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Comments on Agencies Proposed Rule on Disclosure and Reporting on CRA-Related Agreements from the Woodstock Institute

The proposed "sunshine provisions" promulgated under the Gramm-Leach-Bliley Act (GLB) may well drastically reduce the cooperative ventures between community organizations and financial institutions. These ventures are a critical part of the national effort to promote reinvestment and economic development in lower-income communities. The following comments are written with the intention of not increasing the damage to those ventures while recognizing the provisions of the statute.

A. Definition of Covered Agreement

1. *Covered Agreements*

The proper interpretation of a covered agreement is crucial to a faithful interpretation of GLB. The statute clearly does not cover any unilateral declaration by a financial institution (FI) of CRA goals or objectives. Coverage only applies in cases of written agreement between a FI and non-governmental entities or persons.

The terms "contract", "arrangement", and "understanding" should not be further defined. The covered agreements provisions of the statute already make unfair demands on groups that have relationships with financial institutions and making those distinctions any finer will only add to the basic unfairness of the law.

2. *Exemptions for Certain Agreements*

Below market rate loans: This term should be applied by examining loans made to similar people for similar purposes in similar markets not by setting an artificial range below an artificial mean rate of such loans. Examiners are highly unlikely to obtain an accurate enough sense of crucial sub-markets for highly specialized products to be able to construct a believable "market" rate and hence a believable range that constitutes below market for those sub-markets.

The regulatory agencies appear to be clear that a CRA comment made by direct invitation of the regulators is exempt and a comment made in response to a general invitation of the regulators via public notice is not. This distinction is substantively weak: it gives the appearance of permitting the examiners to collect adequate comments without subjecting commentators to the provisions, while reducing the range of comments they will actually receive. All comments to regulators should be treated the same however they are solicited.

The distinction between a contact where the general question is raised whether a bank product or service is CRA eligible and one where the question is about the actual CRA impact has a theoretical logic but absolutely no real world logic. Any discussion between a person and a FI that mentions CRA should be considered a CRA contact. Even if there were a real world logic, examiners would have to adopt hyper-intrusive and very expensive tactics to detect the difference in any interaction.

There must be temporal limits on the time between CRA contacts and CRA agreements that make the agreements covered agreements. The absence of a time limit for what constitutes a covered agreement would be a serious breach of constitutional rights by submitting non-governmental entities or person (persons) to an open-ended regulatory burden. Bank-community group relations are fluid as situations, goals, and staff change. In consequence, a CRA contact should have been made six months or less prior to an agreement to count as a CRA contact for the purpose of these provisions. It is possible for a person to make a CRA comment after making an agreement and for the two actions to be connected in the context of a bank application to an agency. But given the brief time permitted for comments on applications post-hoc comments should be limited to those made within three months of a person making an agreement with a FI.

If a person is covered by a CRA agreement but has not made a CRA contact the law is clear that such a person is not covered by these provisions. Only a person who has made a CRA contact and is party to an agreement is covered.

The agencies' suggestion about their exercise of powers to make additional exemptions to what is a covered agreement betrays a disturbing assumption. The agencies propose that certain day to day transactions should be exempt because the CRA contact does not have any coercive aspect. This suggests that the class of agreements that are not so exempt have, a priori, a coercive aspect. The agencies also suggest exemptions for contacts initiated by banks. The agencies presumably know that many CRA contacts are initiated by banks. They should also be aware that the notion of "being initiated by a bank" may not be an easily defined category simply because many contacts happen informally and orally and the two parties may well not remember who "initiated" the contact.

3. *Fulfillment of CRA*

The agencies surely interpret Congresssional intent correctly by assuming that "factors in fulfillment of CRA" do not include the performance of any activity connected with Federal anti-discrimination or consumer protection laws. Congress would have reacted to these provisions very differently were they perceived to have impacted the enforcement of those statutes negatively. It is, however, interesting to note that the agencies couch their concern by saying that the inclusion of such factors "could have an unintended and detrimental impact on compliance and enforcement of the fair lending laws." Are the agencies aware

that the current list of factors could have an unintended and detrimental impact on compliance and enforcement of the CRA? If that is the case, it is certainly not expressed in this proposed rule. Does that mean that the agencies are less concerned with the enforcement of the CRA? The agencies should make it clear in the Rule the practical steps the Rule incorporates for avoiding such detrimental impact.

