



December 5, 2022

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

**Re: Comment Letter - CDFI Certification Application
Document No. 2022-24082**

Dear Director Harris,

The Ohio Credit Union League (OCUL) represents the collective interests of Ohio's 228 credit unions and their more than three million members. Of those 228 credit unions, 124 are federally chartered; 59 state-chartered, federally insured; and 45 state-chartered, privately insured, with an average asset size of \$188 million. OCUL appreciates the opportunity to comment on the Department of Treasury's proposed changes to the Community Development Financial Institution (CDFI) certification application.

While OCUL acknowledges Treasury's desire to establish application criteria that protects the CDFI program's mission and its impact, many of the proposed certification application changes may prohibit qualified credit unions as CDFIs for reasons that are either incidental or burdensome. 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% of CDFIs and 56.8% of the total amount of issued financial products to CDFI target markets.¹ CDFI credit unions report the most activity in support of low-income areas or people in their target markets.² If changes to the certification application result in significant numbers of credit unions being barred from CDFI eligibility, then the proposed changes run counter to the specific mission as set out by CDFI originally: serve those who need it most.

Thus, OCUL requests CDFI consider the following potential impact to credit union CDFI eligibility and certification as Treasury finalizes certification application requirement and eligibility changes.

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 to ensure that its policies and procedures were appropriate in light of the evolving nature of the CDFI industry. In July 2022, the CDFI

¹ CDFI Fund, CDFI Annual Certification and Data Collection Report (ACR): A Snapshot for Fiscal Year 2020 (Oct. 2021) (2020 ACR), pp. 8, 19.

² 2020 ACR, p. 20.

³ *Notice of Information Collection and Request for Public Comment; Community Development Financial Institutions Program—Certification Application*, 85 Fed. Reg. 27275 (May 7, 2020).

Fund announced that the revised CDFI certification application would be released for a second round of public comment by the Office of Management and Budget.⁴ The proposed implementation date for the revised certification application is April 3, 2023.⁵

Increased Data Requirements

Record Retention

The information and reporting required by the CDFI Fund in this proposal represents a massive quantity of data and personally identifiable information (PII). The Proposed Certification Application would require that CDFI credit unions maintain all CDFI certification-related records for a minimum of ten years.⁶ In comparison, transaction-level information collected to establish compliance with the Equal Credit Opportunity Act and Regulation B must be retained for two years,⁷ loan/application register filings under the Home Mortgage Disclosure Act (HMDA) must be retained for three years,⁸ and both mortgage closing disclosures under Regulation Z⁹, and transaction-level reports under the Bank Secrecy Act must be retained for five years.¹⁰ 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 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 CDFI Fund should consider those implications, particularly for smaller 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.”¹¹ 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 consider the potential exposure of consumers’ data, particularly transaction level data. It is becoming increasingly more challenging for any organization of any size or level of sophistication to mitigate rising information or data security threats. Requiring a 10-year retention rate for personal information is concerning and while seemingly well-intended, may increase consumer data exposure and drive additional fraud prevention costs beyond the information’s value to the CDFI Fund.

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 Proposed Agreement, p. 6.

⁷ 12 C.F.R. § 1002.12.

⁸ 12 C.F.R. § 1003.5(a)(1), (d).

⁹ 12 C.F.R. § 1026.25(c)(1)(ii)(A).

¹⁰ 31 C.F.R. §§ 1010.370(a), 1010.410(d).

¹¹ 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. GDPR, 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)).HMDA

Data Usage and Security

The proposal also asserts 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' PII similar to other federal regulatory agencies. For example, the Consumer Financial Protection Bureau's (CFPB) 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."¹² Other reporting requirements that create publicly available datasets, such as HMDA, involve 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.¹³ CDFI consumers deserve these same protections. Further, a transparent comment and notice process allows CDFI credit unions to understand how the information will be used, which permits them to answer members' questions about the use of data. The CDFI Fund must further clarify how it intends to publicly publish anonymized, redacted, or aggregated information.

