

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

PRESCILLA DUGARD
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

Jan I. Goldsmith
CITY ATTORNEY

June 25, 2012

REPORT TO THE COMMITTEE ON RULES, OPEN GOVERNMENT
AND INTERGOVERNMENTAL RELATIONS

ADDITION OF RESPONSIBLE BANKING ORDINANCE
TO SAN DIEGO MUNICIPAL CODE

INTRODUCTION

At the Rules Committee meeting of May 16, 2012, Council President Young introduced the concept of adding a responsible banking ordinance to the San Diego Municipal Code. The Rules Committee gave direction to the City Attorney to prepare a draft "Responsible Banking Ordinance" to return to the Committee on June 27, 2012. The extent of the Committee direction contained in the report was to create an ordinance that included the following:¹

- 1) Submission of *annual data* which would include the financial institution's home and small business lending; distress loan modifications; branches and ATM's; community development investments (affordable housing and small business development); foreclosure information; employment diversity and number of jobs;
- 2) Submission of a *two-year Community Reinvestment Plan (CRP)*, which would include plans for residential and small business lending, including with low- and moderate-income communities; community development loans and investments, branches and deposits; consumer loan lending; investing; and corporate giving; and
- 3) Establishment of a *Community Reinvestment Review Committee*, which would include council members and members of the Mayor's staff. This committee would review the CRP and issue recommendations to the Council and City Treasurer as to which banks and financial institutions with whom the City should make deposits and conduct other financial transactions.

Attached are two draft ordinances: (1) a proposed Responsible Banking Ordinance (RBO) which addresses the responsible banking reporting and review issues; and (2) a proposed ordinance establishing the Reinvestment Review Advisory Committee.

¹ Rules Committee Report No. 12-066 (May 16 Report).

DISCUSSION

I. SUMMARY OF DRAFT ORDINANCES

The draft RBO addresses the goal of ensuring that financial institutions with whom the City does business are responsive to community needs, while also recognizing the Charter mandated functions of both the City Treasurer, responsible for determining City depositories under Charter section 45, and the Funds Commission, charged with overseeing City investments under Charter section 41. As currently drafted, the RBO does not impinge on these functions.

The RBO annual report requirement includes the reporting categories recommended by the Rules Committee and generally mirrors those required in the Community Reinvestment Act of 1977 (CRA), except that reports are to be specifically for the City of San Diego.² The CRA is a federal regulatory scheme that requires reporting from covered financial institutions as to their lending activities for small businesses, small farms and community development. Its purpose is to assess a financial institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods. The reports are reviewed, rated and made public, and are used by the federal government in reviewing applications for branch locations, mergers and acquisitions.

In addition, the draft RBO provides for submittal of a two-year "Community Reinvestment Plan." The contents of the plan are more limited than the annual report. For example, the CRA rating information is not part of the plan, nor is employment diversity reporting. In order to address concerns raised regarding potential proprietary information, we have included a provision clarifying that financial institutions are not required to submit confidential financial information or trade secrets protected under State and federal law.

The draft RBP requires that the plans and annual reports be provided to the newly established Reinvestment Review Advisory Committee (RRAC) for review. The RRAC will function in an advisory capacity and provide recommendations to the City Treasurer and City Council as recommended by the Rules Committee. The recommendation is then considered by the City Treasurer in fulfilling her duties under Charter section 45.

II. LEGAL ISSUES

The Rules Committee recommendation provides for the proposed RRAC to include a City Councilmember. However, this Office has previously opined that the Charter does not permit a City Councilmember to sit on a Charter section 43 advisory body, such as the proposed RRAC.³ Therefore, the draft ordinance establishing the committee includes community and business representatives as provided in the Committee recommendation.

As discussed above, the draft RBO specifically recognizes the authority of the City Treasurer under Charter section 45 and the Funds Commission, as established in Charter section 41. Both the Treasurer and the Commission have mandated duties under the Charter that

² The draft RBO includes reporting on employment diversity as requested by the Rules Committee.

