LEADERSHIP CONFERENCE ON CIVIL RIGHTS

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RE: Comments on Proposed Regulations Implementing the Gramm-Leach-Bliley Act Regarding the Disclosure and Reporting of Agreements Made Pursuant to the Community Reinvestment Act of 1977

Dear Comment Designees:

This letter constitutes the response by the Leadership Conference on Civil Rights to the requests by the Office of the Comptroller of the Currency (Docket No. 00-11), the Board of Governors of the Federal Reserve System (Docket No. R-1069), the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision (Docket No. 2000-44), hereinafter referred to as the "supervisory agencies," for comments on proposed regulations implementing Section 711 of the Gramm-Leach-Bliley Act requiring disclosure and reporting of agreements made pursuant to the Community Reinvestment Act ("CRA").

1. Introduction

The Leadership Conference is a coalition of over 180 national organizations working to advance civil and human rights laws and policies. We appreciate this opportunity to comment on the supervisory agencies' proposed regulations regarding the disclosure and reporting of CRA agreements. The Leadership Conference has long recognized the need for vigorous enforcement of fair lending laws, including the CRA. As a coalition, we have worked on a host of legislative and administrative activities to strengthen and increase enforcement of the fair lending laws at the national level. We were an active participant in the legislative debate on the Gramm-Leach-Bliley Act.

Since its passage in 1977, the CRA has been a critical tool in helping to combat racially discriminatory lending practices and in ensuring that credit and other banking services and products are extended to low-income communities. In aggregate financial terms, the CRA has generated nearly $1 trillion in lending in low- and moderate-income communities for home mortgages, small businesses and community economic development. Cameron Whitman, *Senate and House Complete Mark-up on Banking Reform*, NATION'S CITIES WEEKLY, March 15, 1999, at 14. On the local level, the CRA has been a powerful political tool enabling community-based organizations to monitor the lending practices of local financial institutions and to promote investment in particular housing and economic programs. Finally, the CRA promotes credit opportunities for underserved communities by drawing the attention of financial institutions to geographic and economic sectors which they have traditionally ignored. The president of the Federal Reserve Bank in San Francisco has noted that "perfectly good credit risks in lower-income communities frequently are denied credit when the usual standards are applied inflexibly." John Ikeda, *Bankers Urged to Expand Their Loans To Aid Communities*, THE SAN DIEGO UNION-TRIBUNE, June 2, 1989, at AA-1. And, the Federal Reserve report released just this week indicates that loans made under the CRA "can potentially lead to new and profitable business opportunities for banking institutions." Marcy Gordon, *Clinton: Report Confirms Lending*, ASSOCIATED PRESS, July 17, 2000.

It is imperative that the CRA requirements continue to be enforced by the supervisory agencies in a vigorous and effective manner. Discrimination on the basis of race and geography continues to pervade the financial services industry. In a major study released last year, ACORN (the Association of Community Organizations for Reform Now) found that African Americans were 2.17 times more likely to be rejected for conventional home mortgage loans than white applicants. *One Step Forward, Two Steps Back: An Analysis of Racial Disparities in Home Purchase and Refinance Mortgage Lending in Forty-one Cities from 1995 to 1998*, ACORN, Sept. 1999. African Americans fare even worse in obtaining small business loans. Recent studies collected and published by the Federal Reserve Board reveal that African-American applicants for small-business financing were over two-and-one-half times as likely as white applicants to be denied credit within the last three years, and almost three times as likely to be denied credit on their most recent loan

requests. Ken Cavalluzzo, et al., *Competition, Small Business Financing and Discrimination: Evidence From a New Survey*, FINANCE AND ECONOMICS DISCUSSION SERIES, Feb. 1999, at 13. Financial institutions also foreclose credit opportunities by failing to open branches and even reducing current services in predominantly African-American neighborhoods. For example, the number of bank branches in white neighborhoods has increased at three times the rate as the number of branches in mostly minority areas since 1980. Penny Loeb, et al., *The New Redlining*, U.S. NEWS & WORLD REPORT, Apr. 17, 1995, at 51. These practices, individually and collectively, have a devastating impact on the ability of African Americans and other minorities to accumulate and maintain wealth and to participate fully in the economic institutions of our society.

