/ inclusiv /

December 5, 2022

Jodie Harris, Director
CDFI Fund
Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

RE: CDFI Certification Application (OMB Control Number: 1559-0028)

Dear Director Harris:

Thank you for the opportunity to comment on the CDFI Fund's updated Certification Application. Since working to establish the CDFI Fund, Inclusiv has been deeply committed to the integrity and mission of the Fund so that targeted borrowers and communities may continue to realize its impact for generations.

The newly released application includes important provisions to strengthen certification standards and ensure that certification is only given to financial institutions with strong community development missions and responsible products and services. However, the updates also include a number of problematic provisions that, though well-intentioned, would together create a nearly insurmountable barrier to participation for worthy CDFI-eligible credit unions. CDFI credit unions exist to provide access to critical financial services and loans to people who have historically been excluded from the mainstream financial system. They serve more borrowers than all other types of CDFIs combined, operate in the communities they serve with direct access to residents, and collectively hold the majority of CDFI assets. Without major changes to the Certification Application, the CDFI Fund risks losing a large number of deep mission-driven, CDFI-certified credit unions, which would be a loss not just to the Fund but, more importantly, to the communities it serves.

We urge the Fund to limit changes to just the most critical priority areas rather than doing a complete overhaul that will require CDFIs to update their data tracking systems, governance structures, development services practices and other operations all at once, forcing them to reallocate significant resources at a time when CDFIs are more needed than ever. For credit unions that are regulated financial institutions, this will result in duplicative work in which they are following standards applied by the Fund separately from those applied by their prudential regulator, often in service to the same end goal. An increased focus on key priorities, like developing nuanced, effectively targeted Responsible Financing Practices standards, would allow the Fund to create well-thought-out standards that would meet the Fund's goals without inadvertently rendering high-impact, regulated CDFIs out of compliance. All changes should be narrowly targeted to address the Fund's objectives and vetted by CDFIs to identify any unintended consequences. At a bare minimum, the Fund should address the specific issues raised in this letter to ensure community development credit unions are able to continue to obtain CDFI certification.

About Inclusiv

Previously known as the National Federation of Community Development Credit Unions, Inclusiv is the first and only CDFI Intermediary for credit unions and the national network of community development credit unions. Our mission is to promote financial inclusion and equity through credit unions. Credit Unions are not-for-profit financial cooperatives owned by, governed by, and focused on providing safe and affordable financial services to their members. Inclusiv members comprise Low Income Designated, Minority Depository Institution, and CDFI credit unions, as well as financial cooperativas based in Puerto Rico. The Inclusiv network represents 500 credit unions serving 18.4 million people in predominantly low-income urban, rural, and reservation-based communities across 47 states, Washington DC, the U.S. Virgin Islands and Puerto Rico. Inclusiv channels capital to and builds capacity of these institutions that are dedicated to serving low-income people and redlined and disinvested communities. We offer technical assistance at no cost to our 297 CDFI-certified members each year and have helped hundreds of credit unions obtain and maintain their CDFI certification.

Certification Application: Primary Mission

The updated Certification Application's approach to primary mission will help ensure that all CDFIs have a demonstrated community development mission and are not engaged in predatory practices in contravention of that mission. The CDFI Fund's new requirement that institutions show that they have a board-approved statement of their commitment to community development and certify that they do not engage in predatory financial practices will strengthen the CDFI certification and support the Fund in achieving its mission. In particular, the Fund's adoption of a 36% APR standard and its prohibition on selling consumer debt to debt buyers will help ensure that CDFI lending is synonymous with responsible lending.

