Congress of the United States

Washington, DC 20515

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Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th and C Streets, NW
Washington, DC 20551

Re: Proposed Rule on Disclosure and Reporting of CRA-Related Agreements
Docket No. R-1069

Dear Ms. Johnson:

On Wednesday, May 10, 2000, the Board of Governors of the Federal Reserve, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision, each published in the *Federal Register* and solicited public comment on a proposed rule implementing section 711, CRA Sunshine Requirements, of the Gramm-Leach-Bliley Act ("GLB Act"). Section 711 of the GLB Act requires the public disclosure and annual reporting of certain written agreements between insured depository institutions or their affiliates and non-governmental entities and persons ("NGEP") made pursuant to, or in connection with, the fulfillment of the Community Reinvestment Act of 1977 ("CRA"). The proposed rule identifies types of written agreements that are covered by section 711 and describes the manner and scope of the GLB Act's disclosure and annual reporting requirements.

As members of the House and Senate Banking Committees, most of whom served on the Conference Committee on H.R. 10/S. 900, we welcome the opportunity to comment on the regulations and provide insight into the purpose of this provision.

We believe that the proposed rule is inconsistent with both the statutory language and legislative history of the provision in several important respects. Specifically, the proposed rule contains an overly broad definition of "covered agreement" and insufficient protections for proprietary information which could discourage many constructive partnerships between banks and community groups that are helping to bring thousands of communities and millions of Americans into the financial mainstream. We find, however, that the proposed rule applies in a reasonable manner the statutory requirement regarding the content of annual reports of activity by non-governmental entities.

Five years ago, the banking regulators worked together to change the focus of the CRA examinations. The new regulations streamlined the examination process and emphasized performance over paperwork. We are deeply concerned that problematic portions of the proposed rule implementing section 711 of the GLB Act will take a large step backwards from this achievement. This could serve to undermine CRA, the communities, and the insured financial institutions that have benefitted.

A. Definition of a "Covered Agreement" is Too Broad

Subsection 711(e)(1)(A) of the GLB Act defines an agreement that is subject to the disclosure and annual reporting requirement of this Act as "[a]ny *written* contract, *written* arrangement, or other *written* understanding that provides for cash payments, grants or other consideration with a value in excess of $10,000, or for loans the aggregate amount of principal of which exceeds $50,000, *annually*..." or any substantively related agreements made "pursuant to, or in connection with, the fulfillment of the Community Reinvestment Act of 1977." (emphasis added). The rule correctly implements a portion of this provision by limiting the disclosure and annual reporting requirements to those agreements that are written and that exceed the monetary thresholds on an annual rather than cumulative basis.

We are, however, concerned that the overall rule contains a definition of a CRA agreement that is overly broad and inconsistent with the statute and legislative history. Specifically, the rule does not provide for appropriate exemptions that would narrow the coverage of this provision and thereby reduce burden on parties to CRA agreements. Moreover, the rule fails to limit the application of section 711 to agreements that have a "material impact" on an agency's decision.

1. The exclusion for agreements with no CRA contact is not given the full effect provided by the Act.

The Act exempts from coverage of section 711 any agreement between an insured depository institution or its affiliate and a NGEP that has "not commented on, testified about, or discussed with the institution, or otherwise contacted the institution" concerning CRA. The proposed rule does not give the full effect to the exclusion of agreements where there is no "CRA contact." Under the rule, virtually every discussion between a NGEP and an insured depository institution regarding the institution's obligation to meet the credit needs of its entire community, even if CRA is not mentioned, would be considered a "CRA contact."

The disclosure and reporting obligations were intended to address assertions made during Senate consideration of the bill that some members of the public may have utilized the comment process on bank applications or comments to regulators during CRA examinations to negotiate agreements for their own benefit. The exemption language was added during the conference committee negotiations. It was intended to narrow the scope of the provision contained in the Senate bill to capture only those written agreements above certain thresholds that resulted from an individual or group utilizing or threatening to utilize the compliance procedures of CRA in reaching an agreement. Such procedures would include public comment or testimony on an institution's application to an agency, or comments on an institution's CRA rating to an agency. The rule should be limited to cover only such contacts.

The legislative history supports this approach. The May 1999 Senate debate on the financial modernization bill is replete with examples that illustrate the types of agreements that the provision was intended to cover. Every CRA agreement referenced in the debate resulted from or involved a relationship between a bank and a community group. In each instance, it was alleged that groups proposed filing comments on a bank's CRA performance as part of an effort to negotiate an agreement with the bank. At no point in the consideration of the GLB Act did Congress contemplate requiring a bank to disclose every written agreement it entered into in order to enhance its CRA record. Indeed, the Conference Report states that "the scope of the provision does not extend to an agreement entered into by an insured depository institution or affiliate with a non-governmental entity or person who has not commented on, testified about, or discussed with the institution, or otherwise contacted the institution, concerning the CRA. This exception to coverage could include, for example, service organizations such as civil rights groups [and] community groups providing housing or other services in low-income neighborhoods." The Report would not have included the example of "housing or other services" if Congress intended these services to be covered by the Act. Failure to revise the proposed rule to limit those actions that constitute a "CRA contact" will result in banks and their partners filing thousands of unnecessary documents solely because they enter into agreements to do business in traditionally underserved communities.

