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August 5, 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:

The **Native CDFI Network** (NCN), the only national organization solely dedicated to serving and supporting Native community development financial institutions (CDFIs), welcomes this opportunity to provide comment on the Notice of Proposed Rulemaking (NPR) that seeks to modernize the regulations governing federal agencies' administration of – and banking institutions' compliance with – the Community Reinvestment Act (CRA).

Changes to the CRA should be adopted to finally have the regulators of financial institutions affirmatively acknowledge, address, and affect the legacy of conquest that has been devastating Native people. American Indian, Alaska Native, and Native Hawaiian communities are located in some of the most rural and remote locations in the country and face a unique set of challenges that limit asset and wealth building and economic growth, such as underdeveloped infrastructure, complex governing structures, and, perhaps most glaringly, severely limited access to capital. NCN's 2017 survey of Native CDFIs revealed a \$29,000 median income for individuals in the markets they serve, and according to a 2019 FDIC survey, Native communities had the country's highest rate of unbanked households at 16.3%, three times the national average. Meanwhile, a significant majority of Native communities (86 percent) lack a single financial institution within their borders to access affordable financial products and services.

In the face of these challenges, and in addition to tribal enterprises, the relatively new formation of Native CDFIs have proven themselves effective but still significantly under-resourced engines for fueling the growth of healthy, vibrant Native economies and communities. Where tribal enterprises pursue high-growth investment opportunities, Native CDFI's serve those tribal community members themselves that are typically considered "high-risk". Native CDFI's have been responsible for sowing the seeds of an emerging, astounding transformation – creating small businesses, jobs, homeowners, and serving as the catalyst for maturing local tribal economies from informal cash economies to entrepreneurial and residential markets capable of leveraging a growing asset base to secure reasonably priced investment dollars and economic opportunities long-denied by mainstream financial institutions. Currently, a total of 72 certified Native CDFIs – serving rural reservation communities as well as urban Native communities – can be found in 27 states across the country, and there are more than a dozen "emerging" Native CDFIs following closely in their footsteps.

The CRA: A 45-Year Record of Failing Native Nations and Communities

As you know, Congress passed the CRA in 1977 to encourage banking institutions to serve the credit needs of the communities in which they operate, specifically low- and moderate-income areas and populations. The Act also aimed to curb discriminatory credit and lending practices against those populations, a practice commonly known as “redlining.” With many Native communities located in the poorest parts of the country, and with a substantial percentage of the Native population deemed to be low or moderate income, the CRA on paper should have significantly enhanced the ability of Native nations, their enterprises, Native-owned small businesses, and Native consumers to access capital and credit through CRA-qualifying banking institutions.

Unfortunately, however, to date the CRA has utterly failed to compel or effectively incentivize banking institutions’ investment in Native nations and communities. Since its founding in 2009, NCN has collected extensive anecdotal evidence confirming that banking institutions’ redlining of Native nations and communities continues largely unabated, a dynamic exacerbated in recent years by the widely documented consolidation of the banking industry and the ensuing retraction of bank branches away from Native nations and communities. As the CDFI Fund’s landmark “Access to Capital and Credit in Native Communities” report points out, while the CRA “was not intended to exclude Native Communities living on tribal lands...in practice it often does,” and banks under the Act’s current regulations can easily satisfy CRA requirements without having to do business in or with Native nations and communities if they so choose (as most do), and they are not required to affirmatively disclose that they have failed to make CRA-qualified investments in and with Native nations and communities.¹

This has contributed to some predictable, persistent, and sobering outcomes. With the CRA effectively excluding Native nations and communities, large swaths of Indian Country have become credit desert epicenters where no banking services are available. This has left many Native people to instead turn to nearby high-cost predatory lenders that trap them in endless debt cycles and rob them of their ability to grow their personal and familial assets and wealth and, collectively, community prosperity. As the Native American Finance Officers Association explains, “An alignment of a banking and credit deserts map with a map of tribal communities reveals a crisis for tribal citizens and governments attempting to access cost-effective capital and banking services.”

The Community Reinvestment Act Notice of Proposed Rulemaking

NCN has been actively involved in the federal government’s various attempts in recent years to modernize the CRA and has been fully engaged with the three federal agencies since early May 2022 about the purpose and contents of this latest NPR, particularly as it pertains to Native nations and communities and the ability of Native CDFIs to serve them. Please find below our overarching comments on four key aspects of the NPR as well as our specific comments on nine questions requesting feedback that bear directly on Native nations, communities, and CDFIs.

