Consumer Finance Monitor (Season 5, Episode 25): A Look at the Joint Community Reinvestment Act Proposal Issued by the OCC, FDIC, and Federal Reserve Board, with Special Guest Kenneth Thomas, President of Community Development Fund Advisors, LLC

Speakers: Alan Kaplinsky, Scott Coleman, and Ken Thomas

Alan Kaplinsky:

Welcome to Consumer Finance Monitor podcast where we explore important new developments in the world of consumer financial services and we explain what they mean to the industry and what they mean to consumers.

Alan Kaplinsky:

I'm Alan Kaplinsky, senior counsel at Ballard Spahr. I'm formally the Chair of the Consumer Financial Services Group at Ballard Spahr. I was in that role for about 25 years. I'm very pleased that you have downloaded our podcast show today. This is an important podcast. Of course all of our podcasts are important, but this is a topic that we wanted to visit at this point because it's not a completed work yet. And so there are opportunities for those of you who are listening to weigh in, to comment to your regulators.

Alan Kaplinsky:

And really what we're going to talk about today is the new proposed regulations issued by the three banking regulators, the Federal Reserve Board, the Comptroller of the Currency, and the FDIC under the Community Reinvestment Act, statute that's been on our books for a long, long time, but one where the regulations haven't been updated in a similarly a long period of time. During the last administration, there was some activity, the most notable thing being that the Comptroller of the Currency had proposed some regulations, but they were not joined in by the FDIC or the Fed. Then of course, we had the change in administration and we will talk during this program about what has very recently, mainly on May 5th, got issued in the form of a proposed regulation by all three regulators. So Fed, the OCC, and the FDIC.

Alan Kaplinsky:

Let me now introduce my guest today. We have a very special guest that I'm extremely pleased has joined us today. A few years ago, we did a, not a podcast, but I think we did a webinar or a webcast with this gentleman. His name is Ken Thomas. He's in my view and the view of many other people, the nation's leading expert and author on the Community Reinvestment Act, or we'll refer to it today CRA. He's testified before Congress, he's advised regulators, he's trained Federal bank examiners, he's written numerous articles and two books on the CRA, including the CRA handbook. Many of its recommendations were implemented into the current CRA Regs. Most recently, he was asked by treasury and some individual bank regulators and member of Congress for his input on CRA reform.

Alan Kaplinsky:

Some of his recommendations regarding branchless banks were in previous OCC rules. Dr. Thomas or we're going to refer to him today less formally as Ken has worked with banks, regulators, and community groups in a consulting capacity since 1977 CRA law was enacted. He was the recipient of one of the three awards of excellence from the National Community Reinvestment Coalition in 1994. He's also launched and he's act as chair of the board of trustees of two different nationwide

CRA investment mutual funds, including the Community Development Fund. Ken is president of Community Development Fund Advisors, LLC.

Alan Kaplinsky:

He's lived in Miami for most of his life, got his bachelor's degree in business administration with the University of Florida, and MBA from the University of Miami and an MA and a PhD from my Alma mater for undergraduate school at least, The Wharton School of the University of Pennsylvania, where he taught banking and finance for 42 years. He's a regular speaker and writer about the banking industry, mainly in the American banker and the Hill. He's appeared frequently on ABC Radio, Bloomberg Radio and CNN, CNBC, and on and on and on. So before I introduce my colleague, Ken, a very warm welcome to you. Great to have you on the show.

Ken Thomas:

Thank you very much, Alan. And thank you very much for having me. I'm looking forward to working with you and Scott on this important evaluation of this very important NPR on CRA.

Alan Kaplinsky:

Okay. And let me introduce Scott Coleman now. Scott is a partner at Ballard Spahr. He works out of the Minneapolis office. For more than 30 years, Scott has represented banks and bank holding companies in connection with mergers, stock purchase transactions, branch purchase, and assumption transactions, capital raising, corporate restructuring, branching, non-bank acquisitions, changes in bank control, and chartered conversions. And most importantly, important to the subject of today's podcast, the Community Reinvestment Act, upon which he has advised many, many of our banking clients. So Scott, warm welcome to you as well.

Scott Coleman:

Thank you, Alan. It's a pleasure to be here and pleasure to talk to Ken again about what we're seeing develop in CRA.

Alan Kaplinsky:

Okay, well, I've got a lot of questions for you guys. I'm loaded with questions here today. And for those of our listeners who may not be as tuned into the CRA, as I'm sure many of our other listeners are, let's start out with a softball question. I'm going to direct it to Scott. What is the Community Reinvestment Act and what is it intended to accomplish?

