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July 20, 2000

Communications Division
Office of the Comptroller of the Currency
250 E Street, SW, Third Floor
Washington, DC 20219
Attention: Docket No. 00-11

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

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

Manager, Dissemination Branch
Information Management & Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: Docket No. 2000-4

Re: Proposed Regulation on the Disclosure and Reporting of CRA-Related Agreements; 65 Federal Register 31961; May 19, 2000

The Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision ("the Agencies") have proposed a rule to implement provisions of Section 711 (the "CRA Sunshine Law") of the Gramm-Leach-Bliley Financial Modernization Act of 1999. These provisions require nongovernmental entities or persons ("NGE/Ps"), insured depository institutions, and affiliates of insured depository institutions that are parties to certain agreements that are in fulfillment of the Community Reinvestment Act of 1977 to make the agreements available to the public and the appropriate agency and file annual reports concerning the agreements with the appropriate agency. The proposed regulations will apply to all insured banks and savings associations. The American Bankers Association ("ABA") brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership – which includes community, regional and money center banks and bank holding companies, as well as savings associations, trust companies and savings banks – makes ABA the largest bank trade association in the country.

The Agencies' proposal is very long and complex and raises many questions about the proper implementation of the CRA Sunshine Law. The proposed regulation appears to be very burdensome for a number of banks, but we recognize that the Agencies are under a mandate to implement the provisions of this very broadly written statute. Nonetheless, ABA believes that the proposal can properly be narrowed and made considerably less burdensome upon the industry.

Additional Comment Period Required

Due to the complexity of this proposal, containing almost one hundred specific requests for comment, many of which must be considered in light of previous comments to questions, ABA strongly believes that the Agencies will need to revise the current proposal and reissue it for additional comment. ABA also requests that the Agencies accept as timely filed comments received in the 15 days after the due date, in order to properly consider a number of comments that ABA has been told are being prepared but might not be filed by the July 21, 2000 due date.

Principles of Analysis of the Proposal

The American Bankers Assciation has used the following principles, as set out in Subsection (h) of Section 711, in formulating its answers to the questions posed by the Agencies:

1. The final regulation must meet the requirements of the law to reasonably ensure and monitor compliance.
2. The final regulation must not impose an undue burden upon the parties.
3. The final regulation should move towards greater certainty and more clarity in detailing the application of the law, even if it means more reporting.
4. The final regulation must protect proprietary and confidential information.
5. The final regulation must provide banks with appropriate safe harbors and standards in order to not subject any party to penalties for inadvertent or *de minimis* errors. The final regulations need to clarify that good faith errors in making reports under the law, whether overreporting or underreporting, will not be penalized.

In seeking to reduce the compliance burden, ABA has been told repeatedly by bankers that they desire more certainty about the exact application of the law to their business and CRA operations. At times this has meant that bankers have opted for more reporting in order to avoid expending resources in trying to determine whether this or that agreement or contract is covered or whether an agreement even exists. Bankers conclude that uncertainty places greater burden on them to make too many difficult judgments that might later be called into question by examiners.

Specific Comments on the Proposal

A. Definition of "Covered Agreement"

1. Covered Agreements

The Agencies use the statutory language to define "covered agreement" but "clarify" the definition by stating that a covered agreement need not be legally binding. For example, the agencies state that an

exchange of letters could be a written agreement, if it otherwise met the definitional requirements. ABA believes that this interpretation does not implement the statute and further creates undue burden in compliance. ABA believes that the statute applies only to legally enforceable agreements. Not only does the statute on its face limit its application to written contracts, written agreements and written understandings, but in Subsection (f) it provides that if a party "willfully fails to comply with this section in a material way, then the agreement shall be unenforceable...." This provision of the statute is rendered meaningless by the Agencies' attempting to apply the statute to agreements that are not enforceable in the first place. More evidence of the limitation of agreements to only legally enforceable ones is found in Subsection (g), which specifically bars the Agencies from enforcing any provisions of any agreement. As no one can enforce legally unenforceable agreements, it is clear that the statute contemplates only legally enforceable agreements.

