NMTC WORKING GROUP™
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January 16, 2024

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Submitted via Regulations.gov and comments@FDIC.gov

Re: "Regulatory Capital Rule: Large Banking Organizations and Banking Organizations With Significant Trading Activity" 88 Fed. Reg. 64,028 (September 18, 2023): OCC Docket ID OCC–2023–0008; Board Docket No. R-1813; FDIC RIN 3064-AF29

To Whom It May Concern:

On behalf of the members of the New Markets Tax Credit (NMTC) Working Group, we appreciate the opportunity to comment on the joint proposed rule, "Regulatory Capital Rule: Large Banking Organizations and organizations With Significant Trading Activity," 88 Fed. Reg. 64,028 (September 18, 2023) (Proposed Regulations), proposed by the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation (collectively, the Agencies). The members of the NMTC Working

Group are participants in the community development industry who work together to help resolve technical NMTC program issues and provide recommendations to make the NMTC even more efficient in delivering benefits to qualified businesses located in low-income communities around the country. Our group includes most of all the organizations that have received NMTC allocations, nonprofit and for-profit community development entities (CDEs), consultants, investors, lenders and lawyers. Moreover, our financial institution members provide the vast majority of NMTC equity investment annually, most of which are covered under the Proposed Regulations.

Ever since the enactment of NMTCs in 2000, the CRA has helped incentivize banks to make investments in NMTCs, a highly successful community development incentive for providing impactful private investment in low-income communities nationwide. Since 2003, the NMTC has provided $71 billion in total allocations and $67 billion in qualified equity investment (QEI) and has created or retained nearly 1 million jobs, according to the U.S. Department of the Treasury. It has also supported the construction of more than 218 million square feet of commercial real estate, of which 57 million square feet was for manufacturing, 94 million square feet was for office buildings, and 67 million square feet was retail space. In December 2020, Congress voiced its continued support for increased NMTC investment by providing a $25 billion five-year extension at $5 billion in annual NMTC allocation authority.

While changes to the Proposed Regulations will have a substantial effect on increasing capital reserve requirements with respect to many banking activities, the Proposed Regulations maintain the same risk rating for NMTCs and other public welfare equity investments as authorized under part 24 (Eleventh) of the National Bank Act. We believe that the decision to maintain this risk rating is due in large part to the low risk profile and the public policy objectives of incentivizing public welfare investment.

In recognition of the strong performance of NMTCs, and the importance of supporting robust community development investment in low-income communities, **the NMTC Working Group urges the Agencies to reduce the 100% risk weight for NMTC equity investment to 50%**. This threshold is consistent with what is available to statutory multifamily mortgages, more accurately reflects the risks of NMTC investments, and would encourage investment in community development. The currently proposed risk weight of 100% for NMTC equity investments fails to incorporate both the low risk of NMTC equity investments and the underlying policy incentives. Lending is generally perceived as a safer activity than equity investment due to lending's repayment priority over equity, and this perception is reflected in the overall risk ratings contained in the Proposed Regulations. However, NMTC equity exposures are uniquely secure, as evidenced by the program's nonexistent recapture rates and generally shorter risk duration.

The Current Risk Rating for NMTC Equity Investment Does Not Accurately Measure the Risks of the Investment Given Non-existent Recapture Rates and Risk Characteristics

The tax benefits associated with NMTC investments provide both a return on and a return of the investors' capital over a 7-year compliance period, of which tax credits are virtually the sole source of the investors' return. Investors do not expect, and generally do not receive, significant operating cash flow or substantial disposition proceeds in order to realize a sufficient return. If an investor elects to unwind its NMTC investment following the NMTC compliance period, the investor recognizes a gain on their negative capital account because, unlike the low-income housing tax credit, the NMTC reduces their capital account balance. Accordingly, though an equity investment in form and substance, a NMTC investment more closely resembles a fixed-income investment (where the income takes the form of a highly predictable stream of tax benefits) than a traditional private equity investment where variable cash flow and speculative capital appreciation constitute the investors' return. NMTC investment returns more closely resemble community development loan rates than private equity returns.

Risks of NMTC Recapture are Extraordinarily Low

Only three events cause NMTC recapture: 1) failure of the community development entity (CDE) to remain a certified CDE, 2) return of the QEI to the investor, and 3) not investing substantially all of the QEI into a qualified active low-income community business (QALICB).

CDEs are the entities that receive NMTC allocation authority from the U.S. Treasury Department's Community Development Financial Institutions Fund (CDFI Fund) and the entities that receive QEIs from NMTC investors. In turn, CDEs make qualified low-income community investments (QLICIs) into QALICBs. QALICB losses, bankruptcy, or foreclosure, in of themselves, do not trigger NMTC recapture. If there is any return of QLICI proceeds during the first 6 years of the 7-year compliance period, the CDE may need to reinvest those proceeds to continue meeting the substantially all requirement and avoid recapture. These "workouts" tend to focus on ensuring there is no risk to the investor's ability to claim NMTCs.

Recaptures Rates are Non-existent

NMTC recapture rates further support the security of the investment. According to our review of data from the IRS's Statistics of Income (SOI) Tax Stats - Corporation Income Tax Returns Line Item Estimates (Publication 5108), an annual report issued by the IRS that contains estimates of frequencies and amounts of taxpayer entries on the applicable lines of the forms and schedules filed as part of corporation tax returns, we could not document a single incidence of NMTC recapture during tax years 2008-2020, a recapture rate even better than the extraordinarily low LIHTC recapture rate, which averaged only 0.09% for tax years 2008-2019, peaking at 0.17% in 2009.[1] As the predominant risk of NMTC investments is the risk of recapture, plainly the risks of such investments are miniscule and the risk rating for NMTC investment should reflect as much.

Conclusion

Banks covered under the Proposed Regulations comprise virtually all of the annual NMTC equity investment market and thus are crucial to private community development investment in low-income communities. We urge the agencies to carefully consider the impact of bank capital requirements that may unnecessarily limit or harm the incentive to invest in NMTC and community development in low-income communities.

[1] IRS, *SOI Tax Stats - Corporation Income Tax Returns Line Item Estimates (Publication 5108)*, https://www.irs.gov/statistics/soi-tax-stats-corporation-income-tax-returns-line-item-estimates-publication-5108

We hope that you find these comments, considerations, and recommendations helpful as you finalize the Proposed Regulations. Thank you in advance for your time and consideration. Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance.

Yours very truly,
Novogradac and Company LLP

by [redacted]

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