Scott Coleman:

Sure. The Community Reinvestment Act was enacted as you mentioned in 1977. Fundamentally, it is a fair lending law. It's not the only fair lending law. We saw the Fair Housing Act of 1968 and the Equal Credit Opportunity Act of 1974, but Congress felt that those did not go far enough, and Community Reinvestment Act was enacted to address what was then called redlining, where institutions were not making loans in low to moderate income areas where they were getting deposits. The purpose of the CRA is to encourage depository institutions to help meet the credit needs of communities of which they operate including low and moderate income neighborhoods, consistent with safe and sound operations. The CRA requires each insured institution to be evaluated on their record periodically by the appropriate Federal banking regulator. And it focuses on 12 assessment factors and it has real world implications for institutions. If you're considering an acquisition or considering a merger, you will be evaluated based on your CRA compliance. And if you have a poor record of CRA compliance, that will impact on your ability to leverage your business plan appropriately.

Alan Kaplinsky:

Well, thank you Scott. Now, Ken, I want to go to you. Given that CRA has been the law for about 45 years, I assume that the implementing regulations that were adopted shortly after the law was passed by Congress had been revised previously. Been a lot of changes in banking over that 45 year period. Isn't reform needed, Ken?

Ken Thomas:

Absolutely. Reform in terms of the changes that are needed because of modernization. Let's go back. 1977 the law was established. Nothing was really done with the law until 1990, because that's when CRA ratings and the public performance evaluations, which we call Pes, became public. That was you remember right after the S&L crisis. Henry Gonzalez and Joe Kennedy and others demanded that the ratings become public. And this was in 1990.

Ken Thomas:

So then when ratings became public for the first time, and these are the first ratings of banks in the United States that were ever made public, everyone got an interest in it. And so in 1993, '94, under the leadership of Gene Ludwig, the comptroller then, he worked with Senator Proxmire to update CRA. So we had an effort in '93, '94, and finally the first major reform in 1995. I had the opportunity to work with both Senator Proxmire and Comptroller Ludwig then very, very closely. That was the major rewrite. Those laws are basically in effect today. We had another rewrite or let's just say an add on in 2005 when we added intermediate size banks. So we went from small to large banks to intermediate size banks. So basically, since 2005 nothing's been done, but liquid has happened since then with the internet. So many things have happened and that's why we really need change.

Alan Kaplinsky:

Right. Right. So this topic of CRA reform, it's been a discussion topic for some period of time. Why, Ken, has it taken so long? Why is it such an arduous process and where are we today?

Ken Thomas:

It really shouldn't be that difficult because when former president Trump came in, it became a hot button issue because two of the people he had appointed, Treasury Secretary Mnuchin and Comptroller Otting, this was a big issue to them because of the bank they previously were with, IndyMac and OneWest Bank in California. They made CRA a priority. When in fact, the real priority where banks needed help was on BSA, they made CRA the priority.

Ken Thomas:

Starting then, in April of 2018, treasury came out with a CRA modernization study. Now this is very important to understand. The goal was to modernize CRA for the impact of digital branchless banks, the internet, the credit card banks, the FinTech banks. We did not have those back in 1977, '95 or 2005. So the goal was modernization, updating. Not reforming, not changing it totally. And as you mentioned previously, the comptroller had some efforts to do that. They were moved around and then we had this joint proposal. But we have to remember the real goal in all this reform is to update or modernize the law to reflect branchless banks and internet banking. That's the main change that's happened in banking since that time.

Alan Kaplinsky:

Yeah. So Scott, Ken and I both referred just a few minutes ago to efforts made by the OCC to promulgate a final rule. They wanted something that the Fed and the FDIC would jump... That they'd get on that bandwagon. Tell us, well, what happened in 2020 with the Comptroller of the Currency. Or maybe it was the acting Comptroller, Brian Brooks, I think. I think he was in charge at that point.

Scott Coleman:

On June 5th, 2020, the OCC passed the final rule on CRA Reform. They passed it alone. They had been working with initially the Fed who had pulled out a discussions and with the FDIC who was participating in discussions until late in the process, but due to the pandemic felt it was an inopportune time to require banks to start moving to a new CRA rule and ask for a pause. I think at the time it still was Comptroller Otting, and this was right before he was on his way out the door. And he proposed to go ahead alone without either the FDIC with whom he'd been corroborating or the Fed who had pulled out. The OCC rule was intended to create objective measures and objective metrics for evaluating CRA performance. There was a proposal that

call report data be used to determine the amount of qualifying activities, including mortgage consumer, small business, and small farm loan activities.

