

Winter 1992

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Recommended Citation

Schrader, Michael E. (1992) "Competition and Convenience: The Emerging Role of Community Reinvestment," *Indiana Law Journal*: Vol. 67 : Iss. 2 , Article 5.

Available at: <http://www.repository.law.indiana.edu/ilj/vol67/iss2/5>

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Competition and Convenience: The Emerging Role of Community Reinvestment

MICHAEL E. SCHRADER*

INTRODUCTION

The initial impact of the Community Reinvestment Act (CRA or Act)¹ on the regulation of financial institutions was neither dramatic nor immediate. The role of the Act, however, is emerging.² It is becoming an increasingly valuable vehicle in the hands of community groups to attack bank credit policies and, more recently, as a means to challenge bank mergers and acquisitions.³ Legislation currently pending before Congress would increase further the role of the CRA by making an institution's ability to avail itself of expanded branching and other powers contingent on the existence of satisfactory community reinvestment records.⁴ With the

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1. Title VIII of the Housing and Community Development Act of 1977, Pub. L. No. 95-128, 91 Stat. 1147 (codified as amended at 12 U.S.C. §§ 2901-2905 (1988 & Supp. I 1989)).

2. See Dean, *Consumer Groups' Mad-Dog Politics*, ABA Bankers Weekly 3 (Apr. 30, 1991) (opinion captioned "CRA: Beating the Banks" recognizing the increased role of CRA and criticizing community groups for, among other things, construing CRA to mean that "[b]ankers unfortunate enough to serve only middle- and upper-income markets should hunt down poor people and force feed them credit"); Bachman, Robinson & Hamlin, *New Wave of Acquisitions Raises Regulatory and Structural Issues*, Nat'l L.J., June 11, 1990, at 28-29 (noting the increasing importance of CRA compliance in acquisition applications before regulators); Eisen & Dennen, *The Community Reinvestment Act: The Regulators Give It a New Emphasis*, 107 BANKING L.J. 334 (1990) (forecasting the continued strengthening of the CRA to allow consumers an increased role in determining which services financial institutions can offer).

3. See Schellie, *Current Developments with the Community Reinvestment Act*, 42 BUS. LAW. 943, 943, 946 (1987).

4. Under proposed House banking reform bill H.R. 1505, banks would be required "to meet their community lending responsibilities under the Community Reinvestment Act before being able to take advantage of the so-called modernization provisions in the bill." *House Banking Keeps Treasury Bill Modernization Provisions Largely Intact*, 56 Banking Rep. (BNA) 999, 1000 (May 27, 1991) [hereinafter *Bill Modernization*]. This would require banks to have, or agree to obtain within two years, a satisfactory CRA rating. *Id.* Under the Financial Institutions Safety and Consumer Choice Act of 1991, H.R. 6, as reported by the House Committee on Banking Finance and Urban Affairs in August, depository institutions with interstate branches would be evaluated with respect to CRA compliance on a state-by-state basis. Financial Institutions Safety and Consumer Choice Act of 1991, H.R. 6, §§ 307-308,

continued erosion of traditional geographic and service restrictions on banking institutions,⁵ and the resulting increase in bank merger activity,⁶ scrutiny under the Act is becoming a factor in balancing community banking needs against the perceived necessity of larger geographic markets.⁷

This Article looks at community reinvestment as a factor in the review of bank merger and acquisition requests. By focusing on the development of the "convenience and needs" standard⁸ in bank merger evaluations and the current regulatory climate's apparent flexibility with respect to the evaluation of competitive factors, this Article concludes, as other commen-

reprinted in Fed. Banking L. Rep. (CCH) No. 1402, at 52-53 (Aug. 6, 1991). In connection with the requirement of separate CRA evaluations, the bill provides that less-than-satisfactory CRA evaluations would be considered to support a conclusion that branches were being utilized as "deposit production offices." *Id.* As such, branches would not function to meet the credit needs of the community and market area in which they operate, and, therefore, would be subject to mandatory closure. *Id.*

5. Until the turn of the century, branching and geographic expansion were nonissues since the economy and society were highly localized. E. SYMONS & J. WHITE, *BANKING LAW* 97 (2d ed. 1984). In 1933, the McFadden Act, ch. 89, § 23, 48 Stat. 189, 190 (1933) (codified at 12 U.S.C. § 36), amended the National Bank Act to permit national banks to establish and acquire branches within the state in which they were located to the same extent that state-chartered banks were permitted to establish and acquire branches. The Douglas Amendment, section 3(d) of the Bank Holding Company Act, codified at 12 U.S.C. § 1842(d), restricts acquisitions outside of the state where the acquiror's principal operations are conducted, except in such instances where the acquisition is specifically authorized by the laws of the state in which the acquiree was located. Since the Supreme Court's decision in *Northeast Bancorp v. Board of Governors*, 472 U.S. 159 (1985), upholding the constitutionality of state reciprocity laws, the number of interstate acquisitions have increased significantly. A review of state banking laws published in 1989 indicated that most states have adopted some form of legislation permitting to some extent interstate acquisitions, with only three states continuing to prohibit interstate acquisitions entirely. DeMott, *Mergers and Acquisitions of Banks and Bank Holding Companies*, in *BANKING LAW AND REGULATION* 823, 829-31 (F. Puleo ed. 1990) (citing 8 Banking Expansion Rep. no. 4 (Feb. 20, 1989) and 8 Banking Expansion Rep. no. 19 (Oct. 2, 1989)). See also Bachman, Robinson & Hamlin, *supra* note 2, at 29 (noting that "[t]he existing barriers to geographic expansion . . . that have limited banks in the past are being dismantled steadily").

6. One source indicates that between 1985 and 1989 there were more than 200 bank merger transactions involving more than \$35 million each. DeMott, *supra* note 5, at 828. This source places the average value of each transaction at approximately \$245 million. *Id.* The recent announcement of mergers between Chemical Bank Corp. and Manufacturers Hanover Corp. and between NCNB Corp. and C & S/Sovran Corp. has contributed to speculation that we are about to enter a period of "bank mega-mergers." *Merger of 2 Big Banks in New York May Be Start of Wave*, Wall St. J., July 16, 1991, at A1, col. 6; *NCNB, C & S/Sovran Agree to a \$4.26 Billion Merger*, Wall St. J., July 22, 1991, at A3, col. 1.

7. For an example of the perceived decline of purely local banking markets and the need for regional markets, see *Beat 'Em or Join 'Em: Community Bankers in Midwest Face Superregional Challenge*, Am. Banker, Jan. 12, 1990, at 1.

