



The Real Estate
Roundtable

June 2022 Annual Meeting Policy Toolkit

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June 2022

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

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Taxing Unrealized Gains (“Billionaire Tax”)

Issue

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

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

Under the president’s proposal, “illiquid” taxpayers, defined as taxpayers whose tradable assets make up less than 20% of their wealth, could elect to pay the minimum tax only to their tradable assets, with a deferral charge of up to 10% when gains on non-tradable assets are eventually realized. Minimum tax payments would be treated as prepayment 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.

Talking Points

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

- At its core, the proposed tax on unrealized appreciation is a federal property tax that would apply year-in, year-out, regardless of whether one’s property (real estate, stock holdings, paintings, jewelry, etc.) is generating any actual income, earnings, or profits for the taxpayer.
- The tax would require the IRS to police households as they identify, tabulate, and value all of 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.



Taxing Unrealized Gains (“Billionaire Tax”)

Talking Points (Continued)

- History suggests the tax would eventually apply to everyone. In 1913, the federal income tax applied to 1/3 of one percent 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 (\$38B/year) is insufficient to make even a dent in the budget deficit (\$1.5T in 2022).
- Past attempts at wealth taxes in other countries have failed overwhelmingly because they were fraught with administrative problems, lacked public support, and had very little impact on income distribution. Of the 12 comprehensive wealth taxes that existed in the developed world in 1990, only three remain today.
- The tax will trigger wasteful disputes and litigation, detracting from productive economic activity. Annual valuation requirements will require costly appraisals. Valuation disagreements will be a constant source of audits, disagreements, and administrative appeals with tax collectors.
- The potential unintended and unknown consequences of taxing unrealized gains are immense. The longstanding principle that tax is deferred until a gain is realized encourages taxpayers to put capital to work on projects that won't pay off for many years. By taxing 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.
- Charities, educational endowments, and churches will suffer. The ability to contribute appreciated assets to public charities and other nonprofits without owing tax on the unrealized gain provides an important economic inducement for philanthropic giving. Taxing unrealized gains on an annual basis will eliminate this economic incentive.
- The proposed tax is quite possibly unconstitutional. Supreme Court jurisprudence has applied a realization requirement to determine whether gains or profits constitute income taxable under the 16th Amendment. Since the proposed tax applies to both realized and unrealized gains, it may go beyond the boundaries of Congress' taxing power.



Issue

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

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

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

Talking Points

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

- Maintaining a reduced tax rate on capital gain decreases the cost of capital, drives long-term investment, encourages productive entrepreneurial activity, draws investment from around the world, and increases U.S. workforce productivity and competitiveness.
- Policymakers should be taking steps to encourage and reward risk-taking and investment in communities where it is needed, not punishing it.
- Capital gains tax incentives are effective in mobilizing capital. Opportunity Zones, which offer the potential to exempt capital gains from tax altogether, facilitated \$75 billion in new investment in low-income communities in just their first two years after enactment.
- Our country's great cities are facing significant challenges. Many cities have an aging infrastructure that can only be fixed with a sustained infusion of capital investment. Public spending alone is not going to get us there. It is going to require partnering with the private sector and private capital. Raising taxes on capital income will make it harder to attract the private investment needed to rebuild our urban centers.



Talking Points (Continued)

- Risk capital differs in meaningful ways from wage compensation. The entrepreneur who foregoes a traditional job in favor of starting a business and building a capital asset forfeits many protections and benefits offered to employees, most importantly the certainty of a pre-negotiated salary. The capital gains preference partially compensates entrepreneurs for bearing risk and uncertainty, including the potential of a complete loss on the investment of their time and capital.
- Relative to our peers, the United States levies a heavy tax burden on capital income. According to the Tax Foundation, 30 of the 36 developed countries in the OECD have a lower maximum tax rate on individual capital gain than the United States.
- In the case of real estate, the reduced tax rate on capital gain partially offsets the higher risk associated with illiquid, capital-intensive projects. It also helps compensate for the economic effects of inflation.
- Unlike other tax policies, such as immediate expensing, the capital gains preference only rewards smart, productive investments that are economically profitable on their own, irrespective of the tax incentive.



Pass-Through Business Income

Issue

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

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

Talking Points

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

- Our pass-through regime is a competitive strength of the U.S. tax system. Most other developed countries are heavily reliant on inflexible corporate regimes that provide little ability for an entrepreneur to tailor the capital and ownership structure to meet the needs of the business.
- Small and closely-held businesses are the principal drivers of job growth and entrepreneurial activity in the United States. Entity choice is a differentiator that contributes to our entrepreneurial culture.
- Half of the country’s four million partnerships are real estate partnerships. Real estate investment, new construction and development, and rental businesses constitute a significant share of pass-through business activity.
- These partnerships include a wide variety of arrangements that range from two friends who purchase, improve, and lease a modest rental property to a large private real estate fund that raises capital from sophisticated institutional investors.
- Similarly, listed REITs provide the opportunity for small investors to invest in large-scale, diversified real estate operations using the same single tax system available to partners and partnerships.
- Pass-through entities such as partnerships, Limited Liability Corporations (LLCs), S corps, and REITs, are ideal for real estate investment because they give investors flexibility in how they structure the risks and rewards of the business.
- Any new tax legislation should avoid the unintended consequences and potential harm caused by the stacking of tax increases on pass-through entities which, when combined, would severely increase the tax burden on these job-creating businesses.

