III. Community Banking and the Limitations of One-Size-Fits-All Regulation

A. Introduction

In October 2013, the Office of the Comptroller of the Currency (OCC) and Board of Governors of the Federal Reserve System (Board) adopted a final rule (Rule) implementing substantial changes consistent with agreements reached by the Basel Committee on Banking Supervision (BCBS) in "Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems" (Basel III).[1] The Rule represented the combination of three separate notices of proposed rulemaking published by the OCC, the Board, and the Federal Deposit Insurance Corporation (FDIC).[2] The Rule was adopted to address "weaknesses that became apparent during the financial crisis of 2007–08."[3] Importantly, the Rule provided more stringent capital requirements for banking organizations.[4]

Throughout the integration of Basel III, community banking advocates have expressed concerns over the burdens that these regulations place on community banks.[5] The following excerpt concisely summarizes these concerns:

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[1] Final Capital Rule, 78 Fed. Reg. 62,018 (Oct. 11, 2013) (codified at 12 C.F.R. pts. 3, 5, 6, 165, 167, 208, 217, 225) (adopting the final regulatory rules in implementation of Basel III).

[2] *Id.* ("The final rule consolidates three separate notices of proposed rulemaking that the OCC, Board, and FDIC published in the Federal Register . . . .").

[3] Simplifications to the Capital Rule Pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996, 82 Fed. Reg. 49,984, 49,985 (proposed Oct. 27, 2017) (to be codified at 12 C.F.R. pt. 3, 217, 324) [hereinafter Proposed Rule].

[4] *Id.* ("Principally, the capital rule strengthened the capital requirements applicable to banking organizations . . . by improving both the quality and the quantity of banking organizations' regulatory capital, and increasing the risk-sensitivity of the capital rule.").

[5] *See, e.g.*, *Bank Capital and Liquidity Regulation: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 114th Cong. (2016) [hereinafter *Testimony*] (testimony of Rebeca Romero Rainey, Chairman and Chief Executive Officer, Centinel Bank of Taos, on behalf of the Independent Community Bankers of America), https://www.banking.senate.gov/hearings/bank-capital-and-liquidity-regulation-part-ii-industry-perspectives [https://perma.cc/U3J5-6HGW] (urging changes to the capital rule that will support

> At its inception, Basel III was meant to apply only to the largest, interconnected, internationally active and systemically important institutions. Community banks, with their simple capital structures and conservative funding and lending practices, have nothing in common with these larger institutions. Applying Basel III to community banks in a one-size-fits-all manner harms the consumers and businesses that rely on community bank credit. The impact will be especially harsh in small communities and rural areas not served by larger institutions. This is why 17,000 community bankers signed a petition calling for an exemption from Basel III for community banks.[6]

Short of an outright community bank exception from Basel III, community banking advocates support reform to several key provisions of Basel III, such as the risk weighting of highly volatile commercial real estate (HVCRE) loans, mortgage servicing asset deductions, and the costs of complex regulatory oversight and examination.[7] Community banks have also noted that Basel III's complex reporting requirements substantially increase the complexity of their quarterly call reports, which "had already become a nearly unmanageable burden," under pre-existing Dodd-Frank reporting requirements.[8] Separate from Basel III, community banks have also opposed the definition of a qualified mortgage under the Consumer Finance and Protection Bureau's (CFPB) Ability to Repay rule.[9]

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the community banking industry); Conference of State Bank Supervisors, Comment Letter on Proposed Simplifications to the Capital Rule Pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (Dec. 26, 2017), https://www.csbs.org/sites/default/files/2017-12/Capital%20 Simplification%20Comment%20Letter--Final--12262017.pdf [https://perma.cc/QK4X-GNS6] (recommending "simplifying the methodology for calculating risk-weighted assets").

[6] *Testimony*, *supra* note 5, at 2–3.

[7] *See, e.g.*, *id.* at 3–6 (outlining the "[a]spects of Basel III that are of particular concern for Centinel Bank and other community banks").

[8] *Id.* at 4 (explaining that call reports derived their name from the original practice of calling in by phone, but had become around 45 pages long in 2006, and are now twice as long under Basel III).

