

Commercial Issues and Actions – Top Priorities

Fall 2018

► **ISSUE: *1031 Like Kind Exchanges*:** In December 2017, Congress passed and the President signed into law H.R. 1, the Tax Cuts and Jobs Act. The bill made dramatic changes to the U.S. tax code, many of which impact real estate. A chief concern was that tax reform would repeal or limit like-kind exchanges under Section 1031; while the bill repealed 1031s for personal property, it specifically retained them for real property.

NAR Action: NAR participates in multiple coalitions to protect Section 1031 from repeal or limitation, and with them has commissioned studies on the macroeconomic effects of repealing Section 1031 and how it impacts real estate specifically. NAR was a key participant in the campaign to protect Section 1031, meeting with members of Congress (including leadership and the tax writing committees), and joining press events to support it. Retaining Section 1031 was a talking point for the Spring 2017 Hill visits, and NAR continually stressed its importance in letters on tax reform to the Hill.

► **ISSUE: *Commercial Lending rules*:** The Basel Committee implemented a risk-weight regime (“Basel III”) for High Volatility Commercial Real Estate (HVCRE) - commercial acquisition, construction, and development loans, raising the risk weight from 100% to 150%, making commercial real estate loans more expensive and less attractive to lenders. Federal banking agencies proposed a new standard for the same category, called it High Volatility Acquisition, Development and Construction (“HVADC”) loans. The proposal decreased the risk weight (to 130%), but broadened the loans included by removing some exclusions. In May 2018 Congress passed S. 2155, a regulatory relief bill which included a HVCRE “fix,” clarifying which borrowers are included and exceptions to the higher risk-weight. Proposed rules from the agencies were released in the fall.

NAR Action: NAR called for changes to Basel in comments to federal agencies and letters to Congress stressing the burden that overly-broad lending regulations have on commercial real estate. NAR supported H.R. 2148, the “Clarifying Commercial Real Estate Loans Act,” sponsored by Rep. Pittenger (R-NC), which clarifies which borrowers fall under the HVCRE rules, as well as its companion bill in the Senate, S. 2405, sponsored by Sens. Cotton (R-AR) and Jones (D-AL). NAR sent two comment letters to the banking agencies in December 2017 on the proposed HVADC rule, urging retention of the current exclusions for well-capitalized loans found in the HVCRE rule, and further lowering the risk-weight. These bills were included in S. 2155, the Economic Growth, Regulatory Relief, and Consumer Protection Act, which was signed into law on May 24, 2018.

► **ISSUE: *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 is in a coalition advocating for reforms to the ADA, including a notice requirement, which would give business owners an opportunity to fix violations without the need to use resources on legal costs. NAR supports H.R. 620, the ADA Education and Reform Act, a bipartisan bill sponsored by Rep. Poe (R-TX). H.R. 620 was marked up and approved by the House Judiciary Committee in September 2017, and passed the full House in February 2018. The bill has not found support in the Senate, so NAR is working to find an alternative solution to the issue that can be passed into law.

► **ISSUE: *Marketplace Fairness*:** A 1992 Supreme Court case held that Congress had to give states authority to require out-of-state retailers to charge sales tax on purchases made by residents. Since then, Congress failed to act, despite bills being introduced to do this. Since then, online sales grew and brick-and-mortar stores charging sales tax found themselves at a disadvantage. In 2018 the Supreme Court heard *South Dakota v. Wayfair, Inc.*, about a South Dakota law allowing the state to require online sellers to charge sales tax. Its June 2018 decision overturned the 1992 case, granting states limited authority to require e-commerce sites to charge sales tax. In the 115th Congress NAR supports two bipartisan e-fairness bills: S.976, “The Marketplace Fairness Act,” (sponsored by Sens. Enzi (R-WY) and Alexander (R-TN)), and H.R. 2193, “The Remote Transactions Parity Act,” (sponsored by Rep. Moen (R-SD) and Womack (R-AR)). Next steps are for the states to pass laws on online sales tax collection requirements.

NAR Action: NAR participates in the Marketplace Fairness Coalition, which advocates for internet sales tax legislation. NAR joined two *amicus briefs* to the Supreme Court supporting the South Dakota law in question, and continues to support S. 976 and H.R. 2193.