On behalf of the nearly 100,000 combined members of the National Multifamily Housing Council (NMHC) and the National Apartment Association (NAA)[[1]](#footnote-2), we offer this statement for the record to the House Committee on Ways and Means’ Tax Teams examining the *Tax Cuts and Jobs Act (TCJA)* to share the views of the multifamily housing industry. We strongly believe that *TCJA* provisions affecting tax rates, the 20 percent qualified business income deduction, and the estate-tax exemption should be made permanent. At the same time, we encourage the Congress to use potential 2025 tax legislation addressing expiring *TCJA* provisions to enact tax incentives to ameliorate the nation’s housing supply crisis while avoiding the enactment of counterproductive and onerous revenue raisers.

As the House Ways and Means Committee's Tax Teams study *TCJA’s* efficacy, we start from the premise that tax policy has a critical role to play when it comes to promoting workable and sustainable policies to address our nation’s housing challenges. Our ultimate goal is to ensure that apartment providers can meet the long-term housing needs of the 40.0 million Americans who live in apartment homes[[2]](#footnote-3) and continue to make significant contributions to the growth of our economy, currently totaling $3.9 trillion annually.[[3]](#footnote-4)

Addressing our nation’s housing challenges, in general, and more specifically our housing affordability crisis, is crucial to promoting economic opportunity in our country and will require strong collaboration and partnership between policymakers and the private sector. Before exploring the essential role tax policy, and *TCJA* in particular, plays in multifamily housing markets, we would like to provide members of the Committee with an overview of the industry and current challenges and conditions.

**The Housing Imperative**

Challenges may present themselves differently from community to community, but it will come as no surprise to Americans nationwide that we are facing a widespread housing affordability crisis. No wonder communities are feeling pinched—we simply do not have enough housing to go around. Today, in more and more communities, hard-working Americans are unable to rent homes due to increased costs driven by a lack of supply, barriers to development, and regulatory burdens.

The total share of cost-burdened households (those paying more than 30 percent of their income on housing) increased steadily from 28.0 percent in 1985 to 36.9 percent in 2021 and is growing, while others have been priced out of communities altogether.[[4]](#footnote-5) This is not sustainable, particularly in a period of higher inflation. Barriers to new supply – for instance, onerous regulatory hurdles, antiquated and often discriminatory zoning and land use policies at the local level, and local opposition to development (also known as NIMBYism or “Not in My Backyard” opposition) – have in large part led the nation to this juncture. It has taken many decades to get to this point, and it will take time to reverse these trends. Nevertheless, it is critical that we start now to enact new and innovative policies that will incentivize new housing production.

In addition, continued economic instability poses a serious threat to the ability of housing providers to leverage the private-market capital necessary to generate needed housing. Higher interest rates have contributed to a period of economic volatility, which is driving up the cost of building new housing, discouraging new investment, and pushing some in our sector out of the market altogether.

Increased construction, material and labor costs, significant increases in insurance costs, and state and local property taxes have made the current operating environment extremely challenging. NMHC and NAA members are reporting that current economic and regulatory challenges are causing them to cut back significantly on development activities, in some cases, by as much as 50 percent. This slowdown has long-term implications.

**Housing Affordability: Growing Demand vs. Supply Challenges**

It is essential that we build housing at all price points to meet the wide range of demand. According to [research conducted by Hoyt Advisory Services and Eigen10 Advisors, LLC](https://url.avanan.click/v2/___https://www.weareapartments.org/pdf/NMHC-NAA-US-Apartment-Demand-through-2035.pdf___.YXAzOm5taGM6YTpvOjQzYmQyNGJiMGRlZmY2MGNmMGZlMmVkZmM5ODYzZmJhOjY6YzU2NTphNzgxZmRlMjg2ZTliOTkxYmFjMDdjYzFiNTIwNTZjOGQwYTY0MzQxYjcwNzVkNWQxMDk0NDA1Zjc1MmMwZDkxOnA6VA), and commissioned by NMHC and NAA, the United States is facing a pressing need to build 4.3 million new apartment homes by 2035.

Key findings include:

* **Shortage of 600,000 Apartment Homes.** The 4.3 million apartment homes needed includes an existing 600,000 apartment home deficit because of underbuilding after the 2008 financial crisis.
* **Loss of Affordable Units.** The number of affordable units (those with rents less than $1,000 per month) declined by 4.7 million from 2015 to 2020.
* **Homeownership.** Apartment demand also factors in a projected 3.8 percent increase in the homeownership rate.
* **Immigration.** Immigration is a significant driver of apartment demand. Levels tapered before the pandemic and have remained low, but a reversal of this trend would significantly increase apartment demand.

**Opportunity Abounds:** **Sustainable Solutions to Enhance Housing Supply and Address Housing Affordability**

The good news: There is a clear path to solving this challenge. Congress must prioritize increasing our nation’s housing supply and support pro-housing policies that will in turn ensure greater housing stability and affordability for renters at a variety of income levels for decades to come.

While there is no one silver bullet, a multifaceted approach can be effective in easing market constraints. This statement for the record focuses on the critical role that key provisions in *TCJA* play in addressing housing supply. We also present additional proposals Congress should consider as part of potential 2025 tax legislation addressing *TCJA* to enhance housing supply further and ease the housing affordability crisis.

