



March 4, 2022

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

Re: MDI and CDFI Emergency Capital Investment Program

Dear Secretary Yellen:

Since its founding in 1927, the National Bankers Association (NBA) has served as a voice for minority depository institutions (MDIs). Our members include Black, Hispanic, Asian, Pacific Islander, Native American, and women-owned and -operated banks across the country. Many of our members are also Community Development Financial Institutions (CDFIs). We believe strongly in advocating for not only our member banks, but also the communities they serve. MDIs provide financial services to minority and low and moderate-income communities in twenty-eight states, the District of Columbia, Puerto Rico and Guam, and they are committed to providing economic revitalization in those neighborhoods. The Emergency Capital Investment Program (ECIP) has the potential to bring long-term, sustainable financial relief to millions of small businesses, underserved communities, and underbanked individuals and to increase the overall fairness of relief programs. MDIs are a discreet group of financial institutions that have demonstrated decades-long commitments to the very communities Congress is targeting with the ECIP.

The NBA is thankful for the effort and time the U.S. Department of Treasury put into designing and implementing the ECIP. The release of \$8.7 billion late last year will help support MDIs and CDFIs in their efforts to help minority-owned businesses and low- to moderate-income communities.

We have now had the opportunity to review the legal documents governing ECIP participation (Legal Documents) that the Treasury Department has made available on the ECIP website, and while we are grateful and appreciate that many of the substantive terms of the documents are consistent with the Term Sheets previously made available for our review, we continue to have significant concerns and reservations regarding the Legal Documents, including the following:

1. Loss of CDFI Status. Section 4.2(b) of the Securities Purchase Agreement requires a CDFI issuer to maintain its status as a CDFI during the term that the ECIP Securities are outstanding. If a CDFI issuer breaches this covenant, then the 10-year lock-up period and 18-month advance notice of a proposed transfer of the shares will no longer apply, meaning that Treasury could sell the shares to third parties subject only to the requirement that it provide a 10-day right of first refusal to the issuer. Under Section 5.3, Treasury may impose other remedies as well, in its sole discretion. This provision only applies to CDFI ECIP applicants. The provision is onerous, and at a minimum we believe it would be appropriate to permit the issuer significantly more time to exercise its right of first refusal. Further, we believe this provision unfairly penalizes MDIs that are also CDFIs, as an MDI that, as of the signing date of the agreement, is not also a CDFI would not be subject to any similar provision. We believe Treasury should implement policies that encourage more MDIs to qualify as CDFIs, not policies that could have the effect of causing MDIs to revoke their status as CDFIs, take action to delay or cancel a pending application for CDFI certification or penalizes them for being CDFIs. We specifically recommend that this language be amended as follows:

4.2 (b) CDFI Status. If the Recipient is a CDFI as of the Signing Date, the Recipient shall not proactively revoke its certification status as a CDFI, within the meaning of 12 U.S.C. § 4702 and in accordance with 12 C.F.R. § 1805.201. If Recipient's CDFI certification is revoked due to a change in CDFI certification guidelines, Recipient shall be granted 24 months to cure prior to enforcement of this provision. In addition, this provision shall not apply to any Recipient that is both an MDI and a CDFI as of the Signing Date.

2. Mergers with Non-CDFI/MDI Institutions. Section 4.2(a) of the Securities Purchase Agreement prohibits a Recipient from merging, consolidating, or otherwise transferring all or substantially all of its property or assets to another entity without Treasury's prior written approval, without providing any guidelines for the circumstances in which Treasury may approve such a transaction. This provision is burdensome and subjective, and the NBA believes it should be revised to better address the circumstances surrounding such a proposed transaction. We would propose potential alternatives such as: (a) describing guidelines in which Treasury would consent to such a transaction; (b) require the Treasury to engage in good faith negotiations for a redemption of the Preferred Shares in connection with such a transaction; or (c) remove the consent requirement entirely and replace it with a consequence or remedy in the event that a Recipient completes a transaction resulting in the loss of its CDFI/MDI status.
3. Transfers to Eligible Nonprofits. Section 6.3(a)(iv) the Securities Purchase Agreement allows Treasury to transfer the Preferred Shares, with the Recipient's prior consent, to a "mission-aligned nonprofit Affiliate of an Eligible Financial Institution participating in the ECIP that is an Insured CDFI" for no or *de minimis* consideration. The NBA is in support of this provision but respectfully requests that Treasury clarify this section to better address how this proposed transfer would work. Regarding the transfer provision, as it is written,

the Preferred Shares could be transferred to a nonprofit affiliate of any ECIP participant that is an Insured CDFI for no consideration, which would potentially provide a financial “windfall” for the transferee in the form of Recipient’s dividends and any future redemption of the Preferred Shares. We believe the intent was to permit a transfer only to an affiliate of the issuer of the particular ECIP shares and not to an affiliate of any of the other Eligible Financial Institutions participating in the ECIP.

