

Banking and Finance Law Daily Wrap Up, PRUDENTIAL REGULATION **—Banking associations sue federal regulators over Community Reinvestment Act final rule, (Feb. 6, 2024)**

Banking and Finance Law Daily Wrap Up

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By Justin Marcus Smith, J.D.

The associations said the regulators were not free to rewrite the CRA to claim for themselves the “boundless power to impose regulations” on banks anywhere their retail loan borrowers are located “without regard for the guardrails placed by Congress.”

The American Bankers Association, U.S. Chamber of Commerce, Independent Community Bankers of America, and four Texas-based associations have jointly [sued](#) federal regulators by seeking Administrative Procedure Act (APA) review of a new final rule promulgated by the Federal Reserve Board (Fed), Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) in October 2023 under the Community Reinvestment Act (CRA), 12 U.S.C. § 2901 *et seq.* The plaintiff banking associations expressed dismay that, in their view, the final rule departed from long-standing, “community”-based CRA tests, thus exceeding the regulatory agencies’ statutory authority in a way that could paradoxically harm low- and moderate-income communities. The banking associations are seeking declaratory and injunctive relief, including preliminary injunctive relief, to block implementation of the final rule while their suit is pending. Meanwhile, the National Community Reinvestment Coalition issued a statement highly critical of the lawsuit (*Texas Bankers Association v. Office of Comptroller of the Currency*, N.D. Tex., Case No. 2:24-cv-00025-Z).

Background. In October 2023, the Fed, FDIC, and OCC promulgated a final rule they said will “strengthen and modernize” regulations implementing the Community Reinvestment Act (OCC Bulletin 2023-32). FDIC Director Jonathan McKernan and Vice Chairman Travis Hill both expressed opposition to the final rule (see [Banking and Finance Law Daily](#), Oct. 25, 2023). The regulations pertaining to the final rule are published at 12 C.F.R. §§ 25.12, 228.12, 345.12, 89 Fed. Reg. 6574 (Feb. 1, 2024) (to be codified at 12 C.F.R. §§ 25, 228, and 345).

The plaintiff banking associations are, in captioned order: the Texas Bankers Association; Amarillo Chamber of Commerce; American Bankers Association (ABA); Chamber of Commerce of the United States of America; Longview Chamber of Commerce; Independent Community Bankers of America (ICBA); and Independent Bankers Association of Texas.

The defendant federal regulators are, in captioned order: the OCC; Michael J. Hsu in his official capacity as Acting Comptroller of the Currency; the Fed; Jerome Powell in his official capacity as Fed Chair; the FDIC; and Martin Gruenberg in his official capacity as FDIC Chair.

Wholesale change. The banking associations complained that the final rule works a wholesale and unlawful change to the CRA statutory and regulatory regime that, in their view, “successfully” encouraged lending to low- and moderate-income (LMI) neighborhoods for nearly 50 years. They said Congress enacted the CRA to combat the “redlining” of LMI neighborhoods, and corresponding regulatory efforts historically focused on bank CRA performance “in each geographic area where the bank has a main office, branch office, or other facility that accepts deposits.”

The associations primarily disagreed with what they characterized as: (1) abandonment of the CRA’s historically “geographic, deposit-taking” focus in favor of “additional sweeping assessment areas” disconnected from a bank’s physical deposit-taking presence; and (2) a new area of focus on large institutions’ deposit products, rather than the CRA’s “explicit direction” to focus on community credit needs. The associations generally complained the final rule represents a “staggering” 649 pages of “complicated” and “burdensome” “statutory

excesses” that “may ultimately result in reduced lending to the very populations that the CRA was designed to benefit.”

The associations expressed concern that the regulatory shift of focus away from assessing deposit-taking areas deprecates three traditional CRA tests: the “Lending Test;” “Investment Test;” and “Service Test.” The associations noted the final rule creates four new tests: the “Retail Lending Test;” “Retail Services and Products Test;” “Community Development Financing Test;” and, the “Community Development Services Test.” The associations complained that “multiple sub-parts and sub-parts of sub-parts” make the final rule “exceedingly complex and burdensome to implement.” The associations said the final rule also imposes “extensive new data collection and maintenance requirements.”

The associations said these new data collection requirements may cause some banks to “elect not to lend, or to scale back lending, in areas outside their geographic deposit-taking footprint to avoid triggering assessment areas outside their local community.”

Regulators’ authority. The associations said the final rule exceeds the agencies’ statutory authority. Specifically, “the Agencies will begin assessing banks’ activities outside of the locations where they maintain a physical presence and accept deposits, thus ignoring the critical geographic limits that Congress incorporated into the CRA.” Second, “the Agencies will assess banks’ deposit products rather than the credit products that Congress targeted in the statute.”

The banking associations also said the final rule exceeded the agencies’ CRA powers to the extent it will impose several Retail Lending Assessment Areas on large banks. The associations said the agencies had admitted that, in the associations’ words, “at least two banks will have more than 100 new assessment areas.” They also took issue with Outside Retail Lending Areas they said will encompass the “exact opposite” of the communities in which a bank accepts deposits. The associations contended Congress meant the CRA meaning of the word “community” to refer to a geographic subunit, like a neighborhood, town, or county, and did not intend that individual banks should be beholden to the credit needs of their entire state or the whole country. The associations contended they will be less able to identify and meet community needs if they are assessed according to Retail Lending Assessment Areas and Outside Retail Lending Areas where they have no physical deposit-taking presence.

NCRC statement. National Community Reinvestment Coalition (NCRC) president and CEO Jesse Van Tol released a [statement](#) characterizing the banking associations’ lawsuit as a morally questionable and “short-sighted move.” He argued that the final rule updated the CRA to address new banking technologies, and that it thereby outlined numerous new opportunities for banks to make money “while earning CRA credit.” He said the law remains explicit that banks are obligated to help meet the credit needs of the local communities in which they are chartered, while recognizing that they can also do business beyond where they physically accept deposits. He also took issue with the banking associations’ efforts to “dismantle the CFPB[.]”

ABA Statement. In an ABA press release, ABA President and CEO Rob Nichols [said](#) the final rule “risk[s] undermining the very goals of CRA by creating disincentives for banks to offer certain products or lend in geographies outside of their branch network.” He said the banking associations were reluctant but had no choice but to file the suit because, in their view, the regulators failed to respond to public comments about significant flaws in the rulemaking.

In the same press release, U.S. Chamber of Commerce chief policy officer Neil Bradley also characterized the new rule as “counterproductive to the purpose of the [CRA.]” He said the regulations “ignore” the traditional community focus of the CRA.

Also in the same press release, ICBA President and CEO Rebeca Romero Rainey echoed the others’ concern about “unintended consequences.” Romero Rainey said, “The agencies’ approach penalizes many smaller institutions, eroding the diversity of institutions and products that drive much-needed access to banking services, credit, and reinvestment in communities around the country.” Romero Rainey also said the regulators did not address ICBA comments in the final rule.

Attorneys: Slater Elza and Thomas C. Riney (Underwood Law Firm, P.C.) for Texas Bankers Association, Amarillo Chamber of Commerce, American Bankers Association, Chamber of Commerce of The United States of America, Longview Chamber of Commerce, Independent Community Bankers of America, and Independent Bankers Association of Texas.

Companies: Amarillo Chamber of Commerce; American Bankers Association; Chamber of Commerce of the United States of America; Independent Bankers Association of Texas; Independent Community Bankers of America; Longview Chamber of Commerce; Texas Bankers Association

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