



# Build Back Better Act

## Selected Proposals Impacting Real Estate



SEPTEMBER 21, 2021

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## Background

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- On September 10, 2021, House Ways & Means Committee Chairman Neal released Budget Reconciliation Legislative Recommendations Relating to Infrastructure Financing (subtitle F), Green Energy (subtitle G), the Social Safety Net (subtitle H), and Prescription Drug Pricing (subtitle J), including a [section-by-section summary of subtitles F, G, H, and J](#). On September 13th, an Amendment in the Nature of a Substitute was proposed to add Subtitle I, Legislative Recommendations Relating to Funding Our Priorities, including a [section-by-section summary of subtitle I](#) in addition to [legislative text](#) of subtitles F, G, H, I, and J. All of these subtitles passed out of Committee.
  - The Joint Committee on Taxation has released a [report](#), and a [score](#), and estimates that the changes to subtitles F, G, H, I, and J combined would raise approximately \$871 billion in net revenue over ten years.
  - All references to “section” are to the Internal Revenue Code of 1986, as amended.
  - **Effective Date** – Unless otherwise noted, the provisions described in this summary apply to taxable years beginning after December 31, 2021.
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# Key Provisions – Individuals

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## Key Provisions – Individuals

	House Bill	Current Law
<b>Individual Income Tax Rate</b>	<ul style="list-style-type: none"><li>• Increases the top individual income tax rate to 39.6% and reduces the dollar amounts at which the 39.6% bracket begins.</li><li>• Rate applies to:<ul style="list-style-type: none"><li>– Married individuals filing jointly with taxable income over \$450,000;</li><li>– Heads of households with taxable income over \$425,000;</li><li>– Unmarried individuals with taxable income over \$400,000;</li><li>– Married individuals filing separate returns with taxable income over \$225,000; and</li><li>– Estates and trusts with taxable income over \$12,500.</li></ul></li></ul>	<ul style="list-style-type: none"><li>• The top individual income tax rate is 37%.</li><li>• For 2022, the regular income tax rate schedules are projected to be as follows:<ul style="list-style-type: none"><li>– Married individuals filing jointly with taxable income over \$646,150; and</li><li>– Unmarried individuals with taxable income over \$538,475.</li></ul></li></ul>
<b>Surcharge on High Income Individuals, Trusts, and Estates</b>	<ul style="list-style-type: none"><li>• Imposes a tax equal to 3% of a taxpayer’s modified adjusted gross income in excess of \$5,000,000 (or in excess of \$2,500,000 for a married individual filing separately or \$100,000 in the case of an estate or trust).</li></ul>	<ul style="list-style-type: none"><li>• No similar provision.</li></ul>

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## Key Provisions – Individuals

	House Bill	Current Law
<b>Individual Capital Gains Tax Rate</b>	<ul style="list-style-type: none"><li>• Increases the top individual capital gains tax rate to 25%.</li><li>• Applies to taxable years ending after September 13, 2021.</li><li>• <b>Transition Rule</b> – Provides that the preexisting statutory rate of 20% continues to apply to gains and losses for the portion of the taxable year prior to the date of introduction.<ul style="list-style-type: none"><li>– Gains recognized later in the same taxable year that arise from transactions entered into before the date of introduction pursuant to a written binding contract are treated as occurring prior to the date of introduction.</li><li>– Determination of when dividends, gains, and losses are properly taken into account is made at the passthrough entity level.</li></ul></li></ul>	<ul style="list-style-type: none"><li>• The top individual capital gains tax rate is 20%.</li></ul>
<b>Deduction of Qualified Business Income</b>	<ul style="list-style-type: none"><li>• Amends section 199A; sets the maximum allowable deduction at:<ul style="list-style-type: none"><li>– \$500,000 in the case of a joint return;</li><li>– \$400,000 for an individual return;</li><li>– \$250,000 for a married individual filing a separate return; and</li><li>– \$10,000 for a trust or estate.</li></ul></li><li>• Limitation also applies to REIT dividends.</li></ul>	<ul style="list-style-type: none"><li>• There is currently no similar dollar limitation on the amount of the deduction allowable for a taxable year.</li></ul>

