TOO SMALL TO SUCCEED?: AN ANALYSIS OF THE MINIMAL UNDUE REGULATORY BURDENS FACING COMMUNITY BANKS IN THE POST DODD-FRANK REGULATORY ENVIRONMENT, AND HOW TO FURTHER MINIMIZE THEIR BURDEN

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Abstract

Dodd-Frank hurts community banks." This has been both a rallying cry and a refrain heard from community bankers, legislators, and scholars throughout the country, and has increasingly served as a justification for the repeal of Dodd-Frank. But is it true? This note analyzes the undue relative regulatory burden of Dodd-Frank on community banks; that is, whether Dodd-Frank creates a greater regulatory burden on community banks relative to larger banks. While there has been very little data collected on the quantifiable costs of Dodd-Frank, the evidence indicates that community banks have been struggling since the 1980s and that many Dodd-Frank regulations apply effective exemptions and tailoring to limit the burden on community banks. Contrary to the claims of many, Dodd-Frank has not created any significant undue relative regulatory burden for community banks.

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I. Introduction

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) is by far the most comprehensive and

significant set of financial reforms of the 21st century.[1] The "product of desperation in the face of a deeply painful financial crisis," Dodd-Frank turned the financial industry on its head.[2] While Dodd-Frank was designed to address actions taken by large, complex financial institutions that caused the financial crisis of 2007 and 2008, the effects of the law were felt throughout the banking sector.[3] With almost 1,000 pages of legislative text[4] and 10,000 new regulatory restrictions,[5] Dodd-Frank charged financial regulators with writing and enforcing 398 rules, resulting so far in upwards of 13,644 pages of proposed and final regulations.[6] It took regulators a full six years, from Dodd-Frank's enactment in July 2010 to June 2016, to complete half of Dodd-Frank's required rulemakings.[7] Some experts believe once all of the rulemaking required under Dodd-Frank is completed, total United States financial regulatory restrictions will increase 32 percent relative to their 2010 levels.[8]

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[1] WHITE HOUSE COUNCIL OF ECON. ADVISORS, THE PERFORMANCE OF COMMUNITY BANKS OVER TIME 3 (2016) ("The Dodd-Frank Wall Street Reform and Consumer Protection Act . . . is the most comprehensive financial regulatory reform of the twenty-first century.").

[2] *See Regulatory Burdens: The Impact of Dodd-Frank on Community Banking: Hearing Before the Subcomm. on Econ. Growth, Job Creation and Regulatory Affairs of the H. Comm. Oversight and Gov't Reform*, 113th Cong. 21 (2013) [hereinafter *Regulatory Burdens*] (statement of Hester Pierce, Senior Research Fellow, Mercatus Center at George Mason University).

[3] *See* TANYA D. MARSH & JOSEPH W. NORMAN, THE IMPACT OF DODD-FRANK ON COMMUNITY BANKS 4 (2013) (stating community banks "are subject to the same rules and procedures" as large financial institutions because of "our one size-fits-all regulatory framework").

[4] *Regulatory Burdens, supra* note 2, at 19.

[5] BRADLEY BREWER & LEVI RUSSELL, IMPACT OF DODD-FRANK ON SMALL COMMUNITY LENDERS 2 (2016) ("Since . . . Dodd-Frank . . . , 10,000 new regulatory restrictions under Title 12 have been imposed on banks.").

[6] *Bearing the Burden: Over-Regulation's Impact on Small Banks and Rural Communities: Hearing before the Subcomm. on Econ. Growth, Tax, and Capital Access of the H. Comm. on Small Bus.*, 114th Cong. 23 (2016) [hereinafter *Bearing the Burden*] (statement of Roger Beverage, President and Chief Executive Officer, Oklahoma Bankers Association).

[7] *Id.*

[8] Marshall Lux & Robert Greene, *The State and Fate of Community Banking* 27 (Mossavar-Rahmani Ctr. Bus. & Gov't Ass. Working Paper Series, No. 37, 2015).

While the term "bank" may conjure up images of gigantic financial institutions for many individuals, the vast majority of American banks are relatively small.[9] As of the second quarter of 2017, 87 percent of banks had assets of $1 billion or less, 98 percent of banks had assets of $10 billion or less, and only nine financial institutions (0.15 percent) had assets of more than $250 billion.[10] In 2013, members of the Independent Community Bankers Association collectively held approximately $1.2 trillion in total assets.[11] At that time, JP Morgan Chase *alone* had approximately $2.1 trillion in assets.[12]

While all financial institutions have felt the impact of Dodd-Frank, many feel community banks have been hit particularly hard.[13] Although less than half of Dodd-Frank's regulations are expected to affect community banks directly,[14] community banks have leveraged their political influence and pressed for regulatory relief since Dodd-Frank's passage.[15] Community bankers claim they are suffocating under "the avalanche of new rules, guidances and seemingly ever-changing expectations," and the related compliance costs.[16] Their

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[9] *See* MARSH & NORMAN, *supra* note 3, at 4 ("[T]he vast majority of the roughly 7,000 American banks are relatively small.").

[10] FED. DEPOSIT INS. CORP, QUARTERLY BANKING PROFILE SECOND QUARTER 2017 7 tbl.III-A (2017) [hereinafter, FDIC QUARTERLY BANKING PROFILE] (showcasing statistics concerning all FDIC Insured Institutions in the Second Quarter of 2017).

[11] MARSH & NORMAN, *supra* note 3, at 4.

[12] *Id.*

[13] *See* Letter from Stephen Wilson, Chairman, Am. Bankers Ass'n to Sheila Bair, Chairman, Fed. Deposit Ins. Corp. (Mar. 21, 2010), http://www.aba.com/archive/Letters_Congress_Archive/Letters%20to%20Congress%20Archive/ChairmanBairMar212011.pdf ("[F]or many of us the very existence of our institutions—and the services we provide to our communities—have been at stake.").

[14] MARSH & NORMAN, *supra* note 3, at 27; *Regulatory Burdens*, *supra* note 2, at 33.

[15] *See, e.g.*, Mike Konczal, *The Power of Community Banks*, POLITICO (Aug. 25, 2016), https://www.politico.com/agenda/story/2016/08/political-power-community-banks-hillary-clinton-000192 [https://perma.cc/Y6ET-2K9W] (describing examples of regulatory relief lobbied for by community banks).

[16] Jeff Baker, *Community Bankers Blame Too Many Rules for Mergers in Sector,* BLOOMBERG BNA (June 9, 2016), https://www.bna.com/community-bankers-blame-n57982073920 [https://perma.cc/3JH6-99CB]; *see* Preston Ash et al., *Too Small to Succeed?—Community Banks in a New Regulatory Environment,* 4 FIN. INSIGHTS 1 (2015).

complaints have not fallen on deaf ears. In March 2016, 329 members of the House of Representatives signed a letter sent to the then director of the Consumer Financial Protection Bureau (CFPB), Richard Cordray, imploring the CFPB to account for the compliance burden facing community banks.[17] In July 2016, a similar letter was sent to Director Cordray signed by 70 members of the Senate.[18]

This note will examine the regulatory burdens facing community banks today in the wake of Dodd-Frank, and argue that, contrary to the claims of many community banks, a large majority of Dodd-Frank's regulations create no undue relative regulatory burden. Community banks are at no competitive disadvantage; rather, the plight facing community banks today, while perhaps exacerbated by Dodd-Frank, is not primarily caused by Dodd-Frank. Part II of this note considers a simple question with a complex answer: what is a community bank. Noting the contradictory standards applied by financial regulatory agencies, there is no clear definition. This section also discusses common community bank features, and community banks' role in the financial crisis in an effort to justify their continued importance. Part III examines regulatory burden in the absolute, seeking to quantify whether regulatory burden has increased for community banks since 2010, and if so, by how much. This section highlights the lack of data collected on this important question and considers alternative data points to argue that the struggles facing community banks were not started by Dodd-Frank. Instead, Dodd-Frank represents one part of a larger struggle community banks face. Finally, Part IV considers relative regulatory burden: whether community banks are relatively worse off than their larger counterparts as a result of Dodd-Frank. This section argues that because all regulations come with a cost, the presence of relative regulatory burden is the only true indicator of whether community banks are unduly suffering under Dodd-Frank. This section advances three types of relative regulatory burdens and using a number of case studies, demonstrates that most regulations are tailored so as to limit, if not

[17] Letter from Adam B. Schiff, et al. to Richard Cordray, Dir., Consumer Fin. Prot. Bureau (Mar. 14, 2016), http://www.aba.com/Advocacy/LetterstoCongress/Documents/March2016lettertoCFPB.pdf#_ga=1.42423653.1154733620.1465870612 [https://perma.cc/4LSM-QASB].

[18] Letter from Joe Donnelly, et al. to Richard Cordray, Dir., Consumer Fin. Prot. Bureau (July 18, 2016), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2016/08/160718-Letter-to-CFPB-on-Tailoring-Regulations.pdf [https://perma.cc/83LZ-RWT9].

completely eliminate, any presence of undue relative regulatory burden. This note proposes solutions that would help continue to eliminate or minimize undue relative regulatory burden.

II. What Is a Community Bank?

While the American banking landscape contains both large and small banks, community banks "play a unique and important role in our economy."[19] Community banks differ from large banks in many ways.[20] On average, community banks devote more focus to the traditional business model of deposits and loans.[21] Additionally, community banks typically hold their loans in their portfolios, where the loans remain until maturity.[22] On the other hand, larger banks often operate using an "originate to distribute" strategy, where the bank originates loans, securitizes them, and then sells them on secondary markets.[23] Finally, community banks often tailor loans to meet the unique circumstances of their customers.[24] Larger banks, meanwhile, "must treat the average American as a commodity in order to maintain a profitable relationship."[25] While community banks and large banks

[19] *See* FED. DEPOSIT INS. CORP., FDIC COMMUNITY BANKING STUDY I (2012) [hereinafter FDIC COMMUNITY BANKING STUDY].
[20] MARSH & NORMAN, *supra* note 3, at 4.
[21] MARTIN BAILY & NICHOLAS MONTALBANO, THE BROOKINGS INST., THE COMMUNITY BANKS: THE EVOLUTION OF THE FINANCIAL SECTOR, PART III 8 (2015) (observing over 90 percent of community bank income comes from traditional sources, compared to large regional banks that derive 80 percent, and the largest banks that derive 60 to 70 percent, of their income from traditional sources); SEAN M. HOSKINS & MARK LABONTE, CONG. RESEARCH SERV., R43999, AN ANALYSIS OF THE REGULATORY BURDEN ON SMALL BANKS 11 (2015), https://fas.org/sgp/crs/misc/R43999.pdf [https://perma.cc/2EE5-5FG2].
[22] CONFERENCE OF STATE BANK SUPERVISORS, AN INCREMENTAL APPROACH TO FINANCIAL REGULATION RIGHT-SIZED REGULATIONS FOR COMMUNITY BANKS 14 (2013) [hereinafter AN INCREMENTAL APPROACH TO FINANCIAL REGULATION] (describing how community banks engage in portfolio lending rather than the originate to distribute model).
[23] *Id.*
[24] *Id.* at 10.
[25] *Regulatory Burdens*, *supra* note 2, at 37 (statement of Tanya D. Marsh, Associate Professor of Law, Wake Forest University School of Law).

have key differences, community bankers "see themselves as complementing large banks" rather than direct competitors.[26]

A. Inconsistent Regulatory Definitions

The phrase "community bank" is colloquially used to describe both small and medium sized banking organizations that are located in, and focused on, limited geographic areas; engage in traditional banking activities; and obtain most of their funds from local depositors.[27] However, from a regulatory perspective, no standard definition exists for a community bank; rather, each regulator applies their own definition.[28] Broadly speaking, there are two types of community bank definitions: asset-based and activities-based.[29] An asset-based definition focuses solely on the amount of total assets the bank has, and by extension, the size of the bank. Measuring a bank's size by the amount of assets it holds is a fairly standard method, which has been used by both banks and regulators.[30] Two federal regulators apply asset-based definitions: The Federal Reserve System (Federal Reserve) and the Office of the Comptroller of the Currency (OCC).[31] The Federal Reserve defines a community bank as any bank that has $10 billion or less in total assets.[32] The OCC defines a community bank as any bank having less than $1 billion in total assets.[33]

While an asset-based definition is undoubtedly simple to understand, what it makes up for in simplicity, it loses in flexibility.[34]

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[26] FEDERAL RESERVE & CONFERENCE OF STATE BANK SUPERVISORS, COMMUNITY BANKING IN THE 21ST CENTURY 11 (2015) [hereinafter COMMUNITY BANKING IN THE 21ST CENTURY—2015].
[27] *Id.*
[28] *See id.* at 7 ("[P]olicymakers have been unable to agree on what type of institution constitutes a community bank.").
[29] *See* HOSKINS & LABONTE, *supra* note 21, at 3.
[30] FDIC COMMUNITY BANKING STUDY, *supra* note 19, at 1-1 ("The standard method used by most bank analysts has been to define community banks according to their size, as measured by their assets.").
[31] MARSH & NORMAN, *supra* note 3, at 8.
[32] *Id.*
[33] *Id.*
[34] *See* COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 7 ("[U]sing only asset thresholds to define institutions, while useful in certain contexts, has not been productive when it comes to determining whether an institution is a community bank for purposes of developing regulatory relief proposals.").

In part, this is because relying solely on an asset threshold to define a community bank fails to account for industry growth.[35] As The Federal Deposit Insurance Corporation (FDIC) acknowledged in its 2012 Community Banking Study, "$1 billion is not what it used to be."[36] In order to be truly effective, "any dollar-based yardstick must be adjusted over time" to account for growth in the industry and the broader economy.[37] Nevertheless, there is no indication that the OCC plans to increase its $1 billion threshold.[38]

The alternative to an asset-based approach, an activities-based approach, takes a different stance: the defining feature of a community bank is more than just its size, it is how the bank operates, what it does and does not do.[39] This approach seems to better align with how community banks view themselves.[40] While an activities-based approach is more flexible, allowing banks that act like community banks but are too large to meet an asset-based threshold to qualify, is not without its subjectivity.[41] The FDIC adopted an activities-based definition in 2012, which they refer to as the "research definition."[42]

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[35] FDIC COMMUNITY BANKING STUDY, *supra* note 19, at I.

[36] *Id.* at 1-1 (discussing how between 1984 and 2011, the total assets of federally insured banks and savings institutions grew 3.8 times larger, the consumer price index rose 2.1 times, and the size of the U.S. economy in terms of nominal GDP rose 3.8 times); *see* FED. FIN. INST. EXAMINATION COUNCIL, EXPLANATION OF THE COMMUNITY REINVESTMENT ACT ASSET-SIZE THRESHOLD CHANGE (Dec. 29, 2016) (indicating the "Small Institution Threshold" for purposes of the Community Reinvestment Act, which is adjusted annually, was $1 billion in 2005 and is $1.226 billion in 2017).

[37] FDIC COMMUNITY BANKING STUDY, *supra* note 19, at 1-1.

[38] *See generally* OFFICE OF THE COMPTROLLER OF THE CURRENCY, 2016 ANN. REP. (2016) (making no mention of increasing the threshold for community banks).

[39] HOSKINS & LABONTE, *supra* note 21, at 3 ("Others define community bank by combining size with a focus on relationship-based services, such as lending, with the local community.").

[40] COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 11 ("We note that community bankers often define their role in terms of 'customer service' rather than size.").

[41] *See* Lux & Greene, *supra* note 8, at 4 (observing that determining which activities constitute basic banking, or what constitutes a local community, is difficult to define and still requires some amount of line drawing).