**Enact and Enhance Tax Policy that Promotes Housing Supply**

While it will take a variety of tax and non-tax approaches to increase supply, the rental housing industry believes tax policy continues to play a critical role in this regard. To this end, we strongly urge Congress to:

* Make permanent critical provisions enacted as part of *TCJA,* namely those pertaining to individual tax rates, the 20-percent qualified business income deduction (Section 199A), and the expanded estate-tax exemption.
* Use potential 2025 tax legislation addressing expiring *TCJA* provisions to enact other tax incentives to boost housing supply, including those that would:
  + Expand and enhance the Low-Income Housing Tax Credit;
  + Enact the *Workforce Housing Tax Credit Act* to support workforce housing;
  + Enhance Opportunity Zones, which were enacted as part of *TCJA*, to incentivize the rehabilitation and preservation of multifamily buildings; and
  + Encourage the adaptive reuse of underutilized commercial properties into multifamily housing.
* Avoid including revenue-raising provisions in potential 2025 tax legislation that would disrupt capital flows to the multifamily industry and make it more costly to develop and preserve housing units.

Specifically, we urge Congress to reject proposals in President Biden’s Fiscal Year 2025 Budget that would limit capital flowing to the multifamily industry, including those that would:

* Increase the top marginal individual income and capital gains tax rates;
* Impose the net investment income tax (NIIT) on active income while increasing the NIIT rate;
* Limit deferral of taxable gain from like-kind exchanges;
* Tax carried interest as ordinary income;
* Tax unrealized capital gains at death; and
* Require 100-percent recapture of depreciation deductions as ordinary income for real estate.

These proposals would directly affect the operations of housing providers by reducing real-estate investment and inhibiting the capital flows that are so critical to the development and preservation of critically needed housing.

Each of these proposals is briefly described below.

**EXPIRING *TCJA* PROVISIONS**

***Make Permanent TCJA Tax Rates and the 20-Percent Qualified Business Income Deduction***

The multifamily industry is dominated by “pass-through” entities (e.g., sole proprietorships, LLCs, partnerships and S corporations), rather than publicly held corporations (e.g., C corporations). Indeed, approximately three-quarters of apartment units are owned by pass-through entities. This means that a company’s taxable income is passed through to the equity owners, who pay taxes on their share of the income on their individual tax returns, regardless of whether the owner receives any cash distribution of the income or it is reinvested in the business. Additionally, a significant number of industry participants are organized as REITs that generally pay no tax at the entity level and pass through dividends to the REIT shareholders.

The tax treatment of pass-through entities contrasts with the taxation of large publicly held corporations, so-called C corporations, which generally face two levels of tax. These entities are subject to tax at the corporate level under the corporate tax system. Taxable shareholders are then taxed upon the receipt of dividend income. Notably, some shareholders of corporate stock, including certain retirement accounts and non-profit organizations, are exempt from taxes on those dividends.[[5]](#footnote-6)

In 2017, as part of *TCJA*, Congress lowered taxes on pass-through entities and REITs through 2025 by:

* Reducing marginal individual tax rates, including the top tax rate to 37 percent from 39.6 percent; and
* Providing a 20-percent tax deduction for qualifying pass-through income and REIT dividends (commonly referred to as Section 199A), effectively reducing the top tax rate on qualifying business income to 29.6 percent.

Unfortunately, absent Congressional action, pass-through entities will see a substantial tax increase at the end of 2025 when the tax provisions benefiting pass-through entities expire. Instead of facing a top rate of 29.6 percent on qualifying business income, such entities will be confronted by a 39.6-percent rate, a 33.8-percent increase. In contrast, the corporate tax rate will remain at 21 percent.

Congress should continue to promote the use of flow-through entities and investment in multifamily housing by making permanent the individual tax rate reductions and the 20-percent Section 199A deduction enacted as part of the *TCJA*. To this end, the multifamily industry strongly supports the *Main Street Tax Certainty Act* (H.R. 4721 / S. 1706) that would make permanent the 20-percent qualified business income deduction. Introduced by Representative Smucker and Senator Daines, this legislation has 177 House cosponsors and 32 Senate cosponsors.

Failure to extend today’s tax laws would result in a substantial tax increase and further exacerbate the nation’s housing challenges. Put simply, higher taxes mean fewer dollars to build new units and preserve our existing housing stock.

***Make Permanent TCJA Estate Tax Rules***

Because many apartment firms are small businesses, often family owned, estate planning is a major consideration for company principals. A critical part of planning focuses on the estate tax imposed on the transfer of their assets to their heirs.

As part of *TCJA*, Congress doubled the estate tax exclusion through 2025. As many apartment executives plan for the continuity of the housing properties in the hands of their heirs, today’s estate tax rules provide clarity and consistency in the tax code, but only through 2025. The apartment industry supports making the estate tax rules enacted in 2017 permanent.

The estate tax rules include three key elements:

* Exemption level: The estate-tax exemption level is the amount that a donor may leave to an heir without incurring any federal estate tax liability. As a result of *TCJA,* an individual is allowed an exemption of $13.61 million ($27.22 million per couple) in 2024, which is indexed for inflation.
* Tax rate: The estate tax rate applies to the value of an estate that exceeds the exemption level. Under present rules, the maximum rate is 40 percent (which is not subject to an expiration date under current law).
* Basis rules: The basis rules determine the tax basis of inherited property. The estate tax today includes stepped-up basis rules, which adjust the tax basis of inherited property to reflect its fair market value when the decedent dies. This is particularly important for the apartment industry because many industry executives’ estates include significant amounts of depreciable real property. The basis rules were not modified under *TCJA*.