The final rule should, at the very least, provide banks and NGEPs with more guidance on what constitutes a "CRA contact." We are concerned that uncertainty over whether a particular CRA agreement is covered by the provision could create a disincentive for constructive partnerships between community groups and banks. A bank and a community group should be able to determine clearly, up-front under implementing regulations whether their agreement is subject to the disclosure and reporting requirements of section 711.

2. The proposed rules gives no meaning to the statutory requirement that only agreements that have a "material impact" on a bank's CRA rating or application are covered.

The rule does not reflect the provision in the statute which limits the applicability of the Act to those agreements that have a "material impact" on an agency's decision to approve a bank's application or to assign a particular CRA rating. Section 711 (e) further narrows the set of agreements described in subsection (a) that are covered. Subsection (e) requires that in order for an agreement to be subject to the disclosure or reporting requirement, the agreement must be made "pursuant to, or in connection with, *the fulfillment*" of the CRA. (emphasis added). The Act defines "fulfillment" to mean "a list of factors that the appropriate Federal banking agency determines have a material impact on the agency's decision... to approve or disapprove an application for a deposit facility...or... to assign a rating to an insured depository institution." Congress would not have needed to add this requirement of subsection (e) if it intended that all agreements meeting the requirements of subsection (a) were covered, yet Congress included "fulfillment" and a requirement that fulfillment mean those factors that have a material impact on a regulator's decision. By contrast, the proposed rule applies section 711 to any agreement that involves any activity that may be considered under a CRA, without regard to the volume of activity or its impact on such a decision by an agency.

The disclosure and reporting requirement of the statute is limited to those agreements which have a material impact on an agency's decision to approve an application or assign a particular CRA rating. For instance, an agreement by a multi-billion dollar insured depository institution to provide a $10,000 grant to a local community-based organization will not affect an agency's decision to approve a merger application, or to assign a rating. Therefore, such an agreement is not covered by the Act, and should not be subject to the disclosure or reporting requirement of the rule. Only agreements exceeding a certain percentage of the institution's CRA activities should be covered. This approach would be consistent with the central purpose of section 711: to require disclosure of agreements that allegedly influence the CRA compliance process.

3. CRA contacts should occur within 6 months before an agreement is made for an agreement to fall outside of the exclusion of subsection (e).

Although the language in section 711 does not specify that a "CRA contact" must occur within a certain period before an agreement is signed in order to trigger a disclosure and reporting obligation, it is reasonable and consistent with the purpose of the provision to require that a temporal relationship exist between a "CRA contact" and when an agreement is executed. Section 711 was intended to apply to agreements that result from, or were influenced by, a CRA contact. The regulators correctly observe in the preamble that there may be no link or influence if a CRA contact occurs a significant period of time before the negotiation of a CRA agreement. It would be impractical and unreasonable to require banks and non-governmental entities to disclose and report on agreements that have no connection to distant contacts.

The passage of time may make it difficult for the parties to a covered agreement to determine or effectively track whether a CRA contact occurred at all. Therefore, we recommend that the final rule require that a CRA contact occur within a 6 month period before the parties enter into the agreements. Conversely, there should be no disclosure or reporting obligation for a contact that occurs subsequent to a CRA agreement. It is illogical to apply the requirements of section 711 to agreements when there is no pre-existing CRA contact, and such a rule would be directly contrary to express terms of the statute, which refer to CRA contacts only in the past tense ("...has not commented on, testified about, or discussed with..."). A disclosure and reporting obligation arising after the contract is signed would be unfair and unadministrable.

4. Section 711 should not apply to real estate investments.

We find the application of section 711 to contracts for investments in real estate to be unsupported by the statute. The statute does not mention the term "investments." However, the proposed rule applies the disclosure and reporting obligation to agreements involving investments in real estate apparently because investments are assessed as part of the CRA exam.

As conferees, we recognized that the purpose of section 711 would not be furthered by the inclusion of mortgage loans as covered agreements. Accordingly, the statute provides an exception for individual mortgage loan contracts. This same principle should also apply to real estate investments. Otherwise, the form of financing would be unwisely placed above its substance in setting public policy.

B. Proprietary and Confidential Information is Not Protected

We have serious concerns about the ability of the banking regulators to protect confidential information under the proposed rule. Under the proposed rule, a party to a CRA agreement would be required to request a determination from its bank regulatory agency on whether certain proprietary information could be withheld from public disclosure. As drafted, the rule would unduly interfere with the ability of banks to enter into business agreements involving low- and moderate-income communities and to protect proprietary information such as pricing.

