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Office of the Comptroller of the Currency
Communications Division
Public Information Room, Mailstop 1-5
250 E Street, S.W.
Washington, D.C. 20219
Docket No. 04-06

Ms. Jennifer J. Jones
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
Docket No. R-1181

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

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552
Attention: No. 2004-04

Re: Community Reinvestment Act Regulations – Joint Proposed Rulemaking

The Community Financial Services Association ("CFSA") appreciates the opportunity to comment on the revisions to the Community Reinvestment Act ("CRA") regulations jointly proposed by the federal banking agencies (69 Fed. Reg. 5729, February 6, 2004). CFSA is a national trade association for state-licensed lenders and insured depository institutions that are engaged in payday lending.

As discussed below, CFSA believes that (1) payday loans should be subject to a CRA evaluation only upon the request of a bank, and only if such loans are made within a bank's assessment area; (2) should a bank elect to have its payday lending evaluated as part of a CRA review, the bank should receive favorable consideration for such lending if its payday loans are offered in compliance with the FDIC's Guidelines on Payday Lending; and (3) the proposed revision related to abusive lending practices is not supported by the text of CRA or its legislative history, and, therefore, should not be adopted.

Payday Loans Should be Evaluated As Part of CRA Only Upon the Request of a Bank and Only Within a Bank's Assessment Area

Currently, the CRA regulation provides for the consideration of consumer loans in only two instances: (1) at the request of a bank, or (2) upon a determination that such loans constitute a "substantial majority" of the bank's business.[1] CFSA believes that payday lending should only be evaluated as part of a CRA review in the first instance, i.e., upon the request of a bank.

The phrase "substantial majority" has been interpreted to mean "so significant a portion of the institution's lending activity by number or dollar volume of loans that the lending test evaluation would not meaningfully reflect its lending performance if consumer loans were excluded."[2] Payday lending performed in compliance with the FDIC's Guidelines on Payday Lending cannot exceed the dollar volume standard set forth in this test. Those Guidelines limit a bank's payday lending to no more than 25 percent of its Tier 1 capital. Therefore, as long as a bank's payday lending activities comply with the Guidelines, a substantial majority of the bank's loans, in dollar volume terms, cannot be devoted to payday lending.

Technically, given the small denominations of payday loans and the frequency in which such loans may be made, it is possible that a bank's payday loans could constitute a substantial majority of a bank's loans on a numerical basis. We believe, however, that mandating a review of payday lending solely upon the basis of the number of payday loans would be inappropriate. The safety and soundness constraints imposed by the FDIC's Guidelines on Payday Lending are clearly intended to avoid excessive loan concentration. Moreover, like any other type of lending, payday lending should be considered within a bank's "performance context." In such a context, a disproportionate emphasis on payday lending typically would misrepresent a bank's core business lending activities.

We also respectfully recommend that, as a general matter, only those payday loans made within a bank's assessment area should be evaluated as part of a CRA examination. We believe that this recommendation is fully consistent with the existing regulations, which focus exclusively on activities within a bank's assessment area. Nonetheless, since several of the banks engaged in payday lending do so exclusively outside their assessment area, we thought it appropriate to emphasize this point.

Payday Loans Should Receive Favorable Consideration Under CRA

If a bank voluntarily elects to have consumer loans considered as part of its CRA evaluation, we believe that payday loans offered within the bank's assessment area should qualify for favorable consideration. The Interagency Questions and Answers regarding CRA provide that small, unsecured consumer loans that are offered in a safe and sound manner and upon reasonable terms may warrant favorable consideration in a CRA examination.[3] Payday loans can satisfy these conditions. They are small, unsecured consumer loans. If offered consistent with the FDIC Guidelines on Payday Lending, they are safe and sound. And the terms for payday loans are reasonable given consumer demand, operating costs and risk.

[1] § ___22(a).

[2] Interagency Questions and Answers Regarding Community Reinvestment, § ___.22(a)(1)-2.

