July 30, 2009

Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 2-3
Washington, DC 20219
Docket No. OCC-2009-0010

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Docket No. R-1360

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
RIN 3064-AD45

Regulations Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: OTS-2009-0010

Re: Community Reinvestment Act Regulations; Joint Notice of Proposed Rulemaking

Dear Sir or Madam:

The Consumer Bankers Association (CBA)[*] appreciates the opportunity to comment on this joint notice of proposed rulemaking (Proposal) under the Community Reinvestment Act (CRA).

The federal bank and thrift regulatory agencies (the Agencies) have proposed revisions to regulations implementing the CRA to include consideration of low-cost education loans provided to low-income borrowers when assessing a financial institution's record of meeting community credit needs. The Proposal implements provisions of the recently enacted Higher Education Opportunity Act (HEOA), which revised the CRA.

[*] CBA 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 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.

The Proposal also incorporates into the CRA rules statutory language that allows the agencies, when assessing an institution's record, to consider, as a factor, capital investments, loan participations, and other ventures by nonminority- and nonwomen-owned financial institutions in cooperation with minority- and women-owned institutions and low-income credit unions. This language codifies guidance in the *Interagency Questions and Answers on Community Reinvestment*, published on January 6, 2009.

Our comments are limited to the amendments mandated by the HEOA.

General

Under the existing CRA regulations, education loans are included in CRA evaluations, at the behest of the institution, as part of a consumer loan category. Consumer lending must be included in the evaluation only if it makes up a substantial majority of the institution's business. Otherwise, the institution may choose to have it evaluated, essentially on a product-by-product basis.

Section 1031 of the Higher Education Opportunity Act (HEOA) has now amended the CRA to require the Agencies to consider, as an evaluation factor, "low-cost education loans provided by the institution to low-income borrowers." The Proposal would implement this change.

A number of issues are raised by the Proposal, including several for which the Agencies have specifically asked for comment. We believe it is helpful, in responding to these questions, to establish some general principles.

It is clear that the intent of the statutory amendment is to encourage affordable education loans to lower income consumers by using the vehicle of CRA. We support that objective. As regulations are drafted to implement the new provision, however, we encourage the Agencies to bear in mind that CRA is not a compliance statute. It is a means of encouraging banks to help meet the credit needs of their communities, subject to safe and sound lending. Therefore, unnecessarily detailed technical requirements should be kept to a minimum, and flexibility and innovation should be encouraged. In sum, as the Agencies draft the regulations, they should do so in a manner that will best encourage low-cost lending to lower income persons to help meet their education needs, while not placing restrictive, technical requirements on institutions that will only interfere with that objective.

With these principles in mind, CBA supports the Proposal, subject to our comments in three areas: a) the proposed manner of evaluating low-cost education loans to low-income borrowers; b) the proposed manner of defining "low-cost" education loans; and c) the proposed manner of defining "low-income" borrowers. Our specific comments follow.

CRA Evaluation

Low-cost education loans to low-income borrowers should be viewed as responsive to the credit needs of the institution's community, by definition, and should receive favorable qualitative consideration. We believe this is what the Proposal intends, but we encourage the agencies to clarify the manner of consideration in the final regulation. The preamble to the proposal states: "As proposed, institutions would receive favorable *qualitative* consideration for originating "low-cost education loans to low-income borrowers" as a factor in the institutions' overall CRA rating. Such loans would be considered responsive to the credit needs of the institutions' communities." 74 FR 31214 (June 30, 2009) (Emphasis added.) We believe this is appropriate, and calls for consideration that is similar to the treatment of community development activities.

The Agencies have requested comment on consideration of the applicable loans as a subcategory of consumer loans. Under this alternative, the institutions would have the option of receiving a separate quantitative evaluation of the number and amount of low-cost education loans to low-income borrowers, without regard to other consumer loans. While this would have the advantage of being consistent with other consumer lending product lines, and would also be optional, we believe that it would be less desirable than the proposed treatment. The Lending Test—of which the consumer lending evaluation is a part—relies on data to determine the distribution and penetration of lending to low- and moderate- middle- and upper-income borrowers and the relative percentages compared with the population demographic. Loans are evaluated by number and amount; borrower characteristics (i.e. distribution among borrowers of different income levels); geographic distribution (i.e. distribution among borrowers in geographies with different income levels and whether loans are made to borrowers in the institution's assessment area); and, for large retail institutions, whether the education loan program is innovative or flexible in addressing the needs of low- or moderate-income individuals or geographies. Therefore, if this were to become a subcategory of consumer lending, the banks would have to generate the necessary data, to the extent it does not already exist. And it would be difficult to evaluate the data in the absence of data from other institutions. If this were the approach taken, we would be concerned that it could be a disincentive for institutions to participate. Furthermore, it would then not be available to all types and sizes of institutions, since the Lending Test is not universally employed. In any case, as noted by the Agencies, all education loans would continue to be eligible for consideration as consumer loans, at an institution's option, under existing CRA rules.

