

# Commercial Issues and Actions

February 2014

► **ISSUE: *Alternative Minimum Tax (AMT)*:** On January 2, 2013, President Obama signed into law the American Taxpayer Relief Act, providing a permanent “patch” that prevents tens of millions of taxpayers from being subject to the alternative minimum tax (AMT), starting with the 2012 tax year. Specifically, the measure sets the exemption amounts (i.e., the income not subject to taxes under the AMT) at \$50,600 for individuals and \$78,750 for couples filing jointly, then adjusts these amounts yearly for inflation. It also allows various non-refundable personal credits to be claimed against the AMT. The AMT was created by the Tax Reform Act of 1986 to prevent higher-income taxpayers from using credits and deductions to completely offset their federal income tax liability.

**NAR Action:** NAR successfully worked with Congress to ensure a permanent patch to the AMT.

► **ISSUE: *Basel III*:** The Federal Reserve, Federal Deposit Insurance Corporation (FDIC), and Office of the Comptroller of Currency (OCC) have finalized a new risk-based capital category – High Volatility Commercial Real Estate Exposures (HVCRE) for commercial acquisition, development, and construction (ADC) loans. Specifically, the new changes raise the risk-weight for an ADC loan from 100% to 150%. In response to the final changes, it is highly likely that banks would substantially change their current lending practices and reduce the amount of available credit in order to avoid the higher capital charges associated with ADC loans.

**NAR Action:** After several letters to bank regulators and lawmakers, including comments sent to the Federal Reserve, FDIC, and OCC, NAR continues to meet with Congress and the Administration to modify the final rule in order to prevent a reduction in commercial real estate lending as well as an increase in borrowing costs.

► **ISSUE: *Bonus Depreciation*:** In 2013, President Obama signed into law the American Taxpayer Relief Act, which extended the 50% bonus depreciation rule for qualifying property purchased and placed in service before January 1, 2014 (before January 1, 2015 for certain longer-lived and transportation assets). This provision allows businesses to take a deduction of 50% of the value of that property in addition to amounts that they can otherwise claim under the depreciation rules. Bonus depreciation is allowed against both the regular tax system and the AMT. In addition, businesses could elect to accelerate some AMT credits in lieu of bonus depreciation.

**NAR Action:** Bonus depreciation rules have once again expired (although they are still in effect through 2014 for certain transportation property, as well as certain longer-lived items). NAR is urging Members of Congress to extend this provision as it considers the extension of other important tax provisions that also expired at the end of 2013.

► **ISSUE: *Carried Interest*:** Proposals to modify the existing carried interest rules could have a severely negative impact on real estate partnerships. The carried interest mechanism for real estate partnerships is a standard operating practice not historically treated as a “loophole,” but rather as a reward for entrepreneurs who take risks inherent in new projects and in making capital investments. No legislation has been considered in the 113<sup>th</sup> Congress that would change the tax treatment of carried interests. However, Senator Carl Levin (D-MI) has introduced a bill designed to eliminate a number of so-called tax “loopholes,” including changing the current tax treatment of carried interest. This bill has no bipartisan support, nor any cosponsors on the Senate Finance Committee. In addition, President Obama’s FY 2014 budget included a proposal that carried interests be treated as ordinary income rather than as capital gains.

**NAR Action:** NAR consistently opposes any proposal that would eliminate capital gains treatment for any carried interest of a real estate partnership. NAR has written to Congress regarding its strong opposition to modifying the current tax treatment of carried interest income.

► **ISSUE: Commercial Lead-Based Paint:** The Environmental Protection Agency (EPA) continues to consider federal rules that may regulate renovation and remodeling activities in public and commercial buildings to address possible lead-based paint hazards. EPA is now estimating the release of a proposed rule for both the interior and exterior of commercial buildings in the summer of 2015. Currently, EPA is collecting information in an effort to get a better understanding of the existence of lead paint in public and commercial buildings, and the extent of renovation and remodeling activities in these structures. In March 2013, Senator James Inhofe (R-OK) introduced the “Lead Exposure Reduction Amendments Act of 2013,” which includes a provision directing the EPA to collect requisite health data for a commercial lead paint rule.