Pass-Through Business Income

Talking Points (Continued)

- Congress should preserve the 20% deduction for pass-through income (section 199A). The availability of the deduction is tied to hiring workers and investing in capital equipment and property.



Real Estate Like-Kind Exchanges

Issue

Since 1921, the tax code has allowed taxpayers to defer capital gain when exchanging real property used in a trade or business for property of a like-kind. The Tax Cuts and Jobs Act of 2017 narrowed like-kind exchanges (section 1031) by disallowing their use in the case of personal property (art, collectibles, etc.) As part of his *Build Back Better* agenda and his updated FY 2023 budget, President Biden has proposed restricting gain deferred through real estate like-kind exchanges to no more than \$500,000 per-year, or \$1 million in the case of a married couple. The president's proposal would be effective for exchanges completed in tax years beginning after 2022. The *Build Back Better Act* approved by the House does not include new restrictions on like-kind exchanges.

Talking Points

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

- Section 1031 is integral to the health of today's real estate marketplace: close to 20 percent of all commercial real estate transactions involve a like-kind exchange. Exchanges help get languishing properties into the hands of new owners who will invest in job-creating capital expenditures and improvements that put properties to their best and most productive uses.
- Exchanges helped stabilize property markets at the height of the COVID-19 lockdown and will facilitate a faster and smoother transition as many real estate assets are re-purposed in the post-COVID economy.
- Like-kind exchanges allow businesses to grow organically with less unsustainable debt by reinvesting gains on a tax-deferred basis in new and productive assets. In this way, like-kind exchanges create a ladder of economic opportunity for minority, veteran, and women-owned businesses and cash-poor entrepreneurs that may lack access to traditional sources of financing.
- Academic and outside research has found that exchanges spur capital expenditures, increase investment, create jobs for skilled tradesmen and others, reduce unnecessary economic risk, lower rents, and support property values.
- Roughly 40 percent of like-kind exchanges involve rental housing. Section 1031 is an important source of capital for affordable and workforce housing. Like-kind exchanges help fill gaps in the financing of affordable housing that are unmet by the low-income housing tax credit (LIHTC). In contrast to LIHTC, developers can use section 1031 to finance land acquisition costs for new affordable housing projects.
- Like-kind exchanges provide critical financing to support economic development and investment in low-income, hard-hit, and distressed communities where outside sources of capital are less available. In addition, like-kind exchanges support vital public services (i.e. police, education, etc.) by boosting transfer, recording, and property tax revenue. Property taxes contribute nearly 3/4 of all local tax revenue.
- Land conservation organizations rely on exchanges to preserve open spaces for public use or environmental protection.

Carried Interest

Issue

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

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

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

The version of the *Build Back Better Act* approved by the House Ways and Means Committee would have extended the current holding period required for carried interest to qualify for long-term capital gains treatment from 3 years to 5 years. However, the extension of the holding period would include an important new exception for a real property trade or business (e.g., real estate). Other aspects of the House proposal would indirectly extend the required holding period by not starting the clock until substantially all assets have been acquired by the partnership.

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

In the Senate, legislation proposed by Finance Committee Chairman Ron Wyden (D-OR) would treat carried interest as an interest-free loan from the limited partners to the general partner that is taxable upon grant, regardless of whether the partnership ever generates any profits. Key Senate centrist Joe Manchin (D-WV) expressed support for ending capital gains treatment for carried interest.

Talking Points

The tax code should continue to reward risk-taking, and Congress should reject tax changes that limit capital gains treatment to invested cash.

- Much of the real estate investment that takes place today uses the partnership choice of entity. Real estate partnerships represent 50% of the nearly 4 million partnerships in the United States and include over 8 million partners.
- Proposed carried interest changes would harm small businesses and partnerships, stifle entrepreneurial risk-taking and sweat equity, and threaten improvements and infrastructure in long-neglected neighborhoods most in need of investment.
- Carried interest is not compensation for services. General partners receive fees for routine services such as leasing and property management. Those fees are taxed at ordinary tax rates.



