Frequently Asked Questions Regarding the State Small Business Credit Initiative

The Office of the Comptroller of the Currency (OCC) is issuing these frequently asked questions (FAQ) in response to questions regarding the State Small Business Credit Initiative (SSBCI). These FAQs do not introduce new policy or guidance and are based on previously communicated policy, guidance, and interpretations. Management of national banks and federal savings associations (banks) should also have sufficient knowledge of all laws, regulations, and guidance related to small business lending.

What is the State Small Business Credit Initiative?

The SSBCI is a federal program, administered by the U.S. Department of the Treasury. The SSBCI provides funding to states[1] to support small businesses and empower them to access the capital needed to invest in job-creating opportunities.

The SSBCI provides recipient states funding for (1) credit and investment programs for existing small businesses and start-ups and (2) technical assistance to small businesses applying for SSBCI funding and other government small business programs.

The American Rescue Plan Act of 2021 reauthorized and expanded the SSBCI (commonly known as SSBCI 2.0) with $10 billion in funding.

What types of credit and investment programs may recipient states set up?

States may set up programs to fit their needs. Program types include the following:

- **Loan participation programs:** In these programs, states buy an interest in the loans made by lenders, or states can lend directly to small businesses alongside private lenders.
- **Loan guarantee programs:** States use SSBCI funds to provide an assurance to lenders that lenders will be partially repaid in the event of default, after the lender makes every reasonable effort to collect, helping small businesses secure loans that may have otherwise been inaccessible or prohibitively expensive.
- **Collateral support programs (CSP):** These programs set aside funds as collateral for new loans, enabling start-ups to borrow funds to help their businesses grow with the assistance of SSBCI capital.
- **Capital access programs (CAP):** These programs provide portfolio insurance through a loan loss reserve fund into which the lender and borrower contribute supplemented with SSBCI funds.
- **Venture capital programs:** States may set up public-private partnerships for capital investing or invest in venture capital funds. These investments are focused on providing capital to underserved start-ups, underserved areas, and diverse founders.

[1] "States" refers collectively to all the recipient jurisdictions: states, the District of Columbia, U.S. territories, and federally recognized tribal governments.

What are underserved communities and businesses owned by a socially and economically disadvantaged individual (SEDI)?

The SSBCI statute, 12 USC 5704(e)(8), requires states to report to the Treasury Department how the state plans to use federal program funds to provide access to capital for small businesses in low- and moderate-income, minority, and other underserved communities, including women- and minority-owned small businesses (collectively, underserved communities). The Treasury Department encourages states to consider the following areas when including plans regarding "other underserved communities": rural communities; communities undergoing economic transitions, including communities affected by the shift toward a net-zero economy or deindustrialization; and communities surrounding minority-serving institutions.[2]

Socially and economically disadvantaged individual (SEDI)-owned businesses[3] are

1. business enterprises that certify that they are owned and controlled by individuals who have had their access to credit on reasonable terms diminished as compared with others in comparable economic circumstances due to their
    a. membership in a group that has been subjected to racial or ethnic prejudice or cultural bias within American society;
    b. gender;
    c. veteran status;
    d. limited English proficiency;
    e. disability;
    f. long-term residence in an environment isolated from the mainstream of American society;
    g. membership in a federally or state-recognized Indian tribe;
    h. long-term residence in a rural community;
    i. residence in a U.S. territory;
    j. residence in a community undergoing economic transitions (including communities affected by the shift toward a net-zero economy or deindustrialization); or
    k. membership in an underserved community (see Executive Order 13985). Underserved communities are populations sharing a particular characteristic, as well as geographic communities that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life. Equity is consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders, and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality;

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[2] Minority-serving institutions are institutions of higher education that serve minority populations and include, but are not limited to, historically Black colleges and universities (as defined in 20 USC 1061(2)), Hispanic-serving institutions (as defined in 20 USC 1101a(a)(5)), tribal colleges and universities (as defined in 20 USC 1059c(b)(3)), and Asian American and Pacific Islander-serving institutions (as defined in 20 USC 1059g(b)(2)).

[3] Refer to the SSBCI Capital Program Policy Guidelines.

2. business enterprises that certify that they are owned and controlled by individuals whose residences are in community development financial institution (CDFI) investment areas, as defined in 12 CFR 1805.201(b)(3)(ii);
3. business enterprises that certify that they will operate a location in a CDFI investment area, as defined in 12 CFR 1805.201(b)(3)(ii); or
4. business enterprises that are located in CDFI investment areas, as defined in 12 CFR 1805.201(b)(3)(ii).

May banks collect and report demographic data of SSBCI borrowers?

