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Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

"CRA Sunshine: Disclosure and Reporting of CRA-Related Agreements" Final OCC, FRB, FDIC, and OTS Rule

The Gramm-Leach-Bliley Act imposes disclosure and reporting requirements on national banks and other insured depository institutions with respect to certain agreements related to the Community Reinvestment Act (CRA).[1] In December, 2000, the OCC, the Federal Reserve Board, the FDIC, and the OTS jointly issued a final rule ("rule") that implements these statutory requirements.[2] The rule is effective on April 1, 2001.

What agreements are covered by the disclosure and reporting requirements?

The CRA Sunshine statute requires certain CRA-related agreements to be publicly disclosed and reported upon annually. The rule defines agreements that are subject to the statute's disclosure and reporting requirements as "covered agreements." An agreement is "covered" if it meets all of the following 5 criteria:

1. The agreement is in writing.

The statute covers any agreement that is a "written contract, written arrangement, or other written understanding ... by an insured depository institution or affiliate with a nongovernmental entity or person ...." The rule requires that the agreement be in writing. A written understanding or agreement need not be a legally binding contract to be covered and the mutual understanding or agreement may be reflected in one or more documents, by one or more parties, including in a press release by a party.[3]

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[1] Pub. L. No. 106-102, § 711, 113 Stat. 1338, 1465-69 (Nov. 12, 1999) (CRA Sunshine provisions; adding new § 48 to the Federal Deposit Insurance Act (FDIA), *to be codified* at 12 U.S.C. § 1831y). The CRA is codified at 12 U.S.C. §§ 2901 *et seq.*

[2] The OCC's final regulation was published at 66 Fed. Reg. 2052 (January 10, 2001). It will be codified at 12 C.F.R. Part 35.

[3] The rule contains examples that illustrate when a bank and a nongovernmental entity or person have reached a "written" arrangement or understanding. One example illustrates that a unilateral written press release describing actions pursuant to a mutual oral understanding is a written arrangement or understanding covered by the rule.

In addition, parties to a written agreement may not avoid coverage by reaching an oral understanding that, for example, a party will submit or refrain from submitting oral or written testimony or comments to a Federal banking agency or written comments to a bank that must be included in the bank's CRA public file, and excluding this understanding from the terms of the written document.

2. The parties to the agreement include an insured depository institution or an affiliate of the institution and a nongovernmental entity or person (NGEP).

An NGEP is defined to include any corporation, partnership, trust, joint venture, or any other type of organization, or any individual. Excluded from the definition of the term are Federal, State, and tribal governments; a Federally-chartered public corporation that receives a specific Federal appropriation -- for example, the Neighborhood Reinvestment Corporation; an insured depository institution or its affiliate; and an officer, director, employee, or representative of any of these entities.

3. The value of the agreement exceeds certain dollar thresholds prescribed by the statute.

This value requirement is satisfied if: (1) the agreement provides for the bank to make cash payments or grants, or to give other consideration (except loans), to individuals or entities where the aggregate value of resources provided is more than $10,000 in any calendar year; or (2) the agreement provides for the bank to make loans to individuals or entities where the aggregate value of the loan principal is greater than $50,000 in any calendar year. In either case, the recipients of the payments, resources, or loans are not required to be parties to the agreement.

If the terms of the agreement do not specify when funds will be disbursed, the rule provides that the entire amount of the funds is deemed to be disbursed in the first year of the agreement for purposes of determining whether the agreement meets the dollar threshold for coverage. Annual reports are required for <u>any</u> year in which <u>any</u> funds are provided or used pursuant to a covered agreement.

4. The agreement is "made pursuant to, or in connection with, the fulfillment of" the CRA.

The term "fulfillment" is defined by the statute as a "list of factors that the appropriate Federal banking agency determines has a material impact on the agency's decision" in connection with an application for a deposit facility or assigning a rating in a CRA evaluation.

