Statement for the Record

Hearing on Our Nation's Crumbling Infrastructure and The Need for Immediate Action

Committee on Ways and Means
U.S. House of Representatives

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March 20, 2019

Chairman Neal, Ranking Member Brady and Members of the Committee on Ways and Means, The Real Estate Roundtable appreciates the opportunity to submit its views in relation to your hearing on the nation's infrastructure and the need for action. A holistic approach to expanding and modernizing our aging infrastructure will create American jobs, boost economic growth, and improve the quality of life in all regions of the country.

America is in the midst of a "transportation revolution." Our citizens have heightened demands for safe and efficient highways, driverless vehicles, ridesharing services, rapid inter-city transit, and reliable power and Internet delivery. Infrastructure policies must respond to changing demographics – and optimize the efficient movement of people, goods, energy and information in interstate and international commerce.[1]

Private sector financial contributions from real estate developments are often essential components to infrastructure projects. Federal spending will always be critical, yet meeting our country's infrastructure demands also will require revenue from states, localities and the private sector. As the Committee on Ways and Means considers innovative financing sources that can help pay-for infrastructure investment, we encourage the Committee to consider bipartisan proposals such as repealing the *Foreign Investment in Real Property Tax Act of 1980*. In addition, as you work with the other relevant Congressional committees, we encourage you to consider potential ways to streamline the permitting process and cut unnecessary red tape to keep project costs and permitting delays in-check.

Infrastructure Financing Through Federal Tax Policy

Federal legislation should unlock private capital for infrastructure investment by repealing the *Foreign Investment in Real Property Tax Act* (*FIRPTA*).

The outdated *FIRPTA* statute is a major obstacle to mobilizing greater private sector capital for investment in U.S. transportation and infrastructure. *FIRPTA* imposes a discriminatory layer of capital gains tax on foreign investment in U.S. real estate and infrastructure—a tax burden that does

[1] *See* CNBC Interview on Rebuilding America with Real Estate Roundtable President & CEO Jeffrey DeBoer (June 7, 2017, available at: https://www.youtube.com/watch?v=fwKugB9whJ8).

not apply to any other asset class. Repealing *FIRPTA* would serve as a strong, market-driven catalyst for improving our nation's infrastructure, including our transportation system.

Our infrastructure challenges require a combination of public and private investment. Passive foreign investors could play a significant role in meeting our infrastructure needs and financing public-private partnerships involving: ports, bridges, airports, tunnels, toll roads, light rail, freight rail, power grid, telecommunications and other income-producing infrastructure assets. Between 2006 and 2016, specialized funds raised more than $200 billion to deploy long-term capital into infrastructure investments.[2] During the same period, pension funds and direct investors allocated another $200 billion to infrastructure investments.[3] These infrastructure funds are using partnerships to pool and syndicate investor capital. REITs are another model that has been used with some success for infrastructure investment. *See, e.g.*, Deloitte, *REITs and Infrastructure Projects* (2010).

However, the United States is far behind other regions of the world in harnessing private investment for infrastructure development.[4] In short, onerous tax and administrative regimes like *FIRPTA* deter potential foreign investors from putting their capital to work on U.S. infrastructure projects. As a result, global infrastructure investment flows elsewhere, financing improvements outside the United States and undermining our economic competitiveness.

Foreign institutional investors are ideal partners for U.S. infrastructure projects because they have the capital for large-scale projects and the time horizon necessary for the long-term returns associated with the upfront investment. Infrastructure investments are attractive to foreign institutional investors because they offer: stable and predictable income streams that exceed fixed income markets, diversification benefits and low correlation with other financial asset classes, and a hedge against inflation. Because the public-private infrastructure model is more developed in other countries, foreign institutional investors are generally more comfortable and experienced investing in infrastructure assets than their U.S. counterparts.

FIRPTA is a major hurdle for the foreign investor seeking to invest in U.S. infrastructure projects. Under current law, *FIRPTA* applies when at least 50% of a company's balance sheet is attributable to the value of real property. In 2008, the IRS issued an announcement in which it indicated that many of the governmental licenses and permits being issued in connection with the leasing of transportation assets, such as toll bridges, should be treated as inseparable from the underlying real property, and thus as U.S. real property interests subject to *FIRPTA*.[5] In 2016, the IRS published final regulations in the REIT area confirming that certain inherently permanent

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[2] PwC, Global Infrastructure Investment: The Role of Private Capital in the Delivery of Essential Assets and Services (2017).

[3] *Id*.

