



February 17, 2023

The Honorable Maria Cantwell  
U.S. Senate  
511 Hart Senate Office Building  
Washington, DC 20510

The Honorable Todd Young  
U.S. Senate  
185 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Suzan DelBene  
U.S. House of Representatives  
2330 Rayburn House Office Building  
Washington, DC 20515

The Honorable Brad Wenstrup  
U.S. House of Representatives  
2419 Rayburn House Office Building  
Washington, DC 20515

Dear Senator Cantwell, Senator Young, Representative DelBene, and Representative Wenstrup,

On behalf of the more than 2,400 organizations and businesses across the nation that have joined the ACTION Campaign in support of the Low-Income Housing Tax Credit (Housing Credit), the ACTION Campaign Steering Committee wishes to express our deep gratitude to you for your steadfast leadership. With the 118<sup>th</sup> Congress now starting up, we look forward to your reintroduction of the Affordable Housing Credit Improvement Act (AHCIA). Our organizations are committed to continuing to advocate in support of your bill.

The start of the new Congress provides an opportunity to adjust the legislation for any provisions that have been enacted and other necessary changes, and to consider other proposals to further strengthen the Housing Credit. As interest in affordable housing grows in Congress, we wanted to present a set of additional consensus proposals we support that may be candidates for inclusion in the AHCIA or other housing and tax legislation.

First, we list three necessary modifications to existing provisions to address congressional action, such as the passage of the Inflation Reduction Act in the 117<sup>th</sup> Congress and other important technical adjustments.

Then, we provide additional proposals for consideration that have support among the Housing Credit community. These are divided into three categories:

1. Suggested modifications to existing provisions that we believe improve upon the bill as previously drafted.
2. Suggested new proposals that would further strengthen the program and address new concerns that have arisen since the bill was last introduced two years ago.

3. Lastly, we offer our perspective on another proposal you may already be considering.

The attached addendum to this letter provides our suggestions for bill language to enact these proposals. Thank you for your consideration.

Sincerely,

**Co-Chairs**

Enterprise Community Partners

National Council of State Housing Agencies

**Steering Committee Members**

Affordable Housing Tax Credit Coalition

Council for Affordable and Rural Housing

Council of Large Public Housing Authorities

CSH

Housing Advisory Group

Housing Partnership Network

LeadingAge

Local Initiatives Support Corporation/National Equity Fund

National Association of Affordable Housing Lenders

National Association of Home Builders

National Association of Housing and Redevelopment Officials

National Association of Local Housing Finance Agencies

National Association of REALTORS®

National Association of State and Local Equity Funds

National Housing Conference

National Housing Law Project

National Housing and Rehabilitation Association

National Housing Trust

National Low Income Housing Coalition

National Multifamily Housing Council

Smart Growth America

Stewards of Affordable Housing for the Future

Volunteers of America

## Necessary Modifications to Existing Provisions

*(See Addendum 1 for proposed legislative language)*

### **Sec. 101: Increase in State Allocation:**

Needed Modification: Restore the 12.5 percent cut the program suffered in 2022 as a permanent part of baseline and apply a phased-in 50 percent increase over two years, beginning in 2023, with accompanying annual inflation adjustments. While this is essentially the same cap increase proposed in the 117<sup>th</sup> Congress, moved forward by two years, we suggest that the bill language apply a percentage increase to the current law amount as the mechanism for increasing state authority, rather than denote specific per capita and minimum dollar amounts, which would need to be adjusted depending on the year in which the increase is achieved. See the addendum to this letter for our suggested bill language.

### **Sec. 307: Increase in Credit for Certain Projects Designated to Serve Extremely Low-Income Households**

Needed Modification: Add clarifying language to the ELI basis boost. Two technical changes to AHClA Section 307 are needed to clarify congressional intent. These clarifications were identified as necessary and made in the House-passed version of Build Back Better to prevent ambiguity in congressional intent.

- As currently drafted, the bill provides a 50 percent basis boost to properties in which at least 20 percent of the units must be rented to extremely low-income (ELI)-designated units. However, the bill language does not clearly denote that these units must also be rent restricted such that they are affordable to households earning no more than 30 percent of area median income. ACTION proposes that we clarify that such units must be both income- and rent-restricted.
- As currently drafted, the bill is ambiguous regarding how an owner determines that it has met the threshold for achieving the ELI basis boost. It is unclear whether the 20 percent threshold applies to the unit fraction or the floor space fraction. Such ambiguity, if not clarified in statutory language, would necessitate IRS guidance, which may not be issued in a timely manner. The ACTION Campaign suggests that the unit fraction be used in this instance, which is consistent with how owners determine the applicable fraction for purposes of establishing the amount of Credit authority a project is eligible to receive.

