January 16, 2024

Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, D.C. 20551
Attention: Ann E. Misback, Secretary
James P. Sheesley, Assistant Executive Secretary

Federal Deposit Insurance Corporation
550 17th Street NW
Washington, D.C. 20429
Attention: Comments/Legal OES (RIN 3064-AF29)

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

Re: Request for Re-Proposal of Regulatory Capital Rule to Remedy Administrative Procedure Act Violations (Federal Reserve Docket No. R-1813; FDIC RIN 3064-AF29; Docket ID OCC-2023-0008)

The Affordable Housing Tax Credit Coalition (AHTCC)[1] appreciates the opportunity to comment on the proposed changes to Regulatory Capital Rule: Large Banking Organizations and Banking Organizations with Significant Trading Activity proposed by the Office of the Comptroller of the Currency, Treasury; the Board of Governors of the Federal Reserve System; and the Federal Deposit Insurance Corporation (the Proposed Regulations). Established in 1988, the AHTCC is a leading trade association of more than 260 organizations and businesses that advocate for affordable housing financed through the Low-Income Housing Tax Credit (LIHTC), our nation's primary tool for financing the development and preservation of affordable rental housing. AHTCC membership represents the full spectrum of those involved in the nation's affordable housing delivery system, including syndicators, developers, investors, state allocating agencies, and affiliated organizations; and together, have financed or developed over half of the nearly 3.8 million total LIHTC apartments.

First, we acknowledge that, 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 LIHTC and other public welfare equity investments. We believe that the decision to maintain this risk rating is due in large

[1] Our comments do not represent the views of any individual member organization but are supported by the AHTCC as a collation in our mission to support affordable housing investment.

part to the strong financial performance of these investments and the public policy objectives of incentivizing public welfare investment.

In recognition of the strong historic performance of LIHTC properties, and the importance of supporting robust investment in affordable housing, **the AHTCC urges the agencies to reduce the 100% proposed risk weight for LIHTC equity investment to 50%**. This threshold is consistent with what is available to statutory multifamily mortgages, more accurately reflects the risks of LIHTC investment, and would encourage investment in affordable housing at a time of incredible need. The currently proposed risk weight of 100% for LIHTC equity investment fails to incorporate both the safety and soundness of LIHTC investment 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, LIHTC equity exposures are uniquely secure, as evidenced by the program's low foreclosure rates, nearly nonexistent recapture rates, and significantly shorter risk duration.

The Risk Rating for LIHTC Investment Does Not Accurately Measure the Risks of the Investment Given Low Foreclosure Rates and Risk Duration

The Federal Reserve Board has already recognized LIHTC investment's outstanding performance in setting the Dodd-Frank Act Stress Test risk shocks under a severely adverse scenario. The relative fair value shock assigned to Section 42 (LIHTC) investments is only -4.9%, far lower than the -69.9% for real estate private equity and -28% for real estate debt; and the relative carry fair value shock for unfunded LIHTC equity commitments is only -1.6%.[2]

The risk of return of LIHTC investment should be considered similar to that associated with LIHTC debt. Under the Proposed Regulations, a post-construction phase LIHTC first mortgage loan would likely be characterized as either a statutory multifamily exposure, or a cash flow dependent regulatory residential real estate exposure, depending on the terms of the loan. Statutory multifamily exposures receive a risk rating of 50% and cash flow dependent regulatory residential real estate exposures receive a risk rating of 50-125%, depending on the loan to value ratio of the cash flow dependent regulatory residential real estate exposure.[3] LIHTC investment is a community development investment, which receives a risk rating of 100%.[4] However, the difference between the risk of return of LIHTC investment and that of LIHTC debt does not merit a 2x difference in risk ratings (50% for statutory multifamily and 100% for community development investments), as demonstrated by LIHTC investment's long, successful track record.

