

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF THE TREASURY

### Community Development Financial Institutions Fund

#### 12 CFR Part 1805

#### Announcement Type: Notice and Request for Information

**SUMMARY:** The Community Development Financial Institutions Fund (CDFI Fund), Department of the Treasury, requests comments from the public regarding the current policies and procedures to certify an organization as a Community Development Financial Institution (CDFI). Capitalized terms found in this notice are defined in the regulations that govern the CDFI Program, in our regulations.

**DATES:** Written comments must be received on or before March 10, 2017 to be assured of consideration.

**ADDRESSES:** Submit your comments via email to David Meyer, Certification, Compliance Monitoring and Evaluation (CCME) Manager, CDFI Fund, at [cdfihelp@cdfi.treas.gov](mailto:cdfihelp@cdfi.treas.gov).

**FOR FURTHER INFORMATION CONTACT:** David Meyer, CCME Manager, CDFI Fund, 1500 Pennsylvania Avenue NW., Washington, DC 20220 or email to [cdfihelp@cdfi.treas.gov](mailto:cdfihelp@cdfi.treas.gov). Information on CDFI Certification may be obtained on the CDFI Fund's Web site at <https://www.cdfifund.gov/programs-training/certification/Pages/default.aspx>.

**SUPPLEMENTARY INFORMATION:** Pursuant to the CDFI Fund's authorizing statute (the Community Development and Regulatory Improvement Act of 1994, 12 U.S.C. 4701 *et seq.*) (the Act) and the regulations that govern the CDFI Program (12 CFR part 1805), a community development financial institution (CDFI) is a legal entity that: (i) Has a primary mission of promoting community development; (ii) serves an investment area or targeted population; (iii) provides development services in conjunction with equity investments or loans, directly or through a subsidiary or affiliate; (iv) maintains, through

representation on its governing board or otherwise, accountability to residents of its investment area or targeted population; and (v) is not an agency or instrumentality of the United States, or of any State or political subdivision of a State.

In accordance with the statutory definition, the CDFI Fund has established seven tests, described below, to certify an Applicant financial entity as a CDFI. Applicants provide legal documentation, narratives and financial data to demonstrate their ability to meet the certification criteria. Applications are accepted on a rolling basis and may be submitted more than once, if declined. Certified CDFIs must complete an annual recertification process to update the financial and organization data contained in the original certification application. CDFI certification application and supplemental information can be found on the CDFI Fund Web site.

With this Request for Information (RFI), the CDFI Fund is embarking on a review of its CDFI certification tests to ensure that they continue to meet the statutory and regulatory requirements and the evolving nature of an industry that has changed significantly since the CDFI Fund's establishment in 1994. Since the first CDFIs were certified, the universe of certified CDFIs has grown from 196 in 1997 to over a 1,000 in number today, with over \$100 billion in total assets and headquarters in all fifty states and several territories. It is a goal of the CDFI Fund to foster a diversity of CDFI types, activities, and geographies, and to enable market-driven solutions to emerge in a constantly changing economic environment.

In addition, the significance of CDFI certification has increased over the years. While CDFI certification continues to make an entity eligible for various programs at the CDFI Fund (CDFI Program, Native American CDFI Assistance Program, Capital Magnet Fund, and the CDFI Bond Guarantee Program), because it is seen as indicating a strong community development mission, it also has come to serve as a qualifier for other Federal government programs and benefits. These include, among others, the Small Business Administration's Community Advantage program and Federal Home Loan Bank membership, as well as consideration for certain investments

under the Community Reinvestment Act and, pursuant to 12 CFR 1026.43(a)(3)(v)(A), an exemption from the Consumer Financial Protection Bureau's "Ability to Repay" rule. The CDFI Fund believes that it is important that certification remain a mark of confidence in an organization's commitment to a community development mission.

It also is imperative that CDFI certification criteria continue to support, rather than inhibit, the growth and reach of CDFIs, especially as it relates to their ability to take advantage of new technologies. These new technologies create the potential for mission-driven organizations like CDFIs to extend their reach and impact in order to improve access to financial products and services for underserved communities and populations wherever they are. This raises questions, however, of whether CDFI certification—particularly in terms of a CDFI's ability to define a Target Market and demonstrate accountability to that Target Market—is currently designed to enable such scope, which was neither possible nor envisioned when the criteria were first established.