### **Sec. 309: Elimination of Basis Reduction for Low-Income Housing Properties Receiving Certain Energy Benefits**

Needed Modification: Adjust the bill to reflect the passage of the Inflation Reduction Act, which enacted aspects of Section 309.

As drafted in the 117<sup>th</sup> Congress, the AHClA eliminated the basis reduction for Housing Credit developments that also claim the Section 45L New Energy Efficient Home Credit, the Section 179D Energy Efficient Commercial Building Deduction, and/or the Section 48 Investment Tax Credit. The Inflation Reduction Act made this change for the Section 45L and Section 48 credits, but not the Section 179D deduction.

ACTION recommends adjusting Section 309 such that it applies only to the Section 179D Energy Efficient Commercial Buildings Deduction, as the other aspects of this section are now law.

## **Additional Housing Credit Proposals for Consideration**

### **Part 1: Suggested Modifications to Existing Proposals**

*(See Addendum 2A for proposed legislative language)*

#### **Sec. 302: Modification of Previous Ownership Rules; Limitation on Acquisition Basis**

Proposal for Consideration: Reduce the related party prohibition rule period to two years, rather than five years.

The ACTION Campaign proposes a technical change to AHCIA Section 302(d). The 117<sup>th</sup> Congress version of the legislation modifies the related party rule to permit properties to qualify for acquisition credit so long as a related party has not owned the building at any time during the five years prior to the acquisition date. Instead, ACTION recommends reducing the related party prohibition period to two years, rather than five years.

Reducing the related party rule prohibition period to two years would minimize the impact of this rule on the ability of investors to finance this preservation property since it typically takes at least two years to redevelop the property before the new financing is placed. This would not change the application of the rule to the sponsor of the property where the real excess basis risk lies. Because of its continuing ownership of the property, it would continue to be limited by the requirement that the building not be acquired directly from a related party.

The following example illustrates the obstacles to financing preservation property due to the related party rule. In 2005, a syndicator raised equity capital in a multi-investor fund from four investors who each took a 25 percent interest in the fund which financed six Housing Credit properties. In Year 16 (2021), the investors exit the properties in the fund and full ownership is now vested in the property sponsors. In 2022, one of the sponsors approaches the syndicator to provide equity financing to rehabilitate the property, but the syndicator cannot put the property in its fund because two of the investors continue to invest through the syndicator which would cause the property to flunk the related party test. Other syndicators operating in the state face the same obstacles to financing the property because of the limited number of investors doing business in the state.

#### **Sec. 601: Revision and Clarification of the Treatment of Refunding Issues**

Proposal for Consideration: Further expand the bond recycling provision to allow states to maximize the use of bond authority for multifamily affordable housing.

The ACTION Campaign recommends expanding AHCA Section 601 to increase the production of affordable rental housing using the 4 percent Credit and multifamily bonds.

Under current law, proceeds from recycled bonds may be used to finance additional multifamily housing production, but such projects do not generate 4 percent Credits. AHCA as currently written would expand on the use of bond recycling by allowing proceeds from recycled bonds to be used as Mortgage Revenue Bonds (MRBs) to provide mortgage help to low- and moderate-income homebuyers in addition to the currently allowable financing of multifamily housing projects without the generation of 4 percent Credits. By so doing, AHCA frees up more “new” private activity bond cap that could be used to finance multifamily housing that can generate 4 percent Credits, as there is reduced need to use “new” cap for MRBs.

The ACTION Campaign proposes to further extend the use of bond recycling by allowing proceeds from recycled bonds to be used to finance Mortgage Credit Certificates (MCCs) and other exempt facilities that currently vie for bond cap with multifamily bonds and MRBs. This would enable states to use as much of their “new” bond cap as they deem necessary for multifamily housing projects that would generate 4 percent Credits, while still providing adequate resources to other eligible activities. This proposal would negate the competition amongst eligible uses for PAB authority.