[9] INDEP. CMTY. BANKERS OF AM., COMMUNITY BANK REGULATORY RELIEF: A ROADMAP TO ECONOMIC GROWTH & PROSPERITY 8–9 (May 2017) http://www.icba.org/docs/default-source/icba/advocacy-documents/priorities/icba

In late 2017, "with the goal of reducing regulatory compliance burden, particularly on community banking organizations," the OCC, the Board, and the FDIC issued a notice of proposed rulemaking titled "Simplifications to the Capital Rule Pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996" (Proposed Rule).[10] The proposal addressed several of the concerns voiced by the community banking industry,[11] and the public comment period ended December 26, 2017.[12] Additionally, on December 18, 2017, the Senate Committee on Banking, Housing, and Urban Affairs advanced the "Economic Growth, Regulatory Relief, and Consumer Protection Act" (Act),[13] which was passed in the Senate on March 14, 2018.[14] The Act contains several provisions that could provide substantial relief to community banks, including an exemption from Basel III's risk-based capital requirements.[15] Although many community banking advocates

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whitepaperonregulatoryrelief.pdf [https://perma.cc/2KGC-ZDR4] [hereinafter ROADMAP] (arguing some "safe, legitimate loans" still do not meet the strict "qualified mortgage" definition, and community banks should be permitted to finance).

[10] Proposed Rule, *supra* note 3, at 49,984–85.

[11] *Compare Testimony*, *supra* note 5, at 3, 6 (expressing grave concern over Basel III's broad HCVRE definition and new mortgage servicing asset provisions), *with* BD. OF GOVERNORS OF THE FED. RESERVE SYS., FED. DEPOSIT INS. CORP., & OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMMUNITY BANK SUMMARY: PROPOSED SIMPLIFICATIONS TO THE CAPITAL RULE PURSUANT TO THE ECONOMIC GROWTH AND REGULATORY PAPERWORK REDUCTION ACT OF 1996 (Sep. 27, 2017) [hereinafter COMMUNITY BANK SUMMARY], https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/pub-community-bank-summary-proposed-rule-changes.pdf (proposing changes to HVCRE risk weighting and mortgage servicing asset deduction provisions).

[12] Proposed Rule, *supra* note 3, at 49,984.

[13] DAVID W. PERKINS ET AL., CONG. RESEARCH SERV., R45073, ECONOMIC GROWTH, REGULATORY RELIEF, AND CONSUMER PROTECTION ACT (S. 2155) AND SELECTED POLICY ISSUES 1 (2018), https://fas.org/sgp/crs/misc/R45073.pdf [https://perma.cc/X3M7-UHJT] [hereinafter POLICY ISSUES].

[14] Economic Growth, Regulatory Relief, and Consumer Protection Act, S. 2155, 115th Cong., Bill Tracking (2017), https://www.govtrack.us/congress/bills/115/s2155 [https://perma.cc/82C7-ALJ2] (reporting the "bill passed in the Senate on March 14, 2018").

[15] *See* Economic Growth, Regulatory Relief, and Consumer Protection Act, S. 2155, 115th Cong. § 201 (2017) (providing that any community bank meeting a certain leverage ratio will have satisfied any capital and leverage requirements to which the bank is subject).

have received the proposed reforms with cautious optimism, opponents argue the reforms dampen too many of the valuable protections provided by Dodd-Frank legislation.[16]

This article examines these proposals and the effects they will likely have on the community banking industry. Part B will provide a brief background on community banks, including some of the regulatory provisions that community banking advocates claim are unduly burdensome. Part C will discuss, in more depth, the recent proposals aimed at easing the regulatory requirements on certain institutions, including community banks. Section D will explore the opposing responses to the proposals from both community banking advocates and opponents to regulatory reforms.

B. Community Banking and Regulatory Burdens

A typical community bank may be defined as a "locally operated and often closely held [institution] with [a] simple, conservative balance [sheet] and strong capitalization."[17] According to the FDIC, as of 2016, the median asset size of community banks was $176 million and 20 percent of counties in the United States relied exclusively on