Carried Interest

Talking Points (Continued)

- Carried interest is granted for the value the general partner adds to the venture beyond routine services, such as business acumen, experience, and relationships. It is also recognition of the risks the general partner takes with respect to the general partnership's liabilities. These risks can include funding pre-development costs, guaranteeing construction budgets and financing, and exposure to potential litigation over countless possibilities.
- Some carried interest proposals would apply retroactively to prior transactions—effectively raising taxes on sales that have already occurred.
- Moreover, the legislation would capture and apply to partnership agreements executed years—often decades—earlier. These negotiated agreements between the partners were based on well-established tax law as it existed at the time. By changing the tax results years later, the bill would undermine the predictability of the tax system and discourage the long-term, patient investment that moves our economy forward.
- In short, these proposals would make it more expensive to build or improve real estate and infrastructure, including workforce housing, assisted living communities, and industrial properties, to name just a few. Some development simply won't happen, especially in long-neglected neighborhoods or on land with potential environmental contamination.



Affordable Housing Tax Incentives

Issue

The United States is facing a severe shortage of affordable housing. There are a number of complex factors contributing to the lack of sufficient housing supply, and many of these factors relate to policies at the state and local levels. However, one federal policy tool that has proven effective in stimulating new, affordable housing is the low-income housing tax credit (LIHTC). Since its inception in 1986, LIHTC has financed the development of nearly 3.5 million affordable rental homes that house over 8 million low-income households.

President Biden's *Build Back Better* agenda originally proposed dedicating \$32 billion to the expansion of LIHTC. The president's desired investment in additional LIHTC allocations represents a 30% increase over the current federal subsidy.

The *Build Back Better Act* approved by the House Ways and Means Committee would have provided \$29 billion over 10 years to expand LIHTC, including a 50% increase in the allocation of credits to states. As the cost of the overall bill came down during negotiations, the LIHTC expansion was scaled back from \$29 billion to \$12 billion before passing the full House of Representatives in 2021.

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

Talking Points

Congress should help expand and grow the supply of affordable and workforce housing by investing greater resources in time-tested tax incentives like the low-income housing tax credit.

- 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.
- 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 2 million affordable homes, support 3 million jobs, and generate \$119 billion in sustainable tax revenue.



Opportunity Zones

Issue

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

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

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

In addition, the tax benefits associated with OZ investments are gradually phasing down and a significant OZ tax incentive expired at the end of 2021. Investors no longer qualify for the 15% basis step-up that applies to prior gain if the investment is maintained for at least 7 years. Separately, the economic value of the temporary tax deferral that applies to gain rolled into an Opportunity Fund is gradually declining as 2026 draws near.

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

Talking Points

- In the short time since their enactment, OZs have created jobs and spurred billions of dollars in new investment in economically struggling communities across the country.
- Opportunity Funds have financed affordable, workforce, and senior housing, grocery-anchored retail centers, and office buildings that allow new and growing businesses to gain a presence and create jobs in long-neglected neighborhoods.
- Other examples of productive activities in OZs include the rehabilitation of dilapidated buildings into new hotels that boost local tax revenue and serve as a magnet for jobs, visitors, and economic activity in the surrounding area.



Talking Points (Continued)

- OZs have demonstrated extraordinary potential to improve communities. In 2020, the Council of Economic Advisors estimated that the Opportunity Funds had raised \$75 billion in private capital in the first two years following the incentives' enactment, including \$52 billion that otherwise would not have been raised. The council projected this capital could lift one million people out of poverty in OZs by 11 percent.
- Most recently, the GAO estimated that 6,000 Opportunity Funds with more than 18,000 partners or shareholders invested \$29 billion in OZs in 2019 alone.
- The decentralized design of OZs allows more investors and stakeholders to participate in the market and invest in qualifying projects that generate economic opportunity and improve the built environment in high-need communities.
- Congress should act quickly to extend expired OZ deadlines, as proposed in [S. 4065 / H.R. 7467](#). Extending the deadlines would ensure that OZs continue to act as a catalyst for economic development in struggling communities and allow the program to fulfill its original promise.
- Congress should also continue working on improvements to the OZ tax incentives, such as enhanced information reporting, data collection, and transparency, as well as lowering the substantial improvement threshold to cover a broad range of real estate rehabilitation and redevelopment projects.



Capital and Credit

Pandemic Risk

Issue

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

Talking Points

- The magnitude of the pandemic's impact on the financial condition and general well-being of the nation has exposed significant vulnerabilities in our country's economic preparedness for and resilience to systemic catastrophic events.
- This includes coverage gaps in insurance protection for losses from business interruption occurring arguably in the absence of "physical damage" to the business location.
- Most business interruption (BI) insurance policies fail to cover claims associated with pandemic risk-related mandatory government shutdowns.
- Due to the government-mandated shutdowns of non-essential businesses and related shelter-in-place directives as a result of the COVID-19 crisis, economic activity in the U.S. was severely disrupted to an unprecedented degree.
- It is important to protect American jobs and to ensure a sustainable and speedy economic recovery from current and future pandemics and government-ordered shutdowns. If not remedied, these insurance gaps could hinder economic growth. This is especially true in new leasing activity, retail, and hospitality sectors.
- The Roundtable is working with industry partners, stakeholders, and policymakers through the Business Continuity Coalition (BCC) to develop and enact an effective federal public-private backstop program for pandemic risk insurance. Similar to the Terrorism Risk Insurance Act (TRIA) enacted the year following the 9/11 attacks, this program would provide the economy with the coverage it needs to provide business continuity coverage in the face of pandemic risk.
- The BCC recommends that all of the impacted lines of insurance, including event cancellation insurance, need to be supported with both a "make-available" requirement and a robust federal backstop for private insurers making the insurance available.
- During at least a five-year economic recovery period (subject to reset if the pandemic recurs), the federal backstop should be provided without charge (as is the case with TRIA) to ensure affordability, maximum take-up, and economic resiliency.
- Such a program needs to be both for non-physical-damage business interruption (NDBI) and be provided on a parametric basis, which may be the only way to ensure widespread, rapid delivery of assistance to America's businesses in future pandemic crises. Liquidity to meet these rapid pay-outs should be guaranteed.

