April 30, 2024

The Honorable Lisa McClain
Chairwoman
Committee on Oversight and Accountability
Healthcare & Financial Services
Subcommittee
United States House of Representatives
Washington, DC 20515

The Honorable Katie Porter
Ranking Member
Committee on Oversight and Accountability
Healthcare & Financial Services
Subcommittee
United States House of Representatives
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Dear Chairwoman McClain and Ranking Member Porter:

ICSC appreciates the opportunity to submit a statement for the record for the April 30, 2024, hearing entitled "Health of the Commercial Real Estate Markets and Removing Regulatory Hurdles to Ensure Continued Strength."

ICSC is a nearly 50,000-member organization for industry advancement, promoting and elevating the marketplaces and spaces where people shop, dine, work, play and gather as foundational and vital ingredients of communities and economies. Our list of policy priorities that ICSC members believe represent regulatory overreach follows. These regulations are costly, inefficient, and often lead to property devaluation and risk to capital investment. We thank the Committee for its focus on excessive, burdensome regulations created by the federal government and its willingness to examine what improvements can be made.

Hazardous Substances
ICSC acknowledges the potential risks related to the environmental and health effects of PFOA and PFAS, two chemicals that are ubiquitous in American commerce, and we support appropriate policy decisions to address them. However, EPA's proposal to designate them as "hazardous substances" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is not the right regulatory tool to address this important issue. The approach of directly regulating these substances under CERCLA, before they have been scientifically analyzed and considered for regulation under other federal environmental statutes, such as the Safe Drinking Water Act (SDWA) and Resource Conservation and Recovery Act (RCRA), is contradictory to EPA's longstanding scientific and regulatory practice.

This decision short circuits the process that the agency has applied in every past hazardous substance designation. Such designation has traditionally been made once a chemical had been rigorously analyzed and listed under another environmental statute, such as the SDWA. This designation is also unnecessary from a practical standpoint as the EPA has ample existing authority to protect the public health and welfare and the environment from any potential risk posed by PFOA and PFAS without designating them as hazardous substances.

EPA's proposal would have multiple negative, unintended consequences that would unnecessarily impact communities and companies. Further, the approach is inconsistent with EPA's goal of safely and efficiently addressing sources of PFAS in the environment that present risk. Listing PFAS and PFOA as hazardous substances could potentially bring millions of landowners under CERCLA authority and prompt the reopening of Superfund sites around the country. It will also now expose landowners to the threat of litigation related to the presence of these chemicals on sites for which these landowners had no responsibility. ICSC believes it could have an enormous detrimental effect on the redevelopment of sites, including past and future brownfields sites.

The strict, joint-and-several liability scheme created under CERCLA renders the statute unable to be properly tailored to effectively address the unique challenges of highly pervasive substances, such as PFAS and PFOA. EPA should address numerous issues prior to continuing this rulemaking, such as: what levels of cleanup are feasible; the impact of such a designation on the redevelopment of brownfields sites, particularly in environmental justice communities, and how waste generated from site cleanups would impact passive receivers, such as drinking water systems and property owners.

ICSC supports legislative action in Congress to ensure that sound science is applied, public health is protected, and that third-party liability is addressed holding innocent landowners harmless. At the same time, we support ensuring that the principle of the "polluter pays" be applied to PFAS and PFOA clean ups, meaning the producers who generated the product, not innocent landowners.

WOTUS

Since its inception, the Clean Water Act (CWA) has helped commercial real estate developers and their tenants make significant strides in improving the quality of water resources while continuing to grow the economy. As environmental stewards, shopping center developers construct vital business districts and help create thriving communities while enhancing our natural resources. However, new Waters of the US (WOTUS) regulations were put into place by the Biden administration that profoundly harm the ability to grow economic development in communities and create jobs in the marketplaces industry. The new WOTUS rule would create a number of challenges to the process of developing new or redeveloping existing properties. ICSC members believe the rule will result in major project permitting delays, increased costs for new permit applications, and regulatory uncertainty and inconsistency in the administration of Corps permitting programs. EPA and the U.S. Army Corps of Engineers have stated one of the primary purposes of the rule is to provide clarity and certainty to the regulators, but ICSC believes the rule will perversely result in a cascade of new litigation, resulting in part to numerous troubling definitions in the rule.

These new challenges will have a negative impact on the deal-making process; for instance, landlords may be unable to fulfill or uncertain of the timeline for meeting lease obligations, leading to possible departure of tenants. Tenant companies seeking to expand or relocate their operations to new locations will be impacted, as project scheduling, timing, and cost will be affected by the need to determine whether a permit is required to conduct activities in these areas. Additionally, the scope, timing, and risk to capital investment of land use would need to be adjusted to account for the expanded requirements and new permit requirements.

Organized Retail Crime

Retail property owners are facing an unprecedented number of Organized Retail Crime (ORC) incidents. The problem is pervasive, impacting shopping centers large and small in all regions of the country. ORC involves the illegal acquisition of retail merchandise in substantial quantities through both theft and fraud as part of an unlawful commercial enterprise, with the intent for resale of the stolen goods.