Conferring Automatic, Enhanced CRA Credit on Activities Involving Treasury-Certified Native CDFIs

NCN supports the agencies’ proposal that automatically confers CRA community development credit on all community development activities involving Treasury Department-certified CDFIs, which includes the more than 70 certified Native CDFIs. NCN supports the inclusion in the CRA Final Rule of the NPR’s provision that “lending, investment, and service activities by any bank undertaken in connection with a Treasury Department-certified CDFI, at the time of the activity, would be presumed to qualify for CRA credit given these organizations would need to meet specific criteria to prove that they have a mission of promoting community development and provide financial products and services to low- or moderate-income individuals and communities” (NPR, pages 92-93).

¹ Native Nations Institute. *Access to Capital and Credit in Native Communities*. Tucson, AZ: Native Nations Institute, 2016, p. 94 ([http://nni.arizona.edu/application/files/8214/6378/9056/Access to Capital and Credit in Native Communities.pdf](http://nni.arizona.edu/application/files/8214/6378/9056/Access%20to%20Capital%20and%20Credit%20in%20Native%20Communities.pdf), accessed August 1, 2022); citing Native CDFI Network, “Community Reinvestment Act: Interagency Questions and Answers Regarding Community Reinvestment,” May 17, 2013.

In addition, NCN supports the agencies' proposal that "activities undertaken by any bank in connection with a non-Treasury Department-certified CDFI could also qualify for CRA consideration if the activity separately met the defined eligibility criteria of a different prong of the community development definition" (p. 93), as this provision would directly incentivize lending, investment, and service activities undertaken by banks with the more than a dozen "emerging" Native CDFIs who have yet to secure Treasury Department certification; in fact, these activities would enhance the ability of those emerging Native CDFIs to secure Treasury Department certification sooner than they otherwise would.

However, NCN requests that the CRA Final Rule take this prioritization of Native CDFIs a critical step further by including an additional and compelling "multiplier incentive" for investing in CDFIs similar or greater in scope and strength to the provision featured in the OCC's June 2020 CRA Notice of Proposed Rulemaking, which proposed a double credit (2X) for banks investing in CDFIs (including Treasury-certified Native CDFIs). This 2020 provision recognized the unique place and role of Native CDFIs providing critical capital and credit to economically marginalized Native families and communities that the CRA was explicitly designed to assist; it needs to be featured in the CRA Final Rule. If the CRA regulators do not include such an additional incentive for investing in Native CDFIs, NCN expects that CRA-tied capital will continue to disproportionately flow from banking institutions to what they deem to be the easiest and most profitable locations and recipients, which history has proven typically leaves Native CDFIs behind.

Allocating CRA Credit for Activities in Native Land Areas Regardless of Area Median Income

As individual Native CDFIs have raised in their comments on the NPR, Native nations and communities have a pressing need to attract and retain working professionals to strengthen and grow their economies. Without appropriate housing and homeownership opportunities that provide these professionals with safe, quality places to live, Native nations and communities risk losing out on their services. These individuals typically are making above 80% of area median income (AMI) and often over 120% of AMI. In addition, with Native nations and communities often located in the poorest areas of the United States, an income of 120% of AMI is still often inadequate to purchase a home. For these reasons, it is critical that the CRA Final Rule not restrict CRA-qualified activities within Native Land Areas to those serving only those individuals at or below the 80% of AMI threshold. It would be counterproductive to penalize Native community members for increasing their incomes due to successful community and economic development interventions by the way of strict income targeting.

Data Collection, Reporting, and Disclosure: Vital to Holding Banks Accountable to the CRA's Intent

The NPR features a lengthy section (pages 384-421) that proposes new provisions governing the data collection, reporting, and disclosure requirements of CRA-mandated banking institutions. Included in the section's 27 questions requesting feedback is Question 173 (page 421), "Should the agencies disclose HMDA data by race and ethnicity in large bank CRA performance evaluations?" Other Questions relevant to Native CDFIs are 157 (page 407), and 161-162 (pages 410-411).

As referenced above, the current CRA does not require banking institutions to invest in Native nations and communities, and, practically speaking, does little to compel those institutions to collect, share with federal regulators, or otherwise publicize whether they make CRA investments in Native nations and communities, where they make them, in whom, and to what extent. For the past 45 years, this blatant lack of transparency has enabled banking institutions to pass the CRA test while intentionally avoiding Native nations and communities without any real accountability for violating the CRA's intent or negative consequence for doing so.

