

Public Welfare Investments in Wind Energy Tax Credit Transactions

National banks and federal savings associations (FSA) have broad authority to make loans and extend credit.¹ The public welfare investment (PWI) authority provides authority for banks and thrifts to make certain types of investments as well. Under this authority, national banks and FSA's may make investments, including those in, wind energy facilities, if the investment is "designed primarily to promote the public welfare, including the welfare of low- and moderate-income (LMI) communities or families (such as by providing housing, services, or jobs).² FSAs may make investments in wind energy facilities under PWI authorities similar to those of banks."³

¹ 12 USC 24 (Seventh) for national banks and 12 USC 1464(c) for FSAs.

² National banks may make investments that are primarily designed to promote the public welfare under the investment authority in 12 USC 24 (Eleventh) and the implementing regulation, 12 CFR 24.

³ FSAs also are permitted to make PWIs, although FSAs are subject to different investment standards and limits than national banks (12 CFR 160.36 and 12 CFR 559; see Office of Thrift Supervision, "Community Development Investment Authority: A Guide to the Federal Laws & Regulations Governing Community Development Activities of Savings Associations," December 1998) at http://www.ots.treas.gov/_files/48079.pdf.

Wind energy projects do not automatically qualify as PWIs. Federal regulations permit national banks and FSAs to make a PWI if the investment primarily benefits LMI individuals, LMI areas, or other areas targeted by a governmental entity for redevelopment, or the investment would receive consideration as a "qualified investment" under 12 CFR 25.23 of the Community Reinvestment Act (CRA) regulations.⁴

Using the PWI authority, national banks and FSAs may invest in wind energy-producing facilities, directly or indirectly (i.e., by taking interests in the entities themselves, or in funds that hold wind energy facilities), if the beneficiaries or the location of the facilities are consistent with the requirements of the PWI authority.⁵

One way to demonstrate benefit to LMI individuals under the PWI authority, for example, is to show a reduction in energy costs in an affordable housing development. Alternatively, a wind energy-producing facility's location might provide a basis for permitting an investment in such a facility to qualify as a PWI, because that authority

⁴ 12 CFR 24.3.

⁵ Examples of investments that qualify under the PWI authority can be found at 12 CFR 24.6.

allows national banks and FSAs to invest in projects that primarily benefit LMI areas.

Also, the facility could be located in an area targeted by a governmental entity for redevelopment.⁶ Most often, the designation will cover a neighborhood, district, or other geographic area under a formally adopted redevelopment plan that includes special activities and benefits or funding from public and private resources. A governmental entity may include any legally incorporated town, city, county, tribal, or federal governmental agency or entity. Examples of formally designated redevelopment areas include federal empowerment zones, brownfield sites, rural communities, state enterprise zones, or city tax incremental financing (TIF) districts.

The final category involves a “qualified investment” under the CRA regulations.⁷ Some investments in wind energy-producing facilities may be considered qualified investments if the facilities revitalize or stabilize low- or moderate-income areas or rural, middle-income, underserved, or distressed communities.⁸ Also, an

⁶ A national bank or FSA making an investment that relies on these criteria should maintain information documenting that the governmental entity or agency has designated the area; the redevelopment criteria for the area; how the PWI is consistent with the governmental entity’s or agency’s plans; and the type of financing and other support that the governmental entity or agency provides to the area or project in which the investment is made.

⁷ 12 CFR 25.12(t).

⁸ See “Interagency Questions and Answers Regarding Community Reinvestment,” 75 Fed. Reg. 11642, 11648, __.12(g)(4)(iii) – 3 and – 4, for more guidance on what is considered to revitalize or stabilize a non-metropolitan, middle-income, distressed, or underserved area. The Interagency Questions and Answers Regarding Community Reinvestment can be found at <http://www.ffiec.gov/cra/pdf/2010-4903.pdf>.

investment that promotes economic development by financing small businesses may be considered a qualified investment.⁹ This could include, for example, an investment that finances a small business, where the small business either installs wind turbines or manufactures the turbine’s components.