Banks are permitted to collect certain demographic data in accordance with the interim final rule "State Small Business Credit Initiative; Demographics-Related Reporting Requirements."[4]

Under Regulation B, which implements the Equal Credit Opportunity Act, creditors are generally prohibited from inquiring about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction, unless an exception applies. One exception is for certain required information collection "to monitor or enforce compliance with the [Equal Credit Opportunity Act], [Regulation B], or other federal or state statutes or regulations."

What is a collateral support program?

In collateral support programs (CSP), the state opens a cash collateral account with the lender in the amount of the SSBCI collateral support. In the event the borrower does not repay the loan, the lender collects against the borrower's collateral first and then collects against the cash deposit for any remaining loss.

Per Treasury, a CSP may be helpful when the borrower's cash flow is sufficient to repay the proposed loan, but a collateral shortfall exists because of insufficient asset values or a lender's more restrictive advance rates.

What is a capital access program?

In a capital access program (CAP), when a participating lender originates a loan, the lender and borrower each contribute a percentage of the loan amount or line of credit, from 2 percent to 7 percent, into a reserve account held by the lender. Typically, the money is held in a state-owned deposit account at the lending institution. The state matches the combined contribution and deposits the full matching amount in the CAP reserve account. The lender's CAP reserve account is available as collateral to cover losses for the entire CAP portfolio. A lender may make a claim on the reserve in the event a CAP borrower defaults and the lender incurs a loss. Loans participating in the CAP are originated and serviced by the lender.

[4] Refer to 87 Fed. Reg. 13628 (March 10, 2022).

Can funds held in a CSP account or CAP reserve account be recognized as part of a bank's allowance for credit losses (ACL)?

Since funds in the CSP account or CAP reserve account are owned and controlled by a third party, these funds are considered an encumbered asset of the bank and therefore cannot be considered part of the ACL.[5] Funds in the CSP account or CAP reserve account and the related guarantees should, however, be disclosed in a footnote in the financial statements.

Are funds held in a CSP account or CAP reserve account considered when a bank or examiner is assessing the adequacy of the amount reserved for loans held in these portfolios?

A cash collateral account for a CSP or a reserve account for a CAP provides collateral support for the loan rather than enhancing the ACL.

These reserve pools act as insurance against losses in a pool of loans similar to mortgage insurance on loan pools. In this case, the reserve pool is not considered when determining a bank's ACL but rather is treated and accounted for like other insurance policies it holds (i.e., if the realization of the insurance claim is assured, a receivable may be recognized). Expected credit losses on loans covered by the risk reserve pool should be measured without consideration of the limited guarantee backed by the risk reserve pool.

A CSP provides pledged collateral accounts to lending institutions to enhance collateral coverage of individual loans. Because the funds in the collateral support account serve as collateral for the loan, these funds may be included as collateral along with other collateral held as security for a loan that is collateral-dependent[6] and evaluated individually.

A CAP establishes a loss reserve pool to cover credit losses that may be incurred in a group of loans. All the CAP premiums contributed by the lender, borrower, and state contributions are held in a single, pooled reserve account, with the state retaining ownership or co-ownership of the account. The bank recovers CAP credit losses by offsetting against the CAP reserve account it holds. The bank itself must absorb any losses over its accumulated CAP reserve account.

[5] ASC 326, *Financial Instruments – Credit Losses*. See also OCC Bulletin 2023-11, "Current Expected Credit Losses: Interagency Policy Statement on Allowances for Credit Losses (Revised April 2023)."

[6] Under ASC Topic 326, a loan is considered a collateral-dependent financial asset when the repayment is expected to be provided substantially through the operation or sale of the collateral when the borrower is experiencing financial difficulty based on the entity's assessment as of the reporting date. Costs to sell are used when the loan is dependent on the sale of the collateral. Costs to sell are not used when the collateral-dependent loan is dependent on the operation of the collateral.

What is a loan guarantee program?

The loan guarantee program is a fixed-percent guarantee (of the outstanding loan balance) and not a limited guarantee (i.e., not limited to the amount of funds in a risk reserve pool). The accounting for loans subject to the loan guarantee program that have not been converted to the risk reserve pool is similar to the accounting for loans with a Small Business Administration guarantee. Calculation of the ACL[7] for loans subject to the loan guarantee program can consider the stated guarantee. If collection of the full contractual balance is not expected, the entire loan must be placed on nonaccrual status.

Is a guarantee provided on a loan in the loan guarantee program recognized by regulators when analyzing the adequacy of the ACL?

If the guarantee is enforceable and the bank has determined that the state, District of Columbia, U.S. territory, or tribal government will honor the guarantee in the event of loss, the bank can take the guarantee into account when determining the adequacy of the ACL.

Can the guaranteed portion of an SSBCI guaranteed loan be excluded from a bank's legal lending limit?