[3] Interagency Questions and Answers Regarding Community Reinvestment, § ___.22(a)-1.

Payday Loans are Small, Unsecured Consumer Loans

Typically, payday loans are offered in amounts below $1,000 and have maturities of 14 days. Payday loans are not secured by real property or any other form of collateral. Instead, a borrower usually provides the lender with a check or debit authorization for the amount of the loan plus the fee. The check is either post-dated to the borrower's next payday or the lender agrees to defer presenting the check for payment until a future date, usually two weeks or less. When the loan is due, the lender expects to collect the loan by depositing the check or debiting the borrower's account or by having the borrower redeem the check with a cash payment. Payday loans appeal to individuals who are starting new careers or families, and who face a need for short-term, low-denomination credit to pay for unexpected life events, such as medical expenses, car repairs or school expenses.

Payday Loans Offered in Compliance with FDIC Guidelines are Safe and Sound

In recognition of the growth of payday lending, the FDIC has issued an advisory on payday lending for state nonmember banks that "describes the FDIC's expectations for prudent risk-management practices for payday lending activities." These expectations include a limitation on the volume of payday loans in relation to a bank's Tier 1 capital (no more than 25 percent), dollar-for-dollar capital against each loan, an adequate allowance for losses, and a limitation on the time such loans may be outstanding before they must be classified as a loss (60 days). Additionally, the FDIC's Guidelines require compliance with federal consumer protection laws, such as the Truth-in-Lending Act and the Equal Credit Opportunity Act. Payday loans offered in compliance with these Guidelines are, per se, safe and sound.

The Terms of Payday Loans Are Reasonable

It is a simple fact that the shorter the term of a loan, the higher the APR. For example, the APR on a $200 credit card charge that is repaid in one month may be as high as 50 percent,[4] and the APR on a bounce protection fee of $20 for an overdraft of $100 will be 541 percent, assuming the consumer repays the overdraft in 14 days.[5] It is not surprising, therefore, that the APR on a 14-day, $100 payday loan with a $15 dollar fee is 391 percent. Such an APR, however, does not mean that the loans are excessively priced. It only means that the APR is a more relevant measure of a loan with a maturity of one or more years.

[4] Show Me The Money! A Survey of Payday Lenders and Review of Payday Lender Lobbying in State Legislatures, Consumer Federation of America and State PIRGs, February 2000, page 9.

[5] Comments of the Consumer Federation of America and the National Consumer Law Center to the Federal Reserve Board on Proposed Revisions to Official Staff Commentary to Regulation Z, January 27, 2003, Appendix, page 2.

The real issue for consumers is not the APR, but how the dollar cost of a payday loan compares with other credit alternatives.[6] As the FDIC has recognized, payday loan customers often have "few, if any, lower-cost borrowing alternatives." For example, the average annual percentage rate of an NSF fee, in conjunction with associated merchant fees, is three times as great as the average annual percentage rate of a payday loan.[7] Similarly, so-called "bounce protection" plans typically exceed the cost of a payday loan, assuming a consumer is able to determine the cost of such plans.

Moreover, a payday loan may be the most readily accessible source of credit for many consumers. The payday lending industry has seen tremendous growth in recent years largely because traditional lenders no longer make short-term, low-denomination, unsecured consumer loans. They ceased providing the product because the cost of doing so exceeded the traditional fee. Payday loan offices, in turn, are conveniently located and the application procedures are both simple and quick. Even Comptroller Hawke, who has raised concerns about relationships between national banks and payday lenders, has acknowledged the attraction of payday lending:

> Today, up to 10,000 outlets nationwide make payday loans — and earn fees that may total as much as $2.2 billion. While many will say that fees for these services are unreasonably high, bankers in this country can't afford to ignore the number of consumers using these services. They clearly demonstrate a market opportunity. Is it realistic to think that bankers can gain a bigger share of this promising market? Clearly, it won't be easy. The nonbank providers that currently control the market possess a number of advantages — not the least of which is public acceptance. Check cashers and payday lenders have attracted customers for a reason — or for a host of reasons. They keep longer hours than banks. They tend to be more conveniently located. They speak their customers' languages. They don't ask for a lot of intrusive paperwork. They frequently offer more of the retail products and services these customers need than banks do — including money orders, wire transfers, and bill payments, as well as short-term, low-denomination loans. They're set up to work fast — a fact of paramount importance to many payday borrowers, who are usually impatient for their money and won't wait days or weeks for a loan to be approved. In short, they're more user-friendly. And nonbank providers can often claim — correctly — that their services cost no more — and

[6] The purpose of the APR disclosure requirement is to permit a consumer to compare the cost of alternative forms of credit by using a common basis. However, many of the alternatives to a payday loan are not expressed in APR terms. For example, no APR is provided with a loan from a friend or family member, a checking account overdraft arrangement, a check subject to an NSF fee or merchant fee, or a late credit card fee. Thus, knowledge of the APR for a payday loan often does not provide a basis for comparison with other credit alternatives.

[7] Payday Advance: A Cost Effective Alternative, Community Financial Services Association of America (February 2003).

> sometimes less — than the same services provided by banks — that is, when those services are even available at banks.[8]

In sum, the fees for payday loans are based upon consumer demand and reflect the cost to market, originate, process and collect these loans.

The Proposed Anti-Predatory Lending Standards Are Not Supported by the CRA Statute or its Legislative History

While we oppose abusive lending practices,[9] we respectfully suggest that the proposed revisions to the regulations related to discriminatory, other illegal, and abusive credit practices are not supported by the CRA statute or its legislative history, and, therefore, should not be adopted as part of this rulemaking process.

CRA was enacted for one purpose only: to encourage regulated financial institutions to *increase* credit in the areas where they maintain deposit facilities. The statute does this by placing an "affirmative obligation" on regulated financial institutions "to help to meet the credit needs of the local communities in which they are chartered," and by requiring the federal banking agencies to consider an institution's record of doing so when evaluating an application for a deposit facility. The statute does not otherwise empower the federal banking agencies to police the manner in which regulated financial institutions make credit available to consumers. Credit practices are subject to other federal laws, many of which were in effect prior to the enactment of CRA, including the Equal Credit Opportunity Act, the Federal Trade Commission Act and the Truth In Lending Act.

The legislative history accompanying the passage of CRA reinforced the affirmative, not punitive, nature of CRA:

> The need for new legislation arises because regulating agencies lack systematic, *affirmative* programs *to encourage* lenders to give priority to credit needs of their home areas.[10] (emphasis added)

The principal author of CRA, Senator Proxmire, was specifically concerned about the redlining. During the Senate floor debate on the Act, he noted that the focus of the law was new loans:

[8] Remarks of Comptroller John D. Hawke, Jr. before the Consumer Bankers Association, April 8, 2002.

[9] CFSA has adopted its own Best Practices to ensure that payday loans offered by CFSA members are offered in a fair and responsible manner.

[10] Senate Report 95-175, page 33.

> The committee included title IV to reaffirm that banks and thrift institutions are indeed chartered to serve the convenience and needs of their communities, and as the bill makes clear, convenience and needs does not just mean drive-in teller windows and Christmas Club accounts. It means loans.[11]

He also noted that the bill created an incentive for banks to make these new loans:

> The act provide that bank examination shall assess how well the lender is serving the local community, and that this assessment will be taken into consideration if the institution makes application for a new branch. Those who are serving their communities should be rewarded. Those who are utterly neglecting their communities should not. [12]

At no point in the debate did he suggest that CRA was intended to police specific lending practices.

In sum, neither the text nor history of CRA support the establishment of the proposed anti-predatory lending standard.

Sincerely,

Lynn DeVault

Lynn DeVault
President

[11] Congressional Record, June 6, 1977, page S8958.

[12] Id.