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December 5, 2022

Jodie Harris
Director
Community Development Financial Institutions Fund
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Re: Notice and Request for Comment on CDFI Certification Application (Document No. 2022-24082 / OMG Control No. 1559-0028)

Dear Director Harris:

The Credit Union National Association (CUNA) represents America's credit unions and their more than 130 million members. On behalf of our members, we are writing regarding the Notice and Request for Public Comment issued by the U.S. Department of the Treasury's Community Development Financial Institutions Fund (CDFI Fund or the Fund) regarding the Certified Community Development Financial Institutions (CDFIs) Certification Application.[1] The Notice and Request for Comment refers to the 2022 revisions to the CDFI Certification Application (Proposed Certification Application) and the referenced CDFI Certification Agreement (Proposed Agreement), both of which the CDFI Fund released on their website prior to the formal publication of the formal notice.[2]

Background

In May 2020, the CDFI Fund requested public comment on the application and reporting requirements for CDFIs.[3] CDFI certification is a designation given by the CDFI Fund to certain organizations that provide financial services for low-income communities and to individuals and communities who lack access to financing. In connection with the public comment process, the CDFI Fund undertook a significant review of its CDFI certification application and review process in order to ensure that its policies and procedures were appropriate in light of the evolving nature of the CDFI industry. In July 2022, the CDFI Fund announced that the Proposed Certification Application would be released for a second round of public comment by the Office

[1] *Agency Information Collection Activities; Submission for OMB Review; Comment Request; CDFI Certification Application* (CDFI Application), 87 Federal Register 66786 (Nov. 4, 2022).
[2] *CDFI Fund Advance Look: Preview the Revisions to the New CDFI Certification Application*, (Oct. 4, 2022), available at https://www.cdfifund.gov/news/487.
[3] *Notice of Information Collection and Request for Public Comment; Community Development Financial Institutions Program—Certification Application*, 85 Fed. Reg. 27275 (May 7, 2020).

of Management and Budget.[4] The proposed implementation date for the Proposed Certification Application is April 3, 2023.[5]

General Comments

CUNA applauds the CDFI Fund for its change with regard to the Target Market[6] benchmark percentages and eliminating the requirement for mapping for non-investment area CDFIs. Further, the Fund's changes with regard to primary mission will help ensure that only organizations with a true commitment to mission are able to obtain the certification and its benefits. This enacts the will of Congress and ensures that funds get to the people they are intended to assist.

CUNA broadly supports the Fund's efforts to ensure that organizations that obtain a CDFI certification are truly putting mission front and center and helping the people in their Target Markets. However, the Fund's application is not properly calibrated to achieve that end. Many of the changes in the Proposed Certification Application would exclude significant swaths of credit unions from qualifying as CDFIs for reasons that are incidental or inexplicable. Many of these changes are not supported by policy justifications in the application and are in opposition to statutory or regulatory provisions applicable to credit unions.

As of the last available Annual Certification and Data Collection Report (ACR), credit unions accounted for 25.4 percent of CDFIs and 56.8 percent of the total amount of issued financial products to CDFI target markets.[7] CDFI credit unions report the most activity in support of low-income areas or people in their target markets.[8] If changes to the CDFI Certification Application result in the prevention of a significant number of credit unions from being CDFI-certified due to basic legal and structural requirements, then they are simply not appropriate criteria and should be rethought.

This Proposed Certification Application represents a significant overhaul of multiple tests on the CDFI Certification Application and is being done in conjunction with other major changes to the CDFI Fund's criteria, including the approval of target market methodologies. CUNA urges the CDFI Fund to further consider the Responsible Financing Practices tests, which may inadvertently have negative effects on the populations that the CDFI Fund is intended to help, rather than moving to finalization. Further, CUNA urges the CDFI Fund to ensure that it has appropriate technological capacity, security, and privacy controls before it implements the transaction level report (TLR). Further, the CDFI Fund should open the TLR itself for public comment so it can understand the cost and difficulty associated with various data points, and

[4] CDFI Fund, *CDFI Fund Update on CDFI Certification Application Process* (Jul. 20, 2022) available at https://www.cdfifund.gov/news/470.
[5] *Id.*
[6] Capitalized terms used but not defined in this comment letter have the applicable meaning ascribed to such terms in the Proposed Certification Application, Proposed Agreement, and/or the Notice and Request for Comment, as applicable.
[7] CDFI Fund, CDFI Annual Certification and Data Collection Report (ACR): A Snapshot for Fiscal Year 2020 (Oct. 2021) (2020 ACR), pp. 8, 19.
[8] 2020 ACR, p. 20.

weigh whether the data requests are sufficiently probative and necessary to offset the burden for CDFIs.

Finally, many pieces of the application have a 12-month look-back, particularly with regard to responsible financing practices. Some credit unions may have hold-over policies or practices that are narrowly used for a particular type of product and that may not have ever been applied to its Target Market. Many of these credit unions may be very willing to simply eliminate that offending policy or practice going forward to obtain or retain certification. For the first 12 months of use of the new application, beginning April 3, 2023, CUNA would urge the Fund to consider alternative treatment for applicants that have eliminated any disqualifying products, practices, or policies in advance of their application, regardless of whether they were in place prior to the 12-month look-back. There is little value to underserved communities for applicants that fully intend to align their practices and procedures with the Fund's requirements to be in a mandatory "waiting period" for 12 months.

Definitions

Obtaining Pre-Approval to Include Similar Financial Products, Similar Financial Services, New Targeted Populations, or Development Services

The Proposed Certification Application states that applicants seeking pre-approval to include similar financial products, financial services, new targeted populations, or development services that are not currently recognized or approved by the CDFI Fund must submit a Service Request in the Fund's Awards Management Information System (AMIS).[9] The CDFI Fund should clarify that all Financial Products and Services offered by an insured depository CDFI that have been approved by the CDFI's prudential regulator are automatically pre-approved by the CDFI Fund. In particular, federal credit unions' powers to offer products and services to their membership are limited by statute.[10] Beyond the specifically enumerated powers in statute, federal credit unions have additional "incidental" powers to conduct activities necessary to their operations.[11] However, federal credit unions may only perform activities under these incidental powers if the activity is preapproved by the National Credit Union Administration (NCUA) as necessary or requisite to carry on the business of the federal credit union.[12] In order to undertake an activity not included on the list of preapproved incidental powers, a federal credit union would need to submit an application for approval with the NCUA.[13] Given the limitations on credit unions' powers and their oversight by a regulatory and prudential regulator, the CDFI Fund should approve all Financial Products and Services offered by CDFI credit unions and other insured depositories.

With respect to development services, the Fund has included a helpful list of information that should be accompany the request for preapproval. However, the Fund has not provided any information regarding what criteria it would apply in making a determination. Providing that

[9] Proposed Certification Application, p. 5.
[10] 12 U.S.C. § 1757.
[11] 12 U.S.C § 1757(4).
[12] *See* 12 C.F.R. § 721.3.
[13] 12 C.F.R. § 721.4.

information would help applicants determine when to apply. For example, clarifying whether or not the Fund requires a pilot or other testing in order to establish the efficacy of a new development service would assist CDFI credit unions in planning or executing new projects. Further, a clear list of criteria would help CDFI credit unions avoid wasting time developing financial products or services that ultimately would not be accepted by the Fund.

Additional and Alternative Requirements and Provisions by CDFI Type

The Proposed Certification Application indicates that an applicant must upload a TLR before beginning the application. CUNA urges the CDFI Fund to make this a voluntary step. For certain credit unions, uploading the TLR first may be a very efficient process for determining qualification and limiting the unnecessary consumption of time and resources. However, given the quantity of data involved in the TLR and how onerous the process is, submission of the TLR may require some system changes for potential-CDFI credit unions to pull the appropriate data and complete the report. Making this a voluntary choice rather than a mandatory prerequisite allows potential-CDFIs to decide to move ahead with the remainder of the application while it makes the necessary system investments to complete the TLR. Applicants could be required to upload and submit a TLR prior to submitting and application, rather than beginning it. Alternatively, the Fund could make a simplified TLR available for an initial qualification.

