WISCONSIN
BANKERS
ASSOCIATION

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July 21, 2000

VIA ELECTRONIC MAIL

Ms. Jennifer J. Johnson
Secretary
Board of Governors
Federal Reserve System
20th and C Streets, NW
Washington, D.C. 20551
regs.comments@federalreserve.gov
Docket No. R-1069

Communications Division
Office of the Comptroller of the Currency
250 E Street, SW, Third Floor
Washington, D.C., 20219
regs.comments@occ.treas.gov
Attention: Docket No. 00-11

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
Attention: Comments/OES
Washington, D.C. 20429
550 17th Street, NW
comments@fdic.gov

Manager, Dissemination Branch
Information Management & Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington, D.C. 20552
public.info@ots.treas.gov
Attention: Docket No. 2000-44

Re: Proposed CRA Sunshine Rules

Dear Ladies and Gentlemen:

The Wisconsin Bankers Association (WBA) is a trade association representing nearly 400 state and nationally chartered banks, savings and loan associations, and savings banks that are located in communities throughout Wisconsin. WBA appreciates the opportunity to comment on the proposed rule issued by 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"), which would implement provisions of Section 711 of the Gramm-Leach-Bliley Financial Modernization Act of 1999 (GLB Act or Act). The GLB Act provisions require nongovernmental entities or persons (NGE/Ps), and insured depository institutions and their affiliates that are parties to certain agreements related to the Community Reinvestment Act (CRA), to make such agreements available to the public. In addition, the provisions impose a duty on such parties to file annual reports concerning the agreements with the appropriate agency.

As outlined below, WBA respectfully requests the Agencies make the following changes in the final regulations to properly implement the GLB Act's provisions and to reduce the burden they impose upon financial institutions.

4721 SOUTH BILTMORE LANE
MADISON, WI 53718

P.O. BOX 8880
MADISON, WI 53708-8880

608-441-1200
FAX 608-661-9381

The Definition of "Covered Agreement" in the Final Rule Should be Limited to Only Legally Enforceable Agreements as Contemplated by the Gramm-Leach-Bliley Act.

While the Agencies use the statutory language in Section 711 (e) of the Act to define "covered agreement," they also include additional language contained in the proposal's preamble to provide "clarification" 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. WBA believes that this interpretation does not implement the statutory requirements of the Act, as the Act only applies to agreements that are legally enforceable. Not only does the statute on its face limit its application to written contracts, written agreements and written understandings, but in Section 711(f) of the Act, 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 definition proposed by the Agencies because the proposal attempts to apply the statute to agreements that are not enforceable in the first place. Additional evidence supporting the Act's limitation to only legally enforceable agreements is found in Section 711 (g). While this section specifically bars the Agencies from enforcing any provisions of a covered agreement, the Act clearly contemplates that the parties to the agreement can enforce the agreement. Consequently, if there are no enforceable provisions contained in an agreement, the statute would not need to address the prospect of an agreement becoming unenforceable. Thus, it is clear that the statute contemplates that agreements covered by the Act are only those that are legally enforceable. Therefore, WBA strongly urges the Agencies to revise the definition of "covered agreements' to include only those agreements that are legally enforceable.

The Definition of "Covered Agreement" Should Not Be Adopted as Proposed Because it Would Create Undue Burdens on Financial Institutions.

The Agencies' inclusion of legally unenforceable agreements in the definition of "covered agreement" would create undue compliance burdens for financial institutions. The laws of obligations and of contract are specific and clear, and thus provide a certainty to institutions in determining which agreements are potentially reportable. However, searching the institution's records for evidence of unenforceable agreements is a ridiculous activity. This compliance burden is compounded by the Agencies' Example 1 (in the covered agreement section of the proposal) 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." If a grant ultimately comes to fruition, it is often not until many months after the process was initiated and after much written correspondence among many parties has occurred. To treat this correspondence as a covered agreement would impose an undue burden because an institution would be required to track all of the correspondence related to the grant before the grant is even made.

However, WBA agrees that any arrangement where an institution actually makes a grant or other transfer of value in response to a specific request would appear to be a covered written agreement. Such an arrangement would also appear to be legally enforceable to the extent that the grant requestor is bound to honor the terms, conditions and purposes of the grant and the corresponding written agreement.

In addition, WBA agrees with the Agencies that a unilateral pledge is not a covered agreement. To conclude otherwise is to create even more undue burden. However, WBA believes that the Agencies need to further clarify that such unilateral pledges or commitments, as described in Example 3 (in the covered agreement section of the proposal), are unenforceable and, from that standpoint, should not be considered covered agreements.

To illustrate, consider that when a financial institution's merger application is pending, a number of community groups submit written requests to the institution to suggest or request implementation of specific grant programs, loan programs, housing programs, etc. The institution refers the requests to its CRA committee, which makes recommendations to the institution's management as to which activities should be undertaken in the community the following year. Management then drafts the institution's CRA program for that next year and announces it publicly as its commitment to the community. Under the Agencies' proposal, any activity in that commitment that was suggested by community groups could be a "covered agreement" and reportable, even if the institution's commitment had nothing to do with any of the requests made by the community groups. Therefore, Example 3 should clarify that pledges and commitments to the community in general are not covered agreements because there is no NGE/P as a party, irrespective of whatever correspondence it received from community groups prior to the institution's unilateral pledge or commitment.

Even in Years When No Funds are Disbursed Under an Existing Covered Agreement, NGE/Ps Should Be Required to File an Annual Report.

In Example 1 (in the annual reports section of the proposal), the Agencies provide that an NGE/P that receives $100,000 in the first year for a project that is expected to take 3 years to complete need only report in the first year, as no funds will be received in the next 2 years. WBA believes that this completely nullifies the purpose of this law. The law mandates an accounting of how the funds are expended in each 12-month period. If the project is going to take 3 years, then the institution funding the project expects that the NGE/P will be making expenditures during the entire term of the project. The Agencies should restate Example 1 to state that annual reports will be required from the NGE/P over the full term of the agreement.

The Final Rule Should Extend the Time Period in Which the Financial Institution Must Forward a NGE/P's Annual Report From 30 Days to 60 Days.

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, which the institution forwards to the appropriate Agency, within 30 days of receipt. The Agencies propose to require NGE/Ps to file the report within 5 months after the close of the NGE/P's fiscal year, if it is to be filed with the institution. WBA believes that a 30 day timeframe is too short and urges the Agencies to increase it to 60 days.

Second, WBA believes that institutions should be allowed to limit how NGE/Ps file such reports with the institution, to insure the institution receives them in a proper and timely fashion.

Third, in the case when the NGE/P's fiscal year is different from the institution's fiscal year, simultaneous filings of the NGE/P's annual report and the institution's annual report are not possible. Therefore, WBA urges the Agencies to require an institution to file the NGE/P's annual report with the institution's annual report or within 60 days from the time the institution receives the report, whichever time period is longer.

Conclusion

The Wisconsin Bankers Association appreciates the opportunity to comment on this proposed regulation. WBA has made several recommendations to assist in achieving clearer and less burdensome regulations, and urges that these recommendations be adopted.

Sincerely,

Harry J. Argue
Executive Vice President/CEO