Massachusetts Bankers Association

78

July 21, 2000

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Attention: Docket No. 2000-44
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Subject: Joint Notice of Proposed Rulemaking, Disclosure and Reporting of CRA-Related Agreements
FRB: Docket No. R-1069, OCC: Docket No. 00-11, FDIC: 65 *Federal Register* 98, pp. 31962-32002, and OTS: Docket No. 2000-44

Dear Sir/Madam:

Thank you for the opportunity to comment on the above referenced proposed rulemaking which would implement provisions of Section 711 of the Gramm-Leach-Bliley Act (GLBA) of 1999. Section 711 of GLBA requires public disclosure of certain agreements made between insured depository institutions and their affiliates, and non-governmental entities or persons ("NGE/P") in fulfillment of the Community Reinvestment Act of 1977 (CRA). The Massachusetts Bankers Association which represents more than 200 commercial, savings, and co-operative banks and savings and loan associations with $300 billion in assets would like to acknowledge the challenges faced by the banking regulatory agencies ("Agencies") in drafting the proposal and express our appreciation for efforts undertaken to simplify the statute's reporting requirements.

INTRODUCTION

For nearly twenty-five years, the CRA encouraged positive partnerships between community banks and organizations with the goal of revitalizing urban and rural communities. These often cooperative relationships have resulted in increased commitments of capital and resources to

underserved minority and low- and moderate -income communities. We are concerned, however, that a broad interpretation of Section 711 will work to counter the spirit and intent of CRA and serve as a disincentive for future CRA-related agreements or discussions. The majority of our members consisting of small community banks typically provide grants or loans because they are vested in the communities in which they do business not as a result of pending mergers or CRA examinations. As proposed, the scope of CRA-related contacts under the rule could literally include thousands of routine business discussions and day-to-day business transactions that do not significantly impact a bank's CRA rating. Even more troubling, the resulting compliance burden would add to the breadth of the requirements that banks are subject to under CRA unlike their non-bank competitors. While this represents one of our key concerns, we would like to comment on several aspects of the proposal.

COVERED AGREEMENTS

Section ____.2 of the proposed rule defines a covered agreement as any contract, arrangement, or understanding that meets all of the following four criteria:

- The agreement is in writing;
- The agreement is made pursuant to, or in connection with, the fulfillment of the CRA, as defined in section ____.2(c) of the proposed rule;
- The parties to the agreement include (1) an insured depository institution or an affiliate of an insured depository institution, and (2) a person; and
- The agreement provides for the insured depository institution or affiliate to provide cash payments, grants, or other consideration having an aggregate value of more than $10,000 in any calendar year, or to make loans in an aggregate principal amount of more than $50,000 in any calendar year.

Furthermore, the rule intends to clarify that an agreement may be a "covered agreement" even if the agreement lacks the consideration necessary for it to be legally binding on the parties. An example in the proposal states that an exchange of written correspondence reflecting a mutual agreement would constitute a covered agreement if it met all the other criteria.

The Association believes that the definition of a "covered agreement" includes several ambiguities and should be clarified. Our members have requested that the Agencies be as specific as possible to eliminate the additional burden of determining what would be reportable under the regulations. The Agencies should take two actions to achieve this result. First, by defining the terms "contract," "agreement" and "understanding". The term "understanding" suggests a more informal process, therefore, it can be extremely vague in this context. The Association submits the following as proposed definitions for contract and agreement. *A "contract" is a legally enforceable agreement between parties to an agreement. An "agreement" should be defined as mutual consent between parties as evidenced by a legally enforceable written document.*

As implied in the Association's proposed definitions, the second step is to exclude documents that are not legally enforceable from the definition of a "covered agreement". This interpretation would avoid confusion over the many types of written agreements or understandings that could be reportable. It sufficiently narrows the scope for banks to comply reasonably with the statute and have greater clarity on the types of agreements that meet the reporting requirements.