Application Process

The Primacy of AMIS Service Requests

The Potential Certification Application states that "Email systems and firewalls should be set to accept messages generated by AMIS. Contact the AMIS Help Desk via an AMIS Service Request for assistance, if needed."[14] CDFI credit unions have reported frustration with the CDFI Fund's reliance on the use of AMIS Service Requests as its almost exclusive method of communication. Recently, one credit union reported difficulty logging into AMIS and receiving instructions on resetting its login information. When the credit union contacted the Fund over the phone about AMIS access, it was unable to speak with a person and left a voicemail. The credit union received a voicemail in response, instructing it to open a Service Request in AMIS about the issue. The application's instructions are, of course, excellent steps for a credit union to take; however, there are a variety of technological and logistical issues whereby opening an AMIS Service Request is not possible or practicable, and CDFIs would benefit from having an alternative method to contact the Fund, particularly to troubleshoot technological and logistical issues where AMIS access is itself the concern.

Further, CDFI credit unions report significant frustration stemming from the Fund's reliance on communication solely through AMIS Service Requests. CDFI credit unions report that opening additional Service Requests to ask clarifying or follow-up questions becomes extremely time consuming. Additionally, communicating solely through Service Requests is a source of significant frustration in that credit unions must provide background information repeatedly. Instead, the CDFI Fund should work towards a case worker structure where a CDFI would be assigned a single point of contact for their application. A single point of contact would enable

[14] Proposed Certification Application, p. 9.

the Fund to get a complete and holistic understanding of the CDFI and its mission, unique membership, history, and operations. This would be more efficient and would enable the Fund to identify red flags more easily. If the Fund is unable to adopt this structure currently due to funding and staffing needs, CUNA would support the Fund in asking for Congressional support to reach that goal.

Execution of the CDFI Certification Agreement

The Proposed CDFI Application specifies that following approval, the Fund will send a toolkit to the applicant's Authorized Representative via email, who must then electronically review, sign, and return the CDFI Certification Agreement within ten (10) business days via AMIS.[15] This ten business day period is insufficient, particularly when CDFI credit unions will be reviewing and executing the CDFI Certification Agreement for the first time. CDFI credit unions boards will need to review and approve the CDFI Certification Agreement. Further, risk management programs usually require the management of contractual agreements, including legal review by competent internal or external counsel, the establishment of internal policies and procedures to ensure compliance, and appropriate recordkeeping and change-management documentation. The Fund should permit at least ninety (90) days for CDFIs to execute and return the CDFI Certification Agreement.

The Need for Formal Due Process

The Proposed Agreement states that "The CDFI Fund reserves the right, in its sole discretion and at any time, to make the determination that the CDFI meets or does not meet CDFI certification eligibility requirements."[16] Further, the Proposed Agreement provides that the CDFI Fund will terminate a certification if "the CDFI is engaged in practices believed to be contrary to the CDFI Fund mission."[17] Given the level of absolute discretion permitted to the CDFI Fund in certifying CDFIs, in combination with the significance of the CDFI designation and awards for CDFI credit unions, the Fund has a duty to implement some level of meaningful notice and due process regarding the CDFI certification.

A CDFI certification enables a CDFI to qualify for funding awards and training and technical assistance opportunities from the Fund, which can vary in amount from hundreds to hundreds of thousands of dollars. CDFI designations are also a qualification for obtaining many other government grants or awards, such as awards under the Treasury Department's Emergency Capital Investment Program (ECIP), which can include capital infusions of millions of dollars. For mortgage lenders, the certification qualifies the CDFI for exemptions to the certain regulatory requirements.[18] Additionally, the CDFI designation qualifies CDFI credit unions for an exemption to the statutory aggregate limit to the amount of business loans the credit union can hold.[19] This combination of financial and regulatory benefits have significant value and importance to the management and strategic planning of a credit union and the financial well-

[15] Proposed Certification Application, p. 10.
[16] Proposed Agreement, ¶4.
[17] *Id.* at ¶11.b.
[18] 12 C.F.R. § 1026.43(a)(3)(v)(A).
[19] 12 C.F.R. § 723.8(d).

being of their membership and community. Given the significant value and importance of the certification, the CDFI Fund must establish meaningful and formal notice and due process mechanisms for CDFI applicants.

Notice and Cure Process

The Fund states that CDFIs are responsible for maintaining and self-reporting compliance with all certification requirements set forth in regulation, guidance, and the agreement, regardless of whether it has received written notice that it is out of compliance.[20] Further, the CDFI Fund states that it may make periodic requests for information, data, and/or documents deemed necessary to assess the CDFI's certification status.[21] At the same time, the CDFI Fund consistently retains the right to determine a certified CDFI is no longer in compliance based on a failure to provide information when requested or unstated standards established at the CDFI Fund's sole discretion.[22] That said, the CDFI Fund will not commit to providing notifications of noncompliance, and explicitly details that the Proposed Agreement establishes no right to notification or due process. [23] The Fund retains absolute authority to terminate CDFI certifications, has no obligation to inform a credit union why the certification is being terminated, and has no obligation to permit a credit union to address the concern.

Under the Constitution of the United States of America, credit unions are entitled procedural due process, including notice, the opportunity to be heard, and a decision by a neutral decision-maker. In combination, the Proposed Agreement and Proposed Certification Application outline an application process that does not allow for regulatory notice, reserves the right to make arbitrary and capricious determinations, and deprives CDFIs of their certification without basic due process.

The Fund must commit to providing a reasonable response period, such as 60 days, for responding to requests for information, data, and/or documentation. Further the Fund must provide a minimum cure timeframe for notices of noncompliance, such as 60 days for missing documentation and 180 days for other issues. Both of these time periods should be set out in the finalized Agreement, along with clarification that additional time may be provided in the notice if the issue warrants it, for example, when replacing advisory board members. The finalized Agreement should clarify that unless the noncompliance involves the falsification of information submitted to the Fund, fraud, mismanagement of award funds, or other malicious conduct, the cure will be forward-facing.

Further, the CDFI Fund must commit to providing notices of noncompliance prior to terminating a CDFI certification. Without reasonable notice and sufficient time to prepare, a certification termination could destabilize a CDFI depository, especially if it is a credit union that has used its CDFI certification to qualify for the statutory exemption to NCUA's member business loan cap. A removal of certification without time to unwind those loans and make necessary changes to

[20] Proposed Agreement, ¶10.
[21] *Id.* at ¶8.d.
[22] *See Id.* at ¶¶ 8, 10, and 11.
[23] *Id.* at ¶10.

the credit union's balance could have severe financial and regulatory repercussions for the credit union and its membership.

The notice of noncompliance must detail the specific requirements which are not being met. If the potential termination is the result of a discretionary determination on the CDFI Fund's part, rather than the failure to meet established requirements, the letter must detail the facts underlying determination and the reasoning for the Fund's decision. Further, the Fund must permit the credit union the opportunity to provide evidence contradicting the CDFI Fund's facts when they are mistaken or incomplete. Terminating a certification on the basis of the CDFI Fund's "belief" without providing a reasonable opportunity to be heard is not in the best interest of the Fund or CDFIs. Refusing to meet these basic administrative standards in the finalized Agreement opens up the Fund to colorable lawsuits in connection with future terminations, loss of awards, or other related losses to financial institutions. This would be a waste of taxpayer funds allotted to the Fund by Congress and a distraction from the mission of the Fund.

Appeals Process

The Fund's provision of a determination letter and optional debriefing is a helpful step towards ensuring CDFI-applicants receive some reasonable information about the denial.[24] However, it does not go far enough. The determination letter should specify the specific reasons the application was denied.

