The Real Estate Roundtable

Real Estate Roundtable Policy Priorities —Spring 2024

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This document provides relevant information on The Real Estate Roundtable's key policy issues, including fact sheets and detailed issue briefs. The majority of the document consists of brief 1-2-page summaries of national policy issues currently facing the industry, The Roundtable's position on the issue, and helpful links for where to find additional information and details regarding The Roundtable's advocacy efforts. The document also includes multiple Roundtable-produced fact sheets distilling key legislation or regulations.

Table of Contents

Tax Policy

Taxing Unrealized Gains (“Billionaire Tax”)

Issue

President Biden and key lawmakers such as Senate Finance Chairman Ron Wyden (D-OR), have proposed a mark-to-market regime in which built-in gain is taxed on an annual basis, regardless of whether the asset is sold. President Biden would impose a 25% minimum tax on the combined income and unrealized gains of taxpayers with $100 million in income or assets.

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) other undefined methods.

Under the President’s proposal, “illiquid” taxpayers, defined as taxpayers whose tradable assets make up less than 20% of their wealth, could pay the minimum tax only on their tradable assets, with a deferral charge of up to 10% when other gains 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 mark-to-market regime in 2022 tax legislation were unsuccessful when they ran into resistance from moderate Congressional Democrats.

In *Moore v. United States*, the U.S. Supreme Court is reviewing a 2017 tax on unrepatriated foreign earnings and whether it violates any constitutional restrictions on the taxation of unrealized income. The decision could have implications for pending legislative proposals.

The Roundtable’s Position

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”)

- 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 and administrative appeals.
- Current law 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.
- 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. 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 budget proposes to raise the capital gains rate to 39.6%, which would bring it to parity with his proposed top rate on ordinary income. In addition, the president has proposed to increase the 3.8% tax on net investment income to 5% and extend it to the income of active business owners, including real estate professionals; the net investment income tax applies to both capital gains and rental income.

The Roundtable's Position

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 reward risk-taking and investment in communities where it is needed, not punish it.
- High taxes on capital income make it harder to attract the investment needed to rebuild our urban centers. Opportunity Zone capital gains incentives facilitated $75 billion in new investment in low-income communities in the first two years after enactment.
- Risk capital differs from wage compensation. The entrepreneur who foregoes a traditional job in favor of starting a business forfeits many protections and benefits offered to employees, such as a pre-negotiated salary. The capital gains preference compensates entrepreneurs for this risk, including the potential complete loss of their time and capital.
- The reduced capital gains rate partially offsets the higher risk with illiquid, capital-intensive real estate projects, as well as the economic effects of inflation.
- Unlike other tax policies, such as immediate expensing, the capital gains preference only rewards smart, productive investments that generate profits.

Tax Policy

Pass-Through Business Income

Issue

Real estate generally is owned and operated through “pass-through” entities. 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 partnerships, S corporations, and REITs at a competitive advantage relative to large C corporations.

Section 199A expires at the end of 2025. At that time, the effective marginal rate on pass-through business income would rise by over one-third, from 29.6% to 39.6%.

Tax legislation considered 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%.

Chairman Ron Wyden (D-OR) has proposed eliminating section 199A for pass-through owners with more than $500,000 in combined income.

The Roundtable’s Position

Congress should continue to support closely-held, entrepreneurial businesses that create jobs and spur growth, and reject tax changes that discriminate against pass-through entities.

- Our pass-through regime is a competitive strength of the U.S. tax system. Most countries rely 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 and its investors.
- Small and closely-held businesses drive job growth and entrepreneurial activity in the United States. Entity choice is a differentiator that contributes to our entrepreneurial culture.
- Half of the 4 million partnerships in the U.S. are real estate partnerships, and real estate activity constitutes a large share of pass-through business activity.
- Listed REITs allow small investors to invest in diversified, commercial real estate using the same single tax system available to partners and partnerships.
- Partnerships, Limited Liability Companies (LLCs), S corps, and REITs are ideal for real estate because they give investors flexibility in how they structure the risks and rewards of these capital-intensive and relatively illiquid businesses.
- Any new tax legislation should avoid the unintended consequences and potential harm caused by the stacking of tax increases on pass-through entities.
- Section 199A is appropriately targeted at businesses that hire workers and invest in capital equipment and property.
- Section 199A also helps preserve tax fairness vis-à-vis large corporations.

Tax Policy

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 (section 1031). In 2017, Congress narrowed section 1031 by disallowing its use for personal property (art, collectibles, etc.).

President Biden's budget would restrict gain deferred through like-kind exchanges to no more than $500K per year ($1M/couple).

The Roundtable's Position

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

- 15-20% of commercial transactions involve a like-kind exchange. Exchanges get languishing properties into the hands of new owners who improve them and put them to their best use.
- Like-kind exchanges helped stabilize property markets at the height of the COVID-19 lockdown. Exchanges are even more important during periods of market stress when external financing is harder to obtain. Section 1031 is facilitating a smoother transition as real estate assets are re-purposed in the post-COVID economy.
- Like-kind exchanges allow businesses to grow organically with less unsustainable debt, creating a ladder of economic opportunity for minority-, veteran-, and women-owned businesses and cash-poor entrepreneurs that lack access to traditional 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.
- Roughly 40% of like-kind exchanges involve rental housing. Section 1031 helps fill gaps in the financing of affordable housing. Unlike the low-income housing tax credit, developers can use section 1031 to finance land acquisition costs for new affordable housing projects.
- Exchanges help low-income, hard-hit, and distressed communities where outside sources of capital are less available. Section 1031 also supports public services (police, education) by boosting transfer/recording/property taxes (nearly 3/4 of all local tax revenue).
- Land conservation organizations rely on exchanges to preserve open spaces for public use or environmental protection.
- Section 1031 is consistent with corporate and partnership tax rules that defer gains when the proceeds are retained and reinvested in businesses (sections 721, 731, 351, and 368).