Talking Points (Continued)

- Insurers can be given an option to satisfy their availability duty by supporting a joint underwriting facility that would itself have a federal backstop. Maximum utilization of global reinsurance capacity and capital markets should also be encouraged. Long-term program continuity is paramount given the time horizon needed for financing this risk.
- A number of frameworks have been proposed—all of which envision programs where insurers offer pandemic coverage policies to businesses with the federal government bearing most or all of the coverage costs. Rep. Carolyn Maloney’s (D-NY) Pandemic Risk Insurance Act (HR. 5823) incorporates all of the BCC’s recommendations. Under the bill, the federal government would serve as a backstop in order to maintain market stability and to share the burden with the private industry. The new legislation will see the federal government share in the losses incurred by paying 95% of such insured losses, in excess of a deductible that policyholders cover themselves. Other proposals by Chubb, Zurich, and the American Property Casualty Insurance Association (APCIA) would require the government to take up to 100% of the risk.
- In July 2021, the Senate Banking Committee’s Subcommittee on Securities, Insurance, and Investment held a hearing entitled “Examining Frameworks to Address Future Pandemic Risk.” In testimony to the Subcommittee, the BCC urged Congress to move expeditiously to pass bipartisan legislation that creates a public-private insurance solution to share the financial risk of losses related to pandemics. This urgent task is an essential precondition to the prompt recovery of this nation’s economy, and going forward will help protect jobs and reduce economic damage from further pandemics.
- Senators Sinema (D-AZ) and Tillis (R-NC) have a bipartisan working group, and we expect to see a bill introduced in the Senate this year. The minority members of the House Financial Services Subcommittee on Housing, Community Development and Insurance held a Roundtable on the issue in February.

Capital and Credit

LIBOR Reform

Issue

The Federal Reserve, FDIC, and Office of the Comptroller of the Currency instructed banks to “completely end” the use of London Interbank Offer Rate (LIBOR) in new contracts by the end of 2021, in anticipation of the complete phase-out of the benchmark by June 30, 2023. To replace this reference rate, the Federal Reserve Bank of New York’s Alternative Reference Rates Committee (ARRC) is working to transition to use of the Secured Overnight Financing Rate (SOFR).

Talking Points

- Roundtable-supported legislation was enacted on March 15, 2022, as part of the Consolidated Appropriations Act of 2022. The law will protect trillions in “tough legacy” contracts that use LIBOR as a reference rate for financial transactions. The Adjustable Interest Rate (LIBOR) Act would establish a process at the federal level to add SOFR, or an appropriately adjusted form of SOFR, to certain legacy contracts that do not have sufficient fallback language. This legislation is intended to promote a smooth transition away from LIBOR by promoting legal certainty, consistency, and limiting legal disputes. The measure will provide borrowers, investors, and all of those in the financial space with certainty as to what happens when LIBOR is no longer published.
- LIBOR is used as a reference rate in over \$200 trillion of financial contracts, including some \$1.3 trillion of commercial real estate loans. According to the Fed-formed Alternative Reference Rates Committee (ARRC), whose task was to find a suitable U.S. currency-based replacement for LIBOR, nearly 20% of those contracts extend beyond 2021.
- Through The Roundtable’s LIBOR working group, we have constructively engaged with the U.S. Treasury and the IRS regarding clarification of any tax implications for implementing the new benchmark. On December 30, 2021, the IRS issued final regulations clarifying how parties can replace LIBOR as a reference rate in mortgages and other financial contracts without triggering negative tax consequences.
- As The Roundtable recommended, the Treasury’s final regulations give borrowers and lenders the flexibility they need to replace LIBOR with virtually any other index that reflects objective changes in the cost of borrowing money—such as a broad index of Treasury or corporate borrowing rates—in addition to a list of rates suggested by various regulators.
- REPAC’s LIBOR Working Group continues to work toward the implementation of an effective, new replacement benchmark that does not impair liquidity, needlessly increase borrowing costs, or cause market disruptions.

