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National Association of Federally-Insured Credit Unions

February 17, 2023

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

RE: February 2023 Advisory Board Meeting

Dear Community Development Advisory Board:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the Community Development Financial Institutions (CDFI) Fund's notice of an open meeting that will occur on February 28, 2023. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 134 million consumers with personal and small business financial service products. NAFCU is happy to be a part of this meeting and would like to provide you with the letter submitted in response to the CDFI Fund's request for comment regarding the proposed new requirements for the proposed CDFI certification application. Overall, NAFCU does not support the proposed changes to the certification standards but specifically believes that a limited 30-day comment period was not enough time to review all of the changes and their impact on credit unions. NAFCU also does not support the proposed one-year effective date for existing CDFIs to come into compliance with the proposed certification standards.

NAFCU's submission to the CDFI Fund's RFC is attached to this letter and we urge you to review the following concerns from our members:

1. The primary mission section of the proposed application eliminates the use of the NCUA's Low Income Designation as an automatic qualifier for membership but allows the CDFI Fund to consider other documentation for a holistic picture of the applicant's dedication to community development. NAFCU supports the review of the overall picture of the applicant but does not support the elimination of the automatic qualifier as it will be burdensome for smaller institutions that will now need to develop a mission statement and only have a year to come into compliance with the proposed requirements.

2. All applicants other than depository institution holding companies (DIHCs), affiliates of DIHCs, and subsidiaries of insured depository institutions (IDIs) are required to demonstrate that any affiliate meets all primary mission requirements. Because the term

"IDI" only includes banks and thrifts with deposits insured by the FDIC, credit unions insured by the NCUA are not included in the exemption. In this case, credit unions are similar to banks as they are insured by a federal agency. NAFCU does not support this exclusion of credit unions from the exemption. Under the proposed certification standards, an applicant that does not consider a borrower's ability to repay (ATR) a loan may be determined ineligible for CDFI certification if an acceptable justification is not offered. NAFCU opposes this because it is contrary to Regulation Z, which explicitly excludes CDFIs from the ATR requirements. For example, this would jeopardize, among other products, safe and affordable payday alternative loan (PAL) programs offered by credit unions.

3. The proposed CDFI certification application asks a number of questions related to fees charged by depository institutions. NAFCU discourages the CDFI Fund from regulating fees as it does not have the statutory authority to do so. Specifically, the CFPB, has an overdraft rule that all depository institutions. Additionally, the NCUA, FCC, OCC, FDIC and Federal Reserve System regulate also regulate fees for financial institutions.

4. NAFCU does not support the proposed elimination of the existing option of utilizing an applicant's board member's participation on the governing or advisory board of an unconnected organization as a means of demonstrating accountability to a Target Market. Credit unions are not able to change board members with ease because they are democratically elected, as required by statute. Additionally, NAFCU opposes the elimination of the qualification for credit unions that are deemed accountable if at least 50 percent of their members were of a Target Market. The elimination of these two accountability standards is estimated to affect 87 percent of credit union CDFIs.

5. Lastly, the proposal requires certification applicants to verify each board member's income whose means of accountability is a Low Income Targeted Population. NAFCU recommends that this verification take the form of an attestation from the board member.

NAFCU appreciates the opportunity to provide comments ahead of this meeting and welcomes any opportunity to speak with you further about our concerns. Should you have any questions or require additional information, please do not hesitate to contact me at (703) 842-2268 or amoore@nafcu.org.

Sincerely,

Aminah Moore
Senior Regulatory Affairs Counsel

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December 5, 2022

Spencer W. Clark
Treasury PRA Clearance Officer
Community Development Financial Institutions Fund
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

RE: Request for Comment Regarding CDFI Certification Application (Docket No. 2022-24082)

Dear Mr. Clark:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the Community Development Financial Institutions (CDFI) Fund's request for comment (RFC) regarding the proposed new requirements for the CDFI certification application. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 133 million consumers with personal and small business financial service products. Overall, NAFCU does not support the proposed changes to the certification standards and recommends increased transparency and minimal discretion from the CDFI Fund regarding all certification requirements so that new applicants and already established CDFIs can comply with a predictable process without excessive regulatory burdens. Additionally, NAFCU recommends a three-year effective date or a mandatory three-year cure period for CDFIs to come into compliance with the proposed certification standards. Finally, NAFCU urges the CDFI Fund to (1) defer to the applicant's functional regulator regarding what products should and should not be offered to consumers; (2) provide all credit unions parity with banks and exempt them from completing the financing entity section of the new application as well as exempting affiliates from demonstrating primary mission requirements; and (3) allow board members to self-certify whether their earnings align with the low-income benchmark of the entity.

