January 2023
State of the Industry Meeting
Policy Toolkit

The Real Estate Roundtable Policy Toolkit

January 2023

The Real Estate Roundtable Policy Toolkit provides relevant information on key policy issues, including fact sheets and topline messaging to employ when engaging with policymakers. The majority of the toolkit consists of brief 1–2-page background papers on national policy issues currently facing the industry, recommended talking points, and helpful links for where to find additional information and details regarding The Roundtable's advocacy efforts. The toolkit also includes multiple Roundtable-produced fact sheets distilling key legislation or regulations.

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Tax Policy

Taxing Unrealized Gains ("Billionaire Tax")

Issue

In September 2019, Senate Finance Committee Ranking Member (now Chairman) Ron Wyden (D-OR) proposed a mark-to-market regime for capital assets in which built-in gain is taxed on an annual basis, regardless of whether the asset is sold. The regime would apply to taxpayers with $1 million in income or $10 million in assets for three consecutive years. Two years later, Chairman Wyden released a modified and more detailed version of the proposal focused on "billionaires."

On March 28, 2022, President Biden unveiled a new proposal to impose a minimum 20% tax on the combined income and unrealized gains of certain taxpayers. The tax would apply to households with wealth (assets minus liabilities) of $100 million or more. Taxpayers would report the total basis and estimated value of their assets on December 31 of each year. Tradable assets (e.g., public stock) would be valued using end-of-year market prices. Real estate and other less liquid assets would be valued at (a) the greater of original or adjusted cost basis, (b) the last valuation event from investment/borrowing/financial statements, or (c) undefined methods.

Under the president's proposal, "illiquid" taxpayers, defined as taxpayers whose tradable assets make up less than 20% of their wealth, could elect to pay the minimum tax only on their tradable assets, with a deferral charge of up to 10% when gains on non-tradable assets are eventually realized. Minimum tax payments would be treated as prepayments creditable against subsequent tax liability on realized capital gains. The tax in the first year would apply to prior, built-in gains and could be paid over a 9-year period. The tax in subsequent years could be paid over a 5-year period.

Efforts to include a version of the mark-to-market regime in tax reconciliation legislation were unsuccessful when they ran into resistance from moderate Congressional Democrats.

Talking Points

Taxing unrealized gains would upend over 100 years of federal taxation, require an unprecedented IRS intrusion into household finances, and create unknown and likely unintended consequences for the U.S. economy.

- At its core, the proposed tax on unrealized appreciation is a federal property tax that would apply year-in, year-out, regardless of whether one's property (real estate, stock holdings, paintings, jewelry, etc.) is generating any actual income, earnings, or profits for the taxpayer.

Taxing Unrealized Gains ("Billionaire Tax")

Talking Points (Continued)

- The tax would require the IRS to police households as they identify, tabulate, and value all their worldly possessions. The tax would thrust the IRS into a new and unwelcome role. The agency would become a permanent, live-in accountant and watchdog over every aspect of households' finances, consumer activity, and economic life.
- Tens of thousands of taxpayers will need to prove that their wealth falls below the relevant threshold ($100 million).
- Supporters of the tax want to extend it to an even larger number of taxpayers. Senator Wyden's original proposal would have applied the tax to the unrealized gains of households with $1 million in income or $10 million in wealth.
- History suggests the tax would eventually apply to everyone. In 1913, the federal income tax applied to 1/3 of 1% of Americans. Ten years later, it applied to seven million Americans. Today, it applies to more than 150 million households.
- Revenue generated by the tax ($38 billion/year) is insufficient to make even a dent in the budget deficit ($1.5 trillion in 2022).
- Past attempts at wealth taxes in other countries have failed overwhelmingly because they were fraught with administrative problems, lacked public support, and had very little impact on income distribution. Of the 12 comprehensive wealth taxes that existed in the developed world in 1990, only three remain today.
- The tax will trigger wasteful disputes and litigation, detracting from productive economic activity. Annual valuation requirements will require costly appraisals. Valuation disagreements will be a constant source of audits, disagreements, and administrative appeals with tax collectors.
- The potential unintended and unknown consequences of taxing unrealized gains are immense. The longstanding principle that taxes are deferred until a gain is realized encourages taxpayers to put capital to work on projects that won't pay off for many years. By taxing business assets and investments annually, the tax will remove one of the major incentives for patient, productive capital investment. The differential tax treatment of liquid and illiquid investments will distort markets and give rise to wasteful new tax shelters and taxpayer games.

Taxing Unrealized Gains ("Billionaire Tax")

Talking Points (Continued)

- Charities, educational endowments, and churches will suffer. The ability to contribute appreciated assets to public charities and other nonprofits without owing tax on the unrealized gain provides an important economic inducement for philanthropic giving. Taxing unrealized gains on an annual basis will eliminate this economic incentive.
- The proposed tax is quite possibly unconstitutional. Supreme Court jurisprudence has applied a realization requirement to determine whether gains or profits constitute income taxable under the 16th Amendment. Since the proposed tax applies to both realized and unrealized gains, it may go beyond the boundaries of Congress's taxing power.

Capital Gains

Issue

Traditionally, the United States has taxed long-term capital gain at a lower rate than ordinary income (wages, rent, and other compensation). The only exception was a brief three-year period after the Tax Reform Act of 1986 when Congress lowered the top ordinary tax rate from 50% to 28% and created temporary tax parity between ordinary and capital income. Long-term capital gain is currently taxed at a top rate of 20%. However, the rate increases to 23.8% if the income is subject to the 3.8% tax on net investment income. The net investment income tax applies to real estate gains earned by passive investors and not income earned from the active conduct of professionals in real estate.

President Biden's *Build Back Better* agenda and his FY 2023 budget proposed to raise the capital gains rate to 39.6%, which brings it to parity with his proposed top rate on ordinary income. In addition, the president has proposed to extend the 3.8% tax on net investment income to the income of active business owners, including real estate professionals; the 3.8% tax applies to both capital gains and rental income.

The *Build Back Better Act* approved by the House Ways and Means Committee in 2021 would have raised the capital gains rate from 20% to 25% and expanded the scope of the 3.8% net investment income tax, as proposed by the president. However, the version passed by the full House did not include an increase in the capital gains rate. The bill did include the expansion of the 3.8% income tax.

Both the capital gains tax increase and the expansion of the 3.8% tax on net investment income were dropped from the final tax reconciliation bill at the insistence of Congressional moderates, particularly Sen. Kyrsten Sinema (D-AZ).

Talking Points

Congress should continue to encourage investment and job creation with a meaningful capital gains incentive.

- Maintaining a reduced tax rate on capital gain decreases the cost of capital, drives long-term investment, encourages productive entrepreneurial activity, draws investment from around the world, and increases U.S. workforce productivity and competitiveness.
- Policymakers should be taking steps to encourage and reward risk-taking and investment in communities where it is needed, not punishing it.
- Capital gains tax incentives are effective in mobilizing capital. Opportunity Zones, which offer the potential to exempt capital gains from tax altogether, facilitated $75 billion in new investment in low-income communities in just their first two years after enactment.

Capital Gains

Talking Points (Continued)

- Our country's great cities are facing significant challenges. Many cities have an aging infrastructure that can only be fixed with a sustained infusion of capital investment. Public spending alone is not going to get us there. It is going to require partnering with the private sector and private capital. Raising taxes on capital income will make it harder to attract the private investment needed to rebuild our urban centers.
- Risk capital differs in meaningful ways from wage compensation. The entrepreneur who foregoes a traditional job in favor of starting a business and building a capital asset forfeits many protections and benefits offered to employees, most importantly the certainty of a pre-negotiated salary. The capital gains preference partially compensates entrepreneurs for bearing risk and uncertainty, including the potential of a complete loss on the investment of their time and capital.
- Relative to our peers, the United States levies a heavy tax burden on capital income. According to the Tax Foundation, 30 of the 36 developed countries in the OECD have a lower maximum tax rate on individual capital gain than the United States.
- In the case of real estate, the reduced tax rate on capital gain partially offsets the higher risk associated with illiquid, capital-intensive projects. It also helps compensate for the economic effects of inflation.
- Unlike other tax policies, such as immediate expensing, the capital gains preference only rewards smart, productive investments that are economically profitable on their own, irrespective of the tax incentive.

Pass-Through Business Income

Issue

Real estate generally is owned and operated through "pass-through" entities that allow income to pass through to individual owners rather than taxing the income at the entity level. In 2017, Congress reduced the corporate tax rate by 40% and created a new 20% deduction (section 199A) for pass-through business income to avoid putting businesses organized as partnerships, S corporations (S corps), and real estate investment trusts (REITs) at a competitive advantage relative to large C corporations (C corps).

Tax legislation proposed and considered in 2021 would significantly increase the combined tax rate on pass-through businesses. The version of the *Build Back Better (BBB) Act* that passed the House Ways and Means Committee in 2021 would have raised the top marginal income tax rate on many small and pass-through business owners from 29.6% today to 46.4%. While the proposed tax increases on pass-through businesses were reduced prior to passage by the full House, significant challenges remain in the Senate. For example, Senate Finance Committee Chairman Ron Wyden (D-OR) has proposed eliminating section 199A for pass-through business owners with more than $500,000 in combined income.

Largely at the insistence of Congressional Democratic moderates, particularly Sen. Kyrsten Sinema, the final tax reconciliation legislation enacted in August 2022 did not include any changes to the general tax rate on pass-through businesses or new restrictions on the 199A deduction.

Talking Points

Congress should continue to support small, closely-held, and entrepreneurial businesses that create jobs and spur growth by avoiding tax changes that discriminate against pass-through entities, such as partnerships and S corps.

- Our pass-through regime is a competitive strength of the U.S. tax system. Most other developed countries are heavily reliant on inflexible corporate regimes that provide little ability for an entrepreneur to tailor the capital and ownership structure to meet the needs of the business.
- Small and closely-held businesses are the principal drivers of job growth and entrepreneurial activity in the United States. Entity choice is a differentiator that contributes to our entrepreneurial culture.
- Half of the country's four million partnerships are real estate partnerships. Real estate investment, new construction and development, and rental businesses constitute a significant share of pass-through business activity.

Pass-Through Business Income

Talking Points (Continued)

- These partnerships include a wide variety of arrangements that range from two friends who purchase, improve, and lease a modest rental property to a large private real estate fund that raises capital from sophisticated institutional investors.
- Similarly, listed REITs provide the opportunity for small investors to invest in large-scale, diversified real estate operations using the same single tax system available to partners and partnerships.
- Pass-through entities such as partnerships, Limited Liability Corporations (LLCs), S corps, and REITs, are ideal for real estate investment because they give investors flexibility in how they structure the risks and rewards of the business. The benefits of pass-through taxation help compensate real estate owners for the additional risks and challenges associated with the ownership of large, capital-intensive, and relatively illiquid assets.
- Any new tax legislation should avoid the unintended consequences and potential harm caused by the stacking of tax increases on pass-through entities which, when combined, would severely increase the tax burden on these job-creating businesses.
- Congress should preserve the 20% deduction for pass-through income (section 199A). The availability of the deduction is tied to hiring workers and investing in capital equipment and property.

