**94-457 FINANCE AUTHORITY OF MAINE**

**Chapter 325: MAINE NEW MARKETS CAPITAL INVESTMENT PROGRAM (Amendment 3)**

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**Summary:** This rule establishes the procedures, standards and fees applicable to applicants under the Authority's Maine New Markets Capital Investment Program (the "Program"). Under the Program, the Authority may allocate tax credit authority to a qualified community development entity, which allocation acts as a reservation of refundable tax credits that may subsequently be approved by the Authority if the qualified community development entity obtains qualified equity investments as certified by the Authority as provided by 10 M.R.S.A. §1100-Z.

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## SECTION 1. DEFINITIONS

1. "Allocation Application" means the Authority's then current application for allocation of tax credit authority that is filed by a CDE with the Authority.

2. "Allocation Application fee" means a non-refundable fee of $1,000 that shall be included with the Allocation Application at the time of filing with the Authority.

3. "Annual Report fee" means a fee of $250 that shall be included with the annual report required of a CDE as set forth below in Section 6.

4. "Applicant" means a CDE that files an Allocation Application or Certification Application with the Authority as contemplated by 10 M.R.S.A. §1100-Z.

5. "CDE" means a Qualified Community Development Entity as defined by this Rule, or a subsidiary thereof that is also a Qualified Community Development Entity as defined by this Rule.

6. "CDFI Fund" means the U.S. Department of Treasury, Community Development Financial Institutions Fund.

7. "Certification Application" means the Authority's current application for certification of a qualified equity investment in a CDE.

8. "Certification Application Fee" means a non-refundable fee of $2,500 that shall be included with a Certification Application at the time of filing with the Authority.

9. "Code" means the United States Internal Revenue Code of 1986, as amended.

10. "Commissioner" means the Maine Commissioner of Administrative and Financial Services.

11. "Credit allowance date" means, with respect to any qualified equity investment, the date on which the investment is initially made in the CDE, and each of the successive six anniversary dates of that date thereafter, provided the investment is certified by the Authority as required by this Rule.

12. "Long-term debt security" means any debt instrument issued by a CDE, at par value or a premium, with an original maturity date of at least seven years from the date of its issuance, with no acceleration of repayment, amortization or prepayment features prior to its original maturity date. The CDE that issues the debt instrument may not make cash interest payments on the debt instrument during the period commencing with its issuance and ending on its final credit allowance date in excess of the cumulative operating income (as defined in the regulations adopted pursuant to the Code, Section 45D) of the CDE for the same period, prior to giving effect to interest expense on such debt instrument. This paragraph does not limit the holder's ability to accelerate payments on the debt instrument in situations when the CDE has defaulted on covenants designed to ensure compliance with 10 M.R.S.A. §1100-Z; 36 M.R.S.A. §191(2)(SS); 36 M.R.S.A. §2351; or the Code, Section 45D.

13. “Low-income community” has the same meaning as set forth in the Code, Section 45D.

14. “Non-metropolitan census tract” means a census tract located in a non-metropolitan county as defined by the CDFI Fund.

15. "Purchase price" means the amount of the investment in the CDE for the qualified equity investment.

16. "Qualified active low-income community business" or “QALICB” has the same meaning as set forth in the Code, Section 45D and regulations adopted thereunder, including 26 CFR Sec. 1.45D-1, but shall also include an entity which, for the most recent calendar year ending prior to the date of investment by the CDE, can demonstrate that 50% or more of its gross income was derived from business activities within, 50% or more of its tangible property was located within; or 50% or more of its services were performed within, a community in a municipality that according to statistics published by the Maine Department of Labor, experienced an unemployment rate greater than the state average, during such period. To the extent statistics are not reported for such municipality by the Maine Department of Labor, the rates of the Labor Market Area in which such municipality is located shall apply.

17. "Qualified community development entity" has the same meaning as set forth in the Code, Section 45D, except that the entity must have entered into or be controlled by or under the common control of an entity that has entered into an allocation agreement with the CDFI Fund with respect to credits authorized by the Code, Section 45D, and must be authorized to operate in the State.