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[16] *Compare* Press Release, Indep. Cmty. Bankers of Am., ICBA Thanks Senate Committee for Passing Community Bank Regulatory Relief (Dec. 5, 2017), https://www.icba.org/news/press-releases/2017/12/05/icba-thanks-senate-committee-for-passing-community-bank-regulatory-relief [https://perma.cc/EKX4-FD42] [hereinafter ICBA Thanks] (thanking the Senate Banking Committee for advancing legislation providing "much-needed community bank regulatory relief"), *and* Press Release, Indep. Cmty. Bankers of Am., ICBA Applauds Agency Plans to Simplify Capital Standards for Community Banks (Aug. 23, 2017), http://www.icba.org/news/press-releases/2017/08/23/icba-applauds-agency-plans-to-simplify-capital-standards-for-community-banks [https://perma.cc/G6JG-NFZP] [hereinafter ICBA Applauds] (applauding plans to simplify Basel III requirements for community banks), *with* Press Release, S. Comm. on Banking, Hous., & Urban Affairs, Brown Opposes Legislation to Roll Back Dodd-Frank Protections (Nov. 13, 2017), https://www.banking.senate.gov/public/index.cfm/2017/11/brown-opposes-legislation-to-roll-back-dodd-frank-protections [https://perma.cc/D7NP-VEZ9] [hereinafter Brown Opposes] (quoting a U.S. Senator's disagreement on "rolling back so many of Dodd-Frank's protections with almost no gains for working families").

[17] ROADMAP, *supra* note 9, at 2.

community banks.[18] Community banks are crucial providers of small-business and agricultural loans and provide other essential services that non-community banks cannot.[19] Additionally, community banks provide substantial mortgage credit to local and national mortgage markets.[20] Unduly complex regulatory requirements impose substantial compliance costs on community banks.[21] Since community banks have fewer resources to devote to compliance than their larger counterparts, compliance costs can place community banks at a significant disadvantage to larger institutions.[22]

1. High Volatility Commercial Real Estate

Under Basel III, acquisition, development, and construction (AD&C) loans are classified as HVCRE loans.[23] Potential resulting "development projects would create jobs in construction and related services, which in turn boost consumer spending and create additional jobs. These projects include hotels, apartment buildings, shopping centers, hospitals, or other commercial projects . . . ."[24] If the borrower cannot commit 15 percent of the project value at origination, an HVCRE loan is subjected to 150 percent risk weighting for

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[18] FED. DEPOSIT INS. CORP., THE 2016 FDIC COMMUNITY BANKING CONFERENCE: STRATEGIES FOR LONG TERM SUCCESS 5, 10 (2016), https://www.fdic.gov/regulations/resources/cbi/conference/cbi-book12-19-16.pdf [https://perma.cc/U3HA-P6RC].

[19] *See id.* ("[T]hese institutions account for 13 percent of banking assets but hold 44 percent of the industry's small loans to farms and business, making them the credit lifeline for entrepreneurs and small businesses of all types.").

[20] *See id*. at 9 ("[C]ommunity banks have been outpacing the industry as a whole in terms of both earnings growth and loan growth across a range of asset categories, including residential mortgages . . . .").

[21] *See, e.g.*, *Testimony supra* note 5, at 4 ("Centinel Bank's last call report was 93 pages long and its preparation consumed 2-1/2 weeks of full time equivalent hours. That's over a month of FTE hours each year.").

[22] *See, e.g.*, POLICY ISSUES *supra* note 13, at 12 ("In particular, as regulatory complexity increases, compliance may become relatively more costly for small firms.").

[23] *See, e.g.*, Indep. Cmty. Bankers of Am., Comment Letter on Proposed Simplifications to the Capital Rule Pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (Dec. 18, 2017), https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/2017/cl_capital_17-12-18.pdf?sfvrsn=0 [https://perma.cc/56NA-BXR3] [hereinafter ICBA Comment].

[24] ROADMAP*, supra* note 9, at 16.

regulatory capital determinations.[25] Further, the borrower is required to commit the capital for the project's duration.[26] Put simply, from the perspective of a community bank, "[it] now [has] to allocate 50 percent more capital in order to finance a loan that [its] community desperately needs."[27] Therefore, this kind of "risk weighting deters many creditworthy projects that would promote local economic development and job creation."[28] According to community banking advocates, "[t]he HVCRE rule sweeps in too many credit worthy developers who . . . simply do not have the resources to tie up a 15 percent cash contribution for the life of a multi-year construction project."[29] Advocates further argue the HVCRE rule "will force [community banks] to make difficult trade-offs in lending," resulting in "reduced credit availability."[30] Small communities "relying almost exclusively on community bank credit" will suffer the most.[31]

2. Call Reports

Banking institutions are required to file quarterly call reports.[32] In recent years, call reports have become increasingly time intensive and complex.[33] "A typical $500 million asset community bank spends close to 300 hours a year of senior level, highly-compensated staff time on the quarterly call report."[34] In 2014, roughly 40 percent of community banks petitioned for less onerous report filings.[35]