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 increase the tax burden on carried interest since 2007. In 2017, Congress created a three-year holding period requirement for the reduced long-term capital gains rate.

Legislation introduced by Rep. Bill Pascrell (D-NJ), the *Ending Wall Street Tax Giveaway Act* (H.R. 2686), would convert virtually all real estate-related carried interest income to ordinary income subject to the top tax rates and self-employment taxes.

In 2021, House Ways and Means Democrats passed legislation to extend the carried interest holding period from 3 to 5 years, and other changes, while adding a new exception for a real property trade or business (e.g., real estate). The proposals were not enacted.

Senate Finance Chairman Ron Wyden (D-OR) has proposed treating 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.

The Roundtable's Position

- The tax code should reward risk-taking; the capital gains rate should apply to more than just invested cash.
- Carried interest changes would harm small businesses, stifle entrepreneurs and sweat equity, and threaten future improvements and infrastructure in neglected areas. They would increase the cost of building or improving infrastructure, workforce housing, and assisted living, and deter risky projects, such as sites with potential environmental contamination.
- Carried interest is not compensation for services. General partners receive fees for routine services (leasing, property management). Those fees are taxed at ordinary tax rates.
- Carried interest is granted for the value the general partner adds 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 (funding pre-development costs, guaranteeing construction budgets, potential litigation).
- Carried interest proposals apply retroactively to prior transactions and partnership agreements executed years earlier. The agreements were based on tax law as it existed at the time. By changing the results years later, they would undermine the predictability of the tax system and discourage long-term, patient investment.

Tax Policy

Opportunity Zones

Issue

Created in 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 needed, OZs help stimulate jobs and growth in low-income communities.

The three main OZ tax benefits are a deferral of prior capital gain rolled into an OZ fund, an increase (partial "step-up") in the basis of the prior investment after a 5 or 7-year holding period, and the exclusion of gain on the OZ investment 10 years.

The final OZ regulations were issued four months before the COVID lockdown. The tax benefits are gradually phasing down (the deferral of prior gain ends in 2026) and the partial basis step-up has expired for new OZ fund contributions.

Bipartisan House legislation (Reps. Mike Kelly, R-PA and Dan Kildee, D-MI; H.R. 5761) would extend OZ deadlines for two years, allow helpful "fund of funds" OZ tax structures, sunset certain high-income OZ census tracts, and create new OZ information reporting and transparency rules.

The Roundtable's Position

- In their short tenure, OZs have created jobs and spurred billions of dollars in new investment in economically struggling communities across the country.
- Opportunity Funds finance affordable, workforce, and senior housing; grocery-anchored retail centers; and commercial buildings that create spaces for new businesses and jobs.
- In 2020, the White House 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%.
- 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 pass H.R. 5761. Extending the deadlines would ensure that OZs continue to act as a catalyst for economic development in struggling communities.
- 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.

Business Interest Deductibility

Issue

The 2017 tax bill included strict new limits on the deductibility of business interest but also included a key provision that allows commercial real estate (a real property trade or business) to opt out of the interest limitation.

The original House Republican tax plan—the House blueprint for tax reform—would have eliminated the deductibility of all business interest (including commercial real estate debt) while replacing depreciation rules with the immediate expensing of all future capital investment, including real property.

The final legislation included a revised section 163(j) in which the deductibility of business interest is generally limited to 30% of the taxpayer's EBITDA (earnings before interest, tax, depreciation, and amortization). It also included 100% expensing of equipment and machinery (not real estate) for 5 years, phasing down thereafter. The 30% interest limit does not apply to an electing real estate business. However, an electing real estate business is required to use the alternative depreciation system, which includes slightly longer cost recovery periods for real property and cannot immediately expense leasehold and other interior improvements.

Since 2022, the general 30% business interest limitation has applied a less favorable rule that uses the taxpayer's EBIT (earnings before interest and tax) rather than EBITDA as the base for measuring the amount of deductible interest. Tax legislation passed by the House in early 2024 and supported by The Roundtable, the Tax Relief for American Families and Workers Act (H.R. 7024) would extend the EBITDA rule, which was in effect from 2018-2021, is one of the items at the center of current tax bill negotiations.

The Roundtable's Position

- Debt is a fundamental part of a real estate entity's capital structure and, in addition to property acquisition costs, is used to finance day-to-day operations and business activities like meeting payroll, buying raw materials, making capital expenditures, and building new facilities.
- New restrictions on interest deductibility would cause enormous damage to U.S. commercial real estate by dragging down property values and discouraging new investment. Fewer loans could be refinanced, fewer projects could be developed, and fewer jobs would be created.
- The ability to finance productive investment and entrepreneurial activity with borrowed capital has driven jobs and growth in the United States for generations. America's capital markets are the deepest in the world and provide our economy with a valuable competitive advantage.

Tax Policy

Business Interest Deductibility

- Business interest expense is appropriately deducted under the basic principle that interest is an ordinary and necessary business expense. Interest income is taxable to the recipient.
- Commercial banks are the dominant source of financing for commercial real estate investment. Like other entrepreneurs, small and medium-sized real estate developers and investors lack access to equity markets and rely on traditional lending to grow and expand.

Addressing the *Perfect Storm* of Pro-cyclical Regulatory Proposals and the Wave of Maturing CRE Debt

Issue

There is growing concern about the potential for a *perfect storm* of regulations that could stall credit markets and impair capital formation—particularly for the $5.67 trillion commercial and multifamily debt market. While well-intentioned, we are concerned that the proposals—particularly the Basel III *Endgame*—could increase the cost of credit, diminish lending capacity, and undermine the essential role banks play in lending and financial intermediation for real estate. These proposed regulations come at a significant economic cost without clear benefits to the resiliency of the financial system. In addition to the proposed capital increases for banks, the Securities and Exchange Commission (SEC) has a number of proposed rulemaking measures that could have a chilling effect on real estate capital markets that could further impair liquidity and be a "death by a thousand cuts" for commercial real estate capital markets. It is important for policymakers to be mindful of how all these regulations interact.