Scott Coleman:

Controversially, especially with respect to the opposition of many community action groups, the rule made use of multipliers where a bank received extra credit for certain activities in particular with, for example, CRA hotspots or CRA deserts, and working with minority owned depository institutions, women owned depository institutions and CDFIs. There were some perhaps ill conceived examples of community development activities. One of which received a lot of intention was the development of a sports stadium. And so trade groups, community action associations looked at the rule and felt like it could allow, especially with the use of multipliers, banks to engage in less CRA activity and get more credit for it. And so there was opposition to it.

Scott Coleman:

The big banks did not love the data collection record keeping and reporting. There was a lot that wasn't addressed in the rule and was to be addressed afterwards because they felt they needed to do data collection before they could set the benchmarks. Lo and behold, there was an election, change in administration change, in leadership. And the net result was that on December 14, 2021, the OCC rescinded the rule in its entirety less than a year and a half after it passed it.

Alan Kaplinsky:

Right. And that was done under who leadership at that time? Was it on enacting comptroller?

Scott Coleman:

Yes.

Alan Kaplinsky:

Yeah? Okay. Ken, before we turn to this joint proposal, I'd like to your thoughts as well of what the OCC did.

Ken Thomas:

The OCC... And again, I had the honor of working with then Comptroller Otting. He invited me to Washington two or three times. We focused on a lot of different areas. And I was able to work with him in the most important area, which he agreed on, was dealing with these branchless internet banks. He agreed that we need what I call the 5% deposit reinvestment rule. Now we have to go back. I asked Senator Proxmire once, "Why did you call it Community Reinvestment Act instead of something else?" He said, "Because we want banks to reinvest where they get their deposits. Reinvestment is the middle name of CRA." And right now we have a category of banks, the branchless banks, the credit card banks, all the new internet banks that are taken deposits nationwide. And all of the benefits are going into three areas, what I call sanctuary areas. Utah, Salt Lake City, Wilmington, and Sioux Falls where they are based. The benefits should really be into the communities where the deposits came from.

Ken Thomas:

So Comptroller Otting at the time agreed to a 5% rule, which is very simple. Any market where you take more than 5% of your deposits, you will have a CRA requirement. And that was excellent. However, the Fed, the new joint reform did not use that approach unfortunately.

Alan Kaplinsky:

Yeah. Okay. Well that's a good segue into this joint proposal. Let's start with you, Ken, since you just finished talking about what the OCC did. What changes does the proposed joint rule make?

Ken Thomas:

You know, Alan, I want to clarify one item. We keep calling it joint, but in my opinion, this is really a Fed proposal dressed in inner agency clothing, because this is very similar to what the Fed put out as an ANPR back in September 2020. And now the Fed has got the OCC to go along. And the acting comptroller, he's an ex Fed guy. The treasury secretary, she's ex Fed. My rule of thumb has always been, and I might have criticized for saying this, but you can take somebody out of the Federal reserve but you can't take the Federal reserve out of them. Once they're a Fed person, they're always a Fed person. And they followed this very much, the Fed approach to this. And it's unfortunate because they did not adopt that 5% rule.

Ken Thomas:

Now what they did include, they made some changes to be fair to them. They didn't have a new size category. Before, we had small, intermediate and large. Now they have a category called extra large, which are those banks over 10 billion. So why did they pick 10 billion? Why not 50 billion? Because there is a tremendous, what I consider undue regulatory burden on these big 10 billion plus banks. Why that? And then we have all new tests. Instead of before where we had for the large banks, three simple tests, lending investment and services, 50%, 25%, 25%. Now we've got four different tests with 45%, 30%, 15%, and 10%, very complicated, and 700 pages of papered with all these formulas. And it reads like a PhD dissertation and it asks 180 questions. Very, very complicated for everyone involved.

Ken Thomas:

And even though we say, "Yeah, there's some changes here," the bottom line is, small banks as Scott mentioned are going to be happy with this because they have been safe harbored. They have been safe harbored by increasing the asset thresholds from roughly 346 million to 600 million, which by the way, includes about 800 banks that are normally helping their local community with the community development test that will no longer be required. So that's not good for these communities. And then we've got about another 200 banks that were formally large banks that are now going to be intermediate banks. So there's a reduction in the amount of community development activities as a result of these changes. But again, all of the burden is going to be on the really big banks over 10 billion.