³ City Att'y Report 09-3 (April 3, 2009).

may not be transferred.⁴ Charter section 45 vests authority in the City Treasurer to determine the selection of depositories for City funds.

III. POLICY ISSUES FOR ADDITIONAL GUIDANCE

In preparing the draft RBO, we referred to the Committee recommendation and reviewed ordinances adopted by other jurisdictions, the CRA review requirements, and comments from council staff, the City Treasurer's office and the community. The current draft RBO reflects one approach among others that would be legally permissible. However, there are several key provisions on which additional policy input from the Committee is needed. These provisions directly affect the scope of the RBO's reach relating to the financial institutions and City financial services affected, as well as the geographic area covered by the reported information.

A. Scope of Financial Institution and Financial Services to be Covered

The May 16 Report recommendation, references "banks and other financial institutions." We recommend additional discussion and policy direction as to the financial institutions the Committee wishes the RBO to reach. The CRA has reporting requirements for specific classes of banks, but does not regulate all financial institutions, not even all financial institutions that provide traditional deposition and loan services, for example, credit unions. Likewise, ordinances adopted by various jurisdictions referenced in the May 16 Report differ in the types of financial institutions affected. In some cases, distinctions are made between depository banking functions and investment banking. In others, virtually any financial institution that touches City finances is potentially affected. Our discussions with staff and community input received reveal differing perspectives on the types of financial institutions the proposed RBO should affect. Distinctions are made among commercial banking, investment banking and other financial institutions.

Similarly, the May 16 Report references "deposits and other financial transactions." The model ordinance and other city ordinances also differ in the scope of treatment on this issue. The policy issue for clarification is what City "financial transactions" will be included for purposes of requiring that financial institutions who want to provide those services must comply with the RBO. In some instances, it may not be practical. For example, a broker working with the City Treasurer on the placement of City investment funds may not be associated with a bank that provides the kinds of services that would be reported in the required annual reports. In order to clarify these key issues, we recommend input from qualified technical staff and professionals in the community to ensure that the RBO appropriately fulfills its stated purpose.

While these distinctions do not present a direct legal issue, clarification on the desired scope is important in order to make the information provided meaningful to the Reinvestment Review Committee. In reviewing the input from council staff, the City Treasurer's office and community representatives, we recommend further Committee review and discussion to provide policy direction for a final draft of the RBO for consideration.

⁴ See, e.g., City Att'y MOL No. 10-12 (June 10, 2010), addressing the question of potential transfer of record keeping functions of the City Treasurer (provided for in Charter section 45) to the City Auditor.

B. Geographic Area for Reports

The May 16 Report is silent on the geographic level for which annual data reporting is required. At Rules Committee meeting, discussion centered on having information reported for the San Diego community. Council staff recommendations go to Council District level. Some ordinances report at the census tract level. In addition the CRA provides for certain reporting at the census tract level, as do some of the ordinances adopted in other jurisdictions. The draft RBO requires the information be reported for the City. We recommend further discussion and clarification on this issue to provide policy guidance needed to complete the ordinance.

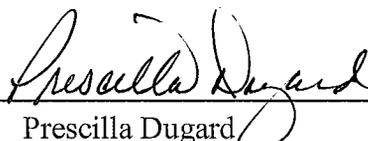
C. Council Policy 900-09

Council Policy 900-09 "Community Reinvestment," adopted November 5, 2001, provides for the City to "encourage financial institutions doing business within its boundaries to develop and implement San Diego-specific community reinvestment programs consistent with the spirit of CRA. It provides for the creation of a Community Reinvestment Master Plan by the San Diego City-County Reinvestment Task Force and further provides for the City Treasurer to consider San Diego-specific community reinvestment programs as part of its banking services contracting process. The draft RBO is not directly inconsistent with the Council Policy. However, there is significant overlap and some potential duplication of effort. This is a policy issue for the Committee's consideration.

