

National Association of REALTORS® Issue Brief

Commercial Real Estate

July/August 2017

1031 LIKE KIND EXCHANGES: In June 2016, House Republicans released their “Blueprint on Tax Reform,” a comprehensive document outlining principles for future tax reform plans. The House leadership and Ways and Means Committee began working on a comprehensive tax reform package right away in 2017, convening working groups to examine different areas of the tax code. While the Blueprint did not mention 1031 like-kind exchanges, that does not mean they are safe, as revenue-neutral tax reform will require sources of funding to make up for lowered taxes elsewhere. The Blueprint does allow for business expenses, including real property, to be written-off immediately – which some believe will make 1031s unnecessary.

NAR ACTION: *NAR participates in multiple coalitions to protect Section 1031 from repeal or limitation. As part of the “1031 Like-Kind Exchange Coalition,” which includes non-real estate industry groups, NAR commissioned a study from Ernst & Young on the macroeconomic effects of repealing Section 1031. As part of the “Real Estate 1031 Like-Kind Exchange Coalition,” made up solely of real estate sector groups, NAR commissioned another economic study on Section 1031, this time focusing on its impact on real estate. NAR participates in Hill visits, meetings with key members of Congress (including leadership and the tax writing committees), and press events individually and as part of the coalition in support of Section 1031. NAR will continue to monitor this issue, and will oppose any plans to repeal or limit its use. Retaining Section 1031 was one of the talking points for the Spring 2017 Hill visits, and NAR has stressed its importance in letters on tax reform to the Hill.*

ADA SUIT NOTICE REQUIREMENT: The Americans with Disabilities Act (ADA) does not have a notice requirement, leaving commercial property owners who may in good faith believe that their properties comply with the law vulnerable to lawsuits. Under the ADA attorneys may collect fees relating to pursuing claims of noncompliance, but the plaintiffs themselves cannot collect damages. Once a suit is filed, there is not opportunity to cure the infraction, so property owners spend time and money on attorneys and fees which could have instead gone toward fixing the issue. In recent years, these “drive-by” ADA suits, by attorneys targeting commercial properties with small, easily-correctible infractions, are on the rise.

NAR ACTION: *NAR participates in a coalition of commercial real estate groups advocating to reforms to the ADA requiring that notice be given to property owners before a suit is filed, giving them an opportunity to use their time and resources to correct the infraction instead of on attorneys. NAR supports H.R. 620, the ADA Education and Reform Act, a bipartisan bill sponsored by Rep. Poe (R-TX), which would accomplish those goals. H.R. 620 is expected to be marked up by the House Judiciary Committee in 2017.*

BASEL III: The Basel Committee on Banking Supervision released a proposal addressing Revisions to the Standardized Approach for Credit Risk, which outlines the risk-weighting regime for credit exposures for those using the standard approach. The proposal, High Volatility Commercial Real Estate (HVCRE), would have a negative impact on credit availability for commercial real estate through its changes to risk weighting different factors within the loan, and increased lending standards that would be higher than what regulators already have in place. The Committee also proposed a small fleet of changes, known as Basel IV, to complete ‘final calibrations’ of the Basel III standard.

NAR ACTION: *NAR actively works with its members and industry partners to understand the impact of the Basel III standards. NAR has joined comment letters calling for changes to the provisions that would be most limiting, as well as submitted letters to Congressional hearings in the House Financial Services and the Small Business Committees stressing the burden that overly-broad regulations for lending institutions have on commercial real estate. NAR signed on to a coalition letter urging for the delay in finalizing Basel III reforms, which was ultimately successful. In 2017, NAR has worked as part of a coalition to assist in drafting legislation clarifying which borrowers the HVCRE rules apply to. That bill, H.R. 2148, “Clarifying Commercial Real Estate Loans,” was introduced by Rep. Pittenger (R-NC) in April 2017.*

CREDIT UNION LENDING: The National Credit Union Administration (NCUA) enacted a rule that would eliminate restrictions on credit unions making member business loans (MBL). The rule gives credit unions more autonomy in creating commercial lending policies unique to each credit union. The rule created a new treatment for construction and development loans. The rule went into effect on January 1, 2017. The NCUA also adopted new rules expanding the field of membership for credit unions.

