Community Development Bankers Association
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March 1, 2022

Via Electronic Submission

The Honorable Janet Yellen
Secretary
United States Department of the Treasury
1500 Pennsylvania Avenue
Washington, DC 20220

RE: Release of Emergency Capital Investment Program (ECIP) Legal Documents

Dear Secretary Yellen:

On behalf of the members of the Community Development Bankers Association (CDBA), we respectfully write to share the concerns of ECIP participant US Treasury-designated Community Development Financial Institution (CDFI) and Minority Depository Institution (MDI) banks on ECIP Legal Documents published on February 2, 2022. These comments address provisions contained within the Certificate of Designation for Non-Cumulative Perpetual Preferred Stock, and the Securities Purchase Agreements for both Senior Preferred Stock and Subordinated Debt Agreement.

CDBA is the national trade association for banks and thrifts that are CDFIs. Many are also Minority Depositary Institutions (MDIs). Our members have a primary mission of promoting community development and target at least 60% of their total lending and activities to Low- and Moderate-Income (LMI) communities and customers that are underserved by traditional financial service providers. Our members represent the majority of CDFI and MDI banks, thrifts, and bank holding companies selected to participate in ECIP.

Like Treasury, we are strongly committed to the success of ECIP, a transformational program to provide critical growth capital to CDFI and MDI depositories that are small and lack the resources of larger banks. As you know, Congress created ECIP to ensure that long-term economic recovery extends to all corners of the economy, particularly LMI and minority communities. It is critically important that the documents governing the program are workable and engender long-term trust between the Federal Government as investor, and ECIP institutions as investees. That trust requires legal provisions that are positive, transparent and predictable.

It is helpful here to refer to comments shared with Treasury in a letter dated April 8, 2021[1]: "The ECIP statute has a strikingly different purpose, tone, and provides the agency with significant latitude in implementation that can facilitate the growth of the depository CDFI sector." At its essence, ECIP

[1] Letter to Treasury Secretary Yellen, www.cdbanks.org/sites/default/files/pdfs/CDBA%20Comments_Treasury%20ECIP_4_7_final.pdf

investments are intended to serve as incentives to encourage more impact finance from healthy institutions that have already demonstrated their ability and commitment to execute this important and difficult work. Unfortunately, we must respectfully report that the documents, as currently drafted, require significant clarifications in order to fulfil their intention.

To summarize the key principles from our April 8, 2021 letter:

- Treasury should emphasize the positive, non-punitive, long-term aspects of this program and differentiate it from the Troubled Asset Relief Program (TARP), "to ensure ECIP reaches a broad range of eligible institutions and there is robust industry participation."
- The documents must shield ECIP institutions and their communities from the uncertainties that inevitably arise in the policy and political environment over long periods of time.
- Treasury should explicitly adopt lessons learned by the CDFI Fund over 25+ years regarding program management into ECIP.
- Treasury should narrowly tailor ECIP compliance requirements to avoid exposing institutions to negative implications beyond the scope of the program.

We believe that time is of the essence. Many banks (eligible for both types of investment) have told us they are uncertain about their participation, and at least one bank (eligible for a $150 million + investment) has told us it intends to forgo its investment. We are very concerned that proceeding with the current legal documents introduces a level of operating uncertainty that is unpalatable to a majority of approved ECIP participants. First and foremost, the leadership of each institution has a fiduciary obligation to their institutions. This obligation includes not engaging in activities – including accepting investor dollars – that expose the institutions to undue risk. The good news is that, in informal conversations with Treasury officials, it appears that the intent of the agency is not to be punitive or to introduce undue risk. But, the documents "as is" are unacceptable to many and changes are needed.

We strongly urge Treasury to consider our recommendations so that ECIP capital may begin to productively circulate within the LMI and minority communities that are the intended beneficiaries of this program. Without the adjustments outlined below, an important opportunity may be lost and ECIP will fall short of fulfilling the intent of Congress.