Alan Kaplinsky:

Yeah. Yeah. So Scott, I'd like to now get your reaction to the proposal and also a reaction to something that Ken said that the small banks in the country, the ones now that are, I guess, less than 600 million in assets, they're going to be pretty happy with this.

Scott Coleman:

Yes, Alan, I think that's right. I think Ken sees done a key point, which is if you looked at the Fed's ANPR that was issued in 2020, just about everything that's in the proposed rule was there, it is the playbook. It's clear that if you were picking a regulatory winner or loser, the Fed won here. There's no question about it. I do think, yes-

Alan Kaplinsky:

Well, so far. So far.

Scott Coleman:

So far. Right.

Alan Kaplinsky:

Yeah.

Scott Coleman:

We'll see what happens, right? But I think the rule is interesting because what we have is a rule that is focused on deposits for about the entirety of its existence and putting deposits back to work in the communities where they come from. The Fed is instead taking us down a path of looking at determining your assessment area, yes, where your locations are, that's always been part of the rule, where you have your main office, where you have branches and where you have deposit taking ATMs. But now they have a retail lending test that looks at where you're lending. But if you're not lending in a low to moderate income area, how does the retail lending test really help you? It just doesn't, to me, make a lot of sense from a reform standpoint. I guess I do agree with Ken that there really ought to be a focus on where the deposits come from and this rule does not take that approach.

Scott Coleman:

As far as who likes the rule, I do think intermediate banks that are now small banks, large banks that might not be intermediate banks, they're going to be happy with it. for the small banks in particular, there is absolutely no requirement that they make any change whatsoever. On the other hand, if you're a large bank and you now have to start gathering all of this data and you have to be prepared for the extra burdens of it, you're probably not going to be happy. I will note there was a data collection requirement as part of the OCC rule too. And so the organization or the industry might be prepared for some of that, but I think this goes further than they were probably expecting.

Alan Kaplinsky:

Yeah. So you have already answered this question, Scott, but how does the OCC rule differ from this proposed rule? You mentioned they've taken away the deposit collection test. Are there other things too that are worth mentioning?

Scott Coleman:

Yeah, it gets away from the concept of multipliers, right? There isn't a multiplier that was the controversy or part of the OCC rule. So from the Fed's perspective, there are going to be metrics about CRA lending. It's going to be focused based on the actual results for you and others in your peer group and your assessment area. But we won't have these multipliers that will increase the amount of CRA credit you get because of where it's being offered or to whom it's being offered.

Alan Kaplinsky:

Right. Right. So Ken turning to the proposed rule again, I know you're not happy with it, to put it mildly. But are there any things about that proposed rule that you think the agencies got right? What did they get right and what did they get wrong?

Ken Thomas:

Well, the first part is easy to answer. The best thing they got right was they did it all together. It was a joint rule. This is important for us as bankers to have a joint agreement on it. You should not have different competing and lots of different rules for different types of charters. Also, they got right the list of eligible items for CRA credit, but that came from the OCC. In fact, a lot of the things they got right, they took from the OCC rule, which was good. The other thing they got right, and I think this goes to how political the Fed has become and politically smart, by given this safe harbor to the small banks, increasing the asset threshold for them and for the ISBs, they will apparently bring on board maybe the ICBA representing a lot of the small banks. Maybe not the ABA because they represent the larger banks.

Ken Thomas:

So they took a very important decision. They made a calculation here politically, that if we bring on the small banks and we get their approval, maybe we can get this thing passed. I think that was a mistake. I don't think it's fair to hold one group of banks hostage to another and put a burden on one versus another, which gets to the second point, what they got wrong. And that is the main thing that Scott just mentioned. They got totally backwards this whole concept of how to deal with branchless internet banks. We have to focus on where they bring in their deposits, not where they make their loans. If these banks are

making loans only in affluent areas and maybe even redlining below and modern income areas, they're going to create assessment areas based upon those lending areas, which makes no sense. The assessment area should be based upon where the deposits come from.

