November 21, 2023

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Washington, D.C. 20551

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RE: Regulatory Capital Rule: Amendments Applicable to Large Banking Organizations and to Banking Organizations with Significant Trading Activity.

Submitted via Federal eRulemaking Portal: *www.regulations.gov* **(Docket ID OCC–2023–0008; Docket No. R–1813, RIN 7100–AG64; RIN 3064–AF29).**

The American Clean Power Association[1] ("ACP") appreciates the opportunity to submit the following comments in response to the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Board"), and the Federal Deposit Insurance Corporation's ("FDIC") (collectively, the "Agencies") proposed rulemaking ("Proposed Rule") to implement components of the Basel III agreement.[2] For the reasons discussed below, ACP and our members have profound concerns about the proposed bank

[1] The American Clean Power Association (ACP) is the national trade association representing the renewable energy industry in the United States, bringing together hundreds of member companies and a national workforce located across all fifty states with a common interest in encouraging the deployment and expansion of renewable energy resources in the United States. https://cleanpower.org/

[2] Basel III, a set of international banking regulations and standards developed by the Basel Committee on Banking Supervision, was introduced to address the shortcomings and vulnerabilities in the global banking system that became apparent during the 2008 financial crisis. Basel III applies to banks with $100 billion or more in total assets. A portion of the reforms related to market risk also applies to smaller banks with significant trading activities (i.e., $5 billion or more in trading assets plus trading liabilities or trading assets plus trading liabilities equal to or more than 10% of total assets). In short, the banks that typically fund tax equity investments in clean energy are swept up into the Basel III rules. Available at: https://www.projectfinance.law/tax-equity-news/2023/september/proposed-basel-iii-rules-could-be-catastrophic-for-the-traditional-tax-equity-market/.

regulatory capital requirements as they threaten to undermine the clean energy transition. To restore confidence in the renewable energy tax equity market for the short and long term, we respectfully urge the Administration to engage in a two-step process, outlined below, to provide clarity that renewable energy tax investments will not be subject to the Basel III's punitive risk-weight requirements. Specifically, the Agencies should: (1) immediately issue a supplemental notice to the Proposed Rule explaining that the capital requirements for tax equity investments for clean energy will be grandfathered under the status quo for agreements executed before the final rule becomes effective; and; (2) ultimately issue a final rule in this proceeding clarifying renewable energy tax equity investments are assigned a categorical 100% risk weight.

I. EXECUTIVE SUMMARY

ACP supports efforts to ensure the safety and soundness of our banking system. However, with the threat of the risk weight for clean energy tax equity investments increasing from 100% to 400%, the Proposed Rule threatens to stall the $20 billion a year clean energy tax equity market and, indeed, has already started to do so. The proposed quadrupling of capital requirements is creating immediate uncertainty surrounding whether the requirement will apply to renewable energy tax equity in the final rule. This has, in turn, chilled investments for both the Production Tax Credit ("PTC") and the Investment Tax Credit ("ITC"), as most agreements entered into prior to the finalization of the rule could be subject to these new requirements, because their duration would continue past the effective date of the rule.

Because the Proposed Rule would make it so prohibitively expensive for the banks to extend tax equity financing, if finalized as proposed, the leading tax equity providers anticipate that annual tax equity investments in the clean energy sector could shrink by 80-90% and, in turn, lead to significant delays and uncertainty for the number of projects that will be built in 2024 and 2025.[3] In fact, the Proposed Rule has already made large banks question whether they "may simply need to exit" the renewable tax equity market altogether as "the quadrupling of the risk weight may no longer make sense."[4] In short, the Proposed Rule is creating barriers to the sound, low-risk and much needed investments in clean energy that are necessary to meet the goals of the Inflation Reduction Act ("IRA").[5]

It is, therefore, critical that the Agencies restore confidence in the renewable energy tax equity market through the two-step process, discussed below. First, as the proposed substantially higher capital costs for banks are already severely limiting clean energy's access to low-cost capital and increasing the costs of clean energy projects, ACP urges the Agencies to consider adopting interim relief until finalization of the rule. ACP respectfully requests that the Agencies issue an immediate Supplemental Notice of Proposed Rulemaking ("Supplemental Notice") to provide clarity and certainty to the parties making these investment decisions and to incentivize