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[25] *Id.*
[26] *Id.*
[27] *Testimony*, *supra* note 5, at 3.
[28] *Id.* at 3; *see, e.g.*, ROADMAP*, supra* note 9, at 16.
[29] *Testimony*, *supra* note 5, at 3.
[30] *Id.* at 3.
[31] *Id.*
[32] *See id.* at 4 (discussing the onerous burdens of increased call report requirements in Basel III on community banks).
[33] *See, e.g.*, *id.* at 4–5 ("Another troubling aspect of Basel III is its contribution to the volume and complexity of our quarterly call report—which had already become a nearly unmanageable burden.").
[34] *Id.* at 5.
[35] *Id.* at 4 ("In September 2014 . . . 40 percent of all community banks nationwide signed an ICBA petition to the regulatory agencies calling for more streamlined quarterly call report filings.").

3. Capital Treatment of Mortgage Servicing Assets

In an effort to retain their position as mortgage servicers, community banks oppose further consolidation of the mortgage-servicing industry.[36] Under Basel III, "the value of mortgage servicing assets (MSAs) that exceed 10 percent of a bank's common equity tier 1 capital must be deducted directly from its regulatory capital."[37] Any MSAs not deducted are risk weighted at 250 percent.[38] Finally,

> [w]hen MSAs combined with deferred tax assets and investments in the common stock of unconsolidated financial institutions exceed 15 percent of common equity tier 1 capital, the excess must also be directly deducted from regulatory capital. Many banks that do not exceed that 10 percent MSA threshold are caught by the 15 percent combined threshold."[39]

This has led some community banking advocates to conclude the MSA provision was designed to exclude community banks from mortgage servicing.[40]

4. The Volcker Rule

Currently, all banking institutions, including community banks, are subject to the Volcker Rule prohibiting proprietary trading.[41] Some have argued the Volcker Rule is ill-suited for community banks, since the risks addressed by the rule are more significant at larger institu-

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[36] *See id*. at 6 ("[I]t is critical to retain and promote the role of community banks in mortgage servicing and to adopt policies that will deter further consolidation of that industry."); ROADMAP*, supra* note 9, at 11.
[37] *Id.* at 6.
[38] *Id.* ("In addition, MSAs that are below the 10 percent threshold must be risk weighted at 250 percent once Basel III is fully phased in.").
[39] *Id.*
[40] *Id*. ("[T]he Basel III mortgage servicing asset (MSA) provisions seem to be designed to drive community banks from the mortgage servicing business.").
[41] *E.g.*, POLICY ISSUES, *supra* note 13, at 15–16 ("Currently all banks are subject to these prohibitions pursuant to Section 619 of the Dodd-Frank Act, often referred to as the 'Volcker Rule.'").

tions.[42] Further, compliance with the Volcker Rule is complex and time consuming.[43]

5. Definition of Qualified Mortgage

"Title XIV of the Dodd-Frank Act established the ability-to-repay (ATR) requirement to address problematic market practices and policy failures that some policymakers believe fueled the housing bubble that precipitated the financial crisis."[44] To satisfy the requirement, a lender must determine that, at mortgage origination, "the borrower has the ability to repay the loan."[45] Under regulations promulgated by the CFPB, a lender may also meet the ATR requirement by issuing a qualified mortgage (QM).[46] "[T]he QM regulations also establish several additional categories of QMs, one of which is the Small Creditor Portfolio QM, which carries the same presumption of lender compliance with the ATR requirement as the Standard QM."[47] The addition of this Small Creditor Portfolio QM (SCPQM) aims to lessen the compliance burden on small lenders.[48] Some argue that since not all of the lender and underwriting requirements included in the

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[42] *See* Daniel K. Tarullo, Governor, Fed. Reserve Sys., Address at the Community Bankers Symposium, Chicago, Illinois: A Tiered Approach to Regulation and Supervision of Community Banks 2 (Nov. 7, 2014) (text available at federalreserve.gov/newsevents/speech/tarullo20141107a.htm [https://perma.cc/6NWS-TQUQ]) ("[M]any rules and examinations that are important for institutions that are larger, more complex, or both, do not make sense in light of the nature of the risks to community banks."); INDEP. CMTY. BANKERS OF AM., PLAN FOR PROSPERITY 11 (2017), http://www.icba.org/docs/default-source/icba/advocacy-documents/priorities/icbaplanforprosperity [https://perma.cc/8QFY-EM3S] (stating that applying the Volcker Rule to non-SIFIs can have "unintended consequences that threaten to destabilize segments of the banking industry").

