January 24, 2024

Ann E. Misback, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, D.C. 20551

James P. Sheesley, Assistant Executive Secretary
Attention: Comments/Legal OES (RIN 3064–AF29)
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, D.C. 20429

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E–218
Washington, D.C. 20219

RE: Supplemental Comments on Regulatory Capital Rule: Amendments Applicable to Large Banking Organizations and to Banking Organizations with Significant Trading Activity.

Submitted via Federal eRulemaking Portal: www.regulations.gov **(Docket ID OCC–2023–0008; Docket No. R–1813, RIN 7100–AG64; RIN 3064–AF29).**

The American Clean Power Association[1] ("ACP") respectfully submits supplemental comments concerning the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Board"), and the Federal Deposit Insurance Corporation's ("FDIC") (collectively, the "Agencies") proposed rulemaking ("Proposed Rule") to implement components of the Basel III agreement.[2] The Proposed Rule has effectively frozen

[1]The American Clean Power Association (ACP) is the leading voice of today's multi-tech clean energy industry, representing over 800 energy storage, wind, utility-scale solar, clean hydrogen and transmission companies. ACP is committed to meeting America's national security, economic, and climate goals with fast-growing, low-cost, and reliable domestic power. https://cleanpower.org/.

[2] Basel III, a set of international banking regulations and standards developed by the Basel Committee on Banking Supervision, was introduced to address the shortcomings and vulnerabilities in the global banking system that became apparent during the 2008 financial crisis. Basel III applies to banks with $100 billion or more in total assets. A portion of the reforms related to market risk also applies to smaller banks with significant trading activities (i.e., $5 billion or more in trading assets plus trading liabilities or trading assets plus trading liabilities equal to or more than 10% of total assets). In short, the banks that typically fund tax equity investments in clean energy are swept up into the Basel III rules. Available at: https://www.projectfinance.law/tax-equity-news/2023/september/proposed-basel-iii-rules-could-be-catastrophic-for-the-traditional-tax-equity-market/.

the clean energy tax equity market for investment tax credit (ITC) and production tax credit (PTC) deals and is jeopardizing clean energy developers' ability to meet construction goals for 2024 and 2025.

In light of this fact, on November 21, 2023, ACP submitted timely comments explaining that the Agencies' proposal to quadruple the capital requirement for banks holding tax equity investments had an instant chilling effect on the clean energy tax equity market.[3] Our comments urged the Agencies to, *inter alia*, immediately issue, before the close of the comment period, a Supplemental Notice of Proposed Rulemaking ("Supplemental Notice") providing that clean energy tax equity investment agreements executed before the effective date of the final rule will not be subject to the proposed capital requirements, even if these agreements continue beyond the rule's effective date. In other words, ACP asked the Agencies to clarify that the new rule will only apply to those clean energy tax equity agreements executed *after* the final rule's effective date. The Agencies did not issue a Supplemental Notice prior to the close of the comment period.

Consequently, ACP respectfully implores the Agencies to immediately issue a Supplemental Notice clarifying that clean energy tax equity investments executed before July 1, 2025 (the effective date of the final rule), will remain at a 100% risk weight, provided that a bank's total equity investments remain below 10% of its capital (the current status quo).

Our supplemental comments below highlight the need for prompt action and outline the legal authorities supporting the Agencies' ability to issue a Supplemental Notice that adopts an abbreviated comment period.

I. Immediate Action Is Required to Unfreeze the Clean Energy Tax Equity Market

The Proposed Rule is silent as to whether new capital requirements would apply to tax equity investment agreements that are executed prior to the effective date of the forthcoming final rule but will continue past the effective date. The uncertainty created by this silence is suffocating the clean energy tax equity market and is unnecessarily delaying the deployment of clean energy in the United States.

As ACP discussed in its initial comments, clean energy tax equity financing plays a critical role in the capitalization of clean energy projects. Even following the passage of the Inflation Reduction Act ("IRA"), which creates new, alternative tax credit monetization options, tax equity investment agreements are expected to remain the most common and preferred option for clean energy project development given their ability to monetize both the IRA's expanded investment and production tax credits and other tax benefits such as tax depreciation. Indeed, to meet the IRA's goal of 40 percent emissions reduction by 2030, experts believe that tax equity investment will need to more than double.