Latinos face similar barriers to accessing credit and other financial services. A series of analyses of HMDA data throughout the 1990s have found that denial rates of mortgage applications from Hispanics were anywhere from 50% higher to twice that of applications from Whites of similar income levels. Raul Yzaguirre, et. al., "The Fair Housing Act: A Latino Perspective, *Cityscape: A Journal of Policy Development and Research,* Vol. 4., No. 3., 1999, at 161. Moreover, some analysts believe that rejection rates of small business loans from Latinos are even higher than mortgage loan rejection rates. Rincon & Associates, *DFW Hispanic Consumer Survey*, 1998. In part as a result, a recent analysis by the Federal Reserve Board found that the median net worth of Latino households fell by 24% in the 1995-98 period, notwithstanding a modest rise in Hispanic home ownership rates and a booming economy. "Latinos' Net Worth Shrinking Despite Boom Times," *Los Angeles Times,* March 25, 2000. Furthermore, recent research from a number of sources confirms that Hispanics, especially recent immigrants, are disproportionately likely to be "unbanked," i.e., to lack access to any regulated financial institution. *Financial Access in the 21st Century*, U.S. Comptroller of the Currency, 1997. Thus, Latinos share with African Americans and other minorities a profound interest in assuring the effective implementation and enforcement of the Community Reinvestment Act.

With these proposed regulations, the supervisory agencies seek to implement the "sunshine" provisions of the Gramm-Leach-Bliley Act which modified the disclosure and reporting requirements for parties to agreements made pursuant to the CRA. The Congressional sponsors of the sunshine provisions argued that such provisions were necessary because the CRA was being used by community-based organizations to coerce financial institutions into investing in, and providing other financial services to, underserved communities in exchange for satisfactory or better CRA ratings. We strongly disagree with this view. The CRA has never been implemented in such a manner. Instead, the CRA has fostered countless successful relationships between financial institutions and community-based organizations that have in turn promoted access to financial services, home mortgage loans and economic development opportunities for millions of citizens.

It is critical that the regulations implementing the sunshine provisions be drafted in a manner that does not compromise the principles behind the CRA. We are very concerned that the sunshine provisions may generally discourage continuing and future participation by community-based organizations in CRA-related activities because of the burdens involved in disclosure and reporting and the privacy interests implicated by the changes. Therefore, it is important that the regulations clearly delineate the disclosure and reporting obligations so that community-based organizations can make fully informed choices about their future participation under the CRA. Otherwise, these groups and even financial institutions may avoid entering into collaborative relationships because they are not certain whether the disclosure and reporting requirements would be triggered. Most importantly, the regulations should ensure that public comment on CRA-related activities of financial institutions is encouraged rather than discouraged. Any other outcome would wholly defeat the purpose of the CRA and would represent a dramatic retreat from the progress to which all participants under the CRA can attest. Our specific comments follow.

II. Exemptions for Certain Agreements

A. Agreements With Persons Who Have Not Made a CRA Contact

The proposed regulations require the disclosure of agreements between financial institutions and nongovernmental entities and persons resulting from a "CRA contact." It is our view that this provision has the potential of substantially decreasing participation in the CRA process by both financial institutions and community-based groups. A broad interpretation could discourage community groups from raising concerns about performance under the CRA or from otherwise participating in the regulatory process. Such a result is directly at odds with the principles of the CRA, which emphasizes the role of public comment and the beneficial effects of community collaboration with financial institutions. For this reason, the definition of a "CRA contact" should be narrowly interpreted in clear terms so as to limit the number of community-based organizations affected by the disclosure and reporting requirements.

1. CRA Contact With an Agency

The proposed regulations correctly recognize that any exempt parties should retain their exemption, despite contact with a Federal banking agency, unless that contact involves substantive comments or testimony concerning an institution's CRA record. Requests for information or other nonsubstantative discussions by a person with an agency should not eliminate the exemption. Additionally, we believe it is important to exempt from coverage instances in which the agency affirmatively contacts a person requesting testimony or comments, as the regulations propose to do. We also agree that statements made by persons at widely attended conferences or seminars on general topics about particular institutions do not qualify as CRA contacts. However, we urge the

supervisory agencies to offer additional guidance on the nature and size of such conferences or seminars to provide a clear understanding about the scope of this exemption.