[43] *See, e.g.*, POLICY ISSUES, *supra* note 13, at 16–17 (characterizing compliance obligations under the Volcker Rule as an excessive burden, observing some "argue that the act of evaluating the Volcker Rule to ensure banks' compliance in burdensome in and of itself").

[44] *Id.* at 4.

[45] *Id.* ("Under the ATR requirement, a lender must determine based on documents and verified information that, at the time a mortgage is made, the borrower has the ability to repay the loan.").

[46] *See id.* at 5.

[47] *Id*.

[48] *Id*. ("It is intended to reduce the regulatory burden of the ATR requirement for small lenders.").

SCPQM are essential to ensuring that a lender will verify a borrower's ability to repay, the definition has been unduly burdensome for lenders.[49]

C. Proposed Relief for Community Banks

1. Simplifications to the Capital Rule Pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996

First, "the proposal would replace the HVCRE exposure definition with a . . . simpler definition, called HVADC, which would apply to credit facilities that *primarily* finance or refinance [AD&C] activities."[50] The new definition is intended "to apply to a broader range of exposures than the HVCRE definition."[51] Further, the Proposed Rule would:

> [R]aise the limit for MSAs and [deferred tax assets] individually, to 25 percent of common equity tier 1 capital and would not include a combined limit. Additionally, the proposal would remove the distinction between significant and non-significant investments in the capital of unconsolidated financial institutions and establish a combined limit on these investments of 25 percent of common equity tier 1 capital.[52]

MSAs and deferred tax assets (DTAs) not deducted would be subject to a 250 percent risk weight, and any investments in the capital of unconsolidated financial institutions not deducted would be risk weighted according to the relevant treatment of the exposure

[49] *See* Press Release, Office of Rep. Andy Barr, Barr Introduces Legislation to Help Homebuyers, Prevent Bailouts (Feb. 27, 2015), https://barr.house.gov/media-center/press-releases/barr-introduces-legislation-to-help-homebuyers-prevent-bailouts [https://perma.cc/59DN-K3TV] (explaining a proposed bill promotes responsible lending practices while relaxing overly burdensome regulations on community banks).
[50] COMMUNITY BANK SUMMARY, *supra* note 11, at 3.
[51] *Id*.
[52] *Id*. at 5.

category.[53] Finally, the Proposed Rule "would eliminate the existing complex calculation to determine the amount of minority interest . . . that could be included in the regulatory capital of a parent banking organization."[54] The Proposed Rule would allow parent banking organizations to include "common equity tier 1 minority interest, tier 1 minority interest, and total capital minority interest up to 10 percent of the [parent's] common equity tier 1, tier 1, and total capital elements (before the inclusion of any minority interest and after certain deductions and adjustments), respectively."[55]

2. Economic Growth, Regulatory Relief, and Consumer Protection Act

The Act contains several provisions with the potential to provide community banks with significant regulatory relief.[56] Most importantly, Section 201 of the Act seeks to establish a Community Bank Leverage Ratio (CBLR) between 8 percent and 10 percent capital to unweighted assets.[57] "If a bank with less than $10 billion in assets maintains a CBLR above that threshold, it will be considered to have met all other leverage and risk-based capital requirements" under Basel III.[58] This has led commentators to refer to the provision as a "regulatory off-ramp" from the risk-weighted capital requirements.[59] A bank that would otherwise qualify for the exemption may nevertheless be determined ineligible for the exemption due to regulators' assessment of the bank's risk profile.[60]

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[53] *See id.* at 5–6 (graphing the risk weight treatment for non-deducted MSAs, DTAs, and investments in the capital of unconsolidated financial institutions).
[54] *Id*. at 6.
[55] *Id*.
[56] POLICY ISSUES, *supra* note 13, at 13 (reviewing eight provisions "aimed at providing regulatory relief to institutions under certain asset thresholds").
[57] Economic Growth, Regulatory Relief, and Consumer Protection Act, S. 2155, 115th Cong. § 201 (2017); POLICY ISSUES, *supra* note 13, at 13.
[58] *See* S. 2155 § 201 (setting the asset threshold for a "qualifying community bank" at $10 billion); *see also* POLICY ISSUES, *supra* note 13, at 13.
[59] Norbert Michel, *Senate Inches Closer to Financial Reg Reform*, FORBES (Jan. 9, 2018, 07:29 AM), https://www.forbes.com/sites/norbertmichel/2018/01/09/senate-inches-closer-to-financial-reg-reform/ [https://perma.cc/ZD5N-YEQU] ("At first glance, then, it looks like virtually all U.S. banks qualify for capital regulatory relief under the S. 2155 off-ramp.").
[60] *See* S. 2155 § 201 ("[A]gencies may determine that a [bank] is not a qualifying community bank based on the [bank's] risk profile . . . ."); POLICY

