92

330 Seventh Avenue
New York, NY 10001

Tel 212 219-1800
Fax 212 941-7458

Lawyers Alliance for New York

July 20, 2000

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

Re: Comments on Proposed Rules to
<u>Section 711 of Gramm-Leach Bliley Act</u>

Dear Sir/Madame:

Enclosed are comments on the proposed rules to Section 711 of the Gramm-Leach Bliley Act. Please contact me if you have any questions regarding their content.

Sincerely,

Sean Delany

Sean Delany
Executive Director

Encl.

Community Development Legal Assistance Center

Nonprofit Law Program

Child Care Law Program

Providing legal assistance to nonprofit and community organizations since 1969.

Comments on Proposed Regulations to Section 711 of Gramm-Leach -Bliley Act

Submitted by Lawyers Alliance for New York
July 21, 2000

Introduction

Lawyers Alliance for New York is a nonprofit, 501(c)(3) organization that provides legal services to nonprofit community-based organizations on matters relating to community reinvestment in low-income areas of New York City, including low-income housing, community development financial institutions ("CDFI's"), and economic development. Our financial support comes primarily from foundation grants and corporate contributions, legal fees and small government contracts.

Each of the 435 nonprofit groups that make up Lawyers Alliance's current client roster is working to improve the quality of life in New York's low-income communities. Our clients provide financing to small businesses that would not qualify for bank loans; conduct job training programs for individuals moving off welfare; create affordable housing, whether by constructing residential buildings or rehabilitating deteriorated properties; and expand the quality of safe and affordable child care services through nonprofit family child care networks and on-site child care centers.

Our comments below are submitted in response to the joint request by the Office of the Comptroller of the Currency (Docket No. 00-11), Federal Reserve System (Docket No. R-1069), Federal Deposit Insurance Corporation, and the Office of Thrift Supervision (Docket No. 2000-44) (the "Agencies") for comments on regulations proposed by the Agencies (the "proposed regulations") pursuant to the disclosure and reporting provisions of Section 711 of the Gramm-Leach-Bliley Act ("GLB"), Pub. L. No. 106-102, 113 Stat. 1338 (1999) ("Section 711").

Our comments below are directed towards those areas of the proposed regulation which we believe merit our particular attention.

Summary of Comments:

1. We urge the Agencies to adopt regulations that (a) restrict the definition of Community Reinvestment Act ("CRA") contacts to those communications with potentially coercive effects, and (b) exempt from such definition those communications intended to assist insured depository institutions to comply with their CRA obligations.

2. We are concerned that financial institutions and community-based organizations will have difficulty determining when to apply the proposed

regulations which are overly broad, vaguely worded and confusing in several respects.

3. We strongly oppose those aspects of the proposed regulations that, by stifling interaction between financial institutions and community-based organizations, will make it more difficult for banks to obtain information about the credit needs of low-income neighborhoods and result in an overall decrease in lending in already underserved areas.

4. We strongly support the adoption of a brief time limit between a financial institution and community-based organization's CRA contact and the parties' entering into a CRA agreement rather than the open-ended time period in the proposed regulations.

5. We strongly oppose those aspects of the proposed regulations that impose unduly burdensome reporting requirements on financial institutions and community- based organizations engaged in CRA-related activities. Moreover, we are concerned that the overall reporting burden will greatly exceed that set forth in the joint request because the number of financial institutions and non-governmental entities incurring disclosure obligations will be much higher than the Agencies' estimates.

Text of Comments

1. <u>We urge the Agencies to adopt regulations that (a) restrict the definition of CRA contacts to communications having potentially coercive effects, and (b) exempt communications intended to assist insured depository institutions to comply with their CRA obligations</u>.

Section 711 is designed to bring "sunshine" to CRA-related activity by requiring the disclosure of any agreement between a non-governmental entity, such as a community development organization, and a financial institution, in fulfillment of the latter's obligations under the CRA, if the non-governmental entity has previously testified about, commented on, or had any discussions or contacts with the bank concerning the CRA. The drafters of Section 711 deemed the provision necessary to stop community organizations from extorting bribes and cash payments from banks and coercing community reinvestment using the threat of CRA-protests of the banks' activities (or lack thereof) in low-income neighborhoods. Congress adopted the sunshine provision, despite the fact that even Senator Phil Gramm, co-sponsor of GLB and the "coercion" theory's leading proponent, has never been able to uncover or document abuses under the CRA or otherwise provide evidence that such coercion and extortion actually exist.