4. Value

Funds that are part of multi-year agreements may be disbursed in a variety of patterns over the term of those agreements. Some may well be disbursed in full in the first or early years. For this reason, the value of disbursement in any given year should be the actual value disbursed in that year, *not* the total value divided by the number of years. Otherwise an entity might find itself reporting in e.g., year 5 of an agreement on funds that were disbursed at the beginning of year 1.

B. Disclosure of Covered Agreements

1. Disclosure to the Public

To avoid undue burdens falling on what will often be small, low-budget nonprofit organizations it is appropriate that the Rule should provide that the obligation to disclose a covered agreement terminates six months after the end of the term of the agreement. This limit is reasonable since a person could obtain the agreement after the time limit by submitting a FOIA request to the appropriate agency. It is also appropriate that any entity be able to recover the cost of providing the agreement to a third party.

C. Annual Reports

1. No Report Required by Person that does not Receive Funds or Resources

An entity should not be required to report on an agreement in a fiscal year in which it did not receive funds specified in that agreement. The purpose of these provisions is, apparently, to discover causal and hence temporal connections between grants etc to entities and those entities' CRA related comments. The lack of a temporal connection would suggest the lack of a causal connection and hence if no money has been received in a given year it is unlikely that the comment is related to the receipt of money. Moreover, an organization that is party to an agreement but does not receive funds under the agreement should not be required to report an agreement. Again, by definition, that organization cannot have entered into the agreement for its own institutional gain or for the personal gain of any member of that entity

2. Contents of Annual Report filed by Entities

It is difficult to comment on a provision that has to cope with legislative mandates that are contradictory. On the one hand, GLB calls for the avoidance of undue burden and on the other for full and detailed reporting. These provisions will probably not enter civic textbooks as examples of lawmaking at its best. The only rational solution to the dilemma is

to go back to the intent of the provisions which is apparently to discover causal connections between the granting of funds by FIs and the grantees' CRA comments. If that is the case, the reporting of key details will suffice. If the intent were to destroy the fruitful relationships between FIs and nonprofit community building groups by an irrational paperwork burden one could conclude otherwise, but such an explicit intent does not appear in the Congressional Record.

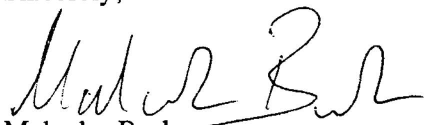
Given the intent, the reporting requirements should include sufficient information to permit an understanding of the use of funds disbursed in accordance with a covered agreement but no more. Accordingly, where funds are used for general purposes an entity should be allowed to report using documents filed for other purposes as long as those documents contain key details. An entity might therefore use an IRS 990 form, a state tax form, or other financial form that contained key details. The list of items contained in the IRS 990 form is sufficient to provide an understanding of the key patterns of expenditures and no further types of information should be required.

In the spirit of full but not excessive disclosure, we strongly recommend that the agencies make two changes in the reporting requirements for funds for specific purposes: (1) if any funds are used for a purpose for which an organization has received other funding, an entity's financial report to those other funders may be used to report on the expenditures under a covered agreement as long as those other reports specify the key details; (2) organizations that receive small amounts of project funding from agreements that in total trigger the reporting requirements should be able to satisfy the reporting requirements with that entity's 990 or other general financial reporting form. This provision should apply to organizations that receive $10,000 or less in grants from an FI and/or $50,000 or less in loans.

The purpose of discovering the patterns of expenditures will be fully served by permitting an organization to file a consolidated report for two or more covered agreements. There appears to be no compelling agreements to permit consolidated reports only when an organization has entered into a higher number of agreements.

Thank you for your consideration of these comments.

Sincerely,



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