There are $2.75 trillion of commercial real estate loans maturing in the next four years. The bulk of these loans were financed when base rates were near zero. They now need to be refinanced in an environment where rates are much higher, values are much lower, and in illiquid markets. For over a decade, with interest rates close to or at zero, loans were conservatively underwritten, with strong debt service coverage and low loan values. As the Fed has increased rates to fight inflation, we are now in an entirely different environment. Liquidity has contracted, and values have declined. Many of these loans will require additional equity, and borrowers will need time to restructure this debt. Capital formation is vital when credit markets tighten to help restructure maturing debt and fill the equity gap.

The Roundtable's Position

- The $20.7 trillion commercial (CRE) and multifamily (MF) commercial real estate market is financed with $5.67 trillion of debt1, 50.3% of which is provided by commercial banks. Of that outstanding debt, some $2.7 trillion of CRE and MF debt is maturing over the next four years. Smaller banks hold approximately $2.3 trillion in commercial real estate debt.[2]

[1] Federal Reserve, Trepp.
[2] Trepp data cited in the *Wall Street Journal*

Capital and Credit

Addressing the *Perfect Storm* of Pro-cyclical Regulatory Proposals and the Wave of Maturing CRE Debt

- As requested in The Real Estate Roundtable's March 17, 2023[3] letter, the June 30, 2023, *Policy Statement on Prudent Commercial Real Estate Loan Accommodations and Workouts* has reestablished a program similar to prior programs that **calls for** "financial institutions to work prudently and constructively with creditworthy borrowers during times of financial stress."
- By renewing the flexibility for banks to work constructively with their borrowers during times of economic stress, this measure has led to billions of dollars of loan restructurings.
- While this policy statement is helpful, additional steps are called for to help restructure and transition the ownership and financing of commercial real estate from a period of low rates and robust markets to a time of higher rates, declining credit capacity, and uncertain economic growth. Additional capital is an essential element to this restructuring, and enacting policies that will encourage robust capital formation is imperative.
- In a January 12 comment letter, The Roundtable raised concerns about the proposed Basel III Endgame measure. The potential significant increase in capital requirements for large banks' capital market activities due to the proposal could materially reduce the depth of banks' products and services offerings to the real estate sector, which will in turn lead to increased cost of raising capital and hedging risk for the industry. As a result, we anticipate that the industry could encounter difficulties in their access to liquidity and affordable funding to fuel growth and create jobs.
- The largest U.S. banks' capital and liquidity levels have grown dramatically since the original Basel III standards were implemented in 2013 in response to the 2008 Global Financial Crisis. Since 2009, Tier 1 capital has increased by 56 percent and Common Equity Tier 1 capital has tripled. Today, as the Federal Reserve recently observed, the U.S. "banking system is sound and resilient, with strong capital and liquidity."[4]
- While well-intentioned, we are concerned that the proposals could increase the cost of credit, diminish lending capacity, and undermine the essential role banks play in lending and financial intermediation for real estate. The proposed increases in capital requirements come at a significant economic cost without clear benefits to the resiliency of the financial system.

[3] Roundtable Urges Federal Bank Regulators to Reestablish CRE Troubled Debt Restructuring Program, March 17, 2023, https://www.rer.org/policy-issues/policy-comment-letters/detail/roundtable-urges-federal-bank-regulators-to-reestablish-cre-troubled-debt-restructuring-program
[4] [1] https://www.federalreserve.gov/publications/files/svb-review-20230428.pdf

Addressing the *Perfect Storm* of Pro-cyclical Regulatory Proposals and the Wave of Maturing CRE Debt

- In addition to the proposed capital increases for banks, the Securities and Exchange Commission (SEC) has a number of proposed rulemaking measures that could have a chilling effect on real estate capital markets that could further impair liquidity and be a “death by a thousand cuts” for commercial real estate. Capital formation is vital when credit markets tighten to restructure maturing debt.
- Policymakers should consider additional measures to restore liquidity including the revival of the Term Asset Backed Securities Loan Facility (TALF) for Legacy CMBS.

Commercial Insurance Coverage in an Evolving Threat Environment

Issue

The proliferation of threats from natural catastrophes has raised concerns about commercial insurance coverage for commercial real estate. As economic losses caused by disasters increase, changing exposures around the world must be addressed in order to effectively manage natural catastrophe risk. These concerns have highlighted the lack of—and need for—insurance capacity and various lines of commercial insurance. Expanding coverage gaps and increased costs present challenges for businesses across many industries, including real estate. A lack of adequate coverage will lead to economic uncertainty, harm stakeholders, and undermine the growth of communities.

Risks from natural disasters like floods, hurricanes, wildfires, hail, tornadoes, and drought cost the U.S. billions of dollars each year. If policyholders are able to find coverage for these various lines, the pricing has increased dramatically, raising economic concerns.

Without adequate coverage, the vast majority of these losses from natural catastrophes are likely to be absorbed by policyholders. These widening coverage gaps and price hikes raise serious economic concerns about protection gaps, coverage capacity, and increased costs for natural catastrophes and business interruption losses. The budget debate in Congress has raised concerns about the future of the National Flood Insurance Program, which is subject to temporary funding extensions and now must be reauthorized by September 30, 2024.

It is important to find solutions to fill these commercial insurance gaps across changing threat patterns. It is important to find a solution—either market-based or with the partnership of the federal government—that will provide the economy with the coverage it needs to address catastrophic events.

The Roundtable, along with its industry partners, continues to work constructively with policymakers and stakeholders to enact a long-term reauthorization of an **improved National Flood Insurance Program (NFIP)**.

A long-term reauthorization of the **National Flood Insurance Program (NFIP)** is essential for residential markets, overall natural catastrophe insurance market capacity, and the broader economy. The NFIP's commercial property flood insurance limits are low—$500,000 per building and $500,000 for its contents – so it is important to exempt larger commercial loans from the mandatory NFIP purchase requirements.

Capital and Credit

Commercial Insurance Coverage in an Evolving Threat Environment

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, 2024.

