February 10, 2017

Senator Orrin Hatch, Chairman
Senator Ron Wyden, Ranking Member
Senator Maria Cantwell
United States Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Senate Bill 3237 (LIHTC) | Recommendations for Revision

Dear Senators Hatch, Wyden, and Cantwell,

On behalf of the undersigned civil rights advocates, we submit the following comments and proposed amendments to last year's draft Senate Bill 3237 ("S. 3237").[1] The Poverty and Race Research Action Center ("PRRAC") is a civil rights poverty organization that works closely with researchers and housing professionals to study the continuing consequences of historical patterns of housing segregation.[2] PRRAC has published extensively on how to measure the impact of the Low Income Housing Tax Credit program ("LIHTC"), and how LIHTC might be better implemented to build opportunity for low-income families.[3] The Lawyers Committee for Civil Rights Under Law is a national civil rights advocacy organization founded in 1963 at the request of President John F. Kennedy, and is committed to the advancement of civil rights for all Americans, including the rights enumerated in the 1968 Fair Housing Act. The Fair Share Housing Center (FSHC) is a public interest organization devoted to defending the housing rights of New Jersey's poor through enforcement of the Mount Laurel Doctrine.[4] FSHC advocates on behalf of legislation and policy proposals that combat segregated housing patterns that serve as barriers to full implementation of the Mount Laurel Doctrine.

The LIHTC program has supported the development of 2.4 million rental units since its creation 30 years ago. The program taps into private sector innovation and funding to provide low-income Americans with access to stable homes and opportunities for upward mobility. We support your efforts to further improve upon this longstanding and successful effort to support private sector investment in housing for low and moderate-income Americans.

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[1] United States Cong. Senate. *A bill to amend the Internal Revenue Code of 1986 to reform the low income housing credit, and for other purposes*. 111th Cong. 2nd sess. S. 3237.

[2] PRRAC is a non-profit 501(c)(3) organization headquartered at 1200 18th St. NW #200, Washington, DC 20036.

[3] A sampling of PRRAC's publications in this vein include Jill Khadduri, *Creating Balance in the Locations of LIHTC Developments: The Role of Qualified Allocation Plans*, PRRAC and Abt Associates, Inc., at http://www.prrac.org/pdf/Balance_in_the_Locations_of_LIHTC_Developments.pdf (2013); Megan Haberle, Ebony Gayles, Philip Tegeler, *Accessing Opportunity: Affirmative Marketing and Tenant Selection in the LIHTC and Other Housing Programs*, PRRAC, at http://www.prrac.org/pdf/affirmativemarketing.pdf (2012); Sarah Bookbinder, Alanna Buchanan, Tamica Daniel, Jonathan Hooks, Shayla Parker, Philip Tegeler, *Building Opportunity: Civil Rights Best Practices in the Low Income Housing Tax Credit Program*, at http://www.prrac.org/pdf/2008-Best-Practices-final.pdf (2008).

[4] FSHC is a non-profit 501(c)(3) organization headquartered at 501 Park Blvd, Cherry Hill, NJ 08002.

Our recommendations regarding S. 3237 are as follows:

(1) Amend the language in Section 309, such that housing credit agencies will award the new 150 percent eligible basis boost to a project located in a high poverty census tract (exceeding a 25 percent poverty rate) only if the taxpayer can demonstrate that the project does not contribute to overconcentration of extremely low-income households in that census tract.

(2) Raise the cap on the portion of MSAs which may be designated as DDAs from 20 percent of the aggregate population of MSAs to 30 percent.

(3) Amend the proposed language in Section 307 to include threshold criteria that shall be considered by state housing credit agencies when formulating a definition for "concerted community revitalization plan."

(4) Amend the proposed language in Section 308 to prohibit State qualified allocation plans ("QAPs") from requiring or offering points for either local approval or local contributions. The current bill directs the Treasury Department to issue non-binding guidance on this issue.

This letter is divided into sections containing further explanation of the recommendations listed above, as well as proposed statutory language where appropriate. Please do not hesitate to contact us for additional explanation or clarification.

(1) Amend Section 309 to discourage overconcentration of extremely low-income households in high poverty census tracts.

We propose the following statutory language amending Section 309 of S. 3237. The language is designed to prevent poverty concentration in high poverty census tracts.