Further, the CDFI Fund should implement a formal appeals process. As an example, the CDFI Fund could consider the appeals process under the NCUA Community Development Revolving Loan Fund (CDRLF). In 2011, the NCUA found that determinations regarding loans or Technical Assistance Grants (TAGs) from the CDRLF was sufficiently important that a formal appeals process was warranted, even though the agency did not have an explicit statutory imperative to do so.[25]

Currently, NCUA regulations permit appeals of denials for loans or technical assistance grants solely with regard to questions of qualifications or denials of grant reimbursement.[26] Following a denial, a credit union must make a written request for reconsideration to the CDRLF program office within 30 days.[27] The program office must respond within 30 calendar days with a written decision stating the reasons for the decision and detail the credit union's right to appeal to the Supervisory Review Committee.[28]

The Supervisory Review Committee is comprised of at least eight senior staff members selected by the NCUA Chairman from the NCUA's regional and central offices.[29] However, certain senior staff positions and interested staff are ineligible to serve on the Committee.[30] Within 30 days of that written decision, the credit union can request review from the Supervisory Review

[24] Proposed Certification Application, p. 10.
[25] *Guidelines for the Supervisory Review Committee*, 76 Fed. Reg. 3674, 3675 (Jan. 20, 2011).
[26] *See* 12 C.F.R. § 705.10.
[27] 12 C.F.R. § 746.105(a).
[28] 12 C.F.R. § 746.105(c).
[29] 12 C.F.R. § 746.108(a).
[30] *See* 12 C.F.R. 746.108(a), (e).

Committee by submitting a request, a statement of the facts, the basis of the determination being appealed and the error alleged by the credit union, evidence relied upon, and a certification that the credit union's board of directors have authorized the filing of the appeal.[31] The Supervisory Review Committee can decide the appeal after a hearing or upon the written record, and once issued, the Committee's decision on CDRLF determinations is final.[32] This process ensures that credit unions are able to obtain detailed information regarding the denials of their award applications; that those denials are not unreasonable, arbitrary, or capricious; and that the CDRLF denials are not the result of a subjective or inconsistent process or an abuse of discretion.

Given the relative size of the CDFI Fund's appropriations, the relative size of awards made through the Fund, and the financial and strategic significance of the CDFI certification for credit unions, it seems appropriate that the CDFI Fund should establish formal appeals processes to provide CDFIs with a similar level of due process.

Establishment of an Ombuds Office

The CDFI Fund should establish its own ombuds office. Federal ombuds generally do not make binding decisions on an agency or provide formal rights-based processes for redress.[33] An ombuds office at the CDFI Fund could help provide confidential, neutral, and independent sources of information regarding the CDFI Application process and the operation of the Fund. An ombuds office could help clarify and mediate confusion for CDFIs experiencing confusion or frustration during the application or recertification process. The establishment of an ombuds office would be a powerful step to improving transparency around the Fund, as well as ensure a fair and equitable process for CDFIs. Further, an ombuds office could play a powerful role in improving the function and efficiency of the CDFI Fund by identifying trending concerns, communicating technological barriers, and generally making recommendations to the Director and senior leadership at the Fund.

Annual Reporting Requirements

It appears that the Proposed Certification Application will align the Annual Certification and Data Collection Report (ACR) and the TLR deadlines,[34] which is an effective and streamlined choice that will help reduce the burden of reporting for CDFI credit unions and is much appreciated. Neither the Proposed Certification Application nor the Proposed Agreement clarify whether these reports will be combined into one single report. As recently urged by CUNA, Inclusiv, the Community Development Bankers Association, and the CDFI Coalition in a separate joint filing,[35] the combination of reports and alignment of deadlines encourage accurate

[31] 12 C.F.R. 746.107.
[32] *Id.*
[33] *A Reappraisal-The Nature and Value of Ombudsmen in Federal Agencies,* Carole S. Houk; Mary P. Rowe; Deborah A. Katz; Neil H. Katz; Lauren Marx; and Timothy Hedeen (Nov. 14, 2016), p. 16.
[34] Proposed Agreement, ¶ 7.
[35] Inclusiv, CUNA, Community Development Bankers Association, The CDFI Coalition, Comment Letter on Performance Progress Report and Financial Statement Audit Report Form and Uses of Award Report Form (OMB No. 1559-0032), available at https://news.cuna.org/ext/resources/NewsNow/2022/11-2022/CDFI-Fund-PRA-Comments-11.25.22.pdf.

and consistent reporting, and the ability to more clearly establish a holistic picture of the CDFI's activities.

Record Retention

The information and reporting required by the CDFI Fund in the Proposed Application Certification, in particular the transaction level report, represents a massive quantity of data and personally identifiable information. The Proposed Certification Application would require that CDFI credit unions maintain all CDFI certification-related records for a minimum of 10 years, which would appear to include filed TRLs.[36] In comparison, transaction-level information collected to establish compliance with the Equal Credit Opportunity Act and Regulation B must be retained for 2 years,[37] loan/application register filings under the Home Mortgage Disclosure Act (HMDA) must be retained for 3 years,[38] and both mortgage closing disclosures under Regulation Z[39] and transaction-level reports under the Bank Secrecy Act must be retained for 5 years.[40] This record retention period is extraordinarily long compared to other Federal requirements. The CDFI Fund should reduce this requirement to five years at the most, or alternatively, only include only aggregate reports in the retention requirement.

The concern over long-term record retention is not primarily related to the cost or burden associated with data retention, though the Fund should consider those implications, particularly for smaller CDFI credit unions and minority depository institutions (MDIs). Credit unions and other insured depositories are heavily examined for their management of risks pertaining to member information and data. In privacy and cybersecurity risk management frameworks, organizations are encouraged to consider the principal of "data minimization."[41] Data minimization protects consumers by reducing the amount of data collected and held about them by third parties to only that necessary for them to enjoy products and services. It also protects organizations by reducing their overall risk related to information and data security incidents.

The CDFI Fund should seriously consider the potential exposure of consumers data, particularly transaction level data. It is not possible for any organization of any size or level of sophistication to eliminate the risk of information or data security incidents. Requiring massive amounts of personal information to be retained for a decade does not strike a reasonable balance between the data availability needs of the Fund, the reasonable risk management activities of responsible financial institutions, and the protection of consumers' information and data.

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[36] Proposed Agreement, ¶ 8.
[37] 12 C.F.R. § 1002.12.
[38] 12 C.F.R. § 1003.5(a)(1), (d).
[39] 12 C.F.R. § 1026.25(c)(1)(ii)(A).
[40] 31 C.F.R. §§ 1010.370(a), 1010.410(d).
[41] The principal of data minimization was popularized by Article 5 of the European Union's General Data Protection Regulation which stated that personal data should only be collected and maintained to the extent it is necessary to accomplish the purpose for which data is processed. GDRP, Art.5(c), available at https://gdpr-info.eu/art-5-gdpr/. This principle has been incorporated in many U.S. frameworks, such as the NIST Privacy Framework (available at https://nvlpubs.nist.gov/nistpubs/CSWP/NIST.CSWP.01162020.pdf) or the California Privacy Rights Act (Civ. Code § 1798.100(a)).

Data Usage and Security

The Proposed Agreement indicate that the CDFI Fund can post any information, including individual transaction-level information, on its website. The CDFI Fund should explicitly provide some reasonable protection of members personally identifiable information (PII) as other federal regulatory agencies provide these kinds of protections. For example, the Consumer Financial Protection Bureau's (the CFPB or the Bureau) confidential information rule states that "[t]he CFPB may, in its discretion, disclose materials that it derives from or creates using confidential information to the extent that such materials do not identify, either directly or indirectly, any particular person to whom the confidential information pertains."[42] Other reporting requirements that create publicly available datasets, such as HMDA involved a notice and comment period allowing the public to identify significant privacy risks to consumers and meaningful protections, such as redaction and aggregation of published data.[43] Consumers of CDFIs deserve these same protections. Further, a transparent comment and notice process allows CDFI credit unions to have an understanding of how the information will be used, which permits them to answer their members' questions about the use of data. If the CDFI Fund only intends to publish anonymized, redacted or aggregated information and does not intend to publicly publish consumer PII, then it should clarify that.