ORC puts a serious strain on business owners, particularly small businesses, in multiple ways, including shopper and employee safety, reputational risk, and financial stability. ORC syndicates focus on the theft and resale of high value branded items that are in demand from shoppers from designer handbags to name-brand laundry detergent. When these goods are resold using an online marketplace or other means of sale, most consumers are often unaware that they are purchasing stolen goods.

Congress should pass legislation to create a federal interagency ORC taskforce. We know there is broad bipartisan support for H.R. 895/S. 140, the Combating Organized Crime Act of 2023 (CORCA). CORCA takes aim at the problem by activating a federal coordination center, while also ensuring criminal penalties address the reality of how ORC enterprises operate.

The federal appropriations process should provide federal law enforcement agencies with the resources and a mandate to investigate and prosecute ORC rings. Appropriators funded a similar and successful HSI initiative to combat IP theft with the creation of the National Intellectual Property Rights Coordination Center. We understand CORCA authors sought to replicate that success and use it as a model for the federal ORC Coordination Center. The Coordination Center is a natural next step to build on the effectiveness of HSI's Operation Boiling Point and the accomplishments of state and local ORC task forces.

Corporate Transparency Act
ICSC strongly supports the Corporate Transparency Act's (CTA) underlying goal of fighting illegal money laundering. The law, however, defines a reporting company so broadly that it includes any legal entity with 20 or fewer employees or $5 million or less in annual revenues. As a result of this broad definition, the Department of Treasury's Financial Crimes Enforcement Network expects to collect over 32 million submissions just this year, including many from the commercial real estate owners and developers who often hold properties in distinct legal entities.

ICSC recently joined a coalition of other similarly situated industry groups in submitting a letter to Members of Congress stating the following: "[W]e expect the CTA to be of little practical use to law enforcement, as criminals are unlikely to accurately self-report their information to FinCEN. Meanwhile, because the CTA targets entities with low revenues and few employees, the brunt of its reporting burden and excessive penalties will be shouldered by law-abiding, Main Street businesses."

Further, the District Court for the Northern District of Alabama recently issued a narrow ruling that the CTA exceeded the Constitution's enumerated powers and was unconstitutional as it applies to members of the National Small Business Association (NSBA). The ruling, however, leaves the law's requirements in place for non-NSBA entities, and is therefore of little practical benefit to other parties.

ICSC applauds Congress's efforts to combat illegal money laundering but encourages Members to consider other methods that do not place such a heavy regulatory burden on small business owners across the country.

Small Business Reorganization Act
Congress is also contemplating extending Subchapter V bankruptcy legislation for an additional two years. The Small Business Reorganization Act was first introduced in 2019 and passed in the CARES Act. The intent was to provide small businesses facing bankruptcy with an alternative to filing Chapter 11. As Subchapter V is under consideration again, ICSC asks Congress to close a private equity/insider debt loophole that has permitted sophisticated business planners and Bankruptcy Code manipulators like Alex Jones to try to abuse this otherwise well-intentioned legislation.

Since SBRA was expanded to include debtors with up to $7.5 million in debt (originally $2.5 million) there have been a few large, sophisticated tenants in both the Office and Retail sectors, backed by private equity investors or multinational corporations, that have taken advantage of the higher debt limit and used Subchapter V to avoid oversight, particularly with respect to

transactions between the debtor and its affiliates. Congress did not intend to position these entities to benefit from the SBRA eligibility standards, which exclude insider debt without any limitation, to avoid the traditional procedures, oversight and protections provided by Chapter 11 (such as more robust disclosures, appointment of a creditors' committee with powers of investigation, and application of the absolute priority rule that prevents businesses from abusing the bankruptcy laws by paying some ahead of others). These debtors are not the "Mom and Pop" and "Main Street" debtors for which Subchapter V was designed. ICSC encourages Congress to close this loophole and safeguard the SBRA program from fraud and continued abuse in the future.

Tax

ICSC is greatly concerned about the pending expiration of many provisions in the 2017 Tax Cuts and Jobs Act at the end of 2025. ICSC strongly supports a permanent extension of the 20% pass-through deduction (IRC section 199A). The vast majority of businesses (95%), including most commercial real estate businesses, are structured as pass-through entities for federal tax purposes. The 199A deduction helps provide parity between the tax rates paid by corporations and those paid by pass-through businesses owners. Without Congressional action, Section 199A is set to expire on December 31, 2025. The Main Street Tax Certainty Act (H.R. 4721 and S. 1706), introduced by Rep. Lloyd Smucker and Sen. Steve Daines, would make this vital provision permanent and provide needed certainty to real estate and Main Street businesses.

ICSC thanks the House for passing H.R. 7024, the Tax Relief for American Families and Workers Act of 2024 (H.R. 7024). This bill would suspend certain tax increases that took effect in 2022 and 2023 on business investment. These changes would promote investment into the repositioning and rehabilitation of existing commercial properties that have been impacted by changes in consumer habits following the coronavirus pandemic.

ICSC appreciates the Committee making regulatory burdens in the commercial real estate space a priority. These impediments increase the time and cost of doing business, increase prices for everyone, kill jobs and make it more difficult for communities to develop and thrive.