8. The concept of "convenience and needs" is found throughout federal and state banking statutes and regulations. In addition to the Community Reinvestment Act's mandate that institutions "serve the convenience and needs of the communities in which they are chartered to do business," 12 U.S.C. § 2901(a)(1), the concept of "convenience and needs" is also included in section three of the Bank Holding Company Act, 12 U.S.C. § 1842(c)(2), the Bank Merger Act, 12 U.S.C. § 1828(c)(5)(B), and the Change in Bank Control Act, 12 U.S.C. § 1817(j)(7)(B).

tators have suggested, that CRA evaluations will play an increasingly central role in merger analyses. Additionally, this Article suggests that community reinvestment analysis could become the sole standard against which convenience and needs are measured.

Part I of this Article provides an overview of the development of bank antitrust standards. A discussion of the changing nature of competitive factors in bank merger analysis is contained in Part II. Part III looks at changes in community reinvestment regulation and its relation to the convenience and needs standard. In conclusion, the Article suggests that community reinvestment may move from a central factor in the convenience and needs analysis to the sole measure of a transaction's effect on the convenience and needs of a community.

I. BANK ANTITRUST STANDARDS

Bank mergers, as a general matter, are subject to the same antitrust standards as mergers in other industries.⁹ There are, however, important differences. The development of the concept of "convenience and needs" in bank merger analysis accounts for most of these differences.

Federal law has regulated bank merger activity since 1956, when Congress enacted the Bank Holding Company Act (BHCA)¹⁰ in order to restrict the undue concentration of banking resources and to limit the geographic expansion of bank holding companies.¹¹ With the passage of the BHCA, which reached only mergers involving bank holding companies,¹² and the passage of the Bank Merger Act¹³ in 1960, it was thought that bank mergers

9. Kinter & Bauer, *Competition at the Teller's Window?: Altered Antitrust Standards for Banks and Other Financial Institutions*, 35 U. KAN. L. REV. 657 (1987); Tortoriello, *Structuring a Friendly Bank Acquisition: Corporate, Securities and Related Considerations*, in BANK ACQUISITIONS AND TAKEOVERS 140 (R. Sheehan et al. eds., 1989).

10. Pub. L. No. 84-511, 70 Stat. 133 (codified as amended at 12 U.S.C. §§ 1841-1850 (1988 & Supp. I 1989)).

11. E. SYMONS & J. WHITE, *supra* note 5, at 44. The 1956 Act, which regulated companies holding two or more banks, was amended in 1970 to also regulate companies holding just one bank. Act of Dec. 31, 1970, Pub. L. No. 91-607 § 101, 84 Stat. 1760.

12. Specifically, the BHCA makes it

unlawful, except with the prior approval of the [Federal Reserve] Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 percentum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company.

12 U.S.C. § 1842(a).

13. Pub. L. No. 86-463, 74 Stat. 129 (1960) (codified as amended at 12 U.S.C. § 1828(c)).

were immune from scrutiny under the standards of section 1 of the Sherman Antitrust Act of 1890¹⁴ and section 7 of the Clayton Act.¹⁵ This immunity, however, proved to be a fiction.

The Department of Justice in *United States v. Philadelphia National Bank*¹⁶ argued successfully that bank mergers were within the reach of section 7 of the Clayton Act.¹⁷ In *Philadelphia National Bank*, the Comptroller of the Currency (OCC) had approved the merger of two large Philadelphia banks.¹⁸ This approval was granted despite the fact that the Federal Reserve Board, the Federal Deposit Insurance Corporation (FDIC), and the Department of Justice had found that the "proposed merger would have substantial anticompetitive effects."¹⁹ In response to the banks' argument that the merger would stimulate economic development in the Philadelphia area, the Court held that a merger likely to lessen competition cannot be "saved because . . . [of] some ultimate reckoning of social or economic debits and credits."²⁰ The Court stated that Congress's "value choice" to proscribe anticompetitive mergers reached benign and malignant mergers alike.²¹

As a result of *Philadelphia National Bank*, amendments were made to the 1956 BHCA and to the 1960 Bank Merger Act in 1966.²² The 1966 amendments, like *Philadelphia National Bank*, recognized the right of the Department of Justice to challenge bank mergers on anticompetitive grounds. More importantly, however, the amendments provided that otherwise pro-

14. Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209 (codified as amended at 15 U.S.C. § 1 (West. Supp. 1991)).

15. Act of Oct. 15, 1914, ch. 323, § 7, 38 Stat. 730 (codified as amended at 15 U.S.C. § 18). The language of section 7 provides as a general rule that:

No person engaged in commerce shall acquire, directly or indirectly . . . the whole or any part of the assets of another person also engaged in commerce, or in any activity affecting commerce *where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.*

Id. (emphasis added).

The uncertainty concerning whether section 7 of the Clayton Act applied to bank mergers was due to a large extent to the fact that "section 7 makes no reference to 'mergers' (nor to 'consolidations')." Kinter & Bauer, *supra* note 9, at 664.

16. 374 U.S. 321 (1963).

17. See Kinter & Bauer, *supra* note 9, at 662-63. The following year the Court also determined that the standards of section 1 of the Sherman Act also apply to bank mergers. *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964).

18. *Philadelphia Nat'l Bank*, 374 U.S. at 333. The merger involved the Philadelphia National Bank and the Girard Trust Corn Exchange Bank, the second and third largest banks in the Philadelphia metropolitan area. *Id.* at 330-31.

19. *Id.* at 332-33.

20. *Id.* at 371.

21. *Id.*

22. Bank Merger Act of 1966, Pub. L. No. 89-356, 80 Stat. 7 (1966) (amending the 1960 Bank Merger Act); Act of July 1, 1966, Pub. L. No. 89-485, 80 Stat. 236 (amending the 1956 BHCA). See Kinter & Bauer, *supra* note 9, at 665-67.

hibited anticompetitive mergers could be lawful if their adverse competitive effects were clearly outweighed by their beneficial effects in meeting the "convenience and needs of the community."²³

Portions of the principal statutory provisions that govern bank mergers and acquisitions²⁴ rely on the statutory language of the Sherman and Clayton Acts. However, these statutory provisions are fundamentally distinct from general antitrust laws because they contain "the convenience and needs of the community" defense.²⁵ While it is well established that bank regulators are required to apply general antitrust standards in evaluating the anticompetitive effects of proposed mergers, the analysis of competition is only part of the relevant inquiry.