Further, other regulatory agencies that hold and process significant quantities of sensitive consumer information and data typically provide the public with information about the sufficiency of their own cybersecurity controls and protections. For example, when the Bureau began collecting HMDA data under the new rule, it issued a Privacy Impact Assessment (PIA).[44] This PIA analyzed the risks associated with data collected under HMDA related to data minimization; data quality and integrity; and data security.[45] The PIA outlined the Bureau's privacy risk management approach, including the object for gathering the information,[46] description of how the data would be shared and with whom,[47] and the standards and controls the Bureau had in place to protect consumers' data against inappropriate disclosure.[48] Similarly, the NCUA Board has shared information in its public meetings about its own enterprise risk management programs and obligations with regard to cybersecurity threats and examination data held by the NCUA.[49]

The CDFI Fund has not provided any information regarding the security it has in place, its privacy management program for the protection and use of this data, any reasonable level of detail about how it intends to use this information, or any guarantee that consumer's PII will not be publicly posted to their website. CDFIs and their members deserve a reasonable level of reassurance from the Fund that this data will be used in a manner that is responsible and

[42] 12 C.F.R. § 1070.41(c).
[43] Home Mortgage Disclosure (Regulation C), 79 Fed. Reg. 51731, 51741 (Aug. 29, 2014).
[44] CFPB, Privacy Impact Assessment (CFPB PIA) (Dec. 22, 2017), available at https://files.consumerfinance.gov/f/documents/cfpb_hmda-platform-pia_122017.pdf.
[45] CFPB PIA at 4.
[46] *Id.* at 6.
[47] *Id.* at 8.
[48] *Id.* at 9.
[49] *See, e.g.*, NCUA Board Action Bulletin (Oct. 20, 2022), available at https://www.ncua.gov/newsroom/press-release/2022/ncua-board-approves-risk-appetite-statement-briefed-central-liquidity-facility-and-cybersecurity.

conducted under a well-analyzed risk management program to avoid inappropriate disclosure of members' private financial information.

Merger-Related Terminations

The Proposed Certification Application specifies that CDFI Certification status cannot be transferred to another entity and that once a merger has taken place, the surviving entity is not CDFI certified until it files a new application and is approved.[50] This appears to indicate that at the time of a merger, the CDFI will automatically and immediately have its CDFI certification terminated. It seems unlikely that a merged CDFI will be able to provide the application information immediately upon merger, nor is approval likely to be immediate.

This means that all CDFI credit unions that experience a merger will essentially drop into a certification hole after merger. If two CDFIs merged, both would lose their certification for some time. As previously discussed, this kind of sudden certification termination can have a destabilizing effect on a financial institution. Instead, when reporting a material event regarding a merger, the CDFI should be required to indicate whether it will be the surviving entity, and, if so, whether it intends to obtain a CDFI Certification post-merger. If the CDFI indicates that intention, then it should automatically be placed into a cure status as of the date of the merger and given 180-days to reapply for the certification. This would provide merging CDFI credit unions with a reasonable pathway to retain their CDFI certification status without causing instability or depriving their communities of benefits in the interim.

Applicant Basic Information

Bylaws or Similar Documentation

Federal law and NCUA regulations require that federal credit unions must have bylaws. At the time a proposed federal credit union presents its organization certificate to the NCUA, it is also required to submit its proposed bylaws for approval.[51] The NCUA issues standard federal credit union bylaws,[52] and changes to these bylaws are either expressly permitted in the language of the standard bylaws, or require NCUA approval.[53] While state-chartered credit unions in some states may have more flexibility in selecting their bylaws, no state charters credit unions without requiring the credit union adopt bylaws. Further, in order to maintain federal insurance, credit unions are obligated under federal law to conform to their adopted bylaws.[54] For these reasons, the CDFI Fund should not require credit unions to provide copies of meeting meetings showing initial adoption of the credit union's bylaws. The documents are often very old, rarely used, and have not been digitized. The probative value of the meeting minutes to the CDFI Fund does not outweigh the burden to applying credit union applicants. Given that credit unions get regulatory approval of their bylaws during chartering and in the course of examination to retain insurance, this requirement should be eliminated when the applicant is chartered or federally insured by the

[50] Proposed Certification Application, p. 11.
[51] 12 U.S.C. § 1758.
[52] 12 C.F.R. Part 701, App. A.
[53] 12 C.F.R. § 701.2(a); Part 701, App. A.
[54] 12 C.F.R. §§ 701.2(a), 741.3(c).

NCUA or chartered with a state authority. Instead, the CDFI Fund should merely ask for the credit union's currently adopted bylaws.

Race, Ethnicity & Sex of Governing Board and Executive Staff Members

The Proposed Certification Application requires the applicant to report the racial, ethnic, and sex breakdown of its executive staff and governing board.[55] However, it is not clear how the CDFI Fund uses this information if an applicant is not relying on these individuals to establish accountability. Further, the CDFI Fund has stated that staff have a conflict of interest and therefore cannot establish accountability for the CDFI.[56] The application process for establishing a Minority Lending Institution (MDI) designation is separate. Many individuals find these questions intrusive. The CDFI Fund should clarify how it considers this information, and whether it can contribute to a denial of an application. In the absence of a strong, stated policy goal for the collection of this information, these questions should be removed with regard to staff and the questions regarding the composition of the governing board should be moved to the accountability section for those CDFIs using the governing board to accomplish that requirement.

Primary Mission

Generally speaking, CUNA supports the CDFI Fund's approach of reviewing the applicant's financing practices to consider whether it "walks the walk" when it comes to mission. It is the CDFI Fund's mission to support the growth and capacity of community development lenders, investors, and financial service providers. It was the intention of Congress that the funds allocated to the CDFI Fund be used to support that mission and to directly expand economic activities for the underserved people and communities served by the Fund. It is paramount that the CDFI Fund ensure that any CDFI that obtains a designation and receives an award is actively and meaningfully engaged in that mission. CUNA strongly supports the CDFI Fund's efforts towards this goal.

CUNA supports the Fund's efforts to require that CDFIs be able to document a primary mission of promoting community development, an actionable strategy towards that mission, and responsible financing practices in support of that mission.[57] In combination, this will provide a holistic view of an individual CDFI's commitment to its community development mission. The Fund's requirements to document a primary mission and evidence a community development strategy are narrowly drawn and straightforward. However, the details of the Fund's approach to determining responsible financing practices may have unintended consequences and inappropriately exclude many mission-focused credit unions from qualifying.

Responsible Financing Practices: Rate Caps

CDFIs should not be making loans that are predatory or usury. In order to screen-out applicants who are making inappropriate loans, the Proposed Certification Application asks (1) beginning, at a minimum, 12 full months immediately prior to submission of the CDFI certification

[55] Proposed Certification Application, p. 18-19.
[56] *Id.* at 85.
[57] *Id.* at 35.

application, does the applicant originate, purchase interests in, offer, market, or service any consumer loan products (including credit cards and purchased loans) that allow for an annual percentage rate in excess of 36 percent when that rate is calculated using the Military Annual Percentage Rate (MAPR) standard[58] and (2) beginning, at a minimum, 12 full months immediately prior to submission of the CDFI certification application, does the applicant originate, purchase interests in, offer, market, or service small business loan products (including credit cards and purchased loans) that allow for an Annual Percentage Rate (APR) in excess of 36 percent?[59] If the applicant answers yes, there are additional questions for which if the applicant answers in the affirmative, such applicant may be ineligible for CDFI certification.[60]

CUNA is concerned that certain small dollar loan products that have been endorsed by other regulators would fall into this category, prompting a credit union offering alternatives to predatory payday loans to be ineligible for CDFI certification as a result of the Proposed Certification Application. This would be especially unfortunate as federal credit unions are already subject to an 18 percent usury interest rate ceiling under NCUA's rules and regulations.[61] NCUA's regulations include an exception for payday alternative loans (PALs), a small-dollar, short-term lending products designed by NCUA to be a responsible alternative to predatory payday loans, which are capped at 28 percent.[62] Certain credit union small dollar loans that have been created in line with the NCUA PAL program would not be permitted under the CDFI Fund's requirements.