Through this RFI, the CDFI Fund seeks feedback from the public on certain aspects of the certification criteria and process, as listed in Sections I and II. We also seek any additional information beyond these questions that members of the public believe would assist in updating the CDFI Fund's certification policies. The CDFI Fund intends to consider the feedback received through this RFI as it reexamines its current criteria and proposes any revisions to its CDFI certification policies. In making any changes to the existing criteria, the CDFI Fund will seek to ensure that certification continues to foster a diversity of CDFI types, activities, and geographies; allows for innovation that supports the growth and reach of CDFIs; and signifies confidence in a strong community development mission.

#### I. Certification Criteria

**A. Legal Entity:** To satisfy the legal entity test, the CDFI Fund requires evidence of an Applicant's incorporation/organization/establishment, such as IRS documentation, establishing documents filed with appropriate authorities, or

charter numbers for Insured Depository Institutions and Credit Unions at the time of certification application.

1. The statute does not indicate how long an organization must be in existence to be considered a “person (other than an individual).” Should there be a minimum period of time an organization should be in existence before applying for CDFI certification? If so, how long? If not, why not?

2. Is there additional documentation, beyond an organization’s establishing documents filed with State jurisdictions, that should be accepted to demonstrate that an organization is a legal entity?

B. *Primary Mission:* The statute states that a CDFI must have “a primary mission of promoting community development,” but specifies few criteria for meeting that test. The CDFI Fund currently allows Applicants for certification to meet this test by providing board-approved organizational documents that demonstrate that the Applicant has a primary mission of promoting community development along with a narrative statement describing how the Applicant’s mission is consistent with the CDFI Fund’s and a brief description of Financial Products offered. Insured Credit Unions that have received a Low Income Designation from the National Credit Union Administration are deemed to have met this criterion by virtue of their designation.

1. Should the currently required board-approved documentation and narrative statement be sufficient to demonstrate an Applicant’s primary mission, or should the CDFI Fund apply a more prescriptive primary mission test? For example, should the CDFI Fund provide a more explicit, possibly quantitative, definition of what it means to “promote community development” that Applicants would be required to meet? If so, what should be the definition and what test should be applied? Are there criteria that the CDFI Fund should not consider and why?

2. Should there be different standards for meeting the primary mission test for nonprofit versus for-profit organizations, particularly for-profits that are not Insured Depository Institutions? If so, what different standards should be applied?

3. What evidence can the CDFI Fund use to confirm an Applicant’s adherence to a stated community development mission? For example, how can the CDFI Fund distinguish between an organization that is fully committed to a community development mission and one that targets the same communities or populations as a CDFI and claims a

community development mission, but whose actions do not demonstrate intent to create community development and/or are predatory in nature?

4. To what extent should the CDFI Fund evaluate the Financial Products and/or Financial Services offered by an Applicant to determine its ability to meet the primary mission test? What test would the CDFI Fund apply in any such evaluation of Financial Products and/or Financial Services?

5. Currently, by statute, Depository Institution Holding Companies wishing to be certified as CDFIs must provide documentation that their parent, Subsidiaries, and Affiliate organizations collectively meet the primary mission test. Should the CDFI Fund also make this a requirement for Non-Regulated CDFIs, for example, a Non-Regulated for-profit financial institution? Why or why not?

C. *Financing Entity:* Insured Depository Institutions and Credit Unions are deemed to automatically meet this criterion. Non-Regulated CDFIs must demonstrate that they engage in direct financial activity (*e.g.*, the provision of Financial Products, Financial Services, and Development Services) as reflected on financial statements and executed notes, and must dedicate a predominance of their assets to Financial Products, Development Services, and/or similar financing.

1. The CDFI Fund does not currently define the term “predominance,” but in practice accepts a plurality of assets as meeting this criterion. Should the term “predominance” be defined more specifically, and if so, how?

2. Should entities that provide less than a plurality of financing activity ever be considered Financing Entities? If so, under what circumstances and is there a minimum level of activity that should be required?

3. Currently, the amount of assets and staff time dedicated to financing activities are used to measure the level of a CDFI’s financing activity. How else could a CDFI’s level of financing activity be measured?

4. For Non-Regulated CDFIs, is the current “predominance of assets” test appropriate, or should alternatives or additional considerations be permitted?