Amend the following proposed language (under Title III—Credit Rate and Other Rules Relating to Credit Eligibility and Determination, at pp. 24-25):

SEC. 309. INCREASE IN CREDIT FOR CERTAIN PROJECTS DESIGNATED TO SERVE EXTREMELY LOW-INCOME HOUSEHOLDS.

(a) IN GENERAL.—Paragraph (5) of section 42(d) of the Internal Revenue Code of 1986 is amended by adding at the end the following new subparagraph:

(C) INCREASE IN CREDIT FOR PROJECTS DESIGNATED TO SERVE EXTREMELY LOW-INCOME HOUSEHOLDS.—In the case of any building—

(i) 20 percent or more of residential units in which are designated by the taxpayer for occupancy by households the aggregate household income of which does not exceed the greater of—

(I) 30 percent of area median gross income, or

(II) 100 percent of an amount equal to the Federal poverty line (within the meaning of section 36B(d)(3), and

(ii) which is designated by the State housing credit agency as requiring the increase in credit under this subparagraph in order for such building to be financially feasible as part of a qualified low-income housing project,

subparagraph (B) shall not apply to the portion of such building which is comprised of such units, and the eligible basis of such portion of the building shall be 150 percent of such basis determined without regard to this subparagraph.

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to buildings placed in service after December 31, 2015.

To read as follows:

SEC. 309. INCREASE IN CREDIT FOR CERTAIN PROJECTS DESIGNATED TO SERVE EXTREMELY LOW-INCOME HOUSEHOLDS.

(a) IN GENERAL.—Paragraph (5) of section 42(d) of the Internal Revenue Code of 1986 is amended by adding at the end the following new subparagraphs:

(C) INCREASE IN CREDIT FOR PROJECTS DESIGNATED TO SERVE EXTREMELY LOW-INCOME HOUSEHOLDS.—In the case of any building—

(i) 20 percent or more of residential units in which are designated by the taxpayer for occupancy by households the aggregate household income of which does not exceed the greater of—

(I) 30 percent of area median gross income, or

(II) 100 percent of an amount equal to the Federal poverty line (within the meaning of section 36B(d)(3), and

(ii) which is designated by the State housing credit agency as requiring the increase in credit under this subparagraph in order for such building to be financially feasible as part of a qualified low-income housing project,

subparagraph (B) shall not apply to the portion of such building which is comprised of such units, and the eligible basis of such portion of the building shall be 150 percent of such basis determined without regard to this subparagraph.

(D) AVOID OVERCONCENTRATION IN HIGH POVERTY CENSUS TRACTS—Subparagraph (C) shall apply to a project located in a census tract which has a poverty rate of at least 25 percent only if the taxpayer is able to demonstrate that the project does not contribute to overconcentration of extremely low-income households in that census tract.

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to buildings placed in service after December 31, 2015.

Section 309 provides an eligible basis boost of 150 percent for projects serving extremely low-income ("ELI") households. While we are generally supportive of measures designed to promote deeper affordability, we are concerned that states might apply this basis boost in ways that exacerbate poverty concentration. If incentives set by state QAPs result in such households being constructed in high poverty census tracts, which we have here defined as a census tract with a poverty rate of at least 25 percent, then the basis boost will inadvertently contribute to a clustering of ELI households in a high poverty, low opportunity regions. We therefore propose that the new eligible basis boost be available only to projects that will not result in overconcentration of ELI households living within a particular census tract.

We are generally concerned that Section 309 as written will encourage taxpayers to propose projects with 100 percent of units designated to serve extremely low-income households in economically depressed areas, thereby contributing to poverty concentration. We suggest that you consider adding a "cap," set somewhere between thirty and forty percent, to the number of units that may be designated to serve extremely low-income households in individual projects seeking to take advantage of the basis boost. Should you adopt such a cap into the statutory text, we further recommend that you include an exception for projects designed to allow government administration of long-term supportive care services via Medicaid or similar programs.

(2) Insert section amending the definition of DDAs and raising the population cap on DDAs.

We propose the following statutory language amending Section 306 of S. 3237. We believe that the suggested changes will allow "difficult development areas" ("DDAs") to counterpoise the incentives created by the newly expanded "qualified census tracts" ("QCTs").

Insert the following proposed language after Section 306 (under Title III—Credit Rate and Other Rules Relating to Credit Eligibility and Determination, at p. 23):

SEC. 3##. DEFINITION OF DIFFICULT DEVELOPMENT AREA; INCREASE OF DIFFICULT DEVELOPMENT AREA POPULATION CAP.

