December 19, 2000

TO: Board of Governors

FROM: Staff[1]

SUBJECT: Final rule implementing the CRA Sunshine requirements of the Gramm-Leach-Bliley Act.

ACTION REQUESTED: Approval to adopt the attached final rule implementing the Community Reinvestment Act Sunshine provisions of the Gramm-Leach-Bliley Act ("Act"). The attached rule has been developed on an interagency basis with the staffs of the FDIC, OCC, and OTS, and it is anticipated that the agencies would adopt an identical rule and would jointly publish the rule in the Federal Register. The draft rule is attached as Appendix A and the draft Federal Register notice is attached as Appendix B.

BACKGROUND: The Act added a new section 48 to the Federal Deposit Insurance Act entitled "CRA Sunshine Requirements." Section 48 generally requires that the parties to certain CRA-related agreements (1) make the agreement available to the public and the appropriate Federal banking agency and (2) file an annual report with the appropriate Federal banking agency concerning payments made or received under the agreement.

Section 48 applies only to written contracts, written arrangements, and written understandings that (1) are entered into by an insured depository institution or an affiliate of an insured depository institution and a nongovernmental entity or person ("NGEP"),[2] (2) are entered into "pursuant

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[1] Messrs. Mattingly, Alvarez, Fallon and A. Miller, Legal Division; Messrs. Loney and Mann and Ms. Ryan, Division of Consumer and Community Affairs.

to, or in connection with, the fulfillment of the Community Reinvestment Act," and (3) call for an insured depository institution or affiliate to provide cash payments or other consideration with an aggregate value of more than $10,000 in any year, or loans with an aggregate value of more than $50,000 in any year. An agreement that meets these criteria is referred to as a "covered agreement."

Individual mortgage loans and certain other qualifying loan agreements are specifically exempted from coverage. In addition, section 48 exempts from coverage any agreement entered into by an insured depository institution ("IDI") or affiliate with a NGEP who has not commented on, testified about, or discussed with the institution, or otherwise contacted the institution, concerning the CRA. These types of contacts are referred to as a "CRA communication" in the final rule.

On May 19, 2000, the Board, OCC, FDIC and OTS jointly published and requested public comment on a proposed rule to implement the CRA Sunshine requirements of section 48. The Board received more than 200 comments on the proposal. Many commenters commended the streamlined reporting and disclosure procedures included in the proposed rule. Many commenters, however, also requested that the agencies clarify the types of agreements that are covered by the rule or take additional steps to reduce potential burden.[3]

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[2] A "nongovernmental entity or person" is defined by the rule to mean any entity or individual other than the Federal government, a state, local or tribal government, an insured depository institution or affiliate, or a representative of any of the foregoing.

[3] A summary of the comments received by the Board on the proposal is provided in Appendix C.

DISCUSSION:

The attached draft rule identifies those CRA-related agreements that are subject to section 48 and implements the exemptions from coverage provided by the Act. The rule also implements the disclosure and reporting requirements of section 48.

Staffs of the agencies have proposed a number of changes to the rule in light of the public comments. The most important of these changes clarify the scope of the rule by—

> * Providing that an agreement is in "fulfillment of the CRA" and, thus, potentially subject to section 48 only if it involves (1) lending, investment or service activities that are of the type that are likely to receive favorable consideration under the CRA, or (2) providing or refraining from providing CRA-related comments or testimony to a Federal banking agency; and
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> * Identifying what actions constitute a "CRA communication," and when and with whom a CRA communication must occur. (As noted above, an agreement is subject to section 48 only if one or more NGEPs that are a party to the agreement has had a CRA communication.)

These revisions are discussed in detail below.

I. Definition of Covered Agreement and Exemptions from Coverage

A. "Fulfillment" of the CRA for Purposes of Section 48.

The final rule incorporates the definition of a covered agreement included in section 48. As noted above, a written agreement meets this definition only if, among other things, the agreement is made "pursuant to, or in connection with, the fulfillment of the [CRA]." The Act requires the agencies to identify the list of factors that are considered to be in "fulfillment" of the CRA for purposes of section 48. This list of factors must include the factors that the agency determines have a material impact

on the agency's decision to (i) approve or disapprove an application for a deposit facility under the CRA or (ii) to assign a rating to an IDI under the CRA.

