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May 17, 2013

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Attn: Comments, FDIC
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SUBJECT: Board Docket No. OP-1456; OCC Docket ID OCC-2013-003

This letter is written in response to the March 18, 2013 notice and request for comments (Notice) from the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) (collectively the Agencies) on the proposal to clarify the Interagency Questions and Answers Regarding Community Reinvestment (CRA Q&As) by addressing several community development issues. The Agencies propose to revise five questions and answers, which address (i) community development activities outside institutions' assessment areas, both in the broader statewide or regional area and in nationwide funds; (ii) additional ways to determine whether recipients of community services are low- or moderate-income; and (iii) providing a community development service by serving on the board of directors of a community development organization. The Agencies also requested comments on two additional questions and answers, one of which addresses the treatment of community development performance in determining an institution's lending test rating, and the other addresses the quantitative consideration given to a certain type of community development investment.

The Massachusetts Division of Banks (Division) regulates 212 state-chartered depository institutions with assets of over $315 billion and approximately 1,400 licensed non-bank financial service entities, including over 600 mortgage lenders and mortgage brokers. The Division

performs routine examinations of these institutions for compliance with all applicable State and federal consumer protection provisions, including but not limited to the Real Estate Settlement Procedures Act (RESPA), the Equal Credit Opportunity Act (ECOA), the Home Mortgage Disclosure Act (HMDA), the Fair Credit Reporting Act (FCRA), as well as the Truth in Savings Act (TISA) and the Electronic Fund Transfers Act (EFTA). In addition, for over 40 years the Division has received an exemption from the Truth in Lending Act (TILA) from the Board of Governors of the Federal Reserve System. In fact, the federal TILA is based on the Massachusetts truth in lending law passed in 1966[1]. The Division also evaluates banks and credit unions and certain mortgage lenders for compliance with the Massachusetts Community Reinvestment Act (CRA)[2]. Through these efforts, Massachusetts has one of the most consumer protective supervisory programs in the country and applies CRA performance standards for all regulated banks and credit unions and certain mortgage lenders. Through our CRA examination program, the Division routinely refers to the CRA Q&As to develop accurate and consistent evaluations of examined entities. In fact, the Division's parallel CRA regulations specifically reference federal rulings and guidance:

> (c) Advisory rulings. Each official interpretation by the Federal Financial Institutions Examination Council (FFIEC) or appropriate Federal banking regulatory agency of the regulations issued under the Community Reinvestment Act (12 USC 2901 et seq.) that is similar in substance to a provision of 209 CMR 46.00 shall, until rescinded by the FFIEC, be deemed by the Commissioner to be an advisory ruling issued under M.G.L. c. 30A, § 8; provided, however, that the Commissioner may reject an interpretation of the FFIEC or appropriate Federal banking regulatory agency.[3]

To date, the Division has not rejected any interpretation of the FFIEC or of the Agencies.

The Division supports the Agencies' comment that community development is an important component of CRA. The Division strongly supports efforts to increase participation in community development activities by financial institutions, particularly large banks. In the run up to the recent economic crisis, the largest banks engaged in practices that destabilized low- to moderate-income neighborhoods, notwithstanding the "Outstanding" and "Satisfactory" CRA ratings that each of these banks received from their federal regulator. It will take years for these neighborhoods to recover from such practices. It is therefore an excellent opportunity to consider how the Agencies might "raise the bar" with regard to CRA performance by the largest banks without increasing the regulatory burden on the smaller community banks which did not contribute to the crisis.

As a general matter, the Agencies appear to have issued the Notice as a result of hearings sponsored by the Agencies in 2010. The June 17, 2010 release which announced the hearings stated that the purpose of the hearings was to "consider how to update the regulations to reflect

[1] G.L. c. 140D.
[2] G.L. c. 167, s. 14 and G.L. c. 255E, s. 8.
[3] See 209 CMR 46.11(3)(c).

changes in the financial services industry, changes in how banking services are delivered to consumers today, and current housing and community development needs. The agencies also want to ensure that the CRA remains effective for encouraging institutions to meet the credit needs of communities." Many of the proposals in the Notice are consistent with the Agencies' objectives in the 2010 hearings. However, many of the proposed amendments to the CRA Q&As are substantial changes in interpretation that may be more appropriate to consider in what many might view as a long overdue update of the CRA regulations. The Division urges the Agencies to come forward with an advance notice of proposed rulemaking (ANPR) to engage the public in how we, as regulators can update the CRA regulations to reflect the community needs and financial industry of the 21st century. In doing so, I would urge the Agencies to hearken back to the statutory statement of purpose of the CRA:

> (a) The Congress finds that—
>
> (1) regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business;
>
> (2) the convenience and needs of communities include the need for credit services as well as deposit services; and
>
> (3) regulated financial institutions have continuing and affirmative obligation to help meet the credit needs of the ***local communities in which they are chartered***.
>
> (b) It is the purpose of this chapter to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the ***local communities in which they are chartered*** consistent with the safe and sound operation of such institutions.[4] (Emphasis added.)

Community Development Activities Outside an Institution's Assessment Area(s)

The Division supports many of the proposed changes in _.12(h)-6 since it establishes a standard of considering community development activities that benefit a statewide or regional area that includes the assessment area(s) provided that such activities "may not be conducted in lieu of, or to the detriment of, activities in the assessment area(s)". The current standard states that a retail institution that has "adequately addressed the needs of the assessment area(s)" will receive such consideration. While the current standard appears clear, the proposed standard may provide greater clarity.

However, given the substantial changes to _.12(h)-7, the Division encourages additional changes to _.12(h)-6. The Division recommends inserting the following language at the end of the proposed _.12(h)-6 from the current answer to _.12(h)-7 which the Agencies have proposed to delete entirely:

[4] 12 USC 2901.