The approach taken in the rule is not consistent with the explicit statutory requirement that all proprietary information be protected. Subsection 711(h)(2)(A) of GLB Act states that "each appropriate Federal banking agency shall ensure that the regulations prescribed by the agency do not impose an undue burden on the parties *and that proprietary and confidential information is protected.*" (emphasis added). This provision was added in recognition that

disclosure of agreements should not compromise proprietary or confidential information of an institution or an NGEP. Since "covered agreements" may contain confidential and proprietary information, the disclosure requirement was not intended to jeopardize an institution's business plan or harm its competitive position in the market, or require disclosure by an NGEP of confidential information. While we recognize the tension that exists between statutory language requiring that agreements be disclosed in their entirety and language requiring that confidential and proprietary information be protected, meaning must be given to the statutory protection of such information.

The agency review process proposed in the rule is not useful or practical. In the preamble to the rule, the regulators note that certain information ordinarily withheld under the Freedom of Information Act ("FOIA") could nonetheless be released. We disagree with that assessment. Nothing in the statutory language prevents parties to CRA agreements from enjoying the same FOIA protections for such agreements as are available for other types of business agreements and arrangements. Rather, the statutory language clearly grants additional protections for such information, and gives regulators the discretion to adopt a reasonable rule. Banks and NGEPs should not be penalized simply because they conduct business in traditionally underserved communities.

The process for determining what information can be kept confidential should be streamlined in order to protect against the inadvertent release of proprietary information and reduce uncertainty. The rule should specify the types of information that may be withheld and allow the parties to withhold this information without seeking prior agency review in lieu of the agency review process. At the very least, a party that has requested agency review of a covered agreement for a determination of non-disclosure should be permitted to wait to disclose the agreement until the agency rules on the request.

C. Annual Reporting of CRA Agreements Should Not Impose an Undue Burden on NGEPs

The proposed rule correctly adheres to language in the statute and guidance in the legislative history to ensure that the reporting obligations under section 711 do not impose an "undue burden" on parties to CRA agreements. Section 711 requires that all NGEPs receiving funds or other resources pursuant to a CRA agreement annually report on the use of such funds to the appropriate Federal banking agency with supervisory responsibility over the insured depository institution that is a party to the CRA agreement. The rule implements this obligation by permitting NGEPs to submit either a specific purpose report or a general purpose report.

The rule is appropriate and consistent with the purpose of the Act. Section 711 was intended to ensure accountability by parties to CRA agreements by requiring them to publicly disclose how they use funds provided under such agreements. In light of concerns about the potential for onerous reporting requirements, the Conference Report adopts language that allows an NGEP that is party to a CRA agreement to meet the reporting requirements of section 711 by submitting its annual audited financial statement or its federal income tax return. Accordingly, the rule permits a NGEP to submit federal income tax forms and other reports prepared for other purposes as annual reports for general purposes funds.

Nevertheless, we are concerned that the rule does not provide NGEPs with sufficiently clear guidance on how to comply with the reporting requirements with the least amount of burden. For instance, whereas the preamble explains that an NGEP may meet the annual reporting requirement by filing its IRS Form 990 tax return along with a listing of the total amount of funds that the NGEP received under the agreement, the rule does not clearly advise that such action would be permissible. We recommend the incorporation of key portions of the preamble into the text of the rule to provide clear guidance on this important requirement.

The simplified reporting procedure for NGEPs that allocate and use funds or other resources under a CRA agreement for a specific purpose does not contradict or undermine the purpose of the provision. Under the rule, any NGEP that receives funds for a specific purpose need only report the amount of the funds received under the agreement and describe how the funds were used on an annual basis. Since the proposed rule contemplates specific purpose expenses to be more limited than any of the categories of expenses enumerated in the GLB Act, it would be impractical to require any other reporting format. In order to further reduce regulatory burden as intended by Congress, we recommend that regulators provide more guidance as to when a person has allocated and used funds or resources for specific purposes.

The itemized list of annual expenses contained in the proposed rule is sufficient. The inclusion of additional categories is unnecessary and would only increase paperwork burden on NGEPs without a benefit to the public. The purpose of the provision was not to require a reporting of any particular expense but rather to provide a listing of the categories of expenses, if any, required to be reported under section 711.

In conclusion, we reiterate our strong concern that the overly broad scope of what constitutes a "covered agreement" and the lack of adequate protections for proprietary information contained in the rule will create serious disincentives for banks and NGEPs seeking to conduct business in low- and moderate-income communities. Without modification, the rule could disrupt the routine business of lending in these communities. We hope that you will take our concerns and recommendations into account as you proceed with the rule-making process.

The final rule should be reasonable and reflect the statutory requirements of section 711 to minimize regulatory burden and protect proprietary information.

Sincerely,

Paul S. Sarbanes

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