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July 11, 2000

Attention No. 2000-44

Manager
Dissemination Branch
Information Management & Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

Sir or Madam,

This is in response to the Agencies' Joint Notice of Proposed Rulemaking ("Notice") regarding the Disclosure and Reporting of CRA-Related Agreements. MidFirst encourages careful consideration of the rule's proposed language so as to minimize regulatory burden and required release of confidential information. Specific issues are outlined below.

Covered Agreements

MidFirst requests additional clarification on the criteria that a Covered Agreement be in writing as well as additional guidance on the requirement that a Covered Agreement need not be legally binding on the parties. MidFirst is concerned that this is unduly broad and may encompass documents of a more general nature that clearly fall short of being a contract, arrangement, or understanding. MidFirst believes that "contract", "arrangement", and "understanding" should be defined in the regulation; these definitions should establish a minimum requirement that the agreement must be mutual between the parties and that it would otherwise meet the legal definition of contract except for its lack of consideration.

The broad reach of the definition of agreement in the proposed regulation seems intended to ensure that CRA Agreements in their entirety, including those containing confidentiality clauses, will be disclosed. Such broad language has the benefit of minimizing the potential for evasion of the disclosure requirements; however, it also maximizes the opportunity for confidential information to become public. Not only is this burdensome on the parties involved, it creates privacy-related risks and will serve as a disincentive for CRA related agreements in the future.

MidFirst argues that the situation involving a general solicitation from a third party for charitable contributions to multiple businesses may create confusion. MidFirst agrees with the Agencies that this situation falls outside of the intent of Congress and does not meet the definition of a Covered Agreement. However, MidFirst argues that an institution may have no way of knowing

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if a solicitation is targeted to a specific institution or to multiple business entities. Further, the institution may have no reasonable means of proving the solicitation was to multiple parties.

Finally, MidFirst requests clarification on what constitutes an exchange of written correspondence. Does this imply that both the insured institution and the Nongovernmental Entity or Person (NGEP) must have drafted and forwarded written correspondence to the other entity. Does the correspondence require a signature of an officer of each party. Alternatively would a letter from only one of the parties be sufficient to constitute a written exchange of correspondence. The definition of correspondence should also be clarified; for example, would an institution check payable to an NGEP that is not accompanied by other correspondence meet the threshold of written correspondence.

Qualifying Loans

MidFirst recognizes the language in the preamble regarding qualifying loans as follows:

> "This exemption is available for any mortgage loan, regardless of the identity of the borrower, the type of real estate securing the loan, or the rate charged on the loan."

MidFirst interprets this exception to be very broad and to include any mortgage loan regardless of any other fact, condition, or term that might be associated with the loan. A loan secured by real estate is always excluded from the definition of Covered Agreement. MidFirst supports this broad interpretation.

Regarding loans and commitments that meet the market rate and re-lending criteria, MidFirst believes this is also broadly applicable and would extend to any and all loans granted or committed to by the insured institution regardless of any other facts, conditions, or terms provided rate and re-lending criteria are met. This would involve a single loan or commitment to a third party or multiple loans or commitments to that third party.

MidFirst believes the situation involving an agreement with a third party to originate a pool of loans to unrelated parties meets the exclusion available under qualifying loan. This situation does not involve the formal commitment of funds, is not binding on the insured institution, and the intended result, multiple loan originations, is subject to the qualified loan exception.

Substantially Below Market

MidFirst encourages the agencies to adopt guidance to be used in identifying when a loan is made substantially below market rates. MidFirst also encourages that a global view be taken when determining if a loan is substantially below market. For example, the interest rate may appear to be submarket, but other terms of the credit may offset the low interest rate in such a manner that the entire transaction was made at market. MidFirst disagrees with the Agencies' footnote 5 in the preamble which implies consideration such as loan fees and discount points paid to the lender in order to buy down the interest rate, perhaps to the point of being a submarket interest rate, would result in the loan being a disclosable Covered Agreement even in the event that the

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combination of fees and rate result in total credit cost reasonably close to market. Other factors should also be considered such as the risk associated with the loan. As a result, it may be difficult to identify a truly comparable loan or pool of loans in which to gauge whether the subject loan is substantially below market.