In bank mergers and acquisitions the responsible regulator²⁶ must engage

23. The 1966 amendments to section 3 of the BHCA revised the section to provide that the Board shall not approve

any other proposed acquisition or merger or consolidation *whose effect in any section of the country may be substantially to lessen competition, or tend to create a monopoly, or which in any other manner would be a restraint of trade, unless it finds that the anti-competitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.*

Pub. L. No. 89-485, 80 Stat. 236 (emphasis added). The Bank Merger Act of 1966, amending the 1960 Act, in similar language also combines the standard of section 7 and the "convenience and needs" defense. Pub. L. No. 89-356, 80 Stat. 7. The 1966 amendments also limited the amount of time available to the Department of Justice to challenge a merger to 30 days following approval of the merger by the appropriate regulator. The amendments, however, also provided that a bank merger challenged by the Department of Justice would be automatically stayed. See R. POSNER & F. EASTERBROOK, *ANTITRUST CASES, ECONOMIC NOTES, AND OTHER MATERIALS* 491-93 (2d ed. 1981); E. SYMONS & J. WHITE, *supra* note 5, at 511-13.

24. Section 3 of the BHCA, 12 U.S.C. § 1842(c); Bank Merger Act, 12 U.S.C. § 1828(c)(5); Change in Bank Control Act, 12 U.S.C. § 1817(j)(7).

25. See Kinter & Bauer, *supra* note 9, at 657-58, 677-78; Tortoriello, *supra* note 9, at 141.

26. Determining which statutes control a merger or an acquisition and which regulatory agency reviews the transaction depends on the nature of the transaction and the charter of the acquiring or surviving bank and whether a bank holding company is a party to the proposed transaction. If the BHCA reaches the transaction, approval by the Board of Governors of the Federal Reserve Board will be necessary. If the transaction falls within the Change in Bank Control Act, approval must be obtained from the "appropriate Federal banking agency." The "appropriate agency" is (1) the Comptroller of the Currency in the case of a national banking association; (2) the Board of Governors of the Federal Reserve System in the case of a state-chartered bank that is a Federal Reserve member bank; (3) the Federal Deposit Insurance Corporation in the case of a state-chartered insured bank that is not a member of the Federal Reserve; and (4) the Office of Thrift Supervision in the case of a savings association or a savings and loan holding company. 12 U.S.C. § 1813(g). If the transaction is governed by the Bank Merger Act, the "responsible agency" from whom approval must be given is (1) the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank; (2) the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a state-chartered member bank; (3) the Federal Deposit Insurance Corporation if the acquiring, assuming, or resulting bank is to be a state-chartered insured nonmember bank; and (4) the Office of Thrift Supervision if the acquiring, assuming, or resulting institution is to be a savings association. 12 U.S.C. § 1828(c)(2).

in a three-part evaluation.²⁷ The first part is a competitive analysis;²⁸ the second, a safety and soundness evaluation;²⁹ and the third, a convenience and needs inquiry.³⁰ The initial evaluation requires the regulator, after delineating the relevant geographic and product markets,³¹ to decide whether the proposed transaction will either create a monopoly, further a combination or conspiracy to monopolize, or substantially lessen competition. The safety and soundness evaluation addresses the financial and managerial resources of the parties to the proposed transaction. This involves, among other factors, the sources of capital for the transaction, the capitalization of the institutions involved, the competence and experience of management personnel, and the future prospects of the proposed and existing institutions. If the proposed merger is not precluded because of safety and soundness concerns but is deemed to have significant anticompetitive effects, the regulator must then evaluate whether the probable effects of the transaction in meeting the convenience and needs of bank customers in the local community outweigh the potentially anticompetitive effects of the transaction. This inquiry requires the reckoning of social and economic debits and credits that was rejected in the *Philadelphia National Bank* case.³²

II. THE CHANGING NATURE OF "COMPETITION"

While competition remains a central theme in evaluating the merits of bank mergers and acquisitions, the relevant markets are undergoing profound changes. The deregulation of financial services³³ has made it increas-

27. See Mattingly & Frierson, *Contested Bank Acquisitions: The Fed's Perspective*, in *BANK ACQUISITIONS AND TAKEOVERS*, *supra* note 9, at 365 (1989).

28. See BHCA § 3(C)(1), (2); Bank Merger Act § 5(A), (B); Change in Bank Control Act § 7(A), (B) (setting out general standards of Sherman Act and Clayton Act).

29. BHCA § 3(c); Bank Merger Act § 5; Change in Bank Control Act § 7(C), (F) (financial and managerial resources, safety and soundness of institutions involved, financial stability of institution being acquired, risk of adverse effect on Bank or Savings Association Insurance Funds).

30. BHCA § 3(c)(2); Bank Merger Act § 5(B); Change in Bank Control Act § 7(B) ("probable effect of the transaction in meeting the convenience and needs of the community to be served").

31. Both the relevant geographic and product markets in which the merger will have a direct and immediate effect must be established to determine the probable competitive effects of a contemplated merger. "Product markets" are denoted in section 7 of the Clayton Act by the phrase "line of commerce" and "geographic markets" by the language "section of the country." See H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* § 3.3, at 62, § 3.5, at 70 (1985).

32. 374 U.S. at 371. See *supra* notes 20-21 and accompanying text.

33. Important legislation deregulating financial services and particularly diminishing the line between commercial banks and savings and loans includes the Depository Institutions Deregulation and Monetary Control Act (DIDMCA) of 1980, Pub. L. No. 96-221, 94 Stat. 132 (expanding powers of federal savings and loan associations), and the Garn-St. Germain

ingly difficult to determine what unique "cluster of products"³⁴ constitutes a particular product market. Federal bank regulatory agencies have recognized, to varying degrees, both that nonbank institutions compete with commercial banks for deposits and to provide bank services and that such factors must be weighed in evaluating the competitive impact of particular transactions.

With respect to product markets, most of the debate focuses on the inclusion of thrift services and deposits in the commercial banking line of commerce. The OCC has for several years been characterized as pro-merger. In the early 1980s, one authority attributed to the OCC the view "that the realities of the marketplace require that competition from thrift institutions be considered in defining the appropriate product market and in assessing the competitive effects of a commercial bank merger proposal."³⁵ The Comptroller's position that thrifts compete directly with commercial banks has gradually moved from dicta in early decisions to specific findings that thrifts and commercial banks are engaged in the same "line of commerce."³⁶ Federal Reserve Board acquisition approvals also indicate a strong movement toward the position that thrifts and commercial banks should be included in the same product market.³⁷ This position is particularly apparent where including thrift services in the commercial banking product market would diminish the severity of the market concentration resulting from a particular transaction.³⁸ The FDIC has an established pattern of including thrift market shares in evaluating commercial bank merger transactions.³⁹ Policy statements by the FDIC have increasingly supported the inclusion of broad

Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (expanding savings and loan powers, and allowing money market accounts to compete with mutual funds). See also Tortoriello, *supra* note 9, at 148, noting that recent legislation has significantly broadened the powers of thrift institutions respecting consumer and commercial lending and deposit-taking, fiduciary and credit card services and the like, and removed significant differences between thrifts and commercial banks. Thrifts now offer virtually complete deposit and loan services to their household customers and have become strong potential competitors for banking services to business customers.

