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July 30, 2009

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Re: RIN 3064-AD45

Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 2-3
Washington, DC 2-210
Attn: Docket Number OCC-2009-0010

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1360

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: OTS-2009-0010

Re: Community Reinvestment Act Regulations Student Loans and Women- and Minority Owned Institutions; *74 Federal Register 31209* (June 30, 2009)

Dear Sir or Madam:

The American Bankers Association (ABA)[1] appreciates the opportunity to offer comments on the interagency proposal to update the Community Reinvestment Act (CRA) rules to implement two statutory provisions. The first change would incorporate changes made by the Higher Education Opportunity Act of 2008 (HEOA) that would give favorable CRA consideration for low-cost education loans to low-income borrowers (HEOA loans). The second proposed change incorporates existing practices and guidelines for activities undertaken with women- and minority-owned financial institutions.

[1] ABA 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 $14 trillion in assets and employ over 2 million men and women.

ABA supports providing favorable CRA consideration for low-cost education loans for low-income borrowers. Clearly Congress has demonstrated support for these activities by including this provision in legislation. To meet Congressional intent and the accompanying national policy goals, ABA believes the proposal must be refined to encourage this type of lending.[2] Fundamentally, since Congress has taken action designed to encourage lenders to lend to low-income borrowers for their educational needs, ABA strongly encourages the agencies to revise the proposal so that any low-cost loan for the educational needs of a low-income borrower is deemed a community development loan. We also recommend that several other adjustments be made to ensure the rules reflect the public policy priority Congress has given these loans, including making the definition of low cost education loans more inclusive and making the definition of low-income borrower more flexible.

In addition, since Congress first adopted over ten years ago the statutory provisions that would grant credit for activities that support minority- or women-owned institutions, ABA has strongly advocated incorporating those elements into the CRA rules. We applaud the agencies for taking that step. By incorporating this into legislation, it clearly demonstrates these activities are national policy, and assessing these activities as a community development activity is appropriate. Since small banks are not assessed on non-lending activities as a general rule, to further the national public policy ABA recommends the agencies clarify in the final rule that loans by small banks to minority- or women-owned institutions are qualified as "other lending activity" for CRA purposes.

Education Loans

Current CRA rules evaluate education loans as consumer loans. If an institution elects to have its consumer loans evaluated for CRA purposes, then any education loans are assessed along with other consumer loans in an institution's portfolio. Under the current rules, there is no separate evaluation of education loans.[3] The HEOA revised the CRA to require the agencies to consider specifically low-cost education loans to low-cost borrowers when assessing CRA performance.

Low-Cost Education Loan. As a first step, the proposal would define a "low-cost education loan" as a loan originated through a U. S. Department of Education (Department) loan program. In other words, loans originated

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[2] The final rule should clarify that offering these loans is at the option of the lender. Individual financial institutions are best positioned to determine the appropriate business strategy and market needs.

[3] If education loans are evaluated as consumer loans in the bank's consumer loan portfolio, then they would be assessed with other secured or unsecured loans, as appropriate, under existing rules. See, e.g., 12 CFR 228.22(a)(1) and 12 CFR 228.42(c).

through the Department would automatically be "low-cost." A second alternative would be that a qualified loan could also be a private education loan as defined in the Truth-in-Lending Act (TILA), including state or local education programs, as long as the private loan had an interest rate and fees no greater than a comparable Department of Education loan. ABA also urges the agencies to consider a third possibility, more fully explained below.

To put these proposed parameters in context, the current rates for fixed-rate Department of Education loans vary between 6.8% and 8.5% (depending on the program). While variable rate loans are no longer offered, the Department continues to publish rates for outstanding variable-rate loans (currently 4.21%). The Department's established fees for student loans currently vary between 2.5% and 4% of the loan amount.

In addition to the preceding qualifications, the agencies propose to add a restriction not included in the statute so that only loans for higher education would be considered. This qualification is added on the premise that the underlying goal for the HEOA is to make college more affordable. Finally, only loans to accredited schools, and not unaccredited or vocational schools, would be eligible under the proposal.