The Responsible Financing Practices section of the application details a set of "bright-line" lending and debt collection practices that would render CDFIs ineligible for certification, but this list of prohibited practices was not included in the 2020 draft of proposed changes and was not vetted with CDFI practitioners. As a result, some of the "bright-line" standards would force a number of leading CDFI credit unions to choose between preserving certification by denying members access to affordable financial products, or foregoing CDFI certification in order to continue to provide responsible financing in low-income and immigrant communities. For example, the CDFI Fund's blanket ban on mortgages with balloon or interest-only payments, which have been used by predatory lenders but can also be features of responsible affordable mortgage loans, underscores the importance of consulting CDFIs on the realities of their lending before issuing categorical "bright-line" standards. The Fund held one such consultation session, in 2018, where it received extensive feedback on the pitfalls of its proposed list of "bright line" practices, and the need for extensive consultation with practitioners in order to finalize any such standards. In 2020 the CDFI Fund released the first draft of proposed changes to the certification application, which did not include any "bright line" practices. By adding them back in 2022 without any consultation with the field, the Fund failed to develop an appropriately nuanced set of mortgage lending standards that will protect borrowers while allowing CDFIs the flexibility to meet the credit needs of their communities.

In addition, the CDFI Fund does not provide adequate guidance on how it will evaluate the information it collects regarding checking accounts and overdraft/NSF fees.

APR Limits

Changes Needed:

- Clarify that CDFIs will not be required to collect and report loan-level MAPR data. Questions PM13 through PM14.5 of the Certification Application should be sufficient to ensure all CDFI lending has a MAPR of 36% or less or employs meaningful guardrails if the MAPR exceeds the 36% limit.

- Questions PM13.3 and PM14.3 ask if a loan product includes a leveraged payment mechanism and automatically disqualify from CDFI certification any entities that answer "yes." Federal credit unions should be exempted from these two questions as they have a leveraged payment mechanism for all loans by statute.[1] Credit unions may elect not to use this payment mechanism, but they may still feel compelled to answer "yes" and will be disqualified from CDFI certification as a result.

CDFIs should not be in the business of making usurious loans, and the 36% APR guideline is an effective way to ensure that CDFIs are not engaged in payday lending or other predatory practices that trap borrowers in cycles of debt. Credit union lending is subject to an interest rate cap, currently 18%, which means that, even when additional fees are charged, the vast majority of loans CDFI credit unions make will meet the 36% standard. The only credit union product that may exceed the rate cap is the NCUA-authorized Payday Alternative Loan (PAL), which is an amortizing, small-dollar loan. The National Credit Union Administration (NCUA) permits credit unions to charge a 28% interest rate and to charge fees on PALs. Many credit unions keep the cost of their PALs low and charge APRs of 36% or less. Other credit unions charge higher fees that may bring their PAL APRs slightly above 36%. Subjecting loans with an APR of more than 36% to additional scrutiny is appropriate and consistent with the mission of the CDFI Fund. Indeed, the Fund's questions in sections PM13.2 through PM13.7 will ensure strong consumer protections for any loans that exceed the 36% APR limit. PM13.3, however, may automatically disqualify credit unions given that federal credit unions have a statutory leveraged payment mechanism available to them, even though not all credit unions use it. Given that fact, the Fund should exempt federal credit unions from this question and the parallel question, PM14.3.

The CDFI Fund, however, should not require insured depositories to calculate the Military Annual Percentage Rate (MAPR) for all loans listed in the Transaction Level Report, or any other loan-level reporting that may be required. CDFI credit unions issue an average of 5 million loans each year, and regulated depositories cannot calculate and record this alternative APR without significant systems investment as they would need to either switch over to the MAPR for all covered lending, which could run afoul of other regulatory requirements, or maintain a second record-keeping system to calculate and collect MAPR data. In short, any attempt to require MAPR calculations for all transactions reported to the CDFI Fund will effectively remove insured depositories from the ranks of certified CDFIs. The

[1] https://www.law.cornell.edu/cfr/text/12/701.39

narrative information requested in application should be sufficient for the CDFI Fund to ensure that insured depositories meet the Fund's APR standards.

Mortgage Standards Should Allow a Broader Definition of Responsible Lending

Changes Needed:

- For regulated depositories, remove "Offers mortgage loan products that include negative amortization, interest-only payments, or balloon payments" from the list of practices that render an applicant ineligible for CDFI certification and replace it with "Offers mortgage loan products that include negative amortization."

- The CDFI Fund should explicitly allow regulated depositories to offer 1-4 family residential mortgage loans with balloon or interest-only payments.