(citation omitted).

34. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 356 (1963).

35. Speech by Richard V. Fitzgerald, *Thoughts on Antitrust Policy*, before the Ninth Annual Conference on Legal Problems in Bank Regulation, San Francisco, Cal., Sept. 23, 1982, and Washington, D.C., Oct. 18, 1982, *reprinted in* 4 OFF. COMPTROLLER Q.J. 27 (Dec. 1982).

36. Tortoriello, *supra* note 9, at 145-46 (citing numerous decisions of the Comptroller in the early and mid-1980s).

37. *Id.* at 143-45 (citing Federal Reserve Board decisions approving acquisitions that would have substantially reduced competition on a "bank-only" basis).

38. See *infra* notes 41-45 and accompanying text.

39. Tortoriello, *supra* note 9, at 146 (citations omitted).

product lines in evaluating the competitive impact of bank merger transactions.⁴⁰

The view that thrifts and other nonbank entities should be included in an evaluation of the commercial banking line of commerce is consistent with the Supreme Court's conclusion in *United States v. Connecticut National Bank*.⁴¹ In that case, the Court held that continued product development among savings banks would ultimately make distinctions from commercial banking unrealistic for purposes of a Clayton Act analysis.⁴² Distinctions between commercial banks and savings and loans for purposes of antitrust analysis are also less realistic in light of the Financial Institutions Reform, Recovery and Enforcement Act of 1989⁴³ (FIRREA). FIRREA amends section 4 of the BHCA⁴⁴ to allow banks and bank holding companies to acquire healthy thrift institutions.⁴⁵ This removal of ownership and affiliation restrictions suggests further expansion of commercial banking product markets in antitrust analysis.

Despite the erosion of traditional geographic restrictions on banking, geographic market definitions continue to focus on generally localized markets, in which the competitive effects of a transaction "will be direct and immediate."⁴⁶ Like definitions of the relevant line of commerce, however, definitions of the relevant "section of the country" appear to be less rigid than definitions earlier authority might have been construed to require.⁴⁷

The effect of changing market definitions on the competitive analysis of merger transactions is illustrated by the Federal Reserve Board's order, under the BHCA, in connection with an application by First Union Corporation (First Union), a North Carolina-based bank holding company, to acquire a Florida-based bank holding company.⁴⁸ In the order, the Federal Reserve Board approved First Union's acquisition of Florida National Bank of Florida, Incorporated (Florida National), a financially troubled holding company with subsidiary banks throughout Florida. First Union was, prior

40. *Id.* (referring to FDIC Policy Statement, 53 Fed. Reg. 39,803 (proposed Oct. 12, 1988)).

41. 418 U.S. 656 (1974).

42. *Id.* at 666. See, e.g., Hicks, *Commercial Loans Loom Larger at Top 100 Savings Institutions*, Am. Banker, May 6, 1988, at 1.

43. Pub. L. No. 101-73, 103 Stat. 183.

44. 12 U.S.C. § 1843.

45. FIRREA § 601. See also *Bank Holding Companies and Change in Bank Control; Acquisition and Operation of Savings Associations by Bank Holding Companies*, 54 Fed. Reg. 37,297 (Sept. 8, 1989) (amending regulations promulgated pursuant to § 4 of BHCA).

46. *Philadelphia Nat'l Bank*, 374 U.S. at 357.

47. See Tortoriello, *supra* note 9, at 150-55, and Kinter & Bauer, *supra* note 9, at 672-73, for discussion of case authority and analysis of positions of the various federal banking regulators on appropriate considerations in defining relevant geographic market in connection with analysis of competitive effects of particular transactions.

48. First Union Corp., 76 Fed. Reserve Bull. 83 (1990).

to the acquisition, the fifth largest banking organization in Florida, controlling 6.6% of the commercial bank deposits in the state. Florida National was the sixth largest organization with 5.8% of the deposits. In the Jacksonville market, where the two holding companies each operated directly competing banks, First Union controlled the third largest of nineteen commercial banks, holding 24.1% of the commercial deposits. The contemplated acquisition created a post-merger firm with almost half of the area's commercial deposits and a market with a concentration index⁴⁹ far beyond the Department of Justice Merger Guidelines.⁵⁰

Despite the fact that consummation of the acquisition of Florida National by First Union would eliminate a major competitor in an already concentrated Jacksonville banking market, the Board approved the merger, finding "a number of factors [that] mitigate the competitive effects of [the] proposal."⁵¹ Of particular importance in the Board's mitigation analysis was the presence of thrift institutions in the market, which compete for deposits and offer comparable services. Finding that this added competitive influence, the Board effectively expanded the relevant line of commerce. This expansion significantly reduced the post-merger concentration index⁵² and contributed to the Board's decision to approve what might traditionally have been perceived as an anticompetitive merger.

49. "Market concentration" refers to the number of firms in a particular market as well as to their respective share in that market. "Concentration" is a central theme in merger analysis because of the underlying policy of section 7 of the Clayton Act that mergers should not be permitted to create or enhance market power.

50. The 1984 Department of Justice Merger Guidelines, 49 Fed. Reg. 26,823 (June 29, 1984), measure market concentration, before and after a proposed transaction, by means of the Herfindahl-Hirschman Index (HHI). The index is calculated by summing the squares of the individual market shares of all the firms included in the relevant product and geographic market. The index divides market concentration into three regions, broadly categorized as "unconcentrated" (HHI below 1000), "moderately concentrated" (HHI between 1000 and 1800), and "highly concentrated" (HHI above 1800). The HHI for the pre-merger Jacksonville market was 1955. Upon completion of the transaction the HHI increased by 1236 points to 3191. *First Union Corp.*, 76 Fed. Reserve Bull. at 84.

General standards for horizontal mergers provide that transactions in markets where the post-merger HHI is below 1000 will not be challenged, except in unusual circumstances. A transaction where the post-merger HHI is between 1000 and 1800 is also unlikely to be challenged, provided that the post-merger index is not more than 100 points higher than the pre-merger index. In a highly concentrated market, where the concentration is greater than 1800, a transaction which increases the index by more than 50 points is a probable candidate for a Justice Department challenge. Banks, as a general rule, are subject to relatively higher thresholds before an antitrust violation is deemed to exist. *See DeMott, supra* note 5, at 858-59 (stating that bank acquisition will not be challenged unless post-acquisition HHI is over 1800 and acquisition increases HHI by at least 200 points, and that an even higher HHI will not result in a challenge to a transaction involving the acquisition of a troubled institution).

