which the DOJ determined that a bank could reasonably be expected to serve the revised assessment area; (3) thoroughly address the bank's responses to redlining allegations as they pertain to assessment area delineation; and (4) provide a thorough analysis of potential impacts that expanding a bank's assessment area could have on the bank's revised assessment area.

If the DOJ begins discussing its evaluation of banks' responses to redlining allegations, community banks and others will be able to determine whether the DOJ is appropriately considering the factors of the CRA regulations that are used to determine the lawfulness of banks' delineations of their assessment areas. This information is particularly relevant in claims involving community banks that have assessment areas near metropolitan areas. Through the CRA regulations, the federal bank regulators have recognized that smaller community banks often cannot expand into

134. 12 C.F.R. § 228.41(e)(2); *see also supra* notes 6, 77–80 and accompanying text (describing the DOJ's approach to redlining analyses).

135. Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance, 81 Fed. Reg. at 48,549.

136. This explanation should also clearly state the statistical method the DOJ relied on in finding statistical disparities between the bank's application and origination volume and those of comparable lenders. The explanation will also necessarily provide a list of the comparable lenders to which the bank is being compared. This will give the bank the necessary information to challenge the allegations based on factors outside of the DOJ's analysis, such as differences in financial resources, business focus, strategy, or model; product offerings; and other factors.

metropolitan census tracts, not due to the racial or ethnic character of the census tracts, but instead because of the size of nearby cities, the level of competition with other banks in the area, and the high costs of expanding with limited resources.¹³⁷

Further, the DOJ should not hold firmly to the idea that CRA assessment areas are key to substantiating redlining claims. Instead, justice can be served with a prudent and measured approach that considers a bank's constraints in serving large urban areas while attempting to identify discriminatory lending patterns outside of the bank's assessment area. This approach gives banks the freedom to delineate their own assessment areas, while at the same time meeting the needs of people and entities outside their assessment areas in non-discriminatory ways.¹³⁸

CONCLUSION

In this Article, I examined the analysis the DOJ has made available in its public redlining complaints and critiqued the DOJ's analysis of CRA assessment areas to support its redlining allegations. Although the uncertainty the DOJ has created with its assessment area analysis risks creating the problems that I have identified in this Article, there are ways to efficiently resolve the problems, primarily by improving communication to community banks.

In an industry where uncertainty translates into risk, transparency is paramount. Clarifying the supervisory and enforcement approaches for both the CRA and fair lending is necessary so that community banks provide access to credit in non-discriminatory ways and do not feel they have to change their business practices in ways that have an adverse impact on the communities they serve. Now is the time to revise the CRA regulations to provide guidance on what factors, beyond the mere exclusion of majority-minority census tracts, the DOJ and the federal bank regulators will use to determine if a bank's assessment area "reflects illegal discrimination." By providing clear analysis and standards, the DOJ can assure that banks comply with the law, reducing the need for enforcement.

137. Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance, 81 Fed. Reg. at 48,549; *see also supra* note 27 and accompanying text (stating that the CRA regulations permit banks to define the boundaries of their assessment areas to include only areas that they reasonably can be expected to serve).

138. The DOJ has found discrimination in lawful assessment areas and outside of lawful assessment areas. *See* Complaint at 3–4, *United States v. Albank*, F.S.B., No. 97-cv-1206 (N.D.N.Y. Aug. 13, 1997) (finding the bank to be discriminating outside of its assessment area, but not requiring a revision to the assessment area); Complaint at 2, *United States v. Union Sav. Bank*, F.S.B., No. 1:16-cv-1172 (S.D. Ohio Dec. 28, 2016) (alleging that the banks were redlining inside their assessment areas).