March 27, 2006

Via www.EGRPRA.gov

Board of Governors of the Federal Reserve System
Attn: Jennifer J. Johnson, Secretary
20th Street and Constitution Avenue, NW
Washington, DC 20551.

Office of the Comptroller of the Currency 250 E Street, SW., Mail Stop 1-5 Washington, DC 20219.

Federal Deposit Insurance Corporation
Attn: Robert E. Feldman, Executive Secretary Washington, DC 20429.

Office of Thrift Supervision
Attn: Regulation Comments, Chief Counsel's Office 1700 G Street, NW., Washington, DC 20552

Re: Comment on the Disclosure and Reporting of CRA-Related Agreements

Ladies and Gentlemen:

On behalf of the National Community Reinvestment Coalition (NCRC), the nation's economic justice trade association of 600+ community organizations, and its members, this timely comment responds to your agencies' request for comments on "which regulatory requirements involving... the Disclosure and Reporting of CRA-Related Agreements are outdated, unnecessary, or unduly burdensome." (Federal Register of January 4, 2006).

For the reasons set forth below, your agencies should urge Congress to remove the so-called "CRA Sunshine" provisions of section 711 of the 1999 Gramm-Leach-Bliley Act (the "GLB Act"). In the interim, your agencies should clarify that only those agreements which would have a material impact on a bank's CRA rating should be disclosed, subject to exemption protective of community groups' First Amendment and petitioning-of-government-for-redress rights.

The five years since the CRA Sunshine provisions went into effect have shown that the theory on which they were based was, at a minimum, flawed. The disclosures filed have not, as the provision's proponent projected, exposed any pattern of improper payments by banks to community groups. NCRC's study of the first 707 agreements found that of the $3.6 billion in loans and investments committed by CRA agreements, only $11.8 million or .3 percent of the total funding devoted towards general operating support for community groups. The allegations that community groups have succeeded in using CRA mainly as a vehicle for funding their organizations are baseless. Instead, the vast majority of the funds were for housing, small business financing and community development activities.

In fact, numerous banks, and regulators such as Office of Thrift Supervision Director John Reich, are on record calling for the repeal of the CRA Sunshine statutory provisions (American Banker of August 17, 2004, "Reviewing the Rules for CRA: A Provision Both Banks, Activists Want to Erase."). As noted therein, NCRC and its members join the banks' and regulators' call for the repeal of the unnecessary burden of Section 711 of the GLB Act.

In the interim the agencies should take steps, consistent with the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA) to reduce unnecessary burdens. On July 11, 2000, NCRC submitted to your agencies a detailed letter and memo outlining ways in which the CRA Sunshine regulation could be constructed to reduce burden and limit infringement on community group's First Amendment rights; that letter and memo are incorporated herein by reference.

One major example will be for your agencies to immediately make clear that by commenting on a bank's expansion application or CRA exam -- a form of public participation that is too rare -- a community group will not subject itself to additional reporting requirements or potential liabilities. More generally, your agencies should clarify that only those agreements which would have a material impact on a bank's CRA rating should be disclosed, subject to exemptions protective of community groups' First Amendment and petitioning-of-government-for-redress rights. Few of the agreements should have such a material impact on CRA ratings.

We appreciate this opportunity to suggest again, now with five years' experience, the repeal of the burdens created by the so-called "CRA Sunshine" provisions of section 711 of the 1999 Gramm-Leach-Bliley Act. If you have any questions, please telephone myself or Josh Silver, Vice President of Research and Policy, on 202-628-8866. Thank you for your attention to the view of NCRC and its members.

Sincerely,

John Taylor
President and CEO

NCRC Letter of 2000 on the CRA Sunshine Regulations

July 11, 2000

Ms. Jennifer J. Johnson
Board of Governors of the Federal Reserve System
20th and C Streets NW
Washington DC 20551

RE: Docket No. R-1069

Dear Ms. Johnson:

The National Community Reinvestment Coalition ("NCRC") submits this letter in response to the joint request by the Office of the Comptroller of the Currency (Docket No. 00-11), Federal Reserve System (Docket No. R-1069), Federal Deposit Insurance Corporation, and the Office of Thrift Supervision (Docket No. 2000-44) for comments on regulations proposed by the agencies (the "proposed regulations") pursuant to the disclosure and reporting provisions of Section 711 of the Gramm-Leach-Bliley Act ("GLB"), Pub. L. No. 106-102, 113 Stat. 1338 (1999) ("Section 711").

NCRC believes that the so-called sunshine provision of the Gramm-Leach-Bliley Act searches vainly for a problem that does not exist. In its aimlessness, "sunshine" has the potential to create significant and real problems for community organizations, banks, and regulatory agencies. It has the potential to violate the First Amendment. By imposing significant regulatory burdens (in direct contrast to the intent of Section 711 (h)(2)(A)), it also has the potential to dramatically decrease the level of community reinvestment in this county, resulting in much fewer small business and home loans being made to low- and moderate-income families and neighborhoods.