Capital and Credit

Corporate Transparency Act

Issue

The Corporate Transparency Act of 2020 (CTA) requires certain corporations and limited liability companies (LLCs) to disclose information about their beneficial owners to the Treasury Department's Financial Crimes Enforcement Network (FinCEN). The Roundtable and its coalition partners have provided input to FinCEN in response to its Advance Notice of Proposed Rulemaking (ANPRM). Additional legislation is being considered in the House Financial Services and Senate Banking Committees, known as the Kleptocrat Liability for Excessive Property Transactions and Ownership (KLEPTO) Act. The bill would arm law enforcement with the information required to track down kleptocrats' luxury assets in the U.S. financial system.

Talking Points

- On January 1, 2021, the U.S. Senate passed H.R. 6395, the National Defense Authorization Act of 2021 (NDAA) over the presidential veto. Division F of the NDAA incorporates the CTA.
- The CTA amended the Bank Secrecy Act (BSA) to require corporations, LLCs, and similar entities to report certain information about their beneficial owners (the individual natural persons who ultimately own or control the companies).
- Although the bill reflects Congress' 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.
- FinCEN is required to develop a confidential, secure, and non-public database to maintain the reported beneficial ownership information. This new reporting requirement aims to enhance the national security of the United States by making it more difficult for malign actors to exploit opaque legal structures to launder money, finance terrorism, proliferate weapons of mass destruction, traffic humans and drugs, and commit serious tax fraud and other crimes that harm the American people.
- The Real Estate Roundtable and three other national real estate organizations on May 5, 2021, submitted detailed comments to FinCEN on the development of a new federal registry that will contain beneficial ownership information.
- The Roundtable, the National Multifamily Housing Council (NMHC), National Apartment Association (NAA), and National Association of Home Builders (NAHB) submitted the comments in response to FinCEN's effort to gather public input on the reporting, maintenance, and disclosure of beneficial ownership information.
- The real estate coalition's extensive comments emphasize the "scope of the CTA is far-reaching and will impact many commercial residential real estate businesses who are frequent users of the LLC structure for conducting business. If not implemented with a clear set of rules and regulations, the CTA could result in an outcome of confusion, missteps, and ultimately fines on law-abiding businesses."

Corporate Transparency Act

Talking Points (Continued)

- FinCEN is required to develop a confidential, secure, and non-public database to maintain the reported beneficial ownership information. The coalition’s comments detail “concerns and recommendations for establishing regulations to implement reporting requirements—as well as provisions regarding FinCEN’s maintenance and disclosure of reported information effectively and fairly.”
- The coalition document addresses several specific implementation issues, including how small companies targeted by the CTA will face compliance burdens. The time-consuming and challenging process of gathering required information on all beneficial owners of a reporting company that may have been created years ago is also addressed.
- On February 4, 2022, a coalition of five real estate organizations, including The Roundtable, 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 policymakers in support of a balanced approach to the issue that would inhibit illicit money laundering activity without the imposition of additional and costly reporting requirements on non-bank businesses, especially those in the real estate industry.



KLEPTO ACT: Fact Sheet

Issue

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

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

Key Takeaways

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



SAFE Banking Act and CRBs

Issue

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

Talking Points

- 47 states and DC currently legalize marijuana to varying degrees. Yet use, possession, and sale remains illegal under federal law.
- Real estate owners, lessors, brokers, and financiers need certainty when they transact with legitimate CRBs.
- The bipartisan *Secure and Fair Enforcement (SAFE) Banking Act*, (H.R. 1996) would eliminate the need for CRBs to operate on a cash basis, bring them into the banking system, and allow them to obtain accounts and credit cards. Commercial property owners would get a safe harbor if they lease space to a CRB, and their mortgages could not be subject to corrective action by a bank.
- To date, the *SAFE Banking Act* has passed the U.S. House six times, most recently in February 2022 as an amendment to the *America COMPETES Act*, but it has yet to pass the Senate.



Capital and Credit

National Flood Insurance Program

Issue

The National Flood Insurance Program (NFIP) is currently operating under a continuing resolution. Since the end of FY 2017, over a dozen short-term NFIP reauthorizations have been enacted. As policymakers continue to debate potential changes and improvements to the program, their challenge is to find a balance between improving the financial solvency of the program, reducing taxpayer exposure, and addressing affordability concerns. Without congressional reauthorization, the program will sunset on September 20, 2022.

Talking Points

- Floods are the most common, costliest natural peril in the U.S. The NFIP was enacted in 1968 due to a lack of private insurance and increases in federal disaster aid. The Program is administered by the Federal Emergency Management Agency (FEMA) and is essential for homeowners, renters, and small businesses in affected areas.
- The level of flood damage from recent storms makes it clear that FEMA needs a holistic plan to prepare the nation for managing the cost of catastrophic flooding under the NFIP.
- Reauthorization of 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 5 million total properties, only 6.7% are commercial. Nearly 70% of NFIP is devoted to single-family homes and 20% for 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.
- 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.



