February 12, 2026

The Honorable Kenneth J. Kies
Assistant Secretary for Tax Policy
Chief Counsel (Acting)
Internal Revenue Service
U.S. Department of the Treasury
1111 Constitution Ave., NW
Washington, DC 20224

Re: Final and Proposed Section 892 Regulations (T.D. 10042 and REG-101952-24)

Dear Mr. Kies:

ICSC, the National Multifamily Housing Council (NMHC), the National Apartment Association (NAA), and NAIOP appreciate the opportunity to offer comments on the final regulations regarding Code Section 892 (T.D. 10042) (the "Final Regulations") and the proposed regulations regarding Code Section 892 (REG-101952-24) (the "Proposed Regulations").

ICSC's nearly 50,000 North American members represent marketplace professionals, including owner/developers of retail centers, as well as retail tenants, investors, economic developers, and legal professionals. ICSC promotes industry advancement for the spaces where people shop, dine, work, play, and gather as foundational and vital ingredients of communities and economies. The industry is a significant job creator, driver of GDP, and critical revenue source for the communities it serves through the generation of sales taxes and the payment of property taxes.

NMHC is a national nonprofit association that represents the leadership of the apartment industry. Our members engage in all aspects of the apartment industry, including ownership, development, management, and finance, who help create thriving communities by providing apartment homes for nearly 40 million Americans, contributing $4.0 trillion annually to the economy. Our nation is currently suffering from a housing affordability crisis, and we face a pressing need to build 4.3 million new apartment homes by 2035. Foreign investment represents a critical source of capital necessary to finance the development of quality, affordable housing. Given that apartment housing is often where America's workforce goes to sleep, new rental housing production is a critical component of driving economic growth and increasing the U.S. manufacturing base.

NAA serves as the leading voice and preeminent resource through advocacy, education and collaboration on behalf of the rental housing industry. As a federation of 139 state and local affiliates, NAA encompasses nearly 113,000 members representing over 13.5 million apartment homes. NAA believes that rental housing is a valuable partner in every community.

NAIOP, the Commercial Real Estate Development Association, is the leading trade association for real estate developers, owners, investors and asset managers in office, industrial, retail, and mixed-use real estate, with more than 21,000 members, in 54 local chapters throughout North America.

We appreciate Treasury's efforts to provide needed clarity with respect to sovereign investors, a key capital source for the real estate industry. The Final Regulations provide welcome clarity in holding that the disposition of a partnership interest does not create commercial activity, and disposition of a U.S. real property interest (USRPHC), by itself, does not constitute the conduct of commercial activity. We also appreciate the narrowing of the USRPHC per se rule to now only apply to domestic corporations along with the finalization of the newly renamed qualified partnership exception for commercial activity.

The Proposed Regulations further explore complex topics regarding effective control (formerly effective practical control) and commercial activity guidelines relating to lending. We recognize this analysis is factually intensive, and we wanted to provide the following comments to avoid any inadvertent negative effect on certain investment structures we believe should be eligible for exemption under Section 892. Further we believe that the Proposed Regulations should provide a "grandfathering" rule because of the significant number of existing investments already made by sovereign investors that could not practically be modified.

Prop. Reg. Section 1.892-4(c)(1)(ii)(D) Example 2 addresses loans made to an entity where the sovereign is also an equity holder. While we agree with the example's conclusion that the loan is an investment and not a commercial activity, we are concerned with the vague terminology such as "substantial percentage" and "not significant relative to the value" creating uncertainty. We request that an example be added to address a favorable situation such as if a sovereign owns 10 percent of a company and all of the equity owners agree to make a pro-rata loan to the company. We do not believe such a pro rata loan, regardless of the relative level of debt versus equity, should give rise to commercial activity.

Finally, the Proposed Regulations specifically asked for comments as to the determination of effective control by the holder of a minority equity interest in an entity if managerial or board-level decisions of the entity are subject to veto or "blocking" rights of the holder and other holders (for example, through consent rights, supermajority requirements, or otherwise). Further, Prop. Reg. Section 1.892-5(c)(2)(iii)(I) Example 8 also finds effective control through a creditor interest where the credit agreement also provides the sovereign with veto rights over dividend and stock repurchases, additional borrowing, capital expenditures, the annual operating budget, and redemption of subordinated debt.

We believe that negative investment-protection rights, such as those listed in the above paragraph, are investor-type rights and not the type of "day-to-day" operational controls that implicate effective control under Section 892. Sovereigns negotiate negative rights to protect their sizable investments in both investment funds and in joint ventures. This does not provide the sovereign with impermissible operational control. Instead blocking rights over major decisions, including operating budgets, merely recognize the sovereign's need to protect its investment. For example, if the fund or joint venture were to completely change its business plan under which the sovereign originally invested and the sovereign is subject to future capital call obligations, the sovereign has a business need to be one of the investors with veto rights over such a change. Further, the sovereign does not typically exclusively hold such rights, and the lack of exclusivity, when combined with the right only being a veto right,

does not provide effective control. We are concerned that this proposed material change could greatly harm the U.S. real estate market that relies on sovereign investors. We recommend the Proposed Regulations be revised to allow such negative rights on what are commonly referred to as "major decision" rights by capital investors to protect their investment.

We thank you for considering the above comments. We understand the necessity of protecting the U.S. tax base, and we believe the narrowly tailored recommendations we have offered strike a critical balance between safeguarding that tax base, promoting foreign investment, and ensuring the U.S. is the best place in the world to do business.

We welcome the opportunity to discuss these in more detail. For further questions, please contact Phillips Hinch, ICSC Vice President of Tax Policy, at phinch@icsc.com or (202) 626-1402.

Sincerely,

ICSC

National Multifamily Housing Council

National Apartment Association

NAIOP