DBA
Delaware Bankers Association

THE DELAWARE BANKERS ASSOCIATION

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July 20, 2000

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Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th and C Streets, NW
Washington, D.C. 20551
Re: Docket No. R-1069

Robert E. Feldman, Executive Secretary
Attention: Comments/OES
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

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Manager, Dissemination Branch
Information Management & Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington, D.C. 20552
Attention: Docket No. 2000-4

Communications Division
Office of the Comptroller of the Currency
250 E Street, SW, Third Floor
Washington, D.C. 20219
Attention: Docket No. 00-11

Re: Proposed Regulation on the Disclosure and Reporting of CRA-Related Agreements; 65 *Federal Register* 31961; May 19, 2000

The Office of the Comptroller of the Currency; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation and Office of Thrift Supervision (collectively referred to as the "Agencies") are requesting comments on a proposed rule that implements provisions of the recently enacted Gramm-Leach-Bliley Act (the "GLB" or the "Act"). The provisions require non-governmental entities or persons, insured depository institutions, and affiliates of insured depository institutions that are parties to certain agreements that are in fulfillment of the Community Reinvestment Act of 1977 (the "CRA") to make the agreements available to the public and the appropriate agency and file annual reports concerning the agreements with the appropriate agency.

The Delaware Bankers Association ("DBA") is a not-for-profit private trade association that represents thirty-nine (39) dues and tax paying financial institutions chartered to do banking business in the State of Delaware. Combined, these institutions maintain assets of more than $140 billion in the State. Accordingly, the DBA is filing this formal response on their collective behalf and we appreciate the opportunity to comment on this very important matter.

GENERAL COMMENTS

The Agencies' proposal is very long, complex and broad; therefore, the DBA believes that it would place a very heavy burden on all types of financial institutions for proper implementation and compliance. In particular, limited purpose institutions may be disproportionately impacted by the proposal. Specifically, limited purpose institutions frequently rely on written agreements with third parties or consortia to comply with the requirements of the CRA. As a result, these institutions would benefit little from the exemptions as proposed. In fact, these institutions would probably report a greater number of agreements than those not subject to the community development test.

The examples provided in the proposal are helpful and should remain in the final version. The proposal, however, broadly defines many terms and needs to establish reasonable time frames for many provisions. In the absence of this clarification, it is anticipated that the agencies will receive an overwhelming amount of material that will be of little use or will result in inadvertent situations of non-compliance by affected institutions. As a practical matter, if there is no time limitation with respect to CRA contacts and written agreements, it may be difficult, if not impossible, for an agency to determine if there was a CRA contact if a substantial period of time has passed between the contact and the agreement. Further, there may be no relation between the contact and the agreement.

For ease of use, since the proposed rule relies heavily on the current CRA regulations in defining its requirements, it would be more convenient to incorporate the proposed rule into the agencies' existing CRA Regulations. The agencies may also want to consider reorganizing Regulation BB into two subparts similar to Regulation O. Subpart A could cover the implementation of the CRA while Subpart B could cover GLB. Subpart B could incorporate its own authority and purpose sections similar to Subpart B in Regulation O.

SPECIFIC COMMENTS

Definition of Covered Agreement

General Definition - The definition of a "covered agreement" is too broad. The proposed rule indicates that an agreement may be a covered agreement even if the agreement is not legally binding on the parties. Under the proposed rule, an exchange

of written correspondence reflecting a mutual agreement or a written agreement that lacks the consideration necessary for it to be a legally binding contract would constitute a covered agreement if the agreement meets the four criteria discussed. Accordingly, the rule should define the terms "contract", "arrangement" and "understanding." The definition of a "contract" should incorporate consideration necessary to make the agreement legally binding. The definitions of "arrangement" and "understanding" should incorporate elements of the consideration necessary to make an agreement legally binding, but the *agreement* would not necessarily need to be legally binding.

Specifically, Example 1 illustrates that the exchange of letters concerning a grant constitutes a covered agreement. Example 2, however, indicates that simply providing the requesting organization with a check does not constitute a covered agreement. Under this guidance, simple acknowledgment letters or notes that accompany a check would constitute a covered agreement. This correspondence, however, would not add any more substance to an agreement than the check alone would. Therefore, correspondence of this type should include some consideration or commitment by the institution to provide the grant and exclude situations where the institution simply acknowledges that it is providing the funds in response to a solicitation for a charitable contribution.

Agreements not Covered by Agreement - The Delaware Bankers Association is generally in favor of the exemptions to covered agreements although limited purpose banks are unlikely to benefit from those exemptions. We do recommend, however, that the terms "substantially below market rates" and "re-lending" be defined or clarified through examples. A possible definition for "substantially below market rates" that the agencies may want to consider is whether the rate is below the bank's cost of funds at the time of the loan. This would document that the bank is not making money on the loan.