18. "Qualified equity investment" or “QEI” means any equity investment in, or long-term debt security issued by, a CDE that:

    A. Has at least 85 percent of its cash purchase price used by the issuer to make qualified low-income community investments in qualified active low-income community businesses located in the State by the second anniversary of the initial credit allowance date;

    B. Is acquired after December 31, 2011 at its original issuance solely in exchange for cash; and

C. Is designated by the issuer as a qualified equity investment and is certified by the Authority pursuant to 10 M.R.S.A. §1100-Z(3)(G). "Qualified equity investment" includes any qualified equity investment that does not meet the provisions of 10 M.R.S.A. §1100-Z(3)(G) if the investment was a qualified equity investment in the hands of a prior holder. The CDE shall keep sufficiently detailed books and records with respect to the investments made with the proceeds of the qualified equity investments to allow the direct tracing of the proceeds into qualified low-income community investments in qualified active low-income community businesses in the State.

19. "Qualified low-income community investment" or "QLICI" means any capital or equity investment in, or loan to, any qualified active low-income community business in the State, made after the effective date of this rule, but on or before the effective date of any certification of the Authority under Section 5 of this Rule, so long as no more than 5% of such investment is used to (1) refinance costs, expenses or investments incurred or paid by the qualified active low-income community business or a related party prior to the date of the qualified low-income community investment; (2) make equity distributions from the qualified active low-income community business to its owners; (3) acquire an existing Maine business or enterprise; or (4) pay transaction fees. The maximum amount of qualified low-income community investments that may be made in any one project constructed, maintained or operated by the business on a collective basis with all of its affiliates, with the proceeds of qualified equity investments that have been certified under 10 M.R.S.A. §1100-Z(3)(G), is $10,000,000, whether made by one or several CDE's. Notwithstanding the foregoing, with respect to any one project constructed, maintained or operated by a business that is a manufacturing or value-added production enterprise that projects to create or retain in excess of 200 direct and indirect jobs as part of the project for which the investment is made, the maximum QLICI shall be $40,000,000. For the purposes of demonstrating the number of jobs the project will create or retain, the applicant may include direct operational employment of the QALICB, as well as the employment of businesses in the supply chain for such business, but shall not include any construction employment or induced employment caused by consumer spending by employees of the QALICB or its suppliers. The Application shall be accompanied by an IMPLAN study conducted by a qualified independent professional or other evidence in either case determined credible by the Authority. For the purposes of this section, the term "supply chain" means businesses that regularly provide goods or services, either directly, or indirectly through other entities, to the QALICB or to suppliers of the QALICB, for their business operations. For the purposes of this paragraph, with respect to projects to which the $10,000,000 limitation applies, the term "project" shall mean all land, buildings, structures, machinery and equipment located at the same location and constructed, maintained or operated by the qualified active low-income community business. For the purposes of this paragraph, with respect to projects to which the $40,000,000 limitation applies, the term "project" shall mean, and refer separately to, each manufacturing or value-added production facility which projects to create or retain more than 200 jobs, including the land, buildings, structures, machinery and equipment functionally related to, and integrated with, the manufacturing or production process conducted on the site of that facility. The term "project" shall not mean, and shall not refer separately to, the component pieces of an integrated manufacturing or production process conducted on the site of a particular facility.

## SECTION 2. APPLICATION PROCESS FOR ALLOCATION OF TAX CREDIT AUTHORITY

1. A CDE that seeks to obtain an allocation of tax credit authority from the Authority pursuant to 10 M.R.S.A. §1100-Z shall file an Allocation Application with the Authority and simultaneously pay the Allocation Application fee.

2. Within sixty days of receipt of an Allocation Application for tax credit authority, the Authority shall either approve the Allocation Application and, as part of that approval, indicate the amount of tax credit authority issued to the CDE, or determine that the Authority intends to deny the Allocation Application. If the Authority intends to deny the Allocation Application, it shall inform the CDE by written notice of the grounds for the intended denial. Upon receipt of the notice of intended denial by the CDE:

   A. If the CDE provides additional information required by the Authority or otherwise completes its Allocation Application within fifteen days, the Allocation Application must be considered complete as of the original date of submission and the Authority has an additional thirty days to either approve or deny the Allocation Application; or

   B. If the CDE fails to provide the information or complete its Allocation Application within the fifteen-day period, the Allocation Application shall be deemed denied and may be resubmitted in full with a new submission date.