General Comments

Lack of Transparency Coupled with Very Broad Authority: **We urge Treasury to adopt greater transparency in its ECIP legal documents. Specifically, the agency needs to clearly define the process around noncompliance and fully disclose potential sanctions.** Section 5.2 and 5.3 of **t**he legal documents grant Treasury very broad authority (sole discretion) to determine whether a bank is in noncompliance and to determine sanctions. At the same time, it provides scant information about what constitutes noncompliance and potential sanction. Documents should include a written method of notification of a potential finding of noncompliance, clearly articulate the range of potential sanctions, define a formal process for appeal, and set a period for curing noncompliance. We fully understand Treasury's desire to protect the taxpayers. We also know that the agency's Community Development Financial Institutions (CDFI) Fund has 25+ years' experience of balancing transparency while fully protecting the taxpayer. We urge ECIP to replicate this model.

Overreach in Disqualification from Other Programs: **CDBA urges Treasury to strike Section 5.2(a) from the Legal documents which incorrectly infers Treasury has the legal authority to disqualify participants**

from CDFI Fund programs or other programs operated by Treasury or other agencies. Section 5.2(a) gives Treasury the power to report ECIP noncompliance to the CDFI Fund and other Treasury program offices with unclear consequences. ECIP has no legal authority to have participants disqualified from the CDFI Fund or other Treasury programs. In addition, this provision also infers the power to disqualify participants from non-Treasury program (e.g. SBA, HUD, USDA) programs. This set of sanctions are a legal overreach, particularly for minor, correctable (i.e. a late report, miscalculated dividend payment) mistakes. ECIP compliance enforcement ought to be restricted to ECIP itself.

Investment and Lending Plan as Performance Measure: **We urge Treasury to strike Section 2.3(m), Sections 3.1(d)(ii) and (iii) Annex A-1 references to the Investment and Lending plan from the legal documents**. These sections of the legal documents appear to hold the applicants to the performance and activity levels outlined in their Investment and Lending Plan. Requiring participants to certify to the currency of the Plan suggests that any deviation -- small or large -- from the Plan will constitute noncompliance. Events and circumstances can and will change over time. In lieu of striking **Section 2.3(m), Sections 3.1(d)(ii) and (iii) Annex A-1 references,** the documents could be amended to clearly state that ECIP participants are not required to certify they will adhere to their plans over the course of the investment period.

No Cure Provided in Event of CDFI Status Change: **We urge Treasury to amend the legal documents: (1) outline a "cure" process within the legal documents for institutions that may experience a temporary loss of CDFI certification; and (2) outline the provisions that will apply if an institution permanently losses its certification status.** Preferred Stock section 4.2 (b) and Subordinate Debt section 4.2(c)) of the legal documents state that a failure to remain a CDFI will trigger an event of noncompliance. In January 2022, the CDFI Fund Director sent a communication to the CDFI industry, that under the soon-to-be-released certification standards some organizations "may not" be recertified. ECIP participants are understandably concerned about the consequences of an unpredictable change in rule resulting in a loss of CDFI status. Although Treasury officials have stated verbally that a loss of CDFI status due to changes in the underlying rules will not *in itself* be a noncompliance trigger for ECIP purposes, we urge Treasury to explain in writing how this process will be managed with the CDFI Fund and ECIP, if ECIP participants suddenly find their certification at risk. Clarity and transparency are critically important for institutions approved for ECIP to assess the real risks for their institutions.

Further, we strongly recommend that Treasury provide both CDFI and MDI ECIP participants a remedy for the loss (temporary or permanent) of either status in the event of a merger or other form of consolidation. This remedy should include (but not be limited to) the ability to repurchase shares from Treasury on non-punitive terms. ECIP participants should not be penalized for making business decisions that acknowledge the need to remain efficient, competitive and operate at scale in order to continue serving their communities.