Real Estate Like-Kind Exchanges

Issue

Since 1921, the tax code has allowed taxpayers to defer capital gain when exchanging real property used in a trade or business for a property of a like-kind. The Tax Cuts and Jobs Act of 2017 narrowed like-kind exchanges (section 1031) by disallowing their use in the case of personal property (art, collectibles, etc.). As part of his *Build Back Better* agenda and his updated FY 2023 budget, President Biden has proposed restricting gain deferred through real estate like-kind exchanges to no more than $500,000 per year, or $1 million in the case of a married couple. The president's proposal would be effective for exchanges completed in tax years beginning after 2022.

The *Build Back Better Act* approved by the House and the final tax reconciliation legislation enacted in August 2022 did not include new restrictions on like-kind exchanges.

Talking Points

Congress should support healthy real estate markets and property values by preserving the current tax treatment of like-kind exchanges.

- Section 1031 is integral to the health of today's real estate marketplace: close to 20% of all commercial real estate transactions involve a like-kind exchange. Exchanges help get languishing properties into the hands of new owners who will invest in job-creating capital expenditures and improvements that put properties to their best and most productive uses.
- Exchanges helped stabilize property markets at the height of the COVID-19 lockdown and will facilitate a faster and smoother transition as many real estate assets are re-purposed in the post-COVID economy.
- Like-kind exchanges allow businesses to grow organically with less unsustainable debt by reinvesting gains on a tax-deferred basis in new and productive assets. In this way, like-kind exchanges create a ladder of economic opportunity for minority-, veteran-, and women-owned businesses as well as cash-poor entrepreneurs that may lack access to traditional sources of financing.
- Academic and outside research has found that exchanges spur capital expenditures, increase investment, create jobs for skilled tradesmen and others, reduce unnecessary economic risk, lower rents, and support property values.

Real Estate Like-Kind Exchanges

Talking Points (Continued)

- Roughly 40% of like-kind exchanges involve rental housing. Section 1031 is an important source of capital for affordable and workforce housing. Like-kind exchanges help fill gaps in the financing of affordable housing that are unmet by the low-income housing tax credit (LIHTC). In contrast to LIHTC, developers can use section 1031 to finance land acquisition costs for new affordable housing projects.
- Like-kind exchanges provide critical financing to support economic development and investment in low-income, hard-hit, and distressed communities where outside sources of capital are less available. In addition, like-kind exchanges support vital public services (i.e. police, education, etc.) by boosting transfer, recording, and property tax revenue. Property taxes contribute nearly 3/4 of all local tax revenue.
- Land conservation organizations rely on exchanges to preserve open spaces for public use or environmental protection.
- The ability to defer gain on a like-kind exchange is very consistent with a general policy in U.S. taxation that business-related gains are deferred provided the proceeds are retained and reinvested in the business. The deferral of gain in partnership (sections 721 and 731) and corporate (sections 351 and 368) transactions is allowed even when the proceeds are invested in property that is different from the property that generated the gain.

Carried Interest

Issue

A "carried" interest is the interest in partnership profits that a general partner receives from the investing partners for managing the investment and taking on the entrepreneurial risk of the venture. Carried interest may be taxed as ordinary income or capital gain depending on the character of the income generated by the partnership. Lawmakers have introduced various proposals to change the tax treatment of carried interest since 2007. In the Tax Cuts and Jobs Act of 2017, Congress created a three-year holding period requirement in order for carried interest to qualify for the reduced long-term capital gains rate.

In the 117th Congress, the *Carried Interest Fairness Act* (Representative Bill Pascrell, D-NJ) would have converted virtually all carried interest income attributable to gain from the sale of real estate to ordinary income subject to both ordinary income tax rates and self-employment taxes.

President Biden's *Build Back Better* agenda called on Congress to "close the carried interest loophole so that the hedge fund partners will pay ordinary income rates on their income just like every other worker."

The version of the *Build Back Better Act* approved by the House Ways and Means Committee would have extended the current holding period required for carried interest to qualify for long-term capital gains treatment from three years to five years. However, the extension of the holding period would include an important new exception for a real property trade or business (*e.g.*, real estate). Other aspects of the House proposal would indirectly extend the required holding period by not starting the clock until all assets have been acquired by the partnership.

The Ways and Means Committee-approved changes to carried interest tax rules were dropped from the bill before its passage by the full House.

In the Senate, legislation proposed by Finance Committee Chairman Ron Wyden (D-OR) would treat carried interest as an interest-free loan from the limited partners to the general partner that is taxable upon grant, regardless of whether the partnership ever generates any profits.

An initial budget reconciliation agreement between Senate centrist Joe Manchin (D-WV) and Senate Democratic Leader Chuck Schumer (D-NY) would have included the House Ways and Means-proposed changes to carried interest. However, the carried interest provisions were dropped from the final legislation at the insistence of Senator Kyrsten Sinema (D-AZ).

Tax Policy

Carried Interest

Talking Points

- The tax code should continue to reward risk-taking, and Congress should reject tax changes that limit capital gains treatment to invested cash.
- Much of the real estate investment that takes place today uses the partnership choice of entity. Real estate partnerships represent 50% of the nearly four million partnerships in the United States and include over eight million partners.
- Proposed carried interest changes would harm small businesses and partnerships, stifle entrepreneurial risk-taking and sweat equity, and threaten improvements and infrastructure in long-neglected neighborhoods most in need of investment.
- Carried interest is not compensation for services. General partners receive fees for routine services such as leasing and property management. Those fees are taxed at ordinary tax rates.
- Carried interest is granted for the value the general partner adds to the venture beyond routine services, such as business acumen, experience, and relationships. It is also a recognition of the risks the general partner takes with respect to the general partnership's liabilities. These risks can include funding pre-development costs, guaranteeing construction budgets and financing, and exposure to potential litigation over countless possibilities.
- Some carried interest proposals would apply retroactively to prior transactions—effectively raising taxes on sales that have already occurred.
- Moreover, the legislation would capture and apply to partnership agreements that were executed years— often decades—earlier. These negotiated agreements between the partners were based on well-established tax law as it existed at the time. By changing the tax results years later, the bill would undermine the predictability of the tax system and discourage the long-term, patient investment that moves our economy forward.
- In short, these proposals would make it more expensive to build or improve real estate and infrastructure, including workforce housing, assisted living communities, and industrial properties, to name just a few. Some development simply won't happen, especially in long-neglected neighborhoods or on land with potential environmental contamination.

Tax Policy

Property Conversions and Housing Tax Incentives

Issue

The United States is facing a severe shortage of affordable housing. At the same time, certain other commercial real estate assets like office buildings are under significant stress due to pandemic-related issues, including employers' greater reliance on remote work arrangements. The Roundtable is encouraging lawmakers to help revitalize cities, boost local tax bases, and address housing challenges by enacting a tax incentive for converting older, under-utilized buildings to housing. The Roundtable also supports a meaningful expansion of the low-income housing tax credit.

Property conversions: In the 117th Congress, Senator Debbie Stabenow (D-MI) and Representative Jimmy Gomez (D-CA) introduced legislation, the *Revitalizing Downtowns Act* (S.2511, H.R.4759), which would create a new tax credit to reduce the costs associated with converting older office buildings to housing or other uses. In October 2022, a Roundtable-led coalition of 16 national real estate organizations endorsed the legislation while suggesting a number of improvements to further strengthen the bill.

Low-income housing tax credit: Since its inception in 1986, the low-income housing tax credit (LIHTC) has financed the development of nearly 3.5 million affordable rental homes that house over eight million low-income households. President Biden's *Build Back Better* agenda originally proposed dedicating $32 billion to the expansion of LIHTC. The president's desired investment in additional LIHTC allocations represents a 30% increase over the current federal subsidy. The *Build Back Better Act* approved by the House Ways and Means Committee would have provided $29 billion over 10 years to expand LIHTC, including a 50% increase in the allocation of credits to states.

In May 2022, the administration released its Housing Supply Action Plan, which calls on Congress to enact new tax credits for the development and rehabilitation of affordable housing sold directly to low- and moderate-income owner-occupants. It also proposes an expanded LIHTC subsidy for projects that otherwise would not be financially viable.

Talking Points

Congress should help expand and grow the supply of affordable and workforce housing by investing greater resources in time-tested tax incentives like the low-income housing tax credit and adopting creative new approaches that support the conversion of underutilized, existing buildings to housing.

Property Conversions and Housing Tax Incentives

Talking Points (Continued)

- A quarter of American renter households spend more than 50% of their income on housing expenses. More than 10 million low-income households spend more than half of their monthly income on rent, according to Harvard's Joint Center for Housing Studies.
- The conversion of underutilized and often vacant buildings offers a tremendous opportunity to improve the built environment and lift a surrounding locality. Property conversions are a cost-effective means to develop new housing supply, create jobs, and generate critical sources of local property tax revenue.
- Conversion projects can occur in a variety of settings, from central business districts and suburban office parks to rural communities and industrial facilities. The repurposing of existing structures can save energy while reinvigorating communities and reigniting economic growth where it is most needed.
- The inherent risks and elevated costs associated with property conversions, combined with the numerous social and economic benefits of conversions that flow to the broader community, justify proactive government policies that incentivize owners to adapt existing properties to new uses.
- LIHTC is an efficient, market-based housing solution that relies on the private sector to finance, build, and operate affordable housing by creating a federal incentive for new construction and redevelopment.
- Under the successful LIHTC program, states can award housing credits based on their own affordable housing priorities. They can target credits to housing units dedicated to certain populations such as seniors or veterans, or to specific regions most in need of affordable housing.
- The Tax Cuts and Jobs Act of 2017 indirectly diminished the value of low-income housing credits because the corporate tax cut reduced the underlying tax liability of many tax credit purchasers, thereby decreasing demand for the credits in the marketplace.
- Congress should significantly expand LIHTC, along the lines of the *Affordable Housing Credit Improvements Act* (S.1136, H.R. 2573), which would create and preserve more than two million affordable homes, support three million jobs, and generate $119 billion in sustainable tax revenue.

Tax Policy

Opportunity Zones

Issue

Created in the Tax Cuts and Jobs Act of 2017, Opportunity Zones (OZs) are designated, low-income census tracts where qualifying investments are eligible for reduced capital gains taxes. By channeling investment where it is most needed and prioritized by states and local communities, OZs help stimulate job creation and economic growth in low-income communities.

Capital gain from prior investments—proceeds from the sale of real estate, stocks, securities, etc.— can be rolled into an Opportunity Fund and the tax that would otherwise be owed on the gain from the prior investment is deferred and not taxed until the end of 2026. Second, capital gains tax on this deferred gain is reduced by 10% if the investment is held for five years or 15% if the investment is held for seven years (through a tax basis "step-up"). Third, capital gain generated from the investments made by the Opportunity Fund is exempt from capital gains tax altogether if the investment in the fund is held for at least 10 years.

Unfortunately, delays in the rulemaking process and the onset of the COVID-19 pandemic have short-circuited the full impact of OZs. The final OZ regulations were issued just four months (December 2019) before COVID-19 caused a national economic lockdown that severely affected taxpayers' ability to launch new real estate projects and other businesses.

In addition, the tax benefits associated with OZ investments are gradually phasing down and a significant OZ tax incentive expired at the end of 2021. Investors no longer qualify for the 15% basis step-up that applies to prior gain if the investment is maintained for at least seven years. Separately, the economic value of the temporary tax deferral that applies to gain rolled into an Opportunity Fund is gradually declining as 2026 draws near.