The original proposal provided that an agreement was in "fulfillment of the CRA" if it involved any of the lending, investment, or service activities referenced in the performance tests and standards of the agencies' CRA regulations.[4] Many commenters asserted that this list of factors was too broad and could result in the rule covering agreements that were not intended to be subject to the CRA Sunshine provisions or that involve activities that typically do not enhance an IDI's CRA performance.

The attached draft rule would amend the list of factors contained in the original proposal to provide that an agreement is in "fulfillment of the CRA" for purposes of section 48 if it involves activities that are of the type that are likely to receive favorable consideration by a Federal banking agency in evaluating the CRA performance of an IDI. In this way, the final rule focuses on agreements that call for an IDI to engage in lending, investment, or service activities that typically would receive favorable consideration in the CRA review process.

For example, home mortgage lending in low- and moderate-income ("LMI") neighborhoods in an IDI's assessment area typically is considered favorably. On the other hand, mortgage lending in middle- and upper-income neighborhoods, while taken into account in determining the size and scope of an IDI's lending activities under the CRA regulations, generally does not receive favorable consideration. However, the context in which the IDI operates may dictate otherwise. For example, this would be

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[4] See Board's Regulation BB, 12 C.F.R. Part 228.

the case if the institution operates only in middle- and upper-income neighborhoods or makes loans only in high cost areas.

The final rule, like the proposal, also provides that an agreement is in fulfillment of the CRA if it calls for any person to provide (or refrain from providing) comments or testimony to a Federal banking agency concerning the CRA performance of an IDI, or provide (or refrain from providing) written comments to an IDI that would have to be included in the institution's CRA public file. The CRA Regulations require the agencies to review such comments or testimony in assigning a CRA rating to an IDI and considering an application for a deposit facility under the CRA.

B. Exemption for Agreements with Persons that Have Not Had a CRA Communication.

The Act also exempts from coverage any agreement entered into by an IDI or affiliate with a NGEP that has not "commented on, testified about, or discussed with the institution, or otherwise contacted the institution, concerning the Community Reinvestment Act." The final rule refers to these types of actions as a "CRA communication."

1. *Definition of CRA Communication*.

The original proposal adopted the exemptive language of the Act and provided examples of actions that would, and would not, disqualify a NGEP for this exemption. Commenters almost uniformly asked the agencies to clarify what types of communications with a banking agency or banking organization "concern the CRA" for purposes of this exemption. In light of these comments, the final rule defines a "CRA communication" to mean any of the following 5 actions—

* Providing comments or testimony to a Federal banking agency concerning the adequacy of an IDI's CRA performance;

* Submitting a written comment to an IDI that discusses the adequacy of the institution's CRA performance and that must be included in the institution's CRA public file;

* Contacting an IDI or affiliate about providing (or refraining from providing) comments or testimony to a Federal banking agency concerning the adequacy of the CRA performance of the institution or an affiliated institution;

* Contacting an IDI or affiliate about providing (or refraining from providing) written comments that concern the adequacy of the institution's CRA performance and that must be included in the institution's CRA public file; and

* Contacting an IDI or affiliate concerning the adequacy of the CRA performance of the institution or any affiliated institution.

This list, which is drawn from the examples included in the proposed rule, clarifies that a communication "concerns the CRA" if it relates to the "adequacy" of an IDI's CRA performance. The attached draft rule also provides examples of discussions that would, and would not, concern the "adequacy" of an IDI's CRA performance. These examples illustrate that a NGEP would have a CRA communication if the entity or person met with an IDI and stated that the institution needed to make more mortgage loans in LMI neighborhoods in its community. A NGEP, however, would not discuss the "adequacy" of an institution's CRA performance simply by discussing whether particular loans, services, investments or activities are generally eligible for consideration under the CRA.

A significant number of commenters asked the agencies to define a CRA communication to include only the provision of CRA-related comments or testimony to a Federal banking agency or discussions with a

banking organization about providing (or refraining from providing) such comments or testimony to a banking agency. The final rule does not adopt this approach. As noted above, section 48 provides that a CRA communication includes any discussion with a banking organization "concerning the CRA." There are many types of discussions that occur with banking organizations that concern the adequacy of an IDI's CRA performance but that are not related to the provision of comments or testimony to a banking agency.