National Flood Insurance Program

Talking Points (Continued)

- The Roundtable and its partner associations support a long-term reauthorization and improvements of the NFIP that help property owners and renters prepare for and recover from future flood losses. Given the low coverage amounts provided to commercial properties, it is important to permit larger commercial loans to be exempt from the mandatory NFIP purchase requirements.



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

Issue

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

Reauthorized EB-5 “Regional Center” Program

- 5-year extension through September 30, 2027.
- Reduces litigation risk from ~90,000 EB-5 investors who have seen no action by DHS on their petition since the regional center program expired on June 30, 2021.

Expanded Targeted Employment Area (TEA Designations)

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

Prioritizing Rural Projects

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

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

- Codified the 2019 USCIS regulation (“donut” approach in which a project must be within a census tract—or any “contiguous” census tracts that “touch” the project’s tract—where the average unemployment rate is 150% of the national average).
- DHS Secretary has the discretion to include a “directly adjacent” tract (to either the “anchor” tract or a “contiguous” tract) to satisfy the requisite 150% high unemployment criteria.
- Distressed Urban TEA designations last for 2 years. These can be reviewed if the qualifying census tract(s) continue to meet “high employment” criteria.
- If a project was in an Urban TEA but falls out of high unemployment status, an “original” investor does not have to increase investment amounts to the non-TEA upper level.
- Only DHS can approve an Urban TEA “high unemployment” designation—unless the Secretary designates such authority to another federal official. No state or local official can approve.

Defining “Infrastructure Projects”

- A “capital investment project” administered by a “government entity”—that serves as the “job-creating entity” funded by EB-5 investors, and that contracts with a regional center—qualifies as an “Infrastructure Project.”
- Must be a “public works project.” No particular type of infrastructure “asset class” specified.

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

Defining “Infrastructure Projects” (Continued)

- Only DHS can designate an Infrastructure Project—unless the Secretary designates such authority to another federal official. No state or local official can approve the designation.

Qualified Investment Amounts & Adjustments

- 800,000 in TEAs
- \$1,050,000 in non-TEAs
- On January 1, 2027, and every 5 years thereafter, investment amounts adjust for inflation.
 - Non-TEA level “adjusts up” for inflation.
 - TEA level “adjusts up” to 75% of the non-TEA level (with the goal of keeping the \$250K delta between investment levels intact).

Clarifying Visa Set-Asides

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

“Aging Out” Criteria

- An investor’s “child” who is admitted to the U.S. on a “conditional” basis and who turns 21 shall continue to be considered a “child” if:
 - she/he remains unmarried **and**;
 - the principal investor is approved as a permanent resident **and**;
 - the principal investor files a petition for the child to remain in the U.S. no later than 1 year after the child’s conditional status has terminated.
- The principal investor can only file 1 “aging out” petition after the child turns 21.
- Unused visas “carry over” in the same category in the following year.
- Unused visas in any “set aside” category made generally available for any project, in the year immediately following the “carry over” year.



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

Allowing the Broad Deployment of Capital

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

Sovereign Wealth Funds

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

Job Creation Criteria

- Ten jobs must be created per investment (same as prior law).
- One job must be a “direct” job. It can be “modeled” and it is not necessary to produce a W-2 for a particular employee.
- The other nine jobs can be “indirect,” modeled, and estimated (same approach under prior law).
- Construction jobs that last less than two years can satisfy 75% of the estimated “indirect” jobs.

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

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

“Grandfathering” Existing Investors

- If Congress fails to reauthorize regional centers after the Act’s expiration on September 30, 2027, DHS will continue to process petitions filed on or before September 30, 2026.
- Applies to I-526 petitions and I-829 petitions (to remove conditional status and allow permanent residency without conditions).
- DHS may not deny an I-526 or I-829 simply because the regional program might expire in the future.
- An investor is eligible to file the I-829 2 years after filing the I-526.



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

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

- USCIS to conduct an audit of each regional center at least once every five years.
- Explicit authority granted to USCIS to deny regional center “business plans” where an applicant has engaged in fraud, criminal conduct, or where plan approval would threaten national security.
- Confirms the application of U.S. securities laws over regional center offerings and investment advice.
- Regional center must submit annual statements of investment activities to USCIS. Failure to submit or falsify an annual statement results in sanctions that can include fines, temporary suspension, and a permanent “de-bar” of individual and regional centers that fail to comply with new oversight requirements.
- No person convicted of a crime (in the last 10 years) or fraud-related civil offense (that resulted in liability greater than \$1M USD) can participate in EB-5 activities.
- With a limited exception for bona fide sovereign wealth funds, no foreign government representative may provide EB-5 capital or be involved in the administration or ownership of a regional center, new commercial enterprise, or job creating entity.
- Requires fingerprints and other biometrics of persons involved in EB-5 activities to be submitted to USCIS.
- Strict new “source of funds” requirements to ensure that an investor’s funds are derived from legitimate and lawful sources.
- Establishment of a new “EB-5 Integrity Fund,” capitalized by regional center program fees, to support amplified USCIS oversight and site visits.