Without stepped-up basis, the tax basis of inherited property can be quite low if the property was purchased long ago and has been depreciated over a number of years. As a result, heirs could inherit an apartment property with no basis and sizeable debt. If they sell it, they would face significant depreciation recapture taxes and capital gains taxes. This discourages heirs from investing further capital to maintain housing property and removes valuable affordable housing from the nation’s inventory.

**HOUSING AFFORDABILITY TAX INCENTIVES**

As mentioned above, housing tax policy can play a key role in spurring housing supply. Accordingly, a 2025 tax bill presents an important opportunity to enact tax proposals designed to expand the Low-Income Housing Tax Credit, establish a Workforce Housing Tax Credit, reinvigorate opportunity zones, and create a new incentive for adaptive reuse.

***Expand and Enhance the Low-Income Housing Tax Credit***

The Low-Income Housing Tax Credit (LIHTC) is a public/private partnership that leverages federal dollars with private investment to produce affordable rental housing and stimulate new economic development in many communities. Between its inception in 1986 and 2022, the LIHTC program – according to the A Call To Invest in Our Neighborhoods (ACTION) Campaign – has developed or preserved 3.85 million apartments, served 8.97 million low-income households, supported 6.33 million jobs for one year, generated $257.1 billion in tax revenue, and produced $716.3 billion in wages and income.[[6]](#footnote-7) The LIHTC program provides critical support to the nation’s affordable housing production but could be improved to have an even greater impact.

NMHC and NAA support the *Affordable Housing Credit Improvement Act of 2023* (*AHCIA*) (H.R. 3238 / S. 1557). This bipartisan bill – introduced by Representatives LaHood, DelBene, Wenstrup, Beyer, Tenney, and Panetta and Senators Cantwell, Young, Wyden, and Blackburn (with 223 cosponsors in the House and 33 in the Senate) – would make a number of far-reaching reforms to the LIHTC. Among other provisions, the bill would make permanent the now-expired 12.5-percent increase in LIHTC allocation authority that applied between 2018 and 2021 to enable the production of new units and further augment credit authority by 50 percent. Additionally, the bill would lower the private activity bond financing threshold to 25 percent from 50 percent required to receive the full amount of 4-percent LIHTC.

Enacting the provisions in the *Affordable Housing Credit Improvement Act* concerning primary unit financing could allow up to 1.94 million additional affordable units to be financed over 10 years. Over that period, this enhanced financing could also support nearly three million jobs, $333 billion in wages and business income, and $115 billion in additional tax revenue.[[7]](#footnote-8)

We also strongly support the LIHTC provisions included in the *Tax Relief for American Families and Workers Act of 2024* (H.R. 7024), which the House approved on January 31 by a bipartisan 357-70 vote. Similar to the *Affordable Housing Credit Improvement Act*, these provisions would augment LIHTC authority by 12.5 percent between 2023 and 2025, as well as reduce the private activity bond financing threshold from 50 percent to 30 percent in 2024 and 2025. These provisions would create over 200,000 new multifamily units and represent a critical step toward addressing this nation’s affordable housing supply crisis.[[8]](#footnote-9)

Finally, we encourage Congress to consider increasing the private activity bond volume cap to enhance the utilization of 4-percent LIHTC. According to February 2024 data by Tiber Hudson and Novogradac, 20 states and Washington, DC, are oversubscribed for the credit. [[9]](#footnote-10) Authorizing these states to issue additional private activity bonds would enable the financing of additional 4-percent LIHTC projects.

***Enact the Bipartisan Workforce Housing Tax Credit Act***

Housing affordability is an issue threatening the financial wellbeing of both middle-income and low-income households across the nation. According to the U.S. Census Bureau’s Survey of Market Absorption, the median asking rent for apartment units completed in the third quarter of 2023 was $1,833, a 12.23-percent increase from the same period in 2018.[[10]](#footnote-11) For a renter to afford one of those units at the 30-percent-of-income standard, the renter would need to earn at least $73,320 annually.

Furthermore, Harvard University’s Joint Center for Housing for Housing Studies reported in January 2024 that “[r]enter households with annual incomes of $45,000 to $74,000 have seen the fastest growth in their burden rates, both over the longer term and during the pandemic. Indeed, 41 percent of renter households in this income category were burdened in 2022, a 5.4 percentage point increase since the start of the pandemic, nearly doubling their 2001 rate.”[[11]](#footnote-12)

Accordingly, affordable housing is an issue affecting those workers who comprise the very fabric of strong communities nationwide, including teachers, firefighters, nurses, and police officers whose wages are not keeping pace with housing costs. Tax policies to spur the production of multifamily housing targeted to middle-income Americans should be part of any legislation that seeks to address housing affordability on a comprehensive basis.

We urge Congress to enact the bipartisan and bicameral *Workforce Housing Tax Credit Act* (H.R. 6686 / S. 3436), sponsored by Representatives Panetta and Carey and Senators Wyden and Sullivan. This legislation establishes a new tax credit to produce affordable rental housing for households earning 100 percent or less of the area median income (AMI).

Designed to complement the successful LIHTC, the WFHTC would enable state housing agencies to issue credit allocations to developers that would subsequently be sold to investors. Investors would receive a dollar-for-dollar reduction in their federal tax liability over a 15-year period, and developers would invest the equity raised to build qualifying affordable apartments. The equity raised would cover 50 percent of the cost of constructing qualifying units. A development project eligible for WFHTC would have to set aside 60 percent of units for households earning 100 percent or less of AMI and must be kept affordable for up to 30 years.

