

N A A H L
NATIONAL ASSOCIATION OF AFFORDABLE HOUSING LENDERS

May 5, 2008

Office of the Comptroller of the Currency
250 E Street, SW, Mail Stop 1-5
Washington, DC 20219
regs.comments@occ.treas.gov
Docket ID OCC-2007-0012

Mr. Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Comments@FDIC.gov
RIN 3064-AC97

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Regs.comments@federalreserve.gov
Docket No. OP-1290

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Regs.comments@ots.treas.gov
ID OTS-2007-0030

Dear Sirs and Madams:

This is a follow-up to our meeting with FFIEC representatives on April 4. We very much appreciate having had the opportunity to meet and share our concerns about CRA examination procedures. This letter provides clarification regarding the current regulatory treatment of unfunded, legally binding Low Income Housing Tax Credit (LIHTC) investments, and the potential negative impact on affordable housing finance.

Background

The Federal LIHTC program was first created as part of the Tax Reform Act of 1986, and the LIHTC is now considered the most important resource for creating affordable rental housing in the United States. Its success is due in large part to investments by financial institutions and their receipt of CRA credit for these investments. Investment by banks in LIHTCs is even more important today than in the past, because of both the current economic environment, as well as the loss of equity investors. It is critical that the agencies do not further destabilize the market through regulatory actions that discourage bank investments.

Recommendation

NAAHL recommends that CRA regulatory procedures serve to encourage, rather than discourage, bank investment in affordable housing. To that purpose, financial institutions should receive credit for the full amount of their LIHTC investments at the time the investments are committed and in future years while the investments remain on the financial statements of the institution. By full credit, we mean equal consideration and treatment for both the funded and unfunded amounts of any LIHTC investment. Further, we recommend the agencies publish a policy statement or provide written guidance to that effect. Such communication would offer clear and definitive guidance for banks and examination staff alike. The presence of very specific guidance would provide the assurance banks need to make such investments.

Current Practice

There is a practice among some banking regulatory agencies of giving credit only for the amount of investment funded during the CRA review period and lesser credit for the outstanding balances of prior period investments. This practice apparently contradicts the current Q&A, __.23(e), which the proposed Q & A would amend. Specifically, our concern is that by not giving full credit for total exposure (outstanding balance plus unfunded commitments), for each year the asset remains on financial statements, the agencies are discouraging banks from investing in LIHTCs in favor of other investments that are less critical, but fully funded at the front end and have a liquid secondary market. Though LIHTC investments can be sold, the secondary market for such assets is very narrow and so they are typically held through the tax credit compliance term (15 years after development is completed).

CRA Regulation & Q&A

NAAHL believes that the current practice of not giving full weight to unfunded, legally binding investments is not only harmful to the affordable housing industry, but contrary to the spirit of the CRA and its implementing regulations. For example, 12 CFR 25.23(e) defines criteria for evaluating a bank's investment performance, with the dollar amount of qualified investments being the first criterion. The July 12, 2001 Interagency CRA Questions and Answers document ("Q&A") provides further clarification regarding treatment of investments.

"... examiners will determine the dollar amount of qualified investments by relying on the figures recorded by the institution according to generally accepted accounting principles (GAAP). Although institutions may exercise a range of investment strategies, including short-term investments, long-term investments, up-front commitments that are funded over a period of time, institutions making the same dollar amount of investments over the same number of years, all other performance criteria being equal, would receive the same level of consideration. Examiners will include both new and outstanding investments in this determination. The dollar amount of qualified investments will include the dollar amount of legally binding commitments recorded by the institution according to GAAP."

According to this interpretation, regardless of whether the investment is an up-front commitment or one that provides funds over time, such as a LIHTC investment, it will receive the same level of consideration. The regulation and the Q&A state that the dollar amount of qualified investments is to include legally binding commitments recorded by the institution according to GAAP.

LIHTCs' Unfunded Investments Are Legally Binding Liabilities

Verification that unfunded commitments are legally binding is realized in a number of ways. First, promissory notes provided by investors to make payments over a period of time contain language that makes collection of such notes enforceable. Investors are subject to legal action if they do not fulfill on their obligation. Further, syndicators pledge such notes as collateral for bridge loans. Bridge lenders review the notes to ensure enforceability and typically require minimum risk ratings for the obligors.

Additionally, the full exposure (balance and unfunded commitments) must be disclosed in 3 reports: the Call Report, the Public Welfare Investment (PWI) cap analysis, and financial statements.

- **Call Reports:** National banks are required to report legally binding, unfunded commitments as a liability, evidencing its on-balance sheet treatment in accordance with GAAP
- **Part 24 Public Welfare Investment Cap:** There is consistency between the CRA and PWI regulations in that legally binding, unfunded investments are included in the dollar amount of qualified investments for CRA and the aggregate limit for PWI investments. There is a disconnect, however, between application of 12 CFR 24 relating to a bank's limit for Part 24 Public Welfare Investments, and 12 CFR 25 relating to full recognition of the dollar amount of qualified investments
- **Financial Statements:** GAAP as well as Emerging Issues Task Force (EITF) 94-1 require that legally binding, unfunded commitments be reported as a liability on financial statements

Summary

We urge the agencies to correct the existing practices described above and publish a policy statement or otherwise provide additional written guidance to that effect as soon as possible. The presence of very specific guidance would encourage banks to continue to invest in LIHTCs which remain extraordinarily important to the development of affordable rental housing. It would remove the disincentive which may cause banks to de-emphasize LIHTC investments and focus on those investments that immediately fund and have a deep secondary market. Given the current conditions of the LIHTC market, time is of the essence.

Thank you for your thoughtful consideration of these recommendations.

Sincerely,

Judith A. Kennedy
President and CEO
National Association of Affordable Housing Lenders (NAAHL)



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