Our profound misgivings and unease about GLB's underlying rationale notwithstanding, we believe that any regulations adopted under Section 711 should target only the situations which the Agencies view as potentially conducive to coercion. Doing so will require revising the proposed regulations to distinguish those situations and communications in which banks might conceivably be vulnerable to coercion from those that actually enable the banks to fulfill their CRA obligations.

In their joint request for comments, the Agencies invite feedback on "whether the rule can and should be limited to cover only contacts that involve providing CRA-related comments or testimony to an agency or discussions with an insured depository institution about providing (or refraining from providing) CRA-related comments or testimony...." Our response is an unqualified yes; the rule can and should be so limited. Where there is no participation in the regulatory process, and no agreement to refrain from participation, then the harm intended to be addressed by GLB cannot have taken place.

Discussions between a bank and a non-governmental entity about potential CRA-related comments or testimony by the non-governmental entity is fundamentally different and, therefore, readily distinguishable from discussions between the bank and a local nonprofit group regarding a project that will enable the bank to fulfill its CRA obligations. The joint request for comment also invites response as to whether the rule can and should be limited to exclude from the definition of CRA contact "discussions with a [bank] concerning whether particular loans, services, investments or community development activities are generally eligible ...under the CRA...." Here again, our response is yes. As the Agencies themselves point out in the joint request, "the marketing of products and services to [banks] frequently may include a general statement of whether the product or service is eligible for credit under the CRA." For financial institutions, such a statement, whether written or oral, is a normal part of their doing business and provides information that is relevant to investment decisions.

In New York City alone, each week, hundreds of conversations occur naturally between banks and the nearly 100 economic development corporations represented by Lawyers Alliance which include 15 credit unions and 30 CDFI's. As an example, one of our clients, a housing and economic development corporation, recently started a loan fund for new construction companies in Harlem. Some of the fund's initial capital was provided by banks. Certainly, at some point prior to investing in the fund, an officer from each bank asked our client about the location of such future construction. The fact that it is slated for Harlem (or any other low-income community), thereby making contributions to the loan fun eligible for CRA credit, does not make such discussions potentially coercive or otherwise suspicious. Similarly, in recent months, two of Lawyers Alliance's community-based credit union clients have expanded their operations by opening branches in other low-income communities. Traditional financial institutions provided some of the necessary capital, receiving CRA credit in the process. The service areas for those new branches--and whether investment in them by CRA-obligated banks would qualify for credit under the CRA--were, no doubt, a subject of discussion.

The foregoing are just two of hundreds of examples of Lawyers Alliance clients and banks working in partnership in ways that further the community-based organizations' missions and provide the banks with CRA credit. We believe that such partnerships play a fundamental role in successful CRA programs and performance and that any regulations adopted under the sunshine provision should provide appropriate recognition and treatment. To do otherwise would be antithetical to the Agencies' policy of encouraging dialogue between banks and community members and organizations.

2. <u>Financial institutions and community-based organizations will have difficulty determining when to apply the proposed regulations which are overly broad, vaguely worded and confusing in several respects.</u>

Putting aside the fact that the proposed regulations are far broader than the alleged harm they seek to prevent, their language is so vague and confusing that almost any discussion between a bank and a community organization has the potential to trigger disclosure obligations. The regulations that are ultimately adopted under Section 711 should be straightforward, clear and directed solely at those situations, if any, in which financial institutions are most likely to become vulnerable to coercion. These regulations are not.

As an example, under the proposed regulations, the list of contacts (defined as "CRA contacts") between a bank and community-based organization that trigger reporting obligations if the parties enter into a covered agreement at any time thereafter, includes discussions between the parties about providing (or refraining from providing) comments to an agency regarding the bank's CRA performance; about actions that should be taken to improve the bank's CRA performance; or about any obligation or responsibility that the bank may have to meet the banking needs of the community. Each of the foregoing is a CRA contact under the proposed regulations, regardless of which party initiates the contact. Consider the situation in which a financial institution approaches a community development organization for information about local credit needs or assistance in locating creditworthy low-income borrowers. The bank's conduct constitutes a CRA contact and triggers reporting obligations, although the proposed regulations contain no explanation of how the contact makes the bank vulnerable to extortion or is otherwise worthy of suspicion and heightened scrutiny.