[3] American Council on Renewable Energy ("ACORE"), Survey of Tax Equity Investors (October 2023), available from the author; *see also* https://acore.org/wp-content/uploads/2023/08/ACORE-Letter-on-the-Impact-of-Proposed-Bank-Regulatory-Capital-Requirements-on-Tax-Equity-Investment-in-Clean-Energy.pdf.
[4] Schroeder, *supra*, note 5.
[5] ACORE, *Expectations for Renewable Energy Finance in 2023-2026*, (June 2023), at 7, available at: https://acore.org/wp-content/uploads/2023/06/ACORE-Expectations-for-Renewable-Energy-Finance-in-2023-2026.pdf

financial institutions to reengage in tax equity financing of clean energy projects. Specifically, to provide such clarity to the market, we recommend the Agencies take the following two steps:

Step1:

- Clarify that tax equity investments entered into before July 1, 2025 (the effective date of the final rule), will remain at a 100% risk weight, provided that a bank's total equity investments remain below 10% of its capital (the current status quo).
    - Simply put, the Supplemental Notice should clarify that no retroactive application of the provisions related to risk-weighting in the proposal will apply to legacy tax equity agreements grandfathered[6] before that date—regardless of whether such agreements extend beyond the effective date.[7]
- The Supplemental Notice should seek comments on the long-term treatment of renewable energy tax investments in the final rule.
    - Specifically, the document should inquire as to whether renewable tax equity investments should receive the same treatment (*i.e.*, have a 100% risk-weight applied) in the final rule as "community investments" due to their similar low risk.

By allowing the tax equity agreements of large banks to remain under the current risk-weight requirements entered into prior to the finalization of the rule, the Supplemental Notice will instantly provide the clarity needed to reenergize the renewable tax equity market. This action is also prudent in light of the low risk posed by these investments. Until the Agencies can consider the merits of adopting that approach in the final rule, the Supplemental Notice will, at least, ensure the renewable tax market is put back on track. ACP notes there is still a significant amount of time before the comment period closes for the Proposed Rule, meaning the Agencies should be able to issue the Supplemental Notice without extending the existing comment period and, in turn, delaying the issuance of the final rule.

Step 2:

Second, to provide long-term certainty and increase renewable tax equity investments, the Agencies should adopt a final rule clarifying that renewable energy tax equity investments will receive the same risk weight as investments in Low-Income Housing Tax Credits (LIHTC)--100%. Applying the same risk weighting for tax equity as private equity is unwarranted and ignores the fact that tax equity investments have a very different risk profile. In many ways, tax equity has more loan-like characteristics versus true equity investments. Given the substantial similarity in risk profiles between renewable energy investments and low-income housing credit

[6] ACP recognizes that this term has a problematic history; nevertheless, we have used this term throughout this document to remain consistent with the common usage of this term in the context intended herein.

[7] This is the method by which agencies will typically resolve unintended, time-sensitive issues that come to light after the issuance of a proposed rule.

investments, we strongly encourage the Agencies to embrace a lasting solution wherein clean energy investments are accorded equivalent treatment— a 100% risk weight.

II. BACKGROUND

The Proposed Rule entails a fourfold increase in capital requirements for banks making non-publicly traded investments, applying the same risk weight to tax equity as to private equity, despite the former being significantly less risky. The clear low-risk profile of tax equity investments, combined with the lack of sufficient explanation in the administrative record for renewable tax equity investments, leads to the assumption that the inclusion of such investments in the 400% risk-weight category may have been an unintended oversight. Nevertheless, while this oversight might have been unintentional, it is having outsized impacts on the ability to finance clean energy projects through renewable tax equity investments.

A. Renewable Energy Tax Equity Investments are Crucial for the Renewable Energy Industry.

In the United States, clean energy development is largely supported through the tax code via tax equity financing—to bridge the gap between initial financing and provide long-term project viability for a project. These investments have become indispensable in securing the capital to fuel a diverse array of clean energy projects, from utility-scale renewable installations to community and distributed energy initiatives. As such, tax equity investments from large domestic banks serve as the linchpin in the capitalization of renewable energy projects.

The IRA is vital in driving tax equity in financing the transition to clean energy. The statute expanded and restructured both the PTC and the ITC under sections 45 and 48 of the Internal Revenue Code, respectively.[8] Under these expanded tax credits, clean energy developers, utilities, and project sponsors have increasingly turned to tax equity investments as the cornerstone of their financial strategy. Between 2017 and 2022, the tax equity market doubled from $10 to $20 billion, split roughly 60% and 40% between wind and solar, respectively.[9] While experts believe that to meet the goals of the IRA tax equity will need to more than double in the near future,[10] the uncertainty created by the Proposed Rule has essentially derailed the ability of tax equity financing to meet this challenge.