Under the rule, "fulfillment" includes providing, or refraining from providing, comments or testimony to a Federal banking agency about the performance under the CRA of a bank or its CRA affiliate, and providing, or refraining from providing, written comments that are required, under the CRA regulations, to be included in the bank's CRA public file.

"Fulfillment" also includes performing any of the activities the agencies consider under the CRA regulations in evaluating a bank's CRA performance "if the activity is of a type that is likely to be given favorable consideration by a Federal banking agency in evaluating the performance under the CRA" of a bank that is a party to the agreement or its affiliate. An activity is "likely to be given favorable consideration" if, for example: (1) an agency has favorably considered the activity in reviewing the CRA performance of a particular bank; (2) it addresses a deficiency that an agency cited in its most recent public evaluation of the performance of the bank; or (3) it is of the type that has been favorably considered by the agencies in reviewing the CRA performance of comparable banks.

5. The agreement is with an NGEP that has had a "CRA communication" with the bank.

The statute excludes from coverage agreements between a bank and a party who "has not commented on, testified about, or discussed with the institution, or otherwise contacted the institution" about the CRA. Coverage under the statute is not limited to NGEPs that have filed formal comments or testimony in connection with a bank's CRA examination or application for a deposit facility. The rule therefore requires that these communications have a certain *content*, as well as satisfy certain *timing* requirements, and occur with individuals who have actual or imputed *knowledge* of the communication.

Content and timing. The rule defines the following communications by an NGEP as CRA communications:

- Any written or oral comment or testimony provided by an NGEP to a Federal banking agency about the adequacy of performance under the CRA of a bank, any affiliated insured depository institution, or any "CRA affiliate"[4] of the bank is a CRA communication if it occurred within 3 years before the NGEP and the bank (or its affiliate) entered into the agreement.

- Any written comment submitted by an NGEP to the bank that discusses the adequacy of the bank's performance under the CRA and that must be included in the bank's CRA public file is a CRA communication if it occurred within 3 years before the NGEP and the bank (or its affiliate) entered into the agreement.

- An oral communication with a bank (or its affiliate) in which the NGEP discusses providing (or refraining from providing) comments or testimony to the Federal banking agency about the adequacy of of performance under the CRA of a bank, any affiliated insured depository institution, or any CRA affiliate of the bank, or providing (or refraining from providing) written comments that must be included in the bank's CRA public file is a CRA communication. These communications are CRA communications if the oral communication is made in connection with the NGEP's request to, or the bank's or affiliate's agreement to, take (or refrain from taking) any action that is in fulfillment of the CRA and the oral communication occurred within 3 years before the NGEP and the bank (or its affiliate) entered into the agreement.

- Any other oral communication by an NGEP to the bank (or its affiliate) about the adequacy of the bank's (or its CRA affiliate's or any affiliated insured depository institution's) CRA performance is a CRA communication if it occurred within 1 year before the NGEP and the bank (or its affiliate) entered into the agreement.

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[4] The final regulation uses the concept of a "CRA affiliate" to capture situations where it is appropriate to attribute the actions of the affiliate to the institution itself. A "CRA affiliate" is an affiliate whose activities are considered by the institution's AFBA in evaluating the institution's CRA performance, or an affiliate that the institution designates as a "CRA affiliate" prior to entering into a covered agreement. Thus, activity to be performed pursuant to an agreement may be "in fulfillment of the CRA" if it is conducted in a CRA affiliate, just as if the activity were done by the insured institution directly. The rule requires banks to notify the other parties to the agreement if the agreement involves a CRA affiliate.

- A CRA communication that occurs *after* an agreement is entered into is irrelevant for purposes of determining whether that agreement is covered.