3. Allocation Applications may be submitted on or after January 1, 2012, via hand-delivery, mail, express mail, courier or electronic means, provided, however, that the Applicant is responsible for ensuring receipt of the Application by the Authority. Any Allocation Application received prior to January 3, 2012 shall be deemed received on January 3, 2012.

4. Completed Allocation Applications will be processed in the order received. Allocation Applications received on the same date shall be treated as received simultaneously, and, to the extent there are not sufficient credits available to fully allocate requested tax credit authority for approved Allocation Applications that were received on the same date, allocations of available tax credit authority shall be pro-rated among such Applicants based upon the amount of authority requested in each such Allocation Application as a percentage of the total authority requested by all such Allocation Applications.

## SECTION 3. INFORMATION REQUIRED ON OR ATTACHED TO THE ALLOCATION APPLICATION

The following information shall be required on or attached to the Allocation Application:

1. The name, address and tax identification number of the CDE, and evidence of the certification of the entity as a qualified community development entity by the Secretary of the United States Treasury;

2. A copy of an allocation agreement executed by the CDE, its controlling entity or other entity controlled by the same controlling entity, and the CDFI Fund, which includes the State in its service area;

3. A certificate executed by an authorized executive officer of the CDE attesting that the allocation agreement remains in effect and has not been revoked or canceled by the CDFI Fund;

4. A description of the amount of tax credit authority requested and the proposed use of proceeds from any qualified equity investments received or long-term debt security issued by such CDE for which it intends to seek certification by the Authority under 10 M.R.S.A. §1100-Z; and

5. Responses to the following five questions, which must be answered affirmatively or negatively without explanation or elaboration (simple yes or no answers), to determine qualification for participating in the program:

   A. Whether the CDFI Fund has awarded multiple rounds of federal New Markets Tax Credit allocation to the CDE, its controlling entity or other entity controlled by the same controlling entity;

   B. Whether the CDE, its controlling entity or other entity controlled by the same controlling entity, has participated as a qualified community development entity in a state New Markets Tax Credit program or has made an investment in this State that qualifies for federal New Markets Tax Credits;

   C. Whether the CDE, its controlling entity or other entity controlled by the same controlling entity, has made an investment qualified for tax credits in a business located in a non-metropolitan census tract;

   D. Whether the CDE, its controlling entity or other entity controlled by the same controlling entity, has made an investment qualified for tax credits in a state where it did not previously have substantial operations; and

   E. Whether the CDE, its controlling entity or other entity controlled by the same controlling entity, has explored potential investment opportunities in this State that would qualify for credits under the Program.

6. A description of the fees that the Applicant intends to charge for transactions for which allocation is sought.

## SECTION 4. AWARD OF ALLOCATION OF TAX CREDIT AUTHORITY; TERM OF AWARD

1. A complete Allocation Application that affirmatively answers at least four of the questions described in Section 3, Subsection 6 of this Rule shall be approved by the Authority and awarded an allocation of tax credit authority pursuant to 10 M.R.S.A. §1100-Z in the amount sought in the Allocation Application, but in no event shall the aggregate allocation to any CDE and its affiliates exceed $62,500,000 of investments, and provided, further, that there remains sufficient allocation authority to fully award the amount sought (up to the per CDE and affiliates limit of $62,500,000 of investments) of each Allocation Application approved by the Authority and received on the same date. If there is not sufficient remaining allocation authority to fully award allocations to Applicants submitting approved Allocation Applications received on the same date, the awards among such Applicants shall be pro-rated as provided in Section 2, Subsection 4

of this Rule. The Authority shall provide written notification of an award of allocation authority to the Applicant. In no event shall the Authority authorize more than $250,000,000 in aggregate investments eligible for tax credit authority, or more aggregate tax credit authority than such amount that, if all allocated authority resulted in certified qualified equity investments eligible for program tax credits simultaneously, no more than $20,000,000 of credits could be taken or refunded in any one fiscal year.