Further, other regulatory agencies that hold and process significant sensitive consumer information and data points typically provide the public with information about the sufficiency of their own cybersecurity controls and protections. For example, when CFPB began collecting HMDA data, it issued a Privacy Impact Assessment (PIA).¹⁴ This PIA analyzed the risks associated with data collected under HMDA related to data minimization, data quality and integrity, and data security.¹⁵ The PIA outlined the CFPB's privacy risk management approach, including the object for gathering the information,¹⁶ description of how the data would be shared and with whom,¹⁷ and the standards and controls the CFPB had in place to protect consumers' data against inappropriate disclosure.¹⁸ Similarly, the National Credit Union Administration (NCUA) Board has shared information in its public meetings about its own enterprise risk management programs and its own obligations with regard to cybersecurity threats and examination data held by the NCUA.¹⁹

The CDFI Fund has not self-reported its data security standards, its privacy management program for the protection and use of this data, detailed about how it intends to use this information, or any guarantee that consumers' PII will not be available online. CDFIs and their members deserve a reasonable level of reassurance from the CDFI Fund that PII usage and analysis is responsible and conducted under a well-analyzed risk management program to avoid inappropriate disclosure of members' private financial information.

¹² 12 C.F.R. 1070.41(c).

¹³ Home Mortgage Disclosure (Regulation C), 79 Fed. Reg. 51731, 51741 (Aug. 29, 2014).

¹⁴ CFPB, Privacy Impact Assessment (PIA) (Dec. 22, 2017), available at https://files.consumerfinance.gov/f/documents/cfpb_hmda-platform-pia_122017.pdf.

¹⁵ *Id.* at 4.

¹⁶ *Supra* 38 at 6.

¹⁷ *Id.* at 8.

¹⁸ *Id.* at 9.

¹⁹ *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>.

New Bylaws, Mission, & Board Requirements

Bylaws or Similar Documentation

NCUA regulations require federal credit unions (FCUs) to submit bylaws for charter approval.²⁰ The NCUA issues standard federal credit union bylaws,²¹ and changes to these bylaws are either expressly permitted in the language of the standard bylaws, or require NCUA approval.²² While state-chartered credit unions may have more flexibility in selecting their bylaws in some states, no state will charter a credit union without requiring board-adopted bylaws. Further, to maintain federal insurance, credit unions are obligated under federal law to conform to their adopted bylaws.²³ For these reasons, the CDFI Fund should not require credit unions to provide copies of meeting minutes 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 for CDFI applicants. Given that credit unions receive regulatory approval of their bylaws when chartered, and in the course of examination to retain insurance, this requirement should be eliminated when the applicant is chartered or federally insured by the 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 CDFI Fund's proposed changes also require the CDFI applicant to report the racial, ethnic, and sex breakdown of its executive staff and governing board.²⁴ 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 CDFI accountability.²⁵ The application process for establishing a Minority Depository Institution (MDI) designation is separate. Individuals may find these questions intrusive or uncomfortable. 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 the information, requiring staff to complete demographic questionnaires should be reconsidered and board demographic questions should be moved to the accountability section for those CDFIs deploying the governing board to meet that requirement.

Primary Mission & Board-Approved Strategy

Under this proposal, a CDFI applicant must have a primary mission of promoting community development. CDFI Fund regulations require that in "determining whether an Applicant has such a primary mission, the CDFI Fund will consider whether the activities of the Applicant are purposefully directed toward improving the social and/or economic conditions of underserved people and/or residents of economically distressed communities."

While the CDFI Fund's stated goal is to ensure adherence to responsible financing practices to ensure underserved or distressed people and communities truly benefit, and to provide for bright line questions

²⁰ 12 U.S.C. § 1758.

²¹ 12 C.F.R. Part 701, App. A.

²² 12 C.F.R. § 701.2(a), Part 701, App. A.

²³ 12 C.F.R. §§ 701.2(a), 741.3(c).

²⁴ Proposed Certification Application, p. 18-19.