To remedy this longstanding, abject failure of the CRA, regarding question #173, NCN strongly supports the disclosure of Home Mortgage Disclosure Act (HMDA) data by race and ethnicity – specifically American Indians, Alaska Natives, and Native Hawaiians – in large bank CRA performance evaluations. The three federal agencies should publicly share that data with Native CDFIs, tribal governments, and other key Indian Country stakeholders annually, and should also annually provide to these groups an updated longitudinal analysis of HMDA data trends involving American Indians, Alaska Natives, and Native Hawaiians, and specifically which large banks are improving and which are not. In addition,

NCN answers in the affirmative question #157 (p. 407), agreeing that the benefits of requiring home mortgage data collection *and* reporting by non-HMDA reporter large banks outweighs any burdens associated with such data collection and reporting. Said data should be broken down by race and ethnicity, and that data and the agencies' analysis of it provided to the aforementioned Indian Country groups on an annual basis.

In this same vein, related to questions requesting feedback #161 and #162, NCN believes the CRA Final Rule should require banks, as part of their CRA evaluations, to collect and report data on their community development financing activities in Native Land Areas and with entities such as Native CDFIs and tribal governments that serve American Indian, Alaska Native, and Native Hawaiian communities. The three federal agencies should publicly share that data with Native CDFIs, tribal governments, and other key Indian Country stakeholders annually, and should also annually provide to these groups an updated longitudinal analysis of CRA-qualified community development financing activity trends in Native Land Areas and involving American Indians, Alaska Natives, and Native Hawaiians.

Furthermore, for all of the above, banks should be required to collect and report data as part of their CRA evaluations that documents *where* within Native Land Areas their CRA-qualified activities took place (specific geographic location, whether an activity took place on tribal trust land or non-trust land, etc.). This disaggregated data will enable Native CDFIs, tribal governments, and other key Indian Country stakeholders to evaluate the true commitment of a particular bank *in practice* to invest in the most underserved and under-resourced parts of Indian Country and hold those banks who are not living up to the spirit of the CRA accountable.

Qualifying Activities Confirmation and Illustrative List of Activities: Including Native CDFI-Involved Activities

The NPR proposes creating and periodically updating a publicly available illustrative, non-exhaustive list of activities eligible for CRA consideration to provide stakeholders with additional certainty in determining what community development activities qualify (see NPR, pages 103-106). NCN supports the creation of this Illustrative List on the condition that it features a comprehensive set of common Native CDFI-involved activities that should qualify, developed through an iterative process involving direct, ongoing consultation between Native CDFIs and the three federal agencies.

NPR Section on Native Land Areas

Below are NCN's responses to key questions requesting feedback in the Native Land Areas section (pages 96-103).

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

NCN supports the NPR's inclusion – for the first time in the 45-year history of the CRA – of a stand-alone CRA-qualifying designation encompassing the many distinct types of “Native Land Areas.” NCN and other leading national Native organizations have been advocating for such a stand-alone designation for years as a critical mechanism for providing banking institutions strong and compelling incentives to lend to and invest in tribal nations and communities (as opposed to avoiding them virtually altogether, as has been their practice). *However*, NCN feels strongly that the current proposed definition is *not* inclusive of geographic areas with Native and tribal community development needs. Due to the enduring legacies of federal termination and relocation policies designed to suppress tribal economic activity on tribal lands and compel Native people to move elsewhere to support themselves, today the vast majority of American Indian, Alaska Native, and Native Hawaiian people live *outside* of the Native Land Areas covered by the NPR's proposed definition; consequently adoption of this definition would severely limit the ability of Native CDFIs, tribal governments, and other community development entities serving American Indian, Alaska Native, and Native Hawaiian communities to secure CRA-qualified investments to support American Indians, Alaska Natives, and Native Hawaiians residing within their respective service areas but outside of the NPR's proposed definition of Native Land Areas. The proposed definition needs to be substantively broadened to enable unencumbered access to CRA-qualified investments to support American Indian, Alaska Native, and Native Hawaiian people no matter where they may live.

Critically, as our partners echo in their comments, the CRA's final definition of "Native Land Areas" should be strictly limited to the CRA and its regulations only, and should not be applied to any other federal policies.

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?

Given that significant percentages of residents in Native Land Areas are low- or moderate-income, and given that tribal governments, Native CDFIs, and other community development entities serving American Indian, Alaska Native, and Native Hawaiian communities by their very nature prioritize serving those community members most in need, adding eligibility requirements for activities in Native Land Areas to ensure they benefit low- or moderate-income residents seems redundant, unnecessary, and potentially burdensome for Native CDFIs, tribal governments, and other community development entities seeking to secure CRA-qualifying lending or investment for community development efforts.

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.