[42] HOSKINS & LABONTE, *supra* note 21, at 3; *see* MARSH & NORMAN, *supra* note 3, at 8; Lux & Greene, *supra* note 8, at 4 (recounting how the FDIC had formerly defined community banks based on an asset-sized approach, adopting a $1 billion asset size cutoff, but the FDIC revised their definition in

The FDIC research definition considers both asset size and indicators of the bank's activities such as geographic scope, the type of assets held, and certain financial ratios such as loans-to-assets.[43]

While the differences between the three definitions are stark, the number of banks each definition encompasses further demonstrates the disconnect among the regulators. At the end of the second quarter of 2017, there were 5,787 FDIC-insured institutions.[44] 5,035 or 87 percent of those institutions had less than $1 billion in assets and thus would be defined as community banks by the OCC.[45] 5,666 or 98 percent, had less than $10 billion in assets, the threshold for community banks according to the Federal Reserve.[46] 5,338 or 92.2 percent met the FDIC definition for community banks.[47]

B. Common Features of Community Banks

While it may be exceptionally difficult to reconcile the various the various regulatory definitions of community banks, it is clear what clear what types of industries and populations community banks banks frequently serve. One phrase that community bankers often use often use to describe their services is "relationship banking."[48] Relationship banking is a model where bankers apply specialized specialized knowledge of, and relationships with, their bank's local local community to generate loans, and therefore revenue.[49] The The relationship banking model can be contrasted with "transactional "transactional banking," the model applied by larger banks.[50]

2012 in their Community Banking Study, adopting what they refer to as the "research definition").

[43] *See* FDIC COMMUNITY BANKING STUDY, *supra* note 19, at 1-2–1-4.

[44] FDIC QUARTERLY BANKING PROFILE, *supra* note 10, at 7 tbl.III-A.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 15.

[48] FDIC COMMUNITY BANKING STUDY, *supra* note 19, at I ("Community banks tend to be relationship lenders, characterized by local ownership, local control, and local decisionmaking.").

[49] Ash, et al., *supra* note 16, at 1 ("Community banks have long prided themselves on a unique model of banking that uses knowledge of, and relationships with, local communities' individuals and businesses.").

[50] FDIC COMMUNITY BANKING STUDY, *supra* note 19, at 1-1.

Relationship banking not only benefits the bank, but the community as well.[51] Because relationship bankers rely on repeat business, often within a limited population, there is a "strong economic disincentive to engage in predatory lending and other practices that exploit consumers."[52] One community banker comments:

> As a community bank, we do business based on strong relationships and trust. We do not deceive our customers or ever attempt to take advantage of them. We can't because we live and work with them every day. We see them in local restaurants, we sit beside them in church, we coach their children, and we belong to the same civic organizations. If we don't treat our customers fairly and honestly, we have to look them in the eye and tell them why we did not.[53]

In addition to aligning the interests of the community and the bank, relationship banking allows community banks to better serve their communities by tailoring the services they offer.[54] Tailoring community bank customers' loans to meet their individual credit profiles allows community banks to meet the credit needs of "informationally opaque" customers.[55] Community banks benefit from

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[51] *See* Esther L. George, President and Chief Exec. Officer, Fed. Reserve Bank of Kan. City, Address at a Conference on Community Banking in the 21st Century, Community Bank Regulation: Intent vs. Reality 5 (Sept. 23, 2014) (draft available at www.kansascityfed.org/publicat/speeches/2014-George-StLouis-CSBS-09-23.pdf [https://perma.cc/8JFY-7WBE]) (commenting that the relationship banking model aligns the incentives of the bank and the community).

[52] MARSH & NORMAN, *supra* note 3, at 9 (quoting George Hansard, president and CEO of the Pecos County State Bank saying "[c]ommunity banks have no desire to make bad loans. Bad loans not only impact the bank's bottom line, but they also negatively impact the banker's job, the community and are also negative to a borrower").

[53] *Regulatory Burdens*, *supra* note 2, at 17 (statement of Eddie Creamer, President and Chief Executive Officer, Prosperity Bank, St. Augustine Fl.).

[54] *See* George, *supra* note 51, at 4.

[55] PETER J. WALLISON, AM. ENTER. INST., IS THE DODD-FRANK ACT RESPONSIBLE FOR THE ECONOMY'S SLOW RECOVERY FROM THE FINANCIAL CRISIS AND THE ENSUING RECESSION? 8 (2015) (defining informationally opaque borrowers as those who do not have sufficiently detailed credit histories from which larger banks can derive credit scores or apply other

their ability to leverage non-quantitative "soft information," such as knowledge about seasonal cash flows, allowing them to better serve these types of customers.[56] Larger banks, on the other hand, simply do not have a comparable knowledge base.[57] Tailoring services to customers also benefits the community bank.[58]

Because of their ability to cater to informationally opaque consumers, community banks play a unique role in the economy: serving rural areas, small businesses, and the agriculture industry. For many consumers in rural areas, access to lending is severely limited, often such that their only option is a local community bank.[59] This is in part because community banks are far more likely to locate both their headquarters and their offices in nonmetropolitan areas.[60] In 2016,

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models to make lending decisions); AN INCREMENTAL APPROACH TO FINANCIAL REGULATION, *supra* note 22, at 9, 14 (observing that these customers might not qualify for loans at larger banks).

[56] AN INCREMENTAL APPROACH TO FINANCIAL REGULATION, *supra* note 22, at 14 (claiming community banks are much more effective at both underwriting and monitoring loans to informationally opaque consumers); MARSH & NORMAN, *supra* note 3, at 11 (describing how community banks can base their decisions off of personal knowledge, such as the customer's character, the local market, and the customer's ability to succeed in the local economy); WALLISON, *supra* note 55, at 8; *See* Lux & Greene, *supra* note 8, at 5.

[57] *See Regulatory Burdens*, *supra* note 2, at 22 (statement of Hester Pierce, Senior Research Fellow, Mercatus Center at George Mason University) ("Community banks are known for offering personalized service and meeting the needs of the local residents and businesses in ways that a larger, nonlocal bank, which does not know the unique characteristics of the community, cannot.").

[58] George, *supra* note 51, at 4 (opining that the long term, direct relationships that community bankers maintain with their customers provides them with detailed knowledge which allows community bankers to make informed assessments about credit quality that extend beyond traditional credit scoring methods); FDIC COMMUNITY BANKING STUDY, *supra* note 19, at III. (suggesting community banks incur comparatively low credit losses, in part because of the relationship lending model and the ability to tailor loans).

[59] *See, e.g.*, *The State of Rural Banking: Challenges and Consequences: Hearing before the Subcomm. on Fin. Instits. and Consumer Protection of the S. Comm. on Banking, Hous., & Urban Affairs,* 114th Cong. 34 (2015) [hereinafter *The State of Rural Banking*] (statement of Sarah Edelman, Director, Housing Policy, Center for American Progress).

[60] *See* FDIC COMMUNITY BANKING STUDY, *supra* note 19, at 3–4 (reporting 47 percent of community banks are headquartered outside a metropolitan area

approximately half of all rural counties, and 25 percent of all counties in total, relied exclusively on community banks.[61] Approximately 5 percent of rural counties in the United States relied on a single community bank.[62] Community banks also sustain small businesses.[63] In 2010, community banks were directly funding the production of at least a quarter of United States private nonfarm GDP, solely from small business lending.[64] Small business lending has remained a core part of the community bank business model after the crisis, even as larger banks have shifted away from this type of lending.[65] Seventeen percent of all loans made in 2015 were made to small businesses.[66] At that time, community banks held 55 percent of small business loans.[67] In part, this is likely because community banks can provide a more personal touch to small businesses.[68] Finally, community banks are a significant source of banking services for the agriculture industry.[69]

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opposed to 17 percent of noncommunity banks, and 38 percent of community bank offices are located outside a metropolitan area whereas 13 percent of noncommunity bank offices are located outside a metropolitan area).

[61] WHITE HOUSE COUNCIL OF ECON. ADVISORS, *supra* note 1, at 8.

[62] *Id.*

[63] *Regulatory Burdens, supra* note 2, at 1 ("If small businesses are the engine of job creation then community banks are the engine of small business."); MARSH & NORMAN, *supra* note 3, at 12 ("$1 out of every $2 lent to small businesses comes from community banks.").

[64] MARSH & NORMAN, *supra* note 3, at 12 (highlighting that in 2010, small business lending accounted for 46 percent of private, nonfarm GDP, and community banks held 48.1 percent of all small business loans).

[65] *The State of Rural Banking*, *supra* note 59, at 35; BAILY & MONTALBANO, *supra* note 21, at 1 (observing that compared to noncommunity banks, community banks devote a greater share of their assets to small business loans)*; see* COMM. ON CAPITAL MKTS. REGULATION, NOTHING BUT THE FACTS: COMMUNITY BANKING IN THE UNITED STATES 2 (2016) ("Credit extension to smaller firms is an area in which the relationship-lending model retains a comparative advantage.").

[66] FED. RESERVE & CONFERENCE OF STATE BANK SUPERVISORS, COMMUNITY BANKING IN THE 21ST CENTURY 13 (2016) [hereinafter COMMUNITY BANKING IN THE 21ST CENTURY—2016].

[67] Ash, et al., *supra* note 16, at 1.

[68] COMMUNITY BANKING IN THE 21ST CENTURY—2016, *supra* note 66, at 12 (describing a 2016 survey of community banks showing community bankers "met at least quarterly with nearly half of their small business borrowers and on a weekly basis with nearly 3 percent of them").

[69] *Bearing the Burden, supra* note 6, at 32 (statement of Shan Hanes, President and Chief Executive Officer, First National Bank, Elkhart, Kansas)

While agriculture lending accounts for a small percentage of the lending market, it produces a massive amount of economic value.[70] Much like they do with small businesses and in rural areas, community banks provide a disproportionate share of agriculture loans, with some of the smallest community banks holding the majority of U.S. agriculture loans.[71] Some experts believe that this is because "small community banks . . . are particularly adept at serving the needs of farming families and are likely the only banking services available to farm families."[72]

"According to the FDIC, one in four American households is either unbanked or underbanked."[73] Both the unbanked and the underbanked "typically bear far higher costs than those fully served by banks and may find it much more challenging to fully participate in the economy."[74] It is clear that without community banks serving rural communities, small businesses, the agriculture industry, and other

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(discussing how the agriculture industry is much broader than just farmers and ranchers, and also includes thousands of farm-dependent businesses, including "food processors, retailers, transportation companies, storage facilities, manufacturers" and observing over 5,000 banks reported agriculture loans on their books as of the end of 2015).

[70] Lux & Greene, *supra* note 8, at 9 (observing that there were $150.3 billion in agriculture loans outstanding in mid-2014, or approximately for 2 percent of the total bank lending market.); MARSH & NORMAN, *supra* note 3, at 14–15 (reporting farms produced $132.6 billion of economic value in 2010, the same as the oil and gas industry, and twice the automobile industry, and because "farmers only receive 14 cents of each dollar spent on domestically produced food," the broader agriculture industry as a whole was responsible for generating over $1 trillion of economic value in 2010).

[71] Ash, et al., *supra* note 16, at 1 (claiming that community banks held 75 percent of agriculture loans at the end of 2015); *Bearing the Burden, supra* note 6, at 31 (statement of Shan Hanes, President and Chief Executive Officer, First National Bank, Elkhart Kan.) (reporting that in 2015, agriculture loans across all banks totaled $171 billion); Lux & Greene, *supra* note 8, at 9 (calculating that as of mid-2014, banks with less than $1 billion in assets provided 55 percent of the total agriculture loans).

[72] MARSH & NORMAN, *supra* note 3, at 16.

[73] *Id.* at 9 (defining an unbanked individual as one who lacks a checking or savings account, and defining underbanked individuals as one who relies on alternative financial services such as payday loans in addition to a traditional bank account); *Regulatory Burdens, supra* note 2, at 34 (statement of Tanya Marsh, Associate Professor of Law, Wake Forest University School of Law).

[74] MARSH & NORMAN, *supra* note 3, at 9.

informationally opaque borrowers, the number of unbanked and underbanked citizens would skyrocket.

III. The Absolute Regulatory Burden of Dodd-Frank

Because all regulations require added costs to comply with them, "all regulations result in regulatory burden."[75] These burdens are felt by every bank across the industry, regardless of their size.[76] However, for community banks, regulatory burdens can be especially worrisome.[77] Many community bankers argue Dodd-Frank unjustifiably punishes community banks because they did not contribute in any meaningful way to the financial crisis.[78] This is due in large part to the

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[75] BREWER & RUSSELL, *supra* note 5, at 4 ("Regulatory policies affect the profitability of banks by imposing added costs to comply with the policies and by decreasing revenue making certain investments unattainable or non-compliant."); HOSKINS & LABONTE, *supra* note 21, at 2 (discussing two types of regulatory burden: "operating costs," or "the costs the bank must bear in order to comply with regulation" including training, updating computer software, and hiring new employees, and "opportunity costs" or "the costs associated with foregone business opportunities because of the additional regulation," such as a bank offering less mortgages as they are comparatively less profitable).

[76] *See, e.g.*, WALLISON, *supra* note 55, at 3 (reporting that in March of 2014, JP Morgan Chase "noted that it would add 3000 new compliance employees, on top of the 7000 it had added the year before" while "the total number of employees of the banking organization was expected to fall by 5000"); *Regulatory Burdens, supra* note 2 at 46 ("[O]nce all the Dodd-Frank rules are implemented, that compliance economy-wide is going to be about 24 million man-hours. And by the way of comparison, 20 million man-hours was sufficient to build the Panama Canal.").

[77] *Regulatory Burdens, supra* note 2 at 19 (statement of Hester Pierce, Senior Research Fellow, Mercatus Center at George Mason University) ("For a community bank that has to hire a new compliance person or pay high-priced outside consultants to help it understand what applies to them, it could be the difference between a profitable year and not a profitable year."); *see* Ash, et al., *supra* note 16, at 2 (indicating that in a 2014 survey "a majority of community bankers voiced that regulatory and legislative pressures represent the most significant growth barrier over the next 12 months").

[78] *See*, *e.g.*, *Regulatory Burdens, supra* note 2, at 39 (statement of Tanya D. Marsh, Associate Professor of Law, Wake Forest University School of Law) ("More fundamentally, the application of Dodd-Frank to community banks is misguided because community banks did not participate in the perceived sins

size and business model of the community bank, and was acknowledged by the authors of Dodd-Frank.[79] Indeed, the data supports the limited effect community banks had on the financial crisis.[80] It should therefore come as no surprise "the bankers on the ABA Board of Directors unanimously decided to oppose [Dodd-Frank]."[81] But is Dodd-Frank entirely to blame?

A. Limited Data Collection on Absolute Regulatory Burden

While it seems it should be easy to analyze how much Dodd-Frank has cost financial institutions, the answer is much more

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that lead to the financial crisis."); *The State of Rural Banking*, *supra* note 59, at 39 ("[G]enerally community banks did not engage in the type of predatory residential mortgage lending that brought down larger banks.").

[79] George, *supra* note 51, at 1 ("[S]mall banks were neither the cause of the crisis nor the target of reforms."); *see, e.g.*, MARSH & NORMAN, *supra* note 3, at 34–35 ("First, community banks are, by definition, too small on an individual basis to destabilize the financial system. Second, the business model employed by community banks has proven to be sufficient to protect consumers."); AN INCREMENTAL APPROACH TO FINANCIAL REGULATION, *supra* note 22, at 7 ("On balance, the size, sophistication, and business model of community banks precluded them from meaningfully engaging in the types of exotic and nontraditional financial activities that resulted in unprecedented systemic risk."); *Regulatory Burdens, supra* note 2, at 36 (statement of Tanya D. Marsh, Associate Professor of Law, Wake Forest University School of Law) ("The relationship-banking business model and market forces protect the customers of consumer banks without the need for additional regulation.").