**NAR Action:** Through a coalition of industry and contracting groups, NAR has met with EPA and other federal departments to discuss the lead-based paint issue. Additionally, NAR submitted a statement for the record at a hearing on regulatory fairness for small business addressing lead paint regulations, and in July 2012 sent a letter to Rep. Graves (R-MO), the Chairman of the House Small Business Committee, thanking him for holding a hearing on the EPA’s compliance with the Regulatory Flexibility Act. On June 26, 2013, REALTOR® Harold Huggins testified on behalf of NAR at the EPA’s public hearing on renovation, repair and painting activities in public and commercial buildings. NAR successfully encouraged 51 members of Congress to sign onto a coalition letter to Acting Administrator of the EPA Robert Perciasepe, raising concerns over the EPA’s procedure for ensuring that a rule on lead paint in commercial buildings is necessary.

► **ISSUE: Dodd-Frank PCCRA Rules:** NAR is concerned with the six banking agencies’ risk retention proposal, which contains a requirement that securitizers set aside the profits from sales of securities in “premium capture cash reserve accounts” (PCCRAs). This provision would greatly reduce the securitization market for many asset classes, thereby reducing a vital source of capital for the commercial real estate industry. Given this potential negative economic consequence, NAR believes the banking agencies need to provide Congress with a cost-benefit analysis of their PCCRA proposed rule.

**Dodd-Frank QCRE:** The Dodd-Frank Act requires entities that securitize mortgage loans to retain 5% of the credit risk. However, the law gives federal banking agencies broad authority to identify the acceptable types, forms, and amounts of risk retention for “low risk” commercial and multifamily loans. In response to the law, six banking agencies have proposed 0% risk retention for “low credit risk” or Qualified Commercial Real Estate (QCRE) loans that meet a series of extremely rigid underwriting standards. NAR believes the six federal regulators need to withdraw, revise, and republish the rule for public comment because the rule: (1) violates congressional intent of the Dodd-Frank Act, (2) unnecessarily defines the QCRE exemption from the risk retention requirements to include only a narrow slice of the mortgage market, and (3) jeopardizes the fragile commercial real estate market.

**NAR Action:** NAR has sent multiple letters to the U.S. House and Senate committees along with comments to regulators in support of policies that enhance the flow of credit to the commercial real estate industry. In addition, NAR testified at three Congressional hearings in the 112<sup>th</sup> Congress before the U.S. House Financial Services Committee on the requirements of Dodd-Frank.

► **ISSUE: EB-5 Program:** On September 28, 2012, President Obama signed into law S. 3245 (Sens. Leahy (D-VT) and Grassley (R-IA)), which reauthorized the EB-5 Regional Center program for 3 years. 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. Authority for these centers had been set to expire on September 30, 2012. The Senate has approved S.744, the Border Security, Economic Opportunity, and Immigration Modernization Act, which includes permanent authority for the EB-5 regional center program. S. 744 was sent to the House for consideration, but has not been taken up and is not expected to be considered.

**NAR Action:** NAR 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.

► **ISSUE: 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 would be depreciated over 39 years (nonresidential) or 27.5 years (residential). Section 179D allows for the accelerated depreciation of high performance equipment that achieves significant energy savings. Unfortunately, this provision expired at the end of 2013.

**NAR Action:** NAR, in coalition with other industry partners, has sent letters to the relevant House and Senate Committees expressing support for 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.

► **ISSUE: Estate Tax:** The American Taxpayer Relief Act permanently extended the \$5 million per-person estate tax exemption (for 2014, the amount is \$5.34 million -- indexed for inflation), but the rate was increased to 40% from 35% for taxable estates above the exemption amount. Without action, the estate tax would have reverted to pre-2001 levels of a 55% top rate and just \$1 million in estate value being exempt from the tax. Should tax reform efforts continue to gain momentum, the estate tax could come into play as a part of a larger tax reform measure.

**NAR Action:** NAR wrote to Congress and met with key decision-makers to ensure the estate tax did not revert to pre-2001 levels.

