The New Markets Tax Credit Program

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This paper considers the impact that the American Recovery and Reinvestment Act (ARRA) had on the Community Development Financial Institutions Fund's New Market Tax Credit (NMTC) Program and the network of for-profit and nonprofit organizations that the CDFI Fund relies on to realize the policy objectives of the program. Housed within the Department of the Treasury, the NMTC Program is intended to encourage private equity investment in low-income communities.[1] Equity – patient capital – has been scarce in low-income communities but is often critical for businesses to grow, create jobs and contribute to material improvement in these areas. To achieve this goal the NMTC provides a 39% credit against federal tax liability for investors who make equity investments in certified Community Development Entities (CDEs). These CDEs in turn provide favorable financing for projects located in low-income areas. These projects have included charter schools, health care facilities, grocery stores, historic theatres, manufacturing facilities, and training centers.[2] The NMTC Program has enjoyed bi-partisan support and in 2008 and again in 2011 the Program was named one of the Top 25 programs for the "Innovations in American Government Award" from the Kennedy School of Government at Harvard University.

The NMTC Program is jointly administered by the Community Development Financial Institutions Fund (the CDFI Fund) and the Internal Revenue Service (IRS). The CDFI Fund is responsible for implementing the program and the IRS is responsible for writing the rules for eligible use of funds and ensuring compliance for the use of those funds.[3] The CDFI Fund awards the tax credit allocations on a competitive basis to CDEs. A CDE is a domestic corporation or partnership that is an intermediary vehicle for the provision of loans, investments or technical assistance in low-income communities.[4] CDEs may be nonprofit or for-profit organizations but they must have a primary mission of community development and be accountable to their target service area. Once organizations are certified as a CDE by the CDFI Fund, they submit an application to the CDFI Fund for a tax credit allocation. Applications are ranked on business strategy, community impact, management capacity, and capitalization strategy. Those that are selected to receive an allocation of tax credits, "allocatees", must sign an allocation agreement with the CDFI Fund.

Once the CDE is awarded a tax credit allocation—typical allocation awards range between $20 and $80 million—the CDE has 5 years to issue the tax credits (i.e., Qualified Equity Investments

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1 Interview #4. http://cdfifund.gov/what_we_do/programs_id.asp?programID=5

2 http://www.cdfifund.gov/docs/nmtc/2010/analysis-of-selected-NMTC-projects.pdf

3 The CDFI Fund is a government corporation established in 1994 and is housed within the U.S. Department of the Treasury. The CDFI Fund also oversees several grant programs, including a grant program that supports community development financial institutions (CDFIs) that automatically qualify as CDEs. The IRS is also housed within the Department of Treasury and the NMTC is one of many tax credits programs it regulates.

4 Marples, Donald, J. CRS Report for Congress. The New Markets Tax Credit: An Introduction. June 19, 2007. Order CODE RS 22680

(QEIs)) to investors and 1 year from the date of QEI issue to use substantially all of the investor proceeds to make qualified low-income community investments (QLICI). QLICIs include: i) making a loan or investment in a qualified active low-income business (QALICB); a QALICB is a business that primarily operates in a census tract with at least 20% poverty rate or 80% median family income or primarily serves targeted populations; ii) providing technical assistance to the QALICB; iii) investing in other CDEs; or iv) purchasing qualified loans from other CDEs. To receive the equity investment nonprofit CDEs must set up a for-profit sub-CDE and typically all CDE allocatees set up sub-CDEs for each project or transaction to manage risk.[5] Figure 1 in the Appendix shows how the program works. Investors purchasing the credit receive 39% over 7 years: 5% of the total amount of QEI in each of the first three years and 6% in each of the final four years. Investors receive 39 cents of credit per $1 of investment. Investors risk recapture of the tax credit by the IRS if:

> 1) the CDE fails to deploy substantially all (85%) of its investment and fails to have this invested over the course of the 7 years; for example, if the business repays some of the QLICI and the CDE fails to redeploy these funds to another QALICB within one year;
> 2) the CDE fails to remain a CDE; it no longer has a primary mission of community development or is no longer accountable to its target service area; or
> 3) the qualified active low-income business fails to remain a qualified active low-income business.

The NMTC Program is an incredibly flexible program with a primary requirement of ensuring that private investments are in a commercial enterprise located in a qualified low-income census tract. Demand for the credit has exceeded availability by 7 to 1 on average since the start of the program. As of February 2012, $33 billion in tax credits have been allocated.[6] The tax credit has been used to finance projects like the following:

- An emergency worker training facility developed in Lafayette, LA, after Hurricane Katrina, projected to train more than 240 students per year and provide more than 60 permanent jobs.
- A high-tech business incubator in Detroit to provide opportunities for minority and women business owners.
- A 161,000 square-foot manufacturing facility in rural Iowa that manufactures parts for wind turbines.
- A charter school development serving 450 middle school and high school students, in the Crenshaw neighborhood of south Los Angeles.[7]

Recent survey results from 66 CDEs showed that they had invested $2.3 billion in 363 businesses, including: $573 million in education facilities, $361 million in industrial or manufacturing facilities, $288 million in health care facilities and $280 million in energy, agriculture or green businesses.[8]

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5 Marples, Donald, J. CRS Report for Congress. The New Markets Tax Credit: An Introduction. June 19, 2007. Order CODE RS 22680

6 http://cdfifund.gov/docs/2011/nmtc/2011%20NMTC%20Award%20Book.pdf

7 Leveraging Federal Resources for Community Development: Greg Bischak, CDFI Fund, 2010 National Interagency Community Reinvestment Conference, New Orleans, March 16, 2010.

8 New Markets Tax Credit Coalition; Progress Report; 2012.

In 2009 the NMTC Program received an additional $3 billion in additional tax credit authority as a part of ARRA. The additional tax credit authority appropriated through ARRA enabled The CDFI Fund to award allocations to an additional 56 CDEs, and while the exact job figures are unknown for reasons discussed below, some estimates suggest the ARRA funds help support the creation of 500,000 jobs through the NMTC Program.[9] As other case studies in this project illustrate, the boost in funding from ARRA served as a 'stress test' for federal managers as they worked through third party networks to disburse ARRA funds quickly, while assuring quality and accountability. In contrast to these other cases, implementing the Recovery Act was a bump in the implementation road for the NMTC Program. While federal managers were pressed to allocate the tax credits quickly and federal managers made judicious decisions that eased implementation, there were several other reasons why implementing the Recovery Act did not pose the same challenges for federal managers of the NMTC Program as it did for managers in other programs examined for this project. Two issues will be discussed in this paper:

1. The different accountability requirements for tax credit programs, compared to grants, under ARRA.
2. The character of tax credit networks, including the relationships among network actors and the role of the federal government in tax credit networks.