Discussion of Example

Example: A bank holding company unilaterally issues a press release announcing that its subsidiary banks have established a goal of making $100 million of community development grants in low- and moderate-income (LMI) neighborhoods over the next 5 years. The unilateral pledge is not a contract, arrangement or understanding entered into with a person and, therefore, is not a covered agreement.

We agree with Agencies that, the disclosure requirements would not apply to unilateral pledges or commitments made by depository institutions. A bank for example could make a generic pledge of one million dollars in small business loans as part of its CRA plan without making a commitment to a specific NGE/P. However, the Agencies need to add additional examples to clarify whether the determination would change with additional facts. For example, if the banking holding company sent an unsolicited check to a neighborhood housing authority for $15,000 in partial fulfillment of the unilateral pledge described above, this should not trigger a reporting requirement.

EXEMPTIONS FOR CERTAIN AGREEMENTS

Qualifying Loans: The proposal excludes from a "covered agreement", a specific contract or commitment for a loan or extension of credit to individuals, businesses, farms or other entities if the funds are loaned at rates not substantially below market rates and if the purpose of the loan is not for re-lending of the borrowed funds to other parties. The Agencies request comment on whether the agreement between the insured depository institution and the community development organization in the following example should be exempt form coverage.

Example: An insured depository institution enters into a written agreement with a community development organization to make $250 million in small business loans in the community over the next five years. The loans would be made on market terms and not for purposes of re-lending. Each small business loan made by the insured depository institution pursuant to the agreement is exempt from coverage.

We believe that the agreement by the insured depository institution with the community development organization and subsequent individual loans would both be exempt under that statutory language in GLBA. The written agreement with the Agency is a "specific contract or commitment" to extend credit (in the community) which would comprise individuals, businesses farms or other entities. Therefore it should be exempt to be consistent with the statute.

Separately, the Agencies should define "substantially below market rate" as the lender's cost of funds.

Agreements With Persons Who Have Not Made a CRA Contact: The proposal adopts the statutory language which exempts any agreement with a non-governmental entity or person who has not commented on, testified about, or discussed with the insured depository institution, or otherwise contacted the institution, concerning the CRA (referred to as a "CRA contact").

Association strongly objects to the broad scope of a "CRA Contact" as currently written in the proposal because it would be extremely cumbersome from a compliance standpoint, particularly for community banks. Depository institutions and their affiliates would be required to track, monitor, document and disclose conversations that could take place in any number of business discussions. Such regulatory scrutiny in routine business is unwarranted and would serve to limit discussions relating to the CRA. Another area of concern is that the proposal requires banks to make judgements on whether discussion contents are CRA-related. This is a potential area of disagreement in compliance examinations. For example, would a discussion involving low- to moderate-income loans be CRA related?

We recommend that the scope of a CRA contact be limited to those instances where a NGE/P submits or will submit written or oral comments or testimony to an Agency concerning the record of performance or future performance under the CRA of an insured depository institution or involves a quid pro quo relationship between the NGE/P and the depository institution. The Agencies provided two alternatives that would change the scope of the actions that would be considered CRA contacts, the "Eligibility Alternative" and the "Comment/Testify Alternative". We believe that the Comment/Testify Alternative is the most suitable reporting scenario and should be adopted by the Agencies because it will eliminate unnecessary reporting of agreements that do not substantially impact an institution's CRA rating or performance. Generic discussions about CRA including discussions about products that are eligible for CRA consideration are beneficial and should not be affected by this proposal.

Timing of a CRA Contact: The Agencies request comment on whether there should be a temporal relationship between a "CRA contact" and when the agreement occurs. Section 711 was intended to apply to agreements that resulted from, or were influenced by, a CRA contact, where a CRA contact occurs at sometime before negotiating an agreement. Therefore, a more reasonable approach would be to focus on agreements made during the public comment period on a merger application or during the time period when a CRA exam is announced and when the exam occurs. We recommend that six-months prior to a merger or bank exam would ensure a reasonable expressed or implied correlation between the CRA contact and the covered agreement. Without such limitations depository institutions and NGE/Ps could not possibly develop a method to track discussions or negotiations between past or present employees of a depository institution concerning loans, investments, and grants that may be related to CRA over an unlimited period of time. Furthermore, it does not appear reasonable that the mere mention of CRA should trigger a reporting requirement when there is no correlation between the past discussion and the current agreement.

