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December 19, 2022

Michelle Dickens
Program Manager, Office of Certification Policy and Evaluation
Community Development Financial Institutions Fund
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Re: Notice and Request for Comment on CDFI Target Market Assessment Methodologies (Document No. 2022-22767)

Dear Ms. Dickens:

The Credit Union National Association (CUNA) represents America's credit unions and their more than 130 million members. On behalf of our members, we are writing regarding the Notice and Request for Public Comment issued by the U.S. Department of the Treasury's Community Development Financial Institutions Fund (CDFI Fund or the Fund) regarding CDFI Target Market Assessment Methodologies.[1] The Notice and Request for Comment refers to the CDFI Fund's Proposed Pre-Approved Target Market Assessment Methodologies (Proposed Pre-Approved List) and other resources, which the CDFI Fund released on their website prior to the publication of the formal notice.[2] CUNA applauds the CDFI Fund's goal to improve transparency and efficiency in the certification application process by sharing clear and explicit guidelines regarding acceptable Target Market assessment methodologies. However, CUNA has grave concerns regarding some of the methodologies included in the Propose Pre-Approved List, and would urge the Fund to accept a wide range of proxy and model data.

Background

The CDFI Fund requires that in order to obtain and maintain a CDFI certification, an entity must demonstrate that it serves an eligible Target Market and directs at least 60% of its Financial Products to its Target Market, both in numerosity and in amount.[3] Applicants for a CDFI certification must describe and seek approval for each assessment methodology they have used and intend to use to confirm financing activity to their Target Market.[4] The CDFI Fund intends

[1] *CDFI Target Market Assessment Methodologies*, 87 Federal Register 63852 (Oct. 20, 2022).
[2] *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.
[3] CDFI Target Market Assessment Methodologies, 87 Fed. Reg, 63852.
[4] *Id.* at 63852-63853.

to publish a list of pre-approved Target Market Assessment Methodologies that maybe used to demonstrate the direction of financing activity to the Target Market.[5]

The CDFI Fund states that the proposed list of pre-approved Target Market Assessment Methodologies reflects the primary assessment methods approved by the Fund and used by CDFIs, but concedes that it has not specifically tracked approved assessment methodologies it has considered or approved in the past due to documentation system changes.[6] The Fund also states that it has not historically tracked all approved programmatic proxy assessment methodologies it has approved, and asks that CDFIs that uses Fund-approved programmatic proxy assessments provide their approved assessments as a comment to this rulemaking so that these can be redetermined for eligibility and added to the preapproved list.[7]

CUNA has long supported the mission of the CDFI Fund and applauds the important work the Fund does. 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.[8] CDFI credit unions report the most activity in support of low-income areas or people in their target markets.[9] Credit unions are critical participants in the CDFI Program, providing the vast majority of consumer financial services to low-income and targeted markets in support of the Program's mission.

General Comments

CUNA applauds the CDFI Fund's publication of this notice and the acceptance of comments in advance of publishing the approved list of assessment methodologies. It is indeed an important effort towards transparency and efficiency that is highly appreciated by current and future CDFI credit unions. However, many credit unions report that some of the assessment methodologies on the CDFI Fund's Proposed Pre-Approved List have only been used by the Fund recently, and that in early 2022 and prior years, credit union assessment methodologies were far more reliant on the use of proxies which the Fund recently began rejecting.

In particular, CUNA is concerned that some of these methodologies are likely violations of the Equal Credit Opportunity Act (ECOA)[10] and its implementing regulation, Regulation B.[11] It is appropriate that the Fund wants to do its upmost to ensure that funding appropriated by Congress for the development and support of underserved or low-income communities actually makes its way to there. Further, it is appropriate that the CDFI Fund ensure that the CDFI certification is only held by organizations that appropriately prioritize the needs of these communities and be able to demonstrate they do so. However, the CDFI Fund must establish data collection and reporting requirements that are reasonable given the existing legal and regulatory frameworks that financial institutions must operate within, and achievable for organizations within a broad

[5] *Id.* at 63853.
[6] *Id.*
[7] *Id*. at 63853.
[8] CDFI Fund, CDFI Annual Certification and Data Collection Report (ACR): A Snapshot for Fiscal Year 2020 (Oct. 2021) (2020 ACR), pp. 8, 19.
[9] 2020 ACR, p. 20.
[10] 15 U.S.C. § 1691 *et seq*.
[11] 12 C.F.R. Part 1002.

range of size and sophistication. The CDFI Fund's desire for data to confirm these benchmarks, while understandable, simply outpaces what is currently possible.