Low- Income Borrower. To determine which borrowers are covered, the definition of "low-income" would follow the existing CRA definition, and a low-income borrower would be defined as one with income less than 50% of the area's median income. In calculating a borrower's income, the income of all those obligated on the loan, including co-signers and guarantors, would be included. Second, loans to a borrower in the bank's assessment area would be eligible for favorable CRA consideration.

And finally, favorable consideration would be given to a financial institution for low-cost education loans to low-income borrowers without regard to which performance assessment is used for that particular institution.

ABA Comments

HEOA loans should be counted as community development loans.
In passing HEOA, Congress endorsed the policy goal of encouraging financing of low cost education loans to lower income borrowers by amending the Community Reinvestment Act to identify this type of financing for express inclusion in the evaluation process. We should presume that Congress already understood that CRA included education loans as a type of consumer loan receiving consideration as part of the evaluation of loans by borrower income. Therefore it seems reasonable to conclude that Congress' intent in passing this amendment was to accord low cost education loans to low-income borrowers more favorable

recognition than available under the status quo. ABA believes that the only effective way to achieve this intent is to include HEOA loans in the definition of community development loans.

Community development loans are a construct of the 1995 CRA reform. By originally defining four categories of community development activity, the agencies distinguished the treatment of such activity from the treatment of regular lending and investment activity. General lending performance under the 1995 CRA reform is measured by comparing proportions of loans by geography or borrower income and assigning higher favorable ratings where such lending shows greater penetration of low-moderate income geographies or borrowers against the norm. In contrast, community development lending is measured as a discrete amount of performance in defined categories and is not compared to similar support for activities outside the defined category. When it comes to community development activity—the more, the better—without regard to comparability with banking activity that otherwise affects the community. For example, all loans for low-income affordable housing are counted positively irrespective of the amount of lending in upper income luxury home developments.

ABA firmly believes that HEOA's policy compels a similar approach for providing CRA credit for low cost education loans to low income borrowers. Accordingly, we strongly advocate that the agencies' regulations be amended to treat HEOA loans as community development loans. This would enable all size institutions to have such loans favorably considered, whichever of the four sets of performance criteria are applicable—small, intermediate small, large or limited purpose/wholesale.

Treatment as a community development loan would also appropriately give more expansive consideration to loans being made, not only within the assessment area, but also within the statewide or regional area that includes the assessment area. This greater geographic reach gives fullest effect to the policy priority HEOA seeks. The 1995 CRA reform was based upon the principle that when it comes to community development lending, a bank's community for CRA purposes extends beyond its retail footprint to a more generous consideration of statewide and regional efforts that help achieve these important social goals locally. Within that view is the understanding that when it comes to community development, no single community is an island, but rather it is part of a broader geographic scope that secures benefits locally by recognizing the value of interdependence regionally.

ABA believes that counting HEOA loans within the consumer loan lending test paradigm as proposed is anathema to according these loans the special treatment Congress has directed. This shortfall cannot be

corrected by isolating HEOA loans for comparison against education loans generally, or even against other low cost education loans. Moreover, consumer loan treatment of HEOA loans also too narrowly limits consideration to the assessment area(s) that are the focus of the various lending components of the various performance tests.

The Congressional purpose evinced by HEOA is to single out low cost education loans to low-income borrowers for favorable consideration without regard to an institution's other support of education financing, let alone to other unsecured consumer lending. Consequently, placing HEOA loans within the community development loan category is the only effective way of achieving the Congressional mandate, and the proposal should be revised to accomplish such treatment.

Defining HEOA Loans

There are three basic elements to be defined in delineating loans that will count as HEOA loans: What constitutes "education loans?" What makes education loans "low cost?" Who are to be considered "low-income borrowers?" We agree with the agencies that the starting point for this analysis is to capture the mandate of HEOA giving appropriate consideration to the expressed intent of H.R. 4137. However, in finally putting these elements together and in order for the proposal to be useful and to encourage banks to make these loans, it is critically important that the agencies develop a simple set of qualifications that can be easily applied by bankers and examiners. The more complex the qualifications that must be met and the more documentation needed to demonstrate that a loan meets the proposed hurdles, the less likely banks will engage in this type of lending activity.