The Agencies' inclusion of legally unenforceable agreements also would create undue compliance burden. The laws of obligations and of contract are specific and fairly certain, and thus provide a certainty to banks in determining which agreements are potentially reportable. However, searching the bank's records for evidence of unenforceable agreements is a ridiculous and unending activity. The compliance burden is compounded by the Agencies' Example 1 of an unenforceable agreement: "An organization sends a letter to an insured depository institution requesting that the institution provide a $15,000 grant to the organization. The insured depository institution responds in writing and agrees to provide the grant in connection with its annual grant program. The exchange of letters constitutes a written understanding." Since in actuality the grant process may take place over a number of months and involve many people, possibly including a grant committee, and since there will not be a "written agreement" under the proposal until the sending of the last letter, tracking the evidence of the written agreement becomes a compliance nightmare and imposes an undue burden. Thus the Agencies need to limit the application of the regulation to only legally enforceable written agreements

Unlike the situation in Example 1, any arrangement in which a bank actually makes a grant (rather than just promises to make a grant) or other transfer of value that meets the reporting threshold of the statute in response to a specific request would appear to be a covered written agreement. It would also appear to be legally enforceable to the extent that the grant requestor is bound to honor the terms of the grant or the purposes for which the requestor was chartered and for which the grant was made.

ABA agrees with the Agencies that, as described in Example 3, a unilateral pledge is not a covered agreement. To conclude otherwise is to create even more undue burden. However, ABA believes that the Agencies need to further clarify that such unenforceable commitments are not covered agreements, no matter the circumstances in which they are made. For example, during the pendency of a merger application, a number of community groups write to the Agencies and to the applicant with requests or demands for numerous specific grants, loan programs, housing programs, etc. The bank refers all of these requests to its CRA committee, which reviews the bank's current CRA activities and also the suggestions for CRA activities made by community groups. As part of the

bank's normal CRA planning process, the committee makes recommendations to the management as to what the bank would do in its community next year. Management determines which recommendations will be made part of the bank's CRA program for next year and announces it publicly as its commitment to the community. Under the Agencies' proposal, any activity in that community commitment that had been contained in one of the suggestions from community groups could be a "written agreement" and reportable, even if the bank's commitment had nothing to do with any of the community groups. Example 3 should be rewritten to clarify that pledges and commitments to the community in general are not covered because there is no NGE/P as a party, irrespective of whatever correspondence, petitions or other representations by community groups have been received prior to the bank's unilateral commitment.

2. Exemptions for Certain Agreements

2a. Qualifying loans: The Agencies ask whether the exemption from coverage of "any 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 [that are] not substantially below market rates and if the purpose of the loan or extension of credit does not include any re-lending of the borrowed funds to other parties" includes a commitment to make multiple loans that meet the statute's restrictions on rates and re-lending. ABA believes that it does include multiple commitments, because as a matter of statutory construction, if the authors had wanted it limited to just single commitments, the statute would have been worded in the singular: "any specific contract or commitment for a loan or extension of credit to any individual, business, farm, or other entity." But the statute is written in the plural. Thus, Example 3 should be written to provide that the commitment to make multiple loans would be exempt.

A mortgage loan should include any loan secured by real estate, without reference to any stated purpose of the loan. The statute simply exempts individual mortgage loans. Further, if banks are required to collect information about the purpose of the loan or use of the proceeds, this would add undue burden.

The Agencies should define "substantially below market rates" in order to provide certainty to banks. ABA recommends that the term be defined as more than 200 basis points below market rate, so that banks will be able to clearly and easily determine which loans are close to the limit and only have to prepare market rate analyses for those loans.

2b. Agreements with NGE/Ps Who Have Not Made a CRA Contact

CRA Contact with an Agency: ABA believes that the Agencies' proposal on determining whether an NGE/P has made a CRA contact with one of the Agencies needs considerable revision. The statute exempts "any agreement entered into by an insured depository institution or affiliate with a nongovernmental entity or person who has not commented on, testified about, or discussed with the

institution, or otherwise contacted the institution, concerning the Community Reinvestment Act of 1977." As shown by the emphasized passages, the NGE/P's contact with one of the Agencies must be on or about the specific institution. That is, while a community group might have commented on several institutions in its community but not on others, that community group has had a CRA contact for the first group of institutions but not for the second. Unfortunately, the Agencies' proposed regulation is unclear in several places on the question of whether an NGE/P has had a CRA contact with respect to the specific institution, and the regulation should be rewritten to make this clear in all cases.

Because a "CRA contact" involves the issue of whether the specific institution was discussed in the contact, the Agencies need to more clearly provide a safeharbor for an institution's lack of knowledge that the NGE/P has made a CRA contact about that institution. Unless the Agencies specifically and explicitly inform each institution about NGE/P contacts with one of the Agencies about that specific institution, the institution normally will not have knowledge of the NGE/P's having had a CRA contact. In such cases, the regulation should make clearer that the institution does not need to report agreements with NGE/Ps about which it does not know whether the NGE/P has made a CRA contact with an Agency about the particular institution. Institutions should be allowed to ask an NGE/P if it has had a CRA contact with an Agency about the institution and to rely upon the answer given by the NGE/P unless otherwise advised by one of the Agencies. If the Agencies undertake to so inform specific institutions of NGE/P contacts, the Agencies should notify the CRA officer normally notified before a CRA examination.