[80] *See*, *e.g*., Lux & Greene, *supra* note 8, at 2, 7 (calculating that from 2009–September 2012, "the average default rate for community banks was 0.23 percent while overall it was 3.62 percent," and "[i]n 2013, the default rates for loans secured by one-to four-family residential properties ran at 3.47 percent for small community banks . . . versus 10.42 percent for banks with more than $1 billion in assets"); MARSH & NORMAN, *supra* note 3, at 25–26 (calculating total residential mortgage defaults at community banks accounted for 2 percent of all defaults from 2003 to 2010, "[c]ommunity banks participated in only 0.07 percent of residential mortgage securitization activities between 2003 and 2010," "only 11 percent of community banks held any derivatives in 2010," and "[c]ommunity banks held just 0.003 percent of all credit derivatives held by banking institutions between 2003 and 2010").

[81] Letter from Stephen Wilson to Sheila Bair, *supra* note 13.

complex.[82] Unfortunately, the reason this area has not been studied greatly is simply because the data does not exist.[83] Even where expenses are collected, in call reports for example, they do not provide an accurate picture of the absolute costs of regulatory burdens.[84] While having this data would allow community banks to demonstrate in actual dollars their cost of compliance, banks suffer from a "Catch-22" in that collecting the data itself would be a burdensome cost.[85] Because of the dearth of data available, researchers seeking to quantify the costs of Dodd-Frank have to approximate compliance costs using data that is collected by financial institutions.[86]

B. Community Banks' Struggles Prior to Dodd-Frank

Long before Dodd-Frank, community banks had been struggling.[87] Community banks have fallen victim to several "longer-

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[82] *Regulatory Burdens, supra* note 2, at 21.

[83] *See* HOSKINS & LABONTE, *supra* note 21, at 36; MARSH & NORMAN, *supra* note 3, at 36 ("Banks do not routinely document their direct compliance costs, those costs are not regularly tracked in call reports, and they have not been studied in recent years.").

[84] FDIC COMMUNITY BANKING STUDY, *supra* note 19, at IV ("Call Reports and other regulatory filings do not provide a breakdown of regulatory versus other types of noninterest expenses."); KEN B. CYREE, THE DIRECT COSTS OF BANK COMPLIANCE AROUND CRISIS-BASED REGULATION FOR SMALL AND COMMUNITY BANKS 1 n.1 (2015) ("The RI-E section of the call report includes expenses on data processing and legal/audit fees, but quite often these fields are missing for small banks, and even if they are reported they are not a direct measure of the full costs of the regulatory burden.").

[85] MARSH & NORMAN, *supra* note 3, at 36; *see* FDIC COMMUNITY BANKING STUDY, *supra* note 19, at B-2 (indicating community banks do not "actively track the various costs associated with regulatory compliance, because it is too time-consuming, costly, and is so interwoven into their operations that it would be difficult to break out these specific costs").

[86] COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 19 (deriving an implied cost of compliance of 22 percent of net income based on a survey of community banks); *see, e.g.*, CYREE, *supra* note 84, at 9 ("The goal of the investigation is to estimate bank compliance costs in terms of direct expenses in personnel and other costs, and in reduced loan output for community and smaller banks."). *But see* THOMAS P. VARTANIAN, BNA INSIGHTS: THE GOOD, THE BAD OR THE UGLY OF THE DODD-FRANK ACT—PART I 4 (2016).

[87] *The State of Rural Banking*, *supra* note 59, at 35 (claiming "[t]he number of community banks has declined at a rate of about 300 per year over the past 30

term trends in the banking industry over the past several decades—including bank branching deregulation, merger activity, and other factors . . . ."[88] These trends reduced the number of FDIC-insured banks from 17,901 in 1984 to 7,830 at the time of Dodd-Frank's passage in 2010.[89]

Intrastate and interstate bank branching restrictions were born out of a desire to increase state revenue.[90] As such, "[t]he legal authority to bank across state lines was highly restricted through much of the twentieth century and not entirely liberalized until 1997 as a result of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994," (Riegle-Neal).[91] Prior to Riegle-Neal, intrastate and interstate banking restrictions led to the presence of many small banks.[92] However, not long after, the number began to drop precipitously.[93] Riegle-Neal underscores an important consideration in the decline of community banks: "[s]ince 1990, 6.5 mergers have occurred for every bank failure."[94] Riegle-Neal was not the only significant law to affect community banks, "from 2001–10, 10 major banking acts became law,

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years" and "[t]his decline began far before the 2007 financial crisis"); *Bearing the Burden, supra* note 6, at 8 (statement of Marcus Stanley, Policy Director, Americans for Financial Reform).

[88] WHITE HOUSE COUNCIL OF ECON. ADVISORS, *supra* note 1, at 1.

[89] FDIC COMMUNITY BANKING STUDY, *supra* note 19, at I; FED. DEPOSIT INS. CORP, QUARTERLY BANKING PROFILE SECOND QUARTER 2010 5 tbl.II-A (2010); *see* Lux & Greene, *supra* note 8, at 2 (observing community bank failures began with the savings and loan crisis of the 1980s).

[90] Randall S. Kroszner, *The Motivations Behind Banking Reform*, 24 REG. 36, 36–37 (2001) (recounting how states would only receive revenue from granting charters, and this revenue caused states to limit both interstate and intrastate branching to increase the number of charters they would grant).

[91] HOSKINS & LABONTE, *supra* note 21, at 6–7; Lux & Greene, *supra* note 8, at 16 (arguing "Riegle-Neal only swung the door open wider on a process that had begun at state and regional levels several decades earlier").

[92] ROISIN MCCORD ET AL., FED. RESERVE BANK OF RICHMOND, EB15-03, EXPLAINING THE DECLINE IN THE NUMBER OF BANKS SINCE THE GREAT RECESSION 1 (2015) ("From 1960 to 1980, there were between 12,000 and 13,000 independent banks in the United States.").

[93] *Id.* at 2 ("By 2000, the number of independent commercial banks had fallen to less than 7,000."); FDIC COMMUNITY BANKING STUDY, *supra* note 19, at II ("Between 1995 and 1998, the period immediately following the passage of the Riegle-Neal Act, an average of 5.7 percent of banks merged or consolidated each year.").

[94] MARSH & NORMAN, *supra* note 3, at 6.

totaling 1,858 pages."[95]

With the merger of many small banks came the creation of larger banks.[96] Since deregulation began in the 1980s, the growth of large banks with assets of more than $10 billion has been exponential.[97] Community bank struggles also caused a widening of the efficiency ratio gap—the difference between the efficiency ratios of noncommunity and community banks—from 1.3 percent in 1998 to 9.7 percent in 2011.[98] Finally, noncommunity banks were able to grow their net income at a greater percentage than community banks.[99] All this means that when the financial crisis struck, noncommunity banks were better able to stay profitable.[100]

C. Community Banks' Struggles Post-Dodd-Frank

Dodd-Frank did not do much to alleviate the struggles faced by community banks.[101] The sheer size and scope of Dodd-Frank alone has caused many community banks to struggle with compliance.[102] In

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[95] Ash, et al., *supra* note 16, at 2.

[96] COMM. ON CAPITAL MKTS. REGULATION, *supra* note 65.

[97] MARSH & NORMAN, *supra* note 3, at 6 (reporting from 1985 to 2010, the number of banks with total assets exceeding $10 billion almost tripled); FDIC COMMUNITY BANKING STUDY, *supra* note 19, at I, 2–9 (surmising the total share of industry assets held by banks with assets exceeding $10 billion rose "from 27 percent in 1984 to 80 percent in 2011," further observing "while noncommunity banks were, on average, 12 times larger than community institutions in 1984, by 2011 they had become 74 times as large.").

[98] FDIC COMMUNITY BANKING STUDY, *supra* note 19, at IV (defining the efficiency ratio as "noninterest expense to net operating revenue").

[99] Lux & Greene, *supra* note 8, at 6 ("[B]etween 1993 and 2013, non-community banks saw net income grow by 395 percent, while community banks' increased by only 102 percent.").

[100] *Id.* ("From 2007 to 2009, community banks' ROA remained positive, while the ROA of large banks collapsed in 2007 to negative values in 2008 and 2009."); *see The State of Rural Banking*, *supra* note 59, at 39 ("Between 2008 and 2011, 419 of the 481 depository banks that failed were small banks.").

[101] *See* MARSH & NORMAN, *supra* note 3, at 4 ("Combined with the hundreds of new regulations expected from the Dodd-Frank Act, these pressures are slowly but surely strangling traditional community banks, handicapping our ability to meet the credit needs of our communities") (quoting Thomas Boyle, Vice Chairman, State Bank of Countryside, LaGrange, Illinois).

[102] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-169, DODD-FRANK REGULATIONS IMPACTS ON COMMUNITY BANKS, CREDIT UNIONS AND

response to increased costs, banks "simply abandon lines of business implicated in the act."[103] This struggle is not unique to community banks; large banks are feeling the pressure of compliance as well.[104] The data demonstrates how this has impacted the banking landscape. A 2016 survey estimated annual community bank compliance costs to be $4.6 billion.[105] New charters have rarely been issued, while numerous banks have failed or merged.[106] Community bank market share decreased twice as quickly, and consolidation trends doubled since Dodd-Frank's passage.[107] Meanwhile, "[t]he top 5 bank-holding companies control nearly the same share of U.S. banking assets as they did in the fiscal quarter before Dodd-Frank's passage."[108] As of 2017, community banks have a combined 13 percent market share.[109]

SYSTEMICALLY IMPORTANT INSTITUTIONS 20 (2015) [hereinafter GAO-16-169]; COMMUNITY BANKING IN THE 21ST CENTURY—2016, *supra* note 66, at 19 ("It feels like we are a compliance shop that writes a loan every once in a while."); COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 23 ("Community banking has changed to the point of spending more time with compliance issues than providing service to our customers."); MARSH & NORMAN, *supra* note 3, at 37.

[103] MARSH & NORMAN, *supra* note 3, at 37.

[104] VARTANIAN, *supra* note 86, at 3 ("A study by Federal Financial Analytics in 2014 concluded that 'quantifiable' regulatory costs faced by the six largest banks have doubled since the financial crisis . . . .").

[105] COMMUNITY BANKING IN THE 21ST CENTURY—2016, *supra* note 66, at 19, 27 n.22 ("We acknowledge limitations in matching data on a relatively small number of banks that responded to the survey with industry aggregates. We also recognize that survey data are subjectively reported. Our interpretations must be qualified accordingly.").

[106] COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 6 ("While only two banks have been approved for de novo charters since 2010, more than 1,500 institutions have closed their doors or merged . . . .").

[107] Carrie Sheffield, *Dodd-Frank is Killing Community Banks*, FORBES (Feb. 2, 2015), www.forbes.com/sites/carriesheffield/2015/02/09/dodd-frank-is-killing-community-banks/#515fa68e73a7 [https://perma.cc/DJT7-RBWE] ("[S]ince the second quarter of 2010–Dodd-Frank's passage–community banks have lost market share at a rate *double* what they did between Q2 2006 and Q2 2010: 12 percent vs. 6 percent."); Lux & Greene, *supra* note 8, at 19 ("[C]ommunity bank consolidation trends have almost doubled since the passage of Dodd-Frank . . . .").

[108] Lux & Greene, *supra* note 8, at 21.

[109] Esther L. George, President and Chief Exec. Officer, Fed. Reserve Bank of Kan. City, Address at the Federal Reserve Bank of New York Community Banking Conference: Why Community Banks Matter (Apr. 6, 2017), (draft

However, other data suggests community banks are succeeding.[110] The FDIC found a community bank in 1984 was over five times more likely to survive to 2011 than a noncommunity bank.[111] Community bank office expansion "has largely offset the decline in the number of FDIC-identified community bank institutions over the last two decades, preserving access to community banks across local areas."[112] By 2015, over 95 percent of community banks had returned to profitable levels, and by some metrics, community banks were outperforming their larger counterparts.[113] Community banks have even begun expanding through acquisitions, purchasing branches formerly owned by larger banks.[114] This data is best interpreted as a "leveling off" of the regulatory burden felt immediately following Dodd-Frank.[115]

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available at kansascityfed.org/~/media/files/publicat/speeches/2017/2017-george-nyfed-4-6.pdf [https://perma.cc/NA2U-YKR4]).

[110] *The State of Rural Banking*, *supra* note 59, at 38 (stating FDIC data show "performance and financial health of community banks has experienced consistent improvement over the past 5 years"); Michael Rapoport, *Small Banks Are in Good Shape, So Why Aren't They Doing Better?*, WALL ST. J. (May 31, 2016), www.wsj.com/articles/for-community-banks-the-best-and-worst-of-times-1464723686 ("Community bankers are struggling under new regulations. But they also are in their best shape in years.").

[111] FDIC COMMUNITY BANKING STUDY, *supra* note 19, at 2–10.

[112] WHITE HOUSE COUNCIL OF ECON. ADVISORS, *supra* note 1, at 7 ("For all FDIC-identified community banks as a group, the number of full-service brick-and-mortar branches per bank doubled . . . and the total number of branches of any kind per bank more than doubled . . . .").

[113] *Bearing the Burden, supra* note 6, at 41 ("Average community bank return on equity has also increased every year since 2009 . . . ."); *see* COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 21 ("Community banks outperformed other categories of banks last year . . . . [N]et interest margins were 50 basis points higher than the industry average.").

[114] *See* Rapoport, *supra* note 110 ("A good example is 1st Security Bank of Washington, which in January [of 2016] purchased four branches from Bank of America Corp. BofA has reduced its branches by nearly 1,000 since 2011, selling 325 of them to community banks.").

[115] COMMUNITY BANKING IN THE 21ST CENTURY—2016, *supra* note 66, at 5. *But see* Rapoport, *supra* note 110 ("'It's a hell of a lot better than it was 2010 to 2012, but it's still not where it was' in 2004 to 2006 said Camden Fine, president and chief executive of the trade group Independent Community Bankers of America . . . .").

D. Other Factors Promoting Community Bank Decline

While financial regulation has played a major role in the decline of community banks, it may not be the only factor. First, for most of the period following the financial crisis, the federal funds rate has been near zero.[116] Because community banks rely so heavily on lending, "interest rate margins play a critical role in determining the earnings of a community bank."[117] A lengthy period of extremely low net interest margins would certainly drive down revenue for community banks, even absent new regulations.[118] Moreover, unlike larger banks, community banks are often "unable to switch to other lines of business" to recoup lost income during periods of low interest rates.[119] Low interest rate margins have pushed noncommunity banks into competition with community banks for small and medium sized business loans.[120] While a disadvantage during periods of low interest rates, community banks' greater reliance on lending activities becomes "an advantage during periods of higher interest rates."[121] The Federal Reserve raised the target federal funds rate twice in 2017 to 1.25

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[116] *Effective Federal Funds Rate (FEDFUNDS)*, ECONOMIC RESEARCH FED. RESERVE BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/FEDFUNDS [https://perma.cc/HM6F-R87Y] (showing the effective federal funds rate dipped below its previous all-time low of 0.68 percent in November 2008 and remained below 0.68 percent until February 2017); *see* MCCORD ET AL., *supra* note 92, at 3 ("The Fed's policy of keeping the federal funds rate near zero since 2008 has pushed lending rates down, which has kept the net interest margin relatively small.").

