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The Real Estate Roundtable

April 29, 2019

The Honorable Peter DeFazio
Chair
Committee on Transportation
and Infrastructure
U.S. House of Representatives
2251 Rayburn Office Building
Washington, DC 20515

The Honorable Sam Graves
Ranking Member
Committee on Transportation
and Infrastructure
U.S. House of Representatives
2164 Rayburn Office Building
Washington, DC 20515

Dear Chairman DeFazio and Ranking Member Graves:

The Real Estate Roundtable appreciates the opportunity to submit its views regarding the nation's infrastructure and the need for action. A holistic approach to modernize our aging infrastructure will create American jobs, boost economic growth, address climate threats, and improve the quality of life in all regions of the country.

America is in the midst of a "transportation revolution."[1] Our citizens have heightened demands for safe and efficient highways, driverless vehicles, ridesharing services, rapid inter-city transit, and reliable power, water and Internet delivery. The quality of infrastructure is one of the most important factors that influences real estate development decisions. Real estate and infrastructure have a synergistic, two-way relationship as growth in one of these asset classes spurs growth in the other. Safe and reliable infrastructure enhances the value of those properties it serves – that in turn generates greater revenues cycling into a stream that amplifies and leverages limited public dollars needed to fund infrastructure projects.

We offer policy suggestions within your Committee's jurisdiction to improve programs to repair and modernize the transportation and other systems upon which the U.S. economy depends. We also suggest targeted changes to the federal tax code, requiring coordination with the Ways and Means Committee, to help pay for our nation's infrastructure deficit.

For more information, please contact Duane Desiderio, Senior Vice President and Counsel (ddesiderio@rer.org), or Ryan McCormick, Senior Vice President and Counsel (rmccormick@rer.org).

Sincerely,

Jeffrey D. DeBoer
President and Chief Executive Officer

cc: Members of the House Transportation and Infrastructure Committee
Members of the House Ways and Means Committee

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

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INFRASTRUCTURE POLICY RECOMMENDATIONS

SUBMITTED BY

THE REAL ESTATE ROUNDTABLE

Policies Within T&I Committee Jurisdiction

- ***Comprehensive infrastructure legislation must include permit systems reforms.***

Provisions to streamline the permit approval process must be a priority in comprehensive infrastructure legislation. Permit delays dampen private sector investment and add to overall projects costs. A report by the nonprofit organization Common Good estimates the cost of delaying the start of U.S. public infrastructure projects by six years to be $3.7 trillion.[2]

Improvements to streamline infrastructure permitting have long been a bipartisan objective.[3] We support measures to establish discipline in the approval process as outlined by President Trump in Executive Order 13807[4] and implementing MOUs.[5] Congress should codify EO 13807's directives such as: a two-year goal to complete all environmental reviews for major infrastructure projects, with interim benchmarks; a "One Federal Decision" framework requiring lead agencies to obtain written sign-off from sister agencies at "concurrence point" milestones in the permitting process; and emphasis on project "prescoping" and "preliminary planning."

- ***Spur public-private partnerships (P3s) by improving the TIFIA loan program.***

Taxpayers cannot foot the entire bill for the full suite of the country's infrastructure needs. Private sector capital contributions must be part of any financing strategy. Yet, the United States is far behind other regions of the world in harnessing private investment for infrastructure development.[6]

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

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

[4] https://www.federalregister.gov/documents/2017/08/24/2017-18134/establishing-discipline-and-accountability-in-the-environmental-review-and-permitting-process-for.

[5] https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf.

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

The Transportation Department's successful Transportation Infrastructure Finance Innovation Act (TIFIA) program is the federal government's main tool to encourage public-private partnerships (P3s) and co-investment of private capital in surface transportation. TIFIA provides federal loans, guarantees, and standby lines of credit to help finance complex surface transportation projects of national and regional significance. TIFIA's low federal interest rates and flexible repayment terms have unlocked private investment capital to finance major projects across the country.[7] Congress should expand the TIFIA model to cover other infrastructure asset classes – such as airports[8] -- outside of current authorization limited to roads and transit.

