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*Via Electronic Submission*

May 21, 2021

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

Ann E. Misback  
Secretary, Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, NW  
Washington, DC 20551

James P. Sheesley  
Assistant Executive Secretary  
Attn: Comments RIN 3064-AF73  
Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street, NW  
Washington, DC 20429

**RE:** Regulatory Capital Rule: Emergency Capital Investment Program [OCC Docket ID OCC-2021-0002]  
[FRB Docket No. R-1741; RIN No. 7100-AG11] [FDIC RIN 3064-AF73]

Dear Sir or Madam:

The Independent Community Bankers of America ("ICBA")<sup>1</sup> welcomes the opportunity to provide comment in response to the Office of the Comptroller of the Currency's ("OCC"), Board

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<sup>1</sup>*The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.*

*With nearly 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5 trillion in assets, over \$4.4 trillion in deposits, and more than \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at [www.icba.org](http://www.icba.org).*

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of Governors of the Federal Reserve's ("FRB"), and the Federal Deposit Insurance Corporation's ("FDIC") (collectively, "Agencies") Interim Final Rule ("IFR") regarding capital instruments issued pursuant to the Emergency Capital Investment Program ("ECIP" or "Program"). While ECIP has tremendous potential to provide billions of dollars of capital to community banks to revitalize and help their communities, ICBA believes that the IFR's treatment of subordinated debt limits the utility of the Program. Instead, ICBA urges the Agencies to revise the IFR to permit subordinated debt issued under ECIP to count toward tier 1 capital levels and to exclude it from debt under the Small Bank Holding Company Act Policy Statement.

### **Background**

The Consolidated Appropriations Act of 2021 (the "Act") created ECIP to revitalize and provide long-term financial products and services in low- and moderate-income and minority communities that have disproportionately suffered from the impacts of the COVID-19 pandemic. The Act authorizes the Secretary of the Treasury to provide capital investments in minority depository institutions ("MDIs") and community development financial institution ("CDFI") banks (collectively, "eligible institutions") by purchasing senior preferred stock or subordinated debt issued by the eligible institutions.

In March 2021, Treasury published the application and term sheets for the Program. Separately, the Agencies issued the IFR to revise existing regulatory capital rules to accommodate and account for capital instruments issued under the Program. Pursuant to the IFR, preferred stock qualifies as tier 1 capital, while subordinated debt qualifies as tier 2 capital. The Agencies now solicit comment on the IFR, particularly regarding the regulatory capital treatment of the Senior Preferred Stock and Subordinated Debt issued under ECIP, and the advantages and disadvantages of the differing capital treatment.

### **General Comments**

ICBA strongly believes that ECIP is a transformational program that will empower hundreds of MDI and CDFI community banks to help thousands of communities and millions of families. MDIs and CDFIs, in particular, are located in, and serve areas that have been, disproportionately affected by the COVID-19 pandemic. As a result, they have helped lead the way toward helping consumers and small businesses during this recovery. The capital raised from ECIP will leverage and accelerate those efforts even further.

However, ICBA is concerned that the IFR's treatment of subordinated debt as tier 2 capital will greatly diminish the Program's potential. This will reduce the impact that Congress envisioned for the Program, especially considering that subordinated debt is the only instrument available under this Program for as many as 75 MDIs and CDFIs that are either mutual banking organizations or banks operating as S-corporations under the Internal Revenue Code.<sup>2</sup>

Categorizing subordinated debt as tier 2 capital could result in billions of dollars not being as fully leveraged as it could be, or worse yet, leaving significant sums of money unused. Not only does the categorization of subordinated debt as tier 2 limit its utility for purposes of Basel III capital standards, but it is rendered even more limiting for banks that comply with the community bank leverage ratio ("CBLR"), as that framework does not account for tier 2 capital.

Therefore, ICBA strongly urges the Agencies to revise the categorization of subordinated debt as tier 1 capital and to exclude it from treatment as debt for purposes of the debt-to-equity ratio under and the Small Bank Holding Company Policy Statement.<sup>3</sup> Such action would (1) adhere to Congressional intent under the Act, (2) keep with precedent set by similar programs from prior emergencies, and (3) treat MDIs and CDFIs equitably, regardless of their corporate structure.

**(1) Congress intended that subordinated debt be treated in a similar manner to senior preferred stock**

Under the Act, the Secretary of the Treasury is authorized to acquire subordinated debt from eligible institutions if senior preferred stock is not feasible.<sup>4</sup> In recognizing that some institutions will not be able to issue preferred stock, Congress explicitly directed the Secretary to create program parameters for subordinated debt that are, "to the extent possible, consistent with the requirements under the Program applicable to the terms of preferred stock."<sup>5</sup> Because preferred stock is being treated as tier 1 capital, it stands to reason that Congress' intent is that subordinated debt be similarly treated and receive tier 1 treatment.

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<sup>2</sup> "FDIC Q42020 Call Report Data," FDIC, Dec. 2020; 21 MDIs and 54 CDFIs structured as S-corporations or mutual banking organizations.

<sup>3</sup> The FRB's Small Bank Holding Company and Savings and Loan Holding Company Policy Statement (12 CFR part 225, app. C) requires subject companies to maintain specified debt-to-equity ratios and specifies how certain types of debt instruments and preferred stock instruments are to be included for purposes of the debt-to-equity ratios. Generally, bank holding companies with less than \$3 billion in consolidated assets (small bank holding companies) are not subject to the Capital Guidelines and instead are subject to the Policy Statement. The Policy Statement limits the ability of a small bank holding company to pay dividends if its debt-to-equity ratio exceeds certain limits.

