NOVOGRADAC & COMPANY LLP
CERTIFIED PUBLIC ACCOUNTANTS

February 13, 2012

Office of the Comptroller of the Currency
250 E Street, SW.
Mail Stop 2-3
RE: Docket ID OCC-2011-14
Washington, DC 20219

and

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Docket No. R-1432 and RIN 7100 AD 82
Washington, DC 20551

and

Robert E. Feldman
Executive Secretary
Attention: Comments - RIN 3064-AD85
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429

and

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
RE: S7-41-11
Washington, DC 20549-1090

Dear Ladies and Gentlemen:

On behalf of the members of the Renewable Energy Tax Credit ("RETC") Working Group, we respectfully submit our comments in response to the Notice of Proposed Rule Making's ("NPRM") request for public input on the proposed rule that would implement Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act enacted on July 21, 2010 (the "Act"). The members of the RETC Working Group are comprised of different professionals in the RETC industry who work together to address, discuss and provide recommendations in an effort to resolve technical business and tax issues and to help make the current RETC tax incentives even more efficient in facilitating the investment in and develop of clean, renewable energy resources around the country. Our group generally includes developers, consultants, investors, accountants and lawyers that specialize in the development and financing of renewable energy projects. Section 619 of the Act prohibits banking entities from engaging in proprietary trading and from maintaining certain relationships with hedge funds and private equity funds (the "Volcker Rule").

As described in more detail below, we recommend that the final rule specifically permit banking entities to continue making RETC investments and not be limited by the Volcker Rule. We also recommend that banks be permitted to sponsor RETC investments as well as be allowed to engage in "covered transactions" with RETC investments they make and/or sponsor. We believe these recommendations are consistent with the intent of the Volcker Rule. We have organized our comments below in order of the questions included in the NPRM.

<u>Question 276.</u> *Is the proposed rule's approach to implementing the SBIC, public welfare and qualified rehabilitation investment exemption for acquiring or retaining an ownership interest in a covered fund effective? If not, what alternative approach would be more effective?*

We believe that the proposed rule's approach to implementing the SBIC, public welfare and qualified rehabilitation investment exemption for acquiring or retaining an ownership interest in a covered fund is effective but believe it should specifically state that investments that qualify for RETCs are permitted investments as explained in further detail in our response to Question 277.

<u>Question 277.</u> *Should the approach include other elements? If so, what elements and why? Should any of the proposed elements be revised or eliminated? If so, why and how?*

The Volcker Rule generally prohibits banking entities from investing in or sponsoring private equity funds;[1] however, Congress included exceptions for certain permitted activities.[2] One such carve-out or permitted activity is for "investments designed primarily to promote the public welfare."[3] Congress also recognized the benefits of continuing to allow banks to invest in historic tax credit ("HTC") funds and created a specific exemption for HTC investments.[4] The RETC community, as well as other similar tax credit communities, including the Low-Income Housing Tax Credit ("LIHTC") and the New Markets Tax Credit ("NMTC") communities, applauds the inclusion of such language since we believe it recognizes and is consistent with Congress' legislative intent in enacting tax credits that provide incentives for banking entities to make investments in renewable energy resources (Sections 45 and 48), underserved economic areas (Section 45D), and affordable rental housing (Section 42), all of which promote the public welfare. Investments in RETC facilities (or a fund consisting of several RETC investments) may be eligible investments for banking entities under the public welfare investment authority.[5] While we recognize that not all RETC investments will fall within the definition of a public welfare investment, Congress exercised its authority to provide for a specific exemption for HTC funds. We believe RETC investments provide a benefit to the public by promoting the development and investment in clean, renewable energy, and should therefore be specifically exempted, as are HTC investments.

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[1] Section 13(a)(1): "PROHIBITION- Unless otherwise provided in this section, a banking entity shall not…(B) acquire or retain any equity, partnership, or other ownership interest in or sponsor a hedge fund or a private equity fund."
[2] Bank Holding Company Act, Section 13(d).
[3] Bank Holding Company Act, Section (d)(1)(E).
[4] Ibid.
[5] See 12 USC 24(Eleventh).