The CDFI Fund draws from the CFPB's Qualified Mortgage (QM) rule to identify mortgage characteristics that are impermissible for CDFIs to offer. In principle, the QM rule is an effective framework to identify responsible mortgage lending. The QM rule also allows certain exceptions to prohibitions on balloon or interest-only payments, for example, to permit responsible lenders to offer mortgage loan products that meet the needs of their communities. The Fund, however, does not adopt the CFPB's appropriately nuanced approach in its Responsible Financing Practices definition. It is critical that the Fund allow regulated depositories subject to CFPB rules and examined for safety and soundness to offer mortgages with balloon payments and interest-only payments designed to meet the needs of the communities they serve and the requirements of their prudential regulators.

Many small CDFI credit unions experience high demand for non-conforming mortgages from their members. ITIN mortgages and high loan-to-value (LTV) mortgages, for example, are vital financial inclusion and wealth-building tools that CDFI credit unions are well-equipped to offer. But, these loans cannot be sold on the secondary market to Fannie Mae or Freddie Mac, and the private secondary market for non-conforming loans is limited. Since lenders often must hold these loans in portfolio, the loans create asset-liability management concerns for the lenders and for their prudential regulators. To address this issue, some credit unions offer mortgages with a balloon payment after 5 or 10 years to avoid holding 30-year loans. The credit unions have procedures in place to help their members modify or refinance their loans when the balloon comes due so that members may continue building equity in their homes. These loans are often offered with excellent terms, like higher LTV with no private mortgage insurance, or low, fixed interest rates.

Similarly, CDFI credit unions that serve farmworkers and other seasonal workers have found that offering mortgage loans with interest-only payments can be an effective strategy to bolster homeownership in their communities. The CDFI Fund should not prohibit regulated CDFIs with mortgage lending programs overseen by a prudential regulator from offering responsible mortgages designed to meet their communities' credit needs.

Overdraft and NSF Practices

Changes Needed:

- If questions PM25 and PM26 will be used to determine eligibility for CDFI certification, the Fund must publish clear eligibility standards for each question.

- If questions PM25 and PM26 will not be used to determine eligibility, the Fund should consider removing the questions, or, at a minimum, make clear that they are only informational.

The application asks depositories to provide information on any overdraft or nonsufficient funds (NSF) fees they charge but provides no clear guidelines that describe how that information will be evaluated and its potential impact on certification. CDFI-certified institutions should have responsible overdraft and NSF policies that reduce costs to their customers and promote financial inclusion to the greatest extent possible. It is well-documented that the majority of these fees are charged to just a small percentage of account holders, with the fee burden disproportionately borne by people of color and people with low incomes. While it is entirely appropriate to ask for information about institutions' overdraft and NSF policies and practices, the Fund must first distinguish between regulated and unregulated lenders, and second, clearly identify practices that are deemed unacceptable for certification.

If the CDFI Fund's request for information about overdraft practices is solely to ensure that institutions comply with existing regulations and regulatory guidance, the application should ask that specific question. However, if the Fund intends to make determinations about the quality of an institution's overdraft and NSF policies and practices that will influence whether the institution will be eligible for CDFI certification, the Fund must make its standards public. Leaving the determination of what constitutes appropriate overdraft and NSF policies and practices to individual CDFI Fund staff may result in unfair and inconsistent denials of certification, as has happened in the past when the Fund has not published clear standards. Without transparent and consistent standards, institutions will be denied the opportunity to adjust their overdraft and NSF practices to comply with the CDFI certification requirements. Further, leaving open the possibility of unfair and inconsistent denials of certification risks the perception that any unpublished standards are applied arbitrarily by the Fund.

Product Pre-approval

Changes Needed:

- The CDFI Fund should clarify that all Financial Products and Services offered by an insured depository CDFI that have been approved by the CDFI's prudential regulator are automatically pre-approved by the CDFI Fund.

<u>Certification Application: Target Market Test</u>

Changes Needed:

- The CDFI Fund should not require prospective applicants to complete a full Transaction Level Report (TLR) before applying for CDFI certification. Instead, the Fund should create a simplified eligibility report that collects only the data needed to ensure the applicant would pass the Target Market Test.