Defining Low-Cost Education Loan

The agencies have proposed to limit the qualification for this lending to post-secondary education. At the outset, ABA believes that taking this approach as a first step and encouraging post-secondary education is appropriate. When the first Higher Education Act was adopted in 1965, promoting post-secondary education was the goal, and more recently the goal of H.R. 4137 speaks in terms of making college education affordable. ABA believes that for purposes of the implementation of the HEOA mandate the final CRA rule should encompass those education loans for participation in programs of institutions of higher education as defined in the Higher Education Act (as amended), 20 U.S.C.A. 1001, 1002. However, to reduce compliance burden, ABA encourages the agencies to publish information that can ease bank obligations to identify what programs are accredited.

In tackling the second question about what makes education loans low cost, ABA agrees that pegging the interest rate and fees to levels

comparable to those established by the Federal Family Education Loan Program is certainly a sufficient condition. Therefore, we support the two prong approach reflected in the proposal's description of low-cost education loans. However, consistent with our position on counting HEOA loans as community development loans, a final rule should establish the relevant standards as amendments to the definition section of the CRA rules.

More on Comparable Loans. While ABA agrees that the two prong approach in the proposal certainly encompasses the minimum set of low-cost education loans intended by HEOA to receive CRA credit, we are concerned that the proposal creates hurdles that lenders will have to overcome to demonstrate that a loan is "comparable" to a Department of Education loan. The definition of a low-cost loan, as proposed, provides that a private loan "comparable" to a loan offered by the Department of Education would be deemed eligible for favorable CRA education. To make this element workable, the agencies need to clarify and articulate what is necessary to determine that a private loan is "comparable."

As important, though, is that the comparability provision raises serious problems that the agencies must consider, since it is likely to present economic hurdles to banks being able to provide private low-cost education loans in the CRA context. Department loan rates are set by the Department or by statute and not the market. Since such loans are also federally guaranteed, lenders can offer these products. However, these loans offered through the Department's programs are only marginally profitable at best. The private market for education loans has been steadily declining in the past few years, in part due to the restrictions and unprofitable nature of the product. In fact, additional restrictions or proposals in Congress to eliminate completely the Federal Family Education Loan Program (FFELP) would make private loans even less attractive and unprofitable for lenders (as well as bring their safety and soundness into question).[4] To make such loans worthwhile, a credit spread of 300 to 500 basis points—at least— would be needed.[5] However, when all the proposed restrictions coupled with non-CRA factors are combined, it is extremely unlikely that banks can economically offer "comparable" education loans. Therefore, ABA strongly recommends that the agencies take steps to develop another set of parameters for determining when education loans are low-cost and include such parameters as a third prong in the regulatory definition.

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[4] See, e.g., HR 3221, The Student Aid and Fiscal Responsibility Act of 2009 introduced on July 15, 2009 by Representative George Miller (D-CA).

[5] Historical loss rates combined with reasonable expectations of loss rates going forward might provide a more accurate figure of the spread that would be needed to encourage these loans.

More on Education Loans. The agencies solicit comment on whether low-cost education loans should be limited to post-secondary educational pursuits and also to only accredited programs. While ABA supports the proposal as an expedient effort to implement the HEOA within the timeframe established by the statute, we believe future effort should be undertaken to consider whether the HEOA policy goals and CRA's community development goals might be further advanced by expanding the types of education loans that receive favorable treatment. CRA is designed to ensure banks meet the credit needs of their communities. By restricting favorable CRA credit to post-secondary education, the proposal would undercut many other valid credit needs for educational loans that actually would do much to assist low-income borrowers, such as vocational or other types of training.[6] By restricting eligibility many helpful educational programs that could benefit low-income borrowers will be discouraged. For example, in the current environment with unemployment rates at record levels and many communities suffering the loss of major employers, it would seem appropriate to encourage lenders to advance funds that would help individuals re-train for new careers. To recognize innovative loan products and loans for low-income borrowers to further their education, CRA eligibility should be as broad as possible. Under existing definitions, a community development activity is one that is "targeted to low- or moderate-income individuals" or that helps revitalize or stabilize certain areas.[7] ABA asks that the agencies at some point in the near future explore ways to extend the qualification to financing educational activities other than traditional post-secondary education, especially for areas hard hit by unemployment or underemployment.

