Community Development Bankers Association
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May 20, 2021

Via Electronic Submission

Mr. James P. Sheesly
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

RE: Amendment to the Capital Rule to Facilitate the Emergency Capital Investment Program (ECIP); RIN No. 3064-AF73

Dear Mr. Sheesly:

The members of the Community Development Bankers Association (CDBA) respectfully submit the enclosed comments in response to the interim final rule (IFR) request for comments related to the Board of Governors of the Federal Deposit Insurance Corporation's (the FDIC's) implementation of the Emergency Capital Investment Program (ECIP).

CDBA is the national trade association for banks and thrifts that are US Treasury-designated Community Development Financial Institutions (CDFIs). Our members have a primary mission of promoting community development and target at least 60% of their total lending and activities to Low- and Moderate-Income (LMI) communities and customers that are underserved by traditional financial service providers.

CDBA believes that ECIP has the great potential to catalyze the next phase of growth and development for depository Community Development Financial Institutions (CDFIs) and the communities and customers they serve. These communities have been disproportionately impacted by the economic effects of the COVID-19 pandemic and long term structural inequities of low income and communities-of-color.

We are excited about the opportunity to work with the FDIC, Federal Reserve, and OCC (the Agencies) and Treasury to make ECIP a success. ECIP's success will depend, in large part, on the engagement of the Agencies in its implementation. To achieve the program objectives set forth by Congress, the regulatory Agencies will need to work closely with Treasury to ensure ECIP reaches a broad range of eligible institutions and there is robust industry participation. We strongly encourage the regulatory Agencies to engage in active outreach to all eligible institutions to ensure economic recovery occurs in hard-hit low income and communities of color.

MINIMIZING OPERATING RISK CAUSED BY SHIFTING POLICY PRIORITIES

CDBA is grateful for the strong support demonstrated by Congress and the Biden Administration for CDFIs. We believe the current Administration is well-aligned with supporting CDFIs and MDIs. Political

and policy winds, however, will likely change over the period in which Treasury holds ECIP investments. We strongly urge the Agencies to affirm that ECIP policies within the Agencies scope of oversight are settled, and not subject to constant revision, for the tenure of an institutions' participation in the program. During TARP and CDCI, negative public sentiment about the programs contributed to an ever-shifting set of program rules and agency direction. Constantly shifting rules create significant operations risk for recipient institutions. Any changes to regulatory policies should only occur with the consent of all parties to an ECIP transaction. We believe such a commitment will encourage more eligible CDFIs and MDIs to participate in the program.

REGULATORY COORDINATION

CDBA strongly urges the FDIC to work closely with Treasury on ECIP implementation. The treatment of ECIP investments by the Agencies are critical to the success of the program. In the short term, we have urged Treasury to work with the Agencies to develop processes to ensure timely approval of ECIP applications. We strongly urge the FDIC to develop examiner training on ECIP to ensure support at headquarters filters down to the examiner level.

AMEND THE DEBT TO EQUITY / LEVERAGE RATIO FOR SUB S AND MUTUAL BANKS

CDBA strongly urges the FDIC to work with the Federal Reserve Board (the Board) to ensure the Board modifies the Small Bank Holding Company Policy Statement (the Policy Statement) in connection with the IFR and create an exception under Section 2.C (Dividend restrictions). This exception should allow S Corp bank holding companies to exceed a 1.0:1 debt-to equity ratio and still issue dividends. Because S Corp and Mutual CDFI banks and MDIs are small organizations, it will be impossible for them to keep their debt-to-equity ratios at 1.0:1 while applying for the amounts Congress authorized. As an example, some CDFI banks estimate that the current regulations would variously limit S Corp and Mutual banks' ECIP capital to only 2% or 5% of assets, a fraction of the potential (up to 15% for banks with assets greater than $2 billion, 25% for those $500 million to $2 billion, and 30% for those under $500 million) allowed under ECIP rules.

Providing such an exception to exclude 100% of ECIP Sub Debt from the Board's Debt to Equity and Double Leverage Ratios would be consistent with the position the Board took with respect to the Temporary Asset Relief Program (TARP), established by the Emergency Economic Stabilization Act of 2008. At the time TARP was established, the Board amended Section 2.A of the Policy Statement to add language clarifying that:

> *"Notwithstanding any other provision of this policy statement and for the purposes of compliance with paragraphs 2.C [Dividend Restrictions]… a bank holding company that has made a valid election to be taxed under Subchapter S…may exclude from debt subordinated debentures issued to the United States Department of the Treasury under [TARP]".*

Further, we urge the FDIC to work with the Board regarding its consideration of a bank holding company's double-leverage ratio as part of its overall safety and soundness supervisory review of the organization. The double-leverage ratio is generally computed by dividing the bank holding company's investment in the banking subsidiary by its total equity capital. A double-leverage ratio will be considered by the Federal Reserve to be high once it exceeds 120%. At this point, the bank holding company may become subject to additional regulatory scrutiny by the Federal Reserve's supervision and regulation team. CDBA recommends that the FDIC work with the Board to modify the definition of the

double-leverage ratio to exclude from the ratio some portion, or all, of an ECIP-related BHC investment into a banking subsidiary.

If the Board does not make these amendments, this time to acknowledge ECIP and exclude ECIP Sub Debt from the overall debt calculation for the purposes of calculating these ratios, S Corp and Mutual CDFI banks and MDIs will be forced to limit their capital application. The organizations closest to the underserved communities will be materially curtailed in their ability to participate in ECIP, expand services in needy communities, and reach deep to address systemic economic challenges.