[117] BAILY & MONTALBANO, *supra* note 21, at 7; FDIC COMMUNITY BANKING STUDY, *supra* note 19, at 4-2.

[118] FDIC COMMUNITY BANKING STUDY, *supra* note 19, at III ("[C]ommunity banks derive 80 percent of their revenue from net interest income compared with about two-thirds at noncommunity banks.").

[119] BAILY & MONTALBANO, *supra* note 21, at 7; FDIC COMMUNITY BANKING STUDY, *supra* note 19, at III, 4-2 ("Non-interest income averaged 2.05% of assets at noncommunity banks over the study period, compared with only 0.8% at community banks.").

[120] COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 22 (claiming "[noncommunity] banks have not traditionally participated aggressively in this market-place").

[121] FDIC COMMUNITY BANKING STUDY, *supra* note 19, at III.

percent, the highest since the crisis, and indicated they anticipate raising the rate once more in 2017, and three times in 2018.[122]

Second, there has been a massive population shift over the last thirty years as younger people move away from rural areas and towards metropolitan areas.[123] These metropolitan areas contain more noncommunity bank locations than community bank locations.[124] Between the 1980 and 2010 censuses, 50 percent of rural counties saw their populations decrease.[125] Meanwhile, metropolitan counties' populations "grew twice as fast as micropolitan counties and 6 times faster than rural counties."[126] The decline of rural populations, especially young adults, can have a significant effect on a local economy.[127] Between 2010 and 2014, 50 percent of all new businesses were started in just 20 metropolitan counties.[128] The exodus of young adults also affects bank staffing, as some community bankers noted younger employees would often leave to work at larger competitors.[129]

Finally, community banks face increased competition from sources beyond noncommunity banks. Rural community banks have faced greater competition from the Farm Credit Administration (FCA), a system created in the early 1900s to provide loans to the agriculture industry, which has grown exponentially since its origin.[130] "In many

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[122] Larry Light, *Federal Reserve Hikes Interest Rates by Another 0.25%*, CBS NEWS: MONEYWATCH (June 14, 2017), www.cbsnews.com/news/federal-reserve-hikes-interest-rates-again-by-025-percent/ [https://perma.cc/L7YP-CKVK]; Jeff Cox, *Fed Raises Rates at March Meeting*, CNBC (Mar. 15, 2017), www.cnbc.com/2017/03/15/fed-raises-rates-at-march-meeting.html [https://perma.cc/YJ5Q-F5S7].

[123] *The State of Rural Banking*, *supra* note 59, at 37 ("As jobs become more concentrated in metropolitan areas, many young people are leaving rural areas for these job centers.").

[124] *See* FDIC COMMUNITY BANKING STUDY, *supra* note 19, at 3–7.

[125] *Id.* at II (commenting the trend has "accelerated since the 2000 census").

[126] *Id.* at 3-6–3-7.

[127] *Id.* at 3-8 ("The departure of people entering their prime working years . . . and the absence of recent college graduates may deprive local businesses and governments of the skilled, young workforce necessary to grow.").

[128] *Bearing the Burden, supra* note 6, at 2.

[129] COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 24 ("Younger employees were said to be hard to retain, with many of them leaving after training to work at larger banks with more promotion potential.").

[130] *History of FCA and the FCS, FARM CREDIT ADMIN.* (last updated Dec. 7, 2016), https://www.fca.gov/about/history/historyFCA_FCS.html [https://

rural states, community bankers said that they simply couldn't compete with [FCA] lenders because of better tax rates, lower interest rates and application of those lower rates to financial products outside agriculture (such as housing)."[131] Additionally, community banks face increased competition from credit unions, which are perceived as having superior tax and regulatory structures.[132] In recent years, credit unions have attempted to broaden their membership qualifications from their traditional "common interest" standard.[133] Credit unions have also expanded the services they offer.[134] Community bankers "continue to be frustrated by the lack of a level playing field in regard to credit unions."[135]

Community banks also face a new threat from nonbank financial entities, such as online peer-to-peer lenders.[136] Nonbank lenders have grown rapidly in the last few years.[137] These entities are

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perma.cc/2HTK-BN8Q]; *see* WHITE HOUSE COUNCIL OF ECON. ADVISORS, *supra* note 1, at 6; *Bearing the Burden, supra* note 6, at 33 ("[I]f the Farm Credit System were a bank it would be the ninth largest bank in the United States, and larger than 99.9% of the banks in the country.").

[131] COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 24.

[132] *Regulatory Burdens, supra* note 2, at 25; COMMUNITY BANKING IN THE 21ST CENTURY—2016, *supra* note 66, at 23.

[133] Daniel K. Tarullo, Governor, Fed. Reserve Sys., Large Banks and Small Banks in an Era of Systemic Risk Regulation (June 15, 2009) (transcript available at federalreserve.gov/newsevents/speech/tarullo20090615a.htm [https://perma.cc/CW68-2HXC]) ("[S]ome credit unions have shifted from the traditional membership . . . to membership that encompasses anyone who lives or works within one or more local banking markets.").

[134] *Id.* ("[S]ome credit unions have also moved beyond their traditional focus on consumer services to provide services to small businesses, increasing the extent to which they compete with community banks.").

[135] COMMUNITY BANKING IN THE 21ST CENTURY—2016, *supra* note 66, at 23.

[136] JULAPA JAGTIANI & CATHARINE LEMIEUX, SMALL BUSINESS LENDING: CHALLENGES AND OPPORTUNITIES FOR COMMUNITY BANKS—BEFORE, DURING, AND AFTER THE FINANCIAL CRISIS (2015); Tarullo, *supra* note 133 ("[N]on-bank financial service providers have become increasingly important participants in the financial services sector, capturing a large and growing share of the retail financial services business.").

[137] Kabbage (a working capital lender) "expects to issue $1 billion in credit in 2015 alone" tripling its "yearly small business loan volume in less than a year," OnDeck Capital reported its Q1 2015 loan volume was 83% higher than Q1 2014, "PayPal Working Capital has lent $500 million to 40,000 businesses from September 2013 to May 2015, and Square has lent more than

largely unregulated.[138] They are capable of leveraging technology to quickly underwrite and issue small business loans and "can directly interface with QuickBooks, PayPal, Square, and IRS tax returns."[139] This has led to an increased market share of small business loans.[140] These lenders are also partnering with larger entities to spur growth.[141]

Interestingly, in the face of increased competition from a number of sources, "community bankers view their greatest competitive threat to be from other community banks."[142] Community bankers do not anticipate the environment becoming less competitive any time soon.[143] In short, while community banks undoubtedly have their struggles, it is difficult, if not impossible to know the extent that Dodd-Frank exacerbated them; this is in large part due to the lack of data collection and the numerous other factors impacting the decline of community banks. Rather than a single killing blow, Dodd-Frank is better viewed as just one regulation in a long line of regulations and policies that have precipitated the decline of community banks.

IV. The Relative Regulatory Burden of Dodd-Frank

Every regulation imposes costs, and as such, it is impossible to say that the presence of cost *alone* makes a regulation *unduly* burdensome.[144] Regulatory burdens have caused community banks to

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$100 million to 20,000 small businesses within a year of launching." JAGTIANI & LEMIEUX, *supra* note 136, at 11–12.

[138] BAILY & MONTALBANO, *supra* note 21, at 7 ("These nonbank lenders are mostly unregulated, which provides them flexibility that is increasingly hard to come by for community banks under post-crisis regulations.").

[139] JAGTIANI & LEMIEUX, *supra* note 136, at 1 ("Most recently, nonbank and alternative lenders have begun to compete with banks by introducing sophisticated technologies and new underwriting methods. These lenders typically issue small business loans electronically, with minimal processing time, across a range of sizes, terms and borrower risk profiles.").

[140] *Id.* at 7.

[141] *Id.* at 4 ("Lending Club established formal relationships with Google and Alibaba where the two tech companies provide lump-sum lending capital for their small business customers through Lending Club platform.").

[142] COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 22.

[143] *Id.* ("Only 1 percent of the bankers surveyed foresaw lesser competition in the future.").

[144] HOSKINS & LABONTE, *supra* note 21, at 2 ("However, the presence of regulatory burden does not speak to the relationship between costs and

discontinue products and change business strategy.[145] Larger noncommunity banks have faced increased compliance costs as well.[146] To determine whether community banks have been treated unfairly in the wake of Dodd-Frank, the regulatory burdens of community and noncommunity banks need to be directly compared. Analysis of undue relative regulatory burden may answer whether community banks face a greater and therefore undue regulatory burden relative to larger banks.[147] Given the almost nonexistent data collection on the actual costs of Dodd-Frank, it is impossible to use actual dollar values in this comparison.[148] As such, what follows are three ways to think about regulatory burden, accompanied by case studies analyzing the extent to which community banks suffer undue relative regulatory burden.

A. Cost-Benefit Analysis

The first way to conceptualize undue relative regulatory burden is to compare the costs and benefits of a regulation.[149] "Cost-benefit analysis ranks among the most important decision-making tools in the modern regulatory state," and dates back to the early

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benefits, and thus does not necessarily mean that a regulation is undesirable or should be repealed.").

[145] COMMUNITY BANKING IN THE 21ST CENTURY—2016, *supra* note 66, at 18 ("Regulatory burden, perhaps unsurprisingly, was named by 37 percent of respondent community banks as a rationale for exiting a specific product or service—a larger percentage than that for unprofitability . . . .").

[146] Llewellyn Hinkes-Jones, *How Much Did Dodd-Frank Cost? Don't Ask Banks*, BLOOMBERG L. BANKING (Feb. 2, 2017), https://www.bna.com/doddfrank-cost-dont-n57982083194/ [https://perma.cc/KP9A-YPV2]; John Carney, *Here's How Much Dodd-Frank Costs the Six Biggest Banks in the U.S.*, WALL ST. J.: MONEYBEAT (July 30, 2014), https://blogs.wsj.com/moneybeat/2014/07/30/heres-how-much-dodd-frank-costs-the-six-biggest-banks-in-the-u-s/.

[147] HOSKINS & LABONTE, *supra* note 21, at 2 ("[U]nduly burdensome refers to the relationship between the benefits and costs of a regulation.").

[148] Hinkes-Jones, *supra* note 146 ("[N]one of the nine largest American banks . . . could provide Bloomberg BNA details on what it cost them to implement the 2010 law."); *see supra* Section III.A.

[149] HOSKINS & LABONTE, *supra* note 21, at 2.

1900s.[150] However, in many cases, both legislation and regulation are passed without due consideration of the costs imposed or the benefits gained.[151]

One simple but common method of encouraging regulatory agencies to consider the costs and benefits of a proposed rule is the generic notice and comment requirements in the Administrative Procedure Act (APA).[152] This method does not require agencies to conduct cost-benefit analyses, but rather offers commenters an opportunity to present data or information related to the costs and benefits and obligates the agency to "consider" those comments.[153] The Government Accountability Office (GAO), in a review of 26 major rules under Dodd-Frank, noted 15 were substantive and therefore subject to notice and comment under the APA.[154]

Another major source of cost-benefit analysis comes from executive orders.[155] As part of these orders, the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs is tasked with reviewing the agency's cost-benefit analysis.[156] In an effort

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[150] PAUL ROSE & CHRISTOPHER J. WALKER, THE IMPORTANCE OF COST-BENEFIT ANALYSIS IN FINANCIAL REGULATION 3 (2013) (citing River and Harbor Act of 1902, ch. 1079, § 3, 32 Stat. 331, 372 (1902)).

[151] VARTANIAN, *supra* note 86, at 1, 3 (observing "[s]ome of our most significant legislation in recent years has been enacted on a pass-first and evaluate-second basis" and "the promulgation of federal rules is at best an exercise in making an educated guess about what might work").

[152] 5 U.S.C. § 553 (2012).

[153] § 553(c) (2012).

[154] GAO-16-169, *supra* note 102, at 18.

[155] *Id.* at 2, 16 (describing executive orders governing cost-benefit analysis); Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) ("[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."); *see* Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993) ("Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.").

[156] Exec. Order No. 12,866, 58 Fed. Reg. at 51,737; GAO-16-169, *supra* note 102, at 16; ROSE & WALKER, *supra* note 150, at 5 ("To ensure that agencies properly perform cost-benefit analysis and select the most cost-effective regulatory options, OMB and OIRA review agency cost-benefit analysis before proposed regulations take effect.").

to assist agencies in conducting cost-benefit analysis, the OMB issued Circular A-4 in 2003.[157] Circular A-4 establishes:

> [a] good regulatory analysis should include the following three basic elements: (1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis.[158]

As part of their guidance, the OMB suggests agencies express both benefits and costs in terms of "monetary units."[159] In situations where monetary units are not easily calculated, the OMB proposes alternative means of performing a cost-benefit analysis.[160] The OMB also advises agencies actively consider the opinions of those affected by the rule as part of their analysis.[161] Finally, in an effort to help standardize cost-benefit analysis and assist agencies, Circular A-4 contains a generic cost-benefit analysis form.[162]

Most of the major financial regulators, as independent agencies, are exempt from these orders.[163] While they are not obligated to adhere to the orders or Circular A-4, many indicated they were

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[157] OFFICE OF MGMT. & BUDGET, CIRCULAR A-4 1 (2013) [hereinafter CIRCULAR A-4]; GAO-16-169, *supra* note 102, at 16.
[158] CIRCULAR A-4, *supra* note 157, at 2.
[159] *Id.* at 10.
[160] *Id.* ("Even when a benefit or cost cannot be expressed in monetary units, you should still try to measure it in terms of its physical units. If it is not possible to measure the physical units, you should still describe the benefit or cost qualitatively.").
[161] *Id.* at 3 ("As you design, execute, and write your regulatory analysis, you should seek out the opinions of those who will be affected by the regulation as well as the views of those individuals and organizations who may not be affected but have special knowledge or insight into the regulatory issues.").
[162] *Id.* at 47; GAO-16-169, *supra* note 102, at 16.
[163] 44 U.S.C. § 3502(5) (2012) (defining "independent regulatory agency"); Exec. Order No. 12,291, 46 Fed. Reg. 13193, 13193 (Feb. 19, 1981) (defining "Agency" as "any authority of the United States that is an 'agency' under 44 U.S.C. 3502(1), excluding those agencies specified in 44 U.S.C. 3502(10)"); ROSE & WALKER, *supra* note 150, at 6 ("Subsequent administrations have also stopped short of requiring independent agencies to engage in cost-benefit analysis . . . .").

committed to following the spirit of the OMB guidance.[164] However, in 2011, the GAO found these agencies were failing to live up to that commitment.[165] In response, some agencies "revised their internal rulemaking guidance to more fully incorporate [Circular A-4]."[166]

While no single statute requires financial regulatory agencies to conduct formal cost-benefit analyses, agencies are required to consider certain costs in isolated instances.[167] Certain authorizing statutes "require certain financial regulators to consider specific benefits, costs, and impacts of their rulemakings."[168] The Paperwork Reduction Act (PRA) requires agencies to "estimate the hours that banks spend complying with its requests for information."[169] The Regulatory Flexibility Act (RFA) requires agencies to consider the impact of their regulations on small banks (banks with assets of $500 million or less—a lower cutoff than any agency definition).[170] For any rule for which an agency performs an RFA analysis, the agency is required by law to develop a "small entity compliance guide."[171] While information provided by the PRA and the RFA is informative, it is rarely if ever significantly analyzed.[172] Under the Riegle Community Development and Regulatory Improvement Act of 1994, agencies are

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[164] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-151, DODD-FRANK REGULATIONS: IMPLEMENTATION COULD BENEFIT FROM ADDITIONAL ANALYSES AND COORDINATION 12 (2011).