***Enhance Opportunity Zones to Incentivize Rehabilitation of Housing Units***

Enacted as part of TCJA, Opportunity Zones are designed to provide tax incentives for investments in distressed communities. Opportunity Zones have held great promise for the development of multifamily housing. In fact, Novogradac in April 2024 reported that residential investment continued to be the leading investment area for Opportunity Funds. Funds tracked by Novogradac have helped finance over 175,000 homes in more than 200 cities across the United States.[[12]](#footnote-13)

Under the program, state governors have designated over 8,700 qualified low-income census tracts nationwide as Opportunity Zones, which remain in effect through 2028. Real-estate developers and others may establish Opportunity Funds to construct and rehabilitate multifamily property that are eligible for two tax incentives.

First, taxpayers may defer taxes on capital gains that are reinvested in Opportunity Funds to the earlier of the date an investment in an Opportunity Fund is disposed of or December 31, 2026. Notably, gains deferred for five years are eligible for a 10-percent basis step up, while gains deferred for seven years are eligible for an additional 5-percent basis step up.

Second, post-acquisition capital gains on investments held in Opportunity Funds for at least 10 years may be permanently excluded from income.

While taxpayers may continue to invest capital gains in Opportunity Funds through June 28, 2027, it is already too late to meet requirements for a step up in basis attributable to newly deferred capital gains. In addition, the economy has changed since Opportunity Zones were originally designated shortly after the enactment of *TCJA*.

Opportunity Zones can be a helpful tool to incentivize housing production and, thereby, assist in addressing the nation’s housing affordability crisis. However, to maximize the full potential of Opportunity Zones, Congress should:

* Enable states to recertify and/or redesignate Opportunity Zones to account for current economic realities and changes since zones were originally designated; and
* Establish new investment deadlines so that taxpayers are incentivized to receive both a longer deferral period and the potential for the 10-percent or 15-percent basis increase with respect to reinvested capital gains.

While Opportunity Zones are beneficial for new multifamily development, developers may find it difficult to use Opportunity Zone benefits to rehabilitate existing properties. To qualify for Opportunity Zone benefits for renovations, the basis of an existing asset must be doubled, excluding the value of any land. Although property that is added to and improves an asset can count toward this threshold, doubling the basis can still be a high hurdle. Accordingly, Congress should reduce the basis increase necessary to qualify a multifamily rehabilitation project for Opportunity Zone purposes.

***Encourage the Adaptive Reuse of Underutilized Commercial Properties into Multifamily Housing***

Given the nation’s shortage of affordable rental housing, many developers are considering turning unused and underutilized commercial real estate, including offices, hotels, and retail spaces into housing. Not only would such repurposing help address the nation’s housing supply challenge, but it would also create jobs and boost local property tax revenues and economic growth.

A segment of commercial real-estate space could potentially be available to be converted into affordable housing. A [February 2023](https://www.nmhc.org/research-insight/research-report/behind-the-facade-the-feasibility-of-converting-commercial-real-estate-to-multifamily/)[[13]](#footnote-14) Urban Land Institute study commissioned by the NMHC Research Foundation provided case study examples of successful conversions, and several large jurisdictions, including Washington, DC, and New York City, have recently embarked on plans to incentivize office-to-residential conversions.[[14]](#footnote-15)

Changing consumer preferences and online shopping are also changing the real-estate landscape. Estimates show between several hundred million and 1 billion square feet of surplus and obsolete retail space. Slower post-pandemic business travel is also challenging a portion of the nation’s hotel stock.[[15]](#footnote-16)

Unfortunately, converting commercial real estate into housing can be extremely challenging and can be more complicated than typical ground-up development. Costs associated with property acquisition and conversion, including addressing structural building issues (e.g., beams, columns, ceiling heights, utilities, and floor layouts), can quickly add up and make the difference between a viable or unfeasible project. This is in addition to other barriers that may arise, including permitting, zoning rules, and NIMBYISM.

A Federal tax incentive to encourage property conversions would be greatly beneficial in helping to overcome these obstacles and spurring additional housing supply. In addition, it would help revitalize distressed commercial property and stabilize the surrounding communities. Notably, Representative Gomez has reintroduced the *Revitalizing Downtowns Act* (H.R. 419) that would provide a 20-percent tax credit to convert office buildings into other uses, including residential use. Senator Stabenow introduced the measure (S. 2511) in the last Congress.

The real-estate industry is actively working with lawmakers on both sides of the aisle – Representatives Carey and Gomez and Senator Stabenow – to improve the measure and ensure bipartisan support. The enhancements would enable other types of commercial properties (e.g., shopping centers and hotels) to qualify for the tax incentive; ensure REITs could utilize the benefit; and clarify that the credit does not reduce other tax benefits including the LIHTC.

Additionally, the multifamily industry would encourage Congress to explore whether tax-exempt private activity bonds could be used to promote adaptive reuse. Housing finance agencies could issue such bonds to help facilitate adaptive reuse of underutilized properties, particularly in areas that have a plan to track discriminatory land use policies as envisioned by the *Yes In My Backyard Act (YIMBY Act)* (H.R. 3507 / S. 1688). NMHC and NAA strongly support this legislation, which requires recipients of Community Development Block Grants to provide information on how they are reducing local barriers to housing development.