The impact of ARRA on the NMTC Program showcases the differences between using tax credit to implement programs through third party networks and managing other tools of governments to achieve policy objectives. Given the increasing use of tax credits to address social policy concerns, understanding the implications of the tax credit tool for federal managers and for their efforts to achieve public policy objectives through third parties is timely. The NMTC Program is a particularly useful case for understanding these differences because many of the staff that ran the program also administered the grant programs managed by the CDFI Fund, grant programs that had a similar purpose and some of the same third parties. In this respect the CDFI Fund is a bit of a natural experiment for understanding the effect of policy tools on the federal government's role in third party networks.

Before discussing accountability and networks, the paper describes the evolution of the program and then summarizes how federal managers responded to ARRA. This is not an evaluation of the NMTC Program or of ARRA. Rather this study of the NMTC Program, along with other cases in this study, lends insight into the primary research question: What is the federal government's role in third party networks and how does the federal government work through third party networks to achieve policy goals? The findings presented here rely on organizational documents, research reports, and over thirty interviews conducted with federal managers, NMTC investors and staff in CDEs that received the tax credit allocations and were located in one of three states: California, Minnesota or Virginia (see Table 1 in Appendix for a breakdown of the interviews). These states were selected to mirror the state selection in other cases for this project with the intent of identifying any significant state patterns across cases. There was no compelling reason to choose one state over another, since the states were not involved in administering the credit and many of the CDEs that received the credit operate in a multi-state or

9 http://nmtccoalition.org/wp-content/uploads/NMTCC-10th-Anniversary-Report.pdf

national service area. However, CDEs were selected to ensure that they included different markets—local, state, regional and national— and were the subsidiaries of nonprofit, for-profit and public agencies. These distinctions proved meaningful for understanding the program but will not be discussed here given space constraints.

The Evolution of the New Markets Tax Credit Program

The NMTC Program was enacted in December 2000 during the final days of the Clinton Administration as a part of the Community Renewal Tax Relief Act. The program was developed in response to a desire of then President Clinton and the National Economic Council to ensure all Americans benefited from the booming economy. The Administration wanted to bring private equity into economically distressed communities. According to one interviewee, potential equity investors said that investing in low-income census tracts was more costly than investing in suburban locations because of fewer business relationships, the need to assemble parcels, zoning regulations and less established hiring networks for employees. [10] Policymakers wanted to find a way to level the playing field between low-income and higher income census tracts by reducing the costs of investing in distressed communities.

The Office of Community Development Policy (CDP) within the Department of Treasury was tasked with coming up with proposals. The CDP worked in collaboration with the Department of Housing and Urban Development (HUD) and the Small Business Administration (SBA). One former federal manager explained that the Administration wanted to create a tax credit that did not distort the market, subsidize uncompetitive business ideas or undermine charitable giving but was significant enough for investors to sit up and take notice. They also wanted to create a credit that avoided overlap with existing programs, like the Low Income Housing Tax Credit.[11] They designed a shallow credit that excluded residential rental housing as an eligible activity and defined a business in terms of sales and employment. Investors would receive a 39% credit spread out over seven years: five percent (5%) for each of the first three years and 6% for each of the remaining four years.[12] The shallow credit was designed to ensure equity investors would bring their "brains as well as their wallets to these deals" in order to realize their full financial return.[13]

Several early developments shaped the implementation of the program.[14] For example, federal managers at the CDFI Fund put in place evaluation criteria that gave points to applicants that committed to investing in more severely distressed communities, targeting the credit more than was required by the regulations. Similarly federal managers evaluated applicants based on the

10 Interview 4.

11 Interview 4.

12 http://www.cdfifund.gov/what_we_do/programs_id.asp?programID=5

13 Interview 4.

14 Other early decisions that shaped the implementation of the program included: i)the decision by the IRS to require that investments in other CDEs needed to be traced ultimately to a qualified low-income business to prevent a situation where investments are sitting in the CDE; ii) the decision by the CDFI Fund to weigh the four components of the application so that it elevated community impact and business strategy over capitalization strategy and management capacity. This change was intended to level the playing field among CDEs affiliated with big Wall Street banks and those affiliated with small mission driven nonprofits; as management capacity and capitalization strategy favored the former CDEs.

favorable terms and rates of their investment in or loans to businesses, something not specified in the regulations but that managers felt was important to ensure that CDEs passed on the benefits of the credit to the businesses in which they invested.[15] The CDFI Fund also required CDEs to raise at least 60% of its equity investment in three years, not five.

One of the most significant developments was the IRS ruling that cleared the way for CDEs to use what became known as the "leveraged structure".[16] In 2003, responding to questions from third parties trying to use the credit, the IRS issued a ruling that provided guidance on how an intermediary structure could be set up to receive equity from investors as well as debt from other sources and then the entire pool could be invested in a CDE.[17] This leveraged structure allowed the tax credits on the entire pool to flow to the equity investors, while the debt investors in the pool received their negotiated interest payments and return of principal from their loan. For example, an equity investor could put in $3 and a lender could put in $7 into the investment fund but the equity investor would get $10 * 39% (or $3.90) worth of credits, instead of $3* 39% worth of credits (see Figure 2 in Appendix).

The leveraged structure bifurcated the credit: instead of the investors receiving the credit and a return on the deal from owning and managing the CDE, which was the original intent, the investors would receive all of their financial return from the higher amount of credits available from the larger investment pool and the leveraged lenders would receive their capital with interest.[18] This improved the appeal of the credit to investors because it increased the value of the credit and separated the debt and equity making it easier to compare projects.[19] Investors argued that they could not easily evaluate transactions that included a blend of tax credits and the financial return from the CDE itself. Without the leveraged structure, it is uncertain whether investors would have participated in the program at all or to the extent that they have.[20]

Yet, the leveraged structure may have indirectly increased the transaction costs associated with using the NMTC because the deal structures were more complicated.[21] The recession meant that many banks were reticent to put debt capital into the leveraged structure.[22] Consequently, CDEs

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15 Interview 3, Interview 5.

16 Interview 7.

17 The ruling was in response to what one interviewee called "code hackers", individuals who know how to work the tax code. In this case, someone realized that the statute did not require equity. I was unable to confirm the source of this idea. Some suggested it came from Novogradac & Company, one of two main accounting firms in New Markets industry, others suggested that nonprofit CDFIs came up with the idea in effort to make the program work for non-corporate investors and then was picked up by accounting firms and morphed into something else.. Interview 4; interview 2; interview 8. However, interviewees explained that the credit was so shallow that there was no other way to make it work.

