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by James Shatz and Andrew Palmer

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In this article, Shatz and Palmer propose a three-part change to the code so that American pension capital can have a home-court advantage in financing U.S. infrastructure.

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## I. Introduction

The Infrastructure Investment and Jobs Act represented the largest public commitment to American infrastructure in a generation, directing federal resources toward roads, bridges, water systems, broadband, and clean energy at a scale not seen in decades.[1] Regardless, the United States faces a significant infrastructure financing gap — estimated at $3.7 trillion through 2033[2] — and this gap could only become larger if foreign institutional capital redirects elsewhere. The government has repeatedly called for more private capital in American infrastructure.[3] Given structural stresses in the retail interval fund market across multiple large private credit platforms in early 2026,[4] the most available policy-responsive source of patient domestic capital for American infrastructure may very well be the universe of "qualified organizations" — that is, corporate pension plans, university endowments, and section 403(b) accounts.[5]

Other countries — most notably, Canada and Australia — have worked to address this problem in a way that the United States should find instructive. In March 2026 nine Canadian pension funds and eight Australian superannuation funds entered into a memorandum of understanding directed at channeling more pension capital into critical infrastructure in both countries. The institutions behind this bilateral investment alliance collectively manage more than $3.2 trillion in assets, and one of the world's largest infrastructure asset managers committed up to C $10 billion in funding for Canadian infrastructure over the next decade.[6]

The direction the pact signals deserves attention. U.S. tax policy has never given domestic

[1] *See generally* Infrastructure Investment and Jobs Act, P.L. 117-58, 135 Stat. 429 (2021).

[2] *See* David Whiteley, "The United States Has a $3.7 Trillion Infrastructure Challenge," RealClearMarkets (Mar. 5, 2026).

[3] *See, e.g.*, Rhett Buttle, "Rebuilding the Nation's Infrastructure: A Conversation With Mayor Mitch Landrieu," *Forbes*, Nov. 14, 2022; John Gallagher, "Duffy Urges More American Dollars Invested in US Infrastructure," Yahoo Finance, July 16, 2025.

[4] *See* Goldman Sachs, "The Outlook for Private Credit Amid Rising Market Stress" (Mar. 26, 2026).

[5] One prominent asset manager has identified a $3.7 trillion U.S. infrastructure funding gap through 2033 and proposed that American and foreign pension capital could help close it, publishing a policy blueprint calling on the U.S. federal government to unlock pension capital for American infrastructure (through, for example, an asset recycling program through which states would lease existing brownfield infrastructure to long-term pension investors and redeploy the proceeds into new community assets). *See* IFM Investors, "IFM Investors Releases Policy Blueprint Aimed at Unlocking Pension Capital Investment in US Infrastructure" (Mar. 9, 2026).

[6] The Canadian-Australian Pension Funds Investment Initiative was announced in March 2026 during Canadian Prime Minister Mark Carney's official diplomatic visit to Australia. Canadian signatories include Alberta Investment Management Corp. (AIMCo), British Columbia Investment Management Corp. (BCI), La Caisse, CPP Investments, Healthcare of Ontario Pension Plan (HOOPP), Investment Management Corp. of Ontario (IMCO), Ontario Municipal Employees Retirement System (OMERS), Ontario Teachers' Pension Plan (OTPP), and the Public Sector Pension Investment Board (PSP Investments). Australian signatories include Australian Retirement Trust, AustralianSuper, Aware Super, CareSuper, Cbus Super, Health Employees Superannuation Trust Australia (HESTA), Hostplus, Rest, and IFM Investors. The signatory institutions collectively manage more than $3.2 trillion in assets under management. IFM Investors separately committed up to C $10 billion in Canadian infrastructure over the following decade. *See* IFM Investors, "Australian Industry Super Funds Join Forces With Canadian Counterparts to Deliver for Members," Mar. 4, 2026.