Bipartisan, bicameral legislation (S. 4065 / H.R.7467) introduced by Senators Cory Booker (D-NJ) and Tim Scott (R-SC) and Representative Ron Kind (D-WI) and Mike Kelly (R-PA) in the 117th Congress would have extended the OZ deadlines by two years and make other important OZ reforms. The reforms include sunsetting the eligibility of certain high-income OZ census tracts for future investments, mandating new OZ information reporting rules, and creating a new fund for localities to support businesses and projects in OZs.

Talking Points

- In the short time since their enactment, OZs have created jobs and spurred billions of dollars in new investment in economically struggling communities across the country.

Opportunity Zones

Talking Points (Continued)

- Opportunity Funds have financed affordable, workforce, and senior housing, grocery-anchored retail centers, and office buildings that allow new and growing businesses to gain a presence and create jobs in long-neglected neighborhoods.
- Other examples of productive activities in OZs include the rehabilitation of dilapidated buildings into new hotels that boost local tax revenue and serve as a magnet for jobs, visitors, and economic activity in the surrounding area.
- OZs have demonstrated extraordinary potential to improve communities. In 2020, the Council of Economic Advisors estimated that the Opportunity Funds had raised $75 billion in private capital in the first two years following the incentives' enactment, including $52 billion that otherwise would not have been raised. The council projected this capital could lift one million people out of poverty in OZs by 11%.
- Most recently, the GAO estimated that 6,000 Opportunity Funds with more than 18,000 partners or shareholders invested $29 billion in OZs in 2019 alone.
- The decentralized design of OZs allows more investors and stakeholders to participate in the market and invest in qualifying projects that generate economic opportunity and improve the built environment in high-need communities.
- Congress should act quickly to extend expired OZ deadlines, as proposed in S. 4065 / H.R.7467. Extending the deadlines would ensure that OZs continue to act as a catalyst for economic development in struggling communities and allow the program to fulfill its original promise.
- Congress should also continue working on improvements to the OZ tax incentives, such as enhanced information reporting, data collection, and transparency, as well as lowering the substantial improvement threshold to cover a broad range of real estate rehabilitation and redevelopment projects.

Inflation Reduction Act Revenue Provisions: Fact Sheet

Issue

The Inflation Reduction Act of 2022 (IRA) was signed into law by President Biden on August 16, 2022. The legislation was paid for through various provisions including adjustments to corporate taxes as well as a new stock buyback excise tax. The real estate industry encouraged lawmakers to drop proposed changes to carried interest rules that were part of the initial agreement between Senators Joe Manchin (D-WV) and Chuck Schumer (D-NY). The tax increases on carried interest were not included in the final legislation. The changes would have slowed housing production, discouraged the capital needed to reimagine buildings to meet post-pandemic business needs, and hampered job creation while creating an additional unknown in an already challenging economic environment.

The Roundtable will continue advocating for tax policies that facilitate capital formation, reward risk-taking, and bolster productive private investment. Below is our summary of key IRA revenue-raising provisions.

Corporate Book-Income Alternative Minimum Tax

The bill creates a new 15% corporate alternative minimum tax that applies when minimum tax liability exceeds regular tax liability, applicable for tax years beginning after December 31, 2022. The minimum tax has a lower rate—15% compared to the 21% corp. tax rate—but a broader base that reflects public accounting rules (GAAP or IFRS) rather than tax accounting rules. The base begins with financial statement income (book income) and includes certain adjustments. The tax applies to corporations with average annual book income, over a 3-year period, exceeding $1 billion.

REITs, S Corps, and RICs are exempt from the tax. For purposes of determining if a corporation is covered by the tax, a corporation's book income is aggregated with the income of all persons treated as a single employer under sections 52(a) or 52(b). However, a Senate floor amendment offered by Senators John Thune (R-ND) and Kyrsten Sinema (D-AZ) modified the aggregation rules to clarify that section 212 activities for the production or collection of income do not constitute a trade or business activity that requires aggregation under section 52. This amendment restricts the need to aggregate distinct portfolio companies that are owned under a private equity or other fund structure.

IRA Revenue Provisions: Fact Sheet

Corporate Book-Income Alternative Minimum Tax (Continued)

Certain adjustments are made in measuring book income. Perhaps most importantly for real estate, tax depreciation deductions (e.g., accelerated depreciation and immediate expensing) are permitted for purposes of calculating book income. Book income is also reduced to reflect financial statement net operating loss carryovers.

The new minimum tax allows taxpayers to claim the low-income housing tax credit (LIHTC), new markets tax credit (NMTC), and other section 38 business credits to the same extent as allowed under the regular corporate income tax, ensuring no negative impact on the low-income housing incentive. This provision permits financial institutions and other large taxpayers to continue investing in affordable housing without generating new minimum tax liability.

Pass-Through Active Loss Limitation

The bill extends for two years a limitation on the deductibility of active pass-through business losses against other income. While the tax code has restricted the ability of taxpayers to deduct passive losses against other income since the 1980s, the Tax Cuts and Jobs Act of 2017, for the first time, included new general limits on a taxpayer's ability to deduct losses from an active business activity against other incomee.g., wage and portfolio (investment) income. The limit applies to net, aggregate losses in excess of $250K for an individual and $500K for a married couple. The Inflation Reduction Act extended the limitation (section 461(l)) for two years, through 2028. The extension of the active loss limitation was added on the Senate floor in an amendment offered by Sen. Mark Warner (D-VA) to replace another revenue provision that would have extended the limitation on the deductibility of state and local taxes by one year, through 2026.

IRA Revenue Provisions: Fact Sheet

Stock Buyback Excise Tax

The bill imposes a nondeductible 1% excise tax on the value of stock that is repurchased during the tax year by a publicly traded U.S. corporation or its affiliate. The excise tax does not apply to repurchases by a REIT or a RIC, or if the repurchase is part of a tax-free reorganization. The provision applies to repurchases of stock after December 31, 2022.

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Pandemic Risk

Issue

Pandemic risk is perhaps the largest unhedged risk in the economy. The COVID-19 pandemic exposed and exacerbated a protection gap in what the business and non-profit sectors assumed to be a resilient financial protection system of commercial insurance. Pandemic-related coverage in various lines of commercial insurance has been withdrawn or restricted going forward. Expanding coverage gaps present challenges for businesses across many industries and could stall economic growth.

Talking Points

- The magnitude of the pandemic's impact on the financial condition and general well-being of the nation has exposed significant vulnerabilities in our country's economic preparedness for and resilience to systemic catastrophic events.
- This includes coverage gaps in insurance protection for pandemic-related losses from various commercial insurance lines.
- The COVID-19 crisis led to government-mandated shutdowns of non-essential businesses and shelter-in-place directives that severely disrupted economic activity in the U.S. and pointed to a lack of economic preparedness from such events.
- Going forward, it is important to protect American jobs and to ensure a sustainable and speedy economic recovery from future pandemics and government-ordered shutdowns. If not remedied, these insurance gaps could hinder economic growth.
- The Roundtable is working with industry partners, stakeholders, and policymakers through the Business Continuity Coalition (BCC) to develop and enact an effective, prospective federal public-private backstop program for pandemic risk insurance coverage across a variety of commercial insurance lines. Similar to the Terrorism Risk Insurance Act (TRIA) enacted the year following the 9/11 attacks, this program would provide the economy with the coverage it needs to provide businesses with pandemic-related coverages in the face of a future pandemic.
- The BCC recommends that all of the impacted lines of insurance, including event cancellation insurance, be supported with both a "make-available" requirement and a robust federal backstop for private insurers making the insurance available.

Pandemic Risk

Talking Points (Continued)

- The U.S. Government Accountability Office (GAO) is working on a CARES Act-related study on pandemic risk insurance. The study will focus on the role that various property/casualty (P/C) insurance lines played in addressing business losses related to the COVID-19 pandemic. It will also explore various policy options for a federal role in supporting various commercial insurance lines or disaster assistance for business losses from a pandemic, including the advantages and drawbacks of each. Our BCC coalition is working constructively with the GAO to ensure that our perspectives are adequately represented.
- A number of frameworks have been proposed—all of which envision programs where insurers offer pandemic coverage policies to businesses with the federal government bearing most or all of the coverage costs.
- In testimony to the Senate Banking Committee's Subcommittee on Securities, Insurance, and Investment, the BCC urged Congress to move expeditiously to pass bipartisan legislation that creates a public-private insurance solution to share the financial risk of losses related to pandemics. This urgent task is an essential precondition to the prompt recovery of this nation's economy and going forward will help protect jobs and reduce economic damage from further pandemics.
- Senate Subcommittee on Securities, Insurance, and Investment Chairman Bob Menendez (D-NJ) is working with Senators Sinema (D-AZ), Moran (R-KS), and Tillis (R-NC) to develop bipartisan legislation in the Senate. The BCC is working with this bipartisan working group with the goal of introducing legislation in the Senate.

LIBOR Reform

Issue

The London Interbank Offer Rate (LIBOR) benchmark is used as a reference rate in over $200 trillion of financial contracts, including some $1.3 trillion of commercial real estate loans. In anticipation of the complete phase-out of the LIBOR benchmark by June 30, 2023, The Roundtable has been working with policymakers to ensure a smooth transition to a replacement benchmark. The Federal Reserve Bank of New York's Alternative Reference Rates Committee (ARRC) is working to transition to use of the Secured Overnight Financing Rate (SOFR), which has been published on an overnight basis since 2018.

Talking Points

- In December, the Federal Reserve Board adopted a final rule that implements Roundtable-supported legislation–the Adjustable Interest Rate (LIBOR) Act–that was enacted on March 15, 2022. The measure will protect trillions in "tough legacy" contracts that use LIBOR as a reference rate for financial transactions.
- The final rule establishes a process at the federal level to add SOFR, or an appropriately adjusted form of SOFR, to certain legacy contracts that do not have sufficient fallback language. This rule is intended to promote a smooth transition away from LIBOR by promoting legal certainty and consistency, while limiting legal disputes. The measure will provide borrowers, investors, and all of those in the financial space with certainty as to what happens when LIBOR is no longer published.
- Through The Roundtable's LIBOR working group, we have constructively engaged with the U.S. Treasury and the IRS regarding clarification of any tax implications for implementing the new benchmark. On December 30, 2021, the IRS issued final regulations clarifying how parties can replace LIBOR as a reference rate in mortgages and other financial contracts without triggering negative tax consequences.
- As The Roundtable recommended, the Treasury's final regulations give borrowers and lenders the flexibility they need to replace LIBOR with virtually any other index that reflects objective changes in the cost of borrowing money—such as a broad index of Treasury or corporate borrowing rates— in addition to a list of rates suggested by various regulators.
- REPAC's LIBOR Working Group continues to work to ensure the implementation of an effective, new replacement benchmark that does not impair liquidity, needlessly increase borrowing costs, or cause market disruptions.

Corporate Transparency Act

Issue

The Corporate Transparency Act (CTA) establishes uniform beneficial ownership information reporting requirements for certain types of corporations, limited liability companies, and other similar entities created in or registered to do business in the U.S. The CTA authorizes the Treasury Department's Financial Crimes Enforcement Network (FinCEN) to collect that information and disclose it to authorized government authorities and financial institutions, subject to effective safeguards and controls. The measure is intended to help prevent criminals, terrorists, proliferators, and corrupt oligarchs from hiding illicit money or other property in the U.S. A final rule implementing the beneficial ownership information reporting requirements of the CTA was issued in September 2022. These regulations go into effect on January 1, 2024.

