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**Submitted via Regulations.gov and comments@FDIC.gov**

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**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**

The Solar Energy Industries Association ("SEIA") is the national trade association of the U.S. solar and storage industry. Our members promote the environmentally responsible development of distributed and utility-scale solar energy and storage. We are committed to working with federal agencies, environmental and conservation organizations, Tribal governments, state agencies, and other stakeholders to achieve this goal. On behalf of our member companies, SEIA appreciates the opportunity to provide these comments on the Office of the Comptroller of the Currency's ("OCC"), the Board of Governors of the Federal Reserve System's, and the Federal Deposit Insurance Corporation's (collectively, the "Agencies") joint proposed rule, "Regulatory Capital Rule: Large Banking Organizations and Banking Organizations With Significant Trading Activity," 88 Fed. Reg. 64,028 (September 18, 2023) ("proposed rule").

SEIA is committed to building a strong solar industry to speed the country's energy transition and address the climate crisis. As the national trade association for the U.S. solar and storage energy

industry, which employs more than 260,000 Americans and reflects a market valued at over \$36 billion, we represent over 1,000 organizations that manufacture, install, and support the development of solar energy and storage.

## I. Introduction

SEIA and its members support the Agencies' efforts to address systemic risks in the global banking system and ensure the strength and resilience of U.S. banks to serve all customers. These comments are limited to a single issue in the proposed rule: the treatment of tax equity investments in renewable energy and manufacturing projects as equity exposures that are not publicly traded.<sup>1</sup> Without modification, the Agencies' proposed 400% risk weighting for such equity positions—which would include tax equity investments in renewable energy and manufacturing projects claiming tax credits under various sections of the Internal Revenue Code—significantly imperils American jobs, investment, tax revenue, and the transition to a clean energy future. Coming on the heels of the passage of the Inflation Reduction Act (“IRA”), which dramatically extended and expanded clean energy tax credits, the timing of this proposal could not be worse. In fact, this proposal has already caused some tax equity investors to contemplate exiting the market altogether.<sup>2</sup> As SEIA has previously written to policymakers, we understand that the tax equity market could shrink by as much as 90% if the proposed rule is finalized.<sup>3</sup> As discussed further below, the Agencies should act timely to clarify that 100% risk weighting will be preserved for renewable energy tax equity exposures.

The solar industry is deeply committed to helping our nation meet the renewable energy targets set forth by President Biden in a just and equitable manner. In order to modernize the grid and address the climate crisis, solar energy must account for at least 37% of U.S. electricity generation by 2035 and at least 44% by 2050.<sup>4</sup> That means roughly *quadrupling* our current installed solar capacity by

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<sup>1</sup> See “Table 7: Risk Weights Applicable to Equity Exposures under the Expanded Simple Risk-Weight Approach (ESRWA),” 88 Fed. Reg. 64,076.

<sup>2</sup> Jeremy Barnum, Chief Financial Officer, JPMorgan Chase & Co., 3Q23 Financial Results (“[A]s we pointed out, we may simply need to exit things. And that will be because it is better than the alternative, which would be to do activity that’s shareholder value destructive but it won’t be costless. A good example of that is the renewable energy tax credit investment business, which as a result of the quadrupling of the risk weight, may no longer make sense. Now, that’s one that we hope will be changed but it’s tricky because those are very long duration assets. So between now and the rule is finalized, it raises some questions about whether we want to put that stuff on the balance sheet.”) (Oct. 13, 2023), transcript available at <https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/investor-relations/documents/quarterly-earnings/2023/3rd-quarter/jpm-3q23-earnings-call-transcript.pdf>.

<sup>3</sup> SEIA, et al., Letter to Dr. Lael Brainard, “The Impact of Proposed Bank Regulatory Capital Requirements on Tax Equity Investments in Clean Energy,” (Aug. 22, 2023), available at <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>.

<sup>4</sup> U.S. Department of Energy, “Solar Futures Study: Frequently Asked Questions,” available at <https://www.energy.gov/eere/solar/solar-futures-study>.