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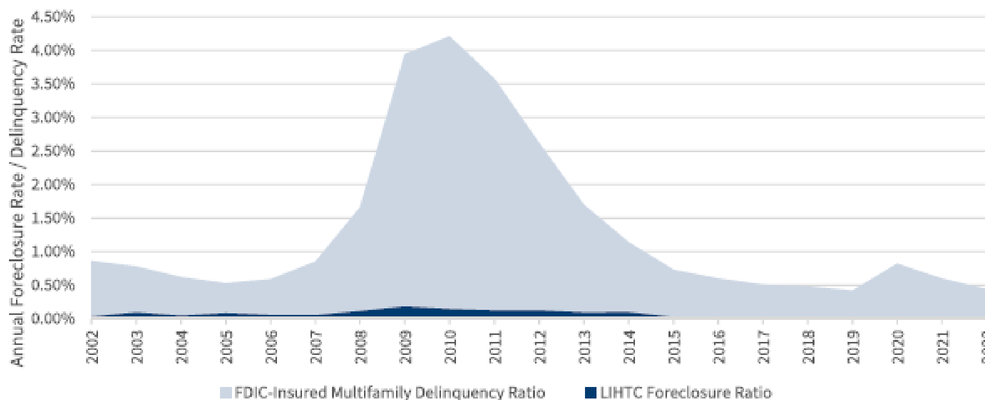
[2] Federal Reserve Board, *2023 GMS Component: Severely Adverse Scenario (GICS-Based Data Input)* https://www.federalreserve.gov/supervisionreg/dfa-stress-tests-2023.htm

[3] Proposed Regulations, p. 64045; 64186.

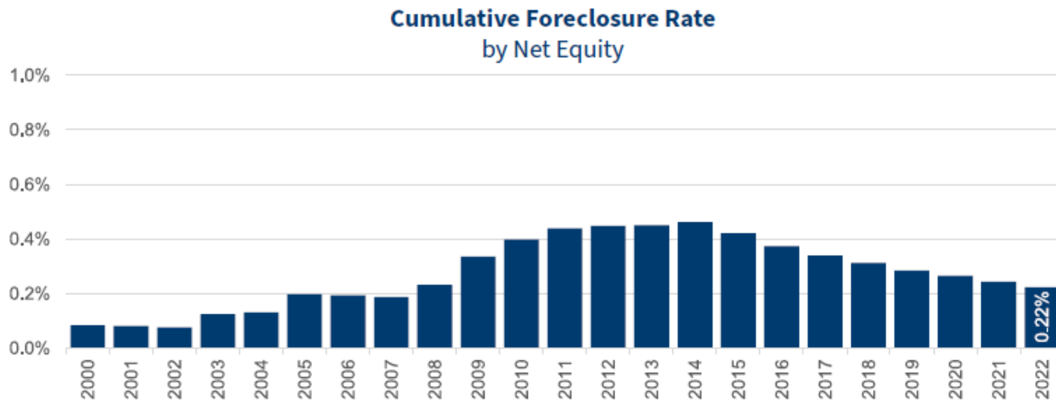
[4] Proposed Regulations, p. 64214.

Tax benefits (LIHTC plus depreciation and other taxable losses) are virtually the sole source of the investors' return in a LIHTC investment, and these tax benefits provide both a return on and a return of the investors' capital over a 15-year holding period. Investors do not expect, and generally do not receive, operating cash or disposition proceeds in excess of their exit taxes. Accordingly, a LIHTC 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 real estate equity investment where variable cash flow and speculative capital appreciation constitute the investors' return. Accordingly, LIHTC investment returns more closely resemble mortgage rates than private equity returns.

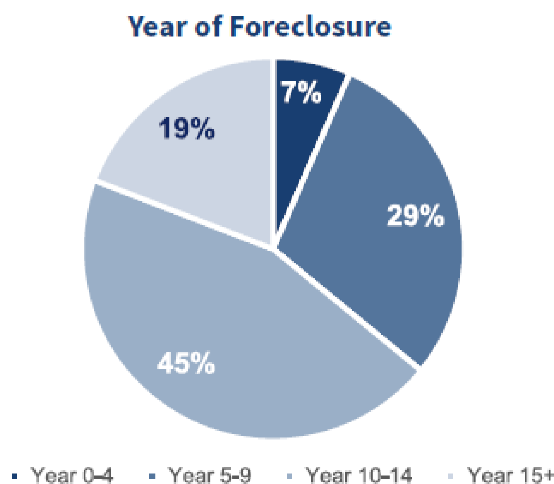
The difference in the safety of LIHTC investment as compared to conventional multifamily investment is quite apparent when comparing annual foreclosure rates of LIHTC properties to conventional multifamily delinquency rates. While it may seem counterintuitive, LIHTC investments have consistently outperformed multifamily mortgages. The following chart compares the annual LIHTC foreclosure rate with the rate at which multifamily mortgages were either at least 90 days delinquent or in foreclosure since 2002:



Multifamily serious delinquencies reached above 4% during the Great Recession, but the LIHTC foreclosure rate has generally stayed below 0.1% since 2002. Clearly, LIHTC properties have proven through various economic environments to be a significantly safer investment than conventional multifamily investment, whether such investment is debt or equity. Another metric, LIHTC's *cumulative* foreclosure rate by net equity (total foreclosed net equity divided by total equity), tells a similar story. As the below chart shows, the cumulative foreclosure rate peaked at a very low level, below 0.5%, in the aftermath of the Great Recession and has decreased to 0.22% by 2022, as more properties have come online and no foreclosures were reported in 2021 and 2022.



