CONSUMER
BANKERS
ASSOCIATION

May 10, 2005

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Ms. Jennifer J. Johnson
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Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
comments@fdic.gov

Re: Proposed Revisions to the Community Reinvestment Act Regulations
OCC: 12 CFR Part 25; Docket No. 05-04; RIN 1557-AB98
FRB: 12 CFR Part 228; Regulation BB; Docket No. R-1225
FDIC: 12 CFR Part 345; RIN 3064-AC89

Dear Sir or Madam:

The Consumer Bankers Association (CBA)[1] is grateful for 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

(the Agencies) to amend the Community Reinvestment Act (CRA). We appreciate the efforts of the Agencies, acting jointly, to propose changes that are intended to reduce regulatory burdens while making CRA more effective in determining the extent which banks are meeting their communities' credit needs.

The Proposal would revise the eligibility requirements for CRA, by providing a simplified lending test and a flexible new community development test for small banks with an asset size between $250 million and $1 billion -- without regard to bank holding company (BHC) status. It would also revise the term "community development" to include certain community development activities, including affordable housing, in underserved rural areas and designated disaster areas.

Finally, the Proposal would codify by regulation the relation of illegal practices to CRA evaluations, which is currently spelled out in the Q&A.

The stated goal of the Proposal is to strike a balance between the desire to fine tune the regulations and the need to avoid unnecessary and costly disruption to reasonable CRA policies and procedures that the industry has put into place under the current rule.

History of Recent CRA Reform Efforts

This Proposal is only the latest in a series of efforts by the Agencies to improve CRA, making it serve the original intention of Congress, while not overly burdening the banking industry.

In 1995, the first attempt at extensive CRA reforms was completed. This was an effort that was several years in the making, and culminated in a major rewrite of the regulations. The new approach to CRA shifted the overall emphasis from measuring how much time and energy depository institutions devoted to CRA, to a measure of the results that they achieved. The reforms were so extensive that the four agencies that participated in the effort (OCC, FRB, FDIC, and OTS) agreed to revisit the reform in 2002, to see whether they were fulfilling the goal of (a) placing performance over process; (b) promoting consistency in evaluations; and (c) eliminating unnecessary burden.

In July 2001, the same four agencies issued an Advance Notice of Proposed Rulemaking (ANPR) jointly (66 FR 37602; July 19, 2001). In our comments, CBA encouraged the agencies not to undertake a major rewrite of the regulation yet again. Many issues were under consideration, but we recommended that they be addressed under the existing rules,

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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 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.

relying on performance context, examiner guidance, and the like, rather than through the rulemaking process.

In February 2004, the four agencies issued identical proposals (69 FR 5729; Feb. 6, 2004). The proposals would have increased the limit on the asset size of small institutions to under $500 million in assets without regard to bank holding company membership. It also would have extended the scope of CRA evaluations to cover certain predatory lending practices, as well as evidence of a pattern or practice of asset-based lending in home mortgage or consumer loans.

In our comments, CBA opposed the expansion of CRA to cover predatory loans. We argued that, while we opposed abusive practices, we did not believe that CRA would be the appropriate vehicle for addressing them. Laws already exist to prohibit the kinds of practices under consideration, and examination and enforcement mechanisms are in place. To expand CRA to cover this issue unnecessarily overlays another enforcement mechanism and would forever change the nature of CRA examination.

On July 16, 2004, the OTS announced a final rule for the thrifts it regulates, which expands the category of small savings institutions to those under $1 billion, regardless of holding company affiliation. On the same day, the Federal Reserve Board withdrew its proposal and the OCC announced it would not proceed any further with its version of the proposal.

On August 20, 2004, the FDIC issued a new proposal on small bank CRA coverage (69 FR 51611, Aug. 20, 2004). The proposal would raise the threshold to assets under $1 billion, regardless of BHC affiliation. For banks with assets between $250 million and $1 billion, the FDIC would add to the five performance criteria of the current small bank test a new sixth criterion, to assess community development lending, investments or services. The proposal would also expand the definition of community development to include benefit to rural areas and individuals.

On November 24, 2004, the OTS issued another proposal—applicable to "Large Thrift Institutions." This proposal would revise the definition of community development for rural areas and add consideration of areas with natural disasters. It would also add flexibility to the divisions of Lending, Investment and Services. Under the proposal, 50% of a thrift's CRA rating would be based on the Lending test, and the rest would be based on any other type or types of CRA activity that the thrift elects.

In our comments, CBA indicated support for the additional flexibility, but opposed the OTS's rulemaking as counter to the goal of uniform CRA rules.

The Current Proposal

On March 11, 2005, the Agencies jointly issued this Proposal. The Proposal would make the following changes to CRA regulation:

1. Increase small bank threshold to $1 billion.

2. Create an intermediate category of banks (known as "Intermediate Small Banks") of at least $250 million and less than $1 billion. Ratings for these banks would be based on a new, flexible community development test plus the streamlined lending test. Intermediate Small Banks would not be able to get a satisfactory rating without receiving a satisfactory rating on both parts.