18 Interview 4.

19 Interview 4.

20 Interview 14.

21 However, another interviewee questioned whether the transaction costs were higher for the leveraged structure versus the simple structure. At the time of this writing, I was not able to answer this question. So few deals were done with the simple structure that it is a difficult comparison.

22 Banks reticence was partly the result of the credit crunch after the collapse of the economy but also a concern over how regulators would view non recourse loans. In order to secure interests of the investors in a leverage d structure, lenders had to agree to making a nonrecourse loan and consequently did not have recourse in the normal sense. Lenders are assigned the A and B note as collateral and could replace the ownership of

turned to smaller banks, charitable sources, bonds, and public subsidies from other programs to find leveraged debt (see Table 3 in the Appendix for sources of leveraged debt). With all these sources of funding going into one deal to increase the yield for the investor—what some referred to as a "capital stack"—the deals became more complex. Lawyers needed to make a determination about whether these alternative sources of funds were 'true debt' and they had to work out the terms for all these parties contributing to the leveraged structure. A few interviewees used the term "brain damage" to refer to the NMTC Program. Interviewees talked about sitting on calls with 15 attorneys trying to work out the details of the deal; about multiple five -inch binders with legal documents, about spending years with potential borrowers to help them get comfortable with the structure.[23] One former federal manager commented, "I don't think people envisioned all of the ancillary players getting involved—the accountants, the lawyers, the auditors and the consultants—all taking a bite out of the apple".[24]

High transaction costs have steered CDEs away from smaller deals, as it became hard to justify the expense of undertaking deals below $2 million.[25] Interviewees even suggested that doing deals under $5 million was increasingly rare. These larger deals have had positive impacts but the high transaction costs has resulted in less money flowing down to the low-income qualified business for project costs.[26] GAO issued a report in 2010 suggesting that Congress offer grants to facilitate a comparison of the grant program to the NMTC program, in part because the fees associated with legal opinions and accounting issues reduces the overall capital invested in the qualified low-income business.[27] Novogradac & Company issued a response to that report suggesting that the analysis ignored elements of the NMTC, including the time value of money as well as additional costs of the cash grant program.[28]

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the leveraged structure if the investor or the CDE failed to meet their obligation. However, other terms of the structure – like the investors right to redeploy capital in the event of a business failure or repayment to avoid recapture of the credit – is not something lenders felt comfortable with (interview #7).. This is why the debt often times comes from the equity investor themselves or from public sources or private philanthropy. However, over time even investors have been less likely to put in the debt, in part because they have so many worthy borrowers looking for debt and New Markets lending is complicated.

23 Interview 7, Interview 14, Interview 16, interview 20. One interviewee explained, "You have a health care provider that is building a building. You come to them with a new markets tax credit allocation and say 'we believe is a better financial solution for you than borrowing 5 million dollar at a market rate. You can't afford a market rate because you are a service oriented nonprofit living on donations and government income, let me sit down and explain what a leveraged loan transaction model looks like. It is hugely complex… it is going to cost you about $150,000 in transaction fees. You are going to need a lawyer, and we are going to need a lawyer and the investor is going to need a lawyer. There will be a lot of legal meetings. And you are going to have to hire an accounting firm to come in and model the transaction and that is going to be another $30,000. But trust me; this is a better option for you.' These are the conversations we are having…"interview 16

24 Interview 8.

25 According to one interviewee, the leveraged structure may have steered CDEs towards low-risk and more conservative deals, real estate deals, because the lender was not getting any tax benefit and therefore wants to be sure that its loan is repaid with interest. Other interviewees raised similar concerns about the low-risk nature of the deals. Interview 4, Interview 1. One interviewee suggested that early on CDEs were going for more conservative low-risk deals, as they tried to figure out the program but this was not the result of the leveraged structure. Interview 3.

26 Interview 25.

27 see GAO-10-334, p. 28.

28 See NMTC Program Outperforms Comparable Cash Grant Program. Novogradac & Company Special Report. October 11, 2011.

At the time of this writing, the IRS and the CDFI Fund staff were looking at ways to reduce transaction costs and encourage more investing in rural areas as well as in operating businesses. Some CDEs were also trying to figure out how to reduce transaction costs, including sharing legal representation (rather than each organization having a separate lawyer) and using local accounting firms that were less expensive.[29] However, it is important to note that the transaction costs are not solely the consequence of the leveraged structure. The diversity of projects that can be financed with the NMTC—everything from a historic arts theatre to grocery store to a job training center—not only makes the credit incredibly appealing and adaptable to local community needs but also prevents standardization of the transactions and keeps costs high. At the same time, the increasing competition for the credit and the size of the deals means multiple CDEs are participating in a project. CDEs do not want to spend all their allocation on one deal; they want to spread their allocation around to demonstrate more impact and to be more competitive if they applied to the NMTC Program again. But multiple CDEs also increase the transaction costs because they each have their own attorneys. Finally a question remains about whether the transaction costs for the NMTC Program are higher than for other tax credit programs, like the Low Income Housing Tax Credit or the Historic Preservation Tax Credit.[30]

American Recovery and Reinvestment Act

The American Recovery Act included 54 specific provisions to reduce tax liability and spur economic recovery. These tax provisions represent more than a third of the total estimated cost, or approximately $297 billion, of $787 billion for the Recovery Act (GAO -10-349).[31] Most of the recovery tax credits are targeted to individuals and administered by the Internal Revenue Service.[32] However, IRS was not responsible for implementing all provisions included in the tax section of the Recovery Act. The CDFI Fund was responsible for implementing the provisions for the NMTC and allocating the $3 billion in additional tax credit authority. The Recovery Act split this $3 billion in tax credit authority into two calendar years: $1.5 billion allocated for calendar year 2008 and $1.5 billion allocated in calendar year 2009. This brought the total tax credit authority for each year to $5 billion (See Table 2 in Appendix).[33]

In December 2008, the Fund was notified that it would be receiving this additional tax credit allocation authority through the Recovery Act. The Fund, under the direction of the Chief Accountability Officer, put together a working group and developed a plan on how to best deploy the additional funds for both the NMTC Program as well as the additional $100 million in funding that the CDFI Fund received for its grant programs. As required by the Office of Management and Budget (OMB), staff were assigned to focus exclusively on ARRA, although

29 Interview 25; interview 16. Using local accounting firms proved challenging as investors were reluctant to use firms other than Novogradac & Company and Cohn Reznik.

30 Interview 7.

31 http://www.recovery.gov/Transparency/fundingoverview/Pages/fundingbreakdown.aspx. There are different estimates of the costs of the tax provisions associated with the Recovery Act. The Joint Center on Taxation estimates the costs to be $325 billion, the Congressional Budget Office estimates the costs at $212 billion and the Administration estimates are $297 billion on recovery.gov. (GAO 10-349).