The answer to this question depends on whether the loan would qualify as a type of loan not subject to the lending limits.[8] Among other types, loans to or guaranteed by general obligations of a state or political subdivision are not subject to the lending limits.[9]

Twelve CFR 32.3(c)(5) states that certain types of loans and extensions of credit are not subject to the lending limits. Among those exemptions are "loans or extensions of credit, including portions thereof, to the extent guaranteed or secured by a general obligation of a state or political subdivision and for which the lending bank has obtained the opinion of counsel that the guarantee or collateral is a valid and enforceable general obligation of that public body."

Under OCC rules, a general obligation of a state or political subdivision[10] means the following:

(1) An obligation supported by the full faith and credit of an obligor possessing general powers of taxation, including property taxation; or

(2) An obligation payable from a special fund or by an obligor not possessing general powers of taxation, when an obligor possessing general powers of taxation, including property taxation, has unconditionally promised to make payments into the fund or otherwise provide funds to cover all required payments on the obligation.

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[7] Refer to the *Bank Accounting Advisory Series* and OCC Bulletin 2023-11 for additional information on calculating allowances for credit losses.

[8] 12 CFR 32.3(c).

[9] 12 CFR 32.3(c)(5).

[10] 12 CFR 1.2(b) or 12 CFR 160.42.

To qualify as a loan guaranteed by general obligations of a state or political subdivision for purposes of the exception in 12 CFR 32.3(c)(5), the lending bank must obtain an opinion of counsel, that State Attorney General, or another state or political subdivision legal official with authority to opine on the question that the guarantee is a valid and enforceable obligation of the state or political subdivision. Banks relying on a state- or other political subdivision-provided legal opinion should confirm that the party rendering the opinion is one permitted to do so under 12 CFR 32.3(c)(5)(ii).

What is a loan participation program?

A loan participation program enables small businesses to obtain medium- to long-term financing, usually in the form of term loans, to help them start or expand their businesses. States may structure a loan participation program in two ways: purchase transactions, also known as purchase participation, in which the state purchases a portion of a loan originated by a lender; and companion loans, also known as co-lending participation or parallel loans, in which a lender originates a senior loan and the state originates a second (usually subordinate) loan to the same borrower. These programs enable the state to act as a lender, in partnership with a financial institution lender, to provide small business loans at accessible terms.

How do guarantees or collateral associated with the SSBCI affect the risk weight of the bank's exposures?

Depending on the specific details of the SSBCI implemented by the state, a bank may be able to reduce the risk weight applied to a covered exposure by recognizing the credit risk mitigation provided by the specific program. To reduce the risk weight, any guarantee or collateral must meet the requirements in 12 CFR 3.36 and 3.37, as appropriate. For questions about the capital treatment of an exposure pursuant to a specific program, please contact your OCC supervisory office.

What is a tribal government, and how are tribal governments participating in the SSBCI?

A tribal government is the recognized governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, community, component band, or component reservation, individually identified (including parenthetically) in the list published pursuant to the Federally Recognized Indian Tribe List Act of 1994 (25 USC 5131).

The American Rescue Plan Act of 2021 allocates $500 million for tribal government programs as part of the main capital allocation. Tribal governments may also receive more funding as part of the very small business allocation, allocation for business enterprises owned and controlled by SEDI individuals (SEDI-owned businesses), and incentive funds related to SEDI-owned businesses. The addition of tribal governments significantly expands the number of eligible jurisdictions to receive SSBCI funds compared with the previous SSBCI implementation under the Small Business Jobs Act of 2010. Tribal governments are expected to use their allocated funds to facilitate capital access programs, provide collateral support, facilitate loan participations, or enable credit guarantee or other credit support programs to support small businesses' lending and investment.

Tribal governments may apply to the SSBCI individually or jointly and may operate programs themselves or contract with third parties or other tribal governments to operate programs.

Can tribal governments use SSBCI capital program funds to provide investments, loans, or other credit or equity support to tribal enterprises?

For purposes of the SSBCI, a "tribal enterprise" is an entity (1) that is wholly owned by one or more tribal governments, or by a corporation that is wholly owned by one or more tribal governments, or (2) that is owned in part by one or more tribal governments, or by a corporation that is wholly owned by one or more tribal governments, if all other owners are either U.S. citizens or small business concerns.

Tribal governments may use SSBCI capital program funds to provide investments, loans, or other credit or capital support to tribal enterprises if these transactions comply with the SSBCI statute, the *Capital Program Policy Guidelines*, all other SSBCI requirements, and the tribe's own conflict of interest policy.

How are tribal enterprises organized, and what are the implications for sovereign immunity and taxation?