5. Should Non-Regulated CDFIs be permitted to include the financing or Financial Services activity of a mission-driven Subsidiary as part of the assessment of the parent CDFI’s financing activities?

6. Should Non-Regulated CDFIs be permitted to rely upon the financing or Financial Services activity of a parent CDFI as part of the assessment of the

Subsidiary’s or Affiliate’s financing activities?

7. Should an organization applying for CDFI certification be required to transact a minimum number or dollar amount of loan or equity investments to be considered a financing entity?

Should the Applicant be required to have at least one or more years of loan or equity investment origination? If so, what should those rules be?

8. Should an organization that only services loans or Equity Investments or has very few transactions be considered a financing entity?

9. Should certified CDFIs be required to offer loans or Equity Investments each year, in order to maintain certification status?

10. Currently, non-arms-length transactions do not contribute to meeting the financing entity criteria. For example, transactions made with Subsidiaries and/or Affiliates are not considered to be arms-length transactions. Should some transactions with Affiliates be permissible as evidence of an organization being a financing entity? If so, which ones? How should an “arms-length transaction” be defined?

11. Should Applicants be required to disclose the expected amount and types of lending that may be made to Affiliates and Insiders in their certification applications? Should such transactions be limited as a condition of certification? Why or why not?

12. Current CDFI Program regulations use the term “similar financing activities” in its definition of the term “Financial Products.” How should the CDFI Fund determine what is included in “similar financing activities?”

D. *Serves an Investment Area or Targeted Population:* Applicants for certification must identify the Investment Area(s) and/or Targeted Population(s) they intend to serve as their Target Market.

1. *Threshold Target Market Test:* Although no threshold level of service is indicated in the statute or regulation, current CDFI Fund policy requires that an organization must serve at least one eligible Target Market and must direct at least 60 percent of all of its Financial Product activities to one or more eligible Target Market to qualify for certification. In general, both the number and dollar amount of the organization’s Financial Product activities should be at least 60 percent of all of its Financial Product activities in the most recent fiscal year. If an organization does not meet the 60 percent threshold in terms of either number or dollar amount of transactions (but not both), the organization can

provide an argument as to why the figure is less than 60 percent and the CDFI Fund reserves the right to accept or reject the explanation.

a. Is the current standard that 60 percent of a CDFI's Financial Product activities must be in qualified Target Markets the right standard? If not, what percentage of transactions should be in and/or to a qualified Target Market to demonstrate that an organization serves that Target Market and why?

b. Should there be different thresholds for different institution types (*i.e.*, Insured Depository Institutions and Credit Unions, nonprofit loan funds, and venture capital funds)?

c. The CDFI Fund currently relies on self-reported summary data submitted by Applicants to demonstrate that they meet the Target Market threshold test. Should statistical sampling of transactions be required to establish a current baseline of activity and document the Target Markets that they are serving?

d. The August 31, 2015 Interim CDFI Program Regulations added the provision of Financial Services as a means of demonstrating that an applicant serves a Target Market. However, the CDFI Fund does not currently have a method of recognizing or applying the provision of Financial Services toward the current 60 percent threshold test for certification. In addition to the level of Financial Products provided by an Applicant, how should an Applicant receive credit for the provision of Financial Services toward meeting any threshold test? How should this be measured? If an Applicant requests credit for providing Financial Services, should there be a separate minimum level of Financial Products that must be provided by the Applicant?

e. The CDFI Fund currently first considers an Applicant's financial activity during its most recent fiscal year in determining whether it meets the threshold test. Is this the appropriate time period to consider, or should a longer period of time be considered? If so, should the applicant be required to meet the threshold in each year of the test, for a time period, or should an average be considered? Should the CDFI Fund consider an Applicant's portfolio of loans outstanding?

2. Investment Areas: The statute requires that an Investment Area must meet at least one of the economic distress criteria (poverty rate greater than 20 percent; Median Family Income (MFI) at 80 percent or below specific MFI benchmarks; unemployment rate 1.5 times the national average) and has significant unmet needs for Financial

Products and Services, or is wholly located within an Empowerment Zone or Enterprise Community.

a. The CDFI Fund's current practice is to define Investment Areas that are composed of one or more units of geography that meet certain distress criteria. Units include but are not limited to counties, census tracts, and Indian Reservations. Should the CDFI Fund change this practice? If so, how?

b. Currently the CDFI Fund allows Investment Areas to be composed of a set of contiguous geographic units that may include a small portion of units that individually do not qualify as Investment Areas. Should the CDFI Fund continue this practice, or should all units within the Investment Area meet the Investment Area qualifications?