- When redesigning the TLR, the Fund should simplify the form to collect only the data needed to confirm program compliance and must ensure that it does not accept the inadvertent upload of any personally identifiable information.

- CDFI Fund must as soon as possible release for public comment a complete draft of the modified TLR that prevents the upload of PII, and with clear explanations of how each required data will be used for determining eligibility for certification.
- Before accepting reports that include information on credit union members as well as on loans made, the CDFI Fund should ensure that AMIS will be able to manage data uploads that are significantly larger than the lending-only CDFI credit union reports that have historically been challenging to upload to AMIS.

- Target Market Assessment methodologies must allow the use of proxy data for race, ethnicity and family income to permit depositories that collectively serve millions of members to accurately and within the bounds of the Equal Credit Opportunity Act/Regulation B report on Other Targeted Population and Low-Income Targeted Population.

The CDFI Fund's proposed changes to the Target Market test outlined in the updated Certification Application will help regulated depositories with strong community development missions secure and maintain CDFI certification.

The Financial Services Option is a critical improvement for insured depositories by allowing CDFIs direct at least 50% of the dollar volume of their financial products and at least 60% of the total number of their financial products to their Target Market, provided that at least 60% of unique account holders (e.g., credit union members) are also in the Target Market. Many CDFI depositories make a large number of small loans to their members and a small number of large loans, like residential mortgages. When economic conditions favor mortgage lending[2], it is possible for the mortgage activity of just a handful of a depository's higher-income borrowers to drive the dollar volume of the institution's Target Market lending below the 60% threshold even when substantially more than 60% of the institution's financial products by number are directed to Target Markets. It is reasonable to require that depositories seeking to use the 50%-dollar volume threshold also demonstrate that at least 60% of its unique account holders fall within the CDFI's Target Market. However, the current list of pre-approved Target Market verification methodologies would not permit identification of credit union members or unique bank account holders who qualify as LITP or OTP. With the understanding that the list of approved methodologies will be augmented to allow for an efficient and complete Target Market analysis of all depository account holders, then this provision would be a reasonable cross-check that the institution is meaningfully serving its Target Market(s).

[2] "Mortgage lending" throughout this letter refers to 1-4 family residential real estate loans and excludes commercial mortgages. The CDFI Fund should clarify its definition of mortgage lending in the application as it is unclear in some instances whether mortgage lending includes both residential 1-4 family mortgage lending and commercial mortgage lending or not.

Inclusiv fully supports the CDFI Fund's decision to no longer require Target Market maps, except for custom Investment Areas, as it eliminates a significant barrier for less-resourced institutions applying for CDFI certification.

We also strongly support the Fund's changes to the custom Investment Area Target Market. The current custom Investment Area option provided a loophole that allowed some financial institutions that would otherwise not meet eligibility requirements to qualify for certification. The new standard will close that loophole effectively.

The CDFI Fund will require applicants to complete and submit a Transaction Level Report (TLR) before beginning an application for CDFI certification, but the Fund has not yet shared its proposed changes to the TLR. The updated Certification Application notes that the TLR will be used to "determine the share of an entity's Financial Products and/or Financial Services that are deployed to the entity's proposed Target Market(s)." Although having the CDFI Fund vet initial data before an applicant submits a full certification application is an effective way to save time for both applicants and the Fund, a full TLR is too onerous and poorly designed for this purpose. While TLRs include data that can demonstrate the level of Target Market financing, they also include dozens of additional data points that are unrelated to any CDFI certification requirements. The CDFI Fund should collect only the data it needs to verify eligibility, not a full report. Despite the many data points included in the TLR, the current TLR is not designed to collect data on credit union members or unique account holders at banks, which will be a required part of the Target Market test for most depositories.