[165] *Id.* at 14 ("Although most of the federal financial regulators told us that they tried to follow Circular A-4 in principle or spirit, their policies and procedures did not fully reflect OMB guidance on regulatory analysis.").

[166] GAO-16-169, *supra* note 102, at 16 n.36.

[167] HOSKINS & LABONTE, *supra* note 21, at 19–21; *see* VARTANIAN, *supra* note 86, at 4.

[168] GAO-16-169, *supra* note 102, at 14; *see, e.g.*, 12 U.S.C. § 5512(b)(2)(A)(i) (2012) (mandating the CFPB consider "the potential benefits and costs to consumers and covered persons").

[169] HOSKINS & LABONTE, *supra* note 21, at 33 ("Agencies do not . . . distinguish between the hours spent by small and large banks . . . .").

[170] Under the RFA, the agency must describe "(1) the reasons why the regulatory action is being considered; (2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities." *Id.* at 20; *see supra* Section II.A.

[171] 5 U.S.C. § 601 note (2000); GAO-16-169, *supra* note 102, at 13–14 (describing The Small Business Regulatory Enforcement Fairness Act).

[172] VARTANIAN, *supra* note 86, at 4.

required to "consider" the costs and benefits a proposed rule would place on small banks.[173] However, the law does not require agencies conduct "a quantitative cost-benefit analysis."[174] Finally, the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA) requires the three primary financial regulatory agencies "to review their regulations at least every 10 years to identify outdated, unnecessary, or unduly burdensome regulations and consider how to reduce regulatory burden," and submit a report to Congress.[175] The most recent EGRPRA review was started in 2014 and culminated in a 440-page report submitted to Congress in March 2017.[176] While not subject to the EGRPRA, the CFPB is required by Dodd-Frank to conduct a similar regulatory analysis, once within five years.[177]

While it is clear that under certain circumstances, regulatory agencies must consider costs, the presence of formal cost-benefit analysis is still limited.[178] A 2012 review of 192 Dodd-Frank rules found 57 of them "contained no cost-benefit analysis" whatsoever, and another 85 contained only "non-quantitative" analysis.[179] This may be in part because it is still "too early to assess the full impact of the Dodd-Frank Act rulemakings," and as such, regulators "have not been able to quantify compliance costs."[180] Additionally, as a general rule, it is even more difficult to express the benefits of a proposed regulation

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[173] 12 U.S.C. § 4802(a) (2012).

[174] HOSKINS & LABONTE, *supra* note 21, at 32.

[175] GAO-16-169, *supra* note 102, at 17; *see* HOSKINS & LABONTE, *supra* note 21, at 21 ("In this review, the agencies are placing an emphasis on reducing the regulatory burden on community banks.").

[176] *Agencies Finalize EGRPRA Review with Joint Report to Congress*, ABA BANKING J. (Mar. 21, 2017), http://bankingjournal.aba.com/2017/03/agencies-finalize-egrpra-review-with-joint-report-to-congress/ [https://perma.cc/JD2Y-E49E].

[177] GAO-16-169, *supra* note 102, at 40 ("CFPB, which is not subject to EGRPRA, conducts its own analyses of regulations that impact financial institutions with $10 billion or less in assets."). *Compare* 12 U.S.C. § 5512(d)(2) (requiring the CFPB to report the results of their analyses once within five years), *with* 12 U.S.C. § 3311(a) (2012) (requiring financial regulatory agencies to conduct an analysis once every ten years).

[178] VARTANIAN, *supra* note 86, at 1 ("[T]here is essentially no comprehensive empirical analysis by the government that measures how improvements in financial safety and soundness compare to the accompanying costs of and restrictions on delivering financial services to the public.").

[179] Lux & Greene, *supra* note 8, at 28.

[180] GAO-16-169, *supra* note 102, at 38.

in terms of dollars.[181] Furthermore, some have concerns that cost-benefit analysis may be misplaced in quantifying the regulatory burden of community banks, because "[a]ny regulatory requirement is likely to be disproportionately costly for community banks, since the fixed costs associated with compliance must be spread over a smaller base of assets."[182]

1. *Case Study #1: Cost-Benefit Analysis and Arbitrary and Capricious Review*

Courts reviewing agency action are obligated to overturn agency action when it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[183] Some courts have held that under certain circumstances, failure to give due consideration to the costs and benefits of a rule is arbitrary and capricious. The first case of note, *Chamber of Commerce of the United States v. SEC*,[184] analyzed a rule issued by the SEC pertaining to mutual fund governance.[185] The court noted that the SEC was obligated by the Investment Company Act to consider "whether the action will promote efficiency, competition, and capital formation."[186] Because the SEC failed to properly consider the costs involved in the proposed rule, it violated the directive in the ICA, and by extension, acted arbitrarily and capriciously.[187]

Another case, *MetLife, Inc. v. Financial Stability Oversight Council*,[188] concerned the Financial Stability Oversight Council's

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[181] *Id.* at 39 n.76 ("[T]he Dodd-Frank Act's potential benefit of reducing the probability or severity of a future financial crisis cannot be readily observed and this potential benefit is difficult to quantify. Any analyses must be based on assumptions about, or models of, the economy."); HOSKINS & LABONTE, *supra* note 21, at 35.
[182] Lux & Greene, *supra* note 8, at 22.
[183] 5 U.S.C. § 706 (2012).
[184] 412 F.3d 133 (D.C. Cir. 2005).
[185] *Id.* at 137; ROSE & WALKER, *supra* note 150, at 29 ("[T]he rule at issue required that mutual fund boards have no less than 75% independent directors and be chaired by an independent director.").
[186] *Chamber of Commerce*, 412 F.3d at 142; 15 U.S.C. § 80a-2(c) (2012).
[187] *Chamber of Commerce*, 412 F.3d at 140, 144 (stating the "rule is 'arbitrary and capricious' if agency fails to consider factors 'it must consider under its organic statute.'") (citing Pub. Citizen v. Fed. Motor Carrier Safety Admin., 374 F.3d 1209, 1216 (D.C. Cir. 2004)).
[188] 177 F. Supp. 3d 219 (D.D.C. 2016).

(FSOC) decision to designate MetLife as a systemically important financial institution.[189] Relying on *Michigan v. EPA,* a 2015 Supreme Court case, the U.S. District Court for the District of Columbia stated that "agencies must . . . engage in 'reasoned decisionmaking,' which requires 'consideration of [all] the relevant factors.'"[190] The Court in *Michigan v. EPA* concluded a decision not to analyze the costs or benefits of a rule prior to finalizing that rule is tantamount to a finding such analysis is irrelevant.[191] Relying on the holding in *Michigan v. EPA*, the court in *MetLife* instructed agencies must consider the costs of their decisions.[192] The FSOC failed to "consider the cost of regulation, a consideration that is essential to reasoned rulemaking."[193]

MetLife, and by extension *Michigan v. EPA*, hold that an outright failure to consider costs and benefits is per-se arbitrary and capricious.[194] This could be used as precedent to override those 57 Dodd-Frank rules found to contain no cost-benefit analysis.[195] Some scholars advocate for an even stricter application of arbitrary and capricious review to cover situations in which an agency fails to "empirically demonstrate that [a] rule's costs were acceptable relative to its overall impact," a standard more in line with Circular A-4.[196] However, the Supreme Court in *Michigan v. EPA* indicated the EPA statute did not require "a formal cost-benefit analysis in which each

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[189] *Id.* at 223; Chris Walker, *Sunstein on Cost-Benefit Analysis and the Administrative Procedure Act (AdLaw Bridge Series)*, YALE J. ON REG.: NOTICE & COMMENT (Apr. 14, 2016), http://yalejreg.com/nc/sunstein-on-cost-benefit-analysis-and-the-administrative-procedure-act-adlaw-bridge-series-by-chris-2/ [https://perma.cc/PM99-VQ7B] ("Two weeks ago, in MetLife v. Financial Stability Oversight Council, District Judge Rosemary Collyer (D.D.C.) sent waves through the financial services industry and among scholars of cost-benefit analysis.").

[190] *Metlife*, 177 F. Supp. 3d at 230 (citing Michigan v. EPA, 135 S. Ct. 2699, 2706 (2015)).

[191] Michigan v. EPA, 135 S. Ct. at 2710 (2015) ("When it deemed regulation of power plants appropriate, EPA said that cost was *irrelevant* to that determination—not that cost-benefit analysis would be deferred until later.").

[192] *Metlife*, 177 F. Supp. 3d at 240; Michigan v. EPA, 135 S. Ct. at 2711.

[193] *Metlife*, 177 F. Supp. 3d at 242.

[194] *Id.*; Michigan v. EPA, 135 S. Ct. at 2711.

[195] *Metlife*, 177 F. Supp. 3d at 242; Lux & Greene, *supra* note 8, at 28.

[196] VARTANIAN, *supra* note 86, at 4 ("After all, if an agency adopts a rule and does not fully understand whether that rule will ultimately have a positive, negative or neutral impact on the economy, how can that not be an arbitrary decision?"); *see generally*, CIRCULAR A-4, *supra* note 157.

advantage and disadvantage is assigned a monetary value," as would be required by Circular A-4.[197]

Chamber of Commerce on the other hand, establishes that a rule can be arbitrary and capricious when the agency "fails to consider factors 'it must consider under its organic statute.'"[198] This standard provides an even stronger hook for analysis of Dodd-Frank rulemaking relating to community banks. The Federal Reserve, FDIC, and OCC are all required by statute, as part of their rulemaking, to "consider" both costs and benefits, especially for "small depository institutions."[199] Likewise, the CFPB is instructed to "consider . . . the impact of proposed rules on [depository institutions with less than $10 billion in assets], and the impact on consumers in rural areas."[200] A failure to adequately consider costs and benefits, or the impact of a rule on community banks, could give rise to judicial review under *Chamber of Commerce*.[201] However, overturning a rule under either *MetLife* or *Chamber of Commerce* is not a guaranteed success. The Supreme Court in *Michigan v. EPA* clearly affirmed that it is up to the agency to decide "how to account for cost," and any agency interpretation of "consider" in their statutes would likely be given *Chevron* deference.[202] Ultimately, either *MetLife* or *Chamber of*

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[197] Michigan v. EPA, 135 S. Ct. at 2711 ("We need not and do not hold that the law unambiguously required the Agency, when making this preliminary estimate, to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value. It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost."); CIRCULAR A-4, *supra* note 157, at 2–3 (mandating quantification of monetary costs, if possible).

[198] Chamber of Commerce of the U.S. v. SEC, 412 F.3d 133, 140 (D.C. Cir. 2005).

[199] 12 U.S.C. § 1813(z) (2012) (defining "Federal banking agencies" as "the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation."); 12 U.S.C. § 4802(a) (2012) ("[E]ach Federal banking agency shall consider, . . . (1) any administrative burdens that such regulations would place on depository institutions, including small depository institutions and customers of depository institutions; and (2) the benefits of such regulations.").

[200] 12 U.S.C. §§ 5512, 5516(A)(1) (2012).

[201] *Chamber of Commerce*, 412 F.3d at 140.

[202] Michigan v. EPA, 135 S. Ct. 2699, 2711 (2015); Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the

Commerce could still be used as a potential hook for judicial review of Dodd-Frank rules that fail to properly consider costs and benefits for community banks.[203]

2. Solutions

While cost-benefit considerations should be fairly easy, the lack of quantifiable data collection on the costs of Dodd-Frank significantly complicates the analysis. As such, the first solution is to promote greater data collection on the costs of financial regulation.[204] While some suggest even this would not be enough to fully inform the debate on community bank struggles, it most certainly can help.[205]

However, simply improving data collection on the costs and benefits of financial regulation is not the same as mandating an agency perform a thorough cost-benefit analysis as part of rulemaking. As such, either Congress or the President should instruct the financial regulatory agencies to engage in a more formalized cost-benefit analysis.[206] Such a requirement would likely lead to better final rules.[207] Enacting this change could be as simple as subjecting the financial regulatory agencies to Circular A-4. It could also be achieved by amending their organic statutes.[208]

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principle of deference to administrative interpretations . . . ."); 12 U.S.C. §§ 4802(a), 5512 (2012).

[203] For more on this topic, see Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L. REV. 1 (2017).

[204] *See* VARTANIAN, *supra* note 86, at 2 ("[T]he government should be compiling empirical data on post-enactment costs that can inform policy makers about how to fine-tune Dodd-Frank's continuing regulation of financial institutions and markets.").

[205] JAMES DISALVO & RYAN JOHNSTON, FED. RESERVE BANK OF PHILA. RESEARCH DEP'T, BANKING TRENDS HOW DODD-FRANK AFFECTS SMALL BANK COSTS 17 (2016) ("However, even with years of data in hand, it will remain difficult to disentangle regulatory costs from other factors that affect small banks' cost structures.").

[206] VARTANIAN, *supra* note 86, at 4 (suggesting a "simple fix" is to require agencies to "conduct a standardized, rigorous cost-benefit analysis").

[207] *Regulatory Burdens, supra* note 2, at 27 ("More generally, a requirement that all rulemaking by the financial regulators be informed by economic analysis could assist the regulators in designing better regulations and identifying instances in which additional regulation is not necessary.").

[208] *See also* John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L. J. 882, 910 (2014)

Finally, it is not enough to simply consider the costs and benefits of a rule at implementation. Effective cost-benefit analysis should extend beyond when the rule is issued.[209] The EGRPRA requirement to revisit a rule every 10 years is too long a time period to adequately address ongoing changes. Furthermore, the costs and benefits of regulations are rarely, if ever, considered in aggregate.[210] In conclusion, taking steps to greater quantify the costs and benefits of Dodd-Frank rulemaking, in addition to formalistic cost-benefit analysis both before and after final rules are issued, will likely help to minimize the regulatory burden facing community banks.

B. Maintaining Benefits While Reducing Costs

Another way to consider whether community banks are struggling under Dodd-Frank is to consider whether the current benefits of financial regulations could be achieved at a lesser cost.[211] This type of consideration is more easily conducted than a cost-benefit analysis because it involves considering less burdensome alternatives to a rule, rather than trying to quantify and balance whether the existent benefits exceed the costs. For example, many community banks note that they spend more time than they used to simply figuring

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("By contrast, in the United Kingdom, the [Financial Conduct Authority and the Prudential Regulation Authority] are required by statute to conduct quantified [Cost Benefit Analysis], unless in the opinion of the agencies the costs or benefits 'cannot reasonably be estimated' or 'it is not reasonably practicable to produce an estimate,' in which case the agency must publish its opinion and explain it.").

[209] Evan Weinberger, *Regulators Looking To Simplify Small-Bank Capital Rules*, LAW360 (Mar. 21, 2016), law360.com/articles/904382/regulators-looking-to-simplify-small-bank-capital-rules ("'We cannot have a regulatory system that adds regulations every year and reviews them every decade,' Wayne Abernathy, the American Bankers' Association's executive vice president of financial institutions policy and regulatory affairs, said in a statement. 'Instead, reviewing and eliminating unnecessary regulations should be a continuous, ongoing effort by each banking agency.'").

[210] HOSKINS & LABONTE, *supra* note 21, at 35 ("Estimates are made before rules are implemented and are generally not revisited after the fact to test their accuracy . . . . [T]here are no statutory requirements for regulators to estimates the costs associated with regulation . . . as a whole. Because estimates are typically made for individual rules in isolation, there is little understanding of what happens to overall burden when rules are aggregated.").

[211] *Id.* at 2.

out whether their bank is subject to a regulation.[212] In many cases, community banks are not even subject to the rule in question.[213] Even though the financial system as a whole gains no benefit, because community banks are exempt from these rules, community banks bear a cost of determining whether they have to comply or not. In other instances, the answer is not as clear.

