

August 3, 2022

Chairman Martin J Gruenberg
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Secretary Ann Misback
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Comptroller Michael J Hsu
Office of the Comptroller of the Currency, Treasury
400 7th Street SW
Washington, DC 20219

Re: Community Reinvestment Act Regulations

Dear Chairman Gruenberg, Secretary Misback, and Comptroller Hsu,

NAFOA is a national intertribal organization comprised of one hundred-forty Indian tribes. NAFOA strives to strengthen tribal finance and to grow tribal economies by advocating for effective long-term economic policies. In furtherance of our mission, we are grateful for the opportunity to comment on this recent joint Notice of Proposed Rulemaking (“NPR”) issued by the Board of Governors of the Federal Reserve System (“Board”), the Federal Deposit Insurance Corporation (“FDIC”), and the Office of the Comptroller of the Currency (“OCC”). NAFOA continues to be supportive of modernizing the Community Reinvestment Act (“CRA”).

The CRA is intended to encourage depository institutions to help meet the credit needs of the communities in which they operate, including low-and moderate-income (“LMI”) neighborhoods. Furthermore, these agencies implement the CRA by establishing criteria to assess the record of depository institutions' lending history and their record of helping LMI neighborhoods. Ensuring that banks reach out to these areas is essential. However, these regulations need to include Indian Country. Tribal communities continue to be underserved and tribal members are the most likely to be unbanked of any community in the U.S. Any modernization of these regulations must be structured to meaningfully drive greater investment to Indian Country. They also should reflect modern banking advancements that have occurred since the CRA was last updated 25 years ago.

While the CRA was originally well-intended and has provided some meaningful community support, Indian Country has been left behind from all the benefits of the CRA. It cannot be overstated that under the current regulatory scheme, the CRA has not worked for Indian Country despite Native communities being among the most underserved and underbanked populations in the country with the largest housing shortages and highest poverty rates. The Board's proposed approach to modernizing the CRA provides the opportunity for Indian Country and other underserved communities who have been historically left out of the scope of the act, to finally be included. The Board, FDIC, and OCC's most recent joint NPR released to modernize the CRA provides much-needed support and potential for Indian Country and is a significant improvement from current CRA regulations. These changes include creating a definition for qualifying community development to benefit Native Land Areas and including a definition for Native Land Areas. Any final proposal must keep these elements.

Over the past years, NAFOA has actively worked with the Board, FDIC, OCC, tribal governments, and various institutions serving Indian Country to develop recommendations for updated regulations. NAFOA encourages the Board, FDIC, and the OCC to adopt an approach that upholds the overdue inclusion of Indian Country as an affirmative obligation. NAFOA's recommendations center around a few themes:

- Ensure Indian Country is consulted in any conversation or attempt to influence the flow of capital and financial services into LMI tribal communities
- Ensure any new regulations are inclusive of individual Indians who need access to personal and business financial services.
- Be inclusive of tribal governments which have large scale and critical capital needs that are essential to growing their economies, creating economic opportunities, climate resiliency projects, and providing services
- Require Indian Country be a part of the scoring system, with scoring that compels bank participation in order to receive a rating of outstanding.
- Continue to clarify the definition of Native Land Areas and Qualifying Activities in Indian Country so Tribal Governments can use the CRA to its fullest potential

Consultation:

Indian Country must be consulted in any conversation or attempt to influence the flow of capital and financial services into LMI tribal communities. We were disappointed to see that while consultation was considered, the agencies did not go through with it. It was stated that a requirement like this would be "overly restrictive and impractical to implement." The NPR stated there were concerns about "diminishing the scope of activities eligible under the definition due to the time and resource constraints of tribal governments." While consultation isn't always easy to guarantee, we believe it is necessary to consult Indian Country in any decisions that will greatly impact tribal communities.

Scoring:

In our previous comments on the CRA, we stated the necessity of ensuring Indian Country be a part of the scoring system, with robust incentives or scoring that compel bank participation. Banks should be required to meaningfully invest in Indian Country in to get a perfect or “outstanding” score. If a bank can receive the same score by investing outside of tribal lands, they will continue to not invest in Indian Country.

In order to effectively drive investment into Indian Country, institutions need enhanced incentives. While these suggestions may appear overly aggressive, they are not. There needs to be an incentive to work with tribes. Banking in Indian Country is more difficult than in any other part of the country, including the other areas designated as high need. Indian Country should be in every bank’s assessment area for both retail lending and community development activities regardless of location. Again, we want to point out that this can be done by ensuring that investment in Indian Country is a requirement for an outstanding score. This is by far the best way to guarantee that institutions will meaningfully invest in Indian Country.

We continue to support the use of Impact Scores as a qualitative evaluation of a bank’s impact and responsiveness through their activities under the Community Development Financing Test. These scores are essential to determine how often banks are effectively investing into communities in need. We support giving banks a score based on the average of their investment through community development. Higher scores and extra credit should be given based on activities in hard-to-reach areas, like Indian Country.

