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Monday, September 10, 2007

Office of the Comptroller of the Currency
250 E Street, SW., Mail Stop 1-5
Washington, DC 20219

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW.
Washington, DC 20551

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

Regulation Comments, Chief Counsel's Office,
Office of Thrift Supervision,
1700 G Street, NW.,
Washington, DC 20552

RE: Docket ID OCC-2007-0012
Docket No. OP-1290
RIN number 3064-AC97
ID OTS-2007-0030

Ladies and Gentlemen:

We are writing to provide general comments on the proposed amendments. We support the Agencies efforts to modernize “three previously adopted publications of informal staff guidance answering questions regarding

community reinvestment" and believe the "proposed nine new questions and answers, as well as the substantive and technical revisions to the existing Interagency Questions and Answers" are a proper first step.

It is our belief that banking and capital market practices, in general, are deeply flawed. It is our hope that the Agencies will begin to review banking and market practices from a systemic, global perspective, since defective practices in one sector have been shown to be linked to faulty practices in other capital market sectors:

- In multiple cases, mortgage market participants used unfair practices to maximize corporate revenue through the application of fraudulent lending practices. These practices targeted vulnerable (mainly minority) home buyers and owners: according to recent studies, African Americans and Latinos pay more for mortgages, even after controlling for credit differentials.[1] By reducing long term income and wealth, these biased and unfair practices damage capital markets and the economy as a whole, as is now becoming increasingly apparent.

- Credit rating companies continue to issue defective ratings, thus showing, in light of the studies cited above, that credit scoring and analysis is biased and unfair.

  Credit rating companies supposedly "base their ratings largely on statistical calculations of a borrower's likelihood of default," but one news report noted that:

  > "Kathleen Corbert, president of the credit rating company Standard and Poor's, resigned after lawmakers and investors criticized the company for failing to judge the risks of securities backed by subprime mortgages."[2]

[1] "The Untold Story Behind The Federal Reserve Mortgage Numbers: Broker Kickbacks Are Gouging Minority Borrowers," Center for Responsible Lending, September 8, 2006. Online at: http://www.responsiblelending.org/press/releases/page.jsp?itemID=30189949. Also see "Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages." Center for Responsible Lending.

[2] "Standard & Poor's President Replaced." Associated Press. Aug 30, 2007. NEW YORK.

This comes after earlier news reports cited statements by

> "dozens of current and former rating officials, financial advisers and Wall Street traders and investors interviewed by The Washington Post say the (NRSRO) rating system has proved vulnerable to subjective judgment, manipulation and pressure from borrowers. They say the big three are so dominant they can keep their rating processes secret, force clients to pay higher fees and fend off complaints about their mistakes."[3]

These practices threaten the integrity of banking and securities markets. Individuals and market institutions with the power to safeguard the system, including investment analysts and rating companies, have been compromised. Few efficient, effective and just safeguards are in place.

Statistical models created by the firm show the probability of catastrophic system-wide market failure has increased significantly over the past eight years.

The public is at risk.

Background

William Michael Cunningham registered with the U.S. Securities and Exchange Commission as an Investment Advisor on February 2, 1990. He registered with the D.C. Public Service Commission as an Investment Advisor on January 28, 1994. Mr. Cunningham manages an investment advisory and research firm, Creative Investment Research, Inc.

Creative Investment Research, Incorporated, a Delaware corporation, was founded in 1989 to expand the capacity of capital markets to provide capital, credit and financial services in minority and underserved areas and markets. We have done so by creating new financial instruments and by applying existing financial market technology to underserved areas. The Community

[3] "Borrowers Find System Open to Conflicts, Manipulation" by Alec Klein, The Washington Post, Monday, November 22, 2004; Page A1.

Development Financial Institution Fund of the US Department of the Treasury certified the firm as a Community Development Entity on August 29, 2003. The Small Business Administration certified the firm as an 8(a) program participant on October 19, 2005.