2. *Timing of CRA Communication*

One of the most significant issues raised by commenters was whether there must be a temporal relationship between a CRA communication and an agreement. A substantial majority of commenters urged the agencies to provide that an agreement with a NGEP is not covered by the statute unless the NGEP engaged in a CRA communication within a specified period of time before the parties entered into the agreement. These commenters asserted that section 48 was intended to cover CRA agreements that result from, or are influenced by, a CRA contact by the relevant NGEP, and that such a connection may be tenuous or nonexistent where the NGEP's contact occurred well before the banking organization and NGEP entered into the agreement.

Many commenters also stated that, without a time limit, the rule would place an undue recordkeeping burden on banking organizations and NGEPs by requiring them to track all CRA communications ever made by or

with the organization.[5] These commenters also argued that, without a time limit, the exemption would become virtually meaningless since organizations likely would not be able to verify that a CRA communication had never occurred. Such a construction, commenters argued, would be inconsistent with the purposes of the exemption,[6] and could significantly "chill" the constitutional rights of NGEPs to exercise free speech and petition the Federal banking agencies.

Other commenters, including a member of Congress, asserted that the exemption was intended to be available only to NGEPs that have not had a CRA communication at any time. These commenters argued that the agencies lacked the authority to require a temporal relationship between a CRA communication and an agreement.

After carefully reviewing the comments on this subject, the staffs of the agencies believe, for the reasons advanced by most commenters, that requiring a temporal relationship between a CRA communication and an agreement is appropriate and consistent with the purposes of the statute. Accordingly, the rule would provide that an agreement with a NGEP is covered by the rule only if the NGEP had a CRA communication within a specified period of time before the agreement.

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[5] Section 48 directs the agencies to ensure that their implementing regulations "do not impose an undue burden on the parties" to a covered agreement. See 12 U.S.C. § 1831y(h)(2)(A).

[6] The Conference Report to the Act states that the exemption was intended to be available to a wide range of organizations, including civil rights groups, community groups providing housing or other services in low-income neighborhoods, the American Legion, and community theater groups. See H.R. Conf. Rep. No. 106-434 at 179 (1999).

In particular, the rule provides that the CRA communication must have occurred within 3 years prior to the agreement in the case of (1) oral or written CRA communications with a Federal banking agency, (2) all written CRA communications with the banking organization, and (3) oral discussions with the banking organization about providing (or refraining from providing) comments or testimony to a Federal banking agency that occur in connection with a request for the banking organization to take additional CRA-related actions. In the case of other oral CRA communications with the banking organization (e.g. discussions concerning the adequacy of its CRA performance), the communication must have occurred within the 1 year prior to the agreement.

The three year period for communications with an agency, certain types of discussions with a banking organization about providing testimony or comments to an agency, and other written contacts with a banking organization was selected based on several considerations. Existing regulations generally require an IDI to maintain written comments in its CRA public file for a period of three years.[7] The agencies' examination schedules also generally call for the agencies to evaluate the CRA performance of large IDIs every 3 years. In addition, regulations issued by the Office of Management and Budget and applicable to Federal agencies also discourage any collection of information that would require regulated entities to retain records for more than three years.[8]

The one year period for other oral communications with banking organization was selected based on several other considerations. One

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[7] See 12 C.F.R. 228.43(a)(1).
[8] See 5 C.F.R. 1320.5(d)(2)(iv).

consideration was that many commenters suggested a time period in the one year range. Also, a shorter time period for oral communications with a banking organization recognizes that, as a practical matter, oral communications are harder to monitor and remember than written communications. Banking organizations, however, are more likely to document and remember oral communications with a NGEP that concern providing comments or testimony to a Federal banking agency where such communications also involve a request to, or agreement by, the banking organization to take additional actions in fulfillment of the CRA. Accordingly, the rule includes these types of oral communications in the three year period described above.

These time frames provide reasonable assurance that the communication and the agreement are not connected and would not appear to impose an undue burden on the parties. Moreover, commenters indicated that where a CRA communication occurs it is most often occurs immediately before the parties enter into an agreement. This contact period is well within the time periods included in the rule.

3. *Knowledge of CRA Communication*.