Ken Thomas:

Again, why did Senator Proxmire call it community reinvestment? Because we want to reinvest where we get the deposits from. We ensure those deposits. We have lender of last resort too big to fail all these benefits we give to the industry and are based upon the deposits. And so that's the main thing they got wrong. There were other things they got wrong. I won't go through them, but I think mainly it was very complicated. I would say the most important thing they got wrong was missing the main goal here. The goal was to modernize, update CRA. Now they listed out eight objectives and there should only be one. They talk about strengthening CRA, this and that, all that could be done with the existing rules just by better training examiners, rooting out what we call the rogue examiners, and having better trained examiners with the existing rules. The existing rules worked fine as all we needed was that reform. They did not get that right. The OCC got it right. But because it was an OCC rule, it was totally trashed, like everything else that the former OCC did unfortunately.

Alan Kaplinsky:

Right. Right. So Scott, how does the industry seem to be reacting? I mean, I know we've already commented on, or you have mentioned that the smaller banks that are going to be exempt and that exemption level of total assets is proposed to be raised. They don't have any complaint because they're not subject to those thing, but what about the rest of the industry? Medium size banks, the large, the extra large.

Scott Coleman:

I think the criticism of the rule has been somewhat muted. And we'll see if that changes as we move into the summer here. I think the rule does some things that they liked, right? Certainly, it preserved the wholesale and limited purpose tests. Like the OCC rule, it creates a proposed list of CRA eligible activities and allows for preapproval of a proposed activity. So you hopefully get some information and clarification about what qualifies. I think they're okay with the additional assessment factors. It's going to be the data gathering and the data reporting that's really going to be a problem. We may also see some concerns about how the rules going to be rolled out and what the evaluations are really going to be. But so far the comments have been fewer than anticipated. And as you noted, and as we've talked about at length, the medium size and smaller banks seem comfortable with the changes so far.

Alan Kaplinsky:

Yeah, of course the comment period, as I understand, it expires on August 5th. I guess there's a possibility it might be extended beyond that. Some people have asked the agencies to do that. So it may be that they're just holding their fire and that we'll really find out what they think about it when the comments start rolling in. Don't you think?

Scott Coleman:

Right. I do. And I think that's important to emphasize. We saw this with the OCC and the OCC rule as well. The OCC actually did listen to the industry. Comments were received and were looked at and there were changes made. And if you are affected by the rule, you do have to take this seriously and you have to submit your comments and get them in a timely fashion, make them constructive. And hopefully the regulators here jointly will look at it. Another thing Ken mentioned which I think is absolutely the case is that it helps that this is a joint rule and we've got a level playing field regardless of your regulator, because we don't want regulatory forum shopping. But there are some big changes here and you've got to consider these and you've got to make your comments.

Alan Kaplinsky:

Yeah. Ken, I assume that you're working on a Magnum Opus of a comment letter. Am I right?

Ken Thomas:

Well, several of them actually.

Alan Kaplinsky:

Several of them. Yeah. I'm very much looking forward to seeing them. So while we're on that subject, we talked about what the industry thinks, what the different size banks might think. What about the community action groups? The OCC rule generated... The final rule generated enormous protests from the community action groups. What's been the reception so far those groups to this proposal?

Ken Thomas:

So far the main community group that's provided an initial response has been the NCRC, National Community Reinvestment Coalition. They are the primary voice as far as CRA goes. There are others, CRC in California and so forth. But the main thing that they've highlighted already, which is going to be a big issue for them was that they wanted CRA to be much more race based than it presently is. It presently is not. Senator Proxmire purposely made CRA income based, focused on low and moderate income areas. Many of which of course were predominantly minority areas, but it was income based because he specifically said he wouldn't have gotten it through Congress. And the Fed opposed him a lot in 1977 based upon credit allocation arguments, if it was race based. So he made it totally income based.

Ken Thomas:

Community groups would like to see it much more race based, much more fair lending issues brought into it. And in fact, for the large banks only, they're going to be providing some HMDA data, which we previously have not seen in the CRA exams, the PEs. So that's one thing that they're going to be upset with. They do not like the fact that about 800 current ISB intermediate banks will become small banks without any community development requirement. So we're talking about at least 800 banks, maybe 300, 400 communities because they're multiple communities of course, for the same community and multiple banks. Hundreds of communities will now have banks that no longer have a community development lending, investment, or service requirement the way we have under the ISB test. That's the problem.

Ken Thomas:

Now they'll say, "Well, they'll do it anyways." Well, look at the recent quarterly bank profile, the pressures that banks are under right now to make a profit, the net interest margins. How difficult it is? And if you remove a requirement, banks have a goal to their shareholders, to make money. And they may not have these optional requirements anymore to fulfill. So there is a very real possibility that some of the community development, things that have been done by some of the former ISBs will not be done if we increase these thresholds. Same with some of the banks gone from intermediate to large.