The Roundtable and its coalition partners have provided input to FinCEN in response to its Advance Notice of Proposed Rulemaking (ANPRM).

Talking Points

- In the CTA, the term "beneficial owner" applies to an individual who directly or indirectly exercises "substantial control" over an entity or owns or controls not less than 25% of an entity. The definition of "substantial control" is expected to be addressed in the FinCEN regulations. FinCEN released proposed regulations on Dec. 7, 2021, seeking to implement the "beneficial ownership information" (BOI) requirement of the Corporate Transparency Act (CTA).
- Although the measure is intended to provide support for law enforcement investigations into shell companies engaged in money laundering, tax evasion, and terrorism financing, it places many costs and legal burdens on small businesses, especially those in the real estate industry.
- In 2021, The Roundtable and its coalition partners submitted detailed comments to FinCEN regarding the development, disclosure, and maintenance of a new federal registry that will contain beneficial ownership information.
- The real estate coalition's extensive comments emphasize the "scope of the CTA is far-reaching and will impact many commercial residential real estate businesses who are frequent users of the LLC structure for conducting business. If not implemented with a clear set of rules and regulations, the CTA could result in an outcome of confusion, missteps, and ultimately fines on law-abiding businesses."

Corporate Transparency Act

Talking Points (Continued)

- The coalition's comments detail "concerns and recommendations for establishing regulations to implement reporting requirements—as well as provisions regarding FinCEN's maintenance and disclosure of reported information effectively and fairly."
- The coalition raised several specific implementation issues, including how small companies targeted by the CTA will face compliance burdens. The time-consuming and challenging process of gathering required information on all beneficial owners of a reporting company that may have been created years ago is also addressed.
- In 2022, The Roundtable and its coalition partners submitted comments to the U.S. Department of the Treasury (DOT) and FinCEN that support efforts to thwart illegal money laundering in real estate, while encouraging policymakers to find a balanced approach that does not unfairly burden law-abiding businesses.
- The Roundtable is part of a broad coalition of business trade groups that supports a legal challenge by the National Small Business Association (*NSBA v. Janet Yellen*), which challenges the constitutionality of the CTA. The coalition stated, "It is clear whatever marginal benefit the CTA affords law enforcement will be far outweighed by the costs borne by small businesses and their owners."
- The Roundtable continues to work with industry partners to address the implications of FinCEN's proposed rules and the impact it could have on capital formation and the commercial real estate industry.

KLEPTO ACT: Fact Sheet

Issue

The *Kleptocrat Liability for Excessive Property Transactions and Ownership (KLEPTO) Act*, (S.4075) was introduced by a bipartisan group of Senators in April 2022, and arms law enforcement with the information required to track down kleptocrats' luxury assets in the U.S. financial system. It would impose stricter rules on disclosing information about who is purchasing a wide range of assets often used for money laundering. The legislation would force FinCEN to require parties involved in real estate sales to disclose the "beneficial owner" of a company involved in the transaction.

The Roundtable strongly supports efforts to identify and impede illegal investments by Russian Federation oligarchs in U.S. real estate and condemns the use of limited liability corporations (LLCs), or any form of real estate ownership structure, to finance illicit acts, launder money, or support terrorism. Authoritarian states, human rights violators, drug cartels, kleptocrats, and terrorists must not be permitted to undermine and destabilize U.S. real estate markets by laundering the illegal proceeds of corruption and other criminal activity.

Talking Points

- Requires the Treasury Department's Financial Crimes Enforcement Network (FinCEN) to mandate disclosure of beneficial ownership information (the identity of the real person behind an entity) for all real estate transactions through legal entities.
- Requires the Federal Aviation Administration to collect beneficial ownership information for all aircraft registered in the U.S.;
- Requires FinCEN to extend anti-money laundering safeguards to the real estate sector;
- Requires FinCEN to extend anti-money laundering safeguards to businesses that sell boats, planes, and automobiles;
- Clarifies that any foreign entity that buys or holds real estate in the U.S. should be considered a "reporting company" under the Corporate Transparency Act;
- Requires the Treasury Department to report on how digital ledger technology could be used to create a tamper-proof, permanent record of real estate transfers; and
- Mandates a subsequent Treasury pilot testing such a program.

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SAFE Banking Act and CRBs

Issue

Legal cannabis-related businesses (CRBs) face the challenge of obtaining bank accounts, and commercial property owners face legal challenges of taking on CRB tenants without safe harbor protections.

Talking Points

- 47 states and DC currently legalize marijuana to varying degrees. Yet use, possession, and sale remains illegal under federal law.
- Real estate owners, lessors, brokers, and financiers need certainty when they transact with legitimate CRBs.
- The bipartisan *Secure and Fair Enforcement (SAFE) Banking Act*, (H.R. 1996) would eliminate the need for CRBs to operate on a cash basis, bring them into the banking system, and allow them to obtain accounts and credit cards. Commercial property owners would get a safe harbor if they lease space to a CRB, and their mortgages could not be subject to corrective action by a bank.
- To date, the *SAFE Banking Act* has passed the U.S. House numerous times, but it has yet to pass the Senate.

National Flood Insurance Program

Issue

The National Flood Insurance Program (NFIP) is currently operating under a continuing resolution. Since the end of FY 2017, over a dozen short-term NFIP reauthorizations have been enacted. As policymakers continue to debate potential changes and improvements to the program, their challenge is to find a balance between improving the financial solvency of the program, reducing taxpayer exposure, and addressing affordability concerns. Without congressional reauthorization, the program will sunset on September 30, 2023.

Talking Points

- Floods are the most common, costliest natural peril in the U.S. The NFIP was enacted in 1968 due to a lack of private insurance and increases in federal disaster aid. The Program is administered by the Federal Emergency Management Agency (FEMA) and is essential for homeowners, renters, and small businesses in affected areas.
- The level of flood damage from recent storms makes it clear that FEMA needs a holistic plan to prepare the nation for managing the cost of catastrophic flooding under the NFIP.
- The NFIP is important for residential markets, overall natural catastrophe insurance market capacity, and the broader economy. However, under the NFIP, commercial property flood insurance limits are low—$500,000 per building and $500,000 for its contents. NFIP has approximately five million total properties, only 6.7% are commercial. Nearly 70% of NFIP is devoted to single-family homes and 20% to condominiums. In the total program, 80% pay actuarial sound rates, however, in the commercial space, only 60% pay actuarial sound rates.
- Congressional hearings have illuminated numerous acute problems surrounding the NFIP, such as insolvency, increased risk of flooding across the country, and insufficient and inaccurate flood mapping. The unintended negative outcomes generated by the NFIP continue to grow and are now spreading to GSEs (government-sponsored enterprises) Fannie Mae and Freddie Mac.
- Lenders typically require base NFIP coverage, and commercial owners must purchase Supplemental Excess Flood Insurance for coverage above the NFIP limits. The NFIP's low commercial limits make it problematic for most commercial owners. As a result, The Roundtable has been seeking a voluntary exemption for mandatory NFIP coverage if property owners have flood coverage from commercial insurers.

National Flood Insurance Program

Talking Points (Continued)

- By permitting certain private issue insurance policies to satisfy the NFIP's "mandatory purchase requirement" for properties in flood plains financed by loans from federally guaranteed institutions, commercial property owners would have the ability to "opt-out" of mandatory NFIP commercial coverage if they have adequate private coverage outside the NFIP program to cover financed assets.
- The Roundtable and its partner associations support a long-term reauthorization and improvements of the NFIP that help property owners and renters prepare for and recover from future flood losses. Given the low coverage amounts provided to commercial properties, it is important to permit larger commercial loans to be exempt from the mandatory NFIP purchase requirements.

EB-5 Reform and Integrity Act of 2022: Fact Sheet

Issue

A major overhaul of the EB-5 "regional center" investment visa program passed Congress in March 2022, and President Biden signed it into law as part of the legislation that funds the federal government through September 30, 2022. The EB-5 Reform and Integrity Act represents the first major reforms to the EB-5 program since it was enacted in the early 1990s. Reforms include:

Reauthorized EB-5 "Regional Center" Program

- 5-year extension through September 30, 2027.

Expanded Targeted Employment Area (TEA Designations)

- TEA projects qualify for **both** lower investment levels **and** visa set-asides (see below):

Prioritizing Rural Projects

- In areas outside a Metropolitan Statistical Area, or within the outer boundary of any city or town with a population of 20,000 or more. (No change from prior law).
- U.S. Citizenship and Immigration Services (USCIS) must prioritize processing visas for investors in rural areas.

New Criteria for Distressed Urban Area Projects ("High Unemployment Areas")

- Codified the 2019 USCIS regulation ("donut" approach in which a project must be within a census tract—or any "contiguous" census tracts that "touch" the project's tract—where the average unemployment rate is 150% of the national average.
- DHS Secretary has the discretion to include a "directly adjacent" tract (to either the "anchor" tract or a "contiguous" tract) to satisfy the requisite 150% high unemployment criteria.
- Distressed Urban TEA designations last for two years. These can be reviewed if the qualifying census tract(s) continue to meet "high employment" criteria.
- If a project was in an Urban TEA but falls out of high unemployment status, an "original" investor does not have to increase investment amounts to the non-TEA upper level.
- Only DHS can approve an Urban TEA "high unemployment" designation—unless the Secretary designates such authority to another federal official. No state or local official can approve.

EB-5 Reform and Integrity Act of 2022: Fact Sheet

Expanded Targeted Employment Area (TEA Designations) (Continued)

Defining "Infrastructure Projects"

- A "capital investment project" administered by a "government entity"—that serves as the "job-creating entity" funded by EB-5 investors, and that contracts with a regional center—qualifies as an "Infrastructure Project."
- Must be a "public works project." No particular type of infrastructure "asset class" is specified.
- Only DHS can designate an Infrastructure Project—unless the Secretary designates such authority to another federal official. No state or local official can approve the designation.

Qualified Investment Amounts & Adjustments

- 800,000 in TEAs
- $1,050,000 in non-TEAs
    - On January 1, 2027, and every five years thereafter, investment amounts adjust for inflation. Non-TEA level "adjusts up" for inflation.
    - TEA level "adjusts up" to 75% of the non-TEA level (with the goal of keeping the $250K delta between investment levels intact).

Clarifying Visa Set-Asides

- Set-asides are a percentage of the roughly 10,000 EB-5 visas available every year.
- 20% for Rural projects
- 10% for Distressed Urban/High Unemployment Area projects
- 2% for Infrastructure Projects
- Unused visas "carry over" in the same category in the following year.
- Unused visas in any "set aside" category made generally available for any project, in the year immediately following the "carry over" year.

EB-5 Reform and Integrity Act of 2022: Fact Sheet

"Aging Out" Criteria

- An investor's "child" who is admitted to the U.S. on a "conditional" basis and who turns 21 shall continue to be considered a "child" if:
  - she/he remains unmarried **and**;
  - the principal investor is approved as a permanent resident **and**;
  - the principal investor files a petition for the child to remain in the U.S. no later than one year after the child's conditional status has terminated.
- The principal investor can only file one "aging out" petition after the child turns 21.
- Unused visas "carry over" in the same category in the following year.
- Unused visas in any "set aside" category made generally available for any project, in the year immediately following the "carry over" year.

