

Objective:

To develop recommended practices to satisfy the accountability test promulgated by Internal Revenue Code §45D(c)(1)(B).

Background:

Internal Revenue Code §45D(c)(1)(B) provides the following guidance on the accountability rules for a qualified community development entity:

§45D(c)(1)(B) the entity maintains accountability to residents of low-income communities through their representation on any governing board of the entity or on any advisory board of the entity.

In the Guidance for Certification of Community Development Entities, New Markets Tax Credit Program, Part VI (the “Guidance”) issued on December 20, 2001, the Department of the Treasury clarified the compliance requirements of the accountability test. The Guidance states in order to comply with the accountability test, “an entity must demonstrate that it maintains accountability to residents of low-income communities through their representation on any governing board of the entity or on any advisory board to the entity.” If an entity chooses to use an advisory board, at least 20 percent of the members of the board must be representative of the low-income community (the “LIC”) served by the CDE. If a Community Development Entity (“CDE”) serves multiple geographic areas, the CDE must demonstrate it is accountable to each of the various service areas.

In order to be considered representative of the LIC, the board member must reside in a LIC within the entity’s designated service area(s) or otherwise represent the interest of residents of the LIC.¹ The Community Development Financial Institutions Fund (the “CDFI Fund”) also encourages CDE’s to appoint low-income persons from their LIC to the advisory board. When an advisory board is used to meet the accountability requirement, the CDE must be able to demonstrate that the viewpoints of the advisory board are given sufficient consideration and attention by the governing board.

The CDFI Fund has provided additional guidance regarding characteristics of board members deemed to be representative of LICs². Examples of individuals that represent the interests of residents of LICs include, but are not limited to:

1. a small business owner whose business is located in a LIC and whose business: (i) provides goods and services to community residents or (ii) principally employs residents of LICs;

¹ New Markets Tax Credit CDE Certification Application issued by the CDFI Fund in May 2009.

² New Markets Tax Credit CDE Certification Question & Answer Document last revised by the CDFI Fund in July 2005.

2. an employee or board member of a community-based or charitable organization principally serving LICs;
3. a religious leader whose congregation is based in a LIC;
4. an employee of a government agency or department that principally serves LICs, or a government employee whose daily job responsibilities principally serve LICs; and
5. an elected official whose constituency is comprised principally of LICs or residents of LICs.

If a CDE has a statewide, multi-state, or national service area, the CDE must demonstrate that at least 20 percent of the advisory board is representative of a cross-section of the LIC(s) within the state(s) that it serves.³ The CDFI Fund recommends that CDEs serving a large geographic area appoint at least one person to the advisory board that is accountable to LICs throughout the CDE's service area.⁴ The CDE may need to establish multiple advisory boards in order to meet this requirement or select board members that represent the interests of a cross-section of the LICs.

The following are recommended practices developed by the NMTC Working Group. These recommended practices have not been approved by the CDFI Fund or Treasury and only serve as a potential method in satisfying the accountability test.

Recommended Practices:

To date, the CDFI Fund and Treasury have not formally issued documentation for CDEs to use to certify that a minimum of 20 percent of their advisory board is representative of the LIC in its service area and the status of each member of the advisory board who is considered a representative of the LIC. In order to meet the purposes of the NMTC Program and reasonably ensure the accountability test regulations are met, an entity should establish written policies and procedures to ensure that it meets the requirements of the accountability test. In addition to written policies and procedures, we recommend that the CDE should (a) require each board member certify, on an annual basis, the information contained in the LIC Representative Form (CDE-3) from the CDE Certification Application, and (b) document that (i) the CDE governing/advisory board LIC representation percentage requirements have been met, and (ii) the advisory board's (if used by the CDE) viewpoints have been considered by the governing board.

It is recommended that the following procedures be performed by the CDE to document (i) that a minimum of 20 percent of the advisory board is representative of the LIC in its service area, (ii) the status of each member of the advisory board who is considered a representative of the LIC,

³ New Markets Tax Credit CDE Certification Application issued by the CDFI Fund in May 2009.

⁴ New Markets Tax Credit CDE Certification Question & Answer Document last revised by the CDFI Fund in July 2005.

and (iii) if an advisory board is used by the CDE, that the governing board gives consideration to the viewpoints of the advisory board:

- Establish a written policy to ensure that the CDE remains accountable to the LIC(s) in the CDE's service area. The policy should consist of the following:
 - Confirmation whether the CDE will maintain accountability to low-income communities through its governing board or an advisory board.
 - At least 20% of the applicable board members are to be representative of the low-income community(ies) that the CDE designated as its target service area in its CDE certification application. Examples of individuals that represent the interests of the service area include, but are not limited to:
 - a small business owner whose business is located in a LIC and whose business (i) provides goods and services to community residents or (ii) principally employs residents of the service area;
 - an employee or board member of a community-based or charitable organization principally serving the LICs within the service area;
 - a religious leader whose congregation is based in LICs within the service area;
 - an employee of a governmental agency or department that principally serves LICs within the service area;
 - an employee of a governmental agency or department if such employee's daily job responsibilities consists principally of servicing LICs within the service area;
 - an elected official whose constituency is comprised principally of LICs within the service area or residents of LICs within the service area.
 - The board's function is to help ensure that the CDE achieves its primary mission and that it maintains accountability to the low-income community.
 - Accordingly, if an advisory board is used, the advisory board should (i) meet at least XX times per year, (ii) be provided periodic written summaries of the CDE's operating policies, investment policies, and investment activities, as well as other factors impacting the CDE's primary mission, and specifically, not less than one week prior to each meeting (iii) review these summaries when it meets, and (iii) provide a written report to the governing board (which may be the advisory board's minutes) following each meeting, which shall contain its viewpoints on

the CDE's operating policies, investment policies, and investment activities, as well as other factors impacting the CDE's primary mission. The governing board should then review and discuss the advisory board's report at its next meeting.

- A representative of the CDE's management team should be required to attend each advisory board meeting, and the following governing board meeting where the advisory board's summary is presented.
 - The CDE will maintain records relating to the composition of the advisory board. These records will be updated continuously throughout the year by a compliance manager.
 - The compliance manager will maintain and update documentation evidencing the advisory board members' representation of the LICs in the selected service area semi-annually.
 - The advisory board shall hold unscheduled meetings as needed to address issues that are time sensitive related to the CDE maintaining its primary mission or its accountability to the low-income community.
- Require that the CDE issue an annual compliance report which certifies its accountability to the LIC(s) and that the CDE has maintained governing or advisory board status.
- No less than annually, the CDE should monitor and maintain the status of each board member. The CDE should use the standard form created by the NMTC Working Group to certify that within the past calendar year each member of the advisory board which is considered a representative of the LIC:
 - verified that the information contained on the LIC Representative Form (CDE-3) submitted with the CDE's Certification Application remains true and correct.
 - identified any plans he/she may have which could change the information included on the LIC Representative Form.
- Submit the board member certification forms to its investors annually to document that the CDE has met its accountability requirements.