[4] *See* OECD, *Pension Funds Investment in Infrastructure: A Survey* (2011); Infrastructure Investor, Fundraising Report (2018).

[5] I.R.S. Ann. 2008-115 (2008) (concerning the definition of an interest in real property and indicating "[t]he IRS and the Treasury Department . . . are of the view that in some of the transactions at issue the governmental permit may properly be characterized as a USRPI")

structures such as microwave transmission, cell, broadcast, and electrical transmission towers; bridges; tunnels; roadbeds; and railroad tracks are real property for REIT purposes.[6] The REIT regulations increase the likelihood that an infrastructure asset is real property for *FIRPTA* purposes.

Fear of triggering *FIRPTA* liability is blocking inbound infrastructure investment.[7] Large investors in transportation infrastructure cite *FIRPTA* as a principal obstacle to attracting greater foreign capital for infrastructure projects. All of the factors associated with *FIRPTA* have the net effect of penalizing foreign investors seeking to invest in U.S. infrastructure, thus deterring inbound investment that could be used to modernize our outdated transportation system.

FIRPTA repeal could incentivize greater infrastructure investment. President Obama's infrastructure initiative, the *Rebuild America Partnership*, recognized that *FIRPTA* is an obstacle that prevents foreign capital from being put to work improving U.S. infrastructure. A White House release noted that: "Infrastructure assets can be attractive investments for long-term investors… that value the long-term, predictable, and stable nature of the cash flows associated with infrastructure. Under current law, gains of foreign investors from the disposition of U.S. real property interests are generally subject to U.S. tax under *FIRPTA*, and foreign investors . . . regularly cite *FIRPTA* as an impediment to their investment in U.S. infrastructure and real estate assets."[8]

In recent years, with overwhelming bipartisan support, Congress has rolled back certain aspects of the discriminatory *FIRPTA* statute. For example, in 2015, under the leadership of Chairman Brady, Congress exempted foreign pension funds from *FIRPTA* altogether. Any infrastructure investment legislation should build on this recent progress. Stand-alone bipartisan legislation to repeal *FIRPTA*, the *Invest in America Act* (H.R. 6726, 115th Cong.), was introduced late in 2018, and we anticipate it will be reintroduced in the days ahead.

The Committee on Foreign Investment in the United States (CFIUS) has the power and authority to ensure that foreign investors do not acquire an inappropriate ownership interest in sensitive U.S. real estate or infrastructure assets. The role of CFIUS with respect to reviewing potential real estate and infrastructure purchases was recently expanded in the *Foreign Investment*

[6] T.D. 9784 (Definition of Real Estate Investment Trust Real Property), 81 Fed. Reg. 59849 (Aug. 31, 20176).

[7] "The *FIRPTA* rules may be of significant relevance to non-U.S. persons investing in infrastructure projects because such investments often provide investors various rights in the underlying infrastructure asset. As a result of these interests or rights in the asset, a further issue is raised as to whether the investor has obtained beneficial ownership of real property rights to which the *FIRPTA* rules could apply." PWC, *Infrastructure Investing: Global Trends and Tax Considerations, Part 2* (2013). *See also* Joint Committee on Taxation, *Overview of Selected Tax Provisions Relating to the Financing of Surface Transportation Infrastructure*, JCX-49-14 (May 5, 2014) ("[T]he special U.S. tax rules applicable to foreign investment in U.S. real estate (the '*FIRPTA*' rules of section 897) may affect the U.S. tax treatment of foreign [infrastructure] investors. Some advisors have taken the position that the intangible franchise right is an interest in real property for purposes of section 897.").

[8] White House Office of the Press Secretary, Rebuild America Partnership: The President's Plan to Encourage Private Investment in America's Infrastructure (Mar. 29, 2013).

Risk Review Modernization Act (*FIRRMA*) and now covers a much broader range of real esate and infrastructure transactions.[9]

Repeal of *FIRPTA* would have an immediate and profound impact on private investment in U.S. real estate and infrastructure. A recent study by University of California-Berkeley professor and economist Ken Rosen concluded that repealing *FIRPTA* would generate an initial increase of $65 to $125 billion in U.S. GDP and create 147,000 to 284,000 jobs throughout the economy. We urge you to include *FIRPTA* repeal in any tax or revenue title accompanying major infrastructure investment legislation.

Federal legislation should responsibly and sustainably increase the federal gas "user fee."

