AMERICAN BANKERS ASSOCIATION

1120 Connecticut Avenue, NW
Washington, DC 20036

1-800-BANKERS
www.aba.com

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Richard R. Riese
Senior Vice President
Center for Regulatory Compliance
Phone: 202-663-5051
Fax: 202-828-5052
Rriese@aba.com

Robert G. Rowe
VP/Senior Counsel
Center for Regulatory Compliance
Phone: 202-663-5029
Fax: 202-828-5052
Rrowe@aba.com

March 9, 2009

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
RIN number 3064-AC97

Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 1-5
Washington, DC 20219
Docket ID OCC-2008-0027

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street & Constitution Avenue, NW
Washington, DC 20551
Docket No. OP-1349

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: OTS-2008-0022

Re: Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment

Dear Sir or Madam:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on possible revisions to existing interpretive guidelines for the Community Reinvestment Act (CRA) rules. These proposed changes supplement guidance that was proposed in July 2007 and finalized in January.

The agencies[2] have proposed one new question-and-answer to give examples how a financial institution might determine an activity is targeted to low-and-moderate income (LMI) individuals, a step ABA supports as moving in the right direction but believes should be extended to embrace an additional presumption so that financial literacy education of grade school students receives its due credit. Second, the agencies propose revising two questions-and-answers to allow pro rata consideration for certain activities that offer affordable housing targeted to low-and-moderate income individuals. ABA strongly recommends the agencies not adopt these

[1] The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $13.6 trillion in assets and employ over 2 million men and women.

[2] The Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve, the Office of the Comptroller of the Currency and the Office of Thrift Supervision.

changes as written since they conflict with existing guidance, will create unnecessary confusion, and will wrongly cause a reduction of CRA credit for mixed use community development activities. Rather, ABA believes that the current standard for primary purpose should be clarified and re-invigorated to be sure examiners are providing the broadest possible credit for mixed use community development loans, investments or services. Pro rata credit should be made available for projects that do not evince a community development purpose but nonetheless generate community development benefits. However, this should not become an option that examiners use to avoid giving broad effect to the alternative primary purpose test and consequently cause them to grant less credit to banks than they should receive for supporting mixed use community development.

Determining an Activity is Targeted to Low-and-Moderate Income Individuals

One of the challenges facing banks is determining whether a particular activity, especially a service or investment, will primarily benefit low-and-moderate income individuals or communities. There are many instances when a financial institution does not have access to sufficient information to clearly demonstrate that the project will benefit low-and-moderate income individuals since the actual income levels of those individuals who benefit from the program is unknown or cannot be demonstrated with sufficient certainty to satisfy examiners or community activists.

To begin to address this difficulty, the agencies are proposing guidance to help determine whether a community service is targeted to low-and-moderate income individuals when actual incomes of recipients are unknown. As proposed, an activity would be deemed targeted to low- or moderate-income individuals if it is:

a. Targeted to clients of a nonprofit that has a mission of serving low- or moderate-income individuals or, due to government grants, is limited to serving low- or moderate-income individuals

b. Offered by a nonprofit that is located in and serves a low- or moderate-income geography

c. Conducted in a low- or moderate-income area and targeted to the residents; or

d. Offered at a workplace for low- or moderate-income workers (based on wage data).

ABA favors adding flexibility to the interpretation of the CRA regulation that enables banks to achieve their community development objectives with a minimum of technical burden and recognizes the broad scope of their service to their entire communities.

Accordingly, ABA supports the proposed Q&A as a step in the right direction. However, we question whether proposed conditions "b" and "c" are not in fact redundant. We believe that there is no program that satisfies the condition of being "offered by a nonprofit that is located in and serves a low- or moderate-income geography" that is not already encompassed within the condition "conducted in a

low- or moderate-income area and targeted to the residents." Why should it be necessary that the nonprofit has its offices in an LMI census tract? (After all, many downtown business districts are in LMI census tracts, whereas many suburban or rural locations are not.) ABA believes that requiring participation of a nonprofit organization in this case just adds an unwarranted requirement to demonstrate qualification for CRA credit. What matters is that the activity is in an LMI area and serving its residents since those residents are likely to have income characteristics consistent with the geography's overall LMI status. Therefore, we urge the agencies to simplify the proposed Q&A so that it lists three alternatives and excludes "offered by a nonprofit that is located in and serves a low- and moderate-income geography."