The Roundtable's Position

- 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.

Commercial Insurance Coverage in an Evolving Threat Environment

- 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 of an improved NFIP that helps 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.
- Going forward, it is important to protect American jobs and to ensure a sustainable and speedy economic recovery from future natural catastrophe events and government-ordered shutdowns. If not remedied, these insurance gaps could hinder economic growth.
- Following a March 12 hearing in the Senate Banking Committee, a bipartisan and bicameral reform and reauthorization bill—the National Flood Insurance Program Reauthorization and Reform Act of 2023 (H.R.4349 – S. 2142) —is currently under consideration in the Senate Banking Committee.

Beneficial Ownership & Corporate Transparency Act

Issue

Under the Corporate Transparency Act (CTA), many U.S. businesses are now required to disclose information on their "beneficial owners" under regulations issued (and to be issued) by the Treasury Department's Financial Crimes Enforcement Network (FinCEN). This disclosure obligation began on January 1, 2024. The stated goal of the CTA is to prevent and combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activity by requiring companies to disclose beneficial ownership information, or BOI, to FinCEN, a bureau of the U.S. Department of the Treasury.

The Rule imposes heavier compliance burdens on real estate businesses with numerous legal entities that own and operate real property across all asset classes. While the CTA and its implementing regulations are not specifically targeted to real estate businesses, it will have a direct impact on the industry. As discussed below, certain types of entities will be exempt from the reporting requirements; however, these exemptions will not apply to many typical real estate limited liability companies and partnerships formed to own and operate commercial properties.

The CTA requires reporting companies to supply three categories of information: information about the entity, BOI, and information about the company applicant. Each reporting company will have to provide information on its "beneficial owners" as well as the "company applicants" involved in forming the entity. A beneficial owner refers to an individual who owns at least 25% of an entity or indirectly exercises "substantial control" over it.

The Roundtable's Position

- Despite legislative efforts to secure a delay in the implementation of the effective date of the *Corporate Transparency Act's* (CTA) beneficial ownership reporting requirements, the law went into effect on Jan. 1, 2024.
- On March 1, 2024, a federal judge ruled that the Corporate Transparency Act is unconstitutional, marking a milestone in the 16-month ongoing legal battle led by a coalition of business groups, including the Roundtable. Importantly, according to a statement from FinCEN, the decision is limited at the moment to the plaintiffs—members of the National Small Business Association, a national association with 65,000 members. Given the narrow exemptions for NSBA members, unless the Treasury Department suspends enforcement of CTA for all businesses that are obligated to file, CTA beneficial ownership reports will still need to be filed. For now, FinCEN urges small business owners to continue to review the ruling with counsel to assess its implications. In the meantime, the Roundtable continues to seek delay and repeal of the law.

Beneficial Ownership & Corporate Transparency Act

- There is significant concern about the CTA's far-reaching scope and its **impact on many commercial residential real estate businesses** that use the LLC structure for conducting business. Our recent letter in support of a legislative delay states that Chairman McHenry's bill "offers a commonsense solution to this pending regulatory trainwreck."
- The CTA amended the *Bank Secrecy Act* to require corporations, limited liability companies, and similar entities to report **certain information about "beneficial owners**" who own at least 25% of an entity or indirectly exercise "substantial control" over it.
- The CTA authorizes the Treasury's Financial Crimes Enforcement Network (FinCEN) to collect and disclose beneficial ownership information to authorized government authorities and financial institutions, subject to effective safeguards and controls. The statute requires the submission of regular reports to the federal government that include **a litany of sensitive personal identifiers of the owners, senior employees, and/or advisors of covered entities**.
- 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."
- 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 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.

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.

The Roundtable's Position

- 47 states and DC currently legalize marijuana to varying degrees. Yet use, possession, and sale remain 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.

Restrictions on Foreign Investment in U.S. Real Estate

Issue

Foreign investment is a major source of capital for U.S. commercial real estate, leading to job creation and economic growth for communities throughout our nation. A number of policy measures at the national and state level seek to restrict foreign investment in U.S. real estate. A number are already in effect. Most of these measures are intended to protect the homeland and ensure that such investments may prevent a nefarious state actor from adversely impacting the nation's economic, military, or civil interests.

At the **state level,** the Florida legislature enacted Senate Bill 264 (SB 264) in 2023. SB 264 aims to limit and regulate the sale and purchase of certain Florida real property by "Foreign Principals" from "Foreign Countries of Concern." Twenty states have enacted restrictions on foreign investors in real estate and agricultural land. Eight states are considering similar measures. More are looking at the issue. So, the state-level restrictions have national implications and seem to fly in the face of the commerce clause of the Constitution in that they interfere with the free flow of interstate and foreign commerce.

While The Roundtable supports efforts to protect the nation's economic, military, or civil security as well as the integrity of commercial real estate investments, we have concerns about rules that may hinder foreign investment in U.S. real estate by legitimate enterprises and capital formation by law-abiding entities.

The Roundtable's Position

- The Roundtable's Sept. 5, 2023, comment letter encourages state regulators to ensure that Senate Bill 264 does not deter investment into real estate in the state or undermine the economic benefits of this important industry. It also raises concerns about the technical aspects of SB 264 that could have unintended and negative consequences for investment in Florida and therefore limit the freedom of Florida's future growth.
- The letter also cites the importance of foreign investment in U.S. real estate markets. In particular, many investment funds that are controlled or advised by regulated U.S. asset managers—including those that actively invest in Florida real estate—source investment capital in global capital markets.
- With approximately $1.5 trillion of U.S. commercial real estate debt coming due in the next three years, foreign equity investments in U.S. assets are often an important source of capital as commercial real estate owners seek to restructure, refinance, or sell their properties.