The biggest federal funding source for surface transportation is the Highway Trust Fund (HTF), capitalized by the "pay at the pump" gas user fee. It currently sits at 18.4-cents a gallon for gasoline (24.4-cents/gallon for diesel) – and has not been raised since 1993. The fund is perpetually on the brink of insolvency and frequently bailed-out by Congress. Its purchasing power has been diminished over time by inflation and strides in fuel economy of passenger vehicles. The infrastructure policy debate should properly re-cast the inaccurately labeled gas "tax" as a "user fee" that Americans must pay to repair and modernize our roads, bridges, mass transit, and grow our economy. We agree with the U.S. Chamber of Commerce's proposal to sustain the HTF by increasing the federal fuel user fee by five cents a year for the next five years, and indexing it to inflation thereafter.[10]

Federal legislation should assess whether IRS "volume caps" and other limitations on private-activity bonds (PABs) should be revised to boost infrastructure development.

Tax-exempt municipal bonds like PABs are proven tools to mobilize public and private co-investment in infrastructure. Congress should broaden availability of tax-exempt bonding tools by raising volume caps on the capacity of states to issue PABs, expand the scope of projects eligible for PAB financing, and give states flexibility to choose which kinds of projects are in most need of tax-exempt bond assistance. The Committee should consider pending bipartisan measures such as:

- The "Move America Act,"[11] enabling states in partnership with private entities to lower overall borrowing costs by issuing tax-exempt bonds to help finance a range of projects across infrastructure asset classes. Smaller states hesitant to issue more debt could leverage greater private equity by trading in some or all of their bond allocation for federal tax credits – that can then be used to capitalize state-level infrastructure banks or revolving loan funds.

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[9] Among other changes, a "covered transaction" now includes (1) any non-passive investment by a foreign person in any U.S. business involved in critical infrastructure, and (2) the purchase, lease, or concession by or to a foreign person of certain real estate (except for single family housing units) in close proximity to military or other sensitive national security facilities in non-urbanized areas. FIRRMA §1703(a)(4)(C).

[10] See Statement of Thomas J. Donahue, President and CEO, U.S. Chamber of Commerce, Before the House Ways and Means Committee by Thomas J. Donahue, President and CEO (March 6, 2019) at p. 5.

[11] H.R. 1508 (co-sponsored by Representatives Blumenauer [D-OR] and Walorski [R-IN]); S. 146 (co-sponsored by Senators Hoeven [R-ND] and Wyden [D-OR]).

- The "Public Buildings Renewal Act,"[12] to drive private sector investment in critical government-owned building infrastructure. State and local governments could access PAB financing for schools, hospitals, first-responder stations, research laboratories, and technology incubators.

- The "BUILD Act,"[13] to raise the federal statutory cap on PABs that can be approved for qualified highway and freight-improvement projects, by $5.8 billion (from $15 billion to $20.8 billion).

Additional Infrastructure Priorities

Taxpayers cannot foot the entire bill for the full suite of the country's infrastructure needs. Private sector co-investment must be part of the overall financing strategy. Best practices are necessary to channel public-private partnerships (P3s) in appropriate circumstances where local markets can support E-ZPass technologies, transit fare increases, rents, or utility bill increments to pay for repaired and new infrastructure. These and other innovative revenue sources must be developed, as discussed below, to dispel the myth that P3s are only synonymous with toll roads.

Furthermore, provisions to streamline the permit approval process must be a priority in any infrastructure package. Permit delays dampen private sector investment and add to the overall costs of infrastructure projects. A report by the nonprofit organization Common Good[14] estimated the cost of delaying the start of U.S. public infrastructure projects by six years to be $3.7 trillion. Increased construction costs, lost workforce productivity, environmental, and other costs associated with entitlement delays must be minimized by avoiding redundant layers of agency bureaucracy while still achieving a robust government review process.

We appreciate the opportunity to suggest innovations for infrastructure financing, streamlined permitting procedures, and other measures as follows:

- ***Improve the TIFIA loan process.*** The Transportation Department's successful Transportation Infrastructure Finance Innovation Act (TIFIA) program provides federal loans, guarantees, and standby lines of credit to help finance complex surface transportation projects of national and regional significance. TIFIA's low federal interest rates and flexible repayment terms have unlocked private investment capital to finance major projects across the country.[15] The review process to obtain TIFIA support, however, can be unduly arduous and lengthy. Legislation such as the "RAPID Act"[16] would enhance the program's efficiency

[12] H.R. 1251 (co-sponsored by Reps. Blumenauer [D-OR] and Kelly [R-PA]).