1. *Case Study #2: Bank Examinations and Call Reports*

Perhaps one of the most significant examples of a cost imposed on banks is the call report. Call reports are "detailed quarterly financial reports all banks file with regulators" as part of their prudential regulation.[214] Over the last 60 years, the amount of information tracked in the call report has multiplied.[215] The present call report includes 2,379 individual data items.[216] However, community banks rarely, if ever, have to report information for all of those data items.[217] Because community banks must determine whether they must report information for each of the 2,379 data items every time they file call reports, "community banks incur disproportionately higher costs for compliance with information reporting requirements."[218] Since Dodd-Frank, community banks

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[212] *Regulatory Burdens, supra* note 2, at 14, 24 ("In 1982, my staff and I spent 10% to 15% of our time understanding and complying with regulation and law. Today, my senior staff and I spend in excess of 35% of our time understanding and complying with law and regulation.").

[213] AN INCREMENTAL APPROACH TO FINANCIAL REGULATION, *supra* note 22, at 7 ("The thousands of pages of rules written for large, complex financial institutions must still be understood by smaller institutions, despite the rules' irrelevance for how smaller institutions conduct business. Smaller institutions must direct resources toward understanding whether the regulations apply and away from serving the credit and deposit needs of their communities.").

[214] Rapoport, *supra* note 110.

[215] COMMUNITY BANKING IN THE 21ST CENTURY—2016, *supra* note 66, at 20–21; Ash, et al., *supra* note 16, at 2.

[216] COMMUNITY BANKING IN THE 21ST CENTURY—2016, *supra* note 66, at 21.

[217] HOSKINS & LABONTE, *supra* note 21, at 25 (claiming that "a typical $75 million community bank showed reportable amounts in only 14 percent of the data items in the call report, and provided data on 40 pages").

[218] Letter from Stephen Wilson to Sheila Bair, *supra* note 13 at 3.

noted the burden associated with filing call reports has increased substantially.[219]

In response to the complaints of many community bankers, the Department of the Treasury, OCC, Federal Reserve, and FDIC jointly proposed a new streamlined call report in August 2016.[220] The new call report, FFIEC 051, is available for banks with less than $1 billion in total assets who have domestic offices only.[221] Such banks had the opportunity to continue filing form FFIEC 041 (the current call report for banks with less than $10 billion in assets), or switch to FFIEC 051 starting with their March 31, 2017 filing.[222] Certain banks otherwise eligible to file FFIEC 051 may be required to continue filing FFIEC 041 by their prudential regulators.[223] In developing form FFIEC 051, the agencies took steps to dialogue with community bankers, allowing community banks a direct opportunity to provide insight and feedback on certain regulatory pressure points prior to FFIEC 051 being published for comment.[224]

FFIEC 051 takes four major steps to ease the reporting burden faced by community banks. First, the agencies eliminated all data items for which a $1 billion asset-size reporting threshold already exists, 40 percent of what was formerly tracked in FFIEC 041.[225] Second, FFIEC 051 changes the reporting frequency of certain items across nine separate schedules from quarterly to either semiannually or annually.[226] Third, FFIEC 051 replaces the information formerly collected in certain schedules with a supplemental schedule.[227] This replaces certain data items with yes/no questions indicating whether a

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[219] HOSKINS & LABONTE, *supra* note 21, at 36 ("[A]lmost three quarters of respondents stated that the number of hours required to complete the call report had increased over the last ten years.").
[220] Proposed Agency Information Collection Activities; Comment Request, 81 Fed. Reg. 54,190, 54,192 (proposed Aug. 15, 2016).
[221] *Id.* at 54,194.
[222] *Id.*; Agency Information Collection Activities: Submission for OMB Review; Joint Comment Request, 82 Fed. Reg. 2444, 2444 (Jan. 9, 2017).
[223] *See* Proposed Agency Information Collection Activities; Comment Request, 81 Fed. Reg. at 54,194 (including reasons why FFIEC 051 will not be eligible for certain qualifying banks).
[224] *Id.* at 54,193.
[225] *See id.* at 54,194, 54,199–211; COMMUNITY BANKING IN THE 21ST CENTURY—2016, *supra* note 66, at 21.
[226] Proposed Agency Information Collection Activities; Comment Request, 81 Fed. Reg. at 54,194–96, 54,211–12.
[227] *Id.* at 54,194.

bank engages in the complex or specialized activity, with additional data tracked in the supplemental schedule.[228] Finally, FFIEC 051 includes a separate, shorter list of instructions for filling out the new call report.[229] Notably, the agencies not only listened to the needs of community bankers, but also took steps to develop FFIEC 051 in a way that would limit the costs associated with adapting to the new call report, while maintaining the benefits of data collection.[230]

The effects of FFIEC 051 were seen almost instantly. The document is a mere 61 pages, compared to the 85 of FFIEC 041.[231] The instructions have been cut from 728 pages to 532.[232] This alone should significantly impact the compliance burden on small banks. Many community banks were quick to take advantage of the new call report form.[233] In March 2017, 3,500 institutions, or 67.5 percent of those banks eligible, filed FFIEC 051.[234] Moreover, the steps taken by the regulatory agencies in considering the concerns of community banks will not be stopping with FFIEC 051.[235] The Federal Financial Institutions Examination Council has indicated the impetus behind the new call report was the results of the first three of nine surveys the agency is undertaking to reduce the burdens of call reports.[236] The agency noted further changes in response to the results of the

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[228] *Id.*
[229] *Id.* at 54,198.
[230] *Id.* at 54,194 (mentioning one such example is maintaining the order and numbering of existing data points).
[231] Agency Information Collection Activities: Submission for OMB Review; Joint Comment Request, 82 Fed. Reg. 2444, 2444 (Jan. 9, 2017).
[232] *Compare* FED. FIN. INST. EXAMINATION COUNCIL, INSTRUCTIONS FOR PREPARATION OF CONSOLIDATED REPORTS OF CONDITION AND INCOME FFIEC 031 AND FFIEC 041 (Mar. 2017), *with* FED. FIN. INST. EXAMINATION COUNCIL, INSTRUCTIONS FOR PREPARATION OF CONSOLIDATED REPORTS OF CONDITION AND INCOME FOR A BANK WITH DOMESTIC OFFICES ONLY AND TOTAL ASSETS LESS THAN $1 BILLION FFIEC 051 (Mar. 2017).
[233] *See*, Chris Vanderpool, *Small Banks File Streamlined Call Reports for First Time*, SNL: DATA DISPATCH (May 17, 2017), https://www.snl.com/interactivex/article.aspx?KPLT=7&id=40685463.
[234] *Id.*
[235] *See* FED. FIN. INST. EXAMINATION COUNCIL, FIL-82-2016 NEW STREAMLINED CONSOLIDATED REPORTS OF CONDITION AND INCOME (CALL REPORT) FOR ELIGIBLE SMALL INSTITUTIONS AND OTHER CALL REPORT REVISIONS 2 (Dec. 30, 2016).
[236] *Id.*

remaining six surveys have an anticipated implementation date of March 31, 2018.[237]

In addition to the call report, banks are also subject to examinations.[238] Generally speaking, these examinations occur on a yearly basis.[239] In 2007, an exception was passed allowing banks with less than $500 million in assets who have "high supervisory ratings and meet certain conditions" to be examined once every 18 months instead.[240] Nevertheless, after Dodd-Frank financial regulators continued with their efforts to minimalize the burdens associated with examination.[241] In December 2015, President Obama signed a law that, in part, raised the asset size threshold for the 18-month examination cycle to $1 billion.[242] The administrative agencies published their final rule implementing this requirement in December 2016.[243] This change is estimated to increase the number of eligible banks by approximately 600, bringing the total number of banks eligible for an 18-month examination cycle to approximately 4,800.[244]

2. *Solutions*

An easy solution to limit the burden of community banks is to clarify when they are and are not subject to a specific rule. In instances

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[237] *Id.*
[238] *See Examinations: Overview*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, https://www.occ.treas.gov/topics/examinations/examinations-overview/index-examinations-overview.html [https://perma.cc/WA4X-E2VL].
[239] HOSKINS & LABONTE, *supra* note 21, at 24.
[240] *Id.*
[241] *See, e.g.*, *Wall Street Reform: Assessing and Enhancing the Financial Regulatory System: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 113th Cong. 47 (2014) ("Recognizing the burden that the on-site presence of many examiners can place on the day-to-day business of a community bank, we are also working to increase our level of off-site supervisory activities."); *Federal Reserve Seeks to Conduct More Loan Reviews Off-Site*, FED. RES. SYS.: COMMUNITY BANKING CONNECTIONS, https://www.communitybankingconnections.org/articles/2014/q2/loan-reviews-off-site [https://perma.cc/HCZ9-27TG].
[242] 12 U.S.C. § 1820(d)(4) (2012).
[243] Expanded Examination Cycle for Certain Small Insured Depository Institutions and U.S. Branches and Agencies of Foreign Banks, 81 Fed. Reg. 90,949, 90,949 (Dec. 16, 2016).
[244] *Id.* at 90,950.

where community banks are exempted from rules, time spent determining the applicability or scope of a rule serves no benefit and only increases the costs facing community banks. One simple solution would be to require a statement of applicability to be filed with every new regulation. These statements could be as short as one page and simply indicate whether and to what extent, community banks are subject to the rule.[245] This would serve as a convenient reference point for community bankers and be more efficient than each individual bank making a determination on their own. The OCC has already adopted a similar solution.[246] Some might argue this effectively shifts a cost currently borne by community banks onto the government. While that is technically true, the benefit of having a clear statement as to when a regulation does and does not apply to a community bank far outweighs the minimal costs associated with those who have written a rule articulating such a statement.

A perhaps more extreme proposal would be to standardize the definition of a community bank and maintain a consistent exemptive policy across all regulations. By and large, regulations do not apply a consistent threshold for determining exemptions.[247] This means every time a new regulation is issued, banks need to spend time determining whether they are affected by the rule. A standardized exemption definition of a community bank would allow banks to make a single determination whether they will qualify for exemptions, and then not have to continue to make that determination each time a new regulation is passed. Such a proposal is not without its faults, as simply deciding at what point to set the exemption would be of great debate.[248]

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[245] A similar proposal was offered by Hillary Clinton as part of her 2016 presidential campaign. *See* Gabriel T. Rubin, *Hillary Clinton Calls for Rule Exemptions for Small Banks; Clinton Says Community Banks Should Be Freed From Rules Intended for Big Banks*, WALL ST. J. (Aug. 25, 2016), https://www.wsj.com/articles/hillary-clinton-calls-for-rule-exemptions-for-small-banks-1472097665.

[246] FED. FIN. INST. EXAMINATION COUNCIL, JOINT REPORT TO CONGRESS: ECONOMIC GROWTH AND REGULATORY PAPERWORK REDUCTION ACT 11 (2017) ("The OCC has added a 'Note for Community Banks' box to all OCC bulletins that explains if and how the new guidance or rulemaking applies to them.").

[247] *See* HOSKINS & LABONTE, *supra* note 21, at 16–17 tbl.2, 18 (describing some of the different ways regulations are tailored).

[248] *See id.* at 38 ("Were policymakers to move to a single exemption level, the question would be whether the exemption should be set relatively high, so

One broader solution, designed to correct situations of unnecessarily costly regulations, is to embrace tailoring.[249] "With tailoring, a rule may apply to small banks and larger banks, but the rule is structured to reduce the regulatory burden on small banks . . . ."[250] Some legislators have proposed laws that would require regulatory agencies to engage in mandatory tailoring.[251] Opponents to such legislation commonly claim it creates a "system where every financial rule" would have to be set on a "bank-by-bank basis."[252] While tailoring legislation was initially proposed during the 114th Congress and reintroduced in the 115th,[253] a law requiring tailoring may not be necessary. The financial regulators all broadly agree tailoring is an important consideration, and in the wake of Dodd-Frank, have taken great lengths to tailor almost every single major rule issued.[254] Finally, President Trump issued an Executive Order on February 3, 2017, in part establishing that a "core principle" of financial regulation is ensuring regulations are "efficient, effective, and *appropriately tailored*."[255] In short, financial regulations issued under Dodd-Frank

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that regulations with exemptions only applied to very large, complex banks, who tend to be active internationally and have non-bank subsidiaries with substantial operations, or whether exemptions should be set relatively low, so that it applied only to relatively small banks that tended to have simple business models.").

[249] *Id.* at 13 ("Tailoring is used when policymakers want to make sure that a requirement still applies to small banks but would like to reduce the burden associated with complying.").

[250] *Id.*

[251] Jeff Bater, *Community Bankers Blame Too Many Rules for Mergers in Sector*, BLOOMBERG BNA (June 10, 2016), www.bna.com/community-bankers-blame-n57982073920/ [https://perma.cc/94YN-P4VT] ("In March, the House Financial Services Committee approved . . . the Taking Account of Institutions with Low Operation Risk (TAILOR) Act. The measure . . . would direct banking regulators to take into consideration the risk profile and business models of institutions subject to regulatory action . . . .").

[252] H.R. REP. NO. 114-870, at 11 (2016).

[253] *See, e.g.*, TAILOR Act of 2017, H.R. 1116, 115th Cong. (2017); TAILOR Act of 2016, S. 3153, 114th Cong. (2016); TAILOR Act of 2015, H.R. 2896, 114th Cong. (2015).

[254] George, *supra* note 51, at 1–2; HOSKINS & LABONTE, *supra* note 21, at 15 ("CRS identified 14 major rules that have been issued since 2010 pursuant to Dodd Frank and the Basel Accords . . . . Of the 14 major rules, 13 have either an exemption or are tailored for small banks.").

[255] Exec. Order No. 13,772, 82 Fed. Reg. 9,965, 9,965 (Feb. 8, 2017) (emphasis added).

are exceptionally tailored as-is, and there are strong signs that a preference for tailoring will continue into the future.

C. Competitive Advantage

The final method of considering the regulatory burden on community banks is to compare the extent of a regulation's burden on community banks and noncommunity banks. A regulation increasing the competitive advantage noncommunity banks have over community banks would contribute to an undue relative regulatory burden. Community bankers believe Dodd-Frank does just that.[256]

The primary complaint of community bankers is that in many cases, regulations stemming from Dodd-Frank effectively treat noncommunity banks and community banks identically.[257] Community bankers view the present regulatory environment as "one size fits all."[258] Because the regulations treat all banks the same, "a smaller bank has a relatively higher cost of regulation compared to a larger bank."[259] As such, many believe that these regulations "disproportionately burden the small banks."[260] Noncommunity banks are able to better handle these costs because they have a greater asset base to spread those costs across.[261]

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[256] MARSH & NORMAN, *supra* note 3, at 5 ("[T]he costs of complying with Dodd-Frank will increase the competitive advantage of large banks to the detriment of community banks.").
[257] HOSKINS & LABONTE, *supra* note 21, at 12; *Regulatory Burdens, supra* note 2, at 11.
[258] Ash, et al., *supra* note 16, at 4.
[259] RON FELDMAN ET AL., FED. RESERVE BANK OF MINNEAPOLIS, ECONOMIC POLICY PAPER 13-3, QUANTIFYING THE COSTS OF ADDITIONAL REGULATION ON COMMUNITY BANKS 5 (2013).
[260] *Regulatory Burdens*, *supra* note 2, at 19 ("[The regulations impose] regulatory costs that disproportionately burden the small banks, and its consumer protection model is one that works much better for large banks than it does for small.").
[261] BREWER & RUSSELL, *supra* note 5, at 3 ("Anecdotally, it is easy to see that a bank with over $50 billion dollars of assets can more easily absorb the compliance costs than a bank with only $175 million of assets."); WALLISON, *supra* note 55, at 5.