CONCLUSION

The draft Responsible Banking Ordinance presents just one approach among many that would be legally permissible. We recommend further discussion and clarification on key policy issues related to scope of coverage and level of reporting as discussed in this report before a final ordinance is presented to the City Council. This Office will work with designated City staff to ensure that the legal issues are appropriately addressed.

JAN I. GOLDSMITH, CITY ATTORNEY

By 

Prescilla Dugard
Deputy City Attorney

PMD:jdf:ccm
Attachments
cc: Gail Granewich, City Treasurer
RC-2012-15
Doc. No. 390132_2.docx

Article 2: Administrative Code
Division 44: Responsible Banking Ordinance

§22.4401 Title and Purpose

This Division shall be known as the “Responsible Banking Ordinance.” The purpose of this Division is to ensure that *financial institutions* with whom the *City* does business are responsive to community needs and seek to promote economic growth and community reinvestment within the City of San Diego. This Division is intended to supplement the efforts of the Community Reinvestment Task Force and City Treasurer in implementing Council Policy 900-09 (“Community Reinvestment”). Nothing in this Division shall limit the authority of the City Treasurer as provided in Charter section 45, nor the authority of the Funds Commission established by Charter section 41.

§22.4402 Definitions

For purposes of this division, defined terms appear in italics. The following definitions apply in this Division:

Affiliate means (as provided in the *CRA*) any company that controls, is controlled by, or is under common control with another company. The term “control” has the meaning given to that term in 12 U.S.C. 1841(a)(2), and a company is under common control with another company if both companies are directly or indirectly controlled by the same company.

Affordable means affordable to *low* or *moderate-income* individuals as provided in the *CRA*.

Comment [PD1]: Definitions, other than those highlighted for policy guidance, are as provided in the *CRA*.

ATTACHMENT A

Banking services include depository services, disbursement services, reconciliation and reporting, discrete banking services, payroll automated clearing house services, online payment services, and procurement card services;

Comment [PD2]: Policy discussion and input needed to confirm scope of banking services contracts to be affected by the ordinance.

Branch means (as provided in the *CRA*), a staffed banking facility authorized as a branch, whether shared or unshared, including, for example, a minibranch in a grocery store or a branch operated in conjunction with any other local business or nonprofit organization.

Community development means

- (1) provision of affordable housing (including multifamily rental housing) for *low- or moderate-income* individuals;
- (2) community services targeted to *low- or moderate-income* individuals;
- (3) activities that promote economic development by financing *small businesses*, as defined in the *CRA*; and
- (4) activities to revitalize or stabilize *low- or moderate-income* neighborhoods.

Community development loan means a loan that has as its primary purpose *community development*, and is not otherwise collected and reported for consideration as a consumer, home or small business loan by the *financial institution*.

Community development service means a service that has as its primary purpose *community development* and is related to the provision of financial services.

CRA means the Community Reinvestment Act of 1977 (12 U.S.C. 2901, *et seq.*).

Community Reinvestment Plan means a document created by a *financial institution* that describes its plan to meet the financial needs of the City of

ATTACHMENT A

San Diego's residents, as provided in this Division.

Consumer loan means a loan to one or more individuals for household, family, or other personal expenditures. A consumer loan does not include a home mortgage or small business loan.

Financial institution means an entity engaged in the business of accepting cash deposits for checking and savings accounts from customers and using those cash deposits to issue loans. *Financial institutions* include banks, savings and loans, and credit unions.

Comment [PD3]: Policy input needed to confirm scope of financial institutions subject to RBO.

Low-income means individual income that is less than 50 percent of the area median income, or a median family income that is less than 50 percent of the area median family income.

Moderate-income means an individual income that is at least 50 percent and less than 80 percent of the area median income, or a median family income that is at least 50 and less than 80 percent of the area median family income.

Predatory lending practices are lending practices that are specifically prohibited by State or federal law and include: (1) the frequent making of new loans to refinance existing loans; (2) the selling of additional products without the borrower's informed consent; and (3) the charging of excessive fees.