Fair Lending Concerns with the Proposed Pre-approved List

Assessment Through Direct Inquiry, Visual Observation and Surname Assessments Violate Fair Lending Laws

CUNA is deeply concerned that Proposed Pre-approved List contains multiple assessment methodologies which would violate ECOA[12] and Regulation B.[13] Specifically, OTP-AA.1, OTP-AA.2, OTP-Hisp.1, OTP-Hisp.2, and OTP-Hisp.3 require individuals to self-report their race as African American or their ethnicity as Hispanic, or for the lender to guess the race or ethnicity of the member based on visual observation or surname. Regulation B states "a creditor shall not inquire about the race, color, […] of an applicant or any other person in connection with a credit transaction," except as provided under specific exceptions in the regulation. These exceptions include compliance with the Home Mortgage Disclosure Act (HMDA)[14][15] and its implementing regulations;[16] information required by a regulation, order, or agreement entered into with a court or enforcement agency to monitor or enforce compliance with ECOA;[17] to determine eligibility for a special purpose credit program;[18] or to conduct voluntary self-testing not required by governmental authorities as permitted by the regulation.[19] There is no exception in Regulation B regarding the CDFI Program or maintenance of voluntary certifications under Federal programs which would allow lenders to inquire about, collect, and report this race and ethnicity data in this manner. Attached is a legal opinion letter from CUNA's counsel on this issue for the Fund's review.

Further, LITP.1 requires CDFI credit unions to collect income data from "the entire family" of the individual in order to compare family income to HUD's Income Limits. This also is a likely violation of ECOA and Regulation B. ECOA was originally established in 1974 because mortgage lender commonly required the signature of a husband or a father when making loans to women.[20] For this reason, Regulation B expressly prohibits requesting information concerning the spouse of an applicant.[21] There are exceptions when the spouse will be involved in the transaction or the applicant will rely on the income of the spouse to make payments.[22] Further, ECOA and Regulation B prohibit asking about an applicant's marital status unless the spouse would have a marital interest in the loan or property secured by the loan.[23] Asking about the

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[12] 15 U.S.C. § 1691 *et seq*.
[13] 12 C.F.R. Part 1002.
[14] 12 U.S.C. § 2802 *et al*.
[15] See 12 C.F.R. §§ 1002.5(a)(4), 5(b)(1), 1002.13.
[16] 12 C.F.R. Part 1003 (Regulation C).
[17] See 12 C.F.R. §§ 1002.5(b)(2).
[18] See 12 C.F.R. §§ 1002.5(b)(3), 1002.8(b).
[19] See 12 C.F.R. §§ 1002.5(b)(1), 1002.15.
[20] Winne F. Taylor, *The Equal Credit Opportunity Act's Spousal Co-Signature Rules*, fn 14, 48 Alb. L. Rev. 382 (1983-1984), available at https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=2240&context=faculty.
[21] See 12 C.F.R. § 1002.5(c)(1).
[22] 12 C.F.R. §§ 1002.5(c)(2).
[23] 12 C.F.R. §§ 1002.5(d)(1).

income of a spouse when this information is not necessary to determine the applicant's creditworthiness is a violation of Regulation B.

CUNA urges the CDFI Fund to review the attached letter and to perform a careful legal analysis of these issues. If the CDFI Fund disagrees with the legal analysis contained in the attachment, it should not adopt these methodologies as pre-approved unless it has first consulted with every agency tasked with enforcement of ECOA and secured publicly available guidance providing certainty for CDFIs that their examiners concur with the Fund's analysis. Further, the CDFI Fund should also obtain an interpretation from the Consumer Financial Protection Bureau clearly stating that the assessment methodologies do not violate ECOA or Regulation B to provide CDFIs with colorable defense against potential civil liability.[24] Without this clarity from NCUA and the CFPB, use of these assessment methodologies represent disproportionate compliance, litigation, and reputational risk to credit union CDFIs and essentially makes it impossible to responsibly establish Low Income Targeted Population Target Markets and Other Targeted Populations Target Markets focused on African American or Hispanic communities.

