



REINVESTMENT ALERT

Woodstock Institute

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CRA “SUNSHINE” RULES AND YOU: How Nonprofits Can Avoid Being Left in the Dark on New Disclosure and Reporting Requirements

What is “Sunshine” and How Did it Come About?

“Sunshine” is the shorthand name for a new provision in federal law that requires nonprofits and others to disclose and report to federal regulators on certain agreements, contracts, or grants that they have with banks. This Alert outlines the basic things that nonprofits need to know in order to comply with the rules. It discusses what types of agreements are covered under “Sunshine;” what constitutes a “Community Reinvestment Act (CRA) Communication” for the purposes of “Sunshine;” and how to disclose and produce annual reports for “Sunshine” agreements. While “Sunshine” is, in the view of many community advocates and bankers, an unnecessary provision that arbitrarily imposes reporting requirements on private transactions, compliance should not be too burdensome. Organizations can generally comply with the law using financial documents that they already have on hand. Woodstock Institute is taking the stance that it is easier for groups that are not sure if “Sunshine” applies to them to assume it does rather than spend time trying to figure out whether or not they are covered.

In 1999, Congress passed the Gramm-Leach-Bliley Financial Modernization Act (or “GLBA”) and President Clinton signed it into law. GLBA broke down the barriers that have existed since the Depression between banks, insurance companies, securities firms, and mortgage companies. These firms can now legally merge, acquire one another, and own one another for the first time in almost 70 years. Community groups, nonprofits, and other advocates for low-income communities fought to expand the Community Reinvestment Act (CRA) to those companies that banks could merge with/acquire under the new law. CRA encourages banks and savings and loans to serve all communities, including low and moderate-income areas, where they take deposits and in which they are chartered. However, these advocates were unsuccessful, and GLBA does *not* extend CRA to mortgage companies, insurance agencies and securities firms.

As GLBA was being debated, certain legislators who do not support CRA argued that community groups and nonprofits were unfairly extracting money from banks using CRA pressure. “Sunshine” came out of this notion that nonprofits should be more accountable to communities about how they use their funds. Though many argued against “Sunshine,” including nonprofits, financial institutions, legislators, and others, the provision passed and is now part of GLBA. It is important to note that the CRA has not been changed in any way by this provision. Also, those who opposed “Sunshine” were very successful in encouraging reasonable reporting requirements. However, there remains substantial confusion over the regulation. This document should help clarify “Sunshine” rules for nonprofits.

Is Your Agreement with a Bank Covered under “Sunshine?”

If *all* of the following criteria are met, then it is:

- The agreement is between one or more insured depository institutions (banks, savings and loans, or their affiliates) and one or more nongovernmental entities or persons (also known as NGEPs, includes nonprofits and for-profits).
- The agreement is in writing.
- The agreement involves cash payments or grants totaling more than \$10,000 or loans totaling more than \$50,000 per calendar year.
- If the agreement covers multiple years and does not specify how much money will be spent in a given year and the total amount of the agreement meets the above thresholds, it is covered.*
- The agreement is made in connection with the *fulfillment of CRA*.
- The NGEF had a *CRA communication* with the granting institution or regulator prior to entering into the agreement.

What Types of Agreements are not Covered?

- Any individual loan that is secured by real estate.
- Loans or extensions of credit to individuals or entities if:
 1. The funds are loaned at rates that aren’t substantially below market; and
 2. The borrower doesn’t intend to loan or extend the funds to third parties.

What Does “Fulfillment of CRA” Mean?

- The agreement involves a *CRA communication*.
- The agreement involves activities that would be considered during a bank’s CRA examination. If your agreement involves any of the following it is “in fulfillment of CRA:”
 1. Any correspondence/communication you made to a federal banking agency or insured depository institution that must be put in the bank’s CRA public file.
 2. Providing home mortgage, small business, community development, or consumer loans.

*If a bank/affiliate enters into more than one covered agreement with the same NGEF in a 12-month period, they are considered “related” and are combined into a single agreement for the purposes of “Sunshine.”