Mr. Cunningham's understanding of capital markets is based on first hand knowledge obtained in a number of positions at a diverse set of major financial institutions. He served as Senior Investment Analyst for an insurance company. Mr. Cunningham was an Institutional Sales Representative in the Fixed Income and Futures and Options Group for a leading Wall Street firm.

In 1991, Mr. Cunningham created the first systematic bank analysis system using social and financial data, the Fully Adjusted Return® methodology. In 1992, he developed the first CRA securitization, a Fannie Mae MBS security backed by home mortgage loans originated by minority banks and thrifts. In 2001, he helped create the first predatory lending remediation/repair MBS security. [4]

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[4]

Pool	Client	Originator	Social Characteristics
FN374870	Faith-based Pension Fund	National Mortgage Broker	Mortgages originated by minority and women-owned financial institutions serving areas of high social need.
FN296479			
FN300249			
GN440280	Utility Company Pension Fund		
FN374869		Minority-owned financial institutions	
FN376162			
FN254066	Faith-based Pension Fund	Local bank	Predatory lending remediation

Mr. Cunningham also served as Director of Investor Relations for a New York Stock Exchange-traded firm. On November 16, 1995, his firm launched one of the first investment advisor websites. He is a member of the CFA Institute and of the Twin Cities Society of Security Analysts, Inc.

The firm and Mr. Cunningham have long been concerned with the integrity of the banking and securities markets:

- In September, 1998, Mr. Cunningham opposed the application, approved by the Federal Reserve Board on September 23, 1998, by Travelers Group Inc., New York, New York, to become a bank holding company by acquiring Citicorp, New York, New York, and to retain certain nonbanking subsidiaries and investments of Travelers, including Salomon Smith Barney Inc., New York, New York. Mr. Cunningham based his opposition on the fact that Salomon Smith Barney Inc. had a history of attempting to monopolize markets and defrauding investors. This single fact rendered the merger potentially injurious to the public welfare.

  Specifically, Mr. Cunningham felt the merger was not consistent with 12 U.S.C. Section 1841 et. seq., the Bank Holding Company Act of 1956. The Act states that:

  > "The (Federal Reserve) Board shall not approve -
  > (B) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade.."

  On April 28, 2003, Citigroup Global Markets Inc. and Salomon Smith Barney Inc. (SSB) settled an S.E.C. enforcement action involving conflicts of interest between research and investment banking operations. Citigroup Global Markets Inc. and Salomon Smith Barney Inc. paid fines totaling $400 million. The firms were found, ***again***, to be defrauding investors by operating schemes in restraint of trade.

- In October 1998, in a petition to the United States Court of Appeals, Mr. Cunningham cited evidence that growing financial market malfeasance greatly exacerbated risks in financial markets, reducing the safety and soundness of large financial institutions. He went on to note that:

  > "The nature of financial market activities is such that significant dislocations can and do occur quickly, with great force. These dislocations strike across institutional lines. That is, they affect both banks and securities firms. The financial institution regulatory structure is not in place to effectively evaluate these risks, however. Given this, public safety is at risk."

- On March 1, 1999, Mr. Cunningham wrote to Senator Phil Gramm, former Chairman of the Senate Banking Committee, to suggest that a "Truth In CRA" Provision be added to financial modernization legislation, then under conference consideration by the Senate and the House, to require community groups and others who may protest bank merger applications on CRA grounds to fully disclose any payments they have received from banks, and to disclose any payments or other assistance they anticipate receiving from banks. This would include providing detailed information concerning proposals currently "on the table." In addition, we noted we would like to see these same community groups be required to report performance data showing bank funding and assistance received and actual loans made or facilitated.

- On Monday, April 11, 2005, Mr. Cunningham spoke on behalf of investors at a fairness hearing regarding the $1.4 billion dollar Global Research Analyst Settlement. The hearing was held in Courtroom 11D of the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York. *No other investment advisor testified at the hearing.*

Summary Comments

The Agencies

"have combined three previously adopted publications of informal staff guidance answering questions regarding community reinvestment (Interagency Questions and Answers). The Interagency Questions and Answers address frequently asked questions about community reinvestment to assist agency personnel, financial institutions, and the public. The agencies are proposing nine new questions and answers, as well as substantive and technical revisions to the existing Interagency Questions and Answers."