General Comments

A community needs basic financial services, affordable credit, and investment capital to thrive economically. CDFIs are mission-focused financial institutions that provide services to underserved communities while also helping to grow local economies by providing affordable housing and supporting small, minority-owned businesses. The main goal of a CDFI is to offer services and products at low or no cost to its target community. During challenging times, including the COVID-19 pandemic, CDFI credit unions have worked to help their members access stimulus payments, combat financial insecurity, and obtain emergency loans.

In low-income or underserved communities, access to financial services is often limited. Due to the mission and requirements of certification for CDFIs, these organizations play a key role in expanding financial inclusion to markets that are in need, especially during times of crisis. CDFIs also play an important role in supporting community revitalization efforts by delivering the loans and investments necessary to help individuals and small businesses thrive. Additionally, NAFCU would like to clarify that "state-insured credit union" is largely a legacy categorization of organizations insured by state-charted, privately operated insurance funds. State-insured institutions are rare as the overwhelming majority of credit unions are insured by the National Credit Union Share Insurance Fund and only about 2 percent are privately insured.[1]

NAFCU does not support the one-year effective date for CDFIs to come into compliance with the new certification standards. The majority of the proposed revisions are burdensome on CDFIs, especially smaller institutions that do not have the resources to make the required changes so quickly. The changes are significant and CDFIs are going to have to work at lightning speed to incorporate these changes in order to comply with the proposed requirements. NAFCU recommends a three-year effective date for CDFIs to come into compliance with the proposed certification standards or a mandatory three-year cure period for those CDFIs that do not meet the requirements within the one-year effective date.

Primary Mission

To be a CDFI the entity must have a primary mission of promoting community development.[2] Currently, applicants are able to meet this test by providing board-approved organizational documents along with a mission statement demonstrating that the applicant has a primary mission of promoting community development, as well as a brief description of the Financial Products/Financial Services offered. Additionally, credit unions that have received a Low-Income Designation (LID) from the National Credit Union Administration (NCUA) automatically meet this requirement and therefore satisfy the primary mission test by virtue of this designation.

The proposed changes to the primary mission section of the CDFI certification application eliminate the use of the NCUA's LID, requiring all credit unions to show that they have a community development mission through documentation. Under the proposed certification requirements all credit unions, regardless of their NCUA designation, will be required to submit a board-approved strategic plan evidencing a community development strategy. The proposed changes allow the CDFI Fund to look at other documentation such as the applicant's community development strategies and community-development-related financial products, financial services, and development services to paint a holistic picture of the applicant's dedication to community development.

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[1] Private Deposit Insurance: Credit Unions Largely Complied with Disclosure Rules, but Rules Should be Clarified (March 29, 2017). https://www.gao.gov/products/gao-17-259
[2] 12 CFR 1805.201(b)(1).

NAFCU applauds the CDFI Fund for recognizing that an applicant's mission statement may not always properly and completely convey a community development mission, but that its products and services prove what its true focus is. However, NAFCU objects to the elimination of the automatic process for LID designated credit unions and urges the CDFI Fund to reduce the burden on those credit unions that, by the NCUA's standards, are doing exactly what a CDFI is required to do and may not have the resources to develop a strategic plan that adequately explains their community development initiatives. The elimination of the LID designation will be especially burdensome for those credit unions that are already LID CDFIs because they only have one year to come into compliance with this new requirement. The CDFI Fund should defer to the NCUA as the functional regulator tasked with evaluating that an institution meets the rigorous criteria to obtain the LID designation. NCUA's determination regarding a LID designation should be sufficient to meet the primary mission requirements.