**OPPOSE ONEROUS REVENUE RAISERS DISRUPTING CAPITAL FLOWS TO THE MULTIFAMILY INDUSTRY**

We strongly support the extension of *TCJA* provisions affecting individual tax rates, the 20-percent qualified business income deduction, and the expanded estate-tax exemption, while also encouraging Congress to use a potential 2025 tax bill to include incentives boosting housing supply. We are concerned, however, about revenue-raising proposals that would negatively affect the housing industry and ultimately limit the supply of housing. Specifically, we urge Congress to reject proposals in President Biden’s Fiscal Year 2025 Budget that would limit capital flowing to the multifamily industry, including those that would:

* Increase the top individual marginal individual income and capital gains tax rates;
* Impose the net investment income tax (NIIT) on active income while increasing the NIIT rate;
* Limit deferral of taxable gain from like-kind exchanges;
* Tax carried interest as ordinary income;
* Tax unrealized capital gains at death; and
* Require 100-percent recapture of depreciation deductions as ordinary income for real estate.

These proposals would directly affect the operations of housing providers by reducing real-estate investment and inhibiting the capital flows that are so critical to the development and preservation of critically needed housing.

***Increase the Top Individual Marginal Income and Capital Gains Tax Rates and Impose the Net Investment Income Tax (NIIT) on Active Income while Increasing the NIIT Rate***

President Biden’s Fiscal Year 2025 Budget proposal seeks significant tax increases with respect to ordinary income and capital gains tax rates while also endeavoring to expand the net income tax to encompass active business income and increasing the NIIT rate. While NMHC and NAA favor extending current-law *TCJA* tax rates as discussed above, President Biden’s proposals would impose a significant tax increase on the multifamily industry. This counterproductive tax increase would both reduce capital available to address the nation’s housing supply shortage and leave far less operating capital for existing real estate.

*Ordinary Income Rates and Expanding the Net Investment Income Tax while Increasing the NIIT Rate:* The Biden Budget would increase the current top statutory marginal income tax rate of 37 percent to 39.6 percent effective retroactively to taxable years beginning after 2023. The increased tax rate would take effect for single filers earning over $400,000 and married filers earning over $450,000.[[16]](#footnote-17)

Furthermore, the Administration seeks to expand the scope of the NIIT, which today applies to certain types of passive income (e.g., interest, capital gains, dividends, annuities, royalties, and rents) to encompass such income earned in the ordinary course of a trade or business.[[17]](#footnote-18) Additionally, the Biden Budget proposes to increase the current 3.8-percent NIIT rate to 5 percent. This proposal would be phased in for taxpayers earning over $400,000 and fully phased-in for taxpayers earning over $500,000.

On a combined basis, the result of these tax increase would subject self-employed individuals, including owners and developers of multifamily real estate, to a top marginal tax rate of 44.6 percent on ordinary income rather than today’s 33.4 percent top effective marginal rate when self-employment taxes are included.

In addition, the Biden Budget would expand current law’s additional 0.9-percent Medicare tax, which today is applicable to employment earnings over $200,000 for single filers and $250,000 for married filers. The Budget proposes to impose an additional 1.2 percent tax on employment earnings over $400,000.

Rather than increasing ordinary income tax rates, Congress should extend current-law rates and the 20-percent Section 199A deduction as discussed above. Again, failure to extend today’s tax laws would result in a substantial tax increase and further exacerbate the nation’s housing challenges. Put simply, higher taxes mean fewer dollars to build new units and preserve our existing housing stock, let alone capital to begin addressing the serious shortage of affordable housing.

*Capital Gains, Qualified Dividends, and Expanding the Net Investment Income Tax while Increasing the Tax Rate:* The Biden Budget proposes to tax capital gains and qualified dividends at ordinary income tax rates for taxpayers earning over $1 million. Additionally, as discussed above, the Administration seeks to expand the scope of the NIIT (subject to the increased 5-percent rate) to include certain types of income, such as capital gains and qualified dividends, earned in the ordinary course of a trade or business. On a combined basis, the proposals would raise the top tax rate on long-term capital gains to 44.6 percent from today’s rate of 23.8 percent (20 percent statutory rate plus the current 3.8 percent NIIT).

A 44.6 percent tax rate on capital gains and qualified dividends would reduce investment in two respects. First, nearly doubling the tax rate on such income would reduce proceeds from realized investment gains. This would translate into a reduced amount of capital available for new investment that could help address the nation’s housing supply shortage. Second, parity between the tax rates applicable to long-term capital gains and ordinary income would reduce the incentive to engage in risk-taking and entrepreneurial activity. Investors, including those financing and developing real estate, are incentivized to take risk because of a meaningful differential between ordinary income tax rates and capital gains tax rates.

***Limit Deferral of Taxable Gain from Like-Kind Exchanges***

Ensuring the nation has sufficient housing is an important public policy goal, and one that can be pursued through housing and tax policy. A critical way that the nation’s tax laws support investment in real estate is through Section 1031 like-kind exchanges. NMHC and NAA strongly believe that Congress should retain current-law like-kind exchange rules as opposed to limiting deferral from a like-kind exchange to $500,000 for single filers and $1 million for joint filers, as the Biden Administration proposes. The Biden Administration’s like-kind exchange tax proposal would effectively eliminate the multifamily industry’s ability to use this critical tool that fosters significant investment in apartments.

Appropriately retained for real property as part of the *TCJA*, the like-kind exchange rules encourage investors to remain invested in real estate by allowing property owners to defer tax on capital gains if, instead of selling their property, they exchange it for another comparable property. As long as the taxpayer remains invested in real estate, tax on any gain is deferred. When the taxpayer ultimately does sell the asset, the tax relating to the gain on the property is due.

Like-kind exchange rules play a crucial role in supporting the multifamily sector by encouraging investors to remain invested in real estate while still allowing them to balance their investments to shift resources to more productive properties, change geographic location, or diversify or consolidate holdings.