While other financing options, namely transferability and direct pay, are emerging in light of the tax equity crisis, it is important to note that these options are not a replacement for tax equity. Rather, transferability is expected to supplement traditional tax equity and attract $4 billion in 2023 and $10 billion in 2024.[11] Moreover, unlike tax equity, transferability does not

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[8] Inflation Reduction Act, P.L. 117-169 (August 2022), Section 45 & 48.

[9] ACORE, *Expectations for Renewable Energy Finance in 2023-2026*, (June 2023), at 7, available at: https://acore.org/wp-content/uploads/2023/06/ACORE-Expectations-for-Renewable-Energy-Finance-in-2023-2026.pdf.

[10] ACORE conversations with tax equity investors.

[11] David Burton, Norton Rose Fulbright, *The Solar + Wind Finance and Investment Summit*, (March 20, 2023), available at: https://www.projectfinance.law/tax-equity-news/2023/march/the-solar-plus-wind-finance-and-investment-summit-soundbites-the-tax-equity-market-and-transferability/.

allow for the monetization of the significant accelerated depreciation benefits available to renewable energy. In a typical tax equity transaction, the depreciation provides an additional value equal to 10-20% of the value derived from the tax credits.

This lost value could translate to less favorable project economics for developers, who otherwise have limited options available to monetize the depreciation benefits of their projects. The lost value could lead to current pipeline projects becoming uneconomic and not being built because the sale price of energy for a project being constructed now has already been contracted with an offtaker for years due to the long development lifecycle of large power plants. For future projects, the additional cost might be passed on in the form of higher energy prices.

Furthermore, traditional tax equity players will serve an important role in providing due diligence and syndication services for large corporate players interested in exploring transferability. A significant portion of the transfer market is expected to be developed in a hybrid structure where a bank provides a tax equity investment with a portion of the tax credits sold to a third party. The transferable tax credit market could grow more quickly and ultimately to a larger size if corporate tax players feel confident that they are investing alongside banks that have expertise in the asset class and are putting their own capital at risk in the transaction. Additionally, investors could also reduce their risk appetites in a highly dependent transferability market that is insufficiently backed by traditional tax equity.

For emerging and newly incentivized technologies, including offshore wind, which involve substantial project scale, equity investments serve as a critical financial tool that developers aim to leverage. Unlike traditional projects, emerging technology may face greater challenges in securing financing. Therefore, a robust tax equity market is essential to enhance transferability and should be regarded as a complementary factor for achieving market success.

B. The Capital Requirements under the Proposed Tax Equity Investment in Clean Energy are Stifling Market Development.

As noted, the Proposed Rule's changes in bank regulatory capital requirements are already making it prohibitively expensive for banks to extend tax equity financing, reducing banks' appetites and capacity to provide such equity ultimately making it nearly impossible for tax equity to meet the current demand for renewable energy tax investments. This is already resulting in potential project cancelations and is starting to trickle through the supply chain—causing a loss of investment in new clean energy manufacturing projects and putting thousands of manufacturing and construction jobs at risk.

In addition to an already chilled investment market, the higher capital requirements in the Proposed Rule create an economic "cliff" beginning in 2025 for clean energy developers that has wide-ranging impacts on the financial health of the expanding clean energy economy and its supply chains. In particular, the proposed shift in capital requirements and the uncertainty regarding how such changes will be applied to long-term agreements that are entered into before the effective date of the final rule but have a duration that extends beyond such date has already begun to significantly impact the clean energy tax equity market as it is unclear whether those agreements will be subject to a 100% or 400% risk weight post-2025.

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Indeed, many bank investors have already paused new investments, and others are seeking to add protections to new deals and existing deals that have not yet secured full funding.[12] In other words, absent clarification, banks are assuming the worst (*i.e.*, a 400% risk weight will be imposed) and simply ceasing their financing altogether. This financial pause in activity will result in a drastically lower number of clean energy projects getting built as developers delay projects given this current climate. To the extent that banks are still willing to enter into tax equity investments, given this uncertainty, they are repricing deals to account for the increased risk weight associated with their tax equity investments in the proposal. However, this increase in pricing is astronomical for developers and could result in project investment no longer being viable if that cost were passed along to them.

The current PTC deal flow, for wind and solar, is mostly frozen. Any new PTC deals will have significant tax credit eligibility post-2024, given their ten-year tenure, subjecting them to the current proposed regulation's increased capital requirements. Any ITC deals in which the project is placed in service (the end point of that tax credit) after 2025 would also be subject to the proposed requirements. As construction lending for pre-2025 ITC deals is expected to close by year-end 2023,[13] this means that virtually all new ITC deals, like PTC deals, are mostly frozen due to the uncertainty created by the Proposed Rule.

