April 6, 2004

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Regulation Comments
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Re: Proposed Revisions to the Community Reinvestment Act Regulations
OCC: Docket No. 04-06
FRB: Docket No. R-1181
FDIC: 12 CFR 345
OTS: No. 2004-04

Dear Sir or Madam:

The Consumer Bankers Association (CBA)[1] appreciates the opportunity to comment on the joint notice of proposed rulemaking ("the Proposal") of the above-named agencies

[1] The Consumer Bankers Association is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery. CBA was founded in 1919 and provides leadership, education, research

("the Agencies") to amend the Community Reinvestment Act (CRA). CBA commented on the Advance Notice of Proposed Rulemaking (ANPR) that the Agencies issued on July 19, 2001.

In our comments on the ANPR, we stated our view that a whole new CRA "reform" process of the type undertaken a decade ago would be counterproductive, as it would lead to a major disruption in the operations of financial institutions and that any resulting benefits would be at too great a cost. The Agencies have clearly paid close attention and are limiting the proposed changes to a few discrete areas.

In our comments on the ANPR we also suggested that much of what was under consideration could be better addressed through the exam process and the performance context and amending the exam guidelines, rather than in a rulemaking. Again, we are gratified that the Agencies have listened and will be seeking ways to improve the guidelines and the examination process to fine-tune the regulation.

We will limit our comments to the following proposed changes:

(1) Credit Terms and Practices. Evidence that an institution, or any affiliate whose loans are included for CRA consideration, has engaged in specified discriminatory, illegal or abusive credit practices in connection with certain loans, will adversely affect that institution's CRA evaluation;
(2) Public Performance Evaluations. Change the public disclosure of data in the CRA public evaluations and disclosure statements related to providing information on loan originations and purchases, HOEPA-covered and HMDA "high cost" loans, and affiliate loans.

Our comments on these proposed changes follow:

Credit Terms and Practices

The CRA regulations provide that discriminatory or other credit practices may affect an institution's CRA rating. The Agencies are now proposing to amend the regulations to "enhance how the CRA regulations address credit practices that may be discriminatory, illegal, or otherwise predatory and abusive."

The Proposal would identify, in the regulations, examples of certain violations of law that will adversely affect an agency's evaluation of an institution's CRA performance. The regulations would provide a list, deemed to be illustrative and not exhaustive, of such practices. The list would be the following:

(i) Discrimination against applicants on a prohibited basis in violation, for example, of the Equal Credit Opportunity Act or the Fair Housing Act;
(ii) Violations of the Home Ownership and Equity Protection Act;

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and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry's total assets.

(iii) Violations of section 5 of the Federal Trade Commission Act;
(iv) Violations of section 8 of the Real Estate Settlement Procedures Act; and
(v) Violations of the Truth in Lending Act provisions regarding a consumer's right of rescission.

These are described as being the "types of illegal and discriminatory credit practices" that will be considered. In addition, according to the Supplementary Information, "[e]vidence of violations of other applicable consumer protection laws affecting credit practices, including state laws if applicable, may also adversely affect the institution's CRA evaluation."

These practices would adversely affect an institution's evaluation in connection with home mortgage lending, small business and small farm lending, consumer lending (whether or not the institution elects to have it considered in its evaluation) and community development lending. The practices would be considered regardless of whether they involve loans in the institution's assessment area(s) or in any other geographical location. They would also be considered if engaged in by any affiliate (whether an operating subsidiary or a subsidiary of the holding company) provided that any loans of that affiliate have been considered for CRA evaluation. Such practices by an affiliate, however, would only be considered within the institution's assessment area(s).

According to the Supplementary Information, "[t]he agencies will consider all credible evidence of discriminatory, other illegal, or abusive credit practices that comes to their attention. Such information could be obtained from supervisory examinations …, CRA comments in connection with applications for deposit facilities, and public sources."

We are certainly mindful of the need to protect consumers from abusive and predatory lending practices. We are very supportive, for example, of the steps that the OCC has taken to adopt rules and guidance that assists national banks and their operating subsidiaries in maintaining lending products and practices that are in all ways responsible and above reproach. We also believe that efforts to promote better financial literacy can help shield the more vulnerable consumers from the worst forms of financial abuse. CBA has surveyed our members for the past several years, and the results demonstrate a strong commitment to education in finance. It is appropriate that CRA consider these practices, as well as the other positive steps being taken by financial institutions to provide affordable loan products and other innovative ways of bettering the communities they serve.