These PALs are specifically designed to serve as safe and responsible alternatives to predatory payday loans. PAL loans are designed with protections against excessive roll-overs, requirements to fully amortize the loan, and limitations on principal balance and term. However, the Federal Credit Union Act (FCU Act)[63] permits a federal credit union to charge a reasonable application fee that reflects the actual costs associated with processing the loan, not to exceed $20,[64] however, is not factored into the permissible 28 percent rate cap allowed for PAL loans. Thus, the APR on certain PAL loans could technically be more than 36 percent when the application fee is factored in.

Notably, the CFPB's final rule for payday and small dollar loan specifically exempts PAL loans after a comprehensive analysis of this issue, which resulted in it specifically recognizing and promoting the benefits that credit union small dollar loans provide.[65] The NCUA also issued a rule in 2019 to create additional flexibility for credit unions to be able to offer PAL loan.[66] NCUA in its most recent rule for PAL loans outlined why these loans are beneficial to consumers,

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[58] Proposed Certification Application, pp. 41-42.
[59] *Id.* at 43.
[60] *Id.* at 41-44.
[61] *See* 12 C.F.R. § 701.21(c)(7)(i). By statute, the usury rate is set at 15 percent per year, however the NCUA Board may establish a higher maximum rate in response to market conditions. In Letter to Credit Unions 21-FCU-04, the NCUA Board set the usury rate to 18 percent through March 10, 2023 (Aug. 5, 2021), available at https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/permissible-loan-interest-rate-ceiling-extended-1.
[62] 12 C.F.R. § 701.21(c)(7)(iii)-(iv).
[63] 12 U.S.C. § 1751 *et seq*.
[64] 12 C.F.R. § 701.21(c)(7)(iii)(A)(7).
[65] *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 82 Fed. Reg. 54472, 54548 (Nov. 17, 2017).
[66] *Payday Alternative Loans*, 84 Fed. Reg. 51942 (Oct. 1, 2019).

compared to other options in the market. They stated, "The Board recognizes that the PALs I rule contains recommended best practices that when exercised in conjunction with a PALs I loan, help put credit union members on the pathway to mainstream financial products and services."[67] The CDFI fund application should exempt loans made under NCUA's PAL program from the question regarding the 36 percent MAPR.

Further, all federal credit unions have a leveraged payment mechanism for all loans by statute. The statutory lien is created by the FCU Act and provides federal credit unions with the power "to impress and enforce a lien upon the shares and dividends of any member, to the extent of any loan made to him and any dues or charges payable by him."[68] The lien can be established for all loans to the member by providing notice at account opening or through notice given regarding a bylaw amendment or policy.[69] The statutory lien allows a federal credit union to debit funds in an account and apply them to outstanding financing obligations due and payable to the credit union when a member is in default.[70] Therefore, regardless of whether federal credit union may use the statutory lien, many federal credit unions do in fact have a leveraged payment mechanisms on all their loans as a matter of policy and their bylaws. Answering "Yes" to this question should not automatically eliminate these federal credit unions from consideration for CDFI certification. The CDFI Fund should add an exception to footnote 13 making an exception for the federal credit union statutory lien.

Finally, the CDFI Fund should consider the use of alternative metrics to fixed MAPR and APR caps. For example, the Fund could consider evidence as to whether an applicant's loan offerings to the underserved community are more favorable in comparison to other offerings actually available in the market. For certain types of products or situations where lending is particularly risky or requires a significant amount of process or work by the lender, a hard cap may discourage credit unions from finding ways to work with these borrowers, for fear of disqualifying themselves from recertification. In these instances, the CDFI Fund may inadvertently push the most vulnerable into the arms of predatory lenders.

Responsible Financing Practices: MAPR and the Transaction Level Report

The CDFI Fund should not require CDFIs to report loan level MAPRs in the TLR. The MAPR is a complicated calculation that is typically performed with the use of commercially available calculators and is often not incorporated into a CDFI's loan origination or servicing systems. Under the Military Lending Act, the MAPR is required to be calculated at the extension of credit for closed-end loans or in any billing cycle for open-end credit.[71] For open-end credit, the MAPR cannot be calculated when there is no balance during a business cycle.[72] For closed-end loans being serviced by the CDFI, it does not have an obligation or guidance in how to calculate an MAPR outside of the extension of the loan. Calculating and reporting the MAPR on these closed-end loans would be an entirely novel exercise. Further, closed-end billing cycles on open-end

[67] *Supra* 65 at 54943.
[68] 12 U.S.C. § 1757(11).
[69] 12 C.F.R. § 701.39(c).
[70] 12 C.F.R. § 701.39(d).
[71] 32 C.F.R. § 232.4(b).
[72] 32 C.F.R. § 232.4(c)(ii)(B).

credit do not all happen at the same time, and it is not clear what MAPR may need to be reported on the TLR these loans. If the MAPR was required on the TLR, CDFI credit unions would need to establish a way to document historical information regarding the MAPR calculations, which systems do not currently allow for. The requirement could be disruptive to normal disclosure processes. It would be an unnecessary and extraordinarily burdensome systemic requirement to place on CDFI credit unions.

Responsible Financing Practices: Mortgage Products

The CDFI Fund should clarify what it includes in the definition of "mortgage products." The CFPB's qualified mortgage rule applies to "covered transactions" which includes any consumer credit transaction that is secured by a dwelling.[73] This would include a range of loans that may not traditionally be considered a "mortgage," such as a personal property loan to finance the purchase of a mobile home that is not attached to the real estate and not considered real property under state law. These loans would not be subject to other "mortgage loan" provisions in Regulation Z, such as certain disclosure requirements or the right to rescind.[74] The CDFI Fund must clarify whether applicants should include loans only to a borrower's principal place of residence, which is subject to the most regulatory protections; any loan secured by real property, a 1-to-4 family residence, or owner occupied property; a loan secured by a dwelling attached to real property (which would depend in part on the law within the CDFI's state); or a loan secured by a dwelling without regard to whether it is attached to real property. If the definition includes use of the word "dwelling," the CDFI Fund should also define that term as a variety of regulatory definitions already exist. Applicants must be able to distinguish whether a personal loan on a houseboat, converted van with no plumbing, or recreational vehicle would be included in the definition of dwelling. Without these distinctions, applicants cannot determine which of their products to include in the analysis.

The CDFI Fund should also reconsider its position with regard to balloon payments.[75] The Qualified Mortgage Rule (QM Rule), which appears to be the basis for much of the CDFI Fund's outline of acceptable features, allows for a balloon-payment qualified mortgage (QM) if it is responsibly designed.[76] As recognized by the Bureau in its ability to repay/qualified mortgage rulemaking, the balloon-payment qualified mortgage "is designed to assure credit availability in rural areas, where some creditors may only offer balloon-payment mortgages."[77] The Bureau stated that the inclusion of this balloon-payment QM was intended to enact the purposes of Congress:

> **The Bureau believes Congress enacted the exemption in TILA section 129C(b)(2)(E) because it was concerned that the restrictions on balloon-payment mortgages under the ability to repay and general qualified mortgage provisions might unduly constrain access to credit in rural and underserved areas**, where consumers may be

[73] *See* 12 C.F.R. §§ 1026.43(b)(1), 1026.43(e)(2), and 1026.2(a)(19).
[74] *See, e.g.*, 12 C.F.R. §§ 1026.19(e)-(f); 1026.23.
[75] Proposed Certification Application, p. 44.
[76] 12 C.F.R. § 1026.43(f).
[77] Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6407, 6409 (Jan. 30, 2023).