[13] S. 352 (co-sponsored by Senators Cornyn [R-TX] and Warner [D-VA]).

[14] See https://www.commongood.org/wp-content/uploads/2018/05/Two-Years-Update.pdf

[15] TIFIA projects at https://www.fhwa.dot.gov/ipd/finance/tools_programs/federal_credit_assistance/tifia/.

[16] S. 353 (co-sponsored by Senators Cornyn [R-TX] and Kaine [D-VA]).

while safeguarding taxpayers' investments. It would improve under-utilized criteria to expedite TIFIA reviews where the project's federal share is 33% or less. The bill would also clarify that low-risk transportation projects do not need to obtain multiple credit review opinions to rate senior secured debt relative to the subordinate federal loan. The lengthy and expensive credit rating requirement, however, would still apply to any project seeking $150 million or more in TIFIA financing where taxpayers bear greater risk.

- ***Harness the "transit premium" of higher property values for real estate located near mass transit to help finance nearby infrastructure.*** To leverage more infrastructure investment, where practicable TIFIA credit enhancement should be coupled with revenue streams from "value capture" strategies such as locally designated tax increment finance (TIF) and special assessment districts (SADs). These state and local techniques tap into the so-called "transit premium" that frequently attends to higher values of properties with ready and convenient access to public transportation. By harnessing increases in property values to help fund public infrastructure, local property tax revenues and/or special assessments can provide steady and predictable revenue streams to pay TIFIA debt – while also attracting private investors.

- ***Prioritize the limited proceeds from the Highway Trust Fund with a "Fix it First" strategy:*** Filling potholes and repairing bridges, while critical to make our infrastructure safe, do not attract the same level of support or attention as new starts with ribbon-cutting ceremonies. Specific funding sources (such as the HTF) should be identified to emphasize infrastructure repair and maintenance. Other sources (like TIFIA) should be prioritized for longer-term infrastructure growth and expanded capacity.

- ***Federal financial and policy support for mass transit is critical.*** Profound demographic shifts in the American population reflect heightened demands for multi-modal, transit-oriented development options. As Millennials increasingly dominate the workforce and Baby Boomers retire from it, infrastructure legislation should support generational preferences for mass transit.

  Congress should continue its commitment to fund and enhance the Capital Investment Grant (CIG) program administered by the Federal Transit Administration (FTA). State and local governments must have "skin in the game" to obtain CIG grants for New Starts, Core Capacity and Small Starts. Accordingly, legislation should reflect criteria set forth in a 2018 FTA letter that value capture revenues, private contributions, and geographic diversity are appropriate factors to support a CIG award.[17] Only the federal government, however, has the capacity to underwrite major new transit upgrades with significant national- and regional-level economic impacts that boost U.S. GDP and enhance our nation's global infrastructure competitiveness.[18] Credit-worthy state and local project sponsors who successfully navigate

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[17] See FTA "Dear Colleague" Letter (June 29, 2018), available at https://www.enotrans.org/wp-content/uploads/2018/07/FTA-Dear-Colleague-Letter-June-29-2018.pdf?x43122.

[18] For example, Chairman DeFazio noted the "staggering" economic impacts in the event that tunnel and bridge components of the Northeast Corridor Gateway program fail. "[A] Northeast Corridor shutdown would have an economic impact of $100 million per day or $36.5 billion per year … if these assets fail." Statement

the TIFIA loan process should not be penalized for seeking a CIG grant as a separate, necessary layer in the capital stack to finance a massive transit project. Simply put, loans repaid by borrowers with interest are fundamentally different instruments than grants awarded with no repayment obligation. Accordingly, infrastructure legislation should recognize that DOT loan repayment amounts should not, dollar-for-dollar, lower the state/local cost share commitment to levels that might restrict opportunities for a TIFIA borrower to supplement project financing with a New Starts or other GIG grant.

Congress should also codify FTA's practice in issuing Letters of No Prejudice ("LONPs") to streamline the CIG process. Significant cost savings and avoidance of project delays can be achieved by allowing a project sponsor to spend non-federal resources incurred after the issuance of an LONP, with the understanding that eligible expenses may be reimbursed later (or count as credit toward local matching share) if the CIG grant is ultimately approved.[19] Clear legislative authorization for LONP issuance can provide project sponsors and private co-investors with greater assurance to advance down a project's "critical path" schedule. Such activities may require significant lead-time and should not be stalled pending the FTA's subsequent release of grant dollars.