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retirement capital a meaningful advantage over the foreign sovereign capital competing for the same American infrastructure assets. For example, a Canadian pension fund investing in a U.S. toll road pays approximately the same effective tax rate as an American pension fund investing in the same asset. Consider two investors with identical investment intent — a public school teacher in Ontario participating in the Ontario Teachers' Pension Plan and a U.S. company factory worker participating in a section 401 corporate defined benefit plan. The Ontario plan holds a one-third ownership interest in the Chicago Skyway (a 7.8-mile toll road forming a critical link between downtown Chicago and its southeastern suburbs) alongside two other Canadian pension funds. As discussed further herein, if the U.S. company plan similarly invested in the Chicago Skyway, it would pay 21 percent corporate tax through a blocker on the income from that investment — the same asset that the Ontario plan holds at the same U.S. tax drag. In this way, the American pension fund gets no home court advantage — a policy gap that Congress has the tools to close.

The Canadian-Australian pension alliance is a data point, not a trend. But the direction it signals is worth taking seriously. The Maple 8 and Australian superannuation funds currently deploy significant capital into U.S. infrastructure.[7] That capital is patient, long-lasting, and suited to the asset class. It's also mobile. By 2040 the combined Canadian and Australian institutional capital pool is projected to reach approximately $14 trillion.[8] That capital is now formally organizing itself around non-U.S. infrastructure opportunities with diplomatic backing at the prime ministerial level. It hasn't left the U.S. market, but it has demonstrated that it has options.

The federal government has used the tax code for decades to signal national economic priorities — for example, through accelerated depreciation for manufacturing, research credits for innovation, and production tax credits for clean energy (to name a few). However, it has never promulgated a purpose-driven definitional framework for essential infrastructure as a distinct category of national economic purpose.

This article proposes a three-part change to the code so that American pension capital can have a home court advantage in financing American infrastructure that it does not currently enjoy. This proposal would serve to direct capital more efficiently toward assets the government has already identified as essential and to begin building the purpose-driven policy framework that essential infrastructure has always deserved and never had.

The consequence of this tax drag does not stay with the pension investor. In competitive public-private partnership procurements, every basis point of return drag that a pension investor bears is priced into the consortium bid. Consortiums pursuing U.S. infrastructure assets model their equity returns net of the tax friction their investors will bear. When domestic pension capital participates through blocker structures, the blocker tax is embedded in the bid economics. The result is that state departments of transportation and municipal authorities pay for the unrelated business taxable income drag through increased concession fees, higher toll rates, or foregone upfront payments. The pension investor absorbs the tax on paper, but the taxpaying public absorbs the cost in practice. A legislative fix that eliminates the drag does not merely benefit pension trusts and their beneficiaries; it also reduces the cost of essential infrastructure delivery for every state and local government that procures it.

## II. Background

The U.S. federal income tax (USFIT) treatment of foreign pension capital depends on the specific classification of the investor. Accordingly, foreign capital accesses U.S. infrastructure through a range of investment structures depending on the foreign investor's specific USFIT status.

[7] The "Maple 8" refers to the eight largest Canadian public pension funds, which have a unique Canadian model of investment management, including in-house investment management and significant direct investment in both domestic and foreign infrastructure and real estate. *See* Katie O'Leary, "The Success of the Canadian Model and Maple 8," Chronograph (Feb. 1, 2024).

[8] *See* Jamie Williamson, "Australian-Canadian Pension Initiative Could Unite $14T for Investing by 2040," Chief Investment Officer (Mar. 6, 2026).