Allowing the Broad Deployment of Capital

- DHS to enact regulations that allow the new commercial enterprise to deploy capital **anywhere** in the U.S. to keep the investment "at risk."

Sovereign Wealth Funds

- Capital from a "bona fide" SWF may be stacked with EB-5 capital to finance a project.
- The SWF can be involved with the equity "ownership"—but not the administration—of the job-creating entity.
- DHS to implement regulation for SWF funding in an EB-5 project.

Job Creation Criteria

- Ten jobs must be created per investment (same as prior law).
- One job must be a "direct" job. It can be "modeled," and it is not necessary to produce a W-2 for a particular employee.
- The other nine jobs can be "indirect," modeled, and estimated (same approach under prior law).

EB-5 Reform and Integrity Act of 2022: Fact Sheet

Job Creation Criteria (Continued)

- Construction jobs that last less than two years can satisfy 75% of the estimated “indirect” jobs.

Allowing the Concurrent Filing of I-526 and I-485

- Investors can **concurrently** file their I-526 petitions (showing EB-5 compliance and investment) and their I-485 petitions (application for a “conditional” green card, which adjusts status from a “non-immigrant” to a conditional permanent resident). This can only be done if there is already a visa number available and current.
- Concurrent filing can reduce the time to adjust status once an I-526 is approved.

“Grandfathering” Existing Investors

- If Congress fails to reauthorize regional centers after the Act’s expiration on September 30, 2027, DHS will continue to process petitions filed on or before September 30, 2026.
- Applies to I-526 petitions and I-829 petitions (to remove conditional status and allow permanent residency without conditions).
- DHS may not deny an I-526 or I-829 simply because the regional program might expire in the future.
- An investor is eligible to file the I-829 two years after filing the I-526.

New “Integrity Measures” to Deter Fraud and Safeguard National Security

- USCIS to conduct an audit of each regional center at least once every five years.
- Explicit authority granted to USCIS to deny regional center “business plans” where an applicant has engaged in fraud, criminal conduct, or where plan approval would threaten national security.
- Confirms the application of U.S. securities laws over regional center offerings and investment advice.

EB-5 Reform and Integrity Act of 2022: Fact Sheet

New "Integrity Measures" to Deter Fraud and Safeguard National Security (Continued)

- Regional center must submit annual statements of investment activities to USCIS. Failure to submit or falsify an annual statement results in sanctions that can include fines, temporary suspension, and a permanent "de-bar" of individual and regional centers that fail to comply with new oversight requirements.
- No person convicted of a crime (in the last 10 years) or fraud-related civil offense (that resulted in liability greater than $1M USD) can participate in EB-5 activities.
- With a limited exception for bona fide sovereign wealth funds, no foreign government representative may provide EB-5 capital or be involved in the administration or ownership of a regional center, new commercial enterprise, or job-creating entity.
- Requires fingerprints and other biometrics of persons involved in EB-5 activities to be submitted to USCIS.
- Strict new "source of funds" requirements to ensure that an investor's funds are derived from legitimate and lawful sources.
- Establishment of a new "EB-5 Integrity Fund," capitalized by regional center program feeds, to support amplified USCIS oversight and site visits.

Sources

- EB-5 Reform and Integrity Act of 2022 (Division BB of the Consolidated Appropriations Act of 2022)

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SEC Proposed Rules: Private Fund Advisers, Form PF

Issue

In 2022, the Securities and Exchange Commission (SEC) proposed two rules that would significantly overhaul the regulation of the private fund industry—a key capital source for income-producing real estate. The first proposed rulemaking would amend the Form PF reporting requirements for certain private fund managers and the second proposed rule would impose new investor reporting requirements on certain Private Fund Advisers under the Investment Advisers Act of 1940.

Talking Points

- The SEC approved the two proposals despite strong dissents issued by Commissioner Hester Peirce, who voted no on each proposal and raised concerns that the rules would take away the SEC's resources for protecting retail investors. Chairman Gary Gensler, however, indicated that he views the rules as protecting retail investors whose retirement plans invest in private funds.
- With the stated goal of enhancing the Financial Stability Oversight Council's (FSOC's) monitoring and assessment of systemic risk and protecting investors, the SEC proposal would transform Form PF into a current reporting form for large hedge fund advisers and advisers to private equity funds, while maintaining the existing quarterly or annual reporting obligations applicable to private fund advisers regardless of size. The SEC's proposal also (1) expands Section 4 of Form PF by reducing the reporting threshold applicable to large private equity advisers from $2 billion to $1.5 billion in private equity fund assets under management, and (2) introduces a new large liquidity fund adviser reporting requirement that essentially requires such advisers to report the same information that money market funds report on Form N-MFP (as proposed to be amended in December 2021).
- As stated in our March 21, 2022, Form PF comment letter, the proposed addition of new reporting requirements presents significant compliance and operational challenges for private real estate fund sponsors with no added benefit to investors and no relation to the intent of Form PF in monitoring systemic risk. As a result, the proposed amendments are not required and should not be adopted. At the very least, the SEC must provide adequate evidence that the proposed amendments bear some reasonable resemblance to systemic risk and provide meaningful cost-benefit analyses to support the increased burdens inherent in adopting the compliance infrastructure necessary for such reporting.

SEC Proposed Rules: Private Fund Advisers, Form PF

Talking Points (Continued)

- The "Private Fund NPRM" would add new and amended rules under the Investment Advisers Act that the SEC believes would increase transparency and avoid adviser conflicts of interest. If adopted as proposed, a private fund adviser would need to adopt policies and procedures to comply with these requirements and evaluate whether its governing documents, offering memoranda, and side letters should be updated to reflect the new regulatory requirements and prohibitions. The proposed rules apply to exempt reporting advisers in some instances, but the SEC has posed questions for comment asking whether other parts of the proposed rules should apply to such advisers. The proposed rules have the potential to significantly increase regulatory burdens across registered and exempt private fund advisers.
- While we support efforts taken by Commission to protect investors and monitor risk, our April 25, 2022 comment letter raises concerns that, if finalized, the private fund proposal could hinder real estate capital formation, the development and improvement of real properties, essential economic activity, and jobs.

NASAA's Proposed Revisions to its Statement of Policy Regarding Real Estate Investment Trusts

Issue

On July 12, 2022, the North American Securities Administrators Association, Inc. (NASAA) announced it is seeking public comment on proposed revisions to the NASAA Statement of Policy Regarding Real Estate Investment Trusts (the "REIT Guidelines"). The Roundtable has serious concerns about the Proposal and urges NASAA to withdraw the Proposal.

Talking Points

- The Proposal could have a profound impact on the $20.7 trillion U.S. commercial and multifamily real estate market, approximately 9.4% of which is comprised of real estate investment trusts (REITs).
- It could have the unintended and unnecessary impact of impeding real estate capital formation, undercutting economic growth, and weakening the strength and stability of U.S. real estate capital markets. Investing in real estate supports economic growth; helps to grow the much needed supply of housing, particularly in the multi-family, workforce, and affordable housing sector; enhances the infrastructure of industrial space, and supports state and local communities across the country.
- Since 1996, the Securities Act of 1933, as amended, has provided a preemption of the substantive state securities law requirements for several types of securities and offerings. However, certain securities offerings, including publicly offered REITs that do not list their securities on a stock exchange ("non-traded REITs"), remain subject to state securities law registration requirements. In addition, they remain subject to review by state securities regulators and the Securities and Exchange Commission (the "SEC"). The REIT Guidelines have been adopted by several state securities regulators or used by their staff in reviewing such offerings.
- The REIT Guidelines were last amended in 2007 and set out requirements for REIT sponsors, advisers, and persons selling REITs, including provisions dealing with the suitability of investors, conflicts of interest, investment restrictions, and rights of shareholders as well as disclosure and marketing.
- NASAA has proposed revisions to the REIT Guidelines in four areas:

NASAA's Proposed Revisions to its Statement of Policy Regarding REITs

Talking Points (Continued)

- The proposed revisions would update the conduct standards for brokers selling non-traded REITs by supplementing the suitability section with references to the SEC's best interest conduct standard.
- The proposal includes an update to the individual net income and net worth requirements —-up to (a) $95,000 minimum annual gross income and $95,00 minimum net worth, or (b) a minimum net worth of $340,000—in the suitability section through adjusting upward to account for inflation occurring since the last adjustment in 2007.
- The proposal would add a uniform concentration limitation prohibiting an aggregate investment in the issuer, its affiliates, and other non-traded direct participation programs that exceeds 10% of the purchaser's liquid net worth. Liquid net worth would be defined as that component of an investor's net worth that consists of cash, cash equivalents, and marketable securities. [NOTE: There is no carveout for accredited or other sophisticated investors.]
- The proposed revisions also include, in multiple sections, a new prohibition against using gross offering proceeds to fund distributions, "a controversial product feature used by some non-traded REIT sponsors . . . having the potential to confuse and mislead retail investors."

- In the request for comment, NASAA points out that if adopted, the revisions to the REIT Guidelines have the potential to influence updates to other Guidelines, including those for Asset-Backed Securities, Commodity Pools, Equipment Leasing, Mortgage Programs, and Real Estate Programs (other than REITs) and the Omnibus Guidelines.
- We are concerned that the Proposal appears to be substantially based on a flawed and outdated impression of the PNLR sector and PNLR products. Many of the issues that NASAA highlights to justify the Proposal—such as liquidity concerns, fee transparency, and sources of distributions—are largely, if not completely, ameliorated with respect to the NAV PNLRs[1] that are now being offered to investors.

[1] REITs that are registered with the SEC but whose shares intentionally do not trade on a national securities exchange. NAV PNLRs, which comprise the majority of PNLRs marketed today, are permanent entities that provide shareholders with regular ability to sell shares back to the REIT at the current Net Asset Value (NAV).

NASAA's Proposed Revisions to its Statement of Policy Regarding REITs

Talking Points (Continued)

- We are working on this issue with a number of other groups and submitted a comment letter raising concerns about the proposal.

The Bipartisan "Physical" Infrastructure Law

Issue

In November 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (IIJA). In a rare show of bipartisan consensus, the House and Senate cleared the measure with Democratic and Republican support.

The IIJA is a historic, $1 trillion+ bill that allocates $550 billion in new spending to improve the nation's "physical" infrastructure (transportation, water, sewer, electric grid, and broadband systems). The Roundtable strongly backed the IIJA as it moved through the legislative process. The Biden administration estimates it would create about two million jobs per year over the next decade. The law is a down payment on the long-term investments our country must make to productively move people, goods, power, and information from home to work, business to business, community to community, and building to building.

Throughout 2022, the administration has been focused on getting the IIJA money "out the door." It has developed a guidebook focused on spending for transportation, energy, and broadband infrastructure for states and local governments to apply for federal grants, loans, and public-private partnership resources under more than 375 programs across the federal agencies.

The administration has also provided a web-based interactive map showing where IIJA funds have been disbursed in communities across the nation.