The current proposal also would restrict eligible loans to closed-end loans. As a result, open-end home equity loans – a popular option for many students – would be excluded. The agencies have not advanced a clear rationale for eliminating such a broad category of loans. ABA questions whether this restriction is appropriate. Since the statutory provision refers to low-cost education loans, ABA does not believe there is any compelling rationale for imposing this qualifier on which types of loans are eligible for CRA consideration in meeting the policy goal of making post-secondary education more affordable. Consequently, we recommend that after finalizing the current proposal, the agencies give further consideration to expanding the type of financing eligible for inclusion as a HEOA loan for CRA credit.

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[6] Congress has demonstrated support for such programs, e.g., on July 16, 2009, Senator Jim Webb (D-VA) introduced the "Adult Education and Economic Growth (AEEG) Act of 2009" to reform and increase investment in job training, adult education and other programs.

[7] See, e.g., 12 CFR 228.12(g)

Low-income Borrowers

The third question that must be decided in defining HEOA loans is whether or not the recipient is a low-income borrower. As the agencies note in the supplementary information to the proposal, Congressional motivation for creating a CRA incentive for HEOA loans focused on helping students from disadvantaged backgrounds that they chose to characterize as low-income borrowers. As set forth in the proposal, when calculating whether a borrower is low-income a lender would include the income of other individuals obligated on the loan. ABA believes the better approach for determining whether a borrower is low-income within the policy intent of HEOA would be to look only at the household income of the primary obligor on the loan. If the primary obligor is a dependent in a low-income household, they would be considered a low-income borrower no matter what additional guarantors or co-signers are obligated on the loan. Similarly, if the student is a financially emancipated adult then his individual income would determine his income status. In both cases, the rule would avoid conflicts with the prudent banking motivation of minimizing risk on the loan by obtaining appropriate guarantors or co-signers.

Including the income of others obligated on the loan sets up an instant conflict for lenders. Because the ability of low-income borrowers to repay is restricted, prudent banking suggests a co-signer or guarantor where possible. The result of prudent banking, though, will be to disqualify many loans from qualifying for CRA credit under the proposal. ABA suggests that to satisfy public policy and encourage banks to offer these loans, only the primary obligor should be considered. Is it not the economic status and condition of the student the purpose of the provision in the law. Including guarantors would be irrelevant and could actually interfere with the purpose of the legislation.

Alternatively, if all those obligated on the credit are taken into account, then the final rule needs to clarify how the agencies will calculate whether the low-income standard is met. Presumably, if there are two individuals obligated on the loan, their income would be combined and then divided in two to determine if the threshold is met, but that should be clarified. And this would be a poor second best to not including the income of guarantors at all in the calculation.

The agencies also ask whether other potential contributions to a student from family members or others should be further factored into the equation. The intent in the proposal is to an approach that is similar to the qualifications for eligibility for financial aid and which replicates the financial aid application process. ABA suggests that, again, this might unduly complicate the proposal. ABA suggests that if a student has applied for financial aid and been identified as eligible by the Department

of Education, that should qualify the borrower as "low-income" for purposes of this test. Students who apply for financial aid submit a Free Application for Federal Student Aid (FAFSA) to the Department of Education. ABA recommends that the final CRA rule simplify things and incorporate a mechanism that builds off the existing financial aid program of the Department of Education that can be easily applied to verify eligibility for CRA consideration.

Assessment Area

Finally, the proposal states that low-cost education loans within the bank's assessment area would be considered. As ABA has recommended earlier, consideration of HEOA loans as community development loans better captures the approach in CRA regulations that a bank's local community extends beyond the assessment area for community development purposes, and we believe that HEOA lending is consonant with that approach. Accordingly, the limit on counting HEOA loans solely within assessment area is too constraining and not in line with a broader recognition of community purpose lending as embodied in CRA regulations.

