April 5,2004

Office of Comptroller of the Currency: **12 CFR Part 25, Docket No. 04-06**
Communications Division
Public Information Room
Mailstop 1-5
250 E Street, S.W.
Washington, D.C. 20219

Federal Reserve Board: **12 CFR Part 228, Regulation BB, Docket No. R-1181**
ATTN: Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Federal Deposit Insurance Corporation: **12 CFR Part 345**
Robert E. Feldman, Executive Secretary
Attention: Comments
550 – 17th Street, N.W.
Washington, D.C. 20429

Office of Thrift Supervision: **12 CFR Part 563e, No. 2004-04**
Regulation Comments
Chief Counsel's Office
1700 G Street, N. W.
Washington, D.C. 20552
Attention: No. 2004-04

Dear Sir/Madam:

AARP appreciates this opportunity to offer comments regarding the joint proposal of the Office of the Comptroller of the Currency (OCC), the Federal Reserve Board (Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS) to amend the regulations issued pursuant to the Community Reinvestment Act (CRA). While we commend the agencies' desire to deter predatory mortgage lending, we believe the proposed amendment to include a single, predatory lending standard test in CRA examinations will neither further the purposes of the CRA, nor curb the widespread problem of predatory lending. AARP does not believe CRA evaluations are suited to uncovering abusive lending practices. We strongly encourage the agencies to withdraw the standard proposed lest a positive CRA rating inadvertently provide a safe haven for predatory lenders.

1. The Proposed Predatory Lending Standard Is Narrow and Under-inclusive and Cannot Be Effectively Enforced Through CRA Evaluations

AARP believes that the agencies' proposal to assess the occurrence of abusive and predatory lending practices through CRA examinations is fundamentally flawed for two reasons. First, we do not believe CRA examinations are an appropriate vehicle for such an assessment. Second, rather than utilizing a comprehensive and multi-faceted predatory lending analysis, the single, proposed measure of predatory lending is notably underinclusive.

AARP believes CRA examinations are not a credible vehicle for evaluating the existence and extent of abusive lending practices, particularly in the proposed format in which the agencies do not contemplate conducting file reviews of individual loans. Even to the extent individual loan files are reviewed, they are unlikely to reveal evidence of equity stripping as defined in the proposed regulations, particularly since the review would not extend beyond a paper review. This type of review is inadequate to unearth even the one predatory lending practice identified in the proposed regulations.

In the experience of AARP in representing homeowners with predatory mortgages for more than a decade, the common thread has been the inability of the borrower to pay the mortgage loan from its inception. Yet, in each of these cases, the lender's loan files have invariably presented some written documentation of income sufficient on the face of it to support the loan. This documentation has taken many forms of "created" or manufactured income that purports to support the borrower's ability to pay, including lender-created verifications of Social Security and pension information; lender-completed loan applications that record various creative sources of income, such as babysitting income, rental income, catering income, etc.; and lender-created tax returns and W-2 forms. The regulations propose nothing to either curb or detect this common predatory practice. Since the agencies propose no standards for documenting and verifying income, except in the case of HOEPA loans, we are concerned that under the proposal, such conduct would go undetected, leaving predatory lenders free to continue these practices. Thus loan files are more apt to obscure abuses than they are to reveal them.

A recent case brought by AAKP involved loans made to six retired homeowners in the District of Columbia. The lender's loan files for five of the six loans contained facially accurate Form 1040s that were purportedly self-prepared by our clients. The clients, who ranged in age from 67-85, all had very limited educations and had worked as housekeepers, janitors, babysitters, and cafeteria workers during their work lives. The "self-prepared" tax returns claimed our retired (and not employed) clients were currently earning from $7,000-$29,000a year in "self-employment" income as bookkeepers, accountants, seamstresses, and computer programmers. At trial, the tax returns were proven to be falsely prepared by the broker and lender. The purpose was to "pad" the loan files to make it appear that the homeowners were eligible for mortgage loans, when in fact, none of them had the income to support these loans.

As the Joint Notice acknowledges, "CRA examinations themselves generally will not entail specific evaluation of individual complaints or specific evaluation of individual loans for illegal credit practices or otherwise abusive lending practices." Fed.Reg. at 5741. Thus, a CRA examination of this lender would not have revealed the problems in these cases because the loan files appeared to contain the proper documentation.

Similarly, it is most unlikely that a paper review of loan files will reveal violations of HOEPA, RESPA, and the FTC Act, among other statutes. Two of the loans cited above were HOEPA loans, but this status was undisclosed and was, in fact, intentionally hidden. For example, the loan files contained HUD-1 settlement statements documenting payments for settlement services, including $84 fees for "walk through affidavits" and $64 fees for "judgment reports." Yet these services were never provided, thus making the payments part of the cost of the credit to the borrowers and a component of HOEPA points and fees. Absent a complete review of the files retained by the title companies and depositions of their employees, a CRA examination of these loan files alone would not have revealed that these fees were payments for services never performed and that the loans were, in fact, subject to HOEPA.

2. The Proposed Predatory Lending Standard Is Narrow and Under-Inclusive.

Second, AARP is concerned that the single, narrow standard proposed to measure abusive lending practices ignores the reality of this marketplace. It is well documented that predatory lending includes a myriad of practices including loan flipping, equity stripping through the imposition of high costs and fees, insurance and product packing, excessive prepayment penalties, mandatory arbitration clauses, etc. See e.g., U.S. Department of Housing and Urban Development and U.S. Department of the Treasury, Recommendations to Curb Predatory Home Mortgage Lending (June 2000) available at http://www.huduser.org/publications/hsgfin/curbing.html, General Accounting Office Report No. 04-280, Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending (January 2004) available at www.gao.gov, and The Implications of the Changing Mortgage Banking Industry for Community Based Organizations, Joint Center for Housing Studies of Harvard University (March 2004). Yet the proposal suggests only one standard that would impact a lender's CRA score: whether a pattern and practice of asset-based lending is evident. Moreover, the proposed standard imposes a very high burden to discover, "evidence of a pattern or practice of extending home mortgage or consumer loans based predominantly on the foreclosure or liquidation value of the collateral by the institution, where the borrower cannot be expected to be able to make the payments required under the terms of the loan." 69 Fed. Reg. 5740. Thus, CRA examination is not only unlikely to uncover evidence of the explicit abusive lending practice identified by the agencies, but will also not address a myriad of other practices that are commonly acknowledged to be predatory.

There is a significant disadvantage to conducting an examination that tests for abusive lending in an ineffective manner. The abusive lender whose practices escape notice will be free to tout its CRA rating as a defense to allegations that it is, in fact, a predatory lender. Thus, by limiting the analysis to a single, narrow standard that the CRA exam is not designed to uncover, the exam may have the unintended consequence of permitting practices that are widely acknowledged to be predatory. Therefore, AARP believes the proposed examinations are an ineffective tool against predatory lending, and may do more harm than good.

AARP remains a strong advocate of effective measures against predatory lending. While we appreciate the good intent evident in the proposed amendments, we believe the limitations are so significant that we urge the agencies to withdraw the proposal.

Sincerely,

David Certner
Director
Federal Affairs