²⁵ *Id.* at 85.

to determine that adherence, the proposed certification application takes away the clearest form of adherence: removing Low-Income Designation (LID) as acceptable evidence of a credit unions' commitment to community development. Instead of allowing LID to operate as proof of a credit unions' community development impact, the CDFI certification application now seeks to require a series of new questions about an Applicant's community development objectives and outputs, along with the terms, conditions, or practices for each applicant's financial products that were used to achieve those objectives and outputs. Additionally, the proposed certification application will require the submission of a board-approved strategic plan evidencing a community development strategy, with applicants without a board-approved strategic plan being deemed ineligible for CDFI Certification.

Rather than accept borderline prima facie evidence of a credit union's commitment to community development, the CDFI Fund has proposed a subjective set of questions to determine a credit union's ultimate eligibility. Board-approved strategies take time and effort. By limiting demonstrations of an applicant's community involvement, a credit union may not be able to readily prove its eligibility within a timely manner, thus disqualifying an otherwise qualified applicant. OCUL requests that the CDFI Fund retain alternative eligibility avenues as the unintended impact of strict limitations will result in reduced financial institution eligibility.

Overdraft Program Requirements

The CDFI Fund asks significant information about applicants' overdraft programs but does not indicate how it will apply certification criteria to these programs.²⁶ The CDFI Fund should explicitly clarify how it is judging these overdraft programs and what activity would exclude an applicant from qualification. Further, the proposal purports to be focused on eliminating applicants with "excessive" overdraft fees; however, there is neither a clear definition of what would constitute excessive, nor an indication that the CDFI Fund will set a clear definition. It is not clear whether the CDFI Fund will view these programs holistically or whether there are certain features or dollar thresholds that it finds inherently prohibitive.

Similarly, it is unclear whether the CDFI 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.

36% Interest Rate Cap as a Disqualifier

Responsible Financing Practices: Rate Caps

By definition, 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 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% when that rate is calculated using the Military Annual Percentage Rate ("MAPR") standard²⁷ 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

²⁶ Proposed Certification Application, p. 48.

²⁷ Proposed Certification Application, pp. 41-42.



Percentage Rate ("APR") in excess of 36%?²⁸ 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.²⁹

OCUL is concerned that certain small dollar loan products that have been endorsed by other regulators would fall into this category, prompting a credit union to be ineligible for CDFI fund application in the future. This would be especially unfortunate as federal credit unions are already subject to an 18 percent usury interest rate ceiling under NCUA regulations.³⁰ NCUA's regulations include an exception for payday alternative loans (PALs), a small-dollar, short-term lending product designed by NCUA to be a responsible alternative to predatory payday loans, which are capped at 28 percent.³¹ 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. Moreover, the FCU Act 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;³² however, these costs are 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.

Finally, the CDFI Fund should consider the use of alternative metrics to fixed MAPR and APR caps. For example, the CDFI Fund could consider evidence as to whether an applicant's loan offerings to the underserved community are more favorable in comparison to other offerings 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 in fear of recertification disqualification. In these instances, the CDFI Fund may inadvertently push the most vulnerable towards predatory lenders.

OCUL appreciates the opportunity to engage with the CDFI Fund on the proposed changes to the certification application. OCUL urges the CDFI to balance mission integrity with strong, yet flexible, application requirements to ensure people, families, and communities can be served credit unions, with accessible, affordable, and safe financial services.

Respectfully,

A handwritten signature in black ink, appearing to read "Paul L. Mercer".

Paul L. Mercer
President

A handwritten signature in black ink, appearing to read "Sean M. Brown".

Sean M. Brown, Esq.
Director, Regulatory Affairs

²⁸ *Id.* at 43.

²⁹ *Id.* at 41-44.

³⁰ See 12 C.F.R. § 701.21(c)(7)(i). By statute, the usury rate is set at 15% 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>.

³¹ 12 C.F.R. § 701.21(c)(7)(iii)-(iv).

³² 12 C.F.R. § 701.21(c)(7)(iii)(A)(7).