

November 7, 2014

Robert E. Feldman, Executive Secretary  
Attention: Comments  
Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street, NW  
Washington, DC 20429

Robert deV. Frierson, Secretary  
Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street & Constitution Avenue, NW  
Washington, DC 20551  
Docket No. OP-1497

Legislative and Regulatory Activities Division  
Office of the Comptroller of the Currency  
Mail Stop 9W-11  
400 17<sup>th</sup> Street  
Washington, DC 20219  
Docket ID OCC-2014-0021

Re: Interagency Questions and Answers Regarding Community Reinvestment Act

Dear Sir or Madam:

The American Bankers Association (ABA)<sup>1</sup> appreciates the opportunity to comment on the agencies<sup>2</sup> proposal to clarify and supplement the existing *Interagency Questions and Answers Regarding Community Reinvestment Act*.<sup>3</sup> (CRA Q&As) The agencies issued the proposal on September 10 to address questions raised by bankers, community organizations, and others, many of which were raised during 2010 agency outreach meetings held by the agencies at locations across the United States.<sup>4</sup>

This proposal addresses alternative delivery systems for retail banking products, provides additional examples of innovative or flexible lending practices, clarifies existing guidance and adds new examples on community development, and offers additional information about how examiners assess whether activities are innovative or responsive to community needs.

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<sup>1</sup> The American Bankers Association is the voice of the nation's \$15 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$11 ½ trillion in deposits, and extend \$8 trillion in loans.

<sup>2</sup> The federal banking agencies issuing the proposal are the Office of the Comptroller of the Currency, the Federal Reserve System, and the Federal Deposit Insurance Corporation.

<sup>3</sup> <http://www.gpo.gov/fdsvs/pkg/FR-2014-09-10/pdf/2014-21560.pdf>

<sup>4</sup> <http://www.federalreserve.gov/newsevents/press/bcreg/20100617b.htm>

ABA supports agency efforts to improve the manner in which they encourage banks' engagement in their communities and to provide improved flexibility under the CRA to recognize good performance with favorable consideration under the regulations and we believe that the proposed changes can effectuate these objectives if they are properly, consistently, and flexibly applied by examiners. To achieve such effective application, the agencies must send a message to banks and examiners in training, in quality assurance, and in outreach that the new language is intended to reward more expansively banks' engagement in their communities, not create new compliance hurdles in the public evaluation process.

Following are ABA's comments on the specific elements of this proposal.

### **Changes to Existing Guidance**

#### Access to Banking Services

The current regulations provide that examiners consider the availability and effectiveness of a large institution's retail delivery system. As part of that process, examiners are supposed to take into account the bank's branch distribution in low- and moderate-income areas, the availability and effectiveness of alternative delivery systems for low- and moderate-income individuals and areas, and the range of services provided in all areas, as well as how services are tailored to meet different needs. However, despite changes in technology, the assessment areas under the regulation still remain on the branch delivery system.

#### *Alternative Delivery Channels*

The agencies agree that changes are needed that consider alternative delivery systems, including mobile banking. Therefore, the proposal would delete language in Q&A 24(d)-1 that states that, "performance standards place primary emphasis on full service branches", and would delete specific reference to ATMs, since over-reliance on branches tends to be an anchor that limits technological innovation rather than an example that welcomes a broad range of technically varied delivery systems. As revised, the guidance would underscore the use of alternative delivery systems to help meet the needs of low- and moderate-income geographies and individuals.

ABA agrees that changes are needed and therefore supports the revision. When CRA was adopted, the focus was on the branch delivery system. With all the significant changes in technology, it is important for examiners to recognize alternative delivery systems, especially since alternative delivery systems may be more effective at reaching different demographics.

Earlier this year, we submitted extensive comments on the use of mobile technology.<sup>5</sup> However, one of the key points to underscore and one which is especially important to recognize is that mobile banking is not a product but a *channel* for reaching customers and that a new delivery channel may not in and of itself rectify problems faced by

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<sup>5</sup> <http://www.aba.com/Advocacy/commentletters/Documents/clMobilePaymentsFinal091014.pdf>

individual customers caused by other financial challenges. This is also important for examiners to understand.