In addition, ACTION recommends providing bond issuing entities 24 months to reallocate recycled bond authority. Under current law, they have 6 months to do so for multifamily properties sans 4 percent Credits. AHCA as currently written would provide 12 months, but ACTION suggests further extending this to 24 months, as bond issuing entities and bond lawyers maintain that 12 months still may not be adequate.

## **Part 2: Suggested Proposals for New Provisions** *(See Addendum 2B for proposed legislative language)*

### **Create a new title within the bill on Housing Credit data and transparency**

One of the ongoing critiques of the Housing Credit program is that data about it and its impact is not readily available. Of note, Senator Grassley has raised this concern, which in part prompted his request of the Government Accountability Office to study the Housing Credit several years ago.

At this time, there are two major sources of publicly available Housing Credit data, both collected by HUD's office of Policy Development and Research: The [LIHTC property database](#), which includes data on the location of properties, and the [LIHTC tenant data collection project](#), which Congress mandated in the Housing and Economic Recovery Act of 2008. Both databases rely on state Housing Credit agencies to submit data to HUD. Though Congress initially envisioned providing funding to support the tenant data collection project, congressional appropriators never provided it. Data collection for the LIHTC property database—a request by HUD that is not required by law—is also unfunded.

IRS collects other data from state Housing Credit agencies and taxpayers that it uses to populate its Housing Credit database. However, that data is not publicly available. The National Council of State Housing Agencies also collects a significant amount of data from state Housing Credit agencies, which is available in the annual State HFA [Factbook](#) and related [data visualization tool](#).

The ACTION Campaign Steering Committee recommends that the bill be expanded to respond to concerns about data transparency in a manner that does not further burden state Housing Credit agencies for additional data collection. Specifically, ACTION recommends the creation of a new title within the bill to highlight transparency and data collection comprised of the following two proposals.

#### ***#1. Facilitate data sharing between IRS and HUD to allow HUD to ensure the accuracy of its LIHTC property and tenant databases.***

IRS collects a significant amount of data on the Housing Credit program from state Housing Credit agencies and taxpayers. While the tax code generally requires IRS to keep all taxpayer information confidential, Congress has made certain exceptions to the law allowing IRS to share data with other federal agencies for statistical use only. These other agencies do not publish any individual taxpayer data. HUD is not currently one of the federal agencies singled out under these exceptions.

HUD staff have suggested that it would be helpful to use certain data collected by IRS to crosscheck the data it receives from state agencies, improving the accuracy of its data collection. HUD would not publish any individual taxpayer data, but instead would

be able to recognize and resolve any instances of inconsistency between its own data and the data the IRS collects.

Proposal for Consideration: Amend the tax code to provide HUD access to IRS data, like the access provided to other federal agencies, to supplement its current data collection activities.

## ***#2. Establish a new IRS reporting requirement for bond usage***

States have a finite amount of private activity bond (PAB) authority to use for eligible activities, including financing multifamily affordable housing, assisting low- and moderate-income homebuyers with Mortgage Revenue Bonds or Mortgage Credit Certificates, as well as other eligible non-housing activities, such as high-speed rail facilities, student loans, certain water and sewage infrastructure projects. When a bond-issuing entity uses PAB authority for any eligible purpose, it must file Form 8038 with the IRS providing the purpose for and amount of bond authority used. Thus, IRS knows how bond authority is being used and whether a state has unused bond cap expiring before the end of the three-year carryforward period, but this information is not made public. Such information would be useful to Congress as it considers policies related to PABs to ensure the efficient use of this critical resource.

Proposal for Consideration: Require IRS to publicly report state-by-state usage of PAB authority and the extent to which bond cap expires after the carryforward period. This proposal is also included in legislation Senator Cortez Masto introduced in the 117<sup>th</sup> Congress (S. 4445, the Affordable Housing Bond Enhancement Act).

## **Allow states to provide developers an additional 12 months to place a project in service**

Current law requires that developments receiving an allocation of Housing Credit authority place in service not later than the close of the second calendar year following the calendar year in which the allocation is made.

In recent years, it has become increasingly difficult for developers to meet this deadline due to market volatility, supply chain disruptions, workforce challenges, and other factors. This problem became far more acute since the start of the Covid-19 pandemic, but fortunately, IRS has provided extensions to this deadline.