In addition, without like-kind exchanges, property owners would be deterred for tax reasons from selling assets that are in need of capital investment. Exchange rules allow those owners to transfer the property to new owners who can invest the necessary capital to revitalize the asset. Thus, like-kind exchange rules facilitate job-creating property upgrades and improvements.

*Like-Kind Exchange Example:*Taxpayer A owns a 10-unit multifamily property worth $2 million. Her tax basis, or current investment interest, in the property is $1 million, leaving a $1 million taxable gain if she were to sell it. Taxpayer A wants to sell this property and use the proceeds to help purchase a $3 million, 15-unit apartment building. If she were to sell the first building and buy the second, she would have to pay tax on the $1 million gain, which at a minimum would reduce the capital available to invest in the new property and may otherwise discourage her from pursuing the transaction.

With a like-kind exchange, she can exchange the assets and defer capital gains. In this transaction, she exchanges her property for the new one (with a loan to account for the remaining $1 million purchase price), and her tax basis in the new property increases to $2 million. The $1 million in capital gain from the sale of the 10-unit property is deferred until she sells the new asset. A like-kind exchange allows her to continue investing in job-creating real estate instead of being forced to hold properties solely for tax considerations.

***Tax Carried Interest as Ordinary Income***

The Biden Administration proposes to tax carried interest at ordinary income rates regardless of how long an asset is held, with the proposal applicable only if a partner’s taxable income exceeds $400,000. Such a change would adversely affect not only the apartment industry, but also the entire real-estate industry, given that 49.6 percent of all partnerships are real-estate related.[[18]](#footnote-19)

NMHC and NAA believe that carried interest should be treated as a long-term capital gain if the underlying asset is held for at least one year. The multifamily industry strongly opposed the extension of the holding period to three years, which was included in *TCJA,* but we note that final regulations released in January 2021 exclude Section 1231 gains (which generally relate to gains from property used in a trade or business, including real estate) from the extended holding period.

Carried interest should receive capital gains tax treatment because it represents a return on an underlying, long-term capital asset, as well as risk and entrepreneurial activity. This is in contrast to any fees that managing partners receive in payment for operations and management activities, which are taxed as ordinary income.

Real-estate development carries considerable financial risks. In fact, one in 10 multifamily projects never breaks ground. Because of the risks involved, many real-estate partnerships use “carried interest” to encourage innovation and entrepreneurship.

Also called a “promote,” carried interest has been a fundamental part of real-estate investment partnerships for decades. Managing partners receive a carried interest, or a share of profits once an asset is sold, in recognition of both the value they bring to the venture and the risks they take. In addition to their management expertise, managing partners often make initial capital contributions to the venture and assume responsibility for recourse debt, litigation risks and cost overruns, among other risks.

A higher tax rate on carried interest will discourage real-estate partnerships from investing in new construction at a time when demand for apartments continues to grow and chronic underbuilding has limited new housing supply. In fact, as noted above, research commissioned by NMHC/NAA shows that the nation will need to build 4.3 million new apartment homes by 2035.

***Tax Unrealized Capital Gains at Death***

Given that many apartment firms are small businesses, often family owned, the continuity of their real-estate operations in the hands of assets to heirs is a major consideration for company principals. While the estate tax may apply to a decedent if the estate value exceeds the exemption amount, current law appropriately enables the heirs to receive property with a basis stepped up to fair market value at the time of the decedent’s death. This is particularly important for the apartment industry because many industry executives’ estates include significant amounts of depreciable real property.

To illustrate how present tax law works, consider the following example: An individual purchased an apartment property in 1996 for $7.5 million before passing away in 2024 and transferring the property to an heir. At the time of transfer, the property is worth $22.5 million and, due to improvements of $3 million and depreciation of $9 million, has a tax basis of $1.5 million. The property has an operating income of $1.575 million.

Currently, the $1.5 million in tax basis would be stepped-up to $22.5 million. Tax would only be imposed when the heir sells the asset and would be based on the difference between the depreciated value of the property at time of sale and the $22.5 million in tax basis (including any adjustments such as improvements and depreciation).

Unfortunately, the Biden Administration is proposing to impose tax on gain when property is transferred by gift or at death, which effectively eliminates the step-up in basis under current law, subject to a $5 million individual exclusion amount. In the example, above, a capital gain of $16 million would be realized when the property is passed to an heir. (This is calculated as: $22.5 million in fair market value, less $1.5 million in basis, and less a $5 million exclusion.) The $16 million capital gain would be subject to a 25 percent tax on the depreciation recapture, capital gains tax on the remainder of the gain, and the NIIT on the overall gain (taking into account the $200,000/$250,000 threshold amount). This would far exceed the building’s annual operating income. Notably, if other Biden Administration proposals were also enacted, including those increasing capital gains tax rates, imposing and raising net investment income taxes on active capital gains, and taxing depreciation recapture at ordinary income tax rates, the tax on such a sale would be prohibitive.

If enacted, this proposal would have extremely unfortunate consequences. Not only would death become a taxable event with an exclusion amount far below today’s estate tax exclusion of $13.61 million per person, but funds necessary to pay the tax could be deferred from beneficial uses, namely maintaining and improving housing.

While the Biden Budget offers ostensible relief for illiquid assets, these options only delay the inevitable. Under one option, taxpayers would have 15 years to pay the tax. However, this would mean that a substantial portion of a property’s operating income would go just toward paying this tax, leaving less to improve and upgrade the property (in addition to paying current-year income and property taxes attributable to the asset). Significantly, the property is subject to state income and possibly estate taxes as well. Overall, this proposal is likely to have a significant negative effect on the amount of affordable housing in the marketplace.