Knowledge. The rule requires that both the bank (or its affiliate) and the NGEP have knowledge of the CRA communication. The institution has knowledge if certain individuals -- an employee who approves, directs, authorizes, or negotiates the agreement with the NGEP, or a CRA compliance officer or executive officer who knows that the bank or affiliate is negotiating or intends to negotiate an agreement with the NGEP or knows that the NGEP will seek to negotiate an agreement with the bank or its affiliate -- have knowledge of the communication. The bank would also be deemed to have knowledge under certain circumstances, such as if an NGEP testifies concerning the bank's CRA record at a public hearing or if the Federal banking agency forwards to any person in the bank, in writing, a comment that the agency has received from an NGEP. Comparable provisions apply to determine when the NGEP has knowledge of the communication.

What agreements are not covered by the disclosure and reporting requirements?

In addition to the specific exclusion for agreements where there has been no CRA communication between the bank and an NGEP, the rule contains two other exclusions from the disclosure and reporting requirements for agreements that otherwise meet the criteria for coverage. A covered agreement does not include:

- "any individual mortgage loan;" or

- "a specific contract or commitment for a loan or extension of credit to individuals, businesses, farms, or other entities, if the funds are loaned at rates not substantially below market rates and if the purpose of the loan or extension of credit does not include any re-lending of the borrowed funds to other parties."

By contrast, general commitments to make loans -- *e.g.*, Bank A commits to Community Organization X that it will make $1 million in community development loans over a 3-year period but does not specify who will get the loans or on what terms -- are not excluded from the rule. These general commitments must therefore be disclosed and reported if the other criteria for coverage are satisfied.

How do parties to a covered agreement comply with the disclosure and reporting requirements?

The statute and the rule impose two types of disclosure requirements: (1) disclosures concerning each covered agreement, and (2) annual reporting requirements concerning all covered agreements involving the reporting party.

The statute requires "each party" to a covered agreement entered into after November 12, 1999, to disclose the agreement, "in its entirety," to the appropriate Federal banking agency (AFBA)

that supervises the insured depository institution[5] that is a party to the agreement, and to the public.

The rule requires banks to make disclosure to the "relevant supervisory agency"[6] within 60 days of the end of each calendar quarter either by filing a copy of the covered agreement with that agency or by providing the agency with a list of covered agreements entered into in that calendar quarter. A bank that elects to provide a list must submit a copy of any agreement on the list within 7 calendar days of receiving a request for the agreement from the agency. An NGEP is required to provide a copy of a covered agreement to the appropriate agency only upon the agency's request

Both the bank (or its affiliate) and the NGEP are required to make disclosure to the public by making a copy of the covered agreement available upon request.

The rule also requires each bank (or its affiliate) and each NGEP that is a party to a covered agreement entered into on or after May 12, 2000, to file an annual report with the AFBA for the insured institution party. Pursuant to the statute, the reporting requirements are different for the two types of entities. The bank's (or its affiliate's) report must include all of the following information:

- Payments, fees, or loans made to, or received from, any party to the covered agreement and the terms and conditions of those payments, fees, or loans.

- Aggregate data on loans, investments, and services provided by each party in its community pursuant to the covered agreement. (The institution, however, is not required to provide information about another party if the institution does not have the information or if the information will be included in the other party's annual report.)

- Any other information required by the AFBA's implementing regulations.

The NGEP must report to the bank's AFBA "an accounting of the use of funds received pursuant to the covered agreement during the preceding 12 months. The NGEP's accounting must include "a detailed, itemized list of the uses to which [the] funds have been made, including compensation, administrative expenses, travel, entertainment, consulting and professional fees" and "other expenses and uses" (which must be specified).

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[5] The statutory disclosure and reporting requirements apply to covered agreements entered into by insured depository institutions or their affiliates. Under the regulation, an "affiliate" is any company that controls, is controlled by, or is under common control with another company. This is the same definition as is used in the Bank Holding Company Act (BHCA) and the FDIA. See 12 U.S.C. § 1841(k) (BHCA definition of "affiliate"), § 1813(w)(6) (FDIA provision cross-referencing BHCA definition). A covered agreement entered into by an affiliate of a national bank would, for example, be disclosed to the OCC as the AFBA for the national bank. In the case where the affiliate is also an insured depository institution, however, the regulation permits all of the insured depository institution (or affiliate) parties to disclose the agreement by jointly filing a copy with each AFBA that supervises any of the insured entities.

