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December 19, 2022

Mr. Viraj Prikh,
Senior Advisor, Office of Recovery Programs
o/b/o Interagency Community Investment Committee
1500 Pennsylvania Ave NW
Washington, DC 20220

RE: Opportunities and Challenges in Federal Community Investment Programs (Document No. 2022-21524)

Dear Mr. Prikh:

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 in response to the recent Request for Information (RFI) Regarding Opportunities and Challenges in Federal Community Investment Programs[1] (Investment Programs RFI) issued by the Interagency Community Investment Committee (ICIC).[2] CUNA applauds the ICIC's approach in looking across multiple programs to identify areas of improvement. Alignment of requirements including definitions, deadlines, and reporting requirements allows credit unions investments in systems and processes to have exponential impacts for the communities they serve. Reductions in barriers will ensure that the broadest number of underserved, unbanked, and low-income communities get access to safe and fair financial products and services that will contribute to their overall financial well-being.

Background

On July 28, 2022, the Biden-Harris Administration announced that the six federal government agencies comprising the ICIC had executed a Memorandum of Understanding to enhance and expand efforts to better align, coordinate, and complement efforts to improve federal community investment and place-based economic development programs.[3] The Agencies implement multiple

[1] Notice and Request for Information-Opportunities and Challenges in Federal Community Investment Programs (Investment Programs RFI), 87 Federal Register 60236 (Oct. 4, 2022).
[2] The ICIC is composed of representatives from the Department of the Treasury (Treasury), Small Business Administration (SBA), Department of Commerce (Commerce), Department of Transportation (DOT), Department of Housing and Urban Development (HUD), and Department of Agriculture (USDA).
[3] The White House, FACT SHEET: Vice President Announces New Private and Public Sector Efforts to Align Tens of Billions in Investments in Underserved Communities (Jul. 28, 2022), available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/28/fact-sheet-vice-president-announces-new-private-and-public-sector-efforts-to-align-tens-of-billions-in-investments-in-underserved-communities/.

community investment programs with the aim of investing in communities, businesses, neighborhoods, and households that are underserved with respect to access to affordable capital and financial services, and that experience economic disparities that limit their financial stability and economic mobility.

The Investment Programs RFI seeks feedback on four key areas of substantive focus. First, how to strengthen the capacity of community financial institutions, such as Community Development Finance Institutions (CDFIs), Minority Depository Institutions (MDIs), Revolving Loan Funds (RLFs), community banks and credit unions to low- and moderate-income communities and historically underserved populations. Second, how to support starting and scaling small businesses among historically underserved communities. Third, how to broaden financial inclusion and provision of financial services among historically underserved communities. Fourth, how to invest in community facilities and infrastructure to improve access to assets and resources that bolster economic mobility and generate community wealth.

Building the Capacity of Credit Unions to Serve Their Communities Generally

In 1934, the Federal Credit Union Act was enacted so federally chartered credit unions could promote thrift among their members and meet the credit needs of low- and moderate-income borrowers who had difficulty getting financing from a traditional bank.[4] As non-profit cooperatives, credit unions are owned by the members they serve. Credit unions are controlled by their members, who 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.[5] This democratic control is a function of statute under the Federal Credit Union Act,[6] analogous state credit union acts, implementing regulations,[7] and credit unions' individual by-laws. Given that credit union boards are democratically elected, they are inherently accountable to their membership. As financial cooperatives, credit unions are automatically vested in their members' financial wellbeing and the financial health of their communities.

The largest barrier for credit unions engaging in Federal programs designed to invest funding in their communities is the operational cost and staff time associated with applying for and establishing the servicing and reporting processes necessary for compliance with program requirements. Oftentimes, these programs necessitate hiring staff for the sole purpose of managing these programs internally or contracting with third-party vendors to provide the necessary expertise. As the labor market for qualified staff to manage these programs is often tight, credit unions typically are unable to afford dedicated staff members and are forced to pay third-parties to assist in these programs. Many credit unions report concern about using third-parties as a conduit between the credit union and its most vulnerable members.

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[4] 12 U.S.C. § 1751 et al.
[5] 12 U.S.C. § 1760.
[6] 12 U.S.C. § 1751 *et seq.*
[7] *See* 12 C.F.R. Part 701.

Alignment of programmatic definitions, reports, and systems would be incredibly beneficial and would significantly lower the bar for participation in Federal programs intended to serve underserved and low-income communities. If a credit union were to invest in a single system that could offer access and compliant reporting for multiple programs, the benefits to its membership can be exponential, and the operational cost is therefore less burdensome. CUNA supports the efforts of the ICIC to identify opportunities to align requirements wherever possible. Further, where alignment is not possible due to statutory language, CUNA would urge the ICIC to issue a report to Congress identifying potential statutory tweaks to permit alignment of requirements in order to achieve both efficiency and efficacy across Federal programs.