Restrictions on Foreign Investment in U.S. Real Estate

- Consistent with Roundtable requests, the Florida Department of Commerce recently proposed a positive clarification to SB 264 that responds to a Roundtable request urging the Florida Real Estate Commission to consider specific concerns before implementing the new state law, which could impair capital formation and hinder the important role that legitimate foreign investment plays in U.S. real estate, the broader economy and job growth.
- The proposed rule published on Sept. 21 addresses the implementation of Florida Senate Bill 264 (SB 264), Section 203, signed into law on May 8. The new law aims to limit and regulate the sale and purchase of certain Florida real property by "foreign principals" from "foreign countries of concern." The Florida Real Estate Commission will implement the new law. (SB 264 text).
- Section 203 of the bill prohibits investment in real property near military installations and critical infrastructure. Importantly, the *de minimis* exemption has been re-drafted, which (1) fixes earlier drafting errors to the Registered Investment Advisor exemption, and (2) introduces a new category of *de minimis* interests that categorically exempts passive indirect investment. (See highlighted areas in the Notice of Proposed Rule)
- The proposed rule clarification remains subject to change during a 21-day public comment period and may include a formal hearing.

EB-5 Visas – Foreign Investment In U.S. Projects

Issue

Congress passed a major overhaul of the EB-5 regional center investment visa program in March 2022. The EB-5 *Reform and Integrity Act (RIA)* reauthorizes regional centers through September 30, 2027. *RIA* represents the first major reforms to the program since it was enacted in the early 1990s. Reforms include:

- New definitions for Targeted Employment Areas (TEAs) to prioritize investments in rural and economically distressed "high unemployment" urban areas;
- Revised investment levels: $800,000 in TEAs and $1,050,000 in non-TEAs;
- Visa "set-asides" to prioritize investments in TEAs and infrastructure projects;
- New "integrity measures" to deter fraud and national security; and
- "Grandfathering" existing investors under prior program rules.

The U.S. Citizenship and Immigration Services (USCIS) is now responsible for developing rules and guidance that implement *RIA*. USCIS's actions must be consistent with congressional intent and follow required procedures under federal law that allow for stakeholder notice and comment—while also optimizing regional centers' potential to attract foreign investments that create American jobs on economic development in the U.S.

The Roundtable's Position

- USCIS rules have long stated that the time period to sustain EB-5 capital must be coupled with the time period for an investor's conditional residency. The agency cannot circumvent a necessary stakeholder comment period, required by the federal Administrative Procedure Act, by issuing an informal Q&A guidance document that "de-couples" the periods for conditional residency and capital sustainment—amounting to an "about face" on pre-existing and duly promulgated regulations.
- Aside from procedural infractions, de-coupling the capital sustainment period from the conditional residency period undermines *RIA's* substantive purposes. That approach raises the specter of fraud in low-quality projects; dampens job creation opportunities by only encouraging small, short-term projects of limited duration; and subverts a stalwart criteria that EB-5 capital must hold the potential for gains or losses under USCIS's long-established "at risk" investment rules.

EB-5 Visas – Foreign Investment In U.S. Projects

- Bureaucratic friction to certify TEA designations must be reduced. Investors, project developers, and regional centers would benefit from USCIS-endorsed mapping tools that allow stakeholders to easily identify if a project is located in a TEA, complemented by a more streamlined agency process to approve designations under *RIA's* objective statutory criteria.

Additional Resources

RER fact sheets and letters

- RER's fact sheet, *EB-5 Reform and Integrity Act of 2022* (April 11, 2022)
- Coalition letter to USCIS on sustainment period (Feb. 9, 2023)

SEC Proposed Rules: Safeguarding Advisory Client Assets

Issue

On February 15, 2023, the Securities and Exchange Commission (SEC) proposed changes to require SEC-registered investment advisers to put all their clients' assets, including all digital assets like Bitcoin, with "qualified custodians".

The proposal would also require a written agreement between custodians and advisers, expand the "surprise examination" requirements, and enhance recordkeeping rules. These rules were originally designed for digital assets. "Reasonable" safeguarding requirements is ambiguous as applied to real estate. The SEC's release indicates that deeds evidencing ownership of real estate can be held at a qualified custodian—this is not accurate. Deeds are recorded with a government authority. Land and buildings cannot be physically absconded. Lenders and other interested parties have an interest in ensuring no misappropriation of real estate.

The Roundtable's Position

- The Roundtable sees no policy reason to impose the proposed rule on real estate—real estate cannot readily be stolen. Lenders and others have an interest in ensuring no misappropriation of real estate. Title insurance protects real estate investors against covered title defects, such as a previous owner's debt, liens, and other claims of ownership. It's an insurance policy that protects against past problems, whereas other insurances usually deal with future risks. Titles are recorded in the name of the acquiring entity by a government entity.
- The SEC's release indicates that deeds evidencing ownership of real estate can be held at a qualified custodian—this is not accurate. Deeds are recorded by a government authority. Conditions to the exemption for real assets are problematic. Auditor verification of transactions is costly and not negotiated for by fund investors.
- "Reasonable" safeguarding requirements is ambiguous as applied to real estate. Different jurisdictions present even more challenges. Different laws for title exist between not only states but also countries. The rule applies to registered investment advisors regardless of where the asset is located.
- For these reasons, we believe that the SEC's policy reasons for imposing the rule on real estate seem irrelevant. The Roundtable has submitted a comment letter to SEC and met with senior staff from the investment management division.

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

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.

The Roundtable's Position

- 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 (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:
    - 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.

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

  - 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 exceed 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[5] that are now being offered to investors.
- We are working on this issue with a number of other groups and submitted a comment letter raising concerns about the proposal.

[5] 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).

Return to the Workplace

Issue

During the public health emergency created by the rapid spread of the COVID-19 virus, governmental authorities ordered widespread closures of places where people gather, including office buildings.

These shutdowns were appropriate at the time, and the commercial real estate industry worked diligently to create safe work environments that would accelerate the reopening of economic activity.

In his State of the Union speech in February 2022, President Biden stated:

- It's time for Americans to get back to work and fill our great downtowns again with people. People working from home can feel safe and begin to return to their offices. We're doing that here in the federal government. The vast majority of federal workers will once again work in person.

