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

Re: Disclosure and Reporting of
CRA-Related Agreements

Dear Sir or Madam:

With respect to the Federal banking agencies' joint notice of proposed rulemaking concerning Disclosure and Reporting of CRA-Related Agreements, the Oklahoma Bankers Association hereby respectfully submits the following comments.

(For convenience of reference, these comments are set out in a chronological order, following the same order in which matters are discussed in the banking agencies' "Detailed Explanation of Proposed Rule." Each comment cites the page number(s) in the Federal Register, Vol. 65, No. 98 (cited simply as "F.R., page __") on which the related issue is discussed.)

1. Adding Examples of What Is a "Written Arrangement," or a "Written Understanding," Because These Terms Have Meanings Broader Than "Written Contract" (F.R., page 31965.) In defining what is a covered "agreement," Section 711 of GLBA states that this term includes a "written contract, written arrangement, or other written understanding." The proposed regulation says a covered agreement, if it also meets other requirements, can be "any contract, arrangement, or understanding (whether or not legally binding) that . . . is in writing."

After stating this brief definition, the regulation goes on to use the generic word "agreement" to include not only contracts, but also arrangements and understandings. It's clear that any agreement within the meaning of the regulation must be "written"; but in common usage most people would say that an "agreement" that is "written" is just another name for a contract. Most people also believe (erroneously) that a "written contract" must be a single piece of paper that two or more people sign, agreeing to something. It seems probable that a person applying the common meaning of

"agreement" and "written" would undercomply with the regulation, unless examples and more lengthy definitions are provided.

Contrary to common understanding, in the case of "offer and acceptance," two or more written documents—with one signed only by the first person, and the other signed only by the second person—are also interpreted together as forming a single written contract. The regulation recognizes this, but literally goes even farther. Technically, no "contract" even exists if the statements and assurances given by the parties are not legally binding; but an "arrangement" or "understanding" can fit within the meaning of the regulation, "whether or not legally binding."

Example 1, at F.R. page 31965, would be especially useful to include in the regulation itself, because it makes clear that two or more documents from separate parties (in this case, letters) together can make up a "covered agreement." It might be useful to expand the beginning of the fourth sentence in this example, as follows: "Whether or not the arrangement is legally binding, this written understanding would be a covered agreement under the proposed rule if . . ."

Example 4, at F. R. page 31965, might also be appropriate to include in the regulation. It makes clear that a completely verbal agreement drops out of the regulation. (The statute requires this result. This exclusion from the regulation is also necessary from a practical standpoint, because it's too difficult to document or prove the terms of a verbal agreement.)

The result of Example 2, at F. R. page 31965, is correct, whether or not it gets included in the regulation. (If an organization makes a general solicitation and isn't laying out any specific terms or proposals for the financial institutions being solicited, and isn't seeking or promising any changed behavior--anything to be done or avoided by either party--then obviously it is a solicitation without "terms" relating in any way to CRA, and shouldn't be considered an "agreement" under the regulation.) Example 3, at F. R. 31965, is really the same case, but with the impetus coming from the opposite direction—the financial institution makes a "clean" announcement of its commitment, without even being asked, and there's no element of "changing the behavior" of the party on the other end, relating to CRA issues involving the financial institution.

I think it is important to raise two other examples of an "arrangement" that the regulation needs to cover in order to prevent substantial evasion or avoidance of the statute's purposes. These additional examples are in no way inconsistent with the four examples given at F.R. page 31965:

(a.) A written offer that is verbally accepted. Although there is only one document in writing (the offer), and only one of the parties signs it, there is definitely both an "offer" (written) and an "acceptance" (verbal). A contract is formed--and technically it's a "written" contract. All of the terms are in writing—although they are in the first party's document, only. Where it is clear that the other party has said, "Yes," there is nothing uncertain about the terms of the agreement. There is no burden in

reporting the agreement's terms (because the terms are in writing), nor is there any burden to the banking agencies in understanding it. For example, a "person" might write a letter to a bank stating, "Our organization represents the interests of low-to-moderate-income individuals who may be underserved by financial institutions. As you may know, we have sometimes been active in opposing regulatory applications by financial institutions that have been less than fully effective in meeting the credit needs of low-to-moderate-income areas. In your institution's case, I believe we can help each other. If you would be willing to contribute $20,000 to us over the next four years to underwrite our general expenses, we will not oppose your pending application. No need to respond in writing--just call to let us know if you agree." So the financial institution's officer calls and verbally says, "Yes."