CDBA also recommends that the FDIC work within Prompt Corrective Action Rules (by which FDIC insured institutions are subject to tiered minimum capital requirements) to ensure that ECIP participation does not negatively influence the FDIC's enforcement of the rules.

ELIMINATE UNEQUAL TERM SHEET OFFERINGS FOR SUB S AND MUTUAL BANKS

CDBA strongly urges the FDIC to work with the other agencies and with Treasury and revisit the term sheet for subordinate debt offered to Sub S and Mutual Banks. We believe several provisions are in direct conflict with the ECIP authorizing statute:

- ECIP's authorizing statute says that the maximum rate for both forms of capital is 2%.[1] The Sub S and Mutual term sheet, however, states that banks receiving Subordinate Debt are subject to a maximum rate of 2.5%. The rate on both investments should adhere to the statutory maximum of 2%, without exception.
- The statute states that sub debt should receive treatment consistent with the Tier 1 treatment for preferred stock.[2] Yet, the Sub S and Mutual term sheet say it will be treated as Tier 2. The Agencies must ensure that capital treatment is consistent with the statute. CDBA urges the Agencies to ensure that the capital treatment on both investments should adhere to the Tier 1 statutory requirement for "consistency."
- The C Corp term sheet offers stock with perpetual maturity, while the Sub S and Mutual term sheet offers a 15 year term. This discrepancy is inconsistent with the ECIP statute. CDBA urges Treasury and the regulatory agencies to ensure the capital offered to Sub S and Mutual banks is "consistent with requirements …applicable to the terms of preferred stock issued by institutions participating in the program." CDBA has recommended that a term of not less than 30 years – but preferably 40 years – would make the subordinated debt instrument comparable in practical terms for the perpetual term of the C Corp offering. For example, Trust Preferred Securities, when they were used, had a term of up to 30 years. A term of 15 years is woefully inadequate.

CONCERNS SPECIFIC TO STATE CHARTERED BANKS

It is imperative that state-chartered banks be treated equitably to national banks. The OCC has modified its licensing rule for national banks and specifically added language facilitating the issuance of sub debt for ECIP. CDBA urges the FDIC to confirm whether individual states have provisions in their licensing rules similar to the OCC's rule, which would limit state banks' ability to issue subordinated debt. CDBA urges the FDIC to work with the OCC to clarify whether it is necessary, and if so, how to address state-level licensing requirements that might have similar provisions regarding the issuance of sub debt.

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[1] "No dividends, interest or other similar payments shall have a rate exceeding 2 percent per annum for the first 10 years."

[2] "Consistent with requirements . . . applicable to the terms of preferred stock issued by institutions participating in the program."

Specifically the OCC's language states that the OCC "Is adding language to its licensing rule . . . To facilitate the ability of a national bank to issue subordinated debt through ECIP." Per the IFR, the new paragraph clarifies that "provisions and covenants added to a subordinated debt document pursuant to requirements imposed by the Treasury Department for purposes of ECIP will not be considered, under paragraph (d)(2) of section 5.47, to unduly restrict or otherwise act to unduly limit the authority of a national bank or interfere with the OCC's supervision of the national bank." This modification should be made explicit for state banks, where required.

TROUBLED INSTITUTIONS

We strongly urge the FDIC to work with the other regulatory Agencies to exercise maximum discretion regarding "Troubled Institutions" to allow CDFI and MDI banks to fulfill Congressional intent to get capital in the hands of LMI and minority communities.

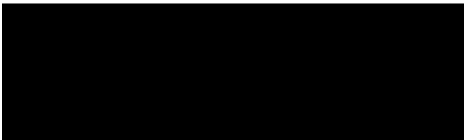
We are concerned about a potentially overbroad definition of "troubled institution" in the FDIC's 12 CFR part 359. We are concerned that the "Troubled Institution" definition extends the exclusion of institutions beyond those with truly troubled composite ratings or subject to serious cease and desist letters, to include those subject to a "written agreement" to "improve their financial condition."[3] This is potentially in conflict with a clause within the authorizing statute, Section 104(A)(d)(2), <u>which requires the Treasury Secretary to consult with the Agencies to determine eligibility. We urge the agencies to consider that receipt of ECIP monies could be used to ameliorate many regulatory challenges.</u>

Additionally, we seek affirmation that if a subsidiary bank is designated in "Troubled Condition" or is subject to a formal enforcement action for reasons <u>other than unsound lending practices</u>, the holding company of such bank, assuming it independently satisfies all ECIP program requirements, can nonetheless participate in ECIP as contemplated by the program.

In conclusion, the membership of CDBA appreciates the thoughtful consideration of the FDIC and its staff as ECIP is implemented. This is a wonderful opportunity to expand the positive influence of a long-standing market-based solution within COVID-impacted communities, and we sincerely appreciate the opportunity to comment and offer feedback. We look forward to future discussion on these important issues.

If you have any questions, please contact Jeannine Jacokes, CDBA Chief Executive Officer, at (202) 689-8935 ext. 222 or jacokesj@pcgloanfund.org, or Brian Blake, Public Policy Director at (646) 283-7929 or blakeb@pcgloanfund.org.

Sincerely,



Jeannine Jacokes
Chief Executive Officer

[3] 12 CFR § 303.101 (c)(3) and (4)