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	House Bill	Current Law
<b>Partnership Interests Held in Connection with the Performance of Services</b>	<ul style="list-style-type: none"><li>• Extends from three to five years the holding period required for gain attributable to an applicable partnership interest (often referred to as a “carried interest”) to qualify for long term capital gain treatment.</li><li>• Retains the three-year holding period for real property trades or businesses and taxpayers (other than a trust or estate) with adjusted gross income of less than \$400,000.</li><li>• The holding period is measured from the latest of (i) the date on which the taxpayer acquired <i>substantially all</i> of the “applicable partnership interest” with respect to which the amount is realized, and (ii) the date on which the applicable partnership acquired <i>substantially all of</i> the assets. Similar rules apply to tiered partnerships.</li><li>• Extends section 1061 to all assets eligible for long term capital gain rates (e.g., section 1231 gains).</li><li>• Treats <i>all</i> transfers of applicable partnership interests as taxable (notwithstanding any other nonrecognition provision).</li><li>• Extends regulatory authority under the provision to address carry waivers and arrangements that avoid the purposes of section 1061.</li></ul>	<ul style="list-style-type: none"><li>• A three-year holding period in the case of certain net long term capital gain with respect to any applicable partnership interest held by the taxpayer.</li><li>• Gain subject to three-year holding period requirement, including gain from a capital asset, but not section 1231 gains.</li><li>• Taxable transfers to related parties subject to special rules.</li></ul>

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	House Bill	Current Law
<b>Excess Business Losses</b>	<ul style="list-style-type: none"><li>• Amends section 461(l) to make the limitation on excess business losses (i.e., net business deductions in excess of business income) permanent.</li><li>• Reforms the rules such that taxpayers would carry disallowed excess business losses forward to the next succeeding taxable year, until there was sufficient trade or business income to offset the losses.</li><li>• Effective for taxable years beginning after December 31, 2020.</li></ul>	<ul style="list-style-type: none"><li>• Section 461(l) disallows excess business losses for non-corporate taxpayers in excess of inflation-adjusted thresholds.</li><li>• Limitation does not apply to taxable years ending or after January 1, 2027.</li></ul>
<b>Net Investment Income Tax</b>	<ul style="list-style-type: none"><li>• Expands the net investment income tax to cover net investment income derived in the ordinary course of a trade or business of certain high-income individuals with greater than \$400,000 in taxable income (single filer) or \$500,000 (joint filer).</li><li>• Not assessed on wages on which FICA is already imposed.</li></ul>	<ul style="list-style-type: none"><li>• The tax generally does not apply to (1) income or gain from a trade or business conducted as a sole proprietor, partnership, or S corporation, if the individual taxpayer materially participates in the trade or business activity or (2) wages of an employee.</li></ul>
<b>Estate &amp; Gift Tax</b>	<ul style="list-style-type: none"><li>• Among other changes, restores the exemption amount for estates and gifts (which was temporarily increased to \$10 million under the Tax Cut &amp; Jobs Act) to its post-2010 level of \$5 million, indexed for inflation.</li></ul>	<ul style="list-style-type: none"><li>• For estates of decedents dying and gifts made after December 31, 2017, and before January 1, 2026, the exemption is \$10 million (indexed for inflation; \$11,700,00 in 2021).</li></ul>

# Key Provisions – Corporations and Partnerships



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## Key Provisions – Corporations and Partnerships

	House Bill	Current Law
<b>Corporate Income Tax Rate</b>	<ul style="list-style-type: none"><li>• Increases top corporate tax rate to 26.5%.</li><li>• Replaces the flat corporate income tax with a graduated rate structure.<ul style="list-style-type: none"><li>– Personal services corporations not eligible for graduated rates.</li><li>– 18% on the first \$400,000 of income; 21% on income up to \$5 million; 26.5% on income thereafter.</li><li>– The benefit of the graduated rate phases out for corporations making more than \$10 million.</li></ul></li></ul>	<ul style="list-style-type: none"><li>• Corporate taxable income is generally subject to a flat tax rate of 21%.</li></ul>
<b>Partnership Taxation (Subchapter K)</b>	<ul style="list-style-type: none"><li>• No proposal to reform the taxation of partnerships.</li></ul>	<ul style="list-style-type: none"><li>• Partnerships treated as flow-through entities for tax purposes generally.</li></ul>