2. An allocation of authority under this Section shall be valid for up to two years. A CDE obtaining allocation may sub-allocate all or a portion of its allocation to one or more subsidiary CDE's, provided the parent CDE files notice of such sub-allocation to the Authority, together with a certification that the subsidiary CDE is a subsidiary and meets all the requirements of a CDE under this Rule, and all of the information required by Section 3(1) of this Rule for such subsidiary. In the event that a CDE obtaining an allocation, or one or more of its subsidiary CDE's to which it has sub-allocated, does not receive qualified equity investments equaling or exceeding the allocation amount within two years of the date of the allocation, and provide proof of each of the same to the Authority within ten days of the investment, that portion of the allocation that exceeds the aggregate amount of qualified equity investments certified by the Authority for such CDE shall lapse and no longer be allocated or available to the CDE, and may be re-allocated by the Authority in accordance with 10 M.R.S.A. §1100-Z and this Rule.

## SECTION 5. CERTIFICATION OF ELIGIBILITY FOR TAX CREDITS

1. To the extent a CDE obtains equity investments or issues long-term debt securities within two years of the allocation of tax credit authority, the CDE may file a Certification Application seeking that the Authority certify such equity investments or issuance of long-term debt securities as qualified equity investments eligible for tax credits under 10 M.R.S.A. §1100-Z. The Certification Application must contain the following information:

   A. Information regarding the proposed use of the proceeds from the equity investments or issuance of long-term debt securities, including: a description of the qualified active low-income community business in which the proceeds will be invested; the proposed use or uses of the proceeds by the qualified active low-income community business; and the low-income community or communities in which the proceeds will be expended;

   B. The name and identification number of investor, type of investment (whether debt or equity), purchase price, and nature of consideration received and date of receipt, for each investment for each taxpayer making a equity investment or being issued a long-term debt security;

   C. A signed certification indicating that the Certification Application has been executed by an executive officer of the CDE, declaring under the penalty of perjury:

      (1) That the Applicant's allocation agreement remains in effect and has not been revoked or canceled by the CDFI Fund; and

      (2) That the cash purchase price for the investment has been received; and

(3) That the statements in the original Allocation Application, as well as in the Certification Application, including all accompanying documents and statements, are and remain true, correct and complete as of the date of the Certification Application;

D. A description of the fees to be charged as part of the investment transaction; and

E. The Certification Application Fee.

2. Upon receipt of a completed Certification Application and accompanying information, verification, and fees, the Authority shall determine if the Certification Application should be granted and the investment certified as a qualified equity investment eligible for tax credits under 10 M.R.S.A. §1100-Z. If the Authority finds that the investment should be certified, it shall notify the CDE, the Commissioner, and Maine Revenue Services of its approval, in writing, including the names of persons eligible to claim tax credits, and the respective amounts thereof.

**SECTION 6. REPORTING REQUIREMENTS; RECAPTURE**

1. A CDE that has been awarded tax credit allocation authority pursuant to Section 4 that has not submitted Certification Applications as to all of its allocation authority must file an annual report with the Authority on April 30, 2013 for the preceding calendar year, and each succeeding April 30 for the preceding calendar year, until all of its awarded allocation has been certified or has lapsed, in each case with the Annual Report Fee, providing the following information:

A. A summary of activity of the CDE in seeking qualified equity investments that have not been certified;

B. The total amount of investment received by the CDE to date that have not been certified, including investments for which it intends to seek certification;

C. To the extent investments have been received and not certified, the qualified active low-income community business in which such investments are intended to be re-invested by the CDE;

D. To the extent investments have been received but not certified, the proposed use or uses of the proceeds by the qualified active low-income community business if so re-invested by the CDE;

E. To the extent investments have been received and not certified, the low-income community or communities in which the proceeds will be expended by the qualified active low-income community business if so re-invested by the CDE;