Elimination of 18 Month Notice: **We urge the Treasury to strike the provision in Section 5.2(b) that states institutions that lose their CDFI certification status will forfeit the right (established in Section 6.3(a)(v)) to an 18-month notice of sale of ECIP holdings**. This provision could lend to the destabilization of the financial institution and is an undue risk, and the 18-month notice period should be retained. If an institution cannot regain their certification status, as noted above, Treasury should provide the option, as above, to repurchase shares from Treasury on non-punitive terms.

Loss of MDI status: **We urge Treasury to provide clarity in the legal documents about the consequences if a Minority Depository Institution (MDI) loses its MDI status.** Like the recommendations above for loss of CDFI status, MDI should have clarity on the consequences and an opportunity to "cure." We also note that MDIs that are also CDFIs should not be expelled from ECIP and their stock or subordinated debt sold if they lose one designation but not the other.

S Corp and Mutual Disadvantages: **We urge Treasury to explicitly clarify within the legal documents that S Corp and Mutual Banks have the ability to convert their tax status at any time during their participation in ECIP without incurring penalties. T**here are numerous disadvantages to S Corp and Mutual Banks participating in ECIP (relative to C Corps), many of which stem from the statute and regulatory provisions beyond the control of Treasury. Given these disadvantages, and to encourage the fullest participation possible, Treasury should make it absolutely clear that ECIP participating S Corp and Mutual banks may convert their tax status without incurring penalties or additional costs outside of those associated with the tax status itself. Treasury should do everything in its power to ensure these elective changes are as frictionless as possible.

Specific Comments

Document: Certificate of Designation for Senior Non-Cumulative Perpetual Preferred Stock

Standard Provisions

Section 7 of the Certificate of Designation grants Treasury the right to send board observers and elect "preferred directors" in the event of an ECIP participant's nonpayment of dividends for five (5) periods. While these are understandable precautions, they can be revised to be more practical. This section can be improved in two key areas:

CONFIDENTIAL MATERIALS: The document does not account for the range of confidential materials that an ECIP bank would need to withhold from an observer or "Preferred Director" in order to meet confidentiality obligations. Currently, ECIP participants may only withhold confidential materials from observers and Preferred Directors "subject to disclosure limitations under applicable law." However, many confidential items are contractual in nature, e.g., confidentiality agreements surrounding M&A activities and proprietary strategy, and are probably not included under "applicable law.

Treasury should allow banks to require appointed "observers" and "Preferred Directors" to sign confidentiality agreements in favor of the bank, and limit the observer's use of confidential information. In the case of Preferred Directors, the confidentiality agreement might allow the Director to share confidential information with Treasury, and put the duty on Treasury to keep the information confidential.

CONFLICTS OF INTEREST: A Preferred Director might face conflicts of interest representing the interests of both Treasury and the Bank. A conflict is especially likely here, where the triggering event is missing dividends likely due to financial trouble. The standard solution to this problem would be for the board to appoint a special committee, comprised of only the independent and disinterested directors, with the full authority to negotiate, discuss, and ultimately approve actions -- but this would disenfranchise the Preferred Director.

Treasury should consider language limiting Preferred Directors' participation in matters implicating Treasury's (or another holders) interests.

Securities Purchase Agreements (SAPs)

Article II - PURCHASE; CLOSING

*A***s noted above, we urge Treasury to strike references to the Investment and Lending Plan from the legal documents in their entirety.** Section 2.3(m) requires participants to submit an Investment and Lending Plan, this time as a required condition of closing. *By including reference to these documents here, and requiring representations to their accuracy in Sections 3.1(d)(ii) and (iii) Annex A-1, Treasury gives the appearance that participants will be required to meet the exact performance and activity levels submitted in their original applications.* The inclusion of the Lending and Investment Plan in the legal documents appears to contradict assertions made by Treasury prior to the release of these documents. Participants understood then that the Plans would not be considered thresholds for determining compliance. We do not believe these plans should be part of the purchase and closing document submission, and they should not be a benchmark for compliance with other terms and conditions.