The Proposed Regulations Fail to Identify a Harm

The so-called CRA (Community Reinvestment Act) sunshine provision is a policy based on groundless accusations and little, if any evidence. Senator Phil Gramm (R-TX) has repeatedly claimed that community organizations, with budgets in the thousands of dollars, use the merger application process to extort bribes and cash payments from powerful, multi-billion dollar financial institutions. According to the Senator's theory, banks are desperate to avoid community groups from making disparaging remarks about their CRA records to federal regulatory agencies that are considering their merger applications. And according to the Senator's theory, banks will pay community groups thousands of dollars so that they will remain silent during the merger application process. What this theory does not acknowledge is that the regulatory agencies are able to separate out frivolous comments designed to merely impugn banks from substantiated comments based on research and data analysis. Moreover, any bad actor does not need the merger application process if the organization wanted to bribe banks. The organization could merely inform the bank that it would say outrageous things about the bank in the press if the bank did not give the organization cash grants.

In addition to resting on faulty premises, the Senator's theory of extortion does not hold up in reality. NCRC has 720 member community organizations that have negotiated more than 300 CRA agreements with banks. Our member organizations are proud of the agreements; these commitments include more than $1 trillion in loans and investments for low- and moderate-income communities. Our member organizations share agreements publicly either through press releases or on their web pages. NCRC has about 300 agreements on file; we also share the agreements publicly. As a matter of fact, Senator Gramm's staff came to our offices, had access to all these agreements, and photocopied about 20 of them. Subsequent to Senator Gramm's staff, Federal Reserve economists came to NCRC's offices and analyzed all of the agreements in our files for their research projects. This openness on the part of NCRC and its member organizations is behavior that is opposite to that of extortionists.

After sharing the agreements with Senator Gramm's staff, the Senator repeatedly made the claim that most CRA agreements are secret. On the Senate floor during debate on the Financial Services Modernization Act of 1999, the Senator said, "I have presented today, from redacted agreements, secret agreements that have been entered into by community groups and banks, three examples, the *only three we have*, where over and over again community groups are paid cash payments in return for them withdrawing objections which they have made to banks taking specific action, or where they have agreed not to raise an objection." In a press release on Thursday, May 6, 1999, the Senator said, "Part of our problem is that community groups, in negotiating with banks, in virtually every case, insist on the confidentiality of these agreements." Yet, NCRC had made nearly 300 agreements involving negotiations between community groups and banks available to the Senator's staff before the Senator made these statements.

Testifying before the Senate Banking Committee in February of 1999, NCRC President and CEO John Taylor stated that NCRC's analyses of CRA agreements revealed small dollar amounts of grants or loans for the community organizations negotiating the agreements. Of the 1997 and 1998 agreements NCRC had on file, only $160,000 out of the more than $912 billion in total dollars committed were grants or loans to the non-bank negotiating party.[1] This is virtually zero percent.

[1] Testimony of John E. Taylor, President and CEO of the National Community Reinvestment Coalition before the Committee on Banking, Housing and Urban Affairs of the United States Senate, February 25, 1999.

As is abundantly clear, neither Senator Gramm nor any other governmental official has made any meaningful effort to document or detail any abuses that would warrant the scope of the proposed regulations. No report has demonstrated convincingly that community organizations have engaged in corrupt or abusive practices, nor is there any evidence that banks have engaged in unsafe or unsound banking or commercial practices to earn or maintain their CRA ratings. No report has indicated that the current CRA Examination Procedures have failed in any way to uncover abusive activities or unsafe/unsound banking practices. Under these circumstances, no grounds exist for regulating CRA-related speech.

The Proposed Regulations Violate the First Amendment

The sunshine provision will violate the First Amendment. The statute requires parties to CRA agreements or written understandings to disclose these private contracts to Federal government agencies only when the non-governmental party testifies to a Federal agency or discusses CRA issues with a bank. Disclosure is also required if a bank and a community organization engage in discussions about the community organization refraining from making a comment on a pending merger application or CRA exam.

The proposed regulations raise serious Constitutional concerns because they impose significant reporting obligations on private persons not otherwise subject to government regulation based solely on the content of their communications with other private persons (that is, banks) or with the government with respect to conduct expressly encouraged by federal law (that is, comments made under the Community Reinvestment Act of 1977). As such, the proposed regulations violate the free speech and right to petition prongs of the First Amendment. We believe that the statute exposes the regulatory agencies to lawsuits if they implement this part of the statute.

Section 711 and the proposed regulations place real and substantial burdens on speech, especially non-commercial speech relating to a person's opinions of a bank's activities in a particular community. The law and the proposed regulations are an open invitation for abuse. Under Section 711, government officials or their staffs could call banks and ask them if they had any conversations with community groups about community groups refraining from or submitting testimony at CRA public hearings (it is public knowledge that Senator Gramm's staff called banks last year looking for examples of so-called extortionist CRA agreements). Based on one person's versions of the events, including hearsay and innuendo regarding CRA contacts, public officials could claim violations of federal law (Section 711). A pall will be cast over legitimate business relationships among banks, community organizations, and other private sector contractors. Banks and community organizations will be afraid to talk to each other for fear that that their private contracts will be subject to endless investigations and witchunts. Banks and community organizations will also have to keep voluminous records of every conversation to protect themselves against accusations under Section 711.

