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Submitted via Regulations.gov and comments@FDIC.gov

Re: "Regulatory Capital Rule: Large Banking Organizations and Banking Organizations With Significant Trading Activity" 88 Fed. Reg. 64,028 (September 18, 2023): OCC Docket ID OCC–2023–0008; Board Docket No. R-1813; FDIC RIN 3064-AF29

To Whom It May Concern:

On behalf of the members of the Low Income Housing Tax Credit (LIHTC) Working Group, we appreciate the opportunity to comment on the joint proposed rule, "Regulatory Capital Rule: Large Banking Organizations and organizations With Significant Trading Activity," 88 Fed. Reg. 64,028 (September 18, 2023) ("Proposed Regulations"), proposed by the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation (collectively, the "Agencies"). The members of the LIHTC Working Group are participants in the affordable housing community who work

together to help resolve technical LIHTC policy issues and provide recommendations to make the LIHTC even more efficient in delivering benefits to help build and preserve affordable housing and serve low-income residents. Our group includes nonprofit and for-profit developers, syndicators, investors, lenders, lawyers and other affordable housing professionals. Moreover, we represent some banks that invest in LIHTC equity annually, to which the proposed regulations would apply. According to the Affordable Housing Tax Credit Coalition, the LIHTC equity market in 2022 was estimated at about $24.5 billion, of which approximately 82% were attributed to CRA-motivated financial institutions, and according to National Association of Affordable Housing Lenders analysis of OCC data, 98% of LIHTC equity investments come from financial institutions with more than $50 billion in assets, many of these institutions will be affected by Proposed Rule.

Since its inception in 1987, LIHTC equity has been the most important source of capital for affordable rental housing finance, and the largest single financing source behind virtually all newly constructed or substantially rehabilitated affordable rental housing annually. Since 1987, the LIHTC has generated more than $280 billion in equity investment, financed 3.85 million affordable rental homes, and housed nearly 9 million low-income households, according to data from the National Council of State Housing Agencies (NCSHA) and analysis from the National Association of Home Builders (NAHB). It has also supported the creation of more than 6.3 million jobs for one year, generated more than $716 billion in wages & business income, and spurred more than $257 billion in tax revenue.

Not only does LIHTC have a strong record of economic impact, it also targets the lowest income household. According to HUD's latest LIHTC Tenant Report, the median LIHTC household earned less than $18,000 annually. Furthermore, 52.2% of the households earned at or below 30% of the area median income (AMI), and 67.8% earned at or below 40% AMI.

Despite this tremendous record of achievement, there are more than 10 million low-income renters nationwide that are severely cost-burdened, i.e., paying more than 50 percent of their income on rent, according to Harvard's Joint Center on Housing Studies (JCHS) State of the Nation's Housing report. Given this rental affordability crisis, and as the premier resource for affordable rental housing production, we urge the Agencies to reconsider its existing risk weighting for LIHTC equity investments.

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 as authorized under part 24 (Eleventh) of the National Bank Act. We believe that the decision to maintain this risk rating is due in large part to the strong financial performance of these investments, the low risk profile as evidenced by recapture rates of under 0.1% and the public policy objectives of incentivizing public welfare investment.

In recognition of the strong historic performance of LIHTC, and the importance of supporting robust investment in affordable housing, **the LIHTC Working Group urges the Agencies to reduce the 100% 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 Current Law Risk Rating for LIHTC Equity Investment Does Not Accurately Measure the Risks of the Investment Given Extremely Low Recapture Rates and Risk Characteristics

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%.[1]

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

The risk of return of LIHTC investment should be considered similar to that associated with debt on LIHTC properties. 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.[2] LIHTC investment is a community development investment, which receives a risk rating of 100%.[3] 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.

The tax benefits associated with LIHTC properties (which include tax credits 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 flow 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 private 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.

Furthermore, foreclosures of conventional multifamily properties far exceed that of LIHTC properties, especially during 2008-2011, during and shortly after the financial crisis.

There are several justifications for the low foreclosure rates in LIHTC properties. Due to the absence of passive loss limitations for large banks and other C corporations and the reasons discussed below, the banks 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 LIHTC properties are underwritten and managed very carefully to significantly limit the risks of property underperformance,

[2] Proposed Regulations, p. 64045; 64186.
[3] Proposed Regulations, p. 64214.

foreclosure and/or recapture. These include having developers provide development cost and operating deficit guarantees, operating and replacement reserves, fee deferrals, and mandatory general partner advances. Banks only make equity investments 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 rental housing.

Recaptures Rates are Extraordinarily Low

LIHTC recapture rates further support the security of the investment. According to data from the IRS's Statistics of Income (SOI) 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 0.09% for tax years 2008-2019, peaking at 0.17% in 2009.[4] This IRS data is particularly because recapture is the way LIHTC investors incur losses and is the important factor to consider regarding its risk profile, 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.

Conclusion

Banks covered under the Proposed Regulations comprise a significant portion of the annual LIHTC equity investment market and thus are crucial to affordable rental housing production and preservation. We urge the agencies to carefully consider the impact of bank capital requirement that may unnecessarily limit or harm the incentive to invest in LIHTC and affordable rental housing.

We hope that you find these comments, considerations and recommendations helpful as you finalize the Proposed Regulations. Thank you in advance for your time and consideration.

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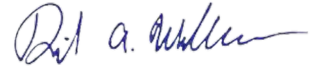
[4] IRS, *SOI Tax Stats - Corporation Income Tax Returns Line Item Estimates (Publication 5108)*, https://www.irs.gov/statistics/soi-tax-stats-corporation-income-tax-returns-line-item-estimates-publication-5108 The recapture rate equals the LIHTC amount recaptured divided by the LIHTC amount claimed. IRS did not publish LIHTC recapture data for 2020 to protect taxpayer identities.

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,

Novogradac and Company LLP



By

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