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Community Development Banking

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LEGAL PROCESSING DIVISION
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BRANCH

CC:PA:LPD:PR (REG-149404-07)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Dear Sir or Madam:

I am responding on behalf of Bank of America to the request for comments on the amendments to 26 CFR part 1 to clarify rules relating to the new markets tax credit ("NMTC"). We have reviewed the proposed regulations and support them as a significant step toward clarifying NMTC regulations in a way that will make execution of NMTC investments easier.

Bank of America has been a leader in community development for over thirty years and has embraced the New Markets Tax Credit program as a critical component of economic development in low-income areas. We have participated in the program since its inception and have received three allocation awards to date, totaling \$423 million. We have invested nearly \$600 million in qualified active low-income community businesses through our own CDE and those of our eight CDE partners. The proposed amendments to clarify the NMTC regulations will facilitate our continued commitment to the program, as discussed below.

As noted in the explanation of provisions for the change in the redemption safe harbor rules, CDEs are typically unable to accurately calculate operating income, as defined in the regulations, until after the end of the taxable year. In light of that, most CDEs are either postponing all investor distributions until the end of the compliance period or making extremely conservative calculations of operating income to avoid accidental redemption. Both of these options are highly unfavorable to the investor. We therefore actively support the proposed regulations allowing CDEs to make annual distributions equal to the sum of prior year undistributed income plus current year operating income. This will allow the CDE to make an accurate calculation of operating income for the prior year and distribute that amount in the current year without fear of the distribution being deemed a redemption. We would like to suggest an additional clarification to the proposed regulations in order to avoid any further confusion. We recommend language to provide guidance for situations in which the CDE has prior year undistributed operating income but has a current year operating loss. In this circumstance, the regulations should clearly state that the distribution should not be limited to the net of the prior year undistributed operating income and the current year operating loss. Rather, the CDE should be allowed to distribute an amount up to the prior year undistributed operating income. Under normal circumstances, prior year operating income generally could have been distributed in the year earned if it were possible to calculate that amount in time to make the distribution; it would not have to be returned by the investor in the event of a net loss in the following year. The same should be true in an NMTC investment. This approach is consistent with the intent of the regulations to ensure none of the original investment is returned to the investor during the seven year compliance period.

We concur with the proposed regulations for treatment of a termination of a partnership CDE under Section 708(b)(1)(B) and for applying the reasonable expectations test when a CDE makes a loan or investment in another CDE which must then deploy the proceeds to a qualified active low-income community business (QALICB). We believe the clarification of these regulations provides welcome guidance to CDEs, and we support the proposed regulations without revision.

The request for comments also specifically requests comments on how to define amounts received by the CDE that would be factored into the substantially all test and potentially trigger a reinvestment requirement. Payments related to a loan should be characterized as principal or interest based on the loan amortization schedule created at loan origination as part of the closing documents. Most CDEs prohibit prepayments from the borrower for the sole purpose of adhering to a preplanned strategy regarding reinvestment. In fact, most CDEs provide 7-year interest only loans with the full principal due at maturity in order to avoid triggering a reinvestment requirement. As such, it is critical that the loan documents should govern the characterization of loan payments received by a CDE.

In the case of an equity investment, a distribution received by the CDE from the QALICB should be considered a return on investment and not subject to the substantially all test to the extent it does not exceed the CDE's allocable share of the QALICB's operating income. Any excess would be considered a return of the CDE's original investment and would, therefore, be factored into the substantially all test.

We appreciate the opportunity to comment on the proposed regulations and look forward to these clarifications being enacted into final form. They will provide significant comfort to investors and CDEs, which will ultimately benefit the QALICBs through greater ease of execution.

Sincerely,



Iris Bashein, SVP
Tax Credit Investments