Since the first option still relies on nonprofits intermediaries, to protect local communities and low- and moderate-income individuals – and to avoid confusion – ABA urges the agencies to develop additional guidance to clearly identify and define "nonprofit" after an opportunity for public comment. Since there are any number of entities that can claim this classification, the guidance should clearly articulate what is needed to qualify. The requirement should be straightforward and simple, perhaps relying on showing a 501(c)(3) approval under Internal Revenue Services rules, so that the nonprofit can easily demonstrate its bona fides. However, the burden for determining qualification should be with the entity claiming the condition has been met and not the financial institution.

Finally, we strongly recommend that the agencies consider adding the option, "delivered to primary or secondary grade level students." Among other things, this standard would put to rest any dispute that financial literacy programs delivered to school students is dependent on demonstrating the income level of the students or their parents. It would simply conclude as a policy standard that students are presumptively unemployed, LMI individuals and therefore the delivery of any community development type service to them qualifies for CRA credit.

Given the critical need for financial education at all levels, but especially for primary and secondary students, it makes no sense to discourage those who are best positioned to offer such programs from allocating resources to a worthwhile community development goal. ABA believes that it is long past time to give full application to the guidance of Q&A __.12(i)-3 which enumerates "teaching financial education curricula for low- and moderate-income individuals" as a community development service. At a time when the agencies are decrying financial product complexity and promoting individual financial responsibility, it is imperative and fitting that banks get full CRA credit for their financial literacy initiatives in training the next generation of bank customers.

Affordable Housing Loans

The agencies' second proposal purports to relax the primary purpose test by granting pro rata credit for affordable housing based community development activity that supposedly does not meet the current Q&A standards for demonstrating "primary purpose." ABA believes that this proposal is predicated on a misunderstanding of the original Q&A. While ABA supports expansion of credit for affordable housing initiatives that are not part of a project that has as its primary purpose community development, we do not want to provide examiners an excuse for not properly giving full credit to mixed income projects that involve affordable housing set

asides—which is the proper treatment for such projects under the current Q&A regime as envisioned by the agencies in their adoption of __.12(h)-8 in 1999[3].

Intent of the Current Q&A

When the agencies adopted __.12(h)-8 in 1999, they expressly sought to provide full credit for mixed income housing projects that set aside less than a majority of units for LMI persons. Responding, in part to commenters who "felt that examiners rely too heavily on mathematical formulas in making this [primary purpose] determination, such as the amount of the low- or moderate-income set aside," the agencies adopted their 1997 proposal to create a non-mathematical alternative to capture "'projects designed for the express purpose' of achieving a qualifying community development purpose, even though less than half the dollars involved in the entire project are concentrated on that purpose." 64 FR 23618, 23619 (1999). They went on to illustrate the application of this broader reach of primary purpose with the following language: "For example, federal tax-incentive affordable housing projects, where less than half the units or half the dollars go into the portion of the project that represents affordable housing for low- or moderate-income persons, fall into this category." *Id.* This was further emphasized in Q&As __ .22(b)(4)-1 and __ .42(b)(2)-3, also adopted in 1999, which illustrated how, although banks would receive (and report) full credit, for such mixed-income projects, an examiner could qualitatively weight projects differently *in the public evaluation narrative*.

Agency staff at the time conceded that this treatment substantially expanded the ability of projects to qualify for inclusion in the CRA credit bucket, even when some projects may be viewed as qualitatively superior to others in their ultimate delivery of community development benefit. As stated in the 1997 proposal of what became __.12(h)-8, "Staff request public comment particularly addressing whether the proposed primary purpose standard *over-inclusively qualifies activities as having a community development purpose,* and if so, is this adequately balanced by the regulatory requirements that allow marginal activities to be weighted less heavily than those activities that provide a greater benefit related to the community development purpose…." 62 FR 52105, 52108 (Emphasis added.) In adopting the Q&A in 1999, the agencies rejected the single comment urging pro rata treatment—and chose instead to provide full credit as they had proposed. 64 FR at 23619.

In other words, the alternative test for primary purpose finalized in 1999 was intended to be expansively inclusive. The three criteria were to be enablers, not barriers, to capturing activities that included community development benefit even though they were part of bigger projects. As ABA has regularly stressed, CRA's statutory charge is to assess a bank's record of meeting the needs of its entire community, <u>including</u> low- and moderate-income neighborhoods, <u>not</u> exclusively low- and moderate-income persons or neighborhoods. Therefore, it is entirely appropriate to count all of a qualifying project as a community development loan, investment or service, even when only a portion goes to benefit the LMI market segment.