NAR ACTION: *NAR wrote a letter in support of MBL rule change, highlighting the important role of credit unions in commercial real estate lending and the success of small businesses. These rule changes will help expand credit unions as a source of lending.*

DODD-FRANK LAW: Implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) continues, with rulemaking on its remaining provisions progressing in the relevant Federal Agencies in 2016. Members of the Republican-controlled House of Representatives and within the Trump Administration have stated that want to repeal Dodd-Frank entirely, and in April 2017 House Financial Services Committee Chairman Rep. Hensarling (R-TX) reintroduced H.R. 10, the Financial CHOICE Act, which repeals many sections of Dodd-Frank as well as other regulations of financial institutions.

NAR ACTION: *NAR is closely following all rule-making surrounding Dodd-Frank, and submits comments to the relevant federal agencies on topics affecting commercial real estate whenever possible. NAR will continue to monitor bills in the 115th Congress that roll back or otherwise amend the law, as well as advocate for common-sense financial regulations.*

EB-5 PROGRAM: The EB-5 Regional Center program has been extended several times, most recently through September 30, 2017. The extension did not make any reforms or changes to the program. Regional Centers help identify American business needs in the community and help direct foreign investor funds to those projects. In return for investing and creating American jobs, these foreign investors are eligible for visas that allow them to live in the United States. The Regional Centers began as a pilot program in 1992, but have been extended several times.

NAR ACTION: *NAR has sent several letters to the U.S. House and Senate as well as to the Director of the U.S. Citizenship and Immigration Services in support of the permanent authorization of the EB-5 Regional Center program. NAR is part of a real estate industry coalition supporting the program, and has sent multiple coalition letters to lawmakers urging its reauthorization. NAR will continue to monitor this issue in the 115th Congress and advocate for permanent reauthorization of the EB-5 Regional Center pilot program.*

ENERGY DEDUCTION 179D: The Section 179D deduction in the Internal Revenue Code encourages greater energy efficiency in our nation’s commercial and larger multifamily buildings, by allowing for cost recovery of energy efficient windows, roofs, lighting, and heating and cooling systems meeting certain energy savings performance targets. Without section 179D, the same energy efficient property is depreciated over 39 years (nonresidential) or 27.5 years (residential). Congress allowed this provision to expire at the end of 2016, following a two-year (one of which was retroactive) reauthorization of it in December, 2015.

NAR ACTION: *NAR supports the extension and enhancement of the 179D deduction by providing a sliding scale of incentives that correlate to actual and verifiable improvements in a retrofitted building’s energy performance. NAR is part of the “179D Coalition,” made up of supportive industry groups, and will continue to monitor and advocate for the long-term reauthorization of this deduction in the 115th Congress, as it considers tax reform plans and looks ahead to a potential extenders package at the end of 2017. NAR has met with the tax writing committees in the House and Senate to stress the importance of this provision and its benefits to commercial real estate.*

THE JUMPSTART OUR BUSINESS STARTUPS (JOBS) ACT OF 2012: The final elements of the JOBS Act, including Title IV, which address Small Company Capital Formation and permit crowdfunding as a financing source, are now effective. The new rules update and expand Regulation A, an existing exemption from registration for smaller issuers of securities. This enables smaller companies to offer and sell up to \$50 million of securities in a 12-month period, subject to eligibility, disclosure and reporting requirements. Title III, effective since January 2016, regulates how crowdfunding platforms and defines unaccredited investors, and how those investors can invest in crowdfunded projects.

NAR ACTION: *NAR supports regulation easing restrictions on businesses’ ability to raise capital, and increasing liquidity in the commercial real estate market. In the 114th Congress NAR sent letters to the House Small Business Committee and the House Financial Services Committee expressing support for the potential that crowdfunding has to bring capital into the commercial real estate markets, and met with Congressional offices to discuss legislation furthering that goal. NAR will continue this work in the 115th Congress, as well as participating in meetings with the SEC and its committees.*

MARKETPLACE FAIRNESS: “Marketplace Fairness,” or internet sales tax fairness, allows states to require that out-of-state online retailers collect and remit sales tax on purchases made by their residents, thus relieving the burden caused by losing sales tax and leveling the playing field between online sellers and traditional brick-and-mortar stores, the clients of Commercial REALTORS®. In 1992 the Supreme Court ruled that Congress must grant this authority to the states. While Congress fails to act, states are resorting to laws allowing them to collect sales tax based on questionable determinations of what counts as a