(a) IN GENERAL.—Clause (iii) of section 42(d)(5)(B) of the Internal Revenue Code of 1986 is amended—

(1) in subclause (II)—

(A) by striking "20 percent" and inserting "30 percent".

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall apply to designations of difficult development areas under section 42(d)(5)(B)(iii) of the Internal Revenue Code of 1986 after December 31, 2016.

The draft bill removes the twenty percent designation cap on QCTs in Section 42(d)(5)(B)(ii)(II). QCTs designated by HUD under Section 42 are disproportionately located in higher density urban areas with high levels of poverty concentration.[5] We are concerned that lifting the QCT cap without taking commensurate action in regard to DDAs will tip the balance of incentives toward QCTs and inadvertently contribute to poverty concentration. Accordingly, we propose that the twenty percent cap on DDAs be raised to thirty percent. Simply put, we believe that any increase in designation of DDAs will further the goal of poverty deconcentration by providing developers with additional incentives to build projects in high-cost, high-opportunity neighborhoods where there is often a shortage of land zoned for multifamily housing, making LIHTC development more expensive and protracted.

(3) Amend Section 307 to include threshold criteria for CCRPs.

We propose the following statutory language amending Section 307 of S. 3237, which will provide clear guidance to states as they develop threshold criteria for Concerted Community Revitalization Plans.

Amend the following proposed language (under Title III—Credit Rate and Other Rules Relating to Credit Eligibility and Determination, at p. 23):

SEC. 307. DETERMINATION OF COMMUNITY REVITALIZATION PLAN TO BE MADE BY STATE HOUSING CREDIT AGENCY.

(a) IN GENERAL.—Subclause (III) of section 42(m)(1)(B)(ii) of the Internal Revenue Code of 1986 is amended by inserting '', as determined by the State housing credit agency,'' after ''the development of which''.

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to allocations of housing credit dollar amounts made after December 31, 2016.

To read as follows:

SEC. 307. DETERMINATION OF COMMUNITY REVITALIZATION PLAN ~~TO BE MADE~~ BY STATE HOUSING CREDIT AGENCY

(a) IN GENERAL.—Clause (ii) of section 42(m)(1)(B) of the Internal Revenue Code of 1986 is amended—

(1) By inserting in subclause (III) '', as determined by the State housing credit agency in accordance with subclause (IV) of this section,'' after ''the development of which''.

[5] Casey J. Dawkins, *Exploring the Spatial Distribution of Low Income Housing Tax Credit Properties*, Office of HUD Policy Development & Research (2011) (available at http://www.prrac.org/pdf/dawkins_LIHTC%20spatial-distribution_081111.pdf.)

(2) <u>By inserting as subclause (IV) the following new paragraph:</u>

IV. Which sets forth criteria that the State housing credit agency shall apply in its determinations whether a project contributes to a concerted community revitalization plan, for purposes of subclause (III) of this section. In making such determinations and formulating its criteria, the State housing credit agency shall consider the following:

(a) The extent to which the plan is comprehensive, geographically specific, and provides a clear timeline and measurable outcomes for implementation;
(b) the extent to which the plan ensures it will not contribute to a loss of affordable housing in the region and involuntary displacement;
(c) the extent to which the plan includes significant commitments of public and private investment in non-housing infrastructure, amenities, or services beyond the LIHTC development; and
(d) whether the plan contains a strategy for increasing the economic diversity of the neighborhood.

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to allocations of housing credit dollar amounts made after December 31, 2016.

Section 307 of the bill amends 26 USC § 42(m)(1)(B), which defines qualified allocation plans (QAPs). Under the current statute, QAPs must give preference to projects that contribute to a concerted community revitalization plan (CCRP), among other requirements. The draft bill assigns housing credit agencies the responsibility for making this determination but offers no guidelines or definition for CCRPs. The Department of the Treasury and the Internal Revenue Service recently recognized this ambiguity and began soliciting comments in an effort to clarify the term. We propose amending the bill to provide a framework that will assist State agencies in making CCRP determinations. This framework considers the following:

1) The extent to which the plan is comprehensive, geographically specific, and provides a clear timeline and measurable outcomes for implementation.

