IMPROVING NEW MARKET TAX CREDIT ACCESSIBILITY TO ADDRESS FOOD VULNERABILITY

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As middle to upper-class Americans panicked over the national shortage of toilet paper, for a moment they came close to understanding what it was like to be poor in the United States. In April 2020, we united as a nation as canned foods, flour, sugar, and cleaning supplies flew from grocery store shelves with no certainty of the quick restock to which many of us are accustomed. For the first time, many of us could no longer spontaneously stop by the grocery store to pick up an ingredient for the recipe we bookmarked over the weekend. Due to COVID-19 stay-at-home orders and fear of catching a deadly virus, we re-evaluated what was truly necessary and limited purchase of fresh produce to opt for nonperishables that we could stock up on for the month.

Although much of the past year has been unprecedented, the limited access to groceries and food items is not. A glaring 23.5 million people in the United States regularly do not have access to affordable, healthy food options because there is no nearby grocery store.[1] *Liquidity constraints also diminish low-income people's reserves of what many agree to be basic necessities. Even when readily available, low-income households pay 5.5% more per roll of toilet paper than they would if they purchased in bulk and on sale like higher-income households.*[2] *Poverty is expensive, and the COVID-19 pandemic forced indigent communities to incur a higher-than-usual food insecurity cost. The relied-upon resources that kept many people fed such as local food banks, pantries, and schools were either struggling to meet heightened demand or shut down.*[3] *For many, public transportation is the only affordable means of getting to a grocery store. The enclosed, crowded space is inapposite to any Center for Disease Control (CDC) guideline issued regarding the pandemic, putting low-*

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1. U.S. DEP'T OF AGRIC., ACCESS TO AFFORDABLE AND NUTRITIOUS FOOD: MEASURING AND UNDERSTANDING FOOD DESERTS AND THEIR CONSEQUENCES iii (2009).

2. A. Yesim Orhun, *Frugality is Hard to Afford*, MICHIGAN ROSS (Feb. 24, 2016), https://michiganross.umich.edu/rtia-articles/frugality-hard-afford.

3. Sameer M. Siddiqi et al., *Food Access: Challenges and Solutions Brought on by COVID-19*, RAND CORP. (Mar. 31, 2020), https://www.rand.org/blog/2020/03/food-access-challenges-and-solutions-brought-on-by.html.

income individuals at higher risk of contracting the virus. Indigent communities are risking their lives for a basic necessity: food.

INTRODUCTION

Food insecurity has more than doubled in the United States in 2020 alone, affecting nearly 23% of households.[4] Households with children have always had a higher rate of food insecurity; the rate has more than tripled since the March 2020 national lockdown.[5] Linked with virtually every other policy issue including education, economic development, health, and crime, food insecurity in the United States is a relevant and pressing issue that federal, state, and local governments have tried to resolve with slow success. The exacerbated impact of the pandemic on the already-vulnerable status of food security illustrates the flaws in our current system and encourages an urgency in implementing effective policies.

This Note focuses specifically on food deserts[6] and the physical access to affordable food vendors. Although related, this issue is distinct from the concept of food security, which measures whether a household can afford food.[7] The goal is to address one aspect of food accessibility in a sufficiently particular manner that allows for relatively fast-acting solutions. Part I of this Note summarizes the current status of the food deserts on a national scope and explores past, current, and proposed policies that attempt to address the problem. Part II provides a comprehensive understanding of New Markets Tax Credits ("NMTCs") as well as their role in addressing the food desert problem. Part III brings to light the issue of gentrification as a byproduct of the implemented tax incentives and explains why NMTCs are the best proposal to proactively tackle and constrain the displacement that occurs. Part IV discusses the currently restrictive accessibility of NMTCs and proposes alterations to the

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4. Diane Schanzenbach & Abigail Pitts, *How Much Has Food Insecurity Risen? Evidence from the Census Household Pulse Survey*, INST. FOR POL'Y RSCH. 1 (June 10, 2020), https://www.ipr.northwestern.edu/documents/reports/ipr-rapid-research-reports-pulse-hh-data-10-june-2020.pdf.

5. *Id.*

6. The term "food desert" has historically been under-inclusive and does not consider other contributing factors such as cost of living and systemic racism. A defining characteristic of food deserts is socio-economic; food deserts are more commonly found in Black and brown communities. White neighborhoods contain four times as many supermarkets as predominantly Black neighborhoods. Food activists have deemed "food desert" an outsider term because it connotes desolation, rather than a place with enormous potential. I use the term "food desert" for the purposes of this Note because the scholarship and statutory language use this term but recognize that the terms "food apartheid" and "food oppression" are more accurate. For additional background information, see Anna Brones, *Food Apartheid: The Root of the Problem with America's Groceries*, THE GUARDIAN (May 15, 2018), https://www.theguardian.com/society/2018/may/15/food-apartheid-food-deserts-racism-inequality-america-karen-washington-interview.

7. U.S. DEP'T OF AGRIC., *Definitions of Food Security*, https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-u-s/definitions-of-food-security/.

current national program that encourage more equity investment, particularly in food deserts.

A. Definitions & Criteria

In the 2008 Farm Bill, Congress directed the U.S. Department of Agriculture ("USDA") to conduct a study of food deserts in the United States. The Farm Bill defines "food desert" as an area "with limited access to affordable and nutritious food, particularly such an area composed of predominantly lower-income neighborhoods and communities."[8] The NMTC program[9] defines low income neighborhoods as tracts where (1) the poverty rate is 20% or greater; (2) the median family income is less than or equal to 80% of the state-wide median family income; or (3) the metropolitan area in which the tract is located has a median family income less than or equal to 80% of the metropolitan area's median income.[10] A low-income tract is considered to have limited access to affordable and nutritious food if a significant number of individuals in the tract is far from a supermarket, or if these individuals have no access to a vehicle to get them to the supermarket. The Food Access Research Atlas provides several measures to determine the food accessibility, concluding that a tract is considered low access if at least 100 households are more than half a mile from the nearest supermarket and have no access to a vehicle, or at least 500 people or 33% of the population live more than twenty miles from the nearest supermarket, regardless of vehicle access.[11] These definitions and criteria will be employed throughout this Note.

B. Public Response

Since the USDA's study, many different parties have mobilized in hopes of alleviating the food desert crisis, or at least hindering its spread. In broad bipartisan efforts, the federal government has approved and distributed more than $220 million in Healthy Food Financing Initiative grant funding since 2011.[12] Communities have come together to create and support a variety of

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8. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651, 2039.

9. 26 U.S.C. § 45D.

10. U.S. DEP'T OF AGRIC., FOOD ACCESS RESEARCH ATLAS (Oct. 31, 2019), https://www.ers.usda.gov/data-products/food-access-research-atlas/documentation/#:~:text=Definition%3A%20A%20low%2Dincome%20tract,supercenter%2C%20or%20large%20grocery%20store; *see also* 26 U.S.C. § 45D.

11. *Id.*

12. Allison E. Karpyn et al., *The Changing the Landscape of Food Deserts*, U.N. SYS. STANDING COMM. ON NUTRITION 44, 46–50 (2019).

nonprofit initiatives. Food cooperatives,[13] food banks,[14] and mobile food markets[15] are all innovative ways in which community efforts have contributed to efforts in increasing food security.

Local governments in particular have been crucial drivers of the effort, largely because gathering data and detail about actual food offerings to identify vulnerable tracts requires visiting local food outlets—a task that is infeasible at the national level.[16] More than 130 cities and counties created local food policy councils, comprising stakeholders with a shared common goal of improving food production and consumption.[17] Municipalities have similarly enacted food policy reforms, spending millions of dollars on incentives to encourage grocery store development.[18] The proposal of policy amendments in this Note relies on the understanding that the federal government encourages local governments to pursue more nuanced efforts in abating the food desert crisis, effectuating a ripple-down effect that extends beyond the federal scope.[19]

C. Taxes

Tax incentives are a popular method of encouraging businesses and individuals to engage in socially responsible behavior and development efforts. Tax incentives can be offered in several forms and are used for various purposes across local, state, and federal levels. A criticism of tax incentives is that even when the ultimate goal is to improve community health, tax expenditures primarily benefit the wealthy.[20] However, this disparity does not deter many Americans from supporting the expansion of offered tax benefits because the

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13. For additional information on the effectiveness of food cooperatives, see Mary Stennes Wilbourn, *Bringing Grocery Stores to Low-Income Urban Food Deserts*, COOPERATIVE GROCER 22 (Nov.–Dec. 2015), https://www.grocer.coop/articles/bringing-grocery-stores-low-income-urban-food-deserts.

14. For additional information on how food banks can help alleviate the food desert crisis, see *The Harsh Reality of Food Deserts in America*, MOVE FOR HUNGER (June 8, 2017), https://moveforhunger.org/harsh-reality-food-deserts-america.