"Re-lending" should be determined by the intent of the transaction (e.g., an insured depository institution lends money to an organization so that the organization may make loans to small businesses or to low- or moderate-income individuals). The purpose of the transaction is to permit the organization to make loans using the funds borrowed from the insured depository institution.

CRA Contact - The definition of CRA Contact is overly broad, particularly given the notion that "the substance and context of the discussion or contact are the controlling factors." For a limited purpose bank, the CRA program is largely independent of the bank's primary business (e.g., lending to individuals through credit cards). Most limited purpose banks' CRA programs are managed by a CRA Officer whose sole function is to make community development loans, qualified investments, and when possible, provide or coordinate the provision of community development services. Specifically, when the CRA Officer discusses a potential investment or loan, the "context" is always CRA, and the other party knows it, even if the words "Community Reinvestment Act" or "CRA" or "CRA rating" are never mentioned. This being the case, it would appear that, under the regulation as currently written, every community development loan and qualified

investment that such a bank makes would be a covered transaction. This would impose a significant reporting requirement given the volume of community development loans and qualified investments made by such banks. Further clarification would help assist all parties involved in determining if they are in compliance.

Fulfillment of the CRA - The DBA supports limiting the rule's list of factors to activities that receive favorable consideration under the CRA Regulations, such as mortgage lending to low- or moderate-income borrowers and community development investments and services. One problem, however, is that the CRA regulations specify that a factor considered by the regulators in assigning the final CRA rating is the bank's fair lending performance. This raises the issue of whether any agreement with a fair lending consultant is reportable under CRA Sunshine. The agencies appear to be suggesting that they would create an exemption for fair lending agreements, out of a public policy concern that fair lending compliance would suffer if these agreements were subject to disclosure. The DBA agrees with the agencies' exclusion of the performance of activities designed to ensure compliance with Federal laws that prohibit discriminatory or other illegal practices from the list of factors. It is our view that most banks that hire consultants to review or improve their compliance programs on fair lending do not want these relationships disclosed to class action plaintiffs' attorneys. Therefore, the DBA recommends that the agencies consider specifically adding exemptions to the list of factors regarding fair lending agreements and consulting services for CRA-related activities.

Related Agreements Considered a Single Agreement

Agreements Entered Into by the Same Parties - The agencies should clarify that the aggregation rule is based on a calendar year rather than on a 12-month period. Although the definition of a "covered agreement" specifies calendar year, Section 35.3 indicates a 12-month period. This could cause confusion and inadvertent mistakes if interpreted as a rolling 12-month period. Most other reporting period requirements are annual and it is our belief that the agencies intended this requirement to be consistent with the definition of a "covered agreement." A rolling 12-month period would significantly complicate tracking and reporting. It is unlikely that depository institutions would intentionally time transactions to skirt the aggregation rules. That would be more trouble than simply complying with them.

Disclosure and Reporting of Covered Agreements

Contents of Annual Report of Insured Depository Institutions and Affiliates - The reporting and disclosure requirements as currently drafted are also overly broad and will impose an undue reporting and record-keeping burden on insured financial institutions, the agencies themselves and, potentially, non-governmental entities that have nothing to do with banking or the CRA. For example, many banks invest in limited partnerships that, in turn, invest in residential properties financed by the low-income housing tax credit. These partnerships last for fifteen years, and, therefore, would have to be

reported to the appropriate agency every year for fifteen years. The documentation involved in these partnerships is extensive, so that the agencies would need to deal with the receipt, storage, and tracking of a large physical volume of paperwork each time a bank enters into a tax credit partnership.

The annual reporting requirement would also impose a significant burden on depository institutions. Each year the institution would need to report on all payments made or received in connection with the covered agreement. Since payments for tax credit investments often are made over a period of years, this would require the creation of a system and process for capturing information on all such payments simply for the purpose of reporting them to the appropriate agency. A similar situation exists with respect to Small Business Investment Company (SBIC) investments. Many of the investors in both types of partnerships are not financial institutions. The regulation as currently drafted would appear to require these investors, including insurance companies, utilities, and industrial companies, inter alia, to comply with the requirements of the regulation. The supplementary information indicates that "(t)he annual report of an insured depository institution also must provide data on any loans, investments, or services provided under the covered agreement by each party to the agreement." This would seem to require that, if a tax credit partnership or SBIC happens to be a covered agreement, the insured depository institution would be required to report information for <u>all</u> of the other investors in the partnership, whether or not they are subject to the requirements of the CRA.