The aforementioned argument centers on the belief there is an economy of scale associated with financial regulation.[262] This is because, although "[r]egulatory compliance costs are likely to rise with size," when measured relative to a bank's revenue, compliance is cheaper for noncommunity banks than it is for community banks.[263] The GAO has observed "larger banks generally are more profitable and efficient than smaller banks," suggesting there may be an economy of scale effect.[264] One reason is because noncommunity banks often internalize a major cost associated with compliance: they typically have more sophisticated legal and compliance staff.[265] When a bank has to hire a lawyer or consultant, the bank is at a disadvantage compared to a bank with one on staff.[266] While data analysis suggests the presence of economies of scale, it appears a majority of banks are not burdened by it.[267] In 2011, the FDIC concluded most community banks with asset sizes over $100 million already benefit from the same economies of scale as the largest noncommunity banks.[268]

1. Case Study #3: Interchange Fees and the Durbin Amendment

The Durbin Amendment caps interchange fees, otherwise known as swipe fees.[269] "An interchange fee is the charge assessed on

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[262] FDIC COMMUNITY BANKING STUDY, *supra* note 19, at 5-22 ("Economies of scale exist when the average cost of producing a unit of output declines as the volume of output increases."); Lux & Greene, *supra* note 8, at 21.
[263] HOSKINS & LABONTE, *supra* note 21, at 28.
[264] *The State of Rural Banking*, *supra* note 59, at 37.
[265] *Regulatory Burdens*, *supra* note 2, at 24.
[266] DISALVO & JOHNSTON, *supra* note 205, at 17.
[267] HOSKINS & LABONTE, *supra* note 21, at 28 (reporting "exams for larger banks took longer, but the increase in hours was not linear with the increase in assets" suggesting presence of some economies of scale in compliance).
[268] FDIC COMMUNITY BANKING STUDY, *supra* note 19, at 5-23 ("Separate analysis was conducted for different lending specialist groups because they may have unique costs and technologies that lead to distinctive patterns of scale economies.").
[269] GRANT THORNTON, COMPLIANCE IMPLICATIONS OF CROSSING THE $10 BILLION ASSET THRESHOLD 4 (2015), https://www.grantthornton.com/~/media/content-page-files/financial-services/pdfs/2015/BK/150916-FIS-Banking-Crossing-10-Billion-Asset-Threshold-Article-151014-FINAL.ashx [https://perma.cc/KL7B-MXG5].

a merchant every time you swipe your debit or credit card."[270] The Durbin Amendment requires the Federal Reserve to set a "reasonable and proportional" cap on interchange fees.[271] The Federal Reserve's finalized rule, issued in June 2011, sets a $0.21 cap on interchange fees per transaction, and allows an additional 0.05 percent charge to cover fraud prevention.[272] Prior to the cap, "the average swipe fee generated $0.44 per transaction for banks."[273]

In 2010, prior to the final rule being issued, Stephen Wilson, chairman of the ABA, wrote a letter to Sheila Bair, the then-Chairman of the Federal Reserve, identifying the Durbin Amendment as a problem area for community banks.[274] The letter claimed "[i]nterchange is one of the most important sources of non-interest income for community banks, and the severe reduction in debit-card interchange income that would result from implementation of the Durbin amendment would be a major hit to the overall earnings of community banks."[275] Mr. Wilson was undoubtedly correct interchange fees were critically important: they were a major revenue driver, representing 8.8 percent of total noninterest income for community banks, and the third highest generator of noninterest income in 2011.[276] In the final version of Dodd-Frank, signed into law a few months after Mr. Wilson's letter, all banks with less than $10 billion in assets were exempted from the Durbin Amendment.[277]

Nevertheless, community bankers expressed additional concerns about the Durbin Amendment.[278] Their primary concern was, even though they were exempted, they would nevertheless have to

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[270] Tim Chen, *What the Durbin Amendment Means for You*, U.S. NEWS (July 12, 2011), http://money.usnews.com/money/blogs/my-money/2011/07/12/what-the-durbin-amendment-means-for-you [https://perma.cc/3SR2-HVJD] (claiming the fee "is levied to offset the cost of fraud prevention and processing the transaction").

[271] 15 U.S.C. § 1693o-2(a)(2) (2012); MARSH & NORMAN, *supra* note 3, at 27 (bemoaning that the Durbin Amendment does not define what either "reasonable" or "proportional" means).

[272] AM. BANKERS ASS'N, DODD-FRANK AND COMMUNITY BANKS 12 (2012).

[273] GRANT THORNTON, *supra* note 269, at 4.

[274] Letter from Stephen Wilson to Sheila Bair, *supra* note 13.

[275] *Id.* at 2.

[276] *See* FDIC COMMUNITY BANKING STUDY, *supra* note 19, at 4-3 tbl.4.2.

[277] 15 U.S.C. § 1693o-2(6) (2012).

[278] *See Regulatory Burdens, supra* note 2, at 12 ("Durbin has affected the entire banking industry. To remain competitive in the marketplace, our vendors had to reduce their interchange fees.").

lower their interchange fees in order to remain competitive.[279] Because the interchange fee is charged to the merchant, the belief was merchants would be incentivized to no longer accept community bank cards (and therefore be subject to a higher interchange fee) and instead only accept large bank cards (with lower interchange fees).[280] Some scholars went so far as to claim such market forces effectively rendered the exemption "unsuccessful."[281]

Once again, data has proven community bankers' fears unfounded. While community bank interchange revenue did decrease slightly after the final rule was implemented in 2011, from an average of $0.45 per swipe to $0.43 per swipe, 2014 data indicated the average interchange fee was still $0.43 per swipe.[282] This suggests community bank interchange fee revenue has remained both relatively high and stable since the rule was implemented.[283] Some data even suggests community banks are making more money per swipe after Dodd-Frank than before.[284] Meanwhile, the Durbin Amendment worked exactly as expected for noncommunity banks—lowering their average interchange fee from $0.44 per transaction to $0.22 per transaction.[285] Furthermore, in 2012, community banks "took in 48 percent of all interchange fee revenue . . . a 16 percent increase in fee income from the previous year."[286] The volume of community bank transactions also increased at a faster rate than noncommunity banks: 12.3 percent

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[279] *Id.*; HOSKINS & LABONTE, *supra* note 21, at 19 (suggesting market forces may cause the Durbin Amendment rule to trickle down); DISALVO & JOHNSTON, *supra* note 205, at 17 ("[C]ompetition between large card issuers and small issuers would effectively impose the ceiling on small banks.").

[280] AM. BANKERS ASS'N, *supra* note 272, at 13 ("[M]arket forces will drive business to the lowest cost option and community bankers will feel the impact.").

[281] MARSH & NORMAN, *supra* note 3, at 28 ("In other words, the law may have expressly exempted community banks, but basic economic theory suggests that approach would have been unsuccessful.").

[282] GAO-16-169, *supra* note 102, at 38.

[283] *See id.*

[284] AN INCREMENTAL APPROACH TO FINANCIAL REGULATION, *supra* note 22, at 18 ("Community banks are earning nearly the same amount on debit interchange fees as they were prior to the financial crisis, and are actually making more than they were before the Dodd-Frank Act . . . .").

[285] DISALVO & JOHNSTON, *supra* note 205, at 17.

[286] AN INCREMENTAL APPROACH TO FINANCIAL REGULATION, *supra* note 22, at 18.

to 5.8 percent.[287] Clearly, community banks have remained competitive in the face of the Durbin Amendment.[288]

The Durbin Amendment is a clear example of community banks claiming a regulation will create a competitive advantage for noncommunity banks and the advantage simply never materializing. Community bankers, legal scholars, and economic researchers all predicted market forces would effectively impose the Durbin Amendment caps on community banks, in spite of the exemption. However, the data indicates the Durbin Amendment has not significantly impacted community banks, and the Federal Reserve's exemption worked exactly as planned.

2. Case Study #4: The Ability to Repay Rule and the Qualified Mortgage Exemption

One of the major causes of the financial crisis was mortgages were issued without due consideration as to whether mortgagors would be able to repay.[289] To address this problem, Dodd-Frank required that, at the time any mortgage is made, the bank must determine the borrower has "a reasonable ability to repay the loan."[290] Moreover, mortgages cannot have "nonstandard contract structures, such as balloon payments."[291] The "ability to repay" requirement is per-se fulfilled if the mortgage is a "qualified mortgage."[292] If a bank does not meet the ability to repay standard (either by making a determination or by issuing a qualified mortgage), the customer can affirmatively sue the bank if the loan was made in the last three years, and can claim a violation of the ability to repay rules beyond the three-

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[287] *Id.*

[288] DISALVO & JOHNSTON, *supra* note 205, at 17 ("In sum, the evidence does not support the claim that competitive forces have effectively imposed the interchange fee ceiling on small banks . . . .").

[289] Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6408, 6408 (Jan. 20, 2013) (codified at 12 C.F.R. pt. 1026).

[290] 15 U.S.C. § 1639c(a)(1) (2012).

[291] DISALVO & JOHNSTON, *supra* note 205, at 14–15; *see* 15 U.S.C. § 1639c(a) (2012).

[292] 15 U.S.C. § 1639c(b)(1) (2012) ("Any creditor with respect to any residential mortgage loan, and any assignee of such loan subject to liability under this subchapter, may presume that the loan has met the requirements of subsection (a), if the loan is a qualified mortgage.").

year statute of limitations as a defense to foreclosure.[293] While Dodd-Frank established certain definitions of qualified mortgages, it also authorized the CFPB to modify the initial definition.[294] In the final rule issued, the CFPB established as a minimum, a determination of ability to repay requires consideration of: (1) current or reasonably expected income or assets; (2) current employment status; (3) the monthly payment on the covered transaction; (4) the monthly payment on any simultaneous loan; (5) the monthly payment for mortgage-related obligations; (6) current debt obligations, alimony, and child support; (7) the monthly debt-to-income ratio or residual income; and (8) credit history.[295] The CFPB also established banks must verify the considered information using "reasonably reliable third-party records."[296] Because of the arduous standard required to demonstrate ability to repay, community banks take on significant legal risk when underwriting a mortgage that is not a "qualified mortgage."[297]

As part of the final rule, the CFPB established a limited exemption for "small creditors."[298] In order to qualify, a bank had to have less than $2 billion in assets, and originate no more than 500 first-lien mortgages in the preceding year.[299] If such a bank holds a mortgage in its portfolio, the mortgage is not subject to certain qualified mortgage restrictions, such as a specific debt-to-income ratio for the consumer.[300] This grants the bank "greater underwriting

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[293] CONSUMER FIN. PROT. BUREAU, ABILITY-TO-REPAY AND QUALIFIED MORTGAGE RULE: SMALL ENTITY COMPLIANCE GUIDE 30 (2016); MARSH & NORMAN, *supra* note 3, at 34 ("[I]f a lender cannot adequately document at the time that the loan is made that the borrower has the ability to repay, the lender violates the Truth in Lending Act and is subject to a lawsuit by the borrower as well as a defense to foreclosure.").
[294] 15 U.S.C. § 1639c(b)(3)(B)(i).
[295] Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6408, 6408 (Jan. 20, 2013) (codified at 12 C.F.R. pt. 1026).
[296] *Id.*
[297] *Regulatory Burdens, supra* note 2, at 26 ("Nonqualified mortgages can be offered, but the associated legal risk is high."); DISALVO & JOHNSTON, *supra* note 205, at 15 ("For the small bank, the key benefit of making qualified mortgages is that it then has protection against lawsuits by borrowers and against attempts by borrowers to avoid foreclosure.").
[298] Ability-to-Repay and Qualified Mortgage Standards under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. at 6409.
[299] GAO-16-169, *supra* note 102, at 26.
[300] *Id.*

flexibility."[301] Moreover, if the bank lends to rural or underserved communities, it can also employ balloon payments and still receive qualified mortgage protection.[302]

Due to the highly complex nature of ability to repay and the qualified mortgage exception, it should come as no surprise that these regulations were identified in a 2015 survey as "the most in need of modification," "the most confusing to implement," and "among the costliest to administer."[303] A 2014 survey reported 73 percent of community bankers felt the ability to repay and qualified mortgage regulations were holding back mortgage lending.[304] Given the potential for severe penalties, many community banks are "unwilling to make loans that are not qualified mortgages."[305] Therefore, "[s]mall bankers report . . . lower approval rates" as a result of the ability to repay and qualified mortgage rules.[306] Many community banks have decided to stop offering mortgages altogether.[307] Those who choose to continue offering mortgages profit very little off them.[308]

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[301] *The State of Rural Banking*, *supra* note 59, at 39 ("Small banks have greater underwriting flexibility when making Qualified Mortgage, or QM, loans . . . because if small banks hold the loans on portfolio, they are not bound to the fixed debt-to-income ratio limit that applies to larger lenders.").

[302] Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. at 6409; GAO-16-169, *supra* note 102, at 26 (observing balloon payments are "a risky loan feature otherwise not permitted for a qualified mortgage").

[303] COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 21 ("The bank must either decide not to offer the product or put procedures in place to ensure that proper documentation is performed and then retained adequately. Either decision is expensive.").

[304] Lux & Greene, *supra* note 8, at 23.

[305] GAO-16-169, *supra* note 102, at 26–27; COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 21 ("'The existence of ability to repay and QM creates a higher risk of lender liability for banks, especially community banks,' one banker said.").

[306] DISALVO & JOHNSTON, *supra* note 205, at 15.

[307] *See Bearing the Burden, supra* note 6, at 25 ("In Oklahoma, approximately 25 percent of the state's banks have simply elected to get out of the home mortgage lending business. They have concluded that both the litigation and regulatory risks they would encounter are simply too great given the limited number of such loans they normally would make in a given year.").

[308] COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 17 ("'Our mortgage operations operate at, or barely above, break-even volumes,' one banker said. 'It is a service we provide to our customers and is not profitable enough today to be a main source of our revenue.'").