15. For a thorough review on mobile markets and their effectiveness in addressing food accessibility, see Lydia Zepeda & Anna "Alice" Reznickova, *Measuring Effects of Mobile Markets on Healthy Food Choices*, UNIV. OF WIS. MADISON (Nov. 2013), https://www.ams.usda.gov/sites/default/files/media/MobileMarkets.pdf.

16. Emily M. Broad Leib, *All (Food) Politics Is Local: Increasing Food Access Through Local Government Action*, 7 HARV. L. & POL'Y REV. 321, 327 (2013).

17. *Id.* at 322.

18. *See* Jessica Fu, *Is it Time to Retire the Term "Food Desert?"*, THE COUNTER (Jan. 9, 2020, 3:43 PM), https://thecounter.org/is-it-time-to-retire-the-term-food-desert-grocery-snap/.

19. *See* Erick Trickey, *How Baltimore Is Experimenting Its Way Out of the Food Desert*, POLITICO (Jan. 23, 2020, 5:02 AM), https://www.politico.com/news/magazine/2020/01/23/baltimore-food-desert-policy-100121.

20. *See* Vivekinan L. Ashok & Gregory A. Huber, *Tax Breaks Are Popular—Even When Wealthy People Benefit Most*, WASH. POST (June 3, 2019), https://www.washingtonpost.com/politics/2019/06/03/tax-breaks-are-popular-even-when-wealthy-people-benefit-most/.

positive impacts are still great.[21] When properly executed, tax incentives are an effective means of supporting low-income communities by facilitating long-term development. For example, the Low-Income Housing Tax Credit has leveraged more than $6 billion in affordable housing development in underserved areas.[22] The Historic Tax Credit ("HTC") has facilitated the rehabilitation of more than 45,000 historic properties, leveraging over $173.7 billion in private investments and creating more than 2.8 million jobs in economically depressed communities.[23] This Note focuses only on NMTC because NMTCs have realistic potential to carry out community-oriented reform that prioritizes preserving community and culture, thus alleviating the direct and cultural displacement that occurs as a result of gentrification.[24]

D. Gentrification & Displacement

Gentrification is defined as "a process in which a poor area (as of a city) experiences an influx of middle-class or wealthy people who renovate and rebuild homes and businesses and which often results in an increase in property values and the displacement of earlier, usually poorer residents."[25] Gentrification is often a byproduct of redevelopment—new higher-end construction and building upgrades attract higher-income and higher-educated residents that change the neighborhood's culture. Capital flow into low-income neighborhoods leads to the influx of affluent residents into the neighborhoods. The influx of residents drives up real estate values, which in turn upgrades the housing stock. As housing stock improves, low-income residents are forced out in several ways. Sometimes, low-income homeowners are unable to pay the increased property taxes and are indirectly forced to leave to find more affordable housing. More often, the process happens quickly as people and businesses are displaced through eviction.

Direct displacement is a phenomenon that occurs in gentrifying neighborhoods when residents can no longer afford to remain in their homes. Higher land values lead to higher rent for both commercial and residential

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21. *Id.*

22. LOCAL INITIATIVES SUPPORT CORP., INTRO TO THE LOW-INCOME HOUSING TAX CREDIT, https://www.lisc.org/our-resources/resource/low-income-housing-tax-credit/ (last visited Oct. 7, 2021).

23. U.S. DEP'T OF THE INTERIOR TECH. PRESERVATION SERVS., ANNUAL REPORT ON THE ECONOMIC IMPACT OF THE FEDERAL HISTORIC TAX CREDIT FOR FISCAL YEAR 2019, RUTGERS EDWARD J. BLOUSTEIN SCH. OF PLAN. & PUB. POL'Y (Oct. 2020), https://www.nps.gov/tps/tax-incentives/taxdocs/economic-impact-2019.pdf.

24. NMTC is a credit intended to incentivize investment in low-income communities. Intermediaries are allocated NMTC credit by the U.S. Department of the Treasury to then select investment projects. The tax credit is redeemed by investors against their federal income tax. TAX POL'Y CTR.: URBAN INST. & BROOKINGS INST., BRIEFING BOOK: KEY ELEMENTS OF THE U.S. TAX SYSTEM, https://www.taxpolicycenter.org/briefing-book/what-new-markets-tax-credit-and-how-does-it-work (Jan. 2021). The NMTC structure will be elaborated on in part II.

25. Gentrification, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/gentrification (last visited Nov. 7, 2021).

tenants because increased property prices lead to increased market values throughout the area, which in turn increases the assessed market values of those properties.[26] As discussed further throughout this paper, newer development is not necessarily intended to return or maintain profits within the low-income community. Increased property tax liability increases rents, forcing current residents to move due to inability to pay the rental increases.

Direct displacement inevitably leads to cultural displacement. The entire community character changes as generations of low-income residents are pushed out. The area transforms—becoming more attractive to affluent individuals that prioritize different services than the low-income residents previously prioritized.[27] The change in character comes with benefits such as better infrastructure and services but simultaneously at the cost of culture, commerce, and community. Even those low-income persons that were able to afford the increased rents no longer recognize the community in which they reside.

This Note seeks to address and prevent what is dubbed the "Whole Foods effect"—the gentrification of neighborhoods once a large grocery store such as Whole Foods or Trader Joe's enters the local market.[28] Although at first glance the introduction of grocery stores ought to alleviate the food desert crisis, it has historically had the detrimental effect of appreciating the cost of nearby homes and forcing the displacement of low-income residents. By making NMTC investing more accessible, direct and cultural displacement can be avoided through the development of food projects other than Whole Foods and similar establishments, while still achieving the ultimate goal of improving food accessibility.

PART I: POLICY INITIATIVES

The unavailability of food and grocery options is a national problem that is in part due to perceived "urban obstacles" such as lower demand and higher capital costs.[29] Grocery stores are susceptible to lower profit margins from

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26. Isaac William Martin & Kevin Beck, *Gentrification, Property Tax Limitation, and Displacement*, 54(1) URB. AFFS. REV. 33, 36 (2018).

27. Nevin Cohen, *Feeding or Starving Gentrification: The Role of Food Policy*, CUNY URB. FOOD POL'Y INST. (Mar. 27, 2018), https://www.cunyurbanfoodpolicy.org/news/2018/3/27/feeding-or-starving-gentrification-the-role-of-food-policy.

28. Svenja Gudell, *Living Near Whole Foods Can Boost Your Home's Value*, ZILLOW (June 19, 2017, 1:30 PM), https://www.forbes.com/sites/zillow/2017/06/19/living-near-whole-foods-can-boost-your-homes-value/?sh=746350692a64.

29. Elizabeth Eisenhauer, *In Poor Health: Supermarket Redlining and Urban Nutrition*, 53 GEOJOURNAL 125, 127–29 (2001) (explaining that grocery stores also effectively redline themselves by refusing to build in urban areas); *see also* Mengyao Zhang & Ghosh Debarchana, *Spatial Supermarket Redlining and Neighborhood Vulnerability: A Case Study of Hartford, Connecticut*, 20(1) TRANS GIS 79, 79–100 (2016).

perishable food items, making them a less attractive investment option.[30] An uphill battle is evident from the onset—investors are already disincentivized to pursue any type of food-related venture. To exacerbate matters, banks have reduced the lending in underserved areas that would serve to address the community's food vulnerability.[31] Additional barriers such as zoning ordinances and difficult approval processes have stalled the introduction of grocery stores into underserved areas.

Since the emergence of the term "food desert" in 1995, Congress has introduced several measures to address the food desert crisis, none of which have proved fruitful. The Food Deserts Bill was introduced in 2015 and established a separate food desert business tax credit for businesses that sell nutrient-dense foods.[32] The Bill died in the Agriculture and Natural Resources Subcommittee just two months after its introduction.[33] The Healthy Food Access for All Americans ("HFAAA") Act, a bipartisan legislation first introduced in 2017, offered tax incentives to a variety of food service providers such as grocers, retailers, and nonprofits to service communities with low access to fresh produce, poultry, dairy, and deli items.[34] The Act incentivized creation of new grocery stores by offering a 15% tax credit to construction companies that build grocery stores in food deserts.[35] The Act addressed the lack of healthy food options in food deserts by offering a 10% tax credit to any store that improves its healthy food sections.[36] The Act uniquely provided support for nonprofits that support community growth—such as food banks, mobile markets, and farmer's markets—in the form of a grant for 10% of their annual operating costs.[37] However, the HFAAA died in Congress in 2017 and was not reauthorized upon its reintroduction in 2019.[38] It was introduced to the Senate again in February 2021, in light of the worsening state of food accessibility.[39]

The Healthy Food Financing Initiative ("HFFI") is one of the few food access success stories attributed to the federal government. Introduced in 2010, HFFI expands access to nutritious foods by offering grants to healthy food retailers specifically targeting underserved communities. HFFI receives support from the U.S. Departments of Agriculture ("USDA"), Treasury, and Health and Human Services ("HHS").[40] The cross-collaboration of three federal

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30. Sandy Smith, *The High Cost of Grocery Store Shrink, And What To Do About It*, CB4 SPOTLIGHT (Feb. 6, 2019), https://cb4.com/blog/grocery-shrinkage-in-retail/.