Small business loan means a loan identified as such in accordance with the *CRA*.

§22.4403 City Treasurer Responsibilities

This Division does not impede or amend the City Treasurer's powers and duties as described in the San Diego Charter, the San Diego Municipal Code, and applicable state and federal laws and regulations.

§22.4404 **Community Reinvestment Plan**

- (a) No later than July 1 of every odd-numbered year, any *financial institution* that wishes to provide *banking services* to the City shall submit to the City Treasurer, a two-year *Community Reinvestment Plan* describing current and proposed programs to address the financial needs of the City, its residents and businesses in the following categories:
- (1) Residential lending programs, including *affordable* single-family and multi-family residential mortgage programs;
 - (2) New construction and rehabilitation lending and investing programs, especially to nonprofit organizations and to *low-* and *moderate-income* persons;
 - (3) *Small business* lending and investing programs, especially to historically underserved and *low-* and *moderate-income* persons and neighborhoods;
 - (4) *Community development* lending and investment programs;
 - (5) *Consumer loan* programs and checking and deposit services, especially to historically underserved and *low-* and *moderate-income* persons and neighborhoods;
 - (6) Continuation of the full range of financial services to the entire community, notwithstanding mergers, consolidations and acquisitions activities and other practices pertaining to headquarter office and branch openings and closings; and

- (7) Philanthropic and charitable giving to local nonprofit cultural and social service organizations and community groups involved in *affordable* housing and economic development activities.
- (b) The *Community Reinvestment Plan* shall include a summary of proposed programs and activities as provided in Section 22.4404(a), but is not required to include confidential financial information or information that qualifies as a trade secret under California Civil Code section 3426.1(d).
- (c) The *Community Reinvestment Plan* will be reviewed by the Community Reinvestment Review Committee, which will recommend to the City Council and City Treasurer whether the *financial institution* should be eligible to provide *banking services* to the City.

§22.4405

Annual Reports

- (a) By July 1 of each year, *financial institutions* that wish to provide *banking services* to the *City* must submit a report to the Treasurer concerning their community reinvestment activities for the prior calendar year. The annual report will detail the *financial institution's* responsible lending efforts as applicable to areas within the City of San Diego as follows:

- (1) residential loans, including:
 - (A) home purchase loans, both federally subsidized and conventional;
 - (B) refinancing of home loans;
 - (C) multi-family loans;
 - (D) modifications of distressed loans; and

Comment [PD4]: Policy input required on the level of reporting: 1) City; 2) Council District; 3) Census Tract.

ATTACHMENT A

- (E) affordable single-family and multi-family residential mortgage;
- (2) foreclosure information, including:
 - (A) defaults and delinquencies on home loans; and
 - (B) real estate owned properties.
- (3) *small business loans* and investments, including to *low- to moderate- income* in the City of San Diego;
- (4) *community development loans* and investments;
- (5) *consumer loans*, especially to *low- and moderate-income* persons and neighborhoods;
- (6) philanthropic and charitable giving to local nonprofit cultural and social service organizations and community groups involved in *affordable* housing and economic development activities;
- (7) the number and locations of the *financial institution's branches* and ATMs in the City;
- (8) efforts to affirmatively market and make available loans and *financial services* within City neighborhoods, including outreach to *low-income* and minority City residents;
- (9) the number of minorities and females employed by the *financial institution* in the City as loan officers, senior management staff, and, if applicable, as members of its board of directors;
- (10) the *financial institution's* most recent CRA rating, if applicable, the date of the rating and a copy of the pages of the most recent

ATTACHMENT A

CRA evaluation report which affirms and describes the basis for the CRA rating;

- (11) whether the *financial institution* or any *affiliate* is the subject of a court judgment that it has engaged in *predatory lending practices*. If so, the *financial institution* must provide details of the judgment and of the changes in lending practices instituted by the *financial institution* to address the violation.