The Expanding Financial Access for Underserved Communities Act

Credit unions are statutorily limited in the individuals they are permitted to serve and the amount of business lending they are able to do. With few exceptions, credit unions are able to serve only their members, which must all qualify for membership based on their relationship to the credit union's defined and stated field of membership.[8] Further, federal credit unions may not make member business loans in excess of 1.75 times the actual net worth of the credit union—often referred to as the "member business lending cap."[9] These statutory constrains significantly impede credit unions' ability to serve underserved and abandoned communities. CUNA supports legislation to remove the constraints on credit unions' ability to promote financial inclusion to these communities.

The Expanding Financial Access for Underserved Communities Act would make three changes to the Federal Credit Union Act to enable credit unions to serve underserved communities. First, these provisions would allow all Federal credit unions to add underserved areas to their field of membership. Under current law, only multiple common bond credit unions—which serve multiple groups—can add underserved communities.[10] Community credit unions and single sponsor credit unions cannot add underserved areas. In this regard, these sections convey no new powers to credit unions; the change simply allows more Federal credit unions to add these areas. Second, these provisions exempt business loans made by credit unions to businesses in underserved areas from the credit union member business lending cap. This change will help foster reinvestment in abandoned communities and encourage job growth. Again, credit unions have, since their inception, engaged in business lending; so, this legislation would not be conveying new powers to credit unions as much as it would be providing encouragement to lend to areas and businesses that are underserved. Finally, these provisions define an underserved area as any area that meets one of three criteria: (1) CDFI Area; (2) New Markets Tax Credit Area; or any other area that is not within 10 miles of a branch of a depository institution. These areas ensure that the focus is on areas in most need, whether they are urban, suburban, or rural. This legislation would give communities, small businesses and individuals who have lost access to affordable financial services—or perhaps

[8] *See* 12 C.F.R. 1753, 1757, 1759.
[9] *See* 12 C.F.R. 1757a.
[10] 12 U.S.C. § 1759(c)(2). Note that of the 5,043 credit unions, just 1,101 are multiple common bond credit unions that can add underserved areas to their fields of membership. Source: NCUA data (Dec. 2021).

have never had sufficient access to such—easier access to federal credit unions. It addresses an unquestionable need in so many areas across the country. CUNA would welcome the support of the ICIC agencies for legislation of this nature.

Building the Capacity of SBA Lender Credit Unions to Serve Their Communities

CUNA recognizes and appreciates the positive impacts that various SBA programs, including the 7(a) loan program, 504 loan program, Microloan program, Program for Investment in Micro-Entrepreneurs (PRIME) grants, and Community Advantage programs, among others, have had on credit unions, CDFIs, and community banks. In particular, the 7(a) loan program and 504 loan programs, authorized under the Small Business Investment Act[11] and Small Business Act[12] respectively, are the SBA's two primary small business loan programs. The 7(a) loan program was established to enable small businesses to obtain credit in situations when they are unable to qualify for financing from traditional sources of credit.[13] Specifically, the SBA agrees to guarantee a large portion of the applicable small business loan amount (generally 75-85%, and for certain specialized loans, up to 90%), subject to the satisfaction of certain SBA lending requirements. Similarly, the 504 loan program provides long-term fixed asset financing to small businesses for the purchase or improvement of land, buildings, and major equipment.

There is a strong history of active credit union participation in each of these programs over the last decade. As such, there are a number of examples of initiatives, proposed regulations, and/or legislative efforts that have been proposed by the SBA and/or Congress, as applicable, for the purpose of broadening the scope of the program to assist more small businesses, and in doing so, making the application and compliance process easier for all parties. For example, CUNA was supportive of the SBA's decision in 2014 to remove the "personal resources" test as part of the eligibility requirements for an applicant to obtain financing under either of the 7(a) or 504 programs. In order to obtain financing under these programs, an applicant must have been able to demonstrate that it was "unable to obtain credit elsewhere" by demonstrating a number of factors, including an assessment of the liquid assets of each owner of 20 percent or more of the applicant entity. The SBA was concerned that applicants with principals who have significant personal resources may still be unable to obtain credit from other conventional lenders on reasonable terms. The removal of this test enabled more applicants to take advantage of the program, and in doing so, allowed credit unions to become more active in the program as well.