31. NICKY BASSFORD ET AL., CMTY. HEALTH COUNCILS, INC., FOOD DESERT TO FOOD OASIS: PROMOTING GROCERY STORE DEVELOPMENT IN SOUTH LOS ANGELES 7 (July 2010).

32. H.B. 1107 (Fla. 2015).

33. *Id.*

34. Healthy Food Access for All Americans Act, S. 1724, 115th Cong. (2017).

35. *Id.* at § 2(b)(1).

36. *Id.* at § 2(a)(1).

37. *Id.* at § 2(b)(1).

38. Healthy Food Access for All Americans Act, S. 786, 116th Cong. (2019).

39. Healthy Food Access for All Americans Act, S. 203, 117th Cong. (2021).

40. U.S. DEP'T OF HEALTH & HUM. SERVS., CED HEALTHY FOOD FINANCING INITIATIVE FY 2016 (last reviewed June 20, 2019).

partners makes funding more accessible. Since 2010, HFFI programs have leveraged more than $267 million in grants.[41] The 2020 HFFI round offers $3 million in grants to food enterprises seeking to improve healthy food accessibility, compared to $1.8 million from the previous year.[42] HFFI has awarded the Community Development Financial Institution ("CDFI") Fund more than $22 million to finance food enterprises. These CDFIs work closely with Community Development Entities ("CDEs") to bring healthy food options to underserved areas. Importantly for the purposes of this paper, CDEs may then use the HFFI grants to apply for NMTC, which allows for the generation of larger amounts of money for the purposes of larger-scale projects. The increased availability of cash combined with the access to NMTC loans creates a financing scheme that magnifies the potential of the HFFI to benefit low-income communities.[43]

National policy initiatives have, in general, fallen short in addressing the food desert crisis. Although helpful, the current scope of HFFI has proven to be lacking. Additional resources are needed to successfully carry out the funding scheme, and accessibility to these resources is important in ensuring equitable and appropriate allocation. A policy that is unusable without an arsenal of sophisticated assistance such as attorneys and accountants is not accessible to community members and nonprofits that have the community's best interests in mind.

PART II. THE IMPACT OF NMTC IN IMPROVING FOOD ACCESSIBILITY

A. NMTC Overview

The NMTC program was established by Congress in 2000[44] to incentivize investment in low-income communities. The NMTC program is administered by the U.S. Treasury Department's Community Development Financial Institution ("CDFI") Fund agency. Each year, Congress authorizes the total amount of credit that the Treasury may then allocate to qualified participants. The statutorily imposed limitation has steadily increased, starting at $1 billion in 2001, and most recently increased to $5 billion in 2020 as part of the Taxpayer Certainty and Disaster Tax Relief Act of 2019.[45] As of July 2020, the

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41. *Healthy Food Financing Initiative Announces $3 Million Available in Funding*, REINVESTMENT FUND (May 20, 2020), https://www.reinvestment.com/news/2020/05/20/healthy-food-financing-initiative-announces-3-million-available-in-funding/.

42. HEALTHY FOOD ACCESS, *Financing*, https://www.healthyfoodaccess.org/launch-a-business-financing (last visited Oct. 7, 2021).

43. U.S. DEP'T OF TREASURY, CMTY. DEV. FIN. INST. FUND, HFFI FACT SHEET, https://www.cdfifund.gov/sites/cdfi/files/documents/cdfi7205_fs_hffi_updateddec2017.pdf.

44. The NMTC program was established as part of the Consolidated Appropriations Act, 2000, Pub. L. No. 106–554, Sec. 1(a)(7), 114 Stat. 2763, 2763A-605.

45. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116–94, div. Q, 113 Stat. 3226 (2019); *Treasury Announces New Markets Tax Credit (NMTC) Allocations for 2020, Increased to $5 Billion*, TAX NEWS FLASH (KPMG, United States) Sept. 22, 2020.

NMTC program has awarded a total of $61 billion to support investments in indigent communities and projects, which has further contributed to the creation of more than 836,000 jobs.[46] NMTC projects can be used for virtually any type of development activity; examples of projects funded by NMTC include health care facilities, manufacturing facilities, childcare, schools, and most importantly for the purposes of this paper—food distributors and retailers.

The logistics of the NMTC program lack transparency and are very complex. The Community Renewal Tax Relief Act of 2000[47] created a new type of investment intermediary—Community Development Entities ("CDEs")—to receive NMTC allocations and deploy the investments in improving projects in low-income communities.[48] A qualifying CDE must be a domestic corporation or partnership.[49] CDEs compete for NMTC allocations on an annual basis, and are scored by the CDFI Fund in four areas: community impact, business strategy, capitalization strategy, and management capacity.[50] Once a CDE is selected to receive an NMTC allocation, it may either invest in its own project, receive loans or investments from other CDEs that have similarly received NMTC allocations, or solicit private investors.[51] If it decides to become an investor, a CDE then selects a Qualified Active Low-Income Community Business ("QALICB") in which to make its investment.[52] If the CDE decides to solicit private investors to support its project/QALICB, the private investors may acquire stock or capital interest in the CDE in the form of qualified equity investments ("QEI").[53] NMTC allocations have historically generated $8 of private investment for every $1 the federal government

46. U.S. DEP'T OF TREASURY, CMTY. DEV. FIN. INST. FUND, TREASURY'S CDFI FUND ANNOUNCES MORE THAN $3.5 BILLION IN NEW MARKETS TAX CREDITS (July 15, 2020).

47. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, Sec. 1(a)(7), 114 Stat. 2763, 2763A-587 (2000).

48. U.S. DEP'T OF TREASURY, CMTY. DEV. FIN. INST. FUND, *CDE Certification*, https://www.cdfifund.gov/programs-training/certification/cde (last visited Mar. 21, 2022).

49. *Id.*

50. Counter-intuitively, banks can qualify to become CDEs; reports show that mission lenders such as CDFIs are awarded 50% of NMTCs while mainstream financial institutions are allocated just half that amount. *See* TAX POL'Y CTR.: URBAN INST. & BROOKINGS INST., BRIEFING BOOK: KEY ELEMENTS OF THE U.S. TAX SYSTEM (last updated Jan. 2021).

51. U.S. DEP'T OF TREASURY, *CDE Certification*, *supra* note 49. Note that although nonprofit and for-profit CDEs can receive NMTC allocations, nonprofit CDEs do not have access to equity investment and therefore cannot offer NMTCs to investors. Only for-profit CDEs can offer NMTCs to investors, so nonprofit CDEs must transfer the allocation among its for-profit subsidiaries. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-334, NEW MARKETS TAX CREDIT: THE CREDIT HELPS FUND A VARIETY OF PROJECTS IN LOW-INCOME COMMUNITIES, BUT COULD BE SIMPLIFIED 5 n.8 (2010).

52. Martin D. Abravanel et al., *New Markets Tax Credit (NMTC) Program Evaluation: Final Report*, METRO. HOUS. & CMTYS. POL'Y CTR. (Apr. 2013), https://www.urban.org/sites/default/files/publication/24211/412958-New-Markets-Tax-Credit-NMTC-Program-Evaluation.PDF.

53. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 52, at 29.

invests.[54] In exchange for their QEI, investors receive a 39% federal tax credit, spread out over seven years.[55] The statute requires that if there is a recapture event with respect to the QEI at any time during the seven-year period beginning the date of its original issue, the tax imposed for that taxable year is to be increased by the credit recapture amount.[56]

There are three events that can result in NMTC recapture: (1) the CDE ceases to qualify as a community development entity; (2) the substantially-all requirement is not satisfied;[57] or (3) the investment is redeemed or otherwise cashed out by the CDE and the CDE distributes the funds to the equity holder.[58] Smaller businesses such as grocery stores are generally more difficult to underwrite for the required seven-year period, making them particularly susceptible to a recapture event.[59] Conventional bank financing usually offers a three to five year financing term, whereas NMTC requires that the financing remain in place for seven years.[60]

Enactment of the federal NMTC encouraged states to implement similar tax incentives, expanding the extent to which local initiatives can make an impact.[61] As of January 2021, fourteen states have adopted legislation enacting their own NMTC programs.[62] State NMTC programs generally mimic the

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54. U.S. DEP'T OF TREASURY, CMTY. DEV. FIN. INST. FUND, NEW MARKETS TAX CREDIT PROGRAM, CDFI FUND ANNOUNCES MORE THAN $3.5 BILLION IN NEW MARKETS TAX CREDITS (July 15, 2020).