- (b) The City will publish *financial institutions'* annual reports on its website within sixty days after the report is filed.
- (c) The City Treasurer will make the annual reports available to the Reinvestment Task Force and to the Community Reinvestment Review Committee.

§22.4406

Community Reinvestment Review Committee

- (a) The Community Reinvestment Review Committee, as established in Chapter 2, Article 6, Division 23 of this Code shall review the annual reports and *Community Reinvestment Plans* and make recommendations to the City Treasurer and the City Council regarding which *financial institutions* should be considered eligible to provide *banking services* to the City.
- (b) The Community Reinvestment Review Committee will not establish scores or otherwise rank *financial institutions* for purposes of making its recommendation.
- (c) The Reinvestment Review Committee recommendation shall be one of the factors considered by the City Treasurer in making determinations for deposit of

ATTACHMENT A

City funds pursuant to Charter section 45. The recommendation shall not be interpreted to require the selection of any particular *financial institution* for *banking services*. The ability of any *financial institution* to offer the highest level of service quality and overall value to the City, while meeting the specifications and requirements of a particular City request for *banking services* shall remain the standard for awarding contracts.

389394.docx

DRAFT

Article 6: Board and Commissions**Division 23: City of San Diego Reinvestment Review Advisory Committee****§26.2301 Purpose and Intent**

It is the purpose and intent of the City Council to establish the City of San Diego Reinvestment Review Advisory Committee. The Reinvestment Review Advisory Committee is established pursuant to Chapter 2, Article 2, Division 44 of this Code, "Responsible Banking Ordinance" to evaluate annual reports and *Community Reinvestment Plans* and to provide the City Treasurer and City Council with recommendations regarding the performance of *financial institutions* as provided in the Responsible Banking Ordinance.

§26.2302 Definitions

For purposes of this Division, defined terms appear in italics. Italicized terms not defined in this Division have the same meaning as provided in Municipal Code section 22.4402.

§26.2303 Reinvestment Review Advisory Committee Established

- (a) There is hereby created a Reinvestment Review Advisory Committee to consist of seven members who shall serve without compensation. The members shall be appointed by the Mayor and confirmed by the City Council and shall be residents of the County of San Diego.
- (b) Members shall serve four year terms and shall serve until a successor is duly appointed and confirmed. No member shall serve more than two consecutive terms. Initial members shall be appointed such that the terms of not more than four such members shall expire in any year so as to allow the members' terms to be staggered. For the initial appointments, three

members shall be appointed to an initial term that will expire March 31, 2014; and four members shall be appointed to an initial term that will expire March 31, 2016. Members whose initial appointments are less than the full term of four years will be allowed to serve their partial term and then two full terms. The expiration date of all terms shall be March 31.

- (c) Any vacancy shall be filled for the remainder of the unexpired term. The Mayor shall make all appointments to fill vacancies from nominations provided by City Council in accordance and applicable Council policy. Any vacancy replacements will be eligible to serve the remaining term of the vacant position and two full terms.
- (d) During March of each year, the members shall designate one member as chairperson from among the members.

§26.2304 Qualification of Members

- (a) The Reinvestment Review Advisory Committee shall be comprised of:
 - (1) One member who represents the San Diego small business community;
 - (2) One member who represents the San Diego large business community;
 - (3) Two members who represent the community based organizations whose principal purpose is community development;
 - (4) One member who represents a community housing development organization; and
 - (5) One member who represents an economic development organization.

- (b) An officer, paid employee, consultant, contractor, subcontractor, or member of the board of directors of a *financial institution* shall not be considered for appointment to the Committee.

§26.2305 Duties and Functions

The Community Reinvestment Review Committee shall:

- (a) Monitor and assess compliance by each participating *financial institution* with its *Community Reinvestment Plan* and report annually to the City Council.
- (b) Make recommendations to the City Treasurer and the City Council regarding which *financial institutions* should be deemed eligible to be considered to provide *banking services* to the City.
- (c) The Reinvestment Review Advisory Committee shall have no managerial, financial or budgetary authority.