The geographic area within a CCRP should be defined appropriately in the context of a given urban, suburban or rural area. Because neighborhood conditions can vary considerably by block, particularly in urban areas, it is important that the boundaries be clearly identified. Additionally, a comprehensive timeline and measurable outcomes are crucial to the process and evaluation of any plan.

2) The extent to which the plan ensures it will not contribute to a loss of affordable housing in the region and involuntary displacement.

The plan must recognize the potential consequences of new development, including rising rents and other factors that may displace previous low-income residents. The goals of the LIHTC program are not achieved by developments which result in new housing for some low-income individuals but drive others away.

3) The extent to which the plan includes significant commitments of public and private investment in non-housing infrastructure, amenities, or services beyond the LIHTC development

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A CCRP should look beyond housing to other elements of livability: amenities, employment, schools, access to transportation, and other necessities. These components contribute to a stable, thriving neighborhood and are a necessary complement to new housing developments.

4) Whether the plan contains a strategy for increasing the economic diversity of the neighborhood.

Plans must seek to avoid economically segregated developments by providing access to mixed-income neighborhoods. Effective CCRPs should consider new developments within a broader economic diversity strategy.

(4) Amend Section 308 by prohibiting local approval and contribution requirements in state QAPs within this statute, rather than relying on Treasury guidance.

We propose the following statutory language to prohibit state QAPs from requiring or allocating points for either local approval or local contributions. We believe this is a more effective approach than the bill's current method of directing non-binding Treasury guidance.

Amend the following proposed language (under Title III—Credit Rate and Other Rules Relating to Credit Eligibility and Determination, at p. 23):

SEC. 308. PROHIBITION OF LOCAL APPROVAL AND CONTRIBUTION REQUIREMENTS

Not later than 120 days after the date of the enactment of this Act, the Secretary of the Treasury shall issue guidance prohibiting States from including a requirement of local approval or local contributions, either as a threshold qualification requirement or as part of a point system to be considered for allocations of housing credit dollar amount under the State's qualified allocation plan for purposes of section 42(m)(1)(B) of the Internal Revenue Code of 1986 (other than the requirement of section 42(m)(1)(A)(ii) of such Code).

To read as follows:

SEC. 308. PROHIBITION OF LOCAL APPROVAL AND CONTRIBUTION REQUIREMENTS

(a) <u>IN GENERAL.—Paragraph (1) of section 42(m) of the Internal Revenue Code of 1986 is amended—</u>

(1) <u>By inserting as subparagraph (E) the following new paragraph:</u>

<u>(E) No State shall require local approval or local contributions as a threshold qualification requirement or allocate points for local approval or local contributions as part of a point system to be considered for allocations of housing credit dollar amount under the State's qualified allocation plan for purposes of section 42(m)(1)(B) of the Internal Revenue Code of 1986 (other than the requirement of section 42(m)(1)(A)(ii) of such Code).</u>

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to allocations of housing credit dollar amounts made after December 31, 2016.

As currently written, Section 308 of the bill mandates that the Secretary of the Treasury issue guidance prohibiting any state QAP from including (a) local approval, or (b) local contributions as factors in the allocation of credits, either as threshold requirements or as part of a point system. We strongly support this objective and believe that permitting states to require or preference local contributions will replicate the nefarious effects that result from states requiring or preferencing local approval. The bill can accomplish this in a more uniform and effective manner, however, by writing the prohibitions into the statute directly rather than calling for non-binding guidance from the Treasury Department.

Local Approval

Requiring or allocating points for local approval undermines efforts to build LIHTC projects in high-opportunity areas and perpetuates historic patterns of housing segregation. Allowing local input beyond the statutory notification requirement "ensures local governments have greater leeway to steer tax credit developments into high poverty areas"[6]—areas that are more likely to be disproportionately minority. Indeed, we agree with the Internal Revenue Service ("IRS") that Section 42 ought to be interpreted consistently with the Fair Housing Act of 1968, which was enacted "to provide, within constitutional limitations, for fair housing throughout the United States."[7] In its December 2016 Ruling,[8] the IRS reasoned that local approval requirements allow local leadership to effectively veto projects by withholding support, thereby channeling housing credits in ways that contribute to racial and economic segregation. The Ruling states that the practice of allowing local approval to operate as a veto "has a discriminatory effect based on race, which is a protected characteristic under 42 USC 3604."[9] The Ruling cites 2015 Department of Housing and Urban Development regulations which emphasize "the duty to affirmatively further fair housing" through actions "to overcome the legacy of segregation, unequal treatment, and historic lack of access to opportunity in housing."[10]