The preamble to the proposed rule illustrates the arbitrary nature of a regulation that seeks to distinguish among spoken or written words. The preamble suggests that a CRA contact or speech does not occur if an organization discusses in general terms how its product or service is "eligible for CRA credit." But if the organization states that its product or service will impact a bank's CRA performance, then the organization's statement is a CRA contact. The distinction in these two comments is faint; and it is easily conceivable that a regulatory official in the future will decide that the general description of how the product is eligible for CRA credit implies that the organization is trying to help the bank improve its particular CRA rating.

Further confounding matters, the preamble to the proposed rule states that the "rule and the examples do not contemplate that a discussion or contact must include any particular words or phrases, such as "Community Reinvestment Act," "CRA" or "CRA rating" in order to be a CRA contact. Instead, the substance and context of the discussion or contact are the controlling factors." In the very next paragraph, the preamble says that a fundraising letter would not be a CRA contact if it was sent to several banks and businesses asking them to meet "their obligation to assist in making the local community a better place to live and work." While this letter does not mention CRA, one could argue that it implies CRA since CRA includes an obligation to make a community a better place to live and work through its obligation on banks to make credit available to all communities in which they are chartered. When a regulation starts deciding which speech triggers which government requirement on which parties, there is no way for the regulation to be consistent and fair.

Thus, banks and community organizations will never be certain when the proposed regulations would be triggered. Community organizations and banks will never know when agency-driven interpretations may shift, making it impossible to know when speech triggers disclosure requirements and/or otherwise subjects private persons to stiff penalties for violating Section 711. These penalties include a voided contract for not making the proper disclosures or for not disclosing a CRA agreement at all, and can also involve a non-governmental entity having to return grants and/or being barred from negotiating CRA agreements for up to ten years.

Although supposedly targeting the use of CRA-related funds for "personal gain," neither Section 711 nor the proposed regulations make any attempt to define that term. Thus, at what point ordinary salaries paid by non-profit organizations will be viewed as funds used for "personal gain" will merely add to the chilling effect of Section 711 and the proposed regulations.

In *NAACP v. Button*, 371 U.S. 415 (1963), the Supreme Court states, "(T)here is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity..(A) vague and broad statute lends itself to selective enforcement against unpopular causes…In such circumstances, a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however, evenhanded its terms appear…"

The sunshine provision threatens the right to redress grievances since it is vague and broad. Its broad nature can apply to thousands of organizations that do not think of themselves as CRA advocates but may use CRA-related speech in their conversations with banks. These include community development corporations, community development financial institutions, and even for-profit organizations such as loan brokers. In addition to NCRC's 720 community organization members, the National Congress for Community Economic Development counts about 3,600 community development corporations across the country. The National Low Income Housing Coalition has 1,200 member organizations that advocate for, provide, and develop affordable housing. As is readily apparent, this nation has thousands of community-based organizations that may not be aware of the Gramm-Leach-Bliley Act and when their conversations with banks may trigger disclosure requirements.

In its comment letter, Tokai Bank of California mentions that it talks with community organizations every day about CRA. If one bank has daily discussions about CRA with non-governmental third parties, it is clear that the proposed sunshine CRA contact rules will broadly apply to thousands of conversations across the country involving thousands of banks and thousands of community organizations.

Under the First Amendment, neither Congress nor the federal agencies can impose these types of content-driven restrictions on speech or the right to petition government. *See, e.g., Consolidated Edison of New York, Inc. v. Public Serv. Comm'n,* 447 U.S. 530, 540 (1980), *citing, Buckley v. Valeo,* 424 U.S. 1, 25 (1976). The proposed regulations only highlight the First Amendment issues presented by Section 711 by creating a confusing and vague array of lines for private persons to trip over. Under these circumstances, the proposed regulations will expose the agencies to extensive litigation. (A supplemental memo on the Constitutional principles implicated by the proposed regulations is attached as an Appendix to this letter.)

The Proposed Regulations May Violate the Commerce Clause

The proposed regulations also pose the threat of subjecting to federal regulation wholly local contracts and communications between persons and banks located in a single isolated community within a state. The underlying contract would not, in and of itself, be federalized simply because the bank is subject to federal regulation or because the contract may have effects on the bank under the CRA. Similarly, as to the non-bank person, the communication remains wholly local and intra-state, notwithstanding the regulation of the bank as a federally-insured or interstate entity under the federal banking laws. Accordingly, by attempting to reach such contracts and/or communications, Section 711 and the proposed regulations may violate the Commerce Clause. *United States v. Lopez,* 514 U.S. 549, 567 (1995).

The Proposed Regulations Will Frustrate the CRA

If the sunshine regulation retains its CRA "contact" provision, it could drastically reduce the level of CRA-related lending and investing by making it much more difficult for banks, community organizations, and even other for-profit companies to enter into partnerships. Considerable confusion will remain about when a CRA contact or speech triggers disclosure requirements. A natural response will be fewer CRA agreements and contracts, meaning fewer loans and investments reaching traditionally underserved communities.

