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## The Real Estate Roundtable

August 7, 2017

The Honorable Steven T. Mnuchin  
Secretary of the Treasury  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

### **Re: Comments on Notice 2017-38 and Treasury Department Review of Temporary Regulations under Section 752 (T.D. 9788; 81 F.R. 69282)**

Dear Secretary Mnuchin:

The Real Estate Roundtable shares the Administration's commitment to creating jobs, lifting wages, and increasing economic opportunity for all Americans and welcomes the focus that the President and you have brought to the often-unintended consequences of federal regulations.

On April 7, 2017, we submitted our thoughts and views on a number of regulatory actions you could take, to drive job creation and modernization of U.S. real estate and infrastructure. In I.R.S. Notice 2017-38, issued in early July, you indicated that the Treasury Department is actively considering withdrawing or modifying its temporary rules under Section 752—one of our regulatory recommendations.

In short, the partnership liability allocation regulations issued under section 752 last year will greatly restrict the ability of individuals to pool their capital, property, and expertise for productive real estate activities and adversely affect real estate commerce. The partnership liability allocation regulations have important implications for the movement of real estate in common partnership contribution transactions involving a single property or a portfolio of properties, such as roll-up transactions and REIT transactions using umbrella partnership (UPREIT) structures. Today, UPREIT structures and partnership roll-up transactions allow individual property owners to diversify their investments and obtain greater liquidity and transparency with respect to their property ownership interests in a tax-deferred transaction akin to a tax-deferred corporate reorganization. Partnership liability guarantees are widely used in connection with these transactions in order to match the allocation of partnership liabilities with the partner having the economic risk of loss with respect to such liabilities and to preserve the deferral of capital gain. Legitimate guarantees allow a partner to accept a risk of economic loss and obtain basis that can be used to deduct allocated losses (subject to applicable passive loss and at-risk limitations and Section 704(b) requirements), as well as to preserve the deferral of capital gain.

The Honorable Steven T. Mnuchin  
Page Two  
August 7, 2017

Under the temporary section 752 regulations, many guarantees, including bottom dollar guarantees, no longer are recognized for tax purposes. From a tax policy perspective, as the American Law Institute observed in its landmark, two volume study of the partnership tax provisions:

[o]nce it is decided to apply relatively strict rules to profit-and-loss allocations [such as are contained in the existing section 704(b) regulations] . . . there seem to be no important policies served by a strict rule for allocating liabilities among partners in computing their basis for their partnership interests.”

Rational taxation of real estate assets and entities supports job creation and facilitates sound, environmentally responsible real estate investment and development, while also contributing to strong property values and well-served, livable communities. Withdrawal of the temporary section 752 regulations would remove an obstacle to capital formation, economic activity and the movement of real estate in commerce. It would also complement the President’s effort to reform the tax system and support your stated goal to “get the engine of economic growth firing on all cylinders once again.”

The temporary section 752 regulations meet the criteria set forth in the President’s Executive Order on Identifying and Reducing Tax Regulatory Burdens (Exec. Order No. 13789) and should be withdrawn. Specifically, they pose an undue financial burden on U.S. taxpayers and add undue complexity to federal tax law. I urge you to seek their withdrawal in your final regulatory report to the President next month.

Thank you in advance for your consideration of these comments.

Sincerely,



Jeffrey D. DeBoer  
President and CEO

JDD/lh