Congress enacted the energy investment tax credit and the production tax credit to encourage the development and production of clean renewable energy in the United States. Congress has also, through various other tax code provisions[6], strongly discouraged individuals, closely held corporations and tax-exempt entities from investing in RETC projects. As such, it seems clear that Congressional intent all along has been to encourage banking entities to make investments in RETC projects without interference from the limitations imposed by the tax code. However without a specific exemption for banking entities to invest, it would seem that the Volcker Rule will serve to frustrate Congressional intent by unintentionally blocking investments by banking entities in RETC transactions.

We believe that many of the aforementioned concerns also led to the specific exemption for HTC investments. These concerns are equally shared by the RETC community. When asked to comment on the successful effort to broaden the definition of public welfare investments to include any federal or state HTC equity transactions, Rep. Allyson Schwartz, D-Pa. said, "The federal historic tax credit plays a major role in the creation of private sector jobs. Any reduction in its use would hurt America's economic recovery. The inadvertent exclusion of so many worthy historic tax credit transactions under the original language would have had a devastating impact on financial institution demand for these credits. We appreciated that in the end, the conferees understood the importance of our amendment."[7] Similar to the HTC, RETC investments have been successful in creating jobs in America. As a whole, the clean energy sector's average growth rate of 8.3% annually from 2003 to 2010 was nearly double the growth rate of the overall economy during that time.[8] This growth rate could not have been possible without the tax equity funding provided by banks in connection with their RETC investments. Preventing banks from investing in renewable energy projects would serve to cut off a critical source of capital that that could severely cripple this thriving industry. It is counterintuitive to the efforts currently underway to create jobs and to revive the American economy.

We request that the rule makers issue specific guidance that these tax credit programs, as well as state and local programs that were created for a similar purpose as these federal tax credit programs, qualify as permissible activities by a banking entity as they meet the requirements of promoting public welfare in Section 619(d)(1)(E) and paragraph 11 of Section 5136 of the Revised Statutes. We believe this would be consistent with the treatment that the HTC has already received by being specifically identified in Section 619(d)(1)(E) of the Act.

Section __.13(a)(1) of the proposed rule permits a banking entity to acquire or retain an ownership interest in, or act as sponsor to a covered fund "that is designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. § 24), including the welfare of low- and moderate-income communities or families…" or "that is a qualified rehabilitation expenditure with respect to a qualified rehabilitation building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar state historic tax credit program."[9] As stated above, we agree with the Agencies and believe the proposed rule permits a banking entity to sponsor tax credit investments because they either serve the communities or families of low- and moderate-income or qualify under Section 47 of the Internal Revenue Code. However, Section __.13 of the proposed rule does not specify whether or not this permitted activity overrides the prohibitions included in Section __.16 of the proposed rule.

[6] See passive activity credit and loss limitations under Section 469 as well as Section 1603 of the American Recovery and Reinvestment Act
[7] Leith-Tetrault, John. "The Impact of the Financial Regulatory Reform Bill on the HTC." *Novogradac Journal of Tax Credits* Volume I, Issue VIII (Aug. 2010): 1-3. Print.
[8] DiPasquale, Christina. "Top 10 Reasons Why Green jobs Are Vital to Our Economy." Center for American Progress, 07 09 2011. Web. 4 Oct 2011
[9] Proposed rule, Section __.13(a)(1)(ii) & (iii).

The guidance is unclear on whether or not a banking entity can sponsor a tax credit investment with which it has a certain relationship. The proposed rule generally prohibits a banking entity from engaging in any transaction with a tax credit fund if the transaction "would be a covered transaction as defined in Section 23A of the Federal Reserve Act (12 U.S.C. 371c), as if such covered banking entity and the affiliate thereof were a member bank and the covered fund were an affiliate thereof."[10] The Federal Reserve Act states:

> "the term 'covered transaction' means with respect to an affiliate of a member bank--
> (1) a loan or extension of credit to the affiliate;
> (2) a purchase of or an investment in securities issued by the affiliate;
> (3) a purchase of assets, including assets subject to an agreement to repurchase, from the affiliate, except such purchase of real and personal property as may be specifically exempted by the Board by order or regulation;
> (4) the acceptance of securities issued by the affiliate as collateral security for a loan or extension of credit to any person or company; or
> (5) the issuance of a guarantee, acceptance, or letter of credit, including an endorsement or standby letter of credit, on behalf of an affiliate."[11]

