



The Affordable Housing Credit Improvement Act (S.1703/H.R. 3077)
Enhancements to the bill in the 116th Congress

Sponsored by Senators Maria Cantwell (D-WA), Johnny Isakson (R-GA), Ron Wyden (D-OR), Todd Young (R-IN) in the Senate and Representatives Suzan DelBene (D-WA), Kenny Marchant (R-TX), Don Beyer (D-VA), and Jackie Walorski (R-IN) in the House, the Affordable Housing Credit Improvement Act of 2019 (S. 1703/H.R. 3077) would make significant strides towards addressing our nation's severe shortage of affordable housing by expanding and strengthening the Low-Income Housing Tax Credit (Housing Credit).

The Affordable Housing Credit Improvement Act was initially introduced in the second session of the 114th Congress in the senate and reintroduced in the 115th Congress in both chambers. For its 116th Congress reintroduction, the bill's sponsors have made several key modifications to incorporate new ideas that will further strengthen the Housing Credit. ***S. 1703 and H.R. 3077 are identical companion bills.*** This paper describes the material differences between S. 1703/H.R. 3077 and the 115th Congress versions of the legislation, S. 548 and H.R. 1661.

Unless otherwise noted in this document, all provisions in S. 548/H.R. 1661 have carried over into S. 1703/H.R. 3077

Section 101: Increase in State Allocations—Modification of Existing Provision in Senate bill/New Provision in House Bill

- **115th Congress:** S. 548 included a five-year, phased-in 50 percent increase in both the per capita amount and small state minimum, which determine the amount of Housing Credit authority each state is able to allocate in a given year—commonly referred to as the Housing Credit volume cap. H.R. 1661 did not include a cap increase provision.

The Affordable Housing Credit Improvement Act achieved a major victory in 2018 when Congress passed the Consolidated Appropriations Act of 2018, which temporarily increased the Housing Credit volume cap by 12.5 percent for Fiscal Years 2018, 2019, 2020, and 2021.

- **116th Congress:** S. 1703 and H.R. 3077 include the 12.5 percent increase in baseline and provide a five-year, phased in 50 percent increase over current levels in the Housing Credit volume cap. They also assume the annual inflation adjustment based on chained CPI in each of the five years during which the cap increase is phased in. In total, the cap increase contained in S. 1703/H.R. 3077 would increase affordable housing production over 10 years by more than 384,000 homes more than we are able to produce today.

Section 201: Average Income Test Applicability to Exempt Facility Bonds—New Provision

- **115th Congress:** S. 548 and H.R. 1661 included a provision to add a third “minimum set-aside” option for Housing Credit properties, called the “Average Income Test” (commonly referred

to as income averaging). This allowed developers the option of serving households earning up to 80 percent of area median income (AMI), so long as the average income in the low-income units in any given property would be no higher than 60 percent of AMI. This provision became law as part of the Consolidated Appropriations Act of 2018, and as such has been removed in S. 1703/H.R. 3077.

- 116th Congress: While Congress modified Internal Revenue Code (IRC) Section 42, which governs the Housing Credit program, to allow for income averaging, it did not make a corresponding change to IRC Section 142, which governs multifamily Housing Bonds. Prior to this, the Housing Credit and multifamily Housing Bonds had the same two minimum set-aside options. Multifamily Housing Bonds trigger the so-called 4 percent Housing Credit, which is used to finance approximately half of all Housing Credit apartments today. Developers of 4 percent properties that elect income averaging must still satisfy one of the existing minimum set-aside options in Section 142—essentially meaning that they must satisfy two minimum set-asides. S. 1703/H.R. 3077 would streamline the use of income averaging for 4 percent properties by adding the Average Income Test as a third minimum set-aside option in Section 142.