F. The date by which the CDE intends to file its Certification Applications;

2. A CDE that has received Certification as to some or all of its tax credit allocation authority pursuant to Section 4 must file an annual report with the Authority commencing April 30 of the year following the calendar year it receives its first Certification, and on each April 30 thereafter through the April 30 of the year following the seventh

anniversary date of the final Certification, with the Annual Report Fee, providing the following information:

A. A summary of activity of the CDE in completing the expenditure of at least 85 percent of its qualified equity investments in qualified low-income community investments within twenty four months of receipt, including: the amounts invested to date; the qualified active low-income community businesses in which the such investments have been made by the CDE; the use or uses of the proceeds of such investments by the qualified active low-income community businesses; the low-income community or communities in which the proceeds were expended by the qualified active low-income community; and the estimated number of jobs created or retained by the qualified active low-income community businesses on account of such investments;

B. Evidence of the maintenance of at least 85 percent of the qualified equity investments as qualified low-income community investments, including any repayment of qualified low-income community equity investments and subsequent reinvestment in other qualified low-income community investments;

C. Whether and to what extent any federal new markets tax credits have been subject to recapture for qualified equity investments certified by the Authority;

D. Whether and to what extent any principal repayments or redemptions have been initiated by the CDE of any qualified equity investments certified by the Authority.

3. As a condition precedent to certification by the Authority of an investment as a qualified equity investment, the Applicant will enter into an agreement with the Authority providing as follows:

A. The CDE will use at least 85 percent of the qualified equity investment to make a qualified low-income community investment in a qualified active low-income community business in this State within twenty-four months of its receipt of the qualified equity investment, and maintain such level of qualified low-income community investments in qualified active low-income community businesses in the State until the last credit allowance date for such credits, and notify the Authority and Maine Revenue Services within thirty days of any failure to comply with this requirement;

B. The CDE will notify the Authority and Maine Revenue Services within thirty days of the CDE receiving notice that any amount of federal tax credits available for the qualified equity investments for which credits under this Program are certified are being recaptured under Code section 45D, including the amount of recapture and the reasons therefore;

C. The CDE will notify the Authority and Maine Revenue Services within thirty days of its having made a principal repayment or full or partial redemption as to a qualified equity investment that has been certified by the Authority as eligible for federal tax credits prior to the date that is the final credit allowance date, including the amount of such repayment or redemption.

4. If the CDE violates the agreement referenced in Section 6(3) of this Rule, or otherwise is in violation of provisions of 10 M.R.S.A. §1100-Z; 36 M.R.S.A. §5219-GG; or this Rule, or if an event described in Section 6(2)(B), (C) or (D) of this Rule has occurred, the tax credits related to the qualified equity investment certified by the Authority shall be subject to recapture pursuant to 36 M.R.S.A. §5219-GG.

5. The Authority may share any information it obtains in any Allocation Application, Certification Application, or Annual Report with the Commissioner and/or Maine Revenue Services, and in any event may notify the Commissioner and/or Maine Revenue Services if it becomes aware of any event or circumstance that may warrant recapture.

**SECTION 7. WAIVER OF RULE**

The chief executive officer may waive any requirement of this rule, except to the extent that the requirement is mandated by statute, in cases where the deviation from the rule is insubstantial and is not contrary to the purposes of the program.

**SECTION 8. RETROACTIVE EFFECT OF AMENDMENT 3**

The changes made by Amendment 3 to the rule, on both an emergency and non-emergency basis, shall apply to all Certification Applications not yet approved on the effective date of such amendments.

BASIS STATEMENT-Amendment 3 (Emergency)

-The rule amendment is necessary to protect the program from unintended use. In the course of administering the program, certain kinds of transactions have been eligible for tax credits under the existing rule that do not provide the level of direct public benefit that the Authority believes the program was intended to require, as stated in the legislative findings and intent found in 10 MRSA §1100-Z(1). The amendment addresses this issue by further defining a qualified low-income community investment, adding a restriction that such an investment does not include a transaction where more than a *de minimus* amount (5%) is used to refinance expenses already made, to make equity distributions, to acquire existing businesses, or to pay transaction fees.