Article III - REPRESENTATIONS AND WARRANTIES

CDBA urges Treasury to encourage transparency and allow participants more opportunities to make detailed disclosures, at their option. Article III of the Securities Purchase Agreement permits just seven (7) schedules (A through G) for participants to disclose exceptions to the representations and warranties required. However, there are 24 representations. While other representations have a materiality and material adverse effect (MAE) qualifier, some participants may appreciate the flexibility to disclose more information. Providing more opportunities for disclosure would be in the interest of both Treasury and participants, as it would help avoid inadvertent breaches of representations or warranties, or disputes at a later time over what may or may not be MAE.

As in Article II, we strongly urge Treasury to strike References to the Investment and Lending Plan from the legal documents in their entirety*.* Treasury has verbally maintained that participants would not be held to performance goals beyond: (1) the required interest or dividend payments; or (2) the maintenance of the CDFI certification that qualified them for the program. Referencing the Investment and Lending Plan in the Representations and Warranties section suggests that Treasury is conflating the application process with the system for establishing compliance. Participants are concerned that reference to these documents in the Representations and Warranties sections under 3.1(d)(ii) and (iii), and Annex A-1 of both Securities Purchase may be interpreted to hold participants to the exact performance and activity levels outlined in their Lending Plan *over the life of the investment*. *Treasury should not hold participants to the performance and activity levels submitted in the Investment and Lending Plans as exhibits to their applications. If it is not Treasury's intent, we urge that it be clarified.*

Separately, Section 3.1(b), Capitalization in both agreements asks for a schedule of 5% shareholders. However, the threshold to track ownership for community banks is 10%. Only public reporting companies track ownership of 5%. **The ownership-reporting threshold should be appropriate to the reporting status of the company, rather than set by default at 5%.**

CDBA urges greater clarification in Section 3.1(b). First, it is not clear whether participants will be able to issue more options after the Capitalization Date and information reported on Schedule B. We ask the agency to clarify that this will indeed be allowed. Second, please clarify whether or not the following language allows a recipient Bank Holding Company to have a Holding Company line of credit that is secured by the IDI Subsidiary stock it owns.

> *"If the Recipient is a Bank Holding Company or a Savings and Loan Holding Company, (x) the percentage of each IDI Subsidiary's issued and outstanding capital stock that is owned by the Recipient is disclosed on Schedule B; and (y) all shares of issued and outstanding capital stock of the IDI Subsidiary(ies) owned by the Recipient are free and clear of all liens, security interests, charges or encumbrances."*

Further, also related to 3.1(b), there are holding companies that have preemptive rights granted in the Articles of Incorporation. This right allows a shareholder to purchase shares to maintain their percentage ownership position if shares are issued. However, the Capitalization warranty for both C and S-Corps requires that the issued common shares not possess preemptive rights. Since Treasury will be in receipt of either a debenture or preferred stock, it is unclear why Treasury should prohibit common shares from possessing preemptive rights. **In the absence of a compelling interest, we ask that Treasury consider striking this provision.**

<u>Article IV - COVENANTS</u>

CDBA believes Article IV of both Securities Purchase Agreements is overly broad and we recommend amending it. Specifically, section 4.1(g)(v) in the Senior Preferred Stock Agreement and 4.1(h)(v) of the Subordinated Debt Agreement allow Treasury "sole discretion" to make unilateral amendments to the Quarterly Supplemental Reports to:

> "(A) reflect changes in GAAP, (B) reflect changes in the form or content of, or definitions used in, Call Reports, Reporting Form FR Y-9C or any other applicable reporting form or (C) *to make clarifications, technical corrections and/or any other adjustments as the Investor determines to be necessary or appropriate*." (Emphasis ours).

We strongly urge Treasury to strike the latter phrase (C). Participants must have more certainty about the reporting requirement that they will be agreeing to before entering into this agreement. Any changes must be transparent and follow a process that includes the method of notification, comment, and sufficient time to implement. The current language leaves too much open to interpretation and subject to unforeseen changes in the policy and operating environmental.