That said, ABA agrees that new channels for reaching customers, particularly low- and moderate-income customers and customers in low- and moderate-income communities, should be factored into CRA evaluations.<sup>6</sup> In undertaking this re-evaluation of how CRA examiners assess how banks interact with their customers and with their local communities, it is equally important to consider the notably different way different generations interact with retail establishments, including banks. For example, the differences in adopting technologies by different age generations should be factored into the understanding of how banks serve their local communities. ABA recommends that the revised Q&A recognize that alternative delivery channels and systems can help meet the needs of the various segments of communities and not just low- and moderate-income individuals.<sup>7</sup>

#### *Access to Branches*

In addition, Q&A 24(d)-1 would be changed to state that while convenient access to full-service branches and effective alternative systems are important factors, “an institution is not required to expand its branch network or operate unprofitable branches.” As revised, the Q&A states that examiners will consider the availability and effectiveness of an institution’s alternative systems and factors that demonstrate customer accessibility and use of such systems.

ABA agrees and supports this change to underscore the point that banks should not be forced to lose money on unprofitable branches. In fact, ABA believes that this concept should apply to all banking products and services, whether delivered through branches or through alternative delivery channels, such as online access or mobile technology. Given the expanding reliance on alternative delivery, we urge the agencies to recognize in the final guidance that financial institutions should not be compelled to operate unprofitable delivery systems, whether through branches or otherwise.

When evaluating branch delivery and alternative delivery systems, ABA also believes it is important for examiners to take into consideration the types of other banking services that exist in a given market beyond those offered by the institution being evaluated. For example, there may be other depository institutions that already meet the needs of the community to the point where it would not be effective for another institution to try to compete. Here, the concept of performance context is critical for examiners to employ in assessing CRA performance.

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<sup>6</sup> One of the ongoing challenges faced by financial institutions, which can undermine CRA, is the insistence that bankers demonstrate data on low- and moderate-income of affected populations. When these data do not exist and cannot be produced, all too often bankers report that examiners will not give consideration to a project or transaction, discouraging bankers from offering a product or service.

<sup>7</sup> It is important for the Q&A to encourage alternative delivery systems for all segments of a bank’s market area to support efforts that experiment with mainstream customers which can, in turn, benefit low- and moderate-income segments once a delivery channel is established.

### *Factors Considered by Examiners*

Similarly, Q&A 24(d)(3)-1 would clarify the factors examiners will take into account to assess the availability and effectiveness of alternative delivery systems. As proposed, examiners will consider cost to consumers compared to other delivery systems, range of services, ease of use, rate of adoption, and reliability of the system. ABA opposes introducing the criteria of comparative cost to consumers, especially since the Q&A provides no guidance about how this comparison is to be conducted. This criterion invites a broad and unmanageable amount of examiner discretion to evaluate the pricing of bank services. CRA has not been—and should not become—a vehicle to second guess market pricing. ABA believes that the other enumerated criteria capture adequate means of judging the effectiveness of alternative delivery systems. There are enough challenges to making a business case for adopting new technologies and suggesting that pricing of new technologies is subject to agency CRA review introduces an unwarranted and unprecedented hurdle that the agencies must avoid.

ABA supports the agencies' statement that not every factor needs to be satisfied to receive favorable treatment in the evaluation. We urge that this instruction be underscored with examiners and carefully overseen during quality assurance reviews.

While ABA believes this guidance is helpful, we also believe it is important that the agencies recognize the impact that regulatory changes and restrictions can have. For example, recent guidance on deposit advance products<sup>8</sup> has had a significant impact on the ability of depository institutions to offer these programs. In fact, depository institutions have discontinued these products. a risk ABA raised in our May 2013 comments.<sup>9</sup> Therefore, when considering alternative delivery systems, examiners should be cognizant of the regulatory restrictions that can inhibit products and services that customers find valuable. This should be acknowledged in the revised Q&A.

