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Michael P. Smith
President

July 26, 2000

Communications Division
Office of the Comptroller of the Currency
250 E Street, S.W., Third Floor
Washington, D.C. 20219

Attention: Docket No. 00-11

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

Re: Docket No. R-1069

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments/OES
Federal Deposit Insurance Corporation
550 Seventeenth Street, N.W.
Washington, D.C. 20429

Re: CRA Sunshine Comments

Manager
Dissemination Branch
Information Management &
Services Division
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552

Attention Docket No. 2000-44

To the Agency Addressed:

In response to the notice of proposed rulemaking published in the May 19, 2000 Federal Register, the New York Bankers Association is submitting these comments on the proposed regulations to implement Section 711 of the Gramm-Leach-Bliley Act, Public Law 109-102 (hereinafter, the GLB Act or the Act). These regulations would establish requirements for the reporting and disclosure of CRA-related agreements. Our Association has consistently supported the Community Reinvestment Act and its implementing regulations. We therefore welcome the opportunity to recommend several amendments to the current proposal described below. Our Association is comprised of the community, regional and money center commercial banks of New York State with aggregate assets in excess of $1 trillion and more than 220,000 New York employees.

Section 711 of the Act requires nongovernmental 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, as amended, to make the agreements available to the public and the appropriate Federal banking agency and to file annual reports concerning the agreements with the appropriate agency. The proposed regulations would implement

Section 711 by identifying the types of agreements covered by Section 711, define many of the terms used in the statute, describe how the parties to a covered agreement must make the agreement available to the public and the appropriate agencies and explain the type of information that must be included in the annual report filed by the parties to agreement.

Importantly, Section 711(h)(2)(A) requires the Federal banking agencies, in adopting regulations under this Section, to "ensure that the regulations...do not impose an undue burden on the parties and that proprietary and confidential information is protected." Our Association's comments are designed to interpret the substantive provisions of the regulations in light of Section 711(h)(2)(A) of GLBA. Our comments follow the order of the proposed regulations.

Definition of "Covered Agreement"

The proposal defines a "covered agreement" to include any contract, arrangement or understanding that meets a set of conditions, whether or not the agreement is legally binding. Our Association strongly opposes the expansion of coverage of the definition of "covered agreements" to include agreements that are not legally binding. First, we do not believe that the statute contemplates coverage on non-binding agreements; second, we believe that covering such agreements could create excessive regulatory burdens for all parties. Coverage of non-binding agreements may create such ambiguity in the definition of covered agreements as to expand the scope of the regulation to cover many types of unilateral statements by parties who are covered by Section 711 that were never intended to become part of a CRA record.

Section 711(e) defines "agreement," in relevant part, to include "any written contract, written arrangement, or other written understanding that provides for" payments of a certain value. The verbal phrase "provides for" contemplates more than a mere intention or desire, and is frequently used in legislative language to indicate a legally mandated result. The legislative history sheds additional light on the interpretation of this definition. Conference Report No. 106-434, to accompany S. 900, on page 178, states the intent of the Senate sponsors of this Section that it "does not confer any authority on the Federal banking agencies to enforce the provisions of these agreements." Since Federal agencies would have no authority under principals of State contract law to enforce agreements that are not legally binding, this Report language would be meaningless if intended to apply to such non-binding agreements.

The proposed definition would also create an undue compliance burden on parties to agreements by requiring the disclosure and reporting of numerous unilateral statements, comments, intentions or even advertisements that were never intended to be agreements. Contract law has long provided clear and consistent guidance as to whether particular agreements are legally binding. By defining covered agreements as including agreements that are not legally enforceable, the proposal vastly expands the universe of potentially reportable written statements, making potentially disclosable and subject to an annual reporting requirement almost any written statement by a party that was made in fulfillment of CRA. We therefore urge that the definition of "covered agreement" be amended to exclude agreements not legally enforceable.

CRA Contacts

The proposed regulation sets forth a list of possible CRA contacts between a member of a nongovernmental organization and an insured depository institution or CRA affiliate that would subject an agreement between the organization and institution or affiliate to the provisions of the regulation. We would strongly recommend that the regulation define the persons who may be contacted at the depository institution or CRA affiliate for purposes of this section. For example, a customer commenting to a teller about the inadequacy of an institution's service to its local community should not be considered a CRA contact. We would recommend that only contacts with, or that come to the actual attention of, an institution's executive officers (as defined by Regulation O, 12 CFR Part 215) or the CRA officers identified in an institution's required CRA notice be considered CRA contacts for purpose of this section of the proposed regulation.

Fulfillment of the CRA

The legislative history of Section 711 contemplates the Federal banking agencies adopting a list of factors that have a material impact on approval or disapproval of an institution's application for a deposit facility under CRA or on the assignment of an institution's CRA rating. The proposal sets forth an acceptable list of factors used in making these determinations under CRA. However, the proposal does not define any standard of materiality by which the impact of each of the factors set forth may be judged. We would respectfully suggest that the standard used in the CRA regulations themselves - namely, a depository institution's performance in meeting the credit, service and investment needs of its entire community, including low- and moderate-income areas - would be an appropriate measure of materiality. Thus, the determination of whether any written agreement would be subject to public disclosure and annual reporting would be judged on the basis of the extent to which it made a material contribution to the ability of an insured depository institution's meeting its community needs through one of the factors set forth.

Treatment of Confidential or Proprietary Information

The proposal requests comment on whether covered agreements are likely to contain confidential or proprietary information the disclosure of which could harm the parties to the agreement. It is our understanding, based on comments from several of our members who have in the past entered into agreements that would be covered under Section 711 if made today, that these agreements may frequently contain information that the parties regard as extremely sensitive, confidential or proprietary. In some cases, the information in the agreements may reveal in detail future marketing plans of individual institutions, terms and conditions of loans or grants or factors bearing on an institution's credit determinations. The agreements may also contain information with regard to the membership or activities of nongovernmental organizations that the organizations regard as highly confidential.

Our Association would therefore strongly recommend that the agencies set forth categories of information that would be exempt from public disclosure under the regulation. This exempt infor-

mation should include, at a minimum, any personally identifiable information, underwriting criteria, certain terms and conditions of loans not available to the general public, an institution's cost of funds or cost of developing particular products, and the membership lists of nongovernmental organizations. In addition, the agencies should set forth in the regulations a procedure for prior review of other information an institution or a nongovernmental organization deems properly confidential or proprietary and wishes to exempt from public disclosure. Such a procedure would be consistent with the statutory requirement that the agencies protect such information.

In summary, the New York Bankers Association urges that the proposal be amended to limit the regulatory compliance burden the regulation may impose and to ensure the protection of confidential or proprietary information. We appreciate the opportunity the agencies have provided to comment on these proposed regulations.

Sincerely,

Michael P. Smith