We believe that Congress recognized the need for banking entities as tax credit investors by permitting tax credit investments in Section 13(d)(1)(E) of the Volcker Rule.[12] Similarly, the Agencies recognized the need for banking entities as sponsors of tax credit funds by permitting banking entities to continue sponsoring tax credit investments in Section 13(a)(1) of the proposed rule.[13] The Agencies exercised their authority granted in Section 13(d)(1)(J) of the Volcker Rule to permit this activity because it "generally would facilitate investment in small businesses and support the public welfare, would promote and protect the safety and soundness of banking entities and the financial stability of the United States."[14] We also believe that a banking entity should be permitted to engage in covered transactions[15] with investments that are permitted under Section __.13(a) of the proposed rule for many of the same reasons as those used to support why banking entities may sponsor tax credit investments.

Specifically with regard to tax credit investments, we believe it is equally important to permit banking entities to continue guaranteeing tax credit investments as it is to permit them to sponsor tax credit investments.

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[10] Proposed rule, Section __.16(a)(1).
[11] Federal Reserve Act, Section 23A(b)(7)
[12] Bank Holding Company Act, Section 13(d) — PERMITTED ACTIVITIES-(1) IN GENERAL.—Notwithstanding the restrictions under subsection (a), to the extent permitted by any other provision of Federal or State law, and subject to the limitations under paragraph (2) and any restrictions or limitations that the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission, may determine, the following activities (in this section referred to as 'permitted activities') are permitted: (E) Investments in one or more small business investment companies, as defined in section 102 of the Small Business Investment Act of 1958 (15 U.S.C. 662), investments designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), or investments that are qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program.
[13] Footnote 292 of the preamble to the proposed rule.
[14] Ibid.
[15] According to the Federal Reserve Act, Section 23A(b)(7), "covered transactions" include the following: extension of credit (loans); purchase or investment in securities; purchase of assets; acceptance of securities as collateral security; issuance of a guarantee, acceptance, or letter of credit.

We believe that a banking entity should be permitted to guarantee a tax credit investment because (1) guarantees generally expose a banking entity to less risk when compared to directly investing and (2) when selling assets, such as tax credit investments, banking entities are often required to provide certain representations and warranties which are similar in nature to a guarantee. Guarantees of tax credit investments often times pose less risk to a banking entity, as a guarantor, than making direct investments, as an investor, because guaranteed transactions have a built-in margin, or cushion, between the anticipated and guaranteed performance of the assets. The anticipated performance or "expected yield" is equal to management's expectations when the investment is originally made. The guaranteed performance is typically lower than what management expects and represents a "minimum yield". As such, the guarantor only absorbs a loss when the asset performs under the minimum yield. If the asset performs worse than expected but better than what is guaranteed, the guarantor incurs no loss. When directly investing, a banking entity absorbs a loss when the asset does not perform as anticipated; however, the guarantor only absorbs a loss when the asset does not perform above the minimum yield. A banking entity should also be able to guarantee a tax credit investment because many sales of such assets require representations and warranties which are similar to a guarantee.

<u>*Question 278.*</u> *Should the proposed rule permit a banking entity to sponsor an SBIC and other identified public interest investments? Why or why not? Does the Agencies' determination under section 13(d)(1)(J) of the BHC Act regarding sponsoring of an SBIC, public welfare or qualified rehabilitation investment effectively promote and protect the safety and soundness of banking entities and the financial stability of the United States? If not, why not?*

The proposed rule should permit a banking entity to sponsor an SBIC and other identified public welfare investments. Since the Volcker Rule carves out, and thereby allows, banking entities to make public welfare investments, including RETC investments, as well as HTC investments, we agree with your conclusion that this carve out also allows banking entities to sponsor these investments. In short, if a banking entity is permitted to make a RETC, NMTC, LIHTC and/or HTC investment in which it assumes market risks, we agree it should also be permitted to sell it and similarly participate as a sponsor because this activity does not contradict a key objective of the Act which is to promote and protect the safety and soundness of banking entities and the financial stability of the United States. The Volcker Rule permits a banking entity to invest in these tax credit investments. Here, the permitted risk of investing is greater than the risk of sponsoring tax credit investments.