► **ISSUE: GSE Reform:** In the 113<sup>th</sup> Congress, two bills were introduced that address GSE reform – H.R. 2767, the “Protecting American Taxpayers and Homeowners Act” (PATH Act) and S. 563, the “Jumpstart GSE Reform Act.” The PATH Act includes provisions that would create a covered bond market to address ongoing commercial real estate refinance challenges as the market struggles to rebound. Covered bonds allow banks to raise funds by issuing a pool of high-quality assets (typically real estate loans) to investors, which are backed both by the bank's promise to repay and by the assets pledged as collateral. The dual recourse nature is attractive to investors, and the banks who issue bonds have a stake in assuring the long-term viability of the mortgages underlying the bond.

**NAR Action:** A talking point during the 2012 NAR Mid-Year Meetings. NAR has orchestrated fly-ins with large-firm executives, testified multiple times, written several letters and submitted statements to Congress, and held countless meetings with key lawmakers to help decision makers understand the importance of ensuring reforms provide for the adequate flow of credit to the multifamily sector. While supportive of the covered bond concept, NAR President Gary Thomas submitted a July 2013 statement to the House Financial Services Committee for a hearing on the PATH Act detailing NAR's concerns with the bill's impact on the residential financing markets. In September 2013, NAR sent a letter to the full House of Representatives explicitly opposing the bill on the basis of its residential mortgage market impacts, and signed onto a coalition letter to the House again opposing its passage.

► **ISSUE: Lease Accounting:** The Financial Accounting Standards Board (FASB) and International Accounting Standards Board (IASB) have proposed new accounting rules that would force many companies to capitalize commercial leases onto their balance sheets, by requiring them to use a “right-of-use” accounting model. This change would force lessees to shorten lease terms to minimize costs. Since lessors raise financing by using the leases and the value of the property as collateral, the amounts they can borrow in the future could be reduced if lease terms are shortened. FASB and IASB expect to have their joint proposal finalized in 2014. The effective date of this proposal would likely be in 2017, when virtually all new and outstanding leases would be subject to the new accounting standard.

**NAR Action:** NAR has written letters and added its voice to coalitions to express concern the new lease accounting proposal will be detrimental to our nation’s economy by reducing the overall borrowing capacity of many commercial real estate lessees and lessors. In 2013, NAR urged 13 lawmakers to send a “Dear Colleague” letter to the FASB, expressing concern that the accounting board was preparing to release the latest exposure draft on leases, but had still not released a cost-benefit analysis of the lease accounting proposal. NAR submitted a comment letter to the FASB in September 2013 on the proposed lease accounting rules. These efforts build upon the earlier 2012 efforts of a coalition of several leading nonprofit and commercial real estate organizations, including NAR, that included the release of a report examining the economic impact of the IASB and FASB’s proposed lease accounting standard, calling on the accounting boards to conduct a comprehensive examination of the costs and benefits of their lease proposal. NAR continues to work with FASB/IASB and other stakeholders to ensure that any modifications to lease accounting rules will not negatively impact commercial real estate practitioners.

► **ISSUE: Leasehold Improvements:** The American Taxpayer Relief Act (signed into law on Jan. 2, 2013) extended the 15-year straight-line cost recovery for qualified leasehold improvements on commercial properties through 2013 and made retroactive to cover 2012. Unfortunately, that provision was then allowed to expire at the end of 2013. Many observers believe that expiring provisions, including the leasehold improvement provision, may not be addressed by Congress until the fall of 2014. However, it is quite likely that when Congress extends this provision, it will do so on a retroactive basis, back to the beginning of 2014. Otherwise, leasehold improvements placed in service on or after January 1, 2014, will need to be recovered over a 39-year period.

**NAR Action:** In July 2013 NAR joined other industry groups in sending a coalition letter to the Senate urging that tax reform should ensure that depreciation tax rules match the economic life of assets by taking into account natural wear and tear and technological obsolescence. In addition, NAR continues to meet with key Members of Congress to urge that the leasehold improvements provision be extended as quickly as possible and on a retroactive basis.