Even before the sunshine regulations are implemented, NCRC member organizations report that banks are not willing to enter into CRA agreements. According to the Coalition on Homelessness and Housing in Ohio, Fifth Third is balking at renewing its CRA agreement because of sunshine. The Detroit Alliance for Fair Banking reports that local banks have become reluctant to develop specific targets and dollar goals in CRA agreements for lending and investing in traditionally underserved neighborhoods. It is alarming that the proposed regulation is already discouraging banks to work in a public manner with community organizations in planning reinvestment strategies and developing affordable lending products.

The sunshine statute strikes at the heart of CRA. The essence of the Community Reinvestment Act is encouraging members of the general public to articulate credit needs and engage in dialogue with banks and federal banking agencies. CRA motivates dialogue and collaboration for the purpose of revitalizing inner city and rural communities. The sunshine statute, by making CRA-related speech suspect, threatens to reverse more than twenty years of bank-community partnerships and progress.

Recommendations: Seek Department of Justice Review and Create a Fact Finding Commission

Because of the profound damage that the CRA contact portion of the sunshine statute will cause, NCRC asks that the federal banking agencies refrain from implementing the CRA contact rules until they have sought an opinion from the Department of Justice's Office of Legal Counsel. In addition, NCRC urges the Federal Reserve Board to use its authority under the statute to refrain from implementing the CRA contact provisions. Under the statute, the Federal Reserve Board has the authority to exempt agreements and CRA contacts from disclosure requirements. Thus, the Board also has the ability to decide that CRA-related speech is not grounds for disclosing CRA agreements.

Instead of basing disclosure requirements on certain types of written or oral speech, NCRC urges the federal banking agencies to base disclosure upon threshold levels for grants and loans and the material impact standard that NCRC suggests below. In lieu of the proposed regulations, Section 711 offers a "CRA contact" neutral approach for the agencies to determine when disclosure requirements should apply. Based on their existing CRA examination procedures, the federal banking agencies are now in a position to consider the nature of CRA-related transactions and determine what CRA-related transactions are material to CRA ratings without regard to CRA-related communications.

Implemented in the manner NCRC suggests, Section 711 would not place an undue burden on private parties engaging in CRA-related activities. Consistent with the tremendous progress in reinvestment made possible by CRA, Section 711 (h)(2)(A) makes clear that Congress did not intend to place an "undue burden" on parties engaged in CRA-related activities.

The proposed regulations, unfortunately, do create undue burdens. In considering a materiality standard, the agencies also should define the harms they are trying to regulate so as to minimize the burdens placed on banks and community organizations in complying with the standards adopted. After the agencies have identified any harms or abuses, they can focus their regulation on the harms instead of adopting a broad and sweeping regulation.

In this regard, we would urge the Agencies to follow the precedent they established during 1993-95 and (i) conduct their own investigation into CRA activities and agreements with banks and other financial institutions with an eye to using existing Examination Procedures to define what types of transactions merit coverage under Section 711 (NCRC firmly believes that such an investigation also will show that there has been no pattern of abuses with regard to the activities of non-governmental entities engaged in CRA-related work); (ii) consider forming a panel of government, banking and community organization officials to collect comments and data relating to CRA-related banking practices and regulation;[2] and (iii) hold public hearings relating to any proposed regulations to gauge the impact of such regulations on financial institutions and community groups around the United States.

The First Amendment and Commerce Clause issues associated with Section 711 not only affect reinvestment, they also establish a precedent about whether political officials can pass laws that trigger disclosure requirements based on speech under existing laws that they do not like. A quarter century of experience implementing CRA does not establish a basis or demonstrate the need for the drastic measures of Section 711. NCRC and its 720 member organizations regard this law as a grave danger and urge the agencies not to adopt the proposed regulations in their current form.

Below are NCRC's detailed responses to the proposed sunshine rule.

Sincerely,
John Taylor
President and CEO

Detailed Responses to the Proposed Rule on CRA Sunshine

The Material Impact Standard for Disclosure

NCRC believes that the Federal banking agencies have made the incorrect choice regarding the material impact standard for triggering disclosure. The statute mandates that CRA agreements must be disclosed if they are made "pursuant to, or in connection with the fulfillment of the Community Reinvestment Act of 1977." It then defines fulfillment as a "list of factors that the

[2] With respect to the broad array of options available to the Agencies, it should be noted that in 1995, the Secretary of the Treasury appointed the 13-member Financial Services Advisory Commission to study the strengths and weaknesses of the federal banking system. In 1994, the Secretary of the Treasury appointed the 30-member Bank Secrecy Act Advisory Group to assist the Treasury Department in developing more effective money-laundering policies while reducing regulatory burdens. Finally, in connection with the GLB amendments to the Bank Holding Company Act of 1956, the Treasury Department and Federal Reserve Board conducted informal interviews with representatives of securities firms and bank holding companies before formulating new proposed rules regarding merchant banking activities, allowable holding periods, and monitoring and risk management systems.

appropriate Federal banking agency determines have a material impact on the agency's decision" to approve an application (including a merger application) or assign a particular CRA rating.