Related, in Section 4.1(g)(ii) of both the Senior Preferred Stock Agreement and Subordinated Debt Agreements, there is no provision for an ECIP participant to contest a finding by the investor of any sort. **CDBA believes there must be such a process outlined in the Agreements that includes the method of notification (in writing), appeal, and cure (please see Article V below for further discussion).**

Further, the section addressing Reporting Requirements (Senior Preferred Stock Section 4.1(h) and Subordinated Debt Agreement Section 4.1(i)) should be clarified to state that the Registration rights set forth in Annex E will *not* be used during the first ten (10) years of the investment.

CDBA requests written clarification on the intent of Section 4.1(k). It appears to hold a participant to provisions in Reg W whether or not the participant would ordinarily be subject to those provisions, except for transactions between Bank Holding Companies and their IDI subsidiaries. It is not clear what Treasury seeks to address with this clause.

Additional sections require clarification:

- The covenant requiring participants to develop an outreach plan (Senior Preferred Stock Section 4.1(l) and Subordinated Debt Agreement 4.1(m)) is vague. We ask that Treasury clarify what are the expectations for the level of detail required in this plan, including how the plan will be evaluated, and what its role will be in the closing process.

- Section 4.12(c)(ii)(A) states that participants must deliver financial statements "in any event within ninety (90) days" after the end of each fiscal year. *This is not possible for many ECIP participants, given many are small, closely held institutions. In several cases, banks are finding it increasingly difficult to get audited financials until the second quarter of the year*. We recommend that Treasury modify this section to allow submission of financial statements "within 120 days."

- Numerous banks have expressed concern regarding the S Corporation Status provision in section 4.2(b) of the Subordinate Debt agreement. Specifically, the language published February 2 regarding the S Corporation tax status of a participant appears to prohibit converting from an S Corp to a C Corp during Treasury's investment period. We respectfully request that this language be modified and disseminated in revised documents in the manner proposed by Ms. Carol Rodrigues in an email to a CDBA member bank executive on February 11, 20222:

  > *"If the Recipient is an S Corp as of the Signing Date, the Recipient shall not revoke or change such its status for federal income tax purposes as an S corporation within the meaning of Sections 1361 and 1362 of the Code or the status of any Recipient Subsidiary as a Q Sub within the meaning of Section 1361(b)(3)(B) of the Code <u>without the prior written consent of the Holders of the majority of the Subordinated Debt</u>.*" (Emphasis ours).

- We strongly recommend that Treasury revisit the negative covenant section regarding CDFI Status (Preferred Stock section 4.2 (b) and Subordinate Debt section 4.2(c)). Specifically, we urge Treasury to clarify that certifying to this covenant *would not apply* in the event of changes in the certification rules that are beyond the control of the ECIP participant. Treasury should further clarify that it will be the CDFI Fund's responsibility to set cure periods in the event of these changes. This is especially important now because the CDFI Fund recently announced its intent to revise its CDFI certification rules for the first time since the program's inception (25+ years). At this junction, there is great uncertainty as to how the new requirements may affect ECIP participants. Further, external circumstances may constrain a participant's ability to deploy ECIP capital in a timeframe that is consistent with maintaining its CDFI status. Because the CDFI Fund is considering *future* changes that are *unknown* and may entail requirements that are beyond the control of current CDFIs, this makes it nearly impossible for CDFIs to agree to such a covenant.

  Further, for the purposes of this negative covenant, we strongly recommend that Treasury provide both CDFI and MDI ECIP participants a remedy for the loss (temporary or permanent) of either CDFI or MDI status in the event of a merger or other form of consolidation. This remedy should include (but not be limited to) the ability to repurchase shares from Treasury on non-punitive terms. CDFI and MDI banks are subject to the same market forces as conventional insured depositories. ECIP participants should not be penalized for making business decisions that acknowledge the need to remain efficient, competitive and operate at scale in order to continue serving their communities.