3. Making grants or investments that have as their primary purpose community development.
4. Delivering retail-banking services.
5. Providing community development services.
6. Anything that is included in a bank's formal CRA Strategic Plan. (Note that very few banks choose the Strategic Plan option for CRA examinations.)

What is a “CRA Communication?”

The language of the regulation is confusing. The Institute recommends that groups report all grants/loans from banks that are over the dollar threshold and that:

- Could have even possibly come out of a “CRA communication.”
- Relate to the provision of financial services in low-income areas.

However, for your information, the rules say that a CRA communication includes:

- Written or oral comments or testimony to a federal bank regulator concerning the *adequacy* of a bank's (or its affiliate's) CRA performance.
- Any discussion with a bank/affiliate about providing or refraining from providing (positive OR negative) written or oral comments or testimony about their CRA performance.
- Any discussion with a bank/affiliate about the *adequacy* of their CRA performance (positive OR negative.)

What Types of Communications are not Covered by “Sunshine?”

There are certain types of communications that are not technically covered. If you are unclear about whether you made a “CRA communication,” assume you should report. There are a number of reasons for this:

- It is pretty simple.
- Banks may not look through their files to determine if a “contact” was made. They may play it safe and report any agreement with a community group over the dollar threshold so you should too.
- It is often easier to report more agreements than to try to differentiate between them.
- You may not remember every contact made with a bank over the last several years. By adopting this approach, you will be less likely to be distracted by the regulation and will be able to focus on your reinvestment work.

The regulation does say that certain things are not considered CRA communications:

- Comments made about a bank's CRA performance at a "widely attended conference or seminar regarding a general topic" (not a public hearing).
- A general fundraising letter that you send out to all types of businesses.
- Comments or testimony made about a bank's CRA performance in response to a direct and specific request to the NGEF from a federal regulatory agency.
- Discussions with a bank about what types of activities/products are eligible for CRA consideration *without* discussing the *adequacy* of the bank's CRA performance.
- Written communication that occurs more than three years before the agreement is enacted.
- Oral communication about the adequacy of a bank's CRA performance that occurred more than one year before the agreement was enacted.

Did You Know about the CRA Communication?

Parties to agreements must know about the communication in order for agreements to be covered. For NGEFs, this means that one of the following persons must know about/be party to the communication:

- A director, employee or member of the NGEF *who approves, directs, authorizes, or negotiates* the agreement.
- A person who serves as executive officer of a NGEF *and* knows the agreement is being negotiated.
- If you are a one-person shop, it is assumed that *you* must know about the communication.
- If a NGEF gets a grant that comes out of a multi-party or coalition agreement, it does not have to disclose/report if: The NGEF did not have a CRA communication; or the relevant senior staff of the NGEF (the executive director or person authorized to negotiate agreements) did not know about the coalition's communication.

DISCLOSURE

When and How Should You Disclose (Which is Different from Reporting)?

- You must be prepared to disclose all covered agreements entered into after November 12, 1999.
- If you entered into a covered agreement after November 12, 1999, and the agreement terminated before April 1, 2001, you will have to be willing to disclose it (not report) until April 1, 2002.
- You have to disclose the agreement to anyone *who asks for it*. Disclosure is triggered *only* by request. (Note that banks have to disclose covered agreements to regulators as a matter of course.)

- If you consider something in the agreement to be “confidential,” you can withhold it. If you think information could be considered confidential under Freedom of Information Act (FOIA) rules, you do not have to disclose it. However, Woodstock recommends full disclosure since you are doing important work and have nothing to hide.
- When you are asked for a disclosure, you must provide a document that includes: the names and addresses of the parties to the agreement; the amount of money you got from the agreement; a general description of how the funds will be/were used; and the term (time period) of the agreement.
- One year after the term of the agreement is over, you no longer have to disclose upon request.
- You can charge people for reasonable mailing and copying costs.
- If a federal bank regulator asks for the agreement, you have to send a *full copy* of the agreement within 30 days. If you are withholding information under FOIA rules, you have to send a “public” copy of the agreement and explain why you are withholding information.

