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July 21, 2000

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Ms. Jennifer J. Johnson
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Washington, D.C. 20551

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments/OES
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Manager
Dissemination Branch
Information Management & Services Division
Office of Thrift Supervision
1700 G Street, N.W.
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Re: Joint Notice of Proposed Rulemaking - Disclosure and Reporting of CRA-Related Agreements

Fannie Mae respectfully submits these comments in response to the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System ("Board"), Federal Deposit Insurance Corporation, and Office of Thrift Supervision's (collectively "the Agencies") joint notice of proposed rulemaking implementing the Community Reinvestment Act ("CRA") disclosure and reporting ("CRA Sunshine") requirements of the Gramm-Leach-Bliley Act (the "Act").

Fannie Mae is a Congressionally chartered, privately owned company created to support affordable residential housing by making a secondary market in residential loans for single and multifamily mortgages. Fannie Mae is engaged generally in the business of buying and selling (by securitizing)

mortgage loans that are originated by lenders, in order to provide liquidity to lenders in the housing market. In 1992, Congress by statute required Fannie Mae to "take affirmative steps to assist insured depository institutions to meet their obligations under the Community Reinvestment Act" as part of its mission to provide liquidity to lenders as well as under statutory provisions that require Fannie Mae and Freddie Mac to make significant purchases of certain types of affordable housing mortgages.[1] To meet these statutory obligations, Fannie Mae has worked hard to create specific, ongoing business initiatives in which Fannie Mae can buy, sell and/or securitize loans that may be eligible for CRA credit, often as one component of an overall business relationship that Fannie Mae has with an insured depository institution ("IDI"). This business involves transactions in which: (i) Fannie Mae purchases loans that may be eligible for CRA credit from originating lenders; and (ii) Fannie Mae sells or securitizes pools of such loans that are sold to mortgage backed securities ("MBS") investors that may or may not buy such securities for CRA credit.[2] Given the company's statutory liquidity and affordable housing mission, Fannie Mae also engages in discussions and partnerships with advocate organizations, such as the NAACP, to promote access to credit and homeownership across the country, through marketing efforts, underwriting experiments and pilots and other initiatives. CRA-eligible products may be a component of these initiatives and, obviously, a lender (which may or may not be an IDI) is needed to originate any loan products since neither Fannie Mae nor most advocate organizations can originate mortgages.[3]

We believe that Congress did not intend the CRA Sunshine provisions to apply to secondary market transactions. The Agencies' proposal recognizes this, in part, by excluding IDIs from the definition of "nongovernmental entity," thereby excluding secondary market sales between two IDIs. Logically, this exclusion should extend to other secondary market participants. However, the Agencies' proposal covers transactions that Congress clearly did not intend to cover, such as the legitimate secondary market sale, purchase or securitization of CRA-eligible loans between an IDI and an institution that is not an IDI. If this inconsistency remains, the regulation not only may result in unnecessary regulatory burden, but also threatens to expose proprietary business models and data of all business entities engaged in secondary market CRA transactions – thus creating less incentive to participate in such transactions. Due to the unique nature of the way in which purchasing, selling and securitizing loans can be used to help IDIs meet CRA requirements and the relatively few organizations truly engaged in this type of business, it would be consistent with both the legislative intent and congressional purpose of the Act – as well as the proposal's exclusion of the secondary market activities of IDIs – to adopt a final rule that encourages the continuation of this business.

As noted above, Fannie Mae's business involving CRA-eligible loans satisfies our statutory obligation to affirmatively assist IDIs in meeting their CRA obligations. Fannie Mae therefore is particularly concerned that the final regulation be constructed in a way that is consistent with this mandate imposed on the company by Congress. There is ample support in the law and in the

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[1] 12 U.S.C. 4565 (Emphasis added).

[2] We are aware that other secondary market participants such as brokerage firms engage in similar CRA-related whole loan sales and non-agency-guaranteed securitizations. Fannie Mae would be particularly disadvantaged vis-a-vis these market participants because such entities' business would be exempt from the CRA Sunshine provisions because many of them are affiliated with IDIs, as discussed below.

[3] These relationships would not be covered under the Act or the proposed regulations (which are directed at disclosure of agreements between IDIs and community organizations), because Fannie Mae is not an IDI and because, as discussed below, Fannie Mae's secondary market activities should be exempt.

proposed interpretation by the Agencies for a final regulation that reconciles these two statutory provisions so as to make them consistent.