Visual Observation and Surname Assessments Are Bad Policy

As referenced above, assessment methodologies OPT-AA.2, OPT-Hisp.2, and OPT-Hisp.3 would appear to borrow a methodology from the HMDA Rule's requirements, which require lenders to "collect the applicant's ethnicity, race, and sex on the basis of visual observation or surname."[25] Since its initial proposal in 2014, CUNA and others have consistently identified that the HMDA Rule's requirement for loan officers to report race, ethnicity, and sex by visual observation and surname is bad policy that negatively affects the trust of underserved and underbanked populations in their financial institution. While the inclusion of this provision in the preapproved methodologies would be a violation of the law as previously discussed, it is nonetheless instructive to discuss the additional reasons why the CDFI Fund should not consider it.

Both lenders and consumer advocates agree that collection and reporting of race, ethnicity, and sex information is important to the value and goals of HMDA. However, multiple commenters to the 2014 proposal raised the same concerns regarding the requirement to assess race and ethnic information based on visual observation and surname.[26] The National Association for the Advancement of Colored People (NAACP) and the National Council of La Raza (NCLR) identified that a refusal to disclose may be based in a fear of discrimination.[27] The Urban Institute called the requirement "anachronistic" in our multiethnic society where people identify with multiple races and ethnicities.[28] Consumer advocates identified that inferred data is likely to be less accurate, and self-reported data is far more useful.[29] One bank noted that it agreed with the

[24] 15 U.S.C. § 1691e(e)
[25] 12 C.F.R. Part 1003, App. B, §10.
[26] 2015 HMDA Final Rule at 66187-88.
[27] *See*, NAACP and NCLR Comment Letter on RULE (Oct. 29, 2014), available at URL.
[28] *See*, Urban Institute Comment Letter, Comment ID CFPB-2014-0019-0081 (Oct. 27, 2014), available at https://www.regulations.gov/comment/CFPB-2014-0019-0081.
[29] *See, e.g.*, Center for American Progress, Center for Responsible Lending, Consumer Action, Consumer Federation of America, Homeownership Preservation Foundation, National Association of Consumer Advocates, National Association of Neighborhoods, National Coalition for Asian Pacific American Community Development, National

Small Business Review Panel's concern that determining race, ethnicity, and sex on the basis of visual observation and surname is "highly subjective and intrusive."[30]

In the 2020 Dataset of Loan/Application Registers, less than one percent of applicants refuse to provide race, ethnicity, and sex information, forcing the loan officer to guess at the data based on visual observation and surname.[31] CUNA compared the breakdown of applicants' race and ethnicity data based on visual observation or surname to the overall breakdown across all reported applications. Among the less than 1% of applicant data obtained through visual observation or surname, the racial and ethnic breakdown reported by loan officers largely mirrored the overall racial and ethnic breakdown across all reported applications.[32] The below table illustrates this comparison.

Table: Race and Ethnicity Data Reported Based on Visual Observation or Surname Compared to All Reported Applications[33]

	Data Collected on the Basis of Visual Observation or Surname[34]	**Data Collected Across All Reported Applications**
White/Non-Hispanic	74.5%	74.9%
White/Hispanic	11.7%	8.9%
Black or African American	7.4%	7.5%
Asian	5.2%	7.8%
American Indian or Alaska Native	0.7%	0.57%
Native Hawaiian or Other Pacific Islander	0.3%	.27%

If the Bureau simply assumed that the racial and ethnic data for non-disclosing applicants exactly mirrored the overall share of racial and ethnic reporting for all applicants, it would have been incorrect about 3,642 applications.[35] This number represents approximately six thousandths of a percent of total reported applications.[36] Stated otherwise, if the Bureau simply made this

Council of La Raza (NCLR), and National Urban League Joint Comment Letter, Comment ID CFPB-2014-0019-0289 (Oct. 29, 2014), available at https://www.regulations.gov/comment/CFPB-2014-0019-0289.

[30] Comment by Winston & Straw LLP, Comment ID CFPB-2014-0019-0266 (Oct. 29, 2014), available at https://www.regulations.gov/comment/CFPB-2014-0019-0266.

[31] FFIEC, 2020 Dataset Loan/Application Records; CUNA Analysis.

[32] *Id.* CUNA did not perform an analysis of the race or ethnicity data for co-applicants, nor with regard to sex data based on visual observation of applicants or co-applicants.