# Key Provisions – REITs

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## Key Provisions – REITs

	House Bill	Current Law
<b>REITs that Own Correctional, Detention, or Penal Facilities</b>	<ul style="list-style-type: none"><li>• Treats income received with respect to property primarily used as a prison or other detention facility as nonqualifying income for the REIT gross income tests.</li></ul>	<ul style="list-style-type: none"><li>• Rental income from prison and other detention facilities eligible to be treated as qualifying income for the REIT gross income tests.</li></ul>
<b>Constructive Ownership Rules</b>	<ul style="list-style-type: none"><li>• Modifies the REIT constructive ownership rules to eliminate “double down” attribution.</li><li>• Specifically, stock, assets, and net profits constructively owned by a partnership, estate, trust, or corporation by reason of the application of section 318(a)(3) (the “downward” attribution rule) are not considered as owned by the entity for purposes of again applying section 318(a)(3) in order to make another person the constructive owner of such stock, assets, or net profits.</li><li>• Applies for determining whether a REIT has nonqualifying income from related party tenants and whether service providers qualify as “independent contractors.”</li><li>• Applies to taxable years ending after the date of enactment.</li></ul>	<ul style="list-style-type: none"><li>• “Double down” attribution applies for purposes of the REIT constructive ownership rules.</li></ul>

# Other Key Provisions

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## Key Provisions – Interest Deductions

	House Bill	Current Law
<b>Deduction of Business Interest Expense</b>	<ul style="list-style-type: none"><li>• Modifies section 163(j) to apply the limitation on business interest expense at the partner or S corporation shareholder level (i.e., an “aggregate” approach).</li><li>• Additional limitations on carryforwards imposed, including a five-year carryforward limitation.</li></ul>	<ul style="list-style-type: none"><li>• In the case of a partnership or S corporation, the business interest limitation is generally applied at the partnership or S corporation level.</li><li>• No limitation on ability to carryforward business interest expense to future years.</li></ul>
<b>New Limitations on Deduction of Interest Expense of a Corporation</b>	<ul style="list-style-type: none"><li>• Adds new section 163(n), which limits the interest deduction of certain domestic corporations that are members in an international financial reporting group to an allowable percentage of 110% of the net interest expense.<ul style="list-style-type: none"><li>– Applies only to domestic corporations whose average excess interest expense over interest includible over a three-year period exceeds \$12 million.</li><li>– Does NOT apply to REITs, any small business exempted under section 163(j)(3), S corporations, or regulated investment companies.</li></ul></li><li>• Additional limitations on carryforwards imposed, including a five-year carryforward limitation.</li></ul>	<ul style="list-style-type: none"><li>• No similar provision.</li></ul>

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## Other Key Provisions

	House Bill	Current Law
<b>Like-Kind Exchanges</b>	<ul style="list-style-type: none"><li>• No proposals affecting like-kind exchanges.</li></ul>	<ul style="list-style-type: none"><li>• In general, no gain or loss shall be recognized on the exchange of real property held for productive use in a trade or business or for investment if such real property is exchanged solely for real property of like kind which is to be held either for productive use in a trade or business or for investment.</li></ul>
<b>Qualified Conservation Contributions</b>	<ul style="list-style-type: none"><li>• Denies a charitable deduction for contributions of conservation easements by partnerships and other passthrough entities if the amount of the contribution exceeds 2.5 times the sum of each partner's modified adjusted basis in the partnership that relates to the donated property.</li><li>• Does not apply to donations of property that meet the requirements of a three-year holding period rule or contributions by family partnerships.</li><li>• Generally, applies to contributions made after December 23, 2016.<ul style="list-style-type: none"><li>–Applies to contributions made after December 31, 2018, where the contributions of easements related to the preservation of certified historic structures.</li></ul></li></ul>	<ul style="list-style-type: none"><li>• Preferential rules apply in determining the amount of a taxpayer's deduction for a qualified conservation contribution.</li><li>• These rules generally allow an individual making a qualified conservation contribution to offset a higher percentage of their contribution base—and a corporation to offset a higher percentage of its taxable income—than taxpayers making charitable contributions of other types of property.</li></ul>



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