CUNA was disheartened to see the SBA reinstate the "personal resources" test in 2020, and urged the SBA to consider lowering or eliminating such arbitrary tests that limit the scope of eligible applicants. In addition, the SBA's 2014 elimination of the nine month look-back period whereby the 504 loan program allowed financing of expenses towards a project only if such expenses were incurred within nine months prior to receipt by SBA of a complete loan application, unless the term limit is extended or waivered by SBA for "good cause" was a clear example of reducing

[11] 15 U.S.C. 695.
[12] 15 U.S.C. 631.
[13] https://wvrecord.com/stories/511524177-bipartisanship-brings-loan-program-expansion-for-small-businesses

unnecessary limitations that arbitrarily limited the scope of applicants and projects eligible for participation in the program. As agencies are implementing new programs under recent CHIPS and IRA legislation, CUNA urges the SBA and other agencies to take a look at other similar arbitrary restrictions to ensure that participation in these programs is maximized in an efficient and effective manner while ensuring that historically underserved communities are able to benefit from federal funds.

An example of legislative action that strengthened the capacity of community financial institutions to partake in the SBA's small business programs, and in doing so, support small businesses and entrepreneurship as well as invest in community facilities and infrastructure, was the enactment of the Small Business 7(a) Lending Oversight Reform Act of 2018. This legislation implemented a number of changes supported by our members, including establishing an Office of Credit Risk Management responsible for managing 7(a) program lenders as well as a Lender Oversight Committee. Further, the legislation broadened the "personal resources test" to include other factors, including non-federal, non-state, or non-local government sources of financing, the business industry in which the loan applicant operates, the adequacy of the collateral available to secure the applicable loan, the loan term necessary to reasonably assure the ability of the loan applicant to repay the debt from the actual or projected cash flow of the business, and any other factor relating to the particular credit application, as documented in detail by the lender, that cannot be overcome except through obtaining a Federal loan guarantee under prudent lending standards, among other factors. Lastly, the SBA administrator was granted the authority to increase the total amount of loan commitments under the 7(a) program in an aggregate amount equal to or less than 115 percent of the limit on the total amount of commitments, subject to satisfaction of certain procedural requirements. These provisions uniformly made the 7(a) program more accessible and efficient for borrowers of all sizes, while also ensuring credit unions and other community banks could sustain their related lending operations. The ICIC, including the SBA, should build on these examples to make the SBA's programs more accessible to borrowers and lenders alike.

In addition, CUNA urges the SBA to take a harder look at ways in which loan and grant program applications and logistics can be streamlined. For example, as noted above, we supported the SBA's 2014 rule that removed the "personal resources" test from the regulations for the 7(a) and 504 loan programs. One significant drawback of the SBA's decision to reinstate this test is that the application process has gotten more complex. More recently, the SBA's and other agencies' loan forgiveness procedures with respect to the Paycheck Protection Program (PPP) during the COVID-19 pandemic were highly complex and burdensome for small businesses, credit unions, community banks, borrowers, and other similarly situated entities. As CUNA noted in correspondence with the SBA's leadership at the time, small businesses do not have the resources to engage on overly complex application processes. Moreover, the complexity of these forms and other requirements often requires the use of accountants, attorneys, or other third parties, all of which require additional expenses that small businesses simply cannot afford.

When borrowers are required to complete overly complex and burdensome forms and applications, they often rely on credit unions for assistance. While credit unions are required to review loan

forgiveness and other applications as well as related documentation thereof, this review should not be relied on by borrowers in order to complete applications. Further, we note that we have raised the issue of complex and overly burdensome application requirements and forms to the SBA and other agencies for decades. For example, in 2007, we submitted comments to the SBA recommending that the Form 4 (borrower's application) and Form 4-1 (lender's application for guarantee or participation) corresponding to the Section 7(a) loan program largely duplicate information lenders collect on their own forms, and thus should be consolidated in the interest of efficiency. As the federal government continues to implement the various pieces of legislation passed during this Administration, we urge the SBA to consider additional ways in which the complexities and burdens of application and compliance requirements can be streamlined in an efficient and effective manner. Making the application and compliance processes for these programs more efficient will undoubtedly incentivize greater private sector participation thereof.

CUNA also urge the SBA to continue to support its Office of Advocacy, which plays a critical role in ensuring credit unions are not harmed by policymaking that does not properly consider their unique size and structure. The Small Business Regulatory Enforcement Fairness Act (SBREFA), 5 U.S.C § 609, is required for Consumer Financial Protection Bureau (CFPB) rulemakings as a result of the Dodd-Frank Act. It ensures that when a substantial number of small entities are impacted by CFPB rules, that the SBA Office of Advocacy must hold a SBREFA process. The SBA's Office of Advocacy SBREFA process provides a forum for credit unions and other small entities to share their perspective on impending rulemakings from the CFPB. It also is a resource for policy development from other agencies that do not require SBREFA, but still benefit from the SBA Office of Advocacy's consideration of how small credit unions are impacted, and intervention on their behalf.