32 For a review of the IRS' implementation of ARRA, see GAO 10-349.

33 http://www.gpo.gov/fdsys/pkg/BILLS-111hr1enr/pdf/BILLS-111hr1enr.pdf

none of these staff were dedicated to the NMTC Program. With little excess capacity the NMTC Program staff worked non-stop to award the allocations and the CDFI Fund was able to rapidly disburse the additional tax credits.[34]

The Recovery Act included a special rule for the $1.5 billion allocation authority that was to be disbursed retroactively for the 2008 funding round. The Fund could either increase the size of the awards already made to CDEs or they could make an allocation to CDEs that had not received an award in 2008.[35] To disburse the funds, federal managers went back to the applications submitted by CDEs in the 2008 allocation round and made awards to the next highest scoring applicants. In total the CDFI Fund made $1.5 billion in what they called "look back awards".[36] The second $1.5 billion of the remaining tax credits were awarded in the next competitive round in 2009. Here the CDFI Fund made the decision to give the stimulus credits to the highest scoring organizations, with the rationale that the top scoring organizations would be better able to handle the added scrutiny of receiving ARRA credits.

At the time the credits were allocated, staff still had not been informed about the accountability requirements for ARRA. Federal managers included a contingency clause in the allocation agreements signed for each stimulus award and the CDFI Fund Recovery Act Plan clearly stated that all recipients of ARRA funding would be expected to provide data to the Federal government on a quarterly basis that indicated how award dollars were spent and the impacts (e.g., job creation). But agencies administering tax provisions and the recipients of the tax benefits were not required to report data to the Recovery Act website. While the exact reasons for this were not clear at the time of this report, it may be because of the IRS's desire to adhere to its mission—to administer the tax code—not administer the increasing number of social policies using the tax code.[37] In the end, NMTC allocatees only had to report on ten additional data points quarterly and did not report or upload this to the central Recovery.gov site but rather to the CDFI Fund directly. At the time of this report, federal managers were considering eliminating these requirements all together.

In addition to limited accountability requirements, the Recovery Act did not introduce any major regulatory changes that affected the implementation of the NMTC Program. This was not the case with other programs. For example, contracts were required to follow Davis Bacon rules, which proved challenging for programs like the Weatherization Assistance Program as discussed in another case for this project. The Recovery Act also introduced changes to tax provisions that proved challenging to implement for the IRS. For example, First Time Home Buyer Tax Credit under ARRA did not have to be repaid. This was a change from the First Time Home Buyer Credit that was passed under Housing and Economic Recovery Act of 2008 which did need to be repaid. The Inspector General found that because the IRS did not change the form to include a

34 Interview 5.

35 http://www.gpo.gov/fdsys/pkg/BILLS-111hr1enr/pdf/BILLS-111hr1enr.pdf

36 The CDFI Fund staff took a similar approach for the additional ARRA funds they received for their grant programs.

37 "In the past, IRS officials said that IRS's role is to collect data only to the extent that the data help it to administer the tax code. However, for the Recovery Act, IRS went beyond its typical efforts in order to provide transparency over the use of the tax provisions and to collect more reportable data on the tax provisions." GAO-10-349: p. 13. Also see Howard, Christopher. 2002. Tax Expenditures. Chapter 13 in *Tools of Government: A Guide to the New Governance*. Oxford University Press.

purchase date, the IRS could not distinguish those qualifying for the 2009 credit from those qualifying for the 2008 credit, resulting in millions of taxpayers receiving letters about repayment.[38] Even in the case of the CDFI Program, the Recovery Act waived certain requirements like matching funds and caps on award amounts, which created a technical issue for the CDFI Fund. The Inspector General found that the CDFI Fund inconsistently applied these new rules because it administered part of the funds under an old Notice of Funds Availability (NOFA).[39] These regulatory changes coupled with the push to get the money out the door proved challenging for many agencies implementing the Recovery Act. The absence of these types of regulatory changes likely eased implementation of the Recovery Act for the NMTC Program.[40]

Overall the CDEs did not report any significant difference between receiving stimulus funds and a regular allocation. However, as previously noted, they did have to submit data on 10 data points quarterly. None of the CDEs interviewed for this case reported that the 10 data points posed a significant burden, particularly since the 10 data points represented a small fraction of what CDEs were required to report to the CDFI Fund on an annual basis.[41] On the other hand, some CDEs reported challenges raising the equity and leveraged debt to allocate the credits quickly because of the credit market freeze. The credit market freeze meant that the big banks pulled away from investing in more risky deals, some banks merged and others weren't profitable. At the same time, there was a major reduction in the upper tier debt.

Consequently, CDEs had to spend more time cultivating relationships with different kinds of lenders and the credit was more difficult to price. One CDE reported that it still had not utilized the tax credits that had been awarded as a part of ARRA and another discussed the challenges posed by having defined a small local service area.[42] However, the difficulty in utilizing the credits was not necessarily unique to the stimulus funds as allocatees receiving a regular allocation during this time also faced similar problems.[43] The credit crunch, coupled with the definition of the allocatees service area (local, state, multi-state or national) and the types of deals they were trying to do presented some obstacles for disbursing the ARRA funds quickly.[44]

But this was not true for all the CDEs interviewed for this study; some CDEs had enough deal flow that they were able to select projects with their stimulus allocation that were likely to generate more jobs.[45] At the same time, CDEs have 5 years from the time their allocation

38 GAO 10-349. IRS Quickly Implemented Tax Provisions but Reporting and Enforcement Improvements are Needed.

39 Office of Inspector General Department of Treasury. Audit Report. 11-079. RECOVERY ACT: The Community Development Financial Institutions Fund Needs to Improve Its Process for Awarding Assistance to Applicants.

40 http://www.gpo.gov/fdsys/pkg/BILLS-111hr1enr/pdf/BILLS-111hr1enr.pdf. To see related IRS CODE. http://www.gpo.gov/fdsys/pkg/USCODE-2010-title26/pdf/USCODE-2010-title26-subtitleA-chap1-subchapA-partIV-subpartD-sec45D.pdf

41 Interview 11, interview 20, interview 21, interview 25, interview 28, interview 29.

42 Interview 28; interview 20.

43 Interview 20, interview 24, and interview 28.

44 For example, CDEs that had a national service market could more easily locate deals and redeploy investments if a deal went under, which was appealing to investors and lenders. This was true regardless of whether a CDE had a regular allocation or a stimulus allocation. Interview 10; interview 13, interview 18

45 Interview 25; interview 21.

agreement is executed with the CDFI Fund to issue the tax credits to investors and 1 year from the date the QEIs are issued to use substantially all of the investor proceeds to make QLICIs.[46] This means that the window they have to utilize the allocations is longer than for many grant programs, likely relieving some pressure.

