



August 1, 2022

Office of the Comptroller of the Currency
Chief Counsel's Office
Attention: Comment Processing
400 7th Street, SW, Suite 3E-218
Washington, DC 20219

Re: Public Comment on OCC Docket ID OCC-2022-0002

Re: Public Comment on FDIC RIN 3064-AF81

Re: Public Comment on Federal Reserve Board Docket No. R-1769 and RIN 7100-AG29

To Whom it May Concern:

Native Community Capital appreciates the opportunity to comment on the Notice of Proposed Rulemaking (NPR) regarding updating the Community Reinvestment Act (CRA). This NPR represents the most significant changes to the CRA regulation and exams in 27 years. We enthusiastically support the comments submitted by the National Community Reinvestment Coalition. We also endorse the comments provided by the Native CDFI Network – most importantly are their recommendations regarding double credits for investment in Native Land Areas, acknowledgement of support for over-income households in Native Land Areas critical to reversing the “islands of poverty” effect common on tribal lands, and transparency in reporting investment data by banks. Likewise, Native Community Capital’s comments are specific to those provisions related to Native Americans and pertaining to tribal lands or other areas referenced in the FRN as Native Land Areas.

BACKGROUND OF OUR ORGANIZATION

Native Community Capital (NCC) is a certified Native Community Development Financial Institution (NCDFI) headquartered in the Pueblo of Laguna, a federally recognized tribe in New Mexico. We also maintain an office in Arizona. NCC partners with tribes, foundations, financial institutions, builders, and other housing industry professionals to raise capital and deploy those funds as home loans (including construction loans and privately held mortgages) to tribal members residing on tribal trust lands. In addition we maintain a small portfolio of small business loans to Native entrepreneurs. We are the product of a 2019 merger of three formerly independent Native CDFI’s. As of 2020 NCC is a licensed mortgage lender in New Mexico and Arizona. Over the last 10 years we’ve deployed over \$20MM to support community- and economic development on tribal lands.

Our relations with tribes, partners and allies across multiple sectors cannot be understated. Because of historic physical, financial and resource exploitation of tribes by the U.S., the trust and rapport necessary to engage in financial transactions, due to the risk of further loss of tribal lands or resources is of the utmost importance. Banks, despite the Community Reinvestment Act, have failed to establish and maintain such relations with tribal communities. Financial institutions do not generally maintain branches on or near tribal lands or offer financial products and services needed by tribal communities that are

disproportionately affected by social and economic distress. Instead, Native Americans residing on tribal lands primarily have predatory lenders and other lenders of last resort or crowd-funding as their only source of credit and capital.

In the last decade 19 tribal owned banks and over 70 certified Native CDFI's have been established to fill the void left by regulated financial institutions. Tribal communities and in my case Native CDFI's are not asking banks to do work that we can do ourselves. However, we do need a level playing field. If banks will not lead then they should commit significant cash resources – equity investments and grant funds to grow the balance sheets of Native CDFIs and others that are actively and typically exclusively serving Native people and communities. We do not need token investments. Rather, we need serious, significant and sustained investment to make up for literally centuries of active exploitation by the US government and more recently active neglect (i.e. modern redlining) by the private sector. Banks have these funds and must distribute them. Native communities need these funds and are deserving of this support as described more fully below.

BANKER REWARDS & INCENTIVES

Fannie Mae and Freddie Mac in their latest plans for underserved communities identify lender challenges wherein they lament, "...the land tenure status of [tribal] trust land[s]...[and] the complex and unique challenges facing high-needs populations...[that] most traditional lenders are unfamiliar with and [are therefore] unable to serve... (FNM p. 81, FMC p. R24). With regard to such statements, this challenge exists only because of a severe lack of precedent for lending on tribal trust lands. And this severe lack of precedent owes exactly to a failure to dedicate sufficient resources to help develop well-functioning economies in tribal areas. Early in my career a banker put it to me bluntly. He asked, "Why should I go through the brain-damage of figuring out how to do a deal in Indian Country when I can get what I need from the OCC by doing a deal with blacks or Hispanics"?

In other words, CRA creates a compliance maze for banks to navigate, negotiate and often circumvent. It seems as if from the bank's view CRA does not, should not, and must not supplant the mandate imposed by shareholders which is to maximize financial returns. Another, perhaps more convenient talking point relayed to me, is that investment standards established by community development organizations are considered by banks as overly aggressive standards that cannot be pursued, even under CRA, as they may run counter to a regulatory regime that demands safe and prudent lending practices – again to safeguard the economic return to shareholders.