In recent years, the Office of Advocacy has facilitated numerous meetings with small-sized stakeholders including credit unions to discuss a broad range of issues, from the CFPB small business data collection rulemaking, the Department of Justice guidelines for website accessibility under the Americans with Disabilities Act, as well as call blocking and Telephone Consumer Protection Act concerns with the Federal Communications Commission. The Office of Advocacy has been an important tool for stakeholders such as CUNA to express concerns and other input to the agency and key policymakers. Its purpose helps enhance the public-private partnership nature that underlies many of the SBA's programs. We urge all agencies involved in the ICIC to establish and/or similar offices for the purpose of ensuring that stakeholders are heard and acknowledged as part of the rulemaking process. This would also help coordination efforts amongst various agencies while also promoting additional private investments in community financial institutions and similarly situated entities.

Further, one of the most important things that Congress and the SBA can do to promote financial security and inclusion in underserved communities is to enable federal law to permit federal credit unions to add underserved areas to their field of membership. As we noted in our March 2022

letter[14] to the Senate Committee on Banking, Housing, and Urban Affairs, under current law, only multiple common bond credit unions are eligible to add underserved areas to their field of membership. Further, credit unions are limited in the levels of lending and other financial services they can offer potential borrowers because they are subject to an arbitrary and outdated business lending cap of 12.25% of their respective assets. Expanding credit unions' field of membership while lifting the business lending cap would significantly increase credit unions' ability to serve historically underserved communities. There is pending legislation in Congress that would implement these goals. In June 2022, the House of Representatives passed the Expanding Financial Access for Underserved Communities Act (H.R. 7003), which would add underserved areas to credit unions' field of membership and exempt business loans made by credit unions in low-income areas from the statutory 12.25% business lending cap. We urge the SBA to advocate for these measures and work with Congress and other stakeholders to ensure they are enshrined in law.

Notwithstanding the above, there are certain proposals under consideration by the SBA that would serve to negatively impact public-private investments in community development programs and initiatives. For example, recently, Congress and the SBA considered enabling the SBA to expand its loan programs in such a way that the agency itself would be permitted to make loans directly to borrowers as opposed to the existing loan guaranty framework. As our President/CEO Jim Nussle noted in a letter to the House Small Business Committee, "The Small Business Administration's government guaranteed lending programs epitomizes a successful public-private partnership, and it's one that leverages private sector expertise. By becoming a direct lender to small businesses, the SBA is likely to harm local financial institutions' relationships with businesses and possibly hamper these businesses from establishing important banking relationships that can only help their business survive and flourish."[15]

Ultimately, credit unions and community banks are better equipped to serve small business and address local concerns. A direct lending program could even lead to unfair competition for smaller lenders, including credit unions, community banks, and other smaller financial institutions, from entering the marketplace. Lastly, given the unprecedented instances of fraud uncovered with respect to PPP, it is likely that similar levels of fraud may occur in connection with a SBA direct lending program without significant oversight. We strongly urge the SBA to continue investing in its loan and other community development programs rather than establish a new direct lending program that would remove private sector expertise, eliminate the regional nature of the program, and ultimately negatively impact credit unions and small community banks who need additional help from federal agencies not increased competition from them.

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[14] https://www.cuna.org/content/dam/cuna/advocacy/letters-and-testimonials/2022/030322_Senate%20Banking.pdf
[15] https://news.cuna.org/articles/120870-sba-direct-lending-will-harm-local-financial-institutions-relationships

Lastly, earlier this year, the SBA issued proposed rules[16][17] with respect to requirements under the Section 7(a) and 504 loan programs, specifically covering affiliation standards, new lending criteria, small business lending company (SBLC) moratorium recission, and removal of the requirement of a loan authorization. Credit unions participating in the 7a loan program, 504 loan program, and other loan programs, including the Microloan program and Disaster loan programs, would be required to comply with these requirements. While we will be separately submitting a robust set of comments, either individually or together with a coalition of likeminded partners, that addresses each of the proposed regulations by the applicable deadline, we raise these proposed regulations here as examples where the SBA intends to streamline requirements for borrowers and applicants, but ultimately, puts small business lenders, including credit unions at risk. For example, the SBA's proposed rule to permit certain SBLCs to apply for a license to offer SBA guaranteed Section 7(a) loans despite a moratorium on SBLCs being in place since 1981 would put credit unions and community banks at risk because new risky lenders such as fintech and other alternative lenders would be permitted to service these SBA loans. Moreover, unlike federally-regulated depository financial institutions such as most Section 7(a) lenders, SBLCs are regulated by the SBA, which may implicate issues involving conflict of interest, regulatory arbitrage, and questions as to whether SBA realistically has the capacity to adequately regulate these entities in the absence of a significant increase in funding for its oversight abilities.