Article V - REMEDIES OF THE INVESTOR UPON BREACH

All three Sections of Article V of both Securities Purchase Agreements provide Treasury "sole discretion" to make critical determinations. This authority is too broad. It creates uncertainty, given the initial investment period will extend over several administrations. ***We urge Treasury to strike the "Sole discretion" provision from all of these Sections.*** Related, the notification method and cure period mentioned in 5.3, Additional Remedies, imposed at Treasury' sole discretion, (with only seven (7) days to either accept Treasury's proposed remedy, propose an alternative remedy, or provide information and documentation contesting Treasury's proposed determination), is unworkable for minor and major instances alike.

Section 5.3(a) is not specific about the manner of informing a participant of noncompliance. Such a consequential notice requires a formal communication. The statement that Treasury "may" notify the Recipient in writing should be revised to replace "may" with "will."

In addition, we urge Treasury to strike Sections 5.3(c) and (d) in their entirety. Section 5.3(c) addresses how Treasury will make a final determination of noncompliance and 5.3(d) requires participants to waive the right to judicial review. The process for determining, sanctioning, and curing noncompliance must be defined and independent of Treasury's "discretion." Specifically:

- **CDBA believes Treasury must define noncompliance more explicitly.** The documents do not clearly state what events will be minor or major "material" events of noncompliance. If a bank makes technical errors, and corrects them in a reasonable amount of time, such errors should not trigger a host of remedies that could fundamentally reshape the program for a CDFI. Treasury should also state that outside factors such as economic recessions, increases in interest rates, labor shortages (including shortages of qualified lending officers and support personnel), all be considered in this equation.

- **In the absence of a judicial appeal process, we strongly urge Treasury to outline in the documents a process for dealing with breaches or violations leading to noncompliance.** The documents do not clearly state what will be the process for banks to appeal or present facts and circumstances to contest a potential finding of noncompliance. *The process should cover notifying participants of breaches as well as an appeal process that includes a third party adjudicator.*

- **CDBA strongly recommends Treasury allow for, and define "cure periods."** This section makes no provision for a "cure period." ECIP participants are active lenders in dynamic markets; the potential for a change in the operating environment to cause noncompliance must be considered. ECIP banks must constantly balance the needs of their CDFI target markets with the same market realities (growth, safety and soundness) that are realities for conventional banks. Given the potentially dire consequences for communities if ECIP capital is impaired within or transferred from local institutions, we ask that cure periods begin by allowing participants to make a good faith effort to remedy any noncompliance, and follow with a generous cure period that recognizes the challenging environment within which these banks have long operated in good faith.

Participants are inferring potential sanctions in other parts of the securities purchase agreements (i.e. being barred from participation in CDFI Fund or other Treasury programs, etc.), because sanctions are not clearly delineated outside of the threat of being "reported." This creates uncertainty. Participants require a foreknowledge of the consequences of noncompliance in order to make informed decisions. For example:

- **We recommend that Treasury clearly identify the consequences for noncompliance and then consult the processes provided by the CDFI Fund as a model for how to communicate and manage those consequences.** For example, while Treasury asserts there is no statutory authority to "clawback" investments, bankers' have expressed this concern. This is a clear example of how the provisions create uncertainty through lack of definition. However, this can be easily mitigated. We advise ECIP to consult with the CDFI Fund given their experience successfully managing this challenge while administering multiple programs over 25+ years.
- **Sanctions for noncompliance should be limited and restricted to the confines of ECIP.** Treasury should not consider disqualification from other programs, whether managed by Treasury, the CDFI Fund, or other government agencies or departments, as a consequence of noncompliance. It is insufficient to think of referrals to other agencies or departments as "only" referrals, given their lack of definition. There is concern that ECIP participants could be "blackballed" from programs operated by other Federal agencies (i.e. HUD, SBA, USDA) that could be detrimental to the health of the financial institution and its communities. Either of these would be an unduly harsh sanction for noncompliance, and would undermine the purpose of the statue itself.

