



NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Benjamin M. Lawsky
Superintendent

November 10, 2014

Robert deV. Frierson
Secretary
Board of Governors of the Federal Reserve System
20th Street & Constitution Avenue NW
Washington, DC 20551

Robert E. Feldman
Executive Secretary
Attention: Comments, Federal Deposit Insurance Corporation
Federal Deposit Insurance Corporation
550 17th St. NW
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Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
Mail Stop
400 7th Street SW
Washington, DC 20219

Re: Comments on Interagency Questions and Answers Regarding Community Reinvestment

To Messrs. deV. Frierson and Feldman and the Legislative and Regulatory Activities Division:

The New York Department of Financial Services (“DFS” or the “Department”) appreciates the opportunity to comment on the Interagency Questions and Answers Regarding Community Reinvestment proposed by the Office of the Comptroller of the Currency (the “OCC”), the Board of Governors of the Federal Reserve System (the “Board”) and the Federal Deposit Insurance Corporation (the “FDIC”) (together, the “Federal Agencies”). The Federal Agencies’ proposed questions and answers (the “proposed Q&A”) (Docket ID OCC-2014-0021; Federal Reserve Docket No. OP-1497) modify the existing final Interagency Questions and Answers Regarding Community Reinvestment (the “existing Q&A”).¹

The Department provides these comments based on 35 years of experience supervising New York State chartered institutions for compliance with the New York Community Reinvestment

¹ “Community Reinvestment Act, Interagency Questions and Answers Regarding Community Reinvestment,” OCC, Board, FDIC, and Office of Thrift Supervision, Treasury (OTS), March 11, 2010, available at <http://www.ffiec.gov/cra/pdf/2010-4903.pdf>.

Act (the “NY CRA”).² New York State enacted the NY CRA one year after the enactment of the federal Community Reinvestment Act (the “CRA”). The two laws share the common objective of encouraging depository institutions to help meet the credit needs of the communities where they operate, and share many rules and procedures. The biggest difference between the CRA and the NY CRA is their respective geographic focuses: the CRA focuses on an institution’s activities within the national assessment area, while New York’s law focuses on an institution’s activities within its New York assessment area.

The Department believes a majority of the points of clarification in the proposed Q&A are necessary and appropriate, however, the Department has one general concern and a number of specific consumer protection and community development concerns. These concerns are detailed below.

A. General Concern

The proposed Q&A may provide an undue advantage to large banks in their CRA compliance. Many of the provisions of the proposed Q&A focus on the community development test, which is applicable only to large banks, wholesale banks, and banks that have been approved for evaluation under a strategic plan. In addition, as detailed below, the Department notes that even in the context of the lending test, which is applicable to banks other than large banks, positive CRA consideration for innovative and flexible lending practices appears to be available only to large banks.

B. Specific Concerns

(1) Innovative and Flexible Lending Practices

The existing Q&A contain a provision noting that small dollar consumer loan programs “may warrant favorable consideration as activities that are responsive to the needs of the institution’s assessment area(s)”³ under the lending test.⁴ The existing Q&A also note, with respect to large banks, that a bank’s use of innovative or flexible lending practices is one of five factors examiners review as part of the lending test.

In the proposed Q&A, the Federal Agencies encourage large banks to do more to promote these small dollar loan programs by suggesting additional innovative or flexible practices with respect to small dollar lending programs. The idea is that innovative or flexible practices are considered favorably when they “augment the success and effectiveness of the lending program.”⁵

Specifically, the proposed Q&A mention “outreach initiatives” and “financial counseling targeted to low- or moderate-income (“LMI”) individuals or communities.”⁶ The proposed Q&A note that the combination of these two activities “may be favorably considered as an innovative

² See New York Banking Law Section 28-b and Part 76 of the General Regulations of the Superintendent.

³ Existing Q&A, § __.22(a)-1.

⁴ The lending test applies to small, intermediate-small and large banks for the purposes of both the CRA and the NY CRA.