Section 204: Modification of Student Occupancy Rules—Modification of Existing Provision

- 115th Congress: Since Congress created the Housing Credit, the statute has included a prohibition on serving full time student households, with certain limited exceptions. While well intentioned, in practice the rule is extraordinarily complex to administer and prevents adult Housing Credit residents from furthering their education. S. 548/H.R. 1661 would have simplified the Housing Credit “student rule” to better align it with the student rule applicable to HUD housing programs and provide an exception to the rule for residents over the age of 24 so that they may pursue educational opportunities and a path to greater self-sufficiency. The bills also provided exceptions to households under the age of 24, consistent with the exceptions provided under the HUD student rule. For example, individuals of any age would be exempt from the student prohibition if they had been a homeless youth, a veteran of the armed forces, a parent, among other exceptions.
- 116th Congress: S. 1703/H.R. 3077 make one small change to the student rule provision in S. 548. They add victim or threatened victim of domestic violence or sexual assault to the list of exceptions to the student rule.

Section 206: Requirement that Low-Income Housing Credit-Supported Housing Protect Victims of Domestic Abuse—New Provision

- 116th Congress: The 2013 reauthorization of the Violence Against Women Act (VAWA) provided protections for victims of domestic violence, dating violence, sexual assault, and stalking who are living in Housing Credit properties. However, VAWA made no conforming changes to IRC Section 42. Because VAWA and Section 42 are not aligned, there are certain circumstances in which their requirements are contradictory. S. 1703/H.R. 3077 would better align the Housing Credit with VAWA by
 - Requiring all Housing Credit long-term use agreements to include VAWA protections,

- Clarifying that an owner should treat a tenant who has their lease bifurcated due to violence covered under VAWA as an existing tenant and should not recertify the tenant’s income as if they were a new tenant at initial occupancy, and
- Clarify that victims under VAWA qualify under the special needs exemption to the Housing Credit general public use requirement.

Section 207: Clarification of General Public Use Requirement Relating to Veterans, Etc.—New Provision

- 116th Congress: In general, Housing Credit properties must be made available for rental to income-eligible members of the general public. Section 42 defines that requirement to permit occupancy restrictions or preferences that favor tenants with special needs, or who are members of a specified group under a federal or state program that supports housing for such groups, or who are involved in artistic or literary activities. The IRS recently issued guidance that the Section 42 general public use rule is applicable to multifamily bond financed properties under Section 142. S. 1703/H.R. 3077 would codify the recent IRS guidance by:
 - Specifying that a multifamily bond-financed property does not fail the general public use requirement applicable to multifamily Housing Bonds so long as it meets the general public use requirements in Section 42, and
 - Adding language to Section 42 to clarify that veterans of the armed forces are excepted from the Housing Credit general public use requirement.

Section 303: Modification and Clarification of Rights Relating to Building Purchase—Modification of Existing Provision

- 115th Congress: As Housing Credit properties reach the end of their initial 15-year compliance period, the tax code permits a nonprofit general partner to obtain full ownership of its property through a “right of first refusal” (ROFR) However, in some cases, the transfer of properties to nonprofits through ROFR has caused disputes between investors and nonprofit sponsors in instances involving the disposition of cash assets, such as operating or replacement reserves that are critical to the long-term viability of the property. This problem becomes of greater concern as more and more properties reach year 15. S. 548 addressed this problem by replacing ROFR with a purchase option for newly financed properties.
- 116th Congress: S. 1703/H.R. 3077 build on the provision originally included in S. 548/H.R. 1661 by providing clarification of ROFR for existing properties. Specifically, they clarify that the property may be acquired directly or by purchase of a partnership interest, and that the property includes all assets held for development, operation, or maintenance of the building. The provision also clarifies that the ROFR or purchase option may be exercised without approval of the investor and in response to any offer to purchase the property, including by a related party.

Section 304: Modification of Previous Ownership Rules; Limitation on Acquisition Basis—Modification of Existing Provision