Nevertheless, we believe that the approach being proposed here is not appropriate for CRA and is fraught with problems. The use of CRA for this purpose, though obviously well-intentioned, is a continuation of the tendency we have witnessed over the years since its enactment to employ CRA as a compliance vehicle rather than an opportunity to promote community development. CRA is intended to determine whether financial institutions are helping to meet the credit needs of the communities they serve, including low- and moderate-income communities, consistent with safe and sound banking. The original idea was to ensure that low- and moderate-income communities, in particular,

not be used as a source of deposits for financial institutions that would fail to provide their credit needs. It was not Congress's intention to have the regulatory agencies download the entire consumer compliance examination process into CRA, making CRA, in effect, a super-compliance oversight review process. Under the Proposal, every product and practice of the institution that has already been subject to a thorough audit for compliance (as well as safety and soundness) would become part of the CRA process. It would move from a bird's eye view of each institution's quantity and distribution of lending and investments to a microscopic analysis of each individual loan product. It is but a short step from this Proposal to a determination of whether each and every loan meets the needs of the individual customer—i.e. whether it is suitable for the customer.

In principle, we have no objection to the Agencies finding fault with institutions that engage in a pattern or practice of mortgage or consumer lending based predominantly on the foreclosure or liquidation value of the collateral, where the borrower cannot be expected to be able to make the payments required under the terms of the loan. As you have noted, both HOEPA and the recent OCC regulations have, in one form or another, prohibited this practice, and we assume that the other bank regulatory agencies would similarly frown on this form of "equity stripping." Our concern is rather with the inclusion of this as an element of CRA. This practice is already subject to scrutiny and enforcement as either a safety and soundness violation or a compliance violation. There is no additional benefit to including it in CRA as well.

We have the same basic objection to the inclusion of numerous compliance violations under the CRA umbrella. We do not endorse or support a single one of the compliance violations listed in the Proposal; however, each is already identified with a regulation or statute that already assesses penalties, whether civil or criminal, and is subject to administrative enforcement. When HOEPA, RESPA, TILA, and the rest were enacted, Congress established the penalties for violations that it viewed as appropriate for each. If they are also CRA consequences because of the impact on the ratings—which may even include loss of powers under the Gramm-Leach-Bliley Act—the penalties substantially increase. If a creditor fails to provide the correct notice regarding the 3-day right of rescission under TILA, for example, the consumer already has the right to rescind, pay nothing and be made whole for up to 3 years! Why is it necessary also to include it as part of CRA?[2] Civil liability and the possibility of criminal liability for willful and knowing violations; regular examination for compliance and the prospect of administrative enforcement with cease and desist orders, restitution and monetary penalties; are all lying in wait for those who engage in violations of most of the compliance laws that would now become part of the CRA review as well. This is well beyond anything Congress could have envisioned when it enacted CRA or the consumer compliance laws.

[2] It is particularly hard for us to understand why violations of RESPA's section 8 and the TILA right of rescission were sufficiently relevant to CRA or "predatory lending" to be chosen for inclusion in the short list that will affect CRA. Since these are intended to be representative examples of violations that would be of concern, it would be helpful to understand what they have in common and what bearing they have on a lender's efforts to meet community credit needs.

In fact, the language of the Proposal suggests that a single violation of one of these compliance laws "will affect" the performance evaluation under CRA (since the asset-based lending provision mandates a pattern or practice, but the other enumerated violations do not). A typical large financial institution with tens or hundreds of thousands of mortgage or consumer loans will generally have many such inadvertent violations, notwithstanding procedures in place to prevent them. The Proposal does not offer any flexibility to find such violations *de minimus* or technical in nature, nor to allow for an acceptable rate of error. In short, if this is adopted, CRA could well evolve into the strictest and least forgiving compliance regulation, and CRA examiners become super-compliance auditors.

The Proposal also raises serious questions about the expansion of CRA outside of the financial institution's assessment area. The Proposal does not seek to extend the coverage of affiliate activities outside of the assessment area, even where the affiliate's loans are being considered. This is appropriate. Yet it is prepared to consider compliance violations by the financial institution wherever they might occur, even if it is only loans within the assessment area that are being considered. In their own discussion of assessment areas in the Supplementary Information accompanying the Proposal, the Agencies rightly point to the important historical relationship of CRA to assessment areas. The proposal is one more step toward the undoing of that relationship.