It is most critical that, whatever form of assessment is adopted, it should not create an explicit or implicit mandate to make these loans or report the loans that are made. Education funding is a product that many banks do not engage in. In fact, since the profit margin has been made extremely thin and the cost of compliance likely to increase with expanded compliance requirements, fewer and fewer banks are likely to remain in the private lending business. Meanwhile, government subsidized loans are expected to be replaced by direct federal lending programs. The result is likely to be a very small number of institutions that will specialize in higher education loans. An additional compliance cost will only exacerbate this trend, and, if the cost is high, no amount of

CRA consideration will be enough to justify it. The result may be the opposite of what was intended by Congress: Fewer banks in the business of making student loans—whether to low-income borrowers or any other borrowers.

Thus, we recommend that the regulation clearly state that low-cost education loans to low-income borrowers are responsive to the needs of the institutions' communities; and that the Agencies will give them favorable qualitative consideration at the option of the institution. Making such loans is not a required element of the CRA assessment; and the absence of these loans would not be viewed negatively under a CRA assessment.

Definition of Low-Cost Loans

Prior to HEOA, nothing in CRA mandates that loans be "low cost." The affordability of the products that qualify for CRA consideration is largely a function of the need to make credit available to low- and moderate-income sectors of the community. Of course, loans that are discriminatory or that violate other consumer protection laws will have a negative effect on a CRA evaluation; but in other respects, the Agencies doing the evaluation do not look at the pricing of the mortgage loans or consumer loans that are given consideration. As a result, the need to determine whether an education loan is "low-cost" is a case of first impression under CRA.

As proposed, low-cost education loans would be defined to mean (1) education loans originated by an institution through a U.S. Department of Education loan program or (2) any private education loan as defined in the Truth in Lending Act, including loans under a state or local education loan program, originated by an institution of higher education with interest rates and fees no greater than those of comparable education loans offered through loan programs of the U.S. Department of Education. The Agencies are seeking comment on the appropriate definition of low-cost loans.

We believe that the definition of a low-cost <u>private</u> education loan should not be based on a comparison with the rates and fees in the federal student loan program, because the federal loan programs and private loans are not comparable in a number of important ways. For example, education loans made through the federal loan program have a 97% guarantee against default. Lenders that make private loans, on the other hand, take 100% of the risk of default in making a loan to a particular borrower. Additionally, in the federal student loan program, the lender's yield is not tied to the interest rate paid by the borrowers. Rather, lender return is based on a separate formula set in statute.

Banks that make private education loans must consider market interest rate fluctuations as well as a borrower's credit risk when making a private loan credit decision. And, in many cases, the private education loan interest rates offered cannot compete with the federal loan program, since the Treasury directly funds the latter.

We recommend against the proposed approach, which establishes the threshold for a low-cost private loan by looking to the pricing of government loans. We believe any formula should reflect the significant differences between these products. Unlike government loans, private loans generally have a variable rate, are based on borrower credit, and are structured so that the lender assumes all of the default risk. Government rates can be set and maintained indefinitely, with much less regard for the cost of funds or the risk of default. If "comparable" government products are used as guidelines, it may unintentionally create an incentive for some banks to make loans that are not profitable or that involve excessive risk. We do not believe that this was the intent of either CRA or HEOA.

Therefore, we recommend that "low-cost loans" include private education loans meeting an Annual Percentage Rate (APR) threshold comprising (i) an interest rate component based on a market-based formula reflective of the cost of funds, such as the use of the 3-month LIBOR plus the addition of a reasonable margin, and (ii) a loan fee component that reflects industry norms.

We will be happy to work with you to assist in developing a practical threshold that meets the objectives of the CRA amendment.

Definition of Low-Income Consumers

We support the proposal that the definition of low-income remain consistent with the manner of determining income under CRA. Thus, the lender should consider the income included in the credit decision: The borrower's income, or the combined incomes in the case of loans that are co-signed. The calculus should also be consistent with CRA, such that "low-income" is less than 50% of the area median income.

We do recommend that government loans that are needs-based, such as subsidized Stafford Loans, automatically qualify as loans to low-income borrowers. In regard to other government loans, at least for the remaining time that institutions continue to be allowed to offer them, we recommend that a method be developed to allow institutions to determine whether they qualify under an income test. Institutions do not obtain income information for government education loans.

One final point: By its terms, CRA is concerned with "low- and moderate-income" (LMI) consumers. The Section 804 of CRA states:

> (a) In general. In connection with its examination of a financial institution, the appropriate Federal financial supervisory agency shall—
> (1) assess the institution's record of meeting the credit needs of its entire community, including *low- and moderate-income* neighborhoods, consistent with the safe and sound operation of such institution; and
> (2) take such record into account in its evaluation of an application for a deposit facility by such institution. (Emphasis added)

The statutory amendment limits consideration to education loans that are made to "low-income borrowers." Since LMI is a clearly understood and well-defined term in CRA and "low-income borrowers" is not, we believe it would be preferable for CRA to remain consistent in consideration of loans to LMI consumers. Therefore, we would encourage the Agencies to use the flexibility accorded them in their rule writing to expand the consideration to include low-cost education loans to LMI borrowers.

Conclusion

Thank you for the opportunity to provide our comments. If you have any questions, please do not hesitate to call.

Sincerely,

Steven I. Zeisel
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