2. CRA Contact With Insured Depository Institution or Affiliate

The Leadership Conference believes that the definition of CRA contact with insured depository institutions or affiliates, as set forth by example, is too broad and is not consistent with the language of the Gramm-Leach-Bliley Act. While the Act provides that, in order to receive an exemption, the party must not have discussed or otherwise contacted the institution concerning the CRA, we believe that this should not include contacts that do not involve the transmission of meaningful information regarding CRA obligations. For example, merely asking an institution for its CRA rating should not require coverage. For this reason, we suggest that the rule should be limited to cover only contacts that involve providing CRA-related comments or testimony to an agency or discussions with an institution about providing such comments or testimony to an agency.

Thus, the examples described in __.2(b)(2)(B)(3), (4) and (5) should not constitute a CRA contact. We further urge the supervisory agencies to make clear that contacts with an institution involving inquiries about hearing dates or other procedural questions about providing comments or testimony are not to be construed as CRA contacts. We also suggest that the regulations exclude discussions with institutions about whether particular loans, services, investments or activities are eligible for consideration by an agency under the regulation. Generally, under the rubric suggested, the regulations should more specifically define when a CRA contact has occurred. This can only lead to more informed choice by parties determining whether to initiate contact that will prompt disclosure of any future agreements.

2. Temporal Relationship Between CRA Contact and Agreement

The supervisory agencies have requested comment on whether there should be a "temporal relationship between a CRA contact and when an agreement is made." Currently, the proposed regulations require disclosure of any agreement (assuming the other requirements are met) that is entered at any time after a CRA contact. Thus, a party that does not want to disclose its agreements will be discouraged from engaging in anything that could be construed as a CRA contact. As the preamble notes, it is likely that Congress intended Section 711 to apply only to agreements that "result from, or were influenced by, a CRA contact." We agree. The sunshine provisions were intended to apply to agreements that were entered as a result of a direct causal link with meaningful comments about CRA performance. The presumption should be that the direct causal link fades after one year. This presumption could be rebutted with significant evidence to the contrary. Furthermore, there is no causal link if the only CRA contact occurred after the agreement. Thus, the definition of a CRA contact should not include a contact that occurs after an agreement is entered.

3. Agreements Involving Several Parties

The proposed regulations require the disclosure of agreements even when one or more participating parties have not engaged in CRA contact. "A covered agreement is any contract, arrangement, or understanding [where] the parties to the agreement **include** . . . an insured depository institution . . . and . . . [a] non governmental entity . . . ." §§ __.2(a)(2)(i) & (ii) (emphasis added). The use of the word "include" indicates that a party not involved in the CRA contact but involved in the agreement would be compelled to satisfy the disclosure and reporting requirements. We do not believe this is necessary. As discussed above, the sunshine provisions were intended to apply to agreements that result from, or were influenced by, CRA contacts. Only the parties initiating such contacts should be accountable for disclosing and reporting the contents of the ensuing agreements. The purpose of the provisions will be fulfilled since disclosure and reporting of the relevant agreement will occur. However, limiting these obligations to the parties actually making CRA contacts will ensure that additional parties to the agreement who made no such contacts do not incur the substantial burden of compliance.

III. Fulfillment of the CRA

Under the Gramm-Leach-Bliley Act, a written agreement is to be disclosed only if it is "made "pursuant to, or in connection with, the fulfillment of the [CRA]." 12 U.S.C. § 1831y(e)(1)(A). The supervisory agencies are directed to enumerate a list of factors determined to have a "material impact" on the agency's decision to approve or disapprove an application for a deposit facility under the CRA or to assign a rating under the CRA. 12 U.S.C. § 1831y(e)(2). In identifying these factors, it is important that the agencies distinguish between the factors that are relevant and the level of activity that would have a **material impact** on a CRA rating or decision to grant or deny an application for a deposit facility. As currently drafted, the proposed list of factors is too broad because not all of the activities identified will necessarily materially affect a CRA rating or an application decision.

Material impact should be defined in a manner consistent with the actual practices of supervisory agencies in reviewing applications and in giving CRA ratings. The supervisory agencies have already identified the factors on which they based decisions about applications covered by the CRA and the limited role that commitments for future action play in the decision-making process. In 1989, the supervisory agencies issued their Statement of the Federal Financial Supervisory Agencies Regarding the Community Reinvestment Act, which stated that "applicants should address their CRA responsibilities and have the necessary policies in place and working well before they file an application." March 21, 1989, at 18. The Policy Statement made clear that mere commitments made during the application process cannot overcome a seriously deficient record of CRA performance. The critical element is the institution's ongoing performance, and not a description of expected

action in the future. Accordingly, any such commitments do not have a material impact on the decision to grant or deny an application.