51. *First Union Corp.*, 76 Fed. Reserve Bull. at 84.

52. By including 50 percent of the deposits held by thrift institutions in the calculation of market concentration, First Union's market share was 39.9%, and the HHI increased by 768 points to 2238. *Id.* at 85 & n.11.

The First Union approval, while a move away from earlier direct competition standards, is not an isolated departure from what might be seen as a more traditional antitrust analysis of bank mergers. The dilution of direct competition standards, through the expansion of the relevant product markets, has been an increasingly frequent feature of regulatory analysis in bank mergers. The Federal Reserve Board, in a divided vote, recently approved a merger between First Hawaiian, Inc. (First Hawaiian) and First Interstate of Hawaii (First Interstate), respectively, Hawaii's second and fourth largest banking organizations.⁵³ The Department of Justice objected to the transaction, claiming that the merger, among other things, would decrease competition in commercial lending.⁵⁴ The Board, in its November 30 order, rejected the Justice Department's argument that only thrifts with significant lending activities should be included in the analysis of competitive factors. The Board included fifty percent of thrift deposits in calculating market concentration. Additionally, the Board noted that it would "consider the competitive effects of thrifts on a fully weighted basis where the record indicates [that] approach is appropriate."⁵⁵

In addition to the inclusion of thrifts in product market definitions, the potential competition doctrine has diminished as a factor in bank merger decisions.⁵⁶ The Department of Justice's challenges to bank mergers on potential competition grounds have been uniformly unsuccessful.⁵⁷ While

53. First Hawaiian, Inc., 77 Fed. Reserve Bull. 52 (1991); See also *Fed Approves Hawaiian Bank Mergers Over Justice Department Objections*, 59 Antitrust & Trade Reg. Rep. (BNA) 834 (Dec. 6, 1990) (discussing order); *Fed Approves Hawaiian Merger*, 55 Banking Rep. (BNA) 926 (Dec. 10, 1990).

54. The Justice Department's objections were in the form of a 50-page report outlining the anticompetitive effects of the proposed merger. The report took the additional step of evaluating the convenience and needs test. The evaluation concluded that all convenience and needs benefits could be produced without the acquisition. *Justice Dept. Objects to Bank Merger Proposal, Citing Anti-Competitive Effects*, 55 Banking Rep. (BNA) 608 (Oct. 15, 1990).

55. *First Hawaiian Inc.*, 77 Fed. Reserve Bull. at 55 n.20. After the First Hawaiian order was issued, the Department of Justice filed suit to block the merger, claiming that the proposed acquisition violates section 7 of the Clayton Act and, particularly, that it threatens small and medium-sized businesses in the state by eliminating only one of a few banks serving such customers. *United States v. First Hawaiian, Inc.*, No. 90-00904 (D.C. Hawaii filed Dec. 28, 1990). The Department of Justice challenged, inter alia, the Board's inclusion of thrifts in its evaluation of the competitive effects of the merger. *Justice Files Antitrust Suit to Block Hawaiian Bank Merger*, 56 Banking Rep. (BNA) 21 (Jan. 7, 1991). A settlement agreement was reached shortly after the suit was filed, with the bank agreeing to several divestitures. *Justice, Hawaiian Banks Settle Antitrust Suit by Divestitures*, 56 Banking Rep. (BNA) 523 (Mar. 19, 1991).

56. For a general discussion of the potential competition doctrine, see Shepherd, *Potential Competition Versus Actual Competition*, 42 ADMIN. L. REV. 5, 34 (1990) (concluding that appraisal of existing degree of monopoly power, and not entry barriers posed by potential competition, provides the main source of "guidance for policy decisions about real markets").

57. See *Republic of Texas Corp. v. Board of Governors of Fed. Reserve*, 649 F.2d 1026 (5th Cir. 1981) (Board denial of acquisition application on potential competition grounds set

competition remains a central factor in bank merger analysis, it is readily apparent, as both the First Union and First Hawaiian approvals suggest, that federal banking regulators are willing to recognize that the nature of the relevant competition is changing. This changing view of competition in merger applications has been accompanied by an increased focus on convenience and needs. Also, with respect to the analysis of convenience, increasingly closer attention has been given to community reinvestment records.

The concept of "convenience and needs" to date is without well-defined boundaries. The concept has been tied to a failing bank situation⁵⁸ but is clearly not limited to such.⁵⁹ Because there is a relationship between convenience and needs and the failing company doctrine, a number of the factors which regulators have accepted as enhancing convenience and needs are probably more accurately characterized as "safety and soundness" considerations. Safety and soundness factors have been recognized (as part of the convenience and needs defense) where the challenged acquisition improves the financial and managerial resources of the target bank⁶⁰ and also where it is believed that the acquisition will produce operating efficiencies. Perceived increases in the competitiveness of a target bank through its association with a larger institution,⁶¹ expansion or improvement of the target's services, and the potential for improved rates on loans and deposits by the target have also been included in the "wide range of benefits and economies that could improve services to the community."⁶²

III. THE EVOLUTION OF "COMMUNITY REINVESTMENT"

The Community Reinvestment Act of 1977⁶³ was enacted in response to concerns that bank redlining⁶⁴ practices were contributing to the decline of

aside because of absence of findings concerning market concentration, probable entrants, and target's position as a market leader). See also *United States v. Marine Bancorp.*, 418 U.S. 602 (1974); Kinter & Bauer, *supra* note 9, at 676-77 (indicating that the potential competition doctrine "has since *Marine Bancorporation* been notably unavailing in government challenges to most such transactions").

58. Tortoriello, *supra* note 9, at 134-35.

59. Kinter & Bauer, *supra* note 9, at 681 n.127 ("In light of the more serious impact of a bank failure than failure in an unregulated sector, the 'convenience and needs' defense is more liberal and thus subsumes the failing company doctrine.").

60. *E.g.*, *First Interstate Bank of Washington*, 2 OFF. COMPTROLLER Q.J. 112 (June 1989).

61. See *Marion Nat'l Bank*, 2 OFF. COMPTROLLER Q.J. 126 (Sept. 1983).

62. Tortoriello, *supra* note 9, at 135. For a general discussion of the convenience and needs defense, see Kinter & Bauer, *supra* note 9, at 677-81.

63. 12 U.S.C. §§ 2901-2905 (1977).