We appreciate this effort, but note the following:

Repeatedly, over the past twenty-five years, signal market participants have abandoned ethical principles in the pursuit of material well being. This has occurred in both bull and in bear markets and has taken place in the most materially advantaged country ever. A culture of avarice, arrogance, greed and malice has flourished in capital market institutions, propelling standards of behavior downward. By 2007, marketplace ethics reached a new low. The following are the simple facts:

- On January 25, 2005, "the Securities and Exchange Commission announced the filing in federal district court of separate settled civil injunctive actions against Morgan Stanley & Co. Incorporated (Morgan Stanley) and Goldman, Sachs & Co. (Goldman Sachs) relating to the firms' allocations of stock to institutional customers in initial public offerings (IPOs) underwritten by the firms during 1999 and 2000."

- According to the Associated Press, on January 31, 2005, "the nation's largest insurance brokerage company, Marsh & McLennan Companies Inc., based in New York, will pay $850 million to policyholders hurt by" corporate practices that included "bid rigging, price fixing and the use of hidden incentive fees." The company will issue a public apology calling its conduct "unlawful" and "shameful," according to New York State Attorney General Elliott Spitzer. In addition, "the company will publicly promise to adopt reforms."

- On March 23, 2005, the Securities and Exchange Commission (Commission) "announced that it instituted and simultaneously settled an enforcement action against Citigroup Global Markets, Inc. (CGMI) for failing to provide customers with important information relating to their purchases of mutual fund shares."

- On April 12, 2005, the Securities and Exchange Commission "instituted and simultaneously settled an enforcement action against the New York Stock Exchange, Inc., finding that the NYSE, over the course of nearly four years, failed to police specialists, who engaged in widespread and unlawful proprietary trading on the floor of the NYSE." As part of the settlement, the "NYSE agreed to an undertaking of $20 million to fund regulatory audits of the NYSE's regulatory program every two years through the year 2011." On that same date, the Commission "instituted administrative and cease-and-desist proceedings against 20 former New York Stock Exchange specialists for fraudulent and other improper trading practices."

- On April 19, 2005, the Securities and Exchange Commission announced "that KPMG LLP has agreed to settle the SEC's charges against it in connection with the audits of Xerox Corp. from 1997 through 2000. As part of the settlement, KPMG consented to the entry of a final judgment in the SEC's civil litigation against it pending in the U.S. District Court for the Southern District of New York. The final judgment..orders KPMG to pay disgorgement of $9,800,000 (representing its audit fees for the 1997-2000 Xerox audits), prejudgment interest thereon in the amount of $2,675,000, and a $10,000,000 civil penalty, for a total payment of $22.475 million."

- On May 31, 2005, the Securities and Exchange Commission "announced settled fraud charges against two subsidiaries of Citigroup, Inc. relating to the creation and operation of an affiliated transfer agent that has served the Smith Barney family of mutual funds since 1999. Under the settlement, the respondents are ordered to pay $208 million in disgorgement and penalties and to comply with substantial remedial measures, including an undertaking to put out for

competitive bidding certain contracts for transfer agency services for the mutual funds."

- On July 20, 2005, the Securities and Exchange Commission "announced a settled administrative proceeding against Canadian Imperial Bank of Commerce's (CIBC) broker-dealer and financing subsidiaries for their role in facilitating deceptive market timing and late trading of mutual funds by certain customers. The Commission ordered the subsidiaries, CIBC World Markets Corp. (World Markets), a New York based broker-dealer, and Canadian Imperial Holdings Inc. (CIHI), to pay $125 million, consisting of $100 million in disgorgement and $25 million in penalties."

- On August 15, 2005, the Securities and Exchange Commission "charged four brokers and a day trader with cheating investors through a fraudulent scheme that used squawk boxes to eavesdrop on the confidential order flow of major brokerages so they could 'trade ahead' of large orders at better prices."