Credit unions' boards of directors are democratically elected from the credit union's membership and their time is contributed as volunteers. Some credit unions even have volunteer staff, highlighting the cooperative, mission-focused nature of these small, community institutions. Consequently, sometimes credit unions' mission statements are not as sophisticated as those of larger financial institutions and may not include the wording that the CDFI Fund is looking for to satisfy the primary mission test, but their product offerings prove that their primary mission is promoting community development. In order to promote transparency and consistency among applicant approvals, NAFCU further urges the CDFI Fund to provide clear details in its final rule about what an acceptable strategic plan to satisfy this requirement should look like.

The CDFI Fund's guidance on primary mission requires all applicants other than depository institution holding companies (DIHCs), affiliates of DIHCs, and subsidiaries of insured depository institutions (IDIs) to demonstrate that any affiliate meets all primary mission requirements. Because the term "IDI" only includes banks and thrifts with deposits insured by the Federal Deposit Insurance Corporation (FDIC), NAFCU encourages the CDFI Fund to provide credit unions parity with banks and include credit unions with deposits insured by the NCUA in the exemption for affiliates to provide primary mission documentation.

The proposed certification application consists of a series of questions related to the financial products and services offered by the applicant. The answers to some of these questions may and, in the case of some answers, must automatically disqualify the applicant from certification. A number of products and services that the CDFI Fund proposes to prohibit a CDFI from offering may be necessary to help members of the community the CDFI serves in their time of need. There is not a one-size-fits-all approach to a consumer's financial situation. Credit unions offer a wide variety of options to their members in order to develop and maintain financial stability.

Ability to Repay

Under the proposed certification standards, an applicant that does not consider a borrower's ability to repay (ATR) a loan may be determined ineligible for CDFI certification if an acceptable justification is not offered. This is contrary to Regulation Z, which explicitly excludes CDFIs from the ATR requirements.[3] This exemption was likely created to allow CDFIs to adopt extraordinary financing to meet the needs of low-income borrowers—helping their long-term ability to improve household stability and economic net worth. Moreover, the NCUA allows credit unions to offer their members meaningful alternatives to traditional payday loans, which can be predatory and detrimental to the finances of the communities that CDFIs are meant to serve.[4] NAFCU urges the CDFI Fund to explicitly exempt those loans that are permitted under current law from this ATR requirement.

Mortgage Protections

Despite the exemption under Regulation Z, the proposed certification standards require any CDFI engaged in mortgage lending to provide product protections consistent with the ATR/Qualified Mortgage (QM) Rule including: (a) no negative amortization, interest-only payments, or balloon payments; (b) adjustable rate mortgages underwritten at the maximum rate in the first five years; (c) original maximum term of 30 years; and (d) total points and fees generally not exceeding three percent of the loan amount. Applications that fail to meet these standards will be rejected.

The CDFI Fund is not a de facto regulator of CDFIs, therefore NAFCU urges the CDFI Fund to defer to the applicant's functional regulator regarding what products should and should not be offered to consumers. The NCUA serves as the prudential regulator for the credit union industry and has an established track record of protecting the safety and soundness of the credit union system. The Office of the Comptroller of the Currency (OCC), FDIC, and Federal Reserve System regulate banks while other financial institutions are subject to regulation by state supervisory authorities and, if they are large enough, the Consumer Financial Protection Bureau (CFPB). There are several situations where a consumer may need to borrow money under conditions that are not ideal or fit within the standards for the model borrower, but the stated purpose of CDFIs is to help those consumers that are underserved and likely not the model borrower. Disqualifying applicants because they offer products that are in most cases the only products that a borrower is eligible for contradicts the mission statement of CDFIs.