Ken Thomas:

Now, the other thing that they're concerned about is that the branchless banks will not be reinvesting properly in their community. Take my home community of Miami. We have in south Florida literally tens of billions of dollars that come out of here that go into the big credit card banks, that go into the big FinTech banks. All the benefits go back to those three cities, Salt Lake, Wilmington, and Sioux Falls. Those benefits should be here in Miami. And that's a problem because we've got big cities like New York, Chicago, LA, San Francisco, Dallas, where we should have benefits.

Ken Thomas:

Now these branchless banks have convinced a lot of the regulators and people in Congress unfortunately that the benefits would go back into the rich areas of Miami. For example, Coral Gables, Coconut Grove and Pinecrest. But the way the law is written is it'll benefit the poor areas in Miami, Like little Haiti, like Liberty City, like Overtown. So think of the 5% rule as a Robin Hood rule. It takes the money from the rich people of a big market and puts it back into the poor communities to help the poor people. That's what the 5% rule was designed. And community groups are not going to be happy that we are going to

have something based upon lending and not deposits. And I would say the final thing about community groups and they have to speak for themselves is this, the system is working fine for them. They're getting right now 500 billions of dollars going into communities every year under CRA. We just saw a record $100 billion commitment by US bank. $100 billion, now under the current Regs.

Ken Thomas:

Now, if we change the Regs, what is that going to be? 125, 150, 200? Community groups are doing very, very well with the existing Regs. They don't need a change. And plus who wants to learn a new IRS code and new CRA rule? The community groups don't want to do it. Bank examiners and certainly bankers don't want to learn it at all. So overall, I think there's going to be a lot of opposition when we see the comments flow in.

Alan Kaplinsky:

Yes, it looks like the only people who may be happy with this are the smaller banks. Everybody else is going to have a problem with it. And that to me suggests that it's going to be a tough flooding for the Fed, the OCC, and the FDIC to then come up with a final rule that will accommodate all these important interests. I mean, you can't adopt a rule that the big banks don't like and the community groups don't like. You've got to somewhere reach some kind of compromise. Don't you think?

Ken Thomas:

You know, they were very smart. I've written a lot about the Fed being too political. They made a very smart political calculus decision here. They figured, "If we could bring the small banks along with this, the ICBA, maybe there's enough push in Congress where we can get enough pull to get this through. Even though the big banks are going to really suffer the most." And that was their decision making. And we've never seen this before, where a regulator basically tips one part of the industry against another. The industry should be United on serving communities. It should not be one versus another. And that's effectively what they're doing here, trying to divide it out. And we'll see, clearly there's more small banks than big banks and they have more representatives in Congress, but that's how it may play out, is that political calculus.

Alan Kaplinsky:

So I guess maybe they confuse the independent bankers with the National Automobile Dealers Association, the automobile dealers. They do have a lot of clout and they've used it on many occasions. But independent banks, there are many of them, but I'm not sure they've got that clout in Congress that the Fed might believe to be the case.

Alan Kaplinsky:

So Scott, there's some stuff going on at the state level, too, right? With the respect to CRA, some states are introducing their own CRA.

Scott Coleman:

Yeah. That's true. Certain states have had CRA on the books for depository institutions for some time. New York has had a law since 1978. Massachusetts since 1982. But Illinois adopted a law in 2021. And then in particular for nonbank lenders, such as mortgage lenders, we saw both Massachusetts adopted a law in 2007, but Illinois adopted a law last March that went into effect January 1 of 2022. New York adopted a law in November that goes into effect November 2022 of this year. And so that could be the tip of what we see as a new trend, where particularly if state banking regulators are not happy with CRA reform, but even if they are, they may decide to go their own way both as to depository institutions and as to nonbank lenders and require Community Reinvestment Activities where there might not otherwise have been a requirement.

Alan Kaplinsky:

Well, isn't that kind of create a patch work? Well, I assume in the CRA, and you correct me if I'm wrong, there's no preemption provision. So states are free to do whatever they want here?

Scott Coleman:

My analysis is that there would be no viable Federal preemption case to argue against it. And I think the fact that we do see these state laws, some of which have been on the books sometime, is evidence of that. I don't think there is a good preemption defense.

Alan Kaplinsky:

Well, boy, it's going to be for banks that are... And I don't know whether these state laws are trying to exert jurisdiction over just the banks that are in their state or are they trying to exert jurisdiction over the banks that are conducting business in their state even those that may have no nexus other than the internet.