Lender relations I've worked on developing are curious because the conversation typically starts with how the full business prospects potentially at play can be achieved, not just loan volume and growth opportunities but introductions to tribal officials for cross-selling other financial products and related tribal government or enterprise accounts that might be had. As such, it seems banks strategically align their CRA compliance activities where it first and foremost results in maximizing financial product and banking service deployment goals. Yet none of this considers the very explicit goals of the CRA. While ambitious bankers may feel that closing a deal or selling a product to a tribe will be more time and labor intensive than realized, and may quickly lose interest, the whole purpose of the CRA is to serve communities that have been unserved.

The CRA was not passed to help banks regain the public's support when these banks have failed them. The CRA is not a publicity tool for banks either. Sadly, one banker once pulled me aside before a meeting with its executive, saying "You know this (the grant they were awarding) doesn't change anything. This is about getting the bank's name out of the gutter. We call this stuff sunshine money...we make a grant and we expect you to go away." Again, this "sunshine money" belies the true purpose of the CRA.

The CRA was passed explicitly to address discrimination in housing and other areas and to force banks to focus not just on profits but also on serving the needs of LMI Americans. It is of course most profitable to serve only the upper and upper-middle class, but the CRA forbids this. It explicitly requires banks to make efforts to reach those who have not yet been reached for banking services.

The CRA was not passed to create leverage for banks to curry favor with members of Congressional delegations and yet the congressional districts where CRA investments are made often do not include those with tribal populations and instead favor more densely populated areas where banks have physical locations. When rural or tribal investment initiatives are announced we appreciate the time VIPs spend in our communities – it puts us on the map. However, in my 25-year career doing this work the fact remains that the publicity of an investment by the bank into a certain project may generate from a congressional delegation member seems to have more importance on project selection than an equitable investment rationale. In my experience, CRA's effect in Indian Country is limited to identifying investment opportunities, and ensuring sparse, one-off type investments with limited repeatability. Because of the broad, rural, and often remote geography – and very often with a severely economically distressed profile – that Indian Country represents, CRA has not created the kind of consistent, dedicated, investments that reflect good corporate citizenship that tribal communities most in need require.

There is a dearth of a private-, non-profit-, and philanthropic sector organizations operating in tribal communities. Moreover, even national non-profit intermediaries eschew service to Indian Country in favor of urban enclaves and non-Indian rural areas. Therefore, modernization of CRA may require that we recognize CRA - like so much social policy - was not designed with Indian Country in mind and so a different solution entirely may be required. Perhaps the most powerful modernization to CRA would be to decouple the financial industry's profit motive from how it calculates where to make CRA investments. This would be very much in keeping with the purpose behind the CRA. Until that can be achieved the solutions proposed in the FRN must be addressed.

FRN Questions related to Native Land Areas

Question 28. To what extent is the proposed definition of Native Land Areas inclusive of geographic areas with Native and tribal community development needs?

The agencies proposed “Native Land Areas” inclusive list is appropriate given the past and ongoing discrimination against Native Americans. However, significant differences exist - e.g. most tribal governments and their reservations in the lower 48 were established through a variety of Congressional Orders, Presidential Decrees and Treaties and their governments established under the Indian Reorganization Act of 1934, while tribal governments in Alaska are subject to the Alaska Natives Claims Settlement Act of 1971, Oklahoma tribal lands in particular maintain a curious status owing to the Indian Removal Act of 1830 but further complicated after the Civil War and again in 2020 in a Supreme Court case known as *McGirt v Ok* and more recently *Castro-Huerta v Ok*. Native Hawaiian homelands also are unique owing to conquest of those lands in 1898.

Nevertheless, I believe most tribal governments and regional or national tribal advocacy organizations would insist that the special government-to-government relationship tribes maintain with the United States must be honored and inclusive of the various geographic areas noted in the FRN and others they may consider unceded – such as certain sacred sites – but

which are in the present day nevertheless controlled by non-tribal interests. Any specific concerns by tribes to the stated eligible geographic areas should be left for tribal governments to opine on.

Question 29. In addition to the proposed criteria, should the agencies consider additional eligibility requirements for activities in Native Land Areas to ensure a community development activity benefits low-or moderate-income residents who reside in Native Land Areas?

