CDBA Community Development Bankers Association
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January 22, 2021

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

Re: Draft Application for Emergency Capital Investment Program

Dear Secretary-Designate Yellen:

On behalf of the members of the Community Development Bankers Association (CDBA), we respectfully submit the following observations and recommendations on the draft "Application Instructions and Materials for the Emergency Capital Investment Program (ECIP) as authorized under H.R. 133, Division N "Additional Coronavirus Response and Relief". This letter is a follow up to CDBA's December 29, 2020 and January 6, 2021 correspondence on the selection criteria and application requirements.

CDBA is the national trade association for banks and thrifts that are US Treasury-designated Community Development Financial Institutions (CDFIs). 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 large majority of all CDFI banks, thrifts, and bank holding companies eligible to participate in the Emergency Capital Investment Program (ECIP). ECIP is designed to ensure the economic recovery extends to all corners of the economy, particularly low-income and minority communities, which is well aligned with the historic work of CDFI banks.

Emergency Capital Investment Program Draft Application Instructions and Materials[1]

Right Sizing of Investment

We are concerned that the application does not communicate how the Department will determine the appropriate size of investments that will be made. As highlighted in previous letters, despite the $9 billion available, CDBA believes there is the real possibility that Treasury has insufficient resources to meet demand given the maximum investment amount authorized in the statute. The current draft application simply restates the maximum investment amounts outlined in the statute and provides no guidance to potential applicants on factors that will be considered. As we have previously stated, we urge the Department to find a way to "right size" its investments to ensure the amount of capital is meaningful, but ensures that many communities can benefit. To meet the intent of the statute, it is essential for the Treasury Department to ensure its system for prioritizing requests ensures resources

[1] "Draft Emergency Capital Investment Program Draft Application Instructions and Materials" www.home.treasury.gov/policy-issues/cares/emergency-capital-investment-program, Accessed January 19, 2021

are channeled to the maximum extent to institutions that have the strongest track record of serving low- and moderate-income, minority, and other disadvantaged communities consistent with Congressional intent and the purposes outlined in statute.

Prioritization of Resources

We are very concerned that the proposed definition for Low- and Moderate-Income (LMI) is so expansive as to undermine the intent of Congress. The draft application includes a definition of LMI *as "less than" 120% of AMI or median family income (MFI)*. This definition is inappropriate given Congressional intent to target ECIP resources to communities most negatively impact by COVID. The vast majority of statistics available on COVID health and economic outcomes clearly indicate that households and communities with lower income have disproportionately borne the brunt of the crisis. Likewise, minority populations have been disproportionately impacted, of which a disproportionate number reside in lower income areas.

We strongly urge the Department to use income definitions that are consistent with existing Federal definitions in use by CDFI and MDI banks and credit unions. The CDFI Fund uses 80% of median family income as its definition of "Low Income" and the Community Reinvestment Act (CRA) defines "Low and Moderate Income" as 80% of median family income. Defining LMI with a 120% AFI or AMI upper limit is wholly inappropriate. By setting a threshold that includes incomes between 80% and 120%, the draft application encompasses incomes correspondingly defined as *middle* income under CRA. *Middle* income communities are not contemplated or included in the legislation.

We strongly believe Treasury should not include a definition of LMI which encompasses middle income communities for ECIP eligibility. This is especially important since the inclusion of non-CDFI certified MDIs means that they will only need to demonstrate 30% of transactions going to "LMI" tracts for the purposes of the program. The difference is huge: while just 36% of people live in low-income census tracts as defined by 80% are Area Median Income, more than 76% live in LMI tracts under the unprecedented, expansive 120% definition.

As stated in previous letters, we strongly urge Treasury to maximize statutory purpose and make the most effective use of taxpayers' dollars, by ensuring that CDFIs receive highest priority in the selection process. Secondly, among this subgroup of CDFIs, we recommend that the small subset of CDFIs that are also MDIs should receive the very highest priority. Institutions that are not certified and do not meet the 60% criteria should be ranked below the CDFIs in order of the proportion of their total lending and other activities targeted to eligible CDFI Target Markets.

Pending Materials and Requirements

While we fully understand the strict statutory deadline under which the agency must issue an application and rules***,*** *we strongly urge the Treasury to solicit industry comments on pending program components such as term sheets, regulations or other guidance, prior to finalization*. We specifically urge Treasury to ensure that pending items identified in the application -- *term sheets (page 6), the final agreement and reporting requirements* (page 9), *organizational chart requirements (page 11), and restrictions on executive compensation, dividends, and share buybacks per the final rule (page 14)* -- are released in draft form with sufficient time for industry representatives to provide comments.

Potentially Overbroad Exclusion of Institutions Based on Past Financial Performance

We are concerned that the draft application includes the very broadest definitions of "Troubled Institution."[2] These definitions extend the exclusion of institutions beyond those with truly troubled composite ratings or subject to serious cease and desist letters, to include those subject to a "written agreement" to "improve their financial condition."[3]

While we believe financial health is an important consideration, we do not believe it should be disproportionately weighted or necessarily exclusionary. In fact, we believe investments from this program have the capacity to strengthen the capacity of participating financial institutions, particularly MDIs that have faced systemic challenges toward raising capital. Under section 308 of FIRREA, Treasury and the regulatory agencies have an obligation to preserve and promote MDIs, but have never had a significant federal appropriation of capital to use, at least partially, in service of this mandate. The ECIP's selection criteria should reflect this obligation.

Access to Subordinated Debt by Both C Corp and Sub S Banks

We are concerned that the draft application may unnecessarily restrict the availability of one form of desirable and appropriate capital from use by at least one type of bank organizational and capitalization structure:

- The list of pending term sheets on page 6 uses the term "Subordinated debt terms for S Corporations term sheet." This suggests that subordinated debt may not be available to banks organized as C Corps.
- On page 13, "Senior Preferred Stock" is an actual investment type, while the other options identified as "investment types" are actually "entity types" (e.g. "mutual institutions", "s corporations" and "credit unions"). This further suggests that subordinated debt will be off limits to C Corps.

We understand that the legislation authorizes Treasury to offer financial instruments suitable for Sub S banks. However, while the statute clearly contemplates involvement of C Corps with the explicit authorization of issuance of preferred stock, we note that even C Corps may have an interest in utilizing some portion of capital in the form of subordinated debt depending on their capitalization needs. Thus, any investment instruments and term sheets should be structured to anticipate this variety.

In conclusion, the membership of CDBA fully appreciates the thoughtful consideration of the Treasury and its staff as the Emergency Capital Investment Program is implemented. This is a wonderful opportunity to expand the positive influence of a long-standing market-based solution within COVID-impacted communities, and we sincerely appreciate the opportunity to comment and offer feedback. We look forward to future discussion on these important issues.

[2] "Troubled Condition" has the meaning given to such term under 12 C.F.R. § 303.101(c) for an Applicant whose primary regulator is the FDIC, under 12 C.F.R. § 225.71 for an Applicant whose primary regulator is the Fed, under 12 C.F.R. 5.51(c)(7) for an Applicant whose primary regulator is the OCC, and for an Applicant whose primary regulator is the NCUA, the meaning given to such term under 12 C.F.R. 700.2.

[3] 12 CFR § 303.101 (c)(3) and (4)

If you have any questions, please contact Jeannine Jacokes, CDBA Chief Executive Officer, at (202) 207-8728 or *jacokesj@pcgloanfund.org*, or Brian Blake, CDBA Public Policy Director at (646) 283-7929 or *blakeb@pcgloanfund.org.*

Sincerely,

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