Under a second option, family-owned and operated businesses could defer tax until a property is sold. While tax may not be immediately due, the lingering prospect of a significant tax bill upon sale (i.e., the deferred tax plus potential additional taxes on gains incurred after the transfer) could deter an heir from making a sale to invest in other assets, such as affordable housing, or multiple heirs who may wish to start new ventures.

***Require 100 Percent Recapture of Depreciation Deductions as Ordinary Income for Real Estate***

Under current law, depreciation deductions are “recaptured” when real-estate assets are sold, with recapture amounts taxed at a 25-percent rate. NMHC and NAA believe Congress should retain this rate as opposed to taxing depreciation recapture at ordinary income tax rates as the Biden Administration proposes for taxpayers earning in excess of $400,000.

After decades of operations, many multifamily owners have a very low tax basis in their properties. If they were to sell them, even under current law they would have significant depreciation recapture tax liabilities. To avoid such tax bills many current owners not only avoid selling their properties, but they are also reluctant to make additional capital investments in properties with little value. The result is deteriorating properties that are lost as safe, affordable housing. By increasing depreciation recapture taxes, the Biden Administration proposal would only make the problem worse.

**Conclusion**

NMHC and NAA appreciate the opportunity to provide the Committee with our views on the state of the multifamily housing industry and the various proposals to improve it, as well as proposals that would be detrimental to solving the nation’s affordable-housing situation. Here is the bottom line: there is no silver bullet, but we think a multi-faceted approach to improving housing affordability and increasing housing supply is our best course of action. The health and stability of the rental-housing sector is paramount to that of our overall economy. And, importantly, the sufficient supply of quality housing is necessary in ensuring the continued economic prosperity and household stability for Americans nationwide as well as providing household stability. Without it, we put both at risk. Solving this challenge should be mission critical. It certainly is for our industry.

On behalf of the multifamily industry and the nearly 40 million Americans we serve, we applaud the House Ways and Means Committee for examining the efficacy of *TCJA* and exploring options for improving upon that important legislation. We look forward to working with Congress to ensure tax policy promotes solutions to address the nation’s most significant housing challenges.