The Policy Statement also addressed the factors to be considered by institutions in structuring a program to achieve a satisfactory performance rating under the CRA. While the CRA regulations have been modified since 1989, the factors identified have continued to be relevant to successful performance under the CRA. The Policy Statement expressed support for special lending programs for low- and moderate-income neighborhoods but stated that the scope of any such program is properly addressed by the institution itself, considering its own expertise and financial capabilities. Thus, the supervisory agencies take the position that it is the institution's responsibility to decide the scope and nature of the activities in which it should engage for CRA purposes, not outside parties.

The supervisory agencies have long held the view that agreements with community-based organizations are not essential to approving a deposit facility application or to achieving a satisfactory CRA ratings and that performance under such agreements is not a part of the review process in either case. Accordingly, individual CRA agreements cannot in and of themselves have a material impact. The final regulations setting forth the definition of "material impact" should exclude all such agreements unless the absence of that agreement would result in the denial of an application or a lower CRA rating.

The supervisory agencies have specifically requested comment on whether the list of factors should exclude performance of activities designed to ensure compliance with fair lending laws. We believe this is the correct view. As the preamble notes, the characterization of any such activities as fulfillment of the CRA could have a devastating impact on compliance and enforcement of fair lending laws. Hopefully, lending institutions have integrated fair lending policies and practices throughout their operations. If so, it would be difficult to discern the specific activities relating to compliance that would then trigger the disclosure requirement. And, as noted, institutions would be forced to disclose agreements with community and fair housing organizations to provide testing designed to determine compliance with fair lending laws. Such disclosure could very well interfere with the performance of the testing service, and could compromise the institution as well as the contracting organization in a number of ways. Clearly, there should be no provision that interferes in any way with fair lending enforcement.

IV. Disclosure of Covered Agreements

A. Disclosure to the Public

The Leadership Conference urges the supervisory agencies to interpret broadly the disclosure requirement to allows parties to use all possible means of disclosing the requested information and

provide illustrative examples indicating how parties may make agreements to the public. Again, the regulations must be implemented in a manner so as to impose the least burden on the parties, particularly the community organizations which have fewer resources than the financial institutions with which to make such disclosures. As long as there are effective procedures to ensure compliance with the disclosure requirement, we believe that any reasonable and efficient means for such disclosure should satisfy the obligation under the Gramm-Leach-Bliley Act. We support the ability of parties to charge reasonable fees for copying and mailing. However, we believe that it is unnecessary to extend a party's obligation to disclose a CRA agreement for twelve months after the expiration of the agreement. Any post-expiration requests for agreements may be adequately addressed through Freedom of Information Act inquiries to the relevant supervisory agency.

B. Persons Must Make Covered Agreements Available to Agency

We support the interpretation of Section 711 set forth in the proposed regulations which allows a nongovernmental entity or person to fulfill its disclosure obligation by providing a copy of the agreement to the relevant supervisory agency upon its request. This clearly reduces the compliance burden of the nongovernmental entity or person without compromising the disclosure provisions of the Act since the depository institution – the other party to the agreement– will have already provided a copy to the supervisory agency.

C. Treatment of Confidential or Proprietary Information

The Leadership Conference urges the supervisory agencies to give full effect to the Gramm-Leach-Bliley Act's express requirement that proprietary and confidential information is protected in the course of disclosing the information required under the Act. 12 U.S.C. §1831y(h)(2)(A). Again, we are concerned about the chilling effect of the disclosure provisions on community organizations that would otherwise enter into CRA agreements with financial institutions and community organizations. We also note that the financial institutions may be discouraged from adopting experimental programs to increase the availability and affordability of credit in low- and moderate-income communities if forced to disclose all details about these programs. For this reason, we are concerned that the preamble suggests that Section 711 may require disclosure of information commonly withheld under the Freedom of Information Act. We urge the adoption of a broad definition of information that is considered confidential and proprietary.