As Figure 1 below demonstrates, while investors were prepared to scale renewable tax equity investments to $22 billion in 2023 and $25 billion in 2024 prior to the issuance of the Proposed Rule, investments are projected to be reduced to $10 billion in 2024 and to $5 billion in 2025 given the proposed capital requirements from the Proposed Rule.[14]

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[12] ACORE, *Basel III and the Looming Threat to Tax Equity Market and Clean Energy Industry*, (Oct. 2, 2023) https://capstonedc.com/insights/basel-iii-and-the-looming-threat-to-tax-equity-market-and-clean-energy-industry/#:~:text=In%20a%20recent%20letter%2C%20the,have%20reportedly%20paused%20new%20investment ("It's hard to question the damaging impact the [Agencies' proposal] would have on tax equity investments if adopted – and, for that matter, the negative impact the proposal will almost certainly have in the near term."); Pivotal180, *Proposed Banking Rules Imperil the Tax Equity Market*, (Sept. 1, 2023) https://pivotal180.com/proposed-banking-rules-imperil-the-tax-equity-market/ ("If the Proposed Rules is not immediately amended, many tax equity investors anticipate curtailing their investments or entirely exiting the market.").

[13] Construction loans for ITC-eligible projects, as well as PTC projects, generally require a commitment from a tax equity provider at the closing of the loan for a take-out commitment by the construction lender to provide permanent financing at a specified future date.

[14] ACORE conversations with tax equity investors.

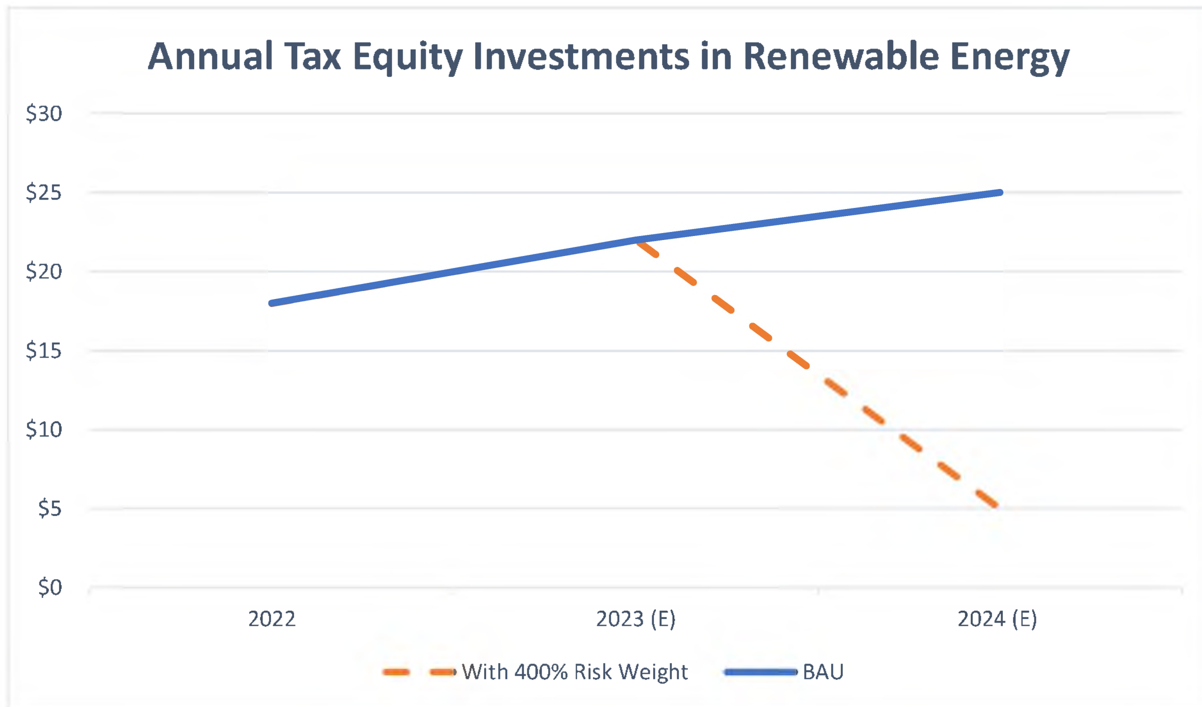

Figure 1

C. Regulators Have Discretion in Adopting Basel Committee Recommendations.

While U.S. regulators have historically applied most of the Basel Committee's recommendations, regulators maintain discretion when adopting individual international Basel Committee standards.[15] This discretion "allows the standards to be implemented differently by authorities in different jurisdictions."[16] Furthermore, this allows for tailored adjustments to align with domestic landscapes and provides precedent for recognizing the unique characteristics of renewable energy projects in the U.S.