2035.<sup>5</sup> Moreover, climate change represents one of the greatest risks to the global banking sector.<sup>6</sup> Any attempt to address systemic banking risk cannot threaten to blunt the transformational impact of the IRA and send us many steps back in our efforts to address the existential threats of climate change.

## II. Background on Tax Equity Investments

For decades, Congress has encouraged commercial investments in renewable energy projects, including utility- and distributed-scale solar systems, through the use of tax credits in the Internal Revenue Code. A tax credit is a dollar-for-dollar reduction in the income taxes that the person claiming the credit would otherwise owe to the U.S. Treasury.

While the value of commercial solar investment tax credits has changed over time and can depend on a variety of project-specific factors, generally speaking, the IRA today provides a base investment tax credit of 6% of the amount of eligible expenses incurred for solar systems one megawatt and larger that began construction on or after January 29, 2023.<sup>7</sup> The value of this investment tax credit increases fivefold, to 30%, for such projects that meet Internal Revenue Service (“IRS”) prevailing wage and apprenticeship rules.<sup>8</sup> The value of the investment tax credit also increases for solar projects utilizing certain amounts of domestic content,<sup>9</sup> constructed in areas with certain types of historical fossil fuel-related activity,<sup>10</sup> and constructed in or serving certain low-income areas or customers.<sup>11</sup>

The IRA also expanded the types of credits available to the renewable energy industry. For example, solar projects can now claim separate investment tax credits on energy storage projects,<sup>12</sup> and production tax credits based on a facility’s electrical output,<sup>13</sup> as well as for hydrogen produced

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<sup>5</sup> See, e.g., Solar Energy Industries Association, “Solar Data Cheat Sheet,” available at <https://www.seia.org/research-resources/solar-data-cheat-sheet> (Dec. 7, 2023), and *id.* (162.8 gigawatts installed in 2023 compared to 760 gigawatts required to reach 37% penetration by 2035).

<sup>6</sup> The world stands to lose 10% of total economic value by mid-century if climate change remains on its current trajectory due to physical factors such as severe weather events, shifting coastlines, and changes to agricultural and living conditions. Swiss Re Institute, “The Economics of Climate Change” (Apr. 22, 2021), available at <https://www.swissre.com/institute/research/topics-and-risk-dialogues/climate-and-natural-catastrophe-risk/expertise-publication-economics-of-climate-change.html>. And the 215 largest companies face nearly \$1 trillion in costs due to physical climate risks. CDP, “World Biggest Companies Face \$1 Trillion in Climate Change Risks” (June 4, 2019), available at <https://www.cdp.net/en/articles/media/worlds-biggest-companies-face-1-trillion-in-climate-change-risks>.

<sup>7</sup> 26 U.S.C. § 48(a)(2), (9).

<sup>8</sup> *Id.*; “Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements,” 88 Fed. Reg. 60,018 (Aug. 30, 2023).

<sup>9</sup> 26 U.S.C. § 48(a)(12).

<sup>10</sup> *Id.* § 48(a)(14).

<sup>11</sup> *Id.* § 48(e).

<sup>12</sup> *Id.* § 48(a)(2)(A)(i)(VI).

<sup>13</sup> *Id.* § 45.

with solar energy<sup>14</sup> and for manufacturing solar energy inputs such as modules, cells, and wafers.<sup>15</sup> In addition, the IRA provided new and expanded tax credits to a variety of other energy technologies, including onshore and offshore wind, nuclear, biogas, sustainable aviation fuel, carbon capture and sequestration, and others.

However, few developers can directly benefit from these investment or production tax credits because they lack sufficient tax liability to efficiently monetize the value of the credits for every taxable year. Instead, developers typically enter into various forms of tax equity transactions to convert tax benefits into cash that can be used to help finance a project. These include, for example, a partnership between a developer and a tax equity investor (such as a bank). In this scenario, the partnership typically allocates a percentage of the project's profits, losses, and cash distributions to the investor in exchange for a portion of the project's capital costs. IRS rules allow investment tax credits to be shared among partners in the same manner that profits are allocated. A tax equity transaction might provide funding for 30-85% of the capital cost of a project, depending on the form of the transaction.