<u>*Question 279.*</u> *What would the effect of the proposed rule be on a banking entity's ability to sponsor and syndicate funds supported by public welfare investments or low income housing tax credits which are utilized to assist banks and other insured depository institutions with meeting their Community Reinvestment Act ("CRA") obligations?*

The NPRM currently permits banking entities to continue sponsoring and investing in public welfare investments. We commend the Agencies for recognizing potential issues arising from a bank-sponsored tax credit fund and addressing these issues in the proposed rule. As the proposed rule stands, banking entities may continue to satisfy the investment test for the purpose of their community reinvestment goals through tax credit investments sponsored by other banking entities. Permitting this activity enables smaller banks to take advantage of a larger bank's ability to efficiently underwrite, select and package the investments into a private equity fund. Larger banks generally have larger community reinvestment goals and have therefore become more efficient because of economies of scale. Over time, many of the larger banking entities have sold these investments to other banks that do not have the same resources available for the underwriting and selection process.

This efficiency has permitted a number of smaller banks to satisfy their community reinvestment goals and to provide meaningful benefits to the communities they serve.

<u>Question 316.</u> *What types of transactions or relationships that currently exist between banking entities and a covered fund (or another covered fund in which such covered fund makes a controlling investment) would be prohibited under the proposed rule? What would be the effect of the proposed rule on banking entities' ability to continue to meet the needs and demands of their clients? Are there other transactions between a banking entity and such covered funds that are not already covered but that should be prohibited or limited under the proposed rule?*

The Volcker Rule states that no banking entity, or affiliate thereof, that serves as a sponsor to a private equity fund may enter into a transaction with a private equity fund, or with any other fund controlled by such private equity fund, "that would be a covered transaction, as defined in Section 23A of the Federal Reserve Act."[16] The NPRM reiterates this provision is Section __.16(a)(1) (the "Super 23A Provisions"). Under the proposed rules, arguably, banking entities will no longer be able to provide guarantees, loans, or letters of credit to the RETC investments they sponsor. As a result, RETC investments will become less attractive and the availability of capital to develop them will decrease.

However, we believe that permitting banking entities to continue engaging in "covered transactions" with RETC investments will not pose a threat to the safety and soundness of banking entities. Based upon informal conversations with members of the RETC industry and public statements made by members of the Internal Revenue Service, we are unaware of any events that have triggered recapture of any investor's RETCs. We believe this is a tremendous testament to the investment soundness that participants in the program have relied upon. By continuing to permit banking entities to engage in "covered transactions" and sponsor RETC investments, these investments will continue to flourish and satisfy the Congressional intent of promoting public welfare through such investments.

The prohibition on engaging in covered transactions with covered funds may not have been intended by Congress to apply to the permitted investments allowed by subsection (E) of Section 13(d) of the Volcker Rule. In a subsequent subsection (G), which is the exemption permitting banking entities to sponsor private equity and hedge funds under certain circumstances, the Volcker Rule specifically provides that the permitted activity in subsection (G) is subject to the Super 23A Provisions of subparagraph (f). There is no such specific limitation set forth to the exemption in subsection (E). Congress may <u>not</u> have intended to sweep public welfare investments and funds comprised of public welfare investments into the definitions of "private equity fund" or "hedge fund" and subject them to the Super 23A Provisions. If subparagraph (f) applied to all of the permitted activities, then the reference to subparagraph (f) in subsection (G) would be superfluous.

## Conclusion

We commend the Agencies for their efforts in implementing Section 619 of the Dodd-Frank Act and to request public comments on the process. We believe that the recommendations included in this letter are consistent with the intent of the Volcker Rule based in part on the discussion included in the Financial Stability Oversight Counsel's ("FSOC") study. The FSOC realized that Congress may not have intended to capture certain private equity funds that are technically within the scope of the Volcker Rule. We believe that RETC investments do not represent a means to circumvent the restrictions on proprietary trading or historically expose banking entities to high risks.

[16] Section 13(f)(1) of the BHC

We are excited about the positive impact that the RETC Program is having on the nation's development of new clean, renewable sources of energy and the potential for future success. However, we believe that the program could become less efficient and deliver less clean energy benefits to the end users without the clarification we have requested above. We appreciate the opportunity to submit our recommendations and 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,

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by
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