A number of commenters also requested that the agencies provide that a CRA communication has occurred only if specified representatives of the banking organization and NGEP (e.g. senior officers or CRA compliance personnel) are involved in, or have knowledge of the communication. Commenters expressed concern that, without guidance in this area, a casual CRA-related contact between lower level employees of a banking organization and a NGEP could cause an agreement between the two entities to be covered by section 48 even where the casual contact was not known to officials of the two organizations.

In response to these concerns, the rule provides that an agreement is covered only if appropriate representatives of the banking organization and NGEP have knowledge that a CRA communication has occurred. The individuals identified in the rule are those that may influence the decision by a banking organization or NGEP to enter into an agreement or the terms of an agreement. They are—

* any employee who approves, directs, authorizes or negotiates the agreement;

* any executive officer (or person who functions as an executive officer of a NGEP) who knows that the institution, affiliate, or NGEP is negotiating or intends to negotiate an agreement; and

* in case of an IDI or affiliate, any employee with designated responsibility for CRA compliance who knows that the institution or affiliate is negotiating or intends to negotiate an agreement.

The rule provides that an IDI or affiliate is deemed to have knowledge of testimony provided at a public meeting or hearing held by a banking agency and of any comments that a banking agency conveys in writing to the

institution or affiliate. In addition, an IDI or affiliate is deemed to have knowledge of any written comments received from a NGEP that are included in the institution's CRA public file. It is reasonable to assume that an IDI or affiliate has knowledge of these types of contacts because they typically are made formally and relate to an agency's review of the institution's CRA performance.

C. Exemption for Certain Loans and Loan Commitments

As noted above, the Act specifically exempts from coverage any individual mortgage loan. In response to commenters, the final rule clarifies that this exemption is available for any loan that is secured by real estate.

The Act also exempts from coverage any "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 [that are] 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."[9] The final rule clarifies that this exemption is available only for a commitment to make a specific loan to one or more individuals or entities (such as the type of loan commitment typically made to a small business in the course of providing a line of credit) and does not provide an exemption for a general commitment by an IDI or affiliate to make loans to unnamed potential borrowers (such as a general lending pledge made by a bank or bank holding company in connection with a proposed acquisition). In response to commenters, the attached materials also provide additional guidance concerning when a loan is made at "substantially below market rates" or for purposes of "re-lending."

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[9] See 12 U.S.C. § 1831y(e)(1)(B)(ii).

II. Disclosure of Covered Agreements

The Act requires that the parties to a covered agreement make the full text of the agreement available to the public and the appropriate Federal banking agency.

A. Disclosure to the Public.

The final rule requires that each party to a covered agreement make the agreement available to any member of the public on request. The rule allows the parties to recover reasonable copying and mailing fees in responding to such requests and allows the parties to make an agreement publicly available through a variety of means, such as by posting the agreement on the Internet or making it available at a local office.

Section 48 requires that the parties to an agreement make the "full text" of the agreement available to the public. Section 48 also directs the agencies to ensure that their implementing regulations do not impose an undue burden on the parties to a covered agreement and protect confidential and proprietary information.[10] In light of these requirements, the rule allows any party to a covered agreement to withhold from public disclosure any confidential or other information contained in the agreement that the party believes the appropriate banking agency could withhold from disclosure under the Freedom of Information Act. The rule, however, also provides that a party may not withhold from public disclosure the basic terms of a covered agreement, including the names of the parties to the agreement, the amount of funds or resources to be provided under the agreement, and any description of how such funds or resources are to be used. The CRA

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[10] See 12 U.S.C. § 1831y(h)(2)(A).

Sunshine provisions were enacted for the purpose of making these categories of information publicly available.

The rule also contains a number of provisions that are designed to reduce the potential burden associated with making covered agreements available to the public. For example, the rule provides that a party's obligation to make a covered agreement available to the public terminates 12 months after the end of the agreement's term. In response to comments, the final rule also allows IDIs and affiliates to make an agreement available to the public by placing a copy of the agreement in the IDI's CRA public file and making it available in the same manner as other documents included in the CRA public file.

B. Disclosure to the Appropriate Banking Agency

Under the rule, NGEPs must make a covered agreement available to the appropriate banking agency upon request. To ensure that the agencies are informed of the existence of covered agreements, the rule requires that IDIs and affiliates that enter into a covered agreement during a calendar quarter make the agreement available to the appropriate agency within 60 days of the end of the quarter in which the agreement was reached.