In determining whether a loan is submarket, MidFirst encourages the Agencies to adopt a formula no less than the greater of 25 percent below market or 400 basis points below market for similar loans as identified by the institution. Under this approach any loan whose rate is less than the rate of similar loans minus the formula variance would be a potentially submarket loan. MidFirst further encourages the Agencies to grant the institution latitude in excluding loans falling below the formula threshold based on supporting factors that can be documented and verified. These factors might include a submarket rate to sell repossessed assets, requiring up front origination-related fees that offset the variance in interest rate, or documented business reasons. Finally, this substantially below market threshold should be calculated and supported only by the institution; an NGEP should have no involvement in making that determination.

Re-Lending

MidFirst believes the intent of Congress and the Agencies is to exclude refinances, renewals, and modifications from the definition of re-lending regardless of the loan terms and conditions. MidFirst requests the Agencies to affirm that re-lending does not include situations in which an insured institution refinances, renews, and modifies an existing loan.

CRA Contact with an Agency

MidFirst requests that to qualify as a CRA Contact, a third party's contact with an Agency must not only touch on CRA issues, but also specifically and directly mention CRA compliance of an insured institution and that that mention of CRA must be done in a manner that would potentially have a detrimental effect on the insured institution. For example, if the third party raises CRA only as an ancillary comment or does not mention CRA (specifically or by implication) during the communication with the agency, then the contact should not meet the definition of CRA Contact. Also, if the third party has no adverse comments regarding the CRA compliance of the institution, then this should also fall outside the definition of CRA Contact. It is burdensome for the triggering threshold to be so low that situations involving indirect or immaterial inferences can generate a CRA Contact. Further, it should primarily be the substance of the comments rather than the forum in which the comments are made that triggers the threshold for a CRA Contact. For example, a comment by an NGEP to an Agency in relation to a branch application must have material and direct references to CRA issues for that comment to become a CRA Contact while the mere fact the comment was in response to a branch application would be insufficient, alone, to generate the CRA Contact designation.

CRA Contact with Institution

MidFirst is concerned that the ability to prove a contact is or is not a CRA Contact may prove exceedingly difficult in some situations; this will increase risk of privacy violations if erring on

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one side and risk noncompliance with sunshine provisions if erring on the other. Further, MidFirst opines that general discussions about CRA with NGEPs including responses to requests for copies of HMDA LARs and CRA Public Files and discussions of an institution's assessment area should not fall within the definition of CRA Contact. Statements by third parties about how a product, activity, or service would provide CRA benefit should also be excluded from the definition of CRA Contact unless those statements are associated with comments about adverse CRA consequences for a particular institution for not engaging in that product, activity, or service.

MidFirst strongly believes that a temporal relationship should be established between a CRA contact and a Covered Agreement. MidFirst believes that a CRA contact should occur within a maximum of one year prior to entering into an agreement for that agreement to be a Covered Agreement. By allowing an agreement to be designated a CRA Agreement regardless of the time elapsed from the date of the CRA Contact would be unduly burdensome and subject to human error. It would also incorporate agreements that have no direct correlation to the contact and would be confusing to the public. Without a clear time continuum connecting the contact and agreement, the relevance of the contact to the agreement is diminished; a time period beyond one year has diminished the relevance between the two events to such an extent that no causality can be attributed to the contact.

MidFirst also believes that there is no relevant basis in designating an agreement executed prior to a CRA Contact as a CRA Agreement since the spirit of the Sunshine legislation is predicated solely on an NGEP raising CRA related issues with an institution. The purpose of this legislation is to identify agreements that might not otherwise be entered into except for CRA concerns having been voiced by a third party. Since CRA Contact is integral in establishing and defining a CRA Agreement, it is logical to require the Contact to be precedent to the Agreement.

MidFirst firmly believes that agreements entered into with multiple parties should not be designated as a CRA Agreement by an institution unless the institution had a CRA Contact with one of the counterparties. In other words, if an NGEP enters into an agreement with Institution A and Institution B and the NGEP had previously had a CRA Contact with Institution A, the CRA Agreement would only exist between the NGEP and A while B would remain unaffected by the Sunshine provisions. Further, precise guidance must by provided by the Agencies in stating how such an agreement can be made public so as to avoid unnecessary publication of third parties involved in the agreement but that are not involved in the CRA Agreement designation.