Talking Points

- **Investments in infrastructure make our local communities safe, productive, and support healthy real estate markets.** Investments in infrastructure and the strength of real estate markets have a synergistic, two-way relationship. Our tenants and employees depend on safe and efficient roads, bridges, and mass transit to commute. Our buildings depend on reliable supplies of water, power, and broadband to function. In turn, infrastructure depends on healthy real estate markets. Property taxes are the main revenue source for local investments in roads, schools, etc. Higher property values mean more tax revenues to help pay for more infrastructure.
- **The IIJA helps the U.S. play "catch-up" on infrastructure investments.** The U.S. ranks 13th in the world when it comes to the quality of our infrastructure. Public investments in infrastructure as a share of the economy have fallen more than 40% since the 1960s—when the Interstate Highway System was built. If we want to stay globally competitive, increase GDP, create jobs, and out-compete China the U.S. has to continue to invest in infrastructure in a serious, significant way.

The Bipartisan "Physical" Infrastructure Law

Talking Points (Continued)

- **The IIJA will boost Public-Private Partnerships (P3s).** Private sector capital must be tapped to help finance public infrastructure. There are simply not enough taxpayer resources to foot the entire bill for all of our nation's infrastructure needs. The IIJA supports programs that deploy taxpayer "seed money" to leverage far greater amounts of private sector investments in a variety of infrastructure asset classes. Its provisions are geared to boost P3 investments in road, transit, rail, broadband, electric grid, and carbon sequestration projects.
- **The IIJA will make our roads and bridges safer.** The largest category of IIJA expenditures is $110 billion to modernize roads and bridges. It represents the single largest dedicated bridge investment since the construction of the interstate highway system.
- **The IIJA helps build the high-speed rail network of tomorrow.** The new law makes the largest investment in intercity passenger rail since the creation of Amtrak. It devotes funds specifically to improve the Northeast Corridor route between D.C. and Boston.
- **The IIJA makes a massive investment in broadband.** It would devote $65 billion with the goal to ensure that every American has access to reliable high-speed internet.
- **The IIJA makes the largest single investment in the electric grid in history.** $65 billion goes to new transmission lines that facilitate widespread adoption of solar, wind, etc., so that clean energy can be transported over long distances.
- **The IIJA makes investments to replace the nation's lead pipes.** $55 billion is designated to provide clean drinking water for all Americans and eradicate the nation's remaining lead pipes. Every $5K investment to replace lead pipes results in $22K in avoided health care costs, as per the White House.
- **The IIJA invests in public transit.** The new law's mass transit investments total over $39 billion to help modernize bus, commuter rail, and subway networks. Most of the money would go directly to support local transit agencies.
- **The IIJA jump-starts federal investments in EV charging stations.** $7.5 billion is for construction of a national network of electric vehicle refueling properties. The goal is to make EV chargers as common as gas stations to minimize travelers' "range anxiety" and provide greater surety that "clean cars" can be easily re-charged and travel over long distances.

The Bipartisan "Physical" Infrastructure Law

Talking Points (Continued)

- **The IIJA helps streamline the cumbersome federal review process to approve projects.** The new law codifies a 2-year federal permitting goal and establishes a "One Federal Decision" document to coordinate the environmental reviews of multiple agencies.

Additional Information

- White House Fact Sheet, "The Bipartisan Infrastructure Deal (Nov. 6, 2021)
- The Biden administration's bipartisan infrastructure law "spending guidebook" from the Biden administration (released Jan. 31, 2022)
- Interactive map "dashboard" showing IIJA project funding across the U.S.

Housing

Bridging the Housing Gap and GSE Reform

Issue

There is a chronic shortage of housing in the U.S. that is driving up housing prices and making it more difficult for lower-income individuals to find safe, affordable housing. Housing production in the U.S. is not keeping pace with expanding housing needs. The underbuilding gap in the U.S. now totals more than 5.5 million housing units. The impact of this growing problem of an under-supply of affordable housing is far-reaching and undermines economic growth—particularly in urban areas. In addition, the government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac—one of the primary funding sources for housing in the U.S.—have been in conservatorship for over a dozen years. Debate over reforms continues.

Talking Points

- Safe, decent, and affordable housing is critical to the well-being of America's families, communities, and businesses. The COVID-19 pandemic has intensified the nation's persistent housing crisis, prompting The Roundtable to mobilize with our national real estate organization partners and jointly advocate for policies that will help to increase housing supplies, grow jobs, and modernize our nation's critical infrastructure.
- Having a robust housing finance system is critical to expanding America's housing infrastructure to help meet the nation's longstanding goal of ensuring decent and affordable housing for all. Current efforts have failed to keep pace with the growing need for affordable housing.
- GSE reform must appropriately balance taxpayer protections and establish an efficient marketplace with a strong, efficient, and sustained financing environment for homeownership, rental housing, and sustained mortgage liquidity.
- As the gap between the number of lower-income renters and the supply of affordable units continues to grow, it is critical for the GSEs to provide support for mortgages to aid low- and moderate-income families—for homeownership and rental housing—as well as underserved areas.
- As American households increasingly turn to the rental market for their housing, a strong housing finance system should support not only homeowners but also aid the expansion of affordable rental housing.

SEC's Proposed Rule on Climate-Related Disclosures for Investors

Issue

On March 21, 2022, the U.S. Securities and Exchange Commission (SEC) released its anticipated proposed rule, "The Enhancement and Standardization of Climate-Related Disclosures for Investors." [Read the SEC's fact sheet.] The Roundtable issued a fact sheet summarizing the proposed rule shortly after its publication.

If finalized, the proposal would become the first-ever rule requiring all companies registered with the SEC to report, measure, and quantify GHG emissions and material risks related to climate change in their registration statements and periodic filings (such as Form 10-K). It is pertinent to all companies registered with the SEC, not just real estate registrants.

The Roundtable submitted comments on the SEC's proposed climate-risk disclosure rule in June 2022. A final rule from the SEC has not yet been released.

The Roundtable's comments on the SEC's proposed rule are summarized as follows:

"Organizational" and "Operational" Boundaries

- Defining "organizational" and "operational" boundaries are critical steps for a company to categorize its GHG emissions. Emissions from sources within these boundaries would be classified as Scopes 1 and 2—and subject to mandatory reporting. Emissions from sources outside these boundaries, in a company's "value chain," would be categorized as indirect Scope 3 emissions.
- "Organizational boundaries" should sync with "consolidated" entities presented in a Form 10-K financial statement for any required Scope 1 and 2 disclosures, as the Commission proposes.
- However, emissions from unconsolidated investments, in which a registrant has only a minority stake and over which it has no operational control, should not be within "organizational" boundaries and thus not be subject to any Scopes 1 and 2 reporting mandate. At most, emissions from unconsolidated investments may be a registrant's Scope 3 emissions.
- A company should only have the Scope 2 responsibility to report on emissions from electricity, steam, heating, or cooling that it consumes itself, to run its own business operations.
- Applying these definitions to the CRE context: a building owner should have no Scope 1 or 2 responsibility to report on emissions generated by metered electricity, steam, heating, or cooling consumed by a tenant that measures energy to run operations in a particular leased space.

SEC's Proposed Rule on Climate-Related Disclosures for Investors

Issue (Continued)

Create a Safe Harbor for Emissions with U.S. Government Data and Tools

- If a registrant uses data, factors, and tools developed by the U.S. Environmental Protection Agency (EPA) and other federal departments to quantify emissions, it should get peace of mind that its calculations will not be second-guessed in an enforcement action or private litigation.
- The Commission should create a "calculation safe harbor" that insulates emissions disclosures from liability when they are: (1) reasonably quantified by professionals with expertise in GHG calculations; and (2) based on the best, available, and most recent data and tools released by federal agencies.

Reporting on Scope 3 "If Material" is a Back Door Mandate and Should be Dropped

- The Proposal's direction to disclose Scope 3 emissions "if material" is effectively a reporting mandate. Adding up emissions from all indirect sources will virtually always be "material" because they will readily exceed Scope 1 and 2 amounts in nearly every industry sector—including real estate.
- The Commission should impose no mandate—in text or effect—requiring emissions reports based on unobtainable or unverifiable data, from Scope 3 "value chain" sources outside of a registrant's "organizational" and "operational" boundaries. The "if material" provision for Scope 3 reporting should be dropped.
- A registrant that voluntarily sets a Scope 3 reduction target should receive "safe harbor" protections, but the one proposed by the Commission needs improvement.
- Any Scope 3 "safe harbor" should protect estimates with a reasonable basis of support (not just intentionally fraudulent reports). Also, given the major challenges acknowledged by the Commission regarding Scope 3 calculations, any safe harbor should apply to a registrant's reasonable decision to omit "value chain" estimates.

Do Not Require Filings Based on Emissions Estimates. Wait Until a Registrant has a Full Year of "Actual" Data to Support Scopes 1 and 2 Disclosures.

- The Proposal effectively requires two separate emissions disclosures: the first filed with Form 10-K based on fourth-quarter estimates, and a subsequently revised filing after the registrant possesses all "actual, determined" GHG data for the prior fiscal year.

SEC's Proposed Rule on Climate-Related Disclosures for Investors

Issue (Continued)

- A registrant should only be required to file mandatory emissions reports—with third-party attestations—once.
- The goals of consistency and transparency for investors would be furthered if the Commission moves its proposed GHG filing deadline after a registrant (and verifiers) have all the data and sufficient time they need to quantify and verify the previous year's Scopes 1 and 2 calculations.

"Physical" and "Transition" Risks Should not be Reported Under a Prescriptive "One Percent" Impact Rule. They are Better Suited to Principles-Based MD&A Disclosures.

- A registrant should discuss the effect of floods, droughts, and similar climate-related events in Form 10-K's MD&A as a "known trend or uncertainty" under Regulation S-K reforms adopted last year.
- Such events are better suited to principles-based narrative reporting—as opposed to the Proposal's prescriptive, bright-line rule that precise metrics must be disclosed for "physical" risks, "transition" risks, and related expenditures if they have a "one-percent" or greater impact on any line item in a financial statement.

Inflation Reduction Act Clean Energy Tax Incentives: Fact Sheet

Issue

President Biden signed the Inflation Reduction Act of 2022 (IRA) into law on August 16, 2022. The legislation will invest almost $370 billion over the next 10 years to tackle the climate crisis.

A number of the IRA's changes to the federal tax code may help the U.S. real estate sector reduce its carbon footprint, particularly:

- A deduction to help make commercial and multifamily buildings more energy efficient (Section 179D);
- A credit to encourage investments in renewable energy generation and other "clean energy" technologies sited at buildings and other facilities (Section 48);
- A credit to incentivize the installation of EV charging stations (Section 30C); and
- A credit to incentivize energy-efficient new residential construction, including multifamily (Section 45L).

The Real Estate Roundtable (RER) has encouraged Congress for a number of years to make clean energy tax incentives more usable for building owners, managers, and financiers—and more impactful to help meet national GHG reduction goals. Below is our summary of key IRA provisions.

179D Tax Deduction For Energy Efficient Buildings[2]

Amount of Deduction

- The 179D deduction amount is on a "sliding scale."
  - Amount increases with higher levels of building efficiency.
  - Minimum efficiency gain eligible for the deduction: 25%, pegged to a minimum deduction amount of 50 cents per building ft^2.

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IRA Clean Energy Tax Incentives: Fact Sheet

179D Tax Deduction For Energy Efficient Buildings (Continued)

- Each percentage point increase in building efficiency correlates to a 2-cent increase in the deduction amount.