In response to comments, the rule allows an IDI or affiliate to fulfill this requirement by providing the agency with either (1) a copy of the covered agreements entered into during the preceding quarter, or (2) a list identifying all of the covered agreements entered into during the preceding quarter. If an IDI or affiliate elects to file a list of agreements with the

agency, it must promptly provide a copy of any agreement referenced in the list to the agency upon request.[11]

III. Annual Reports

Section 48 requires each IDI, affiliate and NGEP that is a party to a covered agreement to file an annual report with the appropriate Federal banking agency concerning the agreement. The rule gives the parties the option of filing these reports on either a calendar or fiscal year basis.

A. Annual Report of Nongovernmental Entity or Person.

Section 48 requires a NGEP that is a party to a covered agreement to file a report at least annually providing an accounting of how the entity or person during the year used any funds received under the covered agreement. The statute provides that this accounting must disclose the total amounts used by the NGEP during the year for an itemized list of expenses, including the compensation of officers, directors and employees, administrative expenses, travel expenses, entertainment expenses, consulting and professional fees, and other uses.

The rule includes these reporting requirements for NGEPs. The rule also gives NGEPs the option of providing a more detailed accounting of how the NGEP used funds received under a covered agreement. In particular, if a NGEP allocates and uses funds received under a covered agreement for a specific expense that is within one of the categories listed above, the NGEP's annual report may identify the specific purpose and the amount used for that purpose. To use this reporting method, the NGEP must

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[11] Unlike with disclosure to the public, a party may not withhold any information contained in a covered agreement from disclosure to the appropriate banking agency.

be able to establish that it allocated and used the funds for a specific purpose, such as to purchase a computer or for a particular business trip.

The rule includes a number of other provisions designed to reduce the potential reporting burden imposed on NGEPs. For example, the rule allows NGEPs to use an Internal Revenue Service Form 990 (which is the Federal tax return form for many non-profit organizations) or any other report (such as audited or unaudited financial statements) to fulfill their reporting obligations if the reports, either alone or in conjunction with other documents filed with the agency, provide the information required by the rule.

The rule requires a NGEP to file an annual report in every year in which the NGEP either receives or uses funds received under a covered agreement. The rule does not require a NGEP to file an annual report for any year in which the NGEP does not receive or use any funds or other resources under the covered agreement since, in these circumstances, the NGEP would have nothing to report.

The rule also allows NGEPs to file their annual reports with the appropriate Federal banking agency by sending the report to the IDI or affiliate that is a party to the agreement with instructions that the IDI or affiliate forward the report to the appropriate agency. In addition, the rule allows NGEPs that are a party to multiple covered agreements to file a single annual report relating to all of the agreements.

B. Annual Report Of Insured Depository Institution or Affiliate

Section 48 requires that the annual report of an IDI or affiliate provide information on payments made or received under the agreement, and aggregate data on loans, investments and services provided under the agreement by any party. The rule includes these requirements and clarifies

that an IDI or affiliate generally must provide data on loans, investments and services provided by other parties to the agreement only to the extent such information is known to the IDI or affiliate.

Under the rule, an IDI or affiliate is not required to file an annual report for any year if the IDI or affiliate did not make or receive any payments under the agreement during the year and has no information concerning the loans, investments or services provided by the other parties to the agreement during the year. The rule also allows an IDI or affiliate that is a party to more than one covered agreement to file a consolidated annual report for all the agreements, and allows an IDI and an affiliate to file a single, joint report if they are both parties to the same covered agreement.

CONCLUSION: Staff recommends that the Board adopt the attached rule in final form. The draft Federal Register that accompanies the rule explains the rule in detail and discusses the comments received on the proposed rule and the agencies' responses thereto.

As noted above, the attached rule and the Federal Register notice have been developed on an interagency basis with the staff of the OCC, FDIC, and OTS and it is anticipated that the rule and Federal Register notice would be jointly published by the agencies. Board staff requests the authority to make minor changes to the draft rule and Federal Register notice to assure conformance with the actions of the other agencies and to make technical corrections as necessary prior to publication. In the event that any agency proposes material changes to the rule or notice, staff proposes to present these changes to Governor Gramlich, as Chairman of the Committee on Consumer and Community Affairs.