⁵ See proposed Q&A, § __.22(b)(5)-1 A1., third bullet.

⁶ Specifically, the proposed Q&A explain, “The institution’s efforts to encourage the availability, awareness, and use of the small dollar loan program to meet the credit needs of low- and moderate-income individuals, in lieu of higher-cost credit, should augment the success and effectiveness of the lending program.” Id.

or flexible practice to the extent that they augment the success and effectiveness of the related loan program.”⁷

The Department has three concerns regarding this proposed Q&A. First the Department is concerned that the proposed Q&A are not encouraging all banks to use innovative or flexible practices, only large banks. Given that this area of lending holds tremendous opportunity for financial inclusion, all financial institutions, including community banks and community development financial institutions, whose missions are in large measure to respond to the needs of the communities they serve, and which tend to be categorized as small or intermediate-small banks for CRA purposes, also must be able to obtain positive CRA consideration for using innovative or flexible practices to encourage the success of small dollar loan programs. The limitation appears to be structural, as the proposed revisions are made to the part of the existing Q&A that apply only to large institutions.⁸

DFS also is concerned that there is insufficient emphasis on consumer protection and the safety and soundness of individual consumer loans. Under the existing Q&A, the lending test identifies the establishment of loan programs “that provide small, unsecured consumer loans in a safe and sound manner (i.e., based on the borrower’s ability to repay) and with reasonable terms”⁹ as a CRA creditable lending activity. The proposed Q&A, in describing innovative or flexible lending practices, contain similar but slightly different language, noting that a bank may establish outreach initiatives or financial counseling targeted to LMI individuals or communities “[i]n connection with a small dollar loan program offered in a safe and sound manner and with reasonable terms.”¹⁰

The difference between the existing and proposed Q&A is the inclusion in the former of the clause, “based on the borrower’s ability to repay.” This is a small but important difference. It emphasizes that offering loans “in a safe and sound manner” is evaluated with respect to individual loans and not the entire portfolio of loans. Thus, DFS believes that the Federal Agencies, at a minimum, should include this language in its final Q&A.

DFS further notes that the proposed Q&A do not address any specific consumer protections as the FDIC and the OCC did in their respective 2013 guidance on bank deposit advance products.¹¹ That guidance states that deposit advance products “must comply with all applicable federal laws and regulations” and specifically identifies the unfair or deceptive acts or practices provisions in the Federal Trade Commission Act and rules regarding pricing disclosures and advertising in the Truth In Lending Act (and Regulation Z), as well as other provisions of the Electronic Funds Transfer Act (and Regulation E), the Truth in Savings Act (and Regulation DD), and the Equal Credit Opportunities Act (and Regulation B).¹² The Department urges the Federal Agencies to reference the same consumer protections in their final Q&A.

⁷ Id.

⁸ Existing Q&A § __.22(b)(5)–1 asks, “What is the range of practices that examiners may consider in evaluating the innovativeness or flexibility of an institution’s lending under the lending test applicable to *large institutions*?” (emphasis added).

⁹ Existing Q&A, § __.22(a)–1 A1., second bullet.

¹⁰ Proposed Q&A, § __.22(b)(5)–1 A1., third bullet.

¹¹ Bank deposit advance products are similar in many respects to payday loans.

¹² “Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products,” FDIC, November 21, 2013; “Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products,” OCC, November 26, 2013.

Finally, the Department is encouraged that the Federal Agencies chose the term “financial counseling” rather than “financial education” or “financial literacy.” DFS believes that counseling implies a more direct interaction with consumers. DFS does, however, encourage the Federal Agencies to clarify that this counseling be provided by reputable organizations whose missions focus on the particular needs of LMI clients.

(2) Community Development-Economic Development

The Federal Agencies propose to provide further examples of economic development under the community development test, which is applicable to large and wholesale banks. The proposed Q&A provide additional examples of activities that could be deemed to promote economic development for CRA purposes.