Sources

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



SEC Proposed Rules: Private Fund Advisers, Form PF

Issue

On February 9, 2022, the Securities and Exchange Commission (SEC) released a 341-page Proposed Rule, "Private Fund Advisers; Documentation of Registered Investment Compliance Reviews (Private Fund NPRM)." The "Private Fund Notice of Proposed Rulemaking (NPRM)" proposes complex and sweeping changes to the regulation of private funds that will impact a broad range of stakeholders. In addition, on February 17, 2022, the Commission released another significant proposed rule relating to Form PF, "Amendments to Form PF To Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers." The Form PF NPRM would also have significant implications by expanding who must report, what must be reported, and when reports must be made.

Talking Points

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

Talking Points (Continued)

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



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 2 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.

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

Talking Points

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

Talking Points (Continued)

- **The IIJA helps build the high-speed rail network of tomorrow.** The new law makes the largest investment in inter-city 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.

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)



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.¹ The impact of this growing problem of an under-supply of affordable housing is far-reaching and undermines economic growth—particularly in urban areas. In addition, the government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac—one of the primary funding sources for housing in the U.S.—have been in conservatorship for over a dozen years. Debate over reforms continues.

Talking Points

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

¹[Housing is Critical Infrastructure: Social and Economic Benefits of Building More Housing](#), Kenneth T. Rosen, June 2021



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

Issue

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

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

The Roundtable submitted comments on the SEC's proposed climate-risk disclosure rule in June 2022. Our comments are summarized as follows:

"Organizational" and "Operational" Boundaries

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

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

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

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

- The Proposal's direction to disclose Scope 3 emissions "if material" is effectively a reporting mandate. Adding up emissions from all indirect sources will virtually always be "material" because they will readily exceed Scope 1 and 2 amounts in nearly every industry sector—including real estate.



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

- The Commission should impose no mandate—in text or effect—requiring emissions reports based on unobtainable or unverifiable data, from Scope 3 “value chain” sources outside of a registrant’s “organizational” and “operational” boundaries. The “if material” provision for Scope 3 reporting should be dropped.
- A registrant that voluntarily sets a Scope 3 reduction target should receive “safe harbor” protections, but the one proposed by the Commission needs improvement.
- Any Scope 3 “safe harbor” should protect estimates with a reasonable basis of support (not just intentionally fraudulent reports). Also, given the major challenges acknowledged by the Commission regarding Scope 3 calculations, any safe harbor should apply to a registrant’s reasonable decision to omit “value chain” estimates.

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

- The Proposal effectively requires two separate emissions disclosures: the first filed with Form 10-K based on fourth quarter estimates, and a subsequently revised filing after the registrant possesses all “actual, determined” GHG data for the prior fiscal year.
- A registrant should only be required to file mandatory emissions reports—with third-party attestations—once.
- The goals of consistency and transparency for investors would be furthered if the Commission moves its proposed GHG filing deadline after a registrant (and verifiers) have all the data and sufficient time they need to quantify and verify the previous year’s Scopes 1 and 2 calculations.

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

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

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Clean Energy Tax Incentives Proposed in the Democrats' Reconciliation Package

Issue

The Biden administration has ambitious goals to combat the climate crisis:

- By 2030: Cut U.S. GHG emissions by 50% (relative to 2005 levels).
- By 2030: 500,000 electric vehicle (EV) charging stations across the U.S.
- By 2035: A 100% carbon-free electric grid.

These targets cannot be reached without assistance from the U.S. real estate sector. America's buildings—and the tenants and occupants who live, work, shop and recreate in them—account for 29% of U.S. energy consumption (residential = 17%; commercial = 12%). They also account for 75% of retail electricity sales (residential = 40%; commercial = 35%).

One of the key policies developed by Congressional Democrats to achieve the Biden Administration's climate goals is the package of clean energy tax credits and deductions included in the *Build Back Better (BBB) Act*. This "reconciliation" bill passed the House of Representatives in November 2021 with only Democratic votes. As of June 2022, Senate Democrats appear to have revived *BBB Act* negotiations, but their version will be significantly scaled back compared to what passed the House last year. The extent of any clean energy incentives that the Senate might be willing to entertain is not yet clear.

As Democrats developed the clean energy tax title of the *BBB Act*, The Roundtable has sought changes to make its incentives for renewable energy, energy efficiency, and EV charging stations more broadly accessible to commercial real estate owners. The clean energy provisions of the tax code should be improved so that building owners—of all types, however formed, and across asset classes—can optimize their investments in technologies that address climate change.