[3] In May 1999, the agencies adopted Q&A 7 to __.12(i) which was renumbered in July 2001 as __.12(i)-7. With the publication of the latest Q&A revision in January 2008, this Q&A was renumbered as __.12(h)-8. (74 FR at 511.)

Ramifications of the Proposal

As proposed, the revision will create inconsistency and unnecessary confusion with existing guidance under other provisions of the Q&A, e.g., section __.22(b)(4)-1 and section __.42(b)(2)-3 of the Q&A.

Currently, section __.22(b)(4)-1 provides that "when evaluating an institution's record of community development lending under the lending test applicable to large institutions, an examiner may distinguish among community development loans on the basis of the actual amount of the loan that advances the community development purpose." The given example posits two $10 million community development projects, where one allocates 40% of the units for low-income residents and the other allocates 65%. According to the existing guidance, "transaction complexity, innovation and all other relevant considerations being equal, *an examiner should also take into account that the 65 percent project provides more affordable housing for more people per dollar expended*." (Emphasis added.) The guidance goes on to state that, "the extent of CRA consideration an institution receives for its community development loans should bear a direct relation to the benefits received by the community and the innovation or complexity required to accomplish the activity…" In other words, this section states that credit is already available on a qualitative basis. The revision to section __.12(h)-8, though, contradicts this. While section __.22(b)(4)-1 expects 100% community development credit to be granted for a loan even where less than 50% benefits low- or moderate-income individuals, the revision to section 12(h) provides only partial credit.

A similar problem occurs with section __.44(b)(2)-3. There, the guidance provides that where the primary purpose of a loan is to finance an affordable housing project for low- or moderate-income individuals but "only 40 percent of the units in question will actually be occupied by individuals or families with low or moderate incomes," the entire amount of the loan will be reported as a community development loan "as long as the primary purpose of the loan is a community development purpose." The guidance goes on to re-emphasize that examiners may make qualitative distinctions between different projects based on the extent to which the activity advances community development. The problem arises because the revision requires more than a majority be affordable housing to constitute a "primary purpose," in which case full credit is granted, while another allows less than a majority to still constitute a "primary purpose." The two sections are inconsistent. The revision states that where less than a majority requires *pro rata* credit while the existing provision allows full credit.

ABA opposes the reduction of credit that the proposal appears to invite. The current version of section __.12(h)-8 was designed to recognize and grant credit for mixed use housing projects. In fact, the purpose of mixed-income development is to promote affordable housing for low- and moderate-income individuals within a stabilizing mixed income environment – the epitome of community development. The proposed revision to this Q&A is potentially both confusing and conflicting with other provisions since it suggests that only pro rata consideration is available for affordable housing or mixed use housing projects where less than a majority of the units are reserved for low- or moderate-income housing while existing provisions in

other parts of the guidance suggest that full credit is available where less than 50% of the project is targeted or reserved for low- and moderate-income housing.

Furthermore, a second part of the proposed revision also comes into play and possibly adds to the confusion. Under the second revision, section __.42(b)(2)-3 would be changed. Under that section, where the primary purpose of a loan is affordable housing but less than a majority of the units will be occupied by low- or moderate-income families, then "it depends" whether the entire loan should be reported as a community development loan. The proposal refers the reader back to section __.12(h)-8 to determine which loans are reported in full and which are reported pro rata. This equivocation further muddies that concept of which loans qualify for reporting as community development loans and which do not. This confusion and uncertainty will inhibit activities if CRA credit is uncertain. In other words, instead of serving as an incentive to promote affordable housing, the uncertainty in the proposal could serve as a disincentive.

The proposed revision has another serious drawback in that it resorts to simple mathematical analysis to evaluate performance. Quantitative assessment for community development activities undercuts qualitative analysis and subjective evaluation. When the 1995 revisions were introduced, the ability of examiners to engage in qualitative assessment was stressed to be the critical element that supported much of the benefits in those changes. If that was true, this proposed revision undercuts that benefit. In fact, as was stressed in 1995, qualitative analysis is the very type of evaluation needed to encourage activities and provide incentives for innovative and creative solutions to the problems facing the nation's communities. That was true then but it is especially true in these challenging economic times.

Accordingly, ABA recommends that the agencies restore the clarity of the intended breadth of the current primary purpose interpretation which is faithful to the Congressional mandate of evaluating community development performance with respect to its value for the entire community, including LMI segments, but not excluding benefit to others. If exam practices have become lax in the intervening decade since the adoption of the current Q&A on primary purpose, and examiners are making it unnecessarily harder to qualify a project as having a primary community development purpose, the remedy is better examiner training and quality assurance, not retreating from the standards adopted in 1999.