Additionally, we ask you to clarify that the phrase “that is an Insured CDFI” is referring to the Eligible Financial Institution participating in the ECIP and not referring to the mission-aligned nonprofit Affiliate. If the latter, this would mean that the Affiliate would have to be a credit union, and we do not believe this is what Treasury intended here. We also ask that you clarify that Treasury is not requiring that the mission-aligned nonprofit Affiliate itself be a CDFI, but instead just that the Eligible Financial Institution also be an Insured CDFI.

4. Compliance with Additional Regulations. Article V of the Securities Purchase Agreement provides that a Recipient’s noncompliance with any additional rules or regulations established in connection with ECIP, with the determination of noncompliance being in Treasury’s sole discretion, can subject such a Recipient to a variety of negative consequences. Accordingly, Treasury could introduce additional rules that would immediately result in noncompliance after a Recipient has already executed the agreement. We find the expectation of compliance with presently undefined rules to be burdensome provision and believe that Treasury should not be able to change or adopt new ECIP rules after a Recipient is already contractually bound to compliance with such rules.
5. Remedies. As noted above, Article V of the Securities Purchase Agreement provides the Treasury with broad discretion to impose “remedies” on the Recipient for any non-compliance with (a) the terms of the Securities Purchase Agreement, (b) the terms of ECIP securities, or (c) certain rules and regulations. While some of these remedies are enumerated, there are no limits imposed on the scope of any additional remedies. Further, determinations of non-compliance – and the remedies imposed by the Treasury – are not subject to any judicial review. We would recommend that the Treasury specifically enumerate its available remedies for non-compliance and provide the Recipient with the right to judicially appeal the Treasury’s determination of non-compliance and imposition of any remedy.
6. References to Investment and Lending Plan. In Section 3.1(d) of the Securities Purchase Agreement, the Recipient is required to represent and warrant certain matters about the Investment and Lending Plan that Recipient submitted to the Treasury in connection with the ECIP Application, including that no material changes have been made to such Investment and Lending Plan and that no material changes are expected to be made to such Investment and Lending Plan. We have found that this representation and warranty

creates some discomfort to potential Recipients, as their business plans are fluid and will most certainly evolve over time, particularly as more banks embrace new financial technology platforms that will enable them to reach borrowers in communities that are outside of their physical footprints. Accordingly, we would request that the Treasury consider either (a) removing the references to the Investment and Lending Plan from the Securities Purchase Agreement entirely, or (b) remove Section 3.1(d)(iii) and include language elsewhere in the Securities Purchase Agreement to the effect that the Treasury acknowledges that the Recipient's business plan may change over time and nothing in the Securities Purchase Agreement shall be deemed to require Recipient to conduct its business in accordance with the Investment and Lending Plan.

7. Registration Rights. Section 4.1(e) and Annex E of the Securities Purchase Agreement require any Recipient who is or becomes subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") to register the ECIP securities on a shelf registration statement and to keep such registration statement continually effective while the ECIP securities remain outstanding. Several of the NBA members are already subject to the reporting requirements of the Exchange Act, and the registration rights covenant would require those Recipients to immediately incur significant costs and effort in order to comply. Such registration requirements offer little incremental marketability for the ECIP securities, while imposing significant cost on the Recipient to prepare and maintain the effectiveness of such registration statements. Additionally, in the highly unlikely event that the holders of the ECIP securities request a "take-down" of the registered securities in an underwritten offering, the Recipient would be required to pay a significant portion of expenses of the offering, including in respect to participating in marketing activities and entering into underwriting agreements. We do not think that these registration rights are appropriate for the ECIP securities, and fear that such requirements could cause some otherwise eligible institutions to decline to participate in the program. Further, the terms of Annex E are, in many respects, much more onerous than those we would expect to see in a privately-negotiated investment that included Registration Rights. Accordingly, we recommend that Annex E and the registration rights concept are removed entirely from the Securities Purchase Agreement.
8. Depository Requirement. Section 6.5 of the Securities Purchase Agreement for Preferred Securities requires a recipient, upon request by the Treasury, enter into a depository agreement pursuant to which the Preferred Shares would be deposited with the depository in order to facilitate the issuance of securities representing fractions of the Preferred Shares. As with the registration rights requirement, this provision presents the risk of the Recipient undertaking undue burdens and expense (both in the negotiation of the depository agreement and payment of the ongoing fees to the depository) for a provision that will present little utility to the Treasury in regard to increasing the marketability of the ECIP securities. Accordingly, we also recommend that the "Depository Shares" section of the Securities Purchase Agreement is removed.

