



January 21, 2004

Regulation Comments  
Chief Counsel's Office  
Office of Thrift Supervision  
1700 G Street, NW  
Washington, DC 20552  
[Regs.comments@ots.treas.gov](mailto:Regs.comments@ots.treas.gov)

**Notice of Proposed Rulemaking**  
**Re: Community Reinvestment Act—Community Development, Assigned Ratings**  
**Attention No. 2004-53**

Dear Sir or Madam:

The Consumer Bankers Association (CBA)<sup>1</sup> appreciates the opportunity to comment on the proposed rulemaking of the Office of Thrift Supervision (OTS) regarding the Community Reinvestment Act (the Proposal).

The Proposal, issued in conjunction with an interim final rule under the Economic Growth and Regulatory Paperwork Reduction Act regarding regulatory burden, covers two areas: First, comment is requested on whether the definition of "community development" should be expanded for thrifts to include community services targeted to individuals in rural areas, and activities that revitalize or stabilize rural areas; or to include areas affected by natural or other disasters or other major community disruptions. Second, the Proposal seeks comment on whether to revise the ratings matrix for large retail thrifts. Currently, the matrix provides that 50% of a thrift's final CRA rating is based on lending, and 25% each is based on investments and services. Under the Proposal, thrifts would be permitted to adjust the weight allocated to lending to exceed 50%. As such, the weight accorded to lending would be at least 50%, but the weight accorded investments and services could be adjusted to suit the individual institution.

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<sup>1</sup> The Consumer Bankers Association is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery. CBA was founded in 1919 and provides leadership, education, research and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry's total assets.

This Proposal, like the proposal issued in the Federal Register on August 18, 2004 revising the definition of “small savings associations,” would only affect the CRA rules applicable to thrift institutions subject to OTS rulemaking. If it were adopted, all other institutions that must comply with CRA (i.e. national banks and state chartered banks) would not be directly affected.

We support CRA regulations that provide a reasonable measure of the huge efforts financial institutions undertake to help meet the needs of their communities, including the low- and moderate-income portions of the communities, subject to safe and sound banking. Although we have at times been critical of its implementation, it has generally proved to be an effective means of recognizing the community development and affordable housing activities of financial institutions. Increasingly, however, we have seen CRA evolve into something that is at times more of a burden than a benefit. Now, when financial institutions are overloaded with the demands of Sarbanes-Oxley, FACT Act implementation, and so much more, it is certainly appropriate to consider how to reduce the burdens associated with CRA.

For that reason, we strongly support the spirit of the Proposal, and its expressed goal to make CRA more flexible, so that institutions can more appropriately meet the needs of their communities, consistent with their strengths, and with the tenets of safe and sound banking practices. If CRA is to continue to be valuable, it must be flexible enough to transform with the changing needs of communities, the changing business strategies of financial institutions, and the demands of the markets being served. However, we do not support the OTS’s adoption of these new rules at this time, since they would apply exclusively to thrift institutions, undermining the historically uniform application of CRA.

### **The Importance of Uniform Rules**

It has been an unspoken maxim of CRA that the bank regulatory agencies with responsibility of rule writing under the act would issue rules that are substantially similar and consistent with one another. In the absence of a statutory mandate, the agencies have always tried to issue uniform regulations, even when it may not have been easy to agree among them as to the best approach. We are concerned that this Proposal—which is now the second independent action by the OTS—is a harbinger, and that the uniform treatment of CRA by the bank regulatory agencies is coming unraveled. For a number of reasons, we believe this is bad precedent and we recommend and that it be reconsidered.

In the first place, the regulatory costs and burdens of CRA increase -- particularly for institutions that have multiple charters -- when different rules apply to the different charters. If the OTS takes this step independently, each of the other agencies may begin adopting separate rules. Given the lack of detail in the statute, the regulations of the different agencies could differ considerably from one another. At what point would it become necessary for each agency to issue Qs&As of its own, making the process still more confused and difficult to manage?

Further, the measures of what kind of lending and investment, products and services, are needed for a Needs to Improve, Satisfactory, or Outstanding rating will depend on which charter the activity happens to be attributable to, rather than on the value to the community. If the purpose of the Proposal is, at least in part, to eliminate artificial distinctions between, say, lending and investments, a separate rule for each agency would only reintroduce artificial distinctions—this time between the activities of different charters. CRA Officers at companies with multiple charters would be spending their time and energy determining where a particular activity will get the most CRA credit, rather than where it will do the most good.