3. Targeted Populations: Targeted Populations include Low Income Targeted Populations (LITP) and Other Targeted Populations (OTP) for a specific geographic unit. LITP, for a specified geographic unit, by statute includes individuals whose family income (adjusted for family size) is 80 percent of the area MFI (for metropolitan areas). LITP in non-Metropolitan Areas is the greater of 80 percent of the area MFI; or 80 percent of the statewide non-Metropolitan Area MFI. The CDFI Fund currently includes, for a specific geographic unit(s), African-Americans, Hispanics, Native Americans, Native Alaskans, Native Hawaiians, and Other Pacific Islanders among the groups automatically considered eligible for an OTP Target Market. Applicants are permitted to seek OTP recognition for other populations by demonstrating that the group lacks access to capital.

a. Should the Targeted Populations be expanded to automatically accept more specifically defined Other Targeted Populations that are eligible for other Federal programs that support economic development in Low-Income communities? If so, which ones and why?

b. CDFIs currently are approved to serve Targeted Populations within a defined geographic unit at below and up to a national level. Should all Applicants proposing to serve Targeted Populations be approved to serve such Target Markets nationally?

4. National Target Markets: Currently, in order to be certified with a Target Market national in geographic scope, CDFIs need to show that they have conducted their financing activities broadly across the variously defined regions of the country, (*e.g.* Northeast, West, Midwest, South, Southeast, etc.)

a. Given that it is unlikely that most CDFIs that work broadly across the nation will complete transactions in every State every year, how can organizations demonstrate that they serve a national Target Market, whether for an Investment Area or for a Targeted Population? Should there be a certain minimum geographic dispersion of actual investments?

b. Some CDFIs serve multiple markets that are part of a multi-State region or are comprised of geographically unconnected markets. When should the CDFI Fund recognize these practices as constituting a national Target Market?

E. *Development Services*: A CDFI directly, through an Affiliate, or through a contract with another provider, must have a track record of providing Development Services in conjunction with its Financial Products and/or Financial Services. Development Services means activities undertaken by a CDFI, its Affiliate or contractor that promote community development and shall prepare or assist current or potential borrowers or investees to use the CDFI's Financial Products or Financial Services. For example, such activities include, but are not limited to, financial or credit counseling; homeownership counseling; and business planning and management assistance.

1. Should the CDFI Fund more explicitly define Development Services? If so, how should it be defined?

2. Should the CDFI Fund require CDFIs to provide a corresponding Development Service for each Financial Product and Financial Service?

3. Should a certified CDFI be required to offer each Development Service each year to maintain certification status?

F. *Accountability*: The CDFI Fund currently requires that a CDFI maintain accountability to its Target Market through representation on its governing board and/or advisory boards. Prior to recent changes in the regulation, a CDFI could demonstrate accountability through other mechanisms such as focus groups, community meeting, and/or customer surveys.

1. What percentage of a CDFI's board members should satisfy accountability rules? Should different percentages apply to different types of boards, *i.e.* governing vs. advisory boards?

2. Is representation on an advisory board sufficient to demonstrate accountability?

3. Should CDFIs be able to demonstrate accountability through means other than board membership? If so, how?

4. Is a business plan and a stratified, statistically significant random sample

of lending by asset class and location sufficient to document accountability? Under what circumstances?

5. Should accountability requirements differ based on a CDFI's type of Target Market, and if so, how?

6. How should the CDFI Fund assess accountability if a CDFI's Target Market includes borrowers or investees who are not members of a Targeted Population themselves (*e.g.*, small businesses, micro businesses, and affordable housing developers, charter schools), but whose "end-beneficiaries" are?

7. How should a CDFI demonstrate accountability to a national Target Market, in particular an Investment Area national in scope? Should there be a requirement to have local accountability to supplement a national governing or advisory board? In this context, how should the term "local" be defined?

8. How should an Applicant that utilizes a web-based lending platform, especially one that serves a national Target Market, demonstrate accountability?