<u>Article VI - ADDITIONAL AGREEMENTS</u>

Treasury should modify the Section addressing Transfer (Preferred Stock Agreement Section 6.3 and Subordinate Debt Section 6.6). First, we suggest Treasury clarify Preferred Stock Agreement Section 6.3(a)(iv) and Subordinate Debt Section 6.3(f)(iv) to ensure that the "Eligible Financial Institution" referred to is the "Insured CDFI", rather than the "nonprofit Affiliate:"

> *"With the prior consent of the Recipient (which may not be unreasonably delayed, conditioned or withheld), the Investor may Transfer all or a portion of the Preferred Shares for no consideration or for a de minimis amount to a mission-aligned nonprofit Affiliate of an Eligible Financial Institution* ***that is an Insured CDFI*** *participating in the ECIP ~~that is an Insured CDFI~~ (an "Eligible Nonprofit").*

Second, Treasury should clarify the provision addressing participant reporting in the event of a transfer of securities. Preferred Stock Agreement Section 6.3(a)(v) and Subordinate Debt Sections 6.3(f)(iv) and (v) state the investor shall not transfer the investment prior to the tenth anniversary without prior consent of the issuer which consent "may not be unreasonably delayed, conditioned or withheld." The term "unreasonable" should also be more clearly defined.

We further recommend that upon the sale of the investment, reporting requirements should no longer apply unless, in the event of a sale prior to year ten (10), the bank elects to report qualified lending in order to achieve rate reductions agreed to in advance by a third party investor.

<u>Article VII - MISCELLANEOUS</u>

We recommend that Treasury clarify what, if any, provisions would govern the behavior of a new, non-affiliate investor. Article VII, Section 7.1(c), Termination, of the Preferred Stock agreement states the agreement may terminate on *"the date on which the Investor has transferred all the Preferred Shares to third parties which are not Affiliates of the Investor."* The equivalent section in the Subordinate Debt Agreement (Article VIII, Section 8.1) makes no reference to these other third parties. Would the same, or a similar provision, be made for the Subordinate Debt as for the Preferred Stock?

Section 7.3, Amendment, of both Securities Purchase Agreements is overly broad. The provision allows Treasury "sole discretion" to make unilateral amendments to the Agreement "to comply with, or conform to, any changes after the Signing Date in any federal statutes, any rules and regulations promulgated thereunder *and any other publications or interpretative releases of the Investor governing ECIP*." (Emphasis ours). Under the Troubled Asset Relief Program (TARP) such unilateral amendment was reserved to Treasury only in the event of changes in federal law or regulations. Including the phrase "*and any other publications or interpretative releases of the Investor governing ECIP"* allows Treasury to both make changes without consultation and interpret those changes without consultation. As this authority is broader even than the Authority reserved under TARP, we strongly urge Treasury to strike the latter phrase.

Annex D - FORM OF ECIP INTERIM FINAL RULE CERTIFICATION

We believe that the certifications required of participants under Annex D require a qualifier. Ultimately, many of the representations cannot be affirmatively known, since regulators often will generally not provide affirmative guidance, rather, only statements of non-objection. Specifically, we propose to add a knowledge qualifier under Section 2 to read as follows:

> "From the Closing Date through the date of this certification, **to the best of my knowledge**, the Recipient has complied with the requirements in: . . ."

Closing

CDFI and MDI banks are eagerly preparing to leverage ECIP capital for the benefit of millions of people in the nation's most distressed communities. We appreciate the hard work and thoughtful consideration of Treasury in launching ECIP. We believe ECIP represents an unprecedented opportunity to expand high-impact, market-based solution within COVID-affected communities. We look forward to a fruitful resolution to these important issues.

If you have any questions, please contact Jeannine Jacokes, CDBA Chief Executive Officer, at (202) 689-8935 ext. 222 or jacokesj@pcgloanfund.org.

Sincerely,

Jeannine S. Jacokes

Jeannine Jacokes
Chief Executive Officer
Community Development Bankers Association