- On November 28, 2005, the Securities and Exchange Commission announced "that three affiliates of one of the country's largest mutual fund managers have agreed to pay $72 million to settle charges they harmed long-term mutual fund shareholders by allowing undisclosed market timing and late trading by favored clients and an employee."

- On December 1, 2005, the Securities and Exchange Commission "announced settled enforcement proceedings against American Express Financial Advisors Inc., now known as Ameriprise Financial Services, Inc. (AEFA), a registered broker-dealer headquartered in Minneapolis, Minn., related to allegations that AEFA failed to adequately disclose millions of dollars in revenue sharing payments that it received from a select group of mutual fund companies. As part of its settlement with the Commission, AEFA will pay $30 million in disgorgement and civil penalties, all of which will be placed in a Fair Fund for distribution to certain of AEFA's customers."

- On December 21, 2005, the Securities and Exchange Commission

"sued top executives of National Century Financial Enterprises, Inc. (NCFE), alleging that they participated in a scheme to defraud investors in securities issued by the subsidiaries of the failed Dublin, Ohio company. NCFE, a private corporation, suddenly collapsed along with its subsidiaries in October 2002 when investors discovered that the companies had hidden massive cash and collateral shortfalls from investors and auditors. The collapse caused investor losses exceeding $2.6 billion and approximately 275 health-care providers were forced to file for bankruptcy protection."

- On January 3, 2006, the Securities and Exchange Commission announced "that it filed charges against six former officers of Putnam Fiduciary Trust Company (PFTC), a Boston-based registered transfer agent, for engaging in a scheme beginning in January 2001 by which the defendants defrauded a defined contribution plan client and group of Putnam mutual funds of approximately $4 million."

- On February 2, 2006, the Securities and Exchange Commission "announced that it filed an enforcement action against five former senior executives of General Re Corporation (Gen Re) and American International Group, Inc. (AIG) for helping AIG mislead investors through the use of fraudulent reinsurance transactions."

- On February 9, 2006, the Commission announced "the filing and settlement of charges that American International Group, Inc. (AIG) committed securities fraud. The settlement is part of a global resolution of federal and state actions under which AIG will pay in excess of $1.6 billion to resolve claims related to improper accounting, bid rigging and practices involving workers' compensation funds."

- On March 16, 2006, the Securities and Exchange Commission "announced a settled enforcement action against Bear, Stearns & Co., Inc. (BS&Co.) and Bear, Stearns Securities Corp. (BSSC) (collectively, Bear Stearns), charging Bear Stearns with securities fraud for facilitating unlawful late trading and deceptive market timing of mutual funds by its customers and customers of its introducing brokers. The Commission issued an Order finding that from 1999 through

September 2003, Bear Stearns provided technology, advice and deceptive devices that enabled its market timing customers and introducing brokers to late trade and to evade detection by mutual funds. Pursuant to the Order, Bear Stearns will pay $250 million, consisting of $160 million in disgorgement and a $90 million penalty."

- On April 11, 2006, the Securities and Exchange Commission announced "charges against individuals involved in widespread and brazen international schemes of serial insider trading that yielded at least $6.7 million of illicit gains. The schemes were orchestrated by..a research analyst in the Fixed Income division of Goldman Sachs, and a former employee of Goldman Sachs."

Fully identifiable entities engaged in illegal activities. They have, for the most part, evaded prosecution of any consequence. We note that the aforementioned Goldman Sachs, fined $159.3 million by the Securities and Exchange Commission for various efforts to defraud investors, subsequently received $75 million in Federal Government tax credits.[5]

Without meaningful reform there is a small, but significant and growing, risk that our economic system will simply cease functioning.[6]

We also note that Alliance Capital Management, fined $250 million by the Securities and Exchange Commission for defrauding mutual fund investors, received a contract[7] in August, 2004 from the U.S Department of the Interior (DOI) Office of Special Trustee for American Indians, to manage $404 million in Federal Government trust funds.[8]

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[5] The tax credits were awarded under the U.S. Department of the Treasury New Markets Tax Credit (NMTC) Program. (See: http://www.cdfifund.gov/programs/nmtc/).