In collecting this information, the redesigned TLR must ensure that no Personally Identifiable Information (PII) can be uploaded to the CDFI Fund's system. The current TLR aggregates consumer loans of insured depositories by census tract, which protects the identity of those borrowers, but it allows CDFIs to upload physical addresses of real estate loans which constitutes an unacceptable risk that private confidential information of individual homeowners' loans can be released to the public. While the current TLR allows CDFIs to omit address information for residential real estate loans, CDFIs may not realize this, and may upload address information. The revised TLR must be designed to prevent the inadvertent upload of any PII for CDFI borrowers by removing the physical address fields for all consumer and non-commercial real estate loans.

Inclusiv is also concerned about the technological capacity of the TLR system to ingest and process the quantity of data that would be submitted for certification and recertification. CDFI credit unions frequently face frustrating technical errors and delays in uploading TLR data in the current system, which has not yet demonstrated the capacity to handle the volume of data submitted by the subset of CDFI credit unions with CDFI awards. Credit unions with FA awards have reported months-long delays in resolving technical issues with their TLR submissions and a number of large credit unions that applied to the Equitable Recovery Program (ERP) reported that the CIMS geocoder was unable to process the volume of transaction data submitted resulting in the use of alternative systems to obtain the needed geocodes. By extending the TLR requirement to all certified CDFIs, adding the analysis of depository members and unique account holders, and requiring multiple years of transaction data for annual recertification, the Fund's systems would need the capacity to seamlessly handle more than 30 million records per year from credit unions alone.

The CDFI Fund can address both the data security and data capacity issues by greatly simplifying the TLR itself. A good model is the current "Consumer Loans/Investments Originated" report used by insured depositories that aggregates consumer loans by census tracts, which reduces the volume of records in the report and protects the PII of borrowers. By contrast, the current TLR used for non-consumer loans includes more than 50 fields of data that are not related to either certification eligibility or Performance Goals and Measures related to CDFI awards. The Fund can greatly reduce the burden and increase data security of the TLR by strictly limiting the required fields to those that respond to specifically identified compliance standards. Until the proposed modifications of the TLR are made available for public comment, we remain deeply concerned that the failures of the current TLR will be exacerbated in its redesign.

Although not covered in this comment letter, the Fund's current list of pre-approved Target Market Assessment Methodologies would effectively preclude any credit union from obtaining CDFI certification based on Low-Income Targeted Population (LITP) or Other Targeted Population (OTP) Target Markets. We understand that the Fund will augment the current list of pre-approved methodologies following a review of the comment letters due on December 19th. Inclusiv will submit detailed recommendations for methodologies that will strengthen Target Market standards, increase efficiency, ensure regulatory compliance for insured depositories, and protect the critical relationships between CDFIs and the communities they serve. Our comments in this letter assume that the Fund will approve verification methodologies that enable credit unions and other insured depositories to track and report on activities in all CDFI Target Markets without running afoul of regulations they must abide by.

<u>Certification Application: Development Services</u>

Changes Needed:

- In the second sentence in the Development Services section that begins "A Development Service is a formal, structured…" replace "with an entity's Financial Products" with "with an entity's Financial Products or Financial Services."

- In the same sentence, the Fund should remove "formal, structured, stand-alone" as descriptors of Development Services to allow for the provision of customized, informal Development Services at key "teachable" moments as members engage with credit union staff.

- Clarify that the Fund will allow Development Services to be provided through videoconferencing, live chat or other online formats. It does not seem to be the Fund's intention to prevent remote provision of Development Services, but the language disallowing "information presented…online" would disqualify these activities.

The CDFI Fund's proposed changes to the activities that would be considered Development Services are based on an overly narrow reading of the statute and would exclude from consideration many proven and emerging strategies to advance financial inclusion in low-income communities. Limiting Development Services to formal, structured interactions that promote access to and/or success with Financial Products is not only a major step backward.