Scott Coleman:

Right now to date, it's been primarily jurisdictional based, but that could change. And I do think that it really is a change that while we talk about the Federal CRA laws being deposit focused except in connection with new proposed rule, some of the states clearly in New York and Illinois recently are focused on lenders, non-bank lenders in the state, and imposing a requirement on them as well.

Alan Kaplinsky:

Yeah. I take it at the national level, there that be a change in the CRA in order for it to cover nonbank lenders. Am I right? It couldn't be done by regulation.

Scott Coleman:

Not under the existing act, no. It's solely focused depository institutions.

Alan Kaplinsky:

Right. Right. Right. So what do you see as the next steps, Scott? Will this rule ever get finalized? And if so, when will it happen?

Scott Coleman:

I think the rule will be finalized. When is a tougher question to answer. Just as a reminder for people, unless as we discussed, unless there's an extension, comments are due August 5th, and I think it's important for the industry and everyone else to submit comments on the rules, because this is not the OCC acting alone but the agency is attempting to act jointly even if we think it's primarily the Fed's proposal, I think it's going to take some time for them to digest the comments that they get. And I think it will take some time for a final rule. But there's been enough discussion about CRA reform over the last five years that I would think we might see something next year. Ken, I don't know what your thoughts are.

Ken Thomas:

We have to keep in mind the political environment here, what could happen, for example, with the November elections in Congress. And for example, we had a change of administration. Everything that was under Trump was trashed. So now we have a new one. So what happens if we get a new administration in 2024? Are they going to trash all this and go back? We should not have rules that on CRA, which is so important, that should be changed by who's in the White House. There should be like the speed limit on I-95, that speed limit should now change based upon who's in the White House, it should be for everyone. But what's happening is it's become too political, and that's where the problem is. If we keep this non-political, we shouldn't have a problem, but we know the reality is with the politics. That's why I'm not too optimistic.

Alan Kaplinsky:

Yeah. Let me ask a question. This is a little out of left field, but it's something I've been thinking about lately and I know you have Scott as well. The FDIC is in the process of reviewing and maybe updating its merger guidelines. That is what they're going to look at in evaluating whether or not to approve a merger of two banks. One of the questions that they have posed in connection with, I guess it was a request for information, not a actual rule making, is should the CFPB be consulted about whether a merger should be approved, because the CFPB is at least supposedly the Federal agency that may be... Well, not the FDIC wouldn't have any involvement because they don't deal with banks. But the CFPB certainly supervises all the big banks over 10 billion and it propagates all the consumer regulations other than the CRA. What do you think of that idea, Scott?

Scott Coleman:

It's not an idea I'm in favor of at all to put it bluntly. The Bank Merger Act already requires the primary Federal regulator who's processing the application to, A, consider the competitive impacts of a proposal, B, consider the Community Reinvestment Act record of the institutions involved in the proposal, and C, look at how will affect the communities involved. So that review is already being done either by the FDIC or the OCC or the Fed, depending on who the primary regulator is that's processing the application. Why we would need consultation with the CFPB on top of that is beyond me. And there is nothing under the Bank Merger Act or the regulations that implement it so far that would even contemplate such a thing.

Scott Coleman:

I will say to the contrary, however, that when you file an application with the Prudential regulator, that they do provide copies of it to the other regulators and afford them the opportunity to comment. So for example, an application to the Fed, even if it does not involve a national bank, a copy of it is sent to the OCC and a copy of it is also sent to the FDIC and they're afforded the opportunity to comment. So-

Alan Kaplinsky:

But not the CFPB, right?

Scott Coleman:

But not the CFPB. So would it really be harmful for a third Federal regulator to weigh in? It wouldn't be the end of the world. I just don't see the need for it. Applications take long enough. And the process seems to be increasing dramatically in the last couple years. And again, at least as currently, there's no regulation that would support that.

Alan Kaplinsky:

Right. So in the statute, the Bank Merger Act, I think it refers to the bank has got to serve the convenience and needs of the community. I assume from what you've said, Scott, and tell me if I'm wrong, that subsumed within the convenience and needs would be among other things, compliance with the whole panoply of Federal consumer protection laws.

Scott Coleman:

Yes, it would.

Alan Kaplinsky:

Yeah. Okay. Ken, do you have a reaction to the CFPB trying to... Well, it's not so much. I don't know whether we can say they've stuck their nose in it. But the FDIC has a five member board. The director of the CFPB Rohit Chopra is one of the five members. The Democrats now have firm control of that board. What's your reaction to that? I know it's a little bit off topic from CRA, but I figured you might have an opinion.