9. Assistance with Subsequent Transfer. Section 6.4(a) of the Securities Purchase Agreement requires the recipient to take several extraordinary measures to facilitate transfers of the ECIP securities, which must be taken at the Recipient's cost and expense. Those requirements include preparing offering memoranda to facilitate the ECIP securityholders' transfer in reliance on certain registration exemptions and making certain information about the Recipient publicly available that the Recipient otherwise would not publish. We request that the Treasury significantly limit or remove these obligations.
10. Access and Information. Sections 4.1(c) and 4.1(d) of the Securities Purchase Agreement requires the Recipient to provide Treasury a variety of reports and access to the Recipient's personnel in connection with the ECIP investment. We find the information, reports and, in particular, the access granted under Sections 4.1(c) and 4.1(d) to be overly broad and respectfully request that the requirements be narrowed or otherwise condensed to make the reporting requirements less burdensome and to otherwise streamline a Recipient's obligations in connection with such reporting.
11. Legal Opinion. Section 2.3(h) of the Securities Purchase Agreement requires the Recipient to deliver to the Treasury a written opinion of counsel as to certain matters as a condition to closing. The required form of opinion is set forth in Annex C. The scope of the opinion is much broader than what is customarily provided in private placements of securities by bank holding companies, and, in order to provide all of the opinions requested, the Recipient will be required to incur substantial legal fees to enable such counsel to conduct sufficient "back-up" procedures in order to provide the required opinion. To reduce undue burden and expense for the Recipients, we would request that the form of opinion in Annex C be modified by:
 - 11.1. Acknowledging generally the opinion may contain customary limitations and qualifications, including reliance on certificates provided by governmental officials and representatives of the Recipient;
 - 11.2. Limiting the reference to preemptive rights in paragraph (c) to those set forth in the Charter of the Recipient;
 - 11.3. Removal of clause (iii) of paragraph (g);
 - 11.4. Removal of paragraph (i); and
 - 11.5. Removal of paragraph (j).
12. Definitions & Clarifications. NBA respectfully requests Treasury's consideration of the following comments on definitions and clarifications around certain issues as follows:

- 12.1. Loan Participations. NBA encourages Treasury to broaden and clarify the types of loan participations that will be eligible for treatment as Qualified or Deep Impact Lending. Our member institutions are small and would like to collaborate with each other and other institutions to deploy capital to impacted communities. We believe that collaborating with other MDIs, CDFIs, and even large financial institutions, will allow us to deploy capital in greater volume, with greater velocity, and with more efficiency. NBA believes that Treasury should encourage such collaborative work by broadly defining that Recipients' participation in any loan that meets the criteria for a Qualified or Deep Impact Lending should receive that treatment for the participant. Regardless of whether one of our member Recipients originates a Deep Impact loan and syndicates it to other ECIP recipients, or whether that Recipient lends its capital into a Qualified loan originated by a CDFI loan fund or a megabank, the capital is having its intended purpose and should therefore receive Qualified or Deep Impact treatment
- 12.2. Public Welfare Investments. NBA encourages Treasury to clarify that ECIP Recipients are able to make Public Welfare Investments and that such investments will be considered Deep Impact deployments of ECIP capital. Many of our members are exploring creative ways to leverage their ECIP capital to create better equitized minority businesses through partnerships with private equity funds that are eligible PWIs due to their focus on minority businesses, or Small Business Investment Companies, CDFI loan funds, or other capital providers. ECIP Recipients should be able to make these investments and receive Qualifying or Deep Impact credit for doing so.
- 12.3. Community Service Facilities. NBA recommends that Treasury explicitly include faith-based organizations in the definition for a community service facility loan. Many of our members have longstanding relationships with faith-based organizations in their communities that primarily serve Low Income or Other Targeted Populations. We seek clarification that loans to support these institutions will be considered as Qualified or Deep Impact lending.
- 12.4. Guaranteed Loans. NBA recommends the Treasury clarify that 100% of government guaranteed lending will be considered as Qualified or Deep Impact lending.
- 12.5. Specialty Lending. NBA encourages Treasury to incentivize Recipients to engage in lending or other means of support to the overall community development ecosystem in ways that may not have been feasible for many Recipients in the past due to their small size. These activities will have the desired outcome of putting more capital to work in communities of need and can broaden the impact and reach of individual ECIP Recipients. Specific activities we recommend be explicitly included for Qualified Lending or Deep Impact treatment are:

12.5.1. Lending to nonprofit, nondepository CDFIs

12.5.2. Placing deposits or secondary capital with CDFI credit unions

12.5.3. Lending to capitalize or support a nonprofit affiliate of the bank; and

12.5.4. Lending to a wholly-owned, non-depository subsidiary.

We are writing to ask you to consider revising the Legal Documents to address the concerns outlined above in order to maximize participation by our constituents in the ECIP and to ensure that as much funds as possible are deployed to help minority-owned businesses and low- to moderate-income communities. We must act now to preserve and promote MDIs and to direct much-needed capital into banks that have a strong track record of serving the communities Congress intended to target for the ECIP investment, while encouraging the Treasury to adopt an approach for the ECIP investments that avoids imposing undue burdens, costs, or uncertainties on the Recipients.

We have an opportunity to help communities build back better if the necessary steps are taken now to provide diverse small businesses, nonprofits, and LMI communities the emergency relief they need. Providing capital to the nation's MDIs and CDFIs is vital if our efforts are to ensure that every community in the country can take part in our nation's post COVID-19 economic recovery, thus benefiting the entire economy. We appreciate the opportunity to share our views with you and look forward to serving as a resource.

Respectfully,

A handwritten signature in cursive script, appearing to read "N. Elam".

Nicole A. Elam
President and CEO
National Bankers Association