NEIGHBORHOOD ECONOMIC DEVELOPMENT ADVOCACY PROJECT

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July 21, 2000

BY MAIL & E-MAIL

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

Communications Division
Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20019
Attention: Docket No. 0011

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

Manager, Dissemination Branch
Information Management & Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington,, DC 20552
Attention: Dcoket No. 2000-44

Re: Proposed "sunshine" regulations

Dear Madam/Sir:

These comments are submitted on behalf of the Neighborhood Economic Development Advocacy Project (NEDAP). NEDAP is a public interest law resource center that works with community groups based in low income neighborhoods and communities of color in New York City. NEDAP provides legal, technical and policy support to help groups in historically underserved communities confront lending discrimination and increase community access to

financial services for locally-based economic development. With NEDAP's assistance, groups throughout New York City have developed and preserved affordable housing, small businesses, and community development financial institutions that serve their neighborhoods.

A substantial portion of NEDAP's work pertains to the Community Reinvestment Act (CRA). NEDAP's staff, for example, have trained hundreds of organizations on the CRA and related laws, represented and counseled dozens of organizations in the CRA comment process, testified at public hearings regarding bank mergers and CRA-related policy matters, and organized ongoing meetings between banking regulators and community groups to discuss CRA enforcement. In the past five years, NEDAP has submitted comments, in coalition with other groups, to the federal banking agencies regarding particular bank mergers. As an organization, NEDAP does not accept grant or other financial support from banks subject to CRA. Almost all of the hundreds of community organizations with which NEDAP works, however, would be subject to the "sunshine" provision.

Given its extensive work with community groups on community reinvestment matters, NEDAP closely followed the drafting and passage of the so-called "sunshine" provision and the overall Financial Services Modernization Act of 1999. In fact, NEDAP convened and participated in several forums for community groups to discuss how the "sunshine" provision would affect groups, both that advocate for CRA compliance and work with banks to foster development of low and moderate income communities.

From NEDAP's perspective, the "sunshine" provision is the product of a flawed legislative process, in which few Congresspeople were aware of its substance let alone its existence, when they voted on the FSMA. The final result is a poorly drafted, convoluted law that will not pass legal muster. Among its legal defects, it contains terms that violate the First Amendment of the Constitution; penalize citizens who participate in the public process; and run counter to the law of contracts.

The "sunshine" provision was introduced to Congress on the wholly unsubstantiated premise that groups abuse the CRA process, extort money from banks, and force banks to make unsound loans. Senate Banking Chair Phil Gramm reportedly researched countless CRA agreements, but uncovered no evidence whatsoever that community groups had engaged in any illegal or coercive tactics with regard to CRA. Notwithstanding the absence of a sound public policy rationale, and based on what appears to be a preoccupation with the Senate Banking Chair to undo the CRA, the "sunshine" provision imposes unnecessary and costly reporting and disclosure burdens on community groups and banks, alike. It also requires regulators, in effect, to address a problem that does not exist. Similarly, the banking agencies will be forced to assume unnecessary costs and enforcement obligations, and to exceed their authority by intervening in private contractual arrangements.

NEDAP does not believe that the improvements to the proposed "sunshine" regulations will cure the serious legal problems presented by the statutory provision. The banking agencies, however, have the power – and obligation – to minimize any burdens that the law imposes on community groups and the public at large. NEDAP's comments therefore focus on mitigating the harmful effects of the law, and should not be interpreted as an indication that NEDAP finds the law acceptable on any terms.

Detrimental Effects of the "Sunshine" Provision

The "sunshine" provision will likely have a detrimental effect on the revitalization efforts of urban and rural communities across the country. CRA requires banks to meet credit needs within the bounds of safe and sound banking operation, that is, to meet community credit needs through non-risky banking practices. In no way does the law force the banks to make bad loans in traditionally underserved communities. Thus, CRA has stimulated partnerships between banks and community-based organizations, small businesses, public officials and others in an effort to help people become homeowners, provide jobs and improve the quality of life in many communities. The simplicity and flexibility of CRA are its best features. Attaching onerous disclosure and reporting requirements to this law will have a detrimental effect and may dramatically reduce cooperative ventures between community organizations and financial institutions.

RECOMMENDATIONS

The statute and proposed regulations infringe on Constitutional rights, as detailed in comment letters submitted by the National Community Reinvestment Coalition and others. NEDAP therefore urges that the federal banking agencies refrain from implementing "sunshine" until they have sought an opinion from the Department of Justice's Office of Legal Counsel. The "sunshine" provision, by making CRA-related speech suspect, threatens to reverse more than twenty years of bank-community partnerships and progress. If the "sunshine" provision retains its "CRA contact" language, it will drastically reduce the level of CRA-related lending and investing by imposing undue burdens on banks and community organizations.

Material Impact Recommendation

Instead of basing disclosure requirements on certain types of written or oral speech, NEDAP urges the federal banking agencies to base disclosure upon threshold levels for grants and loans and the material impact standard. The issue of materiality becomes crucial when interpreting which activities will trigger the "sunshine" provision. Currently, the federal agencies have interpreted the statute to mandate that disclosure is required if an agreement mandates any level of CRA-related lending, investment and services. NEDAP believes that such interpretation of material impact is overly broad and inconsistent with the intention of the statute. Additionally the current threshold amounts that would trigger disclosure requirements are unrealistically low and would result in widespread and burdensome requirements for both the regulatory agencies and the private sector. It is necessary to increase the materiality level so that it focuses on the CRA agreements involving major promises to increase lending and investing throughout entire low and moderate-income communities. Accordingly, the regulatory agencies must develop quantitative standards for determining if a CRA agreement has material impact on CRA performance in a bank's assessment areas.

Definition of "CRA Contact"

Any attempt to impose disclosure obligations with respect to CRA-related activities must be done on a "CRA contact" neutral basis and should relate only to activities that meet a well-defined standard of materiality. The term "CRA contact" must be straightforward to provide

certainty to the parties. Otherwise, the parties may avoid entering into productive partnerships that will subject them to disclosure and reporting requirements. Further, the regulations should not put members of the public at a disadvantage if they raise their concerns about banks' performance under CRA. Any definition of CRA contact that creates a disincentive for the public to speak up, or for the banks to enter into partnerships with people or organizations that do, will severely undermine the effectiveness of the CRA. The agencies should develop a more concrete definition of "CRA contact."

Reporting Requirements

NEDAP agrees with the proposed procedure of requiring the bank to disclose the text of the agreement, and requiring the non-governmental party to disclose the text of the agreement only if requested to do so by an agency. There is no reason why the bank and a non-governmental party must both initially disclose the same agreement to the regulatory agency.

NEDAP also strongly supports the proposal to allow non-bank parties to CRA agreements to satisfy their reporting requirements by submitting their federal tax returns (Form 990), financial statements, annual reports or other routinely-prepared documents. Requiring parties to a CRA agreement to establish new systems to track their expenditures separately for each funding source, and to create new financial reports simply to satisfy the requirements of the "sunshine" provision, would result in undue expense and unnecessary burden.

Thank you for the opportunity to comment on the agencies' proposed "sunshine" regulation. We trust that the banking agencies will not adopt regulations that violate core Constitutional law, harm communities, and create undue burdens on community groups, banks, and regulators alike.

Sincerely,

Sarah Ludwig
Executive Director

Kat Aaron
Community Outreach Associate