MidFirst requests clarification of footnote 9 to the preamble. Specifically MidFirst disagrees with the statement that a CRA Contact occurs if an offering circular indicated the subject investment would receive favorable CRA consideration. This is a general statement, motivated by marketing techniques, is not a guarantee as to favorable consideration, and is not predicated on an analysis of a particular institution's CRA needs. MidFirst is also concerned with the latter portion of footnote 9 in which the Agencies state that a CRA Contact occurs if the parties discuss how the transaction would improve the institution's performance since this implies that the broker providing the offering materials has performed an analysis of the institution's CRA performance so as to make a determination as to the marginal effect the securities would have on the CRA

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rating. The fact that a broker opines that a particular investment meets the criteria to be designated as a CRA investment by the Agencies has no bearing on the effect that that investment would have on the CRA performance of the institution. Therefore, the broker's opinion on the specific effect of the investment on the CRA position of the institution is irrelevant and should have no bearing on whether a CRA Agreement has been established.

Additional Exemptions

MidFirst is concerned with any requirement to make confidential agreements public. The potential exists for a number of agreements to fall within the definition of CRA Agreement and therefore become public domain. In this event, proprietary, confidential, and private information will become public. Not only is it relevant to conceal the identity of one or more parties in many cases, but agreements often have elements including terms and conditions that are confidential as well. Given Congress's recent establishment of privacy principles regarding customer information and the subsequent and sustained interest that Congress has expressed in customer privacy, it is apparent that Congress does not intend for some information to become public information regardless if it is in a CRA Agreement or otherwise. MidFirst encourages the Agencies to remain cognizant of Congressional concern with customer privacy issues as the final regulation is developed.

MidFirst encourages the Agencies to establish guidelines that limit the reach of the CRA Sunshine provisions so that routine operating agreements entered into by an institution and a third party are not subject to disclosure provisions. These guidelines should not require disclosure of these routine agreements regardless of whether CRA is mentioned or not. Examples of agreements that should be excluded from the definition of Covered Agreement would include the purchase of software and materials used in CRA and HMDA compliance, the purchase of assets from third party brokers, legal issues, arrangements to build or purchase a branch, and so forth.

Affiliate

MidFirst encourages careful consideration regarding the requirement for public disclosure of agreements between an NGEP and an affiliate of an insured subsidiary. The intent of the current proposal appears to require disclosure of such agreements if the activities of the affiliate have been included in the CRA review of the insured institution. The most significant concern that MidFirst has in this regard relates to the disclosure of information considered confidential by the affiliate. MidFirst would encourage that consideration be given to establishing a materiality threshold relating to the effect that an affiliate has on an institution's CRA rating before requiring disclosure of an agreement that may be irrelevant to CRA but that may harm the affiliate or NGEP through disclosure of confidential information.

MidFirst encourages additional consideration regarding the proposal to retroactively disclose agreements involving an affiliate. The preamble states that an agreement involving an affiliate may become a Covered Agreement after the date the parties enter into the agreement provided the agreement otherwise meets the thresholds contained in the rule. MidFirst agrees with the concept to prevent circumvention of the rule, but is concerned that this proposal may be unduly broad and

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burdensome. MidFirst therefore opposes agreements being retroactively designated as CRA Agreements.

MidFirst requests specific affirmation that an affiliate will not be subject to this rule unless the institution, in its sole discretion, requests that the Agency include activities of the affiliate in assessing the institution's CRA compliance.

Value

MidFirst opines that for agreements whose terms extend beyond a single calendar year and whose payments are not quantified, the value should be calculated by actual payments made; however, if it is clear that based on the term of the agreement and the funds committed that the reporting threshold must be exceeded in at least one calendar year, then the agreement will become reportable in the calendar year of execution.

Guidance is requested on how to calculate value in situations in which an agreement does not specify the amount of payments, grants, or loans. MidFirst suggests that maximum flexibility and leniency be afforded the institution provided the method of valuation can be supported and is reasonable. MidFirst is also concerned that an arrangement that does not specify payments could unexpectedly exceed the reporting thresholds in future calendar years; MidFirst requests that for these situations, the Agencies specify that failure to report the agreement in initial years is not a violation.