Efficiency Gain Over Baseline	Deduction Amount "Base Rate"	Labor Standards "Bonus Rate"
25% (minimum)	**50 cents per ft^2**	**$2.50 per ft^2**
30%	**60 cents per ft^2**	**$3.00 per ft^2**
35%	**70 cents per ft^2**	**$3.50 per ft^2**
40%	**80 cents per ft^2**	**$4.00 per ft^2**
50% (maximum)	**$1.00 per ft^2**	**$5.00 per ft^2**

- 179D deduction amount increases five times if the building project meets "labor standards" that: (1) pay "prevailing wages" to laborers that "install" equipment; and (2) satisfy "apprenticeship" hiring requirements.
  - IRA's general approach: Projects meeting labor standards are eligible for "Bonus" incentives that are five times more than "Base" incentives.
  - See prevailing wage and apprenticeship guidance (published by the IRS on Nov. 30, 2022)

Eligible Energy Efficient "Property"

- Projects to achieve efficiency gains through installations of:
  - Interior lighting (not "exterior")

IRA Clean Energy Tax Incentives: Fact Sheet

179D Tax Deduction For Energy Efficient Buildings (Continued)

- HVAC and hot water systems
- Envelope (roof, windows, insulation)

Timing

- IRA sliding scale amounts apply to energy efficient property "placed in service" after December 31, 2022.
- No sunset for this deduction. 179D became a permanent part of the tax code in December 2020.

Eligible Building Types

- Any building within the scope of the ASHRAE 90.1 energy standard for commercial and larger (not "low-rise") multifamily buildings.

General 179D Baseline

- New construction must model at least 25% more efficient over the ASHRAE 90.1 baseline to qualify for an incentive on the sliding scale.
- The **2007** version of ASHRAE 90.1 provides 179D's general baseline for equipment "placed in service" up to Dec. 31, 2026 (see IRS guidance published on Dec. 23, 2020).
- The **2019** version of ASHRAE 90.1 will provide 179D's general baseline for equipment "placed in service" on or after Jan. 1, 2027.

Retrofits—Section 179D(f) "Alternative Deduction"

- Retrofit baseline: The building's **own** specific level of pre-retrofit site energy usage intensity (EUI).
  - **Post**-retrofit site EUI reductions of at least 25% are measured against the **pre**-retrofit baseline to determine the "sliding scale" incentive amount.
- A building must be five years or older to qualify for 179D(f)'s retrofit 179D(f) path.

IRA Clean Energy Tax Incentives: Fact Sheet

179D Tax Deduction For Energy Efficient Buildings (Continued)

- Project must be set forth in a "qualified retrofit plan" certified by a professional engineer or registered architect.
  - No requirement that the government review or approve the qualified retrofit plan.
- Taxpayer must wait to claim the retrofit deduction for at least one year after the equipment is in service **and** the project results in anticipated site EUI reductions.
  - Taxpayer cannot claim the retrofit deduction in the year it buys or installs equipment.
  - Architect/engineer must make a "final certification" of site EUI one year after the retrofit plan is implemented to show the efficiency gain.
- 179D(f) retrofit deduction amount and cap
  - Uses the same sliding scale in the table above.
  - The greater the efficiency gains proved out in the retrofit plan's "final certification," the greater the deduction amount
  - The deduction amount is capped at the retrofit plan's cost (i.e., "aggregate adjusted basis…of energy efficient building retrofit property placed in service").

Deduction Reset

- The 179D deduction can apply to a specific building every three years (or every four years in the case of a building owned by a governmental or tribal body, or a non-profit organization).

REITs

- Includes earnings and profits (E&P) "conformity" accounting fix.
  - 179D deduction amount reduces E&P in the year that the energy efficiency components are installed (not ratably over a five-year period, as prior law required).

IRA Clean Energy Tax Incentives: Fact Sheet

179D Tax Deduction For Energy Efficient Buildings (Continued)

- REITs and their shareholders may thus receive a fuller and more immediate financial benefit by claiming the 179D deduction.

Section 48 Investment Tax Credit

Types Of Projects

- "Energy Property" covered by current law: solar to generate electricity for heating or cooling; fiber-optic solar to illuminate the inside of a structure; "small wind" and microturbines; geothermal used to produce electricity; geothermal heat pumps to heat or cool a structure; fuel cells; waste recovery; and combined heat and power.
- IRA adds: energy storage (including thermal energy storage); dynamic glass; microgrid controllers; biogas property; and linear generators.

Credit Amount

- 6% of the cost of the Energy Property ("Base Rate").
- Can scale up to 30% of cost ("Bonus Rate") if project pays prevailing wages and meets apprenticeship requirements for the duration of the project's "construction."
  - Except for microturbines: 2% "Base Rate" and 10% "Bonus Rate."
- "Small solar" and other projects that generate less than one MW of electricity can qualify at the 30% "Bonus Rate" even if they do not meet wage and apprenticeship standards.
- Credit amount can be increased by 2%/10% if project meets "domestic content requirements" (i.e., materials are made in the USA).
- Credit amount can be increased by 2%/10% if project is located in an "energy community" (i.e., Brownfield site, census tract [or immediately adjacent tract] where a coal mine closed after Dec. 31, 1999, or coal-fired electric plant was retired after Dec. 31, 2009).

Timing And Switch To "Technology Neutral" Tax Credits

- Generally: Section 48 project construction must commence in 2023 or 2024.
  - Except for geothermal heat pumps: Construction must commence through 2034.

IRA Clean Energy Tax Incentives: Fact Sheet

Section 48 Investment Tax Credit (Continued)

  - Tax credit starts to scale down for geothermal heat pumps constructed in 2033 and 2034.
- For Section 48 projects constructed **after** Jan 1, 2025:
  - Transition to the technology-neutral "Clean Electricity Production Credit" (Section 45Y) or the "Clean Electricity Investment Credit" (Section 48E).
    - Taxpayer to opt for either the 45Y PTC or the 48E ITC.
    - Credits start to phase out by 2032 or when the electric power sector emits 75% less carbon than 2022 levels (whichever comes later).
  - Section 45Y PTC or Section 48E ITC is available for any "zero carbon" electricity facility or technology.
    - 45Y PTC = tax credit per kWh of "zero carbon" electricity produced and sold in the 10-year period after the facility is placed in service.
      - Base Rate of .5 cents per kWh.
      - Bonus Rate of 2.5 cents per kWh (if prevailing wage/apprenticeship standards are met).
    - 48E ITC = tax credit based on same Base Rate and Bonus Rate structure discussed above.
      - Base Rate: 6% of the cost investment in the "zero carbon" facility.
      - Bonus Rate: 30% of the cost of investment in the facility (if prevailing wage/ apprenticeship standards are met).
    - 5-year depreciation for any qualifying "zero carbon" 45Y facility or 48E property.

Low Income Housing And Communities

- Any credit amounts under Sections 48, 48E, or 45Y do not reduce the basis of buildings supported by Section 42 LIHTCs.
- 20% credit boost for solar and wind projects, generating less than 5 MW, installed "on" low-income housing buildings (such as those supported by LIHTCs).
- 10% credit boost for solar and wind projects, generating less than 5 MW, located in census tracts eligible for New Markets Tax Credits (NMTCs).

IRA Clean Energy Tax Incentives: Fact Sheet

30C Tax Credit For EV Charging Stations

- Extended through 2032.
- Same Base Rate (6%) and Bonus Rate (30%) structure discussed above.
- Credit capped at $100K for each charging station or refueling pump installed at a property.
- Third party "transferability" applies.
- Geographic limitations—charging station must be located in either:
  - A low-income or high-poverty Census tract under New Markets Tax Credit (NMTC) criteria (see NMTC tracking tool); or
  - Not an "urban area" as defined by the U.S. Census Bureau.

Section 45L "New Energy Efficient Home" Tax Credit

Duration and Building Eligibility

- Extended through 2032.
- Pertains to new construction which includes "substantial rehabilitation".
- All residential buildings—single-family and multifamily—are eligible.
- "High-rise" multifamily and apartment buildings can also qualify for the Section 179D tax deduction discussed above (if they are in the scope of the ASHRAE 90.1 standard).
  - ASHRAE 90.1 (and hence, Section 179D application) covers multifamily buildings of four stories or more.

Primary Use of Building

- Must be "residential."
- Mixed-use buildings: "Dwelling" units and common space (excluding parking garages) must exceed 50% of the building's square footage.

IRA Clean Energy Tax Incentives: Fact Sheet

Section 45L "New Energy Efficient Home" Tax Credit (Continued)

For Multifamily Homes

- Credit applies to "dwelling units" in a "building" eligible for EPA's ENERGY STAR "Multifamily New Construction Program."
- "Dwelling unit" must meet both:
  - EPA's most recent National Program Requirements; and
  - Any applicable EPA regional program requirements (e.g., California).

Credit Amounts

- Credits are "per unit" in a qualifying multifamily building.
  - Increased amount if the unit meets U.S.-DOE's Zero Energy Ready Home Multifamily Program (in development).
  - For single family: Increased credit amount if the home is certified by U.S.-DOE as a "Zero Energy Ready Home."
- 5x "Bonus Rate" if prevailing wage requirements are met.
  - No apprenticeship hiring requirement for multifamily "Bonus Rate."
  - No prevailing wage "Bonus Rate" for single family.

	Base	Base Zero Energy	Bonus	Bonus Zero Energy
Multifamily	$500	$1,000	$2,500	$5,000
Single-Family	$2,500	$5,000	n/a	n/a

Low Income Housing

- 45L credit amounts do not reduce the basis of buildings supported by Section 42 LIHTCs.
- However, the IRA does ***not*** provide for similar basis reduction under Section 179D—*i.e.*, any 179D deductions ***do*** reduce the basis of LIHTC buildings.

IRA Clean Energy Tax Incentives: Fact Sheet

Credit Transfers Allowed To Third Parties

- Companies with little or no tax liability that cannot typically benefit from tax credits—like REITs—have the option to "transfer" credits to another taxpaying entity that can use them.
- Transferability can be for the full or partial amount of a credit.
  - Transferability allowed for credits under Section 30C, 45Y, 48, and 48E.
- Transferability is **not** allowed for the Section 179D deduction (except state/local governments, tribes, and non-profit organizations can transfer 179D deduction amounts to architects and designers responsible for the building project).
- The recipient of the credit (the "transferee taxpayer") must pay for the credit "in cash."
- The "transferee taxpayer" must be unrelated to the company making the transfer.
- Transferred credit amounts are not "income" to the company making the transfer.
- Transferred credit amounts are not deductible by the "transferee taxpayer."
- REITs can transfer the full amount of the credit.
  - REIT transfers are not subject to outdated "retained income" restrictions that would otherwise limit the value of credits eligible for transfer.