55. TAX POL'Y CTR.: URBAN INST. & BROOKINGS INST., *supra* note 25.

56. I.R.C. § 45D(g) provides, in pertinent part:

. . . [T]he credit recapture amount is an amount equal to the sum of—

> (A) the aggregate decrease in the credits allowed to the taxpayer under section 38 for all prior taxable years which would have resulted if no credit had been determined under this section with respect to such investment, plus (B) interest at the underpayment rate established under section 6621 on the amount determined under subparagraph (A) for each prior taxable year for the period beginning on the due date for filing the return for the prior taxable year involved. No deduction shall be allowed under this chapter for interest described in subparagraph (B).

Id.

57. 26 C.F.R. § 1.45D-1(c)(5)(i) defines substantially all as at least 85% and provides two alternative methods for meeting the substantially-all requirement.

58. I.R.C § 45D(g)(3).

59. ERNST & YOUNG, THE NEW MARKETS TAX CREDIT: OPPORTUNITIES FOR INVESTMENT IN HEALTHY FOODS AND PHYSICAL ACTIVITY 21 (2013).

60. REINVESTMENT FUND, NEW MARKETS TAX CREDITS AND URBAN SUPERMARKETS 8 (2011).

61. Paul Anderson, *NMTC Coalition Guidance on State NMTC Programs*, NEW MARKETS TAX CREDIT COAL. (June 2, 2016, 12:00 AM), https://nmtccoalition.org/2016/06/02/nmtc-coalition-guidance-on-state-nmtc-programs/.

62. States include Alabama, Arkansas, Florida, Illinois, Kentucky, Louisiana, Maine, Mississippi, Missouri, Nebraska, Nevada, Ohio, Oregon, and Utah. California State Assembly: Comm. on Jobs, Econ. Dev., and Econ., *State New Markets Tax Credit Programs*, https://ajed.assembly.ca.gov/statenewmarketstaxcreditprograms (last visited Jan. 21, 2022).

federal structure, but some states have modified their program structures. For example, whereas the federal NMTC tax credit is 39% of the QEI,[63] Nevada offers a more generous 58% credit.[64] Some states require that state NMTC credits be combined with federal NMTC credits to ensure higher economic return to investors.[65] Many qualifying businesses seek this option even when not required to do so, supporting the inference that it is an attractive option to pursue.[66]

B. NMTC and Food Deserts

Food enterprises are ideal fits for the NMTC program. Food enterprises such as grocers rarely house the activities that would make a business endeavor otherwise ineligible for NMTC—such as tanning booths, gambling, and liquor.[67] One major constraint of NMTC is the seven-year period in which the entrepreneur may not release the loan, and food retailers are not the type of businesses that are frequently bought and sold.[68] The NMTC eligibility application asks the applicant CDE to identify several areas that will be served by its investment, many of which mention "food."[69] In adding "food desert" to its scoring criteria, the CDFI Fund certified such areas as being "highly distressed" and thus more likely to be eligible for the NMTC credit. For example, the applicant is asked whether the census tract is identified as a "Food Desert" per the HFFI definition.[70] The applicant is then asked whether the outcome of their investment encourages healthy food financing projects such as "grocery stores, supermarkets and farmer's markets."[71] The CDFI Fund is committed to tracking NMTC healthy food financing initiatives, particularly those in food deserts. Since 2003, the NMTC has financed over 300 grocery stores, farmer's markets, food delivery services, food banks, and other food enterprise projects.[72]

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63. I.R.C. § 45D(a)(2) specifies "applicable percentage":

For purposes of paragraph (1), the applicable percentage is—

(A) 5 percent with respect to the first 3 credit allowance dates, and

(B) 6 percent with respect to the remainder of the credit allowance dates.

64. NEV. REV. STAT. § 231A.040 (2014) ("Applicable percentage means 0 percent for the first two credit allowance dates, 12 percent for the next three credit allowance dates and 11 percent for the next two credit allowance dates. (Added to NRS by 2013, 3446).").

65. Kevin Potter & Jarick Poulson, *Credits & Incentives Talk with Deloitte, Navigating a Rewarding Financing Tool: New Markets Tax Credit*, 26 J. MULTISTATE TAX'N & INCENTIVES (2016), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-navigating-a-rewarding-financing-tool-new-markets-tax-credit.pdf.

66. *Id.*

67. REINVESTMENT FUND, *supra* note 61, at 8.

68. *Id.* at 9.

69. U.S. DEP'T OF TREASURY, CMTY. DEV. FIN. FUND, NMTC PROGRAM 2020 ALLOCATION APPLICATION (2020).

70. *Id.* at 28.

71. *Id.* at 31.

72. *Grocery Stores and Fresh Food*, NEW MARKETS TAX CREDIT COAL., https://nmtccoalition.org/grocery-stores-and-fresh-food/ (last visited Oct. 8, 2021).

Supermarkets have been one of the main ways in which CDFIs have utilized NMTCs. One of the major success stories comes from Philadelphia, where The Reinvestment Fund ("TRF"), a CDFI, was granted approval for an $18 million NMTC allocation.[73] TRF invested the NMTCs in two Fresh Grocery stores in neighborhoods where there was not a single supermarket within a walkable one-mile radius.[74] The Fresh Grocer offered fresh fruits and vegetables, prepared foods, as well as a deli. It was the first supermarket in the neighborhood in forty years.[75] In an interview, TRF's president said that although training is expensive, the assistance from NMTCs allowed the owner of the store to be able to absorb that cost and offer the jobs to the community's own members.[76] The neighborhood as a whole benefitted from the introduction of the supermarket.

Recognizing the potential for success, states continue to utilize NMTCs for supermarket expansion. For example, UB Community Development, LLC in Missouri announced its plans to use a $7.5 million NMTC allocation to renovate and expand Sullivan's Grocery Stores throughout the state.[77] The project is expected to create fifty-seven full-time jobs and ninety-seven part-time jobs in the next seven years.[78] Total funding will be used to build, equip, and stock an entirely new store while simultaneously expanding, renovating, and restocking currently existing stores.[79] Each target store is located in an identified food desert.[80]

NMTCs can also be used to fund nonprofits and smaller businesses that alleviate the food desert crisis such as food banks, food cooperatives, and independently owned grocers. However, the NMTC program becomes increasingly more difficult when applied to these kinds of projects. In 2013, the Yolo Food Bank in Woodland, California acquired land and an industrial building in hopes of expanding its current operations.[81] Yolo Food Bank first acquired $6 million in independent fundraising, but this was not enough.[82] Yolo Food Bank then sought funding through the NMTC program to help furnish the remaining funds. Because NMTC investors require that their investments be made into special purpose entities that do not directly provide program services,

73. Jennifer Dockery, *NMTCs Create Oases in Food Deserts*, NOVOGRADAC (Jan. 1, 2010), https://www.novoco.com/periodicals/articles/nmtcs-create-oases-food-deserts.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Sullivan's Grocery, a UB Community Development (UBCD) New Markets Tax Credit Loan & Investment Fund Success Story*, UB CMTY. DEV., https://ubcommunitydevelopment.com/sullivans-grocery-stores/ (last visited Oct. 8, 2021).

78. *Id.*

79. *Id.*

80. *Id.*

81. YOLO FOOD BANK, CONSOLIDATED FINANCIAL STATEMENTS (2019), https://yolofoodbank.org/wp-content/uploads/2020/06/YFB-FYE-6-30-2019-Final-Audit-Financial-Statements.pdf.

82. *Id.*

Yolo Food Bank formed the YFB Foundation to serve as the special purpose entity.[83] The NMTC program further required the creation of an investment fund, so The Yolo Food Bank created COCRF Investor 116, LLC ("Investment Fund"), owned by Capital One, to accumulate and distribute the funds under the NMTC program guidelines.[84] Despite its complexities, the project has created twenty-seven permanent jobs and thirty-four construction jobs.[85]

The NMTC program is already directly tailored to address the needs of food accessibility and the food desert crisis. However, the current statutory structure of the program is insufficient to achieve its goal of low-income community development. The NMTC statutory scheme is complex,[86] making NMTC a less accessible option for low-income businesses and non-profits. As seen above, most success stories are drawn from for-profit and large supermarkets. While large food enterprises are one way to address the crisis, they are not the best option because they do not support the community-oriented reform[87] that is ultimately required to achieve the long-term success intended by the NMTC program.

PART III. DISPLACEMENT

Low-income communities are understandably reluctant to introduce tax incentives into local neighborhoods because tax incentives often cause increased property taxes, thus inevitably contributing to subsequent gentrification and then the displacement of low-income families and persons. Safeguards are necessary to preserve these homes and neighborhoods while still implementing effective tax policies.[88] NMTCs are particularly attractive because they are best-suited to address the community's interests. They were created by Congress with the mission of encouraging socially responsible investing.[89]

A. NMTCs Are Intended to Be Socially Responsible

NMTCs are meant to be inherently socially responsible for several reasons. First, in order to be certified by the CDFI Fund, a CDE must have

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83. *Id.*

84. *Id.*

85. *Yolo Food Bank (2,019), Woodland, CA*, NEW MARKETS TAX CREDIT COAL., https://nmtccoalition.org/project/yolo-food-bank/ (last visited Oct. 8, 2021).