#### A. Tax Equity is a Critical Source of Financing for Solar Energy

The overall market for tax equity is a significant and growing source of financing for renewable energy projects. According to the American Council on Renewable Energy ("ACORE"):<sup>16</sup>

- The current tax equity market is valued at \$18-20 billion annually
- A majority of investors plan to increase their renewable energy investment by more than 10% compared to 2022 levels
- 100% of surveyed investors expect the U.S. to increase in renewables investment attractiveness compared to other countries, and 83% expect renewables investment to be more attractive compared to other asset classes
- Developers expect tax equity to be the most available financing source through 2026
- The tax equity market must grow to \$50 billion annually to meet post-IRA demand

Importantly, these findings and the overall structure of tax equity financing in the renewables sector all pre-date the issuance of the proposed rule, which as noted would impose 400% risk weighting for these type of investments—a fourfold increase over the status quo. Industry reliance on a 100% risk weighing status quo produced over \$36 billion in solar energy investments in 2022,<sup>17</sup> and Congress enacted the IRA to accelerate clean energy investments in order to meet the U.S.'s domestic climate goals and international climate commitments.

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<sup>14</sup> *Id.* § 45V.

<sup>15</sup> *Id.* § 45X.

<sup>16</sup> See ACORE, "Expectations for Renewable Energy Finance in 2023-2026" (June 2023), available at <https://acore.org/wp-content/uploads/2023/06/ACORE-Expectations-for-Renewable-Energy-Finance-in-2023-2026.pdf>.

<sup>17</sup> See *supra* n.5.

The solar industry, like other industries and the economy overall, seeks regulatory certainty and durability. Yet the rulemaking record is devoid of any evidence regarding tax equity's role in the solar industry or the banking sector more broadly. As a result, systemic risks posed by climate change and to the over a quarter of a million Americans employed by the solar industry hang in the balance. This is especially puzzling because the Agencies have historically supported a general policy of increased investment in and lending to renewable energy projects by regulated institutions.<sup>18</sup> Regulated financial institutions are both a natural and necessary source of investment capital needed to advance America's energy independence, the reliability and resiliency of the nation's electric grid, and job creation in the solar energy sector. The proposed rules would erect a major hurdle to these important goals.

### **B. Tax Equity Investments Have a Low Risk Profile**

As recently as 2021, the OCC concluded that if renewable energy and other tax credit investments meet all parts of the OCC's Part 7 criteria, a bank may utilize its lending authority to make investments that are "the functional equivalent of a loan."<sup>19</sup> Such investments should only receive 100% risk weighting under the proposed rule because they satisfy all seven of the OCC's criteria<sup>20</sup> and are regularly reviewed by OCC examiners. Again, the record contains no evidence as to why an investment that is "the functional equivalent of a loan" should receive 400% risk-weighting.

It is rare to see debt ahead of tax equity investors in the capital structure of renewable energy projects. This reduces the risk of loss of tax benefits, including as a result of recapture. Tax equity thus typically sits atop the capital stack; yet project finance debt, which is usually subordinate to tax equity, only receives 100% risk-weighting under the proposed rule.

In addition, there are other features that reduce tax equity's risk profile as compared to other equity exposures contemplated in Table 7. Tax equity investments receive the vast majority of returns from tax credits and other fixed tax benefits. While cash returns are usually less important

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<sup>18</sup> See, e.g., OCC, "Energy Lending," available at <https://www.occ.treas.gov/topics/supervision-and-examination/credit/commercial-credit/energy-lending.html>.

<sup>19</sup> See 12 C.F.R. § 7.1025(c); OCC Bulletin 2021-15 (March 25, 2021).