64. Black's defines *redlining* as a "pattern of discrimination in which financial institutions refuse to make mortgage loans, regardless of credit record of the applicant, on properties in specified areas because of alleged deteriorating conditions." BLACK'S LAW DICTIONARY 1279 (6th ed. 1990). Redlining includes a number of practices such as refusing to make loans secured by property in certain areas, refusing to accept loan applications from certain areas, refusing to grant loans in certain areas on prevailing terms, and refusing to grant loans on property older than a certain age. Schellie, *supra* note 3, at 943 n.2.

older urban neighborhoods.⁶⁵ Although the Act uses the terms "convenience and needs," like the bank antitrust statutes, the Act creates an affirmative credit obligation rather than a potential defense. Unlike other redlining statutes,⁶⁶ the Act does not provide for any direct civil or criminal penalties. The CRA employs primarily indirect sanctions, including delays in or even denials of acquisition, merger, or branching requests.⁶⁷

The CRA empowers each of the financial regulatory agencies to promulgate regulations⁶⁸ implementing Congress's mandate that "regulated financial institutions . . . serve the convenience and needs of the communities in which they are chartered to do business."⁶⁹ The agency regulations require banks to adopt and review CRA policy statements⁷⁰ and to maintain a record of public comments on the bank's performance in meeting local credit needs.⁷¹ Regulators, in assessing an institution's CRA performance, are required to evaluate twelve assessment factors, which reflect the bank's

65. Schellie, *supra* note 3, at 943 n.2.

66. Attempts prior to the Community Reinvestment Act to control redlining practices included the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (amended 1988), prohibiting discrimination on the basis of race, color, religion, or national origin in the financing of homes, and the Home Mortgage Disclosure Act requiring the collection and disclosure of lending records. 12 U.S.C. §§ 2801-2811 (1979).

67. Financial regulatory agencies are required to take community reinvestment records into consideration in evaluating institutions' applications for "deposit facilities." 12 U.S.C. § 2903. An application for a "deposit facility" for purposes of the CRA includes requests for (1) charters; (2) deposit insurance; (3) branching approvals; (4) office relocations; and (5) mergers, consolidations, and acquisitions. 12 U.S.C. § 2902(3). See Schellie, *supra* note 3, at 944 & n.5.

See also *Questions and Answers Regarding the Community Reinvestment Act*, 5 Fed. Banking L. Rep. (CCH) ¶ 59,349 (Feb. 2, 1990), noting, in response to a question concerning sanctions available to agencies, that:

A poor CRA performance record may result in denial of an application. The agencies may also use the full range of their enforcement powers to ensure compliance with the requirements of the CRA regulations, such as preparing a CRA Statement, maintaining public comment files, and providing the public notice. In addition, prohibited discriminatory or other illegal credit practices which are adverse factors under CRA, will also result in sanctions under the Equal Credit Opportunity Act, federal fair housing laws, or other commercial credit protection laws.

Id.

68. 12 U.S.C. § 2905. Regulations by the various financial supervisory agencies implementing the CRA can be found at 12 C.F.R. §§ 25 (OCC), 228 (FRB), 345 (FDIC), 563e (Office of Thrift Supervision) (1991).

In addition to these regulations the federal bank regulatory agencies in March of 1989 issued a detailed policy statement outlining the requirements of the CRA. *Federal Bank Regulatory Agencies' Joint Statement on Information Requirement of the Community Reinvestment Act*, 54 Fed. Reg. 13,742 (April 5, 1989), reprinted in 5 Fed. Banking L. Rep. (CCH) ¶ 59,348 (April 14, 1989) [hereinafter *Statement*].

69. 12 U.S.C. § 2901(a)(1).

70. 12 C.F.R. §§ 25.4, 228.4, 345.4, 563e.4.

71. 12 C.F.R. §§ 25.5, 228.5, 345.5, 563e.5.

community involvement.⁷² On the basis of these assessment factors, an institution's performance is evaluated, and a CRA rating of "outstanding," "satisfactory," "needs improvement," or "substantial noncompliance" is assigned.⁷³

Amendments to CRA contained in FIRREA⁷⁴ require that the results of a CRA examination appear in "a written evaluation of the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods."⁷⁵ The written evaluation is required to contain both a public and a confidential section, with the public section being made available to the public for any CRA examination conducted on or after July 1, 1990.⁷⁶

Since the passage of the Act, few branching or merger requests have been denied on CRA grounds. This is unlikely to continue to be the case. In recent years, several branching, merger, and conversion requests have been delayed on CRA grounds.⁷⁷ The increased focus of regulators on the CRA, evidenced by the 1989 joint CRA statement,⁷⁸ the FIRREA amendments to the CRA, and the success community groups have experienced in challenging

72. 12 C.F.R. §§ 25.7, 228.7, 345.7, 563e.7. The assessment factors include: (1) the activities of the bank to ascertain credit needs of its community; (2) the bank's marketing practices; (3) the participation of the board of directors in formulating and reviewing CRA policies; (4) practices by the bank that discourage particular types of credit applications; (5) the bank's geographic distribution of credit; (6) evidence that the bank has engaged in illegal practices; (7) the opening and closing of bank offices; (8) involvement of the bank in development and redevelopment projects; (9) home mortgage, small business, and small farm loans by the bank; (10) the bank's participation in government-issued loan programs; (11) the bank's resources in meeting community credit needs; and (12) other factors which reasonably bear on the extent to which a bank is meeting credit needs. *Id.*

73. 12 U.S.C. § 2906(b)(2). See also *OCC Exam Guidelines on CRA Compliance Target Performance on Credit, Outreach*, 55 Banking Rep. (BNA) 137 (July 23, 1990).

74. Pub. L. No. 101-71 § 1212(b), 103 Stat. 183 (codified at 12 U.S.C. § 2906), amends the Community Reinvestment Act to require, beginning July 1, 1990, public disclosure of an examining agency's CRA evaluation of an institution. See Special Report (No. 1298) *Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, Fed. Banking L. Rep. (CCH) ¶ 1204 (Aug. 18, 1989).

75. 12 U.S.C. § 2906(a)(1).

76. 12 U.S.C. § 2906(a)(2), (b). Debate has been generated by FIRREA's amendment to the CRA calling for the public disclosure of institutions' CRA records beginning in July 1990. Bankers have expressed concern that such disclosures amount to public confessions of CRA-related shortcomings and will place ammunition in the hands of community groups. Traiger, *'Mea Culpa' Can Enhance a Bank's CRA Statement*, Am. Banker, Mar. 7, 1990, at 4. Concern has also been expressed that a mechanism to appeal a CRA compliance rating should be in place before disclosure is mandated. Leander, *Banks' Appeals of CRA Ratings May Go to Court*, Am. Banker, Feb. 1, 1990, at 6; Kantrow, *As Public Evaluations Near, Banks Seek Right to Appeal*, Am. Banker, Feb. 5, 1990, at 8.