Similar changes were proposed in recent legislation, L.D. 297, in the First Session of the 127th Legislature. While there appeared to be extremely broad support in the Legislature for the elimination of so-called “one-day loans” and other transactions with potentially similar deficiencies in direct public benefit, differences over other provisions in L.D. 297 resulted in the bill not being enacted. Without the changes made by this rule amendment, the program remains subject to unintended use if applications for tax credits are filed for transactions that utilize these mechanisms without the intended direct public benefit.

The rule was adopted on an emergency basis on August 20, 2015. The Authority found that emergency adoption of the rule was warranted since there is a real threat that new applications could be filed under the existing rule prior to the completion of the non-emergency rulemaking process that would utilize the balance of tax credits under the program, thereby making the amendment futile. The Authority finds that the imminent threat of loss of significant state tax credits to transactions that do not provide sufficient levels of direct public benefit represents an immediate threat to the public's general welfare and adoption of the rule amendment on an emergency basis necessary to avoid such threat.

The rule amendment is intended to have retroactive effect, to be applicable to any Certification Application that has not been approved at the time of the effective date of the amendment.

ECONOMIC IMPACT ANALYSIS STATEMENT/FISCAL IMPACT NOTE:

A. The cost of this rule amendment to the agency will be covered by fees charged.

B. It is expected that no one will be adversely affected by the amendments other than parties who would use the program in an unintended manner.

C. The rule is not expected to have any material effect on competition or the employment market.

D. The above statements were made based on the Authority's administration of the program.

The proposed amendment will not impose any costs on municipalities or counties.

BASIS STATEMENT-Amendment 3 (Non-emergency)

The rule amendment is necessary to protect the program from unintended use. In the course of administering the program, certain kinds of transactions have been eligible for tax credits under the existing rule that do not provide the level of direct public benefit that the Authority believes the program was intended to require, as stated in the legislative findings and intent found in 10 MRSA §1100-Z(1). The amendment addresses this issue by further defining a qualified low-income community investment, adding a restriction that such an investment does not include a transaction where more than a *de minimus* amount (5%) is used to refinance expenses already made, to make equity distributions, to acquire existing businesses, or to pay transaction fees.

Similar changes were proposed in recent legislation, L.D. 297, in the First Session of the 127th Legislature. While there appeared to be extremely broad support in the Legislature for the

elimination of so-called "one-day loans" and other transactions with potentially similar deficiencies in direct public benefit, differences over other provisions in L.D. 297 resulted in the bill not being enacted. Without the changes made by this rule amendment, the program remains subject to unintended use if applications for tax credits are filed for transactions that utilize these mechanisms without the intended direct public benefit.

The rule amendment is intended to have retroactive effect, to be applicable to any Certification Application that has not been approved at the time of the effective date of the amendment.

The rule amendment was adopted on an emergency basis on August 20, 2015, at which time rulemaking on a non-emergency basis was commenced.

A public hearing was held on the rule amendment on September 17, 2015. Several comments were received. A summary of the comments and the response of the Authority to such comments is as follows:

ECONOMIC IMPACT ANALYSIS STATEMENT/FISCAL IMPACT NOTE:

A. The cost of this rule amendment to the agency will be covered by fees charged.

B. It is expected that no one will be adversely affected by the amendments other than parties who would use the program in an unintended manner.

C. The rule is not expected to have any material effect on competition or the employment market.

D. The above statements were made based on the Authority's administration of the program.

The proposed amendment will not impose any costs on municipalities or counties.

STATUTORY AUTHORITY: 10 M.R.S.A. §1100-Z; 36 M.R.S.A. §5219-GG

EFFECTIVE DATE:

January 1, 2012 – filing 2011-480
October 3, 2012 – filing 2012-283 (Amendment 1)
September 1, 2013 – filing 2013-213 (Amendment 2)
August ___, 2015 – filing 2015-___ (Amendment 3 (Emergency))
October ___, 2015 – filing 2015-___ (Amendment 3 (Non-emergency))