Including Native Land Areas in CRA to encourage increases in bank financing and activities in these areas is vital. The most rural and remote tribal lands have to date generally fallen out of bank assessment areas. However, how banks will implement this requires additional detail. It is curious that federal funds for tribes are deposited and flow through banks across the US and yet even the largest banks have disbanded their Native lending initiatives. Chase, Wells, and Bank of America all disbanded both their Native American commercial and residential lending teams as far back as 2009 and have not re-established them. Fannie Mae also disbanded its Native initiatives team and has never reconstituted it.

Note on page 101: Agencies proposed more targeting to LMI individuals in Native Lands than in other targeted areas because of presence of some middle and upper-income census tracts. How do Native American advocates feel about this?

While it is true that middle- and upper-income census tracts exist contiguously or in close proximity to tribal lands, investments should be directed to economically distressed tribal areas, and additional focus (i.e. targeting) of LMI individuals is appropriate. However, in order to avoid the unintended consequence of maintaining islands of poverty without amenities, investment choices must consider the broader potential impact for tribal community- and economic development. For example, most Native Americans residing on tribal lands must travel long distances for essential commerce. Reservation border towns are known for actively exploiting Native Americans (see FTC Matter/File Number 162 3207 X180041, Civil Action Number 3:18-cv-08176-DJ against one such business that is indicative of many others).

Therefore, business activities where non-LMI Native American business owners are the primary beneficiaries of invested funds and LMI individuals are secondary beneficiaries can significantly improve tribal economies, as well as the general health and welfare of Native people on tribal lands. Likewise, construction of homes for sale to recruit and retain highly educated tribal members for essential service jobs remains difficult. Therefore, the targeting should likely instead focus on how the investment benefits the tribal community and especially where investments can be shown to be elusive as in the more rural and remotely located tribal lands.

Question 30. Should the agencies also consider activities in Native Land Areas undertaken in conjunction with tribal association or tribal designee plans, programs, or initiatives, in addition to the proposed criteria to consider activities in conjunction with Federal, state, local, or tribal government plans, programs, or initiatives?

Yes, so long as tribal associations and tribal designee plans, programs or initiatives can be shown to be majority Native-led and endorsed by the tribal government or at least not actively opposed by a tribal government, the agencies should consider such activities. Given the lack of capacity of many tribal governments, full consent for these proposed activities may be

unreasonable. However, since the FRN states that “the agencies propose that all activities with Treasury Department-certified CDFIs would be eligible CRA activities” (p. 92) and because per statute CDFI's may not be an instrumentality of a government, the implementation should allow for broader investment opportunities than if only allowed via an explicitly established tribal government initiative.

Discussion on page 102 – how do Native American advocates feel about this.

Regardless of the fact that “...the agencies believe that such a requirement could be overly restrictive and impractical to implement,” it is the federal government’s solemn duty to uphold their federal trustee status and consult with tribal governments. The reason why the Native American Housing Assistance and Self-Determination Act established Tribally Designated Housing Entities to replace what were formerly known as Indian Housing Authorities (IHA) is because many IHA’s had gone rogue and were neither responsive to tribal councils nor tribal citizens. NAHASDA clearly established that tribes should designate which organization should receive federal funds intended for tribal housing. That said, CRA investments are private funds and consultation can take various forms. The most formal, I believe, is the negotiated rule-making process for federal programs funds intended for tribes. Once revised CRA regulations are in place other forms of communication, input and consultation could and should be maintained if for nothing else to ensure that tribal governments are recognized as the primary partners responsible for the community- and economic-development activities on the lands they govern.

Question 38. For the proposed factor to designate activities benefitting or serving Native communities, should the factor be defined to include activities benefitting Native and tribal communities that are not located in Native Land Areas? If so, how should the agencies consider defining activities that benefit Native and tribal communities outside of Native Land Areas?

On this matter, the Agencies should consult with the various national, regional, and state organizations that have as their members elected tribal leaders such as but not exclusive to the Alaska Federation of Natives, Affiliated Tribes of Northwest Indians, Southern California Tribal Chairman's Association, Inter Tribal Council of Nevada, Inter Tribal Council of Arizona, All Pueblo Council of Governors, United South and Eastern Tribes, National Congress of American Indians, etc.