REPORTING

When Do You Have to Go Beyond Disclosure and Provide an Annual Report for “Sunshine” Agreements?

- If you entered into an agreement covered by “Sunshine” on May 12, 2000, or later, you have to provide an *annual report* on the agreement.
- If you entered into a covered agreement between May 12 and December 31, 2000 and you received money for the year 2000, you have until June 30, 2001 to report.
- You can choose to report based on your fiscal or calendar year.
- Your report is due six months after the year covered by the report ends. For example, if you received funds for January 1-December 31, 2001, your annual report is due by June 30, 2002.
- You do not have to report separately for each agreement covered under “Sunshine.” You can file a consolidated report as long as you list on a cover sheet the names, addresses, purpose, amount of money you received, and term for each agreement.

What Should Your Annual Report Look Like?

- Note: The regulatory agencies will not provide forms for annual reports.
- Your report should include the names and addresses of parties to the agreement, term of the agreement, and amount of money you received for that year under the agreement.

- You have to provide a detailed and itemized list of the total amount of funds used for these categories: compensation; administration; travel; entertainment; and consulting and professional fees.
- If you received funds for a purpose more specific and limited than the above, you can fulfill reporting requirements by providing the amount of funds used for and a brief description of that purpose.
- You can use internal or external financial documents for reporting purposes. Acceptable documents include: IRS Form 990; any other IRS form; state tax form; audited or unaudited financial statements; annual report; report to members or shareholders; or anything else *so long as it contains information on all the categories listed in bullet point one of this page.* (Note: For consolidated reports, one copy of the IRS form or any other form you are using will suffice.)
- If you use one of the above forms for reporting purposes and it does not contain a line for a certain category, say, entertainment, then you just have to say how much money you spent in that category in your cover letter or through the use of another form you might have on hand.
- You do not have to figure out which regulator is the appropriate one. Different types of banks are regulated by different agencies. You can send your report to the bank that gave you the grant and *instruct them to send it to the appropriate regulator on your behalf.* Make sure you keep a copy for your records to prove you asked the bank to file the report for you. They are mandated to do it.

What Happens if You Do Not Report?

- If you forget or did not know to report, the regulators determine whether or not you have “willfully failed to comply.” If they decide you have, they send you a letter asking you to send in your report. You then have 90 days to do it.
- If you still do not report after 90 days, you lose your right to “enforce” the agreement and the regulator can help the bank find a new NGEF partner. (It is, however, against the law for a regulator to enforce CRA agreements.)
- If you used funds covered by sunshine for your *individual* personal financial gain, you might be required to repay the funds or be barred from entering into CRA agreements for up to ten years.

(Note: The contents of this Alert reflect Woodstock Institute’s understanding of the “Sunshine” regulation to the best of our ability.)

**Prepared by
Katy Jacob**



Woodstock Institute, 407 S. Dearborn, Suite 550, Chicago, IL 60605
Phone: (312) 427-8070 Fax: (312) 427-4007
email: woodstock@woodstockinst.org website: www.woodstockinst.org

**FEDERAL REGULATORY AGENCIES' ADDRESSES
FOR "SUNSHINE" ANNUAL REPORTS**

Office of Thrift Supervision (OTS):

CRA Sunshine
C/O Dissemination Branch
Office of Thrift Supervision
1700 G Street, N.W.
Washington, DC 20552

Federal Reserve Board (the Fed):

Ms. Jennifer J. Johnson
Secretary of the Board
Attn: CRA Sunshine Agreements and Annual Reports
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Federal Deposit Insurance Corporation (FDIC):

CRA Sunshine Agreements – 1730 PA Room 7000
Federal Deposit Insurance Corporation
550 17th Street N.W.
Washington, DC 20429

Office of the Comptroller of the Currency (OCC):

CRA Sunshine
Communications Division
Office of the Comptroller of the Currency
250 E Street S.W.
Mail Stop 3-2
Washington, DC 20219