[33] *Id.* Note that race and ethnicity categories have been collapsed for the sake of comparison, as the racial subcategories were not used when race was reported on the basis of visual observation and surname, and ethnic subcategories were used only rarely.

[34] *Id.* Calculated solely using data reported in the applicant_race-1 and applicant_ethnicity-1 fields, not race or ethnicity reported in subsequent fields or for co-applicants.

[35] *Id.*

[36] *Id.*

assumption, in 2020, it would have been correct 99.23% of the time.[37] It is clear that the race and ethnicity data gained by the imposition of this requirement utterly fails to justify the burden placed on credit unions and other lenders posed by collecting this information through visual observation and surname.

The requirement continues to elicit moral, ethical, and emotional reactions that far outsize the value of the data it generates. While the actual number of applicants who refuse to report is quite small—again, less than 1% of applications—the requirement is consistently present for loan officers who are repeatedly trained on it and anticipate or fear they will need to fulfill it if an applicant does not self-report. Further, credit unions struggle to create a member-centric and pleasant experience for their members and potential members in light of the requirement. Many credit unions struggle to reconcile the requirement with their own goals related internal culture and commitment to diversity, equity, and inclusion.

When the requirement is triggered, it has proven to be troubling for credit unions and their members. For example, one credit union reported that a loan officer guessed the applicant's ethnicity and race based on visual observation incorrectly, causing the applicant distress.[38] The applicant stated they did not provide the information purposefully as they come from a multiethnic family, and that they self-identify differently than was guessed. The applicant indicated they found the assumptions made by the loan officer to be racist and rude. The loan officer apologized, explained the requirement, and was put in the position of assuring the member of their lack of racist intent. Other credit unions shared similar stories and indicated the explanations regarding government requirements are not always accepted, and sometimes applicants abandon the application entirely as a feeling of mistrust and a suspicion of racism has been established.[39] It must be noted that this feeling of mistrust and suspicion arouse surrounding a legally-mandated process involving government-issued forms and despite public signage regarding the existence and availability of that data. A CDFI's questions and assessments regarding race and ethnicity in order to ensure its certification would not have these structural claims to legitimacy.

Some credit unions feel racial and ethnic assessments based on visual observation and surname expose their institutions to litigation concerns and reputational risk. Even if the existence of HMDA legal requirements might ultimately protect the credit union from loss in court, the loss of trust from their membership and potential harm to their reputation in their community due to accusation of discrimination is extremely concerning.[40]

The requirement may seem harmless to the CFPB, the CDFI Fund, and other regulators in the mission to gathering important data, but the reality of putting it into practice is troubling for loan officers who find it upsetting, applicants who feel racial assumptions are being injected into the lending process, and in contravention with a credit union's mission and commitment to diversity, equity, and inclusion. One credit union described the requirement as "forcing a loan officer to put

[37] FFIEC, 2020 Dataset Loan/Application Records; CUNA Analysis. Calculated solely using data reported in the applicant_race-1 and applicant_ethnicity-1 fields, not race or ethnicity reported in subsequent fields or for co-applicants. Including multiple race and ethnicity identifications per applicant would likely further reduce or eliminate the inaccuracies discussed here.
[38] CUNA Member Feedback, received Dec. 16, 2021.
[39] *Id.*
[40] *Id.*

on a 'racist hat' for a minute," in order to guess at the applicants race and ethnicity based on their visual appearance.[41] Others described the requirement as "counter-intuitive" and "odd," considering that the goals of the CFPB and HMDA should be to eliminate discrimination, rather than encouraging loan offices to become proficient in guessing the race of individuals based on their physical appearance or surname.[42] While the policy goals of obtain complete data are laudable, these means simply cannot be justified by the end. The CDFI Fund should not repeat this mistake by intentionally injecting racial assumptions into the banking experience of already-vulnerable communities.