To illustrate this discretion, U.S. regulators gave preferential risk weights for equity exposures to public sector entities, including Federal Home Loan Banks and Farmer Mac,[17] even though the Basel Committee provided no such preferential risk weight.[18] As another example, the Basel Committee provided an option for banking organizations to use an alternative approach for calculating capital requirements for simple, transparent and comparable securitizations, but U.S. regulators did not adopt that approach.[19]

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[15] Basel Committee, *Basel capital framework national discretions* (Nov. 2014) (detailing the number of national discretions that Basel Committee members have taken in implementing hundreds of different Basel II paragraphs). https://www.bis.org/bcbs/publ/d297.pdf.

[16] *Id*. at 1.

[17] Prop. Rule. at 64038.

[18] *See* Basel Committee, CRE 20.53-20.62.

[19] *See* Basel Committee, CRE 40.66.

III. COMMENTS

Given the flexibility that U.S. regulators have exercised in the past in adopting Basel Committee recommendations, coupled with the impact the Proposed Rule is having on renewable clean energy investments and the unique nature of the U.S. renewable energy tax equity model, it does not follow that the Agencies must adopt the Basel III 400% risk-weight recommendation for renewable energy tax equity financing. Instead, the Agencies should here exercise their discretion, as they do "when differences in the structure and development of financial systems warrant different approaches,"[20] and reverse course as outlined below.

A. Interim Solution: The Agencies Should Issue a Supplemental Notice that Grandfathers Legacy Investments Finalized Before the Effective Date of the Proposed Rule.

Given the impact the Proposed Rule is already having on renewable energy investments and the importance of the U.S. renewable energy tax equity model for the clean energy transition, as outlined in previous sections, the Agencies should issue a Supplemental Notice grandfathering legacy investments finalized before the effective date of the Proposed Rule (July 1st, 2025) under the current 10% threshold test (*i.e.*, the status quo), regardless of whether such investments extend beyond the effective date. This short-term clarity is necessary to unfreeze the clean energy tax equity market. Without clarity created by grandfathering legacy investments, for the reasons discussed above, banks and developers will be less willing to finance projects through tax equity past 2025, and the significant economic and environmental benefits of clean energy deployment will remain unrealized.

Of note, applying a grandfathering approach is consistent with existing regulatory precedent.[21] For example, in August of this year, Treasury issued guidance regarding its proposed program created in response to Executive Order 14105, "Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern."[22] The guidance clarified that the definition of "covered transactions" (*i.e.,* those subject to the proposed program) was intended to be "forward-looking, and not to cover transactions and the fulfillment of uncalled, binding capital commitments with cancellation consequences made prior to the issuance of the Order."[23] Treasury further clarified that it would "not use its authority to unwind a transaction that was not prohibited at the time it was completed."[24]

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[20] Basel Committee on Banking Supervision, *Basel Capital Framework National Discretions*, (November 2014), at 1, available at: https://www.bis.org/bcbs/publ/d297.pdf

[21] *See, e.g.,* The Affordable Care Act, Public Law 111–148 (2010) §1251(a)(2)("With respect to a group health plan or health insurance coverage in which an individual was enrolled on the date of enactment of this Act, this subtitle and subtitle A (and the amendments made by such subtitles) shall not apply to such plan or coverage, *regardless of whether the individual renews such coverage after such date of enactment.*")(emphasis added).

[22] *Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern*, 88 FR 54961 (Published Aug. 14, 2023).

[23] *Id.*

[24] *Id.* at 54972; *see also* Postal Regulatory Commission, *Amendments to Rules of Practice,* 85 FR 8789, 8790 (published Feb. 18, 2020), ("Congress also added a "grandfather clause" in Section 601(b)(3) [of 39 USC] to

Similarly, in September, the Securities and Exchange Commission issued a final rule applying a grandfathering concept ("legacy status") to private fund advising agreements entered into before the effective date of the rule.[25] The final rule, in pertinent part, provides: "The legacy status provisions apply to governing agreements, as specified below, that were entered into prior to the compliance date if the rule *would require the parties to amend such an agreement*."