86. Discussed further *infra* part IV.

87. Discussed further *infra* part III.

88. *See also* Phil Ciciora, *Tax Incentives Target Poor Neighborhoods But Leave Communities Behind*, ILL. NEWS BUREAU (Apr. 8, 2019) ("None of these laws have been designed in a way in which we should expect that they would help poor communities . . . This is not to say that they couldn't be designed with communities in mind. They absolutely could be. But the political, economic and legal environment under which these laws have been crafted and come to be used over time has not been conducive to such pro-community goals.")

89. *See* Roger M. Groves, *The De-Gentrification of New Markets Tax Credits*, 8 FLA. TAX REV. 214 (2007).

serving low-income communities or persons as its primary mission.[90] Throughout the duration of the allocation, the CDE must have representation of the low-income community on its governing or advisory board to ensure developments are always pursued in the community's best interests.[91] Representatives interviewed have stated that the rationale behind this requirement is that minority CDEs and locally-based community lending organizations have a better understanding of the economic conditions of the communities they aim to serve.[92] Minority-owned businesses are also more likely to provide economic benefits to minority residents, rather than simply pursue a straightforward for-profit endeavor.[93] Grocery stores such as Whole Foods are not tailored to the needs of the low-income community in which the business was introduced—Whole Foods remains the most expensive place to grocery shop.[94] Although NMTCs may certainly be used in the development of a Whole Foods, they are also well-suited to support smaller community developments that prioritize social responsibility and cultural preservation of the community.

Second, the NMTC program is unique as a tax-incentive because it creates opportunities for businesses in loss positions and for nonprofit organizations. The NMTC program grants discounted cash financing to the qualifying CDE, which allows typically less profitable companies an opportunity to enter the market.[95] The NMTC program is distinct from other development incentives in that it does not grant tax credits to the CDE, but instead to the private investors that then make loans to the CDE. These NMTC loans come with their own advantages—typically carrying interest rates 50% below market rates and

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90. Tammy C. Propst, *New Markets Tax Credits—Creative Financing for Economic Development*, J. MULTISTATE TAX'N. & INCENTIVES 26 (2011).

91. *Id.* at 28.

> The term "qualified community development entity" means any domestic corporation or partnership if—
>
> > (A) the primary mission of the entity is serving, or providing investment capital for, low-income communities or low-income persons,
> >
> > (B) the entity maintains accountability to residents of low-income communities through their representation on any governing board of the entity or on any advisory board to the entity, and
> >
> > (C) the entity is certified by the Secretary for purposes of this section as being a qualified community development entity.

I.R.C. § 45D(c)(1).

92. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-795T, NEW MARKETS TAX CREDIT: MINORITY ENTITIES ARE LESS SUCCESSFUL IN OBTAINING AWARDS THAN NON-MINORITY ENTITIES 4 (2009).

93. *Id.*

94. Emma Newburger, *Whole Foods Still Has the Highest Prices Among Grocers Despite April Cuts, Says Bank of America*, CNBC (May 14, 2019, 12:27 PM), https://www.cnbc.com/2019/05/14/whole-foods-has-highest-prices-despite-cuts-in-april-bank-of-america.html.

95. Potter & Poulson, *supra* note 66, at 26.

containing a seven-year interest only period.[96] Upon expiration of the seven-year term, the low-income business then has the ability to purchase the equity from the NMTC investor, creating potential for independence that the business would not otherwise have been able to attain.[97] CDEs also have the option to utilize a leveraged structure by combining the tax credit equity with the leveraged debt in a limited liability entity.[98] Using tax credits to leverage debt allows the CDE to raise even more funds that would not otherwise be available to invest in the low-income community business. Additionally, this leveraged NMTC structure allows CDEs to offer more competitive interest rates on NMTC loans issued to Qualified Active Low-Income Community Businesses ("QALICBs"). The leverage structure further makes it possible for the CDE to obtain additional incentives, such as greater equity for projects and business endeavors.[99]

Third, NMTCs identify and circumvent the issue of discrimination in lending that prevents low-income communities from creating and expanding small businesses. Low-income communities have a high representation of ethnic and racial minorities, which have historically been targets of discriminatory commercial, personal, mortgage, and small business lending practices.[100] Credit pricing increases and access to credit decreases further when the business or individual is located in a predominately Black or brown community.[101] The NMTC does not explicitly steer allocations to minority entrepreneurs such as racially or ethnically diverse individuals, women, or low-income individuals. However, minority entrepreneurs still make up a large number of low-income community residents that create qualifying Qualified Active Low-Income Community Business ("QALICBs").[102] More than 13% of qualified low-income community investments ("QLICIs") made in 2006 were "made in minority-owned or controlled businesses, more than 10% were made in women-owned businesses, and more than 5% were made in businesses owned or controlled by low-income entrepreneurs."[103]

Recall that one of the three recapturing events is if the CDE ceases to qualify as a community development entity. For a CDE to maintain its designation, it must show that at least 60% of its activities have been directed to low-income persons.[104] There are substantial wealth disparities between

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96. *Id.*

97. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 52, at 19.

98. *Id.*

99. *Id.*

100. Abravanel et al., *supra* note 53, at 142.

101. *Id.*

102. Lauren Lambie-Hanson, *Addressing the Prevalence of Real Estate Investments in the New Markets Tax Credit Program* 23 (Fed. Rsrv. Bank of San Francisco, Working Paper No. 2008-04, 2008).

103. *Id*. at 14.

104. U.S. DEP'T OF TREASURY, CDFI FUND, CDE CERTIFICATION APPLICATION: SUPPLEMENTAL GUIDANCE AND TIPS 27, https://www.cdfifund.gov/sites/cdfi/files/documents/cdfi-cert-app-supplemental-guidance-and-tips-12_2018_508c-final.pdf.

families in different racial and ethnic groups in the United States. The typical white family has eight times the wealth of the typical Black family and five times the wealth of the typical Hispanic family.[105] When discussing low-income communities, it is impossible to ignore the glaring race and ethnic income gap, especially when that gap continues to grow. CDEs are already well-positioned to address the needs of minority, low-income communities—they are expected to do so. Granting minority-run CDEs improved opportunities to take advantage of NMTCs facilitates a better understanding of the targeted community and its needs, maximizing the potential for profit circulation within the community.

B. NMTC & Displacement

NMTCs are not immune from the gentrification concerns of other tax incentives. The entire focus of NMTC is to draw equity capital into low-income communities, enhancing economic development.[106] The underlying question is: who are the intended beneficiaries of the enhanced economic development? Significantly, it has been argued that NMTC takes a "pure-place" strategy in that the main objective is to encourage economic development within a defined area.[107] A pure-place approach, in contrast to a "place-based people" approach, is said to target only the identified tract, and not the needs of the community in that identified tract.[108] With modification, however, NMTCs have potential to be the best option for developments seeking to improve overall low-income community health while preserving the community culture and avoiding displacement.

NMTCs utilized in the food retail sector are often for large, full-service supermarkets.[109] The trend and appeal for these types of enterprises is unsurprising for several reasons. First, the current NMTC structure, as discussed in Part IV, is more feasible for projects worth $5 million or greater. Second, a commonly perceived solution to the problem of food deserts is to advocate for the opening of supermarkets. The rationale makes sense—a nearby supermarket in an identified tract obviously increases access to fresh foods. However, although an increase in the availability of supermarkets resolves the issue of food deserts from a purely data perspective, large chain food retailers

105. Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FED. RSRV. (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm.

106. Groves, *supra* note 90, at 5.

107. Jennifer Forbes, Comment, *Using Economic Development Programs as Tools for Urban Revitalization: A Comparison of Empowerment Zones and New Markets Tax Credits*, U. ILL. L. REV. 177, 194 (2006).

108. *Id.*

109. Supporting reasons provided for this *infra* Part IV. *See also* U.S. DEP'T OF TREASURY, CMTY. DEV. FIN. FUND, NEW MARKETS TAX CREDITS AND URBAN SUPERMARKETS 8 (Sept. 30, 2011).

do not improve overall community benefits. In fact, it can be argued that these food retailers harm the food deserts they initially set out to improve.