NCRC maintains that a CRA agreement or contract has a material impact if it results in a bank making a higher number of loans, investments, and services to low- and moderate-income individuals and in low- and moderate-income communities in more than half of a bank's assessment areas and other markets discussed on a CRA exam.[3] A CRA agreement of this nature is more likely to affect a decision by a federal agency to approve a merger application or influence a CRA rating than an agreement that specifies any increase in loans, investments, and services. For example, an agreement is more likely to impact a bank's CRA rating or application if it results in improved performance in six of the ten assessment areas for a particular bank than in two of the ten areas.

The federal agencies have interpreted the statute to mandate that disclosure is required if an agreement mandates any level of CRA-related lending, investing, and services.

The federal agency interpretation of material impact is overly broad and is inconsistent with the intention of the statute. The additional thresholds for disclosure under the statute involve any grant over $10,000 or loan greater than $50,000 directed towards the non-governmental party negotiating the contract or any other non-governmental party on an annual basis. If the regulatory agencies retain their interpretation mandating disclosure of any agreement with loans and grants above these thresholds, then hundreds if not thousands of contracts among banks, community organizations, and other private sector entities will have to be disclosed on an annual basis. As discussed above, there are thousands of community development corporations and other neighborhood-based organizations that engage in regular conversations with lending institutions and who receive loans and grants for affordable housing and community development activities. A broad interpretation of material impact will therefore amount to a widespread and burdensome requirement for both the regulatory agencies and the private sector.

In order to appreciate how the proposed material impact standard will broadly apply, it is necessary to outline the distinction between CRA agreements and smaller scale grants and loans made to community development organizations and other neighborhood-based organizations. On the one hand, CRA agreements are negotiated between banks and community groups and are significant promises by banks to lend to and invest in low- and moderate-income communities. These agreements involve millions or billions of dollars of loans and investments. On the other hand, contracts between banks and community-based development organizations involve grants and loans for affordable housing and economic development. These loans and grants are in the thousands of dollars. Therefore, a broad interpretation of material impact can cover the hundreds, if not thousands, of contracts made among banks, community development organizations, and for-profit companies.

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[3] CRA exams include ratings for states and certain multi-state MSAs. In addition, CRA exams contain discussions and conclusions for MSAs in which an interstate bank has branches and in non-MSA portions of a state in which a lender has branches.

NATIONAL COMMUNITY REINVESTMENT COALITION NCRC

It is clearly not the intent of Section 711 to create widespread and undue burden on a significant amount of private sector activity that happens to be directed towards revitalizing low- and moderate-income communities. Thus, it is imperative to narrow the scope of material impact so it focuses on the CRA agreements involving major promises to increase lending and investing throughout entire low- and moderate-income communities.

NCRC urges the regulatory agencies to reconsider their interpretation of material impact. At the very least, the threshold should be if the agreement is likely to affect a bank's CRA performance in more than one assessment area or market as a result of committing the bank to a higher level of investments, loans, and services in low- and moderate-income communities. This way, the scope is narrowed, pursuant to more quantifiable and objective criteria, to agreements that are more likely to have a material impact on a CRA rating or merger application.

The regulatory agencies must develop quantitative standards for determining if a CRA agreement materially impacts CRA performance in a bank's assessment area(s). For example, a contract specifying a $15,000 community development loan is unlikely to improve a CRA rating in a multi-state metropolitan statistical area (MSA). On the other hand, a CRA agreement is much more likely to impact a CRA rating if it commits a bank to substantially increase its level of lending, investments, and services in the multi-state MSA during a specified time period in the future. A CRA agreement would improve performance on the lending test, for instance, if it committed a thrift to boost its number of home loans to LMI (low- and moderate-income) borrowers and to LMI neighborhoods. It should also result in substantially increasing the share of loans for LMI borrowers and LMI census tracts by five to ten percentage points (from 25 percent to 30 or 35 percent of all loans, for instance). Similarly, the CRA agreement would enhance the thrift's performance on its investment test if the thrift promised to increase its dollar amount of investments so that the thrift's community development investments to assets ratio increased by half a percent.[4] Lastly, improvement under the service test would consist of promises to open new branches in LMI census tracts, to significantly increase the number of low-cost banking accounts for LMI customers, and/or offer significant numbers of financial literacy counseling sessions.

The agencies can use their experience under the strategic plan option in deciding when various levels of loans, investments, and services under CRA agreements will impact CRA ratings. The strategic plan option in lieu of the regular CRA exams involves agency oversight of quantitative standards. Under the strategic plan option, banks propose goals of lending, investing, and services. The lending institutions assign Satisfactory and Outstanding ratings to various levels of their goal attainment. The agencies then verify if the bank goals truly reflect Satisfactory and Outstanding CRA ratings. Applying the current strategic plan examination procedures towards determining material impact of CRA agreements is more objective and predictable for banks and

[4] In the *CRA Handbook*, Kenneth H. Thomas, Ph.D. suggests using 1 percent as the ratio of community development (CD) investments to assets as an Oustanding level of performance under the Investment Test. Most banks in his sample had ratios of less than half of a percent of CD investments to assets. If a CRA agreement resulted in the ratio increasing by half of one percent, the agreement would be likely to improve the rating on the investment test. See the *CRA Handbook*, 1998, McGraw Hill.

community groups than the current proposed regulations' application of CRA contacts and material impact.