This still raises two questions which need to be resolved. First, if a student has an official residence within the lender's assessment area or broader statewide or regional area that includes the assessment area, but attends a school outside that area, would the loan qualify? Second, if a student with an official residence outside a lender's assessment area or broader statewide or regional area that includes the assessment area attends a school within that area, would the loan qualify?

ABA strongly recommends that in both cases the agencies consider such loans for CRA credit. In other words, if the obligor has an address within the community development area *or* the school is within the bank's community development area, the loan should be eligible for consideration for favorable CRA credit. This way the lender can more readily both support qualifying students from their local communities and at the same time support institutions of higher education within their local communities that enable financial aid programs for qualifying students.

Minority- and Women-Owned Financial Institutions; Low-Income Credit Unions

When assessing a bank's performance, CRA rules allow the agencies to consider capital investment, loan participations and other ventures undertaken in cooperation with minority- and women-owned financial institutions (MWOFI) and low-income credit unions if the activities in question help meet the credit needs of local communities where the latter institution is located. To qualify, the activity does not need to benefit the assessment area of the majority-owned institution. These activities qualify

for CRA consideration no matter which performance test is used to evaluate the institution. The proposal intends to codify guidance issued earlier this year,[8] but ABA believes that the proposed amendment misplaces the standard in the regulation. Rather than be a change to the performance standards section of the regulation, the amendment—like the guidance that precedes it—should be part of the community development definition of the regulation. This allows the scope of the credit afforded MWOFI support to coincide with the community development standard of the bank's assessment area and the broader statewide or regional area that includes the assessment area.

ABA has long supported this step. In our comments submitted when answers to the frequently-asked-questions were proposed in 2007, ABA made the following observation:

> The proposed Question and Answer would state that activities engaged in by a majority-owned financial institution with a minority- or women-owned financial institution or a low-income credit union that benefit the local communities where the minority- or women-owned financial institution or low-income credit union is located will be favorably considered in the CRA performance evaluation of the majority-owned institution. The minority- or women-owned institution or low-income credit union need not be located in, and the activities need not benefit, the assessment area(s) of the majority- owned institution or the broader statewide or regional area that includes its assessment area(s). This Question and Answer implements authority given to the Agencies by Congress more than a decade ago. In fact, ABA requested that the Agencies issue just such an interpretation by letter dated October 14, 1999. ABA supports the proposal.[9]

At that time, ABA also pointed out that we supported incorporating this provision into the regulations, a step that was also supported by the National Bankers Association.

ABA continues to support the regulatory codification of the statutory provision, but not in the manner proposed. As with the treatment of HEOA loans, CRA credit for MOWFI qualifying activity should be included within the community development section of the regulation.

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[8] 74 Federal Register 498, January 6, 2009. http://edocket.access.gpo.gov/2009/pdf/E8-31116.pdf.

[9] Letter from ABA to the agencies, September 10, 2007.

Conclusion

ABA encourages the agencies to make the final rules as simple and straightforward as possible so that banks can easily offer these programs. Offering both low-cost education loans for low-income borrowers and offering transactions involving minority- or women-owned financial institutions are steps that our members support, and ABA supports adding them to the CRA rules, with the preceding adjustments and their proper inclusion in the category of community development activity.

Unnecessarily complex qualifications and hurdles that must be met in order to receive favorable CRA consideration for offering these programs is extremely likely to discourage many banks and will make it harder to give banks the recognition that they merit for their financial service activities in their communities. Unfortunately, in the current environment, the more complex the qualifications to satisfy the regulatory hurdle, the more difficult it is for banks to serve their customers. And, equally unfortunately, where less formal initiatives already exist in banks, the creation of new regulatory hurdles can inadvertently invite examiner scrutiny that spends more time parsing agency guidance than recognizing valuable community development activity. The result: instead of implementing rules that promote the public policies articulated by Congress, the rules could inadvertently thwart the Congressional goals.

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

Sincerely,

Robert G. Rowe, III
Vice President & Senior Counsel