Ultimately, we recognize and appreciate the need to streamline the SBA's requirements for various loan programs; however, we urge the SBA to consider such changes by analyzing the impacts on not only borrowers and applicants, but also on lenders, many of whom are small to mid-sized credit unions and community banks. If the SBA's goal is to promote private sector investments in community development and community development financial institutions, the SBA needs to take a balanced approach that takes into account guardrails protecting the interests of all stakeholders to ensure they continue to participate in this space.

Building Capacity of CDFI Credit Unions to Serve Their Communities

Proposed CDFI Certification Application

The CDFI Fund is currently in a moment of transition and CDFIs are deeply concerned that the Fund is moving in a direction that will essentially exclude significant numbers of currently certified CDFIs from future certification and eliminate important conduits for Federal funding to their membership and the communities they serve. While CUNA and credit unions support the goal of ensuring these funds are obtained by organizations that prioritize mission in both theory and practice, the proposals being pursued by the CDFI Fund are simply not practicable for many depository financial institutions. Recently, CUNA has filed comments with the CDFI Fund

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[16] https://www.federalregister.gov/documents/2022/10/26/2022-23167/affiliation-and-lending-criteria-for-the-sba-business-loan-programs?utm_medium=email&utm_source=govdelivery
[17] https://www.federalregister.gov/documents/2022/11/07/2022-23597/small-business-lending-company-sblc-moratorium-rescission-and-removal-of-the-requirement-for-a-loan

regarding its proposed CDFI Application[18] and related proposals,[19] raising significant questions regarding whether it is meeting basic due process requirements, proposing requirements in violation of fair lending laws, and establishing requirements that were going to have a devastating effect on depository institutions that serve communities intended to be served by the CDFI Fund.[20]

Other organizations have expressed similar concerns and identified that the CDFI Fund's proposed application and related proposals will inappropriately exclude good financial institutions working to assist the populations that Congress intends to be served by the CDFI Fund. For example, the Independent Community Bankers Association has expressed concern that the CDFI Fund has not offered any statutory or policy justifications for it proposed changes, nor performed any analysis of the impact of the proposed changes on CDFI certifications or affected communities.[21] It also stated the proposals "will irreversibly harm existing CDFI banks and prevent other banks from seeking the certification."[22] The American Bankers Association has expressed concern that the CDFI Fund appears prepared to finalize its proposal "despite significant remaining concerns regarding the potential on-the-ground impact of the proposed changes," which are likely to be inconsistent with the Fund's stated policy objectives and "will undermine its ability to inject federal funds into areas that desperately need support."[23] The Community Development Bankers Association has stated that the proposed provisions are potentially harmful and will force CDFIs to be less flexible and responsive to the needs of their communities: "As a consequence, federal funds will cease to reach many vulnerable communities. Those communities will lose access to essential financial products and services, and they may be put at risk of exploitation when non-mission lenders enter markets to fill the void."[24] Inclusiv[25] has stated that the proposed changes "create a nearly insurmountable barrier to participation for worthy CDFI-eligible credit unions" and if finalized as proposed, "the CDFI Fund risks losing a large number of deep mission-driven,

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[18] *See Agency Information Collection Activities; Submission for OMB Review; Comment Request; CDFI Certification Application* (CDFI Application), 87 Federal Register 66786 (Nov. 4, 2022). *See also CDFI Fund Advance Look: Preview the Revisions to the New CDFI Certification Application*, (Oct. 4, 2022), available at https://www.cdfifund.gov/news/487.

[19] *See CDFI Target Market Assessment Methodologies*, 87 Federal Register 63852 (Oct. 20, 2022). *See also CDFI Fund Request for Public Comment: CDFI Certification Target Market Verification*, (Proposed Pre-Approved List) (Oct. 19, 2022), available at https://www.cdfifund.gov/news/489.

[20] Comments of the Credit Union National Association (CUNA) to the CDFI Fund (Dec. 5, 2022), available at https://www.cuna.org/content/dam/cuna/advocacy/letters-and-testimonials/2022/CDFI120522.pdf.

[21] Comments of the Independent Community Bankers Association to the CDFI Fund, p. 3-4 (Dec. 5, 2022), available at https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/comments-on-cdfi-fund.