One of the ways in which big-box food retailers harm the community is the added inequitable competition posed to local, independently owned shops. By virtue of being a chain store, a big-box food retailer will set up a price battle that local merchants in the low-income communities cannot afford to match.[110] Local businesses will be forced to eventually close—driving up unemployment. It may be argued that low prices are good for low-income communities, especially where access to food is concerned. However, low prices are not a consistent characteristic of these big-box retailers. Once all competition is eliminated, prices offered by these stores rise.[111] Ultimately, the addition of new big box stores shifts retail spending from one area of town to another.[112] The result is economic displacement.[113]

The detrimental impact of the new chain retailer extends beyond direct competitors—secondary economic benefits are also lost. Local stores are able to maintain profit circulation within the local economy.[114] Keeping profits closely within the local economy means that the service providers utilized by the local stores such as accountants, printers, and banks also tend to be local businesses.[115] Consequentially, spending money at a locally-owned store benefits the entire community because those stores are then able to utilize and pay for the services of other locally-driven businesses.[116] This is not true of chain stores, where centralization of these functions happens at their headquarters and with outside sources.[117] A dollar spent at a big-box store is a dollar deprived from the local community. It does not go back to local accountants, printers, and banks. Circulation of profits within the community directly prevents displacement by allowing commercial and residential renters to afford their rent.

110. Stacy Mitchell, *The Impact of Chain Stores on Community*, INST. FOR LOCAL SELF-RELIANCE (Apr. 18, 2000), https://ilsr.org/impact-chain-stores-community/.

111. "In Virginia, a survey of several Wal-Mart stores statewide found prices varied by as much as 25 percent. The researchers concluded that prices rose in markets where the retailer faced little competition. A similar conclusion was reached in a survey of Home Depot. Prices were as much as 10 percent higher in Atlanta compared to the more competitive market in Greensboro, North Carolina." *Id.*

112. *Id.*

113. "One study in Greenfield, Massachusetts concluded that a proposed Wal-Mart store would cost existing businesses $35 million in sales. The 177 jobs expected to be gained by the Wal-Mart would be offset by the loss of 148 jobs at other businesses. A similar study in Saint Albans, Vermont found that a new Wal-Mart would derive 76 percent of its sales from local businesses. Many of these stores would be forced to close, leading to a significant net decline in total retail employment and property tax revenue." *Id.*

114. Mitchell, *supra* note 111.

115. *Id.*

116. *Id.*

117. *Id.*

Chain stores also lack any cultural connection or personal investment in the community that could realize long-term community benefits. Jeff Brown, CEO of Brown's Super Stores in Philadelphia, said in an interview that "[l]arge supermarket chains' rigid formats often miss the nuances of a community."[118] Brown's Super Stores was financed by The Reinvestment Fund ("TRF") leveraging an NMTC allocation. Brown's stores stand out as success stories of NMTC food retail allocation not because they are large grocery stores, but because of Brown's commitment to community engagement.[119] Brown emphasizes the customization of his stores to reflect the local diversity of the community in which the store is established.[120] From his extensive experience, stores that succeed are those that understand the needs of the community.[121] The understanding that Brown references manifests in the form of additional available amenities such as pharmacies and banks embedded in the supermarket.[122] Stores led by community leaders such as Brown are dedicated to the community in a way large-chain grocery stores are not. Large-chain grocery stores are highly mobile and will not hesitate to shut down if profit margins are not met.[123] Grocery stores have a high risk of not meeting their narrow profit margins. The average supermarket operates on a very low margin of 1 to 2 percent.[124] To yield any profit, the supermarket must survive for at least a decade.[125] If these margins are not met, the grocery store will shut down and cause further harm to the community. Introduction of new businesses creates jobs. For example, in the case of Brown's Philadelphia location, at least 157 jobs were created.[126] In the event that the chain store is forced to shut down due to unfavorable profitability metrics, even more jobs are lost than if the chain store had not opened up at all—those previously lost by the driving out of the locally-owned store and those newly lost by the shutdown of what was the promise of opportunity.

The primary mission of NMTC is to service low-income communities and persons; this is not possible with the risk of gentrification that often results in the irreversible harm of cultural displacement of the low-income community and direct displacement of its residents. To avoid displacement and aim for sustainable community development, NMTC allocation should be carefully evaluated based on the CDE's neighborhood commitment and involvement.

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118. Associated Press, *Big Grocery Chains Leave U.S. "Food Deserts" Parched*, CBS NEWS (Dec. 7, 2015), https://www.cbsnews.com/news/big-grocery-chains-leave-u-s-food-deserts-parched/.

119. *Success Story: Brown's Fresh Grocer at Monument*, REINVESTMENT FUND, https://www.reinvestment.com/success-story/browns-fresh-grocer-monument/ (last visited Jan. 24, 2022).

120. *Id.*

121. Associated Press, *supra* note 119.

122. *Id.*

123. Mitchell, *supra* note 111.

124. Associated Press, *supra* note 119.

125. *Id.*

126. *Success Story: Brown's Fresh Grocer at Monument*, *supra* note 120.

Whether a nonprofit or corporate endeavor, if the project is not initiated with the opportunity to build a permanent relationship in the neighborhood, the purpose of NMTC is lost. Better alternatives to impersonal and rigid chain grocers are community-driven supermarkets sufficiently flexible to meet the community's needs.

Community-driven supermarkets such as cooperatives are great examples of initiatives that have successfully responded to the food desert crisis. A 2019 study identified seventy-one supermarket plans in the nation that announced plans to open new locations in food deserts since 2000.[127] Of the seventy-one identified, twenty-one were driven by the government, eight by commercial interests, and thirty by community leaders and nonprofits.[128] As of 2019, twenty-two of the supermarkets driven by community and nonprofits were still open—only two were cancelled.[129] In contrast, half the commercial stores and a third of the government developments have either closed or never made it past the planning phase of the project.[130] Food cooperatives in particular were driving forces of success, constituting sixteen of the eighteen community-driven cases.[131] Their success is largely due to the extensive community engagement. A food cooperative is a grocery store often owned by the local community. The members of the cooperative decide what items the cooperative offers to its shoppers, where the items are purchased, and what quality needs to be met.[132] The members partake in a democratic process in voting on standards such as price negotiation and employee hiring and compensation.[133] Importantly, co-ops are open to the public, not just its members.[134] If the ultimate goal is sustainable redevelopment, food co-ops should be prioritized for NMTC allocation related to food accessibility. Co-ops focus on giving back to the community, tackling many of the concerns imposed by chain food retailers discussed above. For example, the Mandela Co-op, based out of West Oakland, California, focuses on purchasing from farmers and food entrepreneurs of color.[135] As commercial supermarkets close in this identified food desert tract, Mandela Co-op is expanding and thriving.[136] Local community members are

127. Catherine Brinkley, *Why Community-Owned Grocery Stores Like Co-Ops are the Best Recipe for Revitalizing Food Deserts*, CONVERSATION (Sept. 11, 2019), https://theconversation.com/why-community-owned-grocery-stores-like-co-ops-are-the-best-recipe-for-revitalizing-food-deserts-122997.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Kristin Sutter, *What is a Food Co-Op? And Why Should You Join One?*, TASTE OF HOME (Aug 14, 2018), https://www.tasteofhome.com/article/food-co-ops/.

133. *Id.*

134. *Id.*

135. MANDELA GROCERY, https://www.mandelagrocery.coop/ (last visited Apr. 23, 2021).

136. *Id.*

incentivized to shop there because the business model is focused on building up the community as a whole.[137]

NMTCs are place-based investment tax incentives. Place-based incentives have been controversial since their introduction in the 1980s.[138] Studies are split as to whether this type of investment contributes to gentrification and ultimately fails low-income communities, or whether these laws actually help reduce unemployment and overall poverty levels.[139] As discussed in Part I, NMTC is unique in its structure of granting discounted cash financing because it is meant to be a viable financing tool for smaller corporations and nonprofit organizations.[140] As it stands, two primary concerns to establishing food cooperatives in food deserts are funding and feasibility.[141] NMTC is intended to assist in overcoming the funding concern. By analyzing and reforming NMTC to be friendlier in practice to these types of businesses, the NMTC mission of facilitating redevelopment while primarily benefitting the low-income community can be realized.

PART IV. NMTC LIMITATIONS & PROPOSED SOLUTIONS

The stated purpose behind the NMTC program is to break cycles of divestment from low-income communities to ultimately serve the identified low-income community.[142] However, as touched upon in Parts II and III, the current NMTC structure misses the mark in achieving that goal by making it difficult for community-oriented organizations—typically organizations best structured to address a low-income community's needs—to participate in the program. Because many of these entities are non-profits and therefore tax-exempt, a tax-incentive scheme like NMTC at first glance may not appear to be beneficial. However, there are several ways such an entity may participate in the NMTC program and still benefit. First, it may apply for NMTC allocation after being granted certification as a CDE from the CDFI Fund.[143] Second, the entity may partake in a leveraged structure by providing debt financing to be combined with another investor's equity financing.[144] Lastly, the entity may play the role of the QALICB, actively engaging in the development and business endeavor in the low-income community.[145] Although seemingly

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137. *Id.*

138. Michelle D. Layser, *A Typology of Place-Based Investment Tax Incentives*, 25 WASH. & LEE J. CIV. RTS. & SOC. JUST. 403, 405 (2019).