Further, the Act provides an exemption from the existing bans on proprietary trading and sponsorship of hedge funds and private equity funds.[61] The exemption would be available to banks with under $10 billion in assets and trading assets and trading liabilities under 5 percent of total assets.[62] The Act would also allow banks with assets under $5 billion to "face reduced reporting requirements for the first and third quarterly call reports of the year."[63] Additionally, section 211 of the Act would raise the asset threshold for eligibility for an eighteen-month examination cycle from $1 billion to $3 billion, allowing significantly more banks to qualify.[64] The eighteen-month cycle would replace the standard twelve month examination cycle.[65]

Finally,

> Section 101 would create a new [QM] compliance option for mortgages that depositories with less than $10 billion in assets originate and hold in portfolio. To be eligible, the lender would have to consider and document a borrower's debts, incomes, and other financial resources, and the loan would have to satisfy certain product-feature requirements.[66]

ISSUES, *supra* note 13, at 13 ("Banking regulators may determine that a bank with under $10 billion in assets is not eligible to be exempt from existing capital requirements based on its risk profile.").

[61] *See* S. 2155 § 203 (creating an exemption to the Bank Holding Company Act); POLICY ISSUES, *supra* note 13, at 15 ("Section 203 would create an exemption from prohibitions on proprietary trading . . . and relationships with certain investment funds . . . .").

[62] S. 2155 § 203.

[63] POLICY ISSUES, *supra* note 13, at 17 ("Section 205 would direct the federal banking agencies to issue regulations allowing banks with assets under $5 billion to face reduced reporting requirements for the first and third quarterly reports of the year."); *see also* Economic Growth, Regulatory Relief, and Consumer Protection Act, § 205.

[64] S. 2155 § 211 (amending Section 10(d)(4)(A) of the Federal Deposit Insurance Act by replacing "$3,000,000,000" with "$1,000,000,000"); *see also* POLICY ISSUES, *supra* note 13, at 18.

[65] Economic Growth, Regulatory Relief, and Consumer Protection Act, § 211(amending the threshold to qualify for the 18 month examination cycle); POLICY ISSUES, *supra* note 13, at 18 (describing the proposed change in frequency of examination for small banks from a 12-month cycle to an 18-month cycle).

[66] POLICY ISSUES, *supra* note 13, at 4.

D. Response to Proposals

The community banking industry has reacted to both proposals with cautious optimism.[67] In a comment to the Proposed Rule, the Independent Community Bankers of America (ICBA) recommended that, for banks "with total assets of $50 billion or less, all prudently underwritten AD&C loans should carry the 100% risk weight" without limitations on the borrower's investment or the debt service coverage ratio associated with the borrowing arrangement.[68] They urged regulators to "revisit the 130% risk weight for all AD&C loans and propose a common-sense alternative to the punitive capital treatment that more fairly acknowledges the value that these loans provide to community bank borrowers and their communities."[69] With respect to the MSA deductions, ICBA recommended:

> In order to better reflect the earning potential for these assets . . . the individual cap should be raised not to 25% but to 50% of common equity tier 1 capital for banking organizations with total consolidated assets of $50 billion or less. In addition, the risk weight assigned to these assets when they are not deducted be lowered to a 100% risk weight.[70]

Some opponents of the Act reject the contention that Dodd-Frank is the cause of community banks' suffering, while others simply express concerns over rolling back key protections of Dodd-Frank so soon after the financial crisis.[71] Critics contend that the Act's mortgage and housing provisions are potentially harmful to consumers, and that