### Innovative or Flexible Lending Practices

As part of the lending test, examiners are required to take into account whether a project is innovative or responsive to community needs. The Agencies believe additional examples would help. Therefore, the proposal would revise Q&A 22(b)(5)-1 to add two new examples. As proposed, the first new example describes small dollar loan programs as innovative when combined with financial literacy or outreach programs, while the second new example describes mortgage or lending programs as innovative or flexible when they consider alternative credit histories.

While ABA appreciates the attempt to offer additional guidance, it has to be acknowledged that the challenge of identifying innovation and flexibility is and has been an ongoing issue. While we appreciate the guidance, we question whether it will be effective without appropriate examiner training. Even so, ABA also continues to be concerned that regulatory restrictions can have a chilling effect and can discourage

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<sup>8</sup> See <http://www.occ.gov/news-issuances/federal-register/78fr70624.pdf>, <http://www.federalreserve.gov/bankinforeg/caletters/CALetter13-07.pdf> and <http://content.govdelivery.com/accounts/USFDIC/bulletins/960943>

<sup>9</sup> <http://www.aba.com/Advocacy/commentletters/Documents/cIOCCFDICdepositadvanceMay2013.pdf>

institutions from offering new and innovative products and services. For example, many bankers report that the potential threat of action under UDAAP<sup>10</sup> is a very real concern inhibiting innovation, exacerbated by the lack of guidance or clarity as to when and how the standard will be applied.

Without clear standards, bankers tend to take a conservative approach and only adopt those practices which have passed muster by an examiner. Even then, with the instability and inconsistency with which examiners approach CRA, it is not always clear if something which was acceptable last year will be acceptable this year. All these considerations undermine the willingness of depository institutions to try new and different approaches to CRA. ABA believes that agencies should monitor PE quality assurance to assure that these modifications of the FAQs are consistently applied to increase recognition of community engagement, not to discourage it by increasing paperwork.

### Community Development

The agencies propose to clarify further community-development related topics not addressed during the 2013 revisions. Some bankers have contended that examiners apply the guidance in Q&A 12(g)(3) in ways that limit economic development activities. For example, some examiners apparently interpret the definition in the existing guidance to limit economic development to persons who are *currently* low- or moderate-income individuals and only recognize activities that support low-wage jobs.

#### *Recognizing Any Activity That Promotes Jobs*

The agencies are proposing a number of revisions. First, they would remove the word "currently" so that the guidance would recognize as economic development *any* activity that supports permanent job creation, retention, or improvement for low- or moderate-income individuals.

One issue that has long concerned ABA is the approach to low- and moderate-income that restricts creativity in CRA. This is an excellent example of how low- and moderate-income elements can easily be misapplied by examiners. Since this change will rectify that, ABA supports the adoption of this example.

All too often, we hear anecdotal reports where projects that might benefit an entire community are disregarded or not considered because information or data are not present to demonstrate that a majority of those that benefit from a project are low- or moderate-income individuals. In some instances, the data may simply not be available. However, when common sense suggests that a project or service benefits an entire community, it should be given favorable consideration. After all, it is the *Community Reinvestment Act*. Where common sense suggests that the community in general can benefit from a project, even though there is nothing to demonstrate clearly that a majority of those that benefit are low- or moderate-income, examiners should feel comfortable giving the project favorable consideration, such as projects that support changes to local infrastructure. This change to recognize job programs that help

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<sup>10</sup> Unfair and deceptive or abusive acts and practices.

individuals grow and progress is a perfect example of projects that should be considered favorably under CRA.

It is unfortunate that the guidance needs to be changed to recognize these programs. Instead, it should be possible to post information about successful programs on the individual agency websites or, better yet, the FFIEC<sup>11</sup> website for all affected to see.

#### *New Examples*

Second, new examples would be added to include activities that support job creation, retention, or improvement through activities such as workforce development or job career training programs, creation or development of small businesses or farms, or technical assistance or supportive services for small businesses or farms, such as shared space, technology, or administrative assistance. In addition, the example would recognize federal, state, local, or tribal initiatives that include provisions for creating or improving access by low- or moderate-income persons to jobs, affordable housing, financial services, or community services.