> When examiners evaluate community development loans and services and qualified investments that benefit a regional area that includes the institution's assessment area(s), they will consider the institution's performance context as well as the size of the regional area and the actual or potential benefit to the institution's assessment area(s). With larger regional areas, benefit to the institution's assessment area(s) may be diffused and, thus, less responsive to assessment area needs.

There should be an expectation that examiners will review the size of the regional area and the anticipated benefit to the institution's assessment area(s). If the above changes are made, then both proposed _.12(h)-6 and _.12(h)-7 will be clearer and ensure that the focus of benefits to an institution's assessment area(s) is not diminished.

Investments in Nationwide Funds

The Division has significant concerns with the proposed revisions to _.23(a)-2. The following sentence is problematic: "Nationwide funds may be suitable investment opportunities, particularly for large financial institutions with a nationwide footprint or for other financial institutions with a nationwide business focus, including wholesale or limited purpose institutions." First, each time the Division has been asked to opine on whether a particular investment will be considered for CRA purposes, the Division has always refrained from stating whether such investment is "suitable". Rather, the Division states that it is the responsibility of each financial institution to conduct its own due diligence. In addition, while the sentence that immediately follows the above sentence in the proposed Q&A states that other financial institutions (including, presumably, community banks) may find such investments to be "efficient investment vehicles", there is no reassurance that such investments are suitable for other than large, wholesale, or limited purpose institutions.

The Division also challenges the assumption that the Agencies should be making it easier or more efficient for the largest retail institutions in the country to receive CRA consideration for investing in nationwide funds that may not benefit the institution's assessment area(s), either directly or indirectly. The Division agrees that investments in nationwide funds should be considered when evaluating the CRA performance of wholesale or limited purpose institutions. Such institutions have a national or international focus without a corresponding deposit base or branch footprint. For other large retail institutions, investments in nationwide funds should only be considered if the institutions have adequately met the community development needs in each of their assessment area(s).

Finally, the Division encourages the Agencies to not delete, as proposed, the first sentence of the second paragraph.

Clarification of Community Development Services Targeted to Low-or-Moderate Income Individuals

The Division supports the additional criteria proposed by the Agencies to clarify how an institution may determine that community services are offered to low-or-moderate-income individuals. The use of eligibility for Medicaid and for free and reduced-price meals under the USDA National School Lunch Program are effective proxies for determining whether services are offered to low- or moderate-income individuals.

Service on the Board of Directors of an Organization Engaged in Community Development Activities

The Division does not support the Agencies' addition of the mere serving on the Board of Directors of an organization engaged in community development activities as being equivalent to the provision of a community development service. The Q&A as it currently exists provides detailed examples of activities that are truly community development services.

Proposed New Questions and Answers

Qualified Investments

The Division supports the proposed new Q&A _.12(t)-9. It is appropriate to only consider the portion of invested funds that have a community development purpose.

Consideration of Community Development Lending Under the Large Bank Lending Test

The Division strongly supports the Agencies' proposed Q&A _.22(b)(4)-2. Community development has been traditionally undervalued with respect to the Lending Test for large institutions. As the Agencies note, the OCC issued guidance to its examiners in 2000 that stated that community development lending performance could only have a positive or neutral impact on overall lending test conclusions. The FDIC and the Board, on the other hand, have traditionally evaluated community development lending performance allowing for a positive, neutral, or negative impact on the lending test rating. The proposed Q&A addresses this incorrect interpretation by the OCC by providing a consistent standard across the Agencies such that community development loans can have a positive, neutral, or negative impact on the lending test rating.

Process

As the Agencies correctly note in the first paragraph of the Background section of the Notice, "The Questions and Answers were first published under the auspices of the Federal Financial Institutions Examination Council (FFIEC) in 1996 (61 FR 54647)…" As a general policy matter, the FFIEC was established by Congress to "prescribe uniform principles and

standards for the Federal examination of financial institutions" by the members of the FFIEC which includes the Agencies. In addition to past Interagency Questions and Answers issued under the auspices of the FFIEC, the FFIEC has issued at least 14 other CRA guidance and examination related releases which can be found in a centralized location on the FFIEC's website (www.ffiec.gov). Having such information issued through the FFIEC is fully in the spirit of the enabling legislation to prescribe and promote uniform principles and standards for examinations. Unfortunately, the Agencies' March 18, 2013 Notice was issued through the three prudential regulators rather than through the FFIEC. Each agency has separate and distinct methods to submit and review comments and only two agencies appear to be promoting submission of comments through the e-rulemaking portal at www.regulations.gov. These separate processes do not serve the public well, either for consumer groups which have an interest in such regulatory interpretations of CRA or for the banking industry which must comply with or implement them. The Division urges the Agencies to return to the more appropriate and streamlined process to issue CRA guidance, interpretations, and examination procedures through the FFIEC.

Once the CRA Q&As are finalized, it will be important that such guidance be consistently enforced through interagency procedures. CRA procedures have traditionally been issued through the FFIEC and the Division urges the Agencies to continue this practice. Consistent examiner training is also important to ensure that procedures are carried out effectively. The Division not only encourages the Agencies to work through the FFIEC to develop and administer such training, we also ask the Agencies to make such training available to States that have CRA examination programs, including Massachusetts.

Thank you for the opportunity to comment on the proposed changes to the CRA Q&As and the proposed new Q&As. Please feel free to contact me or Deputy Commissioner Mayté Rivera at mayte.rivera@state.ma.us if you have any questions.

Sincerely,

David J. Cotney
Commissioner of Banks