“physical presence” (required to collect the tax) within their borders. Some of these laws have been reviewed by federal courts, and it is possible that the Supreme Court will have to rule again on the issue to resolve it. In April 2017, both S.976, “The Marketplace Fairness Act,” and H.R. 2193, “The Remote Transactions Parity Act,” were introduced. S. 976 is cosponsored by Senators Lamar Alexander (R-TN), Mike Enzi (R-WY), Dick Durbin (D-IL), and Heidi Heitkamp (D-ND); H.R. 2193 is cosponsored by Representatives Kristi Noem (R-SD), Steve Womack (R-AR), Jason Chaffetz (R-UT), Steve Stivers (R-OH), Lou Barletta (R-PA), John Conyers (D-MI), Jackie Speier (D-CA), Peter Welch (D-VT), Suzan DelBene (D-WA), and David Cicilline (D-RI). Both bills are the same as versions introduced in the previous Congress that NAR supported.

NAR ACTION: *NAR participates in the Marketplace Fairness Coalition, which advocates for internet sales tax legislation. In the 114th Congress, NAR supported bills establishing internet sales tax fairness, while working with sponsors of the bills and the House Judiciary Committee and leadership to develop compromise legislation. NAR will continue to work with the House Judiciary Committee and Leadership offices on this issue in the 115th Congress.*

MARKETPLACE LENDING: The Department of Treasury issued a report in May 2016 describing what it understands to be the current state of play for marketplace lending, which is a catch-all term for online lending such as social finance, crowdfunding, or peer-to-peer lending. The report highlighted the role that these lenders play in the economy, but also expressed concern for the overlapping regulations governing these entities, and the loopholes created by these regulations. The Office of the Comptroller of the Currency (OCC) issued a report in December 2016 exploring the merits of creating a special purpose bank charter for “FinTech” (financial technology) companies. The OCC report focused on the role of bank charters in regulating financial markets, and concluded with a call for comments.

NAR ACTION: *NAR submitted a letter to the OCC highlighting the growing role that these lenders play in real estate, and the need for balancing innovation and regulation. The letter also referenced NAR’s commitment to innovation.*

NATIONAL FLOOD INSURANCE PROGRAM (NFIP): The National Flood Insurance Program (NFIP) was extended for five years in 2012 by the Biggert-Waters Act, but Congress must reauthorize it again to continue providing flood insurance after 2017. In March 2014 Congress amended Biggert-Waters with the “Homeowner Flood Insurance Affordability Act, which restored grandfathering properties under lower risk rates upon remapping, reducing increased rates of non-grandfathered properties, and repealing rate premium increases at the sale of properties (including refunding increases to those who have already paid them). Later in 2014 FEMA launched the Office of the Flood Insurance Advocate, to assist property owners with questions and concerns over flood insurance rates and maps. In the 115th Congress, several bills have been introduced to reauthorize and reform the NFIP.

NAR ACTION: *NAR continues to work closely with Congress and FEMA to implement the rest of the law, consistent with the statutory deadlines and congressional intent. NAR has met with the Office of the Flood Insurance Advocate, and will continue to monitor this issue and work toward the timely and long-term reauthorization of NFIP before it expires in 2017. In 2017 NAR has led a commercial real estate coalition to build a list of commercial priorities for the program’s reauthorization, which has been shared with the House Financial Services Committee and the Senate Banking Committee. NAR will support legislation reauthorizing the NFIP consistent with NAR principles in the 115th Congress.*

UNMANNED AERIAL SYSTEMS (DRONES): On August 29, 2016 the final rules small unmanned aerial systems (UAS) went into effect, allowing the operation of small UAS (less than 55 lbs.) for commercial purposes with a FAA UAS operator certificate. Though use of UAS is still restricted, the FAA is expected to release rules allowing flights beyond-visual-line-of-sight, at night, and over crowds, in 2017, as well as a separate rule dictating the use of “micro-UAS,” which are those weighting less than 4.4 lbs.

NAR ACTION: *NAR worked with the FAA and the 114th Congress to develop and advocate for UAS rules which permit commercial use of drones in a way that is affordable for users and safe for communities. This work included testifying at a Congressional hearing on the issue, sending comment letters to the FAA and the National Telecommunications and Information Administration, as well as participating in working groups and an Aviation Rulemaking Committee (ARC) with the FAA on micro-UAS. NAR will continue to work with the 115th Congress and the FAA as they move on to address further rulemaking needs for UAS.*