ABA believes these new examples are appropriate and encourages the agencies to continue to identify similar successful programs. However, as noted above, rather than limiting the publication of successful examples to revisions to the Q&As, we encourage the agencies to identify these programs and post them on their website and publicize them in other ways and through other venues, including outreach sessions and webinars.

#### Community Development Loans

##### *Going "Green"*

Because projects that are environmentally friendly, or "green" concepts, are not specifically addressed in the regulations or existing guidance, bankers have commented that examiners do not always give consideration to initiatives that incorporate "green" components designed to reduce utility costs and maintain housing affordability. This is a perfect example of why more extensive training is needed to help examiners connect the dots between programs and CRA.

To address these concerns, Q&A 12(h)-1 would be revised to incorporate an example that illustrates how a loan that finances renewable energy or energy-efficient technologies and that has a community development component may be considered in an institution's performance evaluation. As proposed, the example would specify that consideration would be given to loans to "borrowers to finance renewable energy or energy-efficient equipment or projects that support the development, rehabilitation, improvement, or maintenance of affordable housing or community facilities, such as a health clinic, even if the benefit to low- or moderate-income individuals from reduced costs of operations is indirect, such as reduced cost of providing electricity to common areas of an affordable housing development."

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<sup>11</sup> The Federal Financial Institutions Examination Council website is at [www.ffiec.gov](http://www.ffiec.gov).

ABA believes that this is the right result. ABA also believes that the wording of the guidance should be slightly revised to reflect more accurately the intention and to avoid having examiners narrow the construction of the Q&A. The revised wording should state that consideration will be given to loans to “borrowers to finance renewable energy or energy-efficient equipment or projects that support community development activities even if the benefit to low- or moderate-income individuals is indirect.” Providing a short, simple straight-forward message will avoid confusion and misinterpretation that in turn could defeat the purpose of the change.

Clearly, steps that help reduce energy costs and promote energy efficiencies in multi-family housing projects should be seen as positive steps that help lower costs and make housing units more affordable. As the technologies for these energy-efficient designs improve, the savings can be significant for all neighborhoods and population segments. However, we caution that agencies convey, and examiners be trained to understand, that elevating this specific type of project into the formal FAQs is done to illustrate how other infrastructure projects—like flood control—might also provide similar benefits that warrant positive CRA consideration. The FAQ should not be seen as exalting green projects over other projects with community benefits that inure to the “entire community,” including low and moderate income neighborhoods and individuals.

#### Revitalize or Stabilize Underserved Non-Metropolitan Middle-Income Geographies

The CRA regulations define community development at 12 CFR \_12(g)(4) to include activities that revitalize or stabilize particular areas.

Currently, people in certain areas may lack access to Internet-based alternative delivery systems, and the agencies agree that access to reliable communications infrastructure is important to help revitalize or stabilize underserved nonmetropolitan middle-income geographies. Therefore, the agencies propose to add a new example of the type of project that qualifies as meeting essential community needs at \_12(g)(4)(iii) as “a new or rehabilitated communication infrastructure, such as broadband internet service, that serves the community, including low- and moderate-income residents.”

ABA believes that this is a worthwhile example. It is interesting that this type of broadband access is important to many of the alternate delivery mechanisms and new channels that are constantly being investigated by banks to reach customers. And, this added guidance is consistent with one of the earlier Q&As that the agencies are also considering. Since the two go hand-in-hand, ABA believes this change is also appropriate.

### **Proposed New Questions and Answers**

#### Evaluating Retail Banking and Community Development Services

Community development services are an important component of community reinvestment, but commenters have asserted that community development services are not given sufficient consideration in the services test. The concern is that little emphasis

is given to determining whether products and services are effective or responsive. The proposed clarification is intended to improve consistency and reduce uncertainty.