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### A. Tax Parity Between Domestic and Foreign Investment in Infrastructure

Domestic and foreign institutional investors generally face similar (if not identical) tax burdens when investing in non-real estate infrastructure assets in the United States. While certain foreign governmental investors (such as government instrumentalities and sovereign wealth funds) may be entirely exempt from USFIT on certain passive investment income under section 892, other foreign pension funds qualifying as "qualified foreign pension funds" (QFPFs) under section 897(l) generally invest in U.S. infrastructure through a U.S. "blocker" corporation. The blocker pays USFIT on income effectively connected to its U.S. trade or business ("effectively connected income") at the corporate rate of 21 percent, and then dividends flow from the blocker to the QFPF investor, where they are subject to applicable treaty withholding rates (which vary by jurisdiction).[9]

On the other hand, domestic "qualified organizations" (QOs), defined in section 514(c)(9)(C), are domestic tax-exempt entities whose investment activities are eligible for certain preferred tax treatment under various provisions of the code. QOs include section 401 qualified trusts, including corporate defined benefit pension plans (referred to herein as "domestic qualified pension trusts"), educational organizations and their affiliated support organizations (such as foundations and endowments), section 501(c)(25) title-holding companies, and section 403(b)(9) church retirement accounts.[10] This category generally does not, however, include governmental pension plans, which are state and local systems that generally are categorically exempt from federal income tax under a separate statutory provision and have no need for the accommodations this article discusses.[11]

Just as QFPFs use blockers to shield ECI from U.S. infrastructure investments, QOs also utilize blockers to shield taxable UBTI under sections 511 and 512. U.S. infrastructure assets may generate taxable UBTI to QOs in the form of "trade or business income" (which would generally include infrastructure-related operating income from toll roads, utilities, airports, and similar actively managed assets flowing through the fund's partnership structure to the tax-exempt limited partner), as well as "unrelated debt-financed income," attributable to the leveraged portion of fund assets and taxable regardless of its underlying character.[12] Both fact patterns give rise to UBTI concerns for a domestic qualified pension trust.

In this way, both foreign pension funds and domestic qualified pension trusts use blockers for structuring fund investments in U.S. infrastructure assets (and other classes) because of these ECI and UBTI sensitivities. This creates a general parity between the tax burdens of domestic QOs and foreign QFPFs in the infrastructure sector, and in some cases section 892 investors receive a tax advantage over their domestic counterparts. One asymmetry, however, is worth noting: When the fund uses a subscription credit facility, there's a risk that dividends received by the domestic investor are themselves treated as debt-financed income subject to UBTI at the investor level. This creates a potential second layer of tax exposure that places additional structuring burden on fund managers seeking to accommodate domestic qualified organization investors.

### B. Tax Advantages for Domestic Investors in Real Estate

Unlike infrastructure investment parity, domestic investment in real estate is given a decisive tax advantage over foreign investment. Congress addressed both UBTI problems for real

[9] *See generally* sections 892, 897(l); reg. section 1.892-2T. Whether a specific foreign pension investment vehicle qualifies under section 892 or section 897(l) depends on its particular organizational structure and the nature of its U.S. investments — a determination that must be made on an investment-by-investment basis. What is consistent, however, is that foreign pension capital accessing U.S. infrastructure through a U.S. blocker generally does so at a USFIT cost that is, at most, 21 percent (the corporate tax rate at the blocker) plus applicable treaty withholding.

[10] *See* section 514(c)(9)(C).

[11] Governmental plans described in section 414(d) — including state and local public pension systems — are generally exempt from USFIT under section 115 as instrumentalities of a state or local government.

[12] *See generally* section 514.

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estate through two separate legislative accommodations. First, the rental income exclusion of section 512(b)(3) eliminates the trade or business income problem for tax-exempt limited partners receiving allocations of certain real estate income.[13] Further, QOs can benefit from the exception from the unrelated debt-financed income rules of section 514 for certain real property (provided in section 514(c)(9)), including through investments in partnerships which comply with the "fractions rule" of section 514(c)(9)(E). Specifically, when a partnership includes both taxable and tax-exempt partners, the fractions rule generally requires that a QO partner's percentage share of overall partnership income in any given tax year not exceed its lowest possible percentage share of overall partnership loss in any tax year.[14] This serves as an antiabuse rule designed to prevent partnerships from shifting tax benefits from tax-exempt investors to taxable investors.