Unfortunately, agency actions did not immediately live up to the President's words. Federal agencies continued to promote remote working arrangements as a recruitment, retention, and cost-saving tool.

In February 2023, the House of Representatives passed the SHOW Up Act (H.R. 139) directing federal agencies to reinstate their pre-pandemic telework policies and ensuring that any future remote working plans receive careful and deliberate consideration.

In April 2023, the White House Office of Management and Budget informed federal agencies that they have 30 days to develop plans to "substantially increase" their employees' in-person work at headquarters. In the same month, the White House Office of Personnel Management announced in a government-wide memo that it was ending its "maximum telework" directive for federal agencies, which it adopted during the pandemic.

The guidance is an important step forward supported by The Real Estate Roundtable. Federal agencies must follow through, in good faith, on the White House directive.

The Roundtable's Position

- The federal government employs over 1.3 million civilians in 2,200 communities across the country and is a market leader that influences leasing costs and property values. Actions it takes as a tenant have profound impacts on local markets and associated property tax revenue, surrounding small businesses and their workers, and more.

Return to the Workplace

- Federal agencies' actions to promote permanent remote working are out of step with the direction of private sector employers, who are increasingly recognizing the importance of bringing employees back to the workplace.
- Instead of aggressively promoting work-from-home arrangements for federal workers, the federal government should help facilitate a smooth, market-based transition to the new era.
- The work-from-home trend is increasing the negative pressure on commercial real estate property values and therefore reducing local tax revenues. Between 2021 and 2022, the decline in office building property assessments reduced property tax revenue in Washington, DC, by $140 million. The City of San Francisco forecasted that remote work would reduce office-related property tax revenue by more than $100 million in 2023. A report by the New York City Comptroller in December 2023 concluded that remote work could contribute to a potential decline in property tax revenue as great as $2.1 billion over the next three years.
- Restaurants, small businesses, and their employees are another casualty of policies that discourage a return to the workplace. Workers are spending less time and money in central business districts, with devastating consequences for the businesses—coffee shops, gyms, barber shops, restaurants, etc.—that rely on their patronage.
- Leading academic research has identified a dozen cities where the reduction in local spending as a result of remote work exceeds $2,000 annually per teleworking employee.
- Research released by the Labor Department found that "the increase in remote work had significant effects on local employment…[s]pecifically, a 10% decrease in foot traffic in a Census tract led to a 2.8% decline in employment for accommodation and food services and a 2 percent decline in retail trade employment."
- Remote working threatens the viability of public transit systems. Nationwide, according to the American Public Transportation Association, ridership on commuter rail remains substantially below pre-pandemic levels (74% of pre-pandemic levels in large urban areas, as of March 2024).

Housing, Infrastructure, and Cities

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 budget and legislation passed by the House Ways and Means Committee in the first year of the Biden administration would make major new investments ($29-32 billion) in expanding and improving LIHTC.

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.

The *Tax Relief for American Families and Workers Act* (H.R. 7024), passed by the House in early 2024 and supported by The Roundtable, would expand LIHTC. The bill would temporarily increase credit allocations to States and lower the amount of private activity bond financing that an affordable housing project must receive in order to receive credits outside of the capped state allocation process.

The Roundtable's Position

- 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

- 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.

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.

The Roundtable's Position

- 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.

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 federal agencies.

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

The Roundtable's Position

- **Investments in infrastructure make our local communities safe and 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

- **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 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.

The Bipartisan "Physical" Infrastructure Law

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.

Corporate Climate Risk Disclosures

Issue

A wave of regulations in the U.S. and abroad are requiring companies to publicly disclose climate change impacts on their finances, operations, and assets.

- **Federal Rules:** The U.S. Securities and Exchange Commission ("SEC") released final rules on March 6, 2024, for registered companies to disclose "material" climate-related financial risks. The SEC's rules are the subject of multiple lawsuits now consolidated in federal court. If the SEC's rules take effect and are not delayed, the largest registrants (in terms of "public float") must include certain climate-related disclosures starting with annual Form 10-Ks filed in March 2026. Additional disclosures ramp-up over time and phase-in to reach smaller registered companies. Key disclosures include:

  - Form 10-K's audited financial statement must set out expenses, losses, and capitalized costs incurred in the prior fiscal year to address extreme weather and natural conditions related to climate change—where "aggregated amounts" have a 1% or greater financial impact.
  - Scope 1 and 2 GHG emissions assured by a third-party "attestation report." The SEC rules do ***not*** require registrants to report Scope 3 emissions from sources in a company's supply chain.
  - Any voluntary climate target or goal established by the registrant, even if it includes Scope 3 emissions.
  - Expenditures from "physical risks" to buildings such as equipment replaced due to a storm or insurance coverage affected by rising sea levels.
  - Expenditures from "transition risks" to address adaptation to a warming planet such as cap ex plans to install more energy efficient equipment, purchases of renewable energy certificates (RECs), or fines paid to comply with local climate laws.

- **State Rules:** California enacted S.B. 253 and S.B. 261 in 2023. These laws require companies doing business in the state to report on global Scope 1, 2, and 3 emissions. Rules are in development by the California Air Resources Board (CARB) to implement these laws. Their legal status is uncertain because they are challenged in court. Nonetheless, other states are following California's lead and considering similar laws (e.g., Senate Bill 897A pending in New York).

Corporate Climate Risk Disclosures

- **International Rules:** The European Union's Corporate Reporting Sustainability Directive (CRSD) applies to U.S. companies with EU subsidiaries, and U.S. companies with listed securities on EU exchanges. The European Parliament has delayed CRSD implementation by two years (until June 2026) to give companies more time to prepare. CRSD's reporting topics are much broader than those covered by the SEC and California laws. They go beyond GHG emissions and climate risks to address biodiversity and a range of other environmental, social, and governance topics.