The CDFI Fund specifically provides awards to institutions that allow them to help their communities by financing mortgage lending for first-time homebuyers and being able to provide flexible underwriting for community facilities. Typically, CDFIs provide educational services such as credit counseling and homebuyer classes to help their borrowers use credit effectively and ensure they are able to keep up with their loan obligations. However, most of the mortgages originated by CDFIs are considered nonconforming and would not meet the proposed requirements. Furthermore, the CDFI Fund explicitly states that "a demonstrated willingness to

[3] 12 CFR 1026.43(a)(3)(v)(A).
[4] 12 CFR 701.21(c)(7)(iv).

work with struggling borrowers is an important CDFI characteristic" but these limitations on mortgage terms make it impossible for a CDFI or an applicant to work with struggling borrowers. NAFCU has urged the Federal Housing Finance Agency (FHFA) to consider pilot programs targeted towards buying mortgages from CDFIs, to help underserved borrowers and first-time homebuyers achieve homeownership.[5] As a result, Freddie Mac's Equitable Housing Finance Plan[6] included an increase in capital for CDFIs and minority depository institutions. This demonstrates a recognition that nonconforming CDFI loans play an important part in our housing finance ecosystem.

Interest Rate Cap

The proposed certification requirements prohibit an applicant or CDFI from charging more than a 36 percent annual percentage rate (APR) on all consumer loans. The proposal further requires all applicants to recalculate all rates in the form of the Military Lending Act APR. As previously mentioned, credit unions' operations are subject to rigorous regulatory oversight, and regular examinations. Federally chartered credit unions are required to comply with an interest rate cap administered by the NCUA.[7] The current 18 percent APR cap applies to all loans except those made under the NCUA's Payday Alternative Loan program, which are capped at 28 percent.[8] Additionally, state-chartered credit unions comply with the usury laws set by their respective jurisdictions. Credit unions' lending systems meet the requirements of the federal Truth in Lending Act, which was established to create a uniform disclosure of costs that allows consumers to effectively shop rates and understand the cost of credit. NAFCU discourages the CDFI Fund from placing broad restrictions on lending that reduce consumers' access to sensible loan options from CDFIs.

Fees

The proposed CDFI certification application asks a number of questions related to fees charged by depository institutions. While NAFCU appreciates the CDFI Fund's decision not to require depository institutions to offer accounts that include specific features or place an explicit limit on the number and frequency of overdraft fees that can be charged, NAFCU discourages the CDFI Fund from regulating fees as it does not have the statutory authority to do so. Instead, NAFCU urges the CDFI Fund to defer to depository institutions' prudential regulators for acceptable fees and the limitations set by the Consumer Financial Protection Bureau's overdraft rule.

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[5] NAFCU. Pilot Programs to Increase Access to Mortgage Credit (December 2, 2021). https://www.nafcu.org/system/files/files/12.2.2021%20Letter%20to%20FHFA%20re%20Pilot%20Programs.pdf
[6] Freddie Mac. Equitable Housing Finance Plan (June 2022). https://www.freddiemac.com/about/pdf/Freddie-Mac-Equitable-Housing-Finance-Plan.pdf
[7] 12 U.S.C §1757(5)(A)(vi)(I).
[8] 12 CFR 701.21(c)(7)(A).

Respondents to NAFCU's 2022 *Federal Reserve Meeting Survey* indicated that overdraft use has steadily increased, and now a majority of credit union members (56 percent) have opted into these programs, up nearly six percent from 2021. Again, these programs are provided as a service to consumers, offering critical, cost-effective, and short-term credit and protecting consumers from turning to predatory payday lenders to cover expenses. Over 70 percent of credit unions recently surveyed also indicated that they waive overdraft fees for their members on a case-by-case basis.[9] It is also very common (over 80 percent of credit union members recently surveyed)[10] for credit unions to disseminate educational materials or notices to members who incur frequent overdraft or non-sufficient funds fees to inform them of the risks and provide them with tools to enhance their financial well-being. NAFCU opposes this provision as it is not within the CDFI Fund's purview and the NCUA and CFPB have already addressed overdraft fees.

Financing Entity

A CDFI must be an entity whose business activities are predominantly conducted in arms-length transactions of financial products and/or financial services. The proposed certification application presumes that DIHCs, depository institutions insured by the FDIC, and state-insured credit unions meet the financing entity requirements and are exempt from completing this section of the application. Insured credit unions, defined in the proposed application as "any credit union with member accounts insured by the National Credit Union Share Insurance Fund," are not included in this exemption under the proposed application. Insured credit unions are financing entities by definition, such as banks and state-insured credit unions. Additionally, the current requirements explicitly state that credit unions with federal insurance are deemed to automatically meet the financing entity criteria. NAFCU urges the CDFI Fund to provide all credit unions parity with banks and exempt them from completing this section of the new application as well.