139. *Id.* at 407.

140. Potter & Poulson, *supra* note 66.

141. Wilbourn, *supra* note 14, at 22.

142. U.S. DEP'T OF TREASURY, NEW MARKETS TAX CREDIT PROGRAM, *supra* note *55*; *see also* U.S. DEP'T OF TREASURY, *CDE Certification*, *supra* note 49.

143. Michael I. Sanders, *How Nonprofit Organizations Can Use the New Markets Tax Credit*, 20 TAXATION OF EXEMPTS, no. 3, 2009.

144. *Id.*

145. *Id.*

straightforward, these opportunities for NMTC involvement are still difficult to reach for community-oriented entities.

A. Barriers Facing Community-Oriented Organizations Seeking NMTC Allocation

The NMTC allocation process currently disproportionately disfavors minority-owned CDEs, entities that are arguably best suited to address low-income communities' needs due to the reasons discussed in Part III. In the three-year span from 2005 to 2008, only 9% of minority-owned CDEs were granted NMTC allocations.[146] Even when granted, these CDEs received just 4% of the $8.7 billion for which they applied.[147] In contrast, non-minority CDEs were granted NMTC allocations 27% of the time, and received 15% of the $89.7 billion for which they applied.[148] There is no clear reason as to why this disparity exists.[149] No data suggests that minority CDEs have a lower probability of success.[150] The CDFI Fund decides these NMTC allocations by scoring business strategy and community impact in a two-phase process.[151] Only thirty-one applications from minority CDEs out of the eighty-eight submitted (35%) met the minimum threshold scores to advance to the second phase of the review process.[152] In contrast, 61% of non-minority owned CDEs advanced to the second phase.[153] If the goal is to overcome discriminatory lending practices, the current NMTC allocation process does not achieve it. A potential argument is that the reason for the disparity is sheer volume of applications—minority CDEs submitted just eighty-eight applications in the same time frame that non-minority CDEs submitted 846 applications, accounting for 10% of total applications.[154] However, minority CDEs still do not receive allocations in proportion to their representation in the total pool of applications.[155] It may also be argued that minority CDEs do not apply at high volumes because they are not aware of NMTCs. Considering the outreach conducted by the CDFI Fund, this seems unlikely.[156] Both of these arguments only further support the proposal that the NMTC structure is not equally accessible to minority CDEs and similarly situated community-oriented entities.

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146. *New Markets Tax Credit: Minority Entities Are Less Successful in Obtaining Awards Than Non-Minority Entities: Hearing on GAO-09-795T Before Subcomms. of Ways and Means and Fin. Servs. of H.R.*, 111th Cong. 5 (2009) (statement of Michael Brostek, Director, Strategic Issues).

147. *Id.*

148. *Id.*

149. *Id.* at 1.

150. *Id.*

151. *Id.* at 6.

152. *New Markets Tax Credit*, *supra* note 147.

153. *Id.*

154. *Id.*

155. *Id.* at 10.

156. *Id.* at 9.

The current fee structure of NMTCs disadvantages smaller projects. Due to program-mandated oversight requirements, legal fees, and investor due diligence, the costs associated with each project are relatively fixed.[157] The initial fee charged on the quality equity investment (QEI) is anywhere from 2 to 5 percent, on average.[158] The cost to manage the investment typically ranges from twenty-five to sixty basis points of the annual QEI.[159] Additional services are required to remain in compliance with the NMTC structure such as accountants for audits and lawyers for certification and other legal matters—these typically range from $7,000 to $11,000 annually.[160] Thus, a larger project may require a transaction fee 20% of the equity portion of the QEI. In contrast, smaller projects may require a transaction fee worth 40% of the equity portion. The difference in transaction fee percentages has the impact of facilitating projects with larger allocations because these projects can absorb the fees while maintaining an attractive return rate for investors. Smaller projects do not have this advantage. The majority of NMTC transactions average or exceed $5 million, the required threshold to increase survivability of the project.[161] In effect, the NMTC transaction costs may make projects worth less than $5 million entirely unfeasible.

As seen in some of the examples described throughout this Note, NMTC transactions are complex. As a result of this complexity, smaller grocery stores, food banks, food cooperatives, and other recreation facilities have a harder time attracting NMTC financing. The complexity of the NMTC structure also requires additional resources that are not as readily available to less-sophisticated CDEs. For example, one of the implicit requirements of the leveraged NMTC model is to form a Limited Liability Company.[162] The NMTC investor will form a single-member LLC, funded by the investor's NMTC equity, and use the LLC to borrow additional funds from a third-party lender.[163] The combined equity investment and loan funds make up the greater QEI.[164] This leveraged structure allows the investor to receive higher NMTC incentives than the actual equity investment. Navigating the LLC formation process is tricky, especially for a non-sophisticated investor seeking to primarily benefit the low-income community.

The complexity of the NMTC program almost always adds a fourth party to the deal due to additional reporting and oversight compliance

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157. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 52, at 30.

158. IFF, OVERVIEW OF NEW MARKETS TAX CREDITS, POWERPOINT PRESENTATION, https://charterschoolcenter.ed.gov/sites/default/files/files/field_webinar_attachments/IFF%20NMTC%20Presentation_0.pdf.

159. *Id.*

160. *Id.*

161. REINVESTMENT FUND, *supra* note 61.

162. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 52, at 19.

163. Sanders, *supra* note 138, at 7.

164. *Id.* at 8.

requirements.[165] The level of oversight required is materially different from other types of traditional financing.[166] As alluded to above, this creates the concern that the current NMTC structure effectively bars non-profit investors from entering the market, leaving only for-profit investors able to participate.[167] This is troublesome because for-profit investors are less likely to be dedicated to community revitalization. The entire purpose of the NMTC legislation, as intended by Congress to be an incentive for socially responsible investing, is defeated.

The temporal element of the NMTC statute discourages equity investments. Currently, there is a seven-year credit period in order to qualify for the NMTC credit.[168] During these seven years, 85% of the CDE's equity investment must remain in the Qualified Active Low-Income Community Business ("QALICB").[169] Investors have interpreted this to mean that their investments must be redeemed at the end of the term, which has effectively limited the life of any equity investment to just seven years.[170] This seven-year requirement discourages equity investments because the entire attractive aspect of equity investments is their flexibility. Equity investments are typically subordinated to obligations either until there is a liquidity event or sufficient cash on hand to repay the investor.[171] Liquidity can normally occur at any time and is often much longer than seven years.[172] This means that it is likely many businesses require more than seven years to secure enough cash flow necessary to repay their equity investors. CDEs do not have this flexibility when dealing with NMTC transactions. Forcing equity recipients to repay the investment at the seven-year mark hinders the attraction for both the business and the investor.

The applicable percentage element of the NMTC statute also limits equity investments. The federal NMTC structure is currently less favorable than that of some states. Where the federal structure grants a 39% credit to the investor at the end of the seven-year term, at least six states offer a higher percentage of return on QEI.[173] State statutes tend to parallel federal statutes—effectively

165. Katie Codey, *Can the New Markets Tax Credit Program be Transformed Through Leverage of its Real Estate Bias?*, FED. RSRV. BANK OF ST. LOUIS (July 1, 2011), https://www.stlouisfed.org/publications/bridges/summer-2011/can-the-new-markets-tax-credit-program-be-transformed-through-leverage-of-its-real-estate-bias.

166. REINVESTMENT FUND, *supra* note 61.

167. Julia Sass Rubin & Gregory M. Stankiewicz, *The New Markets Tax Credit Program: A Midcourse Assessment*, CMTY. DEV. INNOVATION REV., FED. RSRV. BANK OF SAN FRANCISCO, no. 1, 2005, at 1.

168. I.R.C. § 45D(g).

169. 26 C.F.R. § 1.45D-1(c)(5).

170. Manuel Andrés Giner, *Missing the Mark: Why the CRA and NMTC Have Failed to Develop the Inner City*, 41 RUTGERS L. REC. 177, 199 (2013–2014).

171. *Id.*

172. *Id.*

173. Alabama requires a 50% credit. ALA. ADMIN. CODE r. § 281-5-1. Arkansas requires a 58% credit. ARK. CODE ANN. § 15-4-36. Louisiana requires a 48% of QEI credits to be applied

limiting the potential of the NMTC structure on a nation-wide scope. The federal NMTC allocation for 2020 is set at $5 billion in tax credit allocation authority for calendar years 2020 through 2025.[174] The program continues to expand and extend. The NMTC program was initially set to expire at the end of 2020 but was extended for five additional years and allocated an increase of $1.5 billion over the $3.5 billion allocated in 2019.[175] The growth combined with the increased competitiveness of NMTC allocation suggests that NMTCs are attractive options and are here to stay. However, increasing the allocation alone is not sufficient to address the barriers affecting community-focused entities. Investor tax incentives in the form of a higher credit can play a contributing role in encouraging investment in these entities and their NMTC-eligible projects.