ABA agrees that comments from an NGE/P in response to a request from one of the Agencies should not create a CRA contact and neither should general comments at a conference or seminar on a general topic. In addition, ABA recommends that the Agencies add an example that clarifies that comments about the CRA performance of institutions in a community in general lack the specificity required to be a CRA contact as to any of the institutions.

CRA Contact with Insured Depository Institution or Affiliate: ABA is concerned that this exemption, as proposed, is largely unusable. The difficulty is in determining, with any degree of certainty, whether anyone at the financial institution or at one of its affiliates has ever had any "contact"—however that term is defined—with a particular NGE/P. At many financial institutions, the size of the bank and its affiliates, the number of employees who have contact with the community, and the number of channels of communication with the public make determining whether the bank or one of its affiliates has had a contact with any particular group virtually impossible. At larger institutions, in particular, there will be little if any opportunity to make use of the "CRA Contacts" exemption, unless there is a way to reduce the risk of noncompliance. The result will be a large influx of unnecessary "CRA Agreements" that were never intended to be part of the reporting requirement and that will burden institutions and regulators alike. For this reason, it is critical that the institution have some certain means of knowing whether a person with whom it has entered into an agreement has had a "CRA Contact."

The Agencies need to provide that an NGE/P has not had a CRA contact with an institution unless it is with a person appointed by the institution for such contacts or an otherwise appropriate person connected with the institution. Otherwise the compliance task of tracking potential CRA contacts with every employee becomes impossible. The following conditions should have to be met for a contact between a person and an institution to be considered a CRA contact:

1. the contact made is in connection with the CRA, and
2. the contact is made between a person and a publicly designated member of the institution (or affiliate) with CRA responsibility. At a minimum, this could be the President/CEO and the CRA Officer, or some other person(s) identified within the institution's public file as a CRA Contact person(s). Institutions should be allowed to specify a CRA contact office and person(s), and to place such information in the institution's CRA notice.

A CRA contact should not include any general discussion about CRA that does not involve the institution's CRA performance or obligations under CRA. ABA believes that this exemption should extend to general discussions of the CRA value or eligibility of particular investments, loans and/or services. Routine inquiries about the institution's current or past CRA performance should not be included. Routine inquiries about the Community Reinvestment Act, about the CRA Regulations or these Section 711 regulations should not be included as CRA contacts. A CRA contact should not include any comment upon the CRA regulations, Questions and Answers, examination procedures, or other similar regulatory and policy guidances.

The Agencies request comment on whether there should be a temporal relationship between a CRA contact and when the agreement is made. That is, must a CRA contact be within a specific time period before the agreement is made or else the contact will not be considered a CRA contact. Without such a temporal relationship, institutions would have to maintain lists of NGE/Ps who had had a CRA contact with one of the Agencies or the institution anytime over the 20 plus years of the Community Reinvestment Act. ABA believes that there should be such a temporal relationship, for the lack of one creates considerable undue burden on institutions. The Agencies suggest that the regulation should provide for a two year time period before the agreement. ABA believes that a CRA contact should be within no more than one year prior to the making of the agreement. ABA strongly opposes a time period longer than two years.

The Agencies suggest also that there be a time period after the agreement in which a CRA contact could occur that would make the agreement covered under the statute. The statute itself precludes such *post facto* contacts, since it excludes any agreement in which the NGE/P "has not" had a CRA contact. To provide otherwise is not only contrary to the wording of the statute but also creates considerable compliance uncertainty. For certainty to exist, banks must be able to determine whether the law applies at the time the agreement is made. Thus there should be no *post facto* time period in which a CRA contact could apply the statute to an already confected agreement.