For insured depositories, providing education, counseling and information related to financial services is integral to lending activities. CDFI credit unions play a key role in providing safe and affordable transaction account options for people who are opening bank accounts for the first time or who have been blocked from accessing the mainstream financial system because of previous negative experiences with bank accounts. These members tend to have very low incomes and both financial coaching and informal one-on-one support from credit union staff are critical to helping them build financial security and ultimately qualify for credit union loans. Other vital financial education topics would be excluded from consideration as well, including debt management workshops, coaching to help people balance their budgets and avoid overdrafts, and know-your-rights sessions. These Development Services help people build the financial capability to participate meaningfully in the current economy, and can help prepare people to become successful borrowers in the future. Omitting them from consideration as a Development Service would significantly undermine the Fund's mission to "expand economic opportunity for underserved people and communities."

Many CDFI credit unions pair informal financial coaching with product delivery. For example, a credit union staff member might meet with a prospective homebuyer multiple times to walk them through how to access down payment assistance programs, help them determine how much they will need to save for closing costs, and make sure they fully understand the terms and cost of the mortgage they plan to borrow. Although this work builds member financial capacity and supports access to a Financial Product, it would no longer count as a Development Service while a less personalized first-time homebuyer class would. Formal standalone classes suffer from two well-documented weaknesses compared to one-on-one coaching: they impose a time tax on people who have low incomes and multiple responsibilities that make attending a series of structures classes challenging, and limit the positive impact of the intervention since they separate theory from practice. The Fund must recognize unstructured conversations with clear Development Services outcomes as a key component of Development Services.

The Fund notes that it will not consider information presented online to be Development Services. Although information posted on a website should not be counted as a Development Service, the cutting edge of financial coaching is based on mobile access to coaching and interventions at key "teachable" moments when members engage with credit union apps. Financial coaching and education provided remotely, whether through videoconferencing or through an app should be considered a Development Service.

Finally, the significantly reduced scope of Development Services stands to harm MDI credit unions disproportionately. Small MDI credit unions often make fewer and/or smaller loans than similarly situated non-MDI credit unions but provide high-quality financial services and targeted assistance to their members. Limiting Development Services to formal programs connected to Financial Products discounts the critical work that MDI credit unions, and all CDFI credit unions, do to support their members' financial well-being by helping them succeed with transaction accounts, supporting them in learning how to budget and save, and helping their members develop other foundational financial skills.

<u>Certification Application: Accountability</u>

Changes Needed:

- Board members who are democratically elected by a CDFI's membership should be considered accountable to their Target Market provided that more than 60% of members and 60% of loans are issued in their overall Target Market.

- Non-profit board members and non-executive staff should be considered accountable CDFI board members under the same circumstances as non-profit executives.

- The Financial Interest Policy must exempt regulated depositories from the provision that "a financial conflict of interest also includes board members who have an active loan product from the Applicant."

The CDFI Fund's clear explanation of what it considers accountability will help institutions comply successfully with the requirements. However, the Fund's proposed methodology fails to distinguish between legal accountability and individual characteristics that are deemed to be representative of specific Target Markets. In the absence of mechanisms to hold governing boards accountable to the people they serve, representative characteristics may be considered useful proxies for accountability to specific communities – but representation standards are only proxies. Legal accountability of governing boards is strictly determined by their corporate structure. Governing boards of for-profit entities are legally accountable to their shareholders, who have the power to change board composition in proportion to the number of shares held by each owner. Non-profit governing boards are legally accountable to state and tax authorities. Whether an entity is for-profit or non-profit, the people served by these institutions have no direct power over the composition of governing boards and no mechanism to effect change in institutional policies or practices.

By contrast, not-for-profit credit unions are member-owned financial cooperatives, governed by boards that are legally accountable to the people they serve. Regulations require that credit union boards consist solely of credit union members who are democratically elected by the membership on the basis of one-member one vote and serve as unpaid volunteers. These requirements are the same for credit unions of all types, regardless of whether they are federally chartered, state chartered, or financial *cooperativas* in Puerto Rico. As democratically elected representatives who serve at the pleasure of credit union members, credit union board members can only be recognized as directly accountable to the people they serve. Cooperative ownership and governance mean that credit union members have a direct mechanism to influence board membership and deliberations through mandatory annual elections and annual general meetings. Proxy indicators of representation among board members of for-profit and non-profit financial institutions confer no such power to the people they serve.