IRS has not always provided these extensions in a timely manner, which has led to problems for many properties. Moreover, IRS only has authority to provide such extensions during a major disaster declaration. Unfortunately, we see these problems continuing in the future, likely beyond such time as the Administration sets an end date to the Covid-19 disaster declaration.



Proposal for Consideration: Provide authority to state Housing Credit allocating agencies to extend the deadline by which a property must place in service by up to 12 months on a case-by-case basis.

### **Repeal the Qualified Contract rule for Credit allocations made after date of enactment**

Under current law, owners have the right to terminate the affordability restrictions on a property in Year 15 or later if the owner requests and the state is unable to find a buyer willing to purchase the property at the “qualified contract” price, as written into the statute, within one year from the point at which the owner makes such a request. The formula used to determine the qualified contract price, in almost all instances, sets the price at far above market value; thus, most properties for which an owner requests a qualified contract are lost from the Housing Credit inventory. The affordability restrictions on over 100,000 rental homes have terminated because of qualified contracts. While many states now require waivers of the qualified contract right as a condition of receiving an allocation, for political reasons, others have not been able to set such policies.

Proposal for Consideration: Remove the qualified contract option for developments receiving an allocation of Credits or multifamily bond authority after the date of enactment. Unlike other proposals, including the proposal in Senator Wyden’s DASH Act and the 2021 Build Back Better legislation, this proposal would not modify the qualified contract price in the statute for existing developments.

### **Require owners to provide notice of expiring affordability to local governments and tenants**

Housing Credit developments are rent- and occupancy-restricted for a period of no less than 30 years (with the exception of properties in which the affordability restrictions are terminated early due to Qualified Contract or foreclosure / deed in lieu of foreclosure). There is currently no requirement for owners to notify tenants or other stakeholders in advance of the affordability period’s termination. Tenants may be caught off guard if their rent goes up after the end of the affordability period. Furthermore, local governments may be unaware of the impending loss of affordable housing in their jurisdictions.

Proposal for Consideration: Require owners to notify low-income tenants and local officials of the impending termination of those restrictions 12 months in advance so tenants who may need to relocate have time to find another affordable place to live and the local government can consider options should it want to work with the owner to preserve the property as affordable. ACTION recommends that this requirement be included in extended use agreements entered into after the date of enactment of the AHCIA, such that we do not create a new requirement for owners of existing properties.

### **Exclude the value of certain energy benefits, such as grants and rebates from gross income for tax purposes**

With the passage of the Inflation Reduction Act, the Bipartisan Infrastructure Law, and other state laws, numerous federal, state, and local grant opportunities are now available to increase the energy efficiency, electrification, and resiliency of affordable multifamily housing. However, such grants must be included in gross income of the taxpayer, unless otherwise exempt. Section 136 of the IRC excludes grants provided by public utilities but does not exclude grants and rebates from federal or state governments for similar energy conservation measures. The requirement to pay tax on such grants is a disincentive for their use.

Proposal for Consideration: Exclude these grants from gross income when used in connection with the Housing Credit.

### **Exempt from Private Activity Bond (PAB) cap bond authority required for the recapitalization and resyndication of Housing Credit developments**

Each year, states receive a finite amount of tax-exempt Private Activity Bond (PAB) authority to be used for certain eligible activities, including multifamily housing, lower rate mortgages for low- and moderate-income home buyers, industrial development, student loans, and other uses. In most states, due to the significant need for affordable rental housing, a large majority of PAB authority is dedicated to multifamily housing bonds.

Recently, more and more states have become bond cap-constrained, meaning that they have far more need for bond authority than what they have available to them under the PAB cap. Nearly half of states report being bond cap constrained, and others report that if trends continue as they have in recent years, they too soon will be bond cap-constrained.

With bond resources inadequate to meet the need, states are forced to make difficult decisions. One such decision is how much bond authority to commit to preservation of older Housing Credit properties—called resyndication—as the more authority that is used for resyndication, the less that is available for new construction, preservation of other aging affordable housing projects originally funded with legacy HUD programs, and conversion of failing public housing projects into privately managed housing under HUD’s Rental Assistance Demonstration (RAD) program.

The Housing Credit program was enacted in 1986, which means that the first Housing Credit properties likely came online in 1988 or 1989—well over three decades ago. Thus, there is a significant amount of Housing Credit stock in need of recapitalization. Without a new infusion of capital financed with housing tax credits, owners of aging Housing Credit properties are likely to convert their properties to market rate rents at the end of the affordability period so that they can increase cashflow to pay for needed upgrades.