[22] *Id.* at p. 1.

[23] Comments of the American Bankers Association to the CDFI Fund , p. 1 (Dec. 5, 2022), available at https://www.aba.com/-/media/documents/comment-letter/clcdfi20221205.pdf?rev=92227d56f46e4681b8aad6ff98fb5027.

[24] Comments of the Community Development Bankers Association to the CDFI Fund, p. 2 (Dec. 5, 2022), available at https://www.cdbanks.org/sites/default/files/pdfs/CDBA%20NBA%20Comment%20Letter%20on%20CDFI%20Certification%20Requirements_12_5_2022%20final.pdf.

[25] Inclusiv was previously known as the National Federation of Community Development Credit Unions and serves as a CDFI Intermediary for credit unions and the national network of community development credit unions.

CDFI-certified credit unions, which would be a loss not just to the Fund but, more importantly, to the communities it serves."[26]

This broad concern and the significance of the changes proposed by the CDFI Fund should prompt significant reconsideration of the proposal and a meaningful review of its potential effects on CDIF depository institutions and the communities they serve. The proposed application and its related changes represent a major increase in barriers for CDFI credit unions, in direct opposition to the goals posed by the ICIC in the Investment Programs RFI. If the ICIC and Treasury is serious about improving the capacity of credit unions and other community development financial institutions to serve these communities then this proposed application and the related changes should be the first step it takes.

Operational and System Improvements at the CDFI Fund

CDFI credit unions have reported frustration with the CDFI Fund's Awards Management Information System (AMIS). AMIS is reportedly difficult to use and "glitches" are frequently reported by both credit unions and the Fund. Reportedly, this has resulted in the loss of documentation at the Fund, resulting in repeated and duplicative requests. Oftentimes, credit union CDFIs are unable to upload information or documentation because of the presence of older and outdated documentation which must be removed on the CDFI Fund's end. Over the past year, the CDFI Fund has been forced to employ frequent workarounds because of AMIS's limitations, including the use of worksheets to replace AMIS fields and the provision of documentation and information via AMIS Service Requests in lieu of uploading information into the system as intended. Further, CDFI credit unions report deep frustration with the Fund's reliance on the use of the CDFI Fund's Service Requests as its almost exclusive method of communication. Once responded to, AMIS Service Requests are closed and CDFI credit unions must open additional Service Requests to ask clarifying or follow-up questions, which becomes extremely time consuming. Additionally, credit unions must provide background information repeatedly.

In order to improve the ability for credit unions and community-based institutions to be able to apply for CDFI certification, the 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 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. CUNA offers its support Treasury with regard to obtaining appropriations from Congressional to improve the technological and service capacities at the CDIF Fund in support of these goal.

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[26] Comments of Inclusiv to the CDFI Fund, p. 1 (Dec. 5, 2022), available at https://inclusiv.org/wp-content/uploads/2022/12/Inclusiv-Comments-on-CDFI-Certification-Application-12.5.22.pdf.

Need for Basic Notice and Due Process

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.[27] 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.[28] 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-being of their membership and community.

At the same time, the CDFI Fund retains an enormous level of absolute discretion in certifying and decertifying CDFIs. Given the significant value and importance of the certification, the CDFI Fund has a duty to establish meaningful and formal notice and due process mechanisms for CDFIs and CDFI applicants.

Notice and Cure Process

Currently, the CDFI Fund 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. At the same time, CDFI Fund has no legal obligation to provide reliable notifications of noncompliance or to permit a credit union to address concerns regarding its practices. 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, this creates a 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.

Treasury should establish some structure and due process regarding noncompliance, a reasonable ability to cure, and CDFI certification termination. 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 National Credit Union Administration's (NCUA's) member business loan cap. A removal of certification without time to unwind those loans and make necessary changes to the credit union's balance could have severe financial and regulatory repercussions for the credit union and its membership. Without these guarantees, CDFI credit unions are under tremendous risk that their CDIF certification could be terminated at any time and awards could be clawed back, throwing the credit union into upheaval and endangering the safety and soundness of the institution.

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[27] 12 C.F.R. § 1026.43(a)(3)(v)(A).
[28] 12 C.F.R. § 723.8(d).