Consequently, issuance of a Supplemental Notice in this case—where failure to do so could generate significant uncertainty and require amendments to contractual agreements finalized before the final rule to take account of the cliff for financing renewable tax equity deals created by the Proposed Rules—is both appropriate and necessary.

i. The Supplemental Notice Should Seek Comments on the Long-Term Treatment of Renewable Energy Tax Investments in the Final Rule.

The Supplemental Notice should also seek comments on the long-term treatment of renewable energy tax investments in the final rule. Specifically, the Supplemental Notice should inquire whether renewable tax equity investments should receive the same treatment (*i.e.,* have a 100% risk-weight applied) as "community investments" due to their similar low risk. This inquiry is necessary to get sufficient feedback to create a robust record to inform the Agencies' decision-making on this issue.

As we lay out in further detail below, ACP fully supports applying a 100% risk-weight to renewable energy tax investments in the final rule. Clean energy projects, in general, and tax equity investments, in particular, are not speculative in nature. They have a different risk profile than traditional equity investments, with their value driven primarily by tax benefits. While changes to the Proposed Rule in the final rule can address these issues for the long term, an immediate Supplemental Notice making clear that existing renewable tax equity investments entered into prior to 2025 will not be impacted by the proposed changes is necessary to unfreeze investments and ensure renewable energy development stays on track.

ii. Comment Period for the Supplemental Notice.

Lastly, precedent exists for the Agencies to issue a Supplemental Notice, such as the one proposed herein, to revise a notice of proposed rulemaking *during* the initial comment period. For example, in August 2023, the Federal Aviation Administration issued a Supplemental Notice that "revise[d] the NPRM by adding Model A321-213 airplanes, which were inadvertently left out of the applicability."[26]

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authorize the continuation of private activities that the Postal Service had permitted by regulations to be carried out of the mail.").

[25] Securities and Exchange Commission, *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews*, 88 Fed. Reg. 63206, 63292 (Published Sept. 14, 2023), available at: https://www.federalregister.gov/documents/2023/09/14/2023-18660/private-fund-advisers-documentation-of-registered-investment-adviser-compliance-reviews.

[26] Federal Aviation Administration, *Airworthiness Directives; Airbus SAS Airplanes*, 88 Fed. Reg. 58116-58120 (Published Aug. 25, 2023), available at: https://www.federalregister.gov/documents/2023/08/25/2023-17773/airworthiness-directives-airbus-sas-airplanes.

We note that, if the Agencies act with the necessary urgency presented by this situation, they could issue the Supplemental Notice in a timely manner without disrupting the current rule's timeline while still meeting their obligations under the Administrative Procedure Act ("APA"). Under the APA, rulemakings require the opportunity for notice and comment.[27] While the statute does not specify a length of time required for notice and comment, the period generally cannot be less than 30 days, unless the agency can show "good cause" and publishes its reasoning with the rule.[28] The comment period for the Proposed Rule does not close until January 16, 2024, leaving more than a 60-day window left for comment, if the Supplemental Notice is issued in the near future. Therefore, the Agencies can still leave sufficient time to comply with their obligation under the APA to allow for notice and comment without needing to extend the current comment period or delay the issuance of the final rule.

B. Long-Term Solution: The Final Rule Should Apply a 100% Risk Weight for Renewable Tax Equity Financing.

To provide long-term certainty and increase renewable tax equity investments, the Agencies should adopt a final rule clarifying that renewable energy tax equity investments get the same risk weight as Low-Income Housing Tax Credits ("LIHTC"). Although the risk profile of renewable energy tax equity investments is substantially similar to LIHTC investments, and the level of government support is comparable, in the Proposed Rule, renewable energy investments do not qualify as community development investments. As discussed below, the final rule should afford renewable energy tax equity investments the same treatment as LIHTC.

Specifically, we recommend that the 100% risk weight category in "Table 2: Risk Weights Applicable to Equity Exposures under the Expanded Simple Risk-Weight Approach (ESRWA)" on page 162 of the Proposed Rule to include two additional categories: (1) investments that meet the stringent criteria set by the OCC to qualify as loan equivalent;[29] and (2) the investments that qualify for the proportional amortization method ("PAM") of equity accounting under Financial Accounting Standards Board ("FASB") rules[30] as they, by definition, would derive most of their returns from federal tax incentives, similar to LIHTC investments. The table on the next page shows the additional exposure types we recommend adding to the 100% risk weight category.

[27] 5 U.S. Code § 553(c).

[28] *Id.* section (d)(3).