First and foremost, NCN seeks clarification on the proposed (and exceedingly vague) requirement that CRA qualifying activities in Native Land Areas "would need to be conducted in conjunction with a Federal, state, local, or tribal government plan, program, or initiative that benefits or serves residents of Native Land Areas, without displacing or excluding low- or moderate-income residents of such geographic areas" (pages 100-101). It is our understanding – based on discussions with the three involved federal agencies – that the NPR intends to encompass all potential activities situated within the exterior boundaries of the particular Native Land Area in question, regardless of the tenure status (trust land, fee land, etc.) of the specific location where the proposed CRA-qualified activity would take place. The NPR also does not address the options available to those seeking CRA lending/investments within Native Land Areas when such a government plan, program, or initiative does not exist.

Perhaps most importantly, the NPR is not clear on whether – and how – the provisions contained in the Native Land Areas section limit *in any way* the NPR's proposal that the new CRA regulations automatically confer CRA credit on *all* activities with Treasury Department-certified CDFIs, including Native CDFIs (see page 92), no matter where those activities may take place. It is NCN's position (as stated above) that the CRA Final Rule's *automatic* assignment of CRA credit for *all* activities with Treasury Department-certified CDFIs not be abridged or limited in any way by any other, potentially conflicting provisions contained within the Final Rule.

Responding specifically to Question #30, should the above "conducted in conjunction with a Federal, state, local, or tribal government plan, program, or initiative" requirement remain in the final proposed rule, NCN supports the CRA's consideration of activities in Native Land Areas undertaken in conjunction with plans, programs, or initiatives through tribal government designees such as tribally designated housing entities (TDHEs) and intertribal consortiums as well as tribal governments, as those designees are prime candidates for – and often the most appropriate recipients of – CRA-qualified lending and investments for economic development and asset building endeavors like housing infrastructure developments, small business incubator spaces, etc. For example, often an individual tribal nation/government does not possess the "economy of scale" to singlehandedly execute large-scale infrastructure development projects that would benefit from CRA-qualifying investments, and in those instances, said nation/government will rely on an intertribal consortium of which they are a member to execute such projects. Finally, the CRA Final Rule should make clear that entities which are formally chartered by Native nations are automatically considered CRA-eligible partners.

NPR Section on Qualifying Activities Confirmation and Illustrative List of Activities

Below are NCN's responses to key questions requesting feedback in the Qualifying Activities Confirmation and Illustrative List of Activities section (pages 103-106).

Question 31. Should the agencies also maintain a non-exhaustive list of activities that do not qualify for CRA consideration as a community development activity?

NCN feels this would be helpful in bringing much-needed certainty for Native CDFIs seeking to attract CRA-qualifying investments; however, any activities tied to Native Land Areas and CDFIs (notably Native CDFIs) should be reviewed and discussed with – and supported by – Native CDFIs, tribal governments, tribal government designees (see above), and other key Indian Country stakeholders before being approved for inclusion on this list of non-CRA qualified activities.

Question 32. What procedures should the agencies develop for accepting submissions and establishing a timeline for review?

The agencies should engage Native CDFIs, tribal governments, tribal government designees, and other key Indian Country stakeholders through regular, formal consultations and listening sessions to review and update any and all activities tied to Native Land Areas and CDFIs (notably Native CDFIs) appearing on the list of non-CRA qualified activities (as well as those appearing on the Illustrative List of Qualified Activities).

NPR Section on Community Development - Impact Review Factors

Below are NCN's responses to key questions requesting feedback in the Community Development - Impact Review Factors section (pages 109-118).

Question 34. For the proposed impact review factors for activities serving geographic areas with high community development needs, should the agencies include persistent poverty counties, high poverty census tracts, or areas with low levels of community development financing? Should all geographic designations be included or some combination? What considerations should the agencies take in defining these categories and updating a list of geographies for these categories?

The US Treasury CDFI Fund and various other federal programs routinely provide additional funding to address persistent poverty counties and other high needs areas. The New Markets Tax Credit Program, the Low-Income Housing Tax Credit Program, the Opportunity Zone initiative, and others such as the 8a program and related state minority contracting preference programs all point to the need for multiple and intensive streams of resource availability for those areas most in need. To provide redress for the fact that Native Land Areas and Native people have not been included in any meaningful way by the CRA over the last 45 years, where Native Land Areas overlap with areas defined as *persistent poverty counties, high poverty census tracts, or areas with low levels of community development financing*, banks should receive a triple credit (3x) to further incentivize them to actually serve Native nations and communities in accordance with CRA's original intent.

The CRA Final Rule also needs to provide equally strong incentives to invest in the service counties/service areas of Native nations that do not have formally recognized land bases. The restoration acts of these Native nations and other federal guidance clearly affirm that citizens of these Native nations residing in these nations' service counties/service areas shall be deemed to be residing on or near an Indian reservation. As such, they should be fully included in the CRA's Final Rule.