77. See, e.g., *Mitsui Bank Withdraws Application for Conversion of Nonbank Trust Unit*, 57 Banking Rep. (BNA) 173 (July 29, 1991) (withdrawal followed public meetings expressing CRA deficiencies).

78. See *Statement*, *supra* note 68; Eisen & Dennen, *supra* note 2, at 337-39.

merger and acquisition applications on CRA grounds all indicate that this trend will continue.⁷⁹

CRA compliance is gradually moving from being a relevant factor in the assessment of a proposed transaction's noncompetitive effects toward being a controlling factor. The substantial attention given by regulators to an acquiring institution's CRA record reflects a regulatory belief that "financial institutions that make meeting their responsibilities under the CRA an integral part of their management and operational structure are best able to . . . [meet] the credit needs of their entire communities, including low- and moderate-income neighborhoods, consistent with safe and sound operations."⁸⁰

Most CRA-related challenges do not result in the denial of a merger application. Instead, the acquiring institution and the protesting community group (or regulatory agency) usually reach a settlement.⁸¹ Though the form of a settlement may vary substantially, institutions are generally required to make substantial CRA commitments, usually in the form of loan commitments for a certain dollar amount.⁸² CRA commitments generally win regulator approval for a transaction.⁸³ Continental Illinois Bancorp's appli-

79. See, e.g., *CRA Hurdles Get Higher*, BANK EXPANSION REPORTER 4-6 (Sept. 19, 1988) (summarizing Federal Reserve Board decisions addressing CRA issues); Podger, *Forecast '87*, Am. Banker, Dec. 1, 1986, at 9 (indicating that CRA protests increased over 500% between 1984 and the beginning of 1987).

Community groups have increasingly used the CRA, not only to challenge mergers, but also as a lever to insure that lending policies actually meet the community's perception of their own credit needs. In a rather unusual context for the CRA, an Iowa citizens group utilized the CRA as a factor in reaching an agreement with the state's largest banking organizations to set aside \$13 million for new borrowers who own small farms. The agreement also provides for regular disclosure of small-farm lending activities to community groups. Kantrow, *Reinvestment Act Is Used in Iowa to Aid Small Farms*, Am. Banker, Mar. 12, 1990, at 8.

80. Crestar Financial Corp., 75 Fed. Reserve Bull. 382 (1989). See also Core States Financial Corp., 76 Fed. Reserve Bull. 176, 178-79 (1990).

81. Schellie, *supra* note 3, at 946-48.

82. *Id.*

83. The joint CRA policy statement issued in March of 1989, *supra* note 69, suggests that CRA commitments can mitigate, but only to a limited extent, the absence of an established record of CRA compliance. This need for an established record, in the place of future CRA commitments, formed the basis of a dissent by Governor Rice from a Federal Reserve Board approval of an application by Advance Bancorp, Inc. of Chicago to acquire a Chicago savings bank, despite a poor CRA record. See *FED Rules Illinois Thrift May Form Bank Holding Company Despite CRA Violations*, 47 Wash. Fin. Rep. (BNA) 699 (Oct. 27, 1986). More recently, the Massachusetts Board of Bank Incorporation denied the application of BayBanks Inc. seeking Board approval to vote the stock of its subsidiaries as part of a planned reorganization on the basis of the "less than satisfactory performance of the bank's Boston area subsidiary in the area of community lending." *Massachusetts Banking Office Denies BHC's Application Based on Bad CRA Performance*, 54 Banking Rep. (BNA) 333 (Feb. 26, 1990). The state board noted that while it was "encouraged by steps taken by BayBanks to improve its community reinvestment position . . . planned or future CRA related activities do not offset an otherwise unsatisfactory past record." *Id.* (emphasis added). The action by the Massachusetts regulators indicates the CRA could become a factor with respect to state as well as federal regulatory applications.

cation to the Federal Reserve Board to acquire an Arizona bank, however, illustrates that commitments are not always viewed as the appropriate remedy for CRA deficiencies.⁸⁴

Continental applied to the Board under section 3 of the BHCA to acquire all of the voting shares of Grand Canyon State Bank, a small state-chartered commercial bank. The competitive effects of the merger were not at issue. The Board's analysis instead focused on the needs of the community to be served by Continental's present and proposed bank subsidiaries. In the order, the Board stated that while CRA improvement commitments are often sufficient to secure merger approval, approval would be withheld where the acquiring institution failed to establish a record indicating "a basic level of compliance on which the commitments can be evaluated."⁸⁵ The *Continental* order could become precedent for future denials in light of statistics compiled by the federal bank regulators indicating that nearly one out of every ten financial institutions examined with respect to CRA compliance since July 1, 1990, received a less-than-satisfactory CRA rating.⁸⁶

In addition to the *Continental* order, the Federal Reserve Board recently blocked a proposed merger between First Interstate Bancsystem of Montana, Inc., based in Billings, Montana, and Commerce Bancshares of Wyoming, Inc., based in Sheridan, Wyoming.⁸⁷ The denial followed a protest by Native Action, a community group located on the Northern Cheyenne Indian Reservation, alleging that a subsidiary bank of First Interstate had failed to take steps to address and meet the credit needs of the reservation community. The Board agreed with the allegations, saying that the particular bank in question had little contact with the reservation. The Board also noted two less-than-satisfactory CRA ratings by the FDIC. The Board indicated that while the bank had made Small Business Administration and other loans in its community, it had made only a limited number of loans to members of the reservation and had taken action to improve its CRA performance only after the merger application had been filed. As in *Continental*, no competitive issues were raised and the denial was based solely on community reinvestment grounds.

At this point in the development of community reinvestment, the *Continental* and *First Interstate* orders still represent isolated circumstances in which applications were denied solely on CRA grounds. Delays in the approval process resulting from community group challenges, however, are

84. Continental Illinois Bancorp, Inc., 75 Fed. Reserve Bull. 304 (1989).

85. *Id.* at 306.

86. Consumer groups, commenting on the statistics, have expressed concern that some institutions are being given passing ratings despite noncompliance. *Regulators Find CRA Performance Lacking for One Out of 10 Institutions Examined*, 57 Banking Rep. (BNA) 137, 138 (July 22, 1991).