Tribal "business structure" refers to the form a tribally (as opposed to an individually) owned business takes and under which laws it will be organized. Tribal businesses can be formed through a federal charter under section 17 of the Indian Reorganization Act as a corporation chartered under tribally enacted laws, under a state's incorporation laws, or as a limited liability company organized under either a tribal code or state law. The business structure will have consequences with respect to tax liability, preservation of tribal assets, regulatory compliance, and transparency of corporate information for potential creditors, investors, joint venture partners, regulators, and customers.[11]

Sovereign immunity is an issue for banks to consider when lending to a tribe or tribal enterprises. Tribal governments, like states and the federal government, possess sovereign immunity from suits. Tribal sovereign immunity can be waived only by the tribe or Congress, and the waiver must be express and unequivocal. The sovereign status of tribes has substantial implications for jurisdiction, collateral, and dispute resolution. Indian tribes and reservation-based communities exist and operate within a unique legal and governmental framework. In light of the tribes' sovereign status, banks and tribes should work together to ensure that lenders can enforce contracts and resolve contract disputes through litigation, arbitration, or other methods of adjudication.

Many tribes have successfully instituted business frameworks that minimize risk to lenders. For example, in their transactions with tribal governments and tribal entities, some banks have negotiated limited waivers of sovereign immunity that are restricted to a specific transaction, with assets expressly pledged or made available to satisfy any claims that may arise from the transaction.

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[11] U.S. Department of the Interior, "Choosing a Tribal Business Structure."

What considerations should lenders make when lending to small businesses on tribal lands?

Commercial lending in Indian Country may require special arrangements largely because of the sovereign status of tribal nations and the unique status of tribal lands. Tribal lands can have a complicated and intermingled mix of land ownership and designation statuses, including trust,[12] restricted fee,[13] and fee simple (or fee).[14] Because tribal lands may have different ownership statuses, tribes and tribal members may have different rights to manage and develop their lands and resources.[15]

Three separate sovereigns—tribal, state, and federal government—operate within reservation boundaries. Adjacent reservation lands that look identical may be subject to entirely different ownership rules and regulated by different governments.

Trust and restricted fee lands may not be conveyed or sold without the consent of the federal government, requiring a different process to secure and perfect a bank's mortgage liens on real property.[16] The Indian Long-Term Leasing Act of 1955 allowed tribes to lease trust lands to a tribal entity, tribal members, or a nontribal party with the approval of the Bureau of Indian Affairs (BIA).[17] The lessee then may grant a leasehold mortgage interest that, in the event of a default, gives the lender control over the pledged land for the balance of the term of the lease.[18] Thus, leasehold interests, with BIA approval and tribal consent, can be encumbered, assigned, and used as collateral for the financing of the transaction. In 2012 the Helping Expedite and Advance Responsible Tribal Home Ownership Act (HEARTH Act) created a voluntary, alternative land leasing process available to tribes.

Bankers also have mitigated the risk of securing loans on trust lands by using collateralized deposits from sources such as tribal reserve funds and certificates of deposit. When tribes with limited resources are not able to pledge reserve funds, some bankers instead have used as collateral the equipment of the commercial enterprise the loan is made for. Loan guarantees, such as those made with SSBCI funds, may reduce the need for pledged collateral.

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[12] Tribal trust lands are held in common and managed by the tribal government with oversight of the Bureau of Indian Affairs (BIA).

[13] Legal title of restricted lands is held by a tribe or the individual, but the land is subject to restrictions against sale or conveyance without the approval of the BIA.

[14] The owner of the land holds the legal title to the lands. Fee lands are freely alienable without federal approval and thus can be used as collateral for a mortgage. When owned by a tribe or individual within the boundaries of a reservation, fee lands are subject to tribal jurisdiction.

[15] Congressional Research Services, "Tribal Lands: An Overview," October 14, 2021.

[16] 25 USC 177.

[17] 25 USC 415. Under federal regulations, such leases are generally limited to a term of 25 years with a renewal option of an additional 25 years; on certain reservations, however, leases may have terms of up to 99 years.

[18] 25 CFR 162, subpart D.

Tribes can vary in their use of secured transaction laws. In the United States rules governing secured transactions generally fall within the jurisdiction of the states, not the federal government, and are encompassed in Article 9 of the Uniform Commercial Code, as adopted by all 50 states and several U.S. territories. The Model Tribal Secured Transactions Act (MTSTA) and its successor, the Revised Model Tribal Secured Transactions Act (R-MTSTA), have attempted to facilitate access to capital on Indian reservations by facilitating similar laws for lenders in relation to chattel and personal property security.

If a bank makes a loan through the SSBCI program, will it be considered for Community Reinvestment Act purposes?

A loan made through the SSBCI may be eligible for Community Reinvestment Act credit. For additional information, please visit the OCC's Community Reinvestment Act web page or contact the applicable OCC supervisory office.

How will examiners review SSBCI lending programs?

Examiners will determine whether banks have established sound underwriting and risk management practices that are consistent with the bank's overall strategic goals and objectives. As with all lending programs, examiners assess the adequacy of the bank's risk management practices relative to the risks associated with the activity.