[29] OCC Bulletin 2021-15, (March 25, 2021), Commercial Lending: Tax Equity Finance Transactions Pursuant to 12 CFR 7.1025, available at https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-15.html.

[30] Financial Accounting Standards Board, *Investments- Equity Method and Join Venture*, (March 2023), available at: https://www.fasb.org/Page/ShowPdf?path=ASU+2023-02%E2%80%94Investments%E2%80%94Equity+Method+and+Joint+Ventures+%28Topic+323%29%E2%80%94Accounting+for+Investments+in+Tax+Credit+Structures+Using+the+Proportional+Amortization+Method.pdf.

Risk Weight	Equity Exposure
100%	An equity exposure that qualifies as a community development investment under section 24 (Eleventh) of the National Bank Act.
	An equity exposure to an unconsolidated small business investment company or held through a consolidated small business investment company, as described in section 302 of the Small Business Investment Act.
	An equity exposure that qualifies as a tax equity finance investment under 12 CFR 7.1025 and earns any of the following renewable energy tax credits under sections 45, 45Y, 45Q, 45V, 45X, 45Z, 48, 48D, or 48E of the Internal Revenue Code, or future tax credits.
	An equity exposure to a tax credit structure that meets the criteria to be accounted for under the proportional amortization method as described in ASC 323 of the FASB's Accounting Standards Codification.

The long-term solution presented above supports the aim of the Basel III regulations for several reasons. First, clean energy tax equity investments have a different risk profile than traditional equity exposures, with their primary value driven by tax benefits. Second, tax equity investors in clean energy credits (predominantly large, well-capitalized banks) have limited downside exposure as the tax equity investment will receive most of its return from more predictable tax credits and other tax benefits, and it has other protective features, such as no senior debt in the project, and its priority over a sponsor's return.

Additionally, the structure of a traditional clean energy investment protects investors from risks. Renewable energy projects that qualify for federal tax credits, like the ITC and PTC, typically follow a partnership flip structure that allows the tax equity investor to take advantage of the available tax credits, which can significantly reduce their tax liability.[31] Tax equity investors typically receive a stable and predictable return on their investment because the return

[31] ACORE, *The Risk Profile of Renewable Energy Tax Equity Investments*, (November 2023), at 7 "Partnership flips are the predominant tax equity structure in the U.S. renewable energy market for both PTC and ITC investments, which generally follow the safe harbor structures described in IRS Revenue Procedures 2007-65 and 2014-12. In a typical transaction, the project sponsor will form a partnership with a tax equity investor to jointly own the renewable energy project LLC, which the sponsor has developed or acquired from other developers. The tax equity investor provides between one-third to two-thirds of the total capital, increasing essential upfront capital into the project, and in exchange, typically receives 99% of the tax attributes and a minority share of the cash, typically between 5% and 30%. The sponsor finances the equipment purchase and project construction with balance sheet equity or a construction loan, which is then paid off by the tax equity proceeds when the project reaches commercial operations."

is often based on negotiated terms within the partnership agreement and is less reliant on the project's performance or market fluctuations.[32]

The tax equity investor has limited downside exposure because the tax equity investment will receive the vast majority of its return from tax credits and other tax benefits, which are more certain than cash flows from project operating income.[33] The accounting treatment of the partnership flip structure adheres to established accounting standards, often governed by the FASB. Under these standards, the recognition of income from tax credits is subject to specific accounting rules and provides greater oversight, making the renewable energy tax equity investment far less risky than traditional investments.

In many ways, tax equity has more loan-like characteristics versus true equity investments. Tax equity, while classified as an equity security, exhibits a risk profile similar to that of a loan. The cashflows received by tax equity investors are largely comprised of depreciation and tax credits, both of which can be regarded as *receivables from the federal government.* That means, even with Fitch's recent downgrade of the U.S. Government credit rating, the primary entity responsible for repaying tax equity investors maintains AA+ credit rating.[34]

Indeed, recognizing the unique nature of tax equity, Treasury issued guidance to banks, explicitly characterizing tax equity as "the functional equivalent of a loan."[35] The guidance instructed that banks may undertake a tax equity finance if it is "the functional equivalent of a loan" and listed the following characteristics necessary to meet this requirement, including:[36]

- The transaction is of finite tenor, though it may include a limited residual exposure that is required by law to obtain certain tax benefits or needed to obtain the expected Internal Rate of Return ("IRR").
- The tax benefits and other payments received by the bank from the transaction provide a full return of capital and achieve an expected return on capital at the time of investment approval.
- The bank does not rely on appreciation of value in the project or property rights underlying the project for repayment.
- The bank uses underwriting and credit approval criteria and standards that are substantially equivalent to those of a traditional commercial loan.