Unfortunately, financing a project in Indian Country has a completely unique set of barriers to entry due to land ownership, tax status, and other constraints that are largely out of Indian Country’s control. Allowing banks to receive equal credit for working in Indian Country as for working in other LMI communities will not be an effective incentive for banks to meaningfully invest in Indian Country. Only by providing enhanced impact scores, credits that are only available by investing in Indian country, will the agencies be able to drive meaningful investment into Indian country.

Qualifying Activities in Indian Country:

We were pleased that the NPR will change the definition of qualifying activities to create a non-exhaustive list of activities that will be eligible for CRA consideration. We believe that given the difficulty of incentivizing banks to invest in Indian Country, that any additional eligibility requirements would only make investing in Indian Country even more difficult. At the same time, we were happy to see that revitalization activities now have a more specific focus on low and moderate-income individuals. We would also like the possibility for this list to be updated either every year or every other year.

Under the Qualifying Activities in Native Land Areas section, there is a part that states that “Revitalization activities in Native Land Areas also would need to be undertaken in conjunction with a Federal, state, local, or tribal government plan, program, or initiative with explicit focus on revitalizing or stabilizing Native Land Areas and a particular focus on low- or moderate-income

households” (pg. 101). While we agree that focus should be on low- or moderate-income households, the definition of “plan, program, or initiative” was unclear, and the role of the federal, tribal, state, and local governments was also unclear. We believe that this language is too vague in terms of what organizations would be required to do when it comes to revitalization activities in Native Land Area. We would request that the NPR be more specific when it comes to defining the requirements entailed in revitalization activities.

Regarding Question 30, we believe all activities within Native Land Area should be eligible for consideration. Also, in the section on Qualifying Activities, the NPR discusses displacement, stating “The agencies propose that essential community facilities, eligible community infrastructure, and disaster preparedness and climate resiliency activities in Native Land Areas must benefit or serve residents, including low- or moderate-income residents of Native Lands Areas, without displacing or excluding low-or moderate-income residents” (page 100). While ensuring the prevention of displacement of residents is well-intended, it is perhaps unrealistic for tribes which may have limited land area, or which are already experiencing the loss of territory due to climate changes. Tribes do not experience gentrification like other low-and-moderate income communities do so therefore, prohibitions designed to prevent it are unnecessary.

For example, when tribes in Alaska will need to move their community to safer areas in order to use climate resiliency activities, there will be displacement. A bright line rule such as that proposed in the NPR would inhibit their ability to prepare their communities for these changes. There are also tribes in California which are small and don’t have a large land base. For these tribes to make improvements or build upon their land, displacement would likely have to occur. Tribal governments know what is best for their own community in terms of climate resiliency activities and other qualifying community development activities and the requirements introduced in the NPR could prevent these governments from using the CRA to its fullest potential. We request this section to be either rewritten to take these factors into account or make exceptions when displacement is a necessary but unfortunate outcome to meet the needs of the tribal community at large.

Native Land Areas:

The inclusion of a definition for Native Land Areas is a welcome improvement. However, we believe there are changes that should be made to this definition. The Definition of Native Land Areas should be expanded to include tribal fee lands. The loss of tribal lands due to earlier federal policies aimed at dispossessing tribes of their homelands is well known. Rebuilding these homelands by taking land into trust is expensive and time consuming. Including tribal fee lands in the definition of Native Land Areas is consistent with the current federal policy of encouraging tribal self-determination and with principles of tribal sovereignty. Tribes should be allowed to designate which lands should be included in Native Land Areas. The definition should be expanded to allow for this change. State recognized tribes are especially vulnerable to having important lands excluded from the definition if they are not allowed to designate the areas for themselves. Similarly, Tribes should be allowed to self-certify their census data. This is consistent with current Treasury practice which has allowed self-certification of household data.

Conclusion:

We continue to support the work these agencies have undertaken to modernize the CRA to ensure it works for all communities across the country. Indian Country has continued to be historically left out of major economic development policies including the initial implementation of the Community Reinvestment Act. These latest updates are a significant improvement and if implemented with the changes suggested, will help to drive greater investment into Indian Country. However, we strongly urge the Board, the FDIC, and the OCC clarify the definition of Native Land Areas and the language on Qualifying Activities in Indian Country. In addition, we continue to believe that the enhanced impact scores for Indian Country is perhaps the only way to incentivize those institutions which are not active in Indian country to meaningfully invest in and work with tribal communities. We understand that tribes are different, but that difference does not justify financial institutions unwillingness to work in Indian country. We hope to see an updated version of the CRA that will allow Indian Country to fully participate.

Sincerely,



Rico Frias
Executive Director
NAFOA