<sup>4</sup> Section 104A(d)(5)(B) of the Act.

<sup>5</sup> Section 104A(d)(5)(B) of the Act.

## **(2) Past precedent supports revised capital treatment of subordinated debt**

ICBA's request for the Agencies to treat subordinated debt purchased from the Secretary of the Treasury as tier 1 capital has precedent. In 2009, several programs authorized under the Troubled Asset Relief Program ("TARP") were created in a similar manner to ECIP, with similar terms and during a similarly exigent time period. More than ten years later, it is apparent that the programs proved to be successful, the capital provided by the programs allowed CDFI banks to "meet customer demand and provide access to services they would otherwise not have been able to provide," and the capital "increased their lending."<sup>6</sup>

When assessing how to categorize the capital instruments purchased through the programs, the Agencies ultimately permitted mutual banking organization and S-corporation banks to include the full amount of new subordinated debt securities issued to Treasury in tier 1 capital for the purposes of risk-based and leverage capital guidelines for bank holding companies and to exclude the subordinated debt from treatment as debt for purposes of the debt-to-equity standard under the Small Bank Holding Company Policy Statement.<sup>7</sup>

The Agencies explicitly provided for tier 1 treatment of subordinated debt to facilitate S-corporation and mutual bank participation in the program that was "as economically comparable as possible...to institutions that have issued Senior Perpetual Preferred Stock."<sup>8</sup> The Agencies acknowledged that instruments would be included in tier 1 capital even though they did not necessarily satisfy the qualifying criteria for additional tier 1 capital. However, the Agencies justified their action by relying upon relevant factors: the exigent circumstances and the temporary nature of the program.<sup>9</sup>

Here too, ECIP was created with a similar purpose to TARP during a similarly exigent time – to mitigate the undue harm and sudden economic hardship of millions of Americans. Just as the Agencies justified their decisions in 2009 based on public policy goals and the intent of Congress, ICBA strongly urges the Agencies once again to take those factors into consideration. Though subordinated debt issued under ECIP might not typically meet the criteria for additional tier 1 capital,<sup>10</sup> prevailing needs and public policy goals should permit

<sup>6</sup> "Community Development Capital Initiative: Status of the Program and Financial Health of Remaining Participants," GAO, June 2014, at 9, *available at* <https://www.gao.gov/assets/gao-14-579.pdf>.

<sup>7</sup> 74 Fed. Reg. 26077, Jun. 1, 2009.

<sup>8</sup> 74 Fed. Reg. 26077, Jun. 1, 2009.

<sup>9</sup> 74 Fed. Reg. 26077, Jun. 1, 2009.

<sup>10</sup> 12 CFR 217.20(c), "additional tier 1 capital Additional is the sum of additional tier 1 capital elements and any related surplus, minus the regulatory adjustments and deductions in §217.22. Additional tier 1 capital elements are:

- (1) Instruments (plus any related surplus) that meet the following criteria:
  - (i) The instrument is issued and paid-in;

these instruments to be included in tier 1 capital. ICBA believes that these changes will help ECIP incentivize impactful lending while ensuring capital treatment that maximizes program effectiveness.

### **(3) Equitable treatment of banks, regardless of corporate structure**

As discussed above, Congress contemplated a scenario where some banks would not be eligible to issue preferred stock to the Secretary. To address that scenario, Congress enabled the Secretary of the Treasury to acquire subordinated debt from eligible institutions if senior preferred stock is not feasible.<sup>11</sup> Treasury's FAQs adopted this provision, making clear that eligible institutions cannot choose whether they issue preferred stock or subordinated debt. Treasury will purchase preferred stock unless "Treasury determines that an institution cannot feasibly issue preferred stock,"<sup>12</sup> such as mutual institutions and S-corporations.

If the Act provided banks an option to issue preferred stock *or* subordinated debt, then an argument could be made for the Agencies to treat one instrument more favorably than the other. But given the fact that banks do not have that discretion, it is grossly inequitable to provide great advantages to certain categories of banks and disadvantages to others, simply due to their corporate structure.

ICBA believes that treating ECIP subordinated debt as tier 1 capital and excluding it when a bank holding company or savings and loan holding company calculates its debt, is consistent with the strong public policy objective to increase the capital available to banking organizations during this current environment. Should you have any questions or would like to discuss this comment letter, please do not hesitate to contact me at [Michael.Emancipator@icba.org](mailto:Michael.Emancipator@icba.org) or 202-659-8111.

Sincerely,

  
Michael Emancipator  
Vice President and Regulatory Counsel

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- (ii) The instrument is subordinated to depositors, general creditors, and subordinated debt holders of the Board-regulated institution in a receivership, insolvency, liquidation, or similar proceeding; and
  - (iii) The instrument is not secured, not covered by a guarantee of the Board-regulated institution or of an affiliate of the Board-regulated institution, and not subject to any other arrangement that legally or economically enhances the seniority of the instrument.

<sup>11</sup> Section 104A(d)(5)(B) of the Act.

<sup>12</sup> "Emergency Capital Investment Program - Frequently Asked Questions," U.S. Dep't of the Treasury, Question 4.1.