Activities carried out by Urban Indian organizations that receive federal funds intended for enrolled Native Americans residing in urban areas should also be considered for CRA funds. These entities exist as a direct result of the federal government's Relocation and Termination Act of 1953 which has resulted in 78% of Native Americans residing off of their tribal homelands. Moreover, Native CDFI's already mentioned on p 92 should receive due consideration for activities they conduct outside of the tribal areas defined in the FRN.

REGULATORY RESOLVE

Although rural black and Hispanic communities may face similar obstacles to those the revised regulations attempt to address, it is only tribes to which the Federal government retains an unequivocal trust responsibility. Because that is the case, a modernized CRA should recognize that fact and be applied explicitly to Native Communities in light of that trust relationship and in direct response to it. This is consistent with the purposes behind the CRA and can be done in a meaningful and significant way to advance the goal of explicitly promoting the welfare of tribes.

I'm fond of saying that the US can put a man on the moon, land a rover on Mars, and now peer into the deepest realms of the cosmos but it cannot look even in its own back yard and put banks on Indian Reservations to provide mortgage loans to tribal citizens. What drove the engineers who achieved tremendous feats in the U.S. space program were potentially tremendous rewards. What drove policy makers for such efforts was resolve in the face of foreign competition. With regard to lending and financial services in Indian Country, clearly the banking community sees negligible or even negative rewards. As such, policy makers must act even more robustly when the subjects (i.e. the banks) of federal legislated mandates fail to comply.

It must be the policy regulators who show resolve to temper the excesses of financial institutions to serve only the most affluent communities and maximize profit while leaving rural, remote Native populations to rely on non-Indian border towns for their often-predatory commerce, to aspire to little more than being life-time renters, be given no chance to create the intergenerational wealth through homeownership that other Americans enjoy. It has been 27 years since CRA was established. How much longer must citizens residing on tribal lands wait for banks to act? Now is the time to use the CRA to demand that banks make the investment into Indian Country that has been wrongly withheld for far too long. Much opportunity has already been lost and many lives have been negatively impacted. This is the perfect opportunity and time to address these needs.

INVESTING IN INDIAN COUNTRY

Tribal communities and in my case Native CDFI's are not asking banks to do work that we can do ourselves. However, we do need a level playing field. If the GSE's and banks will not lead then they should commit cash resources – equity investments and grant funds to grow the balance sheets of Native CDFIs and others that are actively and typically exclusively serving Native people and communities. We do not need token investments, we need serious, significant and sustained investment to make up for literally centuries of active exploitation by the US government and more recently active neglect (i.e. modern redlining) by the private sector.

The great prosperity of the United States, including a well-functioning economy, was not built simply with lofty ideals – it required land and resources stolen from Indian Nations and the brutal trafficking of human bodies for labor. This is not a low-blow or a slight – it is simply historical fact whose legacy is alive and well. Where resources to manage our own affairs have been taken or withheld from us, we require redress in the form of investments and deference to us regarding the design, testing, refinement and scaling of financial products and services that are a best fit for our communities. Financial institutions must commit to a focused effort on the ground in partnership with tribes and Native-led CDFI's and not a broad and shallow effort that will do little other than to advance public relations goals.

It's taken our organization over a decade to reach the minimum threshold for a viable mortgage lender in Indian Country with virtually no financial assistance from private sector financial institutions. I'm thrilled that other, fairly newly established Native CDFI's will achieve similar metrics in much less time. Yet I'm sobered by the fact that many similar Native organizations have closed their doors and ceased operations. Those facts indicate what is possible and the challenges that remain.

The Agencies have proposed for the first time to include Native Land Areas in the revised CRA regulations. I trust that will herald in a new era of tribes and financial institutions working together to provide Native America equitable access to credit and capital so necessary to address dire social and economic development issues on remote, rural, tribal communities. Those of us who lead and work for Native CDFIs and tribal nations are not going away. We shall remain advocates with an unwavering commitment to our communities.

In good times we'll make tremendous progress with partners and allies to advance community goals. In bad times we'll challenge those who overlook, ignore, slow-walk or sacrifice our communities as part of their own corporate policy. We will carry on the work of those who came before us. I thank you for your attention and your assistance to help us improve the Community Reinvestment Act as related to Native America and stand ready to assist in any additional way you may see fit.

Sincerely,

A handwritten signature in black ink, appearing to read "Dave Castillo". The signature is stylized and fluid, with a large initial "D" and "C".

Dave Castillo, CEO