We support a process by which a party could request a determination from the relevant supervisory agency regarding whether the agency could withhold specific portions of the agreement from public disclosure. We believe that the regulation should specifically permit a party that has requested such agency review to delay disclosing the agreement to the public until the agency rules on the request. The privacy interests of community organizations are too important to require

disclosure pending the agency determination. These organizations should not have to bear the substantive and procedural burdens of disclosure while the review is pending. We have no reason to believe that this procedure would be abused by any party. If there is substantial criticism about delaying the disclosure of the agreement, a possible compromise would be to disclose to the public those portions of the agreement that are not in dispute while redacting those portions that are the subject of agency review.

V. Annual Reports

1. No Report Required by Persons Not Receiving Funds or Resources

The Leadership Conference supports the two exemptions from the annual reporting requirements for parties not receiving funds under an agreement in a particular fiscal year and for parties not receiving funds or resources at any time under the terms of an agreement. We agree that to do otherwise, simply because the organization is a party to a covered agreement, would not further the purpose of the Gramm-Leach-Bliley Act. Moreover, requiring such a report in these instances would create an unnecessary burden on the organization and be contrary to the statutory direction.

2. Use of Other Reports

The Leadership Conference strongly urges the supervisory agencies to adopt effective but minimal reporting requirements. This will give full effect to Congress' admonition in Section 711 that the regulations do not impose an undue burden on the parties to a CRA agreement. As noted in the preamble, the legislative history indicates that agencies should allow parties to rely on reports prepared for other purposes in fulfilling the reporting obligations. The proposed regulations allow for this as long as such reports contain all the required information. This is a critical provision which must be retained in the final regulation. Many parties to CRA agreements are non-profit community associations with few staff and resources. Requiring such organizations to devote substantial time and resources to preparing specific accountings of their use of funds received under CRA is at odds with the goals of the CRA to promote the substantive work of these organizations and to encourage their relationships with financial institutions. We strongly agree that use of Internal Revenue Form 990 should fulfill the reporting requirements for general purpose funds. We believe that use of Form 990 or a comparable document should also satisfy the requirements for specific purpose funds. The separate reporting requirement for specific purpose funds is likely to create substantial confusion and lead to inaccurate reporting, which could ultimately jeopardize the entire CRA agreement. Since organizations must reflect all funds received in financial statements, the special reporting requirements can be eliminated.

3. Consolidated Annual Reports

The proposed regulations permit a party to five or more covered agreements to file a single consolidated report. We believe this number is unnecessarily high. The effect of such a provision is that parties to two, three or four agreements have a higher reporting burden than parties to five or more agreements. Accordingly, the greater reporting burden is levied on the smaller organization, which tends to have few resources to devote to compliance. We recommend that any nongovernmental entity or person that is a party to two or more covered agreements be eligible for consolidated reporting.

4. Calendar v. Fiscal Year Reporting

The supervisory agencies have requested comment on whether granting the option of fiscal or calendar year reporting will reduce the regulatory burden of parties. We believe that it will. If parties are permitted to rely on existing documents such as Form 990 to comply with the reporting requirements, they should be allowed to confirm the reporting period to their fiscal year. Compelling parties to do otherwise would involve substantial efforts to collect and analyze financial information in a manner at odds with their accounting system, thereby increasing the burden associated with the reporting requirement.

VI. Compliance Provisions

Section 711 provides that the material and willful failure of a person to comply with the reporting and disclosure requirements may cause the relevant CRA agreement to be unenforceable. This is a drastic penalty. Accordingly, the procedures for imposing such a penalty must be clear and understandable. The regulations should define a "material and willful failure" and should set forth examples of this violation to ensure that potentially affected parties know precisely the type of behavior that will subject them to this severe penalty. Similarly, examples of the inadvertent or *de minimis* reporting errors would also be useful. The written notice provided under the regulation should specify the nature of the failure to disclose or report properly, affording the affected party to investigate, to offer a response, and to correct the violation.

VII. Conclusion

The Leadership Conference appreciates this opportunity to comment on the proposed rulemaking. We urge the supervisory agencies to give full effect to the purpose of the CRA to encourage financial institutions to "help meet the credit needs of the local communities in which they are chartered . . . ." 12 U.S.C. § 2901(b). We believe that our recommendations for implementing the sunshine provisions will help to preserve the critical role of community participation in the CRA

process and ensure that the CRA continues to be an effective tool for eliminating discrimination and for promoting investment and credit opportunities for all communities. If we can be of further assistance, please do not hesitate to contact us.

Sincerely yours,

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