(b.) A written offer intended to be accepted by "performance." This is similar to the previous example, and also technically forms a legally binding written "contract." The difference is that after the first party states all of the terms, the second party is invited to indicate acceptance by doing or refraining from doing something (called the "performance") that the first party has requested). For example, an officer of a financial institution writes a letter to a "person" who was rumored to be planning to make comments with respect to the financial institution's pending regulatory application. The letter says, "We are prepared to make a contribution of $15,000 if your organization will refrain from making comments with respect to our pending application. Don't write or call. I'll send the check as soon as the comment period expires, if you can help in this small way." The "person" then makes no comments on the application, and also doesn't contact the officer who wrote the letter. The check arrives in the mail.

2. The Exemption for Individual Mortgage Loans Should Be Interpreted Using Common Meaning. Section 711 of GLBA provides that a covered "agreement' does not include "any individual mortgage loan." The agencies ask, at F.R. page 31966, "whether a mortgage loan [within the meaning of the exemption carved out by Congress in the statute] includes any loan secured by real estate . . ." The answer should be "Yes." This is the simple meaning of the words.

The agencies ask, alternatively, whether "mortgage loan" should be defined as "only a loan that is secured by real estate and made for the purchase or improvement of the real estate or for the refinancing of such loan." This tracks the definition of "home mortgage loan" from the CRA regulation. The problem with this suggestion is that Section 711 doesn't use the more limiting phrase, "home mortgage loan," nor does it require any particular "loan purpose" as a prerequisite for the "mortgage loan" exemption.

3. Defining "Substantially Below Market Rates." As mentioned at F.R. page 31966, it would be helpful for the agencies to define when loans are made at "substantially below market rates." Such a definition would increase clarity and certainty. A party ought to be able to read the regulation and determine whether its loan

rate is within a permissible range, because such a determination is a threshold issue for disclosure and reporting. It would be helpful, as suggested at F.R. page 31966, if the agencies provided a "formula for determining whether a loan bears a rate that is substantially below the rate that would be charged in a comparable transaction."

4. What Should Not Be a CRA Contact? Under the discussion of the third example of a "CRA contact" at F.R. page 31967, a mere inquiry concerning what is the CRA rating of an insured depositary institution, without any further comment or discussion of the appropriateness or inappropriateness of anything, should not be defined as a "CRA contact." A simple informational inquiry about the CRA rating, with no comment or implication connected to it, is not a potentially coercive situation that requires more extensive regulatory or public scrutiny. Furthermore, a "CRA contact" should not occur if there is a mere informational inquiry "concerning whether particular loans, services, investments or community development activities are generally eligible for consideration by an agency under the CRA Regulations," nor in the situation where a general offering circular for the sale of certain loans includes "a statement that the loans included in the loan pool [are] of the type that could be considered by an agency under the CRA Regulations. "

In addition, as requested at F.R. page 31968, there are probably situations where CRA-related *products* are offered for sale to insured financial institutions generally, or to their affiliates, at fair market prices and without any CRA-related *services* being involved. A company that prints banking-related treatises might offer a CRA Compliance book or a training videotape. Another company might sell software that helps an institution to keep track of CRA activities and investments. Soliciting an institution to purchase such products at fair value, without other discussions or possible services being involved, is not in itself "coercive" and should not be a "CRA contact." Where a recognized supplier of educational courses promotes a seminar related to CRA, or offers to provide an internal CRA-related training course for an institution's employees, this also should not be a "CRA contact."

5. Time Relationship Between a "Contact" and an "Agreement." The agencies ask, at F.R. page 31968, whether the "CRA contact" that precedes an "agreement" should be within a specified period of time before the agreement, in order to be taken into account. Clearly the answer is "Yes." Where there is no close connection in time between a "CRA contact" and a later agreement, the chance that the "contact" could have been "coercive" in leading to the agreement becomes less and less with the passage of time. As F.R. page 31968 suggests, a two-year period between the contact and the agreement should be the absolute outside limit, and a "one-year" period would be better, (1) by substantially reducing insured financial institutions' burdens in retaining records of "contacts," and (2) in focusing the regulation on those agreements that (because of a linkage in time) are more likely to be connected to a prior "contact."