3. Expand the definition of Community Development.

    a. Add affordable housing for individuals in "underserved rural areas" and designated disaster areas. The affordable housing component of the definition of "community development" is currently limited to efforts that benefit low- and moderate-income (LMI) individuals. This would clarify that the individuals would not necessarily have to be LMI individuals if they are located in an underserved rural area.

    b. Add community development activities that revitalize or stabilize underserved rural areas and designated disaster areas. The current test on Revitalize and Stabilize is targeted to LMI census tracts. Many believe that this now misses rural areas that do not have LMI tracts, but are in decline, have been designated for redevelopment, or need revitalizing or stabilizing. The Agencies have noted that approximately 60% of rural areas do not have LMI census tracts.

4. Amend the regulation to allow evidence of certain abusive and illegal credit practices to adversely affect an agency's evaluation of a bank's CRA performance.

CBA Comments

Since the CBA's comments on the July 2001 ANPR, we have consistently stated our view that a major new CRA "reform" process of the type undertaken a decade ago would be disruptive to the operations of financial institutions and that the costs of such a process would outweigh any potential benefits. The nature of this Proposal demonstrates that the

Agencies have clearly paid close attention and are limiting the proposed changes to a few discrete areas. We are grateful for this.

In our earlier comments, we also suggested that much of what was under consideration could be better addressed through the examination process, such as by application of the 'performance context' and amended examination guidelines, rather than through a rulemaking. We continue to encourage evaluation of ways to streamline the CRA process, add flexibility, and reduce burdens, through the exam process itself, rather than through major reforms of the regulation. Exams can be streamlined, flexibility can be better incorporated through improved use of performance context, and clarity and uniformity can be achieved through uniform, interagency training. We recognize that revisions to the guidelines and Q&A may have to wait until interagency rules have been finalized, but much can be done in the interim.

As we have stated before, our two objectives for any reform efforts—whether reform of the regulations or of other guidance—are uniformity and flexibility. Therefore, we hope that the uniform actions of the Agencies are the beginning of an attempt to return to consistent interagency treatment, and we commend the Agencies for proposing to give greater flexibility to Intermediate Small Banks. Indeed, as noted in our comments below, we would like to see similar treatment accorded to larger banks as well.

Community Development Test for Intermediate Small Banks

As the Agencies stated, "Giving banks more flexibility on how to apply their community development resources to respond to community needs through a more strategic use of loans, investments, and services is intended to reduce burden and make the evaluation of community banks' community development records more effective." We could not agree more. Indeed, we would encourage the Agencies to consider that banks operating under the Large Bank test might benefit from such changes as well.

In past comments, we strongly urged the Agencies to consider ways to accord greater consideration to the community development efforts under the Large Bank Test, and to allow the institutions the flexibility to find the correct vehicle to make community development a reality in their markets. The artificiality of the distinctions being drawn by CRA is an obstacle to banks. CRA, aside from merely measuring performance, should be an asset and an encouragement, not a hindrance.

Rather than assess how well an institution is meeting the credit needs of the entire community, the Investment Test merely determines how much the institution has invested, whether the investments are CRA-eligible, and whether any investments are innovative or complex. By forcing CRA-eligible investments, regardless of how prudent or profitable (performance context notwithstanding), the regulation fails to encourage the community development activities that provide for sustainable, long-term community benefit.

A community development test of the type being proposed for Intermediate Small Banks would have the same benefits for those subject to the Large Bank Test. It would permit banks to better align their CRA initiatives with their business strategies and enhance their ability to make meaningful investments in their communities.

Community Development Definition—Rural Areas

Many institutions find that the present definition of "community development" is inadequate to address the needs of rural areas. The Proposal offers a number of options to deal with this inadequacy, each of which effectively expands the rural areas receiving recognition under CRA for activities.

We offer two comments on this portion of the Proposal:

1. **Beware of unintended consequence**—While we are mindful of the need to address the unique characteristics of rural markets, and understand that the LMI measure has not been very effective in this regard, we encourage you to be wary of unintended consequences. The Agencies need to clarify that the proposed expansion of the underserved areas that qualify for community development test credit is not intended to mandate that banks stretch to meet the needs of a larger geographic area. It is intended rather to provide CRA credit for community banks who are meeting needs in these markets, or who want the benefits accorded by CRA to stimulate activity. One way to reduce this risk might be to permit those institutions operating in these underserved rural markets the discretion to expand the portion of the rural geography to the newer (larger) designated area, if they wish to benefit from the additional CRA credit. Otherwise we fear that, inevitably, examiners will come to expect every institution to stretch its resources in these markets.

2. **Keep the rules as close to existing rules as possible**—Of all the options presented in the Proposal, we find the CDFI option the least appealing. Any benefits it offers in flexibility and accuracy are overwhelmed by the difficulty of administration. It is the least familiar and furthest removed from the current measures. It is the most rapidly changing, and therefore the most difficult to maintain on an ongoing basis. It is also the least appropriate to the nature of investments, which can take years to structure and complete. A bank cannot begin a project (such as a complex tax credit deal) on the assumption that it will be given consideration because of its location in a county that meets the requirements of the regulation, only to find that—by the time of the project's completion—the county no longer fits the bill. And even if the qualification can be locked in, the tracking requirements would be extremely complex and costly. Any of the other proposed options would incur fewer implementation problems.