Exemptions from Written Agreement

The statute exempts a CRA agreement or written understanding from disclosure if it involves an individual mortgage loan. NCRC believes that this would also include an agreement that pledges several mortgage loans in a future time period. An agreement for making several loans is simply an agreement that promises a bank to make a series of "individual" mortgage loans. The reference to mortgage loan includes any loan secured by real estate, and not only a home purchase, home improvement or refinancing loan.

NCRC maintains that a commitment to make multiple loans to individuals, businesses, farms or other entities does not have to name a specific business or organization in order to qualify for the statute's exemption from disclosure. The statute exempts "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."

The reference to a specific contract does not limit the exemption to a contract with a specific organization or business or a specific loan. NCRC believes that a CRA agreement committing a bank to make a specific number or dollar amount of small business or small farm loans in a specific geographical area would meet the criterion of a specific contract.

NCRC also believes that below-market rate means a rate that is 200 basis points below a published rate in a newspaper, advertisements, and other media. Given the rise of risk-based pricing, it is becoming more common for lending institutions to offer lower interest rates than those advertised to borrowers they consider well-qualified. A few years ago, a loan offered at one percent below prevailing rates would be considered below-market rate, but we believe that this is no longer the case. Hence, NCRC suggests the 200 basis point standard.

Exempt Status of Unilateral Pledges

Senator Phil Gramm (R-TX), in a lengthy interview in the *American Banker* on June 9 suggests that disclosure requirements should apply to pledges that are made unilaterally by banks and that are not signed by non-governmental third parties. The Gramm-Leach-Bliley Act simply does not include unilateral pledges as contracts requiring disclosure. NCRC agrees with the example in the preamble of the proposed rule stating that unilateral pledges by banks are not subject to disclosure.

Fair Lending Enforcement Exemption

NCRC is pleased that the Federal regulatory agencies exempted fair lending enforcement activities from the definition of written agreements. Activities to ensure compliance with the Equal Credit Opportunity Act (ECOA) or the Fair Housing Act (FHA) necessarily involve audits and mystery shopping of front-line bank employees. Banks sometimes make contracts with third parties to conduct the mystery shopping. Public disclosure of these contracts would tip off the loan officers and defeat the purpose of the mystery shopping

CRA Contact or Speech

As discussed above, NCRC believes that the part of the statute triggering disclosure based on CRA-related speech is unconstitutional. The proposed exemptions for certain types of CRA-speech would only compound the First Amendment difficulties as discussed below. Since the Federal Reserve Board has the authority to exempt agreements from disclosure requirements, the Board also has the ability to decide that CRA-related speech is not grounds for disclosing CRA agreements. As discussed above, NCRC believes that any attempt to impose disclosure obligations with respect to CRA-related activities must be done on a "CRA contact" neutral basis and should relate only to activities that meet a well-defined standard of materiality.

Exemptions for Federal Agency Requests for CRA Comments

In addition to the problems discussed above, the Federal banking agencies' proposed rule makes arbitrary exceptions of what counts as CRA contacts (or discussions about CRA that trigger disclosure requirements). A community group that testifies on its own volition at a merger hearing is subject to disclosure. In contrast, the community group is not subject to disclosure if a federal regulatory agency asked the community group for comments on a pending CRA exam or if the community group made CRA-related comments at widely attended conferences or symposium.

These carve-outs compound the First Amendment difficulties and could taint the CRA process. Under this proposal, the Federal agencies can contact community groups that are predisposed to say what the agencies want to hear about CRA, and then these groups are exempt from disclosure requirements. Also, the Federal agencies can exempt CRA comments at their conferences but, of course, apply disclosure requirements during CRA public hearings on mergers. The solution to this arbitrariness is to simply rule that comments during merger applications, CRA exams, or at any other point in the CRA process do not trigger disclosure requirements since the Federal agencies invited the comments through their own regulations implementing long-standing banking law.

Exemptions Excluding Some Discussions with Banks

The Federal agencies also wonder whether they should include as a CRA contact: 1) written and oral testimony on CRA to the agencies, and 2) discussions with banks about providing or refraining from providing comments relating to their CRA records. The agencies wonder if they should exclude discussions with banks about their CRA ratings and CRA performance while the bank is undergoing a merger. These discussions would be excluded if they did not involve discussions about whether a community group should refrain from or submit testimony to a federal agency.

Sound confusing? NCRC believes this is a convoluted mess. How would it be possible to determine for sure if a community group only discussed a CRA rating with a bank and not whether the group will submit comments to a Federal agency? How will it be possible to make these distinctions unless the federal agencies tap the phones or use some other under-handed technique to ferret out what precisely was said? The regulatory agency may have to make the final decision based on claims by the bank and counter-claims by the community group on what was said.

Section 711 does not include references to discussions about whether or not community groups will submit CRA-related comments. This aspect of the proposed regulation once again illustrates the arbitrary nature of regulating speech since it exceeds the statutory requirements. Likewise, future excesses are also very possible in interpreting an unconstitutional statute.