To summarize, in comparison to the other cases included in this project, the implementation of ARRA by the NMTC Program was a bump in the implementation road for federal managers. Federal managers at the CDFI Fund allocated the credits quickly, reporting requirements were minimal and there were no implementation issues identified by the inspector general at the time of this report.[47] It was the CDEs that faced the challenge of utilizing the credit. While some reported no issues with using the credit, others reported significant challenges, which were less related to ARRA and more related to the slow down in the economy.[48]

Accountability Requirements

Shortly after the Recovery Act was passed, the Office of Management and Budget issued a 62 page memorandum detailing the new accountability and transparency requirements for federal agencies.[49] This memo outlined requirements for administering grant, contract, loan and loan guarantee programs. There was no mention of tax credit programs. As noted above, agencies administering tax provisions and the recipients of the tax benefits were not required to report data to the Recovery Act website. While recovery.gov includes a chart on the estimated dollars distributed through the tax provisions, this estimate is not based on actual provision use but is based on estimates that were created by Treasury's Office of Tax Analysis before the Act was implemented.[50] And even though federal managers in both the IRS and the CDFI Fund did collect additional data to improve transparency under the Recovery Act, including jobs numbers for the NMTC Program, very little of this data is publicly available.[51] The Treasury Inspector General (TIGTA) did issue over twenty reports citing problems with the implementation of tax provisions under the Recovery Act, but none were related to the NMTC Program. Overall, though, the Government Accountability Office (GAO) reported, “While the Recovery Act calls for unprecedented levels of transparency and accountability in how Recovery Act dollars are

46 This is the requirement of the statute. The Allocation Agreement actually requires CDEs to raise 60% of the Qualified Equity Investment by year 3 to remain in compliance.

47 The Inspector General has identified issues with other tax credits. For example, the IG cited that millions of individuals may have erroneously received plug in electric and alternative motor vehicle credits. See http://www.recovery.gov/Transparency/fundingoverview/Pages/audit-reports-tax.aspx.

48 One interviewee suggested that those CDEs without a prior allocation would find it more difficult to raise the Qualified Equity Investment because it takes time for investors to feel confident that the CDE has the ability to remain in compliance and not risk recapture of the credit.

49 Office of Management and Budget. Initial Recovery Act Implementing Guidance. February 18, 2009.

50 GAO 10-349. IRS has noted that it is role is to collect data only to the extent necessary to administer the tax code. See http://www.gao.gov/htext/d10349.html. Also see Christopher Howard. 2002. Tax Expenditures. Chapter 13 in The Tools of Government: A Guide to the New Governance.

51 GAO 10-349; interview 3, interview 5, and interview 9. Consequently, obtaining job data for the New Markets Tax Credit ARRA allocations required submitting a Freedom of Information Act request. One notable exception is the role of the Inspectors General in overseeing the management of the Recovery Act funds.

being spent, information on the tax provisions is generally not included in mandatory Recovery Act reporting."[52]

This differential treatment of tax credits under the Recovery Act seems to reflect a differential orientation to tax credits more generally. For the federal managers administering the NMTC Program the accountability requirements of tax credits stood in stark contrast to their experience administering grants for the other CDFI Fund programs. As one federal manager stated, "The big difference is that at the end of the day, this is not federal dollars, this is not a grant going out door; even though the size of the [award] is huge, there is not a single federal dollar going out the door, so A-133 requirements, OMB requirements…there is less of a burden of reporting."[53]

Yet it would be a mischaracterization to suggest that there is less oversight of tax credits. The CDFI Fund requires that CDEs report detailed transaction and institutional level data annually to help monitor CDE compliance with their allocation agreement and the investors also play a significant role in ensuring compliance to avoid the harsh re-capture penalty if requirements of the program were not met. The recapture penalty requires that investors pay back the credits with interest for all seven years, even if, for example, a business fails to remain a qualified low-income business during the sixth year. To avoid recapture, investors have put in place a number of systems to ensure CDEs are in compliance. One investor explained: "As an investor, we are very concerned with the recapture. That is our focus. So in their operating agreement, we put in place provisions that we think that will prevent a recapture. We have removal rights if they stop doing their responsibilities. We have reporting requirements, and deadlines for those reporting requirements, we have guarantees that say if there is a recapture they will be responsible for repaying us the loss…"[54]

With investors doing the underwriting to ensure compliance, federal managers at the CDFI Fund do not have to monitor NMTC transactions the way they would if investors were not playing this oversight role. However, relying on third parties to ensure oversight also has had consequences. In this case, investor's focus on re-capture has also increased transaction costs as they have put in place a substantial back office structure to ensure compliance. Higher transaction costs ultimately result in less subsidy flows down to the ultimate beneficiary, the qualified business.

Like other tools of government, tax credits and exemptions are intended to achieve specific policy objectives, in this case by reducing or eliminating tax liability. But the differential accountability requirements for the NMTC Program under Recovery Act raise a larger question for federal managers about how to best ensure accountability for tax programs more broadly. Comments by federal managers suggest some ambiguity about how to manage this tool.[55] With

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52 GAO 10-349. The administration of the tax provisions under the Recovery Act were still subject to oversight by the Treasury Inspector General for Tax Administration.

53 Interview 3.

54 Interview 7.

55 For example, the IRS has noted that its role is to collect data only to the extent necessary to administer the tax code. See http://www.gao.gov/htext/d10349.html. Also see Christopher Howard. 2002. Tax Expenditures. Chapter 13 in The Tools of Government: A Guide to the New Governance. Oxford University Press. Similarly federal managers at the CDFI Fund struggled with how to best administer this tax credit, with some suggestion that staff were trying to administer the credit in the same way they would a grant program. Interview #8.

the increasing use of tax credits and exemptions to achieve public policy objectives, more support is needed for federal managers to manage third parties using this popular policy tool.[56]

Networks

Governance networks include nonprofit, for-profit and public organizations that are inter-dependent, working on a common problem and where relationships are structured by neither hierarchy nor contract. Federal managers are dependent on these networks to achieve public policy objectives.[57] While third parties offer expertise and extend the federal government's capacity, they also have their own interests and agendas that can make it difficult for federal managers to ensure results.

The other cases for this project illustrate some of the challenges that federal managers faced as they worked to disburse a sudden infusion of funds from the Recovery Act through third party networks. As discussed above, for the CDFI Fund's NMTC Program, the infusion of $3 billion in tax credit authority did not pose significant challenges for federal managers and their relationships with the CDE allocatees but for the CDEs the story was somewhat mixed as they were challenged to find sources of debt for the leveraged structure and spurred them to reach out to new lenders.