Since the Proposed Rule was issued, however, bank investors have been pausing new investments or repricing agreements to account for the proposed increased risk weight associated

[3] *See* November 21, 2023, Comments filed by the American Clean Power Association, available at https://www.regulations.gov/comment/OCC-2023-0008-0025.

with their tax equity investments. Consequently, clean energy developers may have to delay or abandon projects. If projected clean energy development is to stay on track, the Agencies must promptly issue a Supplemental Notice explaining that the proposed new capital requirements, if adopted, would only apply to those clean energy tax equity agreements executed *after* the final rule's effective date. The longer the uncertainty created by the Proposed Rule persists, the less likely it becomes that the United States' will meet its short- and long-term emissions goals. It is imperative that the Agencies act now to help bring clarity to the market; if they wait until the final rule is published, critical clean energy development opportunities will have already been lost.

II. The Agencies Can Provide Critical Clarification Without Accepting Additional Public Comment

A supplemental notice can be filed when an agency intends to change or clarify a proposed rule in light of the public comments that it received in response to its initial notice.[4] Generally, the supplemental notice should advise the public of any revisions to the original proposal and provide an opportunity for additional comment on any proposed changes or clarifications.[5] The APA does not require a specific comment period length, but Federal courts generally presume 30 days to be reasonable.[6]

In some circumstances, however, it may be appropriate for an agency to bypass the traditional notice and comment procedures. The APA permits agencies to alter the 30–day notice and comment period for "good cause" where "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[7] Additionally, courts have found that an abbreviated comment period may be reasonable where exigent circumstances exist that require the agency to act expeditiously.[8]

Here, good cause exists for the Agencies to either forgo reopening the comment period altogether or to adopt a 10-day abbreviated comment period. First, causing additional delay by reopening the comment period is not in the public interest. For the reasons outlined above and in our original comments, time is of the essence, and it is critical that the Agencies bring certainty

[4] *See, e.g.*, 81 Fed. Reg. 18808 (April 1, 2016), https://fsapartners.ed.gov/fsa-print/publication/23970 (explaining that the agency received comments requesting clarification on specific aspects of the proposed rule and that the agency was publishing a supplemental notice of proposed rulemaking to reopen, for 30-days, the public comment period so that the agency could accept comments on the discrete clarifying changes to be made).
[5] *See, e.g., id.*
[6] *United States v. Valverde*, 628 F.3d 1159, 1162 (9th Cir. 2010); *United States v. Cain*, 583 F.3d 408, 434 (6th Cir. 2009); 5 U.S.C. 553(b)-(c).
[7] 5 U.S.C. § 553(b)(3)(B).
[8] *See Omnipoint Corp. v. FCC*, 78 F.3d 620, 629–30 (D.C. Cir. 1996) (upholding 15–day comment period given the "urgent necessity for rapid administrative action" evidenced by "congressional mandate [to act] without administrative or judicial delays" (citation omitted)); *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir.1981) (upholding 7–day comment period and invocation of the good cause exception, when agency needed to resolve expeditiously dispute among airlines about aircraft landing "time slots," or risk widespread flight disruption).

to the renewable energy tax equity markets by finalizing their rule as soon as possible.[9] Second, additional public comment here would be largely unnecessary and redundant given that the Agencies have already received comments on the issue of "grandfathering"[10] existing clean energy agreements.[11] As such, good cause exists to avoid additional unnecessary delay by reopening public comment.

To the extent that the Agencies feel that additional public comment is necessary, the Supplemental Notice could clarify that the Agencies will only accept comments on this specific issue of grandfathering existing clean energy tax equity agreements and will not entertain any additional comments beyond the scope of the changes proposed therein.[12] Given the limited nature of the revisions ACP is asking the Agencies to make to their original Proposed Rule, a 30-day comment period is unnecessary and unwarranted. The agency would be justified in adopting an abbreviated, 10-day comment period.

III. CONCLUSION

ACP respectfully urges the Agencies to immediately issue a Supplemental Notice explaining that any new capital requirements for tax equity investments will not be imposed on clean energy investment agreements executed before the final rule becomes effective.

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[9] November 21, 2023, Comments filed by the American Clean Power Association, available at https://www.regulations.gov/comment/OCC-2023-0008-0025.
[10] ACP recognizes that this term has a problematic history; nevertheless, we have used this term here to remain consistent with the common usage of this term in the context intended herein.
[11] November 21, 2023, Comments filed by the American Clean Power Association, available at https://www.regulations.gov/comment/OCC-2023-0008-0025; December 12, 2023, Comments filed by American Council on Renewable Energy, available at https://www.regulations.gov/comment/OCC-2023-0008-0044.
[12] *See, e.g.*, 81 Fed. Reg. 18808 (April 1, 2016), https://fsapartners.ed.gov/fsa-print/publication/23970.