New Q&A \_24(a)-1 would explain that when evaluating retail services, examiners are to consider the availability and effectiveness of the range of services offered and the degree to which these services are tailored to meet the needs of low- and moderate-income areas, because they improve or increase access to financial services by low- and moderate-income individuals or low- and moderate-income geographies. To help make this determination, the proposal would add that, “Examiners will consider any information provided by the institution that demonstrates community development services are responsive to those needs.”

While ABA appreciates the goal that the agencies are trying to achieve, this is the type of guidance that needs more precision. Unfortunately, when bankers put together materials that they believe are responsive to demonstrate community development, they report that examiners will make additional demands, and bankers sometimes get the sense that the examiners are requesting additional documentation to avoid making a determination whether an activity is appropriate. Again, this underscores the need for examiner training. Because these activities can vary so widely, it is difficult to encapsulate a key set of parameters that are appropriate in a one-size-fits-all Q&A. However, posting examples online or continuing to publish examples of the types of activities that satisfy these criteria, along with checklists that both examiners and bankers can use, of the type of evidence that can demonstrate that an activity is appropriate, would be helpful.

Fundamentally, if a bank can demonstrate that it has a product or service that meets needs in the community, and that the product has been introduced and delivered to reach the population generally, or is one that is designed to serve the low- and moderate-income segments of the population, or that reaches the unbanked, the examiner should accept the information. Unfortunately, bankers tell us that all too often, no matter how much documentation they present to support that a project meets CRA standards and satisfies community development expectations, examiners continue to ask for something different or something additional without substantiating the rationale for the request. Again, examiner training is the need to be met.

#### Quantitative and Qualitative Measures of Community Development Services

Bankers have noted inconsistencies in how community development services are evaluated quantitatively, and the agencies agree that further guidance would promote consistency. The proposal would therefore add a new Q&A 24(e)-2, which states that both quantitative and qualitative factors are considered and that examiners consider the extent to which community development services are offered and used.

The agencies make clear that the reason for creating this FAQ is to remove the unintended impediment to considering community development services that bankers experience when trying to qualitatively and quantitatively evaluate community

development services to the satisfaction of examiners. ABA welcomes the agencies recognition of this problem.

To address the problem, the proposal states that, “[t]he review is not limited to a single quantitative factor, for example, the number of hours financial institution staff devotes to a particular community development service. Rather, the evaluation also assesses the degree to which community development services are responsive to community needs.” Therefore, when making the evaluation, “examiners will consider **any relevant** information provided by the institution and third parties that help quantify the extent and responsiveness of community development services.” We underscore the agencies use of the words *any relevant* information because its use connotes a policy that flexibly welcomes supporting information and does not presuppose some rigid data standards for acceptably demonstrating responsive performance.

While ABA appreciates the effort to help provide further guidance, we suspect that, like the previous proposed changes, much of the impact will be lost if examiners do not feel comfortable making the necessary judgments to accept a project as appropriate. When the 1995 changes were adopted, the emphasis underscored that much of CRA has to be qualitative in nature. While there is an important quantitative element, judgment is needed to make proper evaluations. That examiner judgment should be monitored to successfully realize the purpose of this Q&A.

#### Responsiveness and Innovativeness

The term “responsive” is found throughout the CRA regulations and the Q&As. The proposal would add a new Q&A 21(a)-3 that provides general guidance on how examiners evaluate whether a financial institution has been responsive to credit and community development needs.

Examiners will not only consider the volume and type of activities but also how effective those activities have been and will undertake the evaluation in terms of the institution’s performance context. To that extent, examiners will consider the institution’s capacity, its business strategy, the needs of the community, and the opportunities for lending, investments, and services, and may consider information from a variety of sources. While ABA believes this is appropriate, we are compelled to point out that what the proposed change is doing is underscoring what has existed for nearly 20 years: the performance context. Thus, it seems that better examiner training on understanding and applying the performance context would also accomplish this goal.

At the same time, while ABA appreciates the effort and intent, it is not clear how this new Q&A changes existing expectations or what it adds to the process. It seems that it merely reiterates what is already in the regulation and the existing Q&As without providing sufficient substance to alter the *status quo*. While we agree this is an issue that needs to be addressed, we are not able to identify how this helps examiners or bankers better understand that a project or program has been responsive.