The proposed regulations are so confusing that financial institutions as well as community-based organizations will find it difficult to determine when disclosure obligations are triggered. According to the preamble to the proposed regulations, it is not necessary for a discussion or contact to include any particular words or phrases, such as "CRA", "Community Reinvestment Act" or "CRA rating", in order to be a CRA contact. Instead, "the substance and context of the discussion or contact are the controlling factors". The proposed regulations offer no guidance in how to determine the "substance" or "context" of a contact, however. As an example of a contact that does not constitute a CRA contact, the proposed regulations describe a fundraising letter sent to banks and other community businesses to encourage them to "meet their obligation to assist in making the local community a better place to live and work." It takes little effort or imagination to argue that the letter's underlying context is the CRA and the phrase "their obligation...to mak[e] the local community a better place", a barely-veiled reference to the CRA's lending and reinvestment requirements.

3. We strongly oppose those aspects of the proposed regulations that, by stifling interaction between financial institutions and community-based organizations, will make it more difficult for banks to obtain information about the credit needs of low-income neighborhoods and result in an overall decrease in lending in already underserved areas.

The proposed regulations offer banks and community-based organizations that become parties to CRA agreements two options, both of them unattractive. The first is to institute extensive record keeping policies and procedures that track each and every discussion, meeting or phone call with a community-based organization (or bank, as the case may be) as a potentially triggering event should the parties enter into a CRA agreement. This option will consume a disproportionate amount of resources, particularly for community-based organizations. The second option is for banks and community-based organizations to reduce the number of discussions, meetings and phone calls with each other or simply avoid contact altogether.

Interaction and collaboration between financial institutions and locally based organizations are crucial to fulfilling the purpose and requirements of the CRA. In their Joint Policy Statement on the CRA, issued in 1989, the Agencies declared that the affirmative responsibility of banks to meet the credit needs of low and moderate members of their communities obliged the banks to ascertain and demonstrate their response to such credit needs. According to the Policy Statement, while implementation of an effective CRA process required a bank to incorporate findings regarding community credit needs into the development of products and services, there was no obligation to make loans that were not "consistent with the [bank's] safe and sound operation." The CRA does not require banks to make loans to individuals or projects that are not creditworthy.

Unfortunately, many traditional financial institutions have difficulty ascertaining credit needs and locating appropriate loan candidates in low-income communities. Banks are unable to successfully transfer the lending criteria and credit strategies they use elsewhere to poor communities. Community- based organizations can be of tremendous assistance because, in addition to understanding the credit needs of their community, they offer expertise that enables banks to establish successful credit strategies in (for them) unfamiliar territory.

To use another example from Lawyers Alliance's client base, one obstacle banks frequently face is the fact that low-income loan applicants may not satisfy standard criteria for home mortgage loans because they lack credit history and may have an irregular employment record. By working with credit unions and other CDFI's, many banks overcome this and other obstacles to satisfying CRA requirements. Community-based credit unions have developed lending criteria for low-income neighborhoods that include, for example, permitting loan income applicants without a credit history to provide evidence of consistent rent and utility payments instead. By funding credit unions and other CDFI's, banks are able to provide credit and other financial services desperately needed by residents of low-income communities and make safe and sound investments. Similarly, community development organizations can help banks take advantage of opportunities, including government subsidies and tax credits, to make loans for the improvement of deteriorated housing. None of this could be accomplished, however, without cooperation and collaboration between financial institutions and community-based organizations.

4. We strongly support the adoption of a brief time limit between a financial institution and community-based organization's CRA contact and the parties' entering into a CRA agreement rather than the open-ended time period in the proposed regulations.