When the location of the wind energy-producing facility forms the basis for qualifying under the public welfare authority, a national bank or FSA must also demonstrate that there is job creation in order to meet the public welfare standard.¹⁰ For example, if a project is located in an LMI area *and* creates permanent jobs, the institution typically would be able to provide a sufficient basis for establishing the public welfare benefit. For wind energy-producing facilities, permanent jobs primarily involve maintenance and servicing.

The Federal Financial Institutions Examination Council’s Web site, <http://www.ffiec.gov/>, can be used to find a list of distressed or underserved census tracts. Median family income statistics and a geocoding system to map census tract level information on area median income can also be found on that Web site, although a specific address is necessary to use the

⁹ 12 CFR 25.12(g)(3). The definition of community development includes activities that promote economic development by financing businesses or farms that meet the size eligibility standards of the Small Business Administration’s Development Company or Small Business Investment Company programs (13 CFR 121.301) or have gross annual revenues of \$1 million or less. See “Interagency Questions and Answers Regarding Community Reinvestment,” 75 Fed. Reg. 11642, 11646, __.12(g)(3) – 1, for guidance on promoting economic development by financing small businesses and farms.

¹⁰ 12 CFR 24.6(b)(3) and (4).

geocoding system. For large wind energy arrays located in rural areas, where an address may be unavailable, other data sources may help pinpoint family or area income by county or census tract. Policymap.org is another data source for evaluating area income and includes mapping tools. The U.S. Census Bureau also provides census tract maps by county at <http://www.census.gov/>.

Certain safety and soundness considerations and limitations apply to all PWIs. A national bank's aggregate investments under the PWI authority cannot exceed 5 percent of the bank's capital and surplus, although this limit may be increased up to 15 percent if the OCC approves a national bank's proposal requesting regulatory permission to exceed the 5 percent limit for its aggregate PWIs.¹¹ Investment limits governing these activities for FSAs differ from those for national banks and vary depending on which legal authority is being used to make the investment.¹² Finally, a PWI may never expose a national bank or FSA to unlimited liability.

The OCC has approved investments in wind energy installations under the PWI authority:

- On December 15, 2011, a national bank received OCC approval for an investment in a fund established as a limited liability company. The purpose of the fund was to finance the construction and operation of six wind turbines. The investment in the fund primarily benefited LMI individuals and areas by allowing students at a technical college to

pursue careers in the renewable energy sector. See Community Development Investment Letter #2011-2, December 2011, at www.occ.gov/static/interpretations-and-precedents/oct12/cdil11-2.pdf.

- On September 14, 2012, the OCC approved a national bank's investment in a community development entity that would provide business development and maintenance of a community-scale wind energy facility in an LMI area.

National banks seeking to invest in wind energy generation facilities under the PWI authority must either submit a prior approval notice to the OCC before making an investment or, if the national bank meets the eligibility standards, submit an after-the-fact notice to the OCC. Even if an eligible national bank meets the after-the-fact notification requirements, the national bank may want to consult with the OCC Community Affairs Department to discuss whether its proposed investment will qualify as a PWI. The OCC currently is in the process of integrating the PWI requirements for FSAs into the agency's regulations. In the meantime, FSAs seeking to make PWIs should comply with the former Office of Thrift Supervision's PWI requirements.¹³ In a number of instances, financial institutions have consulted the OCC before they have made an investment in order to seek assurances from the OCC regarding this determination.

The OCC has developed a Public Welfare Investments Resource Directory that provides information about the requirements

¹¹ 12 CFR 24.4.

¹² 12 CFR 160.36 and 12 CFR 559.

¹³ These OTS compliance requirements for PWI investments can be found at: http://www.ots.treas.gov/_files/48079.pdf

for PWIs and the procedures for filing notices and securing approval from the OCC for an investment.¹⁴

For questions about whether specific investments may qualify as PWIs, or for information on the OCC's approval process for PWIs, contact Karen Bellesi at (202) 649-6420.

¹⁴ See <http://www.occ.gov/topics/community-affairs/resource-directories/public-welfare-investments/index-public-welfare-investments.html>