Means of Demonstrating Accountability

The CDFI Fund proposes to use "Status as an elected official primarily representing residents of qualified census tracts," as a proxy indicator of accountability to Investment Area Target Markets. Inclusiv notes that the Federal Credit Union Act defines a credit union "Official" as "any member of the board of directors, credit committee or supervisory committee," and would like the CDFI Fund to confirm in its guidance that democratically elected board members are included in this provision. We further recommend that this provision not be limited to Investment Areas alone, but also recognize officials who are democratically elected by majority low-income or majority minority constituencies as accountable to LITP and OTP Target Markets.

The CDFI Fund's list of proxy accountability indicators no longer include board members and non-executive employees of mission-driven non-profits that primarily serve CDFI Target Markets. Focusing only on executive staff of mission-driven non-profits neglects the talent and commitment of non-executive staff and board members at these non-profits. Indeed, non-executive staff are likely closer to the day-to-day experiences of the populations these organizations serve and can therefore better represent their interests than the executive staff. The CDFI Fund should also consider non-executive staff and board members to serve as accountable CDFI board members just as it proposes to permit executive staff to serve as accountable CDFI board members.

Financial Interest Policy
The CDFI Fund has proposed that any board members with "active loan products" cannot be considered accountable to their CDFI Target Market. This Policy would effectively prohibit virtually all members of credit union governing boards from being recognized as accountable. As noted above, credit union board members must themselves be members of the credit union and can be expected to use the credit union's financial products on equal footing as all other members. The potential for conflicts of interest is addressed by specific provisions in the Federal Credit Union Act and in each credit union's Bylaws that mandate the "nonpreferential treatment" of credit union officials and members of their immediate family. These provisions are further strengthened through rigorous regulatory review as a standard part of supervisory examinations. This provision is particularly unfair to board members who have low incomes or who are members of targeted populations who may rely on their credit unions to meet their transaction account and borrowing needs. Barring these members from being considered accountable to their communities because they use their credit unions' services in the same way as the broader credit union membership they represent decreases, rather than increases the accountability of those boards. The Financial Interest Policy must exempt regulated CDFIs from the provision related to "active loan products," since the risk of conflicted board members is fully mitigated by regulation and supervision.[3]

<u>Other Issues</u>

Changes Needed:

- On page 6 of the Certification Application, the Fund notes that Insured Credit Unions, including both federally- and state-insured institutions, are presumed to meet the CDFI Certification Financing Entity requirements. On page 51 of the application, however, federally-insured credit

[3] https://www.law.cornell.edu/cfr/text/12/701.21

unions are omitted from the list of institutions presumed to meet the Financing Entity requirements. Federally-insured credit unions should be added to the list on page 51.

<u>Certification Agreement</u>

The updated Certification Agreement effectively clarifies the Fund's expectations for CDFIs and details their compliance obligations. There are a few specific provisions in the agreement that could potentially deter aspiring CDFIs from seeking certification or existing CDFIs from renewing their certification:

- CDFIs should have more than 10 days to review and return their Certification Agreements. CDFIs involve their boards in the decision to pursue and maintain CDFI certification and 10 days is very short notice for a volunteer board to review and approve a complex agreement. Credit union boards typically meet on a monthly basis, so a 70-day period would be sufficient.

- Section 7: Annual Reporting Requirements specify that Annual Certification and Data Collection Reports and Transaction Level Reports will be due 180 days after a CDFI's fiscal year end. While not spelled out in the Agreement, we understand that CDFIs will be required to submit just one report that will be simpler for CDFIs that are just recertifying and will be more complex for CDFIs with grant reporting obligations. We would be grateful if the Fund would confirm that no CDFI will have to submit separate Annual Certification and award TLR reports in a single year.

- Section 8: Records/Audits and Additional Documents states that all CDFIs should retain records for a minimum of 10 years. Federal regulations state that "Financial records, supporting documents, statistical records and all other non-Federal entity records pertinent to a federal award must be retained for a period of three years from the date of submission of the final expenditure report." (CFR 200.334). Since CDFI Certification is not an award, this record retention requirement exceeds any comparable Federal government standards and would impose an undue burden on CDFIs in general, and particularly on small and MDI credit unions.