[6] Models created by the firm and reflecting the probability of catastrophic system wide market failure first spiked in September, 1998. The models spiked again in January and August, 2001. They have continued, in general, to increase.

[7] Contract number NBCTC040039.

[8] The contract was awarded despite the fact that placing Alliance Capital Management in a position of trust is, given the Commission's enforcement action, inconsistent with common sense, with the interests of justice and efficiency and with the interests of Indian beneficiaries. Alliance is also in violation of DOI Contractor Personnel Security & Suitability Requirements.

Recently, we have observed several cases where corporate management unfairly transferred value from outsider to insider shareholders.[9] These abuses have been linked to the abandonment of ethical principles noted earlier. Faulty market practices mask a company's true value and misallocate capital by moving investment dollars from deserving companies to unworthy companies.

We cite the following:

> *"Falsification and fraud are highly destructive to free-market capitalism and, more broadly, to the underpinnings of our society. Above all, we must bear in mind that the critical issue should be how to strengthen the legal base of free market capitalism: the property rights of shareholders and other owners of capital. Fraud and deception are thefts of property. In my judgment, more generally, unless the laws governing how markets and corporations function are perceived as fair, our economic system cannot achieve its full potential. "*
>
> Testimony of Mr. Alan Greenspan, Former Chairman of the Federal Reserve Board, Federal Reserve Board's semiannual monetary policy report to the Congress. Before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate. July 16, 2002.

We agree.

We understand that, given any proposed rule, crimes will continue to be committed.[10] These facts lead some to suggest that regulatory authorities

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[9] Including, but not limited to, Adlephia Communications, the aforementioned Alliance Capital Management, American Express Financial, American Funds, AXA Advisors, Bank of America's Nations Funds, Bank One, Canadian Imperial Bank of Commerce, Canary Capital, Charles Schwab, Cresap, Inc., Empire Financial Holdings, Enron, Fannie Mae, Federated Investors, FleetBoston, Franklin Templeton, Fred Alger Management, Freddie Mac, Freemont Investment Advisors, Gateway, Inc., Global Crossing, H.D. Vest Investment Securities, Heartland Advisors, Homestore, Inc., ImClone, Interactive Data Corp., Invesco Funds Group Inc., Janus Capital Group Inc., Legg Mason, Limsco Private Ledger, Massachusetts Financial Services Co., Millennium Partners, Mutuals.com, PBHG Funds, Pilgrim Baxter, PIMCO, Prudential Securities, Putnam Investment Management LLC, Raymond James Financial, Samaritan Asset Management, Security Trust Company, N.A., State Street Research, Strong Mutual Funds, Tyco, UBS AG, Veras Investment Partners, Wachovia Corp., and WorldCom. Accounting firms, including Arthur Andersen and Ernst & Young aided and abetted efforts to do so. We believe there are hundreds of other cases.

[10] We assume that "employees are 'rational cheaters,' who anticipate the consequences of their actions and (engage in illegal behavior) when the marginal benefits exceed costs." See Nagin, Daniel, James Rebitzer, Seth Sanders and Lowell Taylor, "Monitoring, Motivation, and Management: The Determinants of Opportunistic Behavior in a Field Experiment, *The American Economic Review*, vol. 92 (September, 2002), pp 850-873.

may have been "captured" by the entities they regulate.[11] We note that under the "regulatory capture" market structure regime, the public interest is not protected.

According to the Agencies,

> *"Among the proposed new questions and answers is one that addresses activities engaged in by a majority-owned financial institution with a minority-or women-owned financial institution or a low-income credit union."*

We appreciate this effort and note that a report issued by the U.S. Department of the Treasury, Office of the Comptroller of the Currency, stated:

> *"The growth of minority populations and projected increases in their buying power provide significant opportunities for retail growth by financial institutions."*

Recent studies by Creative Investment confirm this statement. In the second quarter of 2007, there were 226 minority owned financial institutions (banks and thrifts) in the U.S., up from 190 at the end of 2005. The number of institutions totaled 189 at the end of 2003. Minority banks continue to lead the banking industry with respect to asset growth. By June, 2007, annualized asset growth was 17.43% at minority institutions, compared to an all industry growth rate of 6.38%. In 2006, minority institution asset growth was 10.59% versus an all industry average of 9.03%. We believe this trend reflects continued expansion at Hispanic banking institutions and remarkable asset growth at Asian institutions.

