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COMMITTEE ON BANKING LAW

S.5035

Sen. Peralta

SUPPLEMENTAL REPORT ON PROPOSAL TO ADOPT THE HOME MORTGAGE BRIDGE LOAN ASSISTANCE ACT

The New York City Bar Association, through its Committee on Banking Law, urges adoption of S.5035, the Home Mortgage Bridge Loan Assistance Act ("HMBLAA"). This supplemental report provides additional detail concerning the eligibility of banks for contributions to HMBLAA as "qualified investments" under the Community Reinvestment Act (12 U.S.C. § 2901), and the New York Community Reinvestment Act (N.Y. Banking Law, § 28-b) ("CRA").¹

The purpose of HMBLAA is to institute a program that will provide temporary and repayable financial assistance through bridge loans to homeowners experiencing temporary difficulty in paying their mortgage loans due to unemployment, underemployment, or other cause that is specified by regulation, under circumstances beyond their control. Many temporarily troubled mortgage borrowers prove able ultimately to retain their homes and pay off their mortgages in full, without a loan agreement modification, when offered bridge loan assistance. HMBLAA is modeled on similar state programs in other jurisdictions as a cost-effective method to limit foreclosure rates and reduce the attendant economic and social ills.

HMBLAA provides that startup funds for its bridge loan program will be made available through state appropriations to the extent that such funding is available, with the program thereafter to be funded through additional means, including contributions by banks to fulfill their state and federal CRA obligations. Under both the federal and New York CRAs, regulators periodically assess a bank's record of helping to meet the credit needs of its local communities ("assessment areas"), including low to moderate income ("LMI") neighborhoods, through safe and sound lending, investment and service activities. The federal CRA applies to essentially all FDIC-insured banks, and the substantially similar New York CRA applies to New York chartered, FDIC-insured banks. Dollar contributions made by banks or their affiliates to help

¹ Several members of the Committee are lawyers with federal or state agencies. All of those Committee members have abstained from deliberations concerning this supplemental report and the position taken by the Committee in it.

fund HMBLAA are intended to be “qualified investments” under both CRAs, making them eligible for consideration and credit pursuant to a bank’s applicable performance standards.²

Both the federal and New York CRA provide that a dollar contribution to a loan fund is a qualified investment if (1) “community development” is the fund’s primary purpose, and (2) the fund helps meet the credit needs of a bank’s assessment area or a broader statewide or regional area.³ With regard to the second criterion, a bank in New York that provides funds to be used as bridge loans for homeowners experiencing temporary difficulty paying their mortgage loans clearly helps meet the credit needs of its assessment area or a broader statewide area that includes its assessment area (*i.e.*, New York). Both CRAs specifically recognize as qualified investments contributions to foreclosure prevention programs that, like HMBLAA, “may help to revitalize or stabilize [LMI] geographies.”⁴

The first criterion, that community development is the primary purpose of the contribution, also would be met by a New York bank providing funds for bridge loans under HMBLAA. An investment has community development as its primary purpose “when it is designed for the express purpose of revitalizing or stabilizing LMI areas, designated disaster areas, or underserved or distressed nonmetropolitan middle-income areas.”⁵ This standard aligns with the stated purpose of HMBLAA, namely to “head off the many avoidable private and public ills” that flow from the foreclosure crisis, including the “significant deterioration of abandoned housing stock and neighborhoods” and “the foreclosed homes, abandoned housing stock and consequently deteriorating buildings and neighborhoods [that] detrimentally affect those who needlessly lose their homes and the neighborhoods in which they reside.”⁶

Importantly, an investment may have community development as its “primary purpose” even if its express purpose is not limited to stabilizing and revitalizing LMI neighborhoods. The federal and New York CRA rules and guidance make clear that a qualified investment also can serve middle-income geographies and that, in some cases, an investment may be deemed qualified even if it does not predominantly serve LMI neighborhoods.

² 12 C.F.R. § 228.23(c) and 3 N.Y.C.R.R. § 76.9(c) each permit a bank affiliate’s investment to be considered as part of the bank’s CRA performance evaluation.

³ 12 C.F.R. §§ 228.12(g)(4), 228.23(a); 3 N.Y.C.R.R. §§ 76.2(f)(4), 76.9(a).

⁴ Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment, 75 Fed. Reg. 11642, 11647 § __.12(g)(4)(i) (Mar. 11, 2010) (“Interagency Questions and Answers”); 3 N.Y.C.R.R. § 76.2(f)(5)

⁵ Interagency Questions and Answers, § __.12(h)-8. Both regimes provide that activities that revitalize or stabilize certain distressed or underserved nonmetropolitan middle-income geographies are eligible for consideration as qualified investments. 12 C.F.R. § 228.12(g)(4)(3); 3 N.Y.C.R.R. § 76.4(f)(4)(3). These areas are annually designated by the federal CRA regulators based on factors such as poverty, unemployment, and population loss. In 2013, there are 19 such areas in New York, located in Hamilton, Franklin and Schuyler counties. See, http://www.ffiec.gov/CRA/pdf/2013distressedorunderservedtracts_508.pdf at 80 (last visited Dec. 11, 2013).

