



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

Re: New Markets Tax Credit – Section 45D Proposed Regulations

November 5, 2008

To whom it may concern:

Opportunity Finance Network (OFN)¹ appreciates the opportunity to comment on proposed amendments to the New Markets Tax Credit (NMTC) regulations (§1.45D-T), as published in the *Federal Register* on August 11, 2008.

OFN recognizes the significance of the NMTC as a key tool to channel private investment to underserved people and communities. We have received a NMTC allocation; serve on the Board of the New Markets Tax Credit Coalition; represent Member opportunity finance institutions that have received allocations directly, and those that have been recipients of investments from community development entities (CDEs); and have partnered with banks and conventional financial institutions to direct their NMTC allocations effectively. Since early discussions of the NMTC concept, OFN has championed the use of the NMTC to serve low-income people and communities. We note with satisfaction that the most recent allocation round has directed a significantly higher proportion of NMTC resources to mission-driven institutions, and in general we support revisions to the regulations to support such CDEs.

We are pleased to see that the Internal Revenue Service (IRS) has proposed rules to revise and clarify provisions relating to the recapture of the NMTC and believe that the proposed amendments generally will help remove barriers to mission-driven CDEs' full participation. OFN generally supports the comments submitted on behalf of the New Markets Tax Credit Coalition, and urges the IRS to adopt the recommendations in that letter. This comment letter serves to amplify and emphasize those suggestions.

- **Redemption Safe Harbor for Partnership CDEs:** OFN generally supports the proposed revisions to §1.45D-1(e)(3)(iii). The proposed amendment does not, however, sufficiently address situations in which a CDE cannot rely on operating income—a situation that often occurs in mission-driven CDEs. Many unanticipated facts and circumstances could cause actual operating income to fall below expectations. For this reason, we ask that the IRS add language to the amendment to ensure that CDEs that cannot rely on operating income are

¹ Opportunity Finance Network, the national network of more than 160 financial institutions creates growth that is good for communities, investors, individuals, and the economy. Its members include Community Development Financial Institutions (CDFIs) and other opportunity finance institutions that work just outside the margins of conventional finance to bring those markets into the economic mainstream and to help the economic mainstream flow into those markets. CDFI financing has resulted in significant numbers of new jobs, jobs preserved, quality, affordable housing units, and new commercial and community facility space in all 50 states. Over the past 30 years, the Opportunity Finance industry has provided more than \$23 billion in financing that would not otherwise have happened in markets that conventional finance would not otherwise reach.

taken into account. Specifically, we request that IRS modify the safe harbor provision to allow distributions of Qualified Low-Income Community Investment (QLICI) loan interest payments and loan loss reserve proceeds be considered operating income, provided interest is due with respect to a leverage loan.

- **Termination of a Partnership CDE Under § 708(b)(1)(B):** OFN supports this amendment as proposed by the IRS, clarifying that recapture is not triggered in cases in which a CDE is a partnership and the sale of a QEI causes the termination of that partnership as defined in IRC §708(b), which defines when and how a partnership is terminated.
- **Reasonable Expectations:** OFN supports the amendments proposed to §1.45D-1(d)(6)(i). In addition, OFN urges the IRS to consider applying “reasonable expectations” protection to pass-through CDEs (CDEs that make investments in other CDEs) to give investors some assurance with regard to the recapture risk. We endorse the NMTC Coalition’s recommendation that the proposed rule be expanded to support this practice, which allows many CDFIs, including those without the capacity to apply for or manage a NMTC allocation of their own, an important opportunity to participate in NMTC-related activity and direct that activity to underserved markets.

To address this concern and improve capital flow through CDEs to other CDEs, OFN urges the IRS to add a “reasonable expectation” safe harbor applicable to CDE status, and endorses the amendment proposed by the NMTC Coalition.

- **Defining Capital, Principal, or Equity Payments:** In response to the IRS query regarding how to define the dollar amounts received by a CDE “in payment of, or for, capital, equity or principal” set aside for financial counseling and other services, for an equity investment, or as principal received on a loan, OFN concurs with the NMTC Coalition in recommending that rules similar to those used in determining whether a redemption occurred in accordance with §1.45D-1(e)(3) be applied as appropriate given the type of entity making the distribution to the CDE.

Additional Considerations: OFN advocates several additional recommendations to improve and strengthen the NMTC program,

- **Venture Capital Investments:** The structure and practices of community development venture capital organizations, though certainly compatible with the intended use of the NMTC, have sometimes made it difficult for such CDFIs to fully tap the potential of the NMTC. To encourage additional venture capital investing with the NMTC, the IRS should clarify that fees provided to a venture capital fund manager, including management fees, could be considered to be “Financial Counseling and other Services” and thereby qualify as a QLICI. The current NMTC rules define financial counseling and other services as advice provided by the CDE relating to the organization or operation of a trade or business. Though the services of a venture capital fund manager would fall under this definition, additional clarification as proposed above would help investors feel more comfortable investing in a CDE that would count such an activity as a QLICI.
- **Lending to Non-Real Estate QALICBs:** OFN and its partners have in past allocation rounds been concerned by the proportion of allocations directed to real estate investing, and have sought solutions to expand the uses of the Credit. Currently, most CDE lenders issue seven-year, interest-only loans with a balloon payment after year seven in order to alleviate investor concerns regarding the redeployment of repaid principal and maintaining compliance with the “substantially all” requirement. While this seven-year, interest-only loan structure satisfied investor concerns, it limits the ability of a CDE to respond to the financing needs of

its business borrowers. OFN recommends that a CDE be allowed to establish a "sinking" fund that would allow a CDE to direct principal repayments into a designated account without having the accumulating funds count against the CDE's substantially all threshold. The sinking fund account could be held by the CDE, or the IRS could require that the sinking fund account be held at a certified CDFI Bank.

OFN appreciates the opportunity to comment. If you have questions about these recommendations or would like additional information, please do not hesitate to contact me at mpinsky@opportunityfinance.net or 215.320.4304.

Sincerely,

A handwritten signature in black ink that reads "Mark Pinsky". The signature is written in a cursive, flowing style.

Mark Pinsky
President and CEO