- 115th Congress: Housing Credits are not available for the acquisition of properties placed in service during the last ten years. This rule dates to 1986, when Congress was concerned about “churning” real estate to take advantage of property appreciation due to the accelerated depreciation rules enacted in 1981. Decades later, with longer depreciation rules in effect, the Ten Year Rule is no longer relevant. Instead, the rule unnecessarily prevents the acquisition of properties that would otherwise be eligible for preservation. S. 548/H.R. 1661 included a provision that would address this problem by allowing properties that had been placed in service during the last 10 years to receive acquisition Credits, but limiting the acquisition basis to the lowest price paid for the building during that 10-year period adjusted for cost of living and capital improvements.
- 116th Congress: A related issue to the Ten Year Rule is the Related Party Rule, which precludes acquisition credit if a building was owned at any time in the past by a related party (as identified in the IRC). While the purpose of the Related Party Rule is to prevent a prior owner from generating acquisition credits upon a transfer of the property to itself or a related party, there is no time limit on this provision. Investors have run into difficulty in determining the owners of interests from many years ago. Given the limited pool of investors, this rule has impeded rehabilitation of properties. S. 1703/H.R. 3077 build on the provision in S. 548/H.R. 1661 that addressed the Ten Year Rule by allowing properties to qualify for acquisition Credit so long as (1) the property is not acquired directly from a related party and (2) a related party has not owned the building at any time during the five years prior to the acquisition date.

Section 311: Elimination of Basis Reduction for Low-Income Housing Properties Receiving Certain Energy Benefits—Modification of Existing Provision in House Bill Only

- 115th Congress: Three key energy tax incentives—the Section 45L New Energy Efficiency Home Tax Credit, the Section 179D Energy Efficient Commercial Buildings Deduction, and the Section 48 Investment Credit used to finance solar panels—require basis reductions when used with the Housing Credit. This means that when affordable housing developers claim the energy tax incentives, less Housing Credit equity can go into the property. Both S. 548 and H.R. 1661 included a provision to eliminate the basis reduction for the Section 48 Investment Credit. However, H.R. 1661 did not include a similar elimination of the basis reduction associated with Section 45L or Section 179D Credits, as these Credits had not been renewed as tax extenders.
- 116th Congress: H.R. 3077 conforms with S. 1703 by eliminating the basis reduction associated with all three energy Credits.

Section 314: Increased Cost Oversight and Accountability—New Provision

- 116th Congress: Housing Credit properties—like all developments—are subject to market forces impacting cost, including costs associated with labor, materials, and land prices, as well as costs stemming from local regulations. These costs have risen substantially in recent years, and state agencies have taken steps to contain those costs, recognizing that some cost drivers are beyond their control. However, because the Housing Credit program is market-based and competitive, state agencies can and do use competition as a means of incentivizing lower development costs, while still providing the flexibility needed to construct quality, durable properties that will serve the lowest income households possible. S. 1703/H.R. 3077 would codify state efforts to contain costs by adding a required “selection criteria” for cost reasonableness, which states would consider in their determination of which projects will receive an allocation of Housing Credit authority.

Section 501: Inclusion of Rural Areas as Difficult Development Areas—New Provision

- 116th Congress: Building affordable housing in rural areas presents certain challenges that developers in more urban areas are less likely to face. In particular, rural areas often have very low area median incomes. Because Housing Credit rents are based on area median income levels, rural properties often cannot generate enough cashflow to support much debt. Therefore, these properties need more equity invested in them on the front end. S. 1703/H.R. 3077 addresses this challenge by giving states the ability to provide up to a 30 percent basis boost to properties in rural areas if needed for financial feasibility. Rural areas are defined as nonmetropolitan counties and rural areas defined in Section 520 of the Housing Act of 1949 if the state designates 520 areas as rural areas in its Qualified Allocation Plan.

Section 601: Revision and Clarification of Bond “Recycling”—New Provision

- 116th Congress: In 2008, Congress authorized the use of “recycling” of tax-exempt multifamily Housing Bonds so that states could use the proceeds from the repayments of those bonds to finance more affordable multifamily bond-financed housing. However, the properties that receive the recycled bond authority are not eligible for 4 percent Housing Credits. Moreover, there are limits that impede the utility of multifamily bond recycling and technical challenges that have made recycling needlessly difficult to do in practice. S. 1703/H.R. 3077 allows states to maximize their bond resources by letting them use recycled multifamily bond proceeds to finance not only new multifamily Housing Bonds, but also Mortgage Revenue Bonds (which help lower-income households become first time homebuyers); thereby allowing states to devote more of the “new” bond cap to multifamily production that would be eligible for 4 percent Housing Credit authority. It also provides more flexibility by allowing states 12 months, rather than 6 months provided under current law, to issue the new loan backed by recycled proceeds and makes other technical fixes to streamline multifamily bond recycling.