Another complaint from community banks is the ability to repay and qualified mortgage rules impede relationship lending.[309] According to community bankers, because relationship lending aligns the incentives of borrowers and lenders, the ability to repay rule becomes largely unnecessary.[310] In addition, the ability to repay rule prevents community bankers from structuring loans in innovative ways to meet lenders' needs.[311] For example, one community banker cited these rules as why he abandoned his practice of requiring his clients to make mortgage payments for nine months a year instead of twelve which matched clients' seasonal income stream.[312] Another community banker lamented, "[t]he focus (now) is not so much on if proper underwriting was done on a loan but if that underwriting is properly documented as possible proof at a later date."[313]

Community bankers have pressed for relief, specifically an expansion of the "small creditor" exemption threshold.[314] A 2014 survey of 519 community banks indicated two-thirds of community banks made more than 500 mortgages a year and thus were unable to qualify as a small creditor, even though they had less than $2 billion in assets.[315] In the same survey, 50 percent of banks reported they "serve[d] rural areas [but] did not qualify for the rural exception."[316] Another route for regulatory relief is the proposition that any mortgage held in a bank's portfolio should automatically be considered a

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[309] *See* COMMUNITY BANKING IN THE 21ST CENTURY—2016, *supra* note 66, at 15 ("The rules do not 'take into account us knowing our customer'; they 'just make it tough for a small community bank to have the expertise to do mortgage loans in a small rural town'. . . .").
[310] George, *supra* note 51, at 5.
[311] *See Bearing the Burden, supra* note 6, at 34 ("One of the biggest advantages that rural banks had over large commercial banks was the ability to customize payment structure to meet their specific needs. We know our customers, we know when they receive paychecks and we know their cash flow needs. We could leverage this to compete against large lenders and better serve our community. However, due to the regulatory constraints, we've moved to a canned loan product system.").
[312] *Regulatory Burdens*, *supra* note 2, at 49.
[313] COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 21.
[314] *See* AN INCREMENTAL APPROACH TO FINANCIAL REGULATION, *supra* note 22, at 17 (proposing regulatory relief for community banks, including granting qualified mortgage "status to all loans held in portfolio" and "addressing inconsistencies in the rural designation process").
[315] GAO-16-169, *supra* note 102, at 28.
[316] *Id.*

qualified mortgage.[317] Some bankers argue such an exemption is justified because when a bank holds a loan in its portfolio, it carries the risk and therefore has every incentive to ensure the consumer has the ability to repay their loan.[318] Many community banks already hold a large percentage of their mortgages in their portfolio, even absent such an exemption.[319]

In response, financial regulators granted exemptions addressing some of the concerns.[320] Most notably, the CFPB raised the small creditor threshold from 500 mortgages per year to 2,000 per year, and further provided that the new cutoff does not include any mortgages held in portfolio by the bank.[321] The CFPB also expanded the definitions of "rural" and "underserved" to include more regions.[322] The CFPB estimated this change would increase the number of banks qualifying as "rural small creditors" from "about 2,400 to 4,100."[323] Furthermore, Congress attempted to address community bankers' request to exempt any loan held in portfolio as a qualified mortgage during the 2015–16 congressional session.[324] The Portfolio Lending and Mortgage Access Act passed the House in November 2015, but failed to get any further, as President Obama issued a Statement of Administration Policy indicating if the bill passed, "his senior advisors would recommend that he veto the bill."[325]

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[317] *E.g.*, *Bearing the Burden*, *supra* note 6, at 34; *Regulatory Burdens, supra* note 2, at 44; AN INCREMENTAL APPROACH TO FINANCIAL REGULATION, *supra* note 22, at 17.
[318] *Bearing the Burden, supra* note 6, at 25–26.
[319] COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 17 ("45 percent of respondents said they held at least 90 percent of the loans they originated . . . .").
[320] *See The State of Rural Banking*, *supra* note 59, at 39.
[321] Amendments Relating to Small Creditors and Rural or Underserved Areas Under the Truth in Lending Act (Regulation Z), 80 Fed. Reg. 59,944, 59,944 (Oct. 2, 2015) (codified at 12 C.F.R. pt. 1026).
[322] *Id.*
[323] *Id.* at 59,963.
[324] Portfolio Lending and Mortgage Access Act, H.R. 1210, 114th Cong. (2015); *Bearing the Burden, supra* note 6, at 26.
[325] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY H.R. 1210 —PORTFOLIO LENDING AND MORTGAGE ACCESS ACT (Nov. 17, 2015), https://obamawhitehouse.archives.gov/sites/default/files/omb/legislative/sap/114/saphr1210h_20151117.pdf [https://perma.cc/JR5R-TWZT]; *Bearing the Burden, supra* note 6, at 26.

While community banks benefited from the new exemptions, many still declined to underwrite certain mortgages.[326] A 2015 survey of almost 1,000 banks indicated "[l]ess than 25 percent of banks . . . expected to make non-[qualified] mortgage loans in the future on anything other than an 'exception' basis. More than 34 percent did not intend to make any such loans at all."[327] One community banker stated, "[t]he bank does not, nor does it have any intention of, accepting applications or originating any type of loans outside of the allowable exclusions to the [qualified mortgage] provisions." [328] While community banks have contoured their mortgage lending to the regulations, community bank struggles may be overstated, and the qualified mortgage rules have not significantly impacted mortgage lending.[329] Furthermore, the GAO found a majority of loans already met qualified mortgage criteria, and therefore, the rules "would have limited initial impacts on mortgage lending."[330]

In conclusion, while it is clear the qualified mortgage and ability to repay rules are highly complex and have certainly impacted mortgage lending, community banks by and large have been able to respond effectively. Through a combination of tailored regulations and successful amendments, the CFPB helped increase the number of banks benefiting from small creditor qualified mortgage exemptions. In turn, community banks limited their mortgage lending to fall within these exemptions, and gained the protections of the safe-harbor.

3. *Case Study #5: CFPB Standardization and Regulatory Trickle-Down*

Dodd-Frank created a new regulatory agency, the CFPB, with the stated goal of regulating "consumer financial products or services."[331] The CFPB is the primary consumer protection regulator for all banks with assets greater than $10 billion.[332] For any bank with assets less than $10 billion, "the CFPB may issue rules that would

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[326] COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 17.
[327] *Id.* at 18.
[328] *Id.*
[329] *Id*. ("30 percent of respondent bankers said the [ability to repay] rule failed to impact a single denial, and another 32 percent of respondents said the rule impacted less than 10 percent of their denials.").
[330] GAO-16-169, *supra* note 102, at 29.
[331] *See* 12 U.S.C. § 5491 (2012); GRANT THORNTON, *supra* note 269, at 2.
[332] 12 U.S.C. § 5515(a) (2012); HOSKINS & LABONTE, *supra* note 21, at 9.

apply to smaller banks," but the bank's prudential regulator maintains "primary supervisory and enforcement authority . . . ."[333]

One frequent concern expressed by community bankers about the CFPB is that Dodd-Frank and the CFPB have embraced standardization of financial products.[334] Standardization is "a reaction to the narrative that one of the causes of the financial crisis was the inability of parties to understand and appreciate the risks of innovative financial products."[335] In the long run, such an approach hinders the goals of Dodd-Frank.[336] Many community bankers feel the push towards standardization will undermine the relationship-banking model, one of their "strongest advantages," by limiting the customization of loans and other services.[337] Furthermore, community bankers believe that standardization will lead to an increased competitive advantage for larger banks.[338] Others note the push towards standardization will negatively impact informationally opaque

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[333] HOSKINS & LABONTE, *supra* note 21, at 9; Thomas M. Maxwell & Claudia V. Swhier, *Dodd-Frank Act Significantly Changes Regulatory Environment for Community Banks and Thrifts*, BANK ACCT. & FIN. (OCT.–NOV. 2010 ISSUE) 11, 15.

[334] *See Regulatory Burdens, supra* note 2, at 34 ("A recurring theme in Dodd-Frank, particularly with respect to the [CFPB], is that the standardization of financial products and forms will protect consumers.").

[335] *Id.* at 42.

[336] MARSH & NORMAN, *supra* note 3, at 35 (claiming standardization does not "fulfill the purposes of Dodd-Frank . . . to promote systemic stability and consumer protection"); *Regulatory Burdens, supra* note 2, at 26 ("[T]he assumption that consumers are homogenous is wrong. Community banks' practice of getting to know their customers and tailoring products to their needs is at odds with the Dodd-Frank version of customer protection.").

[337] AM. BANKERS ASS'N, *supra* note 272, at 5 ("Banks will find it much more difficult to tailor loan and deposit products to their customers, since the Bureau will favor standardized 'plain vanilla' products as it pursues disclosure simplification."); WALLISON, *supra* note 55, at 3 ("[O]ne-size-fits-all lending standards that have been imposed by regulators under Dodd-Frank have reduced the productivity, raised the operating costs, and limited the amount of credit that small banks could provide to small business borrowers."); FED. RESERVE & CONFERENCE OF STATE BANK SUPERVISORS, COMMUNITY BANKING IN THE 21ST CENTURY OPPORTUNITIES, CHALLENGES AND PERSPECTIVES 15 (2013) ("Many bankers felt that the move toward standardized products . . . [took] away one of the strongest advantages of community banks: the ability to tailor products to fit individualized needs.").

[338] Letter from Stephen Wilson to Sheila Bair, *supra* note 13.

borrowers.[339] Overall, their most severe concern is "many small businesses and individuals that are currently served by community banks may be denied credit."[340]

Underlying most community bankers' complaints about the CFPB is that even though the CFPB has no direct authority over community banks and exempts community banks from many of its policies, community bankers believe there is a regulatory trickle-down effect.[341] While the CFPB cannot enforce regulations directly against community banks, it is empowered to refer enforcement actions against a bank to that bank's regulator.[342] Regulators are obligated to respond to a referral but aren't obligated to take additional steps such as actually penalizing the bank.[343] In response to these concerns, the FDIC has assured community bankers that such a phenomenon does not turn "best practices" into "requirements."[344] Moreover, "Federal Reserve officials said that the Federal Reserve has set expectations for its examiners to not examine regional banks using the same requirements as for large banking institutions."[345]

Unfortunately, the concept of regulatory trickle down may be completely unavoidable. Even with pristine tailoring and broad exemptions for community banks, some community banks may still feel pressured to conform to rules to which they are otherwise not obligated. Ultimately, the only way to ameliorate such a situation is to maintain clear lines of communication and trust between the bank and its regulator. Communication will help regulatory agencies reinforce the position that they will adhere to the exemptions and won't turn best practices into rules—trust will help community bankers believe them.

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[339] *Regulatory Burdens, supra* note 2, at 34 ("[T]his focus on standardization fails to recognize the challenges . . . posed by borrowers who lack the deep credit history or documentation necessary for the model-based lending that's used by the larger banks.").
[340] *Id.*
[341] *See* GAO-16-169, *supra* note 102, at 40–41 ("[R]epresentatives from community banks and credit unions . . . stated that while CFPB exempts them from certain rules or parts of the rules, their prudential regulators might hold them to regulatory standards for larger institutions as a best practice.").
[342] HOSKINS & LABONTE, *supra* note 21, at 9.
[343] *Id.*
[344] GAO-16-169, *supra* note 102, at 41 (claiming the FDIC monitors "its examiners to help ensure that they are following FDIC policies, which take into consideration the size, complexity, and risk profiles of banks").
[345] *Id.*

4. *Solutions*

The previous case studies highlight the fact many regulations stemming from Dodd-Frank are tailored and make use of exemptions to limit the undue relative regulatory burden on community banks. Indeed, in each of the examples given, the regulatory agencies in one way or another heard the concerns of community bankers and attempted to respond. It is this commitment to flexibility and constant betterment of the regulations that truly underscores why community banks suffer minimal undue relative regulatory burden.

It is abundantly clear that in the wake of Dodd-Frank, community bankers have had more opportunities than ever to have their voices heard.[346] Since Dodd-Frank, many of the financial regulatory agencies have created "community bank advisory councils" to get direct feedback from community bankers.[347] Furthermore, "[c]ommunity bankers sit on the boards and advisory councils of the [Federal Reserve's] 12 regional reserve banks and 24 reserve bank branches."[348] Additionally, the Federal Reserve has launched a partnership with the Conference of State Bank Supervisors, sponsoring the annual Community Banking in the 21st Century conference, the data from which informs many regulatory decisions, and can be found throughout this note.[349] The conference and its associated surveys "have motivated the Federal Reserve to take a fresh look at the issues facing community banks, including the challenge of regulatory burden."[350] Some scholars even believe as a result of the broad exemptions generated through dialogue with regulators, community

[346] *The State of Rural Banking*, *supra* note 59, at 40; *see Regulatory Burdens, supra* note 2, at 25 ("Regulators have made some attempts to ease the burden by, for example, organizing dialogues with community banks and preparing compliance guides for community banks.").
[347] *The State of Rural Banking*, *supra* note 59, at 40.
[348] Ben S. Bernanke, Chairman, Fed. Reserve Sys., Remarks at Independent Community Bankers of America: Preserving a Central Role for Community Banking 1, 8 (Mar. 20, 2010), (draft available at https://www.federalreserve.gov/newsevents/speech/bernanke20100320a.pdf [https://perma.cc/XYP6-Y3MD]) ("It is important for our economic health to maintain a diverse and resilient financial system in which community banks play an important role.").
[349] George, *supra* note 51, at 2.
[350] COMMUNITY BANKING IN THE 21ST CENTURY—2015, *supra* note 26, at 5.

banks may have a competitive *advantage* compared to larger banks.[351] As such, the primary solution posed here is simple: to keep doing what is already being done, and for both community bankers and regulators to embrace the partnership they have fostered.

The last proposed solution is one directed less at regulators, and more at community banks themselves: embrace technology. Generally speaking, community banks take less advantage of technology.[352] This simple fact alone could impact the regulatory burden of community banks, as improved technology has been shown to "help bring down compliance costs."[353] Furthermore, technology allows community banks to better compete with noncommunity banks.[354] As consumer profiles shift, and lenders become younger, younger borrowers "may be more comfortable with technology and may prefer dealing with an online lender versus an in-person loan officer."[355] Another banker observed younger consumers preferred mobile banking.[356] However, some signs suggest that community banks have already begun to adapt. In a 2016 survey, 81 percent of community banks indicated that they offered mobile banking services, whereas only 71 percent indicated they offered those services in 2015.[357] Furthermore, an additional 13 percent indicated that while they do not currently offer mobile banking, "they planned to do so in the future."[358] Embracing technology in all of its forms will not only allow community banks to better compete with noncommunity banks, further leveling the playing field, but also allow them to better serve the consumers of the next generation.

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[351] *See The State of Rural Banking*, *supra* note 59, at 40 ("These exemptions may actually help to make community banks more competitive relative to larger banks serving the same communities.").

[352] Lux & Greene, *supra* note 8, at 2 (observing community banks "tend to use less technology" than noncommunity banks).

[353] *The State of Rural Banking*, *supra* note 59, at 40.

[354] *See* Rapoport, *supra* note 110 ("Technology 'allows us to be much bigger than what we are,' said Jeff Dick, CEO of MainStreet Bank in Fairfax, Va. 'We've used it as a growth strategy as opposed to putting branches everywhere.'").

[355] JAGTIANI & LEMIEUX, *supra* note 136, at 17.

[356] COMMUNITY BANKING IN THE 21ST CENTURY—2016, *supra* note 66, at 17 ("One banker in Indiana, for instance, said millennials want 'all interaction to be via a mobile platform, and this is difficult to implement for small and mid-size banks due to cost and expertise.'").

[357] *Id.*

[358] *Id.*

V. Conclusion

This note has taken a deep look into the post-Dodd-Frank regulatory environment and has sought to answer a simple question: has Dodd-Frank burdened community banks, and if so, how much? As has been discussed, the answer is far more complex. This note established the critical role of community banks, which supports their claim for regulatory relief: they serve important subsets of the population who would not be served otherwise, and they did not contribute to the financial crisis. Dodd-Frank's regulatory burdens were examined in the absolute. This examination highlighted a significant lack of data collection and a long history of community bank struggles dating back to the 1980s as community bankers have been squeezed from all sides by regulations, nonbank lenders, large banks, the economy, and more. Finally, this note ultimately looked at the regulatory burden of community banks relative to the regulatory burden of noncommunity banks to assess whether community banks have fallen victim to undue relative regulatory burden as a result of Dodd-Frank. Through three methods of thinking about undue relative regulatory burden, five case studies, and a series of solutions both big and small, this note demonstrated Dodd-Frank created no additional undue relative regulatory burden on community banks. The short, simple answer to the posed question is no, Dodd-Frank has not burdened community banks.

No law or regulation is ever written perfectly. There will always be flaws and those who claim a disadvantage. Honest feedback from those affected, coupled with a commitment to constantly improve our laws is the only way to create positive change. While community bankers are often quick to blame Dodd-Frank and financial regulators for their woes, these same regulators have saved the bankers. It has only been through open dialogue between community bankers and financial regulators that Dodd-Frank's relative regulatory burdens have been limited. If there is one solution this note advocates above all, it is that this dialogue must continue. Only through meaningful feedback and commentary from community banks can regulatory agencies better limit the burdens of future regulations.