1. For more than 26 years, the National Multifamily Housing Council (NMHC) and the National Apartment Association (NAA) have partnered to provide a single voice for America’s rental housing industry. Our combined memberships are engaged in all aspects of the rental industry, including ownership, development, management and finance—representing market-rate, affordable, workforce, senior, luxury and every component in between. NMHC is where rental housers and suppliers come together to help meet America’s housing needs by creating inclusive and resilient communities where people build their lives. As a federation of 141 state and local affiliates, NAA encompasses over 96,000 members representing more than 12 million apartment homes globally. One-third of all Americans rent their housing and 40.0 million of them live in an apartment home. [↑](#footnote-ref-2)
2. 2021 American Community Survey, 1-Year Estimates, U.S. Census Bureau, “Total Population in Occupied Housing Units by Tenure by Units in Structure.” [↑](#footnote-ref-3)
3. Hoyt Advisory Services, National Apartment Association and National Multifamily Housing Council, “The Contribution of Multifamily Housing to the U.S. Economy,” [https://weareapartments.org/pdf/Economic\_Impact.pdf](https://url.avanan.click/v2/___https://weareapartments.org/pdf/Economic_Impact.pdf___.YXAzOm5taGM6YTpvOjQzYmQyNGJiMGRlZmY2MGNmMGZlMmVkZmM5ODYzZmJhOjY6NzljMTo5OThmYWUzNjQ2NWUyODI5NWMzZjZmZDhmOTA2MDk2NzdhMGNjZjQ2YTZhZGQ5MjMxZWMzODM5YmEzOGM2NGQzOnA6VA). [↑](#footnote-ref-4)
4. NMHC tabulations of 1985 American Housing Survey microdata, U.S. Census Bureau; 2021 American Housing Survey; U.S. Census Bureau. [↑](#footnote-ref-5)
5. Rosenthal, Steven M. and Mucciolo, Livia, *Who’s Left to Tax? Grappling with a Dwindling Shareholder Tax Base*, Tax Notes Federal, Volume 183, April 1, 2024, <https://www.taxnotes.com/featured-analysis/whos-left-tax-grappling-dwindling-shareholder-tax-base/2024/03/29/7j9cr>. [↑](#footnote-ref-6)
6. [https://rentalhousingaction.org/wp-content/uploads/2023/11/ACTION-NATIONAL-NOV-2023.pdf](https://url.avanan.click/v2/___https://rentalhousingaction.org/wp-content/uploads/2023/11/ACTION-NATIONAL-NOV-2023.pdf___.YXAzOm5taGM6YTpvOjQzYmQyNGJiMGRlZmY2MGNmMGZlMmVkZmM5ODYzZmJhOjY6NDJjNTpmMDM1ZjQ4MmU4ODgzNTA5ZjZjZWI3MTJjYTFlZjA0Nzk1NmRiY2MyOTdmN2E2MjU1MzhmMjlkN2U4MDg4NWJmOnA6VA). [↑](#footnote-ref-7)
7. [https://www.novoco.com/notes-from-novogradac/lihtc-pab-provisions-newly-reintroduced-ahcia-could-result-nearly-2-million-additional-affordable](https://url.avanan.click/v2/___https://www.novoco.com/notes-from-novogradac/lihtc-pab-provisions-newly-reintroduced-ahcia-could-result-nearly-2-million-additional-affordable___.YXAzOm5taGM6YTpvOjQzYmQyNGJiMGRlZmY2MGNmMGZlMmVkZmM5ODYzZmJhOjY6ZGU4ZjowN2U0NzVjNzE4MjZmMTMwZGI5MjY0YjM2YjBlOTNkMmM2OTk0YTFkOTIyOWI4NDA2MDdkNWY0ZjUwODE0MjM2OnA6VA). [↑](#footnote-ref-8)
8. [https://www.novoco.com/periodicals/news/low-income-housing-tax-credits-news-briefs-march-2024](https://url.avanan.click/v2/___https://www.novoco.com/periodicals/news/low-income-housing-tax-credits-news-briefs-march-2024___.YXAzOm5taGM6YTpvOjVjMTdjOTZmZThlZmJkZTY0NTdiOThmZjI5OTVhMmQ4OjY6Nzk5Zjo0YWQyMjE1NDQ1NDFkZjMyZjIwNWU2ZDY1MTliODlkZTczMTgwNzZiMjFiZDAxMGQ5Y2FkNTNmYmNjNWMwMGQ5OnA6VA). [↑](#footnote-ref-9)
9. [https://www.novoco.com/periodicals/articles/surge-in-pab-financed-affordable-housing-signals-need-to-expand-its-use](https://url.avanan.click/v2/___https://www.novoco.com/periodicals/articles/surge-in-pab-financed-affordable-housing-signals-need-to-expand-its-use___.YXAzOm5taGM6YTpvOjVjMTdjOTZmZThlZmJkZTY0NTdiOThmZjI5OTVhMmQ4OjY6NGNmYzowMzQxYjg0ZjAzNGQ3NGY0NWU1NjNiNmMzZTIzOTJjYTUzNjE4YmI0MDRjZjNlZTAzNTJhNjI4Mjk0MGQzZWJhOnA6VA). [↑](#footnote-ref-10)
10. U.S. Census Bureau, Survey of Market Absorption, [https://www.census.gov/data/developers/data-sets/soma.html](https://nam11.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.census.gov%2Fdata%2Fdevelopers%2Fdata-sets%2Fsoma.html&data=05%7C02%7Cmberger%40nmhc.org%7C61832308ba1c479b0e1c08dc78e5fac3%7C05cc7ce5f709445995445680e78a2e22%7C0%7C0%7C638518176368497314%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C0%7C%7C%7C&sdata=ClSfW1lLfga%2B3r88LpvyCVPXGlFnp2Izj27Zm1fDXxk%3D&reserved=0). [↑](#footnote-ref-11)
11. Harvard Joint Center for Housing Studies, *State of the Nation’s Housing 2024, pg. 35,* [*https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard\_JCHS\_Americas\_Rental\_Housing\_2024.pdf*](https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2024.pdf)*.* [↑](#footnote-ref-12)
12. <https://www.novoco.com/notes-from-novogradac/qof-investments-build-homes-across-hundreds-of-american-cities>. [↑](#footnote-ref-13)
13. Kramer, Anita. *Behind the Facade: The Feasibility of Converting Commercial Real Estate to Multifamily*. Washington, D.C.: Urban Land Institute, 2023, <https://www.nmhc.org/globalassets/research--insight/research-reports/conversion/behind-the-facade_conversion-report.pdf>. [↑](#footnote-ref-14)
14. <https://dcregs.dc.gov/Common/NoticeDetail.aspx?NoticeId=N135303> and [https://www.nyc.gov/site/officeconversions/index.page](https://url.avanan.click/v2/___https://www.nyc.gov/site/officeconversions/index.page___.YXAzOm5taGM6YTpvOjVjMTdjOTZmZThlZmJkZTY0NTdiOThmZjI5OTVhMmQ4OjY6ZWRlMDo2ZGQ0OWMyYjE1NTkwYjhlOWRlZjYwZTRjMTZkNDNiYTg3ODYwOTgwMThlYWU0N2FhZTAwNWFmNjkyNTU1N2U5OnA6VA). [↑](#footnote-ref-15)
15. Kramer, Anita. *Behind the Facade: The Feasibility of Converting Commercial Real Estate to Multifamily*. Washington, D.C.: Urban Land Institute, 2023, <https://www.nmhc.org/globalassets/research--insight/research-reports/conversion/behind-the-facade_conversion-report.pdf>. [↑](#footnote-ref-16)
16. Under current law, today’s 37 percent rate reverts to 39.6 percent beginning in 2026 following the expiration of *TJCA*. The section 199A 20-percent qualified business income deduction, which effectively reduces today’s top 37 percent rate to 29.6 percent, expires at the end of 2025 as well. It should be noted that today’s top 37 percent tax rate does not apply until a single filer earns over $609,350 and a married filer earns over $731,200 (and both thresholds will revert in 2026 to significantly lower pre-TCJA levels, although still indexed for inflation from 2017). [↑](#footnote-ref-17)
17. While many of these types of income are taxed at ordinary income tax rates, long-term capital gains and qualified dividends, which would fall within the proposal, are currently taxed at long-term capital gains rates. These types of income are discussed directly below in the section specifically addressing capital gains and qualified dividends. [↑](#footnote-ref-18)
18. Internal Revenue Service, SOI Tax Stats – Partnership Statistics by Sector or Industry, All Partnerships, Table 1: All Partnerships: Total Assets, Trade or Business Income and Deductions, Portfolio Income, Rental Income, and Total Net Income (Loss), by Industrial Group, 2021. [↑](#footnote-ref-19)