Aggregation

MidFirst requests clarification on the concept of aggregating an affiliate's agreements (whether individually with an NGEP or jointly with the institution) with the institution's Covered Agreements only in situations in which the institution has included the affiliate's activities in the CRA analysis of the institution. This aggregation should not occur without the affiliate being included with the institution, in the institution's sole discretion, for CRA analysis purposes.

Disclosure of Agreements

MidFirst encourages additional clarification regarding the termination date of an agreement. MidFirst does not object to the 12-month proposal by the Agencies. MidFirst recognizes the proposal in Section E of the preamble that states that an agreement lacking an identified termination date terminates on the date the last payment or loan is made. While this date may be evident in many cases, in others, particularly those in which the value is also not documented, the termination date may be vague. In such instances, MidFirst requests guidance on how to justify the termination date, particularly in cases where the institution might make additional and unrelated donations to the NGEP.

MidFirst believes that almost all agreements, understandings, and contracts that might be identified as a Covered Agreement have elements that would be deemed confidential by at least one of the parties. Many of these confidential items are ancillary or immaterial to the true

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structure of the agreement between the parties and the withholding of such information will not impair the public's understanding of actions required by the agreement. The benefit achieved by protecting an individual's or an entity's confidential information overshadows the benefit achieved by disclosing the information.

Differing pieces of information will have differing sensitivity, or confidentiality, priorities for each individual which makes the development of a specific list of items always deemed to be confidential very difficult. Nevertheless, MidFirst recommends that the Agencies develop such a list and allow the parties to the Covered Agreement to request other items to be withheld from disclosure provided a reasonable basis is provided. MidFirst would encourage the following items to be considered for inclusion in the list of items always deemed confidential: a) account number, b) dollar amounts of individual loans, c) income, asset, and liability information for individuals and entities, d) information contained in a credit report, employment file, credit file, and similar sensitive data sources whether the information is obtained from such a source or not, e) phone numbers and addresses if the institution has not received positive verification that they are public information, f) the name, description, and purpose for which a product, asset, or service is purchased or sold, and g) the services to be provided under an agreement.

MidFirst requests consideration be given as to how Agencies will reconcile the items in Covered Agreements that have been deemed confidential by one of the two parties. The Agency will need to blackout the identical confidential information in all copies received and will need to communicate with all parties involved to ensure that all such information is withheld. The steps, timeframes, and procedures for requesting information to be withheld, obtaining Agency approval, and Agency notification to all parties of approval for withholding information should be established, and only after this established time period has expired should the parties to the Covered Agreement be permitted to publicly disclose the documents. Without this security procedure, documents and confidential information will be inadvertently released.

MidFirst also requests specific guidance on the disclosure of agreements and the withholding of information containing confidential or proprietary information, names, and other data. MidFirst requests that institutions be allowed to refrain from public disclosure of the entire agreement or of confidential sections until a decision can be reached regarding the withholding of the subject information; without this provision, there is no need to establish withholding procedures since once information is publicly available, the harm from disclosure cannot be eliminated or reversed. Further, MidFirst requests a safe harbor from regulatory criticism and from public litigation for information disclosed pursuant to these rules that might otherwise violate customer due care standards or a federal or state privacy or due care requirement. Safe harbor is also requested in instances in which a third party to an agreement discloses confidential information that the institution has withheld. MidFirst encourages the Agencies to provide guidelines on how an institution can withhold certain information from public disclosure without having first received approval from the Agency; MidFirst supports a methodology in which the institution has maximum discretion in this regard. MidFirst believes such a methodology would reduce the amount of work required of the Agencies in determining what is confidential information and would also place the decision regarding confidentiality in the hands of the entities (the parties to the agreement) most likely to know what information is confidential.

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Finally, MidFirst would encourage the Agencies to provide additional examples of permissible methods of making Covered Agreements available to the public. Examples might include maintaining a separate file of all Covered Agreements, maintaining a list of Covered Agreements and requiring the public to request that copies from the list be mailed to them, instructing branch personnel to contact the CRA/Compliance Departments with all customer inquiries for Covered Agreements, and so forth. To comply with the mandate to minimize burden, the greater the number of options regarding disclosure will allow each institution to design a system optimal for its internal structure while still providing reasonable public access.

Sincerely,

Charles R. Lee
Vice President