*G. Non-Governmental Entity:* By statute, a CDFI shall not be an agency or instrumentality of the United States, or any State or political subdivision thereof. An entity that is created by, or that receives substantial assistance from, one or more government entities may be a CDFI provided it is not controlled by such entities and maintains independent decision-making power over its activities. In the CDFI Certification application, the Applicant must respond to a series of questions designed to surface/discover issues or circumstances that may prevent an Applicant from meeting this criteria.

1. Are the current standards for establishing that an Applicant is not owned or controlled by a governmental entity sufficient?

2. Are there additional or alternative questions and/or documentation the CDFI Fund should require to determine if an Applicant is an agency or instrumentality of a Federal, State or local government?

## II. Certification Policy and Procedures

A. Should the CDFI Fund request information on the reason for applying for certification and intended use (*e.g.*, funding requirement, marketing)?

B. Are there additional sources of data collected by other federal agencies that can be used to meet any of the seven certification tests? If so, please describe.

## III. General Certification Questions for Public Comment: Through This RFI, the CDFI Fund Invites Comments and Responses to the Following Questions Regarding CDFI Certification

A. "Community-based" is a term often used to describe CDFIs. How should "community-based" be defined and what does it mean for CDFIs to be "community-based"?

B. Although not defined in statute, the CDFI Fund allows Applicants that serve Native communities to self-designate themselves as Native CDFIs and apply for Financial Assistance and Technical Assistance through the Native CDFI Program. Applicants that self-designate as a Native CDFI must attest to providing 50 percent or more of their products and services to Native lands or Native populations. Should the CDFI Fund continue to allow Applicants to self-designate as Native CDFIs or should there be more defined standards that the CDFI Fund should verify? If so, what should they be?

C. Should CDFIs be allowed to be composed of multiple legal entities (Subsidiaries and/or Affiliates)? And if so, must a CDFI include all of its Subsidiaries and/or Affiliates for consideration?

D. Should CDFI certification standards have more "bright-line" tests, *i.e.* specific thresholds and benchmarks that are, where possible, quantitative in nature, or should the CDFI Fund maintain flexibility to evaluate Applicants on a case by case basis, even at the expense of certainty for applicants?

E. In addition to earlier questions regarding potentially different Primary Mission or Target Market standards based on institution type, are there other CDFI certification criteria standards that should vary based on institution type or the type of CDFI?

F. Should "start-up" entities be able to be certified? How should the term "start-up" be defined?

G. Are there additional areas of CDFI certification policy or the CDFI certification application review process that could use improvement? If so, how?

**Authority:** 12 U.S.C. 4701 *et seq.*; 12 CFR 1805.

**Mary Ann Donovan,**

*Director, Community Development Financial Institutions Fund.*

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**BILLING CODE 4810-70-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 15 CFR Part 922

[Docket No. 160907827-6827-01]

RIN 0648-BG02

### Mallows Bay—Potomac River National Marine Sanctuary; Notice of Proposed Rulemaking and Availability of Draft Environmental Impact Statement and Management Plan

**AGENCY:** Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

**ACTION:** Proposed rule.

**SUMMARY:** The National Oceanic and Atmospheric Administration (NOAA) proposes to designate approximately 52 square miles of waters encompassing and surrounding Maryland's Mallows Bay as the Mallows Bay—Potomac River National Marine Sanctuary (MPNMS or sanctuary). NOAA also proposes regulations to implement the sanctuary designation and establish the sanctuary's terms of designation to protect historical, archeological, and cultural resources of national significance. A draft environmental impact statement (DEIS) and draft management plan (DMP) have also been prepared for this proposed action. The purpose of this action is to supplement and complement current Maryland state regulations and resource protection efforts to ensure long term protection of the nationally significant collection of historic shipwrecks and other maritime cultural heritage resources. NOAA is soliciting public comment on the proposed rule, draft environmental impact statement, and draft management plan. NOAA will also begin consultations under Section 106 of the National Historic Preservation Act (NHPA) and solicit public comments specifically related to the identification and assessment of the historic properties within the affected area in compliance with Section 106 review process.

**DATES:** NOAA will consider all comments received by March 31, 2017. Public meetings will be held on the following dates:

- (1) March 7, 2017, 6:00 p.m. to 9:00 p.m., La Plata, MD, and
- (2) March 9, 2017, 6:00 p.m. to 9:00 p.m., Arnold, MD.

**ADDRESSES:** You may submit comments on this document, identified by NOAA—