Again, a similar situation exists with respect to SBIC investments. Private individuals frequently invest in SBIC's. If a particular SBIC is considered a covered agreement, would individual investors, as well as non-bank institutional investors, be expected to meet the disclosure requirements? How would they even know about them? The regulation should provide an exemption for SBIC's and low-income housing tax credit partnerships similar to that provided for loans and extensions of credit that are made "at rates not substantially below market rates."

Treatment of Confidential or Proprietary Information - With respect to disclosure of agreements, the proposal requires insured depository institutions and affiliates to file a copy of a covered agreement with the appropriate federal banking agency within 30 days of entering into the agreement. A non-governmental entity or person would be required to make a covered agreement available to the banking agencies upon request. The rule allows the parties to withhold from public disclosure those portions of a covered agreement that the appropriate Federal banking agency determines properly may be withheld under the Act and the Freedom of Information Act. This is a fairly limited exception and could raise concerns about disclosing loan agreements with private parties that are for CRA fulfillment. The agencies may want to consider a form for disclosure to non-governmental entities or persons regarding the CRA Sunshine provisions. The disclosure would warn the non-governmental entity or person that the documents may be publicly disclosed if it is determined that the agreement is subject to the CRA Sunshine provisions, and that the other party acknowledges receipt of this disclosure and waives any privacy rights with respect to the documents.

In addition, confidentiality concerns exist with respect to SBIC investments. Since private individuals frequently invest in SBIC's, many SBIC agreements contain standard confidentiality clauses that would be violated if a particular SBIC is considered a covered agreement; therefore, the regulation should provide an exemption for similar SBIC investments that provide for loans and extensions of credit that are made "at rates not substantially below market rates."

Use of CRA Public File by Insured Depository Institution - The DBA generally supports using the CRA Public File to make covered agreements available to the public. Some covered agreements, however, may be very lengthy and/or may cover extremely long periods of time (e.g., low-income housing tax credits). Over time this could potentially create an extremely large public file. Also, some financial institutions may enter into as many as eight low-income tax credit agreements per year. Each agreement typically has a term of 15 years. Over time, over 100 agreements for tax credits alone could be held in an institution's public file. This would not include other agreements. This situation could have the effect of making the information less available to the public since a person would have to sift through a large volume of material to locate agreements of interest. Accordingly, the DBA proposes that the agencies consider having insured depository institutions maintain a report listing all active covered agreements. The report could provide the public with critical information about the agreement including a brief description, and could be included in the public file in lieu of copies of the actual agreements. The insured depository institution should then be required to fulfill a request for a specific agreement within a specified time period (e.g., 5 business days). The agencies could require the institution to make the agreement available to the requestor either by making it available at the branch where the request originated or by mailing it to the requestor.

When and Where Must Annual Reports Be Filed - Under Section 711 and the rule, a person may fulfill the filing requirement by providing its annual report to the insured depository institution or affiliate that is party to the agreement within 5 months of the end of the person's fiscal year with instructions for the institution to file the report with all of the relevant supervisory agencies on behalf of the person. Although the DBA does not object to this requirement, we believe that the rule should explicitly state that depository institutions have no responsibility for the accuracy or timeliness of the person's annual report other than to submit the report to the supervisory agencies within 30 days.

In addition, this requirement also highlights another concern over the broad definition of a covered agreement. Under the proposed rule, an exchange of written correspondence reflecting a mutual agreement or a written agreement that lacks the consideration necessary for it to be a legally binding contract would constitute a covered agreement if the agreement meets the four criteria discussed. The proposed rule provides an example that illustrates that the exchange of letters concerning a grant constitutes a covered agreement. Many financial institutions make numerous community charitable contributions and grants each year; however, they may only seek CRA credit for a small percentage of these contributions. Many of these contributions and grants are made

because it is the right thing to do, not because it will give CRA credit. As a result, such banks take conservative approaches in claiming CRA credit for charitable contributions and grants. Under the proposed annual reporting requirements, a person may submit a report to a depository institution to file with the relevant supervisory agencies that includes agreements that the institution has not deemed reportable or visa-versa. The broad nature of the definition of a "covered agreement" leaves too much room for interpretation. This could result in the agencies receiving conflicting information or the appearance of non-compliance on either part.

Conclusion

The DBA appreciates the opportunity to comment on the proposed rule and the agencies' efforts to clarify and streamline the requirements of the Act. The DBA has made a number of recommendations for changes, primarily to provide a clearer and less burdensome regulation. However, because of the complexity of the regulation and the number of anticipated comments, the DBA encourages the Agencies to reissue the revised proposal for another round of comments prior to implementation to maximize future understanding and compliance of the final regulation.

If the staff of any of the Agencies has any questions about these comments, please call the undersigned.

Sincerely,

David G. Bakerian
Executive Vice President