- The CDFI Fund highlights that it may ask CDFIs for information, data and/or documents to assess a CDFI's certification status. The Fund should provide a reasonable response period, for example 30 or 60 days, that is documented in the agreement. The circumstances in which the CDFI Fund might unexpectedly need documentation from a CDFI within 24-48 hours are vanishingly rare, but such fast-turnaround information requests are distressingly common. Instead, the Fund should plan ahead and commit to providing reasonable notice for its information requests. It should also commit to responding to any follow-up questions or other inquiries from CDFIs in a similar time window. For example, if it is unable to respond to requests for Target Market Modifications within 120 -180 days, a CDFI should be able to presume that that modification has been approved rather than having to wait up to several years for an approval.

- Section 10: Notice of Noncompliance does not provide a minimum cure period nor does it specify that cures be forward-facing. Providing certainty about the minimum length of a cure period, allowing sufficient time for CDFIs to effect forward-facing cures by adjusting their future operations, and committing to providing responses to inquiries within a specified time frame would provide significant reassurance to CDFIs facing a cure period that they know what to expect, have the opportunity to fix issues, and know they will receive timely answers to any questions. Cure periods should vary in length depending on the complexity of the issue to be resolved: a missing report can be cured in a matter of weeks; the loss of one or more Accountable board members could take six to twelve months; a percentage shortfall in Target Market lending or membership will typically require at least two full fiscal years for complex CDFI depositories to demonstrate full compliance. While in cure periods, CDFI's should not be eligible to apply for new CDFI awards but should retain their certified status until they have either successfully resolved the issue or exhausted their cure period and forfeited their certification. Allowing sufficient time for CDFIs to return to compliance is critical, especially for regulated depositories. A certification termination on short notice could destabilize a CDFI depository, especially if it is a credit union that has used its CDFI certification to qualify for a waiver of the NCUA's 12.5% concentration limit on member business loans. A removal of certification without time to unwind those loans could have severe financial and regulatory repercussions.

- Section 11: Termination of CDFI Certification notes that certification may be terminated if the "CDFI is engaged in practices believed to be contrary to the CDFI Fund mission." Although it is critically important that the Fund be able to de-certify institutions that are engaged in egregious predatory practices, the standard for decertification should be stronger than the Fund's belief. For example, the Fund should be able to document that that CDFI has received an unusually high number of public complaints, is violating fair lending or consumer protections laws, or is engaged in practices that are unfair, deceptive, or abusive. These standards should be clearly articulated in the guidance.

- Section 13: Data Usage discloses that all data provided to the CDFI Fund may be posted on the Fund's website and does not account for personally identifiable information (PII) or other sensitive information included in CDFI Fund reports. Before making public Home Mortgage Disclosure Act data, the Consumer Financial Protection Bureau engaged in a significant rulemaking that ultimately led to a public database that omits certain key fields, like credit score. The CDFI Fund, however, apparently reserves the right to publish sensitive information about borrowers' credit scores on their website. As noted above, the modified TLR must be designed to eliminate the potential for any PII to be uploaded to the system. The CDFI Fund can evaluate certification eligibility and compliance without the need to collect PII and other sensitive data points from CDFIs.

Although the CDFI Fund's updated Certification Application takes important steps to strengthen the integrity of CDFI certification and ensure that only institutions truly committed to community development may participate in its programs, there are many changes that would push committed CDFIs out of compliance without a concomitant benefit of excluding bad actors from certification. Inclusiv and our members have deep concerns that if the issues we identified above are not addressed prior to implementation by the Fund, a significant proportion of currently certified CDFIs will be forced to let their certifications lapse and prospective CDFIs will be deterred from seeking certification.

Thank you for the opportunity to comment on this important update to CDFI certification. If you have any questions about this comment letter, please contact Alexis Iwaniszíw, Senior Vice President of Policy and Communications, at aiwanisziw@inclusiv.org.

Sincerely,

Cathie Mahon
President/CEO, Inclusiv