The review process to obtain TIFIA support can be unduly arduous. Legislation such as the "RAPID Act"[9] would enhance the program's efficiency while safeguarding taxpayers' investments. It would improve under-utilized criteria to expedite TIFIA reviews where the project's federal share is 33% or less. The bill would also clarify that low-risk transportation projects do not need to obtain multiple credit review opinions to rate senior secured debt relative to the subordinate federal loan. The lengthy and expensive credit rating requirement, however, would still apply to any project where taxpayers bear greater risk with $150 million or more in TIFIA financing.

- ***Harness the "transit premium" of higher property values for real estate located near mass transit to help finance nearby infrastructure.***

To leverage more infrastructure investment, Congress should establish a financing best practice to couple TIFIA loans (where practicable) with revenue streams from "value capture" strategies such as locally designated tax increment finance (TIF) and special assessment districts (SADs). These state and local techniques tap into the so-called "transit premium" that frequently attends to higher values of properties with ready and convenient access to public transportation. By harnessing increases in property values to help fund public infrastructure, local property tax revenues and/or special assessments can provide steady and predictable revenue streams to pay TIFIA debt – while attracting private investors and minimizing taxpayer risk.

- ***Prioritize the limited proceeds from the Highway Trust Fund with a "Fix it First" strategy.***

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

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

[8] E.g., TIFIA for Airports Act (S. 3647, 115th Congress) (co-sponsored by Senators Duckworth [D-IL] and Perdue [D-GA]).

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

- ***Financial and policy support for mass transit is critical.***

According to an Urban Land Institute (ULI) global survey of government officials and real estate executives, "[u]pgrades to public transit systems – including bus and fixed-rail systems [should be] a strong priority for future investment."[10] Profound demographic shifts in the American population reflect heightened demands for multi-modal, transit-oriented development options. As Millennials increasingly dominate the workforce and Baby Boomers retire from it, infrastructure legislation should support generational preferences for mass transit.

Congress should continue its commitment to fund and enhance the Capital Investment Grant (CIG) program[11] administered by the Federal Transit Administration (FTA). State and local governments must have "skin in the game" to obtain CIG grants for New Starts, Core Capacity and Small Starts. Only the federal government, however, has the capacity to underwrite major new transit upgrades with significant national- and regional-level economic impacts that boost U.S. GDP and enhance our nation's global infrastructure competitiveness.[12]

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

Congress should also codify FTA's practice in issuing Letters of No Prejudice ("LONPs") to streamline the CIG process.[13] Significant cost savings and avoidance of project delays can be achieved by allowing a project sponsor to spend non-federal resources incurred after the issuance of an LONP, with the understanding that eligible expenses may be reimbursed later (or count as credit toward local matching share) if the CIG grant is ultimately approved.[14] Clear legislative authorization for LONP

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[10] Urban Land Institute and EY, *Infrastructure 2014: Shaping the Competitive City,* at p. 2 (available at: http://uli.org/wp-content/uploads/ULI-Documents/Infrastructure-2014.pdf).

[11] https://www.transit.dot.gov/CIG.

[12] For example, Chairman DeFazio noted the "staggering" economic impacts in the event that tunnel and bridge components of the Northeast Corridor Gateway program fail. "[A] Northeast Corridor shutdown would have an economic impact of $100 million per day or $36.5 billion per year … if these assets fail." Statement of the Honorable Peter DeFazio, Committee on Ways and Means Hearing on "Our Nation's Crumbling Infrastructure and the Need for Immediate Action" (March 9, 2019), at p. 2. Common Good concluded that the price tag for a one-year delay in building Gateway's Hudson River tunnel would cost $1.6 billion and 366,000 tons of CO_2, with $67.5 million in lost worker productivity.

[13] E.g., https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/OP56%20Letter%20of%20No%20Prejudice%20Review%20-%20Sept%202015.pdf.

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

issuance can provide project sponsors and private co-investors with greater assurance to advance down a project's "critical path" schedule. Such activities may require significant lead-time and should not be stalled pending the FTA's subsequent release of grant dollars.

