GUIDANCE DOCUMENT

This guidance document is advisory in nature but is binding on an agency until amended by such agency. A guidance document does not include internal procedural documents that only affect the internal operations of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules and regulations made in accordance with the Administrative Procedure Act. If you believe that this guidance document imposes additional requirements or penalties on regulated parties, you may request a review of the document.

STATEMENT OF POLICY #19

TAX EQUITY FINANCE (TEF) TRANSACTIONS

A TEF transaction is a transaction in which a bank provides equity financing to fund a project or projects that generate tax credits or other tax benefits and that use an equity-based structure that allows the transfer of those credits and other tax benefits to the bank.

Under existing Nebraska State law, the authority for banks to make equity investments is limited to agricultural credit corporations, livestock loan companies (Neb. Rev. Stat. § 8-148.02), community development investments (Neb. Rev. Stat. § 8-148.04), and bank subsidiary corporations (Neb. Rev. Stat. § 8-148.06). It is possible for a TEF transaction to qualify as a community development investment, which would then be subject to the provisions of Neb. Rev. Stat. § 8-148.04. If not, the transaction would not be permitted under Nebraska State Law.

On December 22, 2020, the Office of the Comptroller of the Currency (OCC) issued a final rule codifying the authority of banks to engage in TEF transactions under their lending authority.* Accordingly, a Nebraska state-chartered bank would be authorized to engage in TEF transactions under the authority of Neb. Rev. Stat. § 8-1,140. This Financial Institution Statement of Policy serves as the Department's compliance standard for state-chartered banks who wish to engage in TEF transactions.

Tax equity finance transactions by banks.

(a) Tax equity finance transactions. A bank organized under the laws of the State of Nebraska may, directly or indirectly through a subsidiary or subsidiaries, engage in a tax equity finance transaction only if the transaction is the functional equivalent of a loan, as provided in paragraph (c) of this section, and the transaction satisfies applicable conditions in paragraph (d) of this section. The authority to engage in tax equity finance transactions is separate from, and does not limit, other investment authorities available to banks, including, but not limited to, authorities granted under Neb. Rev. Stat. 8-148.04 and Neb. Rev. Stat. 8-1,140.

(b) Definitions. For purposes of this section:

(1) *Bank* means a bank organized under the laws of the State of Nebraska, or a subsidiary thereof where applicable;

(2) *Tax equity finance transaction* means a transaction in which a bank provides equity financing to fund a project or projects, whether directly or indirectly through a multi-investor entity or through an entity that invests in multiple tax equity finance transactions, that generate federal tax credits or other tax benefits and the use of an equity-based structure allows the transfer of those federal tax credits and other tax benefits to the bank;

(3) *Net investment amount* of a tax equity finance transaction means, at a given time, the total dollar amount invested by the bank in such transaction *less* the total dollar value of all federal tax credits generated by such transaction that have vested and are no longer subject to recapture.

(c) Functional equivalent of a loan. A tax equity finance transaction is the functional equivalent of a loan if:

(1) The structure of the transaction is necessary for making the federal tax credits or other tax benefits available to the bank;

(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 bank 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 bank does not rely on appreciation of value in the project or property rights underlying the project for repayment;

(5) The bank 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 bank is a passive investor in the transaction and is unable to direct the affairs of the project company; and

(7) The bank appropriately accounts for the transaction initially and on an ongoing basis and has documented contemporaneously its accounting assessment and conclusion.

(d) Conditions on tax equity finance transactions. A bank may engage in tax equity finance transactions only if:

(1) The bank cannot control the sale of energy, if any, from the project; provided that, for the sake of clarity, the bank may institute certain credit or other requirements for third party purchasers of the energy if done pursuant to prudent underwriting and not in an attempt to control, influence, or manipulate the energy market;

(2) The bank notifies the Department prior to engaging in a TEF transaction once the bank's aggregate net exposure to TEF transactions exceeds five percent of capital and surplus;

(3) The bank limits the net investment amount of each tax equity finance transaction undertaken pursuant to this section to no more than five percent of its capital and surplus and the net investment of all tax equity finance transactions undertaken pursuant to this section to no more than ten percent of its capital and surplus, unless the Department determines, by written approval of a written request by the bank to exceed the above prescribed limits, that a higher per transaction or a higher aggregate limit will not pose an unreasonable risk to the bank and that the tax equity finance transactions in the bank's portfolio will not be conducted in an unsafe or unsound manner; provided, however, that in no case may a bank's total net investment in tax equity finance transactions exceed 15 percent of its capital and surplus;

(4) The bank retains records and documentation related to the tax equity finance transaction sufficient to demonstrate compliance with this section for a period of at least

five years after closing of the transaction, including records demonstrating its evaluation of the risks posed by the transaction;

(5) The bank can identify, measure, monitor, and control the associated risks of its tax equity finance transaction activities individually and as a whole on an ongoing basis to ensure that such activities are conducted in a safe and sound manner; and

(6) The bank obtains a legal opinion or has other good faith, reasoned basis for making a determination that federal tax credits or other tax benefits are available before engaging in a tax equity finance transaction.

(e) Applicable legal requirements. The transaction is subject to the substantive legal requirements of a loan, including any applicable lending limits, and if the active investor or project sponsor of the transaction is an affiliate of the bank, to any applicable restrictions on transactions with affiliates.

*OCC Final Rule - OCC Bulletin 2021-15 https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-15.html and https://www.federalregister.gov/documents/2020/12/22/2020-26225/activities-and-operations-of-national-banks-and-federal-savings-associations

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