Talking Points

- **The tax credit for clean energy investments should be expanded to include more types of technologies deployed in buildings.** The "base level" amount of the Section 48 Investment Tax Credit (ITC) in the House-passed bill is 6% of the cost to construct "green energy properties." It has long applied to solar panels, small-scale wind turbines, combined heat and power (CHP), and fuel cells. Positively, the House-passed bill expands the ITC to also include energy storage, dynamic glass, and microgrid controllers. Congress should further expand the ITC to provide an incentive for extensive building "electrification" technologies (such as electric heat pumps).
- **The Section 48 ITC should be modified to encourage the construction of transmission lines needed to transport renewable energy over long distances.** Frequently, solar or wind "farms" are located in more rural areas. The challenge is to deliver large-scale renewable energy generated far away to families, businesses, and buildings in cities and suburbs. Positively, the House-passed bill expands the ITC to provide an incentive to construct high-voltage transmission lines.



Clean Energy Tax Incentives Proposed in the Democrats' Reconciliation Package

Talking Points (Continued)

- **To greatly increase the nation's renewable energy supply, the Investment Tax Credit should include a "direct pay" option so entities with little or no tax liability can fully utilize the Section 48 incentive.** Companies without tax liability should have an option to request a "direct payment" equal to the value of the credit they would have received if they paid income taxes. Positively, the House-passed bill provides a "direct pay" option to better enable entities with no or minimal income tax liability at the entity level (such as REITs) to utilize the Section 48 ITC. They can request a refund for the deemed payment of tax upon completion of a qualifying renewable energy project.
- **The EV charging station tax credit should be more broadly available to buildings that cater exclusively to residential and commercial tenants.** Positively, the House-passed *BBB* bill affords the "direct pay" option for the Section 30C tax credit regarding EV charging stations. However, the House bill only provides the credit—for 30% of construction costs up to \$100K (and 20% thereafter)—for EV charging stations that are open to the "general public." Any final version of the *BBB* Act should allow property owners to qualify for the 30C tax credit if they offer EV charging stations solely for use by residential and commercial tenants.
- **The Section 179D tax deduction for energy-efficient buildings needs an overhaul to encourage "high performance" retrofits of older structures.** Section 179D provides a tax deduction (not a credit) to encourage investments in HVAC, interior lighting, roofs, and windows that lower buildings' energy consumption. 179D has had some impact on new construction—but has never motivated major retrofit projects of older buildings. Positively, the House-passed bill would revise Section 179D to provide an alternative path for the deduction to apply to older building "retrofits." The bill provides that a "retrofit plan" which lowers energy usage by at least 25% can qualify for the revised incentive. The deduction amounts scale-up with greater levels of energy reduction achieved by the retrofit plan. Notably, improvements would be pegged to improvements over the building's own energy consumption baseline before the retrofit project was commenced.
- **Ensure that REITs can benefit from any 179D retrofit tax incentive.** Because REITs must distribute at least 90% of their income to shareholders, and most distribute more, in exchange for which they can deduct their distributions from taxable income, they generally cannot benefit from a tax deduction at the "entity level." REIT shareholders pay tax on such distributions treated as ordinary income to the extent of a REIT's "earnings and profits." Under current law, the section 179D deduction reduces REIT earnings and profits ratably over a five-year period. To allow REITs and their shareholders to benefit from any energy efficiency building incentive, the amount of the tax deduction should reduce earnings and profits in the year that upgraded equipment is installed in a building. Positively, the House-passed bill provides such a REIT "earnings and profits" conformity fix.

Clean Energy Tax Incentives Proposed in the Democrats' Reconciliation Package

Talking Points (Continued)

- **Allow accelerated depreciation for upgraded building equipment.** An enhanced Section 179D retrofit incentive to improve “whole building” upgrades should be joined with an “accelerated depreciation” period for individual systems that are improved on an “individual component” basis. The Roundtable supports the E-QUIP Act (H.R. 2346), which provides a straightline cost recovery period of 10 years for high-performance HVAC, lights, roofs, and windows that replace obsolete and inefficient equipment. Unfortunately, the House and Senate bills miss this opportunity. The *BBB Act* should provide E-QUIP accelerated depreciation for high-performance building components.
- **Burdensome Davis-Bacon wage standards and requirements to hire “registered apprentices” will lessen the value of clean energy tax incentives, undermine climate policy goals, and should not be included in the *BBB Act*.** The whole point of clean energy tax incentives is to encourage the private sector to reduce GHG emissions. However, making compliance too costly with heightened wage and labor standards will diminish companies’ interest in pursuing these incentives, and impede progress towards climate goals. Yet, the House-passed *BBB Act* offers significantly lower incentive amounts if the taxpayer does not pay Davis-Bacon wages or hire apprenticed laborers. No rational taxpayer would use clean energy credits if labor costs exceed the incentive’s amount. The *BBB Act* should not take the unprecedented step of tying clean energy incentives in the federal tax code to labor standards for prevailing wages or apprentice hiring.

Additional Information

- [Letter from RER to Congressional Tax Writers on the *BBB Act*’s Clean Energy Tax Provisions](#) (Nov. 16, 2021)



Homeland Security

Cyber and Physical Threats

Issue

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

Talking Points

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

Homeland Security

Cyber and Physical Threats

Talking Points (Continued)

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