Once this clarity is restored, ABA supports providing pro rata CRA credit for projects that are not designed to accomplish a community development purpose, but nonetheless generate benefits to LMI persons or neighborhoods as is the case when private housing developments include a range of construction some of which provides affordable housing options for LMI persons. In an era when priming the private sector pump is recognized as a valid government purpose, the agencies should not quibble with whether the benefits to LMI persons or neighborhoods are coming from a community development project or from purely profit-motivated business initiatives. Indeed ABA suggests that the agencies reconsider whether to grant credit for projects that provide temporary community development benefits during this period of economic recovery. After all, if banks are expected to be the credit engines of economic recovery in their local communities, then their efforts as such should be widely counted for purposes of demonstrating their CRA record.

Specific Questions about the Proposal's Impact on Affordable Housing

The agencies raise five specific questions about whether the proposed change will encourage affordable housing:

a. Will the revision spur construction of affordable housing?

As noted above, due to the inherent confusion that may be created, and the possible disparity with existing guidelines, ABA believes it may actually undermine activities. Especially with the challenging economic environment and the impact it has had on real estate development activities of all types, ABA believes that it is more likely that funds will gravitate to activities that can be more certain to be granted appropriate CRA credit.

b. Should the pro rata consideration be restricted to projects that require a government set-aside?

ABA believes that projects with government required set-asides are precisely the projects that are expressly designed to achieve a community development purpose and under the current Q&A should receive full CRA credit. It is precisely this type of question that causes ABA to believe that the agencies have lost track of their original interpretation and policy decision that supported adopting the current Q&A in 1999.

c. How should the pro rata amount be determined?

For pro rata calculation, ABA would support deferring to any reasonable means that the bank chooses to use in recording its support. Even if there are methodologies that might result in different or lower credit, the bank should be allowed to use the method that maximizes it credit.

d. Should this favorable CRA treatment be limited to affordable housing or are there other types of activities that should be favorably considered?

The agencies should recall that __.12(h)-8 currently covers any type of community development. In other words, hospital projects, public sewer or water projects, or industrial development projects may be able to demonstrate a primary community development purpose under the current standard of expressly designed to bestow the appropriate benefit. If a pro rata rule is created to capture community development benefits beyond those projects with a primary purpose of community development, then there is no reason to limit it to affordable housing; but rather it should allow the capture of other valid community development benefits

e. Will this lead to inflated community development activity reporting?

Absolutely not. Since the fundamental goal is to encourage community development, barriers that question or undermine or make it difficult to classify a project as meeting community development needs actually undercuts the goals of the CRA. When the intermediate small bank test was introduced in 2007, the premise was that it was an analysis that could be easily met and that it would primarily be a device to confirm that which many banks in that category already did.

This question harkens back to the 1997 proposal's solicitation for specific comment about over-inclusive qualification. ABA strongly urges the agencies to reiterate its decision in 1999 that this treatment of bank investment does not inflate reporting, but appropriately enables its recognition. If anything, ABA believes that the policy choice in 1999 has been under-applied by examiners and that laxity should be corrected. In addition, as we've previously noted, enabling pro rata credit for community development benefits that are generated from projects that do not meet the expansive primary purpose test should still be counted because they capture the important role that banks play in generating benefits to LMI markets and other endorsed recipients through the full range of credit and investment activities engaged in by banks—no matter how they are labeled.

Conclusion

ABA looks forward to continuing to work with the agencies to achieve the original purpose and intent of the CRA of assessing how well banks help meet the credit needs of their entire community, including—but not exclusively—low- and moderate-income neighborhoods. As we move forward, it is critically important those goals are not lost in guidance or examination practice. The rules and guidelines should place performance over process, ensure simple application of the requirements to promote consistent evaluations, avoid cut-and-dried mathematical analysis to maintain flexibility and eliminate unnecessary burdens that can result from confusion and possibly conflicting guidance. Overall, to support that nation's communities, the guidelines should work towards ensuring large and small institutions are given incentives to undertake appropriate activities.

Thank you for the opportunity to comment. If you have any questions or need additional information, please contact Robert Rowe by e-mail at rrowe@aba.com or by telephone at 202-663-5029.

Richard R. Riese
Senior Vice President
Center for Regulatory Compliance

Robert G. Rowe
Vice President/Senior Counsel
Center for Regulatory Compliance