- ***Repairing natural gas pipelines should be an infrastructure bill priority.***

Natural gas is a dominant fuel that powers the U.S. economy and enhances our country's energy independence. While commercial buildings are increasingly more energy efficient[15] and rapidly transitioning to renewable energy,[16] 75% of the fuel consumed by U.S. commercial real estate derives from natural gas.[17] Modernization of the pipeline network connected to our buildings and plants is vital, as aging distribution mains and service lines "constructed of cast iron, wrought iron and bare steel represent the oldest pipelines and … pose the highest-risk for potential leaks." [18] Aside from the costs associated with wasted fuel and system inefficiency, the climate toll from the leaking grid is considerable: "Natural gas distribution systems account for 6% of methane emissions from U.S. natural gas infrastructure."[19]

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

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

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

[17] *Id.*

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

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

Infrastructure Financing Through Federal Tax Policy

- ***Comprehensive infrastructure legislation should unlock private capital for infrastructure investment by including the bipartisan* Invest in America Act.**

The outdated *Foreign Investment in Real Property Tax Act of 1980* is a major obstacle to mobilizing greater private sector capital for investment in U.S. transportation and infrastructure. *FIRPTA* imposes a discriminatory layer of capital gains tax on foreign investment in U.S. real estate and infrastructure—a tax burden that does not apply to any other asset class. By repealing *FIRPTA*, the *Invest in America Act* (H.R. 2210) would serve as a strong, market-driven catalyst for improving our nation's infrastructure, including our transportation system.

Onerous tax and administrative regimes like *FIRPTA* deter potential foreign investors from putting their capital to work on U.S. infrastructure projects. As a result, global infrastructure investment flows elsewhere, financing improvements outside the United States and undermining our economic competitiveness.

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

FIRPTA is a major hurdle for the foreign investor seeking to invest in U.S. infrastructure projects. Under current law, *FIRPTA* applies when at least 50% of a company's balance sheet is attributable to the value of real property. In 2008, the IRS issued an announcement in which it indicated that many of the governmental licenses and permits being issued in connection with the leasing of transportation assets, such as toll bridges, should be treated as inseparable from the underlying real property, and thus as U.S. real property interests subject to *FIRPTA*.[20] In 2016, the IRS published final regulations in the REIT area confirming that certain inherently permanent structures such as microwave transmission, cell, broadcast, and electrical transmission towers; bridges; tunnels; roadbeds; and railroad tracks are real property for REIT purposes.[21] The REIT regulations increase the likelihood that an infrastructure asset is real property for *FIRPTA* purposes.

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

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

Fear of triggering *FIRPTA* liability is blocking inbound infrastructure investment.[22] Large investors in transportation infrastructure cite *FIRPTA* as a principal obstacle to attracting greater foreign capital for infrastructure projects. All of the factors associated with *FIRPTA* have the net effect of penalizing foreign investors seeking to invest in U.S. infrastructure, thus deterring inbound investment that could be used to modernize our outdated transportation system.

FIRPTA repeal could incentivize greater infrastructure investment. President Obama's infrastructure initiative, the *Rebuild America Partnership*, recognized that *FIRPTA* is an obstacle that prevents foreign capital from being put to work improving U.S. infrastructure. A White House release noted that: "Infrastructure assets can be attractive investments for long-term investors… that value the long-term, predictable, and stable nature of the cash flows associated with infrastructure. Under current law, gains of foreign investors from the disposition of U.S. real property interests are generally subject to U.S. tax under *FIRPTA*, and foreign investors . . . regularly cite *FIRPTA* as an impediment to their investment in U.S. infrastructure and real estate assets."[23]

In recent years, with overwhelming bipartisan support, Congress has rolled back certain aspects of the discriminatory *FIRPTA* statute. For example, in 2015, under the leadership of Chairman Brady, Congress exempted foreign pension funds from *FIRPTA* altogether. The current *Invest in America Act* is supported by a broad coalition of 20 national business and labor organizations.