2c. Request for Comment on Additional Exemptions

In order to meet the statute's mandate that any regulations not impose undue burden, the Agencies request comment on whether there should be additional exemptions. It is clear from the Act that, to be in fulfillment of CRA, an agreement must relate to factors that have "a material impact on the agency's decision...to approve or disapprove an application for a deposit facility...or...to assign a rating to an insured depository institution." Thus, agreements that are not considered by the agencies in such determinations are not within the scope of CRA Agreements. Nevertheless, to avoid any ambiguity on the subject, it would be valuable for the rule to clearly delineate such agreements. ABA recommends, at a minimum, the following additional exemptions:

1. Purchases of loans (or mortgage-backed securities and similar instruments) on the secondary market on an arm's-length basis. These purchases are day-to-day business transactions for many banks.
2. Purchases of or licensing agreements for software or computing services, such as for reporting and tracking loans and investments, loan and investment management, contact management, etc.
3. Contracts for legal services.
4. Contracts for consulting services, unless the performance of the contract directly affects the performance of CRA fulfillment. (For example, a consulting contract to evaluate independently the institution's CRA performance to highlight areas of weakness and of strength does not directly enhance CRA performance. However, a consulting contract to provide homeownership counseling would directly enhance the institution's service test.)
5. Contracts and/or payments to trade associations.
6. Agreements with bank-owned or created NGE/Ps. Since agreements with such bank-owned or created NGE/Ps with other NGE/Ps will be covered and reported (as a CRA-related affiliate of the bank), agreements between the owning banks and the bank-owned NGE/Ps should not need to be reported.

3. Fulfillment of CRA

The Agencies' proposed list of "factors that materially affect an institution's CRA rating or the determination under CRA to approve or deny an application for a deposit-taking facility" is acceptable. The Agencies' addition of the two factors on providing or refraining from providing testimony or comments appears to be required by the statute. However, ABA believes that the examples provided are too broad in their application. For example, the Agencies would require that an institution's agreement with a grocery chain to open branches in some grocery stores be disclosed under the CRA Sunshine Law. The Agencies reason that such a branching agreement would be included in the institution's CRA performance evaluation under the service test, which requires the

Agencies to consider the institution's record of opening and closing branches. However, the agreement to rent space and the other terms of the contract with the grocery chain is a day-to-day business contract. The institution's record of opening and closing branches is available to the Agencies without reference to the underlying contracts for the rental of space; provision of electrical, water and other services; etc. The grocery chain's interest in the contract is commercial and is not related to the depository institution's CRA performance. This example should be rewritten as an example of an agreement not covered. Otherwise, almost every business contract of the institution involving lending, banking services and local investments could be classed as in fulfillment of CRA.

The Agencies should not include agreements which have as their primary purpose ensuring the institution's compliance with fair lending laws. The Agencies propose not including fair lending activities as fulfillment of CRA on the grounds that to do so might have an unintended and detrimental impact on the institution's compliance with fair lending laws, even though the Agencies provide in their regulations that they will consider the fair lending record of the institution in determining the institution's CRA evaluation. The Agencies are correct that having an institution disclose every contract for a fair lending review or audit for fair lending compliance or diversity and sensitivity training for bank employees probably will have an adverse effect on depository institutions' fair lending compliance efforts. To prevent such a counterproductive effect, the Agencies should use their rulemaking authority to make fair lending consulting, auditing and training agreements exempt from the CRA Sunshine Law.

4. Value

The Agencies should use the "calendar year" method of calculation in multi-year agreements. If there is no specific timetable for transfers of funds, the Agencies should just divide the total value by the number of years to determine if the threshold is reached. This provides certainty as to the law at the time the agreement is made. Otherwise, institutions will have to annually review all of their agreements that lack specific timetables to determine if one of the reporting thresholds was passed, needlessly increasing overall burden.

5. Related Agreements

No comments

6. CRA Affiliate Treated as Insured Depository Institution

No Comment

B. Disclosure

1. Disclosure to the Public

The Agencies allow disclosure to the public by placing a copy of the agreement in the institution's CRA Public File. While the discussion in the proposal states that an institution may fulfill requests for copies by posting the agreement on the Internet or through other means, the proposed regulation itself does not explicitly state this. ABA recommends that the regulation more clearly reflect the discussion's content. ABA supports the Agencies' proposal that the institution need not maintain the agreement in its CRA Public File for any longer than 12 months after the agreement terminates. The Agencies should clarify that CRA affiliates may file their agreements in the CRA Public File of the institution to which the affiliate's activities will be attributed. Institutions should be allowed up to 30 days to respond to a request for copies from the public (not just the five days allowed for other items in the institution's CRA Public File). This is the same time period that the Agencies provide for NGE/Ps to respond to requests for copies of agreements from the Agencies.

2. Filing of Covered Agreements with the Agencies

The Agencies will allow NGE/Ps to merely make available their agreements to the Agencies, to be submitted only upon request of one of the Agencies. Depository institutions will be required to file copies of agreements with the Agencies within 30 days of making the Agreement. ABA objects. The statute only requires that the institution fully disclose the agreement and make the agreement available. Filing the agreement in the institution's CRA Public File should suffice for the Agencies as it does for the public. If the Agencies want copies, they may request them and pay for reproduction and mailing, again within 30 days of the request.