The Roundtable's Position

- Real estate companies do not own or control sources in their supply chains. Thus, they should not be required to publicly report Scope 3 emissions.
- For example, real estate owners and developers do not control operations in tenant spaces. Nor do they control manufacturing processes for construction materials and other goods used in buildings. Accordingly, owners and developers should be under no mandate to quantify and report Scope 3 tenant-based emissions, or embodied emissions that occur in factories during product manufacturing.
- Policymakers can encourage voluntary reporting by helping building owners and developers capture valid and reliable data from Scope 3 sources. For example, governments should develop policies for utilities to provide building owners with anonymized, aggregated data from tenants who pay leased space energy bills directly to the utility. Similarly, government agencies should create a uniform system of "product declarations" for manufacturers to disclose voluntarily embodied carbon in materials purchased by developers and owners.
- Governments and NGOs should strive for consistent climate reporting rules across their respective frameworks. For example, disclosures that satisfy any federal SEC disclosures that take effect should be deemed compliant by states and cities that may develop their own similar GHG reporting laws.
- Reporting cycles should be consistent across varying disclosure regimes, based on when companies collect and verify valid climate-related data within a fiscal year. No framework should require companies to issue a report based largely on estimates, and then another report based on collected and verified data, within the same fiscal year.

Additional Resources

RER fact sheets

- The SEC's Proposed Rule on Climate-Related Disclosures for Investors (April 2022)
- California's Climate Disclosure Package: Summary of SB 253 and SB 261 (Sept. 2023)

Energy and Climate

Corporate Climate Risk Disclosures

RER comment letters

- Comments to SEC on proposed climate risk disclosure rule (June 2022)
- Real estate coalition "joint trades" letter to SEC on climate disclosure (June 2022)
- Initial comments to SEC on climate reporting (June 2021)

Energy and Climate

Clean Energy Tax Incentives

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 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, storage, grid interconnection, and other clean power technologies sited at buildings (Section 48);
- A credit to incentivize EV charging stations (Section 30C); and
- A credit to incentivize energy-efficient new residential construction and major rehabs, including multifamily (Section 45L).

The Real Estate Roundtable (RER) has encouraged Congress for 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.

The Roundtable's Position

- Davis-Bacon prevailing wage and registered apprenticeship (PW/RA) requirements are a major barrier for real estate companies to access the IRA's clean energy "bonus" tax credits. These labor standards hinder the deployment of energy-efficient and renewable energy construction in buildings.
- If Congress does not eliminate PW/RA barriers, Treasury/IRS should at least enact rules that streamline paperwork and compliance obligations. Building owners are not the "direct" employers of laborers and mechanics on clean energy building projects. They should be able to rely on certifications supplied by contractors who hire these workers, stating that all PW/RA requirements are met.
- The IRA's best opportunities for clean energy deployment are probably the Section 48 investment tax credit (ITC) for solar, wind, and associated storage projects. If those projects generate under 1 MW of electricity, they qualify for a 30% tax credit—and do not have to comply with PW/RA requirements.
- The ITC already covers geothermal and groundwater heat pumps. It should be amended to also cover air source heat pumps and thereby support investments in building electrification.

Energy and Climate

Clean Energy Tax Incentives

- New IRA provisions allow taxpayers to "transfer" certain credits to unrelated third parties. This is an important policy change to enable more clean energy deployment by REITs and other real estate owners who generally have no appetite to benefit from tax incentives. Treasury/IRS should enact rules to optimize the credit "transfer" benefits for mixed partnerships with for-profit and not-for-profit owners.
- The 179D deduction is the tax code's primary incentive for energy efficiency projects in commercial buildings. The IRA made key improvements to 179D to make it more usable for existing building retrofits. However, more changes are necessary for 179D to have real impact in the marketplace. Congress should:
  - Convert 179D to a tax credit ***or*** eliminate 179D's current language that reduces property basis by the amount of the deduction. Either change will help make 179D a net benefit to lower tax liability, as opposed to simply providing a timing benefit akin to accelerated depreciation.
  - Allow private sector building owners to transfer or "allocate" 179D to architects or engineers—as the law currently allows for government, tribal, and non-profit building owners.

Additional Resources

RER fact sheets

- Clean Energy Tax Incentives Relevant to U.S. Real Estate (July 2023)
- Section 48 Investment Tax Credit: "Base" and "Bonus" Rate Amounts (May 2023)
- *Inflation Reduction Act* Revenue Provisions (Aug. 2022)

RER comment letters on Treasury/IRS notices and proposed rules:

- Prevailing Wage and Apprenticeship Requirements Under the *IRA* (Oct. 2023)
- Monetizing Energy Credits: Transfer and Direct Pay (July 2023)
- Clean Energy Tax Credits for Low-Income Communities, Housing (June 2023)
- Comments on Notice for Section 30C Tax Credits for EV Charging Stations (Dec. 2022)
- Comments on Notices for 179D Deduction for Energy Efficient Buildings, Section 48 Investment Tax Credit, and Section 45L Tax Credit for Residential Construction (Nov. 4, 2022)

Building Performance and Electrification Standards

Issue

No federal agency has authority from Congress to regulate private sector buildings through a national building performance standard ("BPS"). A number of cities and states (map) have filled this federal regulatory vacuum by enacting BPS mandates in their jurisdictions to lower energy use, reduce GHG emissions, or install heat pumps and other electrification equipment.

Failure to meet local BPS requirements can result in fines and penalties if buildings do not reach emissions or electrification "targets" by certain deadlines.

The Biden-Harris administration has enabled this state/city trend by launching a National BPS Coalition that convenes numerous localities committed to enacting BPS laws. The U.S. Department of Energy will make federal funds available to state agencies which can then dole out loans and grants to help owners that apply for financial support to comply with local BPS laws.

Although the federal government cannot ***mandate*** standards for building performance, the U.S. Environmental Protection Agency (EPA) and Department of Energy (DOE) are developing ***voluntary*** programs for buildings to reduce GHG emissions. EPA and DOE guidelines may establish more achievable and straightforward criteria for building owners compared to the complex patchwork of state/local BPS that have emerged.