Summary of “Direct Pay” and “Transfer” Options

for the IRA’s Clean Energy Tax Incentives

IRA Tax Incentive	Direct Pay from US Government	Optional Transfer of Incentive
• 179D Tax Deduction for Energy Efficient Commercial and Larger Multifamily Buildings	Not allowed	*Who can transfer:* • Only specified “tax-exempt entities” that own buildings can “allocate” 179D amounts. • This includes federal/state/local government, tribal, and non-profit building owners. • Private sector building owners ***cannot*** transfer 179D amounts. *Who can receive:* • Only the “person primarily responsible for designing” the energy-efficient property can receive allocated 179D amounts. • E.g., Architects, efficiency contractors/consultants *NOTE:* Earnings and profits “conformity” for REITs—i.e., full amount of 179D deduction reduces E&P in the same year that the REIT claims the deduction.
• Section 48 Investment Tax Credit (projects constructed in 2023 or 2024) • Section 48E Clean Electricity Investment Tax Credit (projects constructed in 2025 or later)	Direct pay eligibility limited to state/local governments, tribes, rural electric coops., and non-profits.	*Who can transfer:* • All business taxpayers that are not eligible for “direct pay.” • E.g., REITs, partnerships, corporations

• **Section 45Y Clean Electricity Production Tax Credit (projects constructed in 2025 or later)**		*Who can receive:* • Any unrelated third-party that pays taxes (the "transferee taxpayer"), and that buys the credit amount "in cash."
• **Section 30C EV Charging Station Tax Credit**	Same as immediately above for Section 48 ITC, etc.	Same as immediately above for Section 48 ITC, etc.
• **45L Tax Credit for New Energy Efficient Homes (Single- and Multifamily eligibility)**	Not allowed	Not allowed

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State and Local Carbon Mandates on Buildings

Issue

States, cities, and other localities are increasingly passing laws and ordinances that impose regulatory mandates on buildings to reduce greenhouse gas (GHG) emissions, energy consumption, or both. These laws are known as Building Performance Standards (BPS).

The Biden Administration has enlisted more than 35 jurisdictions to form the National BPS Coalition, committed to enact and implement local BPS laws by Earth Day in 2024. Some of these laws have already been proposed or adopted, for example in Boston, Maryland, Montgomery County (MD), New York City, St. Louis, Washington State, and Washington, D.C.

The effect of BPS laws, and the energy consumption and emissions "targets" they would impose on buildings, can require asset owners to pay for energy efficiency "retrofits," electrification projects, and install solar panels or other clean energy technologies. If an owner does not take such steps to reduce emissions or energy use, they could pay fines or penalties.

The U.S. Environmental Protection Agency (EPA) has issued helpful guidance recommending "metrics" that states and localities should consider if they enact BPS laws. Members of The Roundtable's Sustainability Policy Advisory Committee (SPAC) participated in EPA's multi-year, multi-stakeholder task force in developing these recommendations for states and localities.

Talking Points

- **Workable, federal-level, voluntary guidelines are needed to help standardize a potential "hodge-podge" of divergent local laws that can vary in how they regulate buildings.** Owners, managers, and financiers of nationwide real estate portfolios are looking to EPA for guidance to help unify local-level regulatory requirements and avoid conflicting mandates. EPA's guidance for states and localities is on the right track because it recommends reductions that are within a building owner's ability to manage and control. Specifically, EPA's guidance recommends lowering on-site energy consumption (a.k.a. "normalized site energy usage intensity") as an appropriate metric for BPS analysis and development.
- **Congress does not need to enact federal-level BPS mandates.** EPA has already issue federal-level guidance developed with months of input from environmental advocates, state and local leaders, and real estate stakeholders. Congress does not need to develop new legislation in this arena because EPA has already done the work.

State and Local Carbon Mandates on Buildings

Talking Points (Continued)

- **No BPS law should saddle building owners with responsibilities to "clean" offsite energy infrastructure like the electric grid or district-wide heating or cooling systems.** Regulators must avoid mandates that effectively make building owners responsible to de-carbonize the grid or district steam infrastructure. Such offsite infrastructure is not within the bounds of what building owners can control. Owners do not control whether the grid in their localities is fueled by wind, or nuclear, or natural gas, or hydropower, for example.
- **No BPS law should impose mandates on building owners to reduce emissions from or energy consumed by their tenants.** Any jurisdiction considering a BPS mandate must distinguish between emissions caused by an owner, and emissions caused by tenants. Building owners do not control operations in separate spaces leased by tenants—particularly in cases of "triple net leases" where a tenant directly pays electricity and other energy bills to a utility.
- **States and localities should not develop their own "carbon coefficients" if they consider BPS laws. They should look to well-established federal EPA standards.** Should a jurisdiction decide to impose GHG reduction "targets" on buildings, it should not create its own factors to convert various fuel sources and electricity to carbon emissions. Rather, it should rely upon the well-established emissions factors developed and published by EPA in its online Emissions Factors Hub and localized sub-regional electricity factors in its Emissions Generation and Resources Integrated Database (eGRID).
- **Any BPS law should allow the purchase of Renewable Energy Certificates (RECs) and Power Purchase Agreements (PPAs) as compliance mechanisms.** Until the point that states, localities, utilities, and grid operators are able to deliver de-carbonized electricity to commercial customers, any BPS laws should provide an opportunity for owners to mitigate emissions from purchased electricity attributable to their tenants and central building systems. Renewable Energy Certificates (RECs) and associated Power Purchase Agreements (PPAs) allow building owners to support off-site clean power sources. Owners should be able to claim the environmental attributes of clean power generated elsewhere through appropriately structured REC and PPA programs in the context of any building performance mandates.

State and Local Carbon Mandates on Buildings

Resources

- Map and matrix of BPS laws across the U.S. prepared by the Institute for Market Transformation (IMT)
- U.S. EPA ENERGY STAR's BPS resource page and policy toolkit
- U.S. EPA ENERGY STAR's guidance to states and localities recommending BPS metrics (May 2022)
- "Zero Emission Building Ordinances" webpage prepared by the Building Decarbonization Coalition
- Comments from The Real Estate Roundtable on IMT's "model" BPS ordinance (April 6, 2021)

Cyber and Physical Threats

Issue

The rising incidence of violent crime, organized retail crime, civil unrest, cyber-attacks, and the renewed threat of terrorism have prompted increased vigilance, information sharing, and legislative efforts to improve our nation's resilience. The proliferation of these threats and the reduction of funding for many state and local law enforcement agencies have raised concerns in the commercial facilities sector about how to protect commercial properties and the people who occupy them from such threats. In addition to the remaining challenges posed by the pandemic, the Russian invasion of Ukraine has raised security concerns about the increased incidence of cyber-attacks from the Russian Federation and other state actors.

Talking Points

- Recent high-profile hacking attacks have brought to the fore the necessity of fortifying the nation's IT infrastructure against cyber-attacks.
- On March 15, 2022, President Biden signed into law the Cyber Incident Reporting for Critical Infrastructure Act, which was included in an omnibus appropriations bill. Against the backdrop of high-profile cyber-attacks on critical infrastructure providers and growing concerns of retaliatory cyber-attacks relating to Russia's invasion of Ukraine, the House approved the bipartisan legislation on March 9 and the Senate unanimously approved the legislation on March 11.
- The Act creates two new reporting obligations on owners and operators of critical infrastructure:
    - An obligation to report certain cyber incidents to the Cybersecurity and Infrastructure Security Agency (CISA) of the U.S. Department of Homeland Security (DHS) within 72 hours, and
    - An obligation to report ransomware payments within 24 hours.
- The new reporting obligations will not take effect until the Director of CISA promulgates implementing regulations, including "clear description[s] of the types of entities that constitute covered entities."
- In addition, the SEC has proposed regulations that would require public companies to make prescribed cybersecurity disclosures. The proposed rules would "strengthen investors' ability to evaluate public companies' cybersecurity practices and incident reporting" by requiring:

Cyber and Physical Threats

Talking Points (Continued)

  - (i) mandatory, material cybersecurity incident reporting, including updates about previously reported incidents; and
  - (ii) mandatory, ongoing disclosures on companies' governance, risk management, and strategy with respect to cybersecurity risks, including board cybersecurity expertise and board oversight of cybersecurity risks.
- The Roundtable submitted comments on the proposed SEC rules for submission on May 9, 2022. In the letter, we cite our long history of support for effective information sharing and policies that promote industry reporting to the federal government on significant cybersecurity incidents. We also raise a number of concerns regarding the detailed, granular reporting that would be required by the Proposal, and the rigid incident reporting deadlines, which members fear may unintentionally exacerbate cybersecurity risks for issuers and impose burdens unjustified by obvious benefits.
- The Roundtable is working through a coalition of business organizations to ensure that any cyber incident reporting legislation creates a compliance regime that treats cyber-attack victims as victims, provides affected businesses with clarity in reporting, encourages cooperation between the public and private sectors, and limits legal liability.
- Through our Homeland Security Task Force and Real Estate Information Sharing and Analysis Center (RE-ISAC), The Roundtable remains focused on measures that businesses can take—such as creating resilient infrastructure that is resistant to physical damage and cyber breaches—through increased cross-agency information sharing and cooperation with key law enforcement and intelligence agencies.
- Through a Cybersecurity Information Sharing and Collaboration Agreement with DHS's Cybersecurity and Infrastructure Security Agency (CISA), the RE-ISAC engages in operational efforts to better coordinate activities supporting the detection, prevention, and mitigation of cybersecurity, communications reliability, and related data threats to critical infrastructure.

Cyber and Physical Threats

Talking Points (Continued)

- In addition to civil unrest, organized retail crime, and violent attacks on properties across the U.S., real estate continues to face a variety of cyber and physical threats, such as:
  - disruptive and destructive cyber operations against strategic targets, including an increased interest in control systems and operational technology;
  - cyber-enabled espionage and intellectual property theft;
  - improvised explosive devices (IEDs);
  - attacks against U.S. citizens and interests abroad and similar attacks in the homeland;
  - tenant fraud;
  - pandemic risk; and
  - unmanned aircraft system (UAS) attacks against hardened and soft targets.
- As a critical part of the nation's infrastructure, real estate continues to assess and strengthen its cyber and physical defenses to protect our industry from an array of threats—international and domestic terrorism, criminal activity, cyber-attacks, border security, and natural catastrophes.
- The Roundtable continues to promote security measures against both physical and cyber threats by facilitating increased information sharing and cooperation among its membership with key law enforcement and intelligence agencies.

Cyber and Physical Threats: Continuity of the Economy Plan (COTE)

Issue

Pursuant to Section 9603 of the 2021 National Defense Authorization Act (NDAA), Congress mandated that the President shall develop and maintain a Continuity of the Economy Plan (COTE) to maintain and restore the economy of the United States in response to a significant event. Despite having Continuity of Operations (COOP) and Continuity of Government (COG) plans to ensure the nation could function after a nuclear attack, no equivalent effort exists to ensure the rapid restart and recovery of the U.S. economy after a catastrophic or major disruption. Such disruptions could include a large-scale cyberattack or any other severe degradation that compromises the national conveyance of goods or services. Following such a catastrophic event, the government will have to prioritize its limited recovery resources, governed by a COTE Plan. A COTE will provide the U.S. with a robust and adaptable framework to restore the economy after a catastrophic attack.

Talking Points

- The Roundtable has been working with the Cybersecurity and Infrastructure Security Agency's (CISA) National Risk Management Center to aid their efforts to develop a Continuity of the Economy Plan (COTE) to maintain and restore the U.S. economy in response to a significant event. CISA works with government and industry to identify, analyze, prioritize, and manage the most significant strategic risks to the nation's critical infrastructure.
- The Roundtable's focus is on the Commercial Facilities (CF) Sector and the potential impacts on real estate from a wide-scale event. Among other things, the Plan requires an analysis of U.S. distribution and supply chains to identify the critical economic actors and functions that must be operational if the U.S. is to maintain its defense readiness, public health, and national security.
- Given the crucial role that the CF Sector plays in facilitating interaction and communication with critical infrastructure owners, operators and relevant stakeholders, we are including key partners in our discussions with the COTE Project Team to provide insights and input on the COTE scoping effort from our community.