<sup>20</sup> "A tax equity finance transaction is the functional equivalent of a loan if: (1) The structure of the transaction is necessary for making the tax credits or other tax benefits available to the national bank or Federal savings association; (2) The transaction is of limited tenure and is not indefinite, including retaining a limited investment interest that is required by law to obtain continuing tax benefits or needed to obtain the expected rate of return; (3) The tax benefits and other payments received by the national bank or Federal savings association from the transaction repay the investment and provide the expected rate of return at the time of underwriting; (4) Consistent with paragraph (c)(3) of this section, the national bank or Federal savings association does not rely on appreciation of value in the project or property rights underlying the project for repayment; (5) The national bank or Federal savings association uses underwriting and credit approval criteria and standards that are substantially equivalent to the underwriting and credit approval criteria and standards used for a traditional commercial loan; (6) The national bank or Federal savings association is a passive investor in the transaction and is unable to direct the affairs of the project company; and (7) The national bank or Federal savings association appropriately accounts for the transaction initially and on an ongoing basis and has documented contemporaneously its accounting assessment and conclusion." *Id.*

in the context of a tax equity transaction, they are generally quite certain, given that tax equity investors typically have first claim on the project cash flows before debt is repaid.

Furthermore, tax equity investor diligence is conducted at the partnership/project level, meaning that individual projects receive higher levels of tailored diligence as compared to general business loans, and the creditworthiness of specific project sponsors is comparatively less relevant. With the seniority of distributions and the predominance of tax benefits in the investor's return, a tax equity investor has limited downside exposure in a typical transaction.

Survey data collected from tax equity investors between January 2018 and October 2023 further demonstrates the strong historical performance of renewable tax equity investments in at least 70% of the overall market.<sup>21</sup> Zero investment tax credit investments yielded after-tax losses during this time period, and only two investors reported small (no greater than 0.2%) after-tax losses on production tax credit investments, representing less than 1% of total portfolio value.

Similarly, credit recapture, foreclosure, and bankruptcy associated with tax equity investments are rare. According to this same survey data, less than 1% of total portfolio investments experienced recapture events, and even where recapture occurred, no after-tax losses were incurred. No foreclosures or bankruptcies were reported for the nearly six-year survey period, the bulk of which occurred prior to relevant effective dates in the IRA.

### **C. The Treatment of Tax Equity Investments Under a Final Rule Should Be Modified**

We recommend that the 400% risk weight category in "Table &: Risk Weights Applicable to Equity Exposures under the Expanded Simple Risk-Weight Approach (ESRWA)," 88 Fed. Reg. 64,076, be modified, and that the 100% risk weight category be expanded to include two additional categories: (1) investments that meet the OCC Part 7 loan equivalent criteria; and (2) investments that qualify for the proportional amortization method of equity accounting under Financial Accounting Standards Board ("FASB") rules as they, by definition, would derive most of their returns from federal tax incentives (similar to low income housing tax credit investments and new market tax credits investments that receive the same accounting treatment and are currently included in "community development investments" in Table 7).

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<sup>21</sup> See ACORE, "The Risk Profile of Renewable Energy Tax Equity Investments" (Dec. 2023), at 15-16, available at <https://acore.org/wp-content/uploads/2023/12/ACORE-The-Risk-Profile-of-Renewable-Energy-Tax-Equity-Investments.pdf>.

The table below reflects these changes:

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.
	<u>An equity exposure that qualifies as a tax equity finance investment under 12 C.F.R. § 7.1025.</u>
	<u>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.</u>
...	
400%	An equity exposure that is not publicly traded <u>and is not otherwise described in Table 7</u>

As other commenters have noted, the Agencies retain significant discretion in the implementation of the Basel Committee’s recommendations.<sup>22</sup> SEIA respectfully asks that U.S. banking regulators recognize the low risk profile and other attributes of investments in clean energy tax credits—as recently amended by the IRA—by adopting these recommended changes to Table 7.