## Innovativeness

Another term found throughout the regulation and guidance is the term “innovativeness.” However, some examiners consider community development services innovative only if they are new to a particular market or assessment area. Other examiners only consider an activity innovative if it is new to the institution.

A new question 21(a)-4 would address what is meant by innovative. First, the proposed guidance discusses innovation based on the institution, stating that an innovative practice or activity will be considered when an institution implements meaningful improvements to products, services, or delivery systems that respond more effectively to customer and community needs, particularly those segments enumerated in the definition of community development. Then, the guidance discusses innovativeness in terms of the local market and customers, specifically noting that innovation includes the introduction of products, services, or delivery systems to low- or moderate-income customers or segments not previously served.

While ABA appreciates the effort to help identify whether something is innovative, we believe that several changes would help simplify and clarify the guidance.

First, though, the Q&A should clearly indicate that a project or program does not need to be innovative to be favorably considered under CRA. One criticism that has been raised is that projects that can be extremely beneficial are denied credit because they were last year’s innovation. We agree with the element of the proposal that states that financial institutions should not innovate just for the sake of innovation. If a project is meeting needs in the community, that is the first step to *any* CRA evaluation.

To simplify the guidance, ABA recommends that it state that a project is innovative if it is new for an individual financial institution, *even though other institutions may have already applied that same approach*. This is critical, since many financial institutions report they are extremely unwilling to experiment, especially with the threat of UDAAP hanging over their heads. In other words, innovation can be a new product or service, *or* innovation can be something new for the institution.

## **Additional ABA Comments**

Overall, ABA appreciates the efforts by the agencies to update the guidance offered through the Questions and Answers (Q&As). However, we believe it is important to raise several points that underlie the need for the proposed changes.

First, there is a critical need for comprehensive interagency examiner training. Anecdotal evidence and comments from ABA members tell us that the way examiners approach CRA is all over the spectrum. More frustrating for the industry is that examiner expectations can shift from exam to exam, even when it is the same examination team assessing CRA performance. When different examiners conduct a subsequent exam, they bring different perspectives and expectations to the exam process, which can be reflected in different standards applied to identical programs and products. While

flexibility is important, the variations that can take place between exams, from examiner to examiner, from region to region, and from agency to agency only cause confusion and uncertainty. One of the unfortunate consequences is an increasing reluctance by banks to try anything that has not already passed muster or that does not have a proven track record.

This is best reflected by the demands and expectations for documentation to support a transaction submitted for favorable CRA consideration. Even after the banker produces extensive documentation to support how a transaction or program meets CRA standards, examiners can suddenly request additional information with no clear explanation for the reason and with nothing to tie the request to existing elements in the rule or the guidance. These last minute requests are often time consuming to meet, disruptive, and place unnecessary demands on bank personnel to track down the requested information.

Fundamentally, what is needed is a uniform training conducted by all the agencies in a coordinated fashion. It is important to ensure that all examiners hear the same message and at the same time. Moreover, the training sessions should be open to financial institutions so that the same message is delivered consistently and repeatedly to both examiners and the examined. There is a real advantage for all concerned to have examiners and bankers on the same page.

ABA is certainly willing to work with the agencies to arrange and coordinate appropriate training. Coordinated training was highly successful after the 1995 changes, and interagency forums between bankers and examiners where both hear the same message would do much to address the disparities and inconsistencies that have crept into the system to the point where some believe that the current approach is one that is arbitrary and capricious.

### **Conclusion**

ABA looks forward to working with the agencies to continue to improve the application of CRA. As regulations, markets, technology, and demographics undergo increasingly significant shifts, it is important that application of CRA adapt to stay current and relevant.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert G. Rowe, III". The signature is fluid and cursive, with a horizontal line extending from the end.

Robert G. Rowe, III  
Vice President & Associate Chief Counsel, Regulatory Compliance