► **ISSUE: Marketplace Fairness:** In February 2013, S. 743, the Marketplace Fairness Act a bipartisan bill, was introduced in the Senate and its companion bill, H.R. 684, was introduced in the House. In May 2013 the Senate passed S. 743. This legislation would create authority for state governments to collect sales taxes on Internet sales for goods that are delivered to their states, which would level the playing field between brick-and-mortar and e-commerce retail businesses while assisting the states in collecting billions of uncollected state sales taxes. Action in the House is less certain, but key Members of the House Judiciary Committee, which has jurisdiction, have indicated a desire to move this legislation in 2014.

**NAR Action:** NAR submitted several letters to Congress, urging lawmakers to pass the Marketplace Fairness Act, and continues to request action in the House.

► **ISSUE: National Flood Insurance Program (NFIP):** In 2012, Congress passed the Biggert-Waters Act, which extends the National Flood Insurance Program (NFIP) for five years. Biggert-Waters also phases out subsidized flood insurance rates for many commercial properties but severe implementation problems have threatened to undermine real estate transactions where flood insurance is required to obtain a mortgage. On January 16, 2014, Congress passed the Omnibus Appropriations Bill (H.R. 3547) which prevents FEMA from raising the grandfathered rates through the end of 2014 but not those triggered by the sale of a commercial property that is responsible for the most excessive increases. On January 30, 2014, the Senate passed the “Homeowner Flood Insurance Affordability Act,” (S. 1926), which calls for a 4-year “time out” on rate increases triggered by the sale of property, including commercial sales. The House has yet to take up a companion measure. For more information on flood insurance, see [NAR’s “National Flood Insurance Program” issue page here](#).

**NAR Action:** NAR successfully worked with Senators Menendez (D-NJ) and Isakson (R-GA) to draft and move the Homeowner Flood Insurance Affordability Bill through the Senate. We helped build a broad coalition of industry groups and sent letters in support, and initiated a Call for Action that achieved an impressive response rate among our membership. We also worked with members of the Banking Subcommittee to hold a hearing on the affordability of NFIP rate changes, and

submitted a statement and questions illustrating the hardships they can cause. Now, NAR is working to persuade the House leadership to bring a similar measure to a floor vote, and earlier, signed on to a coalition letter sent to the leadership of the House Financial Services Committee expressing concern over the rate increases.

► **ISSUE: *Terrorism Insurance:*** Following the 9/11 attacks private insurers backed out of the terrorism insurance marketplace prompting Congress to enact the “Terrorism Risk Insurance Act of 2002” (TRIA), a federal insurance backstop that allows the federal government and private insurance companies to share losses in the event of a major terrorist attack. The program has since been reauthorized by Congress twice – in 2005 and 2007. TRIA helped stabilize commercial real estate markets by making terrorism coverage available and more affordable over time. However, the program is set to expire December 31, 2014. As indicated by some commercial property owners and practitioners, the program’s looming expiration next year is already beginning to affect the availability of loans to commercial real estate. Several members of Congress have introduced bills which would reauthorize the Terrorism Risk Insurance Program for five years or more, and both the House Financial Services Committee and the Senate Banking Committee held hearings in September 2013 on the issue. Reauthorization in 2014 is projected to be difficult because opponents believe terrorism insurance should be fully privatized and that the federal government should have no financial exposure in the event of future terrorist events. Proponents counter that terrorism is an uninsurable risk, and, as result, requires some form of government backing.

**NAR Action:** NAR participates in the Coalition to Insure Against Terrorism (CIAT), and has communicated with both the House Financial Services Committee and the Senate Banking Committee in advance of their hearings, stressing the important of the Terrorism Risk Insurance Program to commercial real estate and the economy.

► **ISSUE: *Data Privacy and Security:*** In June 2013 legislation was introduced in the Senate that would require covered entities to take “reasonable measures to protect and secure data in electronic form containing ‘personal information.’” In August 2013 the House launched a bipartisan privacy working group to examine online privacy issues and determine whether legislation is necessary to address concerns over the way companies are handling their client’s data. With the recent data breaches of Target and other retailers, we can expect that additional privacy and data security bills will be introduced in the 113<sup>th</sup> Congress as public concern about the confidentiality of personal medical, financial and consumer data has put pressure on policy makers to increase regulation on the uses of this information.