Our comments are elaborated in more detail below.

I. The Final Regulation Should Treat Entities Engaged in Similar Activities in a Consistent Manner.

The CRA Sunshine provisions apply only to agreements between an IDI (or its affiliates) and a "nongovernmental entity or person."[4] Under the Agencies' current proposal, an IDI and its affiliates would be excluded from the definition of "nongovernmental entity or person." Consequently, agreements between two separate IDIs (and the affiliates of those IDIs) would be exempt from the CRA Sunshine requirements, even if such "inter-depository institution" transactions "relate to" CRA under the meaning of the CRA Sunshine provisions. The practical effect of the proposed definition could be to exempt CRA business transactions (such as the sale, purchase or securitization of CRA loans) between two different IDIs (or their affiliates, which may include an institution engaged in secondary market sales and purchases) from the CRA Sunshine requirements, while the exact same type of transaction between an IDI and Fannie Mae (or other non-IDI secondary-market participant) would be covered. While both types of agreements may allow an IDI to obtain CRA credit, the agreement's coverage by the CRA Sunshine provisions is solely dependent on the counterparty's affiliation with an IDI. Such a distinction arbitrarily puts Fannie Mae and other non-IDI secondary market participants at a severe competitive disadvantage compared to IDIs or their affiliates also engaged in the business of buying, selling and securitizing CRA loans and finds no logical basis in the underlying statute. Importantly, this distinction disincents lenders from using liquidity provided by the secondary market for CRA-eligible loans, driving up the costs of those loans. We think this potential for arbitrary and unfair treatment can be easily remedied as explained below.

In order to avoid an arbitrary result, the Agencies' final regulations should treat entities involved in the same types of business transactions in a consistent manner. In order to reach such a logical result, the exclusion for IDIs and their affiliates must be broadened to cover agreements between IDIs and non-affiliated secondary market institutions that engage in the purchase, sale and securitization of CRA-eligible loans – especially where the secondary market institution, such as Fannie Mae, is engaged in such transactions to meet the obligations imposed on it by federal law.

To ensure consistency of regulatory treatment of similarly situated entities, we respectfully request that the Agencies add the following phrase at the end of proposed Section 35.8(h)(2) (OCC proposed rule) and the corresponding provisions of the FDIC, Board and OTS proposals: "and any other entity engaged in secondary market sales, purchases or securitizations involving CRA-eligible loans." If there is a concern that this language would be too broad, it could be narrowed significantly by adding the following phrase at the end: "in order to comply with the requirements of federal law."

[4] Section 711 of the Act.

The legislative history of the CRA Sunshine provisions strongly supports our point that secondary market sales of CRA-eligible loans are simply not the types of "agreements" the Act meant to bring to light. An overwhelming number of statements made in the Congressional Record by supporters and detractors of the provisions, as well as by the provisions' chief sponsor, Senator Phil Gramm (R-TX), clearly demonstrate that the CRA Sunshine provisions were understood and intended to cover agreements between IDIs and community groups, not sales, purchases or securitizations of CRA-eligible loans between two business institutions.[5] Senator Gramm's Internet policy page explains that the purpose of the provisions is to "require public disclosure of all CRA agreements between banks and community activists, agreements which are, by written consent, kept secret."[6] There is no suggestion in the legislative history of Congress' intent to require public disclosure of any routine business agreements that involve a CRA component.

II. The Terms "Covered Agreement" and "CRA Contact" Should Not Include a Business to Business Transaction.

A. Under the Agencies' proposal, certain agreements will not be considered "covered agreements" because they do not involve a "CRA contact." The Act gives the Board the authority to further exempt transactions from the CRA Sunshine requirements.[7] The Agencies specifically requested public comment on whether the Board should provide an exemption for CRA contacts that occur in connection with the purchase of loans by an IDI or affiliate on an arm's length basis in the secondary market, even when the negotiations of the agreement include a general discussion of the effect of the transaction on the CRA performance of the IDI.[8]

Fannie Mae urges the Board to adopt the proposed exemption for CRA contacts that occur in connection with the purchase of loans by an IDI or affiliate on an arm's length basis in the secondary market and to modify the exemption to include the *sale* of loans by an IDI or an affiliate as well (even when the negotiations of the agreement include a general discussion of the effect of the transaction on the generic CRA performance of IDI). An exemption for these types of contacts is well within the Board's explicit exemptive power under the Act and would be consistent with the intent, structure, and legislative history of the CRA Sunshine provisions (discussed above) which indicate that they were not meant to apply to legitimate business-to-business transactions. The