[32] *Id.* at 8.
[33] *Id.*
[34] Fitch Ratings, *Fitch Downgrades the United States' Long-Term Ratings to 'AA+' from 'AAA'; Outlook Stable*, (August 01, 2023), available at: https://www.fitchratings.com/research/sovereigns/fitch-downgrades-united-states-long-term-ratings-to-aa-from-aaa-outlook-stable-01-08-2023.
[35] OCC Bulletin 2021-15, addressed to the CEOs of all National Banks, offering perspective into its own view of tax equity finance (TEF) transactions. The bulletin stemmed from the OCC's final rule issued on December 22, 2020, which formally established the authority for banks to engage in TEF transactions under their lending authority. Available at: https://www.ecfr.gov/current/title-12/chapter-I/part-7/subpart-A/section-7.1025
[36] *Id. See also,* https://pivotal180.com/proposed-banking-rules-imperil-the-tax-equity-market/.

- The bank is a passive investor in the transaction and is unable to direct the affairs of the project company.
- The bank obtains a legal opinion or has other good-faith reasons to determine that the tax benefits will be available.
- The bank limits the total dollar amount of tax equity finance transactions undertaken to no more than five percent of its capital and surplus.

Almost all tax equity issued in the clean energy market complies with these criteria. Given the loan-like risk profile of tax equity and the official recognition of tax equity as akin to a loan by the U.S. Treasury, it is reasonable to assert that tax equity risk substantially differs from private equity risk and should therefore be treated differently.

Additionally, tax equity arrangements are typically structured to ensure the complete return on invested capital and a satisfactory after-tax IRR within 6-11 years.[37] In cases of underperformance, tax equity investors often retain available cashflows until they attain their predetermined hurdle rate, given the extended lifespan of clean energy projects exceeding 30 years. Moreover, tax equity covenants usually prohibit special purpose project companies from borrowing funds from senior lenders, ensuring tax equity investors maintain a priority claim on project assets and cashflows in situations of financial distress or liquidation.[38] This further underscores the lower risk associated with tax equity compared to a typical private equity transaction.

The risk assessment made by the Basel Committee does not align with the actual risk characteristics of tax equity investments. Consider the scenario proposed below:

> Residential mortgages only require 50% capital weighting, which means the U.S. Banking Authorities are implying that tax equity is 8x riskier than a residential mortgage. The capital weighting for public equity is 250%, so the U.S. Banking Authorities are implying that tax equity is 60% more risky than publicly traded stocks. That would mean holding Sunrun's[39] common stock is 60% less risky than a tax equity investment in a Sunrun-sponsored tax equity fund. Anyone who has followed a tax equity portfolio knows this is not the case. In round numbers, the 52-week high of Sunrun's publicly traded stock is $39 a share and the 52-week low is $13 a share (i.e., there has been a 300% change in price in the past year). No tax equity investment has that type of volatility; much less 60% more volatility than that.[40]

[37] Daniel Gross, *Proposed Banking Rules Imperil the Tax Equity Market*, (September 2023), available at: https://pivotal180.com/proposed-banking-rules-imperil-the-tax-equity-market/.
[38] *Id.*
[39] Sunrun is the nation's leading home solar, battery storage, and energy services company. Available at: https://multifamily.sunrun.com/about-sunrun/.
[40] David Burton and Hilary Lefko, Norton Rose Fulbright, Renewable Energy World, *The Tax Equity Rule with 'Dire' Consequences for Clean Energy*, (October 9, 2023) available at: https://www.renewableenergyworld.com/podcasts/the-tax-equity-rule-with-dire-consequences-for-clean-energy/.

In summary, the Agencies should provide long-term certainty and increase renewable tax equity investments through a final rule clarifying that renewable energy tax equity investments will receive the same risk weight as low-income housing tax credits, 100%. This is consistent with the fact that clean tax equity investments pose the same or lower risk as those credits and would allow large banks to better support the clean energy transition.

IV. CONCLUSION

ACP appreciates the opportunity to comment on the proposed adoption of the Basel III rules and respectfully urges the Agencies to: (1) immediately issue a Supplemental Notice explaining that the capital requirements for tax equity investments for clean energy will be grandfathered under the status quo for agreements executed before the final rule becomes effective; and (2) ultimately issue a final rule clarifying renewable energy tax equity investments are assigned a categorical 100% risk weight.