A reasonable 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 discretion 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 Treasury and the CDFI 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

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.[29]

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.[30] Following a denial, a credit union must make a written request for reconsideration to the CDRLF program office within 30 days.[31] 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.[32]

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.[33] However, certain senior staff positions and interested staff are ineligible to serve on the Committee.[34] Within 30 days of that written decision, the credit union can request review from the Supervisory Review 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.[35] 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.[36] This process ensures that credit unions are able to obtain detailed information regarding the denials of their award

[29] *Guidelines for the Supervisory Review Committee*, 76 Fed. Reg. 3674, 3675 (Jan. 20, 2011).
[30] *See* 12 C.F.R. § 705.10.
[31] 12 C.F.R. § 746.105(a).
[32] 12 C.F.R. § 746.105(c).
[33] 12 C.F.R. § 746.108(a).
[34] *See* 12 C.F.R. 746.108(a), (e).
[35] 12 C.F.R. 746.107.
[36] *Id.*

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.[37] 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.

These type of structural and due process changes would provide CDFI credit unions with a degree of certainty and eliminate the risk of sudden and unavoidable loss which CDFI credit unions currently feel is a very significant risk based on the current limitations and operations of the CDFI Fund. These are also healthy and normal steps in the continuing maturation of administrative agency, which would be appropriately reflective of the significant investments that Congress has made in the Fund and the increase in appropriations intended for the Fund's disbursement.

Data Collection and Reporting

Small Business Data Collection

CUNA recognizes and appreciates the need for the SBA and other agencies to collect data to ensure its programs are meeting the needs of local communities, and in doing so, reducing racial, gender, and geographic, or other economic disparities. However, these laudable goals must be balanced with the need to reduce unintended consequences to credit unions, community banks, and other small to mid-sized financial institutions who do not have the resources to comply with substantial compliance costs. Compliance burdens have a disproportionate impact on smaller financial institutions. Due to potential significant compliance costs, credit unions and other similar small to mid-sized financial institutions could be forced to increase loan fees to recoup costs or exit small business lending, which would hurt small businesses and other eligible borrowers.

[37] *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.

Ultimately, as part of any data collection requirements or efforts, we urge the SBA to focus on the following principles: (i) adopting common sense definitions and reasonable coverage thresholds; and (ii) implementing reasonable timing or compliance schedules so that credit unions and other entities have enough time to understand and comply with such efforts while continuing to support their communities. In fact, we emphasized the same principles in our January 2022 comment letter to the CFPB regarding its small business data lending data collection proposed rules with respect to Section 1071 of the Dodd-Frank Act.[38] CUNA urges ICIC to coordinate amongst its various agencies to ensure that each agency's data collection requirements are consistent so that compliance costs can remain manageable, particularly for small to midsized lenders.

Covered entities under any proposed data collection requirement must be subject to a reasonable threshold that ensures substantial compliance costs are only imposed on those lenders with sufficient financial capacity and technical and logical capacity to absorb such costs. In particular, there must be exceptions for small lenders who do not have the financial or technical capacity to meet substantial compliance costs. There is strong precedent for establishing exceptions for smaller lenders. For example, the National Credit Union Administration (NCUA) has long held that loans with amounts less than $50,000 do not constitute member business loans, and thus, do not need to be reported as such. We urge the SBA, as part of any proposed data collection rulemaking, to consider the impacts of these requirements on smaller lenders, and in doing so, continue to maintain targeted exceptions for small lenders who simply do not have the financial resources to comply with such requirements.

In addition, the SBA, together with other agencies, should consider a targeted and reasonable phase in or compliance schedule for implementation of any data collection requirements. With respect to the CFPB's Section 1071 data collection rulemaking, we urged the CFPB to extend its proposed 18 month compliance schedule to no sooner than three years following its adoption of the applicable final rulemaking. This recommendation was borne our of the fact that prior experience with agency data collection requirements indicates that agencies sometimes underestimate the time required for small lenders and other small businesses to develop the logistical capacity to comply with such requirements. We urge the SBA to not make the same mistake.

CDFI Fund Data Collection

The CDFI Fund is currently working on major changes to its data collection and has indicated an intention to require significant amounts of transaction level data from CDFIs and CDFI applicants.[39] The Fund released this data collection for comment on December 14, 2022, and

[38] https://www.cuna.org/content/dam/cuna/advocacy/letters-and-testimonials/2021/010622_Small%20Business%20Data%20Collection%20NPRM_FINAL.pdf

[39] *Abbreviated CDFI Transaction Level Report Form for CDFI Certification Applicants and Certified CDFIs that are not current Financial Assistance (FA) Recipients Form & Data Point Guidance* (Dec. 2022), available at https://www.cdfifund.gov/sites/cdfi/files/2022-12/TLR_ClearedVersion_1202022.pdf.

CUNA is still working on absorbing the data collections breadth and intends to file separate comments in response to that notice.[40]

However, it should be noted that despite the significant size of the transactional level information the CDFI Fund seeks from CDFI credit unions, neither Treasury nor the Fund have 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 outside of certification consideration, 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 conducted under a well-analyzed risk management program to avoid inappropriate disclosure of members' private financial information.