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[5] 145 Cong. Rec. S13,784 (daily ed. Nov. 3, 1999) (statement of Sen. Gramm) (discussing holding community activists accountable for money received from by banks); 145 Cong. Rec. S13,905 (daily ed. Nov. 4, 1999) (statement of Sen. Kerry) (referring to "certain agreements between a bank and community groups"); 145 Cong. Rec. S13,909 (daily ed. Nov. 4, 1999) (statement of Sen. Domenici) ("allowing a little sunlight to be shed on all CRA agreements between banks and community groups"); 145 Cong. Rec. H11,519 (daily ed. Nov. 4, 1999) (statement of Rep. LaFalce) (discussing the regulatory burden on community groups); 145 Cong. Rec. H11,523 (daily ed. Nov. 4, 1999) (statement of Rep. Waters) (arguing that the sunshine provisions will intimidate "activists"); 145 Cong. Rec. H11,524 (daily ed. Nov. 4, 1999) (statement of Rep. Meeks) (arguing that the sunshine provisions punish "community based groups"); 145 Cong. Rec. H11,540 (daily ed. Nov. 4, 1999) (statement of Rep. Vento) (discussing the burden placed on "community groups and banks" by the sunshine provisions); 145 Cong. Rec. H11,546 (daily ed. Nov. 4, 1999) (statement of Rep. Capuano) ("CRA 'Sunshine' provisions will subject community groups to burdensome new regulations"); and 145 Cong. Rec. E2300 (daily ed. Nov. 8, 1999) (extension of remarks of Rep. Lee) (requiring "community organizations to report their functions and their contracts").

[6] See http://www.senate.gov/~gramm/policy/cra.html (Emphasis added).

[7] Section 711 of the Act.

[8] 65 Fed. Reg. 31968.

exemption must apply to the *sale* of such loans by an IDI or an affiliate, because otherwise, as discussed above, secondary market participants that are *not* affiliated with an IDI will be severely competitively disadvantaged in their efforts to buy, sell and securitize CRA-eligible loans. Severely disadvantaging secondary market participants, such as Fannie Mae, who make a secondary market for CRA-eligible loans pursuant to specific statutory requirements would be particularly arbitrary and illogical, and lenders would be disincented from using the liquidity Fannie Mae can provide.

B. If the Agencies are concerned that exempting the purchase, sale and securitization of CRA-eligible loans in the secondary market from qualifying as a "CRA contact" (or exempting secondary market participants from the definition of "nongovernmental entities") would create too broad an exemption, Fannie Mae suggests a further narrowing by another alternative discussed in the preamble.[9] Specifically, either exemption for secondary market purchases and sales could apply only if the person also did *not*: (1) provide comments or testimony to a Federal banking agency about the institution's CRA performance; or (2) discuss or otherwise contact an IDI or affiliate about providing (or refraining from providing) comments or testimony to a Federal banking agency or comments for a public file about such performance. This would create an extremely narrow exemption for transactions that the statute clearly was not intended to cover. The fact that CRA issues may in some sense be a topic of conversation with business counterparties when Fannie Mae personnel carry out the company's business activities is a consequence of Fannie Mae's statutory obligation to assist IDIs in meeting their CRA obligations, and simply does not involve a "discussion with" an IDI about CRA within the meaning of the CRA Sunshine provisions, nor does it involve Fannie Mae "contact[ing]" an IDI about CRA as Congress used that term in the Act.

C. The preamble also discusses an alternative that would change the scope of the actions that would be considered "CRA contacts."[10] Fannie Mae supports this alternative.

Under the alternative, a person would not engage in a CRA contact if that person discusses with an IDI or affiliate whether particular loans, services, investments or community development activities are generally eligible for consideration by an agency under the CRA regulations.[11] The Agencies correctly recognize that the marketing of products and services to IDIs frequently includes some discussion of eligibility for credit under CRA and that such discussions may be useful for IDIs, and are a commonly accepted business practice.

General marketing statements for products and services that are not targeted at a particular institution's CRA performance and are not necessarily made in connection with specific regulatory applications could not lead to the types of abuses that the CRA Sunshine provisions are intended to eliminate.

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[9] Id.
[10] 65 Fed. Reg. 31967.
[11] Id.

Thank you for consideration of our views.

Sincerely,

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Ann Kappler
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