This section considers whether there is something about the third party network involved in the NMTC Program that may have eased the implementation of the Recovery Act. It describes the third parties involved in the NMTC Program, the relationship among these third parties, and the federal government's role in this network. The section concludes by offering some observations on the NMTC network and the implementation of the Recovery Act. To better understand whether there might be something distinctive about the NMTC network, this analysis makes some limited comparisons to the CDFI Program, a grant program also administered by the CDFI Fund. As noted earlier, the CDFI Fund offers somewhat of a natural experiment for understanding the effect of a tool on third party networks. Some of the same third parties (certified community development financial institutions) are eligible to apply under both programs; federal managers worked on both programs; and the administration of the two programs share some similarities: The CDFI Fund administers a competitive award process for both programs, the awards are made directly to third parties, as opposed to passing through the states, and the broader purpose of both programs is the same: to spur economic revitalization in low-income areas by bringing in private capital to support development.

Network Actors. The third parties involved in the NMTC Program are extremely diverse in size, organizational purpose, and motivation for participating in the program. They also have highly sophisticated financial and accounting expertise.[58] One federal manager characterized the

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56 Salamon, Lester (Ed.) (2002). Tools of Government. A Guide to the New Governance. Oxford University Press.

57 "Contracts may be a way in which two or more organizations are linked, but a set of contractual relationships is not the same as a network" (Johnston and Romzek, 2000, cited in Provan and Milward 2006. A Managers Guide to Choosing and Using Collaborative Networks).

58 It is a completely different level of expertise to be a person that is going to underwrite deals, involving multiple sources of financing, pairing historic credits with NMT credits. It's a lot of brainwork and people are build expertise over the years. Interview 3.

difference between the grant program versus the tax credit program: "It is like playing in the local park versus in the stadium."[59]

Five types of third parties are involved in the NMTC Program. First, there are the Community Development Entities (CDEs). CDEs raise the equity and invest in the businesses. Other than being a domestic corporation, having a primary mission of community development and demonstrating accountability to their target service area, there are no other requirements. Almost all organizations that apply receive the designation.[60] CDEs can be nonprofits or for-profits to receive an allocation from the CDFI Fund, but to receive an equity investment from an investor, a CDE has to be organized as a for-profit. Nonprofits create for-profit sub-CDEs—limited liability companies or limited partnerships—for this purpose, although for-profit CDEs also create sub-CDEs for each transaction in an effort to manage risk. Consequently, one CDE can have several sub-CDEs. For example, Midwest Minnesota Community Development Corporation, a CDFI that was one of the original Community Action Programs started in the early 1970s has 27 sub-CDEs, while U.S. Bank CDE has almost 100 sub-CDEs.

There are almost 6,000 CDEs representing about 900 organizations. The parent organizations include banks (e.g., US Bank, Bank of America); nonprofits (e.g., Midwest Minnesota Community Development Corporation, Local Initiative Support Corporation); government agencies (e.g., Saint Paul Port Authority; Norfolk Redevelopment & Housing Authority), and other for-profit firms (e.g., real estate development companies like 123 Capital Impact; subsidiaries of corporations like Chevron NMTC Fund LLC). Compare the roughly 900 organizations that have CDEs with the 900 Community Development Financial Institutions certified by the CDFI Fund and eligible to receive funding under the CDFI Program: the diversity of implementation partners for the NMTC Program is much greater than it is for the CDFI Fund Program. The bar is much higher for receiving certification as a CDFI and they have much more in common than the CDEs.[61]

The second set of organizations involved in the NMTC network is the investors. Regulated Depository Institutions represent the largest percentage of investors (86% of NMTC investors).[62] Four big banks—U.S. Bank, JPMorgan Chase, PNC, and Bank of America—along with other national, regional and local banks have invested in the credit. U.S. Bank has been the biggest investor.[63] Other investors include corporations, unregulated financial service firms; insurance companies; and individuals. The investors play a significant role in shaping the implementation of the NMTC Program. As noted earlier, they ensure compliance and require CDEs to follow

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59 Interview 5.

60 Interview 3.

61 CDFIs include both nonprofits and for-profits that are certified by the CDFI Fund as having met 6 criteria: 1. primary mission of community development; 2. accountable to its target market; 3. primary activity is financing; 4. Serve an eligible target market (certain distress criteria) 5. be a nongovernmental entity; 6. provide development services in conjunction with its financing activities; 7. be a legal entity at the time of application.

62 New Markets Tax Credit Coalition; Progress Report; 2012.

63In addition to receiving the Tax Credit, Banks can also get CRA credit.

certain procedures, like using specific accounting firms to model transactions.[64] One investor explained that they play several different roles, including: lender, compliance monitor, fund manager, marketer of successful deals, and convener, bringing together CDEs to share lessons learned and to problem solve.[65]

The leveraged lenders, those providing the debt in the leveraged structure, are the third set of actors involved in the NMTC Program. There can be many debt sources in one leveraged structure. Table 3 in the appendix shows the sources of leveraged debt. Leveraged lenders include the banks that are providing the equity to the leveraged structure, other banks, public funding sources, charitable donors, and project sponsors.

The fourth group of actors involved in the NMTC Program is the accountants and lawyers. An entire ancillary structure of accountants and lawyers has developed around the NMTC Program, many of whom worked on the Low Income Housing Tax Credit and the Historic Preservation Tax Credit. Two accounting firms dominate the market: CohenReznik and Novogradac & Company. The law firms include Nixon Peabody, Bryan Cave, Leverage Law Group, Husch Blackwell, Grant Thorton, Armstrong Teasdale, among others. The accountants and lawyers also play important roles in implementing the NMTC Program. For example, the accounting firms hold semi-annual conferences and working groups on the NMTC. Finally, the fifth set of actors is the Qualified Active Low Income Community Businesses, the actual recipients of the favorable financing, which can include nonprofits, small businesses, developers, as well as educational and government controlled entities.

Network Relationships. The networks in the NMTC Program were described by many interviewees as transactional and some suggested temporary. The five sets of actors described above come together to finance a project in a low-income area and are organized around an investment fund—a legal structure—that defines their relationship and responsibilities for seven years. "A CDE is a structure for a transaction. Not brick and mortar entities – they don't have a front door."[66] One CDE commented: "We have to be realistic about the partnerships that have been created and whether they will last. It may have been a one time thing for Morgan or NY Community Bank to invest in non-metropolitan areas that they have never heard of in the mountains, where you have 2,000 inhabitants. Maybe those are just once [off transactions], but they have done it and it changed the lives of the people in that community"[67]

However, the data collected for this case suggests that the picture of these networks as temporary, structured by contracts and motivated by fee income may be too narrow. Trust, or 'getting comfortable', was frequently discussed as interviewees described their project partners and their effort to use the NMTC Program. One investor discussed the reticence of a CDE to

64 One interviewee explained, "This industry only has a handful of accounting firms considered experienced. Investors are driving all business to those accounting firms, which is leaving transaction costs very high because they have a captured market…We have new relationships with Novagradac and CohenReznik – we have to – we have to use them to model the transactions – otherwise no one will touch it – no one will come in." (Interview 16).