DFS is supportive of the examples and further recommends including a “Quality of Jobs” element. Most part-time positions, although considered permanent,¹³ do not include employer-provided benefits. Employer-provided benefits are essential to job security and upward mobility for LMI individuals and communities. The Department believes that the public is better served by creating jobs with benefits for LMI individuals rather than part-time jobs that do not include benefits. The Department has been focused on this issue with its regulated banks and would welcome the opportunity to meet with the Federal Agencies to discuss limiting CRA credit for job creation to jobs that include employer-provided benefits.

(3) Community Development Loans

The Federal Agencies propose adding an example to the Q&A clarifying how examiners may consider community development loans that have an energy efficiency component or that use energy efficient technologies in addition to having a community development component.

The Department strongly supports investments in energy efficient technologies and construction. The proposed Q&A, however, should require a direct impact on LMI communities for this to be consistent with the overarching purpose of the CRA: to benefit LMI individuals or communities. The new example in the proposed Q&A encourages “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 cost of operations is indirect*, such as reduced cost of providing electricity to common areas of an affordable housing development.”¹⁴ The Department does not believe an indirect benefit is sufficient. CRA consideration should only be given to a bank that demonstrates a direct benefit to LMI individuals, households, or areas.¹⁵

¹³ To qualify under existing Q&A §__.12(g)(3)–1, economic development means the creation of “permanent” jobs.

¹⁴ Proposed Q&A, §__.12(h)–1 A1., sixth bullet (emphasis added).

¹⁵ For investments in LMI areas, CRA credit should be prorated in accordance with the proportion of the benefit flowing to LMI individuals or households, or to small businesses, as compared with non-LMI individuals or households. For example, if twelve out of twenty homes in a certain area are LMI homes, then an investment or loan that facilitates energy efficiency improvements in this area could be prorated to provide 60% credit for this investment or loan.

Moreover, “green” technologies represent an area in which private dollars already are flowing to fund projects. Allowing indirect benefits to suffice has the potential to make the CRA meaningless for large banking institutions.

(4) Community Activities that Revitalize or Stabilize Non-Metropolitan Middle-Income Geographies

The Federal Agencies also have proposed to add an example to existing Q&A § __.12(g)(4) under the community development test of activity related to high-speed communication infrastructure. They note that such investments can revitalize or stabilize underserved non-metropolitan middle-income geographies and propose to give credit for loans that finance broadband infrastructure.

The Department strongly supports enhancing access to broadband infrastructure and agrees with the premise set forth in the proposed Q&A that broadband internet service is crucial to global competitiveness, job creation, innovation, financial inclusion and the expansion of markets for American businesses. The Department nevertheless has the same concerns as noted above under (3) for energy efficient community development loans: banks should be required to demonstrate a direct impact for LMI individuals, households or areas. As drafted, the proposed Q&A would give positive consideration to “new or rehabilitated communication infrastructure, such as broadband internet service, that serves the community, *including* low- and moderate-income residents.”¹⁶

The Department believes that merely requiring the inclusion of LMI communities is insufficient. The community development investment should go directly to LMI communities. This could include schools located in LMI areas or serving a majority LMI population, businesses located in LMI areas, LMI housing developments where a majority of housing units will be reserved for LMI households, homeless shelters, organizations providing job or community reentry training for former inmates, survivors of domestic violence or disabled persons, or other highly vulnerable populations that are overwhelmingly likely to be LMI and to lack such high-speed access. Broadband infrastructure investment, like green energy, is an area of significant private investment. The purposes of the CRA are best fostered when these investments go directly to LMI communities.

The Department appreciates this opportunity to comment.

Sincerely,



Joy Feigenbaum
Executive Deputy Superintendent
Financial Frauds & Consumer Protection

¹⁶ Proposed Q&A, § __.12(g)(4)(iii)–4 A4., sixth bullet (emphasis added).