Other reports spotlight the role minority-owned banks play in this area. On October 7, 2005, Democrats on the House Financial Services Committee requested that the Government Accountability Office (GAO) "examine the federal banking agencies' current efforts to promote and preserve minority-

[11] See George J. Stigler, "The Theory of Economic Regulation," in *The Bell Journal of Economics and Management Science*, vol. II (Spring 1971), pp. 3-21.

owned financial institutions and the views of the minority financial services community on the effectiveness of these efforts." This involves reviewing federal banking agencies' implementation of section 308 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).

We believe the proposed revision represents an opportunity to create new, more relevant and more meaningful market based efforts to promote and preserve minority-owned financial institutions.

Small, African American and women and minority owned banks cannot access equity markets in any meaningful manner currently. We note that there are one hundred and thirty five financial service sector mutual funds. Not one of these funds makes investments in small, minority and women owned banks and thrifts.

On February 15, 2007, Creative Investment Research spoke with a representative of "one of the largest investment banking firms exclusively serving banks, thrifts, insurance companies and REITs." This representative indicated that his firm did not work with minority banks unless they had a market capitalization exceeding $100 million (3% of the minority banking industry.) Thus, a firm that "was founded..with a single mission - to help financial institutions increase their franchise values through the execution of sound financial strategies," eliminates 97% of minority banks from investment consideration.

Recent studies have documented the chronic lack of capital in certain small and minority owned banks and thrifts. This section of the revised Q&A responds to that lack of capital by facilitating a clear set of linked mutually supporting community development investments with a stable capital source to help build the business service infrastructure needed to create sustainable communities. Without these efforts at facilitating this strategy, the capital shortage in the Minority banking sector will continue.

We feel that the proposed changes to the CRA Q&A are consistent with both the spirit and the letter of CRA and FIRREA. The agencies effort in revising the CRA Q&A to address this situation will counter the discriminatory practices cited above and will allow others to provide much needed capital

to an underutilized set of financial institutions. It is likely that the positive impacts identified will not be achieved without the incentives provided by the Agencies and that the same result could not be achieved at a lower cost using other sources, including federal programs.

Further, we believe that a bank or bank holding company making an investment in a minority bank, either directly or indirectly, should be eligible for positive consideration under the Community Reinvestment Act or CRA.

According to GAO report cited above, "In Section 308 of FIRREA, Congress outlined five broad goals that FDIC and OTS, in consultation with Treasury, are to work toward to preserve and promote minority banks. These goals are:

1. Preserving the present number of minority banks;
2. Preserving their minority character in cases involving mergers or acquisitions of minority banks;
3. Providing technical assistance to prevent the insolvency of institutions that are not currently insolvent;
4. Promoting and encouraging the creation of new minority banks; and
5. Providing for training, technical assistance, and educational programs."

We feel the proposal to grant a bank or bank holding company making an investment in a minority bank, either directly or indirectly, positive consideration under the Community Reinvestment Act is consistent with goals 1., 2., 3., and 4. We note that these investments will only be eligible for positive CRA consideration to the extent that they provide capital to low and moderate income areas.

In summary, we favor efforts to increase fairness in our banking and capital markets while opposing reform for reform's sake. We believe the proposed revisions to the CRA Q&A guidelines move in this direction and look forward to reviewing the Agencies continuing efforts.

We appreciate the time and effort the Agencies have devoted to this task. Thank you for your leadership.

Please contact me with any questions or comments.

Sincerely,

William Michael Cunningham
Social Investing Adviser
for William Michael Cunningham and Creative Investment Research, Inc.