[6] As used in the rule, the term "relevant supervisory agency" means the AFBA for a bank (or its subsidiary) that is a party to a covered agreement; the AFBA for a bank (or its subsidiary) or its CRA affiliate that provides money or services pursuant to the agreement, whether or not it is a party to the agreement; and the AFBA for a holding company that is a party to the agreement.

In the case of funds used for a "specific purpose" (defined as a purpose that is more specific than the categories on the statutory list), however, the NGEP may, at its option, satisfy the reporting requirements by identifying the specific purpose and indicating the amount spent for that purpose.

The rule provides that NGEPs may use reports prepared for other purposes -- including, for example, Internal Revenue Service Form 990, annual reports to members, or audited or unaudited financial statements -- to satisfy the CRA Sunshine reporting requirements so long as those other reports contain all the information that the statute requires. The rule permits an NGEP or bank (or its affiliate) to file a consolidated report if the NGEP or bank (or its affiliate) is a party to 2 or more covered agreements. The final rule also requires any consolidated report to provide a breakdown of the total amount paid or received by an institution or NGEP under each covered agreement during the fiscal year.

Finally, the rule provides transition rules for disclosure of agreements that are entered into after the dates set forth above but before April 1, 2001, the effective date of the rule, and for annual reporting that relate to fiscal years that end on or before December 31, 2000.

A compliance chart describing the disclosure and reporting requirements, trigger dates and transition rules contained in the regulation is included as an attachment to this document.

May any information be withheld from disclosure to the public or to the Federal banking agencies?

In accordance with a directive in the statute, the rule provides that confidential and proprietary information may be protected from disclosure. A party is permitted to withhold information from public disclosure (but not from disclosure to the agencies) if the party believes that the Federal banking agency could withhold the information pursuant to the Freedom of Information Act (FOIA). Certain types of information may not be withheld from disclosure, however. The rule lists the types of information that the parties must disclose in all circumstances, including the names and addresses of the parties; the amount of payments, loans, or other consideration to be provided by any party; a description of how the resources provided are to be used; the term of the agreement (if the agreement establishes a term); and anything else that the relevant agency determines must be disclosed. Although there will be no prior agency review of any redactions of information by a party, a member of the public that receives a copy of a covered agreement in which information has been withheld may ask the relevant Federal banking agency to determine whether any of the information withheld should be disclosed.

What are the consequences of noncompliance with the disclosure and reporting requirements?

The statute includes express provisions authorizing the agencies to take certain actions against NGEPs who do not comply with it. First, an agreement is unenforceable if an NGEP "willfully fails to comply with [the statute] in a material way." The determination of "willful failure to comply" is made by the AFBA for the regulated entity that is a party to the agreement. The agreement becomes unenforceable under this provision "after the offending party has been given

notice and a reasonable period of time to perform or comply." The rule provides that the agreement becomes unenforceable only by the noncomplying party.

Second, if an NGEP diverts funds received under a covered agreement for personal financial gain, the AFBA may require the culpable party to disgorge the funds, or to prohibit that party from being a party to a covered agreement for a period not to exceed 10 years, or both. Under the rule, an AFBA may take these actions if a court or other body of competent jurisdiction determines that the conditions specified in the statute have occurred.

Finally, the statute says expressly that none of its provisions shall be construed "as authorizing any [AFBA] to enforce the provisions of any agreement" that it covers. The rule contains a similar provision. The agencies, however, retain the authority to enforce compliance with the disclosure and reporting requirements of the regulation under the enforcement provisions contained in section 8 of the FDIA.

Attachment

February 2001