Time Limits for CRA Contact

Using extremely long time limits for determining if a CRA contact triggers disclosure will chill discussions between community organizations and banks. In particular, the agencies wonder if discussions with banks up to 2 years before an agreement or up to 90 days after the agreement should trigger disclosure requirements. Banks and community organizations will have difficulty remembering conversations up to 2 years before an agreement. Again, the regulatory agencies would end up relying on accusations, hearsay, and innuendo to decide what is a CRA contact if they base their trigger on long time periods. A ninety-day time period is likewise a period of time that is longer than most merger application decisions and comment periods. It is possible for a community group to make an off-hand CRA-related comment to a bank or regulatory agency three months after the agreement is signed, and then not realize that their comment just triggered a disclosure requirement.

Long time periods for CRA contacts would create a massive record-keeping burden. Since the parties would not know whether a given set of communications might one day become covered (for example, because they lead to a covered agreement or because a community group makes a comment about a bank for the first time), banks and community organizations would have to keep detailed records of *all* communications just to protect themselves from the vagaries of Section 711 and the proposed regulations.

If the final CRA disclosure requirements remain time-based in any manner, NCRC would suggest using the public comment time period in the case of merger and other applications. In the case of CRA exams, the time period would run from the day the exam is announced (in the advance notices sent by the agencies) to when the exam occurs. These time periods make sense because they are already recognized as official time periods. Parties to agreements will have an easier time remembering events in these time periods than the much longer time periods that are proposed by the agencies.

In the June interview with the *American Banker*, Senator Gramm suggests that "any meeting between a community group and a bank about CRA investments should trigger disclosure requirements." An indefinite time period as the Senator suggests will result in enormous burdens by all parties in remembering and tracking any meetings or negotiations concerning loans, investments, and grants in traditionally underserved communities.

Exemption for "Arms-Length" Transactions by For-Profit Organizations

The agencies ask if certain secondary market activities should be exempt from the CRA speech trigger because they are conducted on a daily basis, they are conducted on an "arm's length basis," and they do not involve any "coercive" aspect. This exemption would apply during the course of the transaction even if the parties discuss whether the activities "involve loans within the institution's CRA assessment area, or would otherwise improve the institution's CRA performance."

This example clearly shows the dangers and biases inherent in any rule regulating free speech. The agencies are showing a bias towards institutions (presumably for-profit organizations) that operate on the secondary market. The agencies show no such concern about the discussions that community development financial institutions, community development corporations, and other nonprofit organizations may have with banks. Worse, the agencies imply that discussions with nonprofit organizations involve a "coercive" aspect while secondary market institutions have discussions on an "arms-length basis" and in a non-coercive manner.

NCRC's 720 community organization members reject this proposal as biased and arbitrary. It reveals the ugly pitfalls accompanying a rule regulating free speech. Instead, NCRC calls upon the agencies to rule that CRA contacts or speech cannot trigger disclosure requirements.

Determining Dollar Values for Threshold Levels

The federal banking agencies request comment for calculating dollar amounts for threshold levels when an agreement does not specify the time period in which grants and loans will be directed to the non-governmental party. In these cases, the federal agencies should rely upon the reporting of banks and community organizations. Because banks are already subject to the agencies' CRA examination procedures, they already report many CRA-related grants and loans to the agencies. There is also no evidence that community groups have anything to hide and will fail to honestly report to the agencies the dollar amount of grants and loans they receive under an agreement. If the dollar amount exceeds the $10,000 threshold for a grant or a $50,000 threshold for a loan, community groups and banks will provide the appropriate disclosures for either specific or general operating grants.

The agencies also ask how to calculate the value of loans and grants for CRA agreements that commit a lender to open a branch or commence a service that is not related to making a grant or loan to a non-governmental party. NCRC's response to this is simple – there is nothing in these instances for the federal regulatory agencies to calculate in terms of loans and grants! These agreements would have no disclosure requirements.

Affiliates of Depository Institutions

The proposed rule covers CRA agreements that are made with affiliates of depository institutions that the parent institution opts to have examined under a CRA performance evaluation. An unintended consequence of this is that depository institutions will have their affiliates make CRA agreements and then chose not to have their affiliates examined under CRA performance evaluations. NCRC believes that the enforcement of CRA and the nation's fair lending laws will be weakened as a result.

NCRC has already seen instances where the CRA and fair lending record of the depository institution undergoing a CRA performance evaluation is better than the record of the affiliate it chooses not to have examined. This trend may intensify, especially if depository institution affiliates make agreements that have relatively small impacts (for example, commitments for grants of around $10,500) and then chose not to be scrutinized by CRA exams. The statute states that "nothing in this act should be construed to repeal any provision of the Community Reinvestment Act of 1977." A rule that encourages affiliates of depository institutions to opt out of CRA exams is contrary to the spirit of this provision.

NCRC suggests that the regulatory agencies automatically consider affiliates of depository institutions covered under any CRA agreement. This would avoid gaming the CRA exam process by having affiliates enter into small CRA agreements. It would also simplify reporting procedures. Affiliates would report at the outset of agreements or have their parent institution report. They would be free of the hassles of having to inform a non-governmental party that any contracts are covered at a later date because the parent institution opted to include the affiliates on the CRA exam. Considerable time may have passed between a signing of a contract and a CRA exam, making it difficult for the affiliate and community groups to keep track of disclosure requirements as they are currently proposed.