Although the Supplementary Information states that this is not intended to be a substantive change in CRA, we cannot agree. The impact of the Proposal would be considerable. If violations of these enumerated laws, at least, will adversely affect CRA performance, numerous troubling questions will arise that the Agencies will need to address. For example, what constitutes "evidence of a violation" such that it will impact CRA performance evaluations? What is the relationship of a violation of any particular compliance law to the CRA rating? Do different violations have a different impact on the evaluation? What other illegal credit practices are of the same "type" as those in the illustration? Can an institution find, retroactively, that some other consumer compliance violation will affect its CRA performance? What state laws will also affect CRA and how is an institution supposed to know (the Proposal says state laws will affect CRA "if applicable")?

These are but a few of the serious questions that are raised by the Proposal. We doubt that it is the direction the Agencies wish to go and we respectfully request that this portion of the Proposal be reconsidered.

If the Agencies choose to go forward notwithstanding these objections, it is critical that the consideration of illegal activities be more limited and defined. Compliance management and CRA management (merged as they will inevitably become) will be impossible without limits such as the following:

- The violations that are considered must be restricted to the activities of the financial institution itself or an affiliate whose loans are being considered;
- They must have occurred during the period of time under consideration;
- They must have occurred within the assessment area(s) of the financial institution.

- Mere evidence of violations should not be sufficient, but rather a determination made pursuant to an examination; and
- There should be a finding that a pattern or practice of such violations has occurred sufficient to affect the institution's overall impact on the community it serves.

Public Performance Evaluations

In order to make it "easier for the public to evaluate the lending by individual institutions," the Agencies propose to draw new distinctions in the public performance evaluations. These include identifying those loans that are subject to HOEPA, those that are over the reporting threshold for rate spread information under HMDA, as revised, and those that are purchased versus those that are originated by the institution. The Agencies seek comment on the extent to which these enhancements of the public information will make the evaluations more effective in communicating to the public an institution's contribution to meeting community credit needs.

We oppose this change because we believe that the distinctions being drawn create the impression that the Agencies view purchased loans, HOEPA loans, and loans over the HMDA threshold for data spread reporting to be in some way less favorable than others. Although the Proposal would not give less weight to these types of loans, we believe such a change would inevitably follow, as the public display of the distinction would lead to a difference in perception and ultimately a difference in treatment.

Purchased loans are as valuable in their own way as originated loans. As we stated in our comments on the ANPR, where the Agencies first suggested that purchased loans might be given less weight: "Not only is there no statutory basis for making this distinction, but we maintain that the public benefits of purchasing loans may be under-appreciated. There is little doubt that the availability of capital for secondary market purchases of mortgages has vastly enhanced their availability and affordability." By distinguishing in the public performance evaluation between originations and purchases, the Agencies would be implying—without actually stating—that the distinction is significant to the manner in which CRA is or ought to be evaluated. We can see no other reason to make a point of separating the categories in the public evaluation.

HOEPA loans and loans over the new HMDA threshold are becoming *de facto* measures of subprime lending, in the absence of other clear delineations. Subprime lending, in turn, is often mistakenly treated as a surrogate for predatory or abusive lending. They are both merely categories of loans that meet a threshold test based on pricing, which is tied to risk. By drawing distinctions in the public evaluation, we believe the Agencies would only be encouraging this mistaken characterization and therefore a lesser CRA weighting, either objective or subjective, of this category of loans. The data are already available as part of HMDA reporting, and to break them out here as well is to suggest falsely that there is some significance to the information for CRA purposes.

Review of Interagency Guidance

Specific places in the regulations where the Agencies indicate they may undertake additional review of the interagency guidance include:

--How qualitative considerations should be employed and balanced against quantitative measures.
--Clarifying that the Investment Test is not intended to be a source of pressure on institutions to make imprudent equity investments. Such guidance may also discuss (1) when community development activities outside of assessment areas can be weighted as heavily as activities inside of assessment areas; (2) that the criteria of "innovative" and "complex" are not ends in themselves, but means to the end of encouraging an institution to respond to community credit needs; (3) the weight to be given to investments from past examination periods, to commitments for future investments, and to grants; and (4) how an institution may demonstrate that an activity's "primary purpose" is to serve low- and moderate-income people.
--The appropriate weight to be given to brick and mortar versus alternative delivery systems in the Service Test.
--The appropriate treatment of assessment areas, particularly for nontraditional institutions.

Many of these are areas we have encouraged the Agencies to address further in the context of the examination guidance. CBA and the CBA Community Reinvestment Committee would be very pleased to work with the Agencies as they consider these issues. As we have stated before, we believe that industry should be more involved in providing technical advice and support as the Agencies develop the guidelines that will become part of the examination process.

Thank you once again for the opportunity to present our views. If you have any questions or would like additional comment on any of these issues, please do not hesitate to contact us.

Very truly yours,

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