For consumers, the different rules would make meaningless any attempt to compare the CRA performance of different institutions. (While it has always been true that agencies are known to have different subjective standards, at least they are applying the same objective measurements!) One of the reasons CRA ratings are made public at all is to permit comparisons to be made by consumers and the media. This proposed change might have the unintended consequence making such comparisons extremely difficult and confusing the public.

Uniformity can also be beneficial by requiring the agencies to debate the merits and demerits of any change in the rules, thereby creating a tension that forces from the process the best and least costly choice. Should agencies each go their own way, no longer would there be a process to prevent hasty decisions and can-you-top-this rules. While in this case the OTS has issued its proposal for comment, if this is a precedent and the beginning of the parting of the ways, agencies will be making changes in their examiner guidance without the necessity for a formal rulemaking, and the likelihood of impulsive changes without the healthy process of debate will be greater.

### **Enhancing Flexibility**

As we have stated, we support the goals of the OTS proposal, which is to reduce regulatory burdens by providing institutions with greater flexibility to make their own determinations about how best to serve their communities. We stressed our concern in our comments on the Advance Notice of Proposal Rulemaking published jointly by the regulatory agencies. In our comment letter, we said, “If CRA is to continue to be viable into the 21<sup>st</sup> Century, it must be allowed to reflect the real business strategies that institutions develop to meet local needs, to be profitable, and to grow.” In that comment, we recommended seeking ways to ensure that CRA evaluations assess financial institutions in a manner that is more consistent with real business strategies, where CRA-eligible lending and investment can continue to be viewed as a profitable and sustainable market, rather than merely a compliance-driven experience.

In the comment letter, we stated:

[T]he LMI marketplace within the community does not always present opportunities for a large enough number of safe and sound loans or “qualified” investments for all the CRA-covered institutions. Furthermore, the competition

among financial institutions to achieve results in some markets can make it extremely difficult to perform, if the only measure of success is how many loans or investments are racked up. They are forced to make decisions that are not in their own best interests—or even in the best interest of their communities—because their choices are too limited. They may buy loans to bolster their performance in a market. They may make loans at below market rates, knowing that they will not be profitable. They may choose unprofitable investments because they are the only investments to be found.

Recommendations we offered in the comment letter included more and better use of the Performance Context, expanded opportunity for qualified investments and community development activities, and a reduced emphasis on technical minutiae. We also proposed that institutions be given a greater opportunity to shift a bank's practices among lending, investment, and services, so that it can best meet local needs within the context of a profitable business model. One CBA-member bank proposed the adoption of a two-part test to replace the current three-prong approach. Half the weight would be for a retail banking test (encompassing both lending and service) and one quarter for community development test (resembling the wholesale and limited purpose bank test). The remaining quarter would perhaps be at the bank's discretion. This is only one of a number of approaches that we offered along with others to address this concern.

We recommend that these and similar suggestions be reconsidered in lieu of the Proposal. We prefer them because they would be uniformly applicable to all institutions subject to CRA coverage, and because they would, in our opinion, retain a better mix of community development activities in the evaluations than the OTS has here proposed.

We do not believe that most of the changes needed to enhance flexibility and sustainability absolutely require an agency rulemaking; they can be accomplished through the use of examination guidance, and the intelligent application of the performance context. In any case, now that the OTS has reignited the CRA review with its Proposal, we encourage all the agencies collectively to determine how best to achieve beneficial reforms. Regardless of what is ultimately decided, it should be done in a substantially similar manner by all the bank regulatory agencies.

### **Natural Disasters and Acts of Terror**

CRA states that financial institutions have a continuing and affirmative obligation to help meet the credit needs of their communities, consistent with safe and sound banking. No one can deny that the impact of natural disasters and acts of war and terror create significant community needs, in low, moderate, and even upper income communities served by financial institutions. At present, examiners will give credit only to those efforts that primarily target LMI individuals or census tracts with the burden of proof put upon the institution. Because the types of relief banks provide help anyone, regardless of income or LMI location, banks may not receive CRA credit for these initiatives that truly help their communities to rebuild. We therefore recommend that the definition of

community development be expanded to add new language that includes activities that provide disaster relief to geographies, businesses and individuals that have been victims of a natural disaster, acts of terrorism, or war. Once more, however, we recommend that the change be made uniformly through substantially similar rules adopted by the regulatory agencies.

In conclusion, we wish to restate our commitment to the spirit of CRA, and our hope that the agencies will work together, with the assistance of the industry, to establish uniform guidelines for a more flexible and sustainable CRA.

Very truly yours,

Steven I. Zeisel  
Senior Counsel