Target Market

A CDFI is required to serve an investment area or targeted population by statute.[11] Specifically, an applicant must direct at least 60 percent of its financial product activities to one or more approved Target Markets (TMs). There are three types of TMs: Investment Areas (IA), Low-Income Targeted Populations (LITP), and Other Targeted Populations (OTP). Under the current standards, the LITP is defined as a low-income population for a specified geographic unit containing individuals whose family income (adjusted for family size) is up to 80 percent of the area median family income for metropolitan areas, or up to 80 percent of the greater of the area median family income or the statewide nonmetropolitan area median family income for non-metropolitan areas. OTP-qualifying populations are identified as African-American; Hispanic

[9] Economic & CU Monitor, January 2022, https://www.nafcu.org/data-tools/economic-and-cu-researchenewsletter/archive.
[10] *Id*.
[11] 12 CFR 1805.201(b)(3).

American; Native American; Native Alaskan, residing in Alaska; Native Hawaiian, residing in Hawaii; and Other Pacific Islander, residing in other Pacific Islands; along with ADA-qualifying Americans.

NAFCU appreciates the CDFI Fund eliminating the geographic boundaries of most TMs in its proposal. NAFCU's CDFI members have expressed in the past that the map containing the TM geographic boundaries would constantly change, making it difficult for CDFIs to maintain service to their TM. NAFCU supports the proposed certification requirements' inclusion of all loans made to any qualified borrower, no matter where they live, in the 60 percent goal. NAFCU further supports the CDFI Fund measuring an applicant's TM financing activity over the most recently completed fiscal year only, eliminating the requirement that the applicant also provide data on its year-to-date activity.

NAFCU will be submitting comments in response to the RFC on approved TM assessment methodologies. In short, NAFCU supports the idea of having approved assessment methodologies for transparency and consistency, but the specifics of the proposed methodologies may cause issues as they relate to fair lending laws. NAFCU applauds the CDFI Fund for deciding to include persons with disabilities as an OTP. This addition expands the pool of qualified borrowers and promotes diversity, equity, and inclusion, helping CDFIs to meet their 60 percent goal.

Accountability

Another statutory certification requirement is board accountability, as "a CDFI must maintain accountability to residents of its Investment Area(s) or Targeted Population(s) through representation on its governing board and/or advisory board(s)."[12] NAFCU does not support the proposal to eliminate the existing option of utilizing an applicant's board member's participation on the governing or advisory board of an unconnected organization as a means of demonstrating accountability to a TM. Additionally, NAFCU does not support the elimination of the qualification for credit unions that are deemed accountable if at least 50 percent of their members were of a TM. The elimination of these two accountability standards alone is estimated to affect 87 percent of credit union CDFIs.[13] Credit unions are not able to switch out their board members with ease because credit union boards of directors are democratically elected, as required by statute.

Additionally, the CDFI Fund's proposal requires certification applicants to verify each board member's income whose means of accountability is LITP. NAFCU discourages the CDFI Fund from requiring pay stubs, tax forms, or other forms of income verification and instead recommends this verification take the form of an attestation from the board member that they are accountable to an LITP as a low-income person. To do otherwise could constitute an invasion of privacy and will likely dissuade capable board members from serving on CDFI boards of directors.

[12] 12 CFR 1805.201(b)(5).
[13] 12 CFR Appendix A to Part 701 Section 1.

Conclusion

NAFCU appreciates the opportunity to comment on the proposed certification application and standards for CDFIs. Overall, NAFCU does not support the proposed changes to the certification standards and recommends increased transparency and minimal discretion from the CDFI Fund regarding all certification requirements so that new applicants and already established CDFIs can comply without excessive regulatory burdens. NAFCU discourages the CDFI Fund from essentially becoming a de facto regulator of CDFIs and urges the CDFI Fund to defer to the applicant's functional regulator regarding what products should and should not be offered to consumers. Should you have any questions or require additional information, please do not hesitate to contact me at (703) 842-2268 or amoore@nafcu.org.

Sincerely,

Aminah Moore
Senior Regulatory Affairs Counsel