



July 23, 2020

Dear Senator/Congressman:

I write to express opposition to Section 303 of S. 1703/H.R.3077, the “Affordable Housing Credit Improvement Act”, legislation introduced by Senator Maria Cantwell (D-Wash) and Congresswoman Susan DelBene (D-Wash). While only one of many provisions in the legislation, Section 303 is notably concerning and should be opposed.

This provision would upend the low-income housing tax credit (LIHTC) by retroactively substituting a general partner’s defensive right of first refusal (ROFR) to purchase property from a limited partner who wishes to sell the property with an affirmative option to force the limited partner to sell the property at a below market price.

Section 303 conflicts with foundational tax principles relating to property ownership long codified in the Internal Revenue Code, thereby jeopardizing the tax credits investors are contractually entitled to receive and chilling future investment in affordable housing. This provision would also eviscerate the property rights of private investors already participating in the program in a manner that likely violates both the Due Process Clause and the Takings Clause of the Constitution, according to legal scholars.

As such, I urge all Members of Congress to oppose this provision and to refrain from support of S. 1703/H.R. 3077 until Section 303 is removed. Similarly, I urge Members of Congress to support efforts to confirm that a right of first refusal for purposes of LIHTC retains its ordinary meaning and cannot be exercised in the absence of a genuine third party offer that the owner intends to accept.

Background

Congress created LIHTC in 1986 to encourage private investment in affordable housing. The credit has been successful – since its creation, it has helped create or maintain over 3 million homes.

Affordable housing projects utilizing LIHTC are typically structured as a limited partnership between a private equity investor that contributes virtually all of the capital required to build the project, and a general partner that is responsible for developing and operating the project.

As the indirect owner of the property, the investor receives several tax benefits, including the LIHTC and depreciation, and is also entitled to revenues from the operation and sale of the project. The general partner receives management fees as well as a share of revenue from the project.

The LIHTC is earned over a fifteen-year period. While the LIHTC investments may be liquidated after that initial period, in order to qualify for the credit, the projects must remain affordable for at least another fifteen years, regardless of who owns them.

The LIHTC statute permits nonprofit general partners to hold a “right of first refusal” to purchase the LIHTC project at a below market price if the limited partner attempts to sell the property to a third party after the initial fifteen-year period. This “minimum purchase price” is defined by statute as the “principal amount of indebtedness secured by the building,” plus all federal, state, and local taxes attributable to such sale.

Sec. 303 Substantially Changes the Structure of the LIHTC and Partnership Agreements

Section 303 of S.1703 is described as a “modification and clarification of rights relating to business purchase.” However, by replacing the below market ROFR with an option that can be exercised unilaterally by the non-profit partner to compel a sale of the project for less than fair market value, the provision opens the door to appropriation of private property.

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The Provision Would Retroactively Upend Tax Law

Section 303 would retroactively change the Internal Revenue Code and alter existing partnership agreements, which would create disruption and undermine confidence in both the LIHTC and the tax system. The retroactive change would modify the terms of thousands of contracts going back more than a decade. Under this proposal, a private investor that first entered into a LIHTC partnership and invested in a property ten or fifteen years ago could see ownership of this project change by legislative fiat.

The proposed change violates the longstanding principle that tax legislation should be imposed prospectively, not retroactively. Taxpayers routinely make decisions based on their reasonable interpretation of the law as it exists at the time, with the expectation that the law will be applied consistently and in a way that promotes certainty. This change, however, would upend the certainty understood at the time of the LIHTC investment, particularly because a below market option flies in the face of longstanding tax principles relating to property ownership.

Section 303 Raises Critical Constitutional Questions

The retroactive nature of Section 303 and the below market option it would create could also violate the Due Process Clause and the Takings Clause of the Constitution.

As noted in a paper entitled “An Unconstitutional Attempt to Address Affordable Housing,” by Jeffrey M. Harris published in the Federalist Society Review, Section 303 would directly impact vested rights and contractual obligations, in direct violation of the Due Process Clause: “Section 303(b)(3)’s significant retroactive changes to thousands of existing LIHTC partnership agreements fail every guidepost the courts have established to evaluate whether legislation violates the Due Process Clause.”

The provision could also violate the Takings Clause. According to an article in the American Bar Association Journal of Affordable Housing & Community Development Law, the below market purchase option created by Section 303 would result in “the physical appropriation of real property from private owners, which constitutes a per se taking under binding Supreme Court precedent.” This could expose the government and taxpayers to liability for monetary damages.

Conclusion

Section 303 of the Affordable Housing Credit Improvement Act undermines the public-private partnership model of the low-income housing tax credit. Congress should reject this provision.

The provision would replace the below market ROFR permitted under the current LIHTC statute with a unilateral right in the form of a below market option exercisable by the non-profit partner, which would retroactively strip property rights from existing private investors. Replacing the ROFR with a below market option also likely violates several clauses of the Constitution, as noted by several legal scholars who have examined Section 303.

Moving forward, lawmakers should reject this proposal – regardless of whether it is considered as stand-alone legislation, within the Affordable Housing Credit Improvement Act, or as part of a broader package of legislation.

Onward,

Grover Norquist
President, Americans for Tax Reform