> able to obtain credit only from a limited number of creditors, including some community banks that may offer only balloon-payment mortgages. Because Congress explicitly set out detailed criteria, indicating that it did not intend to exclude balloon-payment mortgages from treatment as qualified mortgages that meet those criteria, and the Bureau is implementing the statutory exemption for balloon-payment mortgages to be qualified mortgages provided they meet the conditions described below. **The Bureau believes those criteria reflect a careful judgment by Congress concerning the circumstances in which the potential negative impact from restricting consumers' access to responsible and affordable credit would outweigh any benefit of prohibiting qualified mortgages from providing for balloon payments**. The Bureau therefore believes that the scope of the exemption provided in this final rule implements Congress's judgment as to the proper balance between those two imperatives.[78] (Emphasis added.)

Given that Congress instructed the Bureau to ensure that the QM Rule did not restrict credit to rural and underserved consumers by excluding balloon-payments, it would be inappropriate for the CDFI Fund, which is tasked with distributing Congressional-appropriate funds to those same consumers, to disqualify lenders who offer balloon-payments.

Further, the CDFI Fund's overall reliance on the QM Rule to identify acceptable features to mortgages creates a very incomplete picture. The QM Rule is a primary driver of what loans are sellable on the secondary market, particularly to the Federal National Mortgage Association (Fannie Mae) and the Federal Home Mortgage Loan Corporation (Freddie Mac), collectively, the government-sponsored enterprises (GSEs).[79] Because qualified mortgage loans can typically be sold into the secondary market, there are creditors and liquidity generally available for these loans to be made.

Oftentimes, what underserved communities need is not a lender willing to make them a qualified mortgage. Instead, credit unions report significant demand for non-conforming mortgages. For example, ITIN mortgages and high loan-to-value (LTV) mortgages are vital financial inclusion and wealth-building tools for serving consumers who are actually underserved. Given that these loans are non-conforming, they typically are not sold onto the secondary market and must be kept in the credit unions' portfolio. Credit unions are happy to take on this risk in order to meet the financial needs of their members, within the constraints of safety and soundness as determined by their prudential regulator. For this reason, some credit unions might offer mortgages with a balloon payment after 5 or 10 years to avoid holding 30-year loans. This is a creative solution to help an underserved member get access to credit they could not get elsewhere. These credit unions have procedures in place to help their members modify or refinance their loans when the balloon payment comes due so that members may continue building equity in their homes. These loans are often offered with excellent terms, like higher LTV with no private mortgage insurance, or low, fixed interest rates

[78] *Supra* 77 at 6537.
[79] *See, e.g.*, FNMA Lender Letter LL-2021-22 (Jun. 30, 2021), available at https://singlefamily.fanniemae.com/media/26236/display, and Freddie Mac Bulletin 2021-13 (Apr. 8, 2021), available at https://my.sf.freddiemac.com/updates/guide/bulletin~2021-13.

Similarly, CDFI credit unions that serve farmworkers and other seasonal workers have found that offering mortgage loans with interest-only payments in the off-season and amortizing payments when their members are fully employed is an effective strategy to bolster homeownership in their communities. Creatively designing solutions to meet members needs in light of current market conditions experienced by both the member and the credit union is the purpose of the credit union movement. If the CDFI Fund attempts to define acceptable features and structures of a mortgage, it effectively ties CDFI credit unions' hands prohibiting them from making more creative offerings. If CDFI credit unions are willing to take these risks and hold them on their balance sheet out of faith in the member's eventual financial success, surely the CDFI Fund can create sufficient leeway for them to do so. CUNA recognizes the material limitations the CDFI Fund is facing, and the efficiency offered by turning the QM Rule into a proxy checklist for "safe mortgages", however, in automatically excluding lenders based on certain features, the CDFI Fund may well be excluding those institutions that are offering the most meaningful and tailored financial support. This, again, is an example of how the CDFI Fund would benefit from a case worker structure where the Fund could gain an in depth understanding of a CDFI's operations, approach and structure, rather than adopting a hyper-prescriptive approach to lending programs. The CDFI Fund should remove the reference to balloon-payments and interest-only payments in Question PM16.1.

Responsible Financing Practices: Overdraft Programs

The CDFI Fund asks significant information about applicants' overdraft programs but does not indicate how it will apply criteria to these programs.[80] The CDFI Fund should explicitly clarify how it is judging these overdraft programs and what activity would exclude an applicant from qualification. It is not clear whether the Fund will view these programs holistically or whether there are certain features or dollar thresholds that it finds inherently prohibitive. Similarly, it is not clear whether the Fund merely intends to identify whether an overdraft program is abusive or unfair, or if it intends to only certify financial institutions that meet certain best practices. If it is the latter, the CDFI Fund should affirmatively identify the best practices it expects to see, above and beyond compliance with regulatory requirements.

Responsible Financing Practices: Financial Services

The Proposed Certification Application asks the applicant to identify a single checking or deposit product and to list its features, favorable and unfavorable, for review.[81] Among these features are "No account activation, closure, dormancy, inactivity, or low balance fees."[82] However, it is important to understand that dormancy or inactivity fees play a unique role in credit unions.

The FCU Act specifies that in order to qualify for credit union membership, a person must "subscribe to at least one share of its stock."[83] The price of this subscription to one share of stock

[80] Proposed Certification Application, p. 48.
[81] *Id.* at p. 47.
[82] *Id.*
[83] 12 U.S.C. § 1759(a).

is often referred to as the credit union's "par value."[84] The par value is not paid to the credit union, it is deposited into the member's account.[85] Once an person has become a credit union member, they remain a member unless they are expelled or withdraw their membership, and the bases for expulsion are narrow.[86] The FCU Act does allow for a member to be expelled based on nonparticipation if the member fails to purchase shares, obtain a loan, or vote in annual credit union elections.[87] For credit unions that have adopted a nonparticipation policy in compliance with NCUA regulations, if a member fails to maintain their par value in their account and does not replace it within the time period established in the bylaws, their membership ceases.[88]

It is very common for credit unions to have "bad address" accounts where the member has moved without advising the credit union and cannot be located. Oftentimes, these members leave de minimis amounts of money in their share account. Because these people continue to be members, the credit union is obligated to not only continue servicing the account by sending account statements, privacy, and policy changes notices, but also information about the credit union such as credit union meeting notices, election documentation, and the payment of dividends. Whereas other financial institutions are able to simply close the account and return the funds, doing so within a credit union would be an illegal termination of the individual's membership in violation of the FCU Act. Once a credit union member, a person has a legal right to maintain a share account and vote in credit union meetings.[89]

In order to avoid having significant numbers of inactive and unlocatable members in a credit union, the NCUA has expressed that credit unions can charge dormant or inactive account fees intended to drop the balance below the par value, at which time the individual can be removed from membership.[90] Otherwise, credit unions would be forced to maintain these accounts at a loss to the rest of the membership until these small deposits would achieve unclaimed property status and escheat to the state which can take several years. This use of dormancy fees is not designed to generate revenue for the credit union, it is solely intended to protect the other members of the credit union and to avoid waste of their credit union deposits via servicing abandoned accounts and membership. Due to this unique aspect of credit union membership, the CDFI Fund should ignore the use of dormancy or inactivity fees by credit unions. It is a critical tool for maintaining the membership roll and protecting the interests of the membership at large.