**NAR Action:** NAR staff has presented at several events for REALTORS® to educate members on what they need to know about privacy and data security, in addition to beginning production on an online training course on the topic which is estimated to be available in 2014. In February 2013 NAR sent a letter to the House and Senate Commerce and Judiciary Committees outlining its technology and telecommunication policy priorities, including its support of legislation that allows flexibility for industry specific responses in order to prevent policies from being created that are outdated before they even become law. NAR Legal has developed a toolkit to assist members in developing data privacy and security policies and procedures. [The toolkit is available here.](#)

► **ISSUE: *Health Insurance Reform:*** The Affordable Care Act (ACA) was signed into law in 2010, and in June of 2012 the Supreme Court upheld its constitutionality. Thus far, the Department of Health and Human Services has issued a number of rules, including those for the new health insurance Exchanges (which opened Oct. 1, 2013), grandfathered insurance plans, and defining the types of benefits that will be required to be in compliance with the ACA’s essential coverage provisions. The IRS has issued guidelines for the small employer tax credits available now to small firms that provide coverage to their employees, and proposed rules to govern the law’s requirement that large employers (those with more than 50 full time employees) provide health insurance coverage for salaried employees. The ACA’s underwriting and rating reforms, along with the individual and employer mandate, were implemented in January 2014. The law’s employer mandate (the requirement that large employers provide health insurance coverage for salaried employees) will take effect in 2015.

**NAR Action:** NAR submitted comments on the proposed rules for the Exchanges and grandfathered plans, and signed onto a business coalition comment letter on the design of benefits and coverage summaries (SBC) required for all employer

insurance plans. Since independent contractors were not defined as employees for purposes of the ACA, NAR also recommended to the IRS that the agency's final rules detailing the employer mandate requirements explicitly reference existing federal law that defines qualified real estate professionals and direct sellers as "non-employees." NAR Legal has also provided information on a notice of the new health exchanges required of employers with one employee and receipts greater than \$500,000 annually; [that notice is available here](#).

► **ISSUE: *Tax Reform*:** While no comprehensive tax reform proposals yet emerged, key Members of Congress have expressed the desire to overhaul the tax system, with some indicating that "everything is on the table" when it comes to reform prospects. In the House, the Ways and Means Committee Chairman Dave Camp (R-MI) is pursuing "revenue neutral" tax reform that would lower the tax rates by eliminating various tax deductions and credits. In the Senate, the Finance Committee has endorsed a "blank slate" approach that would eliminate all deductions, exemptions, and credits and start with the lowest rates as possible. In November 2013, former Finance Committee Chairman Max Baucus (D-MT) released a series of staff discussion drafts on tax reform, which included proposals to repeal or reduce certain tax benefits vital to commercial real estate. These include increasing the depreciable life of real property used in business or held for investment to 43 years, raising the tax rate on gain from depreciation recapture to the ordinary income tax rate, and repealing the tax rules allowing the exchange of like-kind real estate on a tax-deferred basis. However, with no action taking place on tax reform in either the House or Senate in 2013 and the confirmation of Senator Baucus to be U.S. ambassador to China, many believe it very unlikely that tax reform will be enacted before the end of 2014. For more information on tax reform efforts in the 113<sup>th</sup> Congress, see [NAR's "Tax Reform" issue page here](#).

**NAR Action:** NAR has advocated for responsible tax reform that provides the best opportunities for economic growth and job creation, submitting a statement to the House Ways and Means Tax Reform Working Group on Real Estate in April 2013 outlining its principles for tax reform, including preserving the current law incentives for real estate investment and homeownership. In July 2013, NAR, in coalition with other industry groups, sent a letter to the full Senate urging that many provisions affecting commercial real estate be preserved as "vital to the economy." NAR views the proposals in the staff discussions draft released in November of 2013 as a significant threat to commercial real estate, and, together with many other groups, sent a detailed letter to the Finance Committee in January 2014 outlining the many reasons why adoption of those proposals would be a major step in the wrong direction for the nation's economy, for job growth, and for tax reform. NAR continues to watch these proposals very carefully, and meets regularly with key lawmakers on the U.S. House and Senate Tax writing committees to discuss reform efforts.