Together these two provisions allow a qualified domestic pension trust to invest in a leveraged real estate fund and pay zero UBTI — no blocker required and no corporate tax imposed. In this way, a qualified domestic pension trust investor has no tax drag on returns, while a foreign investor in the same real estate fund must still pay blocker tax — a genuine domestic tax advantage for investments in real estate that is not granted to investments in infrastructure.

Congress intentionally made these accommodations specifically for real estate but has never made equivalent accommodations for infrastructure. Therefore, a domestic qualified pension trust has no easily discernible tax advantage over foreign pension capital for infrastructure investments. U.S. tax policy has not meaningfully encouraged domestic pension capital to invest in American infrastructure — a gap that becomes more consequential as the asset class grows in economic significance.

The cost of the current gap is quantifiable. A typical infrastructure fund targets 12 to 14 percent of the gross internal rate of return with a leverage ratio of 50 to 65 percent across fund assets.[15] On the leveraged portion of income, the U.S. blocker corporation pays 21 percent corporate tax before distributions reach the tax-exempt investor.[16] That drag reduces the estimated net internal rate of return by approximately 130-200 basis points annually before state and local corporate taxes.[17] Over a 10-year holding period, 150 basis points of annual drag compounds to a return differential that is significant by any institutional investment standard.

A qualified pension trust investing in a fractions-rule-compliant real estate fund incurs no equivalent cost — no blocker corporation, no corporate-level tax, and no reduction in the compounding of returns over the holding period. A legislative accommodation that removes this drag does not merely correct a tax inequity; it makes investing in essential American infrastructure materially more attractive for the domestic retirement capital best suited to finance it.

## III. Legislative Proposal

The following three-part change to the code and Treasury regulations would meaningfully put domestic infrastructure investment on a level playing field with both foreign infrastructure investment and real estate investment more broadly. As discussed below, this proposal involves (1) creating and employing a definition of "qualifying infrastructure" investment across the code, (2) excluding qualifying infrastructure income from UBTI, and (3) extending the fractions rule to qualifying infrastructure investments, with safe harbors. Crucially, these proposals can

[13] *See* section 512(b)(3), excluding "rents from real property" from UBTI.

[14] More specifically, the fractions rule requires two conditions to be satisfied simultaneously in the partnership agreement: (1) no QO partner's share of partnership income in any year may exceed its share of partnership loss in the year of minimum loss allocation (with certain permitted adjustments to the calculation of such amounts), and (2) all partnership allocations must be backed by capital accounts maintained under the section 704(b) regulations, with liquidating distributions made according to positive capital account balances. Satisfying both conditions in practice generally requires specific allocation language — a qualified income offset provision, a minimum gain chargeback, and section 704(b)-compliant capital account maintenance.

[15] *See, e.g.*, Alexander Andonov, Roman Kräussl, and Joshua Rauh, "Institutional Investors and Infrastructure Investing," 34 *Rev. Fin. Stud.* 3880 (2021).

[16] These figures are illustrative and should not be relied on as investment advice.

[17] This article does not address state and local tax consequences, which vary significantly by jurisdiction and warrant separate treatment.



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be accomplished using existing statutory definitions and levers that are already available.

The IRS has acknowledged the real property parallel for infrastructure in the context of the business interest expense limitation.[18] Tax writers have a meaningful starting point. What remains is the legislative will to extend that logic to the UBTI provisions and to build a definitional framework worthy of the asset class.

### A. Develop 'Qualifying Infrastructure' Definition and Safe Harbor

To start, a cohesive and usable definition of qualifying infrastructure must be used. Here, section 142 can be deployed as the framework for defining infrastructure for purposes of a legislative fix. Though section 142 formally provides rules governing exempt facility bonds, the enumerated list of permitted proceeds of an exempt facility bond in section 142(a) provides an ideal definition of infrastructure for use in the code more generally. Section 142 was enacted as part of the 1986 code and has been updated and expanded in piecemeal fashion in the ensuing decades by adding additional infrastructure asset classes to the definition, including high-speed rail,[19] public educational facilities,[20] and, most recently, broadband[21] and spaceport facilities.[22]

Policymakers can use this category to carve out a new type of income excluded from UBTI for qualified organization investors. The category should be viewed as structurally analogous to the real property rental income exclusion of section 512(b)(3) that eliminated the same problem for real estate decades ago. The most durable infrastructure definition will be an elastic one that establishes essential categories now while building in the flexibility to expand as the asset class evolves.