Other Exemptions: The Agencies request comment on whether the rule can and should be limited to exclude from the scope of CRA contacts discussions with an insured depository institution or affiliate concerning whether particular loans, services, investments or community development activities are generally eligible for consideration by an Agency under the CRA Regulations. The Association believes that the proposal should include exemptions for the following:

1. Contracts/Agreements for purchases of mortgages backed securities, loan or other investment-related products from independent third parties.
2. Contracts/Agreements for payments to banking trade associations to provide CRA related training, programs or services.
3. Contracts/Agreements or discussions with legal counsel
4. Contracts with consultants to provide an assessment of the banks performance but would not otherwise be eligible for consideration to improve a bank's CRA performance.
5. Contracts for purchases of software or computing services.

These contracts or agreements specified above could be considered in fulfillment of CRA during a bank examination but would not count directly towards a bank's CRA rating. Therefore we request that the Agencies use their authority to adopt these exemptions which will prevent an undue compliance burden on depository institutions.

MATERIAL IMPACT

Section 711 applies only to written agreements that are ``made pursuant to, or in connection with, the fulfillment of the Community Reinvestment Act." Section 711 defines ``fulfillment" of the CRA as a "list of factors" that the appropriate Agency determines have a material impact on the Agencies' decision to approve or disapprove an application for a deposit facility under the CRA or to assign a CRA examination rating.

The Agencies have proposed that agreements be subject to disclosure if they specify any level of CRA-related loans, investments, and services. The Association believes that the Agencies should amend the material impact standard in the final rule. We propose that the material standard be related to the size of the institution or a percentage of the bank's total assets and that a CRA agreement or contract should not require disclosure unless it requires a bank to make a greater number of loans, investments, and services in more than one of its markets. If the material impact standard is not changed, the Agencies will be inundated with literally thousands of letters, written understandings, or contracts about CRA-eligible loans and grants made to NGE/Ps.

PRIVACY ISSUES

In addition there are serious privacy and liability issues. Depository institutions have a limited pool of resources designated for community organizations. Our members are concerned competition for these resources will increase once the agreements are made public. There is concerned that the public nature of non-substantial CRA agreements will foster ill will when depository institutions contribute or fail to contribute to competing organizations, particularly

when the CRA area compromises several geographical areas. Secondly, there is concern that the agreements could contain proprietary and other confidential information that should not be made public. Given the current debate on consumer privacy the Agencies should be sensitive to the need for corporate financial privacy in the regulations. There should be an appropriate balance between informing the community of the nature of these agreements and the competitive interests of businesses.

Additionally, there should be a safe harbor provision for over or underreporting when the institution has done so in good faith.

DISCLOSURE

The Agencies permit NGE/Ps to make their agreements available to the Agencies but requires Depository Institution to file a copy within 30 days of making the agreement. The Agencies should not apply a different standard to depository institutions. The statute requires filing in a public record which should suffice. Depository institutions should not be required to bear the cost of reproducing and filing reports with the Agencies.

TIME EXTENSION

The Association requests that the Agencies extend the comment period by 30 days to allow time for depository institutions to comment on this complex proposal.

In closing, we believe that the proposal requires extensive revision and refinement. We are aware that there are conflicting views on the intent of the statute however, the Agencies must take care not to make it more difficult to partner with nonprofits and other organizations to meet the credit needs of the community. If you need additional information, please call me at (617) 523-7595. Thank you for you time and consideration.

Sincerely,

Tanya M. Duncan
Director, Federal Regulatory and Legislative Policy