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[67] *See* ICBA Thanks, *supra* note 16 (expressing satisfaction with the regulatory relief plan and reiterating the importance of the legislation to community banks); ICBA Applauds, *supra* note 16 (applauding proposed plans to simplify Basel III requirements for community banks).
[68] ICBA Comment, *supra* note 23, at 2.
[69] *Id*. at 5.
[70] *Id*.
[71] *E.g.*, Letter from U.S. PIRG to U.S. Senate Banking Comm. 1 (Dec. 4, 2017) (on file with author), https://uspirg.org/sites/pirg/files/resources/USPIRG opposes2155SenateDec4.pdf [https://perma.cc/MD43-9HDJ] [hereinafter U.S. PIRG] (positing the consolidation of community banking was not caused by Dodd-Frank but has been mounting since 1984); Brown Opposes, *supra* note 16 ("[T]oo many Americans are still feeling the impact of the 2008 financial crisis.").

the Act interferes with regulators' capacity to effectively provide prudential oversight.[72] Many critics have focused on other provisions of the Act targeted at larger financial institutions.[73]

The Act passed in the Senate with a firm majority of 67 to 31 on March 15, 2018.[74] In its release announcing the Act's passing, the Senate Committee on Banking, Housing, and Urban Affairs (Committee) called the proposal "the most significant piece of regulatory reform legislation for community financial institutions in nearly a decade."[75] The Committee referenced support of "over 10,000 community bankers, more than 100 million credit union consumer members, and thousands of small business owners . . . ."[76]The Committee also highlighted the bipartisan efforts which contributed to the Act's passing, claiming that, "[a]t a time of intense political polarization, we have proven that we can work together to get things done."[77] Finally, the Committee opined that "[the Act] right-sizes the regulatory system for smaller financial institutions, allowing community banks and credit unions to flourish."[78]

E. Conclusion

As regulatory requirements for banks become more complex, the burden on small banks becomes disproportionately larger.[79] After the implementation the Basel III capital requirements, community

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[72] *See* U.S. PIRG, *supra* note 71, at 1–2 (expressing disappointment the bill "claims to be a consumer protection bill" but it "reduce[s] the ability of regulators to conduct their prudential oversight mission").

[73] *See, e.g.*, Talmon Joseph Smith, *How Democrats Are Helping Trump Dismantle Dodd-Frank*, NEW REPUBLIC (Mar. 1, 2018), https://newrepublic.com/article/147247/democrats-helping-trump-dismantle-dodd-frank [https://perma.cc/7EWB-NF82] (highlighting Elizabeth Warren's point that Countrywide, a notorious sub-prime lender in the early 2000s, was "smaller than some of the banks that will be deregulated by this bill").

[74] Press Release, S. Comm. on Banking, Hous., & Urban Affairs, Senate Passes Crapo's Economic Growth, Regulatory Relief and Consumer Protection Act (Mar. 15, 2018), https://www.banking.senate.gov/newsroom/majority/senate-passes-crapos-economic-growth-regulatory-relief-and-consumer-protection-act [https://perma.cc/HV56-RFWE].

[75] *Id*.

[76] *Id*.

[77] *Id*.

[78] *Id*.

[79] *See, e.g.,* POLICY ISSUES *supra* note 13, at 12.

banks demanded regulatory relief.[80] As a result, the federal banking agencies issued the Proposed Rule to provide some relief to community banks.[81] Although community banks recognized the efforts of the banking regulators in crafting the Proposed Rule, the industry made it clear there is still room for improvement.[82]

Additionally, the Act proposes comprehensive relief from many of the regulatory burdens facing community banks.[83] As the Act progresses to the House of Representatives, it bodes well that the Act has received bipartisan support.[84] Accordingly, as the proposal progresses, the community bank interests will have to be balanced against the value of certain protections provided by Dodd-Frank.

Connor Flaherty[85]

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[80] *See* ROADMAP, *supra* note 9; *Testimony, supra* note 5.
[81] *See also* Proposed Rule, *supra* note 3.
[82] *See also* ICBA Thanks, supra note 16; ICBA Applauds, supra note 16 (applauding the Proposed Rule); ICBA Comment *supra* note 23 (proposing further improvements to the Proposed Rule).
[83] *See also* Proposed Rule, *supra* note 3 (addressing nearly all of community bankers' concerns under Basel III).
[84] *See, e.g.*, Press Release, *supra* note 74 (calling the bill a "rare, bipartisan moment that had been years in the making . . ." and asserting "[f]or years, senators on both sides of the aisle have been working to reach consensus on how to provide relief for smaller financial institutions").
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