Relatedly, the Financial Services account features also includes an item that states, "Account screening – only deny new customers for past incidences of actual fraud."[91] The primary shareholder on every credit union's share account must qualify for membership within the credit

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[84] *See* NCUA Legal Opinion Letter 98-0713, available at https://www.ncua.gov/regulation-supervision/legal-opinions/1998/membership-rights-and-subscription-requirements.
[85] See NCUA Legal Opinion Letter 09-0243, available at https://www.ncua.gov/regulation-supervision/legal-opinions/2009/liability-credit-union-member.
[86] 12 C.F.R. Part 701, App. A, Art. II, § 4(a).
[87] 12 U.S.C. § 1764(b).
[88] 12 C.F.R. Part 701, App. A, Art. II, § 3.
[89] *See* NCUA Legal Opinion Letter 05-0723, available at https://www.ncua.gov/regulation-supervision/legal-opinions/2005/denial-services-joint-share-account-owners.
[90] *See* NCUA Legal Opinion Letter 08-1030, available at https://ncua.gov/regulation-supervision/legal-opinions/2008/permissibility-closing-inactive-accounts.
[91] Proposed Certification Application, p. 49.

union.[92] Credit unions therefore have a legal obligation to screen potential account holders for their qualifications for membership under the credit union's charter, bylaws, and policies. If the CDFI Fund is trying to get at specific account screening requirements which it views as especially unfavorable, it should list those specifically. Otherwise, every credit union applicant will select this feature and it will not yield useful information to the Fund about the nature of credit union share accounts.

Financing Entity

The Proposed Certification Application contains a presumption that certain regulated financial institutions meet the Financing Entity requirements.[93] It includes three of the four types of regulated financing entities discussed in the definitions,[94] but eliminates "Insured Credit Unions." Based on the inclusion of Insured Credit Unions in the definitions of "Regulated Financing Entities," CUNA assumes this was merely an oversight. However, if this exclusion was intentional, the CDFI Fund should explain the policy behind the exclusion and allow time for response before finalizing the Proposed Certification Application.

Target Market

Target Market: Percentage Benchmarks

CUNA thanks the CDFI Fund for its changes to the Target Market test in the Proposed Certification Application which will help CDFI credit unions with strong community development missions obtain and maintain their CDFI certification. Permitting credit unions and other depositories that reach the 60 percent numerosity benchmark flexibility with regard to the 60 percent dollar volume benchmark will particularly help CDFI credit unions in high-cost areas where dollar volumes can be skewed by a minority of borrowers. This 50 percent flexibility will allow CDFI credit unions to be responsive to market conditions without fear of losing certification. However, CUNA cautions that the financial service option is only a workable option if CDFI credit unions can make use of functional target market assessment methodologies to determine the overall eligibility percentage of their membership.

Further, CUNA urges the Fund to continue considering other methods of flexibility with regard to market conditions. As we saw during the pandemic, extraordinary circumstances can create years-long fluctuations and changes on CDFI credit union's books, which may not fully reflect their commitment to their Target Market. Where these effects are independently observable and widespread across entire regions or sectors, it is reasonable and appropriate for the CDFI Fund to permit appropriate flexibilities. In these instances, the CDFI Fund might consider consulting with the prudential regulators and issuing temporarily flexibilities, such as benchmarks based on five-year averages rather than three years.

[92] 12 U.S.C. § 1757(6).
[93] Proposed Certification Application, p. 51.
[94] *Id.* at p. 3.

Mapping Requirements

CUNA strongly supports the CDFI Fund's decision to no longer require Target Market mapping, except for custom Investment Areas. This change will reduce the burden on smaller and less-sophisticated CDFI credit unions, and reduce costs associated with certification.

Compiling Target Market Data

The CDFI Fund has not yet released its proposed changes to the TLR. Given the significance of the TLR in the application process, this is a substantial informational gap in responding to the subject Notice and Request for Comment. It is difficult to assess the TLR's efficacy at capturing the information for which the Proposed Certification Application purports to use it.[95] CUNA would reiterate its concerns regarding data usage and security of the information contained in the TLR, as was previously discussed in this comment letter.

Further, CDFI credit unions report frustration with technical glitches and limited capacity with the current TLR reporting. In addition to ensuring that a sufficient privacy management program is established for transaction-level data, the CDFI Fund must also ensure that it has actual capacity to responsibly handle the volume of data the Fund is requiring CDFI credit unions to report. If the Fund's systems do not have sufficient capacity, it will inevitably be forced to employ workarounds to ensure the Fund is able to function. The use of workarounds often leads to misplaced information, duplicative requests, errors, confusion, and information not being collected and stored in accordance with policies intended to keep the information safe. The CDFI Fund must ensure it aligns its desire for data with its actual capacity to safely and securely process and store this data.

Target Market Assessment Methodologies

CUNA intends to provide additional comment on target market methodologies in the separate Notice and Request for Comment on that topic.[96] However, it is important to note here that the CDFI Fund's current list of pre-approved Target Market Assessment Methodologies would effective bar CDFI credit unions from certification based on low-income targeted populations or other targeted population target markets. The CDFI Fund must add workable methodologies to its list in order for the Target Market test to be achievable.

Further, with regard to Other Targeted Population (OTP) target markets, CUNA is deeply concerned that existing pre-approved assessment methodologies intended for use with African American or Hispanic Other Targeted Populations[97] violate the Equal Credit Opportunity Act (ECOA)[98] and its implementing regulation, Regulation B.[99] Under the current approved methodologies, the Fund approves of assessing African American or Hispanic Other Targeted

[95] *See e.g.*, Proposed Certification Application, pp. 9, 67, and 71.
[96] Community Development Financial Institutions Fund; CDFI Target Market Assessment Methodologies, 87 Fed. Reg. 63852 (Oct. 20, 2022).
[97] CDFI Fund, Proposed Pre-Approved Target Market Assessment Methodologies, p. 1-11.
[98] 15 U.S.C. § 1691 *et seq*.
[99] 12 C.F.R. Part 1002.

Populations through self-reporting or through visual observation or surname. Regulation B prohibits inquiring "about the race, color, religion, national origin, or sex of an applicant" unless doing so under an exception.[100] No regulatory exception would appear to apply to the Target Market Assessment Methodologies approved by the Fund. Not only must alternatives be provided, but the Fund also should remove these assessment methodologies from the list as they may incentivize violations of fair lending laws.

Development Services

The Proposed Certification Application is confusing with regard to whether a CDFI must offer a development service specifically attached to one of its Financial Products. "Development Services" are defined in the regulation as "activities undertaken by a CDFI, its Affiliate or contractor that promote community development and shall prepare or assist current or potential borrowers or investees to use the CDFI's Financial Products **or Financial Services**." (Emphasis added.)[101] While this definition includes activities intended to prepare or assist borrowers to use a CDFI's Financial Service, the Proposed Certification Application repeatedly states that the Development Service must prepare a borrower for the use of a Financial Product.[102] Question DS02 makes reference to the "Applicant's Financial Products or Financial Services," yet Question DS03 is solely focused on Development Services offered in connection with Financial Products. The significance of this distinction is unclear and the CDFI Fund should clarify its criteria with regard to Development Services connected to Financial Services, which could include some of the most critical Development Services for underserved populations.

Further, the CDFI Fund's statement that a Development Service must be a "formal, structured, stand-alone training, counseling, or technical assistance service" is incredibly narrow. The specification that these services must be formal, structured, and stand-alone has no basis in the regulation or in the Riegle Community Development and Regulatory Improvement Act of 1994. These constraints will discourage innovation and development of high-quality Development Services. Unstructured, individualized counseling and financial coaching is often the best way to reach underserved, unbanked, and low-income individuals. A holistic approach is most likely to lead to the ultimate success of the credit union's members, and that is best achieved through a one-on-one discussion, not a formal, structured setting with other attendees. The CDFI Fund is underestimating the significance of building trust and relationships with the people intended to be served by these Development Services.

The Fund notes that it will not consider information presented online to be Development Services unless it was developed by the CDFI (or with its Affiliate) or under a service agreement. This is unnecessarily restrictive—if a CDFI credit union vets and choses to offer publicly-available, high-quality online programming on its website or its mobile application from another partner, such as a community development organization or similar nonprofit, it should be counted as a Development Service. Excluding offerings form these types of partners will disproportionately hurt MDI and smaller CDFIs. Further, it is not clear why the CDFI Fund needs copies of

[100] 12 C.F.R. § 1002.5(b).
[101] 12 C.F.R. § 1805.104(*development services*).
[102] Proposed Certification Application, p. 79.

agreements related to these offerings. If there are specific contractual provisions that the Fund expects to have in place, it should simply state what those are.