Impact of Evidence of Discrimination or Other Illegal Activity

According to the Supplementary Information in the Proposal, "[t]he OCC, FDIC, and Board again propose to revise the regulations to address the impact on a bank's CRA rating of evidence of discrimination or other illegal credit practices. The regulations would provide that evidence of discrimination or evidence of credit practices that violate an applicable law, rule, or regulation, will adversely affect an agency's evaluation of a bank's CRA performance."

The proposal would include an "illustrative list" of such practices that would track the list in the Q&A. That list encompasses only five practices: (i) discrimination against applicants on a prohibited basis; (ii) violations of HOEPA; (iii) violations of section 5 of the FTC Act (unfair or deceptive practices); (iv) violations of section 8 of RESPA; and (v) violations of the TILA right of rescission. The agencies state: "We believe that specifying examples of violations that give rise to adverse CRA consequences in the CRA regulations, rather than solely in interagency guidance on the regulations, will improve the usefulness of the regulations and provide critical information in primary compliance source material."

The language of the Proposal closely tracks the existing language of the interagency Q&A[2]. We believe that this is preferable to the approach that was proposed in February 2004, which would have widened the reach of CRA. As we said at the time, 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. It would have moved CRA from a bird's eye view of each institution's quantity and distribution of lending and investments to a microscopic

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[2] **.28(c) Effect of Evidence of Discriminatory or Other Illegal Credit Practices**

Q1. What is meant by "discriminatory or other illegal credit practices"?

A1. An institution engages in discriminatory credit practices if it discourages or discriminates against credit applicants or borrowers on a prohibited basis, in violation, for example, of the Fair Housing Act or the Equal Credit Opportunity Act (as implemented by Regulation B). Examples of other illegal credit practices inconsistent with helping to meet community credit needs include violations of—

- the Truth in Lending Act regarding rescission of certain mortgage transactions and regarding disclosures and certain loan-term restrictions in connection with credit transactions that are subject to the Home Ownership and Equity Protection Act;
- the Real Estate Settlement Procedures Act regarding the giving and accepting of referral fees, unearned fees or kickbacks in connection with certain mortgage transactions; and
- the Federal Trade Commission Act regarding unfair or deceptive acts or practices. Examiners will determine the effect of evidence of illegal credit practices as set forth in examination procedures and section .28(c) of the regulation.

Violations of other provisions of the consumer protection laws generally will not adversely affect an institution's CRA rating, but may warrant the inclusion of comments in an institution's performance evaluation. These comments may address the institution's policies, procedures, training programs, and internal assessment efforts.

analysis of each individual loan product. We appreciate that the Agencies appear to have responded to these comments to some degree.

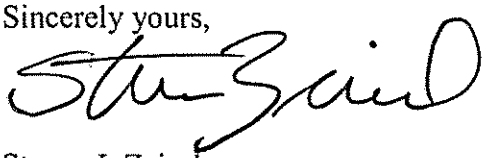
Nevertheless, we remain concerned about expanding the regulation as set forth in the Proposal. While we encourage the efforts to prohibit illegal and discriminatory practices, we do not agree that CRA is the appropriate vehicle for addressing them. CBA does not endorse or support a single one of the 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 additional administrative enforcement. When HOEPA, RESPA, TILA, and the rest were enacted, Congress established the penalties for violations that it viewed as appropriate for each, and the examination process is in place to further ensure compliance. 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 in store for those who engage in violations of most of the compliance laws that are enumerated. Layering CRA consequences on top of these penalties is well beyond anything Congress could have envisioned when it enacted CRA or the consumer compliance laws.

Furthermore, the Proposal extends the reach of this language to "evidence of discriminatory or other illegal credit practices in any geography by the bank or in any assessment area by any affiliate whose loans have been considered as part of the bank's lending performance." This language does not appear in the Q&A, and it is not clear on what basis the Agencies are seeking to expand the scope of the regulation. If the purpose of this Proposal is to address activities that, by their nature, undermine the efforts of the bank to meet the credit needs of its community (and we can only guess at this, since the Proposal does not provide a justification), practices outside the assessment area (i.e. outside its community) should not be within the scope of consideration. Again, we are in no way endorsing any illegal practices. If they are illegal they can and should be enforced under laws that are written explicitly for that purpose. Our concern is only with their treatment under CRA.

If the Proposal is adopted with the goal of essentially retaining the current treatment, as described in the Q&A (except for the issue of scope noted above), we recommend that you also adopt the language in the Q&A that currently states: "Violations of other provisions [i.e. other than the five enumerated examples] of the consumer protection laws generally will not adversely affect an institution's CRA rating, but may warrant the inclusion of comments in an institution's performance evaluation. These comments may address the institution's policies, procedures, training programs, and internal assessment efforts." In lieu of incorporating this text in the regulation, you may wish to consider retaining the language in the Q&A.

Thank you for the opportunity to comment on this Proposal. If you have any questions or wish to obtain further information, please do not hesitate to contact us.

Sincerely yours,



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