6. When a Person Has a "Contact" with an Agency, and the Institution Is Unaware of That Contact. In response to the question at F. R. page 31968, an institution or affiliate cannot fairly be expected to make disclosures with respect to an "agreement" if it does not even know that a triggering "contact" with an agency has occurred prior to the execution of that agreement. (It would be nonsensical to suggest that a "coercive" contact may have occurred, leading to a certain agreement between a party and the institution, if the institution is not even aware that a contact occurred.) In such circumstances, either the agency is going to have to inform the institution that a "contact" has occurred so that the institution will know to report any agreement; or the regulation will have to exempt from reporting those situations where the institution in good faith is unaware that a triggering "contact" with an agency has occurred.

7. Focusing on Factors Reasonably Likely to Receive Favorable CRA Consideration.
As posed at F.R. page 31970, the regulation's required "list of factors" that may be "material" to an institution's application or CRA rating (and which therefore will define what activities are considered to be "in fulfillment" of the CRA) definitely should be limited to "those types of lending (and other activities) that are reasonably likely to receive favorable consideration under the CRA regulations, such as certain types of lending in LMI areas or to LMI borrowers." This approach sharpens the regulation's focus--cutting away the consideration of matters with little impact on CRA performance, while also reducing recordkeeping and reporting.

8. How to Determine the Annual Amount Under Multi-Year Agreements. At F.R. page 31971, methods are suggested for applying the dollar thresholds that trigger reporting, where a multi-year agreement does not have a specific timetable for disbursing funds or resources. Rather than presuming that, for example, the entire sum of $40,000 to be provided over 5 years is all provided in the first year, it makes sense to use the "alternate approach" that is set out—a "look-back" that decides (1) whether the agreement is a "covered agreement," and (2) whether reporting is required for any separate year during the term of the agreement, by determining whether the payments actually made under the agreement in any particular year exceed $10,000. This approach matches the reporting requirement to the year(s) during the agreement's term when sufficient payments are made (and spent) to trigger reporting, rather than lumping the reporting into the first year of the agreement.

9. "Substantively Related Contracts." In response to a question at F.R. page 31972, "substantively related contracts" entered into by separate persons should be aggregated under the rule only if each person has engaged in a CRA contact. In the interest of reducing burdensome reporting requirements, it is not appropriate to require the aggregation of all contracts entered into simultaneously by separate persons with an institution, because this approach would require disclosure and reporting by all such

persons (even those persons who have made no CRA contact, although one or more other persons have done so).

10. Review to Determine What Information in a Covered Agreement Can Be Withheld From Public Disclosure. Because an "exchange of letters" (Example 1 on F. R. page 31965), or presumably any combination of related documents, "whether or not legally binding," can form a "covered agreement," the issue (discussed at F. R. page 31974) of an agreement that may contain "confidential or proprietary information the disclosure of which may cause competitive or other harm to one or more of the parties" cannot always be solved by just leaving any sensitive information out of a contract. Documents that one party never intended to be part of a formal agreement may become part of an "agreement" disclosable under this regulation. The proposed agency review procedure to determine whether requested material can be treated as "confidential or proprietary" is appropriate.

Also (as asked at F.R. page 31974), it is appropriate that information sought to be protected as "confidential or proprietary" would not be disclosable until the agency review procedure is completed. There would be no effective protection of sensitive information if it were possible for someone to obtain that sensitive information even while a request to protect that information from disclosure was pending. Contrary to what is suggested at F.R. page 31974, it should not be necessary to protect the entire agreement from disclosure while the review process is pending, but only those portions for which confidential treatment is being sought. The "expurgated" version of the agreement could be stamped with an explanation (or a cover letter could state) that portions of the agreement have been temporarily withheld from disclosure, and that this information may later become available for disclosure, depending on the review's outcome.