The Assessment Methodology Implementation and Risk Management Practices

The policy goal of ECOA and Regulation B is to create a lending environment that is blind to race and ethnicity, among other characteristics. This is directly at odds with the policy goals of the Fund's approach, which is to create a lending environment that is explicitly conscious of race and ethnicity. These conflicting policy approaches create difficulty for CDFI credit unions which have long prioritized compliance with ECOA when it comes to handling race or ethnicity information in a lending context. For example, it has been a long-held best practice to isolate driver's licenses to ensure they are not visible to an underwriter, lest they become aware of the applicant's race or ethnicity and, consciously or subconsciously, consider it during the underwriting process. Similarly, appraisals should not include photos of a house's occupants or their image to isolate the underwriter from any awareness of the race and ethnicity of the applicant. These efforts are risk mitigation steps not explicitly required by regulation, but nonetheless commonly taken by many responsible lenders to protect their members against discrimination, ensure compliance with fair lending requirements, and manage any litigation, reputation, or management risk surrounding fair lending issues. In this context, the CDFI Fund's assessment methodologies regarding race seem utterly backwards to many credit unions that are deeply committed to assisting communities that have been disadvantaged based on their race.

The CDFI Fund's assessment methodologies would essentially force CDFIs to establish a parallel tract for member service where race and ethnicity information must be gathered on a transactional level, held in insolation to manage fair lending risk, processed by limited staff for the purposes of CDFI reporting, and safeguarded against inappropriate disclosure within the credit union and outside of it. This represents a massive undertaking in policy and practice with significant risk to CDFIs. The CDFI Fund is unable to provide any meaningful guidance about what NCUA examiners would deem legal or compliant in this undertaking, nor any meaningful guidance to assist CDFI credit unions in managing their legal or compliance risk around these issues. Given these significant risks, the CDFI Fund should proceed carefully and in significant coordination with the CFPB, NCUA, and any other regulatory agency that performs consumer compliance and fair lending examinations. In the absence of meaningful time to do so, the CDFI Fund should slow down, and allow CDFIs to use the methodologies they have relied on in the past while the Fund continues to explore these issues and their implications.

[41] CUNA Member Feedback, received Nov. 18, 2021.
[42] CUNA Member Feedback, received Dec. 16, 2021.

The Use of Proxies is the Best Available Alternative Approaches

As a legal and practicable pathway for the collection of actual data is unavailable, the CDFI Fund must consider reasonable alternatives. The CDFI Fund should permit CDFIs to use any well-documented statistical proxies for individual race, ethnic, and income data, including geographical proxies, Bayesian Improved Surname/Geocoding, and modeled income data. For example, the CDFI Fund should permit majority-minority census tracts and/or block groups as a proxy for race and ethnicity-based Other Targeted Populations. Similarly, the Fund should permit low-income census tracts and/or block groups as geographic proxy for low-income Targeted Populations. CDFIs should be permitted to select proxy data from any qualified third-party vendor. This is not a perfect method; however, it is the best currently available method.

Inclusion of an Asian Americans and Pacific Islanders Other Targeted Market

The CDFI Fund should also add Asian Americans and Pacific Islanders (AAPI) as an OTP Target Market. Given that the CDFI Fund is in the process of finalizing its Minority Lending Institution (MLI) designation that will recognize institutions serving Asian Americans and Pacific Islanders as MLIs, now is the time for the CDFI Fund to act. Research from both advocacy groups and the CFPB have revealed significant disparities in lending outcomes based on the nationality of AAPI borrowers. For example, a 2021 CFPB report documented that mortgage applicants who reported their nationality as Vietnamese, Native Hawaiian, Guamanian, or Samoan experienced mortgage denial rates that exceeded those of Hispanic white mortgage applicants and approached the denial rates experienced by Black mortgage applicants.[43] These findings underscore the need for CDFIs to serve low-income AAPI communities.

Conclusion

Thank you for the opportunity to comment on the Proposed Pre-Approved List of Target Market assessment methodologies. CUNA applauds the Fund's intention to provide clarity and transparency but urges the CDFI Fund to remove preapproved methodologies that are violations of ECOA and Regulation B and to allow credit unions to use any well-documented statistical proxies appropriate to their Target Market(s). CUNA is happy to provide additional information or resources if needed. If you have questions or require additional information related to our feedback, please do not hesitate to contact me at (202) 503-7184 or esullivan@cuna.coop.

Sincerely,

Elizabeth M. Sullivan

Attachment

[43] CFPB, Challenging the Model Minority Myth: A closer look at Asian American and Pacific Islanders in the mortgage market (Jul. 1, 2021), available at https://www.consumerfinance.gov/about-us/blog/challenging-model-minority-myth-asian-american-pacific-islanders-mortgage-market/.