### B. Exclude Infrastructure Investment Income From UBTI

Second, the UBTI provisions of sections 511 and 512 should be amended to exclude from UBTI any income derived from a trade or business constituting a "qualifying infrastructure project," defined by reference to section 142 (as discussed above). This eliminates the trade or business income problem — the Line 1 K-1 issue — for all existing qualified organizations.

A targeted legislative accommodation that excludes income derived from essential infrastructure assets from UBTI for qualified organization investors would allow domestic retirement capital to reach those assets without the intermediary cost that a blocker structure imposes. This change would unlock tax benefits associated with UBTI exclusion for significant retirement capital — section 401 qualified pension trusts cover corporate defined benefit plans at thousands of American companies funding retirement security for American workers, while section 403(b) retirement accounts cover teachers, hospital workers, and nonprofit employees.

### C. Extend Fractions Rule to Infrastructure Investment

Finally, the fractions rule of section 514 should be extended to partnerships that are investing substantially in those same qualifying infrastructure projects, subject to a compliance requirement equivalent to the existing real property fractions rule. This eliminates the debt-financed income problem. For these purposes, Congress could define substantially in a variety of ways — for example, by instituting an asset test that requires a meaningful percentage of assets to constitute qualifying infrastructure projects to safeguard against abuse.

Because the fractions rule is satisfied at the partnership level, the compliance architecture must be embedded in the specific vehicle where the QO investors have subscribed. In practice, infrastructure funds would likely establish a QO parallel vehicle alongside a standard ECI-blocking vehicle. The parallel vehicle would hold the same economic interest in the underlying

[18] *See* Rev. Proc. 2018-59, 2018-50 IRB 1018 (2018) (providing a safe harbor permitting taxpayers to treat certain infrastructure trades or businesses as "real property trades or businesses" for purposes of making the "real property trade or business" election of section 163(j)).

[19] *See* Technical and Miscellaneous Revenue Act of 1988, P.L. 100-647 (1988).

[20] *See* Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107-16 (2001).

[21] *See* Infrastructure Investment and Jobs Act, P.L. 117-58 (2021).

[22] *See* One Big Beautiful Bill Act, P.L. 119-21 (2025).



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assets on mirror terms, and QO investors would subscribe to the parallel vehicle.[23] Non-QO investors would continue to subscribe to the fund vehicle that addresses their respective tax sensitivities. This structure is not novel — institutional real estate managers have operated parallel QO vehicles for decades. Infrastructure managers should be permitted to follow the same path.

To illustrate at a high level how this could work in practice, consider the following example of an infrastructure fund manager launching a $5 billion fund targeting toll roads, water utilities, airport concessions, and other essential infrastructure investments. If the fractions rule were extended to qualifying infrastructure investments, as proposed, the fund manager would establish two fund vehicles — a primary fund vehicle for taxable non-U.S. investors, sovereign wealth funds, and QFPFs (that is, investors whose tax profiles align with the ordinary blocker-and-treaty structure that infrastructure funds have used for decades) and a parallel QO vehicle for qualified pension trusts and other section 514(c)(9) investors (and potentially taxable U.S. investors as well). Both vehicles would hold identical economic interests in the same underlying portfolio investments on equivalent terms — the same target assets, fees, waterfall, and governance rights. The parallel QO vehicle would be drafted to satisfy the fractions rule at the fund vehicle level, ensuring that the QO investors' share of income in any tax year doesn't exceed its lowest possible share of loss. The fund manager would run a single investment strategy, sourcing effort, and back-office operation. This parallel QO vehicle structure is standard practice in institutional real estate funds today, so extending it to infrastructure would not require novel fund structuring or operations — it would only require the legislative authorization that permits the fractions rule to apply to qualifying infrastructure investments.