The cutting edge of financial coaching is based on mobile access to coaching and interventions at key moments when members engage with credit union websites and mobile applications. Financial coaching and education provided remotely, whether through videoconferencing or through an app should be considered a Development Service. The focus should not be on whether the CDFI Fund developed the information itself, it should be on whether the content is designed to meet the needs of the Target Market and whether the CDFI has an appropriate plan to meaningfully deploy it.

Accountability

Means of Demonstrating Accountability

For Investment Area Target Markets, the Proposed Certification Application states accountability can be demonstrated through an individual's "[s]tatus as an elected official primarily representing residents of qualified census tracts."[103] The CDFI Fund should clarify the types of elected officials to which this refers. For example, whether election as an officer of a governing board of a credit union, faith-based organization, or business improvement district that serves the investment area would meet this requirement. A similar provision should be included for Low Income Targeted Population (LITP) and OTP target markets where the elected officer represents majority low-income or majority minority constituencies.

It is not clear why the CDFI Fund has eliminated the use of board members and non-executive employees of mission-driven non-profits that primarily serve the CDFI's Target Markets. Focusing only on executive staff of mission-driven non-profits significantly reduces the pool of available candidates for service on advisory boards, particularly in rural areas. Further, excluding non-executive staff undervalues the technical and hands-on experience that nonexecutive staff are able to bring to the table. Staff that is more likely to have one-on-one interactions with members of the Target Market are more likely to provide important and nuanced advice, particularly with regard to outreach and Development Services. Further, volunteer board and committee members with substantive responsibilities to an organization often have sufficient time and passion to serve as advisory board members. The CDFI Fund should also consider non-executive staff and volunteer board and committee members with substantive responsibility to an organization demonstrating accountability.

Means of Demonstrating Accountability: Credit Unions

CUNA applauds the CDFI Fund for providing a clear explanation of how CDFIs can demonstrate accountability. This information will help CDFIs design and implement compliance accountability structures with certainty and confidence. Furthermore, the flexibility permitted by the multiple options to demonstrate accountability is helpful. However, the credit union member exception in Option 3 is incredibly insufficient.

[103] Proposed Certification Application, p. 83.

Credit unions are not-for-profit financial cooperatives controlled by a democratically elected board of directors. This democratic control is a function of statute under the Federal Credit Union Act,[104] analogous state credit union acts, implementing regulations,[105] and credit unions' individual by-laws. Given that credit union boards are democratically elected, they are inherently accountable to their membership. Credit union members are each entitled to one vote, regardless of the number of shares held at the credit union, the amount of funds on deposit, or the amount of loans they have taken.[106] This level of accountability is above and beyond any of the other options available to CDFIs in the Proposed Certification Application. A credit union membership that is displeased with a CDFI credit union's commitment to its mission or activities targeted at its Target Market has the option to completely dispose the governing board through the election process. The CDFI Fund should recognize credit unions as inherently accountable and exempt them from the accountability test.

At the absolute, bare minimum, the CDFI Fund should reinstate the stand-alone option that states if 50 percent of a credit union's membership is determined to be members of the credit union's Target Market, then it is inherently accountable. Even this is an unnecessarily high bar since credit union elections are determined by the plurality of the vote, and do not require a majority.[107] If necessary, the CDFI Fund could require that a CDFI credit union must provide a report of its CDFI activities to its membership along with the annual meeting notice.[108]

Financial Interest Policy

The Proposed Certification Application states that under the Fund's Financial Interest Policy governing board members with "active loan products" cannot demonstrate accountability to their CDFI Target Market. This policy is inherently hostile to the cooperative finance model. It would prohibit virtually all officers of credit union governing boards from service. This policy is completely unnecessary as potential conflicts of interest in connection with loans to governing board members is an issue already clearly addressed by the primary regulators of all insured depositories. For credit unions, the NCUA has established regulatory limits to loans and lines of credit to officials.[109] This provision requires board approval for any loans to a board member where the aggregate amount of loans to that person exceeds $20,000.[110] The regulation prohibits any preferential treatment with regard to rates, terms and conditions,[111] which prohibits the board member from enjoying any employee discount they might qualify for were it not for their board service.[112] CDFI credit unions are regularly examined for compliance with these requirements.

It is unclear why these protections, in combination with the conflict of interest policies required of credit union board members under bylaws and bonding requirements are insufficient to

[104] 12 U.S.C. § 1751 *et seq.*
[105] *See* 12 C.F.R. Part 701.
[106] 12 U.S.C. § 1760.
[107] 12 C.F.R. Part 701, App. A, Art. V, Sec. 2
[108] *See* 12 C.F.R. Part 702, App. A, Art. IV.
[109] 12 C.F.R. § 701.21(d).
[110] *Id.*at 701.21(d)(1).
[111] *Id.* at 701.21(d)(5).
[112] NCUA Legal Opinion Letter 970247 (Mar. 14, 1997), available at https://www.ncua.gov/regulation-supervision/legal-opinions/1997/preferential-loan-rates-employees.

establish an individual board member's commitment to making decisions in the best interest of the credit union membership and Target Market populations. If the CDFI Fund maintains this policy, the CDFI Fund will exclude nearly all credit union board members from being able to demonstrate accountability or force all CDFI credit unions to sell the loans of board members to other financial institutions. Many of the board members at issue are themselves underserved and low-income individuals. Joining and volunteering to serve their credit union is an act of self-help by these communities. The CDFI Fund should not actively harm these individual members of low-income and underserved communities by forcing their credit unions to sell their loans to other non-CDFI entities, which will not provide the same level of service or work with these members in the same way. CDFI credit unions and other regulated depositories should be exempt from this policy.

Further, while federal credit unions may only have one compensated officer of the board, all other board members must not be compensated for their service.[113] Similar to the Proposed Certification Application,[114] this legal prohibition on compensation does not include reimbursement of reasonable and proper costs incurred in carrying out the duties of an officer of the board.[115] However, NCUA's prohibition on compensation also permits board members to obtain reasonable health, accident and related types of personal insurance protection, supplied for officials at the expense of the credit union:

> *Provided*, that such insurance protection must exclude life insurance; must be limited to areas of risk, including accidental death and dismemberment, to which the official is exposed by reason of carrying out the duties or responsibilities of the official's credit union position; must cease immediately upon the insured person's leaving office, without providing residual benefits other than from pending claims, if any; except that a credit union must comply with federal and state laws providing departing officials the right to maintain health insurance coverage at their own expense.[116]

Further, NCUA regulations permit board members to receive indemnification and similar insurance related to their official duties.[117] The Proposed Certification Application's Financial Interest Policy does not account for these insurance provisions, and it seems likely that all or most federal credit union officials could be excluded from service as a result. Again, CDFI credit unions and other regulated depositories should be exempt from the Financial Interest Policy.

Conclusion

Thank you for the opportunity to comment on this update to the CDFI certification application given its extremely importance for credit unions. CUNA urges the CDFI Fund to make the changes recommended in these comments to ensure that a significant number of CDFI credit unions are not inappropriately excluded from certification. Credit unions are critical service providers to low-income and underserved communities, and it is important that they are able to

[113] 12 C.F.R. § 701.33(b)(1).
[114] Proposed Certification Application, p. 85.
[115] 12 C.F.R. § 701.33(b)(2)(i).
[116] 12 C.F.R. § 701.33(b)(ii).
[117] 12 C.F.R. § 701.33(b)(iii), (c).

continue to serve these communities as effectively and efficiently as possible. CUNA is happy to provide additional information or resources if needed. If you have questions or require additional information related to our feedback, please do not hesitate to contact me at (202) 503-7184 or esullivan@cuna.coop.

Sincerely,

Elizabeth M. Sullivan