The national accounting firm CohnReznick, which has tracked LIHTC investment performance for more than 20 years, noted in their annual Affordable Housing Credit Study Report that there were no instances of foreclosure (or deeds in lieu of foreclosure) in the approximately 19,200 surveyed properties for years 2021-2022.[5] Moreover, most LIHTC property foreclosures occur after the 10-year Credit Period. LIHTC investors receive tax credits over a ten-year period (Credit Period) and are subject to the risk of partial recapture for another five years beyond the end of the Credit Period (Compliance Period). Therefore, even the remarkably low LIHTC foreclosure rates likely overstate the risks born by large banking organizations in their LIHTC investment activities, as 45% of foreclosures occur after the Credit Period, which is when large banking organizations have already received the majority of their expected tax benefits, and an additional 19% of foreclosures occur after the Compliance Period, when large banking organizations have received all of their anticipated tax benefits and no longer face a risk of credit recapture:



[5] CohnReznick, "Affordable Housing Credit Study: A Comprehensive LIHTC Property Performance Report" (2023). *Retrieved from*: https://www.cohnreznick.com/insights/2023-affordable-housing-credit-study

There are several justifications for the low foreclosure rates in LIHTC properties. Due to the absence of passive loss limitations for C corporations and the reasons discussed below, the large banking organizations subject to the Proposed Regulations are the primary investors in the affordable housing industry. Such organizations are highly sophisticated, and the risks of underperformance and possible recapture are so severe that the industry is accustomed to utilizing various legal mechanisms to mitigate the risks of underperformance, and thereby foreclosure and/or recapture. These include having developers provide development cost and operating deficit guarantees (among other guarantees), operating and replacement reserves, management fee deferrals, and mandatory general partner advances. Equity investments are made when targeted events, such as construction completion, stabilized economic and physical occupancy goals and a sustained debt service coverage ratio are achieved. Tenancy at LIHTC financed properties tends to be stable and economic performance more consistent because of the shortage of affordable housing supply, as well as the better living conditions as compared to other available unregulated housing options.

LIHTC recapture rates further support the security of the investment. According to the most recent available figures from the IRS's Statistics of Income 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, the LIHTC recapture rate averaged only 0.08% for tax years 2008-2019, peaking at 0.17% in 2009.[6] This IRS data is especially telling because recapture is the way LIHTC investors incur losses, and it reflects both the incidence as well as the severity of loss. As the predominant risk of LIHTC investment is the risk of recapture, plainly the risks of such investments are miniscule and the risk rating for LIHTC investment should reflect as much.

The currently proposed risk weight of 100% for LIHTC investment contained in the Proposed Regulations also fails to incorporate risk from a timing perspective. LIHTC investors generally receive a return of their investment within 7 – 8 years given the valuation of tax credits and the duration of the Credit Period. On the other hand, most post-construction phase loans in the LIHTC industry typically have terms of 15 – 17 years or longer, with debt service payments based on 30 – 40 year principal amortization schedules. Accordingly, under these loans, a lender receives a return on investment during the 15 – 17 year debt service payment period, but only a small portion of the return of investment (generally, 25%-33%, depending on the amortization term). Therefore, the return of investment is generally twice as fast for LIHTC investors (7 – 8 years) when compared to post-construction LIHTC lenders (15 – 17 years). LIHTC lenders are also subject to the risk of principal refinancing at the end of the loan term given that there is typically a balloon at maturity. LIHTC investment, however, is not subject to such a risk factor since the tax

[6] 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 The recapture rate equals the LIHTC amount recaptured divided by the LIHTC amount claimed. IRS did not publish LIHTC recapture data for 2020 to protect taxpayer identities.

benefits received over the Compliance Period provide both a return on and a return of the investors' capital over a 15-year holding period.

