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Investment in Indian Country: How Investments in Tribal Infrastructure and Other Tribal Projects May Qualify for Community Reinvestment Act Credit

By John Mussman, Randolph DelFranco and William Wood

Tribal governments may find knowledge of the Community Reinvestment Act ("CRA") helpful when seeking financing for infrastructure or other projects. CRA requires banks and other insured financial institutions to invest in, loan to and service low- and moderate-income communities, and otherwise to invest in community development. Regulatory agencies take CRA performance into consideration when evaluating applications for mergers, acquisitions, branching or other expansions, so a satisfactory CRA rating may be a prerequisite to a bank's achieving its strategic objectives.

A bank seeking to strengthen its CRA rating may find investments in tribal infrastructure and other tribal projects more attractive if they can be characterized as community development loans or investments under CRA. This article examines how such investments might qualify as community development loans and investments that financial institutions may find attractive as CRA investments.

Tests for CRA Credit

In order to qualify for CRA credit, an investment in tribal infrastructure or other tribal project should meet a two-part test: (1) the loan or investment must meet the regulatory criteria for "community development" *and* (2) it must fall within a particular bank's assessment area. The federal regulator charged with supervision of the bank will ultimately decide whether the loan or project investment meets these criteria. [1]

1. What Constitutes Community Development?

Regulatory Tests. A bank regulator evaluating CRA performance applies three independent tests: a lending test, an investment test and a service test. Given the nature of investments in infrastructure or other similar projects, an investment in such a project would likely involve the bank's performance under the lending or investment test.[2]

> "**The lending test** evaluates a bank's record of helping to meet the credit needs of its assessment area(s) . . . by considering a bank's home mortgage, small business, small farm, and *community development* lending."[3]

> "**The investment test** evaluates a bank's record of helping to meet the credit needs of its assessment area(s) through *qualified investments* that benefit its assessment area(s) or a broader statewide or regional area that includes the bank's assessment area(s)."[4]

Qualified investment is defined to mean "a lawful investment, deposit, membership share, or grant that has as its primary purpose *community development*."[5]

A key component to both the lending test and the investment test is whether the loan or investment constitutes "community development." "Community development" includes:

> [a]ctivities that revitalize or stabilize ... [l]ow- or moderate-income geographies [or] … [d]istressed or underserved nonmetropolitan middle-income geographies designated by the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, or Office of the Comptroller of the Currency ….[6]

For a loan or investment in a tribal project or tribal infrastructure to be considered a community investment, it should be targeted to (1) a low- or moderate-income area or (2) a distressed or underserved community. Under a bank examiner's determination of what constitutes community development, the "community" may include certain areas within tribal reservation boundaries, but it may be helpful to evaluate whether the geography is in fact low- or moderate-income or confirm early on with the FDIC and/or other regulatory agencies that a particular geographic area meets the FDIC or other bank regulatory criteria for "distressed" or "underserved."

Effect on Targeted Geographies. To meet the community development test, an investment or loan should be designed so that it is made to low- or moderate-income individuals or so that it "*revitalizes or stabilizes*" low- or moderate-income geographies or "distressed or underserved non-metropolitan middle-income geographies" designated as such by a federal bank regulator. "Activities that revitalize or stabilize a low- or moderate-income geography are activities that help to attract and retain businesses and residents."[7] **For instance, a project that provides employment for low- or moderate-income individuals in a distressed area would likely fall within such definition.**

If the investment is in an area covered by an Enterprise Community, an Empowerment Zone or within reservation boundaries, there may be a *presumption* that the investment is an "activity that revitalizes or stabilizes a low- or moderate-income geography" and thus qualifies as a community development investment, provided certain conditions are met:

(1) The project has been approved by the board governing an "Enterprise Community or Empowerment Zone (under 26 U.S.C. 1391) and the investment is consistent with the Enterprise Community or Empowerment Zone Board's strategic plan," or

(2) "[T]he activity has received similar official designation as consistent with a federal, state, local or tribal government plan for the revitalization or stabilization of the geography."[8]

Accordingly, the planning or decision-making processes by which a tribal government (or an interested state or local government or planning commission) considers a project may be helpful in receiving favorable treatment under CRA. The formal and informal deliberations of tribal governments, planning committees, and local and state governments are important in establishing whether a project meets a depressed area's community needs. Formal resolutions, minutes, or formal approvals or other documents of an Empowerment Zone or an Enterprise

Community, a planning or zoning board or a tribal governing body containing findings or conclusions that the investment constitutes community development would be helpful to establish that a project constitutes CRA "community development". **Such documentation needs to be genuinely based on the substantive effects of the program rather than merely window dressing and, if possible, demonstrate how the project is expected to address the community's needs or otherwise revitalize or stabilize the targeted community.**

Even absent such presumption, however, an investment may still be deemed qualified, but would require that a bank examiner "evaluate the [investment's] actual impact on the geography, if information about this is available," or, if not, that the "examiner will determine whether the activity is consistent with the community's formal or informal plans for revitalization or stabilization of the low- or moderate-income geography." **Whether a loan or investment that offers indirect benefits to a low- or moderate-income area or a distressed or underserved area qualifies as "community development" is ultimately a factual determination that may depend, for instance, on whether an investment creates long-term employment or provides opportunities for expansion of business or community services in a distressed area and, therefore, may be considered to have a community development purpose.**

2. **Defining a Bank's Assessment Area**. For a qualified community development loan or investment to be suitable to a particular financial institution, the investment or loan must be in that particular institution's assessment area.