Relatedly, Treasury should be delegated the authority to issue safe harbors for common infrastructure fund structures that automatically satisfy the fractions rule if the safe harbor requirements are met. In this way, there would be a defined set of conditions under which an infrastructure fund manager investing in qualifying assets is guaranteed fractions rule compliance without the additional compliance and uncertainty of, for example, a facts-and-circumstances test. This would allow fund managers to continue to transact with their limited partner investors on the same economic terms they always have. The safe harbor would confirm that those terms satisfy the fractions rule without requiring changes to the distribution waterfall, the preferred return structure, the carried interest, or the limited partner loss limitation provisions that define the commercial deal. A safe harbor is particularly important here because the fractions rule is a tax compliance requirement, not a commercial one.[24]

Treasury could model this safe harbor on, for example, the 2016 proposed regulations for real estate, which created specific safe harbors for commercially standard structures — including preferred returns, management fees, and staged closings — that mechanically failed the fractions rule despite being entirely reasonable.[25] Infrastructure fund waterfalls are at least as complex as this. The safe harbor would standardize the solution by ensuring that the economics of the arrangement between investors and funds are not being substantively changed while also ensuring the arrangement remains in compliance with the fractions rule.

[23] As required by the fractions rule, all LP investors in the QO parallel vehicle must generally be held on the same economic terms with the same management fee, same carried interest, and same preferred return, with no variations beyond those permitted in section 514 and the regulations. The income/loss ratio test must also be satisfied simultaneously for all partners in the same partnership. If every QO investor holds on identical terms, a single set of allocation provisions covers all of them cleanly. If a QO investor negotiates different economics (*i.e.*, reduced management fee, modified preferred return hurdle, or a coinvestment right that changes its effective economic participation), the investor subscription would need to be housed in a separate vehicle. That outcome is operationally more intensive but commercially normal for the largest institutional allocators, for whom the economics of a dedicated vehicle are justified by commitment size.

[24] *See* sections 514(c)(9)(E), 704(b). The fractions rule governs how allocations are characterized for tax purposes, not how economics flow between partners. A fund agreement drafted for fractions rule compliance adds section 704(b) tax machinery — including capital account maintenance language, qualified income offset provisions, minimum gain chargebacks, etc. — alongside the commercial allocation provisions without disturbing them. The general partner does not give up carry. The limited partner does not accept a deficit restoration obligation. The preferred return mechanics are unchanged.

[25] *See* prop. reg. section 1.514(c)-2, REG-136978-12, 81 F.R. 84,518 (Nov. 23, 2016).



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Importantly, a safe harbor proposal is consistent with Rev. Proc. 2018-59, 2018-50 IRB 1018, which created a safe harbor in a similar context, treating qualifying infrastructure trades or businesses as real property trades or businesses for purposes of the business interest expense limitation of section 163(j). The revenue procedure defined qualifying infrastructure in part by reference to the exempt facility bond project types enumerated in section 142.

Although a revenue procedure like Rev. Proc. 2018-59 is generally nonbinding and nonprecedential,[26] it can have persuasive reasoning that's helpful for showing the IRS's intent,[27] and it substantively establishes a throughline to section 142. Section 142, in turn, has survived legislative scrutiny and been expanded across multiple congresses, giving policymakers a starting point for a definition of infrastructure to use more broadly across the code, and providing an easy, existing reference point for Congress to work from rather than starting from scratch.

## IV. Challenges

This proposal presents several key challenges worth noting for policymakers in technical substance and implementation as well as for fund managers and tax professionals in structuring and agreement drafting.