### III. The IRA’s Provisions on Credit Transferability Are Not a Substitute for Tax Equity

The IRA added section 6418 to the Internal Revenue Code, which allows the sale of certain tax credits, including section 45 and 48 credits. Section 6418 was intended to expand the ability of taxpayers to monetize clean energy tax credits by creating a robust and liquid market for credits with diverse buyers (*e.g.*, large corporations and power users with renewable energy goals) and sellers (*e.g.*, new market entrants with less experience in tax equity markets) and reducing transaction costs associated with traditional tax equity financing. Nowhere in the IRA, however, did

<sup>22</sup> See Comments of the American Clean Power Association (Nov. 21, 2023), available at <https://www.regulations.gov/comment/OCC-2023-0008-0025>.

Congress express any intent to replace tax equity with transferability, or attempt to, for example, modify IRS partnership rules that enable credit monetization by partner investors with higher tax liabilities. In fact, it is reasonable to assume that because the IRA greatly expanded the types and amounts of credits available to developers of many types of energy technologies, transferability was intended to complement, not replace, traditional tax equity.

There are a number of other reasons why tax equity will remain and grow as a preferred financing vehicle, as demonstrated by ACORE, *supra* n.16. First, SEIA understands that the value of transferred credits is typically lower than for credits monetized through tax equity structures. Initial reported deals for transferred investment credits indicate a typical yield of around 90-92 cents on the dollar,<sup>23</sup> compared to tax equity deals which generally realize higher values. In addition, because no property interest is involved in the transaction, transferred credits do not include other attractive elements of tax equity partnership investments, including accelerated depreciation.

Second, the transfer market is still taking shape and very much in its infancy. While transfers could begin under the IRA for taxable years beginning after December 31, 2022, transfers are currently only subject to proposed IRS rules,<sup>24</sup> which may not be finalized until mid-2024<sup>25</sup> and may change. Liquidity in tax credit markets is still largely unknown, and overall demand drivers may fluctuate based on the projected future tax liabilities of very large corporate purchasers. For these reasons, developers and putative buyers of tax credits (including regulated banks) may prefer tax equity vehicles, at least over the next several years. Banks will also play a crucial role in developing liquidity in the transfer market through syndication of tax credits to corporate buyers via investments in tax equity partnerships that ultimately transfer the tax credits.

Third, the transfer markets for brand-new IRA tax credits—such as new production tax credits for renewable energy manufacturing (section 45X) and “green” hydrogen (section 45V)—are inextricably linked to tax equity. The IRS has yet to issue final rules for these (and other) credits, and in the absence of robust tax equity, transfers of traditional section 45 and 48 credits may crowd out new asset classes and incumbents with greater access to tax equity markets could stifle growth in other emerging credit transfer markets. If tax equity markets contract or investors exit completely in the event these proposed rules are finalized, core elements of the IRA will be significantly hamstrung.

#### IV. Conclusion

SEIA appreciates the Agencies’ efforts to strengthen the resiliency of the banking system and reduce systemic risks. However, we believe the proposed rule does not adequately analyze the low risk

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<sup>23</sup> See, e.g., Keith Martin, “Transferability: Selling Tax Credits” (March 6, 2023), available at <https://www.projectfinance.law/publications/2023/march/transferability-selling-tax-credits/>.

<sup>24</sup> “Section 6418 Transfer of Certain Credits,” 88 Fed. Reg. 40,496 (June 21, 2023).

<sup>25</sup> Office of Information and Regulatory Affairs, “Transfer of Certain Credits Under Section 6418,” available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=1545-BQ64>.



profile of tax equity investments, instead assigning them a default risk weighting by association that is substantially out of step with demonstrated risks to investors. Worse, this oversight, if not corrected, has the potential to chill major investments in renewable energy deployment and manufacturing at a time when we can least afford it. Failing to address it could be catastrophic for American workers and local communities already benefitting from the IRA. Time is of the essence to fight the climate crisis, and we strongly encourage the Agencies to clarify this issue as soon as possible.

Thank you for the opportunity to provide these comments. If you have any questions, please contact Ben Norris at (202) 556-2909 or [bnorris@seia.org](mailto:bnorris@seia.org).

Sincerely,

/s/ Ben Norris

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