- ***Repairing natural gas pipelines should be an infrastructure bill priority.*** Natural gas is a dominant fuel that powers the U.S. economy and enhances our country's energy independence. While commercial buildings are increasingly more energy efficient[20] and rapidly transitioning to renewable energy,[21] 75% of the fuel consumed by U.S. commercial real estate derives from natural gas.[22] Modernization of the pipeline network connected to our buildings and plants is vital, as aging distribution mains and service lines "constructed of cast iron, wrought iron and bare steel represent the oldest pipelines and … pose the highest-

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of the Honorable Peter DeFazio, Committee on Ways and Means Hearing on "Our Nation's Crumbling Infrastructure and the Need for Immediate Action" (March 9, 2019), at p. 2. Common Good concluded that the price tag for a one-year delay in building Gateway's Hudson River tunnel would cost $1.6 billion and 366,000 tons of CO_2, with $67.5 million in lost worker productivity.

[19] Following current FTA practice, legislation should state that an LONP does not imply or guarantee receipt of Federal funding under any program.

[20] The U.S. Energy Information Administration ("US-EIA") reports the number of commercial buildings and floor space have greatly increased since the turn of the century but increases in energy use are much lower – indicating vastly improved energy efficiency performance of U.S. buildings. 2012 Commercial Building Energy Consumption Survey (CBECS), analysis at https://www.eia.gov/consumption/commercial/reports/2012/energyusage/index.php.

[21] On a national scale, commercial buildings rely on solar, wind, hydropower, geothermal, and biomass 12 times more than coal. From 2000-2010, renewable energy accounted for a 20% increase in the sources that fuel commercial buildings. From 2010 to 2017, there was a 66% increase in commercial buildings' reliance on renewable energy. US-EIA, Monthly Energy Review (February 2019), "Commercial Sector Energy Consumption," Table 2.3 at p. 39 (through 2017, most complete year of annual data), available at https://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf.

[22] *Id.*

risk for potential leaks."[23] Aside from the costs associated with wasted fuel and system inefficiency, the climate toll from the leaking grid is considerable: "Natural gas distribution systems account for 6% of methane emissions from U.S. natural gas infrastructure."[24]

We recommend congressional focus on accelerated pipeline replacement in a comprehensive infrastructure plan. Incentives should encourage state energy agencies and utilities to deploy cutting-edge leak detection and pipeline mapping technologies to address the most vulnerable, hazardous pipeline segments that need repair. To help finance pipeline replacement, Congress should consider a pilot credit enhancement platform that mimics TIFIA. Just as Congress extended TIFIA's surface transportation model to help finance railroad and water infrastructure, the Transportation Department's Pipeline and Hazardous Materials Safety Administration should be granted authority for a test program to underwrite loans so eligible gas distribution companies can attract co-investment for repair and replacement of natural gas assets.

- ***Comprehensive infrastructure legislation must include permit systems reforms.*** It should not take longer to permit an infrastructure project than to build it. We support measures outlined by President Trump in Executive Order 13807 (August 15, 2017) and implementing MOUs, to establish discipline in the permitting process for infrastructure projects. Improvements to streamline the infrastructure entitlement process have long been a bipartisan objective.[25] Congress should codify EO 13807's directives such as: a two-year goal to complete all environmental reviews for major infrastructure projects, with interim benchmarks; a "One Federal Decision" framework requiring lead agencies to obtain written sign-off from sister agencies at "concurrence point" milestones in the federal permitting process; and increased emphasis on project "prescoping" and "preliminary planning."

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We are fully committed to working with you to achieve a bold infrastructure initiative that serves the interests of all Americans, and we appreciate your consideration of these recommendations.

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[23] U.S. Dep't of Transportation, Pipeline and Hazardous Materials Safety Administration, Report to Congress, "State-Level Policies That Encourage or Present barriers to the Repair and Replacement of Leaking Natural Gas Pipelines" (Aug. 2, 2017) at p. 4. Chairman DeFazio's statement stressed that infrastructure legislation "need[s] to address the looming threat of a warmer planet from [GHG] emissions …" (*Supra* note 18 at p. 1),

[24] U.S. Department of Energy, "Natural Gas Infrastructure Modernization Programs at Local Distribution Companies: Key Issues and Considerations (Jan. 2017) at p. 5.

[25] For example, the Obama Administration announced policies to reduce permitting risks as a key barrier to attract more robust private sector investment in infrastructure. E.g., https://bipartisanpolicy.org/blog/accelerate-the-permitting-process/.