First, any definition of infrastructure that would be used in the proposal described above (including the one in section 142) presents fundamental challenges that should be acknowledged directly. Infrastructure means different things to different tax professionals, policymakers, and fund managers, and no two definitions are bound to align completely. For example, utility-scale energy storage, electric vehicle charging networks, social infrastructure, and higher education facilities are broadly understood as essential infrastructure by the investment community, but none are currently included in section 142. In this way, a legislative fix that relies solely on the existing section 142 list would leave meaningful categories of essential infrastructure outside its scope on day one. The solution to that problem is a Treasury regulatory authority delegation that allows the list to be expanded by revenue procedure without returning to Congress each time a new essential category reaches economic significance. As discussed earlier in this article, this kind of elastic infrastructure allows for expansion of essential categories as the asset class evolves.

To that end, Treasury could be delegated the authority to designate additional qualifying infrastructure categories beyond the section 142 list by revenue procedure. The elastic mechanism addresses the definitional gap discussed above — energy storage, electric vehicle charging, and other modern essential infrastructure categories that section 142 does not currently reach.

Further, challenges arise regarding the priority of this issue, given the legislative processes needed to make these changes to the code. Legislative bandwidth is genuinely crowded. The Tax Cuts and Jobs Act extension, section 899 developments, and broader tax reform are consuming significant drafting and political capital. The timeline for this fix is uncertain. But the fix is narrow, the drafting is straightforward, and the policy case has never been stronger. The tax professional community has a role to play in making that case clearly, technically, and persistently.

Finally, for tax professionals, this proposal (particularly the proffered change to the fractions rule) may result in needed changes to existing partnership agreements of funds making infrastructure investments. For example, infrastructure fund agreements have generally never needed fractions rule compliance (only real estate investments are currently eligible), so retroactive changes to infrastructure partnership agreements may be needed as a result of this change. This article does not contemplate how to

[26] Courts generally treat revenue procedures as governing internal IRS operations but not creating substantive rights in the public. *See, e.g.*, *Capitol Federal Savings and Loan Association v. Commissioner*, 96 T.C. 204, 216-217 (1991). Instead, they are generally treated as nonbinding and not entitled to judicial deference. *See, e.g.*, *Exxon Mobil Corp. v. Commissioner*, 689 F.3d 191, 200-201 (2d Cir. 2012); *Tualatin Valley Builders Supply Inc. v. United States*, 522 F.3d 937 (9th Cir. 2008); *Federal National Mortgage Association v. United States*, 379 F.3d 1303, 1307-1308 (Fed. Cir. 2004).

[27] Written IRS guidance is generally not precedential, but it does represent the analysis of certain IRS attorneys of the law as applied to a taxpayer's specific facts and can thus provide some indication of the IRS's position on the issues addressed. Additionally, written IRS guidance can reveal the interpretation of a statute by the agency charged with the responsibility of administering the revenue laws. *See Hanover Bank v. Commissioner*, 369 U.S. 672 (1962); *Smith v. Regional Transit Authority*, 827 F.3d 412 (5th Cir. 2016).



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adjust existing agreements. While those agreements may be retrofitted by fund counsel, it may prove challenging to preserve the same commercial terms while maintaining compliance.

### V. Conclusion

The pro-infrastructure, pro-domestic-investment attitude of the current political climate suggests potential for a fix that explicitly advantages American retirement capital over foreign sovereign capital in financing American infrastructure. The argument that the fix gives American pension capital a home court advantage over foreign institutional investors is precisely the economic nationalism framing that may resonate with an administration focused on American competitiveness regardless of its broader appetite for tax reform.

The fix is narrow, and the groundwork is laid. The section 142 project list already exists, Rev. Proc. 2018-59 has already established the real property parallel, the fractions rule already works for real estate, and the parallel QO vehicle structure already works in real estate fund markets. All three parts of the legislative fix described above connect existing provisions, extend proven logic, and are consistent with the United States' consistently stated goal of increasing private infrastructure investment.[28] ■

[28] The foregoing information is not intended to be "written advice concerning one or more federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230. The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser. This article represents the views of the authors only and does not necessarily represent the views or professional advice of KPMG LLP.

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