The IRS's argument on the applicability of the Fair Housing Act is compelling, and its discussion of the consequences of local vetoes conforms with our observations of how local approval requirements and point allocations play out in practice. Regardless of the IRS's interpretation, the alternative – that local approval may play a role in credit allocation – is simply bad policy because it funnels LIHTC projects away from high-opportunity areas and toward high-poverty areas. Our research finds that obstacles imposed by local governments are among "the central barriers housing developers face in proposing affordable family developments outside of economically or racially

[6] Sarah Bookbinder et al, *Building Opportunity: Civil Rights Best Practices in the Low Income Housing Tax Credit Program*, PRRAC, p. 11 (2008) (available at http://www.prrac.org/pdf/2008-Best-Practices-final.pdf).
[7] IRS Rev. Rul. 2016-29 (citing 42 U.S.C. § 3601) (available at https://www.irs.gov/irb/2016-52_IRB/ar05.html).
[8] IRS Rev. Rul. 2016-29 (available at https://www.irs.gov/irb/2016-52_IRB/ar05.html).
[9] *Id.*
[10] *Id.* (citing 80 Fed. Reg. 42272 (2015)).

concentrated areas."[11] Therefore, we strongly support an explicit prohibition on considering local approval and urge that it be written into the bill directly.

Local Contributions

The related practice of requiring or allocating points for local contributions is problematic for two reasons. First, local contributions have the same practical effect as local approvals. Permitting local governments to influence credit allocation by promising or withholding funds allows exclusionary development patterns to persist. Second, this practice amounts to double-counting. Many states' "qualified allocation plans" ("QAPs") already provide points to projects with multiple funding sources, making an additional preference for local contributions unnecessary.

Local contributions are equivalent to local approval.

Permitting states to require or award points for local contributions operates as a type of local approval. Given that state Housing Credit Agencies distribute a finite amount of 9% credits and a few points often separate successful from unsuccessful applications, awarding points for local contributions is equivalent to requiring or preferencing local approvals. This policy incentivizes developers searching for any small advantage to avoid high-opportunity municipalities that refuse to provide local subsidies—directly undermining efforts to disrupt historic patterns of housing segregation.

Local contributions allow politics to infect the allocation system. They provide a method for local governments that are determined to avoid permitting affordable housing construction to push projects away through mere inaction. Towns will simply refuse to provide local contributions, encouraging developers to move to areas where the political climate is more favorable. Large, urban municipalities are more likely to have established affordable housing funding programs, often times as a result of receiving Community Development Block Grant or other state and federal funds. Small, suburban municipalities are less likely to embrace such programs and more likely to refuse to make contributions in a strategic attempt to steer tax credit developments away from their boundaries. Additionally, in some cases suburban areas may not be opposed to projects but simply do not have subsidy programs, an occurrence that is less likely in large urban areas that receive federal and state grants explicitly for such purposes.[12] In practical effect, then, local contribution provisions direct LIHTC projects away from high-opportunity municipalities.

Permitting QAPs to consider local contributions will only strengthen this pattern of racially and economically segregated housing and produce the same bad outcomes that result from local approval requirements.

Considering local contributions is duplicative.

A preference for local contributions is also unnecessary and duplicative. Many state QAPs already offer points for developments with additional sources of funding in an attempt to preference

[11] Sarah Bookbinder et al, *Building Opportunity: Civil Rights Best Practices in the Low Income Housing Tax Credit Program*, PRRAC, p. 10 (2008) (available at http://www.prrac.org/pdf/2008-Best-Practices-final.pdf).
[12] *Id.* at 12.

financially sound proposals. An added requirement or point bonus for local contributions amounts to double-counting; there is no reason to advantage individual subsidies based on the specific *source* of that subsidy. It does not add any value to the assessment of the overall project, but only creates an avenue for local governments to exclude affordable housing by refusing to allocate subsidies.

We support a prohibition on including local contributions as a requirement or as part of a point system and believe that writing the prohibition into the bill itself is the best way to keep local politics out of the credit allocation process.

CONCLUSION

We appreciate the opportunity to share our feedback on S. 3237 and are pleased to support your efforts to improve and strengthen a program that does so much to help millions of Americans. Please do not hesitate to contact us for clarification on the recommendations in this letter or for any other assistance we can offer.

Sincerely,

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