3. NGE/Ps Must Make Agreements Available to Agencies

No comment, see No. 2 immediately above.

4. Relevant Supervisory Agency

No comment.

5. Treatment of Confidential or Proprietary Information

The Agencies will allow reporters to seek confidential treatment for specific portions of an agreement. However, the Agencies suggest that this will be a limited procedure, and they request whether it is likely that proprietary or confidential information will be disclosed. ABA believes that there is a high likelihood that these agreements will contain confidential or proprietary information that should be granted confidential treatment.

Bankers are deeply concerned that NGE/Ps and institutions will face difficult financial privacy problems with this regulation. First, ABA would like the Agencies to clarify that when an institution requests confidential treatment, it is not required to place the document in the public file or otherwise disclose it pending final determination of the request for confidential treatment. Second, the Agencies should also provide for a mechanism to request an Agency determination as to whether an agreement is covered and must be disclosed. There may be factual or legal issues that suggest that an agreement should be disclosed, but the answer may not be clear. Institutions and NGE/Ps should be allowed to not disclose such agreements during the pendency of any request for a determination by the Agencies of whether the NGE/P is a CRA contact of the institution, whether the agreement is in fulfillment of CRA, or any of the other numerous questions that will arise under this proposed regulation.

Additionally, the rule should specify certain types of information that parties can withhold without using the agency review process. This would include information such as account numbers and unlisted phone numbers. Similarly, an institution should never have to disclose its underwriting terms or standards or its cost-of-funds. Other types of information that might need protection, such as rate and terms in some circumstances and certain information about the financial condition of the party, should be subject to agency review and should be granted confidential treatment.

In addition, the Agencies should provide that a good faith overdisclosure by an institution of a private contractual agreement with an NGE/P is not a violation of the statute. Given the number of factual circumstances that can affect the question of whether a particular agreement must be disclosed and the possible penalties for failing to disclose, institutions must have this safeharbor added to the regulations.

6. Disclosure Limited

No comment.

C. Annual Reports

1. No Report Required If No Funds Received

In Example 1, the Agencies provide that an NGE/P that receives $100,000 in the first year for a project that is expected to take three years to complete need only report in the first year, as no funds

will be received in the next two years. ABA believes that this is contrary to the CRA Sunshine Law. The law mandates an accounting of how the funds are expended in each 12-month period. If the project is going to take three years, then the institution funding the project expects that the NGE/P will be making expenditures during the entire time of the project. The Agencies should restate this example to say that annual reports will be required from the NGE/P over the term of the agreement.

2. Contents of Annual Report by NGE/Ps

No comment.

3. Contents of Annual Report from Institutions

Annual reports should have an exclusion for any information that was granted confidential treatment under the disclosure section. Consolidated reports should be allowed for more than one agreement, not just for five or more agreements.

4. When and Where Annual Reports Are Filed.

The statute requires annual reports from both institutions and NGE/Ps. However, the statute allows an NGE/P to file its annual report with the institution with which it has the agreement, and the institution must forward it to the appropriate Agency. The Agencies propose to require NGE/Ps to file five months after the close of their fiscal year, if it is to be filed with the institution, and six months after the close of the fiscal year, if filed directly with one of the Agencies. The proposal contemplates that the five-month filing date with 30 more days for the institution to forward the NGE/P's report to one of the Agencies will allow the institution to file its report simultaneously with the NGE/P's report. ABA believes that 30 days is too short and it should be 60 days. Second, institutions should be allowed to limit how such reports may be filed with them and not just dropped off at a teller's window in one of the institution's branches. Third, the NGE/P's fiscal year is likely to be different from the institution's fiscal year, which would prevent simultaneous filings. In that event, the Agencies should allow filing in 60 days or with the institution's annual report, whichever time period is longer.

Conclusion

The American Bankers Assciation appreciates the opportunity to comment on this proposed regulation. ABA has made a number of recommendations for changes, primarily to provide a clearer and less burdensome regulation. Particularly when regulations might require disclosure of private financial information, those regulations need to be narrowly drawn and precisely worded. ABA hopes that the Agencies will adopt its recommendations, and ABA urges the Agencies to reissue the revised

proposal for another round of comments. If the staff of any of the Agencies have any questions about these comments, please call the undersigned.

Sincerely,

Paul A. Smith