87. *Fed Blocks Attempted BHC Merger, Cites CRA Concerns by Cheyenne Group*, 57 Banking Rep. (BNA) 603 (Oct. 14, 1991).

becoming somewhat commonplace. An example of the kind of challenges that are occurring is the effort of the Charlotte Reinvestment Alliance to block NCNB's acquisition of two Tampa-area branches in Florida's American Savings & Loan. The alliance claimed, based on a study of mortgage lending in minority areas in Charlotte, that the bank "has done very little in the way of community reinvestment."⁸⁸ The Charlotte group, successful in negotiating \$9 million in CRA commitments from First Union Corp. as a result of a 1989 merger, was joined by community groups in Texas who filed complaints alleging that NCNB failed to meet its CRA obligations in minority areas in Austin, Dallas, Houston, and San Antonio.⁸⁹ First Union's application to acquire Florida National⁹⁰ was also delayed on CRA grounds. In commenting on its decision to approve First Union's bid, the Federal Reserve Board noted that "if not for the deteriorating condition of Florida National . . . it would not have approved . . . [the] bid . . . [in light of First Union's] past CRA performance."⁹¹ More recently, shortly after the announcement that a merger agreement had been reached between NCNB Corp. and C&S/Sovran Corp., it was announced, apparently as part of an effort to stave off CRA challenges, that \$10 billion would be committed to community development lending in existing NCNB and C&S/Sovran markets over the next ten years.⁹² Shortly after the announcement, the Federal Reserve Board announced that it would conduct four public hearings in connection with NCNB's application to acquire C&S/Sovran.⁹³

While post-*Continental* Board orders suggest that CRA is not the beginning and the end of the convenience and needs inquiry,⁹⁴ *Continental* and *First Interstate* do indicate that a basic level of compliance could, as a matter of course, be a necessary condition for the approval of a merger or branching request.⁹⁵ An established record of CRA compliance would, of course, provide a more objective basis for determining whether a merger or acquisition is likely to have the probable effect of meeting the convenience

88. *Community Groups Protest NCNB's Record Under CRA in Florida, Texas*, 55 Banking Rep. (BNA) 613 (Oct. 15, 1990).

89. *Id.*

90. See *supra* notes 48-52 and accompanying text.

91. *Fed OKs First Union Acquisition, Sets Tough CRA Compliance Conditions*, 54 Banking Rep. (BNA) 10 (Jan. 8, 1990).

92. Brannigan, *NCNB, C&S Sovran Plan to Expand Lending for Community Development*, Wall St. J., Aug. 7, 1991, at A5, col. 1.

93. *Fed to Hold Public Hearings in Four Cities in NCNB-C&S Sovran Merger Plan*, 57 Banking Rep. (BNA) 448 (Sept. 23, 1991).

94. See, e.g., First Union Corporation, 76 Fed. Reserve Bull. 83, 87 (1989) (CRA performance is major component of the convenience and needs standard under the BHCA but is not the only factor reviewed under that standard).

95. A poor CRA record also resulted in the denial by the Federal Home Loan Bank Board (FHLBB) of a branching request by Leader Federal Savings Bank of Memphis, Tennessee. Ringer, *Memphis Thrift Denied Branch on CRA Grounds*, Am. Banker, July 24, 1989, at 3. See also E. SYMONS & J. WHITE, *supra* note 5, at 150.

and needs of the community than would a commitment for future action.

CONCLUSION

The evolution of the Community Reinvestment Act from a prohibition on redlining to an affirmative local credit obligation is increasingly being recognized by the banking industry.⁹⁶ The present impact of CRA is evidenced by the recent debate in connection with proposed CRA amendments to House and Senate banking bills. The most debated proposals were those made to "gut" the Act by exempting smaller community banks from the requirements of the Act and those which would have made expanded banking powers contingent on the presence of a satisfactory CRA record.⁹⁷ The reform bills approved by the Senate Banking Committee and the House Banking Committee both contain substantive amendments to the Act.⁹⁸

If a new wave of bank and thrift mergers and acquisitions is on the horizon, it seems probable that community reinvestment's role will continue to increase. While this increased role is unlikely to undermine or displace the competitive aspects of bank merger and acquisition analysis, as the recent preemptive action taken by NCNB and C&S/Sovran indicate, CRA can be expected to be a central part of the application process. Developments in this area of the law indicate that community reinvestment has taken on a central role in the evaluation of convenience and needs. This role may provide a more objective means to measure convenience and needs than presently exists, particularly if regulatory standards continue to develop. If current trends continue, CRA may become the sole standard for determining whether an acquiring institution has a convenience and needs defense to an otherwise prohibited merger. Perhaps more importantly, however, as the level of community involvement in banking decisions continues to increase,

96. Questions concerning CRA compliance were recently addressed by Federal Reserve Board of Governors member John P. LaWare in a two-part article in the American Bankers Association publication *ABA Bankers Weekly*. *Fed Governor Answers ABA's CRA Questions*, *ABA Bankers Weekly* 6 (Nov. 27, 1990); *LaWare Addresses Safety, Declining Ratings Issues*, *ABA Bankers Weekly* 6 (Dec. 4, 1990).

97. See *House Banking Sets Tentative Schedule for Action on Amended Bank Reform Bill*, 56 *Banking Rep. (BNA)* 1032 (June 3, 1991); *Bill Modernization*, *supra* note 4; Maio, *Subcommittee OKs Bill with CRA Relief*, *ABA Bankers Weekly* 1 (May 28, 1991).

98. The Senate bill mandates that regulators develop measures to assist institutions in complying with CRA and also requires that examiners disclose the statistical data they rely on in assessing a bank's CRA performance. S. 543, 102d Cong., 1st Sess., 137 *CONG. REC.* S2627 (daily ed. Mar. 5, 1991). The House bill requires a study by regulators and the GAO on ways to improve compliance with and the enforcement of CRA. H.R. 6, 102d Cong., 1st Sess., 137 *CONG. REC.* H8808 (daily ed. Oct. 31, 1991). Both bills require separate CRA evaluations for banking activities in different states and also require banks to notify depositors in advance of any branch closings. A comparison of the two bills is contained in *Comparison of House and Senate Banking Bills Shows Key Similarities, But Effort in Trouble*, 57 *Banking Rep. (BNA)* 298 (Sept. 19, 1991).

a CRA record could become the measure of an institution's "political correctness" and as such could be the basis for deposit decisions⁹⁹ and decisions concerning appropriate banking powers¹⁰⁰ as well for decisions with respect to branching and merger and acquisition requests.

99. A resolution adopted by the House of Delegates of the American Bar Association (ABA) in February of this year calls for the ABA to place its deposits in institutions based on CRA ratings. The resolution also calls on state and local bar associations to use CRA ratings "as a significant factor" in determining where to place their accounts. Twelve state and local governments currently have laws in place requiring that CRA ratings be considered as part of the decision as to where public funds are deposited. *Bar Association Consumer Groups Endorse Depositing Funds in High CRA-Rated Banks*, 56 Banking Rep. (BNA) 733 (Apr. 22, 1991).

100. See, e.g., *supra* notes 4 and 83 noting, respectively, proposal to tie "modernization" powers to CRA and state regulator's action denying holding company power to vote stock of subsidiaries on CRA grounds.