Ken Thomas:

Well, certainly I do. First of all, Director Chopra is a Wharton guy so I'll try to make my comments fair. But I go back to my 1998 CRA handbook. When I proposed at that time that all of the... And at that time we had four regulators. You remember the OTS Federal Home Loan Bank Board. This idea of shopping among regulators for better CRA ratings, I would propose moving all of it to a new agency. So I'm going to leave you with this final comment for the audience to think about. I would recommend taking all CRA all compliance requirements and putting them in the CFPB. That way we have no further inter agency dealings. And we could say, "Well, the OCC gives out better outstanding ratings. They are easy or greater. FDIC is a tough or greater. We would eliminate that by having one agency do all consumer compliance and let the regulators focus on what they're supposed to be doing, safety and soundness. And let the Fed try to focus on what it should be doing, monetary policy and controlling inflation because obviously they're not doing a good job on that front.

Alan Kaplinsky:

Well, I would respectfully disagree, Ken, with that suggestion. First of all, the CFPB does not have any in-house experts on community reinvestment. They would have to acquire that expertise. I suppose that's something that is doable. But the other thing that bothers me is that Rohit Chopra is very much a fair lending guy. That's where in fact he's been spending a lot of his energy since he's been in office for seven or eight months, focusing on fair lending. He's worried about, for example, the impact that the use of artificial intelligence to underwrite loans, that that might be a way in which consumers are being discriminated against, that there are violations of the Equal Credit Opportunity Act that might be going on. So I just worry that he would conflate CRA with fair lending. And I think those two things are different, they're different in nature.

Alan Kaplinsky:

I don't like the idea that there's three agencies involved with CRA, but I don't think the CFPB would be the answer to that. And then that's also very subject to the political whims of one individual, the president. The president can now appoint a new head of the CFPB. There's a supposed to be a five year term, but really in reality, if there is a change at the top. If the president right now is a Democrat, but becomes a Republican in two years, we're going to have another head of the CFPB. And that person may be very conservative in their thinking. And it's just not a good answer as far as I'm concerned, but I certainly respect your opinion.

Alan Kaplinsky:

All right, we're running out of time, but before we do, I want to get some parting thoughts. First I'll go to Scott. Any final ideas or thoughts you want to impart to our listeners? And then, Ken, I'm going to give you the final say.

Scott Coleman:

My final thoughts are that the proposed rule at 687 pages is way too long, but whether you're in a community action leader or whether you are a banker, it's important to go through it carefully and understand what's there because there is a lot that will be different that you need to think about, and you need to determine how it impacts your organization. Again, I can't emphasize enough that you've got a window time to make comments and we need to see those comments submitted.

Alan Kaplinsky:

Okay. And Ken? By the way, I admire your Penn Jersey.

Ken Thomas:

Thank you. Thank you. Like I said, Chopra is a Wharton guy, but as far as the head the Minneapolis Fed, I would leave it with this final comment. The original purpose of CRA reform was to modernize the law for branchless banking, digital banking, not to overhaul it. So if I have a problem with my car, I take it into the shop, I want them to tune it up. I don't want them to say, "Ken, you need a new engine." We need a tune up. And it's very simple what we need. We need the modernization with the 5% deposit reinvestment rule that the OCC had, and basically everything else status quo. And we could keep the idea for

example of the list of CRA algebra activities. Bottom line, maintain the status quo. It's not broken. It works for everyone. It's not broken. We don't need to fix it. We need to update it. And that could be done with the 5% rule and we don't need 700 pages for that. That could be done in seven pages. That's what we need.

Alan Kaplinsky:

Well, thank you again, Ken. I'm sure we'll have you back as developments unfold in this very, very long saga that seems to be endless. So my thanks to you and to Scott. I really want to thank our listeners for downloading the program and remind everybody that our podcast is a weekly podcast show. We release a new podcast every Thursday morning.

Alan Kaplinsky:

And if I might, let me toot the podcast horn just a little bit. Last year, a consulting firm that deals with law firms and teaches them how to get involved with digital media, they rated our podcast show as the second best podcast show among big law firms in the country. And I am extremely proud of that. We've been doing this now for almost four years. Our podcasts are available on Spotify, Google Play, wherever you regularly get your podcast. So with that, I'm going to thank everybody for listening to our show today.