⁶ *Id.* HMBLAA §§ 2(a)(5), 2(a)(6), 2(b).

To determine whether an activity has a primary purpose of community development, the federal and New York regulators initially consider whether “a majority of the dollars or beneficiaries of the activity are identifiable to one or more of the enumerated community development purposes.”⁷ Accordingly, in evaluating contributions to fund HMBLAA under the CRA, the regulators would consider whether a majority of the funds provided by the bridge loans will help revitalize or stabilize LMI areas. Since eligibility for HMBLAA assistance is expressly limited to homeowners who *prior to the occurrence of a financial hardship* were low-income, moderate-income or middle-income borrowers, most of the homeowners receiving bridge loans would have low to moderate incomes, and their mortgaged properties would likely be in LMI areas or nearby LMI areas.⁸

Put another way, homeowners receiving bridge loans under HMBLAA are expected to be predominantly low to moderate income individuals living in or near LMI neighborhoods either because they had low to moderate incomes prior to their financial hardship or because the financial hardship, which is specifically triggered under HMBLAA by filing for unemployment insurance, resulted in middle-income homeowners becoming low to moderate income borrowers. Indeed, one of HMBLAA’s legislative findings is that “the economic slowdown afflicting the State and the Nation has driven large numbers of citizens into temporary involuntary unemployment or underemployment, thereby lowering incomes.”⁹

Moreover, both the federal and New York CRAs permit consideration of activities in “high cost” areas in addition to LMI neighborhoods in determining whether an investment has community development as its primary purpose. The federal interagency CRA guidance states that “the flexibility of the performance standards allows examiners to account in their evaluations for conditions in high-cost areas,” and specifically discusses how this flexibility applies to qualified investments:

[T]he flexibility in the requirement that . . . qualified investments have as their “primary” purpose community development allows examiners to account for conditions in high-cost areas. For example, examiners could take into account the fact that activities address a credit shortage among middle income people or areas caused by the disproportionately high cost of building, maintaining or acquiring a house when determining whether an institution’s loan to or investment in an organization that funds affordable housing for middle-income people or areas, as well as low- and

⁷ Interagency Questions and Answers, § __.12(h)-8. *See also* NYS Department of Financial Services, “Facts About CRA Exams and Ratings,” found at <http://www.dfs.ny.gov/banking/crafaqs.htm>. (“An institution receives favorable consideration for those activities that have a primary purpose of community development. Although *primary purpose* is not defined in the regulation, it is presumed to mean that a majority of the activities engaged in by the beneficiary of the bank’s support, meet the regulatory definition of *community development*.”)(last visited Dec. 11, 2013).

⁸ HMBLAA § 3(b)(4).

⁹ *Id.* § 2(a)(3).

moderate-income people or areas, has as its primary purpose community development.¹⁰

Similarly, the New York CRA regulations have a specific section on “high cost areas,” which allows an examination to “be flexible in its consideration of a banking institution’s activities pertaining to owner-occupied housing in middle-income geographies or for middle-income individuals residing” in neighborhoods where there may be “a shortage of credit which endangers the preservation, stabilization or improvement of middle-income geographies.”¹¹

Finally, in the unlikely event that a majority of HMBLAA bridge loans do not provide funds that revitalize or stabilize LMI neighborhoods and relevant high cost areas, the federal CRA guidance also provides:

[W]here the measurable portion of any benefit bestowed or dollars applied to the community development purpose is less than a majority of the entire activity’s benefits or dollar value, then the activity may still be considered to possess the requisite primary purpose, and the institution may receive CRA consideration for the entire activity, if (1) the express, bona fide intent of the activity, as stated, for example, in a prospectus, loan proposal, or community action plan, is primarily one or more of the enumerated community development purposes; (2) the activity is specifically structured (given any relevant market or legal constraints or performance context factors) to achieve the expressed community development purpose; and (3) the activity accomplishes, or is reasonably certain to accomplish, the community development purpose involved.¹²

Bridge loan funding under HMBLAA also meets each of these requirements: (1) HMBLAA includes a legislative finding that bridge loan assistance is necessary to address the current severe economic crisis, avoid unnecessary foreclosures, help revitalize and stabilize communities and reinvigorate mortgage lending;¹³ (2) the bridge loan program is specifically structured to achieve that community development purpose; and (3) the program accomplishes, or is reasonably certain to accomplish, the community development purposes of avoiding unnecessary foreclosures, helping revitalize and stabilize communities, and reinvigorating mortgage lending in LMI and relevant high cost communities.

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¹⁰ Interagency Questions and Answers, §__.12(g)-3.

¹¹ 3 N.Y.C.R.R. § 76.14.

¹² Interagency Questions and Answers, §__.12(h)-8.

¹³ HMBLAA § 2.