Each institution designates the area in which it chooses to be assessed for CRA compliance (an "Assessment Area"); its primary federal regulator examines the institution's performance in its own Assessment Area to determine the institution's CRA rating.[9] Accordingly, a potential CRA project would be most attractive to those institutions whose Assessment Areas include the area affected by the project.

CONCLUSION

Suitability of a CRA Approach to Project Investment

Whether a financial institution's CRA rating would be improved by an investment or loan may vary based on a particular institution's situation for several reasons:

First, the loan or investment must be in a particular bank's Assessment Area.

Second, CRA evaluation is based on three **separate tests**. An institution that is performing satisfactorily in the **investment test** may be looking for qualified loans to bolster its performance under the **lending test** and, therefore, would likely not find a qualified **investment** attractive. If a particular **investment** may be characterized as a community development **loan** rather than a community development **investment** by such institution, it may be more attractive to a particular financial institution looking to improve its score on the lending test.[10]

Third, although an investment may be "qualified" for a bank, not all investments are treated the same. A bank examiner will attempt to evaluate the quality of the qualified investment for a particular bank and determine whether a financial institution is providing leadership in structuring CRA transactions — a more passive investment may not be as helpful for an institution looking to achieve a higher CRA score as an investment test. In some instances, therefore, a bank may seek to exercise a larger role in the structuring of or planning for a CRA investment or loan, rather than merely making a passive investment.

Presentment of CRA Eligibility

Although a particular investment's impact on a bank's CRA rating depends on the investment and the bank's unique profile, a tribal government or its financial advisors should consider whether a particular project could be "CRA qualified" or "CRA eligible" so that appropriate approvals and determinations can be made with respect to such project before its financing stage. It is important to keep in mind that a loan or investment that qualifies as a qualified CRA for one financial institution may not qualify as a CRA loan or investment for another. The institution's compliance officer and ultimately the financial institution's primary federal regulator will make such determination.

In connection with seeking financing for a potentially CRA-eligible project, a tribal government or its financial advisor should provide a detailed explanation of why the investment *may* be a qualified CRA loan or investment, and provide an explanation of how the investment would fit into an institution's CRA strategic plan or CRA compliance strategy. Such a presentation should be tailored to provide a CRA compliance officer at a financial institution with the tools needed to obtain CRA qualification. These tools optimally should provide background on the tribal government (or other government) evaluation and approval process, reflect how the project meets CRA community development objectives, and, if possible, demonstrate that the community benefited by the project includes a low- or moderate-income population or is located in an area identified by federal bank regulatory agencies as distressed or underserved.

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Notes

[1] The primary federal regulatory authority is the FDIC for a state non-member bank, the Federal Reserve for a state member bank and the OCC for a national bank.

[2] Not analyzed in detail here, "[t]he service test evaluates a bank's record of helping to meet the credit needs of its assessment area(s) by analyzing both the availability and effectiveness of a bank's systems for delivering retail banking services and the extent and innovativeness of its *community development* services." 12 CFR §25.24 (OCC), 12 CFR §228.24 (Federal Reserve), 12 CFR §345.24 (FDIC) (emphasis added).

[3] 12 CFR §25.22(a)(1) (OCC), 12 CFR §228.22(a)(1) (Federal Reserve), 12 CFR §345.22(a)(1) (FDIC) (emphasis added).

[4] 12 CFR §25.23(a) (OCC), 12 CFR §228.23(a) (Federal Reserve), 12 CFR §345.23(a) (FDIC) (emphasis added).

[5] 12 CFR §25.12(t) (OCC), 12 CFR §228.12(t) (Federal Reserve), 12 CFR §345.12(t) (FDIC) (emphasis added).

[6] 12 CFR §25.12(g) (OCC), 12 CFR §228.12(g) (Federal Reserve), 12 CFR §345.12(g) (FDIC). The actual definition of "community development" is actually broader and includes other types of loans and investments:

> (g) *Community development* means—
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> > (1) affordable housing (including multifamily rental housing) for low- or moderate-income individuals;
> >
> > (2) community services targeted to low- or moderate-income individuals;
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> > (3) activities that promote economic development by financing businesses or farms that meet the size eligibility standards of the Small Business Administration's Development Company or Small Business Investment Company programs (13 CFR 121.301) or have gross annual revenues of $1 million or less; or
> >
> > (4) activities that revitalize or stabilize—
> >
> > > (i) low- or moderate-income geographies;
> > >
> > > (ii) designated disaster areas; or
> > >
> > > (iii) distressed or underserved nonmetropolitan middle-income geographies designated by the Board, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency, based on—
> > >
> > > > (A) rates of poverty, unemployment, and population loss; or
> > > >
> > > > (B) population size, density, and dispersion. Activities revitalize and stabilize geographies designated based on population size, density, and dispersion if they help to meet essential community needs, including needs of low- and moderate-income individuals.

12 CFR §25.12(g) (OCC), 12 CFR §228.12(g) (Federal Reserve), 12 CFR §345.12(g) (FDIC).

[7] Federal Financial Institutions Examination Counsel: Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestments, 66 Fed. Reg. 36626.

[8] 66 Fed. Reg. 36626.

[9] A larger institution generally has a larger assessment area and may cover several states or Metropolitan Statistical Areas ("MSAs"). An institution with interstate branches may require an analysis or CRA performance in each state in which it does business, or an analysis of several MSAs. Limited purpose institutions, such as credit card banks, may receive consideration for qualified community development investments outside the bank's Assessment Area, if the bank has adequately addressed the needs of the bank's Assessment Area.

[10] Under the CRA Regulation, a transaction cannot be counted twice, i.e. under both the loan test and the investment test. 12 CFR §25.23(b) (OCC), 12 CFR §228.23(b) (Federal Reserve), 12 CFR §345.23(b) (FDIC).