B. Proposed Solutions

The NMTC program has continued to evolve since its inception in 2002. As a relatively new program, there is still room for improvement. A refined NMTC program that considers Congressional intent and sufficiently facilitates the active involvement of community-oriented entities as CDEs is possible.

One way in which to address the disparities facing these entities best suited to further the mission of the NMTC program is to close the gap in NMTC allocation granted to minority CDEs as opposed to non-minority CDEs. The NMTC application asks whether the applicant is minority-owned or minority-controlled.[176] This selection requirement is not new and has been extended into the 2020 version of the application.[177] The application also asks whether the controlling entity is minority-owned or minority-controlled.[178] The definition of "Minority-owned or Minority-controlled" in accordance with the application is as follows:[179]

> Minority-owned for-profit entity: A for-profit entity that is not a MDI and that has at least 51 percent of its equity ownership interest being owned by individuals who identify themselves as Black American, Asian American, Hispanic American, or Native American.

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toward premium liability, not income tax liability. LA. STAT. ANN. § 1911, LA. STAT. ANN. § 1912. Nevada requires a 58% credit. NEV. REV. STAT. § 231A.

174. Funding Opportunity Title: Notice of Allocation Availability (NOAA) Inviting Applications for the Calendar Year (CY) 2020 Allocation Round of the New Markets Tax Credit (NMTC) Program, 85 Fed. Reg. 59,853 (Sept. 23, 2020).

175. *Id.*; Martha Groves Pugh & Brian Moore, *NMTC Extended Through 2025 with $5 Billion Annual Appropriations*, 11 NAT'L L. REV., no. 7, Oct. 2021.

176. U.S. DEP'T OF TREASURY, NMTC PROGRAM 2020 ALLOCATION APPLICATION, *supra* note 70.

177. *Id.*

178. *Id.*

179. *Id.* at 82.

> Minority-controlled not-for-profit entity: A not-for-profit entity with at least 51 percent of its Board of Directors comprised of individuals who identify themselves as Black American, Asian American, Hispanic American, or Native American.
>
> Minority Depository Institution (MDIs): An entity that is designated by the FDIC as a Minority Depository Institution.[180]

There is no available information as to the weight this information is given by the CDFI Fund when deciding whether a CDE advances to the second phase of NMTC allocation. Minority status should be given substantial weight. Legislative history may not support the overt finding that Congress intended to direct NMTC program benefits for minority CDEs,[181] but this finding is supported by underlying policy considerations. For the multitude of reasons discussed *supra*, minority-owned CDEs have the best chance of utilizing the NMTC allocation to create sustainable development in the identified low-income community. Maximizing participation of minority-owned CDEs is consistent with the most effective use of the NMTC program, as intended by Congress—to best serve low-income communities disproportionately comprised of minority residents.

The complexity of navigating the NMTC program ought to be reduced to allow entrance of non-sophisticated entities and individuals. Accessible entry can be achieved by creating internal, public services to address the need and cost of the required additional parties to the transaction and streamlining the leveraged model. The costs of an NMTC transaction are fixed—a project will need to pay relatively the same amount to meet the requirements of the program whether it is large or small in scope. Rather than by fixed amount, the more equitable option would be to stagger fees based on a percentage of total equity.

To streamline the leveraged model, the U.S. Department of Treasury can adjust the point at which the related entities test is applied. Modifications to the process in which related entities are brought into the transaction are not unusual, and are efficient ways to exact change in the current process.[182] The related entities test, administered by the CDFI Fund, does not allow a CDE to have more than a 50% ownership stake in a qualified active low-income community business ("QALICB").[183] For a nonprofit CDE, this means that neither the nonprofit entity nor its subsidiary may own more than a 50% stake in the project or business. By changing the timeline of the test to occur before the CDE makes its initial related party equity QLICI in a QALICB, the CDE will be able to hold

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180. *Id.*

181. *New Markets Tax Credit*, *supra* note 147, at 5.

182. For example, in 2001, the CDFI Fund considered feedback from commentators and decided to permit an entity and its subsidiaries to apply for CDE certification at the same time, using a single CDE application. Guidance for Certification of Community Development Entities, New Markets Tax Credit Program, Notice, 66 Fed. Reg. 65,806 (Dec. 20, 2011).

183. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-262, COMMUNITY DEVELOPMENT: LIMITED INFORMATION ON THE USE AND EFFECTIVENESS OF TAX EXPENDITURES COULD BE MITIGATED THROUGH CONGRESSIONAL ATTENTION 42 (2012).

equity stakes greater than 50%, increasing the equity that can be left in low-income businesses at the end of the NMTC transaction.[184]

Another potential solution to increasing the effectiveness of NMTC is to make the program more equity-friendly by increasing the required duration of the investment. The current seven-year structure has created the expectation that investors may have their investment redeemed at the seven-year mark. Forcing equity recipients to repay the investment at the seven-year mark hinders the attraction for both the business and the investor. Instead, the recipient of the investment should be allowed to repay the investor on a more flexible timetable, such as when there is sufficient liquidity. This would increase the amount of equity NMTC transactions and spur growth in urban businesses. Lenders can then make loans for any length of time with which they are comfortable, rather than feeling constrained to a seven-year arrangement. Additionally, recall that one of the potential benefits of an NMTC transaction is the option for the QALICB to purchase the business from the investor at the end of the term. Allowing increased time allows the QALICB to generate sufficient funds to purchase the business and keep it operated and maintained within the community in which it purports to serve.

CONCLUSION

In 2020, disparities in our national food system became even more glaring as local food retailers were forced to shut down and transportation became more limited due to the COVID-19 pandemic. The tools to address the nation's worsening food desert crisis are available and there have been arguments that addressing the food desert crisis requires more than simply opening a qualifying store in an identified tract. However, these tools fall short in their implementation. Recognizing this, Congress implemented the NMTC program, a tax-credit incentive with the goal of benefiting low-income communities in a more holistic manner. Tax credit incentives in general are popular yet controversial tools. However, if done properly, NMTCs are the ideal vehicle for tackling the food desert crisis.

There is sufficient data to suggest that inner-city investments are successful when done correctly, yet the scope is still limited due to unwilling and scared investors. NMTCs were created to attract a different type of investor—one that is not afraid of inner-city investing. Currently, in order to qualify as a qualified equity investment ("QEI"), the CDE must invest "substantially all" of the tax payer's investment into the qualified low-income community investment ("QLICI").[185] The "substantially all" requirement, in

184. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 52, at 28.

185. The statute reads:

(b) Qualified equity investment. For purposes of this section—

> (1) In general. The term "qualified equity investment" means any equity investment in a qualified community development entity if—
>
> (A) such investment is acquired by the taxpayer at its original issue (directly or through an underwriter) solely in exchange for cash,

this case, means 85%.[186] Five years after its creation, the CDFI Fund had only awarded over half of the available tax credits, yet 77% of all NMTC applications are denied.[187] The NMTC program does not promote enough investment to have had any real impact on the inner city, yet the budget increases every year, supporting the inference that the program is desirable to investors and here to stay.[188] The current NMTC structure, however, makes it difficult and sometimes entirely unfeasible for "community partners" to compete with large, for-profit banks and corporations for NMTC allocation and further maintain a project throughout the lifetime of the NMTC allocation. This is a shortcoming of the program because there is evidence to support the finding that CDEs and other non-profit organizations are equipped with better information to be more willing to take on the perceived risks of inner-city investing. Community partners carry political, community, and financial advantages. They typically have good relationships with the governments of the municipalities in which they are located, which allows them to assist investors in navigating the approval process that is necessary when engaging in NMTC-funded projects.

If altered, the NMTC structure can be more productive by encouraging more mission-focused investment and greater equity investment. NMTCs can then be used to better fund nonprofits and smaller businesses that alleviate the food desert crisis such as food banks, food cooperatives, and independently owned grocers. For this improvement to occur, the gap in NMTC allocation granted to minority CDEs as opposed to non-minority CDEs must be narrowed to allow community members more direct, active involvement when embarking on nonprofit or smaller endeavor food projects. The complexity of the NMTC program, particularly regarding the leveraged structure that many nonprofits must utilize to be effective, needs to be addressed. Lastly, increasing the required duration of the investment allows community partners to achieve long-term, sustainable food projects with the goal of keeping them managed within the community.

> (B) substantially all of such cash is used by the qualified community development entity to make qualified low-income community investments . . . .

26 U.S.C. § 45D(b).

186. 26 C.F.R. § 1.45D-1(c)(5).

187. Giner, *supra* note 171, at 198.

188. *Id.*