The Risk Rating for LIHTC Investment Should be Lowered Due to Policy Considerations

The Proposed Regulations would revise the capital requirements pertaining to large banking organizations with assets totaling $100 billion or more, as well as their subsidiary depository institutions, to calculate their total risk-weighted assets under two approaches: (1) the expanded risk-approach and (2) the standardized approach. Two primary components of the total risk-weighted assets calculation under the expanded risk-approach calculation are credit risks, which include statutory multifamily and regulatory residential real estate exposures, and equity risks, which include community development investment exposure. The total risk-weighted assets figures would then be used to determine the large banking organizations' risk-based capital ratios and therefore how much capital such banking organization must hold. A higher risk rating thus lends to higher capital requirements, which purports to disincentivize the subject banking organizations from participating in riskier activities, as there is an additional cost of capital attributable to a given asset.

The Proposed Regulations would hold the 100% risk rating for investments qualifying as community development investment under section 24 (Eleventh) of the National Bank Act due to policy considerations. As stated by the agencies: "[r]ecognizing this more favorable risk-return structure and the importance of these investments to promoting important public welfare goals, the proposal would effectively retain the treatment of equity exposures that qualify as community development investments…and assign such exposures a 100 percent risk weight."[7] Although the AHTCC supports the recognition that community development investments generally should receive a lower risk rating, the AHTCC also urges the agencies to acknowledge that LIHTC investment in particular is highly secure (as discussed in detail above), the LIHTC investor pool is disproportionately comprised of large banking organizations subject to the Proposed Regulations, the recent modifications to the Community Reinvestment Act (CRA) have already altered the incentives for developing affordable housing, and the existing affordable housing crisis is escalating. As such, LIHTC investment, specifically, should receive a 50% risk rating as to not risk investment in affordable housing during an affordable housing crisis.

The LIHTC investor class is disproportionately comprised of large banking organizations that will be subject to the Proposed Regulations. From 2020-2022, roughly $21.8 billion in equity was invested, on average, in LIHTC financed developments annually. A high concentration of that composition comes from banking organizations which, in addition to making an investment that historically meets its investment return goals, provides CRA consideration to banks. Of the estimated $24.5 billion of capital committed to LIHTC investment in 2022, approximately 82% of that invested amount was motivated by such CRA obligations.[8] Thus, only a small percentage of

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[7] Proposed Regulations, p. 64077.

[8] CohnReznick, "Affordable Housing Credit Study: A Comprehensive LIHTC Property Performance Report" (2023). *Retrieved from*: https://www.cohnreznick.com/insights/2023-affordable-housing-credit-study

private sector LIHTC investors will *not* be affected by the Proposed Regulations and the underlying incentives associated with the risk rating of assets.

Critically, there is an affordable housing crisis in the United States and the implementation of the Proposed Regulations provides an opportunity to incentivize affordable housing investment. Approximately 46% of American renters spend over 30% of their income on housing costs and approximately 23% of those renters spend 50% or more of their income on housing costs.[9] An estimated 11 million of the approximately 44 million renters in the United States earn "extremely low-incomes", meaning they earn less than the greater of the federal poverty guideline or 30% of their area-median income. Nearly half (48%) of those renters are households comprised of seniors and renters with disabilities.[10] Moreover, the cost of renting has outpaced inflation from 2017-2022, while wages have not.[11]

In summary, the risk rating of LIHTC investment should be lowered to 50% to align with the risk rating of statutory multifamily exposures on the basis of more accurate risk assessment and public policy. LIHTC investment risk should be understood to be the same or less than that of post-construction period lending, as LIHTC property foreclosure rates are low and the risks born by LIHTC investment (namely recapture) are significantly shorter in duration than the risks of lending. The AHTCC recommends the Proposed Regulations modify the risk rating for community development investment, specifically LIHTC investment, from 100% to 50% to better assess the risk of such investments and to incentivize investors to continue or to increase their level of affordable housing investment.

[9] Pew Research Center, "Key facts about housing affordability in the U.S." (2022). *Retrieved from*: https://www.pewresearch.org/short-reads/2022/03/23/key-facts-about-housing-affordability-in-the-u-s/

[10] National Low Income Housing Coalition, "The Gap: About the Gap Report". *Retrieved from*: https://nlihc.org/gap/about

[11] Pew Research Center, "Key facts about housing affordability in the U.S." (2022). *Retrieved from*: https://www.pewresearch.org/short-reads/2022/03/23/key-facts-about-housing-affordability-in-the-u-s/