Meanwhile, non-governmental organizations (NGOs) have developed their own BPS-type standards and climate accounting frameworks. Some have international influence across global markets.

Chief among these are the Science Based Targets Initiative (SBTi) and World Resources Institute's Greenhouse Gas (GHG) Protocol. Government bodies increasingly incorporate GHG Protocol and SBTi standards in their policies. Likewise, major real estate lending and equity institutions have also adopted these NGO frameworks to align with their ESG investment principles.

The Roundtable's Position

- Voluntary federal guidelines—such as DOE's proposed national definition for a Zero Emissions Building (ZEB), and EPA's "NextGen" label for low-carbon buildings—provide consistent and rational standards for local jurisdictions and NGOs that create BPS frameworks.
- Cities, states, and NGOs should rely on federal DOE and EPA policies before re-inventing the wheel with their own building emissions programs that impose unattainable standards and punitive fines.

Building Performance and Electrification Standards

- A "zero emissions" building is generally a long-term aspirational goal. DOE's ZEB attainment horizon must be grounded in a business case for life-cycle investments to install electrification equipment only when oil, gas, or steam-fired boilers become functionally obsolete. It is worse for the environment to rip out working systems that are still useful to heat and cool buildings for years to come.
- DOE's "zero" emissions ZEB definition should work in tandem with EPA's "low" carbon Next Gen certification. The agencies should recognize that satisfying NextGen criteria is a key intermediate signal to the marketplace that a building is on the path toward ZEB status.
- EPA's Portfolio Manager provides the industry-wide, standard tool to measure a building's energy use and carbon emissions. Any BPS program should rely on Portfolio Manager as the evolving tool to capture climate-related metrics for real estate.
- Some localities and NGOs want CRE owners to use 100% clean power at their buildings. This is impossible to achieve unless electric grids, district steam systems, and other offsite energy infrastructure are also 100% clean. Yet, a decarbonized grid remains a distant aspiration according to EPA's eGRID data.
- If policymakers want to drive in the direction of decarbonized buildings then they must also impose measures to decarbonize the power grid at the same pace. Until both buildings and the grid are fully decarbonized, policymakers must provide real estate portfolios with opportunities for off-site market-based clean power procurements—such as purchases of Renewable Energy Certificates (RECs)—to meet renewable energy goals.
- Market-based clean power purchases must be supported by guidelines to ensure high quality and avoid the appearance of "greenwashing." For example, the EPA's Green Power Partnership criteria for RECs and the Commodity Future Trading Commission's imminent guidelines for carbon offsets should become industry standards for BPS compliance.

Additional Resources

RER fact sheets and newsletter articles:

- Roundtable Weekly: "EPA Releases 'Next Gen' Criteria for Low-Carbon Buildings" (March 22, 2024)
- Roundtable Weekly: "Roundtable and Nareit Comment on National Definition for a Zero Emissions Building" (Feb. 2, 2024)
- Fact sheet: US-DOE's Zero Emissions Buildings ("ZEB") Definition (Jan. 18, 2024)
- Roundtable Weekly: "CRE Coalition Asks EPA to Help Standardize Conflicting State, Local Building Emission Laws" (Sept. 15, 2023)
- Fact sheet: Science-based Targets Initiative ("SBTi") (Aug. 9, 2023)

Energy and Climate

Building Performance and Electrification Standards

RER comment letters:

- RER and Nareit joint letter and technical comments on US-DOE's ZEB definition (Feb. 2024)
- Real estate coalition "joint trades" letter to EPA supporting Portfolio Manager (Sept. 2023)
- RER/Nareit supplemental letter to SBTi (Aug. 2023)
- RER/Nareit comments to SBTi on building sector guidance (July 2023)
- RER comments to EPA on proposed "Next Gen" criteria (March 2023)
- RER comments on EPA's use of *Inflation Reduction Act* funds (Jan. 2023)
- RER comments to Institute for Market Transformation (IMT) on "model" BPS law (April 2021)

Homeland Security

Cyber and Physical Threats

Issue

The rising incidence of violent crime, organized retail crime, civil unrest, cyber-attacks, artificial intelligence (AI) 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 challenges posed by these threats, the Russian invasion of Ukraine, conflict in the Middle East, and rising tensions in Asia have raised security concerns about the increased incidence of cyber-attacks from the Russian Federation, the People's Republic of China (PRC), Iran, and other state actors.

The Roundtable's Position

- Recent high-profile hacking attacks have brought to the fore the necessity of fortifying the nation's IT infrastructure against cyber-attacks. Additionally, there are growing concerns about AI having the potential to create new risks. Key concerns include the risk of cyberattacks exploiting AI vulnerabilities, leading to unauthorized access to facilities or sensitive data.
- On March 15, 2022, President Biden signed into law the Cyber Incident Reporting for Critical Infrastructure Act (CIRCA), 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."

Cyber and Physical Threats

- The CIRCIA Notice of Proposed Rulemaking (NRPM) was recently released, and the Roundtable plans to submit comments in conjunction with our colleagues on the Commercial Facilities Sector Coordinating Council to inform the direction and substance of the Final Rule.
- The NPRM contains proposed regulations for cyber incident and ransom payment reporting, as well as other aspects of the CIRCIA regulatory program. Implementation of CIRCIA will enable CISA to develop insights on the cyber threat landscape to drive cyber risk reduction across the nation and to provide early warning to entities who may be at risk of targeting. The comments CISA received through the Request for Information (RFI) and listening sessions over the past year helped shape this NPRM. In turn, getting robust input on the NPRM will support our ability to implement CIRCIA to drive national cyber risk reduction.
- In addition, the Securities and Exchange Commission (SEC) in July adopted rules requiring registrants to disclose material cybersecurity incidents they experience and to disclose on an annual basis material information regarding their cybersecurity risk management, strategy, and governance. The new rules require:
    - (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.

Homeland Security

Cyber and Physical Threats

- Through a Cybersecurity Information Sharing and Collaboration Agreement with DHS's 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.
- 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.