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.

Other federal regulatory agencies that collect this level of data provide explicit protections of consumers personally identifiable information (PII) and publish their privacy assessments that indicate the agency has carefully considered the amount of data it deems necessary and weighed the value of that data against the risk to the consumer. For example, the CFPB's 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 the Home Mortgage Disclosure Act (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.

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[40] *Annual Certification and Data Collection Report Form and the Abbreviated Transaction Level Report*, 87 Fed. Reg. 76541 (Dec. 14, 2022).

[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)).

[42] 12 C.F.R. § 1070.41(c).

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

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

Treasury and the ICIC should seriously consider the potential exposure of consumers data, particularly transaction level data, when considering potential data collections. 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 reported and retained within financial institutions 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.

Finally, CDFI credit unions report significant frustration with the process of data collection, particularly with regard to 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

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[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.

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.

Interagency Collaboration Between CDFI Fund and the NCUA

Prior to the initiation of programmatic changes at the CDFI Fund in 2022, the NCUA and the CDFI Fund had a joint initiative that included a streamlined application process. In February of 2022, the NCUA announced this process would be discontinued in connection with the Treasury Department's updates to the CDFI certification application and reporting requirements.[50] The loss of the streamline application program is not only related to the relative simplicity of the application process, but also the assistance and guidance provided by the NCUA's Office of Credit Union Resources and Expansion (CURE Office) as part of the application process. NCUA's CURE Office also operates its Minority Depository Institution Preservation Program, the Community Development Revolving Loan Fund grant and loan program, the Low-Income Designation, and assists credit unions interested in expansions of their field of membership into investment areas and Enterprise Communities and Empowerment Zones. The CURE Office is a tremendous resource for credit unions seeking resources, funding, and certifications to access technical and financials assistance in their mission to serve the underserved. By having a direct pipeline to the CDFI Fund through the CURE Office, credit unions enjoyed a "one-stop shop" that was responsive and able to provide efficient and effective guidance to low-income and MDI credit unions considering these programs.

The ICIC should all consider how it can most effectively work with the NCUA's CURE Office to reach these credit unions. Further, Treasury should explore whether a new streamline application program in conjunction with NCUA can be designed. In particular, credit unions that have already been designated as low-income and/or MDI credit unions would benefit from such a program.

Technical Assistance and Non-Financial Resources

Technical assistance and other non-financial resources are critical to supporting the deployment of capital or implementation of community-serving projects in historically underserved communities. CUNA recognizes and appreciate certain SBA programs designed to assist borrowers and lending with technical assistance, including, but not limited to, the Contracting Assistance program, the Microloan technical assistance grants program, and efforts undertaken by the SBA's Office of Advocacy. In addition, the SBA's network of resource partners, including SCORE, Women's Business Centers, and other State/Local small business centers, serve important roles in promoting technical assistance for borrowers and lenders. An example of a positive public-private partnership enhancing technical assistance for stakeholders was the 2015 memorandum of understanding between the SBA and the NCUA, in which both organizations aimed to increase awareness about the SBA's loan programs for credit unions whereby once applicable loans were approved, SBA sought to increase its resources via SCORE, Small Business Development Centers and Women's

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[50] CUCollaborate, NCUA to Eliminate Streamlined Application for CDFI Certification (Feb. 25, 2022), available at https://www.cucollaborate.com/blogs/ncua-eliminates-streamlined-application-process-for-cdfi-certification.

Business Centers to offer technical assistance and free counsel to assist small businesses and other stakeholders.[51]

However, we believe the SBA can make changes to existing programs and invest more funding and resources towards technical assistance. For example, we urge the SBA to consider permitting credit unions to participate in the Community Advantage program. This pilot program was designed to address technical, credit and management assistance needs of small businesses in underserved markets. Credit unions would benefit greatly from participation in such program. In addition, the SBA should publish clear best practices or case studies for credit unions and other similar community development financial institutions, along with compliance guidelines, among other resources. Further, the SBA should continue to seek and direct additional funding towards its technical assistance programs via coordinating with Congress or other agencies with similar objectives.

Conclusion

On behalf of America's credit unions and their more than 130 million members, CUNA supports the ICIC's goal of improving the effectiveness of federal community investment programs. If you have questions or if we can be of any assistance, please do not hesitate to contact me at (202) 503-7184 or esullivan@cuna.coop.

Sincerely,

Elizabeth M. Sullivan
Senior Director of Advocacy & Counsel

[51] https://www.cutimes.com/sbm-cut/2015/02/09/ncua-sba-alliance-to-boost-lending/