To mitigate losses from the Housing Credit stock, states are devoting a growing amount of bond authority and 4 percent Credits to resyndications. In 2021, older Housing Credit properties comprising nearly 18,400 units received a resyndication of Credits under the 4 percent program and multifamily bonds.

As the Housing Credit inventory grows and ages, states will be forced to use more of their bond and 4 percent Credit resources to resyndicate older properties, and will have less and less available to build new affordable housing or dedicate to other preservations activities.

Proposal for Consideration: Given the need to rehabilitate older Housing Credit properties and the public benefits associated with ensuring that there is funding available to reset the long-term affordability requirements or properties aging out of affordability restrictions, an exemption from the private activity bond cap should be enacted for multifamily bonds used to rehab existing Housing Credit properties. This provision would apply to such bonds issued after date of enactment.

It should be noted that there is precedent for excluding certain activities from the PAB cap. Under current law, private activity bonds not subject to cap include bonds issued by 501(c)(3) institutions and bonds used to finance airports, docks and wharves, government owned solid waste disposal facilities, highway or surface freight transfer facilities, and other priority investments. Rehabilitation of affordable housing should also be a priority investment that is exempt from the private activity bond cap.

### **Providing a Purchase Option as an Alternative to the Right of First Refusal for Limited Partnership Agreements Entered into by Nonprofits After the Date of Enactment**

Current law provides for a safe harbor which permits Housing Credit limited partnership agreements to include a right of first refusal (ROFR) in the name of a qualified nonprofit organization, typically the sponsor of the property development. Because of ambiguities in the law, further reflected in imprecise language in partnership agreements, numerous legal disputes have arisen across the country. These legal disputes over the meaning of right of first refusal language have resulted in dozens of lawsuits, and in many instances the unintended transfer of funds from affordable housing properties and nonprofit affordable housing sponsors, which can ultimately impact residents.

Proposal for Consideration: The ACTION Campaign is cognizant of concerns raised by some industry participants about previous proposals to create a purchase option in lieu of the current ROFR for future limited partnership agreements and clarify language related to ROFR as it applies to existing properties. To avoid such concerns while still addressing the problem, the ACTION Steering Committee has come to the following three-part consensus proposal, which would only apply to partnership agreements entered into after the date of enactment, and not to existing properties:

1. Permit limited partnership agreements to include a purchase option safe harbor in the name of a qualified nonprofit. With regard to the purchase option safe harbor, a) clarify that the entire assets of the partnership are covered by the purchase option, and b) permit execution of the purchase option through a transfer of partnership interests as well as transfer of the underlying real estate.
2. Retain existing safe harbor for rights of first refusal while adding language that the new purchase option safe harbor is not intended to create inference with respect to the proper interpretation of the current law right of first refusal.
3. Provide that the purchase option safe harbor may apply to existing agreements where the parties agree to modifications to give the nonprofit a purchase option.

### **Part 3: ACTION Position on Deep Energy Basis Adjustment Proposal**

It is our understanding that you may be considering including in the 118<sup>th</sup> Congress version of the AHCIA a Deep Energy Basis Adjustment similar to that included in legislation Senator Klobuchar introduced in the 117<sup>th</sup> Congress, the Energy Efficiency for Affordable Housing Act, S. 4422.

This proposal seeks to address the cost of comprehensive energy improvements as part of rehabilitation by allowing a 30 percent basis boost for rehabilitation expenditures which demonstrate enhanced energy improvements. To qualify, an owner must either 1) engage a qualified professional to create a Qualified Retrofit Plan, demonstrate at least 50 percent energy savings are expected, and certify modifications are installed according to the plan; or 2) meet the requirements of an advanced building construction standard as determined by the U.S. Department of Energy.

ACTION believes this is an interesting concept with many benefits. While ACTION as a whole does not have a position on this proposal, many individual members of our campaign are supportive of it. Should you decide to include it in the AHCIA as reintroduced this year, we would be happy to support it in our advocacy efforts for the bill. However, we encourage you to compel the independence of any qualified profession certifying the modifications by requiring that such professionals be approved by the Housing Credit allocating agency and prohibit the professional from being a related party to the developer.