Imposing a long time limit (or even worse, no time limit at all, as do the proposed regulations) between the occurrence of a CRA contact and a covered agreement triggering disclosure under Section 711 will further stifle discussions between community development organizations and banks. It is unrealistic to expect parties about to enter into an agreement to recall the substance of each and every prior conversation or encounter between them. Any good faith attempt at compliance with the proposed regulations will have to compensate for inevitable changes in personnel and the failure of memory over a long time period and, therefore, necessitate massive record-keeping and tracking procedures that will be burdensome to both parties and crushing to nonprofit community-based organizations.

5. We strongly oppose those aspects of the proposed regulations that impose unduly burdensome reporting requirements on financial institutions and community- based organizations engaged in CRA-related activities. Moreover, we are concerned that the overall reporting burden will greatly exceed that set forth in the joint request because the number of financial institutions and non-governmental entities incurring disclosure obligations will be much higher than the Agencies' estimates.

We strongly support the Agencies' stated goal of ensuring that compliance with the requirements of GLB not impose "undue burdens" on parties engaged in CRA-related activities. Unfortunately, in their present state, the proposed regulations to the sunshine provision threaten to have exactly the opposite effect. We have already discussed how, as a threshold matter, banks and community-based organizations will find it difficult to determine whether a meeting or a conversation occurring in the ordinary course of business triggers disclosure obligations under Section 711.

The Agencies estimate that approximately 5000 non-governmental entities will incur reporting requirements once the proposed regulations are adopted. We believe this number is far too low. It is extremely difficult to pinpoint with any certainty the total U.S. population of community development organizations. With the exception of credit unions and other CDFI's, these entities are often unknown to federal regulators. We can predict, however, that, under the proposed regulations, most of Lawyers Alliance's clients would incur disclosure obligations because they receive CRA-eligible funding for their work in low-income communities, whether through contributions, loans, investments or a combination thereof. If we can make such a statement with respect to our client base, which, after all, represents only a portion of the total population of community-based organizations of one U.S. city, the national total will be many times greater: in the tens (if not hundreds) of thousands, rather than the 5000 projected by the Agencies.

In March of this year, prior to the issuance of the proposed regulations, Lawyers Alliance hosted a citywide forum on Section 711 that was attended by leaders in banking and community economic development. At the forum, the Vice President in charge of CRA compliance at a leading U.S. financial institution stated that her bank has "a staff of community relations officers, who spend everyday of their lives out in the communities looking for opportunities...to work together with community partners to ...increase our delivery of products and services. We have partnerships with a number of community organizations which would...fall under the sunshine...disclosure requirements and we're proud of those arrangements. There is nothing in them...to hide, [however] the regulatory burden,...will be a bigger administrative task."

The proposed regulations will encumber individual community development organizations and banks with a far greater reporting burden than the Agencies project because each of these entities engages in so many CRA-related discussions. The reporting requirements will consume a disproportionate amount of resources and, in order to conserve such resources, it is likely that banks and community organizations will reduce or avoid contact with one another. As a result, legitimate and successful business relationships will collapse, resulting in a decrease in lending and investment in already underserved communities.

Under the proposed regulations, compliance with the sunshine provision's reporting obligations requires both disclosure of any CRA agreements, and a report on the use of funds received under CRA agreements. We strongly support the Agencies' proposal that would allow non-bank parties to use existing reports or documents prepared on a routine basis, such as federal tax returns (Form 990), annual reports or financial statements, to satisfy Section 711's reporting requirements. We are concerned however, that proposed regulations proposal of separate reporting methods for funds received for specific and general purposes will not only lead to confusion and uncertainty, but will require community development organizations to use their limited resources to establish fund-tracking systems, simply to satisfy the sunshine provisions. Such efforts will be unnecessarily duplicative since, as tax-exempt organizations, nonprofit community groups are already required to file an annual report that accounts for all funds received. Accordingly, we strongly oppose the requirement of separate reporting for the use of specific purpose funds.

Under the proposed regulations, a non -governmental entity that is party to five or more CRA agreements is permitted to file a single consolidated report with respect to funds received under the agreements. While we strongly support the consolidated filing option as adhering to the statutory goal of minimizing the burden of compliance , we feel the threshold is much too high. We strongly support making the consolidated filing option available to any non-governmental entity that enters into two or more CRA agreements. To do otherwise places a greater reporting burden on organizations that are the least equipped to meet it: smaller organizations with fewer resources available for compliance.