65 Interview 7.

66 Interview 9.

67 Interview 14.

work with them initially, but slowly over time the CDE got more comfortable with the investor.[68] A CDE talked about trusting another CDE enough so that they could share legal counsel and reduce the transaction costs of a deal involving multiple CDEs.[69] Another CDE explained how one investor agreed to a blind pool, where they did not have "authority or influence" in how the funds were invested.[70] Banks and equity investors also had to learn how to work together, to understand each other's risks. At the same time, many of the individual interviewees had a history of working on community development finance and leveraged some of these relationships in the NMTC Program, suggesting that the relationships were not all short term: "All of these relationships in NM space are relationships we already had in the housing and healthcare finance."[71]

While the network of third parties involved in implementing NM rested to some extent on previous relationships, almost all the CDEs interviewed for this project reported that the NMTC spurred new relationships with investors that they had never worked with before. Data collected by the CDFI Fund between 2002 and 2007 shows that over 76% of NMTC investors were not affiliated with the CDEs in which they made an investment, and over 61% of the dollars invested came from entities that had never before made an investment in the CDE.[72] Similarly a GAO report found that 69% of investors were new in 2006, making their first investment in a particular CDE.[73] One investor noted that 95% of the entities that they work with on these transactions were not in their LIHTC portfolio and were very diverse, including for-profits, nonprofits, venture capitalists, and other corporate entities.[74] Moreover, interviewees, specifically the CDFIs, reported that the NMTC Program has increased their bargaining position relative to these banks– it leveled the playing field, since the nonprofit CDEs now had something that investors wanted – the credits.[75]

In some ways the NMTC network is similar to how others have described the emergency response networks; they lie somewhat dormant until there is an emergency and then the relationships are very structured in the execution. However, unlike emergency response networks, the actors are constantly changing, new third parties are coming in all the time, and while the relationships are highly structured in some respect they are not standardized and trust is a key determinant in whether third parties participate in a transaction at all.

Federal Government's Role in Third Party Networks. The federal government's role in third party networks has not received much attention in the literature. One description suggests that the federal government plays three roles: i) activating networks where it encourages third parties to participate in public problem solving; ii) orchestrating networks so that individual actors

68 Interview 7.

69 Interview 25.

70 Interview 15.

71 Interview 17.

72 CDFI Fund. Promoting Investment in Distressed Communities: New Markets Tax Credit Program. October 2008.

73 GAO 07-296.

74 Interview 7.

75 Interview 15.

contribute to problem solving in productive ways; and iii) modulating networks where the federal government uses rewards and penalties to elicit desired behavior.[76]

The findings from this study support this characterization but also suggest other possible roles. Comparing the CDFI Fund's role in a tax credit network to its role in a grant network shows that in this case the federal government plays more of a steering and meditating role in the NMTC network, compared to a building and legitimating role in the CDFI grant network. In other words, with the NMTC Program the Fund's role is one of steering third parties into new areas and to a lesser extent mediating relationships between large for-profit firms and smaller nonprofit organizations. In contrast, through the grant program the CDFI Fund has built and legitimated a network of third parties to provide capital for underserved populations.

The CDFI Fund's role in these third party networks—steering a network versus building and solidifying a network—partly reflects the purpose of the programs but also these roles were evident in how the two programs were implemented and the impact of the programs on the third parties mobilized by each tool. The purpose of the NMTC Program is to bring private investors into low-income areas by changing the incentive structure and lowering the real and perceived risk of investing in businesses within these areas. The purpose of the CDFI Program is to build the capacity of local organizations that already lend and invest in these distressed communities. On NMTC side, the Fund used the competitive application to reward third parties for going beyond the minimum requirements set by IRS in the regulations to, as one interviewee put it, "steer these to the best communities."[77] For example, the CDFI Fund put in place criteria that rewarded CDEs that planned to invest in more severely distressed communities than required by the regulations. Similarly federal managers evaluated third parties based on the favorable terms and rates of their investment in or loans to businesses, something not specified in the regulations, but that federal managers felt was important to ensure that CDEs passed on the benefits of the credit to the businesses.

Steering these third parties to achieve public objectives was more necessary with the NMTC Program because the program set out to engage a wide range of third parties many of whom did not have a mission that naturally aligned with the program's intent.[78] While federal managers used the competitive application to steer third parties towards delivering higher impact, staff were challenged by the level of sophistication of the groups they sought to direct towards low-income areas. As one federal manager put it, "There is a level of sophistication. They are

76 Salamon, Lester. 2002. Tools of Government: A Guide to the New Governance. Oxford University Press. P. 16-17.

77 For example, the statute defines a qualified low-income community as any census tract that has a 20% poverty rate or above or median family income as at or below of 80% of area median income. Thirty-nine percent (39%) of the census tracts meet that criteria and; "it is not that rigorous of a screen." The CDFI Fund inserted a question that asks whether the tax credit applicant will make a majority of their investments (75%) in "severely" distressed communities, if the applicant checked yes and receive an allocation, they will be required to meet that standard as specified in their allocation agreement. Most deals have been done in these more distressed communities.

78 The whole issue of who qualified as a CDE ended up being pretty open-ended. As long as you could say that the majority of the organization's activities were going toward low-income community and as long as you have some nominal representation on the board or advisory board, you qualified. Ostensibly people had to have a mission of community development but as long as you had the right words in your by-laws or articles of incorporation. That has become a real issue. You have a number of folks playing in this game, who are no more community development oriented than the man on the moon. Interview 8.

constantly wanting affirmation from the Fund [about whether] their thinking outside the box, doing new wrinkles, whether it conforms to IRS rules. So it is hard to stay one step ahead of that kind of industry when they have people who are single-mindedly focused on that activity and have so much more knowledge of IRS rules than we do. So much more finance ability than anyone on my team has..."[79] Another former federal manager commented, "The need for checks and balances become much much higher…and The Fund has no ability [to evaluate this]...these guys are very good at marketing."[80]