Question 35. For the proposed factor focused on activities supporting MDIs, WDIs, LICUs, and Treasury Department-certified CDFIs, should the factor exclude placements of short-term deposits, and should any other activities be excluded? Should the criterion specifically emphasize equity investments, long-term debt financing, donations, and services, and should other activities be emphasized?

As referenced above at the top of page 3, equating CDFIs with MDIs, WDIs, and LICUs for the purposes of the CRA ignores the unrivaled ability of CDFIs to fulfill the CRA's legislative intent, particularly as it relates to its community development functions. Lumping CDFIs together with MDIs, WDIs, and LICUs sends a clear message to banking

institutions that they should prioritize making CRA investments in CRA-eligible banks and credit unions *over* CDFIs given the relative perceived risk associated with each. This is rooted in the fact that MDIs and WDIs and LICUs are regulated institutions; conversely, most CDFIs are not depository institutions, consequently do not carry FDIC or National Credit Union Association (NCUA) insurance, and thus would be deemed a riskier investment by banking institutions seeking to make CRA investments. This dynamic reinforces the need for CDFIs to be distinguished from MDIs, WDIs, and LICUs through the assignment of a multiplier incentive for CDFIs in the CRA Final Rule.

Question 36. Which of the thresholds discussed would be appropriate to classify smaller businesses and farms for the impact review factor relating to community development activities that support smaller businesses and farms: the proposed standard of gross annual revenue of \$250,000 or less, or an alternative gross annual revenue threshold of \$100,000 or less, or \$500,000 or less?

NCN believes the highest thresholds would be most appropriate given the broad range of small businesses operating on tribal lands including both established businesses serving local, regional and even international markets to the more common home-based micro-business and start-up local BNB type businesses serving local tourism industry and small organic farmers serving niche clientele. The highest threshold that allows and incorporates the wide variety of tribal businesses and farms is needed. The ultimate success – of community development activities in supporting the long-term sustainability and growth of Native-owned small businesses and farms requires the broadest consideration given that the CRA has not previously explicitly included Tribal Land Areas and because Native CDFI's were created only after the creation of non-Native CDFI's, that in effect means banks have 50 years worth of neglect to rectify in a meaningful and impactful way.

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?

Given Native CDFIs across the country serve American Indians, Alaska Natives, and Native Hawaiians living both within the NPR's defined Native Land Areas as well as outside of them – as well as the aforementioned fact that the majority of American Indians, Alaska Natives, and Native Hawaiians live outside of Native Land Areas – NCN supports the factor being defined to include activities benefitting Native and tribal communities not located in Native Land Areas. As the language in Question 38 astutely recognizes, “such an approach would recognize that many tribal members reside in areas outside of the proposed definition of Native Land Areas, as a result of a number of factors, including past Federal policies”; in addition, the federal government's trust obligation – expressed through legislation and regulations such as the CRA – “applies to not only tribes but also their citizens regardless of residency on tribal lands given their unique political status” (page 116). For these reasons, the CRA Final Rule and the federal agencies' administration of it should discard the “Native Land Areas” map that the Federal Reserve Bank's Center for Indian Country Development has been sharing to visually explain the new CRA regulations, as it ignores the vast expanse of service areas and service counties of tribal governments, Native CDFIs, and other Native-serving community development entities, and thus has the potential to confuse banking institutions as to where CRA investments in Native nations and communities can take place (and thus discourage them from doing so).

Closing

NCN is deeply committed to Native CDFIs' collective mission of creating ample and fair access to capital and resources for Native people, primarily those in low- and moderate-income communities. Native CDFIs' mission aligns with the enduring spirit of the CRA, which included addressing fairness and access to credit for homeownership, small business development, infrastructure development projects, and other wealth-building activities in tribal communities. Once finalized, the federal agencies should issue comprehensive guidance to banks, tribal associations, Native-led organizations, Native CDFIs, as well as federal, state, local, and tribal governments to better understand how CRA-qualified activities can be operationalized in and with Native nations and communities.

We look forward to continuing to engage directly with the Department of the Treasury's Office of the Comptroller of the Currency (OCC), and Federal Deposit Insurance Corporation (FDIC), and the Federal Reserve System (FRS) to ensure the CRA Final Rule fully -- and finally -- incentivizes substantially increased investments by banking institutions in Native nations and communities across this country.

Sincerely,

A black rectangular redaction box covers the signature of Pete Upton.

Pete Upton

NCN Board Chair/Interim Executive Director

pete@nativecdfi.net