11. Accounting of Purposes for Which Funds Were Used. From the discussion at F.R. pages 31975-76, where the funds or other resources received by a person under a covered agreement are not allocated or required to be spent for a specific purpose, the proposed regulation would permit that person to make a report giving a "detailed, itemized list of how the reporting person has used [all of] its funds during the fiscal year." In other words, where the funds or resources are permitted to be used for general overhead, the regulation would allow the person to meet its disclosure requirement by simply indicating how much money was spent overall by that person in six categories of expenses, without disclosing the specific way in which the particular amount of funds received under the agreement was actually used. (The statute does not say that the specific way in which the funds were spent must be disclosed only if the agreement requires the funds to be spent in a specific way. The statute contemplates not just a showing that "allocated" funds have been spent as required, but also a disclosure of how "unallocated" funds are actually spent.)

Although a disclosure of the total amount spent in each of a person's general "expense" categories may be useful, this approach by itself does not appear to provide what Section 711 of GLBA literally requires. Subpart (c)(1) of new Section 48 of the FDI Act literally requires a person to report "an accounting of the use of funds received pursuant to each agreement." It does not say that an accounting by categories for the expenditure of all funds of the organization will suffice, but instead requires (in all cases) an accounting of the use of the specific "funds received" under an agreement.

All money that is spent necessarily gets spent in some specific way. If appropriate "tracing" is used, each particular amount of income has to be spent for one or more specific expenditures. If $1,000 of income gets deposited to a bank account, and a person is required by regulation to use a specific accounting convention such as "first in, first out," it will be possible with absolute precision to state (by following this convention) that the $1,000 got spent, for example, in chronological order, $635 for office rent, $132.19 for electric bill, $94.00 for reimbursement of mileage, and $138.81 to pay a credit card bill incurred for travel expenses. The regulation doesn't require this much detail, but specific expenditures can first be identified, then sorted into the statute's six categories, and then disclosed. I think this is precisely what is meant by "an accounting of the use of funds received," and I do not think the regulation accomplishes what the statute literally requires. Subpart (c)(3) of new Section 48 of the FDI Act bears this out. It requires "a detailed, itemized list of the uses to which such funds [referring to the "funds received pursuant to each such agreement" mentioned in subpart (c)(1)] have been made . . . " It does not refer to a itemization of how the person's total funds were spent within the six categories.

One further point should be made, regarding the consolidation of reports. Although this portion of the proposed regulation, discussed at F.R. page 31976, allows all funds received under agreements to be combined into an aggregate amount, and also permits the "detailed, itemized list of how the funds were used" to be combined for all agreements, this approach does not seem to comply with the statute's requirement of "an accounting of the use of funds received pursuant to each such agreement. . ." (A separate accounting of uses of funds is not being made for the amounts received under each agreement, if all amounts are consolidated.) The preparing of a consolidated annual report will reduce time and paperwork, and should be permitted by the regulation even when there are only two reports to consolidate. But the accounting for use of funds under each agreement that is covered by the consolidated report is apparently something that should not be presented on a consolidated basis.

12. Reporting of Expenditures Is Tied to the Year of Receipt of Funds, Not the Year of Expenditure. It is troublesome that an insured depository institution and a person could, for example, enter into a five-year agreement, where the institution may decide to pay the entire $50,000 required amount in the first year. Suppose, then, that the "person" receives the full amount, but spends none of it (saves it) during the first year. The proposed regulations' disclosure requirements include only information for total amounts actually spent in the first year within the six categories of general expenses for that year

(none of which reflects any expenditure of the $50,000). In the last four years of the agreement (when the $50,000 is actually spent), the person will have no reporting requirements (and there will be no "sunshine" on those expenditures), because no money is actually "received" in those four years. This seems to violate the spirit of the statute, but the requirement that a report is due only for those years in which funds are received is consistent with statute. At F. R. page 31979, it is suggested that the agency could exercise its discretion, where a one-time grant is made with the clear intention that funds not be spent until a following year or years, to require the person to file an annual report for the later year(s). Administering the regulation in this manner would be desirable.

The Oklahoma Bankers Association appreciates the opportunity to respond to the proposed regulation. We trust that you will give careful consideration to the issues and concerns expressed herein.

Sincerely,

Charles Cheatham
Vice President & General Counsel