On the grant side, federal managers were not trying to steer third parties into low-income communities because these organizations were already working in these communities. Here the focus was on building the capacity of these organizations to deliver results.[81] Towards this end, grants were made to support a business plan. The grant increased the equity position of the organization, allowing the CDFI to leverage greater debt and increase their capacity to invest in their communities. The CDFI Fund also provided funds to support technical assistance for CDFIs. One federal manager explained, "CDFIs are long term entities in communities for generation and generation. The CDFI Program is all about giving those groups the capacity to grow. That is why specifically under the CDFI Program our funds are not tied to specific activity. [On the tax credit side] we are not trying to build up a network of CDEs at all, we are just trying to build up a bunch of funds for 7 years and then everyone walks away. [If] you have a project in a low-income community, it's a good outcome."[82]

Aside from its steering role, the CDFI Fund also found itself mediating third party relationships in the NMTC Program. For example a few interviewees mentioned that early in the program a big investment bank tried to use nonprofits as shells or pass-throughs for the credit, insisting on tight control over the nonprofit CDEs.[83] Later guidance addressed the issue of control. Managers made other adjustments too. Federal managers also changed the weight of the four components of the application so that it elevated community impact and business strategy over capitalization strategy and management capacity. This change was intended to level the playing field among CDEs affiliated with big Wall Street banks and those affiliated with mission driven nonprofits.

The NMTC includes a diverse and sophisticated set of third parties. The relationships among the actors are short term and highly structured to execute each deal, while depending on a store of existing social capital. The federal government's role in the NMTC network is more reactive than proactive. It involves steering these diverse set of actors towards projects in low-income communities that will have the greatest economic benefit and to a lesser extent mediating relationships among third parties. While more research is needed, analysis suggests that three features of this tax credit network may have eased the implementation of the Recovery Act for federal managers at the CDFI Fund. First, the wide pool of possible implementation partners meant that when some third parties backed away from participating in the network, others

79 Interview 7.

80 Interview 2.

81 Interview 5.

82 Interview 3.

83 Interview 2, interview 8, interview 5.

stepped forward. Second, the capacity and sophistication of the third parties likely made it easier to absorb the additional tax credit allocation. Finally, federal managers at the Fund have less of a direct oversight and monitoring role. It also undoubtedly helped that the NMTC Program had been operating for five years when the Recovery Act passed. By that time there was sufficient familiarity and demand for the credit so that federal managers were not in the position of activating new implementation networks.

Conclusion

For the CDFI Fund's New Market's Tax Credit Program, the infusion of $3 billion in tax credit authority did present challenges but not nearly to the extent reported in the other cases for this project. Initial results of this analysis suggest several reasons for this. First, the tax provisions under ARRA did not have the same accountability and transparency requirement as grants, contracts, loans and loan guarantees. Without pressure to report job numbers on a regular basis, or the need to adhere to extra accountability requirements, federal managers were not put in a position of transferring this pressure to the CDEs. Second, ARRA did not introduce any significant changes in the regulations for allocating the tax credits. This was not true with other programs and other tax provisions, which posed challenges for administering ARRA funds. Third, the diversity and the capacity of the NMTC third party network may have eased implementation, although more research is needed.

Appendix
Tables and Figures

Table 1: Interviews Conducted for Case

Interviews	Number
Federal Managers	8
Investors	2
CDEs	22
Virginia	7
Minnesota	5
California	7

NOTE: All CDEs in the three states were invited to participate

Table 2: New Markets Tax Credit Authority 2003-2011

Year	Total Requested (in billions)	Total Available (in billions)
2003	$26.0	$2.5
2004	$30.4	$3.5
2005	$22.9	$2.0
2006	$28.3	$4.1
2007	$27.9	$3.9
2008	$21.3	$5.0
2009	$22.5	$5.0
2010	$23.5	$3.5
2011	$26.7	$3.6

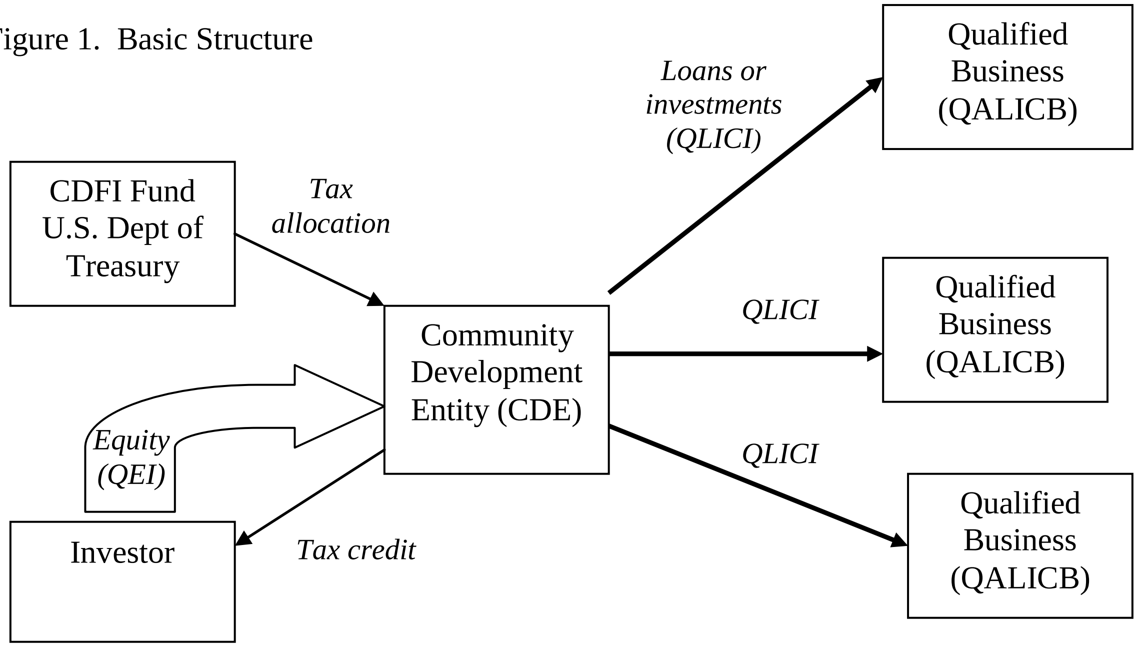
Source: New Markets Tax Credit Progress Report 2012. New Markets Tax Credit Coalition

Table 3. Sources of Leveraged Debt

Sources of Leveraged Debt	% of CDEs reporting this source
Equity Investor	79%
Bank other than Equity Investor	58%
Debt guaranteed by federal or state government	25%
Charitable donors	25%
Unguaranteed debt from state or local government	31%
Project Sponsor	83%

Source: New Markets Tax Credit Progress Report 2012. New Markets Tax Credit Coalition

Figure 1. Basic Structure



Source: p. x OCC. Community Development Insights. Feb. 2007

Figure 2. Leveraged Structure