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

- ***Congress should responsibly and sustainably increase the federal gas "user fee."***

The biggest federal funding source for surface transportation is the Highway Trust Fund (HTF), capitalized by the "pay at the pump" gas "tax." It currently sits at 18.4-cents a gallon for gasoline (24.4-cents/gallon for diesel) – and has not been raised since 1993. The fund is perpetually on the brink of insolvency and frequently bailed-out by Congress. Its purchasing power has been diminished over time by inflation and strides in fuel economy of passenger vehicles. The infrastructure policy debate should properly re-cast the inaccurately labeled gas "tax" as a "user fee" that Americans should bear to repair and modernize our roads, bridges, mass transit, and grow our economy.

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

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

We agree with the proposal offered by the U.S. Chamber of Commerce and other organizations to sustain the HTF by increasing the federal fuel user fee by five cents a year for the next five years, and index it to inflation thereafter.[24]

- ***Cost recovery rules for improvements to building infrastructure should encourage energy efficiency.***

Scores of House members recently wrote to Ways and Means Chairman Neal, asserting that an infrastructure package "marks an important opportunity to address the serious threat of climate change."[25] They requested that the tax code support clean energy technologies with "provisions encouraging energy efficiency in buildings."

In this regard, The Roundtable urges Congress to address an inadvertent deficiency in the *Tax Cuts and Jobs Act (TCJA).* New bonus depreciation and cost recovery rules for Qualified Improvement Property (QIP)[26] have an unintended consequence to discourage energy efficiency investments and technological innovations to modernize our nation's buildings. For most real estate businesses with regional and nationwide portfolios, investments in systems that directly affect a building's energy consumption (and carbon footprint) are depreciated over periods ranging from 20 to 40 years under the *TCJA* framework – beyond their useful lives. Such extensive cost recovery horizons provide no incentive for building owners to replace aging equipment with more costly high-performance, state-of-the-art components.

To correct this shortcoming, The Roundtable recommends legislation to establish a new category of Energy Efficient Qualified Improvement Property – or "EE-QuIP." We suggest a 10-year, straight-line cost recovery period for EE-QuIP expenditures that would apply for both income tax and earnings and profits purposes. EE-QuIP should cover interior and exterior components of, and controls for, the three main systems[27] that most impact energy usage in commercial and multifamily buildings.

EE-QuIP should only pertain to equipment and systems manufactured to meet above-code, high performance specifications that exceeds levels of performance ordinarily required through baseline energy codes and standards. The 10-year cost recovery period for EE-QuIP should be available to all taxpayers, including those that make an election to deduct interest under section 163(j) of the tax code.

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

[25] See April 4, 2019 letter at http://newsletters.usdbriefs.com/2019/Tax/TNV/190405_4_suppA.pdf.

[26] 26 U.S.C. 168(e)(6)(A). QIP means interior improvements to non-residential property. Does not include (1) exterior improvements, (2) building enlargement, (3) any elevator or escalator, or (4) internal structural framework of a building.

[27] (1) heating, cooling and hot water; (2) lighting; and (3) envelope (*e.g.,* roofs and windows).

- ***Federal legislation should revise IRS "volume caps" and other limitations on private-activity bonds (PABs) to boost infrastructure development.***

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

- The "Move America Act,"[28] enabling states in partnership with private entities to lower overall borrowing costs by issuing tax-exempt bonds to help finance a range of projects across infrastructure asset classes. Smaller states hesitant to issue more debt could leverage greater private equity by trading in some or all of their bond allocation for federal tax credits – that can then be used to capitalize state-level infrastructure banks or revolving loan funds.

- The "Public Buildings Renewal Act,"[29] to drive private sector investment in critical government-owned building infrastructure. State and local governments could access PAB financing for schools, hospitals, first-responder stations, research laboratories, and technology incubators.

- The "BUILD Act,"[30] to raise the federal statutory cap on PABs that can be approved for qualified highway and freight-improvement projects, by $5.8 billion (from $15 billion to $20.8 billion).

* * *

The Real Estate Roundtable is fully committed to working with you to achieve a bold infrastructure initiative that serves the interests of all Americans, and we appreciate your consideration of these recommendations.

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

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

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