Means of Disclosure

Text of the Agreement

The statute and proposed rule require two types of disclosure. The first is disclosing the complete text of the agreement. The second involves annual reports by the community organization about the use of grants and loans and annual reports by the lending institutions concerning grants, loans, and investments they made under the agreement.

NCRC agrees with the proposed procedure of requiring the bank to disclose the text of the agreement, and requiring the non-governmental party to disclose the text of the agreement only if requested to do so by an agency. There is no compelling reason why both the bank and a non-governmental party must both initially disclose the same agreement to the regulatory agencies.

In many cases, a bank will have its affiliates regulated by two or three of the federal bank regulatory agencies. To avoid any confusion about which agency should receive the agreement, the agencies ought to establish an interagency office or room at the FFIEC (Federal Financial Institution Examination Council) for receiving and storing the agreements.

Annual Reports

NCRC agrees with the Federal agencies that non-governmental parties should not be required to submit annual reports during the years in which they did not receive grants or loans under the agreement. While other organizations may have received grants and loans under the agreement, it would be logistically impractical for the negotiating party to report on how the grants and loans were used by the other parties. In many cases, the banks may be making relatively small grants to hundreds of community groups over a multi-state area. It is also unreasonable for the non-negotiating parties to be required to report since they may not even be aware that they received grants or loans because of a CRA agreement.

NCRC appreciates the distinction that the federal banking agencies made between grants used for specific purposes and those for more general operating expenses. This proposal has the potential to simplify reporting requirements. Under the procedures for specific grants, a community group can indicate that the grant was used for a specific program such as a financial literacy event or for the purchase of specific equipment such as computers. It is useful for the non-governmental party to know that they can indicate that the grant or loan was used to purchase equipment in addition to supporting a project or program. If the reporting procedure entails a brief description detailing the specific uses of the grant, then the reporting procedure has indeed been simplified.

Under the procedures for general operating grants, NCRC recommends that the Federal regulatory agencies indicate which tax reports and other forms are acceptable. For general operating support, the statute requires that non-governmental parties must provide a list indicating if the grant or loan was used for compensation, administrative expenses, travel, entertainment, consulting, professional fees, and other expenses. In the preamble to the proposed rule, the banking agencies say that the use of tax reports and other forms are acceptable if they include the required information. This is confusing since the agencies also say that the IRS 990 form and other tax forms they inspected require more detailed information than required by the statute. NCRC suggests that the agencies clearly stipulate in the regulation which tax forms are acceptable. Then they can add that other reports and forms are acceptable if they provide the required information.

The public record from the Congressional deliberations over the Gramm-Leach-Bliley Act support the use of the IRS 990 form as the means of disclosure. The Manager's report accompanying the legislation states that, "The Managers intend that…the appropriate Federal supervisory agency may provide that the nongovernmental entity or person…fulfill the requirements of subsection *c* by the submission of its audited financial statement or its Federal income tax return." In addition, Representatives Jim Leach (R-IA) and John LaFalce (D-NY) engaged in a colloquy on the eve of the House vote on Gramm-Leach-Bliley in which they reiterated and emphasized the use of Federal income tax returns as satisfying the disclosure requirements.

NCRC also appreciates the proposal for allowing the use of annual reports to meet the reporting requirements for general operating grants. The agencies propose to allow the non-governmental party to include expense categories specified in the statute in their annual reports. Then, the non-governmental party can list all of their expenses for the year. The federal agencies will then allocate the general operating grant dollars among the expense categories in the same proportion as the non-governmental party spent their overall funds among the expense categories. This proposal is consistent with the statute's language stating that the sunshine requirement should "not impose an undue burden on the parties."

It would be useful for the federal regulatory agencies to prepare sample disclosure reports as they contemplate in the preamble to the proposed rule.

NCRC believes that the consolidated procedures for reporting should be available to the parties if they have two or more agreements instead of limiting the procedure to parties with five or more agreements. Under the proposed consolidated reporting procedures, the parties can produce one report that shows how the funding from all the agreements was used, instead of producing a report for each agreement. The statute does not limit the consolidated reporting procedure to any number of agreements. There is no reason why the consolidated reporting procedure for two or more agreements cannot produce the same level of information as two or more separate reports.

To answer the query from the regulators about whether any additional items should be included in annual reports, NCRC responds that the proposed regulation covers enough items to thoroughly document how funds are used. Any more items amount to regulatory burden.

More Stringent than the Freedom of Information Act

NCRC takes exception to the suggestion that Section 711 of the statute implies more stringent disclosure requirements than the Freedom of Information Act (FOIA). Just because the statute refers to a requirement to disclose an agreement in its entirety, does not mean that a new statute should trump the protections and procedures of a well-established and widely used law like FOIA. Section 711 (h)(2)(A) of the GLB also states that the agencies must ensure that "proprietary and confidential information is protected."

FOIA's rules and procedures should apply to CRA agreements as they now apply to merger applications and other procedures involving CRA. In particular, no party to an agreement should be required to disclose an agreement until an agency has ruled on a FOIA request.